Mapping Sociological Approaches to International Procedural Law

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I. INTRODUCTION

In the last forty to fifty years, a variety of new approaches have been developed to understand the functioning of international law.[1] These approaches were developed either in opposition to the classical positivist approach[2]—set out during the nineteenth century and the first half of the twentieth century[3]—or relying on it

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1. *See generally* ANDREA BIANCHI, INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING (2016).

2. For an example of a classical natural law international lawyer of the nineteenth century, who advanced a system of the law of nations opposed to the then developing positivist approach, see HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (William Beach Lawrence ed., 2d ed. 1863). More recently, Judge Cançado Trindade progressively developed the idea of a new *jus gentium* with a natural law flavor. ANTÔNIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM (2d rev. ed. 2010).

3. One of the best descriptions of the role classical international lawyers had in shaping

to provide a critique of the political and power structures that underlie the norms and rules meant to condition its subjects' actions. From a sociological perspective, the investigation into the roles and function of international law has taken various shapes, asked different questions, and provided a wide range of explanations of the international legal reality. From Max Huber and Georges Scelle to the contemporary "new realism,"[4] however, there remains one limitation to all these approaches: Law is always considered as either law *in* the judiciary or at least the law *for* the judiciary. Questions regarding processes anterior or posterior to the ascertainment of law by judicial institutions are meant or said to form the object of disciplines other than law. Although a number of approaches within legal scholarship attempt to investigate the law's relationship with politics and its general impact on society, without necessarily providing for a straightforward ascertainment of the existing positive (or natural) legal rules, these approaches still rely on these same rules as the starting point to argue and critique the general *role* of law in society.[5]

Sociological readings of international law have a long history. Such readings have always gone hand in hand with the recognition of the limits of the positivist approach. Although of great value for the development of legal doctrine, the pure positivist approach is unable (and often unwilling) to provide a comprehensive understanding of the work of judges and how they come to the decisions they do. In sociological approaches, on the other hand, the general idea was, and still is, that positivism does not allow one to analyze the full depth and complexity of the process of adjudication and of decision-making.

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international law into an independent discipline can be found in MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001). It is interesting to see, however, that the nineteenth century is still the stage of a transition between a conception of international law strongly influenced by natural law and that only gradually, as soon as it starts to grasp with the nascent international politics of the time, positivism becomes rather dominant. *See generally* MÓNICA GARCÍA-SALMONES ROVIRA, THE PROJECT OF POSITIVISM IN INTERNATIONAL LAW (Nehal Bhuta et al. eds., 2013).

4. For more information on the new realism, see Daniel Bodansky, *Legal Realism and Its Discontents*, 28 LEIDEN J. INT'L L. 267 (2015); Alexandra Huneeus, *Human Rights Between Jurisprudence and Social Science*, 28 LJIL 255, 255 (2015); Andrew Lang, *New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science*, 28 LJIL 231, 231 (2015); Jakob V. H. Holtermann & Mikael Rask Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, 28 LJIL 211, 211 (2015); Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LJIL 189, 189 (2015).

5. For example, even a critique of international law like Koskenniemi's book *From Apology to Utopia: The Structure of International Legal Argument* relies heavily on the analysis that doctrinal work on international law has already been made on the basis of a set of rules that exist in the external world. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005). The distinction between the "rule approach" and "policy approach" reveals only the conditions under which "rules" are different (either by means of clear-cut normative statements or by means of continuous appearance and reappearance, as in a process). *See id.* at 189–209 (describing the two approaches within the context of modern international law doctrine). That law is about looking at rules and norms remains the point in common and the thread that brings these two approaches together within the larger discipline of international law. Also, this meta-theory of international law, analyzing the various professional and scholarly discourses about international law, relies on the same premises. *See id.* at 72–157 (evaluating the doctrinal history of liberalism by looking to other scholars' works).

At the level of international law, classical jurists such as Huber and Scelle recognized that merely looking dogmatically into the interpretation of legal texts by judges was not sufficient to understand the work of international courts. For example, as soon as Max Huber became professor at the University of Zurich in 1902, he started working on sociological approaches to international law and published a seminal article in 1910 on the basic sociological underpinnings of international law.[6] Inspired by the *Genossenschaftstheorie* of Otto von Gierke and the legal sociology of Rudolf von Jhering and Ferdinand Tönnies, he analyzed the socio-psychological factors that foster the development of international law.[7] His main thesis aimed precisely to nuance the positivist dogma that put *state consent* at the heart of international legal theory and to stress the importance of a general interest, a community interest that would give to international norms their legal value. Scelle, for his part, was also one of the main proponents of a sociological approach to understanding the functioning of international law. Based on the idea that the fundamental element at the basis of international law is the concept of "international solidarity," Scelle sought to engage with and incorporate themes outside the simple scope of the texts of legal norms to understand the way international legal subjects acted.[8] This was particularly important for understanding the way international courts worked since they were not only meant to take legal norms into account but also to consider this larger social spectrum, based on a solidarity between states and other states, as well as states and international actors.[9]

In this context, a sociological reading of international law stems from the awareness of the limits of positivistic methods, and sociology per se leads to the necessity of the investigation of the different decision-making dimensions of international law. This is one of the main arguments of this article: A sociological reading of international law inevitably leads to the core of what is international procedural law. For our purposes, international procedural law, understood more broadly, is more than just the law *in* and *for* the judiciary. By international procedural law, we refer to a general theory of international law-making that primarily focuses on the role procedures have in determining the outcome of such processes.[10]

In recent years, scholars have again engaged in and contributed to the construction of this kind of sociological reflection. For instance, Moshe Hirsch has recently made the case for the importance of using sociological methods to analyze not only international courts, but also international law in general, in an attempt to

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6. *See generally* Max Huber, *Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft* [*Contributions to the Knowledge of the Sociological Foundations of International Law and the Society of States*], 4 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART [JÖR] 56 (1910) (Ger.).

7. Edoardo Stoppioni, *Max Huber*, SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, http://www.sfdi.org/internationalistes/huber/ (last visited Mar. 29, 2020).

8. *See* Hubert Thierry, *The Thought of Georges Scelle*, 1 EUR. J. INT'L L. 193, 198–201 (1990) (discussing how law originates in biology and social reality, among other things).

9. *See id.* (describing societal and intersocietal solidarity and how they serve as one of the foundations of sovereignty of law).

10. *See generally* INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE, (Hélène Ruiz Fabri ed., 2019).

escape the limitations of the positivist approach.[11] With respect to international courts more specifically, particularly after the turn to practice, one can observe a strong use of empirical sociological methods to investigate other aspects that influence judges in their decision-making processes. For example, Mikael Rask Madsen draws from Pierre Bourdieu's reflexive sociology to engage in an examination of the various external and internal factors that impact the decision-making process in courts.[12] Also, Jeffrey Dunoff and Mark Pollack have made use of practice theory and in-depth interviews to evaluate and examine the circumstances and factors judges consider when drafting judgments.[13]

One of our central claims is that recent years have seen the development of new conceptual approaches to procedures' role in international law. Such approaches are mainly responses to the inadequacies of the previously mentioned positivist approaches. As referred to before, sociological approaches fall into this camp given the fact that they are premised upon the limits of positivism to explain how international law and procedures really work. In this sense, an essential objective of this article is to show how sociological approaches can better inform our understanding of international procedural law. *Grosso modo,* this article makes the case that legal, but more importantly non-legal factors related to procedures, are decisive in crafting decision-making processes. However, to put it clearly, although such approaches can be applied to a variety of decision-making processes, our focus here will be primarily on the work of international courts.

In light of the importance of interdisciplinary understandings of international law and, more specifically, the contribution sociology can offer to this enterprise, this article will map several possible sociological approaches to the study of international procedural law. Specifically, the article outlines four different approaches whereby sociology can help re-conceptualize international procedural law and deepen our understanding of it. To do so, the article will proceed as follows. Part II of the article examines how systematic sociological approaches aid in understanding the role of procedures in legal institutions. Having laid this general groundwork, Part III then examines how one specific strand of contemporary sociological theory, known as practice theory, can enrich our understanding of how specific actors contribute to the development of international procedural law. Part IV considers how critical theory can help explain the legitimacy of international procedural law. Finally, Part V turns from sociological theory to sociological methodology and describes how ethnographical investigation can illuminate the

11. *See generally* MOSHE HIRSCH, INVITATION TO THE SOCIOLOGY OF INTERNATIONAL LAW (2015); Moshe Hirsch, *The Sociology of International Law: Invitation to Study International Rules in Their Social Context*, 55 U. TORONTO L.J. 891 (2005).

12. *See* Mikael Rask Madsen, *Sociological Approaches to International Courts*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 388, 400 (Cesare P. R. Romano et al. eds., 2013) (examining how the sociology of professions and the sociology of elites contribute to the study of reflexive sociology).

13. *See generally* Jeffrey L. Dunoff & Mark A. Pollack, *Practice Theory and International Law*, *in* RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW 252 (Moshe Hirsch & Andrew Lang eds., 2018); Jeffrey L. Dunoff & Mark A. Pollack, *International Judicial Practices: Opening the "Black Box" of International Courts*, 40 MICH. J. INT'L L. 47 (2018).

formation of the legal reasoning.

II. SYSTEMATIC SOCIOLOGY APPROACH TO INTERNATIONAL PROCEDURAL LAW INSTITUTIONS

The first type of sociological approach to international procedural law is what we could call "systematic sociology," encompassing both agency and structuralist theories. One can identify in the early history of sociology two main streams. Both seek to provide an answer to the question of what makes the social world.

A. Agency-Based Theories

Agency-based theories argue that the social world is made of social *actions* by individual social agents, which together provide the fabric of society. Representatives of a more agency-based sociological theory are Alfred Schutz, Peter Berger, and Thomas Luckmann.[14] The agency-based method is a classical sociological approach that can be used to understand the internal functioning of a field. This is not limited at all to the legal field. One could think, for instance, about what Pierre-Michel Menger did for the musical field in his book *Le paradoxe du musicien*. There he studied sociologically the field of musicians: (i) how the careers of musicians are structured by the market and other social institutions; (ii) how these structures may create ethical problems; (iii) the role of the State and of private actors in regulation to address those problems; and (iv) the relationship of the artist to the public.[15]

B. Structuralist Theories

Structuralist theories, on the other hand, argue that the social world and social actions are fundamentally determined by the social structures and institutions surrounding social agents. For example, Emile Durkheim is a prominent representative of this structuralist stream of research.[16] Other structuralist approaches, particularly through the work of Talcot Parsons and Niklas Luhmann, have also strongly impacted the development of systems' theory in sociology.[17]

The use of structural methods is less common in the study of the field of international procedural law. Nevertheless, the Luhmaniann approach is of particular interest to us, for he developed a specific sociological theory of procedures in his *Legitimation durch Verfahren*, translated as "*Legitimation Through Procedure*."[18] In it, Luhmann argues that procedures are set out within particular systems not only

14. *See generally* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966).

15. PIERRE-MICHEL MENGER, LE PARADOXE DU MUSICIEN: LE COMPOSITEUR, LE MELOMANE ET L'ÉTAT DANS LA SOCIETE CONTEMPORAINE [THE MUSICIAN'S PARADOX: THE COMPOSER, THE MELOMANE AND THE STATE IN MODERN SOCIETY] (1983) (Fr.).

16. *See* ÉMILE DURKHEIM, LES RÈGLES DE LA MÉTHODE SOCIOLOGIQUE [THE RULES OF SOCIOLOGICAL METHOD] (1937) (Fr.).

17. *See generally* NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN [LEGITIMATION THROUGH PROCEDURE] (1969) (Ger.); TALCOT PARSONS, THE SOCIAL SYSTEM (1964).

18. *See* LUHMANN, *supra* note 17.

to legitimate their decision-making process but also to unveil *specific* truths contained in such systems.[19] It is clear from this definition of procedure that the thing-in-itself (the procedure) and the rules that set it up and govern it (procedural law) are taken interchangeably. This was acknowledged by Luhmann already in the late 1960s, when he recognized that lawyers had so far only devoted themselves to dealing with procedural law (*Verfahrensrecht*) and not with proper procedure (*Verfahren*).[20] This was largely due to the influence of Han Kelsen's *Pure Theory of Law*, which sought to detach the constitution of procedure within a legal framework from all sorts of sociological analysis and fundamentals (and of any other social sciences for that matter).[21] Luhmann refers, however, to an understanding of the law as not extending beyond the norm that espouses it, therefore denoting a positivist position rather than one that sees the law as existing outside or detached from the norm that creates it. This Luhmannian approach suggests that procedure is a necessary vantage point to understand the functioning of the law. One could—and should—study how international law is formed and transformed via procedure, how remedies safeguard rights, and how procedure can block substantial rights.

C. Beyond the Agency-Structure Dichotomy

Both agency-based and structuralist theories have shown limitations. The focus on individual actors in shaping social composites, or the concentration on structures as the determinant factors for actors' behaviors, does not seem to grasp the total complexity of social facts. In response to these limitations, sociologists from the second half of the twentieth century, such as Pierre Bourdieu, attempted to sketch a new theoretical device that would allow social scientists to go beyond this agency-structure dichotomy.[22] Such an agency-based approach was probably the first sociological approach used for an analysis of international procedural law.

For example, in international legal scholarship**,** Yves Dezalay and Bryant Garth drew from Bourdieu's reflexive sociology to describe the creation and formation of the commercial arbitration field in their landmark book *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*.[23] By showing how specific struggles for positions of power transpired between lawyers from the European continent and those belonging to an Anglo-

19. *Id.* at 11.

20. *Id.* at 12.

21. *Id.* As translated, Luhmann states: "Until now the efforts consecrated to a general theory of procedures have, under the clear influence of Kelsen, distanced themselves from legal sociology. They clearly stem from a strong positivist position. These efforts have in the strict application of their method been able to only concentrate on the topic of procedural law and not on procedures in general. The difficulties in which such a self-justified legal positivism works out are rather obvious. This suggests however that the opposite way should be taken, with a turn to sociology and to question about the possibility of a sociological theory of procedures (and not of a theory of procedural law)."

22. *See generally* PIERRE BOURDIEU, RAISONS PRATIQUES: SUR LA THÉORIE DE L'ACTION [PRACTICAL REASONS: ON THE THEORY OF ACTION] (1994) (Fr.).

23. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996).

Saxon tradition, the authors showcased how the content and form of the field were elaborated. Later scholars have used their work as a springboard for the utilization of sociological methods in the understanding of transnational and international law.

Emmanuel Gaillard tried to replicate this kind of approach in a more recent article on the sociology of investment arbitration.[24] According to him, as the essential players (parties and arbitrators) remain, numerous new actors have also accessed the field of arbitration, be they "service providers" or "value providers."[25] The former actors are what he calls "merchants of recognition," who "distribute legitimacy within the field of international arbitration."[26] The latter "provide guidance as to the way international arbitration should develop and how arbitral social actors should behave."[27] In Gaillard's mind, this new approach would allow one to, for instance, "describe[s] the main rituals in international arbitration that structure the manner in which social actors are expected to behave, as well as the manner in which actors interact in the field of international arbitration."[28]

III. THE VALUE OF PRACTICE THEORY TO UNDERSTANDING INTERNATIONAL POLITICS AND LAW

For the purposes of this article, an investigation of the impact of cognitive processes in the formation of practices is fundamental. Rearranging the theory of practice within a modern cognitivist framework allows for a better understanding of the underlying intellectual stock that drives different legal professionals and their interactions within the different spectrums of legal procedures.[29] In this sense, the conceptual tools offered by Bourdieu's reflexive sociology and, in particular, his concept of field,[30] are extremely useful.

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24. Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 1 (2015).

25. *Id.* at 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. These practices, which are produced by certain agents, are normally harmonized within a particular class: "As structured products (*opus operatum*) which a structuring structure (*modus operandi*) produces through retranslations according to the specific logic of different *fields*, all the practices and products of a given agent are objectively harmonized among themselves, without any deliberate pursuit of coherence, and objectively orchestrated, without any conscious concertation, with those of all members of the same class. The habitus continuously generates practical metaphors, that is to say, transfers (of which the transfer of motor habits is only one example) or, more precisely, systematic transpositions required by the particular conditions in which the habitus is 'put into practice' (so that, for example, the ascetic ethos which might be expected always to express itself in saving may, in a given context, express itself in a particular way of using credit)." Pierre Bourdieu, *The Habitus and the Space of Life-Styles*, *in* THE PEOPLE, PLACE, AND SPACE READER 139, 140 (Jen Jack Gieseking et al. eds., 2014) (emphasis omitted).

30. "Thinking in terms of 'field' also allows one to recapture the global logic of the new world legal order without resorting to generalities as vague and vast as their object. Instead, one can observe and analyze the more concrete strategies by which particular agents, themselves defined by their dispositions (tied to a social position and a trajectory in a national field), their properties and their interests, construct an international legal field while at the same time transforming their national legal fields." Pierre Bourdieu, *Foreword* to YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF

A. Bourdieu's Influence on a New Sociology of International Law

Bourdieu's sociology of law, despite focusing somewhat on the practices of the agents belonging to the field, sheds light on a variety of possible strategies that go beyond the mere consideration of the "profession."[31] Bourdieu's method and concepts also allow for a proper investigation, within the framework of a particular field, of how a "space of possibles," both practically and discursively, is created, which explains how, for example, certain legal solutions to legal, economic, and political questions can be found within the legal world.[32] Another important feature of Bourdieu's theory that contributes to the study of law and international legal procedures is his analysis of the social function of language within a particular field. In a field, the value of discourse is always set within a determined "market," and each discourse receives a specific "price" according to the position of the agent and the amount of "symbolic capital" he has within the field.[33] State structures and the market are seen here as belonging to a more complex "structure" within which not only the legal field but other fields develop.[34] Besides these two elements, a third must also be added: the public.[35] In particular, for our purposes, this is crucial for

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A TRANSNATIONAL LEGAL ORDER, at vii, viii (1996).

31. In this respect, David Sugarman and Wesley Pue have noted that most of the history and sociology of lawyers has always focused on the formation of the profession as an autonomous space in society as the fundamental problematics. Rather, they argue, it is important to consider lawyers' roles in other spheres of social life, including the economy and politics. "Within the historiography and sociology of the profession, the dominant tradition cast its spell through the peculiarly modern concept of 'professionalisation' . . . . Within this body of work the autonomy of the profession was either treated as axiomatic, or alternatively, lawyers were reduced to mere instrumentalities of classes, interests[,] or particular types of society . . . . In consequence, the larger role and practices of lawyers economically, politically, linguistically[,] and culturally remained largely unaddressed or were treated as unproblematic." LAWYERS AND VAMPIRES: CULTURAL HISTORIES OF LEGAL PROFESSIONS 6 (W. Wesley Pue & David Sugarman eds., 2003). Although Bourdieu does argue for the relative autonomy of the legal field his assessment of the interaction with other fields in society and the symbolic market created by means of utilizing resources of one field in another capture this comprehensiveness of the presence of lawyers within the larger space of social life. *See* PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 175–80 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., 1991).

32. On the construction of a "space of possibles," Bourdieu observed that the "specific logic" of the field of struggles between the various agents within it is determined: "on the one hand, by the specific power relations which give it its structure and which order the competitive struggles (or, more precisely, the conflicts over competence) that occur within it; and on the other hand, by the internal logic of juridical functioning which constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions." Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 816 (1987) [hereinafter Bourdieu, *The Force of Law*].

33. BOURDIEU, LANGUAGE AND SYMBOLIC POWER, *supra* note 31, at 66–68.

34. However, Bourdieu's reflexive sociology is instrumental precisely because it attempts to surpass this methodological and fundamental dichotomy in sociology between "agency" and "structure" by requiring the researcher to investigate the internal dialectics between these two elements within the object research. *See* Mikael Rask Madsen, *Reflexivity and the Construction of the International Object: The Case of Human Rights*, 5 INT'L POL. SOC. 259, 262 (2011) (discussing the process of examining the multidimensional dynamics of human rights through reflexive sociology).

35. Lucien Karpik, *Lawyers and Politics in France, 1814–1950: The State, the Market, and*

the examination of how the legal field selects different legal cultures.

The application of Bourdieu's reflexive sociology in understanding the functioning of law is not at all new. Several sociologists as well as legal scholars have made use of the conceptual and investigative tools provided by Bourdieu to examine how the law and lawyers operate in a variety of contexts. We have already mentioned, for instance, that Yves Dezalay and Bryant Garth made use of Bourdieu's reflexive sociology to understand the development of the international arbitration field.[36] Other scholars have, nevertheless, also relied on this sociological approach. For example, Mikael Rask Madsen uses many of Bourdieu's conceptual tools to study the authority of international courts.[37] A third example is the work of Antoine Vauchez, who, despite not integrating the whole of Bourdieu's sociological methods into his analysis, makes use of some of his tools to investigate how lawyers have contributed to the development of many European institutions.[38]

Bourdieu's theory of practice has also influenced the development of interesting approaches that aim at investigating international politics. This is particularly true in the field of international relations, where a variety of scholars have tried to set up new methodologies to research the way in which practitioners shape international institutions and international politics. This (international) practice theory has recently been put forward most notably by Emanuel Adler and Vincent Pouliot.[39] Drawing on Bourdieu's reflexive sociology, Adler and Pouliot propose using some of Bourdieu's conceptual devices to make sense of international practices insofar as they constitute the very element determining international politics.[40] One of the most important ideas this theory has advanced is that "world politics are made up of a myriad of everyday practices that too often go overlooked in scholarly research."[41]

In this case, however, Bourdieu is not the only influence in terms of theory of practice. Adler has pointed to the influence the work of Etienne Wenger and his "communities of practice"[42] has had on his own work.[43] This theory works out a

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the Public, 13 LAW & SOC. INQUIRY 707, 708 (1988).

36. *See generally* DEZALAY & GARTH, *supra* note 30.

37. *See, e.g.*, LAW AND THE FORMATION OF MODERN EUROPE: PERSPECTIVES FROM THE HISTORICAL SOCIOLOGY OF LAW (Mikael Rask Madsen & Chris Thornhill eds., 2014); Holtermann & Madsen, *European New Legal Realism and International Law: How to Make International Law Intelligible*, *supra* note 4, at 211.

38. *See, e.g.*, ANTOINE VAUCHEZ, BROKERING EUROPE: EURO-LAWYERS AND THE MAKING OF A TRANSNATIONAL POLITY (2014); ANTOINE VAUCHEZ, DÉMOCRATISER L'EUROPE (2014).

39. *See generally* Emanuel Adler & Vincent Pouliot, *International Practices*, 3 INT'L THEORY 1 (2011).

40. *See id.* at 2 (explaining that Bourdieu placed matters of practice at the center of his analyses of international relations and that his scholarship has influenced the use of practice theory to study international relations). The authors draw on Bourdieu's scholarship to define the concept of practice. *Id.* at 7, 15–17.

41. *Id.* at 2.

42. *See generally* ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY (1999).

43. *See* EMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS 12, 22 (2005) (employing concepts advanced by

method of understanding practices based on different premises than those of Bourdieu's theory.[44] It illustrates how scholars in the field of international relations are not exactly in full agreement as to what constitutes a theory of practice and how it should be structured and applied to world politics.[45] Nevertheless, the study of the everyday practices of those involved in a variety of processes in world politics has appeared to be an effective and compelling approach. It allows researchers to overcome the difficulties posed by the agent-structure dichotomy and provides conceptual tools to proceed with investigations that go beyond rationalist and norm-oriented theories.[46]

The question remains, though, whether Bourdieu's theory of practice may be of any use to understanding law in international judicial procedures. Although Bourdieu's conceptual tools have been used to describe aspects of certain areas of law, the use of his theories to describe legal phenomena has not been without contention.[47] In order to clarify the content of the controversy, however, it is first necessary to understand the main concepts of Bourdieu's theory of practice.

B. Pierre Bourdieu's Theory (in Practice) for Understanding Law

The place of law in the world of social sciences has long been debated.[48] In this regard, an important question regarding the autonomy of law with respect to other social sciences disciplines has occupied the minds of legal theorists and philosophers for the past two centuries.[49] Much of the debate over this question starts from one of two different perspectives. The first perspective questions are whether law can be said to be a proper science and if so, what is its "scientific" method?[50] These questions are largely driven by a certain desire to have law be made—or at least considered, for that matter—"autonomous" in respect of other disciplines within the

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Wenger as part of the basis of his own analysis of communities of practice).

44. *See* Christian Bueger & Frank Gadinger, *The Play of International Practice*, 59 INT'L STUD. Q. 449, 454 (2015) (differentiating the concept of practice theory as articulated by Bourdieu from that advanced by Wenger).

45. *See id*. at 454–58 (discussing this debate and noting the heterogeneity of practice theory in the context of international relations).

46. *See id*. at 449, 452 (explaining how studying the practices of international actors is an effective method of evaluating order and change in the international sphere).

47. *See, e.g.*, Mauricio García Villegas, *On Pierre Bourdieu's Legal Thought*, 56–57 DROIT ET SOCIÉTÉ [D.S.] 57, 68 (2004) (describing how Bourdieu's view of the legal field is too narrow and nationally focused).

48. For an interesting text on this topic, providing not only a discussion about the different arguments put forward by those contending that law is and is not a social science, refer to Geoffrey Samuel, *Is Law Really a Social Science: A View from Comparative Law*, 67 CAMBRIDGE L.J. 288 (2008).

49. *See* Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC. REV. 571, 572 (1977) (explaining that the debate between instrumentalists and formalists has dominated debates over legal theory for at least the past 200 years); Christopher Tomlins, *How Autonomous is Law?*, 3 ANN. REV. L. SOC. SCI. 45, 46 (2007) (dating the beginning of this debate to the late nineteenth century).

50. *See, e.g.*, Tomlins, *supra* note 49, at 46–48 (explaining this perspective and questioning the autonomy of law in relation to other social sciences).

social sciences.[51] Kelsen was probably the jurist who made the best case for such scientific autonomy in his *Pure Theory of Law*.[52]

The second perspective considers law as an objective fact in constant contact with other areas of social life, be it politics or the economy, for instance.[53] The degree of "autonomy" possessed by the law, in relation to other disciplines, is verified by assessing to what degree lawyers and the law are influenced by events in other spheres of society.[54] This type of analysis is much less concerned with the scientific character of law and more with how it interacts with other domains of the social sciences. Despite dealing with different aspects of law, both approaches seek to determine the degree of autonomy law has within the larger societal spectrum. Even though they approach law through different lenses, their objectives are basically the same.

When defining the legal field, Bourdieu attempts to show how both the scientific and social questions about law's autonomy are inevitably interrelated.[55] If one hopes to describe the degree of autonomy law, as a field, may have in scientific terms, it is necessary to first investigate the ways in which it relates to other social fields, in particular the "field of power."[56] Additionally, if one wishes to understand how the legal field connects independently with other social fields, then it is necessary to see how the legal field construes itself epistemologically and separates itself conceptually from other fields.[57] This social-epistemological analysis of the legal field is consistent with what Bourdieu proposes in his theory of practice.[58]

Inevitably, such a theory of practice raises the question as to whether law should be treated as an objective fact. For Bourdieu, law is a complex space of things, which includes both material and linguistic resources.[59] These resources are

51. *See id.* at 46 (explaining that the proposition that law follows a logic, procedure, and rationale independent of other social phenomenon argues on behalf of the law's autonomy with respect to other social disciplines). For useful discussions of the debate over law's autonomy, see HANS KELSEN, PURE THEORY OF LAW (Max Knight trans., Univ. Cali. Press 2d ed. 1967) (1934); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

52. *See generally* KELSEN, *supra* note 51.

53. *See* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 60 (1984) (providing an overview of the debate over socio-legal theories). *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

54. *See* Balbus, *supra* note 49, at 572 (describing the assumption that law's autonomy is based upon its ability to function without outside influence).

55. *See* Bourdieu, *The Force of Law*, *supra* note 32, at 814–16 (explaining that the social practices of the law are created in accordance with the specific logic of an independent social field).

56. *Id*. at 815; *see* PIERRE BOURDIEU & LOÏC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 104 (1992) (stating that the study of any sociological field must begin with an analysis of the field in relation to the field of power).

57. Bourdieu, *The Force of Law*, *supra* note 32, at 816 (indicating that in order to understand the relationship of the law to other social sciences, one must recognize the law as a separate legal field and evaluate its specific logic).

58. *See generally* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 78–89 (Ernest Gellner et al. eds., Richard Nice trans., 1977) (1972) [hereinafter BOURDIEU, OUTLINE OF A THEORY OF PRACTICE].

59. *See* Bourdieu, *The Force of Law*, *supra* note 32, at 816–17 (explaining that the juridical

under constant dispute by those acting within the field, and the struggle for such resources is what ultimately constitutes the way in which such a field develops.[60] Interestingly, for Bourdieu, a "field" functions as an open concept—that is, a concept whose definition inevitably depends on the theory or system within which it is inserted.[61] There is a particular logic to understanding law in terms of a field where law itself acquires different traits (be it an objective social fact, a language, etc.). Fields work on the basis of a relational logic. That is, to examine a field, such as law, is to presuppose that it subsists in relation to some other field from which it is to some degree distinguishable. In other words, a field is constituted by a "configuration of objective relations between positions."[62] Such positions are objectively defined within the field, attributing to agents or institutions a specific place, within the general structure of power (capital) distribution within such field.[63] These agents or institutions receive the corresponding profits from their positions as well as their objective relation to other positions.[64] These other positions include types such as domination and subordination, among others.[65]

This brief description provides a general outlook of how the concept of field may be useful to understanding particular social phenomena. In fact, this general framework of what constitutes a field leaves open the possibility for each analyzed field to develop its own logic of functioning. Thus, the way in which the economic field works may not be, and most likely will not be, the same as the way in which the legal field functions. The notion of "field" may be very useful to understanding the developments of law in the international sphere.[66] It allows one to capture particular strategies put forward by both agents and institutions beyond mere calculations of interests.[67]

Besides the notion of field, another important concept in Bourdieu's theory is that of "habitus."[68] Here lies possibly the most significant element of rupture between Bourdieu's theory of practice and rational-choice theories. If the latter considers individuals to be rational agents, acting as *homo economicus*, Bourdieu,

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field is a social space).

60. *See id.* (stating that the specific logic of the field is determined by the competitive struggles that occur within it).

61. BOURDIEU & WACQUANT, *supra* note 56, at 95–96. Bourdieu also reveals a strong Kantian influence on his conception of a scientific work: "It is, to be more precise, a permanent reminder that concepts have no definition other than systemic ones, and are designed to be *put to work empirically in systematic fashion*." *Id.* at 96.

62. *Id.* at 97.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See, e.g.*, Mikael Rask Madsen, *Transnational Fields and Power Elites: Reassembling the International with Bourdieu and Practice Theory*, *in* INTERNATIONAL POLITICAL SOCIOLOGY 106 (Tugba Basaran et al. eds., 2017) (describing how Bourdieusian analysis has been applied in the international legal field).

67. *See supra* notes 29 and 30 for a discussion of Bourdieu's concept of "field." A "field" is defined as "a set of objective, historical relations between positions anchored in certain forms of power (or capital). BOURDIEU & WACQUANT, *supra* note 56, at 16.

68. BOURDIEU, OUTLINE OF A THEORY OF PRACTICE, *supra* note 58, at 78.

on the other hand, uses the concept of habitus to grasp those particular dispositions of actors within particular social spaces, which define the space itself, but that do not necessarily result from rules installed within the social space intended to create such dispositions.[69] Habitus is thus a system of these dispositions (of agents and institutions) that structures the field and serves as a principle of creation of "regulated" and "regular" practices that aim at accomplishing a particular goal without consciously stating it as the reason for the action and without being collectively organized.[70] This is the ultimate conceptual representation of Bourdieu's theory against what he calls "*juridisme*" (or in English, "legalism"). By *juridisme*, Bourdieu understood the idea that all actions would inevitably be guided by prior given rules of some sort and that all calculations of agents and institutions would inevitably be based on an assessment of whether following such rules would benefit them in their quest to fulfill their interests. Moreover, these rules would be explicit and would serve as guiding principles for understanding social practices.[71]

Another important feature of Bourdieu's theory, which contributes to the study of international procedural law, is his analysis of the social function of language within a particular field. In a field, the value of discourse is always set within a determined market and each discourse receives a particular price according to the position of the agent and the amount of symbolic capital she has within the field.[72] Symbolic capital, according to Bourdieu, is any kind of capital (social, political, economic, etc.) perceived according to particular categories of perception or division, systems of classification, or cognitive schemes, which are, at least partially, the result of objective structures of the field. This is why Bourdieu, when referring to the discursive spaces within the fields, ultimately speaks of the constitution of a space of "symbolic economy."[73] The most interesting aspect of this analysis is that it allows one to assess why and how certain conceptual and institutional choices have been made within a particular institutional framework.

What makes these conceptual tools so interesting for the study of international legal procedures is that they allow one to grasp particular dispositions of lawyers within such processes. It is important, though, to assess all of these actors in terms of how they struggle and condition the institutional space in which they construe decisions and new rules. It is also essential to examine how the institutional space of the procedure will constantly condition the way in which these professional struggles take place. In this context, one may be able to understand the place law really has in acting as more than just a guiding principle but also as an effective force in determining the results in international legal procedures.

IV. CRITICAL THEORY AND THE LEGITIMACY OF INTERNATIONAL

69. *Id.* at 72.

70. *Id.*

71. Pierre Bourdieu, *Habitus, code et certification* [*Habitus, Code and Certification*], 64 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES [A.R.S.S.] 40, 41 (1986) (Fr.).

72. BOURDIEU, LANGUAGE AND SYMBOLIC POWER, *supra* note 31, at 67–76.

73. *Id.* at 72–76.

PROCEDURAL LAW

Critical theory as an interdisciplinary project can also be inserted within the framework of sociological approaches.[74] Critical theory within the spectrum of critical sociology is hard to define *in abstracto*, as "[t]oday, [it is] hard to say that any one form of sociological inquiry represents 'mainstream' sociology."[75] There are nevertheless some fundamental trends worth highlighting. Thematically, some inquiries tend to focus more on inequalities and forms of domination. Methodologically, some sociologists tend to plunge social crisis in historical context. In this line, we can find a variety of social theorists, such as Walter Benjamin and C. Wright Mills.[76] Within this mindset, in contemporary writings, authors such as Nancy Fraser, focusing on unjust forms of redistribution,[77] or Rainer Forst, working on distorted power relations,[78] tend to be identified with this trend of social critique.

This section will focus on two particular streams of social theory that aim at unravelling the power structures involving the application and functioning of international procedural law: the critical theory stemming from the Frankfurt School and Feminist Theory.

A. The Frankfurt School

The Frankfurt School and its critical theory model became very important intellectual instruments for sociologists as well as for lawyers.[79] Max Horkheimer and Herbert Marcuse, two leading Frankfurt School theorists, seemed at first quite skeptical towards the evolution of the sociological field and tried to reshape its method. Horkheimer noted "[t]hat all our thoughts, true or false, depend on conditions that can change in no way affects the validity of science. It is not clear why the conditioned character of thought should affect the truth of a judgment—why shouldn't insight be just as conditioned as error?"[80] Marcuse argued that "[s]ociology that is interested only in the dependent and limited nature of consciousness has nothing to do with truth. Its research, useful in many ways,

74. LARS GERTENBACH ET AL., SOZIOLOGISCHE THEORIEN [SOCIOLOGICAL THEORIES] 197 (2009) (Ger.).

75. Graham Cassano, *What is Critical Sociology?*, *in* CRISIS, POLITICS AND CRITICAL SOCIOLOGY 1, 2 (Graham Cassano & Richard A. Dello Buono eds., 2009).

76. WALTER BENJAMIN, ZUR KRITIK DER GEWALT [CRITIQUE OF VIOLENCE AND OTHER ESSAYS] (1921); C. WRIGHT MILLS, THE SOCIOLOGICAL IMAGINATION (1959).

77. NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION (1997).

78. RAINER FORST, TOLERANZ IM KONFLICT: GESCHICHTE, GEHALT UND GEGENWART EINES UMSTRITTENEN BEGRIFFS [TOLERANCE IN CONFLICT: HISTORY, CONTENT AND PRESENCE OF A DISPUTED CONCEPT] (2003) (Ger.).

79. For a good general introduction to the Frankfurt School, see ROLF WIGGERSHAUS, THE FRANKFURT SCHOOL: ITS HISTORY, THEORIES, AND POLITICAL SIGNIFICANCE (Michael Robertson trans., 1994).

80. James Bohman, *Critical Theory*, *in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 8, 2005)*, https://plato.stanford.edu/archives/win2019/entries/critical-theory/ (citing MAX HORKHEIMER, BETWEEN PHILOSOPHY AND SOCIAL SCIENCE: SELECTED EARLY WRITINGS 141 (G. Frederick Hunter et al. trans., 1993)).

falsifies the interest and the goal of critical theory."[81]

The claim of critical theory advanced by the Frankfurt School concerning the role of sociology and its attack of the "mainstream approach" lies in the fact that "[g]iven Critical Theory's orientation to human emancipation, it seeks to contextualize philosophical claims to truth and moral universality without reducing them to social and historical conditions."[82] Central to this stream of Critical Theory is its disbelief in the positivist basis of modern sociology. In attempting to structure itself along the lines of natural sciences, it risks failing to grasp the impact specific power and authority structures have in defining social facts.[83]

This new critical trend applied also to the legal sphere. Indeed, the Frankfurt School counted among its acolytes two sociologists, notably Otto Kirchheimer and Franz Neumann. The former has worked extensively on legal sociology and more precisely on procedural justice.[84] A fundamental piece in this regard is Kirchheimer's 1961 work *Political Justice: The Use of Legal Procedure for Political Ends*.[85] In his book, Kirchheimer looks at the phenomenon of "political justice" from an external point of view rather than the internal one of the lawyer, using not only law, but also political science and social psychology in his analysis.[86] More specifically, he examines the nature and use of political positions to influence the definition of legal procedure.[87] In that sense, this book is a major contribution and starting point for any serious sociological reflection on procedural law.

The starting point of his sociological analysis lies in questioning the political reason for the recourse to procedural justice. Why do governments resort to courts? Why would they run the risk of being contradicted? Why would they conduct a trial in a public forum so that this trial could be used against them? Strongly influenced by Max Weber, Kirchheimer answered these questions by emphasizing the fundamental human need to justify the use of power.[88] Power has to appear legitimate to be accepted and stable. To operate successfully, the exercise of governmental power needs to appear reasonable; it is this need for a justification and legitimization of power that leads to the construction of the mechanism of procedural justice. Judges, says Kirchheimer, are the legitimizers of the exercise of governmental power in the political fabric.[89]

This first trend of critical theory allows for a fundamental structural reading of

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81. HERBERT MARCUSE, NEGATIONS: ESSAYS IN CRITICAL THEORY 112 (Jeremy J. Shapiro trans., 2009).

82. Bohman, *supra* note 80.

83. Theodor W. Adorno, *Zur Logik der Sozialwissenschaften* [The Logic of the Social Sciences], *in* DER POSITIVISMUSSTREIT IN DER DEUTSCHEN SOZIOLOGIE [THE POSITIVISM DISPUTE IN GERMAN SOCIOLOGY] 125–44 (Luchterhand Verlag GmbH 1969) (Ger.).

84. *See, e.g.*, THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMANN AND OTTO KIRCHHEIMER (William E. Scheuerman ed., 1996).

85. *See generally* OTTO KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS (1st ed. 1961).

86. *See generally id.*

87. *Id.* at 25–45.

88. *Id.* at 3–6.

89. *Id.* at 4–9.

international procedural law: international judges serve a purpose of justifying the exercise of power in the international legal order. They are meant to legitimize the functioning of inter-State relations. Following on this path, Habermas elaborated an alternative sociology for modernity,[90] where it is argued that "differentiation and pluralization are not pathological but positive features of modern societies."[91] Habermas' Theory of Communicative Action informed much of his thought about how states' structures should be enhanced to guarantee that differences are accounted for in decision-making processes. For this, it becomes essential for procedures to consider such variety of discursive perspectives in order to generate decisions within the processes that are to be considered legitimate.[92]

Taking a different perspective, focusing much more on the role of the individual in the machinery of justice, a second, and more recent, trend of critical theory sheds a different light on the functioning of procedural justice. An example of this other tendency is Geoffroy de Lagasnerie's work on judicial sociology *Judge and Punish: The Penal State on Trial*.[93] After spending years in the Parisian criminal courts watching trials for armed robbery, assault, rape, and murder, the author draws upon this experience to theorize on the ways that procedural justice functions in the liberal State.[94] Focusing on the criminal dimension of justice, he pointed out the paradox of liberal justice. To produce a judgment, two contradictory mechanisms operate.[95] On one hand, the trial builds an individualizing story of specific actors and their particular acts.[96] On the other hand, to punish, the individual is transformed into an aggression against society, against the whole State.[97] The machinery of procedural justice ends up reifying the individual and his passions, creating trauma and violence.[98] Using this second strand of critical theory, international law scholars have started to study how international tribunals contribute to the construction of collective memories[99] and of historical narratives.[100]

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90. *See generally* JÜRGEN HABERMAS, ON THE LOGIC OF THE SOCIAL SCIENCES (Shierry Weber Nicholsen & Jerry A. Stark trans., 1988); JÜRGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY (Frederick Lawrence trans., 1987).

91. Bohman, *supra* note 80.

92. *See, e.g.*, JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS [FACTIVITY AND VALIDITY: CONTRIBUTIONS TO THE DISCOURSE THEORY OF LAW AND THE DEMOCRATIC CONSTITUTIONAL STATE] (1994) (Ger.).

93. *See generally* GEOFFROY DE LAGASNERIE, JUDGE AND PUNISH: THE PENAL STATE ON TRIAL (Lara Vergnaud trans., 2018).

94. *Id.*

95. *Id.* at 95–96.

96. *Id.* at 77–79.

97. *Id.* at 96, 159–71.

98. *Id.* at 146–48.

99. *See, e.g.*, Moshe Hirsch, *The Role of International Tribunals in the Construction of Collective Memories* (Hebrew Univ. of Jerusalem, Research Paper No. 16-43, 2016).

100. *See, e.g.*, Moshe Hirsch, *The Role of International Tribunals in the Development of Historical Narratives*, 20 J. HIST. INT'L L. 391 (2018).

B. Feminist Theory

Feminist approaches could qualify as yet another dimension of a critical sociological analysis of international procedural law, as the logic underlying feminist approaches lie in the attempt to uncover the silence of international law and to show its structural biases and false neutrality.[101]

It has been contended that a feminist analysis of international dispute settlement entails facing three different claims based on: (i) the critique of the mechanisms of domination at work in international procedural structures; (ii) the critique of its biases; and (iii) the critique of its injustice.[102] Concerning the first claim, feminist approaches question whether there is a dominating group in the structure of international law or dispute settlement. Is there a dominating community in the international judicial setting among those who decide and therefore make international law? Highlighting the paucity or absence of women in international adjudicative bodies,[103] scholars like Nienke Grossman have argued that enhancing the presence of women in the international judiciary may contribute to its perceived legitimacy.[104] More generally, a broader claim that comes from these analyses is that enhancing diversity, be it gender-, language-, culture-, or socio-economic-based would not only enhance the perceived legitimacy of the field, but would improve the quality of the decision-making process.[105]

In this line, Stéphanie Hennette Vauchez worked on the role of gender in international judicial selection processes.[106] Hennette Vauchez undertook an important sociological inquiry studying the curriculum vitae of all 120 women who were ever listed as candidates to the European Court of Human Rights (ECtHR) over the time period between 1959 to 2012. The ECtHR is a particularly interesting one to examine in light of the "2004 Resolution of the Council of Europe's parliamentary assembly that formulated a rule of gender balance on the list of candidates presented by states for the [position] of judge."[107] This study concluded that international judicial appointment is far from being gender-neutral. First, the positive evolutions

101. *See generally* HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 48–52 (2000); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 613–45 (1991); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 379–94 (1999).

102. *See generally* H. Ruiz Fabri & E. Stoppioni, *International Arbitration: A Feminist Perspective*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION (Thomas Schultz & Federico Ortino eds.) (forthcoming 2020).

103. *See* Cecilia M. Bailliet, *Gender Imbalance in International Courts*, PLURICOURTS BLOG (Sept. 22, 2015, 1:11 PM), https://www.jus.uio.no/pluricourts/english/blog/cecilia-m-bailliet/2015.09.22.bailliet.gender-imbalance-in-courts.html (citing Grossman's research that found that women make up a small percentage of international judgeships).

104. Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 140 (2009).

105. Hélène Ruiz Fabri, *Understanding International Economic Law in Unsettling Times: A Feminist Approach*, 20 J. WORLD INV. & TRADE 3, 9 (2019).

106. Stéphanie Hennette Vauchez, *More Women–But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights*, 26 EUR. J. INT'L L. 195, 198 (2015).

107. *Id.* at 195.

happening in the context of the ECtHR should not be mistaken for a more comprehensive evolution in international procedural law. Second, it took a lot of activism and a statutory reform for these evolutions to be possible, and it is via obligations that States evolved in the sense of gender diversity. Third, the study considers that states have opted for a minimalist approach to gender balance.

Concerning the second claim, a core thesis of feminist approaches is that some international law rules are gender biased.[108] Feminist scholars essentially analyzed international dispute settlement under a particular prism. In their monograph, *The Boundaries of International Law: A Feminist Analysis*, Hilary Charlesworth and Christine Chinkin discuss how some legal scholars view Alternative Dispute Resolution (ADR) mechanisms as more "feminine" in their essence and therefore particularly beneficial for women.[109] Charlesworth and Chinkin provide that, within the feminist scholar community, so have argued that "the non-confrontational nature of problem-solving techniques are especially advantageous for women in that they provide the space for women's voices to be heard and their interests to be identified."[110] However, the notion that ADR is more suited to women or more feminine in essence has been disputed. Charlesworth and Chinkin note that, "[G]eneral assertions cannot be made that either ADR or adjudication is more advantageous for women . . . ."[111] Accordingly, it is difficult to determine what process of adjudicating is more inclusive of women's voices as a way to counter gender bias.

Likewise, the experience of the "feminist judgments" initiatives are particularly relevant.[112] The idea behind these projects is not to limit the feminist focus to a deconstruction or to critique existing legal structures but rather to "put theory into practice, by writing the 'missing' feminist judgments in key cases."[113] While scholars have generated feminist versions of judgments by domestic courts[114] and of some specific areas of law,[115] there has yet to be a feminist judgments project specifically addressing international law.

The third claim is part of the more general feminist reflection on the problems linked to the structural injustice of the international legal order. Focusing on the sociology of international procedural law should not divert our attention from

108. Alison M. Jaggar, *The Philosophical Challenges of Global Gender Justice*, 37 PHIL. TOPICS 1, 6 (2009).

109. CHARLESWORTH & CHINKIN, *supra* note 101, at 288-89.

110. *Id.* at 289

111. *Id.*

112. *See generally* FEMINIST JUDGMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter et al. eds., 2010).

113. *Id.* at 3.

114. *See generally* KATHRYN M. STANCHI ET AL., FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (2016); Diana Majury, *Introducing the Women's Court of Canada*, 18 CAN. J. WOMEN & L. 1 (2006).

115. *E.g.*, RACHEL REBOUCHE, FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN (forthcoming June 2020); Bridget J. Crawford & Anthony C. Infanti, *Introduction to Feminist Judgments: Rewritten Tax Opinions* 1 (Univ. of Pittsburgh Sch. of Law, Working Paper No. 2017-05, 2017).

international law's more fundamental flaws: "[A]ttention to process can become a substitute for dealing with the underlying issues. Dispute resolution processes do not rectify the structural reasons for disagreement within the international arena."[116] If some consider that international procedural law simply replicates some axioms of imperialism, then a critical sociology of international law would be an asset, insofar as it identifies where injustice is and where improvements to international power structures are needed to rectify these injustices.

All in all, critical sociological approaches to international procedural law allow for an understanding of how this instrument interacts with power, how it limits it in quest of legitimacy, or how it reproduces distorted relations, perpetuating an unjust form of social redistribution. To fight these pathological tendencies, these distorted relations existing within the field of international procedural law, a critical sociology approach seems to extend to international procedural law the Habermasian claim that differentiation and pluralization are positive features of modern societies. It encourages looking at the possible ways to increase diversity and pluralism within the fabric of international procedural mechanisms as a possible tool to dismantle their homeostatic power structures: increasing diversity could lead to tackle unchallenged structural biases.

V. USING ETHNOGRAPHICAL WORK TO ANALYZE THE FORMATION OF LEGAL REASONING

Turning from theory to methodology, we highlight an important method in social sciences: ethnography. This qualitative methodology, which originated in the discipline of anthropology, was progressively adopted by sociologists to study the behaviors of small social groups. It generally "involves the ethnographer participating, overtly or covertly, in people's daily lives for an extended period of time, watching what happens, listening to what is said, asking questions – in fact, collecting whatever data are available to throw light on the issues that are the focus of the research."[117] This particular way of focusing on the everyday interactions within a specific setting developed a peculiar prism of analysis:

> The descriptive narratives portrayed "social worlds" experienced in everyday life within a modern, often urban, context . . . . The investigator "took the role of the other" . . . in these empirical investigations. A dynamic process incorporating social change, especially disorganizing and rapid changes in values and attitudes . . . was emphasized. An openness to people, data, places, and theory was intrinsic to the ethnographic process.[118]

An ethnography of international procedural law asks the sociologist to study

116. CHARLESWORTH & CHINKIN, *supra* note 101, at 307.

117. MARTYN HAMMERSLEY & PAUL ATKINSON, ETHNOGRAPHY: PRINCIPLES IN PRACTICE 1 (1995).

118. Mary Jo Deegan, *The Chicago School of Ethnography*, *in* HANDBOOK OF ETHNOGRAPHY 11, 11 (Atkinson et al. eds., 2001) (citing GEORGE H. MEAD, MIND, SELF AND SOCIETY (1934); JAMES F. SHORT, INTRODUCTION TO THE SOCIAL FABRIC OF THE METROPOLIS: CONTRIBUTIONS OF THE CHICAGO SCHOOL OF URBAN SOCIOLOGY (1971); FLORIAN ZNANIECKI & WILLIAM I. THOMAS, THE POLISH PEASANT IN EUROPE AND AMERICA (1918–1920)).

the role of the adjudicator, to plunge in the daily work of the actors of procedure to collect the elements of their research. The leading figure in the application of this method to a procedural object is Bruno Latour.

In his work on the French Conseil d'État, the highest administrative court, Latour followed the daily work of seven judges for a period of four years and had privileged access to normally confidential deliberations in all contentious cases that were discussed during that period of time.[119] With such a privileged access to the discourse of the judges, he sat in the courtrooms and followed the public hearings but also heard the legal reasoning emerging in the discussions of the judges in camera.

The spirit of the book that emerged from such impressive fieldwork tells the story of the emergence of the legal argument (*les moyens de droit*) in the highest Court applying French administrative law. For the lawyer, the most interesting objective of this sociological method is the elaboration of an analysis of how a particular society speaks legally about some state of affairs. For the sociologist, the fascinating point is clearly Latour's larger conviction that a positive anthropology of the Moderns requires a comparative study of the various ways in which the central institutions of our cultures produce truth. In his observations, Latour identified law as one of the areas in which a society attempts to produce the truth (next to the scientific or religious environments, for example).

The method here is used to fill in the gaps left by the lens of the law or of philosophy. Latour is convinced that only with such an ethnographical work can one grasp what he calls "the essence of law," as an essence does not lie in a definition but in a practice, in a certain way in which the actors of a field behave about some fundamental factors.[120] To Latour, the "*moyen*" is the crystallization of this way of conceiving the essence of the law, the "vehicle on which is transported the rule of law."[121] Omnipresent in his fieldwork, it is a term that is hardly defined or studied in its ontology during legal studies.

Latour's analysis deconstructs legal reasoning. As judges define their function as being their capacity to "say the law," he identified ten fundamental "value objects" that evolve and modify over the "ordeal" of the judicial law-making processes:

(i) The *authority* of the actors participating in the deliberation and in the proceedings;

(ii) The *progress* of the claim, its evolution through different obstacles;

(iii) The *organization* of the cases;

(iv) The *interest* of cases, most notably considering their difficulty;

(v) The *weight* of the texts to be applied;

(vi) The process of *quality control*;

(vii) *Hesitation*, leading to the possibility to link and unlink different

119. *See generally* BRUNO LATOUR, THE MAKING OF LAW: AN ETHNOGRAPHY OF THE CONSEIL D'ÉTAT (Marina Brilman & Alain Pottage trans., 2010) (2002).

120. *Id.* at x.

121. *Id.*

components of the case and that is the heart of the freedom of judgment;

(viii) The *means* or *arguments*, vehicles linking the facts to some texts;

(ix) The *coherence* of law itself; and

(x) The *limits* of law, regulating the boundaries of a legal action. [122]

The observation of the interplay of these factors leads Latour to consider that "judges do not reason: they grapple."[123] The elaboration of the law is the result of the linking of different contingencies, not the coherent edifice that lawyers generally think it is. The work of Latour teaches a lesson of modesty for the lawyer, who is generally instructed to believe that he handles the buttons of the legal power structures.

Latour's ethnographic approach is, of course, rooted in a specific domestic legal system. As a result, it cannot be simply or directly transposed to the international arena. Yet scholars have nonetheless started to apply Latour's ethnographic method to international law. One interesting application to international law of Latour's ethnographical approach is provided in Marc Abélès' book *Heart of Darkness: An Exploration of the WTO.*[124] Abélès has, together with other anthropologists, conducted ethnographical work at the World Trade Organization (WTO). His objective was to describe the institution and its internal layout, elaborating working hypotheses based on this listening process. The focus of this fieldwork was, of course, the Organization's secretariat, seen as the institutional soul of the legal spine of the WTO. Focusing on interviews conducted with civil servants, the authors start from the daily work of individuals to describe the functioning of the institution and its ideological fundamentals but most of all its free-trade bias. If one takes the role of the secretariat in drafting important parts of WTO reports seriously, it becomes interesting to consider that this kind of sociological analysis could have a strong impact even on decision-making.[125]

Latour's ethnographic approach has been applied, up to now, mainly to international organizations law and little has been written applying this pattern to international procedural law.[126] Nevertheless, an ethnography of international procedural justice would be a welcome development in research in this area.

An ethnography of international procedural law would aim at defining the particular meaning of the *moyen en droit* before international courts and tribunals. Some amount of sociological work has been conducted on the history of the

122. *Id.* at 194–95.

123. *Id.* at 192.

124. *See generally* Marc Abélès, *Heart of Darkness: An Exploration of the WTO, in* PALACES OF HOPE: THE ANTHROPOLOGY OF GLOBAL ORGANIZATIONS 1, 31–54 (2017).

125. *See* Joost Pauwelyn & Krzysztof Pelc, *Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement* 1, 3 (Swiss Nat. Sci. Ctr., Working Paper 26-09-2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458872 (explaining the crucial role of the Secretariat in WTO rulings).

126. Interesting literature exists on international criminal law and on the ICC more specifically. *See generally* Ron Levi, et al., *Prosecutorial Strategies and Opening Statements: Justifying International Prosecutions from the International Military Tribunal at Nuremberg Through to the International Criminal Court, in* INTERNATIONAL PRACTICES OF CRIMINAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES 89 (Mikkel Jarle Christensen & Ron Levi eds., 2017).

legalization of the international legal order and of international institutions.[127] But the ethnographical approach would indeed try to grasp how the daily work of international judges gives meaning to this evanescent concept of *moyen*, demonstrating how international law is constructed and applied as a vehicle of production of truth in the international society. This approach would necessarily face some important difficulties, even more so when applied at the international level. To sit in on deliberations obviously requires the consent of the judges and, given the way that some international court and tribunals "manage" their relations with the outside world today, international judges might be reluctant to give outsiders permission to observe deliberations.

VI. CONCLUSION

The attempt of this article was twofold. On the one hand, we map the forms of the sociological reflection on international procedural law. By providing a panorama of the way the field is conceived, we adopt an external point of view to sketch different scenarios where sociological theories and methods could help with understanding the functioning of International Procedural law. This external reading allows a critical reflection on the methods and the functioning of procedural law in the international legal order.

On the other hand, we unpack the fundamental claims that different sociological approaches invoke to better understand international procedural law. First, systematic approaches to sociology aid in identifying different ways in which one can tackle legal issues without making direct resource to legal interpretation. Instead of directly looking at the meaning of rules, one is capable of attesting to the way in which actors direct meaning to such rules, or how the structure in which social and legal agents are inserted are the responsible factors for determining the meaning one gives to such rules, especially those governing procedures. Practice theory also highlights how the interplay between social (legal) agents and structure is in fact more complex than one would expect by showcasing how the process of establishing specific procedures actually derives from symbolic struggles between agents. Such procedures, on the other hand, end up conditioning the various ways in which such symbolic struggles between the legal agents can take place. Critical theory sheds light on the importance of the relation of procedure to power. For this reason, it demonstrates the importance of diversity, concerning the actors of or the approaches to international procedural law, to increase the legitimacy of the discipline.

Finally, ethnography maintains that judicial legal reasoning may rely on something more than a pure mechanical exercise of application of some texts as legal *moyens* are influenced by a large variety of sociological factors. A mapping of such approaches opens the way for one to understand that positivist analysis of legal phenomena, in particular of international procedural law, is but *one* amongst many. In bridging sociological methods and theories with law, legal scholarship, therefore,

127. For an overview of these works, see A. Nunes Chaib, *Institutionalizing the World Economy: A Study into the Law Applicable to International Financial Institutions* (Nov. 25, 2019) (unpublished Ph.D. thesis, Université Paris 1 Panthéon-Sorbonne) (on file with author).

has a lot more to gain than to lose and potential disciplinary *struggles* should not be an impediment for lawyers to engage with them.