

# FOREWORD

## THE PRACTICES OF THE INTERNATIONAL CRIMINAL COURT

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The authors in this issue of *Law and Contemporary Problems* explore the everyday lives of international law. More specifically, the authors theorize and investigate select “practices” of the International Criminal Court (ICC), by which I mean recurrent and meaningful work activities—social or material—that are performed in a regularized fashion and that have a bearing, whether large or small, on the operation of the ICC. By conceiving the ICC as a bundle of practices rather than as a unitary actor whose performance is primarily governed by politics, I seek to re-direct the existing literature on the much debated international organization, which has largely failed to engage, both theoretically and empirically, with the inner workings of the sizable bureaucracy based in The Hague—and the many organizational, cultural, and other cleavages that run through it and that have had a more than random institutional effect on international adjudication. In this foreword I give a brief account of the theoretical foundations on which this issue of *Law and Contemporary Problems* rests, then provide an overview of the empirical investigations. I close by briefly sketching avenues for further research.<sup>1</sup>

### I

#### THEORETICAL FOUNDATIONS

The empirical investigations that form the core of this issue all revolve around what has become known, in the last few decades, as practice theory. Although the many contending perspectives on the nature and logic of practices hardly combine into one unified theory, the term has stuck ever since it first emerged in the late 1970s, and I will use it here. Although space constraints disallow a comprehensive discussion of the key tenets of practice-oriented reasoning in the humanities and social sciences—something that I attempt in my framework article—it bears emphasizing at least very briefly what this perspective entails. Generally speaking, a practice-oriented approach (of which

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1. I return to these matters in considerably more depth in my substantive contribution to this issue. Jens Meierhenrich, *The Practice of International Law: A Theoretical Analysis*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 1.

many alternative ones exist) sidesteps agents or structures as principal determinants of social action, including legal action, and prioritizes a processual view. As one scholar usefully put it, theories of practice

foreground the importance of activity, performance, and work in the creation of all aspects of social life. Practice approaches are fundamentally processual and tend to see the world as an ongoing routinized and recurrent accomplishment. This applies even to the most durable aspects of social life—what scholars call social structures. Family, authority, institutions, and organizations are all kept in existence through the recurrent performance of material activities, and to a large extent they only exist as long as those activities are performed.<sup>2</sup>

What this means for the study of international law, where practice theory has made only modest inroads, is a shift from states, international courts, or other unitary actors to practices as the principal unit of analysis. Similarly, practice theorists turn to closely observed patterns of recurrent behavior for analytical insight about international legal phenomena before invoking the causal or constitutive role of structures, be they ideas or the distribution of power in the international system. What all perspectives from practice theory have in common is a deep interest in revealing the social meaning(s) of life. By singling out the everyday lives of the social phenomena with which they are concerned, practice theorists aim to integrate objective (think rationalism) and subjective (think constructivism) ways of seeing the world. Insights from practice theory have not yet been applied to the ICC, an oversight that occasioned the theoretical orientation of this issue of *Law and Contemporary Problems*. The collective project is geared toward exploring the promise—and limits—of rendering the ICC in practice terms, that is, in terms that favor *neither* methodological individualism *nor* methodological structuralism but that incorporate insights from both in the study of international law. I hasten to add that the application of practice theory attempted herein is exploratory and that considerably more analytical reflection is required to figure out the most suitable “theory–method package,” a term coined by Davide Nicolini, for the study of practices in international law.<sup>3</sup>

## II

### EMPIRICAL INVESTIGATIONS

I asked each of the contributors to the issue to focus their attention on *one* distinctive set of practices—to identify it, to demarcate its conceptual boundaries, and to analyze it by relating theory to empirical data and vice versa. Given the very abstract nature of practice theory, and the substantial amount of translational work that each of these tasks consequently required, some articles are more explicitly oriented toward the theoretical framework that I advance in the lead article than others. What is more, some of the empirical investigations are more descriptive than analytical and thus are not yet perfect examples of

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

3. NICOLINI, *supra* note 2, at 213–42.

the kinds of *analytic narratives* about practices of international law that the larger project from which this issue of *Law and Contemporary Problems* is culled, was designed to ultimately produce.<sup>4</sup>

These outcomes are neither problematic nor altogether surprising. They are symptoms of the continuing divide—which has manifested itself ontologically, epistemologically, and methodologically—between scholars and practitioners of international law, neither group of which has shown any abiding interest in grasping how the other sees the world of international law, and what that other may have to offer the first's interpretation. To the detriment of knowledge production in the study of international law, the vast majority of theoretically sophisticated international legal scholars have but a fleeting understanding of the reality of international law. This tendency is even more pronounced when it comes to International Relations (IR) scholars of international law. Conversely, the number of international legal practitioners with more than a perfunctory grasp of leading international legal scholarship, whether produced by International Law (IL) or IR scholars, is disconcertingly small. To help remedy these unfortunate facts of international legal life, and to alert observers to the more mundane—but nevertheless highly significant—aspects of international criminal law, I invited established and emerging scholars *and* practitioners to home in on the social lives of international adjudication at the ICC. I am grateful to all of my contributors for their willingness to venture into what for all of them was unknown theoretical territory, especially in instances where their high-level international legal practice made it exceedingly difficult to find the cognitive space necessary for the kind of analytical reflexivity that I pushed them to adopt.

All of the articles in this issue of *Law and Contemporary Problems* are best viewed as works in progress, as initial, pioneering efforts at thinking the ICC anew, that is, from a novel analytical perspective and with particular reference to the daily grind of investigating, prosecuting, defending, adjudicating, and administering those who stand accused of having perpetrated the most serious of international crimes. Because no blueprint existed after which the authors could have modeled the practice-oriented analyses that I commissioned, they all approached this analytical challenge differently, and typically in accordance with their respective vocational backgrounds. The result is a set of very diverse articles. Although some of the authors make more of practice theory than others, *all* of the contributions are worthwhile in that they illuminate previously neglected aspects of the ICC as an international organization, from the intricacies of administration to the dynamics of prosecution to the limits of representation to the biases of documentation.

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4. Note that my conception of analytic narratives departs rather fundamentally from the narrow definition pioneered by Robert Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal, and Barry R. Weingast in their coauthored volume *ANALYTIC NARRATIVES* (1998). Mine is an effort to claim the term for the interpretative study of international law so as to advance *both* the anthropology of international law *and* the sociology of international law.

With this in mind, let me provide an overview of what is to come. The nine articles that comprise this symposium are dedicated not only to analyzing *bureaucratic practices*, but also to making sense of what scholars in the political science subfield of IR recently theorized as *international practices*. When read in conjunction, they afford a partial view of the web of legal significance that several thousand men and women from around the world have spun in the first decade of the ICC's existence, whether based in The Hague or elsewhere. They offer tentative conclusions about an uncertain international organization, each occupying a unique vantage point from which to shed light on the institutional development of the ICC.

In *The Practice of International Law: A Theoretical Analysis*, I lay the theoretical foundations for a sustained practice turn in the study of international law in general, and in the study of the ICC, in particular.<sup>5</sup> More specifically, I introduce key attributes regularly associated with practice-based reasoning in the humanities and social sciences and offer an account of what practices are and how they work. I introduce more theoretical complexity by considering noteworthy advances in classic and contemporary theory to showcase the considerably diverse intellectual oeuvre that is available for adoption and reconfiguration by entrepreneurial IL and IR scholars intrigued to think more theoretically about the many visible—and hidden—practices that constitute international law, at the ICC and elsewhere. The article closes with methodological guidelines for the study of practices in international law more generally.

In the first substantive article, *Bargaining Practices: Negotiating the Kampala Compromise for the International Criminal Court*, Noah Weisbord, an associate professor of law at Florida International University, reflects on what he considers an important international practice, namely the role of sincerity in the difficult negotiations over the criminalization of aggression in the twelve years between the adoption of the Rome Statute of the International Criminal Court in 1998 and the conclusion of the so-called Kampala Compromise of 2010.<sup>6</sup> Drawing on Erving Goffman and other social theorists, Weisbord theorizes sincerity as communicative truthfulness about a subjective internal mental state. Based on his participant observation over several years of meetings of the Special Working Group on the Crime of Aggression (SWGCA), Weisbord argues and demonstrates convincingly that sincere bargaining gradually but surely became the dominant social practice in the aggression negotiations. In his article, he explains sincerity's rise thus:

[S]incerity emerged as an effective international practice in the aggression negotiations because it engendered trust and all of its benefits. Gamesmanship was discouraged within the culture of the SWGCA and it became increasingly risky and costly to be duplicitous. Diplomats were well attuned to each other's strategic interests and were keen observers of each other's verbal and nonverbal cues, making it difficult

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5. Meierhenrich, *supra* note 1.

6. Noah Weisbord, *Bargaining Practices: Negotiating the Kampala Compromise for the International Criminal Court*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 85.

to mislead others. In these protracted negotiations, it would have been exhausting to maintain a facade and the benefits were uncertain.

Next, Klaus Rackwitz and Philipp Ambach turn from international politics to bureaucratic politics. In their article *A Model of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court*, the two longstanding ICC practitioners (one of whom recently left the ICC for Eurojust, where he is the administrative director) provide an internal perspective on the logic of administration at the ICC.<sup>8</sup> Given Rackwitz's decade-long service in the Office of the Prosecutor (OTP), where he was the senior administrative manager between 2003 and 2011, and Ambach's several years of service as the special assistant to the president of the ICC, the authors write from a position of deep immersion in the administration of international adjudication. Although their analysis is more conventional than some of the others included in the issue, and largely devoid of theoretical reflection, the empirical depth of their contribution goes a long way toward advancing our knowledge of the making of the ICC bureaucracy, flaws and all. For as Rackwitz and Ambach write,

The Court's legal and institutional framework provides the senior managers of the institution with clear guidance as regards the general pillars and foundational arrangements. However, many areas that were left unregulated at the outset have required managerial practice over time to establish appropriate informal structures, procedures, and *modi operandi* on a variety of different topics, on both an *intra-* and *interorgan* level. Further, the Rome Statute and other legal texts issued by the Assembly defining the Court's institutional framework contain some ambiguous provisions, which has left the Court with the daunting task of finding the practically achievable arrangements that best approximate optimal arrangements within the confines of the Rome Statute system.<sup>9</sup>

It is too soon to ascertain the consequences for the adjudication of international crimes of these administrative challenges, but the article makes clear that the question of how the ICC is run—and how effectively—is far from a trivial matter of international law and international politics.

In his article *Dynamic Investigative Practice at the International Criminal Court*, Alex Whiting, the prosecution coordinator and former investigations coordinator of the OTP, examines the work and efforts, coordinated and otherwise, that during the last decade have shaped the investigation of international crimes.<sup>10</sup> Whiting, who is also professor of practice at Harvard Law School, argues that recurring practices along the lines theorized in my framework article have been sparse inside the OTP. He finds that “ICC investigations are generally reactive, highly dynamic, and unpredictable.”<sup>11</sup>

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7. *Id.* at 100.

8. Philipp Ambach & Klaus U. Rackwitz, *A Model of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 119.

9. *Id.* at 160.

10. Alex Whiting, *Dynamic Investigative Practice at the International Criminal Court*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 163.

11. *Id.*

Whiting explains why this is so and illustrates what he diagnoses as a problematic tension between formal legal requirements and informal investigative practices with empirical evidence drawn from a number of different OTP investigations, notably the Libya situation.

Karim Khan has been a longstanding practitioner of international criminal law, whose career, like Whiting's, began at the International Criminal Tribunal for the former Yugoslavia (ICTY). A barrister at Temple Garden Chambers, London, Khan has been on the list of defence counsel at virtually all of the international criminal courts and tribunals established after the end of the Cold War. He served at the ICC and ICTY as well as the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. He is best known for representing Charles Taylor, the former president of Liberia, before the SCSL, and several defendants who stand accused at the ICC of international crimes related to the collective violence that tore through parts of Kenya in the aftermath of the 2007 presidential elections there. In their article *Defensive Practices: Representing Clients Before the International Criminal Court*, Khan and Anand Shah, a case manager at Temple Garden Chambers, explain why, and how, the institutional design of the ICC has given rise to particular forms of conduct by attorneys representing accused individuals.<sup>12</sup> They do so by analyzing defensive practices related to two important aspects of international criminal procedure, namely the disclosure process and the so-called confirmation of charges at the ICC. By explicating the nature and evolution of defensive ways of doing things, as exemplified by their own experience in some of the ongoing Darfur and Kenya proceedings, Khan and Shah provide an unique and extended glimpse into the everyday life of representing clients at the ICC, highlighting what we might call the structured contingency of international representation.

Sara Kendall and Sarah Nouwen with *Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood* offer a critical account of what one might call victim fetishism in the international community.<sup>13</sup> Kendall, of Leiden University, and Nouwen, of the University of Cambridge, challenge the triumphalist, victim-centered narrative that portrays the ICC as a forum for greater participation by, and an engine for enhanced representation of, those whose lives have been affected by the large-scale violence adjudicated in The Hague. Kendall and Nouwen show that the representational practices of the first permanent international criminal court have thus far produced very different and largely disappointing outcomes. As they write,

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12. Karim A. A. Khan & Anand A. Shah, *Defensive Practices: Representing Clients Before the International Criminal Court*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 191.

13. Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 235.

in the practices of the ICC—which in this context involves not merely the court, but also the epistemic community surrounding it—victims are both overdetermined and less represented than the claims suggest. They are overdetermined in that all victims are amalgamated into an abstract entity, “The Victims,” which serves as a rhetorical justification and rationalization of the project of international criminal law. Meanwhile, as a result of juridification, very few individuals are actually personally represented in legal proceedings. This gap between the discourse surrounding victim representation and what transpires in the court’s work—namely between the presentation of “The Victims” as the *raison d’être* of international criminal law and the very limited role of victims in international criminal proceedings—coincides with a gap between the victim as an abstraction and as an actual victim of mass atrocity.<sup>14</sup>

The final three articles zoom out analytically from the ICC’s bureaucratic practices (as Kendall and Nouwen also partially do) to shed light on a number of broader activities, all of them international in nature. Joseph Hoover, lecturer in International Politics at City University, London, and formerly of the London School of Economics and Political Science, asks how international courts, notably the ICC, are constituted in the international system as actors with the capacity to assign blame, that is, legal responsibility for international crimes. In his article, entitled *Moral Practices: Assigning Responsibility in the International Criminal Court*, Hoover attempts an answer by theorizing moral responsibility as a social practice, with particular reference to John Dewey’s pragmatist philosophy.<sup>15</sup> Doing so, he claims, makes it possible to bring politics into the discussion of morality. To demonstrate the point, Hoover offers up a discussion of the ICC’s intervention in Uganda, arguing that the prosecution of international crimes there shows “that there are serious unintended consequences of the court’s pursuit of its moral ends.”<sup>16</sup>

Frédéric Mégret, associate professor of law and Canada Research Chair in the Law of Human Rights and Legal Pluralism at McGill University, pushes in a similar direction as Hoover. He, too, wants to abstract from what he calls the “strictly forensic goals” of international criminal law, that is, from the interrelated tasks of “investigating crimes, prosecuting the accused, and guaranteeing a fair trial.”<sup>17</sup> More interested in international practices than bureaucratic practices, Mégret, in his article *Practices of Stigmatization*, relates ideas about stigma developed by the sociologist Emile Durkheim to select aspects of practice theory in an effort to gain a better lens onto the goals and impact of international criminal justice.<sup>18</sup> In this context, he purports that

stigma serves as a broad, implicit orientation of the practices of actors in the criminal-justice system, one that in fact makes better sense of what the ICC is involved in. Stigmatization practices, then, describe the totality of practices engaged in by various actors of international criminal justice that aim to produce, channel, or deflect stigma. Further, I will argue that the accumulation of these practices, both deliberate and

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14. *Id.* at 261–62.

15. Joseph Hoover, *Moral Practices: Assigning Responsibility in the International Criminal Court*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 263.

16. *Id.* at 284.

17. Frédéric Mégret, *Practices of Stigmatization*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 287, 287.

18. *Id.*

unarticulated or subconscious, effectively helps the ICC become the powerful vehicle for stigmatization and international social regeneration that it is and thus provides a horizon within which the meaning of the court in international relations and law can be better understood.<sup>19</sup>

In pursuit of this argument, Mégret unpacks the logic of stigmatization theoretically, and illustrates its operation empirically with reference to ongoing ICC activities.

Wouter Werner, a professor of international law at the University of Amsterdam, completes the lineup with an interesting analysis of visual depictions of the ICC. In his article “*We Cannot Allow Ourselves to Imagine What it All Means*”: *Documentary Practices and the International Criminal Court*, he investigates a rarely examined social activity with an immediate bearing on our perception of international criminal law in general and of the ICC in particular—documentary portrayals.<sup>20</sup> The analytical focus on these journalistic or educational practices are indispensable, according to Werner, “because documentaries have turned into a powerful set of practices through which the court is imagined and narrated, ultimately influencing opinions about the court’s work.”<sup>21</sup> Werner’s close reading of *Carte Blanche*, a 2011 documentary about the trial at the ICC of Jean-Pierre Bemba Gombo, the former vice president of the Democratic Republic of the Congo, together with his shorter interpretations of three other documentaries on the ICC—*The Reckoning*, *The Court*, and *Kony 2012*—usefully problematizes the manufacturing of knowledge about the ICC and the atrocities that it was created to adjudicate. By theorizing ICC-themed documentaries from the vantage point of practice theory, Werner brings the humanities to the study of international law in a manner that forces us to reconsider what we know about the first permanent international criminal court, and how we have come to know it.

All of the aforementioned articles, albeit diverse in scope, depth, and theoretical sophistication, contribute to pushing the study of international law in a new direction. The explicit and theoretical foregrounding of recurrent and meaningful work activities—social or material—related to international adjudication at the ICC has the potential of bridging the intellectual gulf between scholars and practitioners of international criminal law, neither group of which has fared particularly well in presenting accounts of the ICC that are theoretically aware *as well as* empirically attuned.

Any scholar or practitioner hoping to truly understand the ICC as the leaving and breathing organism of international life that it is would do well to think of international criminal law not only in terms politics, as IR scholars have been wont to do ever since the International Military Tribunals at Nuremberg and Tokyo were imposed by the victorious Allies on the aggressor countries of

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19. *Id.* at 295.

20. Wouter G. Werner, “*We Cannot Allow Ourselves to Imagine What it All Means*”: *Documentary Practices and the International Criminal Court*, 76 *LAW & CONTEMP. PROBS.*, nos. 3–4, 2013 at 319.

21. *Id.* at 322.



World War II, or in terms of procedure, as doctrinally-oriented IL scholars are in the habit of doing, but also in terms of practices.

### III ANALYTICAL EXTENSIONS

The next iteration of this project is an enhanced edited volume that consists of deepened and broadened versions of the articles collected here as well as analyses of ICC-related practices not featured, due to space and other constraints, in this issue of *Law and Contemporary Problems*. But the study of practices promises to illuminate other areas of international law as well. This issue's focus on the ICC was motivated by my own research agenda, and the increasing significance in the international system of the permanent international court, but there is no reason why a practice-oriented approach could not also illuminate, say, the workings of the Dispute Settlement Body of the World Trade Organization, the goings-on in the International Law Commission, the making of customary international law in a specified area, or the functioning of the international law department in a given ministry of foreign affairs, to name but a few of the countless research projects that are conceivable and that could help bridge the gap between the theory and practice of international law. Kenneth Abbott and Duncan Snidal recently declared the integration of theoretical and applied knowledge "a core agenda for the next generation of IL/IR scholarship."<sup>22</sup> As they put it, "This agenda takes what might be called a 'soft external' perspective: it accepts that internal understandings of law, embodied in legal practices, are valuable on their own terms, but argues that international understandings must be supplemented by external perspectives."<sup>23</sup> This issue of *Law and Contemporary Problems* comes from a similar analytical place. Mere descriptions of ICC developments are considerably less useful than analytical treatments of empirical phenomena informed by an external theoretical perspective.

The external perspective that my contributors and I have brought to bear is that of practice theory. The advantage of trying to make this body of diverse (and rather unwieldy) theoretical insights usable for the study of international law lies in its ability to combine easily with mechanism-based explanations in the social sciences, which is to say, theoretical sophistication is attainable without having to reduce empirical complexity in the name of parsimony, as is usually required when it comes to applying the high level of generality of mainstream IR theory to international legal phenomena. With a little bit of luck, the select practices—bureaucratic and international—that the contributors to this issue on the ICC have tackled, for the first time, illustrate the

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22. Kenneth W. Abbott & Duncan Snidal, *Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 33, 49 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013)

23. *Id.*

explanatory potential that is associated with taking seriously the everyday life of international law. The attempt to do so is part of an ongoing effort to come to terms with the microdynamics of international law, an endeavor that requires, or so I propose, the integration of insights from rationalism *and* doctrinalism *and* interpretivism.