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The New Sociology of International Courts

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Recent years have seen a growth in interdisciplinary studies of international law (IL). Some even argue that IL and International Relations (IR) “cohabit the same conceptual space,”¹ and that “they are potentially a kind of joint discipline”.² There are many good reasons to engage political science and, particularly, IR in the study of international law and courts, the obvious one being that IL has international political implications and that international courts (ICs) exercise forms of public authority. Although the interface of international law and politics undoubtedly will continue to spark academic debate, in this Reflection I will argue that this particular emphasis of the interface of law and politics leaves out the sociological dimension necessary for explaining the law and legal institutions of the “society of nations”. There is, in other words, a missing sociology of the “society of nations” and its legal institutions – that is, a study of the social structures of international society and how these help explain the relative power of international law, courts and lawyers in their interaction with other institutions and actors. In what follows, I will introduce a set of studies that have managed to bring both classical and contemporary sociology into current debates about IL and particularly ICs. I assemble these studies under the common label of the New Sociology of International Courts (NSIG) as they share a set of theoretical and epistemological premises. It should however be pointed out that I do not define these studies as new in contradistinction to an earlier sociology of ICs, which largely failed to materialize (see below), but rather from the long dominant law-political science scholarship on ICs and its particular way of approaching ICs. This reflects the argument put forward in the following: Although sociology featured in some prominent IL works of the early 20th century, sociological

¹ Anne-Marie Slaughter, 'International law in a world of liberal states' (1995) 6 *European Journal of International Law* 503.

² Kenneth W Abbott, 'Modern international relations theory: a prospectus for international lawyers' (1989) 14 *Yale Journal of International Law* 335.

perspectives subsequently more or less disappeared with a few exceptions. This was largely due to developments within mainstream sociology, and the success, particularly in recent decades, of law-politics approaches. Yet, as I will argue, a new generation of empirical sociology of IL has emerged, in particular, with respect to the study of international courts which reposes fundamental questions related to notions of *institutions*, the *legitimacy* of ICs and, particularly, their place in contemporary processes of *global societal structuration*.

RECONNECTING INTERNATIONAL LAW, POLITICS AND SOCIETY

The pioneers of modern day IL were not blind to the politics of IL, but they also exhibited a real interest in figuring out the structures of international society via international law, courts and other institutions. One of these forerunners was the Second President of the Permanent Court of International Justice (PCIJ) Max Huber (1874–1960). He pioneered the use of sociology in studies of international law in his work as a professor of law at the University of Zurich, an academic career cut short when he was appointed to the international bench.³ Huber was critical of both the natural law character of earlier IL writings and the formalism of some of his contemporaries. He was instead interested in the society created by states and the many processes of IL, taking place both over and under the law, as well as the moral and symbolic significance of the new judicial and semi-judicial institutions of IL. Huber's project was never entirely developed, but other authors, notably George Scelle, sought equally to mobilize sociology, in this case to explore how sociology was the glue – in a normative sense – of global interdependent societies.⁴

Huber as well as Scelle wrote at the precise moment when the founding fathers of sociology had provided a set of radical new tools for understanding law and legal institutions in society. Yet, while these early sociologists such as Max Weber and Emile Durkheim shared a keen interest in the place of law in the formation of modern society, IL, and particularly ICs, had little relevance to them as objects of study. With the rare exception of the work of Huber and a few others,⁵ many of the insights of the pioneers of sociology have since been lost to students of IL and ICs. This decline of sociology in the study of IL and, today, ICs, is in part a consequence of developments within sociology. Generally, mainstream sociology long had a limited engagement in research on international phenomena. The result has been a dearth, although not a disappearance, of sociological perspectives in the study of many international issues. The sociological voice has been perhaps most strikingly absent in the field of human

³ See Max Huber, 'Die soziologischen Grundlagen des Völkerrechts' (1910) 4 *Archiv für Rechts- und Wirtschaftsphilosophie* 21.

⁴ A third example worth mentioning is the work of Charles de Visscher who also sought sociological vistas in his work.

⁵ See on the French sociological school in IL, Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001).

rights studies,⁶ but it is only in recent years that it has started being heard again in debates on IL and particularly ICs. There are of course exceptions to these trends, for example the work of Myres S. McDougal and the Yale School of IL mobilized sociological insights; likewise, Critical Legal Scholarship has multiple references to sociology. In both cases, however, the objects of inquiry remain, for the most part, defined in legalistic terms. As I will show below, NSIG, on the contrary, launches an empirical inquiry into ICs which is based on genuine sociological questioning. Overall, in this light, it is not entirely surprising that legal and political scientific analysis have come to dominate studies of particularly ICs. A plethora of advanced theories, particularly about the law and politics of European regional ICs, has been developed by political scientists and lawyers, but the “social,” as in sociology, has generally evaporated from the understanding of international law and courts over the last 50 years with some exceptions. However, although explicit references may be missing, contemporary law and political science approaches to ICs implicitly draw on sociological insights about the role of law and courts in society. Moreover, since the early 2000s, substantial empirical sociological studies of ICs and global governance structures have been carried out, more openly acknowledging the insight of some of the giants of sociology who early on developed advanced ways of understanding the role of law and legal institutions in society. In simple terms, if the dominant nexus for understanding IL and ICs has been law and politics, most of the new sociological studies are highly evocative of how ICs can be studied using a different nexus consisting of law, politics, *and* society.

INTERNATIONAL LAW AND COURTS FROM THE POINT OF VIEW OF SOCIOLOGY

Sociologists have long studied law and legal institutions in *national* society. This is true for both the classics such as Weber and Durkheim just mentioned and leading contemporary sociologists, for example Jürgen Habermas, Pierre Bourdieu, Niklas Luhmann and Bruno Latour. Sociologists, however, study law and courts using a rather distinct starting-point. If law has as its overarching object of inquiry the normative order of legal norms, and political science’s key object is politics and associated institutions and actors, sociology is above all concerned with society and its institutions. With regard to studying IL and ICs more specifically, the main difference between sociology and law and political science is the way in which sociologists approach the idea of institutions. While law and political science typically rely on legal delineations of institutions and thus take the circumscription of institutions more or less as a given, sociology for the most part construes institutions in a much broader sense: either as assemblages of practices within larger social fields or more generally as devices for ordering society. While the latter is present in functionalist and value-oriented

⁶ See for example Mikael Rask Madsen and Gert Verschraegen, 'Making Human Rights Intelligible: An Introduction to Sociology of Human Rights' in Mikael R. Madsen and Gert Verschraegen (eds), *Making Human Rights Intelligible: Towards a Sociology of Human Rights* (Hart 2013), 1-22.

sociological studies of IL and ICs both past and present, the insights of sociology of practice is a far more recent phenomenon in studies of IL and ICs. And it is at the heart of NSIG.

The emergence of what I group as NSIG in terms of a growing body of empirical sociological scholarship on IL and ICs using a set of similar theoretical perspectives was in part inspired by studies of the globalization and transnationalization of law and legal professionals of the early 1990s. A seminal book with regard to the new sociological scholarship on international institutions and courts, is the analysis of international commercial arbitration conducted by Yves Dezalay and Bryant Garth.⁷ Using both legal and sociological insights, Dezalay and Garth demonstrated how the battle over the form and the law of international commercial arbitration could be explained as a battle between not only different forms of expertise (European academic law vs. American-style Wall Street law), but also as a clash between different global elites and their ways of producing law.

The work is based on two different research traditions which are brought together via a set of broader conceptual frameworks provided by the sociologist Pierre Bourdieu: first, a sociology of professions with a view to analysing how professions increasingly compete with one another in the construction of new transnational markets and arenas; secondly, a sociology of elites with the aim of exploring how a set of distinct social groups of (legal) agents hold the power to define new areas of legal practice, with consequences not only for the profession at large, but also for international politics and society. Drawing on Pierre Bourdieu, they frame these battles as social *fields*, that is, as spaces of contestation over defining the law in which different agents occupy positions relative to the portfolio of capitals they can muster and which are 'capitalised' according to the logic of the specific field in question.

Dezalay and Garth's work has also a methodological feature, which has turned out to be of special interest to understanding ICs. Although legal institutions are clearly important to their studies, they are not taking centre stage in the original study on international commercial arbitration. What they instead provide is a sociological alternative to the assumption of many studies in both law and political science that institutions more or less in themselves can explain the emergence of new transnational legal fields. Much closer to neo-institutionalist scholarship on organizational fields,⁸ yet different, they claim that individual agents, and particularly the agents' personal and professional trajectories into the fields and institutions in question, provide unique data for understanding how institutions come about and transform. Using a methodology, which they term 'collective biographies', a form of prosopography, they map out the social characteristics of the social spaces of institutions in terms of the combined and

⁷ Yves Dezalay and Bryant G Garth, *Dealing in Virtue. International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

⁸ For example Paul J DiMaggio and Walter W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 147.

accumulated trajectories of its main agents. This is also where they deploy Bourdieusian notions of capitals – social, educational, political, legal, etc. – to explore the specific legal elite formations of these socio-legal spaces.

Dezalay and Garth's identification of legal elites as an empirical access point for studying transnational legal fields has had considerable impact on a series of in-depth empirical studies of ICs, ranging from the areas of international criminal law to European law, which emerged at about the same time in the beginning of the 2000s. Basically, Dezalay and Garth provide a subtle way of linking questions of elites, power and conflict for exploring how institutions are built and transformed. An example is the study of the International Criminal Tribunal for the Former Yugoslavia (ICTY) by John Hagan⁹ that in many ways follows the lead from Dezalay and Garth on the role of legal agency. In their work, John Hagan and Ron Levi adopt a more institutional approach than that found in Dezalay and Garth, yet they use precisely the described methodology of examining the trajectories of the main agents in order to map the institution in question and its transformation. They concretely scrutinize the interplay between investigators, prosecutors and witnesses, as well as specific powerful individuals employed by the tribunal (emblematically Richard Goldstone, Louise Arbour and Carla Del Ponte), in a complex analysis of the making of humanitarian and international criminal law, and how it eventually gains a force of law with a reference to the Bourdieusian conception of the legal field.¹⁰ From this one can trace a more general sociological interest in international criminal law and its new set of associated institutions.¹¹

A second branch of sociology of IL and ICs that has found an inspiration in both the work of Bourdieu and that of Dezalay and Garth is a set of projects on the emergence of a field of European law with a particular focus on the two European inter- and supranational courts: the European Court of Human Rights and the Court of Justice of the EU (formerly the ECJ). Using these approaches has enabled these scholars to examine the interplay between the agency of European supranational courts and the simultaneous transformation of the social structures in which they evolve.¹² Moreover, this novel approach to the double-structuring of European law by the interplay of actors, indeed often entrepreneurs, of European law *and* structural transformation has allowed

⁹ John Hagan, *Justice in the Balkans. Prosecuting War Crimes in the Hague Tribunal* (University of Chicago Press 2003).

¹⁰ John Hagan and Ron Levi, 'Crimes of War and the Force of Law' (2005) 83 *Social Forces* 1499; Hagan, John, Ron Levi and Gabrielle Ferrales, 'Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia' (2006) 31 *Law & Social Inquiry* 585.

¹¹ For an overview, see Mikkel Jarle Christensen, 'The Emerging Sociology of International Criminal Courts: Between Global Restructurings and Scientific Innovations' (2015) *Current Sociology*, 825-49.

¹² See particularly Mikael Rask Madsen, 'The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence' in Mikael Rask Madsen and Jonas Christoffersen (eds), *The European Court of Human Rights between Law and Politics* (The European Court of Human Rights between Law and Politics (Oxford University Press 2011), 43-60.

them to revise the taken-for-granted story of the emergence of European law and the role played by supra- and international courts in this process.¹³ By using a distinct power-perspective on the making of international (European) law and its relative force, they have highlighted how larger societal and geopolitical currents have had an enduring impact on the evolution of European law and institutions, as well as European integration more generally. Somewhat similar to many of the studies cited above, these inquiries into the deeper socio-logics of European ICs combine insights from theories of professions and professionals with critical approaches to law and its power in society, which highlights how law is mobilized, in specific cases or as part of broader legal movements.

It is exactly because of these combined interests that their analysis tends to find their overriding frameworks in sociological theories in the tradition of, on the one hand, Max Weber and the power and evolution of professions, and, on the other hand, theories of social practices and configurations such as those of Norbert Elias and Pierre Bourdieu. In part building on these insights, a third generation of studies of IL and ICs is now emerging, particularly around the iCourts project in Copenhagen where a host of both well-known and lesser known ICs are being scrutinized using empirical qualitative and quantitative methods.¹⁴ These studies have refined and moved beyond the original Bourdieusian-Weberian framework in two important ways. First they have further theorized key questions related to the power of ICs, notably by showing how the authority of ICs is not explainable by a study of the legitimacy of ICs, but rather requires a study of the practices of the audiences of ICs;¹⁵ secondly, they have demonstrated how the originally mainly sociological explorations of IL and ICs can inform a new legal realism.¹⁶ Termed European New Legal Realism (ENLR), they suggest an analysis that accommodates what H.L.A Hart famously referred to as 'the external and internal dimensions of law' in a single more complex analysis.¹⁷ More precisely, and drawing explicitly on the insights of NSIG, they argue for making the practice of law and how it constructs its particular argumentation and logics an object of empirical inquiry *in combination* with studies of the underlying societal structures which make possible the claim of legal autonomy and the associated production and reproduction of law; that is, they seek a more complete analysis of law and its societal context which suggests that legal practice is always deeply societally embedded.

¹³ See for example Antoine Vauchez, 'The transnational politics of judicialization. *Van Gend en Loos* and the making of EU polity' (2010) 16 *European Law Journal* 1.

¹⁴ For example Salvatore Caserta and Mikael Rask Madsen, 'Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies' (forthcoming 2016) 79 *Law & Contemporary Problems*.

¹⁵ Karen J Alter, Laurence R. Helfer and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' (forthcoming 2016) 79 *Law & Contemporary Problems*.

¹⁶ Jakob .v. H. Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 *Leiden Journal of International Law* 211.

¹⁷ On the new legal realism in international law, see Gregory Shaffer, 'The New Legal Realist Approach to International Law' (2015) 28 *Leiden Journal of International Law* 189.

THREE KEY CONTRIBUTIONS OF NSIG

The New Sociology of International Courts makes at least three contributions to the understanding of ICs. The outlined approach reposes a number of key questions with regard to ICs, including questions related to the notion of *institutions*, the *legitimacy* of ICs and, not the least, their place in contemporary processes of *global societal structuration*. With regard to *institutions*, it challenges the explicit or implicit formalism of both law and political science in the understanding of ICs and replaces it with a notion of social spaces – that is, it centres the “institutional” analysis on the actual situated practices of ICs instead of on what formally are the areas of intervention of a given institution. With regard to *legitimacy*, it challenges the so far two dominant perspectives on IC legitimacy, respectively in terms of normativity and in terms of effectiveness. It replaces these with an empirical study of how ICs are legitimized and especially gain authority in their interaction with key audiences and the structural socio-political conditions under which they operate. Finally, and perhaps most importantly, NSIG reinserts IL and ICs in international *society*. It replaces the perception of international society as mainly the diplomatic interface of states and international organizations with a study of the spaces of contestation between different transnational elites, including states, international organizations, and NGOs.

The latter is where a genuine sociology of ICs, and also potentially IL, is resurrected. In this view, international society is not simply residual to national society and providing functional responses to the new needs for states in the area of globalization; international society is also political in and of itself, meaning that there is an actual social politics related to ICs—not just merely problems of legitimacy on which most legal and political analysis nevertheless tends to centralize their study. This underlying societal dimension also highlights the inherent problem of limiting the analysis of IL and ICs to law and politics. The growth of IL and ICs are part of broader social processes of legal and political restructuring with respect to globalization. And globalization at large is creating new divisions in society between, for example, those who are inside the new global networks and those who are literally “off-line.”¹⁸ If globalization is as pervasive as most scholars of ICs tend to claim, it seems hard to maintain that questions of, for example, the legitimacy of ICs can be answered with a limited focus on the law and politics of ICs. The real question seems increasingly to be what kind of global society is being (co-)produced by IL and ICs and the social and political responses and cleavages that these developments entail. Such a study of IL requires inevitably a sociological analysis for explaining both the place of IL and ICs in contemporary globalizing societies, and how IL and ICs impact contemporary globalizing societies.

¹⁸ Manuel Castells, *The Rise of the Network Society: The Information Age: Economy, Society and Culture Vol 1* (2nd edn, Blackwell 2000).