The European Journal of International Law Vol. 36 no. 1

Of Theory and Reality, and Airplanes and Helicopters

Fuad Zarbiyev[*]

Review of Alain Pellet. ***'Le droit international à la lumière de la pratique: l'introuvable théorie de la réalité. Cours général de droit international public.'*** *Recueil des cours de l'Académie de droit international de La Haye.* Vol. 414. Leiden/Boston: Brill/Nijhoff, 2021. Pp. 547. €164.30. ISBN: 9789004465473.

Abstract

The general course on public international law delivered by Professor Alain Pellet at The Hague Academy of International Law deviates from the recent tendency indulged in by many general courses to approach the discipline from the angle of a particular theme. His is a course taking the phrase 'general course on public international law' quite literally. Despite the generalist outlook of the course, however, there is a guiding thread animating it – namely, Pellet's vision of how the reality of international law should be approached by international lawyers – in particular, by international law academics. After a brief general presentation of the course, this review essay focuses on Pellet's theory of the theory and reality of international law and attempts to offer some general observations about what such a theory means against the backdrop of the current state of the discipline.

As a genre, general courses on public international law offered at The Hague Academy of International Law aptly illustrate 'the literature of exhaustion', a phrase coined by John Barth to refer to 'the used-upness of certain forms or the felt exhaustion of certain possibilities'.[1] It is indeed hard to believe that the notion of a 'general course on public international law' is – in the 21st century – meant to be taken literally, with each general course expected to offer a single scholar's individual perspective about the whole field of public international law. This is presumably why several recent

[*] Professor of International Law, Geneva Graduate Institute, Switzerland. Email: fuad.zarbiyev@graduateinstitute.ch.

[1] J. Barth, *The Friday Book. Essay and Other Nonfiction* (1984), at 64.

general courses have approached the task from the angle of a particular unifying theme: unity,[2] creativity[3] or expansion[4] of international law. The general course delivered by Alain Pellet in 2018 and published in 2021 is an exception: this is a course that takes the phrase 'general course on public international law' literally – because 'the vocation of a general course is to be… general'.[5] Indeed, the course attempts to cover virtually all the traditional themes of the discipline (from the doctrine of subjects to the making and implementation of international law), closely mirroring standard textbooks of international law.

Subtitled 'Pour une théorie de la réalité' when it was originally delivered at The Hague Academy, the course has ultimately been published under the more modest subtitle 'L'introuvable théorie de la réalité', a change that reflects Pellet's coming to realize that offering a theory of reality – described as 'a doctrine that strives to account for all legal phenomena without succumbing to the siren calls of pure theory or sacrificing itself to the purely intellectual excitement of legal constructs with no concrete purpose' – was an impossible task.[6] The published version of the course is structured into three parts. Part I offers an extensive introduction, describing what international law is for and by which and for which actors it is made.[7] Part II focuses on the various ways in which international law is practised.[8] Despite its subtitle – 'International Law in Its Infinite Diversity' – Part III is limited in its coverage, focusing on the so-called fragmentation of international law and the dual phenomena of 'humanization' and 'communitarization' of international law.[9] The last chapter, which reads like a standalone conclusion rather than a chapter in Part III, explains why a theory of reality is most probably unattainable.[10]

The reader is warned right out of the gate that the course is a 'presentation of international law without significant originality',[11] and, indeed, Pellet sticks to his word. This lack of originality, however, by no means equates to a lack of commitment: the course is a formidable manifesto for a certain vision of international law and certain assumptions about how it should be studied and theorized. On many foundational questions, Pellet's account of international law is also more nuanced than most traditional accounts of the discipline. For instance, the course insightfully observes that

2 Dupuy, 'L'unité de l'ordre juridique international. Cours général de droit international public', 297 *Recueil des cours de l'Académie de droit international de La Haye* (*RdC*) (2003) 9.

3 Sur, 'La créativité du droit international. Cours général de droit international public', 363 *RdC* (2014) 9.

4 Treves, 'The Expansion of International Law: General Course on Public International Law', 398 *RdC* (2019) 9.

5 Pellet, 'Le droit international à la lumière de la pratique: l'introuvable théorie de la réalité. Cours général de droit international public', 414 *RdC* (2021) 9, at 486. All the translations from the general course are from the author.

6 *Ibid.*, at 26–27.

7 *Ibid.*, at 31–110.

8 *Ibid.*, at 111–294.

9 *Ibid.*, at 295–508.

10 *Ibid.*, at 486–508.

11 *Ibid.*, at 27.

there is more than one legal system applicable to international affairs,[12] raises interesting questions about the possibility of legal orders not created by states[13] and criticizes the traditional subjects doctrine.[14] Likewise, even though Pellet ultimately sees international law as a largely state-centric enterprise in which 'the place of the individual remains marginal',[15] he recognizes a greater role for non-state actors in the making of customary international law than most traditional international law scholars.[16]

As expected in a positivist account, Pellet's definition of law places heavy emphasis on formal processes out of which legal rules come into being.[17] There is no autonomous place in law for morality, and the distinction between *lex lata* and *lex ferenda* should be strictly enforced.[18] But, contrary to 'plain vanilla' positivists, Pellet thinks that rules that are 'politically and morally unacceptable' are not law.[19] Law is expected to correspond to 'social needs in a given society' and can only exist if it is considered to be legitimate, legitimacy being defined as conformity to the society's 'essential values'.[20] How such deviations from positivism fit into the *lex lata* and *lex ferenda* distinction and how they can be administered in practice, however, is left unexplained.

A seasoned practitioner of international law, Pellet is sensitive to the instrumentalist function of international law and emphasizes the latter's power as an 'instrument of legitimation'.[21] Unlike most mainstream scholars, he is also mindful of power politics, openly acknowledging that 'international law disguises the imbalance of power between the groups involved in order to legitimize the interests of the dominant, which become "rights"', and that, for this reason, 'legal rules contribute to the perpetuation of power relations'.[22] This does not mean, however, that international law only serves the interest of powerful states: thanks to international law, the weak can avoid 'the brutality' of naked power politics.[23] But how this could happen is not elaborated upon in sufficient detail. An example given earlier[24] – Nicaragua's successful case against the USA before the International Court of Justice (ICJ) – is limited to a context (adjudication) that is too special to be of general interest. The promising point that law has some autonomy *vis-à-vis* politics and cannot be conflated with the latter is made but not developed.[25]

In Part II, the course interestingly identifies four modes of engagement with international law described as 'practices of international law': 'doing law' (*faire du droit*),[26] 'thinking law'

12 *Ibid.*, at 54ff.
13 *Ibid.*, at 66ff.
14 *Ibid.*, at 85ff.
15 *Ibid.*, at 420.
16 *Ibid.*, at 122ff.
17 *Ibid.*, at 35.
18 *Ibid.*, at 72, 233, 488.
19 *Ibid.*, at 39, 163.
20 *Ibid.*, at 43.
21 *Ibid.*, at 49.
22 *Ibid.*, at 35.
23 *Ibid.*, at 47.
24 *Ibid.*, at 33–34.
25 *Ibid.*, at 156.
26 *Ibid.*, at 112–132.

(*penser le droit*),[27] 'making law' (*faire le droit*)[28] and 'implementing law' (*mettre en oeuvre le droit*).[29] The first category essentially has to do with what standard vocabulary designates as 'practitioners' of international law, ranging from legal advisors to governments and international organizations to counsel and advocates before international courts and tribunals, although Pellet also includes legal academics in the bunch.[30]

Unsurprisingly, those who 'think international law' – Pellet's second category – primarily include international law academics. The theoretical approaches presented in this part seem to have been picked somewhat randomly, including as they do positivism, objectivism, voluntarism, critical legal studies, the New Haven school, feminism and trans-civilizational perspectives on international law. One is left to wonder what the New Haven school represents today, or what the place of trans-civilizational perspectives on international law is in the broader universe of international law theories. Decades of critical legal studies are dismissed in barely one page as an exercise in 'narcissistic self-flagellation'.[31] Half a page is dedicated to feminism, but the latter fares better than critical legal studies, receiving the distinction of 'constructiveness'.[32]

The presentation of the 'making of international law' closely follows the list of Article 38 of the ICJ Statute – the provision being described as 'irreplaceable'[33] – even though the gaps in that list (unilateral acts of states and binding decisions of international organizations) are also identified and briefly discussed.[34] Despite his wholesale endorsement of Bhupinder S. Chimni's critique of the traditional conception of customary international law as 'a carrier of particular epistemology, culture, and values that marginalize third world voices',[35] Pellet displays no hint of influence from that critique in his discussion of custom.

The chapter dedicated to the implementation of international law covers the familiar ground of international responsibility (state responsibility and beyond) and the settlement of disputes as well as the legal regime governing the use of force. On the latter, Pellet defends the conservative view that there are only two admissible exceptions to the prohibition on the use of force (self-defence and the United Nations [UN] collective security mechanism) but calls for a greater flexibility in the interpretation of those exceptions, admitting, for instance, that a cyber-attack could qualify as an armed attack within the meaning of Article 51 of the UN Charter.[36]

Part III – the last part of the course – is dedicated to the unity of international law, its progressive 'humanization' and the increasing importance of community interests in the discipline. Pellet is less concerned than most of his colleagues in the mainstream by the so-called fragmentation of international law, among other reasons, because he

[27] *Ibid.*, at 133–160.
[28] *Ibid.*, at 161–207.
[29] *Ibid.*, at 208–294.
[30] *Ibid.*, at 116.
[31] *Ibid.*, at 140.
[32] *Ibid.*, at 141.
[33] *Ibid.*, at 185.
[34] *Ibid.*, at 184–185.
[35] *Ibid.*, at 145.
[36] *Ibid.*, at 226.

does not seem to believe that the kind of unity that fragmentation discussions tend to assume has ever existed in the first place.[37] Like Ian Brownlie before him,[38] Pellet associates fragmentation with the mindset of 'fragmentism' of specialists operating in various branches of international law, some of which (for example, human rights law, the law of the European Union) are discussed specifically.[39] While he sees practical differences in the ways in which practitioners from different legal cultures approach international law, those differences do not threaten the essential unity of the international legal order.[40]

The 'humanization' of international law is traced back to the protection of aliens via diplomatic protection and the right to resort to mixed commissions or arbitration,[41] while human rights are presented as the extension of international protection to nationals.[42] Although attractive as a narrative, this presentation may be misleading not only because human rights are not a matter of nationality but also because their sources of inspiration are different from the ones underpinning the primarily economic rights of aliens. The penultimate chapter of the course is dedicated to the place of community interests in international law. In addition to the 'usual suspects' (international community, humanity, common spaces), some newcomers (environment, health, culture and the Internet) are also discussed as 'common goods' giving rise to such community interests.[43]

***

Despite the generalist outlook of the course, there is a guiding thread – a broad unifying theme – animating it and that is what the rest of this review essay will primarily discuss. That broad theme is Pellet's vision of how the reality of international law should be approached by international lawyers – in particular, by international law academics. Pellet has no patience for theories that are out of touch with 'reality'.[44] Theory is not supposed to be an intellectual game detached from 'reality': the latter is both the point of departure and the ultimate destination of theory.[45] Neither theory nor reality is, however, defined.

'Theory' versus 'reality' is one of the most tired dichotomies in the discipline of international law.[46] Yet this does not mean that we have a clear understanding of what

[37] *Ibid.*, at 304. As Don Paterson noted in a different context, '[f]ragments, indeed. As if there were anything to break'. D. Paterson, *Best Thought, Worst Thought* (2008), at 13.

[38] Brownlie, 'Problems Concerning the Unity of International Law', in *International Law in the Time of Codification: Essays in Honor of Roberto Ago* (1987) 153.

[39] Pellet, *supra* note 5, at 310–315.

[40] *Ibid.*, at 361–369.

[41] *Ibid.*, at 371–379.

[42] *Ibid.*, at 379–397.

[43] *Ibid.*, at 454–485.

[44] *Ibid.*, at 135.

[45] *Ibid.*, at 136.

[46] Ch. de Visscher, *Théories et réalités en droit international public* (1970); Schachter, 'International Law in Theory and Practice: General Course in Public International Law', 178 *RdC* (1982) 9. The course 'Decolonisation and the Law' that Philippe Sands recently offered at Harvard Law School included among its key themes 'the reality of international law and litigation, as opposed to its presentation in academic discourse'. See https://hls.harvard.edu/courses/decolonisation-and-the-law/.

'theory' and 'reality' stand for. To start with the latter, most international lawyers tend to assume that 'reality' needs no definition, treating it as a self-evident concept that requires no further explanation. It does not take an anti-realist philosopher like Richard Rorty, however, to realize that, for a series of reasons, 'reality' is an extremely difficult concept to operationalize, which is why Vladimir Nabokov famously described it as 'one of the few words which mean nothing without quotes'.[47]

Conceptual difficulties surrounding the notion of 'reality' are manifold. No serious discussion of reality can, for instance, ignore its intimate connections with the dominant order.[48] It is not surprising that calls to be sensitive to reality often come from politically conservative forces that conveniently overlook the fact that 'at any given point reality equals *status quo* plus attempts at, or ideas about changing it'.[49] It is also hard to discursively disentangle reality from theory: reality may be 'out there', but any description of it, unavoidably shaped and informed by some theoretical assumptions, cannot be.[50] The most essential problem with 'reality', however, is its meaninglessness without the anchoring background of some shared subjective experience. Nabokov's explanation is worth quoting here *in extenso*:

> Let us take three types of men walking through the same landscape. Number One is a city man on a well-deserved vacation. Number Two is a professional botanist. Number Three is a local farmer. Number One, the city man, is what is called a realistic, commonsensical, matter-of-fact type: he sees trees as trees and knows from his map that the road he is following is a nice new road leading to Newton, where there is a nice eating place recommended to him by a friend in his office. The botanist looks around and sees his environment in the very exact terms of plant life, precise biological and classified units such as specific trees and grasses, flowers and ferns, and for him this is reality; to him the world of the stolid tourist (who cannot distinguish an oak from an elm) seems a fantastic, vague, dreamy, never-never world. Finally, the world of the local farmer differs from the two others in that his world is intensely emotional and personal since

47 V. Nabokov, *The Annotated Lolita* (1995), at 312.

48 As Marylin Frye noted, the root of the word 'real' is 'regal' – that is, 'of or pertaining to the king' – something still reflected in phrases such as 'real property' or 'real estate'. M. Frye, *The Politics of Reality: Essays in Feminist Theory* (1983), at 155. In other words, '[t]o be real is to be visible to the king.... What he cannot see is not royal, not real'. *Ibid.*

49 Hoffmann, 'International Law and the Control of Force', in K.W. Deutsch and S. Hoffmann (eds), *The Relevance of International Law: Essay in Honor of Leo Gross* (1968) 21, at 22, n. 4. As Raymond Williams perceptively noted, '"let's be realistic" probably more often means "let us accept the limits of this situation" (*limits* meaning hard facts, often of power or money in their existing and established forms) than "let us look at the whole truth of this situation" (which can allow that an existing reality is changeable or is changing)'. R. Williams, *Keywords: A Vocabulary of Culture and Society* (1988), at 259. On the dominant order's vested interest in the promotion of the notion that 'the physical [is] more real than the intellectual', see Barbara Johnson, *A World of Difference* (1987), at 3.

50 R. Rorty, *Contingency, Irony and Solidarity* (1989), at 5. As John Maynard Keynes famously noted, 'practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slave of some defunct economist. Madmen in authority who hear voices in the air are distilling their frenzy from some academic scribbler of years back'. J.M. Keynes, *The General Theory of Employment, Interest and Money* (1936), at 383. For an insightful discussion of the 'theory/practice' distinction in the context of international law, see A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (2016), at 7–9.

> he has been born and bred there, and knows every trail and individual tree, and every shadow from every tree across every trail, all in warm connection with his everyday work, his childhood, and a thousand small things and patterns which the other two – the humdrum tourist and the botanical taxonomist – simply cannot know in the given place at the given time. Our farmer will not know the relation of the surrounding vegetation to a botanical conception of the world, and the botanist will know nothing of any importance to him about that barn or that old field or that old house under its cottonwoods, which are afloat, as it were, in a medium of personal memories for one who was born there.[51]

To take an example to which most international lawyers may relate more easily, the 'reality' of the governance of the Internet for an expert on the Internet equipped with comprehensive knowledge of the history of the Internet and of its governance mechanisms is not the same as the 'reality' experienced by a generalist international lawyer with barely basic knowledge regarding those matters.[52] This is so because the relevant subjective experiences of these two actors are not identical. Saying, as Pellet does, that reality is revealed through observation[53] does not help since what one observes is a function of what one can see. Indeed, one can never see the 'reality' as the latter objectively is because reality is 'an infinite succession of steps, levels of perception, false bottoms, and hence unquenchable, unattainable'.[54] Oscar Schachter's metaphor comparing generalist international lawyers – among whom Pellet happens to belong – with travellers on highways interconnecting towns and villages in the form of specialized branches of international law brings home precisely this point. As Schachter observed, '[t]hose who travel on the highways are generally only dimly aware of the lively activities in the towns and villages'.[55]

And this is not even to mention the ideological biases of the observer. Pellet himself notes that specialist international lawyers who operate in particular branches of the discipline striving for autonomy are motivated by 'ideological reasons'.[56] That, of course, is true but does not mean that the reality as depictured by Pellet is ideology-free; it simply means that 'ideology, like bad breath, is what the other guy has'.[57] Disparaging specialized international lawyers, as Pellet does, with labels such as 'droits-de-l'hommistes', 'environnementalistes', 'investissementistes' or 'droit-de-la-meristes', or stating with thinly veiled surprise that, 'as a matter of taste', some international lawyers find the law of subsidies or whale conservation more 'exciting' than 'trying to understand the austere mechanisms of responsibility in international law or solving the mysteries of the formation of custom',[58] is hardly describing naked reality; it is asserting the superiority of one's craft (general international law) over others' (specialized branches of international law).

51 V. Nabokov, *Lectures on Literature* (1980), at 252–253.
52 See, e.g., Pellet, *supra* note 5, at 476–484.
53 *Ibid.*, at 295.
54 V. Nabokov, *Strong Opinions* (1990), at 11.
55 Schachter, *supra* note 46, at 21–22.
56 Pellet, *supra* note 5, at 312.
57 T. Eagleton, 'A Toast at the Trocadero', *London Review of Books* (18 February 2016).
58 Pellet, *supra* note 5, at 309.

***

The concept of theory developed in the course also calls for some comments. The reader is informed at the very outset that the author has 'no talent for theorization'.[59] This may come as a shock in any self-respecting social science discipline: what on earth is an academic expected to be good at – as a matter of the societal division of labour – other than theorization? It is tempting to think that, like the student of the Ecole Polytechnique in Pierre Bourdieu's famous discussion of rites of institution who pretends that he knows no mathematics,[60] Pellet does not want to be taken literally when he states that he has 'no talent for theorization'. In other words, what we may be seeing here is one of 'the strategies of condescension' that Bourdieu defined as 'those symbolic transgressions of limits which provide, at one and the same time, the benefits that result from conformity to a social definition and the benefits that result from transgression'.[61] Indeed, as Bourdieu clarifies, 'one of the privileges of consecration consists in the fact that, by conferring an undeniable and indelible essence on the individuals consecrated, it authorizes transgressions that would otherwise be forbidden'.[62] What Pellet may thus be doing is what Bourdieu called 'the privilege of privileges, that which consists of taking liberties with his privilege'.[63] The key to the puzzle, however, is Pellet's discriminating approach to theory. Although – interestingly – theorizing international law is a mode of practice for Pellet,[64] not every theory seems to qualify.[65]

Indeed, the proper role of 'the science of law', according to Pellet, is to be 'in the service' of the practice of law[66] (here, Pellet seems to have forgotten his broad definition of the 'practice of law', which includes the production of legal scholarship). The job description of international law scholars is limited to describing, commenting on and systematizing rules of international law in order to facilitate their application.[67] They can criticize this or that rule and find them unsatisfactory,[68] but they should never lose sight of the distinction between *lex lata* and *lex ferenda*.[69] In particular, they should avoid 'empty', 'sterile', 'purely intellectual critiques'[70] because such critiques are 'unproductive' and can ultimately lead to the weakening of international law by undermining its 'credibility'.[71] It is not clear how 'purely intellectual critiques' can be both 'empty' and capable of weakening international law, but there is something

59 *Ibid.*, at 27, 490.
60 P. Bourdieu, *Language and Symbolic Power* (1991), at 124.
61 *Ibid.*
62 *Ibid.*, at 125
63 *Ibid.*, at 124.
64 Pellet, *supra* note 5, at 133–160.
65 *Ibid.*, at 135, 137.
66 *Ibid.*, at 489. Although there is nothing distinctly French about the desire to legislate for others, this passage calls to mind another French international law scholar who decreed in his own general course at The Hague Academy that all international law scholars had the duty to serve as 'the guardians of the unity' of the discipline. Dupuy, *supra* note 2, at 205.
67 Pellet, *supra* note 5, at 116, 134, 489.
68 *Ibid.*, at 134, 157.
69 *Ibid.*, at 72, 488.
70 *Ibid.*, at 134, 489.
71 *Ibid.*, at 137, 142.

more important to unpack in this position, which seems to assume that working as 'clerks for life' to the legal officialdom is the only prospect legitimately open to legal academics.[72]

To appreciate the intellectual ramifications of Pellet's theory of theory, it may be helpful to start with his observation that, in his litigation experience, he has witnessed the performance of some theoretically minded scholars as excellent practitioners.[73] Pellet chalks this up to 'the schizophrenia of the human mind'.[74] His point seems to be one of the following: (i) despite appearances to the contrary, the scholars in question are not constitutionally incapable of making practical legal arguments and (ii) if the theory is so good, why not plead it when acting as counsel before an international court?[75] But neither of these points shows what Pellet presumably intends to show. It does not take any rare talent to build an international legal argument – it is a skill available to any decently trained international lawyer and, for that reason, largely distributed within the community. Similarly, any competent lawyer knows that highlighting the indeterminacy of law is not a good idea when trying to convince a judge to buy a point.

Underpinning both alternatives (i) and (ii) is the unjustifiable role conflation between legal academia and legal practice, which leads to the inability to conceive that legal scholarship may not be of some immediate use before a court or to a potential client. Examining rules, commenting upon them, finding out where the law stands on a particular issue is a perfectly normal part of the job of a law clerk working for a judge, of a legal advisor working for a government or of a lawyer drafting a memorandum for a client. How can legal academia claim distinctiveness as a separate professional occupation if legal academics are expected to replicate the same tasks? The answer cannot be that academics can provide a better account of 'where the law stands' since that would not be a difference in kind. If so, there is a social cost that we are bound to pay when 'the distinction between the subject studying the law and the legal practice that is the object of study' collapses.[76] That social cost, I submit, is nothing less than a proper understanding of law. As Paul Kahn puts it, '[w]e cannot grasp the law as an object of study if the conceptual tools we bring to the inquiry are nothing but the self-replication of legal practice itself'.[77] In other words, the situation is exactly the opposite of the one described by Pellet for whom theoretical approaches that are of

[72] P. Schlag, 'Clerks in the Maze', 91 *Michigan Law Review* (1993) 2053, at 2056.

[73] Pellet, *supra* note 5, at 143, n. 419; 308, n. 1001 (stating that, despite the fact that its principal author was Martti Koskenniemi, the Fragmentation report of the International Law Commission was drafted in 'a very classic manner').

[74] *Ibid.*, at 143, n. 419.

[75] This point has been made more directly by another French international lawyer. J.-P. Côt, 'Tableau de la pensée juridique américaine', 110 *Revue générale de droit international public* (2006) 537, at 590 ('[i]n my experience as counsel before the International Court of Justice, I have admired the classicism of the argumentation of Yale-school jurists such as Michael Reisman, Florentino Feliciano and Rosalyn Higgins, as well as that of Abram Chayes, father of the International Legal Process. These eminent advisors were careful not to argue the process, and focused instead in a very standard fashion on the determination, interpretation and application of the legal norm'; translation by the author).

[76] P. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (1999), at 7.

[77] *Ibid.*, at 27.

no 'operational interest' to those who 'do law' (*faire du droit*) should be dismissed even when such approaches can contribute to knowledge '*sur le droit*'.[78]

Pellet's own attempt to define law shows that his unduly narrow approach to theory is hard to sustain. As pointed out above, law according to Pellet is a normative content that comes out of a formally determined process.[79] What that definition entails is explained as follows:

> As Emile Giraud, the French professor of public law who was legal advisor to the League of Nations during the war, observed: 'the law represents the politics that has prevailed'. In other words, it is not enough for a course of action to seem right and just; it is also necessary for such a conviction to manifest itself in a certain way, through certain channels and take on certain forms. 'What is right and proper, what is good, must be transposed into law'. We must also find out if and when this success was achieved. This is the whole point of the venerable theory of the sources of law, according to which the sign of this success is that the rule can be linked to a mode of formation of the law – i.e., to a formal source. This is true in both domestic and international law.[80]

To stick to this example, it is hard to see why a legal academic's task would be limited to registering whether a particular formal process has in fact taken place and finding out if and when this 'success story' occurred. Can a legal academic not go further and ask why a particular position prevailed and not some other position, what the conditions of possibility of a 'success' are, whether those conditions need to be revisited, what it would take to change them and so on? In fact, Pellet himself attempts to do precisely that in a more reflective passage of the course when he describes law as a superstructure mirroring the power relations in a given society, relying on Karl Marx and Friedrich Engels.[81] But, as Roland Barthes puts it in his seminal essay on anti-intellectualism, 'science and knowledge… are curiously capable of excess' for an anti-intellectualist: 'Since every human phenomenon, even every mental one, exists only in terms of quantity, it suffices to compare its volume to the capacity of the average [international lawyer] in order to declare it excessive.… Having grown beyond the healthy limits of quantification, knowledge is discredited insofar as it can no longer be defined as work.'[82]

Anti-intellectualism of this kind is relatively common in the mainstream international law scholarship. Praising Louis Henkin's *How Nations Behave*, Ian Brownlie observed that 'it is written in a spare and lucid prose, *no heavy intellectual apparatus* is imposed upon the material'.[83] Even more explicit is another scholar who stated that '*too much creativity* runs the risk of killing law itself'.[84] There you have it. What is inadmissible – because it is a 'waste'[85] – for the tradition that Pellet represents is an excess

78 Pellet, *supra* note 5, at 143, 487.
79 *Ibid.*, at 35.
80 *Ibid.*, at 35–36.
81 *Ibid.*, at 45–46.
82 R. Barthes, *Mythologies*, translated by R. Howard (2012), at 208.
83 Brownlie, 'Review of *How Nations Behave*', 51 *British Year Book of International Law* (1980) 285, at 285 (emphasis added); L. Henkin's *How Nations Behave* (1968).
84 Menéndez, 'Three Times Lucky: In Dialogue with Rein Müllerson', 1 *European Law Open* (2022) 446, at 459 (emphasis added).
85 Pellet, *supra* note 5, at 489.

of 'science and knowledge' that could not be put to some immediate practical use. It is fine to make ornamental references to Marx and Engels, but building an entire Marxist theory of international law is going too far. A passing reference to Jacques Lacan can secure a veneer of erudition,[86] but a Lacanian account of international law is empty intellectualism.

There is a short step from associating 'intellectuality with idleness' to blaming the intellectual for laziness: if an intellectual engages in idle activities, it is precisely because 'the intellectual is by definition lazy'.[87] Hence, the desire to put the intellectual 'to work once and for all' so that 'an activity which can be measured only by its harmful excess' can be usefully converted into 'a concrete labor, i.e., accessible to [practical] measurement'.[88] Indeed, Pellet is not far from wanting to put international lawyers engaged in 'idle' intellectual activities back to work, stating that 'when reading the writings of legal theorists, one tells oneself that they would be better off "doing law" too, rather than confining themselves to purely intellectual criticism'.[89] Even though he admits, with an air of solemn resignation, that 'there is room for everyone' in the universe of international law scholarship,[90] he certainly assumes that something must be wrong with the intellectually inclined international lawyer: how could any halfway competent lawyer prefer to operate in the world of ideas rather than in the *terra firma* of actions? This is a familiar refrain about the intellectual.[91] As Barthes highlights:

> the intellectual soars, he does not 'stick' to reality (reality is of course the ground, an ambiguous myth which signifies at one and the same time race, rurality, province, good sense, etc.). A restaurant owner who caters regularly to intellectuals calls them 'helicopters', a disparaging image which subtracts from flight the airplane's virile power: the intellectual is detached from the real, but remains up in the air, in place, circling round and round; his ascent is cowardly, equally remote from the heavens of religion and from the solid ground of common sense.[92]

The intellectual's idleness, however, is a matter of perspective. If, as Pellet seems to think,[93] productivity of theory is measured by its immediate impact on legal practice – for example, whether a judge can use a scholar's work as a premise for their judgment or whether counsel handling a litigation can cite to that work in support of an argument in their briefs or pleadings – the kind of theories that

[86] See, e.g., Crawford, 'Chance, Order, Change: The Course of International Law. General Course on Public International Law', 365 *RdC* (2013) 9, at 137.

[87] Barthes, *supra* note 82, at 208.

[88] *Ibid.*, at 209.

[89] Pellet, *supra* note 5, at 134.

[90] *Ibid.*, at 489.

[91] See Friedrich Nietzsche's observations on 'the origin of *vita contemplativa*'. F. Nietzsche, *Dawn: Thoughts on the Presumption of Morality*, translated by B. Smith (2011), at 34–35, para 42.

[92] Barthes, *supra* note 82, at 206–207. The narrator in Milan Kundera's *The Book of Laughter and Forgetting* echoes Barthes' point: 'In the political jargon of those days, the word "intellectual" was an insult. It indicated someone who did not understand life and was cut off from the people. All the Communists who were hanged at the time by other Communists were awarded such abuse. Unlike those who had their feet solidly on the ground, they were said to float in the air.' M. Kundera, *The Book of Laughter and Forgetting* (1999), at 6.

[93] Pellet, *supra* note 5, at 145, 487.

Pellet finds unproductive are indeed so because any serious thinking worth its salt is a 'resultless enterprise'.[94] In most professions, it is perfectly possible to competently engage in practice without self-consciously having a theory of that practice. That, however, is not the only legitimate yardstick available to appraise theory nor does it entail that the theory of a practice is as useful to practitioners engaged in that practice as ornithology is to birds.[95] It is true that, in our increasingly materialist societies, theory appears as an 'out-of-order' activity.[96] We do not theorize when engaged in everyday activities. Theorizing and engaging in everyday activities may even be mutually inconsistent.[97] Witold Gombrowicz spoke for everyone when he wittily observed that:

> [i]t seems impossible to meet the demands of *Dasein* and simultaneously have coffee and croissants for an evening snack. To fear nothingness, but to fear the dentist more. To be consciousness, which walks around in pants and talks on the telephone. To be responsibility, which runs little shopping errands downtown. To bear the weight of significant being, to instill the world with meaning and then return the change from ten pesos.[98]

All this to say that we do need international lawyers who have faith in international law and who somehow know with certainty where international law stands at any given point in time. You do not want your lawyer or a judge to tell you that due to 'the urgency that obstructs the horizon of knowledge', they cannot reach a decision since every decision is 'structurally finite' as no decision-maker could have 'infinite information and the unlimited knowledge of conditions, rules or hypothetical imperatives that could justify [a decision]'.[99] However, if we stop using the same standards to judge theory as the ones we would use 'to judge the utility of bicycles or the effectiveness of

94 Arendt, 'Thinking and Moral Considerations: A Lecture', 38 *Social Research* (1971) 417, at 426.

95 The phrase 'philosophy of science is as helpful to science as ornithology is to birds' is commonly attributed to the notorious anti-intellectual scientist Richard Feynman.

96 M. Heidegger, *Introduction to Metaphysics*, translated by G. Fried and R. Polt (2nd edn, 2014), at 14.

97 Arendt, *supra* note 94, at 423 (stating that 'the moment we start thinking on no matter what issue we stop everything else, and this everything else, again whatever it may happen to be, interrupts the thinking process; it is as though we moved into a different world'). This suggests that Paul Valéry's 'tantôt je suis, tantôt je pense' is a better description of the human condition than Descartes' 'je pense, donc je suis'.

98 W. Gombrowicz, *Diary*, translated by L. Vallee (2012), at 226–227. The narrator in Milan Kundera's *Immortality* expresses a similar view: '*I think, therefore I am* is the statement of an intellectual who underrates toothaches.' M. Kundera, *Immortality* (1991), at 225; see also Gombrowicz, *ibid.*, at 700 (wishing Michel Foucault and Roland Barthes a toothache).

99 Derrida, 'Force of Law: The "Mystical Foundation of Authority"', in D. Cornell, M. Rosenfeld and D.G. Carlson (eds), *Deconstruction and the Possibility of Justice* (1992) 3, at 26. Isaiah Berlin insightfully noted that, 'if all the members of a society were sceptical intellectuals, constantly examining the presuppositions of their beliefs, nobody would be able to act at all'. B. Magee, *Talking Philosophy: Dialogues with Fifteen Leading Philosophers* (1978), at 3; see also W. Brown, *Nihilistic Times: Thinking with Max Weber* (2023), at 99–100. In *The Gay Science*, Nietzsche makes the same point more forcefully: '[E]very great degree of caution in inferring, every sceptical disposition is a great danger to life. No living being would be preserved had not the opposite disposition – to affirm rather than suspend judgement, to err and make things up rather than wait, to agree rather than deny, to pass judgement rather than be just – been bred to become extraordinarily strong'. Nietzsche, *The Gay Science*, translated by J. Nauckhoff (2001), at 112, para. 111.

mineral baths', we may get a different picture of productivity.[100] As Martin Heidegger put it in connection with philosophy:

> It is entirely correct and completely in order to say, 'You can't do anything with philosophy.' The only mistake is to believe that with this, the judgment concerning philosophy is at an end. For a little epilogue arises in the form of a counter-question: even if *we* can't do anything with it, may not philosophy in the end do something *with us*, provided that we engage ourselves with it.[101]

What can the kind of theory Pellet despises do with us? International lawyers may well be obligated to make choices for pragmatic reasons to get through their professional day, but that is not a reason for forgetting that those are just choices among various options. Theory may thus simply be 'a method of defending intelligence against the consequences of one-sidedness'.[102] It can serve, in particular, as an antidote to blind faith by forcing us to question the unconscious (because deep-seated) assumptions behind our customary ways of doing things and by constantly reminding us that things could be otherwise. Losing one's blind faith in international law has, of course, its dangers; in that sense, Pellet is right in emphasizing the danger of critical approaches to international law. That, however, is a danger inherent in any serious thinking,[103] not a reason for dismissing the latter or for urging critical scholars to exert self-censorship.[104] As Heidegger went on to observe, a 'faith [that] does not continually expose itself to the possibility of unfaith… is not faith but a convenience,… an agreement with oneself to adhere in the future to a doctrine as something that has somehow been handed down'.[105] In this regard, the oft-parroted mantra that 'deconstruction without reconstruction' is pointless[106] – that 'ministerial cabinet talk' as Michel Foucault once called such arguments[107] – is as silly as asserting that one cannot criticize the unfairness of existing socio-political arrangements unless one is in a position to replace them with fairer ones.

[100] Heidegger, *supra* note 96, at 13.

[101] *Ibid.*, at 13–14.

[102] This definition of deconstruction offered by Peter Sloterdijk can be applied to any theory worthy of the name. P. Sloterdijk, *Derrida, an Egyptian* (2009), at 39.

[103] As Hannah Arendt put it, '[t]here are no dangerous thoughts; thinking itself is dangerous'. Arendt, *supra* note 94, at 435. Questioning the possibility of defining justice in the abstract can, for instance, cynically be taken as a licence to be unjust in concrete instances. *Ibid.*, at 434–435.

[104] Pellet, *supra* note 5, at 160. Such calls for self-censorship come very close to looking like the equivalent of the slogan 'shut up and calculate', the summary description of the 'Copenhagen interpretation' of quantum mechanics, for international law scholars. On the 'Copenhagen interpretation', see Mermin, 'What's Wrong with This Pillow?', 42 *Physics Today* (1989) 9.

[105] Heidegger, *supra* note 96, at 8. In other words, '[t]his is neither having faith nor questioning, but indifference'. *Ibid.*

[106] Pellet, *supra* note 5, at 141.

[107] J.D. Faubion (ed.), *Michel Foucault: Power* (2000), at 236 ('[t]he necessity of reform mustn't be allowed to become a form of blackmail serving to limit, reduce, or halt the exercise of criticism. Under no circumstances should one pay attention to those who tell one: "Don't criticize, since you're not capable of carrying out a reform." That's ministerial cabinet talk. Critique doesn't have to be the premise of a deduction that concludes, "this, then, is what needs to be done." It should be an instrument for those for who fight, those who resist and refuse what is. Its use should be in processes of conflict and confrontation, essays in refusal. It doesn't have to lay down the law for the law. It isn't a stage in a programming. It is a challenge directed to what is').

***

As the foregoing observations should make clear, the general course – to Pellet's enormous credit – makes its epistemological assumptions explicit to a degree that is rarely seen in the mainstream scholarship. For that reason, the course can serve a salutary function in the discipline by opening up a space in which various approaches to international law can perhaps meaningfully engage with each other, something that has been desperately lacking in international law, as Jan Klabbers reminded us.[108] But the course accomplishes a great deal more. Lionel Trilling famously pointed out that George Orwell exemplified 'the virtue of not being a genius'.[109] Pellet possesses the same virtue. Not being a genius is a virtue because, unlike genius, it is democratically distributed: how to become a genius cannot be taught, and, no matter how hard one tries, one can never become a genius just by willing it. Though we may not openly admit it, geniuses intimidate us. Like the Total Perspective Vortex, the alien torture device in Douglas Adams' *The Restaurant at the End of the Universe* that serves to show how insignificant the victim is in the cosmic scheme of things, geniuses make it plain how insignificant we are in the broader intellectual universe. We secretly resent geniuses, much like in Zadie Smith's famous blurb for a book by David Foster Wallace: 'A visionary, a craftsman, a comedian.... He's so modern he's in a different time-space continuum from the rest of us. Goddamn him.'[110] We love mediocrity, we thrive in ordinariness: 'He is not a genius – what a relief! What an encouragement. For he communicates to us the sense that what he has done any one of us could do.'[111]

Indeed, even though Pellet may not have intended it, his conception of scholarship makes knowledge production in international law more democratic. Originality has no place in legal scholarship if the point of the legal scholar is to replicate the conceptual universe and vocabulary of the judge:[112] you do not want your judge to be original; you want them to be as predictable as possible.[113] Unlike in original or innovative works, every conceivable argument can be anticipated in the kind of legal scholarship eulogized by Pellet. But because we can all make those arguments, none of us is unique or even remarkable: if you take out the name of the corporeal author who actually produced a piece of scholarship of that kind, it can be attributed in style, tone or substance to virtually any member of the community. In other words, we are all interchangeable.[114] What a wonderful message of equality for legal academics!

[108] Klabbers, 'On Epistemic Universalism and the Melancholy of International Law', 29 *European Journal of International Law* (2018) 1057.

[109] L. Trilling, *The Moral Obligation to Be Intelligent* (2008), at 263.

[110] D.F. Wallace, *Consider the Lobster* (2005).

[111] Trilling, *supra* note 109, at 264.

[112] This is what an international law scholar seems to have meant in a recent book review: 'Legal analysis (offered in the book under review) is careful. It presents no originality or surprising departures, *which is a major quality* in a work dedicated to a given crisis' (translation by the author). Kolb, 'Book Review of *Carolin Gornig, Der Ukraine-Konflikt aus völkerrechtlicher Sicht*', 125 *Revue générale de droit international public* (2021) 697, at 700 (emphasis added).

[113] On the socio-political relevance of originality, see F. Nietzsche, *Dawn: Thoughts on the Presumption of Morality*, translated by B. Smith (2011), at 126–127, para. 173.

[114] Joseph Brodsky perceptively noted that one condition for serving as a standard is to be 'utterly lacking in character'. J. Brodsky, *Less Than One: Selected Essays* (1986), at 5.

Granted, we do realize that the price of interchangeability is the looming prospect of subsiding into oblivion once we are gone: think of Marcel Sibert or Louis Cavaré (to limit ourselves to French international law scholars), major international law treatise writers in the early decades of the second half of the 20th century, all but forgotten today. But you cannot have everything. Besides, when oblivion is the fate awaiting the overwhelming majority of the community, one is unlikely to lose any sleep over it. We can even take pride in the fact that what makes the discipline possible is precisely the community of inauthentic, unoriginal experts who individually act as Heidegger's anonymous 'das Man', speaking on behalf of the discipline and enforcing its impersonal standards. If the disciplinary community of international law were exclusively composed of individual geniuses constantly producing original, inimitable works, there would be no academic discipline called 'international law'.[115]

What such a contribution to the democratization of knowledge production in international law means can only be properly appreciated when placed in the context of the current state of the discipline. Pellet's general course is not, say, Guy Davenport's *The Geography of the Imagination*, a book deservedly described as offering 'take-to-a-desert-island levels of companionship' (but who would take a law book to a desert island anyway?).[116] Its occasional bullying style notwithstanding, however, the general course displays an international lawyer marvellously mastering the grammar of international law and presenting the discipline in a way that is admirably accessible to every professional fluent in the language of international legal officialdom. This made me think back to some of the conferences ostensibly dedicated to international law in which, despite being an international lawyer with a solid background in black-letter law, boundless intellectual curiosity and a fair amount of extra-disciplinary knowledge (not to mention international legal practice) under my belt, I went through the painful experience of listening to speakers who seemed to suffer from fluent aphasia, a condition causing a subject 'to produce grammatically coherent yet unintelligible sentences'.[117] I recalled the difficulty I experienced in making any sort of meaningful connection between what those speakers were saying and international law, no matter how open-minded I was prepared to be about the boundaries of the discipline.[118] In their self-perception, they were not international lawyers[119] – which, mind you, they were by formal training and official title – but critical philosophers, political scientists,

[115] As Ulrich reminds us in *The Man without Qualities*, repetition is a condition of possibility of science. R. Musil, *The Man without Qualities*, translated by S. Wilkins (2017), at 409 ('[s]cience is possible only where situations repeat themselves.... Anything that has to be valid and have a name must be repeatable, it must be represented by many specimens, and if you had never seen the moon before, you'd think it was a flashlight. Incidentally, the reason God is such an embarrassment to science is that he was seen only once, at the Creation, before there were any trained observers around').

[116] G. Davenport's *The Geography of the Imagination* (1997).

[117] K. Baasch, 'Too Late for "Late Capitalism"', *Compact* (6 March 2024).

[118] The writings of these self-proclaimed revolutionaries are often equally impenetrable, failing what Frederick Crew described as 'the first test of any revolutionary utterance, that it be understandable to people outside the revolutionary's immediate circle'. F. Crew, *Skeptical Engagements* (1986), at 118.

[119] In fact, a speaker in one of those conferences openly stated that international law was 'too boring' to be talked about.

sociologists, anthropologists or political economists, even though it is doubtful that any of them would be taken seriously in those disciplines.[120]

I am confident that many colleagues have gone through similar experiences. But none of us, I bet, can articulate our collective feelings better than David Foster Wallace when he summarized what post-modernism meant for his generation of writers:

> For me, the last few years of the postmodern era have seemed a bit like the way you feel when you're in high school and your parents go on a trip, and you throw a party. You get all your friends over and throw this wild disgusting fabulous party. For a while it's great, free and freeing, parental authority gone and overthrown, a cat's-away-let's-play Dionysian revel. But then time passes and the party gets louder and louder, and you run out of drugs, and nobody's got any money for more drugs, and things get broken and spilled, and there's cigarette burn on the couch, and you're the host and it's your house too, and you gradually start wishing your parents would come back and restore some fucking order in your house. It's not a perfect analogy, but the sense I get of my generation of writers and intellectuals or whatever is that it's 3:00 A.M. and the couch has several burn-holes and somebody's thrown up in the umbrella stand and we're wishing the revel would end. The postmodern founders' patricidal work was great, but patricide produces orphans, and no amount of revelry can make up for the fact that writers my age have been literary orphans throughout our formative years. We're kind of wishing some parents would come back. And of course we're uneasy about the fact that we wish they'd come back – I mean, what's wrong with us?… Is there something about authority and limits we actually need?[121]

What is the past that we seem to have irretrievably lost? As Akbar Rasulov describes in a forthcoming publication, until a couple of decades ago, to be a good international law scholar meant mastering black-letter law and techniques of rule-based reasoning, 'the kind of scholarly skillset that one could be trained in as well at Lagos and Tehran as in London or New York'.[122] Today, the toolbox of international legal scholars includes 'structuralism, feminism, literary theory,… transnational network theory, Carl Schmitt, Foucauldian biopolitics, postcolonial theory, neo-Marxism,… empiricism, the Cambridge school of historiography, more discourse analysis, more Marxism and Foucault, and even a dash of behavioural economics'.[123] And the boundaries of the discipline just never stop expanding,[124] so much so that we no longer know 'what it is acceptable not to have read', 'what to feel guilty about not having read'.[125] While

[120] 'Interdisciplinary' is insightfully defined in the amazing *Keywords; for Further Consideration and Particularly Relevant to Academic Life* as 'that which lies "between" the disciplines', which means 'in principle, a domain not policed by them'. Community of Inquiry, *Keywords; for Further Consideration and Particularly Relevant to Academic Life* (2018), at 45. One is left to wonder whether the lack of disciplinary policing may not be among the major incentives for interdisciplinarity: 'What I taught was vague and interdisciplinary and unchallengeable', as an academic in one of the short stories of the inimitable Gary Lutz reports. G. Lutz, *The Complete Gary Lutz* (2019), at 15.

[121] S.J. Burn (ed.), *Conversations with David Foster Wallace* (2012), at 52. Incidentally, Wallace's feeling about authority was warranted: '[A]uthority figure is feared, but even more the subject fears he will go away.' R. Sennett, *Authority* (1980), at 40.

[122] Rasulov, 'Race Consciousness and Contemporary International Law Scholarship: The Political Economy of a Blindspot', in J. Desautels-Stein *et al.* (eds), *Race, Racism, and International Law* (forthcoming).

[123] *Ibid.*

[124] *Ibid.* ('[i]f the latest patterns in "theory fads" are anything to go by, it seems one also needs now to add to the toolbox various elements of data science, Latour, and critical post-humanism').

[125] J. Culler, *The Literary in Theory* (2007), at 79.

transgressions of disciplinary boundaries in the early theory-heavy international law scholarship produced by Philip Allott, Antony Anghie, Hilary Charlesworth, Bhupinder S. Chimni, David Kennedy, Martti Koskenniemi and Anne Orford were committed for 'the sake of something',[126] in our age characterized with 'the absence of any great collective project'[127] and 'ulterior motives',[128] transgressions have become 'an end in itself'.[129] Put bluntly, what my generation of international law scholars is suffering, and can never recover, from is the anxiety of 'unmasterability of the domain'.[130] Hence our secret desire that our disciplinary parents – and Pellet would be an excellent candidate with his long experience as *Père Fouettard* dispensing beatings to 'naughty' colleagues – come back and restore some order in the discipline.

***

This detour about the state in which the discipline finds itself today reminded me of my younger self who, having arrived in France at the age of 21 with a degree in international law obtained at Baku State University where I had been trained with the monumental Soviet reference work in international law – *Kurs mezhdunarodnogo prava v semi tomakh* (*Course of International Law in Seven Volumes*) – achieved a score of 19 out of 20 in the international law exam at a French law school a couple of months later. Call me sentimental if you will, but it seems to me that there was something appealing in that experience. Paraphrasing Julian Barnes' nice quip about God – 'I don't believe in God, but I miss him'[131] – I am tempted to say that I do not believe that a community of international law scholars harmoniously working towards 'facilitating and reinforcing the role of law as a tool of management and pacification of the international society' that Pellet talks about[132] has ever existed, but I miss that community. Isn't making us feel homesick for a home that we never had precisely what post-modernism does?[133]

[126] Burn, *supra* note 121, at 27.

[127] F. Jameson, *Postmodernism or the Cultural Logic of Late Capitalism* (1991), at 17.

[128] *Ibid.*

[129] Burn, *supra* note 121, at 28.

[130] Culler, *supra* note 125, at 79. If it is any consolation, other fields seem to be going through a similar experience. Speaking for literary theory, Jonathan Culler stated in 2005: '[T]heory is not a circumscribed body of knowledge that one could master, even if one wished to. Theory presents itself as a diabolical assignment of difficult readings from fields one knows little about, where even the completion of an assignment will bring not respite but further more difficult assignments. ("Ah, but have you read Žižek on Lacan and Hitchcock?"). There are no limits to what thinkers, from various fields, may be constituted as theorists, and there are always new theorists being invented or promoted by the young and the restless, along with the chestnuts, so we can't be sure whether we "have to" read Jean Baudrillard or Julia Kristeva or Slavoj Žižek or Giorgio Agamben or Alain Badiou – the last two 2005's candidates for important theorist.' *Ibid.*

[131] J. Barnes, *Nothing to Be Frightened of* (2009), at 1.

[132] Pellet, *supra* note 5, at 137.

[133] E. Kleinberg, 'Pandering to the Timid: The Truth about Post-Truth', *Wild on Collective* (February 2019), at 2.