

INTERNATIONAL LEGAL THEORY: SNAPSHOTS FROM A DECADE OF INTERNATIONAL LEGAL LIFE

FLEUR JOHNS*

CONTENTS

I	Introduction.....	1
II	Compliance	3
III	Constitution.....	5
IV	Critique	6
V	Counter-	7
VI	Tallies, To-Dos	8

I INTRODUCTION

In its very first issue, the Foreword to the *Melbourne Journal of International Law* stated an aspiration that the *Journal* might ‘carr[y] the best and most original thinking of the younger generation, who will in their time be shaping the contours of international law to meet the needs of the new century’.¹ The contributors to the *Journal* would, it was hoped, continue a practice of ‘constantly pass[ing]’ a ‘range of ideas’ into international law from a ‘variety of sources — academic and professional; religious and secular; individually oriented and socially driven; and traditional and modern’.² For their part, the Foundation Editors of the *Journal* set a goal for their progeny of ‘provid[ing] a forum for the informed and considered discussion of the legal issues accompanying ... important social issues’. They voiced confidence that the *Journal* would be able to meet the challenge of ‘mak[ing] meaningful contributions to the understanding and development of international law’, remarking that the *Journal* had already taken on ‘a life and character of its own’.³

That the ‘life and character’ of the *Journal* over the course of its first decade has been a theoretically active one is evident from its successive issues. The theoretical disposition articulated in the opening pages of that first issue was and remains characteristic of the field to which the *Journal* has contributed. It reveals an orientation towards progress, professional succession and the ‘meet[ing] [of] needs’;⁴ an eagerness for the yet-to-be-encountered (or yet-to-be-mastered) and an eclecticism of appetite in that regard; as well as a strong sense of propriety

* BA, LLB (Hons) (Melbourne); LLM, SJD (Harvard); Senior Lecturer, Faculty of Law, The University of Sydney.

¹ His Excellency Christopher G Weeramantry, ‘Foreword’ (2000) 1 *Melbourne Journal of International Law* iii, iii.

² *Ibid.*

³ Suzan Davies et al, ‘From the Editors’ (2000) 1 *Melbourne Journal of International Law* i.

⁴ Weeramantry, above n 1, iii.

(the need to present as ‘informed and considered’ in all judgements).⁵ Nonetheless, from the very start it seemed that this disciplinary disposition was to be placed under negotiation in the pages of the *Journal*. So in that very first issue, one finds David Begg writing about ‘patriarchal bias’ in an activist mode.⁶ Dianne Otto calls attention to ‘assumptions or values that are communicated in the teaching of international law’ and to ‘normative hierarchies’ by which the discipline is marked.⁷ There too is Constance Johnson, laying claim to an ‘Australian perspective’ on the international legal regime for the protection of underwater cultural heritage.⁸ None of these contributions stands at odds with the disposition just described, yet these castings remain somewhat awry to the stated task of furthering the ‘understanding and development of international law’ in a benign, ecumenical sense. So the theoretical ‘discussion’ has continued, in ‘long littleness’:⁹ in fits and starts, circlings and doublings-back, forgettings and remembrances, across broad expanses, and down occasional rabbit holes; on it goes.

Barely a decade away from that moment of millennial ambition and *fin-de-siècle* anxiety when this *Journal* was founded, it still seems too soon to take stock of the theoretical accomplishments enacted in the *Journal*’s pages and elsewhere across the discipline of international law, and yet something does seem to have happened. International lawyers here and elsewhere do seem to have taken a number of turns, each of which has also been both a return and a turning away: a turn to politics; a turn to history; a turn to interpretation; a turn to ethics; a turn to empiricism; a turn to philosophy; a turn to the private; a turn to the public. Rather than boarding any one of these carousels, for the purposes of this reflection, I will survey some of the main theoretical projects pursued, within and beyond the *Journal*, in international law over the past decade.

Four types of project strike me as influential and ongoing from this period. First, international lawyers have worried persistently about the problem of ‘non-compliance’. One cluster of theoretical projects has sought to address this worry, theorising when and why international legal rules are followed and when and why they are not, or how international law and artefacts of international legal knowledge otherwise influence behaviour. Second, international lawyers have long engaged in collating, analysing, interpreting and systematising positive legal materials and theorising about the nature of the resulting ‘system’ in its global reach. In recent years, this type of project has gained impetus from anxieties surrounding international law’s ‘fragmentation’ according to sub-specialty, institutional node or region. Third, international lawyers have struggled in a variety of ways to grasp more fully what people do with, through and in international law, and to challenge theoretically the limits and possibilities of that thinking and doing, whether towards a specific or an open-ended

⁵ Suzan Davies et al, above n 3, i.

⁶ David Begg, ‘Poverty and Human Rights in Bangladesh’ (2000) 1 *Melbourne Journal of International Law* 149, 151.

⁷ Dianne Otto, ‘Handmaidens, Hierarchies and Crossing the Public–Private Divide in the Teaching of International Law’ (2000) 1 *Melbourne Journal of International Law* 35, 35–6.

⁸ Constance Johnson, ‘For Keeping or for Keeps? An Australian Perspective on Challenges Facing the Development of a Regime for the Protection of Underwater Cultural Heritage’ (2000) 1 *Melbourne Journal of International Law* 19.

⁹ Frances Cornford, *Collected Poems* (1954) 19.

transformative goal. As I characterise it here, this third type of project has focused less on explaining the actions of states and other generic social agents than on re-imagining the work and responsibilities of jurists. Fourth, international lawyers have engaged in explicitly strategic theoretical endeavours, often deploying theoretical tactics opportunistically to counter certain tendencies and foster others. This fourth type of project may trade in the language of the others. It is, however, concerned less with their theoretical consummation than with the itinerant pursuit of political intuitions about freedom and domination in international legal life, and with drawing attention to the pitfalls of prevailing pathways for living that life.

As with any typology, this list is grossly reductive — at once under-inclusive of important work and over-inclusive in respect of each categorisation. The work so classified is for the most part confined to writing in English and is necessarily neglectful as a consequence.¹⁰ Important differences are elided within these groupings. Upon careful reading, most theoretical engagements by international lawyers would cross, combine and complicate these categories, or perhaps refute their cogency altogether. Nonetheless, as a matter of emphasis and temperament, some international lawyers seem more drawn to one or two of these types of projects than to others. This reflection will, accordingly, work with this grouping, obtuseness notwithstanding.

II COMPLIANCE

For international lawyers who are focused on compliance versus non-compliance as a theoretical dilemma, the past decade has been an eventful one. The optimism — even hubris — characteristic of the discipline in the late 1990s soon dissipated after the Bush Administration took office in 2000 and instituted policies of withdrawal, disregard or outright hostility towards international legal norms and institutions.¹¹ Among international lawyers critical of the Bush Administration, responses to its policies have been, at least in part, theoretical.

For some, empiricism has offered hope for international law's restoration to its 'rightful' place at the centre of statespersons' decision-making, as it had to previous generations of international lawyers evading despair and pursuing

¹⁰ Particularly under-represented here are theorisations of international law through the lens of systems theory and/or 'reflexive law'. See, eg, Peer Zumbansen, 'Law's Knowledge and Law's Effectiveness: Reflections from Legal Sociology and Legal Theory' (Comparative Research in Law and Political Economy Research Paper No 11/2009, vol 5(2), Osgoode Hall Law School, York University, June 2009).

¹¹ For representative expressions of outrage among international lawyers in this regard, see Oona A Hathaway, 'Why We Need International Law: Undoing the Bush Administration's Damage', *The Nation* (New York, United States) 19 November 2007, 35; Anne-Marie Slaughter, 'The Partial Rule of Law: America's Opposition to the ICC is Self-Defeating and Hypocritical', *The American Prospect* (Washington DC, US) 19 September 2004, A20; Harold Hongju Koh, 'Setting the World Right' (2006) 115 *Yale Law Journal* 2350; Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005).

influence.¹² The goal of theoretical work of this sort has been to ‘respond to the challenge mounted by critics of international law’ through ‘analysis of how international law affects what states actually do’.¹³ Theoretical controversy has then settled, on one hand, on the methodologies of analysis and, on the other, the range of behaviours, subjects, influences and assumptions encompassed in the formulation of ‘what states actually do’. Sociological models in this vein have differed in their characterisation of ‘the institutional environment in which states operate’ and differed also on the question of which actors’ behaviours are constitutive of international legal order.¹⁴ Debate has also focused on the extent to which international law exerts some ‘normative component that pulls states toward compliance’ (if indeed it does at all), and the ways in which it arguably does so.¹⁵

A distinct yet related set of projects marked in part by a turn to empiricism are those that have sought to engage with the dynamics of ‘new governance’ globally. Empiricism in this mode has offered a way to find critical footholds within regulatory paradigms characterised broadly by a move to ‘soft law’ approaches: that is, governance emphasising nominally non-coercive techniques, adaptability, competition, public–private collaboration, decentralisation and competence.¹⁶ The concern of these projects is not so much with closing the gap between international law ‘on the books’ and ‘in action’ (although chasm-bridging between the research and the ‘real world’ phenomena it projects often remains a preoccupation). Indeed, this gap is often celebrated as a space of

¹² For earlier incarnations of a turn to empiricism in international legal scholarship in the US, see especially Harold D Lasswell and Myres S McDougal, ‘Legal Education and Public Policy: Professional Training in the Public Interest’ (1943) 52 *Yale Law Journal* 203. For insightful commentary thereon, see Carl Landauer, ‘Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought’ (2000) 12 *Yale Journal of Law and the Humanities* 171; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2002) 474–80.

¹³ Oona A Hathaway, ‘Between Power and Principle: An Integrated Theory of International Law’ (2005) 72 *University of Chicago Law Review* 469, 472.

¹⁴ Ryan Goodman and Derek Jinks, ‘Toward an Institutional Theory of Sovereignty’ (2003) 55 *Stanford Law Review* 1749, 1750. Cf Jutta Brunnée and Stephen J Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’ (2001) 39 *Columbia Journal of Transnational Law* 19, 28 (characterising international law as one among a number of linked ‘intersubjective structures’ built among a shifting array of actors and arguing that international legal norms become more persuasive the wider the variety of participants engaging in processes of their construction).

¹⁵ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (2005) 185 (offering ‘an alternative to the conventional wisdom that international law has a normative component that pulls states toward compliance, contrary to their interests’ and arguing, *inter alia*, that a state will act according to its ‘instrumental calculus’, which may or may not counsel in favour of international legal compliance). Cf the reactions to Goldsmith and Posner’s book in Paul Schiff Berman, ‘Seeing beyond the Limits of International Law’ (2006) 84 *Texas Law Review* 1265, 1266, 1279 (railing against its ‘[t]endentious and unpersuasive’ deployment of rational choice theory to erode the ‘moral force’ of international legal norms) and Andrew T Guzman, ‘The Promise of International Law’ (2006) 92 *Virginia Law Review* 533, 533 (lauding Goldsmith and Posner’s contribution to a ‘major methodological shift’ in international law, away from normative and toward social science-based approaches to the study of international law).

¹⁶ On ‘new governance’ generally, see Orly Lobel, ‘The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’ (2004) 89 *Minnesota Law Review* 342.

creativity, even political possibility.¹⁷ Rather, the concern of these projects is to ask of global governance paradigms in particular settings: who is winning and who is losing? How is the reformist agenda being constructed and with what implications?¹⁸ Elsewhere, the questions posed of empirical data are different again. An important body of work focuses on the mundane, routinised knowledge practices of transnational legal work, asking: what are the implications of legal knowledge assuming particular forms and what registers of engagement are fostered by those forms among those who work with them?¹⁹

III CONSTITUTION

A second group of theorists in international law have tended to frame their project in somewhat more expansive terms. Theirs is in part an architectural aspiration: to make of international law in its contemporary operation a more or less coherent ‘system’, ‘community’, ‘order’, ‘realm of governance’ or ‘situation’ and to locate in that some grounds for human hope. One version of this type of project, which has proven attractive to many over the past decade, is that directed towards the constitutionalisation of international law: that is, the location or establishment of relatively durable legal standards for governing or exercising power globally, which are common to members of a broad group and accepted as legitimate among them, and which are drawn from constitutional discourse and practice.²⁰

Debates surrounding the constitutionalisation of international law tend to revolve around the distribution of power within the projected constitutional order; the location, character and content of the substantive norms comprising that order; specific proposals for institutional design and reform; as well as questions of scale and ranking (that is, which principles should give way to which in circumstances of conflict and at which level of government should this or that conflict be resolved).²¹ Disagreement also tends to converge upon the

¹⁷ See, eg, Joel Handler et al, ‘A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences’ [2005] *Wisconsin Law Review* 479, 497.

¹⁸ See, eg, Gregory C Shaffer, *Defending Interests: Public–Private Partnerships in WTO Litigation* (2002); Yves Dezalay and Bryant C Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002); John Braithwaite and Peter Drahos, *Global Business Regulation* (2000). See generally Howard Erlanger et al, ‘Foreword: Is It Time for a New Legal Realism?’ [2005] *Wisconsin Law Review* 335; ‘Symposium: New Legal Realism’ (2006) 31 *Law and Social Inquiry* 795.

¹⁹ See, eg, Annelise Riles, *The Network Inside Out* (2000); Annelise Riles (ed), *Documents: Artifacts of Modern Knowledge* (2006); Annelise Riles, *Collateral Knowledge: Legal Reason in the Global Financial Markets* (forthcoming).

²⁰ For critical accounts of the ‘turn to constitutionalism’ in international law and international organisations, see Jan Klabbers, ‘Constitutionalism Lite’ (2004) 1 *International Organizations Law Review* 31; Jeffrey L Dunoff, ‘Constitutional Conceits: The WTO’s “Constitution” and the Discipline of International Law’ (2006) 17 *European Journal of International Law* 647.

²¹ See, eg, Christian Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law’ (1999) 281 *Recueil des Cours* 23, 42 (‘To the extent that the State forgoes or is compelled to relinquish its role as guarantor of the common interest of its citizens, common institutions should be established at regional levels or universal level to compensate for the losses incurred’). See also Erika de Wet, ‘The International Constitutional Order’ (2006) 55 *International and Comparative Law Quarterly* 51, 75 (‘[C]onstitutional co-existence ... implies a certain competition or even conflict in relation to the exercise of competencies and jurisdictions’).

potential for exit or transformation within a given order (where hope should best be directed and who is best positioned to shepherd us towards it).²² The preoccupation of projects in this vein is less with empirical facts of international legal influence per se, and more with questions of who should answer to whom in international policymaking and under what evaluative standards.²³

IV CRITIQUE

A third set of theoretical projects ongoing in international legal writing are those focused on probing and recasting the vocabularies, responsibilities and inclinations of the international legal profession.²⁴ Many of the projects categorised elsewhere could, of course, be so described: it is, for instance, possible to approach constitutionalism in the international legal order primarily as a matter of shifting 'mindsets' rather than architectonics.²⁵ Likewise, some of the work discussed in Part II above might be so characterised. Nonetheless, some ongoing projects in international law may be distinguished by their insistent focus on the missions, dispositions, languages and experiences of international lawyers 'as actors in particular social dramas',²⁶ especially in the resounding dramas of colonialism, decolonisation, and post-conflict reconstruction.

Writings along these lines often share worries voiced by international lawyers concerned with compliance or systemic (re)organisation: worries, for instance, about violence, inequity and the narrowing of possibilities for the exercise of freedom. They also exhibit, however, a profound scepticism about the extent to which those worries may be addressed through the extension of international legal initiative, the furthering of international legal compliance, or through one or other sort of tinkering among international legal experts. Instead, these efforts and inquiries are directed towards mapping and disrupting recurring patterns of international legal thought and the conditions of possibility and impossibility that they entrench. In this work, attention has been particularly focused over the past decade on the historical development of what many now think of as international

²² See, eg, Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law Journal* 1375. Cf Martti Koskeniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9, 31 (rejecting '[m]ere constitutional architectonics' in favour of a liberal hermeneutics in the vocabulary of constitutionalism).

²³ See especially Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3&4) *Law and Contemporary Problems* 15; Daniel C Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale Law Journal* 1490; Nico Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247.

²⁴ Most of the contributions so oriented have a provenance directly or indirectly traceable to the New Approaches to International Law ('NAIL') project initiated by David Kennedy. See generally Thomas Skouteris, 'Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship' (1997) 10 *Leiden Journal of International Law* 415.

²⁵ Koskeniemi, 'Constitutionalism as Mindset', above n 22. See also Klabbers, above n 20.

²⁶ Koskeniemi, *The Gentle Civilizer of Nations*, above n 12, 7.

law's guiding characteristics, basic meanings, and central institutions, and the stakes at play in the generation of those.²⁷

Some of these projects take the form of sophisticated versions of external critique, adopting a vantage point imagined as external to international law from which to subject it to critique, whether for its dubious foundations or its adverse effects. Other critiques are internal in the sense of their operating (or aspiring to operate) within the vocabulary of international legalism, albeit mostly with some extra-vernacular impulse or inspiration.²⁸ Some have laid claim to new insights, diagnoses or meanings. Others have been cast in the mould of thought experiments. Many have sought to find in international law some hook or lever permitting both the persistence of foundational questioning (questioning levelled at that which is not reducible to or explicable by reference to prevailing empirical conditions) as well as a radical disclosure of that which is authorised and foreclosed by those foundations. Many aspire as well to locate in international law, through philosophical or other means, some conditions of unredeemed metapolitical possibility.²⁹

V COUNTER-

Finally, there is a fourth category of theoretical projects in international law that would be belied by categorisation elsewhere, even as this work often intersects with some of the projects earlier described. The engagement of these projects with theoretical questions in international law is distinguishable from the engagements so far described because it is resolutely tactical.³⁰ As theorists, the tendency of writers in this vein is to present as amateurs.³¹ In this work, investments in methodology and erudition are cast as incidental to critical gains

²⁷ See, eg, Karen Knop, *Diversity and Self-Determination in International Law* (2002); Koskeniemi, *The Gentle Civilizer of Nations*, above n 12; Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004). On the move from structure to history, see especially Koskeniemi, *The Gentle Civilizer of Nations*, above n 12, 6–10 and Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (revised ed, 2005) 562–617.

²⁸ This distinction is drawn from, and informed by, Duncan Kennedy, *A Critique of Adjudication (Fin de Siècle)* (1997). On extra-vernacular efforts, see David Kennedy, 'When Renewal Repeats: Thinking against the Box' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (2002) 373.

²⁹ For a good range of projects along these various lines, see Anne Orford (ed), *International Law and Its Others* (2006), reviewed in Fleur Johns, 'Book Review: International Law and Its Others' (2007) 8 *Melbourne Journal of International Law* 516. On the location of unredeemed possibility in philosophy, see Anthony Carty, *Philosophy of International Law* (2007); Anthony Carty, 'Review Essay: International Legal Personality and the End of the Subject' (2005) 6 *Melbourne Journal of International Law* 534.

³⁰ I draw here on the use of 'tactic' in Michel de Certeau, *The Practice of Everyday Life* (1984) xviii–xx, 29–42.

³¹ See, eg, Kennedy, 'When Renewal Repeats', above n 28, 402 ('In this sort of project, the work of a "significant" intellectual — say, Foucault or Derrida — who was in vogue at the time was often helpful, and we puzzled together about numerous then-famous theoretical texts. But it turned out that texts written by our mentors and by one another were equally, often even more useful in terms of epiphanies per paragraph'). For a fuller account of these influences and interactions, see David Kennedy, 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (1986) 21 *New England Law Review* 209.

pursued in the world, even as the emancipatory or renunciative goals in view often seem plagued by ambivalence.³²

Projects of this kind often locate their theoretical intuitions and inquiries within an experience or perception of suffering: amid some particular international legal demands of Third World peoples or women, for instance, or the anguish or unease that some international lawyers seem to feel over one or other conundrum. Attention is directed to tracing the connections between things that seem to generate this suffering: investments, borrowings, elisions and dependencies.³³ Theoretical insights or maps produced in this work are then 'tested' by consideration of their plausibility (their capacity to sound or feel more or less right) to the audience(s) before and among whom they are produced, and according to the sorts of questions, actions and reactions that they seem to generate among students and other readers of international law. Usually, no greater claim to causality, accuracy, legitimacy or novelty is made and no more winning appeal is made to a historical client.

These tendencies, of course, also appear in work that I have described in categories above. However, the theoretical engagements that I am now describing seem most committed to setting aside attempts to validate their inquiries outside the fray of international lawyering, while simultaneously refraining from any insistence on the systemic autonomy of that field or the fixity of relations within or around it. The approach that I am characterising is restless, irreverent and disloyal in its theoretical endeavours. Sometimes, an appeal to agency is made, while elsewhere questions of agency are bracketed. In some instances, attention is called to consequences (intended and otherwise) while at other moments consequentialist calculations are the target of critique. Exits are patrolled and routinely closed down. The domestications of centrism and the comforts of 'community' are resisted. Readers are repeatedly plunged back into different iterations of the international legal here and now.

VI TALLIES, TO-DOS

In these four modes and others, international legal theoretical work ongoing in the *Melbourne Journal of International Law* and elsewhere has taught us much about the limitations and possibilities of international legal work. In some ways, we seem to have become better at recognising these — more adept at counting bodies and tallying costs. At the same time, attention has been drawn to the dangers of seeking to make of international law a giant calculating machine.³⁴ None of the collective projects that I have so crudely described here has, however, yielded definitive answers concerning international law's relationship to that which is commonly cast as non-law: faith, politics, social life.

³² See, eg, Hilary Charlesworth, 'Feminist Methods in International Law' (2004) 36 *Studies in Transnational Legal Policy* 159; Nathaniel Berman, 'Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion' [1997] *Utah Law Review* 281; B S Chimni, 'Alternative Visions of Just World Order: Six Tales from India' (2005) 46 *Harvard International Law Journal* 389.

³³ See, eg, Nathaniel Berman, "'The Appeals of the Orient': Colonized Desire and the War of the Riff' in Karen Knop (ed), *Gender and Human Rights* (2004) 195.

³⁴ Koskeniemi, 'Constitutionalism as Mindset', above n 22, 9. See also Martti Koskeniemi, 'Case Analysis: Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons' (1997) 10 *Leiden Journal of International Law* 137.

Important insights have been generated about international law's role in war and in the transnational economy and the ways in which military and economic violence are connected in and through international law.³⁵ We seem to have a far better grasp than we did ten years ago of international law's complex and perplexing relationship to empire.³⁶ Some of the ways in which international law may be read as gendered and engendering have been set out with lucidity and care.³⁷ Promising work has been done showing the enduring salience of Marxist ideas and critical practices for international law.³⁸ International lawyers are probing the potential of cosmopolitanism for regenerating critique in global politics.³⁹ Many more important innovations will escape mention here. Yet for all the steps that have been taken and the epiphanies yielded, one often gets the sense of ground being tilled and re-tilled, again and again. Perhaps it is this that enables us to find the disciplinary ground still so fertile.

Each of the four styles of theoretical project described here yields ideas about where international lawyers should turn next in their theoretical inquiries and a list of questions that should be at the top of the disciplinary agenda in this respect. So, in the little space left of this reflection, let me throw in a few of my own.

First, many of the most significant theoretical insights of the past decade in international law seem to have been generated out of a continuation of a long critical tradition focused on the scientisation, rationalisation or proceduralisation of politics and the rise of managerialism. There is, of course, still much to be said about these tendencies (and their dark sides), particularly as articulated in the programs of global governance and global risk management. Nevertheless, work in this direction might be fruitfully cross-hatched by a renewed critical focus on the ambivalent role of charisma in global politics, the coincidence of re-enchantment and disenchantment (to use Weberian terms), and the complex insinuations of the theocratic and thanatomatic in international legal decision-making.⁴⁰

Second, it seems timely, too, to extend critical ethnographies of expertise further and to query conventional narratives of exclusion and marginalisation in

³⁵ See, eg, 'War and Trade Symposium' (2006) 31 *Brooklyn Journal of International Law* 667–804.

³⁶ For one thoughtful account of 'where we are' in this regard, see Sundhya Pahuja, 'The Postcoloniality of International Law' (2005) 46 *Harvard International Law Journal* 459. See further, Anghie, above n 27; Nathaniel Berman, 'The Grotius Lecture Series: In the Wake of Empire' (1999) 14 *American University International Law Review* 1515; Peter Fitzpatrick, "'Gods would be needed...': American Empire and the Rule of (International) Law' (2003) 16 *Leiden Journal of International Law* 429.

³⁷ See, eg, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000); Karen Knop (ed), *Gender and Human Rights* (2004); Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (2005).

³⁸ See, eg, Susan Marks (ed), *International Law on the Left: Re-Examining Marxist Legacies* (2008).

³⁹ See Roland Pierik and Wouter Werner, 'Cosmopolitanism, Global Justice, and International Law' (2005) 18 *Leiden Journal of International Law* 679. See also Costas Douzinas, *The Political Philosophy of Cosmopolitanism* (2007); Roland Pierik and Wouter Werner, *Cosmopolitanism in Context: Legal and Political Perspectives* (forthcoming).

⁴⁰ It is important to acknowledge, of course, that work more or less in this vein is already underway. See, eg, Jennifer Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (2007).

mapping global politics and polities.⁴¹ In their rush to grasp the intricacies of global governance, international lawyers may have lost touch, for instance, with recent re-imaginings and new permutations of ‘command and control’ power across the world.⁴² Likewise, we still know relatively little about governance practices fostered in clandestine, illiberal and illicit markets and the theoretical challenges posed thereby.⁴³

Third, there seems much about the ‘enigma of biopolitics’ — the coincidence of a biopolitical insistence upon life with biopolitics’ apparent culmination in lethal power — that speaks to the concerns that international lawyers have typically shared and ongoing work in this sphere is one place among many where international lawyers might fruitfully engage.⁴⁴

Finally, there is, of course, another sort of theoretical project of which we have seen relatively little of late: ‘root and branch rethinking’ of international law on the scale of Kennedy and Koskeniemi’s structuralist accounts or Myres McDougall’s and Harold Lasswell’s policy science.⁴⁵ Fortunately for all of us, there is still so much to be done and undone.

⁴¹ For one series of reflections suggesting prospects in this regard, see Janet Halley et al, ‘From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism’ (2006) 29 *Harvard Journal of Law and Gender* 335.

⁴² Once again, work is underway. See, eg, Hani Sayed, ‘Development and the State of Exception’ (Paper presented at the Annual Meeting of the the Law and Society Association, Berlin, 25 July 2007).

⁴³ See, eg, Chantal Thomas, ‘Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics’ (2003) 24 *Michigan Journal of International Law* 549.

⁴⁴ See, eg, Roberto Esposito, ‘The Immunization Paradigm’ (2006) 36(2) *diacritics* 23, 23; Malcolm Bull, ‘Vectors of the Biopolitical’ (2007) 45 *New Left Review* 7. Yet again, work is already ongoing. See, eg, Anne Orford, ‘Biopolitics and the Tragic Subject of Human Rights’ in Elizabeth Dauphinee and Cristina Masters (eds), *The Logics of Biopower and the War on Terror: Living, Dying, Surviving* (2007) 205.

⁴⁵ David Kennedy, ‘The Last Treatise: Project and Person (Reflections on Martti Koskeniemi’s *From Apology to Utopia*)’ (2006) 7 *German Law Journal* 982, 982.