Introduction

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SETTING THE SCENE

In the past few years, it has become increasingly self-evident that the research methodologies of international law can no longer be confined to pure normative and doctrinal analysis. They need to be complemented by interdisciplinary approaches. Indeed, a new generation of scholars is engaging in pioneering empirical and socio-legal studies in fields as diverse as arbitration,¹ international economic law² and international courts and tribunals.³ I believe we are witnessing a wave of change within the international legal academia and the chapters featuring in this collection are testament to that paradigm shift, being themselves instances of cutting-edge research in the socio-legal and empirical law fields.

Empirical, socio-legal and, in general, interdisciplinary analyses of international legal issues now abound. Technological advancements greatly facilitate the ongoing transition to a pluralist approach to research methods in international law, at the same time allowing use of specialized, yet user-friendly, computer software for empirical investigation and increasing the availability of online materials to conduct doctrinal analysis through ever faster and comprehensive databases.

The use of diverse international law research methods, and related tools, has also revived the debate about the theoretical underpinnings of such research methods: when do we turn to empirical methods? How do we integrate the empirical findings with principled legal reasoning? However, in contrast to the quantity and quality of scholarly contributions grounded

¹ S Puig, 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387.

² W Alschner et al, 'The Data Driven Future of International Economic Law' (2017) 20 JIEL 217.

³ U Šadl and H Palmer Olsen, 'Can Quantitative Methods Complement Doctrinal Legal Studies? Using Citation Network and Corpus Linguistic Analysis to Understand International Courts' (2017) 30 LJIL 327; W Alschner and D Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (2018) 29 EJIL 83.

on the normative and doctrinal tradition, the literature on international law research methods is both outdated and severely underdeveloped. To date, only two monographs have attempted to engage with the question of methods.

The first one is *Practice and Methods of International Law* by Shabtai Rosenne.⁴ It contains information as to where one can find the text of treaties and evidence of state practice counting towards the creation of customary rules or general principles of international law – a task now greatly facilitated by online databases and search engines. As Morris Cohen once wrote, the third source of law is legal research.⁵ In this sense, Rosenne's monograph can be seen as the forerunner of the modern international legal research field.⁶ The second monograph is *A Methodology of International Law* by Maarten Bos.⁷ It presents as 'methodology' what is essentially an interpretive technique for identifying the presence of a rule of international law. In this sense, it does not significantly differ from other works on the general theory of public international law.⁸ All in all, neither publication engages with the question of the role and place of research methods in international law. Nor do they discuss underlying theories of research methods. Quite the contrary, they build on a strictly positivist conception of international law, thus strengthening it as the default conception of international law to be analysed and developed through normative and doctrinal analysis.

The more recent co-authored volume, entitled *Research Methodologies in EU and International Law*,⁹ provides a conceptualization of the role of research methods in facilitating the understanding of the practical functioning of international law. However, empirical and socio-legal

⁴ S Rosenne, *Practice and Methods of International Law* (Oceana, New York 1984).

⁵ ML Cohen, *Legal Research in a Nutshell* (2nd ed, West Publishing, St Paul, Minn. 1971), 3–4.

⁶ See, for instance, AS Winer and MAE Archer, *A Basic Course in Public International Law Research* (University Press of America, Lanham, Md 2005); H Frostestad Kuhel and MA O'Brien, *International Legal Research in a Global Community* (Carolina Academic Press, Durham, North Carolina 2018).

⁷ M Bos, *A Methodology of International Law* (North-Holland, Amsterdam 1984).

⁸ A recent example is P Gragl, *Legal Monism: Law, Philosophy and Politics* (OUP, Oxford 2018) (endorsing a Kelsenian perspective to public international law); J von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP, Cambridge 2014).

⁹ R Cryer et al (eds), *Research Methodologies in EU and International Law* (Hart, Oxford 2007).

methods are not considered. Broader in perspective, but restricted to a single research method, is Anthea Roberts' *International Comparative Law*.¹⁰ It provides insights on how international norms are interpreted and redefined by national parliaments, executives and judiciaries, thus treating legal concepts as objective, and to an extent, autonomous constructs.

The forthcoming *Research Methods in International Law: A Handbook*¹¹ is arguably the most comprehensive collection of chapters on international law research methods, covering the entire spectrum – from doctrinal to empirical to interdisciplinary. However, its main aim is to explain the basics of each methodology considered. Therefore, in the spirit of a handbook, it retains an explicit informative character about 'how to do' research on international legal matters.

The present collection of chapters has a different aim. It fills a lacuna in the international law literature by discussing concrete applications of non-doctrinal research methods, both quantitative and qualitative, to various fields of international law with a view to assessing their interplay with the doctrinal-only type of inquiry. In doing so, it places emphasis on the role different non-doctrinal methods serve in developing international legal theory. By engaging in the thorough analysis of case studies rather than discussing the theoretical underpinnings of research methods, it explains what non-doctrinal methods add to mainstream doctrinal analysis and what they neglect. It provides a critical analysis of the advantages and disadvantages of utilizing non-doctrinal research methods, largely understood as empirical methods, rather than presenting them as a better alternative to the traditional approach to the study of international law.¹² As Huaxia Lai argues in this book, there is no empirical turn as such in international law – or, at least, not yet.

The central argument put forward in this book is that research methods are complementary to each other, not mutually exclusive. Hence, relying exclusively on either of them provides an incomplete picture of international law. This is not to say that every single piece of research must be interdisciplinary. The invitation is simply to acknowledge the limited nature of the findings of any research endeavour: each contributes to a wider academic dialogue about the content and shape of the international

¹⁰ A Roberts (ed), *International Comparative Law* (OUP, New York 2018).

¹¹ R Deplano and N Tsagourias (eds), *Research Methods in International Law: A Handbook* (Edward Elgar, Cheltenham, UK and Northampton, MA forthcoming).

¹² G Shaffer and T Ginsburg, 'The Empirical Turn in International Law' (2002) 106 AJIL 1; JVH Holtermann and MR Madsen, 'Toleration, Synthesis or Replacement? The "Empirical Turn" and Its Consequences for the Science of International Law' (2016) 29 LJIL 1001.

legal system. Doing research in international law is a work of art and patience. It is also a question of method.

RETHINKING THE RELATIONSHIP BETWEEN THEORY AND METHOD

In a sense, trying to elucidate the relationship between theory and method in international law is an elusive task. In the absence of a generally agreed definition of international law, methods can only be regarded a tool at the disposal of the researcher to inquiry about a specific theory.¹³ Consequently, the real focus of the ongoing debate about the role of methods in international legal scholarship ultimately rests on the concept of *theory*, and the related practice of *theorizing*, in law as opposed to the wider social sciences.

In the social sciences, from which the non-doctrinal research methods derive, a theory is 'simply a reasonable and precise answer to the research question' aimed at enabling the researcher to extract an observable implication – that is to say, 'a claim about what we would expect to observe in the real world if [the theory was] right.'¹⁴ In other words, a theory is a sort of conjecture (hypothesis) about a supposed relationship between two or more entities or characteristics of the observed phenomenon (variables). Because the hypothesis is essentially an assumption that a relationship between variables exists, it is equally possible to expect that no relationship exists between the selected variables (null hypothesis).

The ensuing process of theorizing about the hypothesis consists of identifying the constituent elements of the relationship (variables of interest) based on the information the researcher possesses about the phenomenon under investigation (the available data). Since observable implications are *conceptual* claims about the envisioned relationship between variables, the researcher selects the methods, qualitative or quantitative, she thinks are the most appropriate to measure the degree of the relationship. In framing a research design which is as objective as possible, the researcher is guided by her own knowledge, experience, sensitivity and preferences as to the

¹³ Cryer (n 9), 5–6; C Dominicé, 'Methodology of International Law' in R Bernhardt (ed), *Encyclopaedia of Public International Law* (North Holland, Amsterdam 1997) vol III, 354–5 (on the absence of a generally accepted definition of method and methodology).

¹⁴ L Epstein and AD Martin, 'Quantitative Approaches to Empirical Legal Research' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP, New York 2012) 901, 906.

suitability of the research methods. As a result, the process of theorizing in the social sciences turns out to be both arbitrary and flexible.

Testing the hypothesis is a process intimately related to that of theorizing, but not identical. It requires the implementation of the selected research design. For quantitative studies, this implies performing statistical analyses, with their accompanying logic and assumptions. It is unfortunate that much of the critique about empirical legal studies has so far focused on this aspect, rather than theory and theorizing, thus consolidating a partial misconception as to the place and role of non-doctrinal methods in international law. I say partial because the certainty of the outcome of quantitative studies often comes at the expense of clarity and ease to understand the computational steps leading to the outcome. As Gabriel Lentner argues in this book, there is a latent risk for researchers not trained in statistics to misinterpret the findings of the analysis. Even worse, researchers performing quantitative analyses have often addressed research questions that are not suitable for statistical analysis, thus failing to engage with legal reasoning and contribute to legal analysis.¹⁵

The consequences of poor empirical research, including poor communication practices, can be detrimental for both academic research and legal practice. Commenting on the empirical evidence provided by the parties in the *ATA Airlines* case (2011), Judge Posner famously noted:

Neither party's lawyers, judging from the trial transcript and . . . the briefs and oral argument in this court, understand regression analysis; or if they do understand it, they are unable to communicate their understanding in plain English.¹⁶

The apparently arcane logic of statistical analysis, which generates the abovementioned problems of communication of the findings, is actually deeply related to philosophical thinking. Warnings against drawing generalizations from individual observations date back to Karl Popper's theory of falsification as the basis of scientific knowledge.¹⁷ Accordingly, when testing the hypothesis, empiricists assume that the null hypothesis is true – that is to say, that there is no relationship between variables. In practice, *they test the null hypothesis* and, whenever they find that a relationship between the selected variables exists, they assess whether the relationship is generated by chance or is statistically significant. By convention, the significance level (often referred to as the *p* value) is set at 5 per cent.

¹⁵ See also RM Lawless et al, *Empirical Methods in Law* (2nd ed, Aspen, New York 2016) 344.

¹⁶ *ATA Airlines v. Federal Express Corp.*, 665 F.3d 882, 889 (7th Cir. 2011).

¹⁷ See, for instance, K Popper, *The Logic of Scientific Discovery* (Routledge, Abingdon 2002).

A p value higher than 0.05 (meaning 5 per cent) indicates that the value generated by the statistic test in relation to a sample of observations is close to the hypothesized value for the population, thus suggesting that the relationship is caused by chance. In such circumstances, we *fail to reject* the null hypothesis. Conversely, a p value less than or equal to 0.05 indicates that the sample statistic and the hypothesized value for the population are far apart, suggesting that the relationship under investigation is statistically significant: it cannot be the product of chance. In such circumstances, we *reject* the null hypothesis.¹⁸ Since the analysis revolves around the null hypothesis, empiricists usually conclude by saying that the data ‘are *consistent* [or not consistent] with the observable implications following [the] theory.’¹⁹ They do not say that a theory ‘is right or wrong.’²⁰ Discussing the implications of the findings, including the legal ones, is the next logical step of the inquiry. In this sense, Finkelstein writes that:

What mathematics offers is not a *deus ex machina* for legal problems but only the opportunity for new insight into values based on a deeper knowledge of the facts.²¹

Despite its theoretical premise, recourse to empirical methods in law has not received unanimous approval by international law scholars. They argue that the process of performing statistical analysis ignores the distinctive function of norms in the international legal system²² and dismisses the value of legal argumentation at once.²³ While having a plurality of views is a healthy sign of the current state of the debate in the international legal

¹⁸ L Epstein and AD Martin, *An Introduction to Empirical Legal Research* (OUP, New York 2015), 157 and 159.

¹⁹ Epstein and Martin (n 14) 907 (emphasis original).

²⁰ *ibid* (emphasis original).

²¹ MO Finkelstein, *Quantitative Methods in Law* (Free Press, New York 1978), 17. On similar remarks on the need to search for and assess more scientific evidence, see H Zeisel and D Kaye, *Prove It with Figures: Empirical Methods in Law and Litigation* (Springer, New York 1997), 1–4.

²² J Klabbers, ‘Counter-Disciplinarity’ (2009) 4 *Int’l Pol Soc* 308, 309 and 311; contra, see T Eisenberg, ‘The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns’ (2011) 5 *Univ Illinois L Rev* 1713, 1720 (arguing that ‘it is better to have more systematic knowledge of how the legal system works rather than less, *regardless of the normative implications of that knowledge*.’ Emphasis added).

²³ The gap between empirical evidence and legal argumentation is sometimes referred to as the fact-value gap. See, for instance, FL Leeuw and H Schmeets, *Empirical Legal Research* (Edward Elgar, Cheltenham, UK and Northampton, MA 2016) 225–6. See also JB Fischman, ‘Reuniting “Is” and “Ought” in Empirical Legal Scholarship’ (2013) 162 *U Penn L Rev* 117, 120 (arguing that ‘[o]ften the

academia, the reluctance to engage with the concept of theory and the process of theorizing in the social sciences remains hidden in this specific criticism. Inevitably, this attitude ends up erecting a barrier between international law and the social sciences on the basis of axiomatic, rather than rational, assumptions as to the role and function of international legal theory in legal reasoning.

With the exception of the realist position,²⁴ theory is generally taken as constitutive of international law. We assume, for instance, that international law is the product of the sources of international law listed in Article 38 of the Statute of the International Court of Justice 1945 – namely, treaties, custom, general principles and, to a lesser extent, the decisions and teachings of the most highly qualified publicists of all nations.²⁵ We do not question why international law is restricted to those sources or why they are (regarded as) the most important ones. International law is a belief system, as such self-explanatory.²⁶ And it does not matter whether international is really international:²⁷ we assume it is. It follows that theory is what we believe international law is, since ‘doctrine-making is a matter of scholarly choices.’²⁸ Consequently, we construct international legal discourse based on underlying assumptions.

Theory in international law is mostly an exercise in abstraction while theorizing is the very process of formulating the theory.²⁹ As a result, testing the theory does not require any empirical investigation, unless by empirical is meant the selected case study approach.³⁰ For instance, Thomas Franck famously argued that:

It could be done without empirical evidence that the rules of the international legal system are *usually* obeyed, or that there is a community of states. Instead, it is only necessary to posit *some* instances of state behavior that accord with normative behavioral constraints and ask why those constraints should weigh

quest for scientific credibility leads contemporary empiricists to lose sight of the normative goals of legal scholarship’).

²⁴ JL Goldsmith and EA Posner, *The Limits of International Law* (OUP, New York 2005).

²⁵ See, for instance, H Thirlway, *The Sources of International Law* (OUP, Oxford 2014).

²⁶ J d’Aspremont, *International Law as a Belief System* (CUP, Cambridge 2017), 55–70.

²⁷ A Roberts, *Is International Law International?* (OUP, New York 2017).

²⁸ d’Aspremont (n 26) 73.

²⁹ *ibid* 3, 39 and 45.

³⁰ *ibid* 47–8 (‘Having heard these international instruments speak the fundamental doctrines, international lawyers come to think of fundamental doctrines as truth that calls for no empirical or rational demonstration’).

in the policy decisions of governments in the absence of an effective global sovereign. *Such a modest and easily found fragmentary data base . . . is the only requisite for speculative inquiry as to why states obey rules. It is not necessary to the inquiry that all, or even most, rules be obeyed.*³¹

This is an instance of an axiomatic approach to international law. It is also the opposite of the theory of falsification on which quantitative analysis is based: one observation, as isolated as it can be, is the necessary and sufficient condition to generalize about the international legal system as a whole. By focusing only on rules – that is to say, the normative, as opposed to the factual, character of international law – such an approach to legal reasoning in international law confirms the self-referential nature of international law as a belief system. Not surprisingly, under these conditions, there is not much scope for dialogue between international lawyers and social scientists. Hence the antipathy of the former towards the non-doctrinal research methods.

The most notable exception to the dominant, positivist understanding of international law is the policy-oriented approach, also known as the New Haven School of international law.³² Born out of a long-term collaboration between Harold Lasswell and Myres McDougal at Yale Law School, it is to date the only school of thought advocating the use of social sciences research methods in law. Or, at least, that was the case at the beginning. An expert in communication studies with a background in sociology, Lasswell envisioned law, including international law, as part of the social reality in which it operates rather than a set of rules and abstract principles. As a social construct, law was seen as an instrument to forge a democratic society designed to maximize the wellbeing of individuals. As a result, some of the cardinal conceptual categories of the New Haven School, such as policy and a world order of human dignity, are heavily rooted on social sciences theories.³³

Influenced by his educational and professional background, Lasswell put emphasis on examining the language used by the participants in the decision-making process with a view to discerning the normative content of those decisions in a systematic and scientific way. To that end, it presented content analysis, especially in its quantitative variant, as a landmark methodology of the nascent policy-oriented approach

³¹ TM Franck, *The Power of Legitimacy among Nations* (OUP, Oxford 1990), 9 (emphasis added).

³² HD Lasswell and MS McDougal, *Jurisprudence for a Free Society* 2 vols (Brill, Leiden 1992).

³³ HD Lasswell, 'The Language of Power' in HD Lasswell et al (eds), *Language of Politics* (MIT Press, Cambridge 1965), 26; id, 'The Problem of Validating Content Analysis' in *ibid*, 51.

to law.³⁴ Hence, his meticulous approach to categorizing concepts and relationships.³⁵ However, after Lasswell retired, the New Haven School took a sharp legalist turn that effectively eliminated the need for recourse to the social sciences research methods while retaining the original conceptual categories. In doing so, the policy-oriented approach turned into a teleological type of inquiry whose telos – namely, creating a world of human dignity – was so broad and indeterminate that it allowed for selective, and ultimately discretionary, interpretations of the facts under investigation to become the new methodological approach. Accusations of providing politically charged interpretations of international law ensued.³⁶

However, it would be a mistake to dismiss the policy-oriented approach as an unusual, albeit successful, academic encounter with no counterpart in Europe and elsewhere. Whatever the fate of the policy-oriented approach, which remains a mainstream conception of international law,³⁷ the considerations above warn against the tendency to conflate international legal theory with positivism and international legal research with the doctrinal-only type of analysis. Resort to empirical methods is instrumental to uncover shades of meaning about the practical impact international law has in society. Understanding how the participants in the international legal system perceive the normativity of international law and how they apply it in their relationships with each other as well as assessing the efficacy and efficiency of international law regimes is a call to broaden the dominant state-centric conception of international law – hence, an invitation to pluralize international legal scholarship.

NON-DOCTRINAL RESEARCH METHODS IN CONTEXT

Non-doctrinal methods in international law are, broadly speaking, empirical methods. They are also research methods not associated with any

³⁴ HD Lasswell, 'Why Be Quantitative?' in Lasswell et al (n 33), 40–52.

³⁵ Lasswell and McDougal (n 32) vol I, xxx (referring to Lasswell's 'self-imposed demand' for the most comprehensive and detailed possible type of inquiry).

³⁶ RA Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104 *Yale Law Journal* 1991, 2006–7.

³⁷ OA Hathaway, 'The Continuing Influence of the New Haven School' (2007) 32 *Yale J Int'l L* 553, 555; LA Dickinson, 'Toward a "New" New Haven School of International Law?' (2007) 32 *Yale J Int'l L* 547, 549 (arguing that the new generations of policy-oriented scholars trained at Yale Law School is committed to the rule of law).

particular scholarly position. As Giulia Gentile and Luigi Lonardo argue in this book, 'a method is a way to achieve a result, and it is neutral to that result.'³⁸ Accordingly, non-doctrinal methods are tools to examine the social reality in which law, including international law, operates.

This book engages with a limited number of non-doctrinal methods with a view to elucidating their relationship with the doctrinal type of inquiry. The selection of non-doctrinal methods discussed in the book is exemplificative. Some of the chapters critically evaluate the differences between doctrinal analysis and empirical methods in general using social constructivism and the data-driven approach to international economic law as case studies. Other chapters apply empirical methods to selected areas of international law with the aim of showing what quantitative and qualitative analyses add to doctrinal analyses on the same topic and what they neglect. Specifically, individual chapters deal with the aim, content and theoretical underpinnings of inductive research as well as ethnography, archival research and statistical analysis.

A number of common themes run through the chapters. Three are the main ones.

The first theme is a concern to generate more scientific results. In her chapter on the sources of general principles of international law, Marija Đorđeska criticizes the attitude of both the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) in order to find evidence of general principles of law without disclosing the methodology adopted to reach such conclusion.³⁹ The criticism closely resembles the one about the ICJ's practice of resorting to assertion as a substitute for providing evidence of the existence of a rule of customary international law.⁴⁰ However, in order to provide a more accurate and objective image of what general principles of law are, she resorts to the systematic observation of the PCIJ and ICJ practice over time as a way to redress the tendency to pick and choose convenient pieces of evidence while neglecting others. The rationale behind the choice of an inductive method is that the systematic observation generates measurable data, thus creating a more transparent and conducive environment in which scholarly agreement on the definition of general principles can consolidate.

Similar concerns about enhancing transparency are shared by Giulia Gentile and Luigi Lonardo. They utilize statistical analysis to elucidate,

³⁸ Chapter 6, 127.

³⁹ Chapter 1, 19.

⁴⁰ S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417.

and therefore enhance our understanding of, selected practices of the European Union in the field of sanctions. Likewise, in relation to interdisciplinary research, Sarina Landefeld argues that social constructivism aims at enhancing transparency by studying international law as a social process and evaluating the meaning of legal concepts in a historical, as opposed to the textual, perspective.⁴¹ Along the same lines, Josef Ostránský cautions about accepting at face value certain ‘universalist and often sweeping normative assumptions’ recurring in international legal scholarship.⁴²

The second theme relates to the object of the inquiry, which cannot be confined to the textual formulation of normative provisions. Alice Margaria and Josef Ostránský emphasize the participatory nature of ethnographic research by exploring research themes which are not traditionally associated with legal analysis. Similarly, Sarina Landefeld writes that one of the virtues of discourse analysis is that it ‘may focus on a variety of linguistic elements individually or in combination, such as rhetorical elements, frames and storylines, which researchers search for and code as regularities and patterns in the discourses.’⁴³

One of the distinctive traits of qualitative research in the social sciences is that, once the research question is set and the research design framed, the role of the researcher becomes merely instrumental to gathering the information needed from the participants without influencing them. In other words, the researcher acquires new knowledge about the issue under investigation by learning from the participants.⁴⁴ It is because the perspective of a qualitative study is centred on the participants’ perception that law is seen as a social institution not amenable to be analysed only through the lens of the law-as-text approach.

In her chapter on culturally and religiously diverse families in Europe, Alice Margaria elucidates the extent to which the system of protection of human rights under the European Convention on Human Rights addresses the concerns of culturally and religiously diverse families. In order to conduct the analysis, she examines both the case law of the European Court of Human Rights and the transcripts of interviews conducted with litigants to gain unique insights into the background of litigation. Analysing the text of the Court’s decisions sheds light on how marriage is understood by the Court, for example whether it embraces

⁴¹ Chapter 2, 57.

⁴² Chapter 3, 64.

⁴³ Chapter 2, 58–9.

⁴⁴ A Bryman, *Social Research Methods* (5th ed, OUP, Oxford 2016), 34–5.

a monogamous conception or a different one. However, examining ‘the thoughts and feelings of the individuals who brought their own case to Strasbourg’ brings to the fore the distance in both perceptions of marriage as a social institution and expectations as to the outcome of the cases.⁴⁵ This unavoidably affects the legitimacy of the Court, whether positively or negatively.

Attention to the social outcome of the inquiry extends beyond litigation to other areas of international law as well. Josef Ostřanský evaluates perceptions of international investment law by discussing the personal experience and histories of individuals directly involved in the application of investment treaties in domestic law. He emphasizes how the use and effects of various international norms within the domestic setting have often been ambivalent and describes the challenges of building a relationship of trust between the researcher and the respondent in both official and unofficial settings in order to obtain the information needed for the purposes of conducting the research.

More objective in nature, quantitative analysis also relies heavily on the personal background of the researcher, including her knowledge, style and preferences.⁴⁶ Giulia Gentile and Luigi Lonardo point out that statistical analysis, as useful as it is, is not immune from bias. Prone to mistakes as to the manipulation and interpretation of data, the process of quantification must be subjected to the most rigorous standards of openness and replicability.⁴⁷ Gabriel Lentner also argues that the relatively discretionary nature of quantitative research is abused whenever researchers attempt to frame a quantitative study around research questions that are not amenable to statistical analysis. Such attitude negatively impacts how international law scholars perceive the role of empiricism in international legal research.

The third theme is the inherently partial and incomplete nature of non-doctrinal studies, which makes them necessarily complementary to, rather than substitutive of, doctrinal analysis. As Sarina Landefeld notes, by focusing on different subjects of analysis social constructivism – like any other non-doctrinal method – ‘draws attention to actors, factors and dynamics which may be overlooked, marginalized or ignored by doctrinal research.’⁴⁸ However, in doing so, it provides a partial, incomplete

⁴⁵ Chapter 4, 88.

⁴⁶ *ibid* (arguing that the personal views of the researcher may influence the selection of the area of research, the research questions and eventually the research methods employed).

⁴⁷ Chapter 6, 133–6.

⁴⁸ Chapter 2, 61.

understanding of the world itself.⁴⁹ Hence, it should be seen as a contribution to a critical conversation on the nature and purpose of international law. Elizabeth Faulkner also points out that normative and doctrinal analysis forms part of the background of archival research, an observation shared by Giulia Gentile and Luigi Lonardo in relation to statistical analysis and Josef Ostřanský in relation to ethnographic studies.

Marija Đorđeska utilizes an inductive type of inquiry to test the validity of the widespread assumption that the ICJ – and, previously, the PCIJ – ascertains general principles solely by relying on domestic law. The findings of her analysis show that general principles may have domestic, international or judicial underpinnings. By disproving an established scholarly position, in this specific instance the inductive approach directly contributed to the discovery of a new conceptual category about the role and place of general principles in international law, thus enriching the scholarly literature. As Josef Ostřanský writes, the inductive approach ‘looks at the constituent parts of the process, not only at the end results,’⁵⁰ meaning that theory, from this limited perspective, emerges from facts, at the same time providing an account of the process of normative change over time. This latter aspect features prominently in other non-doctrinal methods as well. For instance, archival research helps understand how legal concepts change over time by enriching the understanding of the social and cultural background in which international instruments are adopted. Likewise, discourse analysis sheds light on how social constructs acquire legal meaning at particular points in time, an aspect mostly overlooked by doctrinal analysis.

On a different note, Huaxia Lai laments a lack of engagement with legal theory in the research background of certain quantitative studies, especially in the field of international economic law. Aimed at analysing large quantities of data, such studies end up substituting computation for formulation of legal theory in undertheorized areas of law. She writes: ‘Data no longer serves the secondary purpose of testing hypotheses in empirical scholarship; it generates theory for the study of international law.’⁵¹ As a result, not infrequently such studies turn out to be self-referential and mostly detached from the background and context of the empirical investigation. Most noticeable in the area of international courts’ decisions, she points out that: ‘Self-described as empirical studies, these citation analyses take no interest in the rest of the judicial opinions that constitutes the

⁴⁹ *ibid*

⁵⁰ Chapter 3, 77.

⁵¹ Chapter 8, 181.

citations' empirical and textual context.⁵² In departing from the spirit of theorizing by falsification, such research projects alienate themselves from the canons of social sciences research methods and, in doing so, fail to complement existent doctrinal legal studies. This observation corroborates Gabriel Lentner's criticism about performing quantitative analysis to answer questions not suitable for quantitative research.⁵³

OUTLINE OF CHAPTERS

In Chapter 1, Marija Đorđeska evaluates the use and application of general principles of law recognized by civilized nations by the PCIJ and the ICJ. She argues that adopting a more scientific, inductive approach to analyse the primary sources of international law helps clarify the current state of the international legal system, thus facilitating a stable and transparent evolution of all its elements. In this context, doctrine serves a minor role, although it cannot be completely discarded. An argument is made that while theory does not stand in the way of more objective results, the dogmatic reliance on doctrine in creating or developing these theories does.

In Chapter 2 Sarina Landefeld promotes interdisciplinary research for the analysis of the evolution of norms and concepts of international law. She argues that while international relations scholars have examined the nature of international law – and, in particular, the nature of international legal obligation – through the lens of social constructivism, this remains a neglected methodology among international law scholars. The chapter explains why social constructivism lends itself to research of international law issues. It shows how social constructivist insights and techniques, such as discourse analysis, may facilitate a more comprehensive understanding of how and why international legal norms and concepts evolve over time. By developing a narrative about the history of international legal rules which cannot be derived from within the ideational and methodological constraints of the discipline of international law itself, social constructivism provides a critical perspective on contemporary law aimed at revealing how meaning is constructed for the purpose of international law, including its ambiguities and lacunae.

In Chapter 3 Josef Ostránský argues that the rise in empirical methods brings much needed reflection into the profession of international law,

⁵² *ibid* 183.

⁵³ Chapter 7, 160.

which generally views itself as cosmopolitan, universalist and promoting seemingly incontestable virtues, such as peace and justice. He argues that, inspired by social anthropology, ethnographic research can bring important insights into the study of established fields of international law such as international investment law, where qualitative studies are relatively few. Through the lens of an ethnographic study, the chapter evaluates the capability of international investment agreements to influence government practices, policies and discourses. To that end, it examines the structure and power dynamics of both the government and the public administration, the role of non-governmental actors and the political narratives associated with concluding foreign investments and their regulation. The specific research method used is the extended case method, which includes the evaluation of participant observation, interviews, discourse and content analysis of official documents and media as well as archival work. The findings bring to the fore discrepancies between normative prescriptions and actual practices in international investment law, thus enhancing the current understanding of what international investment law induces beyond its immediate legal effects.

In Chapter 4 Alice Margaria examines how the system of protection of human rights under the European Convention of Human Rights (ECHR) has thus far responded to the needs of culturally diverse families in Europe. Starting from the basic assumption that the law is more than a set of rules and their application, she describes litigation as a multi-party and pluridimensional process whose underlying forces and dynamics can only be revealed by actively engaging with its agents. Drawing from social anthropology methods, the analysis reconstructs the relevant case law of the European Court of Human Rights by delving into the personal experiences of the individuals directly involved. By focusing on certain extra-judicial factors bearing an impact on both the development of the case and the final decision, the inquiry sheds light on the human stories behind litigation. It thus brings alive the perceptions of the individuals directly involved in the cases, which in turn represent a key benchmark for assessing the benefits and the shortcomings of law as an avenue to justice. The chapter concludes by arguing that an ethnographic approach to the case law of the European Court of Human Rights enriches the scholarly debate on the effectiveness of the ECHR system of protection of human rights and adds a new layer of analysis as to the ability of the Court to do justice to the complex identities of individuals involved in each case.

In Chapter 5 Elizabeth Faulkner examines the issue of trafficking of children, which has received extensive attention from both academic and political fora in recent years. She argues that despite the current understanding of human trafficking as a growing phenomenon, it remains a

relatively new area of international law. However, trafficking has featured in a number of international instruments since the early twentieth century and therefore it predates the formation of the current international legal system. By pointing out that human trafficking has both a long legal and political history, the chapter critically analyses the historical evolution of the concept of child trafficking under international law from a socio-legal perspective complemented by archival research. In reconstructing the origins of the concept of child trafficking, the analysis sheds light on the social and political drivers behind its appearance. In particular, it shows that despite its history and incorporation into numerous legal agreements, the term ‘trafficking’ was not defined in international law until the Trafficking Protocol was adopted in 2000. Considering how the international legal framework has responded historically and what parallels can be drawn between the White Slavery Conventions from the early twentieth century and the contemporary legal framework that addresses child trafficking, the chapter provides unique insights on the evolution of a sub-field of international human rights law, thus complementing the existent doctrinal and normative studies which inform states’ contemporary responses to child trafficking.

In Chapter 6 Giulia Gentile and Luigi Lonardo examine how EU judicature exerts judicial review powers in relation to EU sanctions. Such measures, which are adopted by the Council of the European Union to influence the political behaviour of third countries and individuals, may be challenged before the General Court and, on appeal, before the European Court of Justice (ECJ). They utilize quantitative methods to analyse the judgments delivered by the ECJ on appeals concerning EU sanctions since the entry into force of the Lisbon Treaty. The chapter shows that scholarly literature concentrates on EU sanctions from a doctrinal standpoint, predominantly focusing on specific issues of judicial protection, such as the jurisdiction of the courts, human rights and procedural matters. By adopting an empirical-quantitative approach to EU restrictive measures, the chapter adds a further and innovative perspective on the courts’ judicial review in the area of sanctions.

In Chapter 7 Gabriel Lentner evaluates the embrace of quantitative method as the latest development in the empirical turn of international law scholarship and asks how international law works in practice using quantitative tools. He argues that existing quantitative research has addressed a wide range of issues, including the scope of regulatory space under international treaties, the structural biases in investor-state dispute settlement, patterns in international courts’ and tribunals’ citation practices. While these quantitative works share the common feature of operationalizing international law concepts into numeric indicators, they

generally build upon large datasets consisting of numerical data points quantified from textual information in treaties and case law. Coded data enables comparison across cases and treaties, and facilitates hypothesis testing against the entire data population. However, the primary challenge for quantitative analysis lies in developing a rigorous research design that features sensible measurement, which is the prerequisite for valid causal inference. The chapter addresses the problem of measurement in the research design of existing quantitative studies in international law and proposes an empirical approach that is capable of avoiding the methodological pitfalls in that regard. It shows that reducing key terms to numerical figures misrepresents the complexities and practice of international legal arguments, interpretation and decision-making. By surveying a number of studies using computer-enabled data scraping techniques, the chapter explains why such a crude measurement is a false start for empirical research and can produce misleading or irrelevant findings. Hence, it cannot be regarded as a substitute for doctrinal analysis.

In Chapter 8 Huaxia Lai challenges the claim that the data-driven approach holds the future of international economic law scholarship, arguing that it is unlikely to fulfil its promises of transforming international economic law research. The chapter first explains why international law research embraces the big data approach in its empirical turn and surveys the method's recent application in international economic law. An argument is made that, despite its popularity, the data-driven approach has proved to be misleading and of limited use for understanding international economic law. Among the various pitfalls, the data-driven scholarship on international economic law often relies on flawed measurement devoid of theoretical underpinnings. The chapter therefore concludes by proposing an alternative approach that bridges doctrinal analysis and the empirical agenda in studying international economic law.

Some concluding remarks gathering up the threads running through the chapters about the promise and perils of non-doctrinal research methods in international law follow.