# 12 'The Critic Is Not the One Who Debunks, but the One Who Assembles'

## On Professional Performances and Material Practices

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### Introduction

When Roberto Dañino, former General Counsel at the World Bank, arrived in the institution, he found a department perceived to be at the verge of 'marginalisation' – a dire state he diagnosed and soon attributed to the rigid 'culture' of legal practice. In tracing Dañino's efforts to 'make the department relevant again', we get a glimpse of the situated, material, embodied institutional life of international law: the changes Dañino instilled were manifested not in formal legal sources but in the introduction of new cultural codes, professional prototypes (the 'how to' lawyer), and technical routines of risk management. In the domain of international institutional law – often oriented towards abstraction, comparison, or aspiration – such prosaic legal practices tend to be underplayed. If we want to perceive or evaluate changes in the cultural technique of international law(yering) such as those sparked by Dañino, I argue, we need to redirect our attention to 'that which lies at the edges of conventional international legal sightlines', as Johns argued – to focus not on 'grand designs' but on 'lived practices and techniques', in the words of Riles. This chapter signals two productive entry points for such a turn to practice: (i) a focus on the shared and contingent criteria of competence – the 'social grammar' – that mark professional postures and performances and (ii) a heightened attention for the practices of relationality, translation, and materiality through which law is composed – the string of 'people and things' that it assembles. This methodological orientation to professional scripts and material routines also offers a perspective on 'critique' that differs

from the familiar structuralist modes of analysis and intervention. What might legal 'critique' become if, with Levi and Valverde, we were to trade the 'abstracted view of "structure" [for] the empirical work of studying action, actors, communication, imitation and translation, networks, knowledge flows and the continual process that constructs society itself'? If we associated the 'critical' gesture, in Latour's terms, with 'multiplication, not subtraction' – with more, not less? If the direction of 'critique' were not away from its objects (a flight into their social or political conditions of possibility) but 'toward the gathering'? If the 'critic' were not 'the one who debunks, but the one who assembles'? Perhaps it is in tracking and tracing, mapping and multiplying, and not in the stylized posture of scepticism that 'critique' might regain potential?

## 'I Wanted to Make the Legal Department Relevant Again'

When Roberto Dañino – former Peruvian Prime Minister and ambassador to the United States – was appointed as the World Bank's General Counsel in 2003, he felt he arrived at a department in disarray. Only a few years after Ibrahim Shihata's departure – Dañino's illustrious predecessor whose presence still lingered in the organization and who, according to Dañino, had 'very much exercised the power of the office' – he perceived that the legal department had now become 'marginalised'.[1] There was a decline in requests by the World Bank's Board of Executive Directors for formal legal opinions, and lawyers present at that time expressed that they were increasingly kept at a certain distance from the organization's transactional process. Experiencing an expanding distrust of the institution's political Board,

[1] Interview with Former General Counsel Roberto Dañino, October 2016 ('Dañino Interview'). This interview material is drawn from and contextualized in D. Van Den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice* (Oxford University Press, 2022). This crisis narrative and trope of 'marginalisation' was, in fact, a recurring one. When Shihata, General Counsel from 1983 to 2000, was appointed in the World Bank he, in his words, 'discovered that the Legal Department was very demoralized [and] marginalised'. In response, his first act as General Counsel was the physical relocation of its department back to the main building, across the street from where it had been (on his request, the department was moved back across H street from the N building to the E building – the main building). The diagnosis of marginalisation, in this sense, also provided a platform for heroic interventions of revival and renewal to take place.

a lingering discontent of its operational branches, and a diminishing esteem for the department, Dañino framed this dire state as the result of a particular 'culture' in the legal department.[2] The issue, as he construed it, was that too many lawyers displayed their power by saying 'you cannot do this … this is wrong'.[3] While the institution's senior management demanded ambition and agility in the face of new global challenges, a close ally of Dañino lamented, the law had become 'fossilized'.

In articulating his strategy to instil a new 'paradigm' of legal practice in the Bank, Dañino categorized this 'old type' of lawyer as the 'why not' lawyer.[4] 'My strategy for making the LEGAL VPU [Vice Presidency] more relevant and better positioned to meet the needs of the Bank', he stated early in his tenure, is to 'change our attitude from "why not" to "how to". We cannot just be policemen, blindly enforcing the rules. We need to go beyond that and provide … value-added to our clients'.[5] This was the time of the Millennium Development Goals and the Comprehensive Development Framework. A time of radical expansion, moral reinvigoration, and institutional growth led by James Wolfensohn – probably the most ambitious Bank president since McNamara.[6] This was not the time to slow down the grinding mills of global liberal reform by adopting a principled posture of legal formalism.[7]

To make the department 'relevant again', Dañino perceived that it was necessary to rewrite the script of legal practice in the Bank and articulate a new ideal-type for the international institutional lawyer: the creative and client-oriented 'how to' lawyer. The 'cultural' clash caused by this new professional prototype escalated in a discussion over the legality of the Bank's engagement with criminal justice and

[2] Dañino Interview. [3] *Ibid*. [4] *Ibid*.

[5] R. Dañino, 'The World Bank: A Lawyer's Perspective', Talk at Harvard Law School, 1 November 2004.

[6] On the extensive reformist ambitions of Wolfensohn, see G. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017).

[7] On the principled posture that Shihata cultivated and how it was frustrating those with an ambitious vision of reform, see Van Den Meerssche, *The World Bank's Lawyers*. I have also elaborated on this in D. Van Den Meerssche, 'Performing the Rule of Law in International Organizations: Ibrahim Shihata and the World Bank's Turn to Governance Reform' (2019) 32 *Leiden Journal of International Law* 47–69.

security sector reform in developing countries. For Shihata – and the conservative lawyers still clinging to his scriptures – this area was categorically off-limits. Several years before Dañino arrived, a legal memorandum had been drafted that argued that police power was an expression of the sovereign power of a state, and that, consequently, the financing of police expenditures would not be consistent with the organization's Articles of Agreement.[8] The World Bank, it underlined, should not be seen as a 'world government' with an unlimited mandate and should only engage with those tasks specifically included in its constituent charter.[9] This position epitomizes the 'old approach': its methodology is formalistic, its principled logic produces clear legal boundaries, and its legal conclusion urges rigidity and restraint. In this 'old approach', 'sovereignty' figures as a central pivot: since the World Bank is not a 'world government', as Shihata would consistently reiterate, its legal competences are both constituted and constrained by the codified exercise and expression of state consent.[10] This mode of legal practice reflects a familiar functionalist imaginary: the idea that the mandate and competences of the organization resulted from an act of attribution from a collective principal (the member states) to an agent (the World Bank) in the form of a multilateral treaty – the Articles of Agreement. In this sense, the principled policing of legal boundaries and the World Bank's prohibition to engage with 'politics',

[8] This opinion is cited as the conservative position to questions on criminal justice reform in A.-M. Leroy, *Legal Note on Bank Involvement in the Criminal Justice Sector*, 9 February 2012, para. 22 ('one traditional view in the Bank has it that criminal justice is … essentially an exercise of sovereign power, akin to the military, support for which will inevitably involve the Bank in making political judgments and therefore not a proper subject for Bank intervention'). Leroy's legal opinion, which explicitly draws on and incorporates the change in legal paradigm developed by Roberto Dañino, is available at https://documents.worldbank.org/en/publication/documents-reports/documentdetail/138001468136794111/legal-note-on-bank-involvement-in-the-criminal-justice-sector (accessed 7 November 2024).

[9] The trope of the 'world government' was recurrent in the writings of Ibrahim Shihata, who consistently invoked it to point out the functionalist limits of the organization's purposes and mandate.

[10] In prior writing, Geoff Gordon and I have qualified this as the international law's *oedipal* manifestation – its presence as prohibitive, principled constraint on behaviour. D. Van Den Meerssche and G. Gordon, 'A New Normative Architecture' – Risk and Resilience as Routines of Un-governance' (2020) 11 *Transnational Legal Theory* 267–299.

for Shihata, ultimately echoed the principle of state sovereignty and sovereign equality.[11]

This imaginary had limited not only the organization's engagement with criminal justice reform but also its involvement in situations of conflict and its interventions in the sphere of governance reform more generally. In the former case, Shihata had made an appearance before the Board, where he articulated a number of central legal principles, described as 'either self-evident or dictated by the Articles'.[12] 'The first principle', he stated, is that the World Bank 'is not a world government … with an unlimited mandate. It is an international organization with a mandate defined in its Articles of Agreement'.[13] In the latter case, the 'world government' trope returns: 'it is perfectly clear that the Bank's purpose is not to substitute itself for the peoples and governments of its borrowing member countries in deciding how these countries are to be governed. This might be a task for a world government, not the World Bank'.[14] Furthering the vision that the institution has limited competences, attributed in the Articles, Shihata argued that it 'cannot venture to act beyond its purposes and statutory obligations without the risk of acting *ultra vires*'.[15] The *ultra vires* concept is tied to 'the basic principle of *pacta sunt servanda*, the cooperative nature of the Bank and the consensual basis of its actions'.[16]

Importantly, however, Dañino ascribed the dire state of the legal department not to the application of particular theories or doctrines, but to the prevalence of a specific professional 'culture'. Shihata had,

[11] The political prohibitions clause, Shihata argued, linked with 'principles of equality of states and non- intervention in domestic affairs, enshrined in the UN Charter (Article 2(1) and (7)) and high in the minds of the original drafters of the Articles who envisaged universal membership' in the Bank. I. Shihata, 'The World Bank and "Governance" Issues in its Borrowing Members', in I. Shihata (ed.), *The World Bank in a Changing World – Selected Essays*, Vol. I (Martinus Nijhoff Publishers, 1991), 66–67.

[12] IBRD, *A Framework for World Bank Involvement in Situations of Conflict*, Transcripts of Board Meeting, 18 February 1997, http://documents1.worldbank.org/curated/en/225911521016631337/pdf/124249-TSCP-PUBLIC-03-Transcript-of-IBRD-IDA-Board-Meeting-of-February-18-1997-Redacted.pdf (cleared upon request) (accessed 7 November 2024), 35.

[13] *Ibid.* [14] Shihata, *The World Bank in a Changing World*, 80.

[15] *Ibid.*, 96.

[16] I. Shihata, 'Introductory Chapter: Interpretation as Practiced at the World Bank', in I. Shihata (ed.), *The World Bank Legal Papers* (Martinus Nijhoff Publishers, 2000), lvi.

indeed, consciously cultivated an 'attitude' or 'posture' of liberal legalism inside the department and the institution more generally. 'I believe in discipline', he noted in an interview at the turn of the millennium, '[a]nd, you have to respect the rule of law because you cannot advocate it and not respect it, internally'.[17] This was tied to a specific vision of the role of the lawyer in safeguarding the thriving and survival of the World Bank (and the system of global governance more broadly): '[i]gnoring [the limitations of the Articles] can work only to the detriment of the Bank and, in the long run, of all its members', Shihata responded to his critics at American Society of International Law in 1988.[18] This principled posture was not only instrumental in nature but also related to a specific social trusteeship ideal of the legal profession. Even as Director General at the OPEC Fund, Shihata noted: 'I did a great deal of the technical legal work myself, mainly out of concern for my own profession. I don't consider management a profession'.[19] This 'concern' for the international legal profession expressed itself in performances of detachment and an iconology of constraint: 'I have not acted simply as the spokesman for Management', he later recalled, 'I have acted as the spokesman for the law'.[20] This liberal promise of speaking truth to power, for Shihata, reflected varying 'cultures' in the 'attitude of lawyers depending on [their] background': the 'typical practicing lawyer in a law firm [who] is driven by the interest of the client', he argued, acts 'very different [to] a law professor who cares for what he thinks is legally correct'.[21] This 'care' and 'commitment' was portrayed to verge on heroism: 'not everyone has it in himself to [take these positions]', Shihata observed,

[17] Interview with I. Shihata, World Bank Oral History Program, 23 and 24 May 2000, 82.

[18] ASIL, *Proceedings of the 82nd Annual Meeting*, American Society of International Law, Washington D.C., 1988, 42.

[19] Interview with I. Shihata, World Bank Oral History Program, 11 May 1994, 13. On Shihata's professional path prior to joining the World Bank, see the marvellous account in U. Özsu, 'Hydrocarbon Humanitarianism: Ibrahim Shihata, "Oil Aid", and Resource Sovereignty' (2020) 23 *Journal of the History of International Law* 137–160.

[20] Interview with I. Shihata, World Bank Oral History Program, 23 and 24 May 2000, 15. *Cf*. D. Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, 1997), 3 (pointing to the 'iconology of constraint' at the heart of a particular strand of liberal legal culture).

[21] *Ibid*., 31. In this sense, Shihata consciously operated as a 'counterweight to management'.

'because many people want to continue in their job and feed their children which is legitimate, and I am not blaming them. Other people [referring to himself] are not like that, however … [T] hey feel strongly about principles and they act accordingly no matter what happens to them'.[22] This cultivated posture was, of course, not idiosyncratic but aligned with a particular ideal of international liberal legalism shared by many in Shihata's personal and professional milieu. It is reflected, for example, in Bedjaoui's identification of the 'frustrating tyranny of a certain praetorian subjectivism' at the 'margin of indeterminacy' – a 'crushing responsibility' he faced 'anxiously' and 'humbly'.[23] These specific professional ideals were reflected inside the World Bank not only in the restrictive reading of the Articles of Agreement, as pointed out earlier, but also in how the department was organized. There was a hierarchical culture where only Shihata formally published legal opinions or academic writings. These opinions entail thick webs of references (to *travaux préparatoires*, judicial precedents, VCLT provisions, or classic constitutional authorities) assembled in a dense textual form and legalist style. Management often lamented that Shihata drafted not legal opinions but constitutional edicts. When he was asked about his views on demands for decentralization, he cautioned that a 'lawyer in the field is not like a lawyer here because he doesn't have the same institutional support, and he may tend to become overwhelmed by the context of where he is'.[24] This, he feared, would promote a 'culture in the attitude of lawyers driven by the interest of the client', which was antithetical to his 'commitment' to the 'rule of law'.[25]

Upon Dañino's arrival, he (and those close to him) quickly recognized this professional culture – with its centralized structure,

[22] Interview with I. Shihata, World Bank Oral History Program, 23 and 24 May 2000, 15.

[23] See M. Bedjaoui, 'Expediency in the Decisions of the International Court of Justice' (2001) 71 *British Yearbook of International Law*, 3–4. Haskell sharply describes this cultivation of an internal posture of constraint as essential in neutralizing the political implications of legal discretion. Political choice, he observed, is hereby masked by a cultivated cosmopolitan sensibility of 'prudence'. See J. Haskell, 'A Case in the Politics of Form: Yearbooks of International Law' (2020) 50 *Netherlands Yearbook of International Law* 21–35.

[24] Interview with I. Shihata, World Bank Oral History Program, 23 and 24 May 2000, 31.

[25] *Ibid*.

principles borderlines, legalist style, and outdated social trusteeship ideals – as a 'conservative course' that was preventing the institution from being an innovator or pioneer, and from playing a leading role in non-traditional domains of development practice (such as criminal justice or security sector reform). 'I didn't want lawyers', Dañino later observed, 'who always said: "you cannot do this", but lawyers who could tell you how to do things in a legal way'.[26] Aware of the need for a professional change in the department, he recalls: 'I came up with a motto … going from the "why not" to the "how to" lawyer'.[27] The introduction of the 'how to' lawyer entailed a change in both the purpose and the instruments of legal practice. On the first level, the 'how to' lawyer, for Dañino, had to be a profoundly pragmatic and goal-oriented professional with the capacity to 'fix' problems and, in doing so, provide a 'value added' to the organization's mission.[28] This lawyer would be a welcome actor in the day-to-day operational processes of the Bank (as opposed to the 'why not' lawyer, who frustrates the operational process by producing rigidity and formal barriers). In order to achieve these goals, lawyers need to display 'creative thinking' and an ability to design 'tailor-made' solutions for problems at particular levels. On the second level, this change in the practice of lawyering demanded a new set of material tools of legal practice. In

[26] Dañino Interview. [27] *Ibid.*

[28] We see a resonance with Kratochwil's diagnosis of cultural changes in the international legal profession: 'Meanwhile [lawyers] claiming special expertise seem equally distanced from the ideal of the "moral politician" for whom Kant had rooted as they are from the professional or the *spoudaios* who was the ideal of the social trusteeship professionalism. As the new expertocratic professionals are caught up in an interminable slew of meetings and deadlines, they have little left for reflection and critical assessment … [C]omfort and confidence come from frantic activity … being part of "the team", and from reliance on routinized and deeply engrained techniques. Props like graphs, PowerPoints and best practices have then increasingly to substitute for reflective judgment, as work becomes more and more reified and subject to "scientific" (mostly quantitative) assessment … [T]he modern [legal] professional becomes a Macher (both in the sense of the homo faber and the Yiddish "fixer" who gets things done), since even in "third sector" organizations s/he has to be a "go-getter" and mission junkie rather than the helper of yore who lived his "calling".' F. Kratochwil, 'Spoudaios, Professional, Expert or "Macher"? Reflections on the Changing Nature of an Occupation', in W. Werner, M. De Hoon, and A. Galan (eds.), *The Law of International Lawyers: Reading Martti* (Cambridge University Press, 2017), 256.

this context, Dañino introduced a 'doctrine' for legal practice that would replace formal 'judgments' with a 'risk-analysis approach'. This transformation was associated with the introduction of a set of novel bureaucratic techniques, (visual) heuristics, and managerial expert committees geared towards a more efficient measurable evaluation and assessment of operational needs. Ingrained in the shift from the 'why not' to the 'how to' lawyer, in short, was the introduction of a deeply deformalized and multidisciplinary language of legality.

Capturing this shift in the 'culture', 'philosophy', and 'mindset' of lawyering, Dañino's legal opinion on criminal justice applied the 'risk-analysis approach' to matters of operational expansion.[29] Rather than a 'blanket prohibition' on engagement in this sector, the opinion argued, that for many of those projects of criminal justice reform that pose some risk of political interference, that risk could be 'managed'.[30] This 'risk management' approach relied on managerial processes of 'consultation' and 'systemwide diagnostic analysis' as well as the creation of an *ad hoc* 'special review mechanism'.[31] This departure from the Shihata doctrine demanded a completely different professional orientation and a new set of decision-making tools. The shift to 'risk management' implied a mode of evaluation that did not need to be 'binary' (legal/illegal): by adopting a new range of managerial heuristics – case-by-case diagnostics, tailored involvement, risk mitigation measures, and compliance tools built around indicators, safeguards, or monitoring devices developed by *ad hoc* task teams – the prohibitive binary approach that had marked Shihata's tenure would be traded for an enabling framework of contextual, non-binary risk assessment. The new policy was to identify the 'green lights, yellow lights and red lights' within those operational domains that Shihata had previously considered as part of the sovereignty function of the state and beyond the legal mandate of the Bank. The 'risk management approach' was

[29] R. Dañino, 'Legal Opinion on Bank Activities in the Criminal Justice Sector', 31 January 2006. This legal opinion is referenced and reproduced in Leroy, *Legal Note on Bank Involvement in the Criminal Justice Sector*. Leroy later noted that '[t]he 2012 Legal Note built on a 2006 Legal Opinion which, for various reasons, did not find full institutional acceptance, but which encapsulated the evolution in thinking, perhaps a bit too far "before its time"'. World Bank Legal Vice Presidency, *Annual Report FY 2013: The World Bank's Engagement in the Criminal Justice Sector and the Role of Lawyers in the 'Solutions Bank'* (Washington, DC: World Bank, 2013), 95.

[30] Dañino, *Legal Opinion on the Ibid. Justice Sector.* [31] *Ibid.*

framed as a 'process-based solution' instead of one that would categorize specific activities as permissible or impermissible. This radical change in approach expressed in this process-based solution would evolve into a new set of heuristics and bureaucratic techniques for legal practice: 'risk assessment templates', an online 'risk portal' for adaptation at the project level, 'rules-of-thumb', 'roadmaps', and 'colour codes' for risk evaluation and mitigation, as well as the reallocation of roles and responsibilities in 'special review mechanisms' built for 'dynamic' forms of 'risk management'.[32]

The heuristic of the 'how to' lawyer hereby appears as rationalization for a thoroughly deformalized mode of legal practice inscribed within bureaucratic processes of decision-making operating on the basis of risk scores, indicators, managerial mechanisms, informal guidelines, and exogenous forms of expertise (indeed, lawyers would not need to play a central part in the committee in charge of the risk management process). None of the aims sought to be achieved through these processes are immanent to the 'rule of law' itself: the teleology of the 'how to' lawyer is client satisfaction, the reduction of transaction costs, and managerial effectiveness. Yet, it is important to note that this transformation occurred in conjunction with a more 'holistic' approach to development issues – as expressed in the Comprehensive Development Framework of Wolfensohn and the diagnostic instruments this entailed – as well as the embrace of risk analysis in public governance more widely.[33] The shift in 'doing law' from the 'why not' to the 'how to' lawyer thus entailed a move away from the coordinates of public international law thinking (with the associated functionalist constraints of intergovernmental consent) to a mode of lawyering fine-tuned to the exigencies and ambitions of a growing global bureaucracy.

In trading practices of formal treaty interpretation and the policing of boundaries for such adaptive, creative, and client-oriented forms of risk management, Dañino asserted that lawyers could become 'agents of change', which would make 'the legal department relevant again' in

[32] On the introduction and effects of these decision-making tools, see Van Den Meerssche, *The World Bank's Lawyers*.

[33] See, for example, J. Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom' (2005) *Public Law* 512–549.

an institution marked by rapid operational expansion.[34] This ideal of change – and the deformalizing drift that it entailed – was inspired by a cosmopolitan vision of global governance no longer constrained by the shackles of sovereignty – a vision inspired by those reformers who, Dañino felt, 'really make a difference in the world'.[35] Cosmopolitan commitments were attuned to corporate scripts of legal practice in an effort to counteract the lingering constitutional sensibilities and prohibitive interventions by the remaining 'conservative' lawyers in the Bank.[36] As formal treaty interpretation was displaced by routines of risk assessment, some in the legal department protested and qualified these new standards as unlawyerly. While Dañino wanted 'jurisprudence' to be made 'at the level of the lawyers' in a decentralized and deformalized fashion, he experienced 'a lot of pushback inside the legal department itself': 'changing culture', a former lawyer close to Dañino observed, 'is just the most difficult thing in an institution like this'.[37] In navigating these tensions, Dañino immediately saw the need for internal administrative reform: he launched an 'aggressive decentralization strategy', created the 'legal and judicial reform unit' with an explicit operational mandate, put forward a 'simplification and streamlining' of 'legal services', changed the department's recruitment policies (targeting young lawyers who still 'wanted to change the world'), and distributed working papers, guidance notes, and brainstorming memos aimed at rewriting the scripts of legal practice, and persuading those still committed to old routines.[38]

By the time Dañino left the Bank, the standards of professional practice had significantly shifted. A new legal imagination had gained ground – a *bricolage* of reformist ambitions, managerial modes of public sector governance, corporate ideals of lawyering, and tropes of

[34] Dañino Interview ('lawyers can be agents of change or agents of stopping that change').

[35] *Ibid*. In the interview, Dañino referred to Kofi Annan (who just published his manifesto *In Larger Freedom*) as well as Mary Robinson and Louise Arbour. Yet, the leading example for Dañino was President James Wolfensohn himself.

[36] Referring to the 'very conservative lawyers' in the World Bank, Dañino observed: 'I'm just not that kind of lawyer. I don't believe in natural law … I think laws are made by humans and they always need to be adapted to changing circumstances … as things evolve in the world'. *Ibid*.

[37] *Ibid*.

[38] He already laid out many of these plans early in his tenure. See Dañino, 'The World Bank: A Lawyer's Perspective'.

moral universalism that were drawn from Dañino's prior professional life as politician, entrepreneur, and investment banker.[39] This new way of 'doing legal knowledge' had profound political effects: the role of the 'how to' lawyer was no longer to draw legal boundaries but to enable a smooth operational expansion, safeguard 'client satisfaction', and contribute to Dañino's ambitious agenda of global legal and judicial reform.[40]

How does change in international law occur? How does international law obtain meaning and political substance? How does it channel and mediate social and institutional relations? This account displayed that international law's politics and pathways to change are not (only) expressed in grand legislative interventions, not (only) in its semantic twists and turns or in its deeply embedded 'structural biases', not (only) in its theoretical reconfigurations, (neo)colonial codes, or the capricious choices of solitary giants. It is in the mundane and material – the risk-based colour code, the new professional prototype, the habits and routines, the tools and templates, the cultural criteria of competence – that we see the life of international law change course (a change, of course, interwoven with and interweaving broader patterns of socio-political transformation). As a skilled 'navigator', Dañino changed the course of law in the World Bank in precisely this manner; not as a doctrinal architect of international (institutional) law but through the gradual cultivation of a new material practice and professional performance.

## Pluralizing Our Ways of Seeing International Organizations (Law)

This brief vignette, I believe, signals several challenges of methodological and political significance to the discipline of international organizations law. While it shows salient changes in the orientation

[39] On the notion of law as *bricolage*, an experimental use of tools that are 'lying around', see M. Koskenniemi, *To the Uttermost Parts of the Earth Legal Imagination and International Power 1300–1870* (Cambridge University Press, 2021).

[40] This reference to Riles signals the importance of focusing on the material 'technicalities' of this change. See A. Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 *Buffalo Law Review* 973–1033. This resonates in the changing technical registers of lawyering as it transmuted into a managerial routine of risk analysis.

and organizational effects of legal labour, these changes prove difficult to articulate with reference to the doctrines, archives, and sources that shape this field of literature.[41] Oriented towards abstraction, comparison, or aspiration, intellectual interventions in international institutional law tend to underplay (or ignore) the importance of prosaic legal practices and the performative effects that they engender in concrete institutional spaces. I therefore subscribe wholeheartedly to this volume's aim of studying international organizations at 'sites of socio-technical struggles', and to pluralize and politicize the subjects, methods, and aims of international institutional law in a non-doctrinal fashion.[42] If we want to perceive and possibly problematize shifts in the 'cultural technique' of international law(yering) of the type sketched out earlier,[43] we need to redirect our attention to 'that which lies at the edges of conventional international legal sightlines',[44] as Johns has argued – to focus not on 'grand designs' but on 'lived practices and techniques'.[45] The brief empirical exploration in the previous section shows two particularly productive socio-legal entry points, I believe, for what such a 'turn to practice' could entail.

First, as Dañino's efforts clearly testify, I see a need to focus on the changing 'role of the lawyer' and the professional scripts that shape how legal norms are being enacted.[46] Koskenniemi's indeterminacy

[41] *Cf*. Sinclair, *To Reform the World* (on the limited selection of materials in international organization law). This archive is described as 'the treaty constituting a particular IO, the rules of procedure of individual organs [and] a number of decisions and opinions of the ICJ' in J. Von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' (2008) 9 *German Law Journal* 1939–1964.

[42] *Cf*. N. Mansouri and D. R. Quiroga-Villamarín, 'Editorial Introduction: Seeing International Organizations Differently' in this volume.

[43] *Cf*. C. Vismann, *Files – Law and Media Technology* (Stanford University Press, 2008) (on law as a 'cultural technique').

[44] F. Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2012), 187.

[45] A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011), 246. *Cf*. G. Sullivan, '"Taking on the Technicalities" of International Law – Practice, Description, Critique: A Response to Fleur Johns' (2017) 111 *AJIL Unbound* 181–186.

[46] The need to devote critical attention to the 'changing role of the legal "professional"' is signalled also in Kratochwil, *Spoudaios, Professional, Expert or "Macher"?* This changing role of the lawyer within the World Bank would later be consolidated by General Counsel Anne-Marie Leroy. D. Van Den Meerssche, Deformalising International Organizations Law: The Risk

thesis, which strongly influenced the trajectory of 'critical' international law, points to the 'gap' between 'legal materials (rules, principles, precedents, doctrines) and the legal decision'.[47] It is in this 'gap' – and not in the substance of the (inherently indeterminate) legal institution – that the 'politics' of international law is purportedly performed.[48] For Koskenniemi, this indeterminacy 'gap' is a space of freedom and responsibility: if every opposing political position can plausibly be articulated in the language of international law, he argues, any legal 'choice will be just that – a "choice" that is "grounded" in nothing grander than a history of how we came to have the preferences that we have'.[49] Yet, while this view of the 'law-applier' as the final site of normative agency, imaginative possibility, and political responsibility might be suitable for the 'solitary giants' on which Koskenniemi's historical writings tend to focus, it misses out on the shared social practices that constitute and condition the meaning of these interventions.[50] If we want to situate the 'politics' of law(yering) in international institutions, it is necessary to focus on the 'social grammar' of legal practice – on the professional roles, institutional scripts, and 'feel for the game' that shape 'the conditions of … law's production and existence',[51] and determine what can be qualified as a 'competent performance'.[52] This is reflected in the 'culture' that Dañino encountered upon his arrival and which he sought and struggled to change – understanding that

Appetite of Anne-Marie Leroy (2023) 34 *European Journal of International Law* 141.

[47] I am referring to what Koskenniemi has himself described as his 'weak' critical thesis. M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument (Re-issue)* (Cambridge University Press, 2005), 600ff.

[48] *Ibid*., 601. [49] *Ibid*., 615.

[50] *Cf*. F. Megret, 'Thinking about What International Humanitarian Lawyers 'Do' – An Examination of the Laws of War as a Field of Professional Practice', in W. Werner, M. De Hoon, and A. Galan (eds.), *The Law of International Lawyers: Reading Martti* (Cambridge University Press, 2017), 267ff (on Koskenniemi's focus on 'solitary giants').

[51] *Ibid*., 274–275.

[52] F. Kratochwil, *The Status of Law in World Society: Meditations on the Role and the Rule of Law* (Cambridge University Press, 2014), 53 (on how the study of 'competent [legal] performance[s]' avoids 'endless rounds of deconstruction'). This argument gives sociological substance to the notion of 'structural bias' invoked by Koskenniemi as the 'strong critical thesis'.

any 'choice' that he would make in defiance of these professional standards would lack traction.[53]

In short, if the life of international law is not exhausted by its formal grammar (but shaped by a much thicker 'social grammar'), critical interventions should focus not only on the biases of solitary 'people with projects' but also on how their professional postures and routines – their modes of 'doing' legal knowledge – are shaped by shared criteria of competence.[54] At the pivotal juncture in legal practice described earlier, we observe precisely this struggle between competing actors to assert proper social criteria of competence in the practice of lawyering. The contestation voiced by the 'conservative' lawyers in the department was not that the legal claims in Dañino's opinion were flawed (according to internal standards of legal validity), but that the adopted way of reasoning was 'unlawyerly' – that it contradicted the immanent 'rules of the game' that structured their professional activity. What we witness at this juncture is not a clash of particular legal interpretations or a set of attempts to alter the legal norms through which the institution is governed, but a contentious encounter between diverging 'communities of practice' who compete over the culture of norm-use in an institutional setting.[55] It is in these

[53] The notion of 'culture' employed here can be perceived as a set of criteria on what constitutes a competent performance. This can be theorized as a common 'social grammar' (along Bourdieusan lines) or a *Lebensform* – a shared 'feel for the game' (along the lines of Wittgenstein's pragmatism). These various strands of theorizing resonate with Mégret and Kratochwil. *Cf*. Kratochwil, *Status of Law*, 58: 'Against the theoretical ideal that looks for external factors causing actions, Wittgenstein stresses practice; against the notion of concepts fitting objects, he emphasizes their "use" in language. But "use" depends on a "form of life" and on publicly shared criteria or grammars [that] establish our proper use of the terms.'

[54] *Cf*. T. Aalberts and I. Venzke, 'Moving Beyond Interdisciplinary Turf Wars – Towards an Understanding of International Law as Practices', in J. d'Aspremont, T. Gazzini, A. Nollkaemper, and W. Werner (eds), *International Law as a Profession* (Cambridge University Press, 2017), 307 ('[w]e suggest thinking of international law as a practice that contains within itself the yardstick of what counts as … a "competent performance"').

[55] I am referring here to the argument of Brunnée and Toope, who define 'communities of practice' as a collective of individuals who, 'through engagement in a shared domain, develop a shared repertoire of resources, including cases, stories, tools, vocabularies, and ways of addressing recurring problems'. See J. Brunnée and S. Toope, 'Interactional International Law and the Practice of Legality', in E. Adler and V. Pouliot (eds.), *International Practices* (Cambridge University Press, 2011).

shifts in the logic of practice and the social grammar shaping the professional performance of international law, that we can observe and critically evaluate changes in international organizations law. The account provided earlier, in this sense, ties in with wider professional transformations at the intersection of cosmopolitan enthusiasm and corporate dynamism that demand critical scrutiny. It is precisely in these professional shifts, I argue, that we see the advent of a neoliberal legal practice – a disenchanted register of expertise (as expressed in forms of 'risk analysis') attuned to the exigencies of competitive market behaviour.[56]

Second, inspired by Science and Technology Studies (STS) and Actor-Network Theory (ANT), the 'turn to practice' can be enriched by exploring the technical and material qualities of lawyering, and showing how objects, rules-of-thumb, textual references, and templates of analysis or documentation mark and mediate the politics of international law.[57] In tracing the messy practices of relationality, translation, and materiality through which law is composed – the string of 'people and things' that it assembles – we can find new pathways for analysis and critique.[58] Recent writing by Riles, Johns, Hohmann, and others displays the rewards of a relational, materialist approach to the

[56] I have elaborated more on this in D. Van Den Meerssche, 'Governmentalities of Disorder' (2024) *Völkerrechtsblog*, https://voelkerrechtsblog.org/governmentalities-of-disorder/ (last accessed 7 November 2024). This observation aligns with the argument made in A. Lang, '"Global Disordering": Practices of Reflexivity in Global Economic Governance' (2024) 35 *European Journal of International Law* 93.

[57] I see this orientation towards non-human agency – beyond the image of international law as a discursive formation (a 'grammar') – to be at the vanguard of critical writing. Various strands of theory enable this disruption of the mind/matter, culture/nature divide that shapes the modernist terrain of international legal thinking – from Foucauldian *dispositifs* or Latourian assemblages to new materialist perspectives on 'vibrant matter'. What could critique look like if we started not with Kant and Hegel but Whitehead and Spinoza? For a radical account on matter/meaning as (re)configuring of the 'human' itself, see Z. I. Jackson, *Becoming Human – Matter and Meaning in an Antiblack World* (New York University Press, 2020).

[58] I am inspired here by Barad's 'agential realist elaboration of performativity', which 'allows matter its due as an active participant in the world's becoming'. In K. Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007), 136 and 334 ('relata do not pre-exist relations'). See also J. Hohmann, 'Diffuse Subjects and Dispersed Power: New Materialist Insights and Cautionary Lessons for International Law' (2021) 34 *Leiden Journal of International Law* 585;

study of legal expertise and authority as outcomes of 'how heterogeneous practices and techniques are woven together in ways that produce new relations, actors, and forms of power'.[59] If we want to grasp the changing politics of law in the brief vignette set out earlier, for example, we should appreciate how the material templates of risk management shape what matters and what is excluded from mattering.[60] How does the material shift from the textual templates of legal judgment to the adaptive managerial metrics and colour codes of 'risk analysis' alter the law's promise as a form of constraint or contestation?

## 'Toward the Gathering'

These methodological invitations reflect a radical approach to what a 'turn to practice' could entail – an approach where practices are not studied as specific instantiations of the law (subject to positivist empirics) but as performative enactments where law's boundaries are drawn and its politics enacted. Yet, the invitation to study professional scripts and material routines is aimed not only at enriching our methodological approach to international law as a specific cultural technique, but also at offering different entry points into the vexed question of what constitutes 'critique'. I expect this point to be somewhat polemical. If anything, would the endless tracing of networks and translations not erode the potential for a 'critical' intervention?[61] Is Latour's flat relational ontology – his scathing take on 'structuralism' and 'critical' sociology – not the epitome of postmodern delight and depoliticized drift?[62] Where do we find sites of political agency or intervention in these layered networks of material entanglement?

D. Van Den Meerssche, 'The Multiple Materialisms of International Law' (2023) 11 *London Review of International Law* 197.

[59] Sullivan, *Practice, Description, Critique*, 183. *Cf.* Riles, *A New Agenda for the Cultural Study of Law*; Riles, *Collateral Knowledge*; M. Valverde, 'Jurisdiction and Scale: Legal "Technicalities" as Resources for Theory' (2009) 18 *Social & Legal Studies* 139–157; F. Johns, 'Data, Detection, and the Redistribution of the Sensible in International Law' (2017) 111 *AJIL* 57–103.

[60] *Cf.* D. Gandorfer, *Matterphorics: On the Laws of Theory* (Princeton University PhD Thesis, 2020).

[61] Yet, in her plea for more descriptive work – to study 'surfaces' rather than 'depths' – Orford finds 'critical' potential precisely in such 'descriptive' work. See A. Orford, 'In Praise of Description' (2012) 25 *LJIL* 609–625.

[62] Some Marxists certainly think so, though, as Haraway noted, often by misconstruing his interventions. See R. H. Lossin, 'Neoliberalism for Polite

One particularly salient strand of 'critique', especially in work on the law of international institutions, situates the politics of the 'international' in the 'structural bias' – the 'deeply embedded preferences' – of specific regimes.[63] Such 'biases' would explain the consistency in law's distributive outcomes despite the inherent indeterminacy of its grammar. The role of the 'critic', from this vantage point, is both to detect the tectonic 'structural' forces that determine law's direction, and to diagnose their historical origins and political pathologies. In this vein – and to a great effect – scholars have identified the 'deeply embedded' neo-colonial hierarchies and innate logics of 'liberal reform' that are inscribed in the law of international organizations.[64] Yet, as the 'old nemeses' of critical international law have 'learned some new steps',[65] as Johns observed, perhaps we might revisit Latour's polemical question: 'has critique run out of steam?'[66] What would it mean to describe Dañino's efforts in terms of 'deeply embedded' causal forces hidden 'behind' or 'underneath' his expressed motives?[67] What do we learn about law's changing composition and performative politics by 'rel[ying] on players or phenomena somehow already present in the interstices of history' – do we thereby not 'end up assuming exactly what needs to be explained'?[68] Would we not subtract from the

Company: Bruno Latour's Pseudo-Materialist Coup', *Salvage #7 – Towards the Proletarocene*, 2020 ('[i]f neoliberalism were a Platonic Republic, Latour would likely be its philosopher-king'); The Dig Radio, 'Cyborg Revolution with Donna Haraway', 2 May 2019, www.thedigradio.com/podcast/cyborg-revolution-with-donna-haraway/ (last accessed 22 September 2021).

[63] *Cf*. Koskenniemi, *From Apology to Utopia*, 607ff.

[64] *Cf*. S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); Sinclair, *To Reform the World*.

[65] F. Johns, 'From Planning to Prototypes: New Ways of Seeing Like a State' (2019) 82 *Modern Law Review* 834 ([t]hose old nemeses … of international legal scholarship … have learned some new steps, And in so doing … may quite possibly have blunted or outrun the standard tools of critical, progressive, and reform-minded international lawyers').

[66] B. Latour, 'Why Has Critique Run out of Steam? From Matters of Fact to Matters of Concern' (2004) 30 *Critical Inquiry*, 247 (aiming to 'associate the word *criticism* with a whole new set of positive metaphors, gestures, attitudes').

[67] *Ibid*, 229 (describing this critical gesture as the 'wheeling of causal explanations coming out of the deep dark below').

[68] J. Haskell, 'The Choice of the Subject in Writing Histories of International Law', in J. D'Aspremont, T. Gazzini, A. Nollkaemper, and W. Werner, *International Law as a Profession* (Cambridge University Press, 2017),

multiplicity of agential elements in law's emergence – from the effects it engenders and the networks that it ties together – if we portray the legal form merely as the passive carrier for forces emanating elsewhere?[69] If we, yet again, reduce law's institutional role to being the bearer of static neoliberal projects? Can law be more than merely a clumsy disguise? The critic more than an archaeologist of powerful pre-existing social, structural, deeply embedded forces?

What might 'critique' become if, in the words of Levi and Valverde, we were to trade the 'abstracted view of "structure" [for] the empirical work of studying action, actors, communication, imitation and translation, networks, knowledge flows and the continual process that constructs society itself'?[70] If we associated the 'critical' gesture with 'multiplication, not subtraction' – with more, not with less?[71] If the 'critic' were not 'the one who debunks, but the one who assembles' – 'not the one who lifts the rugs from under the feet of the naïve believers', but who offers 'arenas in which to gather'?[72] If the direction of 'critique' were not away from its objects (a flight into their 'social' or 'political' conditions of possibility) but 'toward the gathering'?[73] What might we see and what might become possible if salient forces (empire, capitalism, patriarchy, etc.) were not wielded as causal explanations lingering in the deep down below – as 'social' explanations wielded in the practice of 'critique' – but traced as material assemblages that are entangled with and extended by varying forms of legal labour (which are themselves relationally enacted through evolving cultural scripts, institutional forms, and mundane bureaucratic techniques)?[74] Perhaps it is in tracking and tracing, in mapping and multiplying, and not in

264–265. This can also be expressed as privileging inductive over deductive thinking, as argued in M. Halme-Tuomisaari, 'Keeping Up Standards for a Better World: Anthropological Alternatives to the Study of International Organisations', in this volume.

[69] B. Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, 2005), 7 ('[i]n such a view, law … should not be seen as what should be explained by "social structure" in addition to its inner logic; on the contrary, its inner logic may explain some features of what makes an association last longer and extend wider').

[70] R. Levi and M. Valverde, 'Studying Law by Association: Bruno Latour Goes to the Conseil d'Etat' (2008) 33 *Law and Social Inquiry* 807.

[71] Latour, *Why Has Critique Run Out of Steam*, 248.

[72] *Ibid*., 246.

[73] *Ibid*.

[74] Such a relational, materialist approach aligns with splendid work on the infrastructural mediation of global capitalism. L. Khalili, *Sinews of War and Trade Shipping and Capitalism in the Arabian Peninsula* (Verso, 2021).

the stylized posture of scepticism that spaces of action and resistance open and that 'critique' might regain potential?[75]

This call to dwell on relational entanglement – to 'stay with the trouble' in Haraway's terms – might trouble not only structuralist modes of 'critique' but also our commitments to the concept of 'law' as a stable social category. Perhaps to some disciplinary dismay, inquiries starting from materiality itself, as Pottage argued, might very well 'lead to the dissolution of law as a social instance'.[76] The aim is not to materialize law but to see how legal forms are made, displaced, or metabolized in emergent *dispositifs*.

[75] Perspectives on new materialism and relational ontology in feminist science studies, critical black theory, Anthropocene studies, and the digital humanities provides inspiring insights into the problem and potential of 'critique' along these lines. *Cf*. Barad, *Meeting the Universe Halfway*; D. Chandler, *Ontopolitics in the Anthropocene: An Introduction to Mapping, Sensing and Hacking* (Routledge, 2018); L. Amoore, *Clouds Ethics* (Duke University Press, 2020).

[76] A. Pottage, 'The Materiality of What?' (2012) 39 *Journal of Law and Society* 179–180.