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The Judicial Manufacturers of International Law

Florian Grisel

TOMMASO SOAVE, *The Everyday Makers of International Law: From Great Halls to Back Rooms*. Cambridge, UK: Cambridge University Press, 2022.

INTRODUCTION

International legal cases attract considerable public attention, but very little is known about the ways in which these cases arise and even less about how they are decided. Issues of access and the sensitivity of the cases heard by international courts help explain the relative dearth of scholarship on these topics. Tommaso Soave contributes to lifting these obstacles by taking a deep dive into the inner workings of the international judicial community, focusing on the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR), the World Trade Organization (WTO), and investment-state tribunals. With deftness and care, Soave works through the main stages of several cases brought to each of these institutions, from the preparation (which he calls “the lyophilization of life”) to the deliberations and the rendering of the judgment. Soave writes beautifully, captivating the reader with myriad details and stories. Only an author with a similar blend of practical experience (as an attorney at a law firm and a dispute settlement lawyer at the WTO Secretariat) and academic expertise could reveal the life of international courts in such detail.

The first part of this essay sketches the important contribution that *The Everyday Makers of International Law* makes to the existing scholarship on international courts and the significance of its conclusions for analyzing them. It then concentrates on the challenges raised by the empirical study of international courts, before highlighting the tension between literary narratives and social science methods.

ENTERING THE BACK ROOMS OF INTERNATIONAL LAW

In casting light on the inner workings of international courts, *The Everyday Makers of International Law* is a welcome addition to the existing scholarship on international

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courts. As Soave correctly points out, international courts are still shrouded in secrecy, which prevents outsiders from fully understanding how they operate. Soave makes the most significant contribution so far to lifting this veil, and his book provides material that will be tremendously useful not only to sociolegal scholars with an interest in international law, but also to practitioners who wish to understand how the courts before which they plead cases actually function.

Other scholars have already provided accounts of the life of international courts and Soave's book complements them in several ways. These accounts usually focus on individual case studies, presumably for reasons of access that will be discussed in more detail below, and they highlight the roles played by the most visible actors in court proceedings, namely judges, prosecutors, and lawyers. For instance, Hagan's pioneering work documents in considerable detail the investigations and proceedings of the International Criminal Tribunal for the former Yugoslavia, focusing on the central role played by its chief prosecutors in the successful indictment of Slobodan Milosevic (Hagan 2003). From a more doctrinal perspective, Thirlway provides an insider's view of the functioning of the ICJ, with a particular focus on its judges and registry members (Thirlway 2006, 2016). Soave's book implicitly draws on this existing scholarship, while adding to it in at least two respects.

A first key feature of the book is its focus on actors who are generally neglected by scholars of international courts. In accordance with a sociolegal tradition that gives a voice to marginalized actors, Soave shines the spotlight on those working in the shadows of international courts, namely the legal officers, judicial assistants, clerks, and "administrative" secretaries who bear the burden of the cases without (always) being given credit. As Soave points out, these actors are of critical importance, but their role has been neglected in the existing literature. He refers to a "conspiracy of silence" that surrounds the work of the assistants and registry members of international courts (139), as well as the power plays that international adjudicators engage in when they deny or downplay the assistance provided by these actors (139). Soave is right to characterize these dynamics as "giv[ing] prominence to certain actors while relegating others to marginality" (138).

Another distinguishing feature of the book is its longitudinal approach. By placing different courts and tribunals on a level playing field and shifting the focus from one institutional setting to another, Soave makes the "invisible college of international lawyers" (Schachter 1977) visible, highlighting similarities between these different institutions when it comes to social and educational backgrounds. Soave not only points to interesting continuities in the social dynamics of these courts (e.g., the fact that their members share a certain educational background), but also tracks the development of cases before these courts from a multiplicity of standpoints (those of the lawyers and the judges, but also of the registry members or clerks working with the judges) and across time. This longitudinal approach lends the book a particular complexion, as it traces the development of imaginary cases from the lawyers' office to the courts (calling to mind Latour's focus on the "file" in what he calls the "fabrique du droit"¹ [Latour 2010]).

1. The translation of "fabrique du droit" into "making of law" does not fully capture the complex meaning of the word "fabrique," which encompasses the action of "making" but also the places where the "making" is done (the "factory" or "manufacture").

GATHERING DATA ON THE INTERNATIONAL JUDICIARY

Like any ambitious book, *The Everyday Makers of International Law* raises certain challenges that will be further explored below. One of these challenges concerns the difficulty of gathering data on international courts. The book draws on a combination of three main data sources to substantiate its conclusions: the first and (arguably) most significant of these is the author's own experience at the WTO. The second source is secondary material, including policy papers and scholarly articles written by practitioners of international law. As the author acknowledges, these texts display limitations, because the writings of practitioners are often mired in "selective, uncritical, and self-congratulatory" details (xiv). For this reason, Soave supplements this documentary evidence with data from a third source, namely a series of interviews with "private attorneys, clerks, and court bureaucrats" at the ICJ, the ECtHR, the IACTHR, and investor-state proceedings. He mentions seventeen "prospective interviewees" whom he "reached out to" (xiv). The limited size of this sample could potentially be explained by the "rule of silence" that practitioners of international law often impose on themselves on legal grounds (i.e., confidentiality or ethical duties deriving from professional codes of conduct) or as a result of habit and social convenience.

Another related challenge concerns the composition of this sample. Soave states that his "ideal candidates" to interview were those with "direct knowledge of the inner processes of adjudication" who were "willing to talk about them openly" (xiv), which arguably led to the overrepresentation of early- and mid-career practitioners (two-thirds of the "prospective interviewees," according to the author). This sample may explain a shortcoming that Soave bemoans, namely the complacent and self-congratulatory tone frequently adopted by international lawyers when describing their work. For instance, reference is made to: "a small elite of academics hailing from the most prestigious law schools of Europe and the Americas" (25); a counsel's "inferiority complex due to a lack of academic activity" (55); the "fancy Ivy League training" of one of the book's characters (194); the clerks and bureaucrats having been "top students at their respective universities" (214); a fictitious arbitrator being a "very smart man" (302); and so forth.

Another consequence is that, by appropriating this terminology, the book promotes the narrative of international law as being constructed by elites who leverage their human, social, and financial capital (usually acquired within national settings) to prevail in the international sphere. Because this narrative focuses on elite members and their influence on the forms assumed by international adjudicatory regimes (Soave 2022, 11–12), it does not fully explore why—as the author claims—lower-level bureaucrats play such an important role in the development of international law. Is it simply because they perform the tasks that more senior actors delegate to them (as the character "Sophie" suggests)? Is it because they are hoping to graduate to a more senior role by carrying out these tasks (as "Carlos" suggests)? Is it because they add diversity to the "invisible college of lawyers" that underpins the development of international law? Or is it because their very marginality determines, in some sense, the contributions that they *can* make to the development of international law?

In contrast to this approach, there exists another, competing framework that casts light on the marginalized legal actors who, because of their unique position at the intersection of social systems, manage to create new arenas of international governance (Grisel 2017, 2022). A key dimension of the puzzle may be the unique position of these marginalized actors at the intersection between several different social systems, giving them a privileged opportunity to build a new system that is not specifically grounded in the social fields from which (national) elites typically derive their legitimacy. Researching the lives of these marginalized actors poses significant challenges for researchers, as it requires access to data that is often dispersed across various jurisdictions, if it is not lost or unavailable to the public (Grisel 2022, S61).

LITERARY NARRATIVES AND SOCIAL SCIENCE METHODS

Another intriguing feature of the book is the alternation between analytical narrative and fictional style. The recourse to fiction is surely refreshing given the continued dominance of doctrinal textbooks in the field of international law. In the preface, Soave justifies his use of fiction with the claim that he “wanted to pepper the action with a bit of irony and *souplesse*,” by contrast with “[t]he gaze of the social scientist [that is] driven (and constrained) by the availability of empirics . . .” (xvii). His intention is to distinguish his own work from the “social-legal classics” that are “masterful but somehow burdened by their own weight” (xvii).

Among other works, Soave cites Bruno Latour’s ethnography of the *Conseil d’Etat* to justify his method (xvi). In fact, Latour “encrypt[ed] the numbers of the cases, the names of the characters, the dates, and even the numbers of the observed sub-sections” to preserve a “strict confidentiality” (Latour 2010, 23). He anonymized his data in order to use “fifteen months of ethnographic work spread over four years to enjoy privileged access to the work of the Council” (Latour 2010, 6). Similarly, the anonymization of almost three hundred interviews by Yves Dezalay and Bryant Garth in *Dealing in Virtue* (also cited by the author in support of his approach) differs from the transformation of the narrative into a *fictional* one. Soave argues that readers “trust” Latour, Dezalay, and Garth with the data that they have anonymized (xvii). This is entirely correct, but it is also important to keep in mind that the mass of data gathered by these authors was quite significant (and therefore induced that level of trust).

The use of fiction as a narrative device reminds the reader of a time when “social novelists” explored the lives of fictional characters to describe their contemporary societies. In the foreword to the *Human Comedy*, for instance, Balzac explains why his study of “Society” (the capitalized word in some sense anticipates Durkheim’s subsequent analyses) identifies “social types” that are personified through different characters (Balzac [1842] 1999, 22).² These types are, according to Balzac, the social equivalents of “species” in the field of “zoology” (Balzac [1842] 1999, 23). By setting these characters in motion, Balzac purports to draw a “vast picture of society” (Balzac [1842] 1999, 30). Similarly, Zola (whose prominent work *The Rougon-Macquart* bears the following subtitle: “Natural and Social History of a Family under the Second

2. The translation ignores the capitalization in the original text.

Empire”) strives to apply scientific methods to the literary description of society (Charle 2003). In *The Experimental Novel*, Zola draws an explicit link between his use of fiction as a conduit for the description of society and the positivist theories that were thriving at the time (as represented by authors such as Auguste Comte and Claude Bernard) (Zola 1893). Social novelists whose work coincided with the rise of positivism paved the way for the pioneers of the social sciences, such as Karl Marx, Emile Durkheim, and Max Weber.³ As the social sciences arose as a discipline, however, the genre of “naturalistic novels” or “social novels” disappeared almost entirely, along with the potential overlaps between literary fiction and social scientific work.⁴ The reasons for this are mainly methodological: as social scientists struggled to identify sound methodologies allowing them to study society, they progressively dismissed the “exorbitant claim of the quasi-sociologist” underlying “social novels” (Charle 2003).

However, one should not brush aside the use of literary narratives too rapidly. In fact, one of the most pressing issues of sociolegal scholarship is giving voice to “failed,” “deviant,” and “marginalized” individuals and entities. In this context, scholars have argued that innovative modes of scholarship, such as group biographies, could “give voice to those who have not been heard” (Sugarman 2015). Taking this idea a step further, one could argue that fiction can fill silences and secrecy in the empirical record when marginalized actors are involved. This possibility raises formidable scientific challenges, as creative writing can simply reflect the preconceived ideas and biases that the early social scientists were (perhaps naively) so keen on discarding (Durkheim [1895] 1982, 72). Where should the line be drawn? Fictionalized writing can be a useful tool to describe the lives of marginalized communities if this fictional account is grounded in a solid empirical record (in which case it becomes a work of nonfiction based on anonymized data). In this regard, Soave could have drawn inspiration from recent scholarly work on criminal gangs. For instance, in *Mafia Life*, Federico Varese has woven together various data sources (interviews, police records, investigative reports, and published confessions) to “piece together a story that is plausible and consistent with most sources” (Varese 2017, 7). Another example is Sudhir Venkatesh’s *Gang Leader for a Day*, which achieves similar objectives by disguising “people, places, and institutions [that] are real; . . . not composites, and . . . not fictional” (Venkatesh 2008, 285; Venkatesh 2006). The fine line is drawn between the anonymization of data, on the one hand, and the creation of new data (no matter how realistic), on the other.

None of this detracts, however, from the book’s intrinsic qualities. By casting light on the forgotten actors of international legal scholarship, this volume not only plays an important informative function, but also serves as a learned foundation upon which further scholarship will hopefully build. Future research could explore, for instance, the ways in which these forgotten actors have paved the way for more established members

3. A similar trajectory, albeit less linear, occurred in the United States (Hegeman 2014, 405).

4. This tradition has left traces in the literary genre. For instance, Svetlana Alexievich (Nobel Prize in Literature 2015) has created a “literary non-fiction genre” based on interviews. See “Svetlana Alexievich: Biographical.” *The Nobel Prize*. Accessed April 18, 2023. <https://www.nobelprize.org/prizes/literature/2015/alexievich/biographical/>.

of elite communities, as was the case in international arbitration (Grisel 2017), or how these marginalized actors have been instrumental in promoting the growth of a global legal culture that sustains the development of international law (Campbell 2013).

REFERENCES

- Balzac, Honoré de. *The Human Comedy: Introductions and Appendix*. Champaign: Project Gutenberg, (1842) 1999.
- Campbell, Kirsten. "The Making of Global Legal Culture and International Criminal Law." *Leiden Journal of International Law* 26, no. 3 (2013): 155–72.
- Charle, Christophe. "Le romancier social comme quasi-sociologue entre enquête et littérature: le cas de Zola et de L'Argent." In *L'Écrivain, le Savant et le Philosophe: La Littérature entre Philosophie et Sciences Sociales*, edited by Eveline Pinto. 2003. <http://books.openedition.org/psorbonne/19798>.
- Durkheim, Emile. *The Rules of Sociological Method*. New York: The Free Press, (1895) 1982.
- Grisel, Florian. "Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession." *Law & Society Review* 51, no. 4 (2017): 790–824.
- . "The Centres and Margins of Transnational Law: Potential Developments and Methodological Challenges." *Journal of Law and Society* 49, Suppl. 1 (2022): S51–S63.
- Hagan, John. *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*. Chicago: University of Chicago Press, 2003.
- Hegeman, Susan. "The Novel and the Rise of Social Science." In *The Oxford History of the Novel in English: Volume 6: The American Novel 1879-1940*, edited by Priscilla Wald and Michael A. Elliott, 405–22. Oxford: Oxford University Press, 2014.
- Latour, Bruno. *The Making of Law: An Ethnography of the Conseil d'Etat*. Cambridge, UK: Polity Press, 2010.
- Schachter, Oscar. "The Invisible College of International Lawyers." *Northwestern University Law Review* 72, no. 2 (1977): 217–26.
- Soave, Tommaso. "The Two Faces of the Invisible College: Cooperation and Competition in the International Judicial Community." European University Institute Working Paper. 2022.
- Sugarman, David. "From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-Legal Scholarship." *Journal of Law and Society* 42, no. 1 (2015): 7–33.
- Thirlway, Hugh. "The Drafting of ICJ Decisions: Some Personal Recollections and Observations." *Chinese Journal of International Law* 5, no. 1 (2006): 15–28.
- . *The International Court of Justice*. Oxford: Oxford University Press, 2016.
- Varese, Federico. *Mafia Life*. London: Profile Books, 2017.
- Venkatesh, Sudhir. *Off the Books: The Underground Economy of the Urban Poor*. Cambridge, MA: Harvard University Press, 2006.
- . *Gang Leader for a Day*. New York: Penguin Books, 2008.
- Zola, Emile. *The Experimental Novel and Other Essays*. New York: The Cassell Publishing Co., 1893.