Introduction: On the Philosophy of International Criminal Law

Three Main Functions of Philosophy

As a vehicle for legal doctrine and general jurisprudence, and, where international criminal law is addressed as a ‘discrete province’ of international law, special jurisprudence, philosophy plays a pivotal role. Without philosophy, legal doctrine and general jurisprudence would be primitive and potentially dangerous enterprises by virtue of being too far removed from the ‘Source of Wonder’, that is, the kind of knowledge-seeking questions that are motivated by a sincere wish to understand things, rather than to cover or conceal them, or even attempt to deny them. In contradistinction to the authentic and genuine desire to learn – which, if expectations are not met, is supplemented by an effort to better or improve things, be they actually existing phenomena or prevailing perceptions about these – the unphilosophical mindset reigns in an epistemological frost-zone. This is to say that the unphilosophical mindset is ultimately indifferent about whether claims are well-founded or ill-founded. It is driven by an ambition that, in one important sense, sacrifices the truth. Instead of acquiring insights and learning lessons, the primary desire is to proclaim or declare something for the sake of securing a particular interest. If such an attitude, such a ‘set mind’, is not allergic to propositions, to statements that can be tested for their truth-value or, where claims entail an intersubjective basis for consensus, rationality, it is definitely out to stop the process.

1 Samantha Besson and John Tasioulas (eds.), The Philosophy of International Law (Oxford University Press, Oxford, 2010), pp. 1–2. Since the philosophy of international law can also be ‘envisaged as a branch of Special Jurisprudence’, the general/special jurisprudence distinction has no real pull as a demarcation tool and, consequently, the text only refers to general jurisprudence. Ibid., p. 2.

2 Talk about the ‘Source of Wonder’ is a typical starting point for philosophers who try to explain their own discipline. I take this opportunity to thank Bronik Matwijkiw for his valuable input regarding the various functions of philosophy in the context of international criminal law.

3 Given that the claims are unsubstantiated, they technically amount to propaganda. In the context of international criminal law, realpolitik is one example of the implied kind of
of questioning because this leads to discussion and argument. As ingredients of philosophical reasoning, philosophers do not, of course, fear discussion and argument, or the ‘endless quibbling’ that their opponents may accuse them of. That said, philosophers are not typically amused by useless rhetoric – no matter what the myths about them may (falsely) say. Philosophers do not scrutinise the pros and cons of a given matter merely to satisfy their own vanity or to gain their audience’s admiration. The time and effort they are willing to devote to the thesis-antithesis constellation that shapes philosophical forms of discussion and argument is a contribution toward the dialectic that functions to negate old ways in the light of new discoveries – which would not have been made without the curiosity and courage to ask questions and to think things through.

As a discipline, the emphasis in philosophy is on basic questions. Concerning international criminal law, the Top Ten list of such questions includes inquiries into complex and – more often than not – controversial matters or topics such as:

1. ‘What is international criminal law?’ thereby inquiring about international criminal law’s nature and origin and, ipso facto, its sources of norm-creation and, as an aspect of this, the difference (if any) between legislation and adjudication;