Carlo Focarelli. ***International Law as Social Construct. The Struggle for Global Justice***. Oxford: Oxford University Press, 2012. Pp. lv + 571. £85. ISBN: 9780199584833.

An enigmatic epigram welcomes the reader of Carlo Focarelli's book: '*[w]hat is a mountain for? For the moon to set behind*' (at lv). Poetic images not infrequently hint at hidden meanings; in this case, however, the enigma stems from the fact that the phrase, although appearing between quotation marks, is not credited to anyone (which is strange for a heavily footnoted book whose name index includes more than 1,000 entries). Since a Google search takes the reader straight back to the book under review and nowhere else, the temptation to assume that the anonymous poet was the author himself has been strong (and maybe imputable to the advent of *EJIL's* 'Last Page'). I resisted this impulse for fear of appearing too unlearned ('other readers will surely have recognized the author', I said to myself) to be considered fit to review the immensely erudite book that Focarelli's *International Law as Social Contract* indisputably is. Turning a blind eye to the epigraph would have been an easy way out; I chose to ask the author. He was kind enough to reveal to me that the phrase is an abridged version of a dialogue between the famous Swiss psychologist (and polymath) Jean Piaget, asking questions about the Salève, a mountain also known as the *Balcon de Genève*, and a seven-year-old boy named Rou: 'The Salève was made "*by men*. – Why? – *It couldn't make itself all alone*. – What is it for? – *For the moon*. – Why? – *For it to set behind*."'[1] Enquiring about the meaning of the epigraph turned out to be a serendipitous choice.

The author of *International Law as Social Construct* is fond of definitions. Drawing from Thomas Aquinas, Pico della Mirandola, Kant, Comte, and von Humboldt, he tries to define, for instance, the concept of 'humanity' (at 380–381). The book itself is, however, hard to define. A reviewer (not an international lawyer) complained that the subtitle – *The Struggle for Global Justice* – misled him into believing that the book could be a contribution to the so-called global justice debate,[2] but in fact Focarelli never meant to share in the 'most important current task' of moral philosophy and political theory, as Thomas Nagel famously defined it.[3] The volume here reviewed is best seen as two books in one. The second one, which accounts for more than two-thirds of the opus, should be mentioned first. It occupies the whole of Part II (*The Construction of International Law*) and is easily recognizable as a treatise on international law that offers a wealth of detailed and highly readable analyses spanning an impressive range of topics – the concept of just war, state debt and insolvency, R2P, food safety and the WTO SPS Agreement, *jus cogens*, the rights of indigenous peoples, terrorism, core labour standards, to name just a few – all of which are elegantly disposed around four thematic poles, namely 'Players', 'Rules', 'Values', and 'Remedies.'[4] By contrast, Part I (*Law as Social Construct*) is meant to lay the theoretical groundwork for the doctrinal treatment of international law (the treatise) that follows. It is, however, a largely autonomous and thought-provoking reflection on law *in general*, without which the doctrinal part remains perfectly intelligible.

Focarelli expounds a theory of law which in the tradition of English (and Scandinavian) empiricism treats questions about the nature and the content of law(s) as questions of fact. Law supervenes upon a social practice displaying a common or convergent 'intentionality' – an attitude of *recognition*, according to H.L.A. Hart's influential characterization of the so-called

1 J. Piaget, *The Child's Conception of the World* (2007), at 349.

2 Rainbolt, 'Book Review', *Notre Dame Philosophical Revs. An Electronic J* (2013), available at: http://ndpr.nd.edu/news/40614-international-law-as-social-construct-the-struggle-for-global-justice.

3 Nagel, 'The Problem of Global Justice', 33 *Philosophy & Public Affairs* (2005) 113. On the need to integrate the debate on global justice into international law's research agenda see Ratner, 'Ethics and International Law: Integrating the Global Justice Project(s)', 5 *Int'l Theory* (2013) 1.

4 A concise recapitulation of the book's contents is provided by Aust (H.P.), 'Book Review', 60 *Netherlands Int'l L Rev* (2013) 135.

internal point of view, or a *belief*, for a Scandinavian realist like Olivecrona, and for Focarelli himself. What the author calls his 'particular version of social constructionism' consists in 'depict[ing] international law as a social construct on the assumption that it is people and their beliefs that make the law, including international law, not the minds of theorists' (at 2). Rationalism must be kept at bay, as law 'does not necessarily reflect what is wise, or scientifically well-founded, but rather what "works" in society in the perception of its addressees as a whole' (*ibid.*). Focarelli claims that his approach to social reality allows him to avoid 'forcing the whole material of international law into an a priori paradigm', be it Hobbesian, Grotian, or Kantian (*ibid.*). Such 'appeal to facts' is a typical gesture of empiricist theorists. But assuming that law in general, or international law in particular, is made by 'people and their beliefs', or influenced by 'the perception of its addresses as a whole', is all but neutral: it means espousing a particular theoretical outlook on international law-making processes and their ultimate 'foundations' whose underlying 'democratic ideal' may be worth fighting for, but cannot be passed off as a cold fact. Unsurprisingly, in other well-know empiricist accounts, the attitude of the mass of the law's addressees is far less significant than the practices of the law-applying officials. For H.L.A. Hart,[5] Joseph Raz,[6] Julius Coleman,[7] Leslie Green,[8] Scott Shapiro,[9] and many others, what counts is the consensus of elites. As John Gardner recently put it:

> the relevant custom, the one that makes the rule [of recognition] what it is, is not the custom of a population that can be identified independently of it. There is no wider population, beyond the official users, who participate in making the rule by their cumulative attempts to follow it. … If Hart's labelling of it as a 'social rule' led one to envisage, romantically, an ultimate rule of recognition for each legal system made and used by … ordinary folk … then one is bound to be disappointed.[10]

The book under review takes no notice of the debate on law's 'recognitional communities' (to use Matthew Adler's terminology),[11] and is relatively unforthcoming as regards the identity and the internal structure of the social formation whose beliefs and practices allegedly undergird international law. 'People' is surely too vague a notion. In some places, the relevant 'subject' is identified with 'the international community', a plural social formation which, according to Focarelli, nowadays includes many different 'non-state players' but is still dominated by states (at 141 ff). Does it all boil down, then, to the traditional notion that what is 'generally recognized as international law' is 'ultimately grounded in custom', a custom that is made by states, so that the relevant community is coextensive with the state system (at 355)? It does not. The concept of community underlying Focarelli's thesis is under-theorized but not trivial. In his view, '[t]he international community not only believes in certain rules, but also in certain "values" underlying those rules' (at 461); it is, however, 'extremely difficult … to identify what is valuable to all human beings, as is inevitable when dealing with international law' (at 356). If not for 'rules', then, at least for 'values', the relevant community *includes* each and every human being. Besides individuals, other subjects of course take part in making international law what it is. Ultimately, the international community is an autopoietic social formation made of each individual or legal person 'who believes and is believed' to be part of it (at 356).

5 H.L.A. Hart, *The Concept of Law* (2012).
6 J. Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System* (1980).
7 Coleman, 'Negative and Positive Positivism', 11 *J Legal Stud* (1982) 139.
8 Green, 'The Concept of Law Revisited', 94 *Michigan L Rev* (1996) 1687.
9 Shapiro, 'Law, Plans, and Practical Reason', 8 *Legal Theory* (2002) 387.
10 J. Gardner, *Law as a Leap of Faith* (2012), at 283.
11 Adler, 'Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?', 100 *N Western U L Rev* (2006) 719.

This ecumenical, purportedly fact-based, conception of international law's recognitional community does not seem to square, however, with an important point made by Focarelli by way of introduction (at 3):

> there can be little hope for the construction of a credible international law without building on the legal traditions of all the peoples concerned. It is proposed here, as a further future project, to get out of the Western domination of the discipline, both epistemologically and politically, by starting a serious analysis of international law from a legal comparative perspective.

One problem with this statement is that its author cannot, on his own premises, claim to know what international law objectively is without taking into account other, non-Western ways of seeing and feeling about international law, *unless* it is conceded that today's international law, while not 'credible' politically (unfair?), is contemplated also by non-Western peoples, not, however, as the admirable social construction in the thought of which Westerners sometimes relish, but as an oppressive system in which those peoples are forced to 'believe'.[12]

This leads me to what I regard as the book's weak point: the philosophically thick concept of 'belief' – which is so central to Focarelli's theory – is left almost unexplained and, by default as it were, seems to denote a homogenous set of mental dispositions. But there are many ways of 'believing'. A first significant variation mirrors the distinction between a rationalist account of law ('naturalism') and an empiricist one ('positivism'). One may believe in law in general, or in a specific legal system, real or imagined, as something that is worth having on moral grounds. Alternatively, one may believe in the existence of this or that legal system without attaching to it any moral value, or even despising it. Focarelli clearly favours a positivist account of law but seems unwilling or unable to scrub off its naturalistic traces. On the one hand, he is far from believing that law is an unqualified good: '[m]ore law, or more effective law, may be the problem' (at 63). This conviction undoubtedly stems from his disenchanted vision of law and *justice* as 'form[s] of successful collective violence having the potential to have and dictate any content' (at 12). In his view, '[j]urists may propose nice conceptions of law; however, the real law is the one which works in society and this can work only if it is backed by the stronger' (at 22). Interestingly, Focarelli draws this idea, not from a classic political thinker like Hobbes, as he could have done, but from an illustrious non-specialist, Sigmund Freud (at 9 ff).[13] It has been argued, however, that apart from a few idiosyncrasies, Freud's account of the origin and nature of law is either indistinguishable from Hobbes',[14] or even – as Jacqueline Stevens rightly put it – 'more "Hobbesian" than even Hobbes', because, 'whereas Hobbes provides a theory of sovereign elites able to compel violence on their behalf from self-interested and therefore otherwise unwilling soldiers, Freud suggests that war provides an inevitable and beneficial outlet for the masses' pent-up death drive'.[15] But if law can prescribe or tolerate anything, except for encroachments on what Hart called 'minimum content of natural law', without which not even the basic purpose of survival is pursued,[16] then law can accommodate 'very great iniquity'.[17] Law stems from 'the need of the weak to unite and remain cohesively united by means of law against the stronger in order to avoid succumbing' (at 12) – but may it at the same time condone or support massive discrimination or economic exploitation of the harshest kind? On the other hand, Focarelli slides from the notion that 'law is a form of collective violence against individual

[12] See K. Olivecrona, *Law as Fact* (1939), at 143–148.

[13] See, for a similar move, G. Gozzi, *Diritti e civiltà. Storia e filosofia del diritto internazionale* (2010), at 382–384.

[14] Artosi, 'Il fascino discreto della natura umana', 8 *Jura Gentium* (2011) 6.

[15] Stevens, 'Sigmund Freud and International Law', 2 *Law, Culture and the Humanities* (2006) 201, at 207–208.

[16] H.L.A. Hart, *The Concept of Law* (2012), at 193 ff.

[17] *Ibid.*, at 207.

violence' (at 9) to an apologetic image of law 'made and applied, in the (right or wrong) perception of its members as a whole, on behalf and for the benefit of all' (at 32), including, it seems, people harshly exploited or gravely discriminated against. On this basis, he chastises 'realists' and 'deconstructionists' for 'working against law when they – in exercising abstract rationality – break both the belief and the hope in the law without caring that belief and hope are a vital part of any law' (at 56). He further contends that his broad construction of the relevant community – every human being is 'part of the process of making and unmaking law' – 'creates an inherent dynamics which implies and calls for struggle', a 'struggle for law' which becomes indistinguishable from a 'struggle for justice', understood as 'the protection of the most vulnerable' (at 65), a *moral* ideal the author tries to 'positivize' *in extremis* by arguing that vulnerable persons are to be individuated in each society 'according to the sense of vulnerability therein prevailing' (at 60). It is to be hoped, then, that the dominant forces in society, which make the law in the author's own realistic account, are not too prone to consider their own squeamishness as vulnerability.

The complex notion of 'belief' requires more conceptual unpacking. Apart from the one just proposed, other meaningful distinctions are possible: beliefs may be more or less intense, induced or imposed, thoroughly examined or unreflected, limited to a segment of the international legal order or all-embracing, fine- or coarse-grained, accurately reflecting social realities, or false. Focarelli, by contrast, maintains that in order to exist, law must be underpinned by a uniform and widely shared 'mythic belief' (at 44), a 'mythic vision shared by the community' (at 50), whose 'support or adherence is essential' (at 55). Focarelli's 'myth of law' resembles, and takes inspiration from (at 46), Malinowsky's portrayal of how, in primitive societies, myth 'expresses, enhances, and codifies belief', thus providing 'a pragmatic charter of primitive faith and moral wisdom.'[18] In his view, the different *doctrines* of international law are best seen 'as strategies of concomitantly demythologizing and remythologizing international law' (at vii): new doctrines dissolve the pre-existing myths only to replace them with new mythic constructions of legal reality. These doctrines are, in Focarelli's sophisticated and partly original classification (at 94 ff), naturalism, positivism, realism, axiologism, deconstructionism, sociologism, constitutionalism, administrativism (aka GAL), and third-worldism (aka TWAIL). A characterization of these doctrines as (sources of) society-wide, strongly felt beliefs, strains credulity, as they are debated among a limited number of persons who work in the field of international law and whose role in the 'division of linguistic labour' that is necessary in the construction of international legal meanings is not entirely clear.[19] Law is certainly not 'like a mountain' – in the sense that law's ontology is not that of material objects, as Focarelli often repeats[20] – but neither is it

[18] B. Malinowski, *Myth in Primitive Psychology* (1976), at 19.

[19] The idea that meaning may depend on a division of linguistic labour is expounded in Putnam, 'The Meaning of "Meaning"', 7 *Minnesota Studies in the Philosophy of Science* (1975) 131. Putnam's insight was exploited for jurisprudential purposes by Coleman and Simchen, '"Law"', 9 *Legal Theory* (2003) 1.

[20] This claim is uncontroversial. Law is of course a 'thought object', which '[e]xists by being believed in' (MacCormick, 'The Ethics of Legalism', 2 *Ratio Juris* (1989) 184, at 191). Accursius (glossing Gaius) pointed out that '[c]orporeal things are those which can be touched, such as land, a slave, a garment, gold, silver, and, no short, innumerable other things. Incorporeal things are things which cannot be touched, being of the sort which exist only in contemplation of law, such as the estate of a deceased person, a usufruct, and obligations however taken.' Bartolus described legal obligations as *simplices imaginationes*. Of acts like testaments Francesco Mantica wrote that 'non inventur extra intellectum, cum sit imaginatio intellectus'. See Padovani, 'The Metaphysical Thought of Late Medieval Jurisprudence', in A. Padovani and P.G. Stein (eds), *The Jurists' Philosophy of Law from Rome to the Seventeenth Century* (2007), at 47–52. The fact that norms are *res incorporales* does not prevent them from undergoing a process of reification, as explained by E. Pattaro, *The Law and the Right: A Reappraisal of the Reality that Ought to Be* (2007), at 215–218: '[c]atholodoxia is a belief in the universality of one's own beliefs. Norms are typically universal or catholodox beliefs. … Catholodoxia … sometimes comes with the ontological assumption – properly, a

like a chair, an object we all are able to recognize without relying on the specialist knowledge of a subclass of speakers. International law is more like gold or other materials that ordinary people may sometimes fail to recognize without the help of an expert; but it differs from gold in that its experts – international lawyers – do not necessarily enjoy the same degree of authoritativeness in society as metallurgists or goldsmiths, and certainly do not display the same level of consensus among them. In other words, whereas the concept of international law is undoubtedly 'linguistically deferential', [21] it may be difficult to determine who defers to whom. To say that international law is 'created and sustained by society' (at 33), through 'mythic beliefs', obscures rather than clarify the complex web of influences, interactions, and possible 'delegations' that feed into the construction of international law.

The existence of international law or of any of its rules can be 'believed in' as I believe in the presence – now in this room – of that whitewasher's ladder, i.e., unreflectively, or as I believe in that ladder's stability after having tested it, i.e., on the basis of experience and upon reflection.[22] The contribution of these two kinds of 'beliefs' with regard to the elaboration of the *content* of international law would not be the same. And of course many people never put their minds to international law, or law more generally, as they are used, or forced, to keep 'their heads down to avoid coming to the attention of the powers-that-be'.[23] These people are nonetheless to be counted among the addressees of the law and their apparent disinterest, whatever its cause, contributes greatly to the legal system's effectiveness. One should also bear in mind that popular beliefs about international law are typically false, even wildly extravagant, as anybody performing an international-lawyerly version of what Pier Paolo Pasolini did in his documentary *Love Meetings* (interviewing passers-by about sex) is bound to discover to her great amusement, or frustration. If law was 'what all or most of those who see themselves as its addressees believe objectively to be their law', as Focarelli maintains (at 50), the image of international law would be quite different from the orderly canvas he paints in Part II of his book. False beliefs about international law may also be induced by propaganda, education, or other forms of ideology's transmission. As such, they are not confined to laypeople. Most international lawyers believe, for instance, in the existence of a prescribed and reasonably definite method for identifying custom, and such a notion seems to be accepted by many of their readers.[24] This, however, would not make it immune from a refutation based on evidence that such a picture rests on an inaccurate representation of the way in which customary international law is actually discovered and applied. International law's claim to reality and objectivity excludes that fancy beliefs, no matter how strongly felt, contribute to its construction.

Focarelli himself resolutely weeds out what he regards as false beliefs about international law. He criticizes naturalism for its spurious universalist claims (at 103); positivism for having abusively transposed concepts from the domestic law of Western states to the sphere of

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reification or hypostasis – that the object of one's beliefs subsists of itself; independently of what anyone believes. … [T]his reification depends on the believer's belief (be they clearly defined or confusedly present in him or her). … Catholodox believers consider this system to be subsistent *per se* and imputable to a superior or a collective subject (or to both), like God, Nature, the People, the Class, the State, or the Sovereign.' Or – one may add – the International Community.

21 Coleman and Simchen, *supra* note 19, at 38.

22 Schwitzgebel, 'Belief', *Stanford Encyclopaedia of Philosophy* (2006), available at: http://plato.stanford.edu/entries/belief.

23 J. Gardner, *Law as a Leap of Faith* (2012), at 285.

24 See Gradoni, 'The International Court of Justice and the International Customary Law Poker Game', in M. Andenas and E. Björge (eds), *The ICJ's Role in the Reassertion and Convergence of International Law: Farewell to Fragmentation* (forthcoming 2014).

international law (at 106–107); realism for advancing 'myths' about the aggressiveness of human nature that may prove 'devastating for human coexistence' (at 110); axiologism for thinking too much about the law as it should be (at 112); deconstructionism for being 'too logical' to be mindful of common sense and practical knowledge (at 114); sociologism for being too ready to believe in the existence of a 'harmonious society' (at 122); constitutionalism for its prescriptive overtones (124–126); administrativism for promoting a 'technocratic project' aimed at concealing rather than constraining power (at 129); third-worldism for 'stating the obvious', when it claims that international law reflects the interests of the powerful, and for its 'misconceived' analyses aimed at 'smuggling for legal what is a political claim' (at 131–132). Focarelli then suggests that international legal science should set itself the task of 'remythologizing' international law 'by investigating all the legal traditions known in comparative legal analysis, rather than on (Western) jurisprudential grounds' (at 140). His book could thus be seen as a provisional *remythologization* of international law as a social construct firmly grounded in humankind's mythic belief in the existence of a state-centred (and West-dominated) international community which determines the sources, expresses the values, and churns out the rules of its law. 'How people construct social reality is at the heart of international law', Focarelli writes on the book's last page. This statement is not warranted by social reality itself. It is, in fact, a myth. 'The struggle is for the *reality* of the law – presumably shared by most people – as it is, however uncomfortable' (at 497). But who is lying to whom about international law's reality? How can one tell the truth from a lie, if 'beliefs' are all important? Moreover, it can be surmised that the not-so-unorthodox image of international law emerging from Part II of the book would have been much more uncomfortable, ill-defined, and fractured had it not been filtered by the author's *esprit de géométrie* and a dense layer of doctrinal rationalizations. What ultimately grounds the international law edifice depicted by Focarelli is not so much a collection of social facts as the author's espousal of a positive anthropology whose Hobbesian–Freudian traits – overemphasized in Part I of the book in order to pull the rug from under the realist's feet – end up being muffled in enlightened reason and noble sentiment. Human behaviour is determined not only by fear (or death drives) but also by a sense of 'wonder', which 'advises people that love is the key to life' while 'nourishing a cosmopolitan, even sacred sense of humanity' (at 493). Remember the investigation into the epigraph's origin and meaning, Jean Piaget, and his young interviewee named Rou? Focarelli's international law *is* like a mountain, in which impenetrable stone (a metaphor for power) enchantingly blends with a child's poetic imagination. It is, *mutatis mutandis*, very much like Rou's mountain: the brainchild of one of the most learned international lawyers of his generation, 'for the moon to set behind'.

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Philipp Dann. ***The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany***. Cambridge: Cambridge University Press, 2013. Pp. 604. $130. ISBN: 9781107020290. [First published in German by Mohr Siebeck in 2012.]

Philipp Dann has long been committed to the legal issues of international development cooperation, and now his monograph on this subject, originally written in German, has been published