Research Handbooks in International Law

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Research Handbook on the Theory and History of International Law

Edited by **Alexander Orakhelashvili**

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RESEARCH HANDBOOKS IN INTERNATIONAL LAW

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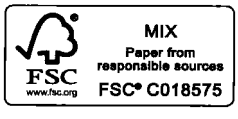

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Foreword

It was unexpected, but inevitable. It was not easy to suppose that the intellectual discipline of International Law would, at last and so readily, recognise the shameful poverty of its theoretical superstructure. When it happened, it was not surprising, given the spectacular increase in the volume and density and complexity and diversity of substantive International Law since 1945. Large-scale social phenomena – religions, political systems, economic systems – generate the ideas necessary to explain and justify them. And the ideas become part of the life of the phenomena, each energising the other in their further development.

Law, as a large-scale social phenomenon, has been in such a mutually creative relationship with transcendental ideas throughout the whole of recorded human history. Law, evidently a natural and necessary social phenomenon, has needed an exceptional volume of socially effective ideas to explain and justify its highly coercive actual power in given societies. A law governing governments was obviously something less than a natural or necessary social phenomenon. But, intermittently, the prestige of the word *law* was borrowed tentatively, defensively, paradoxically, metaphorically – natural law, the law of nations, international law. But it was out of the question that a law governing governments might be able simply to appropriate, for its own purposes of explanation and justification, the vast age-old accumulation of transcendental thinking about the universal phenomenon of law.

International Law was obviously an anomaly in relation to that perennial and universal tradition. For some observers, it was too anomalous to be treated seriously as law. For others, the wish had to father the thought that International Law might, at least, be useful, if its vestigial law-like characteristics were emphasised, and if the behaviour of governments were, occasionally and generously, interpreted as manifesting some sort of law-consciousness.

Since 1945 there has been what can only be described as a revolution in the social organisation of the human world. The international dimension of human existence has overwhelmed the national dimension of human existence. Bland, easily-spoken words – interdependence, international community, globalisation – do not do justice to the social reality of a world in which there is now a seamless web of causes and effects stretching from the remotest village to the totality of human social phenomena. Social organisation is now stratified, vertically and horizontally, in social and political and legal forms which are often old in their systematic forms (states, governments, law-making and law-applying institutions, public administrations) but which are new in their fields of action and interaction. There is a new global distribution of social power, a new global constitutional reality.

International Law does not merely reflect these new social phenomena. It embodies and enacts and enforces them. No one can now deny that this new kind of human world demands a new effort to generate the ideas necessary to explain and justify it – not least, to explain and justify the new social role of International Law.

Responding to that urgent and intimidating and exciting summons, this *Handbook* reflects three kinds of intellectual strategy. One may look again at the inheritance of transcendental thinking about a law governing governments, and treat it now with the intellectual seriousness that it deserves, given that it was the work of thinkers who were deeply immersed in the perennial and universal tradition of transcendental social and legal philosophy. One might even seek to extrapolate a particular tradition within that philosophy to inspire and direct the new revolutionary social challenge.

One might also engage in the kind of intellectual endeavour which has been at the heart of higher-level thinking about social phenomena at the national level – seeking to unravel the conceptual implications of particular aspects of the new international legal reality, with a view to understanding them and evaluating them and influencing the development of public policy.

Finally, one might try to establish a better understanding of how we have come to be where we are. The past is present in the present, and so is the future. We must bring the sophistication of national historiography at its best to our understanding of the strange story of the troubled co-existence of intensely diverse and competitive societies and cultures, of which we are the more or less grateful heirs.

It is a good time in which to be a thinker about the remarkable present and the daunting future of the human world. This *Handbook* will encourage more thinkers and more thought. It could not be more timely or more necessary.

Philip Allott
Cambridge
December 2010

Preface

In 1992, Professors Philip Allott and James Crawford introduced 'The History and Theory of International Law' as an LLM course at Cambridge University, taking up the challenge of exploring the widest possible intellectual and historical background of international law. I was in a privileged position to be part of that course over the 2000/2001 academic year; its high-level and inspiring discussions highlighting the complexity of theoretical argument, coupled with voluminous sets of photocopied materials, covering thinkers and works ranging from Plato to Morgenthau, and including the actual texts of history-changing documents, provided me with the enthusiasm to engage with theoretical questions of timeless value, ultimately culminating in the preparation of this *Handbook*.

This *Handbook* brings together the scholarly input of a group of academics with an acknowledged expertise in the relevant areas of the theory and history of international law. It is also an effort conducted against the background that, despite the multiplication and diversification of theoretical scholarship of international law, there is still no such work that would locate this subject in a relatively comprehensive perspective, whether in purely legal or inter-disciplinary terms, and thus enable scholars and students to refer to it as a useful starting point for identifying and examining the relevant issues of theory and history.

This *Handbook* has also been prepared against the background that the past two or three decades have witnessed the emergence of many different theories, combining jurisprudential, socio-political and ethical approaches. One single volume obviously cannot accommodate all of them. Given that every publication format is limited, the aim is to focus on the most durable elements of international legal theory and ensure the proper representation of those theories and issues whose timeless relevance has been demonstrated through long experience.

The first part of the *Handbook* is dedicated to the essence and development of international legal theory and focuses on major theoretical developments since the era of classical scholarship of international law. The second part focuses on theorising particular branches, or areas, of international law. The third part focuses on the history of international law from the medieval age to the present day.

Given such a wide profile, this *Handbook* is intended to fill a wide doctrinal gap resulting from the lack of an equivalent contribution so far; and to provide a framework for doctrinal discourse that will enable focusing on the theory and history of international law in its complexity, as opposed to isolated treatment of individual theories or historical periods. Individual chapters provide a thoughtful and focused analysis of pertinent issues and demonstrate how international legal discourse can benefit from historical and inter-disciplinary perspectives to enable us to comprehend the multiple aspects of the complex system of international law. They also provide perspectives as to the limits of such analysis and the need to focus on the legal dimension in the first place so that the legal nature of international law is not obscured. While individual chapters serve a common purpose as part of the single comprehensive scholarly effort, they are still individually pursued

scholarly efforts; no homogenisation or unification of methods and approaches has been attempted. This is all the more important as the first comprehensive effort in theory and history of international law also has to benefit from its representation of the richness of multiple methods and approaches and thereby gain an enhanced importance to provide a platform for further enhancing the discourse on theory and history of international law.

A Orakhelashvili
Birmingham
August 2010

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PART I

THE ESSENCE AND DEVELOPMENT OF INTERNATIONAL LEGAL THEORY

1 The relevance of theory and history – the essence and origins of international law

Alexander Orakhelashvili

1.1 LAW AND SCHOLARSHIP

The international legal argument focuses on the analysis of legal rules and instruments, and their application to facts. The ultimate aim of studying international legal theory is to understand the principal systemic and structural categories of the international legal system. Theory enables us to transcend the context of individual situations in which the international legal argument develops and to indentify general patterns that characterise this legal system in its entirety. Theory also provides a starting-point for studying international law in an interdisciplinary perspective, analysing its interaction with ethics, morality, politics, culture and economy, which include factors that influence the choice of States to accept or reject a particular rule, or decisions whether or not to comply with rules that they have accepted. These considerations cannot, however, replace those that underlie the validity of the rules in question and consequently the lawfulness of the relevant decisions. Therefore, to remain a valid exercise in international legal argument, theory has to tangibly relate to principal categories through which the international legal system operates in terms of creation, implementation and modification of international legal rules. Consequently, one of the principal tasks of theoretical analysis is to separate that part of theory which accurately reflects the nature and content of international law from that which merely constitutes a product of theoretical conjecture and of over-theorising.

Over-theorising has a significant history. As Onuf explained, in the nineteenth century 'the legal order was all the scholar saw around him, for it was an order of his own making, an artifactual order'.[1] As WE Hall observed at the end of the nineteenth century, given the 'standards so different in origin' worked out by writers 'without reference to that body of international usage which always insensibly exerts its wholesome influence whenever particular rules are under consideration, there would be almost as many distinct codes as there are writers of authority'.[2] Scholarship operated through doctrinal paradigms. Writers would 'seise on oracular pronouncements and reiterate them for generations'. Impressions would then emerge

> in the minds of those same writers that the rule exists simply because they are writing about it as if it exists. The relevant practice is largely the opinions of earlier writers, salted with the occasional instances of supportive State behaviour that have come along. Instances of contrary behaviour are dismissed in footnotes as irrelevant to the consensual view of scholars, if they are acknowledged at all.

[1] N Onuf, 'Global Law-Making and Legal Thought' in N Onuf (ed.), *Law-Making in the Global Community* (1982) 1 at 44.

[2] WE Hall, *A Treatise on International Law* (1895) 2–3.

An example is provided by what Onuf calls a putative rule on the three-mile limit of the territorial sea, adding that 'Scholars were shocked when a substantial number of States resisted codification of the three-mile limit at the Hague Codification Conference in 1930.' Then, with the bureaucratisation of foreign policy in the nineteenth century, diplomat-bureaucrats replaced writers as an integrative feature of the system, jurists began to replace writers as law-making catalysts, and codification which initially was a private affair gradually became an inter-State exercise. Thus,

> As the 1930 Hague Conference eloquently testified, scholars found not only that they could no longer make oracular law but that the oracular pronouncements of earlier centuries were not nearly so much cherished by States as they were by successive generations of scholars.[3]

Therefore, 'The chronic upheaval of the twentieth century has all but destroyed the credibility of the legal order invented by scholars. . . . Gone is the scholar's preeminent role in the articulation of a renewed legal order.'[4]

Such privileged role of scholars was due to their privileged position in addressing the audience of those who taught, researched and practised international law, or were interested in it. This enabled scholars to present, or even re-invent, international law as they deemed fit, as their philosophical, ethical, social or political convictions required. A scholar motivated by extra-legal considerations ran a greater risk of losing scholarly independence. Each generation of theorists was guided by principal theoretical categories adopted as the dominant trends of legal theory of their and preceding academic generations. Thus theory could both advance beyond the actual state of development of international law, and stay behind it. On the other hand, legal advisers whose role by definition is to advance the viewpoint of a particular government cannot always give an impartial view either. A practising lawyer can similarly be influenced by political, strategic, economic and ideological considerations, ending up with asserting legal positions or attacking established legal positions to reinforce those considerations.

The relative demise of the role of scholars has been reflected in Oscar Schachter's articulation of the theme of an 'invisible college' of international lawyers. This 'invisible college' was not meant to justify subjectivism in legal reasoning and substitution of agreement of States by a doctrinal judgment. The scholars' role was instead to ensure a representative expression of legal views that would be independent of views of particular governments, and would bring such independent legal expertise to the process of law-making, especially treaty-making. Lawyers not bound by views of a particular govern-

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[3] Onuf in Onuf, 21–22; Gidel goes as far as to suggest that 'l'absence de possibilité d'accord sur la fixation à trois milles de la largeur de la mer territoriale démontre que la prétendue "règle des trois milles", si fréquemment mise en avant comme un axiome, ne saurait être considérée comme une règle de droit international maritime positif actuel', '*La mer territoriale et la zone contigue*', 48 *RdC* (1934) 133 at 138.

[4] Onuf in Onuf, 44–45; the ILC then superseded the scholar, Onuf, 43. Obviously, Onuf's suggestion should be qualified to the extent that in many instances the ILC codification projects ended up as multilateral treaties widely adhered to by States. To the extent these treaties apply, the need to examine State practice in detail does not arise. But this need persists where the relevant State has refused to accept a particular treaty.

ment could, even if having diverse views, form an objective legal judgment regarding international legal questions.[5]

The problem has thus invariably consisted in projecting, imagining or imitating the agency that can tell us what international law is and how it is supposed to work. The solution to this problem lies solely with understanding that there is not anyone specifically and distinctly suited to this task to the exclusion of anyone else. The real question is not 'who' but 'what', 'how' and 'why'. These real questions relate to methods and evidence as opposed to the agency – methods that require considering international law as a body of rules consensually agreed by States, placing an emphasis on evidence as opposed to perception. The over-theorising of international law is due to projecting particular legal positions as desirable or necessary whenever they suit the particular agency's interests, goals, values and ideology. The only proper remedy against over-theorising is the focus on proper ways of identifying international law – the evidence that States have indeed agreed on a particular rule or principle as binding.

The proper study and analysis of international law should therefore aim at separating legal issues from those of morality, politics, ideology and social interest. Confusing socio-political factors – based on subjective appreciation – with the analysis of legal rules inevitably leads to ignoring the basic nature of international law as the body of rules agreed upon by States. It cannot be over-emphasised that, when agreeing on rules of international law through a treaty or custom, by that very agreement States manifest their judgment as to political, ideological and social considerations attendant on the operation of the agreed rule. Doctrinal attempts to assess or re-appraise agreed rules against the background of political, social and ideological factors essentially amount to attempts to replace the judgment of States embodied in agreed rules by the writers' own judgment. The actual value of theories thus depends on the degree of their reflection of the agreed content of international law. Critical and analytical theories can usefully explain various aspects of operation of the international legal system and point to its social implications, drawbacks and options for improvement. Such theories are not, however, supposed to re-appraise, depending on the writers' political and ideological preferences, what the actual content of international law is; if they attempt to do so, they risk becoming theories for the sake of it, with little or no relevance to how the international legal system actually works.

States need certainty as to whether or not they are bound by a particular rule of international law. The line separating non-law and law is thus crucially significant. Identifying this line was not on the doctrinal agenda prior to the eighteenth century when international law was mainly explained by immemorial custom, natural law and natural reason: these can acquire or consolidate their validity by virtue of States having either observed or not contradicted their existence and relevance, notably by falling short of adopting a contrary rule or practice.[6]

The problem of non-law arises once international law is identified with consensually agreed positive law.[7] In terms of the difference between established rules of law and

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[5] O Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern University Law Review* (1977–1978), 217.

[6] A D'Amato, 'What "Counts" as Law?' in Onuf (ed.), 83 at 98.

[7] See, on multiple aspects of the relationship between law and non-law, A Orakhelashvili, *Interpretation of Acts and Rules in Public International Law* (2008), chapters 5 to 8.

aims of the legal system, Fitzmaurice has observed that law aims at ultimate justice, but achieves it indirectly, by methods the immediate object of which is 'not so much justice as such, but order, stability, certainty, and the elimination of that subjective element that cannot fail to enter into any attempt to apply justice directly, and which often vitiates it'. Law is obeyed not because it is just but because it is unjust not to obey law.[8] As Kelsen observes in a way similar to Fitzmaurice, goodness or badness of a particular behaviour depends on its compliance with the presupposed legal norm; the relevant value-judgment can only relate to the conformity with that norm. For,

> Without presupposing a general norm prescribing (or forbidding) something, we cannot make a value judgment in the objective sense of this term. The value attributed to an object is not given with the properties of this object without reference to a presupposed norm. The value is not inherent in the object judged as valuable, it is the relation of this object to a presupposed norm. . . . the question as to the highest value in the subjective sense of the term can be decided only emotionally, by the feelings or the wishes of the deciding subject. One subject may be led by his emotions to prefer personal freedom; another, social security; one, the welfare of the single individual; the other, the welfare of the whole nation. By no rational consideration can it be proved that the one is right or the other wrong.[9]

1.2 THEORETICAL OPTIONS FOR DEMONSTRATING THE LEGAL CHARACTER OF INTERNATIONAL LAW

Historically, two options have been deemed conceptually acceptable to explain international law in the society where, unlike national law, there is no government: to link international law to natural law or to deny its existence by reference to the nature of statehood and sovereignty. This dilemma had caught scholars and significantly impacted the range of intellectual choices they could adopt. John Austin denied that international law is law; some nineteenth-century scholars have insisted that international law is external public law of States (*äusseres Staatsrecht*). G-F von Martens adopted the view that this external public law was based on a pre-positive natural law which applies to State conduct before, as it were, the State enacts its positive laws. In relation to external relations with foreigners, a State as a legal person conserves its natural relations ('conserve son rapport naturel') to those who are not its members, whether other States, peoples or individuals. Therefore, natural law applies to the State's external relations (*droit public exterieur*). Such external public law is a branch of the law of nations.[10] An 'external public law' also constitutes a doctrinal construct enabling the State to unilaterally project its political, strategic, economic or ideological visions as binding international law, or its replacement.

In the alternative, Georg Jellinek has suggested the theory of self-obligation (*Selbstverpflichtung*) to explain the binding force of international law. The process of 'self-obliging' could not, however, create sustained legal rights and obligations unless

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[8] G Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', 19 *Modern Law Review* (1956) 1 at 12–13.

[9] H Kelsen, 'The Natural-Law Doctrine before the Tribunal of Science', 2 *Western Political Quarterly* (1949) 481 at 483–485.

[10] G-F Martens, *Précis du droit des gens moderne de l'Europe* (1831) 40.

something external to and independent of that 'self-obliging' would determine that it was meant to have that effect. If self-obliging were the ultimate source of international obligations, it would not be possible to objectively ascertain in relation to what that self-obligation is made; every State could then auto-interpret its 'self-obliged' commitments.

Jellinek's two initial options of analysis are either to logically deduce the existence of international law above and over States, or to establish its existence by referring to those legal concepts that are necessary for the existence of all law whether national or international. Jellinek specified the aim of his analysis as locating the existence of rules that inherently follow from the nature of international transactions. Jellinek further observes that the very nature and permissibility of treaties in international relations militated against viewing international law as external public law of States (*äusseres Staatsrecht*).[11] Jellinek's principal thesis, however, is that there can be not merely State will but such State will that can bind the State; States can arguably bind themselves in the sense that the one who obliges is identical with the one who is obliged. In order to establish this, Jellinek considers it necessary first to prove that the State can bind itself in its own legal system towards private legal entities. If the State can subject itself to itself, then it can also set the law internationally ('wenn er sich selbst unterordnen kann, ist er im Stande, sich ein Recht nach Aussen zu setzen').[12]

But Jellinek still accepted that the ultimate basis of international law, even if 'self-obliged' by States, stems from the necessities of inter-State relations, and recognised that treaties cannot have legal effect in the absence of legal rules that stand above treaties and from which treaties obtain their legal validity.[13] This anticipated the argument of Brierly and Anzilotti regarding the fundamental and non-consensual rule from which treaties derive their legal force, thereby underlining the importance of this factor for scholarly legal thought across different theoretical quarters.

Jellinek alluded to Kant that being bound by a treaty is based on the categorical imperative which is seen as an indication that States see themselves as bound.[14] Still, Jellinek's further effort to prove that States can bind themselves internationally is not that straightforward. One option is to suggest that the domestic law of obligations can be applied by analogy to the process of international treaty-making and constitute part of *jus gentium* the way it was understood in Roman law, among others as part of *naturalis ratio*. But this option stumbles at the difficulty of making analogies with principles that do not form part of the same legal system.[15] Then Jellinek demonstrates the existence of international law by reference to obvious facts that States keep agreeing internationally with each other and regard these agreements as binding, as has been manifested in the 1871 London Protocol.[16] This emphasises the relevance of agreement as the basis of international law in line with the classical consensual positivist tradition.

Jellinek's analysis illustrates how the intellectual tradition of international law of his day was caught between the pressures of visions of power politics as ultimately

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[11] G Jellinek, *Die Rechtliche Natur der Staatenverträge* (1880), iii–iv, 1.
[12] Ibid., 5–7.
[13] Ibid., 4.
[14] Ibid., 17.
[15] Ibid., 47–51.
[16] Ibid., 58–59.