Five Masters of International Law

Conversations with

R-J Dupuy

E Jiménez de Aréchaga

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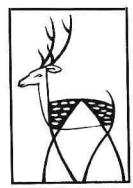

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Preface

The unexpectedly favourable reception of my interview with BAV Röling,[1] set me thinking that I could repeat the experiment by preparing a series of questions which would serve as a blueprint for interviewing other distinguished international lawyers. True, for certain readers, an interview may prove less interesting than a fully-fledged academic paper. However, interviews have the advantage of allowing a lively and fresh exchange of views. They also vividly reproduce a person's train of thought. The ponderings of the interviewee run in a sort of fluid discourse, not having been crystallised yet in the immutable propositions of a paper. Hence, interviews also make easy reading. This was recently confirmed by a distinguished member of the International Court of Justice, who told me that he had enjoyed reading the interview with Röling while comfortably lying in a deck chair on the beach, without the constraints of sitting at his desk to take notes, pencil at the ready.

I therefore resolved to embark on this new enterprise. I was curious to ask a selected number of scholars not only to expound their thoughts on the current role of international law in the world community and venture some forecasts, but also to have them share the story of their initial steps as scholars, to understand whether they shared a common intellectual matrix and to see whether there had been a particular school of thought influencing them. I also planned to consider the interviewees not only as prominent professionals who had excelled in their careers, but also as human beings of flesh and blood. This, I acknowledge, finds its underpinning in my belief that it is not true what Hegel (followed by the Italian philosopher Benedetto Croce) held, namely that in the end what matters is not the private life of human beings but their works, that only their works remain and only by their works can one gauge the value of their authors. For Hegel, once men have fulfilled their tasks, they are similar to empty hulls that fall away from their kernel.[2]

[1] BVA Röling, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (A Cassese ed)(Oxford, Polity Press, 1993).

[2] '*Was sie [die Menschen] sind, ist eben ihre Tat gewesen; diese ihre Leidenschaft had den Umfang ihrer Natur, ihres Charakters ausgemacht. Ist der Zweck erreicht, so gleichen sie leeren Hulsen, die abfallen.*' ('What they are is nothing else than their work; their passion has determined the scope of their nature and of their character; once they have attained their purpose, they resemble empty hulls that fall off'): GWF Hegel, 'Vorlesungen über die Philosophie der Weltgeschichte', in GWF Hegel, *Sämtliche Werke*, vol VIII (ed Georg Lasson) (Leipzig, Verlag von Felix Meiner, 1920) at 78.

Instead, with respect, I think that their personal life is no less important, and once they have passed away much of that life remains in the minds as well as in the hearts of those who knew them. In a way they belong to the Lares and Penates of those who survive, together with the memory of our own personal ancestors.[3]

Thus, I decided to include personal questions about the interviewees' lives too. I wanted to understand to what extent their professional activities had sheltered them from disquiet in the face of so many tragedies afflicting the world. This—I must acknowledge—was not an easy task for me: somehow I felt like like Asmodée, the lame devil described by the French writer Lesage, who, once he was liberated from the corked phial in which a magician had kept him for long, in exchange for his delivery took his liberator, the student Cléofas Léandro, to a tower, heaved up the roofs of all the houses in downtown Madrid and, notwithstanding the darkness of the night, exposed their insides to his view.[4] Of course I lacked Asmodée's diabolical powers, I was not so inquisitive, and in addition the interviewees—perhaps unwittingly—tended to shelter behind a heavy protective armour.

Another issue which intrigued me was the extent to which these scholars had acted under the influence of positivism. Indubitably, legal positivism has represented great progress in the evolution of legal thinking, on two grounds. First, it has enabled scholars and practitioners to separate law from morality, 'the law as it is from the law as it ought to be'.[5] This is epitomised in the famous dichotomy between *lex lata* and *lex ferenda*. By the same token, the proponents of positivism also have rightly insisted on the need to distinguish between 'statements of fact' and 'statements based on values', and to exclude the latter from legal inquiries. Secondly, positivism has emphasised the need to distinguish between the legal analysis of rules and institutions, and sociological or historical investigations of the law. Legal analysis must use legal methods of interpretation, legal concepts and constructs, and refrain from relying on parameters proper to other disciplines. It usually suffices to open a legal treatise from the 19th century to realise that the uncritical mixture of historical, legal and sociological inquiry resulted in a fuzzy reconstruction of legal institutions and rules with a total lack of rigour. In a retort concerning this lack of compartmentalisation of the social sciences, Dionisio Anzilotti—indisputably one of the most eminent international lawyers of the 20th century and a very influential positivist—quoted an astute maxim by Kant at the beginning of his masterpiece, *Corso di diritto internazionale*[6] (*Textbook of International Law*), which reads 'one does not multiply science but rather

[3] The Lares and Penates, considered spirits of the dead, were the Roman gods who acted as guardians of the entire household.

[4] Alain-René Lesage, *Le Diable Boiteux*, first published in 1707 (Paris, Gallimard, 1984).

[5] HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press, 1983) at 50–53.

[6] D Anzilotti, *Corso di diritto internazionale (ad uso degli studenti dell'Università di Roma)*, 3rd edn (Rome, Atheneum, 1928).

ends up marring it if one merges the borders between the various scientific disciplines'.[7]

However, while deeply appreciating the merits of positivism, one should not overlook some of its striking limitations. Let me highlight two of them here. First, positivism's most conspicuous defect lies in the fact that its inherent methodological tenets may constitute an impediment to the evolution of law. To illustrate how problematic this is, one need only recall the objections the two American delegates to the Paris Peace Conference raised in 1919 against the inclusion of provisions banning crimes against humanity in a treaty, in the name of positivism.[8] The same kind of positivist objections were voiced in 1920 within the 'Advisory Committee of Jurists', appointed by the Council of the League of Nations to draft the Statute of the Permanent Court of International Justice. When the Belgian delegate, EEF Descamps, expressly relying on the celebrated 'Martens clause',[9] suggested the new Court should also apply 'the rules of international law as recognized by the legal conscience of civilized nations' in addition to treaties and custom, the American, British and Italian delegates invoked positive law to oppose the proposal.[10] The current formulation of the provision in

[7] '*Es ist nicht Vermehrung, sondern Verunstaltung der Wissenschaften, wenn man ihre Grenzen ineinenderlaufen lässt.*' Oddly, this maxim does not appear in the French translation of the *Corso* (*Cours de droit international*, translated by GC Gidel (Paris, Recuil Sirey, 1929)).

[8] 'As pointed out by the American representatives on more than one occasion, war was and is by its nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice. A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstance, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity.' See R Lansing and J Brown Scott, 'Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities (April 4, 1919)', Annex II to Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Versailles, March 29, 1919), (1920) 14 *American Journal of International Law* 95, at 144.

[9] This was the celebrated clause adopted, at the instigation of the Russian jurist and diplomat Fyodor Fyodorovich Martens (1845–1909), at the Hague Peace Conference of 1899, and which became part of the preamble of the IVth Hague Convention. It stated that 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the [Hague] Regulations [on the Laws of War on Land] adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the *principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.*' (emphasis added). (The French original was worded as follows: 'En attendant qu'un Code plus complet des lois de la guerre puisse être édicté, les Hautes Parties contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par Elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique.') On this clause see my paper 'The Martens Clause: Half a Loaf or Simply Pie in the Sky? (2000) 11 *European Journal of International Law* 187.

[10] The US delegate Root noted that 'Nations will submit to positive law, but will not submit to such principles as have not been developed into positive rules supported by an accord between all States', League of Nations, Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th 1920* (The Hague, van Langen-Huysen Brothers, 1920) 287. He subsequently asked: 'Was it possible to compel nations to submit their disputes to a Court which would administer not merely law, but also what it deems to be the conscience

question (whereby the Court can 'apply the general principles of law recognized by civilised nations') was a compromise following strenuous negotiations.

Positivism's second major weakness is that in certain circumstances it may be deemed to involve a logical and moral ban or impediment to lawyers in the fight against authoritarian regimes. Admittedly, in dark periods of dictatorships, positivism has enabled scholars and other experts to avoid getting enmeshed in political life, thus preserving a large measure of 'purity' in legal investigations. On the other hand, positivism has also provided a moral licence for eminent scholars to be subservient to authoritarian regimes on the assumption that jurists must only interpret the law, whatever its content and whether or not it is consonant with democratic principles. In other words, they should not go so far as to advance value judgements, or assess the merits or flaws of the authoritarianism of existing social and political institutions, which obviously would entail approving or disapproving them. The example that springs most easily to mind is one which I have already had the opportunity to recount elsewhere.[11] It concerns the distinguished Italian international lawyer, Tomaso Perassi, who, although a man of strong democratic ideals, had no qualms about his position as chief legal adviser to the Italian Ministry of Foreign Affairs under Mussolini, since he separated his official functions from his democratic ideals with the barrier of strict positivism. Perhaps it was only fair that his legal formalism ended up arousing the disdain of the fascist authorities (in 1939 the Foreign Minister Galeazzo Ciano scornfully labelled him 'a professional pettifogger' (*professionista del cavillo*)).

It is partly as a reaction to this intellectual trend that I have sought to show some flexibility throughout my own career. While substantially accepting the basic axioms of positivism in my own research, I have modestly attempted to make some circumspect forays into related disciplines. In particular, I have tried to draw upon history and political sciences whenever they could provide insight into the rationale behind a legal institution or rule. I have also critiqued legal concepts or institutions, and proposed how in my view they could be ameliorated in order for them better to respond to current demands.

I was therefore keen to understand how the eminent international lawyers I was to interview had come to grips with this problem, and in particular to what extent they had segregated law from other social sciences.

I initially planned to interview only European scholars and judges so as to highlight the commonalities of the European schools of thought, but also to identify the differences between the various branches of the European tradition. However, on reflection, such an approach seemed shallow, if not artificial, since it would not reflect the increasing intermingling and cross-fertilisation of ideas and approaches in the modern world. Not least, I realised

of civilized peoples?' (*ibid*, at 294). For the statements of the three delegates against the Belgian proposal, see *ibid*, 293–94, 308–10, 315–17, 318–25.

[11] A Cassese, 'Soliloquy' in A Cassese, *The Human Dimension of International Law: Selected Papers* (eds P Gaeta and S Zappalà) (Oxford, Oxford University Press, 2008) lix.

that non-European jurists should be included since they are no less influential than their counterparts operating in Europe. I thus cast my net wider than the Old Continent and selected those international lawyers whom I considered outstanding in their field but also representative of the different schools of thought. In the end, I chose two Europeans (René-Jean Dupuy and Sir Robert Jennings), one Latin American very close to the US and European traditions (Eduardo Jiménez de Aréchaga), and two leading US scholars (Louis Henkin and Oscar Schachter).

I also asked two prominent Italian international lawyers, Roberto Ago and Gaetano Arangio-Ruiz, to take part in the enterprise. The former kindly advised me that he was not really interested. This surprised me as I was convinced he would be keen to expound his ideas, discuss his career and highlight his many scholarly, diplomatic and judicial achievements. The latter (Arangio-Ruiz) accepted and gave a spirited if disjointed interview. Then, when he read the transcript, he expressed his dissatisfaction with his own answers (which were actually incisive and profound). After some time, he gave me a completely redrafted set of answers. This time, it was my turn to be discontented, for the interview had lost its freshness; his answers were lengthy lucubrations about international legal issues and in particular against the growing role of the UN Security Council. He of course sensed my hesitations, and after some time, asked me to return the transcript to him, promising to hand in a new draft. However, more than four years have passed since then, and I have not received any revised draft. I therefore deduced that he simply wanted to drop out in a gracious if tortuous manner. However, with his authorisation, a few pages of his interview were published, together with excerpts from the interviews of Jiménez de Aréchaga and Schachter, in a Symposium on Kelsen published in the *European Journal of International Law* in 1998.[12]

I prepared a tentative questionnaire for the (six, then five) interviewees, so as to ask each of them the same questions and then compare their answers and try to draw some sort of conclusions from them. The questionnaire is included in this book to provide an idea of the anticipated structure of the dialogues. The interviews themselves are printed in the chronological order in which they were conducted. However, they clearly expand upon some of the questions contained in the Basic Questionnaire, and do not use precisely the same headings. This explains some of the differences between the questionnaire and the interviews, and between the interviews themselves.

I thought it would be useful to provide readers (especially the younger ones) with a concise intellectual 'portrait' of each interviewee before his interview. I also felt it necessary to try to gather up the various threads at the end of the book, by highlighting the many significant ideas which emerged from

[12] See Gaetano Arangio-Ruiz, Eduardo Jiménez de Aréchaga and Oscar Schachter, 'Kelsen, Personal Recollections' (1998) 9 *European Journal of International Law* 386. The extract from the interview with G Arangio-Ruiz is *ibid* at 386–87.

the interviews and contrasting the varying responses on some crucial points. Furthermore, at the (right) request of the publisher, I added many footnotes, providing references to the writings or cases mentioned by the interviewees. I also briefly set out in footnotes the relevant dates (and, in some instances the salient features) of the numerous authors referred to by some interviewees. Although this job was time-consuming, I thought it would prove helpful to the younger generations, who often seem to ignore all (or most) scholars of the past. Thus, in the end, this book should also have some sort of pedagogical value for younger scholars.

This book has taken me almost 20 years to complete. I began the first interview in 1993 and conducted the last one in 1995. Then many other intellectual chores distracted me from the task of revising and editing the manuscript. Now that all the interviewees have passed away and the editor is also likely to set out on that eternal voyage soon, I thought it was high time to resurrect the project in order to avoid leaving this wealth of material lying forever in a dusty drawer. Luckily, Sandra Sahyouni helped me in the demanding task of editing the various sections of the book, and Valentina Spiga was of great assistance in sorting out all the numerous footnotes and double-checking references. I am most grateful to both of them.

I hope that the book will make interesting reading and that all the time-consuming efforts to bring it to completion prove worthwhile.

Antonio Cassese
September 2010

Basic Questionnaire[13]

I. The Beginnings

(i) Initiation to scholarship

—Which international lawyer most influenced your thinking, at the beginning of your scholarly activity?

—Which international lawyer you met in your career has impressed you the most, and why?

(ii) The state of legal scholarship at the outset of your career

—By and large, what was the status of legal scholarship when you initiated your scholarly activity?

a) What were the areas of major interest of the legal literature in your country?

b) What were the major features of that literature? (In particular, did it take a pronounced positivist, or even legalistic approach? Did it draw upon other social sciences such as history, political science, sociology?)

c) How did the legal literature of your country compare with that prevailing in other European countries?

(iii) Law and philosophy

—Leaving aside legal scholarship, which philosophical or ideological schools influenced your intellectual development? Or did you instead stay impervious to any non-legal school of thought?

(iv) On being a public figure

—Have you been active or visible in the public arena? Have you written for newspapers, appeared on television or spoken on the radio?

[13] As mentioned in the comments to the Preface, clearly I have expanded upon the following basic questions in the interviews. The questionnaire merely formed the foundation for our discussions.

—Do you think international lawyers (or any lawyers, for that matter) should be socially active and involved in their communities? Or do you feel instead that they should concentrate exclusively on their activities as experts?
—Have you ever taken part in any political (or trade union) activity in your country or at the international level? Have you ever been a militant in an NGO?
—Do you perceive yourself merely as a 'technician' or as a fully-fledged 'intellectual'?

II. Scholar v Practitioner

—How have you considered your activity as a scholar separate from your activity as a practitioner (be it as judge, legal adviser, contributor to law-making, etc)? Or are they both mutually reinforcing, and part and parcel of each other?
—What impact did your activity as a practitioner have on your intellectual development?
—What primarily motivated you to undertake non-scholarly activities as a practitioner? Do you perceive the practice of law (as opposed to its study) as being mainly motivated by a real calling or vocation (*Beruf* in the Weberian sense)?

III. Contributing to International Law

—What would you consider your major contribution to international law

a) at the academic level?
b) at the level of law-making, adjudication or law-implementation?

—Do you feel that you have been able to create a 'school' by training and inspiring a number of disciples? If so, what are, in your view, the main features of this 'school'?
—Independently of the scientific value of your contribution to international law, in your view, which part of your activity is likely to have a lasting impact on the international community?
—Do you have any regrets about something that you might or should have done in your career as a scholar or practitioner?

IV. The Outlook for the World Community

—How do you perceive the current trends emerging in the international community? In your opinion, which values of traditional international law should be preserved? Which should be discarded?

—What values and features of the present international community do you think might potentially disrupt the present fabric of the world community?
—What values are instead indicative of a dynamic and positive evolution toward a better world community?
—Is there any means of bridging the present gap between normative values (human rights, *jus cogens*, repression of crimes against humanity, the notion of international crimes of States, etc) and the actual reality of international relations, still inspired by nationalist and sovereignty-oriented feelings?

V. Personal Matters

(i) Heeding the demon

—At the end of his essay on 'Science as a vocation', Max Weber wrote that each scholar should 'find and obey the demon (*daimonion*) who holds the fibre of his very life'. Do you feel that you have heeded the commands of your *daimonion*? Do you feel that you have met 'the demands of the day', in human relations as well as in your vocation?

(ii) Making life more bearable

—In his essay of 1930 on 'Civilization and its Discontent', Freud wrote that life 'is unbearable because of too much pain, disillusion, and tasks that cannot be fulfilled', adding that none of us can get through it without 'palliatives' (*Linderungsmitteln*), of which, according to him, there exist essentially three:

1. 'Powerful diversions' (*mächtige Ablenkunkungen*) that make us 'attach little value to our misery' (examples for Freud are scholarly activity or the gardening suggested by Voltaire in the last page of *Candide*);
2. 'Substitute gratifications' (*Ersatzbefriedigungen*) which 'lessen our misery' (one of them being art, which creates illusions that distract us from reality);
3. 'Drugs' (*Rauschstoffe*), 'that make us insensible to misery'.

To what palliatives have you willingly or unwillingly had recourse in your life?

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