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THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW

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The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory

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Table of Contents

International Legal Theory: New Frontiers Of the Discipline

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I. Introduction

It seems to be fashionable today to admit that one's discipline is in disarray. Most academics are apparently ready to admit that their particular discipline is failing to cope with the demands placed on it in the late twentieth century. Certainly international law is being required, more than ever before, to respond effectively and equitably to a host of difficult and controversial matters in trans-national society. In fact, it might be said that most international lawyers are so deeply and frequently engaged in responding to events that the discipline has, in effect, become chiefly 'reactive' in character.

Partly because of the immensity of the field, an increasing number of international lawyers today are virtually driven to *specialization.* This general trend toward the development of highly specialized expertise in a subsector of the discipline is not, of course, confined to the field of international law. It is a phenomenon familiar in most areas of modern scholarship. As a consequence, the literature of international law has become an assemblage of specialized areas of inquiry, in most of which the contributions of legal specialists become intertwined with those of specialists from other disciplines. In short, the literature of international law as a whole has undergone a process of *fragmentation.*

If this process continues, it may be only a matter of time before communication across the discipline becomes virtually non-existent. In the social sciences, the compression of events and knowledge forces scholars of many kinds to respond to the need for 'solutions' to contemporary problems. This challenge to scholarship seems especially arduous for the international lawyer, whose training as a lawyer has purportedly equipped him to work quickly under pressure in order to provide a timely as well as effective response to a perceived need. As a result, the 'engaged' international lawyer of today rarely has the luxury of leisurely reflection, which seems important for the provision of theoretical insights into his discipline.

The 'reactive' nature of contemporary international law might be said to mean that most attention is given to international law as a *craft* rather than a *science.* Even those engaged in full-time academic appointments are likely to find a significant portion of their time devoted to advisory and consultative services for governments and agencies confronted with the need to react to current events. Unfortunately this general absorption in practical concerns has led to a diminishing devotion to the development of *theory* in international law. Yet, given the importance of most international issues debated in inter-governmental forums, it was never more important than today to provide a solid common foundation of theory and doctrine for the international legal system.

In the 1950's and 1960's the need for generally acceptable theory was usually attributed to the importance of finding a means of reconciling the divergent political philosophies of East and West. In the last two decades, the strains and disparities between North and South have seemed to be the principal reason for forging general understandings about the purposes, directions, and elements of international law. Yet neither of these confrontationist periods has had the benefit of world-wide, or even widespread, allegiances to a single stock of theory in international law. In short, as the world community struggles with the most formidable problems of intergovernmental cooperation and regulation ever addressed, the science of international law seems seriously deficient in major theoretical works.

This volume, then, is intended to provide a 'corrective' to this kind of deficiency in the literature of international law. The book is designed in such a way as to permit distinguished international lawyers to focus on particular aspects of the 'theory' of international law. In its first part, the volume reviews the relevant schools of jurisprudential thought and their impact on the work of international lawyers. Part II examines the interactions between five different social sciences and the field of international law. In Part III the contributors analyze fundamental concepts of the discipline with a view to providing a re-appraisal of the entire conceptual apparatus of the international legal system. Finally, in Part IV the authors evaluate 13 different issues of current significance from a theoretical perspective.

Since none of these essays deals with the general state of theory in international law, we feel it might be useful to take this opportunity to note some of the relevant factors which motivated this undertaking and shaped the final design. First, it seems necessary to take stock of some contemporary trends in the literature, which seem to pose new challenges to working jurists. Second, it might be timely to suggest that the meaning and role of 'theory' in international law should be clarified. Third, it appears appropriate to discuss the role of the individual jurist in international law under the conditions of the late twentieth century. Finally, it might be worthwhile to anticipate some of the new directions to be taken in theoretical writings, taking into account the emergence of new modes of communication in the academic world.

II. Contemporary Trends in the Literature

The most obvious characteristic of the literature today is its immensity. By rough reckoning there appear to be several thousand treatises in existence in the field of international law. In addition, there are hundreds of journals devoted chiefly or exclusively to questions of international law as well as many more with occasional contributions on the subject. Furthermore, international agencies, both inside and outside the UN system, issue uncountable pages of materials of documentation on every conceivable human problem with an international legal aspect. The sheer volume of these various writings on international law is staggering to behold and literally impossible for any single theorist or practitioner to comprehend. The difficulties of dealing intelligently with this mass of information and ideas are compounded by the fact that important contributions to the field are made in many different languages. Even the general acceptance of English as the primary medium of communication in international law does not relieve most international lawyers from the necessity of dealing with one or two of the other major languages in the international community.

Both of the predominant trends, *specialization* and *fragmentation,* seem to have resulted in an increasing loss of control over the discipline. Together, these trends have limited the expectations of international lawyers, whether they work for national governments, international agencies or the academic community. Relatively few international lawyers today believe they can make significant contributions to their discipline outside one or two specialized compartments. This has had demoralizing effects within the discipline, especially in the academic community where the problem of access to the never-ending accumulations of documentary and literary materials is especially acute. It may, of course, be construed as a benefit that few academic international lawyers today can have the arrogant self-assurance of their predecessors by reason of their encyclopedic range of knowledge! But what may not be so welcome is the prospect that, because of their lack of access to many sectors of the field, even the best academics can no longer serve effectively as critic or theorist in the discipline at large.

Other difficulties arising from the loss of control in the discipline can be identified. The increasing detachment of specialized areas in the field means that mistakes or biases in these areas are more likely to remain uncorrected because of the inherent difficulty of 'monitoring' the entire range of legal and related developments. Moreover, loss of control over contemporary developments has added enormously to the problems of theory-building in international law. The construction and development of international legal theory has never been an easy undertaking, because of the universal dimensions of the field and the extraordinary diversity of political and cultural factors at work. The loss of control resulting from the immensity, specialization and fragmentation of international law seriously aggravates the problems of working at the theoretical level within the discipline.

It should be conceded, on the other hand, that specialization in international law has contributed very significantly to what must be termed a dramatic improvement in the level of intellectual *sophistication* within the discipline. 'Sophistication' in the discipline has, of course, a history that ante-dates the age of specialization by hundreds of years. The first kind of sophistication in the science of international law was *philosophical* in character, reflecting the formative influence of natural law and theology in European intellectual development. Erudition at that time was essentially a philosophical aspiration. As this influence grew in the eighteenth and nineteenth centuries, it took on a *humanistic* or ethical orientation, shaped by a growing social awareness. By the early twentieth century, especially in the United States, *scientific* influences had become apparent in international law. The American culture proved hospitable to new approaches to the role of international lawyers in the modern world, permitting them to adopt a more pragmatic experimentalist approach to legal doctrine and theory. In conditions of greater social mobility, it was easier for American international lawyers to cross disciplinary lines in order to deal effectively with problem-solving through collaborative undertakings with colleagues drawn from different scientific disciplines. In recent years, scientific sophistication in international law has been reflected in massive 'systematic' studies that draw upon all areas of relevant knowledge, organized within frameworks devised by international lawyers and social scientists.

With the emergence of philosophical, humanistic, and scientific modes of sophistication in international law, the discipline reflects extremely diverse approaches to theorizing in the late twentieth century. Many of the major writers of the twentieth century can be classified in accordance with this three-fold division. Kelsen, Verdross, and Verzijl, for example, seem to exemplify what we have described as the philosophical approach to the theory of international law. Brierly, Lauterpacht, and Jenks might be regarded as following the humanistic tradition in the discipline. Schwarzenberger, Friedman, and Stone might be categorized as primarily scientific in their orientation to the theory of international law. Some, of course, are difficult to classify in such an arbitrary manner. McDougal and Lasswell seem to exemplify the scientific approach in international law, but much of their work seems rooted in the humanistic tradition.

One of the most familiar features of international law today is the *politicization* of legal issues in the world community. Many of the jurists trained in the philosophical, humanistic, and scientific traditions might be inclined to regard this trend as a debasement of the discipline. Yet it may be argued that what is emerging in the late twentieth century is a new approach that strives for *political* sophistication. Earlier theorists in international law were not, of course, lacking in political awareness, but the world they inhabited was relatively homogeneous or, at least, seems so today in retrospect. Today, on the contrary, the world community appears exceedingly diverse, calling for

unprecedented efforts at accommodation. The problems that have to be solved, with the assistance of international lawyers, must be universally acceptable to virtually every political culture and governmental system. Such difficult undertakings seem to call for a new kind of sophistication, different from and sometimes inconsistent with the earlier modes of sophistication in international law.

Alvarez and Roling may have been among the first modern jurists to recognize the need for this political kind of sophistication in the science of international law. Tunkin and Falk might be mentioned as contemporary international lawyers with an essentially political approach to the discipline. McDougal and Lasswell, though chiefly scientific and humanistic in their orientation, might also be regarded as partly political (or ideological) in their approach to the theory of international law.

III. The Meaning and Role of Theory in International Law

1. The Meaning of Theory

Ultimately, of course, the meaning of 'theory' is a profoundly philosophical question. Clearly this is not the place for the editors to attempt an epistemological exercise. Nor does it seem productive to put forward a concept of the theory of international law that could withstand a rigorous appraisal in the scientific tradition. It may, however, be necessary to clarify our use of the term 'theory' as applied to international law as a branch of law and as a social science.

Very few international lawyers today are seriously interested in the philosophical question whether international law is really law. Most are prepared to treat the question as a rather arid exercise in semantics. For most international lawyers the chief philosophical questions about the international legal system are connected with the overriding question of intellectual allegiance to one of the principal schools of jurisprudential thought. In daily practice, international lawyers rarely feel compelled to declare their allegiance boldly and unequivocally. Yet periodically an international lawyer may be forced back to the philosophical basis for a position he feels obliged to take on a given issue. In such a situation he seems to be confronted essentially with three philosophical choices: the natural law position, either in its theological or secular version; the positivist or neo-positivist position; or the instrumentalist position, either in its Marxist or policy-science version. These three positions are perhaps the most clearly defined philosophical choices open to lawyers in general. It might be suggested that the international lawyer has potentially a deeper involvement in questions of legal philosophy because of the immense complexity of issues confronting international society. Although the international lawyer is sometimes confined to narrow technical questions of international law, he is likely to spend much more of his time today involved in larger issues of 'social

engineering,' directed at the difficult objectives of community-building in the world community.

If international law is accorded the status of a social science, it is immediately distinguishable from these other disciplines by virtue of its normative emphasis. Presumably the closest approximation to international law in the social sciences, albeit of a less normative character, is the field of international relations. But many theorists within this sub-discipline of political science admit readily that the theory of international relations cannot purport to serve a predictive, much less a manipulative, function. A fortiori, it is difficult for a theorist in the field of international law, a normative science, to argue that theory has more than taxonomic and explanatory functions. Clearly, part III of this book, addressed to the fundamental elements of the science of international law, serves the taxonomic function of theory: what might be described as the 'theories of' international law. In different ways, the other three parts of the book represent approaches to 'theorizing about' international law. Part I, as indicated above, covers the field of jurisprudential speculation about the nature of the international legal system. Part II looks at international law from the perspective of various social sciences and contrasts the concepts and techniques of international law with those of other disciplines. Part IV contributes another dimension of theorizing about international law, offering broad, prospective or conceptual speculations, which focus on particular issues of the day.

2. The Nature and Uses of Theory

In the context of international law it seems evident that theory has taken on an expanded meaning in modern times. Traditionally, the theorist was a scholar immersed in philosophy or theology who approached the discipline of international law within the tradition of preexisting schools of thought, focussing on metaphysical and ethical aspects of the 'science' of international law. Virtually all of the 'classical' theorists of international law regarded themselves more or less consciously as exponents of a particular philosophical view point with an intellectual and moral responsibility to develop the discipline within the selected tradition. Essentially, the philosophical theorist's appraoch was that of linear development from philosophical premises of his own choosing. Even today, many of the philosophical theorists in international law tend to be associated, directly or indirectly, with the tradition of natural law, and this has tended to produce a more or less explicitly ethical approach to the discipline.

By the nineteenth century, positivism had become prevalent in the legal thinking of many Western nations, and the particular result of this in international law was a trend toward what might be termed the development of the 'systematic anatomy' of the body of international law. The philosophic disposition to break down the field of international law into fundamental elements, concepts and doctrines, was easily reconciled with contemporary

trends in municipal law, and with the pedagogical need to prepare systematic treatises suitable for introducing students to the science of international law. The benefit of this kind of 'dissectionist,' doctrinal scholarship was to provide a clarification and even development of rules, which nation-states by the late nineteenth century recognized as necessary for the orderly exercise of state-craft in world affairs. Today, most *doctrinal theorists* are influenced, more or less overtly, by the positivist school of jurisprudence. They are rarely concerned with the kinds of metaphysical questions that challenged the early classicists. By and large they are content to regard international law as an emerging system of rules and procedures generally accepted in state practice and consent as the most fundamental element in the process of legal development.

What the philosophical and doctrinal theorists seem to have had in common is an exclusive attachment to the *ivory tower.* Although the doctrinal theorists have had an indirect concern with the operational utility of international rules, their contributions, like those of the philosophical theorists, were largely academic in formulation. It is one of the more recent developments in the history of international law that theoretical contributions have become of some relevance to international lawyers in the *arena* of conference diplomacy and other public service activities.

The prominence, even pre-eminence, of the arena in contemporary international law seems to have created the need for a different kind of legal theorist, one essentially concerned with problem-solving in modern trans-national society, or more properly, with the 'problem of problem-solving.' For this kind of 'scientific' theorist, theoretical concerns focus on questions related to the gathering of information, the comparison of insights from different disciplines, and the choice of analogies and techniques from all areas of knowledge relevant to the problem to be solved. This kind of interest is, of course, of special appeal to academics involved in methodological issues and those responsive to the latest information technologies in the ivory tower. But the problem-solving approach of the scientific theorist also brings him into frequent contact with international lawyers in the arena, who have official responsibility for producing 'solutions' to difficult problems in the organized world community. Accordingly, the scientific theorist, unlike his philosophical and doctrinal counterparts, tends to be drawn into collaborative undertakings with colleagues both of the tower and of the arena. What seems to be happening in the late twentieth century is that these collaborative undertakings sometimes have the effect of extracting theoretical contributions from international lawyers of the arena as well as from international lawyers of the tower.

There is also a constituency of international lawyers associated with the market place of private service: that is, the *forum.* International lawyers have always contributed to the development and maintenance of international trade, but practitioners of this kind have had virtually no opportu-

nity to make theoretical contributions to the discipline. This may soon change, as specialists in the legal aspects of trans-national corporate and commercial affairs are required to forge increasingly sophisticated linkages with lawyers of the arena, in conformity with modern views regarding the need for inter-governmental regulation over such matters.

As to the future use of theory in international law, it seems easy to predict that philosophical theorists will continue to make their contributions within the tower, mostly within the conventional format of specialized monographs of limited interest to the practitioners in the forum and the arena. Doctrinal theorists, on the other hand, though operating mostly within the tower, may find themselves in growing demand from the forum and the arena to provide rule-clarification in an increasingly confused world. Both governments and corporations may be expected to turn to doctrinal theorists for assistance in the wake of complicated law-making exercises and 'flawed' conventions. Such theorists might be expected to perform a kind of neo-glossatory service in the years to come.

The future of scienfitic theorists seems, however, the most assured. There is simply no prospect of a reversal of the current trend toward collaborative and cross-disciplinary approaches to the problems of world society. This particular kind of sophistication is likely to prove increasingly indispensable to those engaged in public service responsibilities. Given the increasing importance of most forms of research to industry as well as government, it may be only a matter of time before forum international lawyers with private clients are drawn into collaborative research undertakings with important theoretical implications.

IV. The Role of the Jurist

In the classical period, one spoke without embarrassment of the 'the jurist' and of his special contribution to the 'science' of international law. Today the term 'jurist' has a somewhat elitist connotation, which most will find difficult to apply to their colleagues under the egalitarian conditions of modern society. In an earlier, less egalitarian age, the term 'jurist' was regularly applied as an honorific to an international lawyer of very special scholarly distinction. The 'jurist' was singled out from other international lawyers as an 'authority,' whose views could and should be cited with respect. Normally an international lawyer deserving such an appellation had earned the honour by authoring a systematic treatise on international law or by authoring 'authoritative' monographs in specific areas of doctrine.

Today, however, the concept of jurist is complicated as well as unfashionable. One major reason for this is that international law has become fragmented under the inexorable pressure to specialize. In most cultures today, one tends to talk of 'experts' rather than 'jurists.' In the context of the UN system, for example, the term 'jurist' is often applied to members of the

ICJ, occasionally to the members of the ILC, but almost never to the group of agency and government legal specialists who operate on the problem-solving circuit of conference diplomacy. This seems to be a significant shift at least in the use of the English language, and presumably a counterpart change can be discerned in other major languages.

This shift in semantics seems likely to reflect a fairly fundamental change in attitude toward such valuable human resources as knowledge (erudition), information (expertise) and judgment (wisdom). Logically, this might suggest that the 'jurist' of the future will be required to demonstrate very special qualities of erudition, expertise, and wisdom. But in a highly specialized age, characterized by unremitting explosions in the growth of knowledge, such paragons are unlikely to be forthcoming. The safest prediction seems to be that the term 'jurist' will be reserved as a socially flattering honorific, applied to international lawyers of exceptional distinction, but that it will be replaced for operational purposes by that of 'expert.' What may be doubted, however, is that the modern 'expert' will be expected to display the same impeccable degree of impartiality that was traditionally expected of the classical 'jurist' in a nominally less politicized age.

Despite the many valuable contributions to the practice of international law by virtually all cultures, it remains true that the *theoretical* literature is still dominated by the scholars of a few countries. It is surely to the serious detriment of the discipline that theoretical influences are still so narrowly focussed on a few cultures. In a science that purports to serve the interests of all economic and political systems, it is a flaw of the discipline that its theoretical foundations do not yet reflect the inputs of most members of the nation-state system. Whether this suggests that some cultures are not so readily geared to theoretical speculation, or merely that they have not yet acquired the opportunity to engage in such scholarship, is a difficult matter for conjecture. But surely it must be hoped that these foundations will be broadened in accordance with the need for strengthening the universal credentials of the international legal system.

Even today, European jurists still dominate the philosophical and doctrinal sectors of the literature on international law. In Europe, historical opportunity and cultural affinity seem to have combined in providing a fertile source of ideas about international law. Since the opportunities for making such contributions are no longer confined to that continent, might it be supposed that *culture* is, after all, the crucial determinant? When American jurists began to contribute to the science of international law in the middle of the nineteenth century, it was the doctrinal rather than the philosophical sector that was transported across the Atlantic. Presumably this was due to the triumph of positivism over natural law in most areas of the English-speaking world. It seems, however, that the new American influence on doctrinal development owed something to the pragmatic, utilitarian spirit of scholarship in the intellectual milieu of the eastern seaboard of the United

States. But by the early twentieth century the American theorists, unlike their European counterparts, did not regard it sufficient to engage in the scholarship of rule clarification, despite the admitted utilitarian advantages of this exercise. Modern practicality was soon to attract the American legal theorist into close examination of the policy and decision-making processes at work behind the legal formulations. This trend was partly due, no doubt, to the necessity for sophisticated institutional analyses in a complex federal state such as that of the United States, but it seems attributable also to the spirit of collaborative adventure in the American academic community in the 1920's and 1930's.

It is difficult to envisage the future pattern of cross-cultural osmosis within the science of international law, but in a disaggregated way it might be possible to speculate on a number of national cultural influences likely to be observable in the remainder of the twentieth century. The British, for example, seem likely to continue as one of the principal sources for systematic treatises, possibly because of what appears to be a cultural distaste for undue specialization. There seems to be a recent flourishing of philosophical contributions to general jurisprudence in the United Kingdom, but it is not yet clear whether this is likely to influence the nature of British theoretical contributions to international law. What does seem fairly certain is that British international lawyers will continue to provide the bulk of general and introductory text books in the English language literature, and thereby exert a strong, if indirect, influence on the minds of young international lawyers around the world at the state of first acquaintance with the subject.

The French intellectual influence on international law has been immense, especially in the eighteenth and nineteenth centuries. Perhaps no other culture has made comparable contributions of form, clarity, discipline, and professionalism to the international legal literature. This influence became less global in scope in the period of the League of Nations, despite the fact that the French language was still the major working language in the world of diplomacy. After the Second World War, the English language had become predominant in international affairs, although French continued to be the language of instruction for young international lawyers from many parts of the world. It seems extraordinarily important not to deprive the literature of international law of the Cartesian clarity and vitality of the French intellect, but in official drafting exercises some of this influence is invariably lost because of the need to reconcile appropriate modes of expression in all six of the official languages of the United Nations.

Of the major European cultures, perhaps the German is best suited for outstanding contributions to the future theory of international law. In view of the modern need to involve international lawyers in collaborative, cross-disciplinary efforts to deal with the main social problems of our time, the versatility of the German intellect seems to assign a major role to the German theorist. Most German international lawyers are still trained in the

philosophical tradition and seem to have a natural aptitude for abstract thought. Through their use of Kantian-like frameworks of analysis, the Germans are intellectually oriented toward systematic inquiry.

In the early twentieth century, this particular Germanic talent seemed to flower more easily in the American academic community, where the crossing of disciplinary lines was more easily encouraged. After the Second World War, American counter-influence seems to have facilitated the use of cross-disciplinary inquiry in international law and other areas of investigation in occupied Europe. In the result, the German international lawyer today seems particularly versatile, combining the gift of philosophical inquiry with that of scientific endeavour as well as a practical concern for the precise use of doctrine for the purposes of the forum. Ironically, the increasingly pervasive influence of German (and German-American) culture in international law is apparently being won at the expense of the German language.

V. The Influence of Technology

In the traditional period of international law, jurists were men of books. Erudition in this field, as in others, was measured by the depth of book learning. Even today, university libraries are still crucial to the development of international law. The major 'centres of learning' are still the principal foci of theory-building: hence the expression 'schools of theory.' Today, however, it seems that new advances in the theory of international law will be dependent on a wider range of factors outside as well as inside the university community.

Almost certainly the chief factor in the future development of theory in international law will be the availability of new and impressively efficient technologies of communication. Soon books will no longer be the principal channel of data and ideas concerning legal and regulatory problems in the world community. The new technologies will be dominated increasingly by computerized systems for the dissemination of knowledge, many of which will be expensive to assemble but relatively cheap to use after the costs of assembly have been met. In the world of international law, one can expect to see a technological revolution in the collection and retrieval of treaty texts and other important documents relevant to the development of international law at global, regional and national levels. Access to these materials will become easier with the advent of the silicon memory chip. Moreover, the preeminence of the English language in international law may become less marked in the early twenty-first century when automatic language translation computers become widely available, and students and laymen secure access to previously esoteric texts through the efficient use of popular audio-visual techniques of presentation and explanation.

Of the three principal modes of theory-building in international law—the philosophical, doctrinal, and scientific—these new forms of technology are