

International Legal Theory and Doctrine

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A. Introduction

- 1 More than in other fields of law, → *international law*[’s] centre of gravity has been with theoretical abstraction and doctrinal construction. Its links with philosophy and political theory have been close and persistent, and academic lawyers have been the predominant carriers of its political ethos. It is not obvious where the line between ‘theory’ and ‘doctrine’ lies. In general terms, it may be said that where the former asks questions about international law as a *whole*—as a ‘system’ or an ‘instrument’ of policy—doctrine deals with particular, substantive aspects of the law, such as, for example, the rules on the use of force (→ *Use of Force, prohibition of*), the principles of → *State responsibility*, or the role of → *sanctions* in the enforcement of → *treaties*. Nevertheless, if it is usually assumed that doctrine proceeds by interpreting and systematizing the normative materials, how that work is carried out depends on ‘theoretical’ views about the purpose of interpretation and the types of materials to be included in the system (→ *Interpretation in International Law*). Here, as will be further elaborated below, there are two broad directions or sensibilities: one that focuses on rules and legal sources and seeks to create a reliable conception of binding law, another that works with processes and objectives in order to link the law firmly to its social ‘context’ (→ *Doctrines [Monroe, Hallstein, Brezhnev, Stimson]*).
- 2 The theory of international law asks general questions about the nature and role of law in the international world. Three sets of questions have been particularly important. One begins with the recognition of the heterogeneity of international actors, the variety of preferences and objectives they have and the differences in their cultural and historical backgrounds. Is law between such actors possible? Might there be common principles or an overarching *telos* uniting them? Is the world a legal community (*Rechtsgemeinschaft*) or condemned to remain a contractually based ‘anarchical society’? A second set of questions emerges from the claim of those actors to be independent from each other and entitled to lead autonomous lives. How can any standards be really ‘binding’ on such actors and what might their ‘binding force’ mean? What is the justification for coercing autonomous actors? And a third set of questions focuses on those actors and their manner of relating to each other. Who are the relevant actors in the first place, and how can the law assist them in attaining what they want? And what to do if they want different things—as they often do? These three sets of questions deal, respectively, with the → *universality* of international law, its binding force, and the relations between international law to its political and social environment.
- 3 Such questions have recurred over and over again in different vocabularies since the emergence, in connection with European colonial expansion (→ *Colonialism*), of a tradition of contemplation about a secular law beyond western statehood. It has often been dealt with in terms of the relationship between universal and regional—or local—rules. The question of binding force has been translated into problems about the → *sources of international law* or the consequences of breach: how ‘hard’ or ‘soft’ is international law? The relationship of law to international society has been debated sometimes in terms of international law’s historical ‘mission’ of pacification and civilization, sometimes in terms of functional co-ordination and co-operation between States. The notions of → *globalization*, → *legitimacy* and → *effectiveness* address such questions today in a political science inspired vocabulary that renews the professional quest in a manner that appears familiar to contemporary international elites. But if vocabularies differ, the concerns of theory and doctrine today are not too distant from those addressed by the founders of theoretical reflection in the field, Francisco de Vitoria in 16th century Spain, Hugo Grotius in 17th century Holland or Immanuel Kant in 18th century Eastern Prussia.
- 4 And yet, new vocabularies empower new forms of legal expertise, lifting new concerns into focus, downplaying the importance of others. It often appears that international law has, since the mid-20th century, turned increasingly from theory to doctrine. This has come with the technical professionalization of the field and has meant a narrowing of its focus, privileging interpretative skill or concerns about effectiveness over transcendental reflection about international

law's links with human nature or its role in creating a better world. Large teleological questions have been set aside in order to work on technical rules and practices. Yet that work, too, is informed by larger visions, although they may lack academic articulation. International law develops in shifts of emphasis between periods of confidence and confusion, routine and innovation, construction and critique. As doctrinal work begins to appear stale and inconsequential, the emphasis will continue to change and renewal will come from raising the focus from rules to theories about rules and from facts to the question of the justifiability of such facts.

B. Universality

- 5 A persistent question of international legal theory concerns the normative scope of international law. There is no doubt that the language and ethos of universal law are a European heritage, a heritage that has always imagined itself as applicable also beyond Europe. The challenge has been to construct the law in such a way that it would not simply be another *ius gentium*—the law of an imperial centre applicable to foreigners.
- 6 The question about the possibility of universal law lay at the core of the famous debate between the Spanish theologians Bartolomé de Las Casas and Juan Ginés de Sepúlveda at Valladolid in 1550 that focused on the justification of Spanish rule over the Indians (→ *History of International Law, Ancient Times to 1648*). What finally emerged as the official theory of the empire was that Indians, too, were in possession of a soul, and enjoyed rights over their land on the same basis as the Spanish. War could be waged on them only if they opposed trade or proselytizing. The theory of natural rights had developed in order to defend church property against the Franciscan doctrine of poverty. By the time the issue of property rights was dealt with by the Protestant Grotius—1608 and 1625—the view had been consolidated that these were based on a universal natural law that also justified war in their defence (→ *Natural Law and Justice*).
- 7 The Grotian view of universal law as an emanation from natural sociability was modified by Thomas Hobbes and Samuel Pufendorf who envisaged humanity in terms of its natural search for pleasure and avoidance of pain (→ *History of International Law, 1648 to 1815*). This provided the foundation for an international law conceived in terms of natural rights or self-protection and self-perfection that pushed sovereigns into co-operation to realize their long-term interests. During the 18th century, the view of international law as co-ordinating arrangements and customs of warfare, as well as principles of European statecraft and → *diplomacy*, were articulated as the *droit public de l'Europe* (public law of Europe; translation by the editor) and universalized as natural law by such enlightenment figures as the Swiss diplomat Emmerich de Vattel and the Scottish philosopher Adam Smith. The view of international law as both natural to the interaction of modern States and an instrument for the development of universal federation—of free republics—expressed by Kant in 1795, became a firm foundation for most later theory. As the experience of the French revolution undermined efforts to work natural law into the basis for a stable post-Napoleonic world order, new streams of academic writing professionalized the field by separating it from philosophy and politics—including political economy—and based it firmly on European diplomacy.
- 8 Wary of the abstractions of natural law, 19th century jurists examined the field from a predominantly historical angle, as the product of centuries of interaction between European sovereigns (→ *History of International Law, 1815 to World War I*). To account for its universality, that European experience was situated within a developmental theory of stages of civilization, derived from late-19th century social and socio-biological thought. Under the threefold distinction between 'civilized', 'barbarian' and 'savage' communities, European States and their settlement colonies were understood to occupy the first level, the great Asian empires—→ *China*, Siam, Japan, and Turkey—the second, and most of Africa the third level. This classification was only slightly modified in the mandates system under the → *League of Nations*. After World War I, however, there was a widespread sense that the efforts to create a universal law though extrapolating a 'standard of civilization' under Europe's auspices had failed (→ *History of International Law, World War I to World War II*). Many indicted → *legal positivism* for what they felt had been an excessive respect for State policy and will. A reconstructive scholarship in the 1920s was inspired by the establishment of the League of Nations in 1919 and the → *Permanent Court of International Justice (PCIJ)* in 1922 and sought the basis for universal international law from two directions.
- 9 One consisted of a sociological theory about the laws of modernity, → *interdependence* and solidarity among → *nations* (→ *Sociological Theories of International Law*). This updated 18th century natural law with a touch of French social philosophy and Comtean ideas about the natural social development. 'Solidarism' developed into a left federalist agenda and support for reading the Covenant of the League of Nations in constitutional terms and seeing the work of international organizations as the administration of an international public realm (→ *International Organizations or Institutions, History of*). The other direction joined the legal formalism of Kelsen and his associates with the new natural law orientation by Verdross, Lauterpacht and others. Their theories were critical of pre-war doctrines of → *sovereignty*

and → *vital interests* and used approaches from general legal theory—especially from the ‘systemic’ character of law—and the case law from arbitral tribunals and the PCIJ to construct international law into a gapless legal system.

- 10 After World War II, there was a sense that the inter-war theories had been too abstract and optimistic and needed to be replaced by more ‘realism’ (→ *History of International Law, since World War II*; → *Legal Realism School*). The legal pragmatism of the 1950s and 1960s took for granted that the → *Cold War (1947–91)* prevented progress to a universal law. The main task was to elaborate the conditions of international co-operation in an ideologically divided world. In the Soviet Union, socialist theory developed from an initial unwillingness to participate in international relations dominated by capitalist States into a pragmatic view of → *peaceful coexistence* in the 1950s and 1960s that allowed co-operation between the blocks but maintained Soviet → *hegemony* within the socialist block. In the west, pragmatic energy was directed towards strengthening international institutions and preparing the → *decolonization* of the developing world. A law ‘without sanctions’ could still be effective by inducing conformity through enlightened self-interest (→ *Sanctions*). In the 1960s new theories began to proceed on a kind of global sociology that mapped a ‘new’ international world where ‘novelty’ was understood as increasing penetration of international law into economic development, → *human rights* and environmental protection (→ *Environment, International Protection*), trade, and co-operation in the social and welfare realms. Lawyers learned the language of ‘world order’ to integrate studies of Cold War co-operation and a military balance into constitutive conditions of universal law. Friedmann's *The Changing Structure of International Law* (1964) was an emblem of 1960s ‘theory’—pragmatic and reform-oriented, with a slightly left-welfarist outlook on world problems.
- 11 In the 1980s and 1990s universalism received a boost. New developments in human rights and environmental co-operation, the activation of the → *United Nations [UN] Security Council* (→ *United Nations, Security Council*), the establishment of the → *World Trade Organization (WTO)* in 1994 and the turn to → *international criminal law* in reaction to civil war in the Balkans and → *genocide* in → *Rwanda* laid the basis for renewed speculation about the possibility of a world ruled by an international law. The end of the Cold War enabled lawyers to pick up themes such as → *humanitarian intervention* from previous periods.
- 12 Today, three broad streams of reflection about universal international law have emerged. An institutional cosmopolitanism draws upon the massive increase of institutional activities in human rights, trade, environment, criminal law and from functional co-operation between an expanding set of actors. For these doctrines, State → *sovereignty* remains the principal problem, while issues of effective and ‘legitimate’ → *international governance*, with increasing participation by the → *civil society*, lay out the academic and reformist agenda. Institutional cosmopolitanism offers a platform especially for European constitutionalist doctrines to engage the → *fragmentation of international law* emerging from functional differentiation on the one hand, and the unilateralism of the United States of America (‘US’) and its allies on the other (→ *Unilateralism/Multilateralism*).
- 13 A second new stream of theories emerges from ‘liberal’ or ‘neo-liberal’ writings, based in the developed north. These theories look beyond the diplomatic and public law orientation of traditional international law and institutional cosmopolitanism, understood as unable to respond efficiently to the ‘challenges’ of a globalized world. They stress the need for interdisciplinary collaboration between lawyers and political scientists and share a predominantly instrumental view of international law as a regulatory policy-choice sometimes useful for the attainment of desired objectives, typically the New Haven Approach. These objectives are occasionally associated with economic and technical preferences, at other times with humanitarian and environmental interests or the consolidation of transnational structures of co-operation. These theories are expressly universalist and sometimes resonate with 19th century debates on the ‘standard of civilization’.
- 14 A third set of contemporary theories is the heterogeneous group of writings → that come under labels such as ‘feminism and international law’ (→ *Feminism, Approach to International Law*), ‘new approaches to international law’—or ‘New Stream’—and ‘third world approaches to international law’ (→ *Developing Country Approach to International Law*). They are distinguished from the above by their complex universalism that is often visible in their critical engagement with various types of ‘identity politics’. These theories take self-consciously the role of critics, or challengers of the doctrinal tradition. Writing from the margin is for them a political commitment and a research strategy. They stand up for groups or interests not usually represented in traditional doctrines or institutions and they derive inspiration from a very heterogeneous collection of academic materials—radical political philosophy, critical sociology, post-colonial studies, feminism, literary criticism and so on. These theories stress the internal contradictions and indeterminacy of traditional, cosmopolitan and liberal doctrines and focus on their institutional biases. For them, law is often less rules or institutions than a language, a cultural sensibility or a political project. Both feminist and New Stream writing is distinguished by their conscious use of sociological—and in case of New Stream, also historical—methods in doctrinal analysis. They

often describe law from an actor's perspective, stressing the 'political' nature of law, its bias in favour of hegemonic preferences.

C. The Explanation of Binding Force

- 15 A persistent theme of theoretical speculation focuses on how to explain the binding force of a law that is supposed to apply to sovereign entities. If sovereignty signifies independence, is it compatible with being bound? Two types of answers have been given. One seeks the source or origin of normative authority beyond sovereignty, for example from a superior—divine—will, from a constraining principle of morality or reason or from some historical or social necessity (→ *Ethos, Ethics and Morality in International Relations*). Another set of answers draws international law's binding—normative(nature from the sovereign's own self-interest or will or the very nature of 'sovereignty' itself. These explanations are exhaustive and mutually exclusive: a sovereign may be bound only because this follows from something outside its sovereignty or because it is implied in sovereignty. Much of the history of international legal theory has to do with the opposition between such 'external' and 'internal' explanations for international law's binding force (see also → *Methodology of International Law*).
- 16 Conventional accounts often reduce theoretical debates to a confrontation between more or less naturalistic—'external'—and positivistic—'internal'—theories (→ *Legal Positivism*). The labels 'natural law' and 'positivism' cover, however, a very wide spectrum of positions that often become indistinguishable from its assumed adversary. This is so because neither 'natural law' nor 'positivism' can be sustained without support from the other: a theory that begins by postulating a 'natural' law must prove itself by pointing to 'positive' evidence about its realization in history and practice; a theory that grounds itself in 'positive' facts of statehood—eg sovereign → *consent* or interest—must derive its normative force from outside such sovereignty, namely an 'external' criterion about when and to what extent sovereignty is to have such force.
- 17 The indeterminacy and persistency of these theoretical positions follow from the inability to prefer consistently either external or internal explanations for why international law would be binding. Theories that seek binding force from *beyond* sovereignty seem utopian and unverifiable, unable to explain their content unless they refer back to what it is that States do or say or what lies in their interest. Theories that base binding force *on* sovereign behaviour, will or interest cannot distinguish between power and authority, a band of robbers and legitimate sovereigns, unless they refer to a criterion that tells which 'will' is normative, what 'interest' is lawful and where the boundary between conforming behaviour and breach lies. Because there are no other explanations available—after all, an explanation can only be either external or internal with regard to sovereignty—international legal theory opens up into an unlimited field for contestation between alternative theoretical approaches none of which can have the final say.
- 18 As we have seen (see para. 7 above), early modern natural law already viewed the justification of constraint alternatively from the outside and the inside of sovereign power, concluding that it was the very self-interest of sovereigns that compelled them into co-operation. This view sufficed to explain the mores of European diplomacy as a legal system well towards the end of the 19th century. For all practical purposes, the 'binding force' of international law could be understood to mean the rational need for States to co-operate. Treaties, for example, had binding force in the same way as domestic constitutional law: not owing to external power of enforcement but because they expressed the sovereign will to be bound (doctrine of autolimitation). Or as it was put by the PCIJ in its very first case—the *Case of the SS 'Wimbledon' (Government of His Britannic Majesty v German Empire)* (→ *Wimbledon, The*)—treaties were not a → *derogation* but an attribute of sovereignty. If war remained a sovereign privilege, this was only a realistic conclusion from the premise that there was no external judge to assess what might be in accordance with vital State interests.
- 19 Inter-war scholarship rejected these ideas as too servile to sovereign power and logically redundant: whether State will was binding could only be ascertained by reference to an external standard; voluntarism—and positivism—in this sense relied on a non-voluntary—naturalist—understanding of State co-operation as an expression of just principles. Either international law was wholly autointerpretative—in which case every State could always back out from whatever it had consented to, and international law was not really binding. Or there had to be a way to argue that an obligation bound the State irrespective of its reluctance now to admit it. The pragmatic explanation for the binding force of treaties was sought from moral or sociological necessity. Without treaties, and the → *pacta sunt servanda* principle, States could not co-operate in order to realize their objectives. In the 1920s and 1930s, the 'external' standpoint was often received from a theory of interdependence, a morality of → *good faith (Bona fide)*, reciprocal justice, or from the purely formal argument that presumed a superior norm that would ground and limit the binding force of rules (Kelsen, Verdross).
- 20 The search for international law's binding force as a theoretical quest came to an end by World War II. It led too far from the concerns of lawyers preoccupied with the conditions of the Cold War. If there was no clear explanation for international law's binding force, this did not mean that most States, diplomats and lawyers would not have felt

international law as binding and acted accordingly. If it was true that most States follow most of international law most of the time (Henkin), the search for an underlying explanation was perhaps altogether unnecessary. The problem of binding force was now referred to the spheres of psychology—as a ‘feeling’ of being bound—or sociology—as the likelihood that breach will be followed by sanction. Or it was seen as a ‘philosophical’ or ‘jurisprudential’ question with which international lawyers ought not to be excessively concerned. It was sufficient to rely on the legal sources (→ *Sources of International Law*) as laid out in Art. 38 Statute of the → *International Court of Justice (ICJ)* as a sufficient explanation for why States might be bound—‘because there is *this* treaty, *this* custom or *this* general principle’.

- 21 Nevertheless, although the vocabulary of ‘binding force’ may no longer have inspired much theoretical reflection since the 1950s—as it seemed to lead into the interminable opposition between various kinds of ‘positivism’ and ‘naturalism’—the question of why a State ought to comply with a rule when it was not in its self-perceived interest to do so, did not go away. The problem was aggravated by a certain destabilization in the doctrine of legal sources caused by the emergence of novel kinds of law, → *soft law* created by international institutions and de facto practices adopted powerful actors. Debates about normative hierarchy— → *ius cogens*, Art. 103 → *United Nations Charter*—and about the relationship of general international law to regional functionally specialized types of law—human rights law, trade law, humanitarian law etc—brought to the surface again the question of binding force (→ *International Law and Domestic [Municipal] Law*; → *Humanitarian Law, International*). Even as most States did comply with most law most of the time, the sense remained that the devil hid in the exceptions—and that if there was no properly normative reason for why the States in the minority should also comply, then perhaps international law had no normative force, but was simply a post hoc label attached to the ways States had chosen to behave.
- 21 Unwilling to re-enter the terrain of positivism/naturalism, international lawyers turned to the social science vocabulary of → *legitimacy* to address the normative force of international rules. They began to analyze the indicia of what aspects in those rules account for the sense of compulsion they carry, assuming that it is a significant part of a State's status as a member of the international political system that it professes continuous adherence to them (Franck). The language of ‘legitimacy’ goes some way towards resolving the dilemmas posed by purely external and purely internal explanations for international law's binding force. Legitimate rules—typically treaties, custom, general principles—should be complied with as simply a part of a State's claim to be treated as a regular participant in international co-operation. However, this only pushes one step further the question of what, then, is it that such participation requires in any single dispute or controversy—that is, when it counts? Asking that question will immediately draw attention away from general ‘legitimacy’ to the *opposability* of a rule on a determined State or other legal subject. And this will revive the opposition between ‘internal’ and ‘external’ explanations once again: the rule is either opposable because it is what the States—or the legal subject—*intended* (internal) or because this provides a just—equitable, reasonable, optimal—way to understand it (external). As this is the form in which the question of binding force is raised in the context of most professional ‘law-jobs’, it cannot be answered by the vocabularies of political science (‘legitimacy’) or ethics (‘rightness’). Instead, there needs to be a specific *legal* explanation for why a rule is binding and that explanation can only emerge from the sovereign will of the State—or other subject—or some standard of non-will-related justice.

D. International Law and Society

- 23 The question of binding force occupied perhaps the largest space of what passed as international law theory until the end of the 19th century. Thereafter—but also occasionally before—it had to contend with another type of exploration that asked the question of international law's effect and role in the worlds of diplomacy and politics. If the question of ‘binding force’ opened international law for theoretical questions as it were from the ‘inside’ of the profession, the concern over its role in the world opened those questions from the ‘outside’ to the ‘users’ of law. As would be expected, while the former exploration was inspired by philosophy, political theory and jurisprudence, the latter question was predominantly dealt with in the vocabularies of sociology, social theory and political science.
- 24 It was the very project of early modern natural law to re-establish the authority of a political order after the loss of unifying faith by grounding this order in a scientific view on human nature—human needs, interests and predispositions—and projecting it at the level of society as a solid basis for a secular legal system. International law's reality would be grounded in sovereign power and in the laws of human society that made it possible for sovereigns to attain their self-interest only by co-operation. To be sure, war was endemic but, as Kant prophesized in 1784, through the devastation it wrought and owing to the expanding benefits brought about by trade, States would learn sociability and embark on the path of universal federation.
- 25 Kantian liberalism joined hands with the spread of the ideologies of free trade and civilization, both reassuring lawyers that the invisible mechanisms of society would generate general good out of private interest. In the 19th century, theories of interdependence and the pacifying effects of trade were supplemented by the view of history as progression through

different levels of development. With the emergence of sociology in France and Germany towards the end of the century, these historical and anthropological speculations were increasingly replaced by developed theories of functional and economic interdependence and the social forces of modernity as the foundation for a solid and socially responsive international order. Invariably, such sociologies canvassed increasing integration as the necessary outcome of this process and made a plea for the use of international law to control that process (Alvarez, Huber, Scelle).

- 26 The first formal sociologies of international law emerged after World War II to explain the possibilities and limits of an international legal order between sovereign States (Corbett, Stone, de Visscher). These theories emerged together with the critique of the 'utopian' legalism of the League of Nations system and the consolidation of 'international relations' on the basis of political 'realism' at US universities as an offshoot of the teachings of Weimar refugees—Morgenthau and others—and in Great Britain within the 'English School' (Bull, Wight). During the Cold War, it seemed important to link international law firmly with the official diplomacy of States while still canvassing the conditions under which the effects and intensity of the ideological confrontation could be mitigated and States could be slowly directed out of the quagmire. In the 1960s and 1970s a policy-oriented jurisprudence emerged that was oriented towards an increasingly instrumental view of the law. Whether from the political right or the political left, this view critiqued the idea of law as autonomous rules or institutions and emphasized the need for linking the law closely to its social environment (McDougal, Falk). The metaphor of law as a 'reflection' of international society gave rise to different ways of understanding international law following on different ways to articulate what was central in the 'international society'—some focusing on law as an element of diplomatic and political 'processes', perhaps as an instrument of 'communication' values or objectives or in a more straight-forward fashion as an aspect of institutional power. From the 1970s onwards, international law was also increasingly theorized as part of western predominance (Orford). Ways were sought to align it with Third World concerns about → *self-determination* and economic development (Rajagopal, Miéville).
- 27 In the 1990s and thereafter, there has been increasing concern to widen the scope of international law so as to take account of the developments grouped under the label of → *globalization* (Berman). Efforts have been made to bring new types of international—or transnational—phenomena within the law: relations between States and private individuals, governmental and → *non-governmental organizations*, transnational corporations, State administrations and so on (→ *Corporations in International Law*). Many have argued about the decreasing significance of States in the international system. Some have pointed to the way statehood 'disaggregates' into the administrative services conducting international business with increasing autonomy (Slaughter). New theories highlight new types of law-creation through international organizations with the participation by → *non-State actors* and sometimes through informal action by private transnational entities themselves. Theories of informal 'governance' have been accompanied by focus on law-making as amorphous 'regulation' often induced by informal standard-setting or the emergence of de facto behaviour as 'models' to be followed. A part of international legal theory has turned into a doctrine of the 'management' of international problems in an 'efficient' and 'legitimate' fashion (Goldstein and others).

E. International Legal Theory Today: The Clash of Normative and Sociological Doctrines

- 28 The debates about international law's binding force and the relationship of international law to its political environment have developed to relatively homogenous but in part opposing academic sensibilities. Where most European lawyers focus predominantly on international law's normative force—examining and elaborating its rule-structures—lawyers from the US and the Third World are often more preoccupied with questions about international law's normative scope and institutional management. Such a distinction between normative doctrines—doctrines about the legal sources, about interpretation and application of the law—and sociological doctrines—doctrines about international law's objectives and institutional effects—reflects orientations of academic training and conceptions of the proper roles of the lawyer vis-à-vis the judge, diplomat or the policymaker.
- 29 This opposition is reflected for example in the debates about the fragmentation and 'constitutionalization' of international law that have preoccupied lawyers in the early years of the 21st century. 'Fragmentation' denotes the emergence of special regimes and sub-systems of international law that deal with particular questions from a particular perspective, not necessarily following the rules of general international law. For example, principles of State responsibility under general international law might not necessarily be recognized by international criminal tribunals and vice versa, while human rights organs routinely apply the → *Vienna Convention on the Law of Treaties (1969)* differently from 'generalist' bodies (see → *International Criminal Tribunal for the Former Yugoslavia [ICTY] Prosecutor v Tadić*; ICJ *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v Serbia and Montenegro]*; → *European Court of Human Rights [ECtHR] [Belilos v Switzerland]*). Legal fragmentation emerges from the—social—process of functional differentiation and the fact of getting autonomous of parts of society that has long been under way in domestic societies but has commenced with force in the international realm only through the emergence of specialized organizations and treaty-regimes (Fischer-Lescano and Teubner).

- 30 One way to look at this process is to see therein the expansion of international law's material scope. From the perspective of the concern to ensure that law closely 'reflects' social developments, the appropriate reaction would be to increase legal specialization as a natural effect of globalization. Viewed as a technical instrument for 'responding' to problems emerging in the specialized fields, this gives rise to a 'managerial' approach to which international law is above all an instrument for the optimal realization of the preferences favoured within each field of expertise. In a fluid 'globalized' context the search for optimal solutions necessitates a constant adjustment of the relevant legal standards and their accommodation to changing circumstances. For this purpose, they will have to be formulated as open-ended rules of thumb or presumptions—typically written into → *framework agreements*—while increasing authority will need to be delegated to the experts' bodies charged to administer the relevant regimes.
- 31 This approach will bring to the surface a problem analogous to that of binding force among sovereign States. If the law becomes only an instrument of expert regimes then it will be unable to pose demands on them or direct their development. If the law turns fully managerial, it loses its normative force and becomes a blanket endorsement of the politics of each form of expertise, without resources to solve clashes of functional regimes, such as 'trade' and 'environment'. This concern lies behind the debate on the 'constitutionalization' of international law (Klabbers). Common to the variety of ways in which the idea of a 'constitution' is used internationally is the effort to find an overarching normative standard or platform from which to judge conflicts emerging from the processes of globalization. What is the relationship of legal regimes—say the regime of human rights and that of the immunity of high State officials—with each other? What principles may be applicable in cases of conflict? Some lawyers have elaborated on the nature of the UN Charter as a world constitution while others have sought coherence from fundamental 'values' or the needs of a postulated → *international community* (Fassbender, Dupuy). Where sociological theories elaborate the data of the international world into pluralist doctrines, normative theories work with legal sources and rules and principles in order to discriminate between positive and negative developments.
- 32 In this way recent theories and doctrines confront in a novel vocabulary problems and dilemmas that are as old as international law itself. The project of constructing a universal law has always been conducted from two directions. One has consisted in the effort to find an external—'transcendental'—starting-point in normative—religious, moral, ethical, political—propositions whose universal → *validity* would entitle their use as conclusive justifications for limiting the freedoms of international actors, above all States. The other has taken the meaning of social facts as self-evident and has sought to create a universal international law by extending the law's material scope to cover those facts as widely as possible. The force of the former approach lies in its ability to provide a critical perspective on the use of international power. The persuasiveness of the latter perspective lies in its realistic embrace of such power.
- 33 The structure and dynamism of international legal theory and doctrine is provided by the exchange between the normative and the factual perspectives in the effort to create a universal law. For a theory or doctrine to be plausible, both need to be present. A doctrine lacking normative perspective would be reduced to a non-binding apology, a description and legitimation of what power has been able to achieve in society. It would have no resources to distinguish between what 'is' and what 'ought to be'. A doctrine divested of factuality would seem an ephemeral utopia, indemonstrable by reference to what actually takes place in the world, including what international actors want, or what lies in their interests. It would be speculation or worse, the dressing of the speaker's preference as 'law'. As new theories give rise to novel doctrines, and novel doctrines are abstracted into better theories, international law will continue to develop through periods when forms of social power are consolidated into widely accepted mainstream theories and doctrines and periods when most attention is directed to critically challenging them. Through this dialectic international law provides the intellectual tools not only to interpret the world, but to change it.

Select Bibliography

A Smith *The theory of moral sentiments, or, An essay towards an analysis of the principles by which men naturally judge concerning the conduct and character, first of their neighbors, and afterwards of themselves: to which is added a dissertation on the origin of languages* (E Duyckinck New York 1822).

G Jellinek *Die rechtliche Natur der Staatenverträge: Ein Beitrag zur juristischen Construction des Völkerrechts* (Hoelder Wien 1880).

E Kaufmann *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (Mohr Tübingen 1911).

I Kant 'Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht' in *Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik* (K Vorländer ed, 2nd edn Felix Meiner Leipzig 1922) 5–20.

I Kant 'Zum Ewigen Frieden' in *Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik* (K Vorländer ed, 2nd edn Felix Meiner Leipzig 1922) 115–69.

A Verdross *Die Verfassung der Völkerrechtsgemeinschaft* (Springer Wien 1926).

M Huber *Die soziologischen Grundlagen des Völkerrechts* (Rothschild Berlin 1928).

H Kelsen *Das Problem der Souveränität und die Theorie des Völkerrechts* (2nd edn Mohr Tübingen 1928).

G Scelle *Précis de droit des gens: Principes et systématique* (Recueil Sirey Paris 1932–36) vols 1–2.

H Lauterpacht *The Function of Law in the International Community* (Clarendon Oxford 1933).

S Pufendorf *De jure naturae et gentium* (CH Oldfather ed Clarendon Press Oxford 1934) vols 1–2 trans.

H Morgenthau 'Positivism, Functionalism and International Law' (1940) 34 AJIL 261–84.

C Schmitt *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot Berlin 1950).

PE Corbett *Law and Society in the Relations of States* (Harcourt New York 1951).

MS McDougal 'International Law, Power and Policy: A Contemporary Conception' (1953) 82 RdC 137–259.

PC Jessup *Transnational Law* (Yale University Press New Haven 1956).

JL Brierly *The Basis of Obligation in International Law and Other Papers* (Clarendon Press Oxford 1958).

A Alvarez *Le droit international nouvel dans ses rapports avec la vie actuelle des peuples* (Pedone Paris 1959).

J Stone *Legal controls of international conflict; a treatise on the dynamics of disputes- and war-law* (Stevens London 1959).

G Clark and LB Sohn *World Peace through World Law* (2nd edn Harvard University Press Cambridge 1960).

MA Kaplan and N de Belleville Katzenbach *The Political Foundations of International Law* (Wiley New York 1961).

WG Friedmann *The Changing Structure of International Law* (Stevens London 1964).

H Grotius *De iure belli ac pacis libri tres* (Oceana New York 1964) vols 2.1–3 trans.

E McWhinney 'Changing International Law Method and Objectives in the Era of Soviet-Western Détente' (1965) 59 AJIL 1–15.

C Parry *The Sources and Evidences of International Law* (Manchester University Press Manchester 1965).

M Barkun *Law without Sanctions: Order in Primitive Societies and the World Community* (Yale University Press New Haven 1968).

C de Visscher *Theory and reality in public international law* (Princeton University Press Princeton 1968).

A Chayes, T Ehrlich and AF Lowenfeld *International Legal Process: Materials for an Introductory Course* (Little Boston 1968–69) vols 1–2.

B Rosenthal *Etude de l'oeuvre de Myres Smith McDougal en matière de droit international public* (Pichon et Durand-Auzias Paris 1970).

H Bull *The Anarchical Society: A Study of Order in World Politics* (Macmillan Basingstoke 1977).

L Henkin *How Nations Behave: Law and Foreign Policy* (2nd edn Columbia University Press New York 1979).

H Mosler *The International Society as a Legal Community* (Sijthoff Alphen aan den Rijn 1980).

GW Gong *The Standard of 'Civilization' in International Society* (Clarendon Oxford 1984).

A Carty *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press Manchester 1986).

D Kennedy *International Legal Structures* (Nomos Baden-Baden 1986).

M Wight *Power politics* (Viking Penguin New York 1986, c1978).

MS McDougal *Studies in World Public Order* (Nijhoff Dordrecht 1987).

WM Reisman and A Willard (eds) *International Incidents: The Law that Counts in World Politics* (Princeton University Press Princeton 1988).

P Allott *Eunomia: New Order for a New World* (OUP Oxford 1989).

TM Franck *The Power of Legitimacy among Nations* (OUP Oxford 1990).

I Kant 'Perpetual Peace: A Philosophical Sketch' (1795), in *Political Writings* (Hans Reiss ed, 2nd enlarged edn CUP Cambridge 1991).

L Hanke *All mankind is one: a study of the disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the intellectual and religious capacity of the American Indians* (Northern Illinois University Press DeKalb 1994, c1974).

R Higgins *International Law and How We Use It* (OUP Oxford 1994).

R Falk 'Casting the Spell: The New Haven School of International Law' (1995) 104 YaleLJ 1991–2008.

E de Vattel *Le droit des gens, ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (William S Hein Buffalo 1995).

B Fassbender 'The United Nations Charter as a Constitution of the International Community' (1998) 36 Colorado Journal of Transnational Law 530–619.

A-M Slaughter, AS Tulumello and S Wood 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 AJIL 367–97.

J Rawls *The Law of Peoples: With 'The Idea of Public Reason Revisited'* (Harvard University Press Cambridge 1999).

B Roth *Governmental Illegitimacy in International Law* (Clarendon Oxford 1999).

H Charlesworth and CM Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press Manchester 2000).

J Goldstein and others (eds) *Legalization and World Politics* (MIT Press Cambridge 2000).

T Hobbes *Leviathan* (Pearson Longman New York c2000).

D Kennedy 'When Renewal Repeats: Thinking against the Box' (2000) 32 NYUJIntlL&Pol 335–498.

S Marks *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP Oxford 2000).

R Tuck *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (OUP Oxford 2000).

M Koskenniemi *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP Cambridge 2001).

P-M Dupuy 'L'unité de l'ordre juridique international: Cours général de droit international public (2000)' (2002) 297 RdC 9–489.

A Orford *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP Cambridge 2003).

B Rajagopal *International law from Below: Development, Social Movements and Third World Resistance* (CUP Cambridge 2003).

J Habermas 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' in *Der Gespaltene Westen* (Suhrkamp Frankfurt a.M. 2004) 113–93.

J Klabbers 'Constitutionalism Lite?' (2004) 1 IntlOrgLRev 31–58.

A-M Slaughter *A New World Order* (Princeton University Press Princeton 2004).

A Anghie *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2005).

PS Berman (ed) *The Globalization of International Law* (Aldershot Ashgate 2005).

RSJ Macdonald and DM Johnston (eds) *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Nijhoff Leiden 2005).

M Koskeniemi *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a New Epilogue* (CUP Cambridge 2005).

N Matz *Wege zur Koordinierung völkerrechtlicher Verträge: Völkervertragsrechtliche und institutionelle Ansätze* (Springer Heidelberg 2005).

C Miéville *Between Equal Rights: A Marxist Theory of International Law* (Brill Leiden 2005).

A Fischer-Lescano and G Teubner *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts* (Suhrkamp Frankfurt a.M. 2006).

Select Documents

Belilos v Switzerland (ECtHR) Series A No 132.

Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (ICJ, 26 February 2007) <<http://www.icj-cij.org/docket/files/91/13685.pdf>> (27 February 2008).

Case of the SS 'Wimbledon' (Government of His Britannic Majesty v German Empire) PCIJ Rep Series A No 1.

Prosecutor v Tadić (Opinion and Judgment) ICTY-94-1 (7 May 1997).