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978-1-107-01926-3 - International Legal Positivism in a Post-Modern World

Edited by Jörg Kammerhofer and Jean d'Aspremont

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INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD

International Legal Positivism in a Post-Modern World provides fresh perspectives on one of the most important and most controversial families of theoretical approaches to the study and practice of international law. The contributors include leading experts on international legal theory who analyse and criticise positivism as a conceptual framework for international law, explore its relationships with other approaches and apply it to current problems of international law. Is legal positivism relevant to the theory and practice of international law today? Have other answers to the problems of international law and the critique of positivism undermined the positivist project and its narratives? Do modern forms of positivism, inspired largely by the theoretically sophisticated jurisprudential concepts associated with Hans Kelsen and HLA Hart, remain of any relevance for the international lawyer in this 'post-modern' age? The authors provide a wide variety of views and a stimulating debate about this family of approaches.

JÖRG KAMMERHOFER is a senior research fellow and senior lecturer at the Faculty of Law, University of Freiburg, Germany. He is also a visiting lecturer at the Vienna University of Economics and Business, Austria.

JEAN D'ASPREMONT holds the Chair of Public International Law at the University of Manchester. He is also Professor of International Legal Theory at the University of Amsterdam, the Netherlands.

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Edited by
JÖRG KAMMERHOFER
JEAN D'ASPREMONT

Assistant editors
Kate Brookson-Morris
Brendon Plant



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CONTRIBUTORS

JEAN D'ASPREMONT is Chair of Public International Law at the University of Manchester, UK and Chair of International Legal Theory at the University of Amsterdam, the Netherlands.

JOCHEN VON BERNSTORFF is Professor of Public Law, International Law and Human Rights Law the University of Tübingen, Germany.

BEATRICE I. BONAFÉ is Associate Professor at the University of Rome 'La Sapienza', Italy.

PATRICK CAPPS is Professor of International Law at the University of Bristol, UK.

THÉODORE CHRISTAKIS is Professor of International Law at the University of Grenoble-Alpes, France.

RICHARD COLLINS is Lecturer in Law at the University of Sheffield, UK.

GLEIDER I. HERNÁNDEZ is Lecturer in Law at the University of Durham, UK.

FLORIAN HOFFMANN is Franz Haniel Chair for Public Policy at the University of Erfurt, Germany.

DOV JACOBS is Assistant Professor of International Law at the University of Leiden, the Netherlands.

JÖRG KAMMERHOFER is Senior Research Fellow and Senior Lecturer at the University of Freiburg, Germany and visiting lecturer of the Vienna University of Economics and Business.

JAN KLABBERS is Professor of International Organisations Law at the University of Helsinki, Finland.

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CONTRIBUTORS

DENNIS PATTERSON is Professor of Law and Chair in Legal Philosophy and Legal Theory at the European University Institute, Italy; Board of Governors Professor of Law and Philosophy, Rutgers University, United States; and Professor of Law and Chair in International Trade and Legal Philosophy, Swansea University, UK.

YAËL RONEN is Lecturer in Law at the Sha'arei Mishpat College, Israel.

SAHIB SINGH is a PhD candidate at the University of Cambridge, UK and Visiting Lecturer of International Law at the University of Vienna, Austria.

ALEXANDER SOMEK is Charles E. Floete Chair in Law at the University of Iowa, United States.

CHRISTIAN J. TAMS is Professor of International Law at the University of Glasgow, UK.

D. A. JEREMY TELMAN is Professor of Law at Valparaiso University, United States.

ANTONIOS TZANAKOPOULOS is Associate Professor of Public International Law at the University of Oxford, UK.

INGO VENZKE is Associate Professor at the University of Amsterdam, the Netherlands.

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PREFACE

Legal theory is inherently comparative and polemical (in the word's original sense). Legal theories inevitably define themselves in relation to and in the struggle with other approaches. International legal theory is no different in this respect. As with any comparison, this is only possible to the extent that there is a common set of standards against which similarities and commonalities are measured. Yet, both in general jurisprudence and in international legal theory, it is positivism itself which has for a number of decades been the standard of reference against which theories are compared. In other words, legal positivism has long played a structural role in theoretical debates about law. Yet, surprisingly, this central standard of reference of contemporary legal theoretical debates has itself remained undefined and in constant flux. 'Positivism' has been ascribed so many different meanings that it has endangered the intelligibility of theoretical debates. The present volume was envisaged, written and edited against the backdrop of this dialectic tension between the near-definitional role of international legal positivism on the one hand, and the large measure of vagueness about what, exactly, 'positivism(s)' mean(s), on the other. The chapters of this book primarily reflect on the various possible meanings attributed to 'international legal positivism' and how all these variants of legal positivism have been related to other approaches, as well as applied to concrete legal problems.

This volume, the first study of the twenty-first century on the meanings and the cognitive, definitional and didactic roles of legal positivism in international law, is particularly unique, as all authors of this volume have been influenced (in very different ways) by the last two decades of critical thinking about international law. This is why the book should not be misunderstood as an attempt to proselytise for legal positivism. Rather, many of the arguments in this volume are perhaps better understood as a set of (sometimes self-)critical reflections about what we have made of the idea of legal positivism, i.e. how this idea has been used in arguing within, defining and structuring international legal theory. This reflexive

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framework explains why the views expressed in the following chapters are very diverse and occasional clashes occur. Critical engagement and debate within the book was encouraged as far as possible. This book can thus also be seen as an exhibition of the immense diversity of views about the meanings, relations and uses of international legal positivism in the twenty-first century.

It will not come as a surprise that organising a debate where people – each of them with a fundamentally different understanding of (international) law – are meant not to talk past one another, but engage in a common intelligible reflection, requires much effort. In these times, dominated as they are by economic considerations, it will surprise the reader even less to hear that material and financial support, both from within and outside the university, is a *conditio sine qua non* for such a project to succeed. This book and the organisation of an authors' workshop in Amsterdam in November 2011 would not have been possible without the tremendous investment of many people, as well the financial support of institutional partners. A preface always is also an opportunity for the editors to express their gratitude to those without which the project behind such a book would not have been possible.

Our first and foremost thanks go to all those who agreed to participate in this project in the capacity as authors of a chapter. Even where (for various reasons) a colleague did not participate to the end, their influence still made itself felt in more informal ways. A conversation among the contributors that proved most fruitful started even before the delivery of chapters. The editing process itself was a journey of discovery for everyone involved and the end product seems to provide sufficient evidence that both the editors and contributors were on this journey together. This project would not have been possible without the financial and organisational support of a number of institutions. Foremost among these is the Deutsche Forschungsgemeinschaft (German Research Council), which very generously and courageously invested in a project most unusual for German legal scholarship. The Koninklijke Nederlandse Akademie van Wetenschappen (Royal Dutch Academy of Sciences) supported the authors' workshop in November 2011.

Our home institutions, past and present – the Universiteit van Amsterdam, the Friedrich-Alexander-Universität Erlangen-Nürnberg, the Albert-Ludwigs-Universität Freiburg and the University of Manchester – all provided an optimal institutional setting for the preparation and execution of the project. A first series of thanks go to those who facilitated the project in Amsterdam, and especially to André Nollkaemper for his

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support, to the members of the Amsterdam Centre for International Law who, sometimes anonymously, contributed to the discussion, and to all those who made the Amsterdam workshop possible at that end. We would also like to thank Matthias Jestaedt for granting an unusually large measure of freedom and for turning the rigid German system into a strong system of support for all within the Lehrstuhlfamilie. We would also like to thank colleagues at the Hans-Kelsen-Forschungsstelle for their help and attention.

A large number of colleagues have supported this endeavour without being formally involved. There are too many to thank them all, but we would like to highlight the input by a few: Erik Breuker, Anne van Mulligen, Anne Peters, Rike Sinder and Martine van Trigt. Finally, two anonymous reviewers for Cambridge University Press provided valuable insight and guidance in their readers' reports. The very arduous task of editing this volume and running the project – including the tedious but incredibly important bits – would not have succeeded were it not for our very own editorial team: Kate Brookson-Morris, Malte Feldmann, Clarissa Henle, Vanessa Meißner, Brendan Plant and Camilla Schiefler. Their hard work, invaluable collaboration and patience in trying times made this project possible in the first place.

ABBREVIATIONS

ACHR	American Convention on Human Rights
<i>AJIL</i>	<i>American Journal of International Law</i>
ASIL	American Society of International Law
<i>BYBIL</i>	<i>British Yearbook of International Law</i>
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CLS	Critical Legal Studies
CWC	Chemical Weapons Convention
DPRK	Democratic People’s Republic of Korea
EAL	economic analysis of law
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EHRR	European Human Rights Reports
<i>EJIL</i>	<i>European Journal of International Law</i>
EU	European Union
<i>FATU</i>	<i>From Apology to Utopia</i>
GAL	global administrative law
HRC	Human Rights Committee
HRTB	human rights treaty body
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICL	international criminal law
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institut de Droit International

ABBREVIATIONS

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IHL	international humanitarian law
ILA	International Law Association
ILC	International Law Commission
ILP	international legal positivism
<i>ILR</i>	<i>International Law Reports</i>
IMT	International Military Tribunal
IR	international relations
ISO	International Organization for Standardization
JCE	Joint Criminal Enterprise
<i>LJIL</i>	<i>Leiden Journal of International Law</i>
MN	Marginal Note
NAFTA	North-American Free Trade Agreement
NAIL	new approaches to international law
NGO	non-governmental organisation
NILP	new international legal positivism
NILR	new international legal realism
NLR	new legal realism
OAS	Organization of American States
PCIJ	Permanent Court of International Justice
PIL	public international law
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TWAIL	third world approaches to international law
UN	United Nations
UNIO	United Nations Conference on International Organization
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization