INTERNATIONAL LAW AS A BELIEF SYSTEM

International Law as a Belief System considers how we construct international legal discourse and the self-referentiality at the centre of all legal arguments about international law. It explores how the fundamental doctrines (e.g. sources, responsibility, statehood, personality, interpretation, *jus cogens*) constrain legal reasoning by inventing their own origin and dictating the nature of their functioning. In this innovative work, d'Aspremont argues that these processes constitute the mark of a belief system. This book invites international lawyers to temporarily suspend some of their understandings about the fundamental doctrines they adhere to in their professional activities. It aims to provide readers with new tools to reinvent the thinking about international law and combines theory and practice to offer insights that are valuable for both theorists and practitioners.

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CONTENTS

Foreword by Pierre Schlag *page* vii
Preface xi

1 International Law as a Belief System 1
2 Structure of the International Belief System 31
3 Self-Referentiality of the International Belief System 55
4 Manifestations of the International Belief System 71
5 Suspension of the International Belief System 103
6 Epilogue 116

Bibliography 124
Index 151

FOREWORD

A temporary suspension of the belief system known as international law – this is what Jean d'Aspremont calls for in this breathtaking work. Not a refutation or a rejection of these beliefs – that would not be actionable in any event – but an unlearning.

Prefatory to all this, of course, is a recognition that international law is, among other things, a belief system. We will bear down soon enough on Jean d'Aspremont's description of this belief system – what he finds key. But first, let's ask, what is implied in the claim that international law is a belief system at all?

One way of thinking about it is the notion that international law cannot be understood *merely* in terms of its canonical materials. One can stare at Article 38 for as long as one wants or even heed its words and collect as many legal materials as it may reference, and still one will not understand international law. Why not? The simple answer is that even though the assimilation of those materials may enable one to *perform adequately* within this system, one will not appreciate what *fundamental beliefs* make the system work (the relations that enable the legal arguments and interpretations) nor what demarcates the limits of the system (the questions and the claims disallowed).

But let's suppose one can perform adequately within the system as an international lawyer without awareness of the underlying belief system. Why undertake the inquiry proposed by Jean d'Aspremont? I can think of several answers, the most important being offered by Jean himself.

First, the international lawyer has an *instrumental interest* in performing not merely adequately, but well. In this regard, appreciating the web of beliefs that are not fully articulated in the legal materials becomes key. How so? If one does not understand how legal doctrines actually persuade, convince, coerce (and so on), one is left with the law's own stories about how it operates. These tend to be (not surprisingly for such a thoroughly rhetoricised practice) overly self-congratulatory. Law's stories about itself – how it works – in some ways not only inform but also

cloud judgment. To perform well as a lawyer requires, in d'Aspremont's terms, a certain unlearning. One could question this point, of course. It's not clear, for instance, that becoming an art critic will make one a better artist. True enough. But in law, as opposed to art, it would be very surprising if becoming a critic did not make one a better lawyer. The reason might be captured this way: there is *what you say in court during* oral argument and there is *how you think in your office about* what you will say in court in oral argument. If those are one and the same, it will not be a very good oral argument. (At the very least, I would want a different lawyer.) Unlearning is necessary, as is the development of some language to talk about legal doctrine or legal dogmatics that is not itself a thinly veiled academic abstraction or idealisation of those doctrines and dogmatics.

Second, such an unlearning would seem to be an *ethical imperative* for a serious lawyer. How so? Well, in part, the instrumental interest translates into an ethical imperative. As part of a profession where the life and livelihood of other persons (clients, third parties and the community) hang in the balance, performing well becomes an ethical imperative. But there is yet a second ethical imperative – part of the idea of law is that it is and should be a deliberative and reflective enterprise – which means that, among many other things, its self-critical gesture will often be crucial. The contrary idea that law would abjure critical self-examination in favour of mere application or rote reproduction is arguably a failure of law. I say arguably because, of course, critical reflexivity has its own path dependence and pathologies, and besides, one cannot inquire into everything. Nonetheless, bringing to mind the fundamental questions – the beliefs that underpin the law – is itself very much an aspect of what it is to do law. A stark and recent reminder (at least in the United States) of this point was the Bush-era Bybee memorandum, which in its pro forma deployment of banal legal doctrine suitable for tariff regulations to the question of torture showed that law cannot be reduced (without self-injury) to a mere technical discipline.[1] If law is to respect the objects

[1] Memorandum from John C. Yoo, Deputy Assistant Attorney General, US Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (August 1, 2002), in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Oxford University Press, 2005), p. 172. The Bybee memorandum was severely criticised by Bybee's successor at the Office of Legal Counsel (OLC), a prominent conservative academic legal thinker, for its lack of candor and one-sided selection of legal authority. Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton, 2007), p. 149. For an excellent discussion of the shortcomings of the memorandum, see David Luban, 'Carhart Memorial Lecture

of its regulative activity, then the identity of those objects (i.e. torture and its victims) must be recognised and, in turn, law must consider to what degree it is itself *à la hauteur*.[2] The Bybee memorandum in all its juridical banality was a shocking reminder of what failure on these scores actually means.

Beyond the instrumental and the ethical, there is an *intellectual interest in understanding* the belief system that underlies international law. In some sense this is much more the vocation of the law professor than the judge or the lawyer. The law professor has made a commitment to seek out understanding (and to impart understanding to his or her students). The refusal to inquire would seem like a betrayal of that calling – a violation of the teacher-student relation (which surely is both more and less than the client-lawyer or the judge-party relation).

Perhaps the most fundamental reason to undertake the inquiry lies in recognising that the paradigmatic sites of *political struggle in law* occurs in its shadows. As d'Aspremont makes clear, the unlearning he charts out for us is not only a descriptive endeavour but, as I would call it, a political one.

The decisive site of struggle where actors fight to determine the modes of legal reasoning of international legal discourse cannot be reduced to the arena where the repositories of fundamental doctrines are promulgated and adopted. Instead, the decisive sites of struggle become those where the modes of legal reasoning and the axiomisation thereof are actually debated and produced.

This is to say that the politics of law are never far from its articulate pronouncements even as their existence, identity and efficacy are nonetheless denied through our own beliefs about law.

So now let's talk about these beliefs underpinning international law as Jean d'Aspremont describes them. There are, he thinks, fundamental doctrines that pertain to international law topic-clusters, such as sources, responsibility, statehood, personality, interpretation and *jus cogens*. Recognisably, these fundamental doctrines play an extremely important role in international law. The question is, how is it that we think about these fundamental doctrines, and how is it that this way of thinking yield a sense of constraint and even systematicity such that the system of international law is reproduced in the minds, arguments, interpretations

Series "That the Laws Be Faithfully Executed": The Perils of the Government Legal Advisor' (2012) 38 *Ohio N. Univ. Law Rev.* 1043.

[2] Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law J.* 160, 1619–21 (recounting the reasons for the release of the criminal defendant in the case of *United States* v. *Tiede*).

and actions of international lawyers? This is the crux of d'Aspremont's inquiry.

In Chapter 2 of this book, the answer, he argues, is that three specific features of international legal discourse is construed as forming a belief system: the idea that fundamental doctrines constitute rules (*ruleness*), the derivation of fundamental doctrines from international instruments (*imaginary genealogy*), and the explanation of the formation and functioning of fundamental doctrines by fundamental doctrines themselves (*self-referentiality*). It is by virtue of such ruleness, imaginary genealogy, and self-referentiality that fundamental doctrines come to invent their own origin as well as dictate their own functioning, thereby generating an experienced sense of constraint among international lawyers. This phenomenon is construed here as the expression of a belief system.

International lawyers thus repeatedly (and largely unknowingly) apprehend and cast fundamental doctrines in these terms. The beliefs, as d'Aspremont argues, are not without effect. *Ruleness* yields law as an object and thus achieves a certain degree of stabilisation, identity, fixity and endurance. The *imaginary genealogy* yields a fictive history, severing what we recognise as international law from its pluralistic and contingent origins. *Self-referentiality* imposes a certain closure and allows the reproduction of law as the self-same. The three combine to produce the sense of systematicity as well as constraint.

What if we, as lawyers, judges or law professors, did not look at international law in such ways? d'Aspremont suggests that we would recognise that international law has been created in much more politicised, pluralistic, planned and contingent ways than we presently imagine. Notice that the four adjectives in that preceding sentence are not clearly on friendly terms with each other. Indeed, they are not – and that is d'Aspremont's point: the ways in which international law is constructed – and thus its resulting identities and meanings – are much more eclectic than our law-like beliefs about international law allow us to recognise. Perhaps, then – and this is exactly d'Aspremont's invitation – we ought to step back and think again?

Pierre Schlag

PREFACE

If international law books come with prefaces, it is usually not by virtue of a demand from the potential readership but because authors relish speaking about themselves and the history of their work. Prefaces are even places commonly meant for authors of international law books to indulge in some well-engineered sentimentalism. This is not surprising. Having courageously fought their way to completion of a decent manuscript and having juggled academic writing with the pressure of a constantly accelerating profession, authors of international law books often finish their work with the feeling of being miserable heroes. In fact, I have regularly come to think that completing a book in the twenty-first century requires the skills of an armchair paratrooper who can intrepidly, dedicatedly and frenetically read, think and write in any moment clear of teaching, administration and management. And yet, whatever the heroic feat of completing a book under such conditions possibly is, it often remains unclear to any such hero what international law books actually contribute to in the distressingly burning world which such books seek to describe, evaluate or manage. If the story of authors of international law books is a story of miserable heroes, we can probably forgive them for the sentimentalism they manifest in their prefaces.

Whatever sentimentalism the rest of this preface may thus betray, this book does not grapple with the sentiments of international lawyers. Rather, it deals with their *beliefs*. It particularly develops the idea that international lawyers – whether as scholars, judges, counsels, militants or teachers – engage with the problems of the world through the deployment of a belief system. According to the heuristics built in this book, being an international lawyer entails the membership to a belief system. This belief system is manifest in the way in which fundamental doctrines – around which international legal discourse is built – operate in international legal thought and practice. Fundamental doctrines of international law, this book argues, create the conditions of their own existence, such self-referentiality guaranteeing a comfort space where international

lawyers have to justify neither their fundamental doctrines nor their use thereof when they describe, evaluate or manage the world.

The claim that international law bears the characteristics of a belief system certainly does not amount to belittling international law. Quite the opposite. Belief systems are very serious matters, especially when they are used to describe, evaluate and manage the world. Although the heuristic exercise conducted in the following chapters falls short of any nihilism or utter scepticism, I am aware that my claim could raise the question of a possible rupture with my earlier work on sources, statehood and responsibility. I acknowledge that despite my long interest in unearthing the architecture and politics of international legal argumentation, much of my earlier work engaged with international legal arguments in their own terms and especially in terms of sources and interpretation. In contrast, the following chapters extend an invitation to all international lawyers to 'unlearn' their knowledge and sensibilities regarding the formation and functioning of the fundamental doctrines, which includes a radical break from international lawyers' common representations of their fundamental doctrines in terms of sources and interpretation.

Whether the discussion offered in this book possibly constitutes a discontinuation with my previous work is irrelevant. This is not only because I have always been amused by the descriptions of my earlier work as 'positivist(ic)', for I do not even know what positivism is other than being a convenient strawman in a confrontational and deliberative business. Mainly, questions of continuity or discontinuity are unimportant because I am convinced that consistency of thoughts is overrated in the discipline of international law. Actually, the obsession with consistency of thoughts is something which I have always found very bizarre in a discipline which considers itself intellectual. Thinking must entail a readiness to vandalise one's early thoughts. This does not mean that the suspension of the belief system advocated in this book repudiates anything I have done earlier – it should remain possible to research international legal argumentation from within the belief system. The point made here is rather that it is time to bring an end to the impoverishing social expectation that each international lawyer constantly and invariably abides by the same one-dimensional concept of international law.

The foregoing should suffice to indicate that this book is not meant to belong to (and vindicate) any 'tradition' or 'school' of legal thought. Whilst there is some didactic convenience of segmenting international

legal thought in strands, this book turns a blind eye to such conventional subdivisions. This is why it unashamedly borrows from a wide variety of legal scholars, philosophers and social scientists without much interest in the theory or tradition with which they are associated and irrespective of the cross-commensurability of their respective arguments. Instead, I simply use the thoughts of these authors as conceptual tools to design my own thoughts, without seeking to import their respective theories in international legal thought. This purely instrumental approach inevitably transforms and deforms the thoughts of others. This will probably be held against me anyhow. I remain convinced, however, that innovative thinking comes at this price.

Thinking is an experiment. The experimentation that led to the claims developed in this book started a few years ago and benefitted from the decisive support and critical input of some key colleagues and friends. They ought to be mentioned here as they have generously and repeatedly allowed me to bounce half-baked ideas off them whilst also reading parts of the manuscript. In this respect I would like to express my immense gratitude to John Haskell, Akbar Rasulov, Sahib Singh, Justin Desautels-Stein, Geoff Gordon and Yannick Radi. Thanks to their continuous availability and interest, they have offered me a remarkable and permanent sounding board for my ideas throughout this project. I will always be indebted to them. The following chapters explicitly indicate when my exchanges with them have directly informed my reflection. I am hugely indebted to Pierre Schlag, who provided me with extensive feedback on several occasions and who spent hours with me discussing several facets of the argument during a visit at the School of Law of the University of Colorado. Pierre generously accepted to write the Foreword of this book. I am not only appreciative but also humbled that this book is introduced by one of the greatest and most refined legal thinkers of the twenty-first century. I am immensely grateful to Georg Nolte, Heike Krieger and Andreas Zimmermann for inviting me to spend a sabbatical semester in Berlin between September 2016 and February 2017, which provided me with the space and time necessary to finalise this book. I thank Jan Klabbers, Steven Wheatley, Janne Nijman, Catherine Brölmann, Gleider Hernandez, Luíza Leão Soares Pereira, Maruša Veber, Dimitri Van Den Meerssche and Maiko Meguro, who expressed interest in the project and whose repeated feedback and recommendations were very insightful. I thank Rosa Beets, whose research assistance proved enriching, especially regarding the discussion of the fundamental doctrine of statehood. I am very thankful to Richard Clements for his tremendous

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