PART I

Introduction: Setting the Stage

1

Introduction to International Legal Theory

Taking Stock, Looking Ahead

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1.1 INTRODUCTION

From its inception, international law has been closely linked to philosophy and political theory, and over time competing theoretical approaches have emerged to explain international law's nature, form, and efficacy. Even today, we associate the most authoritative names in the discipline – whether founders such as Grotius and Vattel or more modern figures ranging from Kelsen and Lauterpacht to contemporary writers such as Chimni, Chinkin, and Koskenniemi – with specific theoretical perspectives that engage foundational questions about international law's purpose and content.

Every generation of scholars and practitioners reshapes international legal theory as it rethinks international law and its role in international affairs. Two decades ago, the *American Journal of International Law* (*AJIL*) published a "Symposium on Methods in International Law."[1] The *AJIL* Symposium took place toward the end of the 1990s, during heady times for international law. A decade after the end of the Cold War, a revitalized UN Security Council was actively addressing issues of international peace and security, the newly formed WTO was seen as the leading edge of global economic governance, and the newly founded International Criminal Court was the most visible element of a multipronged effort to end impunity for war crimes and other atrocities. Against this backdrop, the *AJIL* Symposium editors enlisted leading scholars to explicate different traditions of thought and apply these traditions to a then-pressing doctrinal puzzle. The contributions to that project proved influential in shaping subsequent thinking about the theoretical underpinnings of contemporary international legal scholarship and practice.

In the intervening decades, much has changed. Increased specialization in both practice and scholarship has produced concerns over a fragmentation of

[1] Anne-Marie Slaughter & Steven R. Ratner, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 Am. J. Int'l L. 291 (1999).

international law, leading some to question whether the international legal order is sufficiently coherent to constitute a single, unified system. Moreover, due in part to shifts in the distribution of power among states, many traditional international lawmaking processes have stagnated, giving rise to new informal and non-state technologies of transnational regulation. At the same time, international tribunals have proliferated, sparking not only a judicialization of many areas of international relations, but also a backlash by states resisting judicial decisions, exiting court systems, and creating alternative dispute settlement fora. And new challenges continue to arise, as international law is asked to govern disruptive new technologies that pose difficult challenges across a range of policy areas, including the deployment of autonomous war machines and the regulation of activities in cyberspace. More recently, the rise of nationalist, populist, and authoritarian leaders in many states has placed substantial pressures on the postwar international legal order. And, as this volume goes to press, the Covid-19 epidemic is exposing stark fault lines in the international legal order, as well as other aspects of social life.

Scholars' efforts to understand and explain these developments have sparked a revival of interest in international legal theory.[2] In response, new schools of thought have emerged, while traditional approaches have been reinterpreted to address new challenges. At the same time, a "turn to history" has produced a sophisticated debate over the use and misuse of the discipline's history for contemporary purposes, and an emerging field of comparative international law challenges the notion of a single, unified international legal tradition.[3] Yet, despite (or perhaps because of) this outpouring of writings, scholars and practitioners are inundated with competing theoretical schemes, creating the need for a comprehensive and critical, yet user-friendly, review of the theoretical landscape.

This volume draws together an outstanding team of legal academics to both explicate and critique approaches to international law central to current scholarly debates and practice. While each chapter can profitably be read as a stand-alone essay, the volume as a whole is designed to provide a synoptic overview of competing theoretical approaches, and a more in-depth understanding of the strengths, limits, preoccupations, and insights of those approaches. Our goal is for the volume to serve as an authoritative overview of current thinking about the theoretical foundations of contemporary international law, a useful guide to disciplinary continuities and

[2] In addition to this volume, other recent works on international legal theory include B. S. Chimni, International Law and World Order: A Critique of Contemporary Jurisprudence (2d ed., 2017); Andrea Bianchi, International Legal Theories: An Inquiry into Different Ways of Thinking (2016); The Oxford Handbook of the Theory of International Law (Anne Orford & Florian Hoffman, eds. 2016).

[3] On the historical turn, *see, e.g.*, Anne Orford, International Law and the Politics of History (2021); The Oxford Handbook on the History of International Law (Bardo Fassbender & Anne Peters, eds. 2012). For a sampling of debates on the unity of international law, *see, e.g.*, Comparative International Law (Anthea Roberts et al., eds., 2018); Anthea Roberts, Is International Law International? (2017).

transformations, and an indispensable resource to those who wish to expand the frontiers of theoretical thinking about our field. Less grandly, but more immediately, this text is an invitation to join a rich and ongoing dialogue over some of the deepest questions confronting those who study, teach, practice, or seek to reform international law.

The remainder of this introduction sets the stage for readers to engage with the substantive discussions and arguments found in the rest of the volume. Part I provides a brief introduction to the concept of international legal theory: How do we know an international legal "theory" when we see it? What distinguishes theory from, say, jurisprudence or from, in the vernacular of the *AJIL* Symposium, international legal method? This Part also defends international legal theory from the charge of irrelevance that is sometimes advanced by legal scholars, practitioners, and those in neighboring academic disciplines. Part II provides a roadmap to the rest of the volume by addressing the selection of theoretical traditions and presenting an overview of the book's organization and contents. Part III analyzes how the various theories assess the putative "crisis of international law in the early twenty-first century," a common theme that we asked each contributor to address. A brief conclusion follows.

1.2 INTRODUCING INTERNATIONAL LEGAL THEORY

To say that international law has long been associated with theory is not to say that the relationship has always been easy. Both the academic discipline and the vocation of international law exhibit a love-hate relationship with theory. No less a figure than Ian Brownlie, Chichele Professor of Public International Law at Oxford University, noted that "it is the theories of law which are one of the principal causes of low morale among students of international law."[4] In his General Course at the Hague Academy, Brownlie went so far as to claim that "[i]n spite of considerable exposure to theory, and some experience in teaching jurisprudence, my ultimate position has been that ... theory produces no real benefits and frequently obscures the more interesting questions."[5] Brownlie's dismissal of theory represents accepted wisdom in many circles. B. S. Chimni famously characterized international legal theory as a "wasteland,"[6] and David Kennedy notes that "in traditional parlance, the making of methodological arguments is far removed from the actual practice of international law, and seems quite irrelevant to it."[7]

Claims that theory can be sharply distinguished from, or stands in opposition to, practice has a deep historical pedigree. A Greek parable, ascribed by Diogenes

[4] Ian Brownlie, The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations 2–3 (1998).
[5] *Id.* at 11.
[6] B. S. Chimni, International Law and World Order: A Critique of Contemporary Approaches 15 (1993).
[7] David Kennedy, *Theses About International Law Discourse*, 23 Ger. Y.B. Int'l L. 353, 353 (1980).

Laertius to Pythagoras, declares that: "life . . . is like a festival; just as some come to the festival to compete, some to ply their trade; but the best people come as spectators [*theatai*], so in life the slavish men go hunting for fame [*doxa*] or gain, the philosophers for truth."[8] Hannah Arendt observes that "[t]he inference to be drawn from this early distinction between doing and understanding is obvious: as a spectator you may understand the 'truth' of what the spectacle is about; but the price you have to pay is withdrawal from participating in it."[9] Arendt further notes that the Greek word for spectators, *theatai*, is the root for the later philosophical term "theory," and for many centuries, the term "theoretical" meant "contemplating," or reflecting on an event or activity from the outside rather than from within.[10]

To acknowledge that the roles and activities of the theorist and the practitioner differ, however, does not entail the conclusion that theory and practice inhabit totally separate realms, or that the former has no relevance to the later. Pushed to its logical conclusion, this supposed opposition of theory and practice would deprive thought of reality and action of sense, rendering both meaningless. But this sharp dichotomy is false; all practice unavoidably rests upon theoretical presuppositions, even if they are implicit or unacknowledged; the "models and preconceptions in terms of which we unavoidably organize and adjust our perceptions and thoughts will themselves tend to act as determinants of what we think or perceive."[11] Applying this insight to international law, Scobbie writes that "theory is necessary because it provides us with the intellectual blueprint which enables us to understand the world, or some specific aspect of human affairs. . . . Theory makes data comprehensible by providing a structure for the organization of a given discipline or body of knowledge."[12] Put slightly differently, "[i]n law, as in other things, we shall find that the only difference between a person 'without a philosophy' and someone with a philosophy is that the latter knows what his philosophy is."[13] An even stronger version of this claim holds that as the most fundamental legal categories, such as legal personality and jurisdiction, rest upon theoretical understandings, "all law, even the blackest of black letter law, is always already the application of a theory of law: law does not and cannot have (nor maintain) an a-theoretical existence."[14]

To note the necessity and ubiquity of theory begs the question of what, exactly, international legal theory consists. What do scholars seek to achieve when they construct theories of international law? How can one choose among competing

[8] *See* Diogenes Laertius, Lives of the Eminent Philosophers, book VIII (Robert D. Hicks trans., 1925).
[9] Hannah Arendt, The Life of the Mind 93 (1978).
[10] *Id.* An alternative strand of ancient thought understood theorizing as an intimately connected with, rather than detached from, practice. *See* Martha C. Nussbaum, *"Lawyer for Humanity:" Theory and Practice in Ancient Political Thought*, *in* Theory and Practice: XXXVII Nomos 181 (1995).
[11] Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 Hist. & Theory 3, 6 (1969).
[12] Iain Scobbie, *A View of Delft: Some Thoughts About Thinking About International Law*, *in* International Law 53, 63 (Malcolm Evans ed., 4th ed. 2014).
[13] Filmer Northrop, The Complexity of Legal and Ethical Experience 6 (1959).
[14] Jason A. Beckett, *Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL*, 16 Eur. J. Int'l L. 213, 227 (2005).

theoretical claims, or the theories that assert these claims? How is studying or doing international legal theory different from studying or doing international law? Surprisingly, many reviews of international legal theory devote little or no attention to these questions. For example, Ronald St. John Macdonald and Douglas Johnston's important 1983 edited volume on international legal theory does not define the term; mentions, in passing, that international legal theory has predominantly "taxonomic and explanatory functions;" and categorizes international legal theories as falling into natural law, positivist, or instrumentalist camps.[15] Fifteen years later, the *AJIL* Symposium attempted to sidestep the question and presented itself as an exploration of the "methods of international law." By "method," the organizers meant "the application of a conceptual apparatus or framework – a theory of international law – to the concrete problems faced in the international community." The Symposium's touchstone was thus on "relevance for lawyers and legal scholars facing contemporary issues," which the organizers sharply distinguished from "abstract theories of international law that explain the nature of international law but are devoid of application to particular problems."[16]

While both projects made significant contributions, we do not share their points of departure. In emphasizing international legal theory's "taxonomic and explanatory functions," Macdonald and Johnston adopted too narrow an approach to the goals of theory. As the contributions to this volume illustrate, international legal theories take multiple forms and adopt various goals: some offer a systemization, some contextualized or conceptual understandings, some a directive for action, and others a critical or normative evaluation. For reasons mentioned above, we likewise depart from the *AJIL* Symposium's sharp dichotomization of theory and practice.

Other influential approaches to international legal theory borrow conceptualizations of theory inspired by the natural and social sciences. Anne Peters, for example, argues that "theories should express the patterns or structures of data or of phenomena in the field under observation, as parsimoniously and concisely as possible. They should reduce complexity."[17] This position echoes a "widely accepted view that the purpose of any theory . . . is not to reproduce reality, but to increase our understanding of fundamental processes by simplifying it."[18]

Some theories of international law do indeed aim at simplification. Consider, by way of example, Martti Koskenniemi's From Apology to Utopia, which suggests that international law's complex argumentative structure can be understood as arising out of and reflecting a relatively small number of binary conceptual oppositions.[19] At the same time, the relationship between theory and simplicity is,

[15] Ronald St. John Macdonald & Douglas M. Johnston, *International Legal Theory: New Frontiers of the Discipline*, *in* The Structure and Process of International Law 1, 3 (Ronald St. John Macdonald & Douglas M. Johnston eds., 1983).
[16] Ratner & Slaughter, *supra* note 1.
[17] Anne Peters, *Realizing Utopia as a Scholarly Endeavor*, 24 Eur. J. Int'l L. 533, 536 (2012).
[18] Duncan Snidal, *The Game Theory of International Politics*, 38 World Pol. 25, 28 (1985).
[19] Martti Koskenniemi, From Apology to Utopia (2006).

well, not so simple. Many important theories do not seek to simplify. Consider, for example, Third World Approaches to International Law (TWAIL), which seeks to complicate conventional Eurocentric understandings about the discipline's origins and history, which TWAIL scholars view as incomplete and misleading.

More generally, to the extent that theories attempt to simplify a complicated reality, they confront tradeoffs. Any effort to simplify law's complexities into a simple model or framework risks distortion or mischaracterization; no theory can be a perfect representation of the reality it purports to describe. Thus, while generalization and parsimony are hallmarks of useful theory, climbing too high up the ladder of abstraction in search of simplicity risks theoretical vaporization. On the other hand, more complex theories that better capture nuance and variation run the risk of obscuring basic insights and becoming unwieldy. At the extreme, a theory as complex as the phenomena it describes would be – like Borges's "Map of the Empire that was of the same Scale of the Empire and that coincided with it point for point" – both entirely accurate and entirely useless.[20] The inevitable tradeoffs between the greater reach of more abstract theoretical approaches and the greater precision of narrower theoretical claims, between a theory's extension (the range of cases it covers) and intension (its meaning or connotation),[21] means that there is no single optimal level of abstraction, or simplicity, for theory to aspire to. Rather, different theories have different aims, and hence we should expect (and welcome) theories pitched at different levels of abstraction.

Another common position is that theories should follow the epistemological ideals of natural scientific reasoning.[22] Under this model, theories rest upon positive assumptions from which arguments, explanations, and predictions are derived. In this approach, theorists frame questions in explicitly causal terms, develop hypotheses about cause-and-effect relationships, and empirically test these hypotheses with data from systematic observation or experiments. We appreciate the explanatory power of a scientific hypothetico-deductive conception of theory, and of generating empirically testable causal claims.[23] Yet valorizing the aim of causal explanation at the expense of all other potential goals of legal theory is problematic.

International law is a social institution and not a naturally occurring phenomenon. Unlike trees, planets, and other naturally occurring phenomena, law is created at least in part by the commitments and beliefs of those who observe and

[20] Jorge Luis Borges, *On Exactitude in Science*, *in* Collected Fictions 325 (Andrew Hurley trans., 1998).

[21] The classic treatment of this distinction remains Giovanni Sartori, *Concept Misformation in Comparative Politics*, 54 Am. Pol. Sci. Rev. 1033 (1970).

[22] *See, e.g.*, Peters, *supra* note 17; Thomas Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. Ill. L. Rev. 875; Lee Epstein & Gary King, *The Rules of Inference*, 69 U. Chi. L. Rev. 1 (2002).

[23] Jeffrey L. Dunoff & Mark A. Pollack, *Experimenting with International Law*, 28 Eur J. Int'l L. 1317 (2017).

use it.[24] Knowledge of social facts and institutions is fundamentally different from knowledge of natural phenomena, hence the theoretical approaches of the sciences are not the only appropriate approaches for legal theory.[25] Other approaches are both available and widely used. In particular, hermeneutical approaches to social institutions, which teach that "a primary focus of theorizing is and should be awareness of the motivations and purposes of participants, emphasizing participants' understanding, not merely their behavior,"[26] are often employed. We might go even further. International law is "a normative system, harnessed to the achievement of common values";[27] it thus offers actors normative guidance, provides standards for their behavior, and reasons for their actions. To be an international law practitioner or scholar entails "a constant responsiveness to the sources and constraints of normativity."[28] Theorizing about normative undertakings thus includes a number of goals other than prediction, including description, explanation, understanding, justification, and critique.

As these observations suggest, precisely defining the activity and task of international legal theory – let alone theorizing theory – is not a simple task. Across the disciplines, theory is a contested term that lacks a stable or invariable meaning, and international legal theory likewise has an extended past and a range of connotations. Our approach to international legal theory can be explained through discussion of several simple-sounding questions – "what," "who," "when," "where," and "how" – that foreground themes present in the contributions to this volume. By asking "what," we raise a question about the subject matter of international legal theory. What is its domain of interest? What principles distinguish the topics that fall within from those that fall outside of this domain? By asking "who," we mean to direct attention to the creators of international legal theory. Who produces international legal theory, and in what institutional settings? In asking "when," we mean to invoke temporality, including an awareness of the historical context within which theories and formed. In asking "where," we mean to highlight the tension between international legal theories' claims to universality, and the disproportionate role played by northern-tier individuals and scholarly traditions. We also mean to foreground the idea that theories and theorists are not disembodied; theorists cannot escape their locations and contexts to access a "neutral" Archimedean perspective, and all theorists necessarily adopt particular perspectives. Finally, by asking "how," we raise questions regarding how international legal theorists go about their business. How do they identify which questions are of interest? How do they address the questions that animate the field?

[24] For more on the creation of "social facts," see JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).
[25] *See* Brian Z. Tamanaha, *Necessary and Universal Truths about Law?*, 30 RATIO JURIS 3 (2017).
[26] Brian H. Bix, *John Austin and Constructing Theories of Law*, 24 CAN J. L. & JURIS. 431 (2011).
[27] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1 (1994).
[28] James Crawford, *International Law as Discipline and Profession*, 106 PROC. AM. SOC'Y INT'L L. 471, 485 (2012).

Our discussion of these issues is not intended to generate a definition of international legal theory. Definitional exercises have a tendency to produce a "check list" approach that can push discourse toward terminological dead ends, and divert attention from more productive inquiries. Nor will our discussion identify a hermetically sealed conceptual terrain. Rather the domain we sketch is marked by porous and shifting boundaries, as the practice and goals of theory invariably reflect historical and cultural contexts.

To map this terrain, we begin with the "what" question: What is international legal theory's subject matter, or domain of interest? To observe that international legal theory is centrally concerned with international law is neither tautological nor useless. For starters, this claim is useful by way of exclusion. Thus, for purposes of this volume, we exclude theorizing about related areas of law, such as comparative law, as well as neighboring or overlapping areas of study, such as international affairs, security studies, international political economy, and so on. The claim likewise distinguishes international legal theory from neighboring domains such as political or moral theory. International legal theorists may, and often do, have overlapping interests with theorists in these disciplines and may even borrow concepts or categories from these fields. But the borrowings are undertaken in order to shed light on the workings of international law, and not intended to advance debates in cognate disciplines.

International legal theory can likewise be distinguished from jurisprudence or legal philosophy. In recent decades, these later fields have been concerned with identifying necessary and universal truths about law and, at least in the Anglo-American legal culture, dominated by an analytical jurisprudence largely concerned with analyzing and elucidating legal concepts such as duty, fault, liability, and the like. Thus, while jurisprudence has contributed much to our understanding of law and legal systems, "legal philosophers have not thought much about international law over the past century,"[29] and the central concerns of this volume lie outside the focus of much contemporary jurisprudential writing.

Finally, the chapters that follow do not address theories of particular subfields of international law, such as human rights or international criminal law. As a conceptual matter, we limit our focus to theorizing about the international legal system as a whole, an intellectually ambitious and conceptually difficult undertaking. And, as a practical matter, we would not be able to keep the volume at a user-friendly length if we surveyed theory across international law's various subfields.

[29] Liam Murphy, *Law Beyond the State: Some Philosophical Questions*, 28 Eur. J. Int'l L. 203 (2017). That said, recent years have seen the emergence of international law as a topic of philosophic inquiry. *See, e.g.*, David Lefkowitz, Philosophy and International Law: A Critical Introduction (2020); Steven R. Ratner, The Thin Justice of International Law: A Moral Reckoning of the Law of Nations (2015); The Philosophy of International Law (Samantha Besson & John Tasioulas, eds., 2010).