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Introduction

I. Objectives

This book has been written in the belief that much disagreement in international legal discourse is theoretical. As Steven Ratner and Anne-Marie Slaughter observe in their introduction to the volume *The Methods of International Law* 'beneath the surface of much scholarship … are a host of unanswered questions about presuppositions, conceptions, and missions, all of which influence … analysis of an issue and … conclusions and recommendations for decision makers'.[1] There are few occasions to clarify the 'presuppositions, conceptions, and missions' because explicit theorization is still the exception and unspoken theory tends to occlude arguments pertaining to the underlying epistemological and ontological premises.[2] It is not as if there are not enough theories of, or about, international law. But these are not subjects of sustained debate and reflection. A focus on theory is also necessitated today by the growing 'specialization and fragmentation' of the field of international law.[3] In the absence of a theoretical framework it is difficult to explain and evaluate a range of disparate developments that are taking place. The ultimate justification for doing theory is, of course, the desire to transform the world into a place where individuals can live with dignity in harmony with Nature. However, these twin goals cannot be realized without a good understanding of how the present system of world order is constituted, the reasons why it produces inequality and injustice, the role of international law in it and the ways to move forward.

[1] Steven R. Ratner and Anne-Marie Slaughter, 'Introduction' in Ratner and Slaughter (eds.) *The Methods of International Law* (Washington DC: The American Society of International Law, 2004), p. 2.

[2] It is another matter that the "empirical" itself has not received sufficient attention. See however Gregory Schaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 (2012) *American Journal of International Law,* pp. 1–46.

[3] See ibid., p. 1.

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In the backdrop of the felt need for explicit theory, this book sets itself three broad objectives. The first objective is to articulate an Integrated Marxist Approach to International Law (IMAIL), combining the insights of Marxism, socialist feminism and postcolonial theory. The plain justification for this theoretical eclecticism is the recognition that theories overly focused on some social logics (e.g., the 'logic of capital') or on some social categories (e.g., 'class' or 'gender') or on some geographical spaces (e.g., the west) fail to develop a systematic and comprehensive understanding of extant world order, as also the history, nature and character of international law. In contrast, IMAIL enables an accurate diagnosis of the ills that afflict current world order and the role international law and international lawyers can play in addressing them. But it has been well observed that while theoretical eclecticism is not in itself problematic, there is an 'obligation to establish the compatibility of the theoretical elements that are combined', for theories often 'exhibit specific incompatibilities which makes simple appropriation or fusion of distinct theories impossible'.[4] IMAIL is advanced on the assumption that Marxism, socialist feminism and postcolonialism or more accurately *particular versions of each* are not only congruent but helpfully complement each other. It is readily acknowledged that it is possible to offer an interpretation of the three theoretical traditions that place them in opposition to each other.[5] Thus, for example, postcolonial theory may be counterposed to versions of Marxism that subscribe to a linear theory of evolution of society. But IMAIL proceeds on the understanding that the diversity postcolonial theory celebrates is compatible with an interpretation of Marxism that draws on Marx's historicist work.[6] In so far as socialist feminism is concerned,

[4] Alan Hunt, 'The Theory of Critical Legal Studies' in Costas Douzinas and Colin Perrin (eds.) *Critical Legal Theory* (London: Routledge, 2012), Volume I pp. 243–286 at pp. 244–245.

[5] For instance, as Sankaran Krishna notes of the works of Hamza Alavi and Robert Young, 'both regard Marxism as the critical tradition that is indispensable for postcolonial thought … Young and Alavi regard Marx's legacy as complex and contradictory but always indispensable to the politics of resistance that animates postcolonial thought'. Sankaran Krishna, *Globalization and Postcolonialism: Hegemony and Resistance in the Twenty-First Century* (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2009), p. 68.

[6] It is no accident that non-Western thinkers such as Aimé Césaire, Frantz Fanon, Walter Rodney, Amilcar Cabral and C. L. R. James are claimed by both Marxist and postcolonial theoretical traditions. It is unfortunate that, as Benita Parry notes, postcolonial theorists such as Edward Said embraced them 'as comrades … while omitting to identify them as Marxists'. Benita Parry, 'Edward Said and Third World Marxism', 40 (2013), *College Literature: A Journal of Critical Literary Studies*, pp. 105–136 at pp. 105–106. See also Bart Moore-Gilbert, 'Marxism and Postcolonialism Reconsidered', 7 (2001) *Hungarian Journal*

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the influence of Marxism is more apparent albeit the category 'gender' rather than 'class' occupies the pride of place in it. But both the traditions imbibe the other in ways that allow them to come together. Later in the chapter, something more will be said on the nature of borrowings from Marxism, socialist feminism and postcolonial theory.

The second objective of the book is to critically examine the most insightful and influential contemporary approaches to international law from an IMAIL perspective. These are the classical realist approach of Hans Morgenthau, the policy-oriented approach of Myres McDougal and Harold Lasswell, the world order model approach of Richard Falk, the feminist approach of Hilary Charlesworth and Christine Chinkin, and the 'new approaches' of David Kennedy and Martti Koskenneimi. To each of these approaches an independent chapter is devoted. While the book concludes with a separate chapter on IMAIL, it is in vital ways articulated through a critique of these approaches. It is, however, important to stress that the critical moment in the volume does not seek to simply counterpose IMAIL to different approaches but attempts to examine each of them on its own merit. It is believed that criticism in order to be effective has to proceed at two levels: before proceeding to demonstrate that an alternative perspective can offer more persuasive responses to the questions that are asked or issues that are raised, it must seek to identify the problems, discrepancies and limits of a theory on the basis of its premises and its stated ambitions. Such a procedure helps avoid the tendency of being dismissive of an approach simply because it is different from the preferred approach, both in terms of method and its aspirations. In other words, there must be an internal and external moment of critique – the former identifying the inner tensions and contradictions in an approach and the latter offering ways of addressing or transcending them. This dual mode of critique, at once empathetic and oppositional, not only does justice to individual approaches considered but also yields valuable insights that can be productively incorporated in the favoured approach.

This book does not deal separately with two other leading contemporary approaches to international law, viz., the dominant Positivist Approach to International Law (PAIL) and the influential Third World Approaches to International Law (TWAIL). The reasons for this are discussed presently. The book also does not examine the transnational legal process and the law and economics approaches as these do not as yet have

of English and American Studies (HJEAS) Postcolonial Issues: Theories and Readings, pp. 9–27 at p. 19.

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a larger or global appeal.[7] The new international relations-international law (IR-IL) approach is discussed, albeit in the chapter on classical realist approach. On the other hand, the constructive Global Administrative Law (GAL) initiative is not examined as it only offers a partial approach to international law, focused as it is primarily on addressing democratic deficit in the functioning of international bodies.[8] It may be argued that some of the approaches receiving extensive treatment (e.g., the policy-oriented approach) have lost their appeal over time. Even if this were to be the case, these approaches invite study because they rely on assumptions or advance concepts and constructs that continue to inform contemporary writings on international law. An acquaintance with them helps avoid hubris about the novelty of any proposed new approach to international law. Thus, for example, the policy-oriented approach anticipated in many ways the views of 'new approaches' advanced by Kennedy and Koskenneimi. For instance, it centrally raised the issue of indeterminacy of rules long before New Approaches to International Law (NAIL), even as it stressed semantic indeterminacy of rules as against structural indeterminacy emphasized by 'new approaches'. There is also intrinsic value in understanding why any approach was influential at a particular time in history and has much to tell us about why particular approaches matter today.[9] In that limited sense, the present book can be considered as offering a fragment of an intellectual history of the discipline of international law in the post–Second World War period.[10]

[7] For a brief discussion of these approaches see Ratner and Slaughter, *Methods of International Law*, pp. 211–239 and 79–109, respectively.

[8] On GAL, see Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', 68 (2005) *Law and Contemporary Problems,* pp. 15–63. For a critique of GAL, see B. S. Chimni, 'Cooption and Resistance: Two Faces of Global Administrative Law' 37 (2005) *New York University Journal of Law and Politics,* pp. 799–827.

[9] The idea also being to 'try to reconstruct the intellectual contexts in and for which their texts were originally written'. Interview with Quentin Skinner, (2001) 'On Encountering the Past', p. 44. Accessed on 25 May 2015 at www.jyu.fi/yhtfil/redescriptions/Yearbook%202002/Skinner_Interview_2002.pdf

[10] There are, of course, many ways in which this history can be told. The different examples of intellectual history can include the story Antony Anghie tells of the relationship of the colonial project to the emergence of positivism in the nineteenth century, David Kennedy's history of the discipline of international law in the United States in the post–Second World War era and Martti Koskenniemi's history of the work and vision of European international lawyers in the nineteenth and twentieth centuries. See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2003); David Kennedy, 'When Renewal Repeats: Thinking Against the Box' 32 (2000)

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The third objective of the book is to consider crucial world order issues and problems that the international legal process has to grapple with. These inter alia include the welfare of weak groups and nations, the ecological crisis, the role of human rights and the absence of democratic structures in the international system. The overall aim of engagement with world order concerns is to arrive at a better understanding of them, and in its light think of global legal and institutional arrangements that can help advance human freedom.[11] Such an ambition anticipates the deployment of what Edward Said termed 'secular criticism', that is, 'a criticism freed from the restrictions of intellectual specialization'.[12] It calls for transgressing disciplinary boundaries to produce knowledge that is life enhancing. The 'secular criticism' is articulated in this book in the matrix of five separate but overlapping and intersecting logics that co-constitute 'world order' viz., the 'logic of capital', the 'logic of territory', the 'logic of nature', the 'logic of culture' and the 'logic of law'. Some bare reflections on the meaning of 'world order' (and 'global governance') and the different logics are offered later in the chapter.

At first, however, something needs to be said on (i) the significance of the fields of origin and reception for assessing contemporary approaches to international law and world order; (ii) the reasons for excluding PAIL and TWAIL from detailed treatment (while offering thumbnail sketches of them) and (iii) the traditions of Marxism, socialist feminism and postcolonial theory that are combined to articulate IMAIL – postcolonial theory receives a little more space as it is not explicitly discussed further in the chapters to follow. The remarks on these themes, especially the inclusion of outlines of PAIL and TWAIL, make this introductory chapter somewhat unusual and protracted. It is, however, hoped that the clarifications and elaborations will help set the stage for the subsequent chapters.

New York Journal of International Law and Politics, p. 335; David Kennedy, 'The Disciplines of International Law and Policy', 1 (1999) *Leiden Journal of International Law*, pp. 9–133; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2004).

[11] The broad function of criticism is to be 'life-enhancing and constitutively opposed to every form of tyranny, domination, and abuse; its social goals are noncoercive knowledge produced in the interests of human freedom'. Edward Said, *The World, the Text and the Critic* (Cambridge, MA: Harvard University, Press, 1983), p. 29.

[12] Bill Ashcroft and Pal Ahluwalia, *Edward Said* (London: Routledge, 1999), p. 15, pp. 30ff. According to Ashcroft and Ahluwalia, Said 'introduces the disarming, not to say disconcerting, idea of the critic as "amateur", by which he means that the critic must refuse to be locked into narrow professional specializations which produce their own arcane vocabulary and speak only to other specialists'. See ibid., p. 35.

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II. Fields of Origin and Reception

Since a principal objective of the book is the critique of contemporary approaches to international law which happen to have been articulated in the West, and whereas their critique is being advanced from a location in the non-West i.e., India, it is useful to keep in mind in this regard the distinction Pierre Bourdieu draws between the 'field of origin' and the 'field of reception'.[13] This is an intricate subject that calls for much greater consideration than can be given here. What follows is a mere observation or two on the subject with the sole purpose of alerting readers to the complexities of advancing a critique of approaches that have originated in 'fields of origin' different from that in which these are received, interpreted and understood.[14]

The 'field of origin' is of critical relevance in international exchanges as 'texts circulate without their context'.[15] If particular texts are read without situating these in 'forms of life' in which they have germinated, these can be easily misconstrued. To take the 'field of origin' into account entails that a theoretical approach be read and assessed after locating it in the spatial and temporal contexts in which it assumes life and evolves, including the past approaches to which it is a response.[16] A crucial reason for making the latter move is that concepts and arguments are most often used as 'weapons' in ongoing conversations on a subject in the 'field of origin'.[17] A new approach is also advanced in order to address the perceived inadequacies of existing approaches in a field. From this standpoint it is significant that many of the approaches to international law discussed in the

[13] Pierre Bourdieu, 'The Social Conditions of the International Circulation of Ideas' in Richard Schusterman (ed.) *Bourdieu: A Critical Reader* (Oxford: Blackwell Publishers, 1999), pp. 220–228 at p. 221. It is this distinction that perhaps made Said note that what he was doing in his book *Culture and Imperialism* is 'rethinking geography'. Edward Said, 'Response' in Bruce Robbins, Mary Louise Pratt, Jonathan Arac, R. Radhakrishnan and Edward Said, 'Edward Said's Culture and Imperialism: A Symposium', 40 (1994) *Social Text*, pp. 1–24 at p. 21. It may, however, be noted that the distinction between the 'field of origin' and 'field of reception' equally applies in the West and non-West.

[14] Some of these observations are also valid in the instance of the theories used to articulate IMAIL. But this point is made later through the discussion of the value of postcolonial theory. See infra, pp. 22–30.

[15] Bourdieu, 'The Social Conditions', p. 221.

[16] See ibid. Postcolonial theory is in an important sense all about how literature in the 'field of origin' imagined and portrayed the non-Western world. It is also about how work in the 'field of origin' is received and translated in the 'field of reception'. See Chapter 6, pp. 371, 379.

[17] See generally Quentin Skinner, *Visions of Politics Volume I: Regarding Method* (Cambridge: Cambridge University Press, 2002), p. 177.

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book have been articulated by US scholars. These approaches naturally tend to explore theoretical and practical issues that are prominent in legal and public discourse in the United States at a particular time reacting to or building upon prior approaches that have been advanced. Thus, for example, the policy-oriented approach of McDougal and Lasswell was a response to the classical realist and formalist or positivist approaches to international law, as these were not seen as possessing the requisite theoretical and conceptual tools to adequately address issues arising out of the Cold War. Similarly, the intermediate approach of Falk was advanced in relation to the policy-oriented approach in order to affirm a position of relative neutrality during the Cold War. Falk wished to sustain the relationship between law and politics without collapsing the one into the other in the manner of McDougal. He, therefore, sought to occupy the middle ground between McDougal's policy-oriented approach and Hans Kelsen's pure theory of law with its emphasis on the autonomy of law. The different approaches in the 'field of origin' may, despite their divergence, often draw upon common intellectual sources. Thus, for instance, both the policy-oriented approach and NAIL have derived inspiration from American legal realism. Albeit, in moving beyond American legal realism, the two approaches draw upon vastly different intellectual sources: one relying on the conceptual apparatus of Lasswell and the other on a heady mix of linguistic, deconstructive, Weberian, post-structural and post-Marxist theories.[18]

From the perspective of the Global South, the 'field of origin' of contemporary approaches to international law has a broader significance. The fact that most of these have been articulated in the Global North, and further that this state of affairs is reflective of intellectual production in the field of international law in general, has meant that much of scholarship is characterized by lack of sufficient familiarity with the non-Western world. It has also meant that non-Western scholarship has been submerged under a torrent of writings emerging from the Global North. At least one outcome of this situation is that the decolonization of international law scholarship is yet to be accomplished. The academia in the Global North continues to set the intellectual agenda and prescribe the standards and protocols of good scholarship allowing it to, among other things, decide

[18] It may be noted that while the pioneers of the liberal feminist approach to international law come from outside the United States, both Charlesworth and Chinkin have degrees from a US university and draw upon feminist scholarship done there. Thus, the work of Catherine MacKinnon has influenced their writings even as they are critical of radical feminism. See Chapter 6.

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which critical tradition is valuable. It is this troubling scenario among others that postcolonial theory seeks to address. In recent years the situation has begun to change, albeit at glacial pace, with TWAIL gaining ground.[19] It is perhaps important to clarify here that the point being made is not about the existence of distinctive knowledge systems in the Global South or to in any way recommend a nativist turn. It is rather about the domination of the field of international law by scholarship that does not engage with the history and realities of the Global South or displays relatively poor understanding and knowledge of it. This is unfortunately as true of critical as of the mainstream scholarship.

The problem of understanding different theoretical approaches to international law is not just about knowledge of the 'field of origin'. As Bourdieu notes, 'the sense and function of a foreign work is determined not simply by the field of origin, but in at least equal proportion by the field of reception'.[20] The 'field of reception' has a critical bearing on how theories are received and the transmutations they undergo in the process. In other words, 'the recipients, who are themselves in a different field of production, re-interpret the texts in accordance with the structure of the field of reception'.[21] The field of reception in the non-Western world is constituted, above all, by their different histories and flowing from them multiple traditions of doing international law, both national and regional.[22] Thus, arguably there is a Mexican, Kenyan or an Indian approach to international law or more broadly Latin American, African and Asian approaches to international law.[23] To be sure, those who do international law deploy concepts, doctrines and practices on which there is a degree of intersubjective understanding permitting communication.

[19] The slow process of change should not come as a surprise. As Karl Marx and Frederick Engels explained long ago, the ruling ideas of an age are most often the ideas of dominant social forces in society, in this case ideas that have been advanced by legal elites in advanced capitalist states. Karl Marx and Frederick Engels, *Selected Works* vol. 1 (Moscow: Progress Publishers, 1973), p. 47.

[20] Bourdieu, 'The Social Conditions', p. 222.

[21] See ibid., p. 221.

[22] It is true that we can also speak of the 'field of origin' and 'field of reception' in the Western world, but it is believed that the 'contexts' in which different approaches to international law are advanced and received are for historical reasons not as different in the instance of the Western as in the case of the non-Western world.

[23] See generally Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) Part III: Regions, pp. 383–813; B. S. Chimni, 'Is There an Asian Approach to International Law: Questions, Theses, and Reflections', 14 (2008) *Asian Yearbook of International Law,* pp. 249–265.

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But flowing from the location and situation of nations and regions, and the way in which the discipline has evolved within them, there are diverse approaches to the history, doctrines and development of international law, amidst which different approaches to international law are received and examined. Matters are further complicated by the fact that the national or regional approaches are not monolithic approaches but comprise of different theoretical traditions and sensibilities that are shaped by particular understandings of the history of the nation and the region.[24] These factors explain, including fortuitous ones, why each local tradition is more receptive to some approaches to international law than others and in distinct ways.[25] To speak of an accidental factor, the policy-oriented approach has had some resonance in the international law academia in India as a number of Indian scholars, which include B. S. Murthy, R. P. Anand and P. Sreenivasa Rao, went to Yale Law School in the 1960s and 1970s to take their doctoral degrees. While only some of them later used the complex methodology and vocabulary of the New Haven approach, its Cold War orientation ensured that a left approach to international law was not explored despite the strong presence of the Marxist tradition in social sciences in India.[26] To put it differently, IMAIL is being articulated amidst a complex constellation of factors that impact the 'field of reception'. These inter alia account for its weak or strong reactions to particular formulations advanced by different approaches to international law. It is important to underscore this point as these responses can be misunderstood if not read in the context of the field of reception.

Finally, it may be noted that the hermeneutic complexities introduced by the 'field of origin' and 'field of reception' acquire critical significance also because intellectual life is very often 'home to nationalism and imperialism'.[27] Therefore, as Bourdieu observes, 'a truly scientific internationalism, which … is the only possible ground on which internationalism of any sort is going to be built, is not going to happen of its own

[24] The distinct approaches are also interpreted by an individual scholar given his or her own life experiences and theoretical orientation.

[25] Each of the different contemporary approaches has therefore a different presence in countries of the Global South.

[26] The influence of the New Haven approach has waned over time, especially with the passing away of the key figure of B. S. Murthy. It is also perhaps the case that elements of the New Haven approach have been incorporated in 'new' approaches that have a more current appeal. See Chapter 5 for discussion of 'new' approaches.

[27] Bourdieu, 'The Social Conditions', p. 220.

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accord'.[28] It can come about only through a cooperative search for 'truth'. It is in that spirit that the present book undertakes a critical review of different approaches to international law.[29]

III. Omission of Positivist Approach: Reasons and Sketch

It was noted that this book does not deal separately with PAIL which remains since the nineteenth century the most influential approach to international law. The principal reason for this exclusion is that most of the other approaches discussed in the book engage with it, albeit these admittedly are focused on a critique of positivism or its variants.[30] But devoting an independent chapter to PAIL would have involved unnecessary repetition as it would inevitably involve reviewing its critique by other approaches to international law. However, for the very reason, a few words on the positivist approach and its strengths are in order here. Ratner and Slaughter describe the positivist approach as follows:

> Positivism summarizes a range of theories that focus upon describing the law as it is, backed by effective sanctions, with reference to formal criteria, independently of moral or ethical considerations. For positivists, international law is no more or less than the rules to which states have agreed through treaties, custom, and perhaps other forms of consent. In the absence of such evidence of the will of states, positivists will assume that states remain at liberty to undertake whatever actions they please. Positivism also tends to view states as the only subjects of international law, thereby discounting the role of nonstate actors. It remains the lingua franca of most international lawyers, especially in continental Europe.[31]

Two adherents of PAIL, Bruno Simma and Andreas Paulus, distinguish between 'classical positivism' and 'modern positivism' which encompasses

[28] See ibid.

[29] While it is written by someone educated in the history, tradition and practices of international law in India and whose thinking has been critically shaped by the left academia, the author aspires to be a participant in the collaborative search for 'truth'.

[30] See for instance Chapter 2, pp. 65–70 for Morgenthau's views on positivism or MILS; Chapter 3, pp. 113–116 for McDougal and Lasswell's critique of positivism; Chapter 4, pp. 183–191 for Falk's views on positivism; Chapter 5, pp. 259–271 for Kennedy's critique of positivism; Chapter 6, pp. 409ff for the Charlesworth and Chinkin critique of positivism; and finally Chapter 7, pp. 449ff for the Marxist critique of positivism.

[31] Ratner and Slaughter, *Methods of International Law*, p. 5. The Austro-Marxist Karl Renner describes 'positive legal analysis' as follows: 'Positive legal analysis has no other task than to ascertain all the legal norms relevant to the facts and to apply them in the case in hand. This exhausts the function of positive legal analysis.' Karl Renner, *The Institutions of Private Law and Their Social Functions* (London: Routledge and Kegan Paul, 1949), p. 48.

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