Introduction

STRUCTURE OF THIS BOOK: GENERAL CLASSIFICATION OF DOCTRINES OF INTERNATIONAL LAW

Obviously there can be no question, in an overall study such as this, of considering all the various theories or doctrines that might merit consideration. The literature on international law is nowadays so extensive that it would be extremely difficult to attempt a comprehensive analysis. In any event, that task, however desirable when one is looking for encyclopaedic information, is really not necessary for a systematic or historical assessment. Our essential concern here, as we chart a course through overlapping contemporary doctrines of the law of nations, is to shed light on their most characteristic tendencies, and especially on those theories that for whatever reason stand out particularly. This method makes it easy to give particular attention to the main elements of current thinking in this field, and at the same time has the advantage of avoiding a monotonous and repetitive format.

If that, then, is our overall objective, the next question is as to the criteria we need to apply in order to select and classify the various doctrines. There are several possibilities here. One might, for example, present the various doctrines in chronological order, or even according to the nationalities of their exponents, and clearly either of these approaches would have certain advantages as regards the treatment of and access to earlier documentation. That is why the bibliographical sections of a number of general studies have adopted this approach. But, in the present context, the drawback would be that the framework of the study would quickly prove too rigid, especially as regards classifying doctrines by their countries of origin. Although some currents of thought appear to be particularly linked to national traditions of philosophy or scientific thought, the law of nations is, of course, an international subject, not only by its very nature, but also because of its doctrinal interdependence from one country to the next. Another approach would be to group the various doctrines as a function of the different problems that exist in international law (an approach adopted by, for example, Professor Redslob in his
Histoire des grands principes du droit des gens, Paris, 1923): but that seems inappropriate here, since it involves making more or less arbitrary breaks within overall theoretical frameworks, whereas, as we shall see, within those frameworks everything is organically inter-connected.

We have therefore chosen, as the most suitable approach for present purposes, to select and classify doctrines and theories from the point of view of grouping doctrines as a function of their conception of the law of nations and its normative foundations. These twin problems, the conception and the normative basis, are indeed the two essential ones. It is necessary to address them first, in order to be able then to tackle all the other questions, especially those concerning the relationship between international law and the internal laws of States, and the sources of international law. Indeed, the attitude any author takes to this initial point is bound to have direct and profound repercussions on the rest of his work. The analysis of this initial aspect makes it possible for us to group doctrines according to their most characteristic affinities, since the latter concern the very foundations on which each particular doctrine is constructed. In this way we will identify some of the fundamental currents of thought, so that it will then remain only to examine them as they have been applied in the work of their most doughty representatives.

The authors we select in this way as being most representative will not always be those who have written the weightiest and most authoritative manuals and treatises. Given that we are classifying doctrines as a function of the concept and normative foundations of the law of nations, the weightiest and most authoritative authors will not necessarily be the most representative for our purposes, because the objective in view when one writes a manual or treatise is generally of a rather different order, and that being so, the author will not necessarily engage in an in-depth study of the fundamental questions. Conversely, theories representative of particular schools of thought have often been written up by authors who have never written in comprehensive overall terms about the questions concerned: this is true, for example, of Georg Jellinek, Julius Binder, Heinrich Triepel and Léon Duguit.

The next question is this: in what order should we consider the differing fundamental currents of thought. The order we select needs to take account both of the logical and the historical processes concerned.

We will start with doctrines which deny that the ‘law of nations’ is truly law. It is clearly logical to take these doctrines first, promoted as they are by commentators as numerous as they are eminent. The consideration of other doctrines can more usefully be allowed to coincide
with the timing of their historical appearance and development. Although doctrines that accept that the law of nations is truly law, and those that deny it, have long co-existed side by side, in parallel intellectual furrows, it is nevertheless possible to discern, over time, changes in their relative pre-eminence and reciprocal influence. In general terms, positivist formalism, which was intellectually dominant at the end of the nineteenth century, has since that time gradually lost its dominance, while the roles of doctrines based on theories of natural law or on sociological conceptions have gained ground. More recently, a number of relatively eclectic theories have seen the light of day, and it is reasonably plain that now, in the early twenty-first century, it is these that predominate. Our chronological starting point is the last third of the nineteenth century. The Franco-Prussian War of 1870–71 was not only a landmark in the political history of Europe; it was followed shortly afterwards by a turning point in the development of philosophical and scientific ideas, marking the start of an era that would meet its tragic end in World War II. The thread of ideas will then be followed up to the present days.

The structure of this book results, then, from the above considerations. The two opening chapters are given over to a critical examination of doctrines which either deny that the law of nations is ‘law’ in the true sense of the term, or else insist that, at the most, it is law of an imperfect type. The third chapter is concerned with doctrines which, accepting that the law of nations is law in the full sense of the term, claim that its binding force depends on the will of the State. In the two following chapters we then concern ourselves with normativist and sociological doctrines. The former remain firmly embedded in the positivist bedrock, while bringing various refinements to it, and the latter seeking a new basis for law in general, and for international law in particular. At that point we will be addressing our attention to the important doctrines of Professors Kelsen and Scelle, not to mention, as regards the latter, the preceding work of Léon Duguit. Their bold and rigorous thinking merits specific study in view of the originality of their central theses. Thereafter, we move on to consider doctrines based on natural law, a revival of which was one of the central features of the philosophy of law in the first half of the twentieth century. Finally, we will deal with more recent developments.

---

1 A subject is often best understood in the context of how it developed historically; when, and in response to what problems, did a particular phenomenon, a doctrine, emerge? As Aristotle puts it at the beginning of the Politics, the best way of studying is to ‘examine the development of the realities from their origin’: Politics, Book I, chap. II, no. 1.
developments, from 1945 to the present day. In this period there was a declining interest in grand theories about the law of nations. Instead, international jurists concentrated their attention on analysing positive law and practice. The foundations of international law were left to philosophers of law. However the philosophers, for their part, often had little real knowledge of international law, so that their comments tended to be fairly summary. The overall result was a net decline of interest in the foundations of the law of nations. The most widely credited answers that were forthcoming on this question rested on eclectic approaches which sought to combine the respective advantages of the various existing theories. More recently, we have seen a certain reawakening of interest in fundamental questions of this kind. Possibly this will lead to more widespread thinking about the basis of the important but endangered legal order that is international law, and also to the construction of new overall conceptions, building on existing ones or seeking new ideas and insights.

One final word is in order, on the usefulness of an enquiry of this kind. Compared with other branches of law, public international law shares with canon law (albeit for very different reasons) the fact that its very nature as law is problematical. Public international law has been challenged as law, on the basis that its juridicity is far from evident to a great number of authors and commentators approaching the subject from other horizons, whether legal or non-legal. Furthermore, their view often coincides with that of the ordinary man in the street, who is very often sceptical and snery, and at the very least has reservations, about the reality of international ‘law’. This makes the effort to construct an effective explanation for the law of nations markedly more valuable than comparable efforts in other fields of law. An expert in internal law can treat the positive law of his country as an immediate ‘given’, sanctioned ultimately by the weaponry of the State. The international lawyer, by contrast, must first establish the bases for a system of law that does not present or impose itself as an evident ‘given’. Some authors have of course argued that the need to explain shows us that there is something infantile about the character of international law. They think these

---

seemingly morbid and masochistic questions ought to give way to a tranquil sense of assurance: international law must be seen as an evident fact of international life, just as municipal law is to the internal life of a State. If only we could stop questioning its existence and foundations, we would have taken a decisive step forward. International law would then at last have found a way into the sacred halls of ‘law’. But is such an easy way out of the problem actually available to us?

It is surely questionable whether one can win so famous a victory over doubt by simply holding the Nelsonian telescope to one’s blind eye. International law has not reached the same stage of development as systems of internal law, and never will: the point, put quite simply, is that international law is not municipal law, and can never resemble it, because it will always lack the enforcing weaponry of the State. If it were otherwise, it would be because international law had turned into a system of federal global law, in which case it would in fact have ceased to exist. The need to enquire into its true bases thus remains unavoidable, since they always will be problematic. It would seem, in truth, that this eternally problematic character is one of the noblest features of international law. One may well argue that the human spirit confounds itself precisely when it abandons its own questings, settling instead for questionable trumpery assurances – when it puts aside its tormenting doubts and lulls itself to sleep with the drug of certainties, a drug whose side-effects will then close down its vital immune system.3 One of the essential tasks of theoreticians is to constantly renew and reinvigorate critical thinking about the fundamental questions. This same effort is surely required of the international lawyer, to draw value and strength

There is the problem, laid bare in all its gravity, this is where we are placed in the face of our responsibilities as lawyers. There is no possibility of evading the problem by the kind of intellectual somersault that causes some of us to take refuge in distant galaxies of cloudy generalised theories; as if by chance, such theories once again become fashionable, to the point why they weigh down the pages of this Journal to a degree that, at least to my taste, is excessive (and in view of the general situation I cannot resist the temptation to remember that in the Grand Saloon of the Titanic the dancing continued even while the ship was sinking” [our translation]. But there is a misunderstanding here: in what way does the general theory prevent the firm condemnation of abuses of power as contrary to international law? If this theory more clearly shows the foundations of international law and even the existence of that law, that can only reinforce the judgment in the particular case. In other words, the choice is not ‘either/or’ but ‘both/and’.

3 In this regard see the handsome observations of E. Fechner, Rechtsphilosophie, 2nd edn, Tübingen 1956, p. 286.
from the apparent weakness of his subject. How, after all, can one truly claim to know any subject, far less to have mastered it, without having examined its fundamental basis? True knowledge necessarily means knowledge in depth, both conceptually and in historic time. As regards the history, four lines of Goethe’s *West-eastern Diwan* are much in point, in which he takes cognizance of the poetry and wisdom of Asian societies: ‘He who cannot personally take account of three thousand years of experience dwells in the darkness of inexperience, living from day to day’ [our translation].