1. Introduction

Rossana Deplano and Nicholas Tsagourias

1. METHODS AND METHODOLOGY IN INTERNATIONAL LAW: AN EXCURSION

Method describes a technique of acquiring knowledge. International law method(s) thus describe(s) the techniques of acquiring knowledge about the international legal system in general or about international norms in particular. Methodology is the theory of methods which explains and justifies the method(s) used in a particular instance. Applying a certain methodology does not necessarily mean that international law scholars or practitioners will follow a prescribed method, but they can apply a mixture of methods if that is justified by the chosen methodology.

Methodology is informed by discipline-related theories and enquiries which in the case at hand refer to international law theories and enquiries. There is thus correlation between theory, methodology, and methods; theory, which represents a systematic knowledge-resource, informs the selection of a particular methodology whereas the latter informs the selection of particular methods. Put differently, theory provides the context for the enquiry, whereas methodology provides the conceptual justification for the choice of methods according to which theory can be understood, reasoned, demonstrated or disposed of in relation to the specific enquiry. Methodology and methods thus touch upon the values, content, and rationale of international law and determine how international law issues or problems can be understood and addressed. Even if they do not solve problems, they provide the means and manner according to which issues can be researched and solutions articulated.

Studying international law methods is thus important because it provides a cognitive map according to which the perspective of a particular inquiry is framed and research is conducted. It also explains and justifies the process of generating and applying legal knowledge and of producing arguments and action to achieve certain ends. Furthermore, it reveals the underlying philosophical, political, or broader legal questions underpinning research. All this means that the significance of studying international law methods is not just internal, related to their internal consistency and coherence, but has an external dimension as well because it touches upon the values, content, and rationale of international law as a discipline and as a governance tool. It is for this reason that this Handbook also grapples with the major theories of international law, the aims of international law and its practice in different fields. Finally, studying international law methods assists researchers, scholars, and practitioners to create a space where understandings about the content and aims of international law and of legal arguments can be achieved and legal action can be engineered.

2. THE SCHOLARLY DEBATE ABOUT INTERNATIONAL LAW METHODS

As indicated above, international law scholars use diverse methods to underwrite their research and arguments. For the sake of schematic categorisation, international law research methods can be grouped into four broad, although not prescriptive or exhaustive, categories.

The first category includes doctrinal methods. Doctrinal methods have a rich historical tradition and are by far the most commonly used research methods in international law. They consist of ways of thinking about the international legal system. As such, they are more concerned with building a theoretical framework for analysis rather than with the systematic analysis of empirical evidence gathered in relation to a discrete piece of research. As Macdonald and Johnston write, a focus on theory allows the researcher to bridge the gap between general international law and specialised areas thereof, thus providing a unified methodological approach to the study of international law.¹ An example of this tradition is Ratner and Slaughter's edited collection of essays examining the question of individual accountability for violations of human dignity committed in internal conflict from seven different theoretical perspectives.² Another scholarly collection presenting a variation of themes within the doctrinal methods is Orford and Hoffmann's *Oxford Handbook of the Theory of International Law*³ and Bianchi's *International Law Theories*.⁴

Empirical and socio-legal methods, the second category, are of much more recent origin in international law. Derived from the social sciences,⁵ they include qualitative and quantitative methods. Examples of quantitative methods include the Empirical Legal Studies (ELS) tradition and the computational analysis of law. They both utilise social sciences research techniques, such as statistical and social network analysis, to

¹ R St J Macdonald and D M Johnston, 'International Legal Theory: New Frontiers of the Discipline' in R St J Macdonald and D M Johnston (eds), *The Structure and Process of International Law* (Nijhoff 1983), 3.

² They include: positivism, the policy-oriented approach to international law, international legal process, critical legal studies, international law and international relations, feminist approaches of international law and law and economics. See Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (The American Society of International Law 2004). Also 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *Am. J. Int'l L.* 291.

³ A Orford and F Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (New York OUP 2016).

⁴ A Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016).

⁵ A Bryman, *Social Research Methods* (5th ed, OUP 2016), 3, describing social research as 'research that draws on the social sciences for conceptual and theoretical inspiration' on 'how to formulate research topics and issues and how to interpret and draw implications from research findings'.

provide new insights on how law works in practice.⁶ Examples of qualitative analysis include socio-legal research and New Legal Realism. Heavily grounded in pragmatism,⁷ they do not engage in normative theory to wit, they do not address the question of what law is in the abstract.⁸ Instead, they examine how law obtains meaning, is practiced, and changes over time.⁹ In short, they maintain that legal concepts acquire legal meaning through practice and that their legal form is context-dependent, flexible, and amenable to change rather than being an assumption or posited.¹⁰ One of the benefits of empirical and socio-legal methods is that, being grounded on empirical observation of broad trends in international practice, they supplement the findings deriving from the normative and doctrinal analyses of international law.¹¹ A potential drawback is that empirical observation could be seen or treated as an end in itself instead of a supplement to a given normative and theoretical background.¹²

Comparative methods, the third category are relatively rare in international law. They are about the comparative study of techniques of interpretation of international law rules and principles by the participants of the international legal system. Comparative international law methods contend that abstract rules and principles acquire concrete meaning by the way they are interpreted (and subsequently applied in practice) by international law actors. The leading book in this field is Roberts, Stephan, Verdier and Versteeg's *Comparative International Law*,¹³ although the

⁶ P Cane and H M Kritzer, 'Introduction' in P Cane and H M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2010), 1; R Whalen, *Computational Legal Studies: The Promise and Challenge of Data-Driven Research* (Edward Elgar Publishing 2020).

⁷ G Shaffer, 'The New Legal Realist Approach to International Law' (2015) *LJIL* 189, 195, 'From a jurisprudential perspective... legal realism's approach to explanatory theory-building can be viewed as a form of pragmatism.'

⁸ M C Suchman and E Mertz, 'Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism' (2010) *Am Rev Law Soc Sci* 555, 562, 'pragmatist theory tends to be "normatively empty" – it does not specify a particular value-orientation'. See also V Nourse and G Shaffer, 'Empiricism, Experimentalism, and Conditional Theory' (2014) *Southern Methodist University Law Review* 141, 150, 'Legal realists, old and new, (ourselves included), are less interested in the general, jurisprudential question of "what is law", than in the question of "how law is formed" and practiced.'

⁹ Nourse and Shaffer, *ibid.*, 189.

¹⁰ *Ibid.*, 195–6.

¹¹ See, for instance, T Eisenberg, 'The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns' (2015) 11 *Univ Illinois L Rev* 1713, 1715–20.

¹² Bryman (n 5) 4, 'social research is informed and influenced by theory. It also contributes to theory because the findings of a study will feed into the stock of knowledge to which the theory relates'; S D Franck, 'Empiricism and International Law: Insight for Investment Treaty Dispute Resolution' (2008) 48 *Va J Int'l L* 767, 773, arguing that '...empirical methodologies provide scholars with tools to gain new facts, see existing ideas through a different lens, and engage in a more nuanced analysis of international law phenomena'.

¹³ A Roberts, P B Stephan, P-H Verdier and M Versteeg's *Comparative International Law* (New York, OUP 2018). See also by the same authors, 'Comparative International Law: Framing the Field' 109 (2015) *AJIL* 467.

origins of the scholarly debate can be traced back to the 1986 Proceedings of the Annual Meeting of the American Society of International Law.¹⁴

Interdisciplinary methods, the fourth category, blend some of the main traits of doctrinal methods with empirical ones. The body of scholarly literature adopting such methodological approaches is vast and growing. Arguably, the two most developed areas of interdisciplinary research are international law and international relations¹⁵ and international law and economics (including behavioural approaches to international law and economics).¹⁶ A benefit of interdisciplinary analysis is that it conceptualises the structure and functioning of international law through the lens of social sciences research methods by placing international law within the intellectual roots of those cognate disciplines. Interdisciplinary methods thus evaluate the role and impact of international law in the international community from different angles, going beyond the strictly normative or empirical analysis of international law. The grounding of the analysis within the theoretical lens of non-legal fields of inquiry is what differentiates interdisciplinary analysis from the ELS tradition, especially in its quantitative variant.

An alternative, less used classification of methods rests on the distinction between inductive and deductive methods. The inductive approach maintains that legal rules are those recognised as such by the subjects of international law, that is to say, those stemming from the actual practice of international law. The chief exponent of the inductive approach to international law is George Schwarzenberger.¹⁷ The deductive approach derives the existence of a rule from a process of logical reasoning based on posited principles, which also confer the validity on the rule. This is the most common approach, to which natural law – and increasingly positive law – scholars subscribe.¹⁸ An advantage of these two approaches is that they create a structured approach to international legal reasoning by providing a methodological approach to the identification (and, to an extent, interpretation) of international law rules and principles. A potential disadvantage is that they are entirely concerned with estab-

¹⁴ M W Janis and I Brownlie, 'Comparative Approaches to the Theory of International Law' 80 (1986) *ASIL Proc* 152. See also B M Mamlyuk and U Mattei, 'Comparative International Law' 36 (2011) *Brooklyn J Int'l L* 386.

¹⁵ Leading works include the essays in J L Dunoff and M A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (New York, CUP 2013).

¹⁶ A T Guzman, *How International Law Works: A Rational Choice Theory* (New York, OUP 2008). See also A van Aaken, 'Behavioral International Law and Economics' 55 (2014) *Harvard International Law Journal* 421; J L Dunoff and M A Pollack, 'Experimenting with International Law' 28 (2017) *EJIL* 1317.

¹⁷ See G Schwarzenberger, *The Inductive Approach to International Law* (Stevens 1965); see also his seminal work, *ibid.*, 'The Inductive Approach to International Law' 60 *Harv L Rev* (1947) 539.

¹⁸ See, for instance, B Simma and A L Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' 93(1999) *AJIL* 302; J Kammerhofer and J d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014).

lishing the existence of a legal rule or principle operating within the boundaries of a given theoretical framework. As a result, the international legal system is presented as a self-contained system whose working is largely unrelated to the social world in which it operates.¹⁹ This amounts to a restrictive conception of the relationship between theory and methods, which effectively confines the available methods of research to selected ones – such as logical reasoning and doctrinal methods – to the detriment of others, such as interdisciplinary methods.²⁰

Be that as it may, it is fair to say that although the study of methods and methodology is an important aspect of legal education, research and practice, it has not received the attention it deserves as a separate field of study whereas references to methods and methodology are often implicit in scholarly works or in legal reasoning.²¹ We can identify only a handful of publications which engage with international law methods and methodology. Shabtai Rosenne's *Practice and Methods of International Law* (1984)²² contains information as to where to find the law and how to read it,²³ thus acting as a reference book and a data source. Maarten Bos' *A Methodology of International Law* (1984)²⁴ develops a theory of international law and explains how rules are made whereby methods guide legal thought albeit not in a binding manner. In our opinion it is only the edited collection *The Methods of International Law*²⁵ which provides a detailed account of a number of international law methods and how they apply to specific issues.

This Handbook thus covers a lot of ground not only because of the scope and diversity of methods it studies but also because of its theoretical engagement with the role of methods in international law.

3. OVERVIEW OF THE HANDBOOK AND ITS RATIONALE

The list of methods presented in this Research Handbook is wide-ranging but not exhaustive. It covers doctrinal, empirical, socio-legal, comparative, inter- (and multi-) disciplinary methods and combinations thereof. All this demonstrates the

¹⁹ T Aalberts and I Venzke, 'Moving Beyond Interdisciplinary Turfs Wars: Towards an Understanding of International Law as Practice' in J d'Aspremont et al (eds), *International Law as a Profession* (CUP 2017), 288. See also C Dominicé, 'Methodology of International Law' in C Dominicé, J Belhumeur and L Condorelli (eds), *L'ordre juridique international entre tradition et innovation* (Graduate Institute Publications 1997), para 10. Available at <http://books.openedition.org/iheid/1334> (accessed 19 October 2020).

²⁰ Dominicé, *ibid.*, para 21. See also M Bos, *A Methodology of International Law* (North-Holland 1984), vii and 1.

²¹ I Venzke, 'International Law and Its Methodology' 28(2015) *LJIL* 185, 186.

²² Shabtai Rosenne *Practice and Methods of International Law* (Oceana 1984).

²³ *Ibid.*, ix.

²⁴ Bos (n 20).

²⁵ (n 2).

methodological richness of international law and the iterative process that exists between international law and other disciplines. Above all, it demonstrates the maturation of international law as discipline.

Individual chapters present the tenets of the chosen method and its underlying methodological assumptions. They may then apply these tenets and assumptions to specific fields of international law or to specific issues. Often chapters are informed by broader theoretical enquiries about the purpose and aims of international law. They may also contain an evaluation of the chosen method and its contribution to achieving the aims of international law.

As editors we allowed authors to present and discuss their respective methods as they saw fit because we are aware of the fact that there may be different readings of international law methods, methodology, and theories. In our opinion, it is for the readers to assess particular approaches. Our aim with this Handbook is not to end all debates about international law and its methods but, instead, to contribute to the debates on a more informed basis.

The chapters also engage in dialogue with each other, sometimes explicitly whereas other times implicitly, because all chapters deal with common themes about international law and the international legal system, about its normativity, values, rules, aims, processes, even if they approach them from different perspectives or deal with specific issues.

We believe that the contribution of this Handbook to international law research, scholarship, and practice is multifaceted.

First, it fills gaps in the international law scholarship.

Second, it will benefit international law scholars and researchers because it presents a variety of methods with their distinct intellectual process of knowledge identification, acquisition, and application and explains the underlying methodological assumptions behind each respective method and its assumptions about international law.

Third, the Handbook will be useful for practitioners because it presents legal reasoning and law application not as a mechanical exercise but as a technique with its own processes of reasoning and justification whose understanding can lead to more informed reasoning and outcomes.

Fourth, the Handbook will facilitate reflection and understanding of the role and aims of international law scholarship and profession and how international law scholars, researchers, and practitioners can navigate through theoretical and professional allegiances and techniques of enquiry to arrive at justifiable conclusions and attain the aims of international law.

Fifth, by explaining the links between international law methods, methodology and theory, the Handbook demonstrates the relevance of methods in legal thinking.

As Frede Castberg said in his 1934 Hague Academy lecture entitled *la méthodologie du droit international public*, ‘une méthodologie qui tient compte de cette relation

entre le droit et ses buts remplira précisément la tâche pratique de la science du droit en tant que science: nous assurer la maîtrise des événements futurs'.²⁶

²⁶ 'A methodology which takes into consideration the relationship between the law and its objectives fulfils the practical role of legal science as science: it ensures the control of future events.' (authors' translation). F. Castberg, 'La méthodologie du droit international public', *RCADI*, vol. 43, 1933-I, 313–83, 381.