
A Colloquium on International Law Textbooks in England, France and Germany: Introduction

Anthony Carty*

Abstract

The Introduction raises at a general level the question whether and in what sense it is possible to speak of national textbook traditions in international law within Europe. As the articles which follow are the work of commentators on textbooks, the Introduction itself attempts to give a flavour of the residential colloquium in which authors of the textbooks themselves contributed effectively to the discussion of the themes of national textbook traditions. As the articles cannot embrace every theme of the textbook problematic, the Introduction places each of them in the wider context and invites further debate to flesh out the issues more fully.

In November 1999 the University of Derby hosted a residential colloquium at Callow Hall, Ashbourne, on textbooks in international law out of which come the papers constituting the present *dossier*. The format of the meeting was that authors of textbooks would meet with commentators in dialogue together. Out of this a more informed and fair comment could be published. The method of the presentations was to bring out the distinctiveness of the works through both a historical and a philosophical critique. Without history one cannot have any hope to understand the context in which a work has been produced, but without philosophical reflection there is no foundation for an assessment of the extent to which the ambitions of the works have been achieved.

However many such works might be the object of such an exercise, it is believed their analysis would require the type of individual attention which was attempted at Callow Hall. It is believed that large meetings such as conferences and congresses are, as such, of little intellectual interest, however successful individual contributions might be. This is also supposed to explain the limitation of the study to three countries, which is completely arbitrary.

What has been attempted so far is to challenge the cultural diversity of the textbook

* University of Derby.

tradition in these few countries in the context of the 'ever growing' union which is the European Union. An effective common European foreign and defence policy is the desired goal and its value is not diminished with the perception that close analysis of differences in legal approaches to international affairs reveals that these are substantial.

To favour the textbook as a way of tackling such problems is to plunge immediately into the problematic of the textbook, whether it should exist at all and, if so, what should be its nature. There is one form of exploration of European traditions which the exercise of the colloquium would not claim to prioritize over textbooks. It is the empirical, historical exploration of the work of legal advisers in foreign ministries, which is being undertaken separately. However, the 'good' textbook would be preferred over the specialist monograph or legal opinion, because it should be able to bring a coherent vision and context to the multiplicity of detail of international events.

Whether this is possible is one of the issues most hotly debated at the colloquium. Philip Allott, who represented Sir Robert Jennings and Sir Arthur Watts, who were detained at international court and arbitration proceedings, firmly contested the idea that there could be a textbook except perhaps to cover the foundational questions of international society, a form of international constitutional law textbook. He defended the ninth edition of Oppenheim's *International Law* as a practitioners' manual against the charge that it lacked what Patrick Capps, as a legal philosopher, calls in his paper, commenting on Oppenheim, the need for justified analytical propositions.

The question whether English empiricism, as a form of intuitive 'justification', might be at play, was also extensively aired. The paper of Mathias Schmoeckel, which is firmly historical, brought home how the original success of Oppenheim in England was due to his ability to systematize the subject in a land which was already lacking in adequate systematic treatises. The record also shows the open appreciation which John Westlake, the holder of the Cambridge Whewell Chair at the beginning of the twentieth century, had for Oppenheim's efforts and how Westlake ensured that Oppenheim should replace him. The question which arises from the paper of Capps is whether texts can wander so far away from an analytical system that there has to be a rather strident call for the reintroduction of what he calls a justificatory mode, for which he has recourse to Kantian philosophy and which, in the discussions, he sees as most exemplified in the traces of idealism in the work of Verdross and Simma, *Universelles Völkerrecht*.

Such despair of England was countered by the prolonged debate between Ian Brownlie and Colin Warbrick about the place of the textbook in the English tradition of *legal textbook writing*. Here the question whether there should be any chapters on method and philosophy was most hotly contested. The closeness of this debate is very faithfully represented by Warbrick in his paper and was, in this respect, one of the most successful aspects of the colloquium. Brownlie's tireless and cordial resistance to theory and philosophy came to make sense pedagogically in the context of the legal textbook writing tradition of his time (late 1950s, early 1960s) in England. Inevitably, as the author of the text published here, Warbrick has, for the moment, the last word, and has issued another challenge.

If one accepts Brownlie's argument in historical terms it raises acutely problems of translation and communication at the European level, since it grounds the English international law textbook within the English tradition alone. Yet the question of tradition as such was also a hotly contested issue. Graf Vitzthum vigorously disputed the idea, and particularly any attempt to characterize Germans as idealists. Inevitably, he connected the issue with that of the function of a textbook. The latter did not have to provide a 'grounded vision'. It should expound for the student the variety of approaches and the complexity of the material available. While Vitzthum had devoted some place to what is normally understood as theory in his first edition of his edited work he intended to reduce this in the second in favour of the addition of more particular matters. While his own collective volume did not actually produce contradictory views of the state of the law it represented a variety of methodologies of which functionalism and instrumentalism are probably the most prominent. Needless to say there is nothing specifically German about these approaches.

Carlo Santuli, an Italian resident in Paris, somewhat assuaged the force of these rather penetrating criticisms of the conception of the colloquium. Particular methodologies and practices, emphasis of subject matter and approach, do become entrenched in the institutional pedagogic practices of particular countries. In this sense it is definitely true that there are at present distinctive cultural traditions shaping international law in the different countries. They are not *national* in any genealogical sense. For instance, the Austrian, Kelsen, is very influential in the French international law academy. Another example of cross-cultural borrowing has just been the subject of discussion. Functionalism is an American import to Germany, which was, in any case, developed by Wolfgang Friedmann who was genealogically not all that American.

Siegfried Schieder engages in a sustained critique of the idealism of the work by Verdross and Simma from the perspective of American pragmatism and makes a first attempt to evolve the basic elements of a pragmatic approach to international law. Of Italian nationality, but German speaking, he views idealism with scepticism as a method for tackling the complexity of a world which is not merely in change but also in deep conflict. Functionalism has also an automatic quality about it which no longer convinces. Idealism, whether among German political theorists and international lawyers, or among their American counterparts, has the potential to encourage dogmatism and to recommend recourse to 'justified' violence with great frequency, if only for the sake of consistency, which is, after all, *the* Kantian virtue. Schieder's critique bears out the significance of Santuli's remarks: quite simply *whose idealism?* Schieder stresses that for him the true categorical imperative is the most extreme sensitivity to the position of 'the other' and the most acute self-reflective awareness of the real position of 'the self'. With these conditions met, he expects that all is in place to dissolve conflicting paradigms used to categorize international reality. Schieder's method does not necessarily lead to textbook writing, but can supplement it.

For Capps, an Englishman with no particular interest in Germany, idealism is simply a heartfelt plea to his fellow English international lawyers to accept the need for some rigour, discipline and intellectual openness in their profession. Reacting to the

ninth edition of Oppenheim's *International Law* he says that also English lawyers have to be willing to argue their points and not simply describe so-called legal events as if these could get up and walk on their own feet. If argument is to be coherent and consistent there have to be starting points, foundation points out of which these essential qualities can emerge. Capps is clearly pointing in the way of the writing of textbooks of the Verdross and Simma rather than the Vitzthum style. There is no place for the argument that the 'Multiplicity of Being' calls for silence. At the same time Capps' contribution remains at the level of analytical philosophy. He does not attempt to present the inevitability of a particular foundation for international law on this occasion. His work merely remains a call for intellectual seriousness.

If cultural differences are institutional rather than genealogical, then the questions still remain whether they matter and how far it is desirable or possible that they be overcome. Here the study of Schmoeckel is very optimistic. The manner in which Oppenheim was received in England shows that even in such dark political times, just before the First World War, the intellectual elites of a nation could appreciate the merits of a foreign scholar and put him to full use. They could see clearly the deficiencies of their own outdated in-house models and their own failure to replace them.

The historical method is essential to the forming of such judgments and its inevitable ponderousness makes obvious its unsuitableness to grand conferences 'for the unification of international law in Europe'.

My own paper attempts to justify the claim that there are profound differences in the conception of the system of international law in Europe, and that the principle 'ignorance is bliss' to some extent prevails in European circles. This is despite cooperation among some distinguished jurisconsults before the European Union and the International Court of Justice. Indeed it is a principal aim of the *European Journal of International Law* to engage in such debate across frontiers. I undertake an inevitably controversial account of the method of a leading French textbook on international law (Jean Combacau and Serge Sur, *Droit International Public*) and its approach to some important substantive issues. I compare it with a German textbook which had not been published at the time the colloquium was conceived (Karl Döhring, *Völkerrecht*). I use a method drawn from analytical political philosophy to see within which typical tradition of European political theory these French and German works can be fitted. The method could be applied to Spanish, Italian, Greek or Swedish textbooks with just as much foundation. However, it is not as exhaustive a method as the historical method and I have no doubt that the latter method is better. Nonetheless, given the constraints of time and space which any debate must impose, I believe, to follow the language of Capps, I have at least undertaken a 'justified argument' and, to follow the spirit of Schieder, I hope it will open a spirited dialogue. I myself throw in some optimistic concluding suggestions about the nature of common European traditions of political philosophy. Reasons of space exclude elaboration.

To stress once again the inevitable modesty of the whole undertaking of the colloquium, shortly after it happened there appeared in Germany a fourth edition of Knut Ipsen's edited *Völkerrecht*. In the first chapter the editor gives such a

comprehensive treatment of the entire philosophical and historical debate about contemporary international law as to bring all facets of opinion before the eyes of German students, including the American 'Newstream of scholarship' and critical international legal studies. Ipsen even credits these movements with having had influence upon the 'Mainstream'. This is a model to be followed whatever one's viewpoint of the nature of textbook writing and teaching.

