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# *Brownlie's Principles of Public International Law: An Assessment*

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## **Abstract**

*The first edition of Professor Ian Brownlie's Principles of Public International Law was published in 1966. It is now in its fifth edition. The book covers the major aspects of the law of peace. Its structure has not greatly changed since the first edition. It is well established as a student textbook and it is a work of authority. The book is well known for its disavowal of the treatment of the basis of obligation in international law, though Brownlie has made some remarks about his position in other writings. The paper considers whether the structure of the book has stood the test of time, both in relation to changes in international law and in the law school syllabuses in the United Kingdom. It then addresses Brownlie's foray into theory and whether it sits well with the account of the law presented in the book. It concludes that it does not do so in all respects and that it leaves one very big question unanswered.*

## **1 Introduction: The Identity of Principles of Public International Law**

I should make two preliminary points. First, I have confined myself to a consideration of the five editions of Brownlie's *Principles of Public International Law (Principles)*,<sup>1</sup> with one addition. The additional item is his article, 'The Reality and Efficacy of International Law',<sup>2</sup> and I have taken account of the expanded version of it which forms the introduction to Brownlie's 1995 Hague General Course.<sup>3</sup> Secondly, for what

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<sup>1</sup> I. Brownlie, *Principles of Public International Law* (1st ed., 1966; 2nd ed., 1973; 3rd ed., 1979; 4th ed., 1990; 5th ed., 1998). There are Russian, Japanese and Portuguese translations of some of the editions. For a full bibliography, see G. S. Goodwin-Gill and S. Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) xvii–xxi.

<sup>2</sup> 52 *British Yearbook of International Law* (1981) 1.

<sup>3</sup> 'International Law at the Fiftieth Anniversary of the United Nations: General Course on Public International Law', 255 *Recueil des Cours* (1995) 9–228.

it is worth, I consider myself to be in the same tradition of English international law of which *Principles* is a significant modern component. Much of what I say is by way of observation on, rather than of difference from, the manner and content of *Principles*.

It is not without difficulty to find an approach which is neither a book review nor an anecdotal account of where *Principles* finds its place in the English law schools.<sup>4</sup> This paper follows the presentation at the Colloquium but I have developed it a little and taken into account Brownlie's own remarks in the Colloquium. What I have done is to look at the general academic background in England about the time Brownlie was writing the first edition of *Principles* and to record his own account of his object in producing the book that he did. Brownlie was writing a textbook for university students. I consider some developments in the English law schools since 1966 and how they have had an impact on the place of the international law textbook. I then briefly examine some of the features of *Principles* and consider whether or not the practically unchanged structure of *Principles* continues to serve academic needs in the light of changes in the practical achievements of international law. Finally, I give some attention to the theoretical approach taken by Brownlie in *Principles*.

Brownlie said at the Colloquium that *Principles* was written as a student textbook, comparable in scope and ambition with textbooks on domestic law subjects. Most often, he made comparison with Treitel's *Law of Contract*, the first edition of which was published in 1962.<sup>5</sup> The period when *Principles* was being written was a very productive one for new textbooks in England: by 'new', I mean wholly original and not merely new editions of established books, however great the revision. Some of the books, like Treitel's, were in fields where there were widely used, standard works.<sup>6</sup> Others, like Smith and Hogan's *Criminal Law*,<sup>7</sup> were in established fields where the existing textbooks, for one reason or another, often atrophy, were no longer regarded as satisfactory. Others still were designed to 'create' new subjects for the undergraduate syllabus, for instance, Cross on *Evidence*<sup>8</sup> and Bromley's *Family Law*.<sup>9</sup> At the time of the first edition of *Principles*, the writing of ambitious textbooks was a flourishing practice in British universities. There was a cadre of lecturers willing to use them and a body of students ready to meet the demands of using these new texts. In assessing the scope, style and aim of *Principles*, we should take this into account.

The original *Principles* entered a pretty barren field. Waldock's sixth edition of Brierly had altered Brierly's original conception of it as an introduction to international law,<sup>10</sup> without quite creating a self-contained textbook of the subject. There was a fifth edition of Schwarzenberger's self-referential idiosyncrasies<sup>11</sup> — fine,

<sup>4</sup> Convenience justifies 'English': I have no reason to think that there are any great differences with respect to the place of the textbook and the teaching of international law between England and Wales, Scotland or Northern Ireland.

<sup>5</sup> G. H. Treitel, *The Law of Contract* (1st ed., 1962; 10th ed., 1999).

<sup>6</sup> Most notably, G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (1st ed., 1945; 5th ed., 1960).

<sup>7</sup> 1st ed., 1965; 9th ed., 1999 by J. C. Smith.

<sup>8</sup> R. Cross, *Evidence* (1st ed., 1959).

<sup>9</sup> P. M. Bromley, *Family Law* (1st ed., 1957).

<sup>10</sup> J. L. Brierly, *The Law of Nations* (1st ed., 1928; 6th ed., 1963 by C. H. M. Waldock).

<sup>11</sup> G. S. Schwarzenberger, *A Manual of International Law* (1st ed., 1947; 5th ed., 1967).

if one was being taught by Schwarzenberger but difficult if one was not — and a sixth edition of Starke's rather undervalued, *An Introduction to International Law*.<sup>12</sup> My recollection is that university courses on public international law were primarily 'law of peace' courses. Brownlie did not have to invent 'public international law' as a subject for the undergraduate syllabus, as Bromley had to create 'family law', and he was not without up-to-date competitors, as Smith and Hogan had been. He wrote in the preface to the first edition that:

there are few treatments of [public international law] which are substantial without being inconveniently large and which emphasize the issues of legal principle and technique sufficiently.<sup>13</sup>

He did not identify his audience — Starke, for instance, in his first edition said that he was writing for 'intending international officials and diplomatic recruits and University students'<sup>14</sup> — but it is clear from what Brownlie said that he was aiming at ambitious students and, looking back, it does seem that the sights of some writers of student textbooks at that period were being set higher than those of their predecessors, as they tried to provide more substantial works without descending into that detail or aspiring to that comprehensiveness which was demanded by practitioners. Though I am far from maintaining that it be an iron rule of progress of major student textbooks, there has been a pattern of some of the great textbooks mutating into practitioners' works and losing their utility, often by reason of their increasing size, as student books.<sup>15</sup> It is not an observation which applies to *Principles*, which remains remarkably true to its original conception and size. There might though, as we shall see, be other reasons why the weightier treatments of subjects have been losing their places in British law schools.

Although *Principles* had practically the same chapter headings as the contemporary Starke, it was not the same book. The difference was not merely a function of size. Quite apart from the detail — Brownlie had a much wider range of reference to the literature and to case law, in the main culled from the *Annual Digest* and the *International Law Reports* — the distinction lies in Brownlie's objective to present international law as a system (though he does not aspire to an account of the whole system):

special attention has been paid to the structural relations of the subject and the need to avoid considering topics in isolation.<sup>16</sup>

This is an important aim. It shows itself, for instance, in the account of the relationship between international and municipal law, on the one hand, and on the

<sup>12</sup> J. G. Starke, *An Introduction to International Law* (1st ed., 1947; 6th ed., 1967).

<sup>13</sup> *Principles* (1st ed.) v.

<sup>14</sup> Starke, *supra* note 12 (1st ed., 1947) v.

<sup>15</sup> For instance, G. C. Cheshire, *Private International Law* (1st ed., 1935; 12th ed., 1992); Smith and Hogan, *supra* note 7, is no longer advertised as a student text by its publisher, Sweet & Maxwell.

<sup>16</sup> *Principles* (1st ed.) v.

sources of international law on the other.<sup>17</sup> The over-arching importance of the ‘principles of attribution’ which link the functional relations of territory, nationality and jurisdiction in their external manifestations is an important example of the task Brownlie set himself.<sup>18</sup> Most of all, it allows him to provide a persuasive account of the law of state responsibility, which escapes the Anglo-American concentration on the single wrong of the treatment of aliens, to identify the generalities of the topic and to anticipate the development of the topic of state responsibility by the International Law Commission.<sup>19</sup>

The identity of the ‘principles’ in the title of *Principles* is not explicated anywhere in the book. Brownlie’s ‘principles’ are not the ‘policies’ or aims of the international legal order. It is not entirely certain that they are Dworkinian ‘principles’:

standard[s] that [are] to be observed, not because [they] will advance or secure a [policy goal], but because [they are] requirement[s] of justice or fairness or some other dimension of morality.<sup>20</sup>

Nonetheless, they do share some affinities with Dworkin’s notion. Brownlie has a short section, which has remained unchanged through the editions, on ‘General Principles of International Law’,<sup>21</sup> in which he gives as examples, *inter alia*, consent, the equality of states, good faith and domestic jurisdiction. Consent and good faith fit Dworkin’s conception of principles of general justice or morality but equality of states and domestic jurisdiction are clearly features of a regime, whether moral or legal, applying to states alone. This kind of ‘principle’ arises, as Brownlie says, from state practice (though, in practice, it may be quite unnecessary to go back to the practice to demonstrate its authenticity). Consent, good faith etc. belong, perhaps, to the category Brownlie describes (but does not exemplify) as ‘though useful . . . unlikely to appear in ordinary state practice’.<sup>22</sup> As Dworkin conceded, the line between principles and rules, particularly general rules, in his senses can be difficult to draw.<sup>23</sup> *Principles* contains evidence for many rules, some of them quite particular. Where they are not

<sup>17</sup> *Ibid.*, at 29–34 and 48–51. Brownlie’s view, endorsing the Fitzmaurice/Rousseau position on the ‘separate fields’ understanding of the relationship between international and municipal law, and his emphasis on the importance of the matter of proving the international law rule to the satisfaction of the national court, was amply borne out by the *Pinochet* cases, especially *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 1)* [2000] 1 AC 61; [1998] 3 WLR 1456; [1998] 4 All ER 897, at 917 (Lord Slynn); *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening) (No. 3)* [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97, at 178 (Lord Millett, explaining that he alone took the view that systematic torture was a crime by customary international law and, therefore, a crime by English law).

<sup>18</sup> *Principles* (1st ed.) v. and 302–351.

<sup>19</sup> The treatment of responsibility is broken into three chapters: ‘The Responsibility of States’, ‘The Admissibility of State Claims’ and ‘Some Incidents of Illegality and the Concept of *Ius Cogens*’. The treatment of aliens is covered in a separate section on ‘The Protection of Groups and Individuals’.

<sup>20</sup> R. Dworkin, *Taking Rights Seriously* (1978) 22.

<sup>21</sup> *Principles* (1st ed.) 15–16; *Principles* (5th ed.) 18–19.

<sup>22</sup> *Principles* (5th ed.) 19.

<sup>23</sup> Dworkin, *supra* note 20, at 27.

merely examples, their significance appears to lie in their structural nature, rather than as detailed applications of the general powers of states, so identified.<sup>24</sup>

This account of the inter-state system was Brownlie's positive aim and, in my view, he amply realized it. However, *Principles* is also well known for a terse negative which appeared in the first preface. In the course of it, Brownlie had already, if one may use the vernacular, 'slagged off' the McDougal policy approach to international law.<sup>25</sup> Brownlie conceded the influence of policy on the content of the law, rather in the sense of Salmond's 'historic sources',<sup>26</sup> but he would not allow such considerations to affect the identification of the content of rules identified through the familiar 'law-making' sources. What he then went on to say was:

No chapter appears on the basis of obligation in international law because it is thought that, as part of the problem of defining law, the topic belongs to books on legal theory.<sup>27</sup>

It was a recurrent theme of Brownlie's contributions at the Colloquium that *Principles* was a textbook on a discrete and established field of law and that there was no more call for treatment of the fundamental basis of international law in his book than there would be a place for a similar chapter addressing the foundations of English law in, say, Treitel. While I am sympathetic to the position that international lawyers need feel no embarrassment in explaining the legal nature of international law — we are, I heard the other day, in a 'post-epistemological situation' — an unwillingness to dispel the genuine doubts of students, still more to decline to meet head on the cynical realists among them, runs the risk that the sceptics will never be convinced and that the same foundational issues will be dragged up again and again during the course. Brownlie's reluctance to treat of the question of obligation, even in short order, is unnecessarily (and surprisingly) defensive.<sup>28</sup>

Textbooks, at least textbooks worth writing, either create a subject as an academic course or they refashion established subjects by bringing fresh light or a new approach to what has become all too familiar or they fill the gap left by the crusted character of the previous works.<sup>29</sup> Nigel Simmonds puts a higher burden on the textbook writer if he is to make a contribution to 'legal science'. He makes a distinction between an instrumental view of law — what rules do we need the best to achieve certain social

<sup>24</sup> Among the structural features presented within *Principles* is the way in which states cooperate, though the need for such cooperation might be made more specific (but examples of this cooperation, say on extradition, are beyond Brownlie's concerns).

<sup>25</sup> *Principles* (1st ed.) v.

<sup>26</sup> *Salmond on Jurisprudence* (12th ed., 1966 by P. J. Fitzgerald) 109–112.

<sup>27</sup> *Principles* (1st ed.) v. There was a new preface to the second edition, which repeated the aims of those in the first edition but omitted the forthright remarks about the Yale School and the explanation for the omission of coverage of the basis of obligation in international law. Extracts from the preface in the second edition have appeared in all subsequent editions.

<sup>28</sup> See A. D'Amato, *International Law: Process and Prospects* (1986) 1 ('Is International Law Really "Law"?').

<sup>29</sup> James Fawcett wrote about 'that combination of ancestor-worship and love of repair rather than replacement, which can turn English law books, endlessly re-edited, into a heap of many strata, in which curious fossils are to be found'. 82 *Law Quarterly Review* (1966) 134 (referring to Oppenheim, while reviewing O'Connell's *International Law*).

policy ends? — and a moral view of law — are the ends of law just and is the law achieving its ends justly? While the technician can write the book about the first, only the ‘legal scientist’ can write the second:

The doctrinal writer seeks to construct a body of principles . . . The principles he expounds are integral parts of the moral theory, or conception of justice, that underlies the area of the law in question.<sup>30</sup>

*Principles* does not explicitly aspire to this ambition and, indeed, if anything, international law writing has tried too much to be part of this elevated school. Rather, *Principles* is a reworking of the law of peace by bringing a sustained technical analysis of a kind not found in the earlier books, while leaving the traditional arrangement of the basic categories largely unchanged, and moving into a field where such competitors as there were, were regarded by many teachers as not adequate for their purposes. International law is not *as* ‘technical’ a subject as, say, tax law — the institutional limitations of the international legal system see to that — but it is Brownlie’s purpose to show that it can be treated sensibly in such a manner. For this endeavour, to concede too great a need for theory is to question whether it can be done at all.

We need not take Professor Brownlie’s exclusion of exposition of theory from *Principles* as an indication that he did not have one. In his well-known Hamlyn lectures, Professor Atiyah discerned in the denial of or aversion to theory in English academics, not so much a resistance to theory, as a sublimation of it.<sup>31</sup> I have tried to use his approach in an earlier paper with respect to English writing on international law, including Brownlie’s. My conclusion was that the submerged theory which ran through much of the literature was a modern positivism, influenced, I thought, by the extensive engagement in practice, particularly litigation, of the leading English professors and their substantial contacts with the Legal Adviser’s Department of the Foreign and Commonwealth Office.<sup>32</sup> The modern positivist recognizes the externally limited nature of sovereignty if there is to be any international law at all, so he is not fazed by the lack of an Austinian sovereign for the international legal order. Equally, he recognizes the limits of legal language as a vehicle for automatic, self-applying rules and acknowledges, therefore, a creative role for the law-applier, whoever he may be, whether foreign office legal adviser or international judge.<sup>33</sup> The very lack of density to the rules of international law, their relative spareness, their uncertainty, their incompleteness and, despite Brownlie’s best efforts, sometimes their incoherence one with another, increases the opportunity for imaginative interpretation for whoever

<sup>30</sup> N. E. Simmonds, *The Decline of Juridical Reason: Doctrine and Theory in the Legal Order* (1984) 26.

<sup>31</sup> P. Atiyah, *Pragmatism and Theory in English Law* (1987).

<sup>32</sup> Warbrick, ‘The Theory of International Law: Is There an English Contribution?’, in W. E. Butler (ed.), *Perestroika and International Law* (1990) 41; and A. Carty and C. Warbrick (eds), *Theory and International Law: An Introduction* (1991) 49.

<sup>33</sup> T. Nardin, ‘Legal Positivism as a Theory of International Society’, in D. R. Mapel and T. Nardin, *International Society: Diverse Ethical Perspectives* (1998) 17.

takes on the task.<sup>34</sup> The line between the legal and the political is drawn in a different place in the international legal system than it is in a developed, domestic legal order. It is another feature which distinguishes international law and a domestic legal order, which Brownlie seems reluctant to acknowledge for fear that it would mean admitting the weaker or even the non-legal character of international law.<sup>35</sup>

The intellectual climate in which international law is now studied has, like that for all other social sciences, developed since 1966 but successive editions of *Principles* show little sign of accommodating to these changes. However, since it appears that 'new wave' writing has had relatively little impact on English writing on international law, *Principles* remains part of the mainstream.<sup>36</sup> Moreover, it is not only the intellectual world which has changed. Developments in the substance of international law — human rights, environmental protection, economic law — have encouraged the view that international law, whereas it once was something mainly to do with states, now might have something to do with justice (or values), such that speculation from those values could create an agenda for the law and, in the ultimate, norms binding on persons members of the international system.<sup>37</sup> There are the desperate — Philip Allott's designation of international law as part of the problem rather than part of the solution for the manifest ills which afflict our world<sup>38</sup> — and there are the optimists — Philippe Sands is an example — who expect that more litigation within this expanding substantive law will change the world.<sup>39</sup> This process of the evolution of the content of international law is not new but each part of it reinforces the others and so perhaps we should be prepared to consider that the result has been a change in the nature of the relationship between the state and the international system, as the scope of the reserved domain diminishes (not a view I take myself). Should a textbook seek to usher in this new order or wait to report upon it only if and when it is accomplished? Not only has Brownlie taken the view that recent events have not been of a character to cause any fundamental re-evaluation of his conclusions arrived at in 1966 but, given the aim of *Principles*, it is beyond his purpose to be part of any force for change.

<sup>34</sup> For recent exercises in incoherence, see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996), ICJ Reports (1996) 226; *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* (No. 3) [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97. What can we tell our students about these cases which reflects well upon international law?

<sup>35</sup> See *infra* note 80.

<sup>36</sup> I do not mean by this to belittle Tony Carty's own work, of which there is a considerable amount, or that of others, e.g. Aristomedou, 'Choice and Evasion in Judicial Recognition of Governments', 5 *EJIL* (1994) 532. It is just that such work seems to have remained outside most other academic writing in this country.

<sup>37</sup> For example, R. Higgins, *Problems and Process: International Law and How We Use It* (1994); T. Franck, *Fairness in International Law and Institutions* (1995).

<sup>38</sup> P. Allott, *International Law and International Revolution: Reconceiving the World* (Josephine Onoh Memorial Lecture 1989, University of Hull).

<sup>39</sup> Sands, 'International Law, the Practitioner and Non-State Actors', in C. Wickremasinghe (ed.), *The International Law Practitioner* (2000) 101–121.

## 2 Textbook or Treatise?

I have been taking it for granted that *Principles* is a textbook. However, one of the reviewers of the first edition, Professor Richard Baxter, did describe it as a ‘general treatise on international law’ and the designation has been used since.<sup>40</sup> These are not terms of art but it might be argued that there are differences of function (a textbook addresses students) and reach (a treatise claims comprehensiveness) between them, even if it is difficult to maintain a clear division between the categories. The *Concise Oxford Dictionary* says that a treatise treats a subject ‘more or less’ systematically! It seems to me that a ‘textbook’ must have as its primary aim a student audience and, if that not be so, then it is what I assert for the purposes of what follows.<sup>41</sup> The textbook is a treatment of the subject from which one learns, rather than being a source of information for those who already know a thing or two about the matters of which it treats. Students are not the textbook’s only target. In the nature of things, their teachers must be taken into account. And, of course, a textbook might be of use even to those familiar with a subject — a neat exposition, an up-to-date account, an unfamiliar reference, a jogging of ageing memories.

It comes as a surprise — and to our students, it would come as an unwelcome shock — to be reminded that Oppenheim regarded the first edition of his great work as a textbook:

[It] is intended to be an elementary book for those who are beginning to study international law. It is a book written for students by a teacher.<sup>42</sup>

Although the title is *International Law: A Treatise*, Oppenheim claimed that it was a ‘complete survey’.<sup>43</sup> By contrast, the editors of the ninth edition say that they seek to maintain ‘its status as a practitioner’s book, rather than an academic treatise’.<sup>44</sup> Hall’s first edition carried no designation<sup>45</sup> but by the fourth edition<sup>46</sup> it had become a ‘treatise’ and such it remained thereafter, though Pearce Higgins indicated in his preface to the eighth and final edition that he had students in mind,<sup>47</sup> and, in the spirit of the times, he addressed himself to suggesting how international law might be developed by states, as well as recording what the state of the law was. Brierly described *The Law of Nations* as an ‘introduction’ to supplement ‘textbooks’, of which only Hall is referred to by him in the text, not that he would have had many to choose from.<sup>48</sup> It appears, then, that there are differences in function and reach between textbooks and treatises (even if the distinction is a less than scientific one) — the latter

<sup>40</sup> 42 *British Yearbook of International Law* (1967) 333.

<sup>41</sup> For an interesting consideration of the distinction with respect to the latest edition of Oppenheim, see Janis, ‘The New Oppenheim and its Theory of International Law’, 16 *Oxford Journal of Legal Studies* (1996) 329.

<sup>42</sup> L. Oppenheim, *International Law: A Treatise* (1st ed., 1905) vii.

<sup>43</sup> *Ibid.*

<sup>44</sup> R. Jennings and A. Watts, *Oppenheim’s International Law*, vol. I (9th ed., 1992) xiii.

<sup>45</sup> W. E. Hall, *International Law* (1st ed., 1880).

<sup>46</sup> *Ibid.* (4th ed., 1895).

<sup>47</sup> *Ibid.* (8th ed., 1924) xi.

<sup>48</sup> J. L. Brierly, *The Law of Nations* (2nd ed., 1935) vi. (5th ed., 1955) v.

aiming at those who know and who seek a comprehensive (or, at least, a broad) scope — professionals, perhaps rather than students. A contrast can be drawn between *Principles* and the almost contemporaneous work by O'Connell, *International Law*, manifestly a practitioner's book but one with very considerable elements of theory about the institutions of international law incorporated within it.<sup>49</sup> Internal evidence suggests that the Oxford University Press regards *Principles* as a textbook and that was certainly Brownlie's original objective: it is on that basis that I shall proceed.<sup>50</sup>

### 3 Textbook and Subject

Textbook writing is not always regarded as a serious business. Academics in the United Kingdom are periodically subjected to the 'Research Assessment Exercise', in which the work of their Departments, predominantly published work, is categorized for, amongst other purposes, the awarding of future research monies from public funds. It is widely believed that the genre 'textbook' has not been accorded the prestige of 'article' or 'monograph' for the making of these measurements. But textbooks have a vital role in academic life for they practically create and maintain the subjects we teach — they show that a topic is suitable for being taught to students and what its essential features are. For instance, within the broad field of international law, we can see that Alan Boyle and Pat Birnie have effectively created international environmental law as a subject,<sup>51</sup> whereas we are still waiting for similar achievements for international human rights and international economic law. Endeavours like Birnie's and Boyle's need to do something more than amass a pile of information. They need to show that there is a degree of coherence which links the materials which they have selected — that knowing about one part can reinforce what one knows about another, that, at the end, one can face unfamiliar materials or problems with some confidence about what they mean or how they should be resolved. It is, then, a search for an explication of the principles of the subject, mediated as such an enquiry must be, through examination of the rules themselves, some of which are chosen for illustration. These considerations are especially important for subjects like public international law which must be substantially compressed and selections made from an almost unlimited range of materials to make a course. The wheel, of course, can be reinvented and many textbooks are no more than a rehash of old ideas — hence the Research Assessment Exercise Panel's dismissal of the whole category — not that we have *the* wheel in this country, *the* international law textbook which commands universal admiration and admits of no improvement, only imitation.

Brownlie conceded that *Principles* was not a complete textbook of international law, even as it was taught when it came out in 1966. 'This is not a textbook which says

<sup>49</sup> D. P. O'Connell, *International Law* (1965).

<sup>50</sup> I have not given any consideration to books of cases and materials on international law, being rather an Anglo-American phenomenon than a European one.

<sup>51</sup> P. W. Birnie and A. E. Boyle, *International Law and the Environment* (2nd ed., 2000).

something about all aspects of public international law.<sup>52</sup> There was no extended treatment of the internal practice of the United Nations and none at all of certain of the substantive principles of the Charter such as that on the use of force. There was no treatment of the laws of war. Indeed, it did not pretend even to be a complete account of the law of peace — no textual treatment of succession, only superficial coverage of diplomatic law (though both are now dealt with more thoroughly).<sup>53</sup> In substantive terms, its main claims to originality were that it gave an extended treatment to nationality as an element of the attribution of persons and things to a particular state, a section on ‘Common Amenities and Cooperation in the Use of Resources’ (which contained the remarkable claim that ‘There is probably a collective duty of member states [of the UN] to take responsible action to create reasonable living standards both for their own peoples and those of other states’,<sup>54</sup> which has survived even unto the present edition<sup>55</sup>) and a short section on ‘Illegality’, with an early reference to *jus cogens*.<sup>56</sup> The ‘collective duty’ raised the eyebrow of one reviewer of the first edition.<sup>57</sup> The quotation and the accompanying text do show the attraction of the glimmering of an idea of justice in international relations to Brownlie, which, with the best will in the world, it would have been hard to show was an institution of the positive law in 1966, if one relied on the explanation of the sources of international law set out earlier in *Principles*, and would scarcely be easier to do today, especially if one relied only on the additional sources cited to accompany the quotation in the fifth edition.

Textbooks have to appeal to teachers as well as students — their authors must take into account changes in the academic environment, in addition to changes in understanding and practice of the subject. For perhaps the first 20 years after *Principles* was written, there were no sea-changes in the structures of the English law schools and their curricula but, since then, the imposed innovations, largely from outside the law schools, even from outside the universities, have been considerable. At the undergraduate level, we have seen the introduction of modular courses,<sup>58</sup> inevitably reducing the teaching time available for a given subject. The objectives of modularization, never convincingly articulated, had transferability of students between programmes and between institutions, at their core. This might have been expected to lead to harmonization, even uniformity, in the treatment of individual subjects. The reverse has been the case — the old dispensation, surviving as it had for many years, had produced a degree of consensus about what an undergraduate course consisted of, no doubt under the influence of the major textbooks. That is why

<sup>52</sup> *Principles* (1st ed.) v.

<sup>53</sup> Chapters on immunities and state succession were added to the second edition of *Principles* and have been expanded since.

<sup>54</sup> *Principles* (1st ed.) 227.

<sup>55</sup> *Principles* (5th ed.) 256. The footnotes add references to GA Res. 3281 (Charter on Economic Rights and Duties) and GA Res. 41/128 (Declaration on the Right to Development).

<sup>56</sup> *Principles* (1st ed.) 414–418; *Principles* (5th ed.) 511–517, much revised and raising questions about the unfinished character of the idea of *jus cogens*.

<sup>57</sup> ‘[It] needs to be received and debated with some caution.’ D. H. N. Johnson, 83 *Law Quarterly Review* (1967) 463.

<sup>58</sup> There is no uniformity about this but a ‘module’ is roughly equivalent to two-thirds of a ‘course’.

Brownlie, examined through its table of contents, looked so much like Starke. Now, there is no received experience on which to rely — only the creation of new experiences, some of which I have to say, are rather happier than others. *Principles*, already a large book, has looked even more out of proportion as courses have become modules. Modular successors have not yet appeared,<sup>59</sup> partly because there is as yet no identity about what such modules should look like. Of course, Oxford and Cambridge and one or two other institutions with far-seeing vice-chancellors have had the confidence to resist the march to modularization. In such places, *Principles* will not have lost its utility by reason of this kind of curricula change. Indeed, other changes in the law schools work in its favour. The rapid development of taught postgraduate courses involving international law has made space for more advanced teaching. It has been my experience that *Principles* is more accessible to more experienced students, who have both more knowledge and more inclination to put the time into studying international law than our increasingly instrumental undergraduates. Nonetheless, the expansion of postgraduate teaching has not matched that of the undergraduate schools and one must recognize that the economic imperatives of the publishing industry might yet reinforce the benighted regime of modular degrees by squeezing out the more substantial textbooks or forcing their transformation into practitioners' books, the process to which I referred earlier.<sup>60</sup> One cannot escape the conclusion that, in the United Kingdom at least, the structures of higher education are more likely to influence the textbook than the textbooks are being written which drive the substance of education. It is a tribute to the strengths of *Principles* that it has survived the recent vicissitudes with what appears to be continuing strong appeal. The contrast with France and Germany as the situations were related at the Colloquium is considerable: there, there are several ambitious and demanding textbooks, most with a perspective even wider than *Principles*, each, it seems, obtaining a sufficient market among students to maintain its commercial viability. Because of its apparently common field, international law might seem like a promising candidate for a 'European' textbook but the different higher educational structures and student expectations will be an obstacle to its realization.

There is, though, another element to change — that is change in the real world. Has the nature and content of international law remained sufficiently stable for the relatively few structural modifications in *Principles* in the later editions to maintain its claim to be a treatment of the central issues of international law. Here, I speak of matters of preference or inclination rather than intellectual necessity. I have said that my general view of the nature of international legal obligations is much the same as

<sup>59</sup> There are perfectly good, shorter textbooks, like M. Dixon, *International Law* (1st ed., 1990; 3rd ed., 1996) but they are still directed to a full course on international law, not something which could be confined within a single module.

<sup>60</sup> One great advantage that textbooks on international law have is that they may have an international appeal: that certainly seems to be the case with *Principles*, which, in such a market, has the distinct advantage of being written in English. The seventh edition of Akehurst's *Modern Introduction to International Law* (ed. P. Malanczuk, 1995) is clearly aimed at a more cosmopolitan audience than the earlier editions which were focused strongly on United Kingdom materials.

Brownlie's. However, I do think that international law as an actual system of law and as a subject of academic study and instruction has, if not actually achieved change, aspired to change more than the successive manifestations of *Principles* admit. What I have principally in mind is the partial transformation of the international legal system from one practically exclusively concerned with the bilateral relations between states to one in which there is a substantial place for multilateralism: it is reflected in the impact of 'multilateral' influences on the law-making processes, on claims of third-party interest in the enforcement of international law and in the infiltration into many areas of the law of issues such as human rights and environmental protection. It is a process of movement from a system substantially analogous to one based on private law concepts to one in which public law notions take their part, though in an imperfect and mutated way.<sup>61</sup> It is a process which began before 1966 but which has gained momentum in the period since then. My own position is that considerations such as these affect, or might be claimed to affect, the law of peace much more than a reader of *Principles* would discern. At a minimum, one might expect a student textbook on international law to treat the structure and some of the internal functions of the United Nations, notably peace-keeping and its recent variants. Beyond this, the enforcement of international law, especially with respect to obligations *erga omnes*, is a strong candidate for coverage. Students would be disappointed not to have some introduction to these topics. As a criticism, this may be rejected on the ground that, whatever changes there have been, it is simply that matters have been added to the perennial concerns of the law of peace, which, in their central characteristics, largely remain as they were. To demand additions of the kind I am suggesting is to demand merely a bigger book,<sup>62</sup> a suggestion at odds with the development of the curriculum outlined above. If, on the other hand, the changes are of more moment, then what one is asking for — and one is conscious of the unfairness — is another book, rather than new editions of this one.

#### 4 Coherence, Accessibility, Contemporaneity

Teachers seek coherence in a textbook, that it demonstrate that there are common themes running through the materials and that it indicate why what it treats is a 'subject' and not just a ragbag of information. Students seek accessibility — that that which is clear is explained with confidence and that which is not clear is explained with sympathy, sympathy, that is, for the students. What is required by both teacher and student is a structure in which the various parts are identified and how they fit together is explained. Teachers of international law, if not their tyro students, are, doubtless, willing to settle for a more rickety structure than their domestic law

<sup>61</sup> It is a matter of internal theory, as well as foundational theory, and so need not submit to Brownlie's exclusion of jurisprudence. Explicitly or otherwise, students should be aware of the contesting views of, say, Prosper Weil on the one hand, and some of the German scholars like Simma, Frowein or Tomuschat, on the other. British writing, of course, would be conspicuous by its absence.

<sup>62</sup> For instance, M. N. Shaw, *International Law* (4th ed., 1997), which is 20 per cent bigger than *Principles*. There are chapters on most of these topics in Brownlie's 'General Course', *supra* note 3.

colleagues. Here and within its own terms, Brownlie has been and remains a success. Some of the explanation is outstanding — the relationship between the sources and evidences of international law, the relationship between international and domestic law, the economy of the treatment of title to territory and rights to maritime areas, above all, drawing the proper demarcations between state responsibility, the substantive tort of (mis)treatment of aliens and the admissibility of claims.

It might, then, seem surprising if I say that it has been my experience that students do not universally find assistance from *Principles*. The explanation I offer is that its approach is too frank — it does not retreat from the difficulty of presenting international law as a series of discrete and specific rules, only between which is there space for general principles. The book is relentless in its insistence that such standards as may be identified can only be appreciated when they are applied to specific circumstances, that some problems can be identified but not readily resolved and that generalizations are to be suspected.<sup>63</sup> That the facts can drive the outcome of cases ought not to be unfamiliar to common lawyers, yet our students do not always find it easy to transfer what they know about domestic law to international law. In the domestic context, the danger that a whole subject of law will dissolve into a wilderness of single instances is, from time to time, obviated by the work of the superior courts. Students, only too aware of the sparseness of international litigation, see no such salvation in the international arena and, undoubtedly, many of them find having to absorb a process rather than a series of outcomes uncongenial. If they find difficulties, it is because *Principles* sees international law through the eyes of the practitioner (which is not to make the claim that it is a practitioner's book). The process of application of the law, particularly customary law, is such that the normative understanding of a 'rule' must take into account the present circumstances to which it is being applied — and those circumstances sometimes overwhelm the resources of international law: one need look no further than the disagreements about the legality of the forcible NATO action against Yugoslavia with respect to events in Kosovo to see the seriousness of the phenomenon for an explanation of how the law works.

## 5 What Place for Theory?

It is here that Brownlie's disavowal of theory has its drawback. The identity between international law and domestic law on which Brownlie founds his position cannot be taken for granted. The very approach of *Principles* casts doubt upon it. This characteristic of *Principles* was there from the very beginning, before Brownlie had developed his extensive international practice. It would have been interesting to know how he arrived at this view of what doing international law is like, which I feel sure must have been confirmed by his practice before international tribunals, but Professor Brownlie kept his counsel at the Colloquium.

<sup>63</sup> For example (from the fifth edition) contingency: personality (p. 68), consolidation of title (p. 163), nationality (p. 387) and expropriation (p. 546); and criticism of theory: international law and municipal law (p. 55), recognition (p. 88) and the status of individuals (p. 605).

The question brings us back to Professor Atiyah's observation that even those who deny theory have in fact some underlying explanation or agenda which they pursue, even while denying that they do so. Even with the support of so powerful an advocate, one proceeds with caution in Brownlie's case because he is not just atheoretical but anti-theoretical, resolutely so. He said in his Hague Lectures:

In spite of considerable exposure to theory, and some experience in teaching jurisprudence, my ultimate position has been that, with one exception, theory produces no real benefits and frequently obscures the more interesting questions.<sup>64</sup>

He then goes on to say the exception is his rejection of theory — which, paradoxically, does have a theoretical basis — it is because he shares Kelsen's position that the binding source of law must be found outside the law, so that a search for the source of the binding nature of international law is not the concern of lawyers alone — or even at all.<sup>65</sup> Now, I am not sure about this — Kelsen did say that the identification of the basic norm was the task of 'jurists',<sup>66</sup> which, if I understand it correctly, includes all of us, Brownlie too.

What he knows is that there is an observable practice, in the main of state officials, to address matters in terms of international law and of states employing cadres of professional lawyers, who address one another in the language of international law, in order better to further the states' interests. This allows him to get into matters of 'technical' theory within this common calling and to analyse past practice for what it reveals in terms of patterns of behaviour and then to propose solutions to the questions to which present practice demands answers.<sup>67</sup>

The emphasis on practice is counter-balanced by the rejection of theory. Brownlie's essay, 'The Reality and Efficacy of International Law' contains a peremptory rejection of the jurisprudence of H. L. A. Hart and his (Hart's) application of his major propositions to international law.<sup>68</sup> Brownlie is particularly scathing about the practical impossibility of the identification of Hart's ultimate rule of recognition within any legal system, especially so with respect to international law.<sup>69</sup> It is this which he is rejecting when Brownlie states his preference for Kelsen's analysis. The reliance on his experience of the reality of international law is no more than the deliberations of one of Kelsen's 'jurists' determining the efficacy (and, therefore, the legitimacy) of the international legal system. Like Kelsen, even if not explicitly, thus confirming Atiyah, Brownlie postulates the *grundnorm* of the international legal system in the effective practice of states to regard custom as creating legally binding obligations. There are two observations which one might make. The first is that I draw this conclusion from Brownlie's view, expressed in all the editions of *Principles* that:

<sup>64</sup> 'General Course', *supra* note 3, at 30.

<sup>65</sup> *Ibid.*, at 26–27.

<sup>66</sup> H. Kelsen, *General Theory of Law and State* (translated by A. Wedberg, 1945) 115–119.

<sup>67</sup> He certainly passed the message on effectively to his research students, whose work is characterized by its unstinting pursuit of evidence of practice.

<sup>68</sup> H. L. A. Hart, *The Concept of Law* (1st ed., 1961) 97–107 (rule of recognition) and 208–231 (international law).

<sup>69</sup> *Supra* note 2, at 6–7.

The sovereignty and equality of States represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of States having a uniform legal personality.<sup>70</sup>

Sovereignty and equality as used here refer especially to the right of states to participate equally in the law-making processes of the international system.<sup>71</sup> In *Principles*, Brownlie writes:

In a sense 'formal sources' do not exist in international law. As a substitute, and perhaps an equivalent, there is the principle that the general consent of States creates rules of general application.<sup>72</sup>

The 'community' to which Brownlie refers in the first extract is a legal community because of the acceptance of a particular form of law-creation by the members of this community.

My other observation is that his dismissal of Hart is too comprehensive. Hart's explication of the importance of the internal aspect of rules as a characteristic of the notion of obligation is crucial to international lawyers<sup>73</sup> (even if not wholly original<sup>74</sup>). There are, as well, interesting questions for international lawyers in unpicking Hart's minimum concept of natural law in a society of states.<sup>75</sup> Considerations of this kind would, though, take us into fields of 'nature' or 'obligation' theory and, therefore, beyond *Principles*, though not, as it turns out, beyond Brownlie's ken completely.<sup>76</sup> Where Brownlie is right is in preferring Kelsen's position that the basic norm stands outside the legal system to Hart's claim that the rule of recognition is part of the legal order. Kelsen's analysis rightly directs our attention to the conclusions of jurists (social pragmatists), rather than judges.<sup>77</sup> If the answer that Brownlie gives in his Hague Lectures is his theoretical position, I am not convinced that it is a position on which *Principles* can firmly stand. Brownlie needs Kelsen's sociological foundation of international law (but he does not need Kelsen's final view about the unity of the international and national legal orders<sup>78</sup> and I should be surprised if he endorsed either Kelsen's explanation of the need for a coercive element as a characteristic of law or his account of how that coercive feature manifests itself in international law<sup>79</sup>). He

<sup>70</sup> *Principles* (5th ed.) 289.

<sup>71</sup> Warbrick, 'The Principle of Sovereign Equality', in V. Lowe and C. Warbrick (eds), *The United Nations and the Principles of International Law* (1994) 204.

<sup>72</sup> *Principles* (5th ed.) 2.

<sup>73</sup> Hart, *supra* note 68, at 86–88.

<sup>74</sup> H. S. Maine, *International Law* (2nd ed., 1894) 49.

<sup>75</sup> Hart, *supra* note 68, at 189–195.

<sup>76</sup> See *infra* note 83.

<sup>77</sup> Brownlie often uses the Rhodesian situation after 1965 to demonstrate the ineffectiveness of *municipal* law, rather than the failure of international law: see Brownlie, 'The United Nations as a Form of Government', in J. E. S. Fawcett and R. Higgins, *International Organization: Law in Movement. Essays in Honour of John McMahon* (1974) 26, at 27. But the incident is illustrative too of the role of, here, the judge as the jurist determining the basic norm to decide which legal order was effective *before* applying the rules of the order determined to be effective (which, *ex necessitate*, had to be the legal order which conferred on him the title 'judge'): *Madzimbabuto v. Lardner-Burke* [1969] AC 645.

<sup>78</sup> Brownlie has always had reservations about this: see *Principles* (1st ed.) 31.

<sup>79</sup> See Rigaux, 'Hans Kelsen on International Law', 9 *EJIL* (1998) 325.

needs Hart's theory of obligation (but he does not need Hart's ultimate rule of recognition, if that means it must be a rule within the legal system). Brownlie's identification of the sovereignty and equality of states as the constitutional foundation of international law is persuasive (and it is of no foundational significance that it appears also as a rule within the system in Article 2(1) of the Charter). If Brownlie had relied selectively on Kelsen *and* Hart, he could have found a basis for *Principles* which would have satisfied his student readers (but himself only if he were to concede that the force of international law might derive from different facts than those of municipal systems).<sup>80</sup>

## 6 End

I want to end on another question and in the nature of a prospectus rather than a conclusion. In the Hague Lectures, Brownlie says: 'I am "an objective positivist"'.<sup>81</sup> On this admission, I fix him as a 'modern positivist' in the centre of the English tradition which I identified in my paper referred to above.<sup>82</sup> 'However', he goes on, 'my positivism is supplemented by an awareness of the significant role of international tribunals in making law.'<sup>83</sup> The question which follows is an obvious one: how do international tribunals go about their law-making without a theory of justice (or obligation)? Or, put another way, how does an objective positivist counsel know how to persuade such a tribunal to his client's position when the law does not speak clearly, does not speak at all or speaks wrongly? But this is a matter for another colloquium.

<sup>80</sup> That there is such a difference goes back to Hume: see D. Hume, *A Treatise of Human Nature* (1739, ed. E. C. Mossner, 1969) 617–620; and J. Harrison, *Hume's Theory of Justice* (1981) 230–232. The difficulties the UK government has faced in implementing a foreign policy 'with an ethical dimension' suggest that there remains something in this.

<sup>81</sup> 'General Course', *supra* note 3, at 21.

<sup>82</sup> Warbrick, *supra* note 32.

<sup>83</sup> 'General Course', *supra* note 3, at 21.