
The Internationalist as a Scientist and Herald: Lassa Oppenheim

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Abstract

Lassa Oppenheim's treatise has been called 'probably the most influential English textbook of international law'. Its comprehensiveness invited several great internationalists to re-edit the book. But the original intentions of the book, as well as Oppenheim's biography, have not yet been closely investigated. The German-born Oppenheim, professor of criminal law at the University of Basel, focused on international law only after his move to London in 1895. Though naturalized in 1900, his views on law remained influenced by the German methodological discussion of that period, generally labelled as 'positivism'. Looking at this discussion more closely, different approaches to 'positivism' can be identified. There is Oppenheim's originality as well in so far as he also drew on contemporary psychological theories of law. Thanks to his clear and consistent ideas on method, Oppenheim could reduce the existing doctrinal theories to a seemingly homogeneous body of law. Oppenheim was convinced that such a description would stimulate the spread of the knowledge of international law and thus further international understanding. The modernity of Oppenheim's book is due both to his psychological and his systematic approach. While Oppenheim wrote at the end of the classical period of international law his textbook has become, in its turn, a classic like the work of Grotius.

1 The Man and the Book

Lassa Oppenheim was born at Windecken near Frankfurt-am-Main in 1858 and died at Cambridge shortly after the First World War in October 1919.¹ His father was a Jewish horse trader who achieved considerable wealth and the family moved to Frankfurt where they lived from private means. His education was remarkably

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¹ See M. Kingreen, *Jüdisches Landleben in Windecken, Ostheim und Heldenbergen* (1994), at 112–114; Zimmermann, 'Oppenheim, Lassa Francis Lawrence', in *Neue Deutsche Biographie*, vol. 19 (1999), at 566–567.

extensive. In 1878 he began his law studies, but followed courses in metaphysics with the philosopher Hermann Lotze, psychology with Wilhelm Wundt, and legal medicine in order to gain a thorough understanding of jurisprudence. He studied in Göttingen, where he learnt Roman law with Rudolf von Jhering, in Berlin, where he heard amongst others Julius Baron, Heinrich Brunner, Georg Beseler and the great historian Heinrich von Treitschke, and in Heidelberg, where he followed Caspar Bluntschli's course in international law. In Göttingen in 1881 he handed in his doctoral dissertation which he had written under the guidance of the famous commercial lawyer Heinrich Thöl. This is an impressive list of some of the most prominent German lawyers of the time. After a short period of practical experience he determined on an academic career and on criminal law as his major subject. He was one of the true pupils of the famous criminal lawyer Karl Binding in Leipzig. In this field they influenced each other. His '*Habilitation*' took place in Freiburg in 1885. At this time Baden was the most liberal part of Germany in appointing Jews to university chairs. Here he hoped to receive a professorship. By the beginning of the 1890s he had published five books on criminal law and some articles. He was appointed Extraordinarius Professor in 1889 in Freiburg, but contrary to his expectations he did not receive an ordinary professorship. For this reason he moved to Basel in 1892 as an extraordinary professor and was made ordinary professor in 1893.

This could have been an end to his career. But British relatives, liberal inclinations, financial independence and perhaps a propensity for the British way of life induced him to leave his job and to move to London in 1895 without any prospects of another income. But he adapted quickly and was naturalized on 31 December 1900, by which date and act he became Lassa Francis Lawrence Oppenheim; his father had called him Lahsa. In London he had to start a completely new career and chose international law as his new field. He quickly gained expertise and built up a vast library. Even the Foreign Office started to borrow books shortly after his naturalization. This shows the extent to which his father's inheritance had made him financially independent. Such private means made life easier to some degree and explain part of Oppenheim's life. Nonetheless, he began teaching again as soon as possible. He first taught in night schools, then at the London School of Economics. With the publication of his *International Law* (the first edition was published in 1905–1906), he gained a high reputation in England and abroad. Due to John Westlake's recommendation he was appointed as professor of international law at Cambridge University in 1908. He thus became the fourth Whewell Professor. He held this chair until his death in October 1919.

His *International Law* proved to be an unusual success. It sold extremely well in its first three editions. The third edition was completed after his death by Oppenheim's student Roxburgh, who stuck closely to the ideas of Oppenheim. In 1919 Oppenheim was still able to rewrite considerable parts of his book and to comment on the new evolution of international law. So the third edition can be regarded as the last authentic edition. Subsequent editions by famous internationalists used the label and

made this book 'probably the most influential English textbook of international law'.² The original book reveals only small traces of a national standpoint. Its success is rather due, as will be suggested here, to a clear systematic approach underlying Oppenheim's legal theory. Although the theory is hardly presented in the book, it is the reason for its clarity and popularity.

2 Methodology

As has long been noted, Oppenheim's German training is very conspicuous in the writing of his *International Law*. But 'positivism' is a label which combines quite a variety of approaches. Most of them have not been very well investigated, with the result that 'positivism' remains a vague and untrustworthy tag. Moreover, it is very difficult to explain Oppenheim's methodology as he wrote so little about it. There is very little on his methodology to be found in his *International Law*. Personal views he reserved for articles and his lectures.

Methodologies are so abstract that it might be useful and illustrative to present an instance of his argumentation as a clue to his systematic approach. Our example is taken from a lecture, a context in which Oppenheim tended to argue more freely and with less caution. In his *International Law*, however, he tackled problems in the same way. In the lecture he investigated the reasons why treaties have a binding force.³

Some of the more modern writers (Hall, Jellinek, Nippold) find the binding force of treaties in the self-restraint exercised by states in becoming a party to a treaty; others (Triepel) assert that it is the contracting states' own will which gives binding force to their treaties; and, lastly, there is Bluntschli and his adherents who teach that the binding force of international treaties is to be found in the idea of right innate in mankind (*im Rechtsbewusstsein der Menschheit*). I believe that all these answers are unsatisfactory. I believe that the question as to the binding force of international treaties can be satisfactorily dealt with only by dividing it into several different questions and by answering those questions *seriatim*.

First, the question to be answered is why are treaties legally binding? The answer must categorically be that this is so because there exists a customary rule of international law that treaties are binding.

Secondly, the question might be put as to the origin of the existence of such customary rule. The answer must be that such rule is the product of several joint causes. Religious and moral reasons require such a rule quite as much as the interests of states, for no law could exist between nations if such rule did not exist. All causes which have been and are still working to create and maintain an international law underlie this question.

And, thirdly, one might pose the question of how it is possible to speak of a legally binding force in treaties without a judicial authority to enforce their provisions. The answer must be that the binding force of treaties, although it is a legal force, is not the same as the binding force of contracts according to municipal law, since international law is a weaker law, and for this reason less enforceable than municipal law. But just as international law does not lack legal character in consequence of the fact that there is no central authority above the state which

² Wight, 'The Balance of Power', in H. Butterfield and M. Wight (eds), *Diplomatic Investigations* (1966) 149, at 172.

³ L. Oppenheim, *Lectures on Diplomacy as Part of International Law* (unpublished manuscript: Trinity College, Wren Library, Add ms a 338 1/1 to 1/21, here 1/16 to 15 s).

could enforce it, so international treaties are not deficient of a legally binding force because there is no judicial authority for the enforcement of their provisions.

Oppenheim starts by giving a brief overview of the previous solutions to the question together with some short critical remarks. It is also notable that he names many authors from various national backgrounds. He then puts the question with more precision. The remarkable feature of this reasoning is his division of problems. It is a sort of dogmatism, which also led Oppenheim to keep international and municipal law apart and thus to adopt the clear dualism of the German tradition.

The first answer reflects current international law. This reflection is as short as it is categorical. International law in practice gives a precise and indubitable solution. Accordingly, Oppenheim rejected the natural law theory with a light hand: nobody could believe any longer that there were any rules above the written and commonly accepted law.⁴ This theory should rather be kept in museums.⁵ Cruel wars had taught Europe that international relations are governed only by law and not by religion.⁶

Yet Oppenheim continues his reasoning and checks the law to determine whether his reasoning is convincing. The first answer might be the most important one, but the positive law can still be questioned. Secondly, he inquires into the reasons behind an existing rule. Unlike Kelsen, he does not think of law in terms of a legal hierarchy according to which each norm is validated by a higher ranking norm. The interest of states as well as religious and moral reasons might, according to Oppenheim's reasoning, challenge the law in practice. So, although the beginning promised an altogether positivistic approach, here morals and interests are introduced as having an effect nonetheless on international law.

Consequently, the lawyer has to do more than merely describe the present practice. In addition to the exposition of the existing rules of law Oppenheim listed six further tasks:⁷ (1) historical research; (2) criticism of the existing law; (3) preparation of codification; (4) distinction between the old customary and the new conventional law; (5) fostering of arbitration; and (6) popularization of international law. In case of a lacuna the law could also be found by analogies and by looking for applicable solutions.

(1) He considered the history of international law a prerequisite for understanding the development of the family of nations. Historical knowledge would help to grasp the current developments and trends in international law. (2) Criticism of the existing law was to foster a progressive development of international law. Yet Oppenheim advised internationalists to 'remain on the ground of what is realizable and tangible'. (3) Closely related was the preparation of codification. Oppenheim was a partisan of codification as a means to evolve the law. Furthermore, it forced internationalists to

⁴ L. Oppenheim, *International Law* (1st ed., 1 § 59, at 92). 'We know today that a Law of Nature does not exist.'

⁵ Oppenheim, 'The Science of International Law: Its Task and Method', 2 *AJIL* (1908) 313, at 329: 'But the law of nature has played its part. We know now-a-days that it is impossible to find a law which has its roots in human reason only and is above legislation and customary law.'

⁶ L. Oppenheim, *Gerechtigkeit und Gesetz* (1895), at 21.

⁷ Oppenheim, *supra* note 5, at 314 *et seq.*

agree on precisely worded principles of law. Thus, international law became more complete and certain. He was quite prophetic in his conviction that the twentieth century would see at least a partial codification of international law. (4) Yet codification would not create universal law, it could only bind the parties to the convention. Therefore, it was necessary to distinguish between the old customary and the new conventional law. (5) The task of fostering arbitration could also help to establish the positive international law. Moreover, arbitration was able to prevent armed conflicts. For this reason Oppenheim was in favour of obligatory arbitration in certain, previously defined cases.

(6) The popularization of international law, finally, was another way to ascertain the features of the current law. The practice of international law by states is not enough. It is necessary that nations and even the man in the street are both convinced that such common practice is law. Specialists must inform others on what is law, just and equitable. They have the duty to spread the knowledge and acceptance of law.

The other tasks Oppenheim mentioned are but secondary means compared to the establishment of the existing international practice. Yet they have a special importance of their own. Popularization as well as the other means, according to Oppenheim's legal theory, help to shape the law and to explain legal development. Specific international law, having become acceptable, may be applied in the future as a matter of course. Thus, these secondary means gain a particular importance if the present law is defective. With the rejection of natural law theories, Oppenheim cannot see any rules of enduring importance. All law is subject to human reason and is thus imperfect.⁸ In this regard he stands in the Kantian tradition and doubts the possibility of perfect understanding.⁹ Mankind's only chance is the constant struggle for perfection. In this goal he is justified by the belief in the constant progress of mankind for the better. The primary sources of law and the subsidiary means have accordingly to be seen together: the analysis of the present is necessary for criticism; criticism is necessary for the evolution of law;¹⁰ and evolution is necessary for the acceptance of the present law.

It is in this sense that the famous 'morals' of Oppenheim's *International Law* can be understood. They are a consequence of his methodological approach and the core of his presentation of this matter. Apart from the presentation of the legal subject, Oppenheim referred throughout his writings to major political and moral factors of influence for international law. As Oppenheim clearly distinguished morals and law, he could propose these ideas, even within a textbook on international law, without mixing law and politics. After a short introduction to the history of international law,

⁸ *Ibid.*, at 329.

⁹ This tradition was frequently upheld around 1900, see e.g., Haferkamp, 'Ernst Landsberg in Weimar', in A. Thier, G. Pfeifer and P. Grzimek (eds), *Kontinuitäten und Zäsuren in der Europäischen Rechtsgeschichte* (1999) 297, at 300.

¹⁰ A. Ross, *Theorie der Rechtsquellen* (1929, reprinted 1989), at 181 calls this overt politics. I find this evaluation to be exaggerated.

he drew five conclusions in the first edition, six in the second and seven in the third.¹¹ (1) He emphasized the necessity of the balance of power as an ‘indispensable condition of the very existence of international law’. (2) Politics and law should only be based on real state interests. (3) As the principle of nationality had become so strong, the creation of new national states was inevitable; but international law should ascertain the rights of minorities. (4) He pointed out that international law needs time to mature. He thought an eternal peace very unlikely and therefore proposed a Permanent Court of Arbitration and further progress of codification. (5) The development of international law would depend on standards of public morality and upon economic interests. (6) In the third edition he revived the Kantian idea that autocracy would lead to war, as the monarch tended to base his policy on force; democracy instead would exclude the policy of personal aggrandizement and insatiable territorial expansion. (7) Finally, Oppenheim thought it necessary that the legal school of international jurists should prevail over the diplomatic school. The legal school aimed at codification, clear rules, and the establishment of international courts. On the other hand, the diplomatic school would have international law as a body of elastic principles rather than firm and precise rules and was therefore opposed to international courts as concurrent to diplomatic solutions.

The morals were intended as advice and reference to common sense. They appealed to public opinion and might have the effect to influence public ideas on international law. As law according to Oppenheim depended on common conviction about the contents of justice, political and moral influences were closely related to law. In order to grasp the rule itself and to deal with it scientifically, both levels had to be separated. Yet it helped to understand the development if these factors were taken into consideration.

Furthermore, these morals represent the attempt to gain an insight into current trends and future developments of the law. The morals were rather the clue for understanding the current transformation of the law, a magic device to look into the future. In the case of humanitarian intervention he became quite prescient:¹²

If the historical facts are properly viewed, one might say that, although it has not yet done so, International Law will in time recognize the rule that interventions in the interest of humanity are admissible and excused, provided they are exercised in the form of a collective intervention of the Powers.

His emphasis on the law of minorities as well was clearly prophetic.

It has become quite clear that Oppenheim did not just want to state the practice. He envisaged law as embedded or at least backed up by religion and morality. In some instances he showed that the evolution of morals could even overrule written law. How then does the creation of law take place according to Oppenheim? To understand his view we have to look first to his concept of mankind.

¹¹ L. Oppenheim and R. Roxburgh, *International Law* (3rd Ed., 1921) I § 51, at 100 n. 3. Without any doubt this was written by Oppenheim; cf. Oppenheim, ‘Le caractère essentiel de la Société des Nations’, *Revue Générale de droit international public* 26 (1919) 234, at 243.

¹² Oppenheim and Roxburgh, *supra* note 11.

Oppenheim adopted the view of mankind as a rationally as well as subconsciously acting being, as did many lawyers in the second half of the nineteenth century. Eduard von Hartmann had published already in 1869 his *Philosophie des Unbewußten* (*Philosophy of the Unconscious*) in which he focused on those parts of the human mind which are not regulated by reason and intellect. Oppenheim believed conscience to be the most influential force besides reason.¹³ He regarded man's conscience as a psychological and social phenomenon; it had its origin in man's position in society and not in religion. Conscience would take notice of the inner notions and feelings about man's actions. Thus, it was a means of constant perfection of morals and at the same time it could better religion and law.

But mankind was only partly responsible for his conscience. Due to interaction in society conscience was subject to constant change and could be influenced by the law or rather the perception of law. Oppenheim thus assumed an interaction between the two levels of morals and law. He could suppose that law is rooted in people's opinion (*Volksanschauung*). Public opinion could differ from the solution according to the letter of the law, but in some cases it could even be better founded.

Now it is possible to understand why Oppenheim thought dissemination of the idea of international law so important. The appeal to popular opinion was a way to inform the people of the law and to improve their understanding. In the course of historical progress this appeared to be perhaps the most efficient way for ameliorating the world. At least it constituted the core of the task for any writer in international law.

Carl Schmitt criticized Max Weber's similar psychological approach for losing contact with law as a science. Oppenheim's approach was even more based on psychological analysis. Yet he stressed that lawyers are bound to obey the letter of the law. His focus on the law in practice is so intense that Schmitt's reproach really cannot apply in this case. The function of psychology here is only to understand better the reason and direction of the development of law. The autonomy of law is respected to a very high degree without neglecting the fact that it is subject to constant change. Thus he gave law its place in society and adjusted jurisprudence to the current concept of the human mind. It is perhaps the main attraction of Oppenheim's legal theory that it has these two sides. In the end, this was another attempt to reconcile the natural and moral sciences (*Natur- und Geisteswissenschaft*) and to have a holistic view of mankind.

3 Comparison with German Teaching on Legal Method before 1900

Let us compare Oppenheim to other positions in the German debate. For Rudolf von Jhering (1818–1892) 'positive jurisprudence' meant a method to fill legal lacunae. Roman civil law offered numerous principles but not always the right solution. He was fundamentally convinced of a constant progress in ethical matters which he even

¹³ L. Oppenheim, *Das Gewissen* (1898), at 10 *et seq.*

called ‘god in history’.¹⁴ After the 1860s Jhering emphasized the pre-eminence of a legal conscience as a guideline for legal development. The evolution of law depended rather on the assessment of the interests of the parties involved. But the inner legal assessment of a matter (*Rechtsgefühl*) was no innate force, but the result of legal experience. The legal assessment was formed in the course of history and, individually, through the stages of man’s growing to maturity, through a subconscious process of experience and abstraction. It is the duty of leading individuals to teach new values and to reshape the legal sentiment (*Rechtsgefühl*) of the people.¹⁵ For this he insisted also on the political function of law and sought out the driving force behind any legal decision.

We see some relation between Oppenheim and Jhering, but the psychological basis for law is not further developed in Jhering’s theory. In another field the model of Jhering is more obvious. In Cambridge Oppenheim edited a short collection of cases without solutions for use in his classes. Much earlier Jhering had done the same for civil law. It was Jhering who introduced the system of academic training on cases, which still continues in German legal education.

In public law, Carl Friedrich von Gerber (1823–1911) introduced a similar approach, which he called ‘legal method’.¹⁶ By focusing on empirical studies of the present law and a systematic description, he also tried to introduce a new subject. He tried to demonstrate the independence of public law from other legal domains. After German unification in 1870 and the institution of the new imperial constitution, it was much easier to deal with public law autonomously. Paul Laband (1838–1918) radicalized Gerber’s *juristische Methode* in dropping subsidiary reflections on history, philosophy and sociology.¹⁷ A contemporary put it bluntly. Since Laband, the science of public law knew what to do:¹⁸ they had to analyse the *status quo*, to make it understood by means of clear terminology and systematic presentation without regard to what is or what many people think should be or indeed what in fact should be. The autonomy of public law was stressed so that the German people could more easily accept the quite radical changes in practice: they obeyed only the law, which did not constitute a violation of historical traditions and was not due to the interest of the increasingly dominant federal government in Berlin. These examples show that ‘positivism’ can mean quite different things according to the field where this approach is applied. The difference from Oppenheim is obvious.

Georg Jellinek (1851–1911) stressed the importance of the individual legal sentiment even more than Jhering. He was convinced that it is not the object but the subject of perception which matters. For him law was a psychological dimension of

¹⁴ R. von Jhering, *Über die Entstehung des Rechtsgesfühles* (1986), at 54; for Jhering’s evolutionary theory see the commentary by Behrends in *ibid.*, appendix at 58 *et seq.*

¹⁵ R. von Jhering, *Entwicklungsgeschichte der römischen Rechts* (1894), at 24.

¹⁶ See P. von Oertzen, *Die soziale Funktion des staatsrechtlichen Positivismus* (1974), at 163 *et seq.*

¹⁷ See P. Laband, *Das Staatsrecht des Deutschen Reiches* (5th ed., 1911), introduction to the first edition, at VI; see also C. Schönberger, *Das Parlament im anwaltsstaat* (1997) at 85 *et seq.*

¹⁸ For the citation by Emil Lingg, see Schönberger, *supra* note 17, at 86.

mankind.¹⁹ It is the human mind which detects the law; law is conceived in man's intellect. But there is more than this conception. For the validity of law it is moreover necessary that mankind can see the law applied. Thus there is a tension between the individually perceived and the generally stated law. Jellinek tried to solve this discrepancy by suggesting types as a means of describing law. Types include different phenomena but allow diversity. In the field of international law Jellinek maintained the individualistic approach as accepting only the free will of states as the source of the law. But Jellinek had to exclude the possibility that states refuse to accept long-established rules. Here he drew back to an argument taken from the nature of life (*Natur der Lebensverhältnisse*): states were bound to accept and follow the objective character of international law.²⁰

There are striking similarities with Oppenheim's theory. Both vigorously rejected natural law theories. For both only the free will of states could create international law. Moreover, both invoked psychological arguments to prove the existence of law. Yet Oppenheim did not share Jellinek's idea of types as a means to describe law as well as the argument taken from the objective nature of international law. Psychology is important for Jellinek, yet it is not as closely interwoven in epistemology and jurisprudence as Oppenheim taught. Finally, the latter's psychology was further developed. He did not have to adopt Jellinek's theory of self-restraint as the foundation of law as we have seen in the introductory citation. Law was not forced on states because they live in a society, but living in society causes the will to consent. Both seem very close in theory and may have been influenced by the same sources, yet they formed distinct approaches.

As inspirations for his work Oppenheim named Adolf Merkel (1836–1896) and his Swiss colleague, Philipp Lotmar (1850–1922), one of the first to study labour law scientifically. Merkel was influenced by his teacher Jhering, and by John Austin and Herbert Spencer. He distinguished between the positive description of the law and its criticism according to ideals. Only the separation of reality (*Sein*) and ideal (*Sollen*) would lead to the evolution of law. According to Merkel, legal progress ordinarily depends on the interest of major social groups. Law in its core is therefore only understood when legal theory shows in what way the existing law depends on social and historical circumstances. He argued that law is only accepted as valid if it is in accordance with the popular concept of morality (*Sittlichkeit*).²¹ This is the last source from which law derives its authority (*Rechtsgeltung*). Law cannot be considered as binding in case of overt discrepancy. There is only the possibility that new legal ideas convince the people and help to form new moral standards.

Like Merkel, Oppenheim accepted the persuasive force of new law. He agreed with Merkel that special groups like lawyers can have an influence on law. This, as well as a consideration for history and interest groups, he has in common with Merkel. There

¹⁹ G. Jellinek, *Allgemeine Staatslehre* (3rd ed., 1919, reprinted 1969), at 332.

²⁰ G. Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), at 43, 48.

²¹ Merkel, 'Über das Verhältnis der Rechtsphilosophie zur "positiven" Rechtswissenschaft und zum allgemeinen Teil derselben', in A. Merkel, *Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts*, vol. 1 (1899), at 314 et seq.

are striking similarities to Merkel's teaching on international law as well. But logic and system do not play the dominant role as in Oppenheim's theory. Here the psychological element of law is much more developed and systematized.

To Oppenheim's mind it had been Lotmar's achievement that he had eliminated the moment of valuation (*Wertmoment*) in the notion of justice as an unsupportable identification of justice and social utility. Philipp Lotmar emphasized that law is subject to constant change due to the economic needs of society.²² The ideal of justice varies in the course of time. Lotmar explains the concept of innate natural rights as a psychological phenomenon and as a subconscious rhetorical device to suggest that people's demands against the state are just. The lawyer has to obey the law. He is not allowed to argue the law, but has to define the extent of legal rules. This can be carried out without any regard to psychology, philosophy or historical research. The job has rather to be done by means of logic and systematization only. According to Lotmar's theory, the definition of value differs according to nation (*Volk*), religion, social position, political party and individual views as well to the interest and mental disposition (*Gemüt*) of a man. Thus it was impossible to believe in general values shared by all mankind.

Lotmar stressed the logic and system of law like Oppenheim and had the same intention to limit the arbitrary power of judges.

But the former did not consider the educational aspect of law and thus did not look to the interaction between law and society on the psychological level. Oppenheim has this in common with Merkel, as well as a consideration for history and interest groups. Lotmar's exclusion of absolute law cannot be the most important argument for a similarity with Oppenheim's ideas. As we have seen in his belief in eternal historical progress, the latter fundamentally believed in the existence of timeless values. Furthermore, Oppenheim had been a prolific lawyer long before he could come across Lotmar's writings. Oppenheim did not need Lotmar to know Wundt, with whom he had studied himself. So the similarities between Oppenheim and Lotmar are not the result of a school of law, but rather the expression of a way of thinking that was very modern for the time. The same is true for the relationship with Merkel. Oppenheim's mixture of concern for system, for the evolution of law and for the deduction of law from psychology remains quite unique.

After 1900 the debate on methodologies was concerned less with systemizing but rather with the evolution of law. Psychology still played an important role but authors stressed the arbitrary power of judges and lawyers for the evolution of law. Thus their doctrines are not close to Oppenheim's theory.

The result therefore is twofold. On the one hand, there are clear similarities with the German positions and assumptions around 1900. Oppenheim can be seen as a member of this so-called 'positivist' school of law concerned with empirical studies and the establishment of a legal system. He shared an interest in developing the law by means of systemization and logic with Laband. Thus he rather belongs to the older

²² Lotmar, 'Vom Recht, das mit uns geboren ist', in P. Lotmar, *Schriften zu Arbeitsrecht, Zivilrecht und Rechtsphilosophie* (1992) 6, at 15.

tradition, but clearly not to the followers of Bluntschli. Oppenheim criticized Bluntschli for accepting legal rules too rashly and did not count him among the positivistic authors. The most basic difference between the two textbooks is that Bluntschli tried to establish a code of international law and his text is, after an introduction, written in this way.

Oppenheim maintains also a very distinct position and cannot be regarded as a follower of someone else. His theory is a magnificent example of the interest many German lawyers took in psychology from the late nineteenth century to the 1940s. But this also characterizes Oppenheim as a German rather than as an English lawyer. In the German methodological debate around 1900 Oppenheim holds an individual, long-forgotten, but nonetheless important and inspiring position.

4 Comparison to British Internationalists

According to a statement made after Oppenheim's death, there had for many years been no complete treatise on the law of nations before Oppenheim's first edition. Several textbooks had been published dating back to the 1830s. Henry Wheaton's (1785–1848) *Elements of International Law* was first published in 1836 and remained a famous textbook also in Great Britain. It was very detailed and gave many historical instances, but it was very reluctant to assume a rule of law rather than mere usage and thus had a tendency to remain vague. Oppenheim considered his approach to be 'Grotian'. Only three years later a book came out written by William Manning (1809–1878). It is not surprising, therefore, that he clung to notions of the law of nature, which he identified with the will of God. The work of Sir Robert Phillimore (1810–1885) was first published in 1854 and had the same approach. It seems to be the work of a learned clergyman rather than of a lawyer. He still believed in natural revealed law. Also he largely drew from Sir James Macintosh as well as from the fathers of public international law, Grotius, Vattel and Suarez. This view was considered to be utterly outdated and even erroneous at the end of the nineteenth century. The textbook by Sir Travers Twiss (1809–1897) was only some years younger and at the beginning of the twentieth century belonged to a bygone world as well, for instance when it treated the balance of power as 'a creation of Positive Law'. William Hall (1835–1894) published one of the more recent manuals in 1880. It gave clear definitions, presented many cases, and provided an easy access to law as to its principles. However, it clung to the ideas of natural law and was thus outdated in method as well. Hall was a good lawyer rather than a philosopher and presented mostly only the British view. Other internationalists at the end of the nineteenth century upheld this natural law approach in their textbooks: Sir Shirston Baker (1846–1923), T. J. Lawrence and James Lorimer (1818–1890). They are representatives of the old system and were not so flexible as to fit into a quickly changing international order. Hall's comprehensive manual was already considered to be outdated immediately after his death in 1894.

Oppenheim's approach was very modern for its time and appealed to those who

tried to modernize the British science. John Westlake, for example, was regarded as a modernizer and ‘positivist’. By recommending Oppenheim as his successor, Westlake tried to vanquish remnants of the old natural law tradition. Furthermore, British internationalists like Ernest Whittuck admired Oppenheim’s knowledge of international jurists abroad and of their writings as well. Thus, Oppenheim’s writings were attractive as being really international and modern.

It was quite understandable therefore that the literature tended to use Oppenheim’s manual as a standard reference book. And the manual really was useful. As a comprehensive textbook, it could be used by students for an initial insight into the different aspects of the subject. It was practical for libraries as it covered the field. Moreover, specialists, whether judges or professors, found further literature with a description of the topic which was reliable, judicious and reflexive in all legal respects.

But somehow Oppenheim had also struck, as the American, Gregory, suggested in 1919, a balance between Anglo-American and the continental schools.²³ But it was not a balance of different methods or of different opinions. Nor was it just the combination of German scholarship and the English point of view. The success was rather due to a truly international erudition and an approach according to the standards and demands of the time. Oppenheim’s method could be appreciated in England because a very important internationalist like Westlake shared most of his approach focusing on the positive law. Although it cannot be denied that Oppenheim’s choice of the British view in crucial questions might have been useful for acceptance in the United Kingdom, the fair, impartial and conspicuous description was more important to win readers beside the members of the British Foreign Office, namely, readers in other parts of the world and throughout the years.

5 Authors as Authorities

It is commonly overlooked that the status of sources of international law depends on historical developments. It is in this light that we take a final look at Oppenheim’s treatise. Oppenheim only accepted treaties and custom as sources of public international law and treaties depended on the previous custom. According to Oppenheim, other factors might be called causes of the development, but not sources.

He saw no use in bringing case after case, thereby not being able ‘to see the wood for the trees’.

The right method is to abstract the principles from the decisions, and then to quote the decisions themselves as examples of the application of the principles.

Court decisions were used only to ascertain the existence of state practice and principles. They gave evidence of the law but were not considered to produce it. To call this employment of court decisions anecdotal does not quite grasp Oppenheim’s methodological intentions. Oppenheim respected the different national ways of

²³ Gregory, ‘Professor Oppenheim’, 14 *AJIL* (1919) 229, at 230.

judicial reasoning, but he did not want judges 'to worship the decisions of the courts of their own country as the late Mr Hall'.

Oppenheim did not accord textbooks the status of a source of law. Oppenheim argued that, unlike Grotius or Bynkershoek, authorities in the twentieth century can no longer be considered to be the law itself. Individual authors, always nationals of a country, are identified with their country and are hardly equally accepted around the world. Examples show, however, the existence of treatises which have gained great influence and have even become guides for the practice of the states. In this respect international authors might gain even more importance for the development of international law than for municipal law. But Oppenheim pointed out that it is not the authority of the author, but the recognition of states and the practice, which created the law. Following his methodological approach internationalists help to disseminate the understanding and the respect for international law.

The perspective at the end of the twentieth century is different. Especially in the United States the role of the textbook has been nearly annihilated. Restatements of the practice of courts and governments have taken over this function. The lack of a thorough re-evaluation of the subject and the lack of consistent interpretation which might give coherence to the subject is outweighed in the view of many by the precision and accuracy of detailed work achieved by numerous meetings of experts. The sequence of restatements only gives snapshots of the present state of the law without any pretensions as to general validity. The considerable doctrinal change of public international law leads to a rapid ageing of textbooks. It was quite attractive therefore to leave doctrinal matters out and to focus on custom and codification. Thus, a coarsened positivism hides the inconsistency of theories and conceptual confusion.

This development led to court decisions acquiring more authority. They take over the task of developing the law which has been abandoned by authors. In many cases the international judges decide on the existing international law and adapt the old to new developments. To some extent they take over the function of the sovereign states who hitherto agreed on the law but increasingly find it difficult to find political solutions or to agree on codification. Consequently, international court decisions not only demonstrate the existing law, but create new law to a larger extent than other sources.

In this perspective, Oppenheim seems to be the forerunner of a movement which finally leads to disapproval of textbooks on international law. Obviously, this is not true for the civil law tradition. In this tradition manuals remain the first literature to consult. Students learn the subject according to treatises and later they will still use this literature as a standard reference. Besides the actuality, the fame of the author guarantees a book's status as an important authority. But is it so different in the common law tradition? At least for the United Kingdom there are some indications that this is not the case. Carl Landauer suggested that Brierly's *The Law of Nations* was such a textbook which was frequently used and influenced authors for decades.²⁴ By

²⁴ Landauer, 'Brierly and the Modernization of International Law', *Vanderbilt Journal of Transnational Law* 25 (1993) 881, at 917.

this he tried to equate the importance of Brierly's book with Oppenheim's success. According to Arthur Nussbaum, Oppenheim's *International Law* is the 'most frequently employed systematic treatise on the subject'.²⁵ It has also been called 'probably the most influential English textbook of international law'. The re-editing of this book demonstrates as well that there is a common feeling that a textbook is useful or even necessary. Of course there is little proof that the authority of Oppenheim or of any other textbook passes national frontiers and influences other national discourses as well.

This is another indication that Oppenheim's scepticism as to the character of textbooks as sources of international law is justified. When later scholarship, however, denies the value of textbooks altogether, the initially well-founded idea is exaggerated. Although the role of textbooks particularly in the twentieth century has not yet been closely investigated, Oppenheim's caution appears to describe more accurately the real function of international doctrine. Can there be any doubt that popular descriptions of law can be influential and even have an effect on the judicature? To deny any importance of popular conceptions means to negate any chance of a democratic aspect of international law.

Somehow Oppenheim struck a balance again, this time between scepticism and affirmation in dealing with authorities in international law, between theory and practice. In this sense his appraisal of doctrine is sounder, more reliable, and better founded in history than that of many contemporaries. To call Oppenheim modern here means to point to his actuality.

²⁵ A. Nussbaum, *A Concise History of the Law of Nations* (1947) 247.