The Function of Public International Law
The Function of Public International Law
Since the late 1980’s international legal scholarship has been shaken up by incisive anti-foundational critiques as voiced by inter alia David Kennedy and Martti Koskenniemi. Following the tradition of critical legal scholarship, these critiques demonstrated the indeterminacy of foundational legal concepts in international law and the openness and reversibility of international legal arguments. The insights from critical legal scholarship provoked strong and contradictory responses. Some embraced them as tools for emancipation, that could be used to disclose the political agendas pursued in the name of an objective and neutral international legal order. International law, in this view, should be re-politicized. Others, however, regarded critical scholarship as undermining the international rule of law; as a project that may be well-developed in terms of analysis and deconstruction, but also as a project that threatens international law’s independence from politics as well as its ability to civilize conduct in international affairs.

Jan Anne Vos’ The Function of Public International Law is an ambitious attempt to transcend the terms of the debate between critical legal scholars and ‘mainstream’ international lawyers about the relation between law and politics. Vos basically accepts the validity of the critique voiced by critical scholarship. In terms not dissimilar to Koskenniemi’s basic concepts in From Apology to Utopia, Vos argues that international legal argument oscillates between two mutually exclusive positions or frameworks. The first is the framework of obligation, which holds that rules of international law restrict a pre-given freedom of states. The other is the framework of authorization, which holds that international law confers upon states the normative power to act. According to Vos both frameworks suffer from the same problem: they cannot be upheld consistently. As a result, international legal argumentation has a tendency to constantly shift from one position to the other, even though both positions cannot be valid at the same time. Vos illustrates the workings of both frameworks in general theories of law, international theory, the sources of international law, the law of international organizations and concepts such as ius cogens and erga omnes.

For Vos, however, the radical indeterminacy that follows from his analysis does not mean that international law is irrelevant or overtaken by politics. On the
contrary: Vos regards the dilemma situation that results from the mutually exclusive and internally contradictory frameworks as a precondition for the proper working of international law. International law, in his view, is not a system of rules laying down standards for conduct, but rather a system which forces states (and other actors) to continually constitute and reconstitute international society through practical reasoning. Within this reformulated framework, Vos regards international law and international politics as mutually constitutive; as part and parcel of the never-ending constitution of international society. For him this is, to use the title’s wording, the function of public international law.

As I stated above, the approach taken by Vos is ambitious. Vos is not afraid to turn established readings of international law and legal theory on their head nor to come up with independent and original interpretations of some classics in international law and legal theory. Moreover, he does not shy away from developing his own framework of international law and from giving examples how this framework could be (or could have been) applied in practice. The unconventional nature of Vos’ approach will most likely spur debate and controversy. In a way, however, this is exactly what the book seeks to achieve. After all, the book itself is part and parcel of what it analyzes, the ongoing debate on the constitution and reconstitution of international society through practical reasoning; through argumentation, critique and counter-argumentation.

January 2013
Wouter Werner
Professor of Public International Law
VU University
Amsterdam, The Netherlands
Contents

1 Introduction .................................................. 1
   1.1 Oppositions ............................................. 1
   1.2 Structure: The Lauterpacht View and the Lotus View .... 5
   1.4 Reformulated Framework .................................. 15
   1.5 Outline .................................................. 21

Part I Mutual Exclusivity in Jurisprudence and Theory

2 Introduction to Part I ........................................... 25

3 The Framework of Obligation and the Framework of Authorization in the Case of the S.S. “Lotus” and in Legality of the Threat or Use of Nuclear Weapons ................. 27
   3.1 Introduction ............................................. 27
   3.2 The Framework of Obligation and the Framework of Authorization Considered in the Case of the S.S. “Lotus” ......................................................... 28
   3.3 The Framework of Obligation and the Framework of Authorization Considered in Legality of the Threat or Use of Nuclear Weapons .................................... 38
   3.4 Comparative Analysis and Conclusion ...................... 48

   4.1 Introduction ............................................. 53
   4.2 Transition I: Hobbes ...................................... 56
   4.3 Transition II: Locke ...................................... 59
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.4</td>
<td>Transition III: Rousseau</td>
<td>61</td>
</tr>
<tr>
<td>4.5</td>
<td>Transition IV: Kant.</td>
<td>63</td>
</tr>
<tr>
<td>4.6</td>
<td>Interlocutory Conclusion</td>
<td>65</td>
</tr>
<tr>
<td>4.7</td>
<td>Law of Peoples: Rawls</td>
<td>66</td>
</tr>
<tr>
<td>4.8</td>
<td>Union of Primary and Secondary Rules: Hart</td>
<td>69</td>
</tr>
<tr>
<td>4.9</td>
<td>Integrity: Dworkin</td>
<td>71</td>
</tr>
<tr>
<td>4.10</td>
<td>Legal Reasoning: MacCormick</td>
<td>73</td>
</tr>
<tr>
<td>4.11</td>
<td>Coordination: Finnis</td>
<td>75</td>
</tr>
<tr>
<td>4.12</td>
<td>Conclusion</td>
<td>78</td>
</tr>
</tbody>
</table>

5  The Framework of Obligation and the Framework of Authorization in Theory of Public International Law  
5.1 Introduction | 81
5.2 Permission Inferred from the Absence of Obligation: Grotius | 83
5.3 Voluntary Law: Vattel | 87
5.4 Legal Order: Kelsen | 89
5.5 Process: McDougal/Lasswell | 92
5.6 Practical Reasoning: Kratochwil | 94
5.7 International Law as Intrinsic to International Society: Allott | 96
5.8 Conclusion | 98

6  Conclusion to Part I | 101

Part II  Mutual Exclusivity in Sources

7  Introduction to Part II | 107

8  The Concept of General Principles of Law Situated Within the Framework of Obligation and the Framework of Authorization | 109
8.1 Introduction | 109
8.2 The Concept of General Principles of Law | 111
8.3 The Relationship Between General Principles of Law and General Principles of the Internal Law of the State; The Domestic Analogy Reappears | 113
8.4 The Concept of General Principles of Law Situated Within the Framework of Obligation | 117
8.5 The Concept of (General) Principles of International Law | 122
8.6 The Concept of (General) Principles of International Law Situated Within the Framework of Obligation | 124
8.7 Conclusion | 133
9 The Concept of Conventional International Law Situated Within the Framework of Obligation and the Framework of Authorization ........................................................................... 135
  9.1 Introduction ......................................................................................... 135
  9.2 The Concept of Conventional International Law .......................... 136
  9.3 The Concept of Treaty and Analogy with the Internal Law of the State ............................................................. 138
  9.4 The Concept of Treaty Situated Within the Framework of Obligation ................................................................. 143
  9.5 The Concept of Conventional International Law and Third States ...................................................................... 158
  9.6 Conclusion .......................................................................................... 168

10 The Concept of Customary International Law Situated Within the Framework of Obligation and the Framework of Authorization .............................................................. 171
  10.1 Introduction ......................................................................................... 171
  10.2 The Concept of Customary International Law .......................... 172
  10.3 The Concept of Customary International Law Situated Within the Framework of Obligation and the Framework of Authorization ................................................. 174
      10.3.1 The Case of the S.S. “Lotus” ...................................................... 176
      10.3.2 The Asylum Case .................................................................... 178
      10.3.3 The Fisheries Case ................................................................ 182
      10.3.4 The North Sea Continental Shelf Cases ......................... 186
      10.3.5 The Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits) ............... 191
      10.3.6 The Case Concerning the Arrest Warrant of 11 April 2000 .......................................................... 195
      10.3.7 The Concept of Customary International Law Resituated Within the Reformulated Framework ........... 198
  10.4 Conclusion .......................................................................................... 201

11 Conclusion to Part II ............................................................................ 205

Part III Mutual Exclusivity and the Dichotomy Between Institutions and Community

12 Introduction to Part III ........................................................................ 211

13.1 Introduction ................................................. 215
13.2 The Concept of International Institution .......................... 217
13.3 The Concept of International Institution Situated Within the Framework of Obligation and the Framework of Authorization ................. 222
13.4 Conclusion .................................................. 245

14 The Concept of *Jus Cogens* and the Concept of Obligation *Erga Omnes* Situated Within the Framework of Obligation and the Framework of Authorization ........................................ 249
14.1 Introduction .................................................. 249
14.2 The Concept of *Jus Cogens* .................................. 250
14.3 The Concept of Obligation *Erga Omnes* ......................... 253
14.4 The Relationship Between the Concept of *Jus Cogens* and the Concept of Obligation *Erga Omnes* ........................................ 260
14.5 The Concept of *Jus Cogens* and the Concept of Obligation *Erga Omnes* Situated Within the Framework of Obligation and the Framework of Authorization ......... 262
14.6 The Concept of the International Community (of States) as a Whole and the Position of Third States ........................ 267
14.7 The Bilateral Structure of Public International Law? ............. 268
14.8 Conclusion .................................................. 271

15 Conclusion to Part III ........................................... 275

16 Conclusion: The Function of Public International Law as the Constituting of International Society Pursuant to Practical Reasoning ........................................ 279

Table of Cases .................................................... 293

References ......................................................... 297