

Under Rhodes' Eyes: The 'Old' and the 'New' International Law at Looking Distance

Keywords: Bibliography; New Approaches to International Law; Oxford ILA Conference.

Abstract: The Spring Conference of the British Branch of the International Law Association exemplified to the authors some of the ways in which the 'old' encounters the 'new' in contemporary international law. Followed by a selective Bibliography of new-stream international legal writing, this Editorial tries to unravel the 'interested distance' maintained by the mainstream towards new trends in international legal scholarship.

Cecil Rhodes, then Prime Minister of Cape Colony, succeeded in the 1890s in expanding British South African territory northwards, acquiring Mashonaland and Matabeleland, later named Rhodesia in his honor. Cecil Rhodes is remembered principally for furthering the British colonial cause and for his will, bequeathing some £ 3,000,000 for the establishment of the Rhodes Scholarships at Oxford University. About 100 years later, in a luxurious hall named in his honor, Rhodes' brooding eyes overlooked the plenary of a major European international law conference of Spring 1998 from a life-size painting.¹ This editorial note is devoted to the Oxford Conference and, in particular, to what the authors experienced as its most interesting aspect, namely the encounter between international law's 'old' and 'new', its center and its periphery, its establishment and the barricades, i.e., the 'mainstream' and the 'newstream'.

We have seen arguments claiming that a new stream of international legal scholarship has emerged, challenging on many fronts the prevailing conception of international law.² Most of the newstream writing has revolved

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1. Conference on The Role of Law in International Politics, 24-25 April 1998, Rhodes House, Oxford, England, organized by the British Branch of the International Law Association, in cooperation with the Center of International Studies and the Center of Socio-Legal Studies of Oxford University. The proceedings of the Conference will be published in the form of a book in Fall 1998 (Oxford Conference).
 2. H. Charlesworth, *Cries and Whispers: Responses to Feminist Scholarship in International Law*, 65 *Nordic Journal of International Law* 557 (1996); O. Korhonen, *New International Law: Silence, Defense, or Deliverance*, 7 *EJIL* 1 (1996); and T. Skouteris, *Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship*, 10 *LJIL* 415-420 (1997). For some representative accounts of such writing see, e.g., D.Z.

¹¹ *Leiden Journal of International Law* 429-440 (1998)
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around the rubric of the *New Approaches to International Law* (NAIL) and has presented a voluminous bibliography and extensive scholarly presence.³ Some worry, however, that there is a spectacular absence of an engaged response to the newstream critique by the mainstream and a lack of dialogue. At the same time, we have seen that the newstream has not been totally ignored: its works are cited and some 'newstreamers' are invited to conferences and are generally applauded. The question is why many feel that there is a lack of meaningful debate. The 'old' seems to be standing at a looking distance, gazing over the 'new', curious but un-involved. The situation of this 'interested distance', as it presented itself to the authors at the Oxford Conference, is what the following pages will attempt to unravel.

There are three levels in which the mainstream seemed to *recognize* the meaning and significance of the arguments and positions of the newstream.

First, there was recognition in what we will call the *four corners* of the argument. By four corners we refer to the 'scheme', the mode of delivery, the structure of the argument and the formula of what constitutes acceptable scholarly academic writing in international law in the nineties. Recognizing in the four corners of the argument concerns the extent to which the epistemology, the method, the aesthetics of the 'new' is experienced 'as own' by the 'old'. Therefore, to the extent that newstream argument seems to share a modernist epistemology (logical propositions, providing reasons to ground those propositions, rationally constructed models and arguments), it registers to a mainstream audience as intuitively acceptable in its formulation. To the extent that it is formalist in its method (rigorous study of material, thorough investigation of the classics of the discipline, respect towards the philosophical and historical tradition of international law), it feels intuitively respectful and legitimate in its constitution. To the extent that its aesthetics do not deviate from the standard stocks (it maintains essentially 'legal' jargon, it is eloquent, and mildly exciting as a text), it sounds attractive and non-alienating. In case of such a recognition, the newstreamer is branded as a 'guest', a newcomer, who is nevertheless admitted to the professional community of international jurists on account of his/her willingness to share some of the existing assumptions and semantic structures; but also on account of his/her interim submission to the mainstream authority to define those assumptions and structures.

In recognizing in the four corners, the mode of delivery of the newstream argument is acknowledged, but not necessarily its substantive claims or their

Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 *Nordic Journal of International Law* 341-383 (1996); D. Kennedy, *A New Stream of International Law Scholarship*, 7 *Wisconsin International Law Journal* 1-49 (1988-1989); and A. Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 *EJIL* 66-96 (1991).

3. For a selective bibliography of such writing, see *A Selective Bibliography of Newstream Writing*, *infra*, at 434 *et seq.*

consequences for the profession and the discipline. Actually, such a recognition is usually accompanied by deep scepticism over the substantive parts of the argument. To exemplify the point: during the Oxford Conference several speakers quoted isolated statements from the writings of Martti Koskenniemi, perhaps the leading proponent of European newstream writing. Although those quotations appealed to the speakers and the audience for their rationality, eloquence, and insight (they offered such a challenging entry point to the discussion!), Koskenniemi's overall project and argument was hardly debated or criticized. Koskenniemi was celebrated as a particularly perceptive and respectful newcomer whose overall project, however, goes well beyond the four corners of the nineties.

Second, there was by some a recognition of the *cultural value* of the critique represented by the newstream argument. The recognition of the cultural value of critique may appear under at least two names. First, under the name of 'progressivism' and the necessity for 'constructive' critique. The newstream, as the story goes, has the 'right' to criticize. 'Constructive' academic critique is the *conditio sine qua non* for the progress and improvement of the discipline. 'Constructive' critique is not only a permissible and legitimate academic task, but also a leading value and a habitual professional responsibility for the international jurist. Its footing in international legal culture is undisputed, especially on account of the European and Anglo-American persistence in an open-ended and liberal professional community. Such a critique is perceived to be especially necessary at times of great social change and the views from the margins could then have a fruitful impact on the discipline. The constructive critique, even when it appears unsettling, must be formally allowed to enter the professional discourse, and any transformative potential it may have, will then be evaluated fairly in the marketplace of values and eventually utilized – or not – by the professional community. There is, however, no obligation to accept or to respond to every such constructive critique. The absence of engaged response should not be interpreted as prejudice or indifference on the part of the professional community, but rather as a failure of the critique to convince. In this case the critique is taken to be simply misdirected, off-mark. The newstreamer is no longer an outsider, but an unsuccessful insider, perhaps an apprentice, or simply one incapable of formulating a relevant critique. Actually, the mainstream may become interested only once the constructivist credentials of the critique are exhibited. To take another example at the Oxford Conference: an American colleague presented a newstream critique of contemporary human rights literature which received a great endorsement only once his constructivist commitment (to a 're-construction' of human rights debate) came to couple his critique during question time. Casting away any suspicion of nihilism and declaring a reconstructive project re-positioned him within the four corners and legitimized the critique.

Under another name, there may be recognition of the social value of the critique *as such*. Provided it somehow remains within the four corners, and irrespective of its transformative potential, mainstream attention may be earned simply on account of the genius and novelty of the argument. In this latter case, the newstreamer is at best the genius, but other times the cranky scientist or the court's jester. The well-known speaker at Oxford who began by announcing the utopian character of his argument for the majority of the audience, captured the audience's full attention and sympathy but received no meaningful questions or responses.

There is recognition, finally, in what we will describe as *αισθησις* (aesthesis). Some mainstreamers do recognize in the newstream project an *αισθησις*, a sense, a meaning, a realizing aesthetics and epistemology of its own. *Αισθησις* is that which by definition exists beyond the four corners of the argument. It is the ethical element which always escapes the technical, rational, modernist definitions of international law. It is the non-legal that is deferred to politics, philosophy and morals. *Αισθησις* is enchanting in its realizing, captivating, overflowing, inspiring and the audience experiences this enchantment. Being, however, instigated by an external source (the newstream argument), *αισθησις* remains distant, alien, non-appropriated, when in private. It cannot be self-instigated unless founded in one's self. In this case the newstreamer becomes the artist, the poet, the philosopher, the priest, the mystic – the catalyst. The jurists who recognize in this *αισθησις* can be best found surrounding the interesting speaker at the break, longing for that additional word or explanation that will re-instigate the recognition.

In the newstream, the mainstream writing is widely discussed partly because there is no clear line between the two and partly because there is often a critical emphasis. The ways of engagement differ greatly. Annexed is a bibliography of representative writing in the newstream. The newstream writing, apart from the mentioned critical emphasis deals mostly with the widest questions of international law; it addresses the structural and fundamental questions at the basis of international legal work. For this reason, it is interested in all aspects of the mainstream research and also interesting and relevant to it. The basic idea is that if some problems seem to persist in the *corpus* of law and in the everyday of the international jurist despite the relentless efforts of generations of competent lawyers, then perhaps it is time to propose something 'completely new' (thus the name). To find this 'new', without ending up like Icarus, demands detailed research into the traditions of international law, into the history of international legal thought, into the classics of international legal theory and the wider context of international law. As a consequence, many of the newstream works deal with the 'forgotten' topics of mainstream investigating into the gaps and shades between and beyond the most popular questions. This is neither an attempt at self-

marginalisation, excess academicism, nor irrelevant theorising, but a proposal to shed light on the persistent/popular problems from other sides.

For these reasons, it seems that the new and mainstream have all the basis to interact in the ways depicted above. As Hilary Charlesworth challenges, however, the newer writing is only rarely, if ever, a part of the professional know-how of the average scholar of international law.⁴ At the Oxford conference a clear change seemed to be on its way. It is probably impossible to decipher the key to the multi-faceted collection of newstream and then 'engage it'. It is hardly necessary. Instead we propose the reading of some representative writing included in the bibliography below and the reconnaissance of the insights that are common – but often forgotten – with one's own.

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A Selective Bibliography of Newstream Writing

*Compiled by Outi Korhonen & Thomas Skouteris**

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4. See H. Charlesworth, *Cries and Whispers: Responses to Feminist Scholarship in International Law*, 65 *Nordic Journal of International Law* 557 (1996).

* A larger version of the Bibliography was originally compiled with the inspiration and supervision of David Kennedy for the purposes of a series of conferences on the same topic. For an earlier version of this bibliography, see D. Kennedy & C. Tennant, *New Approaches to International Law: A Bibliography*, 35 *Harvard International Law Journal* 417 (1994). The present updated *Selective Bibliography* was researched and compiled in a larger version by Outi Korhonen, and was prepared for publication with the collaboration of Thomas Skouteris.

The authors would like to express their gratitude to all who contributed to the Bibliography by sending information and correcting mistakes. We also apologize for the necessary omissions which were based on the selection criteria of emphasis on international law, recent date of publication, and availability.

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