The Value of Year Books of International Law

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Is there still a place for a 'Yearbook' of International Law? Viewed as no more than an annually published volume of scholarship, one would surely answer in the negative. There is no shortage of excellent law journals, including journals focused on international and comparative law. It is thus doubtful that any quality article published in a yearbook would have failed to find a good home elsewhere. With even relatively obscure law journals readily available in electronic form at minimal cost and with maximum ease, the case for a yearbook is surely weak if predicated simply on the importance of disseminating international legal scholarship. It does not follow, however, that the yearbook is without value.

The unique importance of a yearbook is perhaps not well understood because it is very much anchored in a positivist understanding of international law. While viewed by some as old-fashioned or simply misguided, I have argued elsewhere that the positivist account of international law retains a principled internal consistency and political salience unmatched by any other theory.[1] At least if renovated to take account of modern realities – as Bruno Simma and Philip Alston did in a pioneering contribution in the pages of the *Australian Year Book*[2] – positivism allows international law to move firmly beyond the political, and meaningfully to stand as a constraint on state action. Especially for those of us who work in the world of international human rights, the positivist paradigm – while yielding a less broad-ranging normative universe than that asserted by policy-based theorists – provides a solid marker for standards that are clearly more than normative preferences.

More specifically, the modern positivist project insists that for customary international law to be understood as ethical and legitimate, there must be meaningful evidence of consent by states through their actions, rather than simply by words. This is, of course, the reason for the classic prescription that customary law arises only where there is a coincidence of reasonably consistent state practice and a relevant sense of obligation (*opinio juris*). So conceived, customary international law is not simply glorified political science, but is instead a means of

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1 J C Hathaway, 'A modern positivist understanding of the sources of universal rights' in J C Hathaway, *The Rights of Refugees under International Law* (2005) 16.

2 B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1992) 12 *Aust YBIL* 82. A critical review of the value of legal positivism in modern context may be found in B Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13(2) *European Journal of International Law* 401.

negotiating and evincing consent through action rather than simply by form of words (as in the case of treaties).

In establishing real, action-based consent by states to putative customary norms, the role of the international yearbook is vital. Its primary distinguishing feature – the recapitulation of state practice in a way that can constitute a record of actions genuinely capable of being invoked in support of international legal argumentation – is a function unique to its genre. The *Australian Year Book of International Law* provides the authoritative record of Australian practice in relation to international law. It is thus a critical piece in the network of yearbooks authored in jurisdictions around the world, offering international lawyers the raw material of positivist customary international legal argumentation.

Indeed, the *Australian Year Book* and many of its sister yearbooks make an equally important contribution to the elaboration of argument based on general principles of law. Understood as extrapolations from binding domestic law common to the overwhelming majority of states, general principles are most readily identifiable in surveys of legislation and judicial and administrative practice of the kind recorded in the pages of this and other yearbooks.

If I were to suggest ways in which the unique mission of the international law yearbook could be advanced, I would encourage even greater emphasis on the truly unique mission of documenting the basis for claims grounded in non-treaty-based international law. The more traditionally framed scholarly portions of the yearbook might then reasonably focus on the drawing together of such evidence in relation to particular branches of the law, and on showing where consensus is established, still emerging, or simply not evident. Indeed, if yearbooks from around the world could work more effectively together – agreeing to common reporting standards and organising materials in ways that facilitate cross-jurisdictional analysis – they could make a genuinely unique contribution to the resuscitation of both custom and general principles of law as clear and seriously regarded sources of obligation.

In an era when it has become fashionable in some quarters to doubt the viability of international law not codified in treaties,[3] the yearbook's role is more critical than ever. It enables claims to be made on the basis of solid evidence of consent rather via the assertion of policy-based preferences masquerading as universal values. In short, the yearbook plays a critical role in ensuring that the unique force of international law as law is not subverted by wishful legal thinkers, even as it counters the claim that consent can be evinced only through the drafting of treaties.

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3 See eg J Goldsmith and E Posner, *The Limits of International Law* (2005).