
International Legal Scholarship as a Cooling Medium in International Law and Politics

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Abstract

The article aims to contribute from a history of science angle to the recent debate on the relation between legal scholarship, utopian ideals, and practice, which was spurred by the EJIL Symposium on Antonio Cassese's 'Realizing Utopia' and subsequent publications in this journal. It defends a conception of legal scholarship that keeps a reflexive distance vis-à-vis practice and current political trends in international relations. It focuses on traditional background assumptions of international legal scholarship, which constantly threaten this reflexive distance. Arguably these background assumptions are a 19th century legacy and today – in a context of fragmentation and globalization – stand in the way of developing the full potential of international legal scholarship as a medium of societal reflection. The classic role of the scholar as a law reformer in the current context turns out to be more problematic than it may have been in the past. Inspired by Kelsenian concerns and Nietzschean metaphors, the article instead suggests that international legal scholarship functions as a cooling medium for the overheated discursive operations of the political, economic and legal subsystems of World Society.

In 1919, the year the international system we live in today was established, the Austrian scholar Hans Kelsen reflected upon the role of the legal scholar as follows:

In a society convulsed by world war and world revolution, it is more important than ever to the contending groups and classes to produce usable ideologies that allow those still in power to effectively defend their interests. That which accords with their subjective interest seeks to be presented as what is objectively right. And so public law scholarship must serve that purpose. It provides the 'objectivity' that no politics is able to generate on its own.¹

My contribution is animated by this Kelsenian concern, by the concern that legal scholarship could turn out to be nothing more than the pseudo-objective defence of

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¹ H. Kelsen, 'Juristischer Formalismus und Reine Rechtslehre', 58 *Juristische Wochenschrift* (1929) 1723.

ruling ideologies. A further rather obvious initial assumption is that international legal research should and must be more than what international lawyers do in foreign office legal departments and international tribunals – there must be more to it. Precisely because, in Dworkin's words, '[j]urisprudence is the general part of adjudication, silent prologue to any decision at law',² scholarship in general needs to fulfil another function within a given society from the one practitioners perform in particular societal subsystems, such as the legal system.

I would contend that scholarship needs to observe international legal practice from a reflexive distance, hereby influencing it in indirect and often unforeseeable ways. But insisting on a reflexive distance towards the operations of the legal system and conceding its albeit unforeseeable influence on practice appears to be a paradoxical claim to make. If we, however, take the communicative paradigm seriously, a watertight distinction between authorized law-making organs of the legal system, such as governments and judges on the one hand and legal scholarship on the other, would be an implausible assumption. International legal practice involves academics and their writings, courts refer to commentaries and scholarly publications, and practitioners have been trained in academic institutions. From a sociological perspective the inner operations of the international legal system are connected with international legal scholarship. So how should we then understand the specific role of international legal scholarship within this broader discursive practice, which inevitably involves both practitioners and scholars?

In this context, the young Nietzsche usefully pointed out the general role of the sciences in society. He argued for what one may call a bicameral system of culture, two brain chambers: one for the sciences and the other for the non-sciences. This would act as a safeguard against unrestrained vitality as well as nihilistic paralysis:

Illusions, biases, passions must give heat; with the help of scientific knowledge, the pernicious and dangerous consequences of overheating must be prevented.³

The metaphor of scholarship as a cooling regulator for the overheated discursive operations of the political and economic and legal subsystems of World Society inspires my contribution. On this basis I want to defend an ideal of international legal scholarship which keeps a reflexive distance *vis-à-vis* practice and current international political and legal trends.⁴ In order to perform this function, international legal scholarship should be a distinctive academic discourse that helps us to understand the doctrinal structure, role, and societal effects of the language of international law within this globalized environment. I would contend that this reflexive distance is permanently under threat of being annihilated by an unwarranted identification of existing

² R. Dworkin, *Law's Empire* (1986), at 90.

³ F. Nietzsche, *Human, All Too Human: A Book for Free Spirits* (1986), sect. 251 (Future of Science).

⁴ The ideal of legal scholarship defended here as a distinctive discourse which has the potential to reflect upon the law from outside was an ideal pursued by Hans Kelsen's Pure Theory of Law. The problem with the pure theory is, however, that Kelsen pushes this postulate to its limits by assuming that there is something like an "objective" and "neutral" standpoint for the scholar – believing in the possibility of a strict separation between an objective "legal science" and politics. He implies that the scholar can escape from the political completely. But this is pushing the helpful ideal of reflexive distance too far; see J. von Bernstorff, *The Public International Law Theory of Hans Kelsen, Believing in Universal Law* (2010).

international law with ideals of reason, progress, and morality through international legal scholarship. My hypothesis is that widespread background assumptions of international legal scholarship, which had a very important role to play in the development of modern international law, can be conducive to erasing the reflexive distance required for international legal research. Those assumptions therefore need to be re-examined on a continuous basis, in particular since these traditional background assumptions have different effects in the current socio-legal context, which is shaped by globalization and fragmentation, from the ones they may have had at the time of their inception.

The first background assumption is that international law is an inherently rational order. The second related background assumption is that more international law means more peace and justice for the world, which can be called the expansionist *telos* of international legal research. I would like briefly to illustrate in the first two parts of this contribution the suspected origins and potential effects of these two background assumptions (at 1–2) before, in the third and last part, conclusions for the role of international legal scholarship are drawn, including its claim to generate objective knowledge and its relationship towards practice.

1 International Law as an Inherently Rational Order based on Evolved Community Values

The first background assumption is that international law is an inherently rational order based on evolved community values, the elements of which are to be exposed by the legal scholar.⁵ It is the offspring of a specific positivist doctrine, which international law adopted at the end of the 19th century, which lingers on in our discipline and international legal practice. More concretely it is the legacy of German *Staatswillenspositivismus* – positivism of the will of the state – which was framed by the German authors Georg Jellinek and Heinrich Triepel. Starting from the assumption that international law is based on consent, emerging from the free will of individual nations, it arguably still shapes our understanding of international law.

Georg Jellinek, the towering figure of the late 19th century German public law, ostensibly rejected all pre-Kantian natural law approaches for the field of international law. Already in the early 19th century German legal positivism in the form of Savigny's influential historical school had based its concept of private law on the concept of the autonomy of the individual and the task of the law to reconcile and delineate individual spheres of freedom. While accommodating German idealism (Kant/Schelling/Hegel) in that regard, Savigny and Puchta at the same time portrayed law as an organically evolved societal medium expressing as such particular community values (*Volksgeist*), which allowed them to reject the introduction of the French *code civil* in some German territories as an alien intervention into traditional German civil law. Community values in their view were culturally determined and evolve over a

⁵ On the 'spell of rationalizing legal analysis' in (US) national legal scholarship see R.M. Unger, *What Should Legal Analysis Become?* (1996), at 34 ff.

long period of time. They can only be discerned by the legal scholar who, in order to exercise his monopoly of reconstructing the law, will have fully to explore the historical origins of the law first ('*Zurück zu den Pandekten!*'). According to Puchta, this privileged knowledge subsequently allows the legal scholar to systematize the law through a formal and coherent system of legal concepts (*Begriffsjurisprudenz*).⁶

In the second half of the 19th century German legal positivism was convinced that it had moved beyond both the 18th century rational natural law and also the early 19th century positivism of the historical school. For Jellinek the free will of the state as a legal subject is the only formal foundation of a positivist theory of international law. Its binding character is a result of the sovereign's ability voluntarily to limit its own freedom of action (auto-limitation) and its implicit recognition to honour this commitment as long as circumstances do not change dramatically (*clausula rebus sic stantibus*). The traditional 17th and 18th century dualism between positive international law on the one side and rational or religious natural law on the other is thus being replaced by the Hegelian notion that the law as an expression of individual (state) freedom constitutes an inherently rational order. The positivist explanatory model for a binding law of nations *à la* Jellinek initially found numerous adherents in Germany, but also in other European countries. The main German-language textbooks on international law at the time,⁷ by Ullmann,⁸ Heilborn,⁹ and Liszt,¹⁰ referred directly to Jellinek when explaining the basis of obligations of international law. Although French international lawyers mostly drew upon the doctrine of the basic rights of states (*droits fondamentaux des états*), criticized by Jellinek as a kind of clandestine natural law, Carré de Malberg,¹¹ under the influence of Jellinek, also traced international law back to the self-obligating will of the state.¹² The foundation that Jellinek had offered in the late 19th century, by bridging the premise of the free will of the state and the idea of a binding order of international law, despite various waves of scholarly attacks, had an unusual ability to connect with the changing *Zeitgeist*. Heinrich Triepel, among Germany's most renowned scholars of international law until the 1930s, likewise building on Jellinek, posited the existence of a 'common will'

⁶ Ironically the historical school, which had criticized enlightened rational natural law as overly abstract, leads to a highly formalized and deductive system of legal concepts: see F. Wieacker, *Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung* (1952), at 373–377.

⁷ Karl Strupp prefaces his own principles of international law with an overview of the most important textbooks: K. Strupp, *Grundzüge des positiven Völkerrechts* (5th edn, 1932), sect. VII.

⁸ E. von Ullmann, *Völkerrecht* (1908), at 250.

⁹ Heilborn, 'Grundbegriffe des Völkerrechts', in F. Stier-Somlò (ed.), *Handbuch des Völkerrechts* (1912), i, pt 1, at 29–31.

¹⁰ F. von Liszt, *Völkerrecht* (11th edn, 1918), at 2.

¹¹ R. Carré de Malberg, *Contribution à la théorie générale de l'état, spécialement d'après les données fournies par le droit constitutionnel français* (1920), at 234.

¹² On the French development at the *fin de siècle* and the prevailing doctrine of the basic rights of states see L. Duguit, *Souveraineté et Liberté. Leçons faites à l'Université Columbia (New York) 1920–1921* (1922), at 105–110. In his lectures, Duguit compared the German doctrine, influenced by Jellinek, to the French doctrine of the basic rights of states: '[I]a doctrine allemande était plus brutale. J'en trouve surtout l'expression dans les ouvrages d'un juriste allemand éminent, dont on ne saurait méconnaître le rôle et l'influence, le professeur d'Heidelberg, aujourd'hui décédé, Jellinek': at 107–108.

(*Gemeinwille*) of the states that was independent of the will of the individual state.¹³ This common will did not arise from treaties of a contractual nature, which represented only the respective wills of the individual states, but only from ‘agreements’ (*Vereinbarungen*) that carried objective obligations.¹⁴

My point is that despite the rejection of the 18th century rational natural law and Savigny’s historical school, the consent theories encapsulated and preserved basic assumptions of these two traditions through their reliance on Hegel. It is first the notion that an order which can be derived from individual freedom is a rational one, and secondly Savigny’s idea that the law is an expression of community values (*Volksgeist*), which have evolved over a long period of time and can be legitimately discerned and formalized by the legal scholar. Jellinek thus could (at the high point of European colonialism) construct international law as a positive legal order based on consent and as an objective, historically evolved, and inherently rational law of what he called ‘European Civilized Nations’ (*Europäische Kulturvölker*). Already at the time of its inception the rationality assumption often came with a dark exclusionary side. For a number of 19th century scholars it went without saying that non-European colonized peoples had no access to this ‘civilized’ rationality. And as a consequence they could also be deprived of its benefits.¹⁵ Jellinek’s Scottish contemporary, James Lorimer, portrayed the exclusive claim to rational rule of European Colonial powers as follows:

The moment that the power to help a retrograde race forward towards the goal of human life consciously exists in a civilised nation, that civilised nation is bound to exert its power; and in the exercise of its power, it is entitled to assume an attitude of guardianship, and to put wholly aside the proximate will of the retrograde race. Its own civilization having resulted from the exercise of a will which it regards as rational, real and ultimate, at least when contrasted with the irrational, phenomenal and proximate will of the inferior race, in vindicating its own proximate will, it is entitled to assume that it vindicates the ultimate will of the inferior race – the will, that is to say, at which the inferior race must arrive when it reaches the stage of civilisation to which the higher race has attained.¹⁶

With these often racist undertones, the rationality assumption in international law was at the basis of scholarly attempts to construct a binding international legal system. Out of relatively few customary and conventional norms scholars attempted to build a system of European international law despite the absence of centralized political and legal institutions.¹⁷ Granted, between the inception of the consent theories in the late 19th century and today more than 100 years have passed, but I would argue

¹³ The same argument was put forth by Anzilotti with the ‘*voluntà collettiva*’: D. Anzilotti, *Corso di diritto internazionale* (2nd edn, 1912), at 26; later, Anzilotti would resort to Kelsen’s concept of the basic norm; see D. Anzilotti, *Lehrbuch des Völkerrechts* (1929), at 33.

¹⁴ H. Triepel, *Völkerrecht und Landesrecht* (1899), at 63 ff.

¹⁵ A. Angie, *Imperialism, Sovereignty and the Making of International Law* (2004), at 56 ff.

¹⁶ J. Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (1980, reprint of the Edinburgh edition, 1883), i, at 227, 228.

¹⁷ On international legal scholarship as system-building see Benvenisti, ‘The Future of International Law Scholarship in Germany: The Tension Between Interpretation and Change’, 67 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2007) 589.

that the idea that an order which is based on consent and evolved community values is a rational one is still with us today.

A late and problematic offspring of the rationality assumption can be seen in the current reign of the balancing metaphor in international legal scholarship. Wherever international lawyers encounter conflict and antagonism between legal and political regimes in the transnational sphere, they tend to assume that through enlightened judicial balancing these conflicts will miraculously disappear and rational order will be restored. In legal conflicts between the national regulator and international regulatory objectives or in cases of international regime collisions, balancing seems to become the international lawyer's universal remedy in the face of antagonism, contradictions, irrationalities, and surfacing politics in international law.¹⁸ And it is we, the international lawyers as judges, arbitrators, and scholars, who know how best to handle the delicate balancing exercise. But why is this rationality assumption problematic in the times of globalization and fragmentation, in which we are operating today? I would again argue that it potentially reduces the reflexive distance scholarship should have by cloaking legal regimes and judicial law-making with a dignity they might not deserve. Through interpreting the law in line with superimposed standards of rationality or alleged community values, the role of the law and its organs in fostering particular political and economic projects can recede into the background.

Particularly problematic in this context is the 20th century (post-war) trend in international legal scholarship to assume not only that the law is inherently rational but also an expression of ethical community values.¹⁹ The 20th century move to ethics in international law is indeed linking up to a traditional image of the international legal scholar as the defender of general values encapsulated in the international legal order as a whole. As a general concept this traditional image can be traced back to the religious natural law tradition and has survived the above-mentioned positivist turn in the 19th century jurisprudence through various scholarly concepts of the community and its law.²⁰ When Antonio Cassese said that international lawyers should feel free to 'critically ... appraise the rule or institution ... in light of the ... general values upheld in the international community',²¹ he expressed a deep-seated and often noble sentiment among many international lawyers. To portray the legal scholar as a defender and representative of the 'general values' embedded in international law

¹⁸ Critical on the use of the balancing metaphor in WTO law see Regan, 'The Meaning of "Necessary" in Article XX GATT and GATS Article XIV: the Myth of Cost-Benefit Balancing', 6 *World Trade Rev* (2007) 347; Critical on balancing in the human rights field: Koskeniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power', 1 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* (2010) 49, at 50–51, 53.

¹⁹ On the post-1989 atmosphere in international law see Koskeniemi, 'Projects of World Community', in A. Cassese (ed.), *Realizing Utopia, The Future of International Law* (2012), at 8.

²⁰ On the darker colonial legacy of the community term and its language of responsibilities and care *vis-à-vis* the Third World cf. A. Orford, *International Authority and the Responsibility to Protect* (2011); less sceptical on the various usages of the concept in international legal doctrine and state practice: A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (2001).

²¹ A. Cassese, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter* (2011), at 259.

as a whole or as the bearer of a common 'sense of justice'²² has for a long time animated the self-understanding of the field as a common scholarly enterprise. Despite its potential contextual merits in forming and stabilizing international legal discourse, proponents of this approach tend to underestimate how diverse and antagonistic this 'community' in reality is. Identifying general values beyond stating generalities, such as 'crimes against humanity are intolerable' or 'human rights must be respected', becomes increasingly difficult. In concrete cases, the assumed values of the international community often collide, such as in the case of humanitarian interventions where the prohibition on the use of force conflicts with human rights protection, or cases where diverging regime-imperatives are at the centre of the legal debate (patent protection versus human rights). Take any of these contested issues and you will have as many diverging hierarchical orderings of the values at stake as you have international lawyers involved in that debate.

My point is that the scholarly reference to general values of the international community is a highly unstable one. In defence of Cassese's point, Anne Peters in this journal has called for more normative analysis of the law, and refers to the experience of National Socialism, where Nazi lawyers uncritically subscribed to the Nazi ideology. While this is certainly a correct observation, it leaves unmentioned that the quest for more normativity also can have a dark side, as the Nazi lawyers example can also aptly demonstrate. Indeed, Nazi lawyers themselves conducted a normative analysis of the law, by criticizing and interpreting the existing law from the perspective of the new *Volksgemeinschaft* and its assumed general values. It is a common misunderstanding that an alleged reign of 'pure positivism' in German legal culture had stabilized Nazi rule. First of all, positivism was discredited in mainstream German jurisprudence as orthodox formalism long before the Nazis took over. Moreover, legal historians have convincingly shown that it was the 'unlimited interpretation' of the norms of the pre-fascist domestic and international legal order through the lenses of the 'values' of the *Volksgemeinschaft* and racist National Socialism that initially stabilized and executed Nazi rule.²³ Nazi lawyers saw themselves as belonging to a progressive and critical movement injecting more normativity into the sterile positivist and formalistic legal discourse, which had in their view betrayed the deeper values of the German *Volksgemeinschaft* over the last 50 years. In that sense there was too much normativity in Nazi legal scholarship.

In sum, both the assumption of an inner rationality of the law as well as the assumption of the legal scholar as a midwife for immanent community values can erase the required scholarly distance to its object of research. Even if these assumptions result

²² Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern U L Rev* (1977–1978) 225.

²³ Analysing affinities with and opposition to National Socialism among individual German public-law scholars and the complex relationship between theory and a changing political context see Stolleis, 'In the Belly of the Beast', in M. Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany* (1998), at 87 ff, and M. Stolleis, *A History of Public Law in Germany 1914–1945* (2004), at 249 ff; see for a good overview of the complex interactions between authoritarian rule and legal theory in European societies also the essays in C. Joerges and N. Sing Galeigh (eds), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (2003) and the review by Koskeniemi, 'By Their Acts You Shall Know Them... (And not by their Legal Theories)', 15 *EJIL* (2004) 839.

in reform proposals made by the scholar, the reformist search for the hidden inner beauty of the law can take on an affirmative dimension through preserving an idealized vision of the law. Let me be clear about the term ‘affirmation’ used here: affirmation of the legal system through scholars can be a good or a bad thing – it all depends on the context – affirming the democratic and liberal features of the Weimar constitution in 1933 in Germany certainly was a good thing, or the scholarly affirmation of the prohibition of the use of force after the US invasion in Iraq in 2003 in my view was an important scholarly contribution to the debate around the invasion. But, as Kelsen insisted in the 1920s, affirmation as well as disaffirmation of a legal regime should be a self-reflected scholarly operation, which acknowledges its political character.²⁴ It should not be done subconsciously by assuming that the law is inherently rational or based on common values and therefore must be interpreted in a particular fashion.

The same goes for other methodologies, be they inspired by public choice theories, economic analysis, empirical methodologies, or critical scholarship – the legal scholar should not pretend that these methodologies produce ‘objective’ results as to what the law is or ought to be. Instead scholarship should make transparent from a reflexive distance which particular political or economic projects these methodologies may serve in a given research context. Moreover, affirming international legal regimes through scholarship in general has more serious political repercussions than the affirmation of domestic law. Domestic law can be changed after the next elections. Through regular democratic elections there is a constant promise of radical reform (even if rarely realized) – a promise that does not realistically exist for international law.²⁵ The problem is not only that the formation of the rules of international law might be less legitimate than that of democratic domestic law, but more important is the lack of effective politicization of its rule through an institutionalized opposition embodying a transformative potential and prospect.²⁶ International lawyers are dealing with a legal system without democratic elections and without revolution. How could you even think of changing 2,500 bilateral investment treaties if you feel that this regime is in need of radical reform? At the same time, international law today shapes domestic legal orders in a way that early 20th century scholars could only have dreamt of.

2 On the Expansionist *Telos* of International Legal Scholarship

Historically I would locate the related ‘more international law is more progress’ assumption in the late 19th century. In the 19th century public law scholars witnessed the emergence of highly formalized domestic legal systems, encompassing codification, compulsory adjudication, and centralized law-creating institutions. By

²⁴ J. von Bernstorff, *The Public International Law Theory of Hans Kelsen, Believing in Universal Law* (2010), at 104–107.

²⁵ Discussing the tension between the consent principle and notions of democracy see Weiler, ‘The Geology of International Law – Governance, Democracy and Legitimacy’, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547, at 547–548.

²⁶ On institutional potentials and limits of politicization within the WTO see I. Feichtner, *The Law and Politics of WTO Waivers, Stability and Flexibility in Public International Law* (2012).

analogical reasoning international lawyers perceived international law as ‘primitive’,²⁷ ‘anarchic’,²⁸ or ‘incomplete’²⁹ law, which needed to be institutionally strengthened by introducing centralized organs of law creation and application. Many European international law scholars during that time developed an inferiority complex *vis-à-vis* their own object of research. Modern Western centralized national legal systems became consciously or subconsciously the assumed yardstick for international law.³⁰ Hence, the vigorous 19th century German debates about the character and basis of international law in the absence of a general system of compulsory adjudication.

As a consequence, the ever more dominant ‘positivist’ scholarship adopted an evolutionary perspective on international law. Even though it still was ‘primitive’ in its decentralized structure and in its reliance on non-formalized legal sources, it had the potential to expand and develop in order to overcome and solve concrete problems occurring through the separation of sovereign entities and jurisdictions.³¹ During the ‘long’ 19th century, it was increasingly perceived as a medium to answer regulatory needs created by the first wave of economic globalization. Between 1860 and 1914 more than 30 international institutions based on multilateral treaties were founded, most of which served purposes of technical and scientific cooperation between states. Moreover, at the same time international law was discovered as a medium to foster universalist political projects. Western transnational movements (NGOs) began to project their humanitarian and pacifist causes on the progressive development of international law.³² The pacifist project for instance aimed at a complete abolition of inter-state violence, and in many ways went beyond what later was achieved in both the interwar period and the UN Charter. In order to serve these progressive purposes international law had to create institutions for standard setting, adjudication, and enforcement.

Subsequently, in the first decades of the 20th century, at the high time of European nationalism, this domestic law analogy began to merge with pacifist and humanitarian sensibilities in the revolutionary postulate for a World Organization, capable of ensuring peace in and outside Europe through a system of compulsory judicial settlement of international disputes and collective peace enforcement. More international law for the cosmopolitan avant-garde meant more peace and justice for the world.

²⁷ As a ‘primitive’ legal system, international law in the 1930s was for Kelsen in a stage of evolutionary transition to a legal system where law creation and law application would be transferred to centralized organs: Kelsen, ‘The Law as a Specific Social Technique’, 9 *U Chicago L Rev* (1941) 97.

²⁸ G. Jellinek, *Allgemeine Staatslehre* (2nd revised and expanded edn, 1905), at 368.

²⁹ Fricker, ‘Noch einmal das Problem des Völkerrechts’, 34 *Zeitschrift für die gesamte Staatswissenschaft* (1878) 399.

³⁰ On the myth of progress and the domestic law analogy in current international law scholarship, cf. P.W. Kahn, *The Cultural Study of Law. Reconstructing Legal Scholarship* (1999), at 109–110; on progress in international law generally, see T. Skouteris, *The Notion of Progress in International Law Discourse* (2010).

³¹ International law as ‘primitive’ law: H. Kelsen, *Unrecht und Unrechtsfolge im Völkerrecht* (1932), at 586; cf. L. Oppenheim, *International Law – A Treatise* (1920), I–Peace, at 11, 25 who calls it the weaker law as compared to municipal law.

³² The international Red Cross movement, the international pacifist movement, as well as the international workers’ movement are cases in point, on late 19th century political internationalisms: J. Osterhammel, *Die Verwandlung der Welt, eine Geschichte des 19. Jahrhunderts* (2013), at 726–734.

Many European and US interwar international lawyers were inspired by this expansionist move aiming to reduce the institutional gap between highly developed national legal systems and international law. Theoretically, the main obstacle for them was the principle of national sovereignty. Progressive development, codification, institutionalization, compulsory adjudication, and the rule of law in international relations became common ideals of the cosmopolitan ‘Geneva spirit’.³³

The movement from ‘*Faustrecht*’ – ‘the law of the jungle’, where might is right – to ‘civilization’ is identified with breaking away from a primitive, sovereignty-obsessed international law to a more developed international legal system.³⁴ This 1920s international rule of law project was a visionary one, aiming at a real pacifist revolution of international politics, a project that has animated the brightest international law scholars of the 20th century, such as Hans Kelsen and Hersch Lauterpacht. The shared enthusiasm for a changed, more peaceful world order prompted legal scholars in various countries, coming from different methodological backgrounds, to try and prepare, in a scholarly fashion, the road to what they called ‘a new international law’. As part of this movement one could mention, in addition to the authors of the Kelsen School, Lammasch, Nippold, Krabbe, and Duguit from the pre-war generation, and for the younger generation Scelle, Politis, Alvarez, and Brierly.³⁵ I once fell in love with its protagonists and have a lot of respect for this project, remnants of which I would argue are still with us today, but its origins must be contextualized as an early 20th century fight of pacifist movements against European nationalism, which had led to the Great War. It had its own blind spots though, the perpetuation and legitimation of European great power dominance and of colonization through the League of Nations’ mandate system being one of them. Moreover for many areas of current international law a close relationship to the overall legitimating pacifist agenda cannot further be construed. More law in some fields, including international adjudication, can by contrast fuel violent conflict.³⁶ In the area of international criminal law for instance, significant tensions between ending impunity on the one hand and safeguarding or creating peace on the other have become apparent. Likewise a quasi-automatic relationship between free trade and the absence of violence in international relations can hardly be maintained.

After the collapse of the League in the late 1930s and through the rise of realism in the 1940s, the inferiority complex became even stronger: the realists wanted international lawyers to believe that international law was irrelevant whenever

³³ James Wilford Garner in 1931 sought to provide an overview of the reform movement in the 1920s: Garner, ‘Le développement et les tendances récentes du droit international’, 35 *RCADI* (1931) 605.

³⁴ The theoretical criticism focused above all on Jellinek’s doctrine of self-obligation allegedly representing a sovereignty-obsessed 19th century international law: Brierly, ‘Le fondement du caractère obligatoire du droit international public’, 23/III *Collected Courses of the Hague Academy of International Law* (1928), at 482–484; H. Lauterpacht, *The Function of Law in the International Community* (1973, reprint of the 1933 edn), at 409–412.

³⁵ James W. Garner, in The Hague lectures in 1931, sought to provide an overview of the reform movement in the 1920s: *supra* note 33.

³⁶ Kahn, *supra* note 30, at 110; Haltern, ‘Recht und soziale Imagination’, in W. Gephart (ed.), *Rechtsanalyse als Kulturforschung* (2012), at 98–99.

strong political interests were at stake. Hans Morgenthau – inspired by Carl Schmitt – inaugurated an approach to international law which tended to reduce international legal validity to a phenomenon that was always dependent on its congruence with the interests of the strongest political actors.³⁷ The attacks by the realists strengthened the background assumption among scholars that international law needed to expand by creating more and stronger institutions. Again, the domestic law analogy proved helpful to further the expansionist cause in international legal scholarship. Through the invention of *ius cogens* and *erga omnes* obligations, scholarship likened international law to domestic legislation in a constitutionalized *Rechtsstaat*. One of the latest upshots of the domestic law analogy is thus the debate on international legal constitutionalism.³⁸

Today, the expansionist argument needs to be critically reassessed in each research context for various reasons. One reason is the asymmetrical realization of the expansionist project. It has been very successful in some areas of international law over the past 30 years – its mission has been accomplished, for example, in international economic law and, at least in principle, in international criminal law, and was enthusiastically received by international lawyers. In these areas, relatively stable international institutions have been established by international law together with sectoral systems of compulsory jurisdiction – so we can speak of a partial rule of law in international relations – pioneered primarily by the regulatory needs of globally operating economic actors. Moreover, due to an enormous increase of norm-production in various subfields of international law, international lawyers today often become specialists in one particular area of international law. Fragmentation has thus created many ‘invisible colleges’ of international lawyers, not just one, as famously held by Oscar Schachter in 1977 before the high phase of fragmentation in international law began.³⁹ His wishful prediction regarding the question of specialization in 1977 was as follows: ‘[s]hould we expect – and even encourage – a similar development toward specialization in the study of international law? My own view is that this is not likely in the near future, nor is it desirable’.⁴⁰ In the face of institutional fragmentation Schachter’s hope for disciplinary unity turned out to be an illusionary one.

The initial impulse to cherish these new sectoral rule of law – pockets in the ever more specialized international legal research communities may, however, stand in the way of recognizing to what extent each particular regime plays into the hands of some actors, which had the power to establish it in a given historical constellation. It may also lead researchers to fall for the abstract self-proclaimed goals of a particular regime, such as ‘fostering global wealth through free trade’ or ‘protecting investors against

³⁷ On Morgenthau and his foundational influence on the post war discipline of international relations see Koskenniemi, ‘Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations’, in M. Byers (ed.), *The Role of Law in International Politics. Essays in International Relations and International Politics* (2000), at 17–34.

³⁸ See on the domestic law analogy and constitutionalism in international law scholarship Kahn, *supra* note 30, at 109–110; on international legal constitutionalism von Bogdandy, ‘Constitutionalism in International Law: Comment on a Proposal from Germany’, 47 *Harvard Int’l LJ* (2006) 223.

³⁹ Schachter, *supra* note 22, at 217–226.

⁴⁰ *Ibid.*, at 221.

expropriation and arbitrary national regulation’ or the idea ‘to fight impunity’. If the researcher realizes, however, that these self-proclaimed positive effects of institutionalization are only being realized for some states or individuals, lead to double standards, or come with high costs for other legitimate societal interests, he or she might, in line with the ‘more law is more progress’ narrative, attribute these negative consequences to the fact that there is not enough international law in this area or that existing institutions should be reformed. Scholarship, even if it is advancing reform proposals, might thus indirectly uphold a legitimizing idealized concept of a particular legal regime even though its concrete institutional practices are in sharp contrast to this ideal; such as the ideal of economic growth and prosperity for all nations through institutionalized free trade in the face of decades of unequal North–South distribution of tariff reductions and other trade barriers, including subsidies on agricultural products in the North.⁴¹

Unintentionally, we might thus become what Philip Alston has called ‘hand maidens’ of strong geopolitical interests or economic globalization, rather than a reflexive discursive element cooling overheated developments in the globalized sphere.⁴² Hence, the real problem is not that legal scholars pretend to be law-makers,⁴³ but that many forms of doctrinal work can – often unwillingly – sustain deep-seated economic and political structures by lacking the necessary intellectual distance. Sociologically this risk is a consequence of the inevitable discursive linkages between theory and practice in an ultimately encompassing international legal discourse. Under the complicity lens many classic forms of international legal scholarship may lose their innocence. I would add here that even the ideal of effective compliance, which often animates international legal research, can be called into question from this perspective. Is effective compliance really a value in itself that today can stand without further justification in all international legal contexts?

Another problem with the expansionist argument in a fragmented international legal system is that it tends to overlook to what extent particular rule of law pockets can cancel out legal developments in other sub-areas of international law. Institutional breakthroughs in one area can be the end of rule of law aspirations in another area of international law. International human rights lawyers for instance advocate an international tribunal adjudicating on human rights abuses by transnational corporations and enforceable state obligations to regulate foreign investors, while international investment law in the meantime has erected a highly efficient rule of law system in which transnational corporations can directly challenge these state regulations required by human rights law.⁴⁴ The assumption that by creating more and more sectoral rule of law pockets there will one day be a universal rule of law may thus be false altogether.

⁴¹ On these inequities of the Uruguay round see Weiler, ‘The WTO: Already the Promised Land?’, in Cassese (ed.), *supra* note 19, at 420–421; see also Jouannet, ‘How to Depart from the Existing Dire Condition of Development’, in *ibid.*, at 413–415; for an in-depth reflection of often irreconcilable conflicts between international trade law and human rights obligations see Bartels, ‘Trade and Human Rights’, in D. Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law* (2009), at 572 ff.

⁴² Alston, ‘The Myopia of the Handmaidens: International Law and Globalization’, 8 *EJIL* (1997) 435.

⁴³ A concern voiced by Peters, ‘Realizing Utopia as a Scholarly Endeavour’, 24 *EJIL* (2013) 533, at 539.

⁴⁴ With a compelling critique of the rising power of foreign investors and private adjudicators over public interest regulation through the recent explosion of investment treaty arbitration see G. Van Harten, *Investment Treaty Arbitration and Public Law* (2006).

In general, the expansionist argument in international legal scholarship focuses too much on an abstract and ideal potential of international law to be realized in the future rather than on its concrete role of shaping the world as it is, including its negative aspects, such as violent and protracted conflict, economic exploitation, or environmental degradation. A growing part of global civil society movements, the classic late 19th and 20th century backbone of progressive institutional developments in international law, has started to campaign against specific areas of international law and their current institutional manifestations. In the context of poverty eradication for instance, NGOs have recently rediscovered the old sovereignty principle. In their campaign for what they call 'food sovereignty' for local populations, they criticize interventions by international institutions, notably the World Bank and the IMF, into the lives of local populations.⁴⁵ Globalization has in many areas led to an NGO-driven transnational turn against international law. My general point is that in most areas of international law we are today dealing with very influential and increasingly contested institutional structures, which not only profoundly shape our perception of how we should and can live together in this global village, but which also have acquired powerful means to intervene into our daily lives.⁴⁶ In this sense, *international law is what happens to the world while scholars are busy making plans for its reform and development.*

3 The Relationship between Theory and Practice

All of this may sound like 'back to the ivory tower', which is not what I want to say, if the ivory tower is associated with a disengaged discourse that is not interested in the practical effects of the law on individuals and on society; if, however, the ivory tower is associated with an academic discourse that is not primarily or exclusively attempting to produce semantic artefacts to be used directly within operations of the international political and economic system, I would go along with it. Paul Kahn, in his book *The Cultural Study of Law*, has made the provocative point that the legal researcher has to free him- or herself from the law before (s)he can do proper research, and that this means in more concrete terms to free oneself from the assumption that scholarship should contribute to reforming the legal system or to make a contribution to improving legal practice.⁴⁷ Harold Koh, former legal adviser in the US State Department, made the opposite point last year at his notorious ASIL dinner speech. International lawyers in his view should gain more practical experience and direct their attention to problems that practitioners face and provide solutions. In line with the classic and new New Haven Approach, the role of international legal research in his view was to expand available policy options on the basis of the founding values of international law. I agree with Koh

⁴⁵ See on the use of the dynamic version of the sovereignty concept von Bernstorff, 'The Global "Land-Grab", Sovereignty and Human Rights', 2/9 *ESIL-Reflections* (2013), available at: www.esil-sedi.eu/sites/default/files/ESIL%20Reflections%20-%20von%20Bernstorff.pdf (last visited 3 Dec. 2013).

⁴⁶ For one of the attempts in the literature to analyse and re-formalize global governance processes in international institutional law see A. von Bogdandy, R. Wolfrum, J. von Bernstorff *et al.* (eds), *The Exercise of Public Authority by International Institutions, Advancing International Institutional Law* (2010).

⁴⁷ Kahn, *supra* note 30, at 30.

that practical experience can be very helpful for researchers in order to get what he calls ‘a feel’ for why and how international law matters in practice. But I strongly disagree with the reductionist image of the scholar as a policy option provider. This is certainly one of the roles scholars can and do play in practice as advisers. But in my view it is an inappropriate ideal of good scholarship. Koh’s arguments for me might invoke a particular ideal of good practice, which involves scholarly expertise, but not of good scholarship.

International legal scholars in many ways directly take part in operations of the institutionalized international legal system, be it through writing legal opinions, *amicus curiae* briefs, law clinics, or as judges or independent experts as well as through collecting, compiling, and publishing legal decisions and materials in a structured and systematized fashion. Given their close and instrumental relationship with the operations of the institutionalized legal system I would call these scholarly activities ‘first order’ legal scholarship. They help the legal system to run smoothly by supporting the various actors (plaintiffs, defendants, judges) in performing their respective roles and operations in legal proceedings. One of these instrumental and eventually also affirmative functions is the production of argumentative ‘redundancies’ to be employed strategically by the actors of the legal system.⁴⁸ ‘Second order’ legal scholarship, however, is marked by the lack of its direct relevance for the operations of the legal system as such. It reflects on the law and its societal context in a more abstract fashion. Due to its theoretical distance *vis-à-vis* the institutionalized legal system, it fulfils a different societal function. Admittedly, in many writings of international legal scholars, first order and second order scholarly arguments can and do exist next to one another in a way that clear-cut distinctions and attributions between the two forms of scholarship in practice are sometimes difficult to maintain.⁴⁹

But does all of this in turn require second order legal scholarship to accept that it is completely irrelevant for international legal and political practice? That would be very difficult to bear for a legal scholar. And everybody who has recently tried to raise funds for a research project knows that to state in the proposal that one’s project is from a short- and mid-term perspective without any direct practical use might not be the best way to get the grant. That is where for me Nietzsche comes in to fill the void with his metaphor of the regulating cooling system for overheated operations of the internal rationalities and excessive forces of the subsystems of the ‘*Weltgesellschaft*’ (World Society). So what we do in second order legal scholarship is not at all useless. In a way it is the primary function of legal scholarship conceived as a ‘science’ of the law. We have been given a detached position to analyse and (re-)describe where international legal norms come from, how they are doctrinally constructed, how they shape perceptions, foster particular preferences, and how existing international legal rules interact with other rules in the discursive practice we call international law.

⁴⁸ N. Luhmann, *Das Recht der Gesellschaft* (1995), at 352–353; on the practitioner’s role and her limited ability to further personal utopias see Feichtner, ‘Realizing Utopia through the Practice of International Law’, 23 *EJIL* (2012) 1152. This is the place for ‘doctrinal constructivism’: cf. von Bogdandy, ‘The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges facing Constitutional Scholarship in Europe’, 7 *ICON* (2009) 364.

⁴⁹ On the problematic scholarly movement from critical distance to doctrinal reform in general see Ulrich Haltern, *supra* note 36, at 90–91.