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International Legal Scholarship at the Millennium

Jeffrey L. Dunoff*

The beginning of a new journal is always a moment of great promise and expectation, and the start of *The Chicago Journal of International Law* is no exception. The decision to launch an *international* law journal at this time no doubt reflects both a widespread understanding that many problems traditionally considered domestic have important international dimensions, and the increasing prominence and diversity of international legal norms and institutions. In this sense, the start of this journal reflects good news about the state of international law.

But there is something disquieting about starting a new international law journal with an inquiry into the problems of international legal scholarship. While it is often useful for an academic discipline to self-consciously examine its own understandings, a Symposium dedicated to this topic may signal an underlying weakness in the discipline. The purpose of this short essay is to explore the unsettling juxtaposition presented by the launch of this journal and its Symposium theme: is there a connection between the good news about international law that prompts the start of this journal, and the bad news about international law scholarship that prompts this specific Symposium?

I

Any discussion of the problems with international legal scholarship presupposes an understanding of the purposes and goals of this scholarship. These scholarly purposes and goals, however, are neither unitary nor static. Rather, at any one time, there are different forms of scholarship, and scholarship can play different roles at different times. Moreover, the purposes and goals of scholarship are and should be legitimate foci of academic debate.

Nevertheless, it is often possible to generalize about dominant trends in legal scholarship at a particular time. For example, we can understand domestic law scholarship in this century to have moved through several discrete phases, including moves from Langdellian formalism to Legal Realism to Legal Process to various contemporary movements, including law and economics, critical legal studies and feminist legal thought. Harold Koh argues that international legal scholarship has undergone a very similar progression.¹

But there is another way to understand developments in international legal scholarship. For much of this century, and particularly in the decades following

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1. Harold Hongju Koh, *Transnational Legal Process*, 75 *Neb L Rev* 181, 187-88 (1996).

World War II, international law was a marginalized discipline. Political realists such as E.H. Carr, George Kennan and Hans Morgenthau, forcefully argued that power, rather than law, governed the international realm.² They criticized the “legalist-moralist” tradition of American thought for naively attempting to transfer a domestic conception of legal order into the anarchic international system.³ At its heart, the realist critique challenged the relevancy—indeed, the very reality—of international law.

In response, over the last few decades, much international law scholarship was at least implicitly dedicated to establishing the reality and relevance of international law. While the story of these efforts has been well-chronicled elsewhere,⁴ the salient point here is this scholarship’s success. International law scholars no longer feel compelled to justify their chosen area of study. As a result, international law scholarship today is heterogeneous, in terms of both goals and methodologies. However, notwithstanding this healthy diversity, international law scholarship today most typically consists of prescriptive or normative claims about how international legal issues should be addressed and resolved. As this is the most common form of international law scholarship—and as this prescriptive quality most sharply distinguishes legal scholarship from that of other disciplines—in what follows, I shall focus on this branch, without meaning to slight other important forms of international law scholarship.

Efforts to prescribe—to solve specific legal problems—are deeply dependent upon the particular definition of the problem to be solved. Thus, the solution to a human rights problem will often be quite different—in doctrinal and institutional terms—than a solution to, say, an international environmental or an international trade law problem. A client with an international intellectual property problem will typically look for a lawyer with different expertise than a client confronting a law of the sea or a diplomatic immunity issue. Thus, as both an analytic and a practical matter, international law issues are often understood as presenting problems arising out of one or more international law sub-fields, and international law scholarship is often dedicated to the articulation and advocacy of particular resolutions to these sort of problems.

II

Perhaps the most striking aspect of contemporary international law—and no doubt a factor in the start of this journal—is the emergence and development of entirely new international law fields and the increasing sophistication of both new and existing fields. Treatises and scholarship from fifty or sixty years ago would have

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2. See George F. Kennan, *American Diplomacy 1900-1950* (Mentor 1952); Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (Knopf 3d ed 1964).
 3. Kennan, *American Diplomacy* at 93 (cited in note 2).
 4. See, for example, Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *Am J Intl L* 205, 208 (1993).

suggested that international law consisted entirely of two categories, the Law of Peace and the Law of War. Since then numerous new substantive areas, including human rights, environmental protection, international investment, intellectual property, and the law of development, have emerged as important parts of the field. However, while each of these substantive fields is understood to be a part of the international law corpus, each is typically taught and learned as if it existed as an independent and autonomous area, subject to its own practices, norms, and institutional structures. The implicit message is that the whole consists of a collection of fragmentary parts and that these different parts seldom, if ever, connect.

While the notion that different international law subject matter areas are self-contained and only infrequently connect was probably never totally accurate, it is an increasingly false and misleading image today. Outside of the legal academy, the apparently discrete subject matters do not exist in isolation. Rather, legal norms arising out of different subject matter areas can and do intersect, interact, and, increasingly, clash. Indeed, the interconnections between apparently distinct areas, such as trade and environment, or human rights and development, present many of the most challenging and important international legal issues of our time.

At times, international processes appear to recognize and incorporate the interconnections among different subject areas. Many multilateral environmental agreements, for example, expressly invoke trade and intellectual property rules to achieve environmental objectives. At other times, international bodies recognize the interconnections, but lack a clear vision of how to organize or reconcile them. For example, a deeply fractured International Court of Justice, in its Advisory Opinion on the Legality of the Use of Nuclear Weapons,⁵ had great difficulty clearly delineating the inter-relationships among international humanitarian law (*jus in bello*), international legal norms regarding the use of force (*jus ad bellum*), human rights law, and international environmental law. At still other times, international bodies appear unable to accommodate or even recognize these interconnections. At the recent WTO Ministerial meeting in Seattle, for example, trade diplomats were unable to agree, *inter alia*, on the desirability of incorporating economic issues such as competition and investment—not to mention labor, environmental, and other social issues—into negotiations over the liberalization of trade in services and agricultural goods.

These examples illustrate some of the doctrinal and diplomatic tensions arising out of the countervailing tendencies towards doctrinal specialization and integration. They also highlight the fact that our present way of organizing international law doctrine is a historically contingent phenomenon. The various substantive fields arose in response to particular social developments and problems, and proved useful insofar as they enabled international law to address problems that its doctrine did not previously reach.

5. *Legality of the Threat or Use of Nuclear Weapons (Advisory)*, 1996 ICJ 226.

The critical question is whether these doctrinal subdivisions, and the boundaries between these subdivisions, still play a useful role. However, this is a question that prescriptive international law scholarship does not frequently explore. While there are notable exceptions, much prescriptive international law scholarship takes these subdivisions—and their boundaries—as given, and tends to plow deeper and deeper into narrower and narrower issues. In one sense, this increased specialization reflects the complexity and maturity of international law. But, the difficulty is not only that important issues seldom present themselves in this way to decision-makers, but also that a narrow focus on doctrine from one area tends to distort the articulation of the problem, the legal analysis, and the proposed solution. So, for example, the problem of child labor in Asia is not simply a human rights problem, nor an international trade law problem, nor a law of development problem. Similarly, the problem of individual accountability for atrocities committed in internal conflicts does not fall neatly within the boundaries of international human rights law, international humanitarian law, or international criminal law.⁶ Indeed, an increasing number of issues like these confound the boundaries that appear to separate the various doctrinal sub-fields. The underlying difficulty is that to the extent that contemporary problems do not correspond to conventional doctrinal categories, increased doctrinal specialization may hinder, rather than advance, international law scholarship's prescriptive purposes.

Moreover, increased specialization may undermine international law scholarship's prescriptive goal in another way as well. Oscar Schachter has suggested that:

We may envisage international law as a large terrain made up of towns and villages with interconnecting paths and highways. The specialized branches of the law form the separate towns and villages, each centered on its own affairs. Narrow paths run from one to another, used occasionally. Across the entire terrain are the superhighways, the connecting links, which in the metaphor convey the general principles and concepts. Those who travel on the highways are generally only dimly aware of the lively activities in the towns and villages. Those who remain only in the local communities immersed in their specialities tend to lose sight of the interconnections and coherence of the larger whole.⁷

In other words, increasing specialization may lead not only to a misdescription and misdiagnosis of international law problems, but also may lessen the ability to see the interconnections between the various villages. More importantly, the effort devoted to increasing specialization cannot help but distract scholars at a time when the more necessary task is to question why the village boundaries lie where they do. In several senses, then, the good news about international law's expanding domain—which gives rise to the issues involving interconnections between different substantive areas—is bad news for international law scholarship.

From this perspective, the problem with international legal scholarship is that in

6. See, for example, *Symposium on Method in International Law*, 93 Am J Int'l L 291 (1999) (exploration of doctrinal puzzles presented by the problem of individual accountability for atrocities committed in internal conflicts from numerous methodological perspectives).

7. Oscar Schachter, *International Law in Theory and Practice* 1 (Martinus Nijhoff 1995).

a time when conventional international law categories no longer capture underlying social and political realities, this scholarship too readily accepts these categories. While this is hardly a novel critique of legal scholarship,⁸ it does suggest an alternative strategy for achieving scholarship's prescriptive aims. Rather than continuing to recycle and manipulate inadequate doctrinal categories, international law scholars ought to be highlighting these inadequacies and challenging these categories, as a prelude to the development of more useful categories.

III

While some scholars are already engaged in this difficult task, a related development may limit the number of academics who do so. The explosion of international law and international institutions has produced an increased demand for international law practitioners. Leading international law scholars have increased opportunities to serve on national government agencies and international organizations, on national and international expert bodies, as counsel to parties in international disputes, as international arbitrators, and in other roles as practitioners. As a result, with the relevance of international law established (at least for the time being), the opportunities and the incentives to impact international events are very great.

As practitioners, legal scholars advocate their clients' interests. They seek to solve particular legal problems by achieving their client's objectives. But, the fact that practitioners and scholars both seek to solve legal problems should not lead to the mistake of confounding the former's enterprise with the latter's. The practitioner will be primarily, if not exclusively, concerned with strategically advancing his client's case or cause. To do so, the scholar as practitioner will adopt the vocabulary and doctrinal concepts most likely to advance his clients' interests. The incentive will not be to challenge these categories, but rather, to strategically deploy them in the manner most likely to achieve a favorable outcome for the client.

As a practical matter, this activity may serve to entrench more deeply the doctrinal categories and boundaries that, at this particular time, legal academics should be challenging. As a psychological matter, the scholar runs the risk that, through direct participation in legal controversies, he becomes professionally invested in the maintenance of current doctrinal boundaries. Such an investment would make him less likely to engage in the sort of inquiry urged above. From this perspective, the problem with international legal scholarship is that it may lack a critical distance from the field that—from the scholarly perspective—it should be critiquing.

8. Many of the early legal realists, of course, advanced similar arguments. See, for example, Herman Oliphant, *A Return to Stare Decisis*, 14 ABA J 71, 76 (1928) ("The law's present classification of human activities compels us to sit in places where life's game is no longer played.").

IV

If the above analysis of the current state of international legal doctrine and international legal practice is accurate, then international law scholarship ought to assume a certain stance vis-à-vis international law doctrine, if it seeks to achieve its prescriptive mission. This stance is not the traditional prescriptive stance, which tends, at this point, to simply reinscribe inadequate legal doctrines. This stance is also not the partisan stance of the practitioner, who seeks to solve concrete legal problems, but to do so in a way defined by a client's predetermined objective.

A more useful stance is suggested by the following parable, ascribed to Pythagoras by Diogenes Laertius: "life . . . is like a festival; just as some come to the festival to compete, some to ply their trade; but the best people come as spectators [theatai], so in life the slavish men go hunting for fame [doxa] or gain, the philosophers for truth."⁹ Following Hannah Arendt, I read this parable as suggesting that the relatively detached perspective of the spectator enables her to see more of the festival. The actors, in contrast, necessarily play only a more narrowly defined part; they are bound to a particular role that finds its ultimate meaning and justification only as a constituent of a larger whole. Arendt argues that "withdrawal from direct involvement to a standpoint outside the game (the festival of life) is not only a condition for judging . . . but also the condition for understanding the meaning of the play."¹⁰ For Arendt, "[t]he inference to be drawn from this early distinction between doing and understanding is obvious: as a spectator you may understand the 'truth' of what the spectacle is about; but the price you have to pay is withdrawal from participating in it."¹¹

Analogizing the scholar to the spectator suggests a distinctive role that scholars can play, given their relative distance from the particulars of specific legal controversies. This difference in perspective enables scholars to bring different kinds of considerations to bear and to advance their prescriptive claims in a more systematic and, perhaps, imaginative way than practitioners can. This is not, of course, a call for scholars to turn away from the common world of human affairs. Such a move risks depriving thought of reality. It is also not an argument against all participation in public affairs, or for a total withdrawal from the political realm. International law scholars can and should contribute much that is valuable to international legal processes.

I am also not suggesting that scholarship is somehow apolitical or value-free, or should aspire to be without utility. Adopting a relatively detached perspective and engaging in the scholarly enterprise both have political implications. And while scholarly work of the kind urged above may not directly help practitioners change

9. This translation is found in G.S. Kirk and J.E. Raven, *The Presocratic Philosophers* 228 n 278 (Cambridge 1963).

10. Hannah Arendt, *The Life of the Mind* 94 (Harcourt 1978).

11. *Id.* at 93.

legal doctrine, this hardly means that it is useless. Rather, this scholarship can change the prevailing intellectual atmosphere within which public decisions are made. For example, the cumulative effects of feminist critiques of human rights and humanitarian law has changed the prevailing intellectual atmosphere, and helped to reverse the relatively low status of prohibitions for sexual violations within the hierarchy of humanitarian law norms and to transform the debate over rape and other forms of gender violence as war crimes.

Finally, this is not an argument about the relative merits of the life of a scholar and that of the political activist. Rather, the argument is that our roles as government officials or public servants or public intellectuals are qualitatively different from—and may be in tension with—our roles as scholars. Moreover, I am advancing the perhaps more controversial claim that when it is difficult to separate the actors from the spectators, something important is lost. It is not lost to international law, which is greatly enriched by academic input. But, this enrichment may come at considerable expense to a particular form of scholarship; for, without the spectator's relatively detached perspective, the scholar's ability to enrich our understanding of international legal issues is compromised.

V

International legal scholarship faces many challenges at the start of the new millennium. The challenge posed by issues that appear at the intersection of different doctrinal areas problematizes the current division of international law's doctrinal domain. More deeply, it problematizes much of the way we organize our professional knowledge and scholarship. The current doctrinal divisions are not natural, but constructed, and we would benefit from understanding how and why these divisions occurred and continue. Moreover, by pointing to a potential danger associated with direct and substantial participation in public affairs, I mean to call attention to the very different reasons for engaging in practice and scholarship. Again, these "problems" are happy ones insofar as they reflect the vigor and importance of international law. They may also be largely unavoidable in any rapidly expanding and developing field.

But if my analysis of our current situation is accurate, then many international law scholars may be engaged in precisely the wrong activities. I have suggested a particular stance that scholars might assume, and particular inquiries they might undertake.

Notably, the withdrawal implied by this stance is quite different from that of the philosopher. While the philosopher withdraws to solitary contemplation, the spectator remains in our everyday, ordinary world. Moreover, as Arendt emphasizes, spectators always exist in the plural, that is, as members of an audience. While a spectator may not be driven by the interests of fame or gain, her opinions are not independent of the views of others. Rather, if they are to enjoy assent or influence, her opinions must be properly mindful of the various perspectives expressed by her colleagues. In this sense, to be a spectator (or a scholar) presupposes a certain form of

dialogue. This Journal will serve the international legal community well if, in this Symposium and in the future, it enables a variety of spectators to engage in an ongoing dialogue over the unfolding festival of international law. 