INTERNATIONAL LAW AS A PROFESSION

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International Legal Scholarship Under Challenge

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5.1 Introduction

International law is in crisis. This is nothing really new – we have faced crises after 9/11/2001 and the 'war on terror' (with its serious and ongoing erosions of human rights law), after the unlawful Iraq war of 2003 which was a serious violation of the prohibition on the use of force, since the 2008 breakdown of the WTO Doha negotiation round, and so on. Still, the crisis in Crimea may constitute a turning point in the development of international relations in Europe. Russia in 2014 incorporated parts of the territory of another sovereign state and thereby resorted to a political strategy that was common in the 19th century, but surely was considered *passé* in Europe at the beginning of the 21st century. We seem to witness the opening of a new (or old) ideological fissure of Europe which also seems to affect scholarship: academic assessment of the Crimea crisis mirrors the geopolitical camps. Hardly any 'Western' scholar deems Russia's political course justifiable and justified under the precepts of international law. Inversely, Russian scholars happily justify the annexation of Crimea within the framework of the existing international legal order, notably by pointing to the right of self-determination.[1]

That cleavage thrusts into the limelight the problem of *epistemic nationalism* (charge no. 1). The critique is that much or all international legal scholarship is (maybe inevitably) determined by the national background of the researcher and therefore suffers from unconscious national bias (or is even openly guided by national interest). And as the most influential scholars are 'Westerners', the result seems to be that not

* This chapter uses elements of my article 'Realizing Utopia as a Scholarly Endeavour' (2013) 24 *EJIL* 533–52. I thank the participants of the Max Planck research seminar and the editors of this volume for valuable critique on a previous version of this chapter.

[1] C. Marxsen, A. Peters and M. Hartwig (eds.), 'Symposium: "The Incorporation of Crimea by the Russian Federation in the Light of International Law"' (2015) 75 *ZaöRV* 1.

only international law as an object of study but also international legal scholarship as a whole tends to be Western-centric.

Besides or instead of nationalism, other '-isms' may impact on international legal scholarship: idealism, universalism, humanism, liberalism, capitalism, empiricism and so on. While these sets of ideas may have different substance and occur on different levels of abstraction, the perceived overarching problem here is that the work done by international legal scholars is (inevitably) value-loaded and even ideological in the negative sense of being tied to a range of manipulative belief systems (*the charge of ideology*, charge no. 2).

Besides these two related charges, further important concerns are voiced in the current debate on international legal scholarship as a profession. These concerns are directed against different types of scholarship, and are not necessarily mutually reconcilable: some charges overlap, while some contradict each other. Notably the links between international legal scholarship and practice are often considered problematic. Some think that much scholarship is too close and too much influenced by legal practice, while others think that much of the research activities are too detached from practice. The observation here is that academics find themselves in a catch-22: if their activity blurs with legal practice, what they do is at best some kind of handcraft or technique. If however they steer far from practice, their writings will not have any impact on the real world of international law as applied. The result would be that what academics in the field of international law do is basically meaningless in intellectual, social and political terms. I call these the *charges of unscholarliness* (charge no. 3), and the *charge of irrelevance* (charge no. 4).

The fifth concern, probably most popular in the United States, is that much of (notably European) international legal scholarship is too doctrinal, limiting itself to purely internal arguments about legal constructs, interpretation according to the traditional canons, concentrating on legal terms, seeking to systematise and harmonise legal provisions, and commenting on judicial decisions (the *charge of doctrinalism*, charge no. 5). This chapter addresses the five charges one by one.

5.2 Charge No. 1

5.2.1 The Perils of Epistemic Nationalism

'Epistemic nationalism' is the twofold phenomenon that international legal scholars often espouse positions which can be linked to their prior

education in their domestic legal system and/or which serve the national interest.[2] The first variant, thinking along one's familiar legal tradition, often occurs unconsciously, while the second variant, supporting one's home country, may happen deliberately or unwittingly. A parallel issue is the persistent segregation of research institutions along national lines. It is for that reason, too, that we nowadays doubt that the 'invisible college of international lawyers' as invoked by Oscar Schachter in the 1970s[3] is really a global college. It rather seems to be an elite college of scholars of the developed world, a college in which academics from the so-called Global South are relegated to the role of the eternal students.

While conscious or unconscious epistemic nationalism is nowadays usually considered problematic; it has on the contrary been heralded as proper in the past. The idea that scientific and scholarly activity (in the exact sciences as in the humanities and social sciences) is contingent on the nationality of the researchers and should properly be thus contingent took hold in the 'War of the Minds'[4] during the First World War and became mainstream during National Socialism. The most prominent explicit denial of the universality of science was the proclamation of the so-called 'German Physics' which was promoted by Nobel Prize winners Johannes Stark und Philipp Lenard.[5]

[2] A. Peters, 'Die Zukunft der Völkerrechtswissenschaft: Wider den epistemischen Nationalismus' (2007) 67 *ZaöRV* 721.

[3] O. Schachter, 'The Invisible College of International Lawyers' (1977) 72 *NULR* 217: '[T]he professional community of international lawyers . . . constitutes a kind of invisible college dedicated to a common intellectual enterprise.' The expression 'Invisible College' was used by Robert Boyle in 1646 in relation to a predecessor society to the *Royal Society* which was founded in 1660 (see R. Lomas, *The Invisible College* (London: Headline, 2002) 63; *The New Encyclopedia Britannica*, 32 vols., 15th edn (Chicago: Encyclopedia Britannica, 2002) vol. X, 220.

[4] A. Kleinert, 'Von der Science Allemande zur Deutschen Physik. Nationalismus und moderne Naturwissenschaft in Frankreich und Deutschland zwischen 1914 und 1940' (1978) 6 *Francia* 509. French authors deemed relativity and quantum theories as 'typical German mathematical-metaphysical delirium' (at 520 with reference to P. – J. Achalme, 'La science des civilisés et la science allemande' (1916) 162 (author's trans.).

[5] P. Lenard, *Deutsche Physik in vier Bänden*, 2nd edn (München: Lehmann, 1937–1941); W. Menzel, 'Deutsche Physik und jüdische Physik in 'Völkischer Beobachter' of 29 January 1936, cited by Kleinert, 'Von der Science Allemande', n. 4, at 522, defined: 'German physics is the experimental investigation of reality in non-living nature for the delight of observing its forms and processes' (author's trans.). In a presentation in 1935, 'Physik im Kampf um die Weltanschauung' ('Physics and the Battle for World Views'), Max Planck argued against this nationalisation of science and stated: 'A science which is not able or willing to act beyond its own nation does not deserve its name' (author's trans.). Presentation held in the Harnack-House, Berlin-Dahlem, on 6 March 1935 in M. Planck, *Vorträge und Erinnerungen*, 5th edn (Stuttgart: Hirzel, 1949), 285, at 298.

International legal scholarship was also 'nationalised' (or 'regionalised') in this way. The most important historical examples of regional approaches to international law are the Latin American[6] and Soviet schools of international law.[7] The heydays of a consciously and deliberately nationalised and even racialised international legal scholarship were again the National Socialist years. In the pamphlet 'The German Science of Public International Law' from 1939, Friedrich Berber claimed that 'the foundations of public international law would be considered anew from the perspective of the National Socialist worldview'. At the same time he declared that 'attempts by foreigners, such as those by the French Fournier, ... to capture all German work on public international law in a rigid conceptual pattern appear pretty naïve'.[8] An essay, 'The Influence of Jewish Theoreticians on German Teachings of Public International Law', said that Jewish legal thinking had emptied the nation, law, state, society, work, community and so had transfigured those concepts to the point 'that the legal sciences – as a normative science aligned with Jewish thinking – were alienated from the German people'.[9] Theses of this sort reached their peak in Carl Schmitt's closing words at a symposium on 'Jewry in the Legal Sciences' in October 1936 in Berlin: 'A Jewish author has no authority for us, not even a "pure scientific authority"'.[10]

In opposition to such stances, anti-nationalist scholars time and again insisted on and called for a de-nationalised quality of international legal scholarship. The 19th-century Franz von Holtzendorff, for example, sought to move from nationalised scholarship to 'civilized' scholarship: he pleaded to consider international legal scholarship *not* as 'a theory, developed by singular eminent authorities on the basis of their *national* consciousness', but as the product of a '*shared* academic state of the mind

[6] A. Alvarez, *Le droit international américain: son fondement, sa nature d'après l'histoire diplomatique des états du nouveau monde et leur vie politique et économique* (Paris: Pedone, 1910) 13–21.

[7] G. Ivanovich Tunkin, *Theory of International Law*, W.E. Butler trans. (Cambridge: Harvard University Press, 1974).

[8] F. Berber, 'Deutsche Völkerrechtswissenschaft' (1939) 17 *Geist der Zeit* 731, 732, 733 (author's trans.).

[9] N. Gürke, 'Der Einfluß jüdischer Theoretiker auf die deutsche Völkerrechtslehre' (1937) 6 *Das Judentum in der Rechtswissenschaft* 5, 28 (author's trans.).

[10] C. Schmitt, 'Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist', conclusion of the symposium of the *Reich*'s group of university teachers of the national socialist law-keepers association from 3rd and 4th October 1936, 'Das Judentum in der Rechtswissenschaft' (1936) 41 *Deutsche Juristenzeitung* columns 1193, 1195 (author's trans.).

of civilized nations'.[11] This intellectual move is not appealing anymore; the claim of civilisational superiority does not seem much better than nationalism. Similarly, the search for a 'jurisprudence' for a 'global community' as called for by the New Haven scholars of the 20th century, up to the 1990s still,[12] sounds false. It seems as if their protagonists fell prey to epistemic nationalism, too, because their approach in many ways served US American national interests.

So would a way out (and a path towards 'true' scholarship) lie in 'pure' legal reasoning, as advocated by Kelsen in explicit opposition to scholarship driven by national interest?[13] A radical detachment from one's national background was also recommended by George Scelle who, in the 1930s, linked the surpassing of the national perspective to the object of his discipline: 'Scientific objectivity must dispel ... every subjective point of view and, in particular, ... every national point of view from legal education. ... The only ideal we should nurture is the objective of law itself, being an ideal in so far as it can never be attained: the creation of peace between human beings.'[14]

Contradicting Scelle on this point, I suggest that it is not necessary that scholars of international law clinically strip off their 'national' point of

[11] F. von Holtzendorff, 'Einleitung in das Völkerrecht' in F. von Holtzendorff (ed.), *Handbuch des Völkerrechts: Auf Grundlage Europäischer Staatenpraxis*, 5 vols. (Berlin: Habel, 1885), vol. I at 46 (author's trans., emphases added).

[12] H.D. Lasswell and M.S. McDougal, *Jurisprudence for a Free Society: Studies in law, science and policy*, 2 vols. (New Haven: New Haven Press, 1992), vol. I, xxii: 'The jurisprudence for which we searched was one relevant, in its theories and intellectual procedures, for any community, including the global or earth-space community and all its component communities. A jurisprudence which stopped short with a single nation-state could scarcely be adequate in or for an interdependent world.'

[13] H. Kelsen, 'Preface to the First Edition' (New York: Rinehart, 1952), in H. Kelsen and R. Warren Tucker (eds.), *Principles of International Law*, 2nd edn (New York: Holt, 1967), at ix: '... I do so in opposition to a tendency wide-spread among writers on international law, who – although they do not dare to deny the legal character and hence the binding force of this social order – advocate another than a legal, namely a political, approach as adequate. This view is in my opinion nothing but an attempt to justify the non-application of the existing law in case its application is in conflict with some interest, or rather, *with what the respective writer considers to be the interest of his state*' (author's emphasis).

[14] G. Scelle, *Précis de droit des gens: Principes et systématique*, 2 vols. (Paris: Recueil Sirey, 1932), vol. I, ix: 'L'objectivité scientifique doit bannir d'un enseignement juridique tout idéal extra-juridique, toute 'croyance', toute aspiration affective, tout point de vue subjectif et, notamment, dans notre domaine, les points de vue nationaux –, tout sentiment en un mot, si élevé, si légitime ou si profond soit-il. Le seul idéal qu'on puisse contempler c'est le "but", idéal aussi, puisque jamais atteint, que se propose le Droit: l'établissement de la paix entre les hommes' (author's trans.).

view. (Moreover, a complete *Wertfreiheit* is not attainable, as explained in Section 5.3.2.) On the contrary, scholars can and should proactively make use of their diverse national background by enriching their scholarship with a comparative perspective.

5.2.2 *The Promise of Comparative International Legal Scholarship*

If epistemic nationalism were unsurmountable, it would constitute a serious obstacle for international legal scholarship. Epistemic nationalism seems irreconcilable with scholarship because the regulative idea of any scholarship or science is its *epistemic universalism*. (It is a different matter that 'doing science' as a business is still typically politically and financially contained within the boundaries of the nation-state, through career paths, funding, etc.[15]) Epistemic universalism means that science/scholarship is based on the postulate of a global inter-subjectivity of research findings. Given certain premises and a particular method, in principle anyone, regardless of sex, nationality or religion should arrive at the same results. (Imagine a mathematical proof or a biological observation which is only valid for Germans or Chinese.) Global inter-subjectivity in turn requires a transnational academic legal discourse whose participants accept that arguments are sound only if they are fit for universal application.

Such a genuine transnational discourse is possible, because scholars (if they are in good faith) are not doomed to remain trapped in epistemic nationalism, for the following reasons. The first banal ground is that the subject matter of international legal scholarship, namely international law, claims global validity, scope and relevance. Unlike domestic law, international law is formally applicable not only within one single state's boundaries but in the whole world. Of course the origins of international law lie in the European state system that formed since the 16th century and in the rules then applied throughout Europe ('droit public de l'Europe')[16]. Simplistically put, these rules then were spread to other

[15] Cf. for this and for the term 'epistemic universalism' E. Crawford, T. Shinn and S. Sörlin (eds.), 'The Nationalization and Denationalization of the Sciences: An Introductory Essay' (1992) 16 *Sociology of the Sciences* 1, 2.

[16] G.B. de Mably, *Le droit public de l'Europe* (Geneva: Co. des Libr., 1776); J.L. Klüber, *Droit des gens moderne de l'Europe* (Paris: Aillaud, 1819); G. F. von Martens, *Précis du droit des gens moderne de l'Europe* (Paris: Guillaumin, 1858). See A. von Bogdandy and S. Hinghofer-Szalkay, 'Das etwas unheimliche Ius Publicum Europaeum' (2013) 73 *ZaöRV* 209.

continents, mainly through commerce and war, accompanied by ruthlessness and arrogance, and by destruction of other legal cultures in which that dissemination resulted.[17] As a result of this more or less hegemonial process, international law nowadays (at least in aspiration) spans the entire globe.

The global nature of international legal scholars' object of investigation is worth mentioning because it is distinct form the purely national object of study examined by scholars of domestic law; the latter are therefore to some extent doomed to epistemic nationalism. Of course the global nature of the object under study cannot prevent that it is examined from different (including different national) perspectives and with different methodologies, but it at least allows for a universalisation of perspectives. Add to this the 'globalising' socialisation of international legal scholars. In fact, the most influential scholars, who are accustomed to collaborating (notably within institutions such as the ILC, ILA or the ICJ) with researchers and/or practitioners from other countries, consistently downplay the relevance of national pre-understandings in dealing with international law as a scholar (or practitioner).[18]

But let us concede that this globalising socialisation, notably within international institutions, will never completely eclipse initial national legal formation. The diverse national background of international legal scholars will lead them to rely on differing (national) case law they rely on, on different domestic practice they know well, and will possibly lead to diverting assessments. Notably, nationally coloured methodological trends can lead to the following dead ends: At the risk of overusing clichés, we might say that British pragmatism might lose itself in unpredictable casuistics, US legal realism runs the risk of ending in legal

[17] See for an appraisal of the Eurocentrism of the writing of that history of international law (ignoring too many other experiences and forms of legal relations between autonomous communities developed in the course of history and discarding such extra-European experiences and forms which were discontinued as a result of domination and colonisation by European Powers) B. Fassbender and A. Peters, 'Introduction: Towards a Global History of International Law', in B. Fassbender and A. Peters (eds.), *Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 1–24.

[18] See H. Lauterpacht, 'The So-called Anglo-American and Continental Schools of Thought in International Law' (1931) 12 *BYIL* 31, 61: '... no substance in the view that there exist two schools of international law – the Anglo-American and the Continental ...'; C. Rousseau, 'Les conceptions nationales du droit des gens', in D. Bardonnet et al. (eds.), *Le droit international: unité et diversité: Mélanges offerts à Paul Reuter* (Paris: Pedone, 1981), 441, at 446; I. Brownlie, 'Remarks, Comparative Approaches to the Theory of International Law' (1986) 80 *ASILP* 154–55; R.Y. Jennings, 'An International Lawyer Takes Stock' (1990) 39 *ICLQ* 513, 527.

scepticism, legal cynicism or even in the denial of international law, that French legal formalism threatens to turn into rigourism, and to lose touch with reality, that German legal idealism can develop into sheer naiveté, German doctrine into dogmatism, and so on. It is also worth mentioning that the rise of English as the lingua franca of international legal scholarship strengthens the impact of the 'Anglo-Saxon' style of reflection on international law.[19]

At this point, the multinationality of the pool of international scholars turns into an *asset*. It is an asset because it allows individual scholars to learn from each other through reflexive acquisition of knowledge and so to renew themselves from within. Europe is particularly suited to serve as a 'laboratory'[20] for the hybridisation of 'national' brands of international legal scholarship, that is, for the mutual fertilisation of the different nationally permeated academic traditions.

A related, maybe even more important asset of the various national backgrounds of international legal scholars is that this diversity allows the actors to enrich their international legal scholarship by elements of comparative law, which thus may become 'comparative international legal scholarship', and thereby become more powerful. The comparative approach, analysing *national* practice, will allow better to identify a truly international legal corpus of rules on a particular international problem at hand. Take, as a first example, national court decisions. These may be relevant for the formation of international customary law, they might constitute 'subsequent practice' for the interpretation of international treaty law, and they are a 'subsidiary means for the determination of rules of [international] law' (Art. 38(1)(d) Statute of the International Court of Justice). Collecting and comparing national court decisions is therefore an important task of international legal scholars that can be performed properly only with some knowledge of the domestic systems.

Second, legal comparison plays a traditional (albeit a limited and technical) role in the examination of the general principles of law in terms of Art. 38(1)(c) Statute of the International Court of Justice. General principles of law became prominent in EU-law – the development of European administrative law and the European Charter of Fundamental Rights fed particularly on the comparison and synthesis

[19] See on the importance of language, its mastery and the cultural baggage coming with it for the evolution of international criminal law scholarship M. Bohlander, 'Language, Culture, Legal Traditions, and International Criminal Justice' (2014) 3 *JICJ* 1–23.

[20] M. Delmas-Marty, 'Comparative Law and International Law: Methods for Ordering Pluralism' (2006) 3 *Tyo JLP* 43.

of relevant principles of administrative law[21] and fundamental rights in the member states[22]. In international criminal law and criminal procedure, general principles of law have grown in their practical significance.[23] Comparative law also has something to say in the controversy surrounding the universalism or relativism of human rights to identify any 'overlapping consensus' here.

A third aspect compelling comparisons is that international law must be implemented by the states themselves due to the lack of a central enforcement mechanism. Therefore, international law must rely on 'local legitimation'.[24] Actors must know about local legal traditions if they are to optimise their use of this resource of legitimacy.

Fourth, many phenomena with a global scope (ranging from pollution over migration to terrorism) are caused not by states (understood as black boxes), but by political and private actors within states. Globalisation in that sense has, and this is banal, intensified the interactions between the national and international levels of law and governance. The globalisation of national law and the 'multiculturality' of international law are co-constitutive and interdependent. Attempts to resolve any global problems with help of international law must therefore act upon the situation within the state. Therefore, those who create and apply international law must know domestic framework-conditions very well.

For all of these reasons, knowledge about different national legal regimes interacting with and co-constituting the body of international law seems increasingly important. Along this line, Mireille Delmas-Marty,[25] Emmanuelle Jouannet,[26] and Anthea Roberts[27] have suggested that the study of the various legal regimes, traditions and legal ways of thinking, as well as methods of legal comparison, should be integrated

[21] J. Schwarze, *European Administrative Law*, 2nd edn (London: Thomson/Sweet & Maxwell, 2006).

[22] Art. 6 Treaty on European Union, OJ 2008, No. C 115/01 (EU Treaty).

[23] See ICTY, Case No. IT-95-17/1-T, *Furundžija* (10 December 1998), para. 178; Art. 21 para. 1(c) Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 90 (Rome Statute).

[24] L.A. Obiora, 'Toward an Auspicious Reconciliation of International and Comparative Analyses' (1998) 46 *AJCL* 669, 680.

[25] Delmas-Marty, 'Comparative Law and International Law', n. 20.

[26] E. Jouannet, 'French and American Perspectives on International Law: Legal Cultures and International Law' (2006) 58 *Mai LR* 291, 333.

[27] A. Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *ICLQ* 57.

into the study of international law. International legal scholars need to be comparatists, and the diversity of national backgrounds helps them to be so.[28] Importantly, scholars need not only compare the various domestic solutions in a 'horizontal' manner, but also look 'vertically' at domestic law and international law.[29]

In response to the charge of epistemic nationalism, we might say that the variety of national legal and academic cultures and of research styles on international law is not necessarily fatal but – on the contrary – has the potential to enrich research in international law worldwide by allowing for 'comparative international legal scholarship'. The acknowledgement and discussion of real-world epistemic nationalism in international legal research can help pursuing the regulative idea of any scholarship, namely epistemic universalism. This does not require scholars to completely detach themselves from their education and cultural context (which would be impossible and unnecessary), but demands that they make a conscious effort to internalise the 'others' perspectives.

5.3 Charge No. 2

5.3.1 The Problem of Ideology

Epistemic nationalism is just one facet of the problem of ideology in scholarship. 'Ideology' is here employed in the negative sense of a manipulative belief system that claims to embody general and ultimate truths and values, while camouflaging political and economic self-interest. In the field of international law, most relevant ideologies are political ideologies such as liberalism, socialism, cosmopolitanism and the like. The charge of ideology is that (much) of international legal scholarship has an 'ideological nature', with its findings depending on 'political preferences remaining concealed', instead of being laid open.[30]

[28] For scholarly observers, it is an open question whether such comparison should be best conducted in an 'inductive' fashion, starting from the inchoate court practice and seeking to isolate the lowest common denominator, or whether it should – inversely – 'deduce' rules from more abstract principles (such as the primacy of human rights protection acknowledged in the international legal system). Probably a combined approach, both bottom up and top down, that is, an examination of state (court) practice guided by principles in the style of a 'better law' approach is warranted in order to identify and develop international law.

[29] *Cf.* A. Momirov and A. Naudé Fourié, 'Vertical Comparative Law Methods: Tools for Conceptualising the International Rule of Law' (2009) 2 *ELR* 291.

[30] I. Feichtner, 'Realizing Utopia through the Practice of International Law' (2012) 23 *EJIL* 1143, 1154.

A recent paper was 'animated ... by the concern that legal scholarship could turn out to be nothing more than the pseudo-objective defence of ruling ideologies.'[31]

The problem of ideology (the pervasiveness of a specific political belief system) seems exacerbated in scholarship that is 'idealist' (as opposed to 'positivist', 'realist', or 'critical'). In fact 'idealism' or even 'utopianism' is normally used as a pejorative term both by 'realists'[32] and by critics,[33] to characterise certain academic methods on the on the ground that these are in reality (political) ideology. The third group of anti-idealists, the 'positivists', also denounced a 'tendency wide-spread among writers on international law' to produce 'political ideology'.[34] Hans Kelsen sought to escape this by writing books of a 'purely juristic character'.[35] In his foreword to the commentary on the UN Charter of 1950, he stressed that this work dealt 'with the law of the Organisation, not with its actual or desired role in the international play of powers. *Separation of law from politics* in the presentation of national or international problems is possible.'[36]

5.3.2 *The Promise of Political Implications*

In contrast to what Kelsen believed and what he aspired to do, it is nowadays doubted that it works to purge international legal scholarship

[31] J. von Bernstorff, 'International Legal Scholarship as a Cooling Medium in International Law and Politics' (2014) 25 *EJIL* 977, 977–78.

[32] See for the view that interwar political science was 'idealist'/'utopian', and an erroneous attempt to transfer '19th century liberalism' to international relations: E.H. Carr, *The Twenty Years' Crisis 1919–1939* (London: MacMillan, 1948), 8, 11, 40 and *passim*.

[33] Using concrete international legal problems, notably M. Koskenniemi has sought to show how norm-oriented ('idealistic'/'utopist') argumentation and fact-oriented ('realist'/'apologist') argumentation either merge or are self-defeating or contradictory. Because of the open structure of legal argumentation, says Koskenniemi, public international law cannot be investigated scientifically. Hence, international legal questions can only be resolved through conscious or unconscious resort to (necessarily controversial) political convictions (M. Koskenniemi, 'The Politics of International Law' (1990) 1 *EJIL* 4, 7, 9, 12 and *passim*). See further Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd edn (New York: Cambridge University Press, 2005); D. Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1987); A. Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 *EJIL* 66–96.

[34] H. Kelsen, 'Preface', n. 13, at ix. See for the ideal of science underpinning Kelsen's approach A. Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25 *EJIL* 369, 377–79.

[35] *Ibid.*

[36] H. Kelsen, *The Law of the United Nations* (London: Stevens, 1950), viii (emphasis added).

of politics. It is widely accepted that international legal scholars are to some extent political actors, too. Martti Koskenniemi at the opening conference of the European Society of International Law in Florence in 2004 put it as follows: '[T]he choice is not between law and politics, but between one politics of law, and another. Everything is at stake, but not for everyone. And how to distinguish? Well, in the same way we distinguish between kitsch and non-kitsch.'[37] This statement may be a bit blunt, so let us look at the factors which 'politicise' international legal scholarship one by one.

The first factor is that the object of their studies is itself a political matter, maybe even 'power in disguise' as hard-core realist Georg Schwarzenberger called it.[38] A more moderate (and in my view more appropriate view) is that international law is the 'result from the blending of ethics and power'.[39]

International law is political, not only because of its dependence on political power, but also because it transports political values. The most influential academic schools of our time, the New Haven School[40] and Critical Legal Studies,[41] have both, although with quite different arguments, insisted on this point, and have not become tired of unveiling through ever new examples the pretences of neutrality and technicity of international law as a chimaera.

Secondly, legal scholars are political because they are experts. Experts are not technical, neutral, non-ideological, in short 'unpolitical'. Rather, what is going on is the 'politics of expertise'.[42] '[F]or knowledge itself is a power', as Francis Bacon[43] put it. Michel Foucault gave this insight

[37] M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *EJIL* 113, 123.

[38] G. Schwarzenberger, *Power Politics: A Study of World Society*, 3rd edn (London: Stevens, 1964), 199, 202–03: 'the primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power ... power politics in disguise'.

[39] G. Scelle, *Manuel de droit international public* (Paris: Domat-Montchrestien, 1948), 6: 'Les règles de droit viennent de la conjonction de l'éthique et du pouvoir'.

[40] Cf. R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), vi: 'I try to show that there is an unavoidable choice to be made between the perception of international law as a system of neutral rules, and international law as a system of decision-making towards the attainment of certain declared values'.

[41] E.H. Carr, *The Twenty Years' Crisis*, n. 32.

[42] D. Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 *EHRLR* 463, 463; D. Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 5 *Syd LR* 5.

[43] F. Bacon, *Mediationes Sacrae* (London: Excusum impensis Humfredi Hooper, 1597), chapter 11, 'Of Heresies', at M4 (with regard to God).

a different twist: the objectives of knowledge and the objectives of power are the same: '... in knowing we control, and in controlling we know'.[44]

Finally, the international legal scholar is a political actor because her value judgements normally carry political implications. Values are one component of any scholarly treatment of international law. The *Werturteilsstreit*[45] and the *Positivismusstreit*[46] have done away with the previously cherished belief that science and values could be separated. The question before had only been whether the academic *should* pronounce a value judgement or not. After the *Positivismusstreit* of the 1960s, the problem is now conceived the other way round: The severability of science and values has been called into question. The issue is no longer whether the scholar should pronounce a value judgement but, on the contrary, whether she *can* actually *abstain* from doing so. The answer mostly given today is that she cannot. A complete value-free academic activity appears impossible, because any kind of statement and any interpretation are pre-structured by the speaker's *Vorverständnis*. International legal scholarship is 'value-free' only in the sense that it does not generate the (legal) norms but only statements *about* norms (about law).

On the other hand, it is not the primary purpose of scholarship to give expression to values. International legal scholars should therefore find a middle ground between the unrealistic postulate of value-freedom (*Wertfreiheit*) and unbounded evaluation.[47] When these values are

[44] G. Gutting, 'Michel Foucault' Stanford Encyclopedia of Philosophy (2008), available from http://stanford.library.usyd.edu.au/archives/fall2008/entries/foucault/ (last checked on 12 December 2016); M. Foucault, *Discipline and Punish: The Birth of the Prison*, A. Sheridan (trans.) (New York: Random House, 1975), 170–77. Foucault analysed the mutual co-constitution of knowledge and power with regard to (visual) observation in prisons as a means of exercising 'disciplinary' power, but his writing on this point has been received as a more general insight by later legal (notably critical legal) scholarship.

[45] According to Max Weber, 'jurisprudence ... ascertains what is valid according to the rules of juristic thought, which is composed partly of logic and partly of frameworks established by convention. Thus it determines *if* certain legal rules and certain modes of interpretation are to be seen as binding. It does not answer the question of *whether* precisely these rules should be created. Jurisprudence can only declare that, if one wishes to succeed, then this legal rule is the suitable way of doing so according to the norms of our legal system'. M. Weber, 'Science as a Vocation', in M. Weber, *Science as a Vocation*, M. John (trans.), P. Lassman et al (eds.) (London: Unwin Hyman, 1989), 3, 19 (emphasis in the original).

[46] See H. Maus and F. Fürstenberg (eds.), *Der Positivismusstreit in der deutschen Soziologie* (Neuwied: Luchterhand, 1969).

[47] L. Engi, 'Wissenschaft und Werturteil – Wissenschaft und Politik' (2009) 4 *Ancilla iuris* 25, 25.

reflected and laid open and not sold as scientific insights, the reliance on such values does not damage the scholarly character of reflection, wrote Max Weber.[48] Antonio Cassese says along the same lines: 'What matters, ... is that he or she [the scholar] should make it explicit and clear that the choice between two conflicting values is grounded in a personal slant or bias, and not in any "objective" legal precedence of one value over the other'.[49] It remains however exceedingly difficult to follow that recommendation to make transparent one's ideational background in real life scholarship.

5.3.3 *The Promise of Normative (as Opposed to 'Positive') Analysis*

The dangers of ideology seem greater when scholars engage in a normative analysis of international law. Such a normative analysis is rejected by traditional legal positivists, who demand that international legal scholarship should occupy a 'role [only] as a supernumerary and chronicler'.[50] It is also rejected by contemporary neo-Kelsenianists[51] and by the hard-core law and economics school. For example, Goldsmith and Posner deplore that 'theorizing often fuels, and is overtaken by, normative speculation about improving international law'.[52]

In opposition to that stance, this section seeks to show that specific features of international law, notably its openness and dynamics, *require* a normative analysis of the law and of its applications. By 'normative analysis', I mean justifying or criticising existing norms, making reform proposals, evaluating the application of the law and criticising such practice.[53] Because of the leeway inherent in any interpretation and

[48] M. Weber, '"Objectivity" in Social Sciences', in M. Weber, *The Methodology of the Social Sciences*, E. A. Shils and H. A. Finch (trans., eds.) (New York: Free Press, 1949), 49.

[49] A. Cassese, *Five Masters of international Law* (Oxford: Hart, 2011), 259.

[50] C. Hillgruber, 'Braucht das Völkerrecht eine Völkerrechtstheorie?' in M. Jestaedt and O. Lepsius (eds.), *Rechtswissenschaftstheorie* (Tübingen: Mohr Siebeck, 2008), 113, at 121 (author's trans.).

[51] See critically on creeping law-making by scholars from the perspective of a pure theory of law J. Kammerhofer, 'Law-Making by Scholarship? The Dark Side of 21st Century International Law "Methodology"' in J. Crawford and S. Nouwen (eds.), *Proceedings of the European Society of International Law* 3 (Oxford: Hart, 2010), 115.

[52] J. Landman Goldsmith and E.A. Posner, *The Limits of International Law* (Oxford University Press, 2005), 15.

[53] Such a normative analysis was, for example, performed by scholars and academic institutions who analysed the application of the rules concerning the use of force and the Security Council by the US and British government in the spring of 2003, who

application of a rule to the facts, any evaluation of legal practice is, in the sense of a theory of science, a 'normative' and not merely a 'positive' analysis.

5.3.3.1 The Inevitability and Desirability of Normative Analysis

Normative analysis is inevitable to some extent. Although it can be ideal-typically distinguished from positive analysis in which the law is 'only' described, explained and prognosticated, there is in reality a blurred intermediate zone. First, because 'description' is in itself already a constructive and systematic performance, which is based on numerous distinctions and choices. The 'observer' must choose the actors, the acts, the periods of examination, and he must interpret texts. In all this, the observer's ('normative') preconceptions pre-structure her 'positive' description. This blurred zone has been well described by a law and economics scholar who in principle insists on positive analysis of the law: '[T]he responsibility of scholars is to illuminate, not to promote their own ideals. On the other hand, good scholarship holds great promise for advocacy; for it can clarify causal relationships that are otherwise obscure. *Illumination is not neutral.*'[54]

The second reason why normative analysis of international law cannot be avoided is the typical indeterminacy and vagueness of treaty provisions and by a large number of unwritten norms. Therefore, much more doubt hovers over the existence of the *lex lata* than in domestic law, which is relatively fully and precisely codified in the form of codes, laws, and decrees. In addition, international law has evolved gradually, often out of soft law texts. The exact point of change from a pre-legal practice to a hard rule of international customary law can hardly be pinpointed. For these reasons, neither the canons of construction for treaty interpretation nor empirical research on the formation of customary law will in themselves yield clear results. The findings must be complemented by normative (evaluative) considerations. For example, it makes sense to qualify a practice and the accompanying *opinio iuris* as sufficiently general and enduring when the legal norm identified thereby is overall in conformity with the international legal system and in harmony with other international legal principles. As Antonio Cassese put it, 'the critical positivist

highlighted that these rules had been misinterpreted and distorted by the political actors and that they could not serve as a proper legal basis for the invasion of Iraq in 2003.

[54] J.P. Trachtman, *The Economic Structure of International Law* (Cambridge: Harvard University Press, 2008), 4 (emphasis added).

should feel free . . . critically to appraise the rule or institution . . . in light of the . . . general values upheld in the international community'.[55]

Finally, a normative analysis is desirable, as the historical experience of the defencelessness of the 'pure' scholarship of international law against ideological modification of the law shows. 'Pure' positivism 'may be deemed to involve a logical and moral ban or impediment to lawyers in the fight against authoritarian regimes'.[56] Notably during the Third Reich, many German international legal scholars did not voice any critique. Instead of pointing out violations of international law, they subscribed to a National Socialist doctrine of international law by which the norms were modified and adapted to ideology.[57]

A dilemma is that while the early 20th-century legal positivism did not erect a bulwark against Nazi scholarship, a more 'normative' analysis (of whatever flavour) is not per se better. 'Nazi lawyers themselves conducted a normative analysis of the law, by criticising and interpreting the existing law from the perspective of the new Volksgemeinschaft and its assumed general values'; in some sense there was 'too much normativity in Nazi legal scholarship'.[58] However, it was the legal positivists' claim that there is no necessary connection between law and morality, which may have facilitated National Socialism to fill the law with their contents. And then, legal positivism by definition required legal scholars to accept and work with the existent ('posited') law, however morally wrong it may have been.

In our times, too, purely positive analysis has engendered a false security. Because of the openness of international norms, it is often not really clear what their contents are. In this situation, states will tend to assert rules which are in their favour (and thereby set up their own version of international law) or they will do what they want.[59]

[55] See in this sense Cassese, *Five Masters*, n. 49, at 259. Cf. for a critique of the neglect of taking into account general principles: H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), 438: 'the desire of generations of international lawyers to confine their activity to a registration of the practice of States has discouraged any attempt at relating it to a higher legal principle, or to the conception of international law as a whole'.

[56] Cassese, *Five Masters*, n. 49, Preface, at viii.

[57] See D.F. Vagts, 'International Law in the Third Reich' (1990) 84 *AJIL* 661 with references.

[58] Bernstorff, 'International Legal Scholarship', n. 31, at 983.

[59] W. Twining, W. Farnsworth, S. Vogenauer, and F. Tesón, 'The Role of Academics in the Legal System' in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 920, at 942, 945.

The mere 'description' of such legal claims and practice of governments by scholarly observers is then to some extent random.

5.3.3.2 The Feasibility of Normative Analysis

The normative analysis we need is feasible without (deliberately or unwittingly) selling emerging norms for law as it stands. That phenomenon is widespread in international legal scholarship, last but not least because the boundary between law and not-yet-law, due to the special features of the international legal process, is unclear. The premature labelling of merely emerging norms as valid law is in methodological terms flawed because it mixes (beyond what is inevitable) positive and normative analysis. Moreover, it risks undermining the normative power of international law as a whole. When the legal scholar wrongly asserts the existence of a legal norm she usurps the position of a law-maker without normative justification.[60]

As long as legal scholars mark where they make an evaluation (by relying on principles with some anchorage in the international legal order), and as long as they signal what is, according to their analysis, the *lex lata*, and what they request *de lege ferenda*, a normative analysis fully conforms to scholarly standards. Louis Henkin described the tightrope walk between methodologically sound, but still creative reconstruction of the law and unscholarly juris-fiction as follows: 'I don't trust the wishful thinkers, I don't trust those who say "this is the law because it ought to be". But I support those, and I am one of those, who say "this is what the law ought to be, and whether I'm not sure it's not, let me see to what extent it is maybe, or can be made to be!"'.[61] In this form (as an evaluative systematisation and an evaluative closure of legal gaps), normative analysis is not only a methodologically sound element of international legal scholarship in the sense of 'nice to have' but an indispensable part of it. Normative analysis is necessary, exactly because of the inherent graduality of the international legal process and because of the indeterminacy of treaty law. These typical features of international law prevent, as explained, the purely positive analysis from generating clear and unequivocal results. And because states can then more or less choose the interpretation of the law that suits them best, the auto-limitation of scholars to 'description' of the law and legal practice 'as it stands', will make it even easier for states to disregard international law

[60] The (lacking) authority of scholars to *make* law will be explained in Section 5.5.2.

[61] Cassese, *Five Masters*, n. 49, at 197.

under cover of law. On the premise that such breaches of international law are undesirable, normative analysis (which more easily than positive analysis uncover these breaches) is necessary.

To conclude, the perils of (political) ideology can be met by scholars consciously and proactively espousing it as a challenge.[62] The problems can hardly be avoided by concentrating on seemingly value-free 'positive' analysis. Instead, scholars might acknowledge that an ambivalence between normative and positive analysis characterises international legal scholarship, and that this ambivalence embodies a tension which can be productive.

5.4 Charge No. 3

5.4.1 *The Problem of Unscholarliness and Recurring Attempts of 'Scientification' of the Discipline*

The contemporary critique of ideology and national bias, often coupled with scepticism vis-à-vis all 'normative' approaches, frequently goes hand-in-hand with the charge of 'unscholarliness'. The critique is that legal academics dealing with international law often (or even inevitably) lacks a scholarly (or 'scientific') character, and therefore does not really deserve the label 'scholarship' (or even 'science', to use the Germanicism).

Such critique is implied or explicitly voiced by proponents of the ongoing 'empirical turn'[63] of international legal scholarship. Those favouring an economic approach to international law have submitted that 'international legal scholarship lacks a progressive research program'.[64] For the proponents of law and economics, the unscholarly character of much legal research is due to the failure to distinguish between description and prescription. As a remedy, law and economics recommends to use certain 'more promising economic methodologies, in terms of their capacity to generate a progressive research program that

[62] Along the same line, Jochen von Bernstorff has asked for a 'self-reflected scholarly operation, which acknowledges its political character ... scholarship should make transparent from a reflexive distance which particular political or economic projects [his or her] methodologies may serve in a given research context'. Bernstorff, 'International Legal Scholarship', n. 31, at 984.

[63] G. Shaffer and T. Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 *AJIL* 1.

[64] J.L. Dunoff and J.P. Trachtmann, 'Economic Analysis of International Law' (1999) 24 *YJIL* 1, 3.

might usefully address persistent international law problems',[65] and of course quantitative empirics.[66]

That 'new scientism'[67] which has taken hold in the discipline of international law is actually less radical or unusual than it appears at first sight. In fact, all historical 'paradigm shifts' can be read as attempts at the scientification of the authors' engagement with international law.[68] Thus, in the 17th and 18th centuries, a secularised natural law was mobilised against theologically based natural law, with reference to mechanics, mathematics and the natural sciences.[69] Thomas Hobbes compared the investigation of the law of the state to dismantling a clock to understand the functions of the constituent pieces and wheels.[70] Samuel Pufendorf prided himself on having worked out the first science of natural law and public international law.[71] Christian Wolff

[65] *Ibid.*, 4. [66] See on empirical approaches also below Section 5.6.3.1.

[67] H. Hongjuh Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 *Neb LR* 181, 190.

[68] See also Orford, 'Scientific Reason', n. 34, at 369: 'the status of international law as an academic discipline has been intimately connected with the capacity of international lawyers to demonstrate that our discipline is properly scientific. Yet the ideals of science upon which international lawyers have drawn in seeking to demonstrate the scientific nature of our work have not remained static.' For an overview of the schools of international law, see the focus section of 44 (2001) GYIL 25–201. See also S. R. Ratner and A.M. Slaughter (eds.), 'Symposium on Method in International Law' (1999) 93 *AJIL* 291.

[69] From the secondary literature, see D. von Stephanitz, *Exakte Wissenschaft und Recht: Der Einfluß von Naturwissenschaften und Mathematik auf das Rechtsdenken und Rechtswissenschaft in zweieinhalb Jahrtausenden. Ein historischer Grundriß* (Berlin: De Gruyter, 1970), 69–72, 84–92, 170; A. Dufour, 'Le paradigme scientifique dans la pensée juridique moderne' in P. Amselek (ed.), *Théorie du droit et science* (Paris: Presses Univ. de France, 1994), 147, at 154, 160 with further references. 'C'est ... surtout chez Pufendorf que le nouveau paradigme physico-mathématique de la pensée juridique moderne trouvera sa première expression privilegiée ... Pufendorf finit-il par épouser dans le *De Jure Naturae et Gentium*de 1672 l'infléchissement démonstratif donné à la méthode mathématique et du même coup l'idéal cartésien d'une science découlant tout entière d'un principe fondamental d'une certitude absolue.' (*Ibid.*, 158, 161).

[70] T. Hobbes, *On the Citizen 10*, R. Tuck and M. Silverthorne (trans., eds.) (Cambridge University Press, 1998): 'For a thing is best known from its constituents. As in an automatic Clock or other fairly complex device, one cannot get to know the function or each part and wheel unless one takes it apart, and examines separately the material, shape and motion of the parts, so in investigating the right of a commonwealth and the duties of its citizens, there is a need, not indeed to take the commonwealth apart, but to view it as taken apart ...'.

[71] 'Those who busily investigate the make-up of natural bodies do not consider it sufficient to inspect only the external appearances that immediately meet the eye at a first glance; rather, they also make extraordinary efforts to probe those bodies more deeply and to analyze them into their component parts ... The same path has been taken by those concerned to examine carefully the character of the most prominent moral body, namely

succeeded Hobbes and Pufendorf in the physico-mathematical paradigm.[72] In the course of the 19th century,[73] others aspired to a 'natural science of law'[74] or a 'biology of law'.[75]

At least since the end of the 19th century, the natural law-paradigm was dismissed as speculative and unscholarly.[76] International lawyers, such as Dionisio Anzilotti, in his *Corso di diritto internazionale* of 1928 sought to preserve the scholarly character of international legal research using the methods of legal positivism: the strict concentration on the positive rules of public international law, to the exclusion of all political and ethical considerations.[77] This approach reached its height in Hans Kelsen's *Pure Theory of Law*, with the explicit objective of scientification. In his foreword to the already mentioned commentary on the UN Charter of 1950, Kelsen stressed that these works embodied 'a juristic – not a political, approach' to the United Nations and other international

the state.' S. Pufendorf, *Dissertatio de statu hominum naturali*, M. Seidler (trans.) new edn of the Latin text (Lewiston, NY: E. Mellen Press, 1990), 109.

72 See C. Wolff, *Institutiones Juris Naturae et Gentium, in quibus ex ipsa hominis natura continuo nexu omnes obligationes et iura omnia deducuntur* (Halle and Magdeburg: Renger, 1750), preface (repr. in 26 C. Wolff, *Gesammelte Werke (Collected Works) Praefatio*, 1–5, M. Thomann (ed.), F. Nicolai (trans.)).

73 From the secondary literature, see R. M. Kiesow, 'Science naturelle et droit dans la deuxième moitié du XIXième siècle en Allemagne' in P. Amselek, *Théorie du droit et science* (Paris: Léviathan 1994), 187–210, at 187, with numerous references to biologism, ethnologism and social Darwinism in German legal scholarship of the 19th century; cf. also von Stephanitz, *Exakte Wissenschaft und Recht*, n. 69, at 135–215.

74 A.H. Post, *Einleitung in eine Naturwissenschaft des Rechts* (Oldenburg: Schulz, 1872), [relevant page(s)]; R. von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, 4th/9th edn (Leipzig: Breitkopf und Härtel, 1880, repr. Aalen: Scienta, 1968), Part II/2, § 41, 361: Legal scholarly writing may be described as 'natural science in the spiritual sphere'. See also: 'It has here been undertaken the same with constitutional law as what I thrive to achieve with my Roman law – a natural-scientific examination, a chemical analysis of the object' (R. von Jhering, Letter to Gerber from 17 July 1852 in M.G. Losano (ed.), *Der Briefwechsel zwischen Jhering und Gerber* (Ebelsbach: Gremer, 1984), Part 1, 51 (author's trans.).

75 J. E. Kuntze, *Der Wendepunkt der Rechtswissenschaft: Ein Beitrag zur Orientierung über den gegenwärtigen Stand- und Zielpunkt derselben* (Leipzig: Hinrichs, 1856), 90, para. 89.

76 See, most particularly H. Kelsen, *Über Grenzen zwischen juristischer und soziologischer Methode* (Tübingen: J.C.B. Mohr, 1911), 16 (Presentation to the Viennese Sociological Society): 'An example for such an inadmissible mixing of the normative with the explicative considerations, of such a faulty syncretism of methods is presented by natural law.' (author's trans.). See already Holtzendorff, 'Einleitung in das Völkerrecht', n. 11, at 44–45.

77 D. Anzilotti, *Corso di Diritto Internazionale, Introduzione – Teorie Generali*, 13th edn (Roma: Atheneaum, 1928), 16–18.

issues.[78] Everything else was 'not a political theory of public international law but a political ideology'.[79]

American pragmatism at the end of the 19th century ran in the opposite direction, but with the same goal of scientification. It conceived of legal science as a discipline for investigating causal relationships and prognosticating results.[80] Legal scholarship was cloaked in scienticism through recourse to sociology, psychology and psychoanalysis. In international legal scholarship, legal realism aspired to satisfy the demands of scientification. Thus, in his renowned programmatic essay of 1940, Hans Morgenthau, who was by training a lawyer, warned that international legal scholarship was 'in a retarded state of scientific development'.[81] Georg Schwarzenberger preached an 'inductive treatment of international law' as 'an empirically and dialectically evolved response to ... the shortcomings of deductive speculation and rationally unverifiable eclecticism in the Doctrine of international law'.[82]

After the catastrophe of the Third Reich and the Second World War a 'retreat from positivism' and a 'return to natural law' took place in international legal scholarship.[83] Thereby the academy reacted to the 'inacceptability of an unfettered autonomy of states that has become obvious in the two world wars' and so attempted to found 'international

[78] Kelsen, *Law of the United Nations*, n. 36, at xiii. [79] Kelsen, 'Preface', n. 13, at ix.

[80] See among the pragmatists O. W. Holmes, 'Law in Science and Science in Law' (1899) 12 *Harv LR* 443, repr. in R. Posner (ed.), *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr* (Chicago University Press, 1992), 185–200.

[81] H.J. Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 *AJIL* 260, 264.

[82] G. Schwarzenberger, *The Inductive Approach to International Law* (London: Stevens, 1965), 4. Schwarzenberger found international legal scholarship to suffer from 'over-simplifications', and 'doctrinal attempts to blur, rather than clarify, the borderlines between lex lata and lex ferenda'. In contrast, the proclaimed inductive method should focus on the '(1) exclusive character of three law-creating processes in international law' [according to Art. 38 ICJ Statute], '(2) establishment of the "means for the determination of rules of law" (the law-determining agencies and their elements) in accordance with rationally verifiable criteria'; '(3) awareness of the character of the rules of international law as the only binding norms of international law'. This proposition implied 'that legal principles on any level of abstraction, terms of classification, maxims or analogies from other legal systems as such cannot be "sources" of rules of international law.' Finally, the inductive method sought the '4) realisation of the differences which exist between international law as applied in unorganised, partly organised and fully organised international society' (*Ibid.*, 4–6).

[83] U. Scheuner, 'Naturalistische Strömungen im heutigen Völkerrecht' (1950/51) 13 *ZaöRV* 556, 607 (author's trans.). According to Scheuner, this 'retreat' was not limited to Germany (for the Anglo-Saxon and French sphere see ibid., 585–89).

law independently from the will of states'.[84] However, the issue was also about salvaging the scientific character of legal writing through a renewed focus on 'enduring' subject matters[85] in the Aristotelian sense.[86]

By contrast, the New Haven School, which entered stage with high scientific ambitions, promised a new jurisprudence, informed from other disciplines and context-related. It focussed on common values and advocated 'the conscious, deliberate use of law as an instrument of politics.'[87] As Myres McDougal pronounced in an address to the Yale Law School Association in 1947, 'our aspirations are not modest ... and our emphasis is now primarily upon construction ... we hope before too long to become a faculty ... which can bring the best methods of contemporary science, and the creative flash of insight, to the task of creating the law of the future'.[88] The approach accommodating these ambitions continues to be significant for international legal scholarship.

Many fundamental doubts about the 'scientific' character of legal scholarship[89] go back to the Aristotelian notion of 'science'. For Aristotle, science was possible only in relation to necessary and universal subject matters.[90] This arose from his demand for strict equivalence between knowledge and the subject of knowledge. From the Aristotelian perspective, law belonged to the realm of human experience, which related to transient, perishable things. Practical wisdom (φρόνησις), or prudence (*prudentia*), which recognises the contingent

[84] *Ibid.*, 607.

[85] See e.g. E. Wolf, 'Fragwürdigkeit und Notwendigkeit der Rechtswissenschaft' (1953, repr. 1965) 15 *Freiburger Universitätsreden* 20–21.

[86] For the Aristotelian concept of science see Aristotle, *The Nicomachean Ethics*, H. Rackham (trans.) (Cambridge: Harvard University Press, 1996), book VI, chap. iii, sec. 2.

[87] Lasswell and McDougal, Jurisprudence for a Free Society, n. 12, at xxii.

[88] M. S. McDougal, 'The Law School of the Future: From Legal Realism to Policy Science in the World Community' (1946/47) 56 *YLJ* 1345, 1355. See also M.S. McDougal, 'International Law, Power, and Policy: A Contemporary Conception' (1953-I) 82 *RCADI* 133.

[89] See O. Weinberger, 'Der Wissenschaftsbegriff der Rechtswissenschaften' (1975) 5 *Studia Leibnitiana, special issue (Sonderheft)* 102; A. Kaufmann, 'Über die Wissenschaftlichkeit der Rechtswissenschaft' (1986) 72 *Archiv für Rechts- und Sozialphilosophie* 425, 429; C. Engel and W. Schön (eds.), *Das Proprium der Rechtswissenschaften* (Tübingen: Mohr Siebeck, 2007).

[90] 'We all conceive that a thing we know scientifically cannot vary; ... An object of Scientific Knowledge, therefore, exists of necessity. It is therefore eternal, ...' Aristotle, *The Nicomachean Ethics*, n. 86, at iii.

realities of practice, was therefore no science (επιστήμη).[91] Accordingly, jurisprudence was merely a 'wise knowledge of law'.

The Aristotelian notion obviously influenced the Prussian Prosecutor Julius Hermann von Kirchmann's famous 1847 Berlin lecture on the 'Worthlessness of Jurisprudence as a Science'. Kirchmann had identified the transitoriness of the subject matter of law 'as the fundamental ill, from which the science suffered'. 'By making the accidental its object, it becomes random itself; three corrective words of the legislator, and entire law libraries become scrap paper.'[92] The fear of producing only scrap paper especially haunts international legal scholars in areas which evolve very quickly, such as international investment law or international criminal law.

5.4.2 *The Promise of Theory*

The merits of the critique of unscholarliness and of the current and historic attempts to scientify the research in international law can be assessed by asking how (and which) types of research better achieve what successful sciences are generally supposed to achieve, namely the accumulation of inter-subjective knowledge. (*Which* knowledge of course depends on research interest and research questions asked.)

Legal scholars acknowledge that their research should, in principle, produce 'new discoveries'.[93] However, in legal scholarship, knowledge gains are not as obvious, and it is even explicitly denied that they exist.[94] What is the reason for the lacking accumulation of knowledge in legal

[91] '[I]t follows that Prudence is not the same as Science, ... because matters of conduct admit of variation': *ibid.*, vol. VI, iv, 3). According to H.J. Berman, Aristotle's jurisprudence was not even a τέχνη, rather it verged into ethics, politics, religion, and rhetoric. H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 133.

[92] J.H. von Kirchmann, 'Die Wertlosigkeit der Jurisprudenz als Wissenschaft' in H.H. Meyer-Tscheppe (ed.), *Die Wertlosigkeit der Jurisprudenz als Wissenschaft* (Heidelberg: Manutius, 1988), at 15, 29 (author's trans.).

[93] C.F. von Savigny, *System of the Modern Roman Law*, W. Holloway (transl.), (Madras: J. Higginbotham, 1867), ix–x, stressed that 'the mass of acquirements [*Kenntnisse*] brought into operation, in comparison with that earlier time, stands very high ... Nothing certainly is more commendable than the effort to enrich science by fresh discoveries; ...'.

[94] Kirchmann, 'Wertlosigkeit der Jurisprudenz', n. 92, at 13: '[L]egal scholarship ... has, since at least the times of Bacon remained stationary ..., the controversies have not become less, but more, even where the most laborious full investigation thought to have finally reached a stable result, barely a decade passes and the quarrel begins anew' (author's trans.).

research?[95] The reason does not appear to lie in the methods of producing knowledge. The core of the scientific procedure is the inter-subjectivity of method, that is, of the path that leads to the result.[96] In the 'exact' sciences, that method should be apt to be applied in principle by everyone, and then lead to the same result. In legal scholarship, results are obtained primarily through argument rather than through empirical observation. There is not one single answer but rather a range of possible results, the outer limits of that range being defined by the admissible (that is, professionally acknowledged) strategies of argumentation. The standard of argument in good legal scholarship is high. Findings of legal research will generally be inter-subjectively repeatable. The reason for the meagre accumulation of knowledge rather is the focus of legal research on concrete applications of law. The connecting link between theory and less abstract research results is lacking. This is 'less the construction of a building . . . but the accumulation of unused bricks in a pile'.[97]

To construct the edifice of legal scholarship, we need theories in the sense of models. What I have in mind needs to be distinguished from 'bigger' and 'smaller' concepts which are often also called 'theory' in the professional jargon of jurists. I do not mean grand designs, 'theories' in the parlance of social sciences and the humanities, such as 'discourse theory', 'general systems theory', or 'pure theory of law'. Those are rather paradigms or frameworks, lenses through which the relevant objects of study are examined. Neither do I mean the singular answers given by law-appliers to interpret a legal norm in an actual case, to solve a concrete legal question. Examples would be the declaratory against the constitutive 'theory' of recognition of states, the constitutional against the internationalist 'theory' with regard to Art. 46 of the Vienna Convention on the Law of Treaties, the absolute against the relative 'theory' of reservations to multilateral treaties, and so on.

In contrast, in science, theories are neither the big paradigms, nor the concrete reading of one specific legal institution. Here, theories are

[95] One reason could be that legal scholarship actually does not strive for truth (and with that for knowledge). This view, however, does not do justice to the aspirations of legal research.

[96] Accordingly, the central feature of science is neither the use of mathematics, as Galileo Galilei thought, nor the inductive procedure, as Francis Bacon suggested. See H. Schwenke, *Zurück zur Wirklichkeit: Bewusstsein und Erkenntnis bei Gustav Teichmüller* (Basel: Schwabe, 2006), 293–97.

[97] J. Binder, *Philosophie des Rechts* (Berlin: Stilke, 1925), 948, referring here to comparative law (author's trans.).

normally conceived of as models or structures.[98] The most general requirement for all scientific theories is as follows: theories should express the patterns or structures of data or of phenomena in the field under observation, as parsimoniously and concisely as possible. They should reduce complexity. So, 'a useful theory is a compression of the data; comprehension is compression ... The simpler the theory, the better you understand something.'[99] Importantly, theories must interrelate like stones in a house or pieces of a puzzle.

This concept of theory is applicable to legal scholarship. In international law, there are indeed theories that do reduce complexity. An example of such a 'data-condensing' theory is that of subsidiarity. The idea of subsidiarity forms the common basis of different rules (e.g. the local remedies rule, the priority of regional organisations over UN peacekeeping operations, and the complementarity of the International Criminal Court to domestic courts in the prosecution of international crimes under Article 17 of the ICC Statute).[100] On the basis of this reduction of complexity, scholars can show that the subsidiary responsibility of the international community for guaranteeing human security when the territorial state fails in its duty to protect 'fits' into the international legal system. International legal theories in that sense generate inter-subjective knowledge and are thus successful scholarship.[101]

5.4.3 *The Promise of Foundational (as Opposed to Applied) International Legal Scholarship*

The production of theories in the sense explained above might be called 'foundational' international legal research. Concededly, the usual dichotomy between 'applied' and 'foundational' science is not so relevant in the field of legal scholarship which always – however indirectly – relates to actual

[98] A.F. Chalmers, *What Is This Thing Called Science?*, 3rd edn (Berkshire: Open University Press, 1999), 104–48 ('Theories as Structures II and II').

[99] See G. Chaitin, 'The Limits of Reason' (2006) 294 *SA* 74–81 and the literature cited therein. 'Conversely, if the only law that describes some data is an extremely complicated one, then the data are actually lawless.' So 'a theory has to be simpler than the data it explains, otherwise it does not explain anything' (*ibid.*). Chaitin draws support here from Leibniz: 'Mais quand une règle est fort composée, ça qui luy est conforme, passe pour irrégulier', G.W. Leibniz, *Discours de Métaphysique*, 2nd edn (Hamburg: F. Meiner, 1985), 14 (author's emphasis).

[100] Cf. P. Carozza, 'Subsidiarity as a Structural Principle of Human Rights Law' (2003) 97 *AJIL* 38.

[101] See on the 'theoretical' research dimension also Section 5.6.3.2.

problems of society simply because this is a principal function of the law. Ideal-typically, 'applied' international legal scholarship generates knowledge at a low level of abstraction, knowledge that can be directly used to solve concrete legal and hence societal problems. Application-oriented studies advise institutions and office-holders, providing concrete help in decision-making or prompting the preparation of international agreements. The line between this type of research and international legal practice is blurred.

'Foundational' scholarship, in contrast, furnishes knowledge about basic structures, developments or patterns of international law. An example would be the scholarly lens of global administrative law.

This type of research can withstand the dynamics of international legal development, notably in some fields. International legal scholars should react by working on a sufficient level of abstraction and generality. Only then will their work be independent of the latest technical changes, and refer to a *lasting* object of study, and will not to produce scrap paper.

To conclude, academics can meet the charge of unscholarliness of international legal work by building theories and by engaging in (more or less) foundational research. The turn to empirics (qualitative and quantitative) is fertile but might be put into perspective on various grounds: First, the attempt at scientification of international legal research through reliance on different neighbouring disciplines (ranging from mechanics over biology, social sciences, linguistics, to economics) has been a recurring feature of the discipline which shows that the ongoing empirical turn is nothing totally new. Second, the 'hard' datas' and figures' exactitude and objectivity should not be overrated by legal scholars, nor their vulnerability to ideological interpretation, exploitation or even manipulation neglected. And finally, the contemporary inclination to consider (explicitly or implicitly) the exact sciences (including economics) as the prime type of true research, and hence also as a model for international legal research, should be viewed with caution.

5.5 Charge No. 4

5.5.1 The Problem of Practical Irrelevance

Scholars of international law, are, just like other professional academics, called upon to demonstrate that their work has some sort of social significance or practical utility.[102] This normal political or bureaucratic

[102] Orford, 'Scientific Reason', n. 34, at 381.

demand is also voiced with regard to legal scholarship. The reproach that much international scholarship risks to be (in practical or social terms) irrelevant constitutes in many ways the opposite of charge no. 3. And the more 'scholarly' (theoretical and foundational) the scholars' work is, the more vulnerable it is to the charge of irrelevance.

In fact, much of international legal scholarship appears to have drifted away from legal, notably judicial, practice. US-Academic writing especially appears to be so theoretical, so much 'law and ... ' that it seems irrelevant and uninteresting for legal practice and is in consequence not cited by the courts. An observer has characterised the situation as 'estrangement', as 'disconnection', and 'gap between academy and profession'.[103] An illustration of the professionals' (practitioners') stance is given by John B. Bellinger III, legal adviser to the US Department of State from 2005 to 2009. He encouraged the student-run US international law journals 'to try to stay away from the theoretical, which is generally not helpful to practicing government lawyers ... I found 90% of law review articles not terribly helpful' because they were 'too academic'.[104]

The practitioner's complaint does not meet deaf ears, because, on the other 'side', many international legal scholars wish their writings to have an impact on the improvement of international law and thereby to contribute to law reform. For example, Antonio Cassese opined: '[F]or a lawyer to be not a mere technician, but also somebody who has a broader mind, it would also be important to try to *contribute to changing* the law in addition to interpreting the existing law'.[105] It is, Cassese thought, 'the moral duty for lawyers to propose reform of rules and regulations whenever this proved necessary'.[106]

5.5.2 *The Lack of Academic Law-Making Power and the Beauty of it*

The scholars' desire to influence the evolution of international law can be satisfied only indirectly. The reason is that international legal scholars are not and should not be law-makers, although Article 38(1)(d) of the ICJ

[103] Twining, Farnsworth, Vogenauer, and Tesón, 'The Role of Academics', n. 59, at 929–33.

[104] Bellinger and his colleagues are – if at all – interested in overview articles, e.g., on some treaty negotiations, especially on older treaties, and with information about foreign states. At least: 'occasionally we would find people who really thought hard about an issue and who would give us something that we hadn't thought of before.' (J. B. Bellinger III, 'Interview' (2010) 52 *Harv ILJO* 32, 33).

[105] Cassese, *Five masters*, n. 49, at 143 (emphasis added). [106] *Ibid.*, 256.

Statute mentions the 'teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law'. The phrasing of Article 38 (dating from 1922) manifests the *zeitgeist* at the beginning of the 20th century. The reference to 'teachings of the most highly qualified publicists' is inspired by the historical school of law and its benevolent attitude towards 'the law of jurists' or 'learned law' and was an heir to the (romantic) reaction against the codificatory ideal of the enlightenment. The formulation of law by academics is typical for young and undeveloped areas of law (such as, in the 19th century, the domestic private law in continental European states and in the 21st century the European private law). Any new, rudimentary and largely uncodified area of law needs academic standard-setters. Talking of Hugo Grotius as the 'father of international law' exactly points to this groundlaying work of academics. With more intense codification and concretisation of a legal order this contribution must necessarily fade into the background.

But the importance of academic writing remains, and this can be explained by pointing to some special features of international law. These are notably the law's high dynamism and the lack of legislative organs. Therefore, for example, as Johann Caspar Bluntschli wrote, it falls upon academics to 'pronounce [the law] afresh', 'and through this pronouncement further its recognition and validity'.[107] Bluntschli thereby ascribed an indirectly law-creating function to academics. By speaking and writing about an amorphous practice and *opinio iuris*, academics perform a task of verbalising and ordering, which is needed for grasping an international norm and making it operational in the first place. Indeed, it seems as if the special difficulties of identifying international norms make the clarifying role of international legal scholars crucial. And because the identification already carries in it a kind of systematisation, all international legal scholars are to that extent 'law-makers'.

[107] J. C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (Nördlingen: Beck, 1878), preface ('Vorwort'), iv–v: 'Die Rechtswissenschaft darf … meines Erachtens nicht bloss die schon in frühern Zeiten zur Geltung gelangten Rechtssätze protokolliren, sondern soll auch die in der Gegenwart wirksame *Rechtsüberzeugung neu aussprechen und durch diese Aussprache ihr Anerkennung und Geltung verschaffen helfen*. Je empfindlicher der Mangel gesetzgeberischer Organe ist, welche für die Fortbildung des Völkerrechts sorgen, um so weniger darf sich die Wissenschaft dieser Aufgabe entziehen. Freilich muss sie sich auch davor hüten, der Zukunft vorzugreifen. Sie darf nicht unreife Ideen als wirkliche Rechtssätze und selbst dann nicht verkünden, wenn sie ihre Verwirklichung in der Zukunft klar vorhersieht' (emphasis added).

As the former British legal adviser Michael Wood put it, there is 'a broader and important function played by the most eminent of the writers (who were frequently also practitioners), to give shape and order to the disparate strands that make up international law. Even more than in most areas of law, international law owes its framework and often indeed the elucidation of its rules to writers, ... In that sense, they are fundamental to the international legal system.'[108]

Still, academic texts are *not* law. It is a commonplace that these '[w]ritings are not a (formal) source of the law, but they may be evidence of the law'.[109] Scholars are 'supposed to elucidate what the rules to be applied by the Court were, not to create them'.[110] Article 38(1)(d) is the 'storehouse from which the rules of heads (a), (b), and (c) can be extracted'.[111]

The classical explanation for the lack of law-making power of scholarly writing is that academics are not part of the machinery of the sovereign state. Over 350 years ago, Thomas Hobbes expressed this fact as follows: '[t]he Authority of writers, without the Authority of the Common-wealth, maketh not their opinions Law, be they never so true. ... For though it be naturally reasonable; yet it is by the *Soveraigne Power* that it is Law'.[112] The absence of the 'doctors'' decision-making authority is also highlighted by the English Admiralty Court finding in 1778 that '[a] pedantic man in his closet dictates the law of nations; everybody quotes, and nobody minds him. The usage is plainly as arbitrary as it is uncertain; and *who shall decide, when doctors disagree*? Bynkershoek, as it is natural to every writer or speaker who comes after another, is delighted to contradict Grotius.'[113]

However, deducing the authority of the speakers and thereby the validity of international norms from state sovereignty is no longer in line with current understanding of the meaning of sovereignty, which is

[108] M. Wood, 'Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online edn (Oxford University Press 2011), para. 3.

[109] Ibid., para. 17.

[110] A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice*, 2nd edn (Oxford University Press, 2012), at 853, para. 304.

[111] S. Rosenne with the assistance of Y. Ronen, *The Law and Practice of the International Court of Justice, 1920–2005*, 4th edn, 4 vols. (Leiden: Nijhoff, 2006), vol. III, 1551.

[112] T. Hobbes, *Leviathan* (London: J.M. Dent & Co/Everymans Library, 1943), 143 (emphasis added).

[113] The '*Renard*', 9 Dec. 1778, 165 ER 51, 222, 224 (emphasis added).

nowadays considered not to be a self-sufficient source of authority, but rather as instrumental to the realisation of human objectives.

The second standard explanation for the lack of law-making power of academic writing does not fare much better. It is the assertion that scholarly texts are not an acknowledged 'source' of international law.[114] However, the normative closure of the international legal system through the immanent construction of 'sources' has proved unhelpful and is, from the perspective of legal theory, highly dubious. It seems more fruitful to determine the quality of 'law' of a given social norm, not through recourse to the paradoxical metaphor of the sources, but on a case-by-case basis.[115] From this perspective, which draws on legal pluralism, law-making by social actors is not categorically a no-go.[116] In consequence, a modern 'learned law' is conceivable.

A different line of reasoning that leaves space for academic law-making is espoused by Critical Legal Studies that mix up the *observation* of the law and its *creation*. When Martti Koskenniemi declares '[I]nternational law is an argumentative practice',[117] he does not say who argues and whose arguments count as juris-generative. An understanding of international law as an argumentative practice implies that the discourse of academics *is* international law and not just talking *about* international law. However, this approach risks throwing the baby out with the bathwater. The academic discourse does not as such make law.

What gives some texts status as 'international law' is not the fact that these have been edicted by a sovereign nor that they are defined as a 'source'. It is the dual fact that some norms are socially necessary for global regulation and that they have been elaborated with the participation of affected persons. If we take this as a yardstick, scholars, as individuals or as an epistemic community,[118] are not authorised to make law. Their expertise is not a sufficient basis of authority for making international law. Referring to an experts' 'code', the then European

[114] In German not a 'Rechtsquelle' but a mere 'Rechtserkenntnisquelle'. Hillgruber, 'Volkerrechtstheorie?', n. 50, at 113, 115.

[115] T. Vesting, *Rechtstheorie* (München: Beck, 2007), 78–95.

[116] *Cf.* A. Peters, L. Köchlin, T. Förster and G. F. Zinkernagel (eds.), *Non-state Actors as Standard Setters* (Cambridge University Press, 2009).

[117] M. Koskenniemi, 'Methodology of International Law' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online edn (Oxford University Press, 2011), para. 1.

[118] According to P.M. Haas, EpComs are 'networks of knowledge-based experts' P.M. Haas, 'Introduction: Epistemic Communities and International Policy Co-ordination' (1992) 46 *IO* 1, 2.

Court of First Instance formulated the following 'grounds of principle relating to the political responsibilities and democratic legitimacy of the Commission', and stated: 'Whilst the Commission's exercise of public authority is rendered legitimate, pursuant to [Article 17(1) of the TEU (Lisbon) ex-Article 211 EC], by the European Parliament's political control, the members of SCAN [Scientific Committee for Animal Nutrition], although they have scientific legitimacy, have neither democratic legitimacy nor political responsibilities. Scientific legitimacy is not a sufficient basis for the exercise of public authority'.[119]

Although expertise may be one source of legitimacy and authority, further factors must add to it so as to warrant an authority to make law, namely institutional and procedural ones such as representativity, participation and publicity. International legal scholars are not elected and they do not represent stakeholders. Because they do not attempt to regulate their own affairs (in the style of indigenous people, religious communities, or globally active merchants), their texts are not comparable to indigenous and religious law and the *lex mercatoria.*

To conclude, international legal scholars, even when acting in institutionalised groups such as the *Institut de droit international* or the International Law Association, cannot and should not 'make' international law in the same sense as governments. Academic 'codifications' can acquire the status of law only through adoption by a governmental or inter-governmental actor. An example is the Lieber Code, which became a formal instruction to the US Army only after its incorporation into a ministerial order issued by the American secretary of war.[120]

Again, the reason for the need for such an endorsement is not that academics are not part of the sovereign state machinery or that the texts are not defined as a 'source', but that the institutions and procedures in which they make codes, resolutions and memoranda largely lack the legitimising factors of representativity, participation, publicity and accountability. In consequence, the authority of scholars is not an institutional, procedural, or social one, but purely an *epistemic* one.

And this state of affairs, to make an important point, cannot be changed if scholarship is not to lose its essence. Scholars are not and

[119] Case T-13/99, *Pfizer Animal Health v. Council of the EU* [2002] ECR II-3305, para. 201.

[120] 'Lieber Code', Instructions for the Government of Armies of the United States in the Field, 24 April 1863. The norms were overhauled by a group of army officers and then endorsed by the then Secretary of War, Ed Townsend, Assistant Adjutant General (General Orders No. 100), available at: http://avalon.law.yale.edu/19th_century/lieber.asp. (last checked 12 December 2016).

should not be accountable to real clients, but only to ideal entities such as the scientific community, the truth, the public, with this ideational accountability being in no way formalised. It is exactly this lacking accountability which is the counterpart to the scholar's lack of law-making power. And this, in turn, is a precondition for thinking freely and out of the box. Only because academic treatises do not have direct legal consequences (as 'law'), and only because scholars are devoid of formal and institutional responsibility (which does not exclude a broader 'responsibility' towards society at large), can they devote themselves to thought experiments and speculation, and thereby 'provide ideas and float proposals which could act as "midwives" for social and legal change'.[121]

5.5.3 *Mutual Support and Mutual Irritation of Practice and Scholarship*

The charge or irrelevance of international legal scholarship can be put into perspective by acknowledging that there may be a positive feedback loop between practical and scholarly activity, but that there may also be a mutually destructive relationship between both.

For most international lawyers, it is 'obvious to say that one cannot be a good lawyer without having, at some point or other, practised law'.[122] The reason is, first, that international legal practice (and notably one's *own* practice) in fact provides themes for academic writing. Second, one's own practical experience helps one to realise where international law empirically really stands. For example, a teacher who explains the law to his students can check whether his or her assertions reflect the law as it stands if he considers whether these explanations would also hold before the ICJ.

Third, practice allows one to test one's (academic) theories. Lord McNair, when he was president of the ICJ, said:

> If I may give my own testimony both as a teacher of law and as a practitioner, I can say that I have constantly had the following experience. Whereas I may have thought, as a teacher or as the author of a book or an article, that I had adequately examined some particular rule of law, I have constantly found that, when I have been confronted with the same rule of law in the course of writing a professional opinion or contributing

[121] A. Cassese, *Realizing Utopia* (Oxford University Press, 2012), 683.
[122] Cassese, *Five Masters*, n. 49, at 260.

> to a judgment, I have been struck by the different appearance that the rule may assume when it is being examined for the purpose of its application in practice to a set of ascertained facts. As stated in the textbook it may sound the quintessence of wisdom, but when you come to apply it its many necessary qualifications or modifications are apt to arise in your mind. . . . [W]hen counsel and judge are confronted with the need of applying a rule of law, or an alleged rule of law, to certain facts established by evidence, it is probable that the legal element in the resulting solution will be a more useful and more practical rule of law than a rule elaborated by a teacher or writer in his study working alone and in the abstract.[123]

Overall, legal practice provides the 'reality check' for international legal scholarship.

So while international legal practice is obviously useful and important for the scholar, the reverse is equally true: international scholarship can help international legal practice. In continental Europe, legal scholarship has even been called 'a theory for reflecting practice', the essence of which consists in that practical relevance.[124] Seen in this light, legal scholarship is in a peculiar way an 'applied' as opposed to a 'foundational science'.[125]

Hans-Georg Gadamer wrote that 'theory must justify itself before the forum of practice'.[126] In other words, 'theory' is valuable (only) if it has a practical use. I submit that the explanatory power of a theory is already one form of practical use: there is nothing more practical than a good theory.[127] Such a theory, once established, may be applied only at a later

[123] A.D.L. McNair, 'The Development of International Justice: Two Lectures Delivered in the Law Centre of New York University' (1954) in Sir G. Fitzmaurice and R.Y. Jennings (eds.), *Lord McNair: Selected Papers and Bibliography* (Leiden: Sijthoff, 1974), at 242, 257–58.

[124] A. von Arnauld, 'Die Wissenschaft vom öffentlichen Recht nach einer Öffnung für die sozialwissenschaftliche Theorie' in A. Funke and J. Lüdemann (eds.), *Öffentliches Recht und Wissenschaftstheorie* (Tübingen: Mohr Siebeck, 2009), at 65, 75 with note 52; H. Schulze-Fielitz, 'Staatsrechtslehre als Wissenschaft: Dimensionen einer nur scheinbar akademischen Fragestellung' in H. Schulze-Fielitz (ed.), *Staatsrechtslehre als Wissenschaft* (Berlin: Duncker & Humblot, 2007), at 11, 26.

[125] See on 'foundational' scholarship Section 5.4.3.

[126] H.-G. Gadamer, 'Lob der Theorie' in H.-G. Gadamer, *Lob der Theorie: Reden und Aufsätze* (Frankfurt: Suhrkamp, 1983), 26, at 38 (author's trans.).

[127] A. Peters, 'There is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law' (2001) 44 *GYIL* 25. This dictum is often ascribed to Immanuel Kant but was probably coined by Ludwig Boltzmann. I. Kant, 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nichts in der Praxis' in W. Weischedel (ed.), *Immanuel Kant: Werke in 12 Bänden*, 12 vols. (Berlin: Suhrkamp, 1977), vol. XI, 127–72, esp. Ch. III, 'Vom Verhältnis der Theorie zur Praxis im Völkerrecht, in allgemein-philantropischer Absicht, d.i. kosmopolitischer Absicht betrachtet'. The phrase was first clearly expressed (without reference to Kant)

stage, when the circumstances arrive. For example, a theory about the 'fit' of a right to humanitarian assistance into the current international legal system may be needed when a huge natural disaster occurs. This means that a good theory may not deploy any immediate effect but may acquire practical relevance in the long term. Also, particularly in the humanities, and in legal scholarship, theories may be (very) indirectly useful by allowing us to think up new realities, to develop our sense of possibilities, our *Möglichkeitssinn* to speak with Robert Musil.[128] Acknowledging this type of usefulness makes scholarship 'relevant' in a broader sense than the one often meant by practitioners such as the legal adviser quoted above.

Finally, merely 'indirect' practical uses of scholarship may alleviate the potential damage brought to scholarship through a (simultaneous) practical activity of the scholar. First, the practitioner's obligation to reach specific results is incompatible with the scholar's openness towards any results. Second, the loss of distance endangers the (relative) impartiality, and thus scholar's ability to critique. An enmeshment of scholarship with practice would undermine one broader societal function of the group of scholars, seen as an epistemic community, namely the function of intellectual critique and check of legal practice.[129]

These considerations may to a large extent alleviate the charge of practical 'irrelevance' of international legal scholarship, and – on the contrary – underscore the benefits of that seeming 'irrelevance'.

5.6 Charge No. 5

5.6.1 *Implicit and Explicit Critique of Doctrinalism*

The critique of doctrinalism directed at much of international legal scholarship is seldom voiced explicitly. But it shows itself in the fact that doctrinal papers are hardly accepted for publication in US law

by L. Boltzmann, 'Über die Bedeutung von Theorien (1890)', in L. Boltzmann, *Populäre Schriften*,. Engelbert Broda (ed.) (1979), 5458 at 57: 'Daß ... die Theorie auch das denkbar praktischste, gewissermaßen die Quintessenz der Praxis sei'.

128 A. von Bogdandy made this point in the research seminar.

129 See on the necessity of a critical distance (and generally on the roles of practitioners and scholars in international law) A. Peters, 'Rollen von Rechtsdenkern und Praktikern – aus völkerrechtlicher Sicht' in *Berichte der deutschen Gesellschaft für Völkerrecht* 47 (Heidelberg: CF Müller, 2012), 105–137, at 144–53; on the 'reflexive distance [from practice] required for international legal research' Bernstorff, 'International Legal Scholarship', n. 31), at 979, 984.

reviews. Nowadays, the most popular suggestion for remedying the perceived flaw of doctrinalism is qualitative and quantitative empirical work to be performed by international legal scholars (who consequently need to be trained in interview techniques and/or statistical analysis). This prescription normally goes hand-in-hand with the recommendation to abstain from 'normative' scholarship and to concentrate on 'positive' analysis, and to that extent simultaneously reacts to charge no. 2 (the charge of ideology).

One way of expressing the critique of doctrinalism is the observation that the 'disciplinary' limitations of doctrinal scholarship makes that type of activity too 'legal' in the sense that fails to absorb methods, insights and arguments from other disciplines. For example, Isabel Feichtner remarks that an international lawyer should not only 'disclose ideological leanings, but . . . go a step further and support her preferences by reference to other disciplines be they moral philosophy, economics or social theory'.[130] She identifies a dilemma: she holds it – for the reasons stated above – indispensable to absorb insights and arguments from other disciplines to 'broaden the base for principled contestation'. In other words, interdisciplinarity is necessary to maintain the quality of scholarly work. But, on the other hand, it is exactly this interdisciplinarity (and the integration of other legal disciplines, such as private or criminal law into our writings) which 'might dampen our idealism as concerns (international) law as an instrument to realize Utopia'. Lawyers, if they want to be true scholars, can therefore not be idealists. This leads Feichtner to the inevitable conclusion: 'If as international lawyers we want to participate and find consolation in the utopian project of international law we need to do this not as scholars but as practitioners'.[131] At this point, her concern aligns itself with charge no. 4 (unscholarliness).

5.6.2 *The Limits of Doctrinal Scholarship*

In order to assess the merits of the charge of doctrinalism, we need to clarify what we mean by 'doctrinal scholarship', and examine why it might be particularly problematic with regard to international law. Doctrinal scholarship maps international law. First, it conveys an overview of the law as it stands by arranging legal concepts, basic principles, and rules on decision making. Secondly, it orders ('systematises') and structures the law. This research dimension is called doctrinal because it

[130] Feichtner, 'Realizing Utopia', n. 30, at 115. [131] *Ibid.* at 1157.

is tied to legal rules, principles, and decisions that count as 'doctrines' or even as 'dogmata'. The method of doctrinal research is primarily logical semantic analysis. A scholar can, for example, examine the meaning of the term 'jurisdiction' in Article 1 ECHR, which is of fundamental importance for the applicability of the Convention in complex situations such as peace missions abroad. Importantly, doctrinal analysis seeks to impact directly on court decisions and on treaty-making. It is practice-oriented to such an extent that it has been called a 'scholarship of law application'[132] and a 'scholarship to prepare decisions'.[133] Charges against a scholar's doctrinalism are therefore simultaneously charges against that scholar's practice-orientation.

I submit that, because of specific qualities of international law, doctrinal analysis in this field is not useless, but indeed of limited value. First, the stuff of international law is less dense than in the main field of application for doctrinal research: domestic contracts, tort, and property law. There are, in total, fewer rules and judicial decisions. So a logical-semantic analysis of this 'thin' legal subject matter yields less.

Secondly, a considerable amount of international law is still uncodified. The exact content of customary international law must first be investigated with non-logical-semantic methods. This is a different task from the investigation of the meaning or sense of a written rule (treaty interpretation).[134] Thirdly, international law is to a higher degree than domestic law the result of political compromise, and for that reason less systematic and less clear than other legal materials.

To conclude, these three special features of international law indeed limit the value of doctrinal research specifically in that area of law. It is due to these features that additional research dimensions, besides the doctrinal analysis of the law, are more needed in international law than, let us say, in the law of civil procedure of a given country.

[132] 'Rechtsanwendungswissenschaft', see A. van Aaken, 'Funktionale Rechtswissenschaftstheorie für die gesamte Rechtswissenschaft' in M. Jestaedt and O. Lepsius (eds.), *Rechtswissenschaftstheorie* (Tübingen: Mohr Siebeck, 2008), at 79.

[133] 'Entscheidungsvorbereitungswissenschaft', see Von Arnauld, 'Wissenschaft vom öffentlichen Recht', n. 124, at 87.

[134] F. Tesón mainly refers to this feature: 'it is not possible to identify international legal rules by conventional doctrinal methods. If international legal scholarship is going to advance human values and not simply serve those in power, it must supplement legal doctrine with international relations theory and political philosophy. Otherwise, it will continue to be an exercise in futility.' (Tesón in Twining, Farnsworth, Vogenauer, and Tesón, 'The Role of Academics', n. 59, at 941–47, quotation at 947).

5.6.3 *The Promise of Scholarship in Other Research Dimensions*

It is therefore suggested that the activity of international legal scholars will be (more) successful, that is, will generate more knowledge which can be transmitted in an inter-subjective way, when it is (also) conducted in one or several other dimensions, beyond purely doctrinal analysis.

5.6.3.1 Empirical Dimension

One possible dimension is empirical research. Here international legal scholarship attempts to 'study the conditions under which international law is formed and has effects'.[135]

Empirical international legal scholarship may be conducted at the micro or macro level. At the micro level, the researcher investigates the origins of a particular norm. At the macro level, she or he studies larger trajectories, e.g. the evolution of whole legal regimes, such as the law of the sea or the climate change regime. In either case, the concern is the investigation of concrete factors behind the development of norms and the identification of the conditions under which the rules work.

Empirical scholarship can also be historical. For example, we can investigate the historical evolution of Article 42 of the International Law Commission's Articles on State Responsibility to test a hypothesis about the development of the concept of obligations *erga omnes* (research into foundations) or to apply that provision correctly in an actual case of liability (applied research).

Empirical research is notably concerned with the effects or impact of (international) law. In this research dimension, norms are seen as a mode of governance, and compliance with these norms is investigated. This type of research attempts to establish when, where and to what extent these norms actually direct the behaviour of the relevant actors, and asks why and under what circumstances international law is followed or disobeyed. Given the difficulties with enforcing international law, this dimension is particularly important. However, it does not work without a glance outside the discipline. It can profit from new governance theories and administrative theory. More than anything else, it should embrace the results of parallel research in international relations.

Compliance research is empirical research, but it is also theory-based, since it works on models. Gregory Shaffer and Tom Ginsburg have called

[135] Shaffer and Ginsburg, 'The Empirical Turn', n. 63, at 1.

this 'emergent analytics', that is 'analytics that oscillate between empirical finding, real-world testing, and back again'.[136] For example, Jack Goldsmith and Eric Posner employ a rational choice model for studying international law,[137] with legal norms backed by sanctions functioning much like prices for certain behaviour. For these authors, the scarcity of 'hard' sanctions for breaches of international law is the decisive factor behind deficiencies in the operation of international law. There is, however, much to be gained by working with other models as well in such 'real-world' legal research.[138] Finally, it should be borne in mind that empirical approaches, too, may be ideologised, and do not in themselves guarantee 'objective' or 'scientific' results.

5.6.3.2 Theoretical Dimension

Another dimension of research would be the theoretical or conceptual one. As explained above, the term 'theory' is extremely blurry.[139] In the preceding section, I used the term for a middle ground statement between grand design on the one hand, and legal answer to a concrete question of interpretation on the other hand. What matters here is that the theoretical or conceptual research generates findings outside (not inside) the concrete legal rules at hand, it produces 'theories *about* law', as the New Haven School called it,[140] and thus reduces complexity. The theoretician of law is concerned with questions such as 'What is international law?' and 'How does argument in international law function'? Gender-focussed investigations of the structure of international law and its potential gender bias fall within this dimension as well.[141] Good research questions can be asked in the theoretical dimension. For example, the emergence of customary norms has only recently been explained convincingly, in a rational-choice paradigm.[142] Before,

[136] *Ibid.* [137] Goldsmith and Posner, *The Limits of International Law*, n. 52.
[138] H. Albert, *Rechtswissenschaft als Realwissenschaft: Das Recht als soziale Tatsache und die Aufgabe der Jurisprudenz* (Baden-Baden: Nomos, 1993), 7, *passim*.
[139] See Section 5.4.2.
[140] M.S. McDougal, H.D. Lasswell, and W.M. Reisman, 'Theories about International Law: Prologue to a Configurative Jurisprudence' (1976–1968) 8 *VJIL* (Faculty Scholarship Series, Paper 2577) 188, 200, emphasis added.
[141] H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).
[142] P.-H. Verdier and E. Voeten, 'Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory' (2014) 108 *AJIL* 389, 401–11. This example shows that no paradigm can be reasonably employed to explain everything, its usefulness depends on the research question asked. With regard to other questions, the rational choice paradigm may be too reductionist.

the transition from breach of the old rule to the establishment of a new customary rule had remained mysterious.[143] Or, to give another example, against the background of denials of international law[144] it seems particularly important to conduct new research into the legal-ness of international law notwithstanding its weak enforcement and weak democratic legitimacy.

In the theoretical or conceptual research dimension a plurality of paradigms is emerging. Until recently, post-modernism, in the form of Critical Legal Studies, occupied the space for theory. Presumably, however, critical studies will slip into the background as (by definition) they can offer no constructive solutions to problems. Other approaches may play a larger role, depending on the area of international law, e.g. feminist approaches in international criminal law and human rights law, or rational choice theories in treaty law.

5.6.3.3 Ethical Dimension

Finally, ethical-legal research suggests itself, too. In that dimension, international legal scholars investigate the ethical contents of international law (often embedded in specific world views) and criticise these with reference to non-positivist standards of justice.[145] This type of research is therefore ideal-typically 'normative' as opposed to 'positive' in the sense explained previously (Section 5.3.3).

A random example of legal-ethical research would be a reappraisal of the principle of state equality and the tension between de jure equality and de facto inequality. It is the job of international legal scholars not just to assess whether a general principle of the inequality of states is emerging. It is also their task to map the structural impact of such a change, as well as its ethical implications.

Another example are studies on the moral foundation of human rights. This is a suitable issue for international legal scholarship since that moral foundation will co-determine the human rights provisions' interpretation, and thus the application and potential limitations of those rights.

[143] See on the impossibility of distinguishing the error in law (in relation to a still-valid customary rule) from the new *opinio iuris* H. Kelsen, 'Théorie du droit international coutumier' (1939) *RITD* 253–74, 263.

[144] J.R. Bolton, 'Is There Really "Law" in International Affairs?' (2010) 10 *TLCP* 1.

[145] See e.g. J. Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), 1, who considers 'how the content of the Law of Peoples might be developed out of a liberal idea of justice'. See in legal scholarship, e.g. A. Cassese: 'In my view, for somebody to be an intellectual and not a mere lawyer, is also that he or she attaches great importance to ethical values and tries in a way to use them' (Cassese, *Five Masters*, n. 49, at 142).

For example, with the assistance of ethicists and empirical social researchers, international legal scholars might be able to identify an existing consensus on values having regard to basic human capabilities and needs.[146] These and other problems cannot be properly understood if the ethical research dimension is blended out.

Why does ethical-legal research seem unavoidable? It is unavoidable, because there need to be some people to reassess and re-reflect one particular quality of international law – namely its claim to embody and convey justice.[147] The evaluation of positive law by reference to non-positivist standards of justice or rightness is even more appropriate in international legal scholarship than in the study of the domestic law of democratic states. The reason is that in a democratic order, the law is justified by its democratic genesis and by the state's constitutional confines. Considerations of an 'external' legitimacy are problematic with regard to laws which have been enacted in a democratic process. In contrast, international law lacks a direct democratic foundation. Codified bases for international law similar to those found in state constitutions, which would provide criteria for an assessment of the law's legitimacy, are only rudimentarily available. For this reason, the study of international law can and must include ethical considerations to a greater degree than research in domestic law.

Juridico-ethical arguments are often disdained as being either inevitably ideological (charge no. 2) or unscholarly (charge no. 4), or both. This scepticism is fuelled by the fact that, historically, legal-ethical reflection was often accompanied by a belief in natural law. Arguments of a natural law-type re-emerged briefly after the Second World War and in international law is notably associated with Hersch Lauterpacht. After this short renaissance, the field was practically cleared of constructive ethics. The Kosovo intervention of 1999 represented a turning point. It initiated a 'turn to ethics', as Martti Koskenniemi called it,[148] not just in the political and legal, but also in academic discourse.

[146] *Cf.* A.K. Sen, *Commodities and Capabilities* (Amsterdam: North Holland, 1985); A.K. Sen, 'Capability and Well-being' in M.C. Nussbaum and A.K. Sen (eds.), *The Quality of Life* (Oxford: Clarendon Press, 1993), 30–50; M.C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000), 4–15.

[147] J. Rawls, *A Theory of Justice* (Oxford University Press, 1999), 3: 'Justice is the first virtue of social institutions, . . . laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.' See also S. Ratner, *The Thin Justice of International Law* (Oxford University Press, 2015).

[148] M. Koskenniemi, '"The Lady Doth Protest Too Much". Kosovo, and the Turn to Ethics in International Law' (2002) 65 *MLR* 159.

Indeed, the sceptres of ideology and of unscholarliness arise here. Granted, the world view of the researcher will influence his inquiry into the question whether the ultimate purpose of state sovereignty is human dignity and individual rights, to revert to the example of humanitarian intervention/responsibility to protect. But the inquiry can still be 'scholarly' if the researcher argues *ex suppositione* in favour of norms: if norm A (centrality of the human being in international law) and norm B (instrumental character of state sovereignty) are valid, then norm C (responsibility to protect) must also be valid. This type of reasoning is scholarly.[149]

Second, the issue of ideology/politics may well be problematised by the researcher himself/herself. In other words, it is not just the (revived) ethical research dimension, but also its reflection at the meta-level, which is possible (and needed) vis-à-vis the uneasy triangle of international law's claim to universality, the real diversity of lives, and the ideal of global pluralism.

To conclude, the acknowledgement of the limited harvest of doctrinal scholarship in the field of international law, and engagement with empirical, theoretical or ethical scholarship is apt to overcome exaggerated doctrinalism.

5.7 Conclusions

A new type of international legal scholarship is needed in the novel period of international law we are living though, a period which is characterised by a high tension between interdependence and globalisation (economic, technical, cultural) on the one hand, and stark cleavages and fencing (ideational, economic, territorial) among states, on the other hand. In such a period of tension or even crisis, international legal scholarship is particularly vulnerable to various types of critique. Most of the criticism is not actually new but acquires a new significance in the current context.

First, in the face of a global North-South divide, an East-West divide in international relations and a looming political conflict between Russia and the rest of Europe, the problem of epistemic nationalism of scholarship (charge no. 1) is highly relevant.

[149] Weber, 'Science as a Vocation', n. 45, at 22: on the 'impossibility of "scientific" advocacy of practical standpoints – except in the case of a discussion of means to a given, presupposed end'.

I have submitted that the influence of the scholar's national background is not inevitably pernicious but can be used productively as long as the pitfall of epistemic nationalism is recognised and problematised. It has been demonstrated that it is necessary (and possible) to make arguments about international law that can be understood, used, and developed further by individuals independent from their national background.

Charge no. 2 is the charge of ideology (of which nationalism is only one manifestation). I have submitted that international legal scholarship can indeed not be conducted in a 'value-free' manner. However, researchers are not unavoidably trapped in their individual paradigm, but can make explicit personal preconceptions and overcome their own framework.[150] Though often insufficiently realised in practice, the principle of objectivity remains the central regulatory idea at which research in international law can and should be oriented. This means that the ideational and even ideological element is not a reason to worry too much. Quite to the contrary, a normative analysis of the law (besides a purely positive analysis) is necessary and valuable. The researcher may and should 'draw upon general principles consecrating universal values upheld in the world community' to engage in teleological interpretation of the rules at hand.[151] And when those 'universal values turn out to be in conflict ... the interpreter will necessarily have to rely upon his or her ideological or political leanings'[152] which he or she would have to make visible as much as possible.

Charge no. 3, the charge of unscholarliness, and its opposite, the charge of practical irrelevance of much scholarship (charge no. 4), have been examined. It has been argued that links between scholarship and practice can be mutually beneficial. Importantly, however, scholars need to maintain a critical distance to practice if they want to be able to assess and criticise practical applications of the law. If they let themselves be sucked up by practice, or refrain from writing openly for fear of being 'burnt' for positions in legal practice (e.g. as arbitrators or counsels), their scholarship normally becomes boring.

The charge of doctrinalism (charge no. 5) has been taken seriously. Specific features of international law, its 'thinness', its uncodified parts, and its inbuilt inconsistencies and fragmentation make this body of law

[150] *Cf.* A. Peters and H. Schwenke, 'Comparative Law Beyond Postmodernism' (2000) 49 *ICLQ* 800, at 815–18.

[151] Cassese, *Five Masters*, n. 49, at 259. [152] *Ibid.*

less suitable for purely doctrinal analysis than domestic, well-codified law. The conclusion is that complementary ways to conduct scholarship are – relatively speaking – more urgent here in order to conduct international legal scholarship successfully and professionally.

The guild of international legal scholars has always reacted to crises in international law with particular creativity and since time immemorial has treated these ruptures as new – scientific – beginnings. This much occurred after the Thirty Years' War, after the First World War and the Second World War.[153] In the middle of an apparently endless 'War on Terror', and on the brink of a new Cold War, there is the possibility and the need and for similarly creative international legal scholarship. Such scholarship is as necessary as ever, because it is the job of international scholars, as professionals, to develop ideas – ideas which may have the power of transforming international relations, and which therefore contribute to 'realizing utopia':[154] '*On résiste à l'invasion des armées; on ne résiste pas à l'invasion des idées*'.[155]

[153] After the Thirty Years' War, G. W. Leibniz coined the phrase of the 'legal subject'. After the First World War, G. Scelle made a creative contribution to the perennial question of the normative basis of international law with the idea of *dédoublement fonctionnel* and the thesis that the individual is the actual subject of international law. After the Nazi terror of the Third Reich and the Second World War, Hersch Lauterpacht advocated for the recognition of international human rights law and individual criminal responsibility. At the same time, the policy-oriented jurisprudence, developed in New Haven at the end of the Second World War, connected political science and international legal scholarship in a manner that was then quite original. Hence, it found a new methodological answer to new international political problems.

[154] Cassese, *Utopia*, n. 121, at 683, quoting Hugo.

[155] V. Hugo, *Histoire d'un crime: Déposition d'un témoin* (Paris: Hetzel, 1877, 2009), 639.