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The Importance of Being Earnest: Purpose and Method in Scholarship on International Law

Omri Sender

THE IMPORTANCE OF BEING EARNEST: PURPOSE AND METHOD IN SCHOLARSHIP ON INTERNATIONAL LAW

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I. INTRODUCTION

It is not infrequently remarked that the golden age of writers on international law is long over. While the treatises of the discipline's founding figures were often treated as authoritative, the scholarship of their successors has been relegated to the formal status of a "subsidiary means for the determination of rules of [international] law."[1] But it has also been suggested that the work of international legal scholars is at present more important than ever, not least in digesting the ever-expanding evidence of international practice in order to distill the unwritten rules of customary international law—and sometimes to advocate for their progressive development. This significant role requires an integrity of method that promotes not only the credibility of a particular study, but also the validity of international law more broadly, and the influence of authors in shaping it. Before examining contemporary problems that might stymie such an impact, and

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1. Statute of the International Court of Justice art. 38.1(d), June 26, 1945, 59 Stat. 1055, T.S. 993 [hereinafter ICJ Statute].

suggesting why it is essential that they are addressed, it will be convenient to recall the place of writings in international law in general.

II. The Place of Writings in International Law

International law owes a great deal to the writings of jurists, who were the first to give it structure and directly influenced its content at an earlier period when 'law-making' treaties and judicial pronouncements were largely absent. Scholars such as Vitoria, Suarez, Gentili, Grotius, Pufendorf, Wolff, and Vattel are often regarded as the founders of international law, with authors such as Hall, Westlake, and Oppenheim following in their footsteps by offering systematic expositions of a law of nations that was for the most part still unwritten.[2] Up to the end of the nineteenth century, international law was indeed largely "to be collected from the practice of different nations, and the authority of writers."[3] These writers on international law were cited in diplomatic correspondence and were considered as being among the principal sources of international law.[4] They also had "in a sense to take the place of the judges and . . . to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognized usage has now ripened into a custom, and the like."[5] Such "opinions of famous writers on international law" were among the important factors influencing the growth of international law,[6] the authority of those pronouncing them being based on the view that "as a rule they represented the general

2. *See generally* Francisco de Vitoria, Relectiones Theologicae (1557); Francisco Suárez, Tractatus de Legibus ac Deo Legislatore (1612); Alberico Gentili, De Jure Belli Libri Tres (1598); Hugo Grotius, De Jure Belli Ac Pacis (1625); Samuel von Pufendorf, Elementa Jurisprudentiae Universalis (1666); Christian Wolff, The Law of Nations (1749); Emer de Vattel, Law of Nations (1758); William Edward Hall, A Treatise on International Law (1880); John Westlake, Chapters on the Principles of International Law (1894); Lassa Oppenheim, International Law: A Treatise (1905).

3. Triquet v. Bath (1764) 3 Burrows, 1478.

4. Henry Wheaton, Elements of International Law § 15 (Little, Brown & Co., 8th ed. 1866).

5. Lassa Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 Am. J. Int'l L. 313, 315 (1908).

6. Lassa Oppenheim, International Law: A Treatise, Vol. I (Peace) 24 (2d. ed., 1912). For some notable early examples of recourse to writings, see *In re* Piracy Jure Gentium [1934] AC 586 (UKPC); Schooner Exch. v. McFaddon, 11 U.S. 116, 143–46 (1812); The Paquete Habana, 175 U.S. 677 (1900).

consent of men, their reputation proving that they represent many persons besides them."[7]

The rise of positivism, with its emphasis on State sovereignty, precluded any formal recognition of international lawmaking by private authors. With it came the great increase in treaty-making as well as the expansion of case law dealing with international law, both of which have reduced the importance of writings in expounding the existing law. The Privy Council, for instance, said in 1920:

> [V]aluable as the opinions of learned and distinguished writers must always be, as aids to a full and exact comprehension of a systematic Law of Nations, prize courts must always attach chief importance to the current of decisions, and the more the field is covered by decided cases the less becomes the authority of commentators and jurists.[8]

The growing availability of official records of State practice and collections of treaties,[9] the growth of international organizations in which States constantly interact, and the convocation from time to time of intergovernmental codification conferences,[10] have had a similar effect.

Yet the view has also been expressed that writings on international law are at present "hardly the poor cousins of international law."[11] In

7. Hersch Lauterpacht, *Westlake and Present Day International Law*, 15 ECONOMICA 307, 318 (1925) (describing Westlake's approach as to the authority of the opinions of international publicists); *see also* WHEATON, *supra* note 4, at 22 (suggesting that text-writers of authority "are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles").

8. *Judicial Committee on the Privy Council: The Hilding and Other Vessels (Part Cargoes Ex)*, 15 AM. J. INT'L L. 593, 596 (1921).

9. *See* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 24 (1958).

10. *See* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, 156–57 (Feb. 20) (dissenting opinion by Vice-President Koretsky) (suggesting that in such cases it was no longer indispensable, for determining the existence of certain rules of international law, "to gather the relevant data brick by brick, as it were, from governmental acts, declarations, diplomatic notes, agreements and treaties, mostly on concrete matters").

11. Jan Paulsson, *Scholarship as Law*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 183, 189 (Mahnoush H. Arsanjani et al. eds., copy. 2011) (suggesting a resurgence of influence on the part of scholars by pointing out that "international

the modern era, some have suggested, where the mass of material evidence of customary international law is so large and disordered, authors are perhaps of greater importance than ever before, for they alone can properly fulfill the particular task of distilling and clarifying the law in a way that is not open to a court which has to focus on the disposal of a particular problem.[12] Others have noted that "[w]hile the availability of other sources of information may have altered the nature of the function of 'publicists' as recorders of the practice of States, their part as its qualified interpreters cannot always be disregarded."[13] Still others maintain that:

> the role of contemporary doctrine . . . has not diminished, but has rather changed its character. The writers simply relieve the judge, and, in general, all those whose task it is to solve problems of international law. In particular, writers supply ready answers to the question as to whether a certain customary rule of international law is already (or still) binding.[14]

Such observations are corroborated by the fact that the literature on international law is consulted by judges and others as a matter of

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law has become a kaleidoscope; the need for a systematic exposition is growing").

12. Robert Y. Jennings, *What Is International Law and How Do We Tell It When We See It?*, 37 Schweitzerisches Jahrbuch für Internationales Recht 59, 78–79 (1981), *reprinted in* Sources of International Law 27, 46–47 (Martti Koskenniemi ed., 2000). *See also* W. Michael Reisman, *Jonathan I. Charney: An Appreciation*, 36 Vand. J. Transnat'l L. 23, 24–25 (2003) (suggesting that because identifying customary international law is a very challenging intellectual task, it is "the distinctive responsibility of the international legal scholar"); James-Leslie Brierly, Règles Générales du Droit de la Paix 71 (1936) (suggesting that it was up to the writers to tidy up the mess of materials that presents itself on the international plane, explaining that examining the evidence of customary international law, establishing its value and formulating the conclusions to which it seems to lead was among the most important services that the writers on international law can render).

13. Lauterpacht, *supra* note 9, at 25; *see also* Paul W. Kahn, *Nuclear Weapons and the Rule of Law*, 31 N.Y.U. J. Int'l L. & Poly. 349, 370 (1999) ("The international legal scholar takes on the burden of moving from the particular to the general. He or she announces that a principle has been accepted in a convention or has passed from convention to custom, i.e., from discrete political practices to a general rule of law. By announcing a rule of law, the scholar fills the logical void raised by the traditional conundrum of the origins of customary law, i.e., how can a practice become law, if a necessary condition of law is that the practice be pursued with an understanding—*opinio juris*—that it is already law.").

14. Karol Wolfke, Custom in Present International Law 156 (2d rev. ed. 1993).

course, and no doubt plays a substantial part in shaping juridical opinion.

The auxiliary role of writings in determining rules of international law is enshrined in Article 38.1(d) of the Statute of the International Court of Justice ("ICJ"), which refers to "the teachings of the most highly qualified publicists of the various nations, as [a] subsidiary means for the determination of rules of law."[15] This century-old text, first adopted for the Permanent Court of International Justice ("PCIJ"), recognizes the valuable role that writings may play in indicating whether a certain rule exists and how it might apply to the circumstances of a particular case. But it equally makes it clear that "the judge should only use [doctrine] in a supplementary way to clarify the rules of international law."[16] Chief Justice Cockburn famously expressed this sentiment in the *Franconia* case: "writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it."[17]

The preparatory work that led to Article 38.1(d) of the ICJ Statute offers little guidance as to what precisely was to fall under the term "teachings of the most highly qualified publicists of the various nations."[18] It seems clear, however, that the members of the Advisory Committee of Jurists who proposed this text for the Statute of the PCIJ—much like those who retained it in the Statute of the ICJ—probably had in mind the writings of only a handful of distinguished writers, and perhaps the major treatises. The exponential proliferation of international legal writing would happen only later.

15. ICJ Statute, *supra* note 1.

16. Advisory Comm. of Jurists, Permanent Ct. of Int'l Just., Procès-Verbaux of the Proceedings of the Committee: June 16th–July 24th 1920, at 336 (1920) [hereinafter Procès-Verbaux] (statement of the President, Baron Descamps).

17. R v. Keyn (The Franconia Case) [1876] 2 Exch. Div. 63 (Crown Case Reserved) at 202 (Eng.). *See also* West Rand Central Gold Mining Company, Ltd. v. The King [1905] 2 KB 391 at 407, *reprinted in* 1 Am. J. Int'l L. 217, 230–31 (1907); Molvan v. Attorney-General for Palestine [1948] 81 Lloyd's List LR 277 (PC) at 284.

18. The term "publicists" may seem a curious one in English; the members of the Advisory Committee of Jurists had also referred to "authors" and to "writers." *See* Procès-Verbaux, *supra* note 16, at 323, 344, 351. The word "publicists" was a translation of the French text of the Statute, which refers to *publicistes*—that is, persons learned in public law (as opposed to those who teach or practice private law). Everyone who professes public international law (as opposed to private international law) in a French university is by definition a professor of public law.

Some have suggested that what really needs to be considered are not the writings of individuals but the writings of publicists in general, in order to ascertain any concordant views among them,[19] as such general agreement among qualified authors would naturally be given greater weight in seeking to determine whether a rule of international law exists. This idea finds support in the preparatory work of the Advisory Committee of Jurists,[20] as well as in the French text of Article 38.1(d), with its mention of *la doctrine*.[21] The ICJ, which has hardly ever referred to writings (as opposed to its judges writing individually),[22] made a general reference in the *Nottebohm* case both to

19. Robert Jennings, *Reflections on the Subsidiary Means for the Determination of Rules of Law*, STUDI DI DIRITTO INTERNAZIONALE IN ONORE DI GAETANO ARANGIO RUIZ 319 (2003), *reprinted in* BRITISH CONTRIBUTIONS TO INTERNATIONAL LAW 1915–2015, at 845, 849 (Jill Barret & Jean-Pierre Gauci eds., 2021) ("This term 'teachings' was presumably an attempt at a translation of the French 'doctrine', and it might in fact have been better translated simply as 'doctrine'. The idea of doctrine seems to introduce a new factor. It suggests that an examination of the works of publicists in the plural, may be used to find out whether a view is one which may be said to constitute a teaching or doctrine that is accepted by publicists in general or at any rate by a considerable number of them"); WOLFKE, *supra* note 14, at 156 ("The importance of doctrine is no longer based on certain individual celebrities, but above all upon the concordant opinions of writers representing various legal and social systems.").

20. Baron Descamps referred to "the concurrent teaching of the authors whose opinions have authority" while invoking Chancellor Kent's saying that "when the greater part of jurisconsults agree upon a certain rule—the presumption in favor of that rule becomes so strong, that only a person who makes a mock of justice would gainsay it." He also referred to "coinciding doctrines of jurists" (supported by Lord Phillimore who later spoke of "the works of writers who agree upon a certain point"), and he preferred to see a reference in the Statute not to "the opinions" of writers but to "coinciding doctrines." De Lapradelle similarly said that "[i]f it were wished to include doctrine as a source it should be at any rate limited to coinciding doctrines of qualified authors in the countries concerned in the case," but nevertheless suggested that "the publicists are hardly ever agreed on a point of law." It was in order to satisfy him that the word "coinciding" was dropped from the text, but he eventually voted against the inclusion of what was to become paragraph (d), saying that "[t]he source of law referred to under this heading could not be clearly defined. Laws, customs, and general principles of law could not be applied without reference to jurisprudence and teaching." PROCÈS-VERBAUX, *supra* note 16, at 323, 331–32, 334–36, 337, 584.

21. *Id.* at 567.

22. *See* Michael Peil, *Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice*, 1 CAMBRIDGE J. INT'L & COMPAR. L. 136 (2012); SONDER TORP HELMERSEN, THE APPLICATION OF TEACHINGS BY THE INTERNATIONAL COURT OF JUSTICE (2021). The Court's reluctance to cite the work of individual authors may well reflect a desire to

"the writings of publicists" and to "the opinions of writers,"[23] and in the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, it noted "the view of the vast majority of States as well as writers."[24] The PCIJ had surveyed in the *Lotus* case the "teachings of publicists" (expressly leaving aside "the question as to what their value may be from the point of view of establishing the existence of a rule of customary law"), only to emphasize that no unanimity of opinion could be established.[25]

Whatever may have been the position in the past, nowadays the sheer volume of publications in the field of international law (and certain tendencies therein, discussed below) would hardly make it feasible to establish a concordant view in all cases. There is, of course, the filter provided by the words "the most highly qualified publicists of the various nations," but this curious phrase seems to require an inherently subjective appreciation: Georg Schwarzenberger observed that "[i]t is about as difficult to find out who are the most highly qualified publicists in the field of international law as to say with any claim to objectivity what is a peace-loving nation within the meaning

avoid being seen as making invidious distinctions among publicists. Jennings, *supra* note 19, at 847. It may also be the case that "the Court prefers, if possible, to base itself on evidence more obviously emanating from States or from tribunals invested by States with law-determining authority." Humphry Waldock, General Course on Public International Law 96 (1962).

23. The Nottebohm Case (second phase) (Liech. v. Guat.), Judgment, 1955 I.C.J. 4, 22–23 (April 6) ("Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality. The same tendency prevails in the writings of publicists and in practice . . . . According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.").

24. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 85 (July 8). *But see* Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. (intervening)), Judgment, 1992 I.C.J. 351, ¶ 392 n.1 (Sept. 11) (exhibiting a rare exception where "an article by Sir Cecil Hurst, later President of the Permanent Court of International Justice" was cited by a Chamber of the Court).

25. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 26 (Sept. 7) (finding that what "writers teach" did not fully support the view advanced by France).

of the Charter of the United Nations."[26] Baron Descamps had initially spoken in the Advisory Committee of Jurists of "publicists carrying authority," and Lord Phillimore remarked that "[t]here is no need to say, that only the opinions of widely recognised authors were in question."[27] The PCIJ referred in one case to "the teachings of legal authorities,"[28] a phrase that brings to mind the warning issued by a former judge of that Court, according to which "[w]riters, even dead ones, seldom deserve the compliment paid in calling them 'authorities.'"[29]

Those who are "the most highly qualified" are, in the words of the U.S. Supreme Court, the "jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat."[30] The International Law Commission ("ILC") has similarly drawn attention to "the

26. Georg Schwarzenberger, *The Inductive Approach to International Law*, 60 HARV. L. REV. 539, 559–560 (1947). *See also* Prosecutor v. Al-Bashir, ICC-02/05-01/09 OA2, Decision on the Requests for Leave to File Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, the Request for Leave to Reply and Further Processes in the Appeal, ¶ 10 (May 21, 2018) (the ICC Appeals Chamber inviting, rather curiously, only "the most senior" of those scholars who had done research and writing on the relevant legal questions to submit written observations and to participate in the oral hearings, including on the question whether customary international law afforded immunity that would bar the Court from exercising its jurisdiction).

27. PROCÈS-VERBAUX, *supra* note 16, at 319, 333. A later suggestion by Baron Descamps and Lord Phillimore, as amended by Ricci-Busatti, referred to "opinions of the best qualified writers of the various countries." *Id.* at 351.

28. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1925 P.C.I.J. (ser. A) No. 6, at 20 (Aug. 25).

29. Manley O. Hudson, *Legal Foundations of International Relations*, 2 NAVAL WAR COLL. REV. 11, 19 (1949).

30. The Paquete Habana, 175 U.S. 677, 700 (1900). In an *amici curiae* brief submitted to the United States Supreme Court in support of the respondents in *Kiobel v. Royal Dutch Petroleum*, the Governments of the United Kingdom and the Kingdom of the Netherlands referred to "respected jurists." Brief for the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae Supporting Respondents at 4, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491). *See also* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 143, 145 (2d Cir. 2010) (referring to certain "renowned professors of international law" as "authorities [that] demonstrate[d] that imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*").

writings of those who are eminent in the field."[31] But the ILC has also observed that "[i]n the final analysis, however, it is the quality of the particular writing that matters rather than the reputation of the author."[32] The Commission further specified, in the commentary to its Conclusions on Identification of Customary International Law, that "among the factors to be considered in this regard are the approach adopted by the author to the identification of customary international law and the extent to which his or her text remains loyal to it."[33] These words highlight not only the need to consider the merits of any given study and the extent to which the particular circumstances of its author may have colored his or her views; they are also there in recognition of the fact that the writers on international law may well have an important part to play in criticizing the existing rules and in proposing new ones.[34] A shining example is the influence of authors in promoting the concept of *jus cogens*, and indeed the law of human rights. Some writers had a formative influence over the development of particular rules, such as Gidel on the law of the sea. It should go without saying that the task of stating the existing law is fundamentally different from the task of saying what the law might or should one day become.

31. Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, at 151 (2018) [hereinafter Draft Conclusions].

32. *Id.*; *see also* LAUTERPACHT, *supra* note 9, at 24 (referring to "recognized competence, impartiality and authority"); Anthony D'Amato, *What Does It Mean to Be an Internationalist?*, 10 MICH. J. INT'L L. 102, 104 (1989) (suggesting that "the term 'highly qualified publicists,' of course, is synonymous with . . . 'respected scholars' . . . [it] selects from the class of scholars those whose writings have commended themselves, through objectivity of reporting and judgment, to the international legal community"); Georg Schwarzenberger, *The Province of the Doctrine of International Law*, *in* 9 CURRENT LEGAL PROBLEMS 1956, at 235, 238–39 (George W. Keeton & Georg Schwarzenberg eds., 1956) (referring to the "tests which are implied in Article 38 of the Statute of the World Court: uncompromising independence, an international outlook undeflected by any particular 'cause,' and unceasing efforts at more complete mastery of one's own chosen subject"); S.T. Helmersen, *Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice*, 30 EUR. J. INT'L L. 509–35 (2019).

33. Draft Conclusions, *supra* note 31, at 151.

34. One may recall here the words of Robert Ward: "Of so great consequence are sometimes the silent exertions of the closet, to the more active and louder professions which contend with it for the government of the world." 2 ROBERT WARD, AN ENQUIRY INTO THE FOUNDATION AND HISTORY OF THE LAW OF NATIONS IN EUROPE 364 (1795).

III. Present-Day Perils

The contemporary reader may perhaps find this hard to believe, but the writers on international law were once criticized for being too conservative. A century ago, Manley O. Hudson described them as mostly working over materials that had been handed down to them, and he considered it a very serious matter "that law-writers frequently express not the ideas of their own time, but the ideas of some preceding generation."[35] More specifically, Hudson bemoaned:

> They tend to regard contemporaneous thought and contemporaneous practice as more ephemeral than the traditions received from their teachers, and hence they state as accepted that which a preceding generation thought and did. Imitation is a temptation to which they continually yield, and it is only increased by their willingness to deal with doctrine as if it were always constant and consistent.[36]

That is no longer the case today, and we are better for it. But all too often the scholarship is once again divorced from international law as it operates in the real world, even if in quite a different way. As Professor Jan Klabbers put it, "[i]nternational law, in the academy, is no longer about what states do, but has become about what international lawyers do. We have lost touch with legal practice, and the discipline has become transfixed by methodological debates."[37] Sir Christopher Greenwood sounded a similar alarm, aptly observing that "[w]riters on international law should never be the mere scribes of state practice but there are worrying indications of a trend in international legal scholarship that is both ignorant of and determinedly detached from the practice of international law."[38]

Much of what is published nowadays on international law does indeed suffer in this way. Questions are raised—and answered—not only without the knowledge that they are rooted in earlier experiences of international law, but also without due regard to the overriding reality of international relations. State practice is glossed over, surveyed partially or inaccurately, or paid only lip service. Assertions are made without sufficient knowledge of how the rules and legal institutions that make up the international legal system work in practice. Arguments are

35. Manley O. Hudson, *Prospect for International Law in the Twentieth Century*, 10 Cornell L. Rev. 419, 437 (1925).

36. *Id.*

37. Jan Klabbers, *On Epistemic Universalism and the Melancholy of International Law*, 29 Eur. J. Int'l L. 1057, 1062 (2018).

38. Christopher Greenwood, *The Practice of International Law: Threats, Challenges, and Opportunities*, 112 Am. Soc'y Int'l L. 161, 167 (2018).

put forward that bring to mind the memorable words of the Privy Council from 1934: "their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law."[39]

In some cases, it seems that the writers are content with writing for one another. They seem to forget—perhaps they do not much care—that their influential predecessors did not remain secluded within the ivory tower of academia. Figures such as Hugo Grotius, Alberico Gentili, and Friedrich Fromhold von Martens, as Sir Michael Wood reminds us, "were first and foremost practitioners, with their writings being closely associated with their practice."[40] It is in this tradition, and out of his own exemplary personal experience, that the former president of the ICJ, Eduardo Jiménez de Aréchaga, advised that "one has to combine academic activity with some real-world activity."[41] The two pursuits, he said, "support each other: you are a better professor if you practise law; you are a better practitioner if you have an academic background."[42]

Another contemporary challenge is posed by the increasing specialization of the writers on international law. If the concern about fragmentation of the law at the hands of international courts and tribunals has by now largely subsided,[43] the threat to the unity of the discipline presently lies in the fact that international law is increasingly taught, and thought of, through narrow prisms of specialized branches.[44] Professor Jorge Viñuales has pointed in this context to an "inability to think out of the (branch) box," that is, "the 'framing' of a real-life problem [as being limited] to the artificial confines of a 'branch' rather than encompassing the wider body of rules (whatever the branch) which may be relevant to it."[45] That may well be observed in some of the writings on international law as it relates to the environment, international criminal law, and international human rights law, which often neglect to consider not only the implications of the thesis presented for other fields, such as diplomatic relations or the

39. *In re* Piracy Jure Gentium [1934], AC 586 (Eng.).

40. MICHAEL WOOD, COURSES OF THE SUMMER SCHOOL ON PUBLIC INTERNATIONAL LAW: INTERNATIONAL LAW IN PRACTICE 32 (2022).

41. ANTONIO CASSESE, FIVE MASTERS OF INTERNATIONAL LAW 70 (2011).

42. *Id.*

43. *See* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW (Mads Andenas & Eirik Bjorge eds., 2006).

44. Klabbers, *supra* note 37.

45. Jorge Viñuales, *The Forgotten Constitution: The UN Friendly Relations Declaration at 50*, EJIL: TALK! (Apr. 23, 2020), https://www.ejiltalk.org/the-forgotten-constitution-the-un-friendly-relations-declaration-at-50/ [https://perma.cc/W245-ETZL].

laws of war, but also for the fundamental principles underlying international law as a whole. One can perhaps no longer expect international lawyers to keep abreast of all the activities of States (and others) in all walks of international life; but they must not lose sight of the wood for the trees. To quote Judge Greenwood once more, "[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law."[46]

Yet another problem that writings not infrequently suffer from, which has been with us some time now, is no less acute: the blurring of the line between *lex lata* and *lex ferenda*—between actual and desirable law.[47] The distinction between law and policy is, of course, an essential one. Without it, "any present law cannot be held as a constraining factor in social decision."[48] Too often, however, as Sir Robert Jennings wrote, "missionary zeal tends to enter into the calculation, greatly tempting an enthusiastic 'publicist' to be less than clear about the distinction."[49] In so doing, the writer—no doubt well-meaning—dresses his or her political views in juridical guise. Instead of criticizing a certain existing rule and calling for its replacement, or campaigning for a new rule to be adopted where there is none, he or she overstates the case and misrepresents the law that is in force.

Failings of this kind are particularly evident in some of the contemporary scholarship concerned with customary international law. Take, for instance, the numerous writings on the immunities of State officials from foreign domestic jurisdiction. While some authors demonstrate that the traditional rules conferring immunity remain

46. Ahmadou Sadio Diallo (Guinea v. Demo. Rep. Congo), Judgment, 2012 I.C.J. 324, 394 (June 19) (declaration by Greenwood, J.).

47. Writing a century ago, Oppenheim suggested that "[s]cience may also test and criticize, from the politico-jural standpoint, the existing rules of customary or enacted law, but, on the other hand, it may not contest their operation and applicability, even if convinced of their worthlessness. It must not be said that these are obvious matters and therefore do not need special emphasis. There are many recognized rules of customary law the operativeness of which is challenged by this or that writer because they offend his sense of what is right and proper . . . Here they are putting their politico-jural convictions in the place of a generally recognized rule of law." Lassa Oppenheim, The Future of International Law 57 (1921).

48. Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 209 (Cambridge Univ. Press reprt., 2005).

49. Robert Jennings, *International Law Reform and Progressive Development*, *in* Liber Amicorum: Professor Ignaz Seidl-Hohenvelden in Honor of His 80th Birthday 325, 333 (Gerhard Hafner et al. eds., 1998) (noting, however, that "this use as a rhetorical weapon of the lack of a clear boundary between proposal and existing law is not confined to writers").

firmly rooted in international law, even where the commission of serious international crimes is alleged, others suggest there is a visible 'trend' denying such immunity, and still others assert that immunity is not at all afforded under the international law in force. Needless to say, they cannot all be right. The determination of customary international law may not be an exact science; but there is no excuse for failing to properly take into account the views pronounced on this issue by States, or indeed to qualify an argument when necessary. Allowing preconceived ideas of what is 'right' to guide the inquiry and determine its outcome is not a legitimate way to ascertain the law, either.

Even more puzzling is the tendency of some authors to depict customary international law as defunct or obsolete, ignoring the fact that governments, judicial institutions, and other actors continue to invoke and apply this principal source of international law on a daily basis.[50] And then there are those who set out to describe what customary international law "really is" and how we all ought to think about it, unperturbed by the fact that States—the primary lawmakers in the international community—continue to pledge their allegiance to the persistent formula of 'a general practice accepted as law.[51] Many writings have undoubtedly contributed greatly to better understanding of customary international law, but others exemplify the concern that "especially wherever scholarly discussion starts to feed on itself, it loses touch with reality."[52]

All of this cannot be brushed aside as a purely academic matter, for it may well have serious consequences in the real world. Municipal judges, for instance, are not invariably well versed in international law, and may be swayed in one direction or another by writings to which they turn for impartial guidance in a particular case. Larger considerations, too, call for an integrity of method and a balanced

50. *See* Herbert W. Briggs, *The Colombian-Peruvian Asylum Case and Proof of Customary International Law*, 45 AM. J. INT'L L. 728, 729 (1951) (observing that "[t]heoretical difficulties involved in the determination of these elements [of customary international law] or of the methods and procedures by which customary rules of international law are created or evolve from non-obligatory practice often receive more attention than the fact that in a given case courts have relatively little difficulty in determining whether or not an applicable rule of customary international law exists"); IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS: INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS 21 (1998) (referring in particular to the constituent element of *opinio juris* in observing that the question of proof of customary international law "does not present as much difficulty as the writers have anticipated").

51. See G.A. Res. 73/203, at 2 (Dec. 20, 2018).

52. Hans W. Baade, *Codes of Conduct for Multinational Enterprises: An Introductory Survey*, *in* LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 407, 413 (Norbert Horn ed., 1980).

exposition of any subject matter in the literature on international law. To these considerations we now turn.

IV. The Importance of Being Earnest

The determination of rules of international law should be carried out with an earnest solicitude by all those engaged in the task, not only writers. But the position of scholarship in the international legal system, and the present reality in which it is produced and consulted, may justify recalling why it is, exactly, that such diligence is required. Four closely related reasons may be listed.

First, it is crucial for the authority of international law to maintain a distinction between law and non-law. If interest and ambition—however well-intentioned—are given juridical guise and the line cannot be drawn clearly between law and proposal, international law will not retain the confidence of those to whom it is addressed. Determining the existence of rules without a degree of assurance that the international community is indeed committed to them as obligatory risks the effectiveness and legitimacy not only of the specific rule in question, but ultimately of the system as a whole.[53] The writer ought therefore to clearly see the difference between *lex lata* and *lex ferenda*: if not, he or she might end up undermining international law rather than encouraging its administration. "Pseudo-law," as Professor Bin Cheng has remarked, "can be the worst enemy of the Rule of Law."[54]

None of this is to say that writers should not shoulder the task of contributing to the progressive development of the law, or proposing wholly new law. As already noted, there is tremendous value in scholarly assessment that tests and criticizes international law. But even if it were true that "[i]n the absence of a World Parliament, truly ambitious—perhaps 'revolutionary'—scholarship appears to offer a singular hope for the derivation of common principles,"[55] that work must be done transparently.[56] It is profitable to quote once more the words of Jennings, which remain as valid today as they were over thirty years ago:

> It is undeniably important that scholars with imagination and vision should publish ideas for better international law. Good ideas, if they are timely and blessed by good fortune, possibly

53. *See* Jonathan I. Charney, *Customary International Law in the Nicaragua Case Judgment on the Merits*, 1 Hague Y.B. Int'l L. 16, 24 (1988).

54. Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 Indian J. Int'l L. 23, 48 (1965).

55. Paulsson, *supra* note 11, at 191.

56. *See* Wood, *supra* note 40, at 30.

> accomplish as much as, or more than, the diplomatic conferences, with their promising drafts of articles, so beloved by those who seek to further the "progressive development" of international law. Yet it is important not to carry the campaign for a "new" international law so far as possibly to weaken the authority and respect which our present international law enjoys. And it is still important to distinguish between *lege lata* and proposals *de lege ferenda*; not merely as a technical matter but because of the trap into which the layman so easily falls of supposing all international law to be a proposal.[57]

Second, any scholarly investigation that seeks to define the restrictions placed by international law upon the sovereignty that States continue to hold so dear must necessarily be rigorous and realistic, for otherwise it will easily be rejected by them. As the German Federal Constitutional Court has stressed, "[d]ue to the fundamental obligation of all States expressed therein, high requirements must be placed on the establishment of a general rule of international law."[58] An emphasis on facts and regard for reality in offering a meticulous and dispassionate evaluation of the law, will make the conclusion presented by the writer legitimate and reliable, and thus difficult to question or ignore as a unilateral attempt at law-making. Philip Allott's observation comes readily to mind:

> [A]n international lawyer who persists in finding rules of international law which governments, international tribunals and his lawyer-colleagues never or seldom thereafter treat as law, may be on the side of the angels but will not in the end serve the useful purpose of contributing to the improvement of the quality of relations between States.[59]

Third, when scholarship is diligent and objective, it is a credit to the status and stature of its author, which in turn allows him or her to exercise real and legitimate influence. Writings that are thorough and realistic will continue to be of much needed assistance to those who apply international law to actual situations, whether in ministries of foreign affairs, national courts, international tribunals, or elsewhere. They will also carry greater authority, and draw respectful attention, when they put forward proposals for a change in the law. To the extent

57. Robert Y. Jennings, *An International Lawyer Takes Stock*, 39 INT'L & COMPAR. L.Q. 513, 527–28 (1990).

58. BVerfGE, 2 BvR 824/15, 31, July 3, 2019 (Ger.), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/07/rk20190703_2bvr082415.html [https://perma.cc/ML59-BBNQ].

59. Philip Allott, *Language, Method and the Nature of International Law*, 45 BRIT. Y.B. INT'L L. 79, 105 (1971).

that the increasingly diverging views among writers on many subjects in the field render citations from them unhelpful,[60] sticking to elementary scholarly principles could help minimize that.

Finally, the task of evaluating and recording the law has a moral dimension to it. As Reisman put it,

> International law is based on consent, which is a healthy and democratic feature. Actors are not bound by law unless they agree to it. They can agree explicitly through treaties and conventions or implicitly—through practice. Just as it would be intellectually dishonest and profoundly immoral to try to impose a contract on a party that had never agreed to it, it is intellectually dishonest and immoral to try to reach the same result by pretending that a customary international rule has been formed, without systematically determining that state practice accompanied by the necessary attitudes has generated a customary rule.[61]

V. Conclusion

The writers on international law have made—and continue to make—an extraordinary contribution to the discipline. None of what has gone before is to rob their work of the confidence and creativity that ought to guide it, nor is it suggested that the law must always be found, rather than made. Instead, the point here being emphasized is that precisely because of the considerable influence that writings can and do exert, academic discourse on international law ought to be "trustworthy evidence of what the law really is."[62] Scholarship advocating for a progressive conception of international law can and should be a powerful vehicle for desirable change, but its authors must not arrogate for themselves a legislative function that they do not have. The formal role of writings as a "subsidiary means for the determination of rules of international law," as John Fischer Williams wrote in 1939, is the expression of "an acceptance by states of the importance of the contribution which individuals of light, leading, and authority, not acting consciously by or on behalf of states, do in fact make to

60. *See* Lauterpacht, *supra* note 9, at 24; *see also* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 75–76 (Feb. 14) (joint separate opinion of Higgins, J., Kooijmans, J., and Buergenthal, J.); The Renard (1778) 165 Eng. Rep. 51, 52 ("A pedantic man in his closet dictates the law of nations; 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.").

61. Reisman, *supra* note 12, at 24.

62. The Paquete Habana, 175 U.S. 677, 700 (1900).

international law."[63] These words remind us what it is that all writers on international law, when picking up their pen, should aspire to do.

63. John Fischer Williams, Aspects of Modern International Law 58 (1939) (referring also to the other so-called subsidiary means listed in Article 38.1(d) of the ICJ Statute, judicial decisions).