9-1-2003

Symposium Introduction: Scholarship as Evidence of International Law

William J. Aceves

Symposium Introduction: Scholarship as Evidence of International Law

WILLIAM J. ACEVES*

International law has long-recognized the role of scholarship as a "subsidiary means for the determination of rules of law."[1] While it does not create law, scholarship chronicles the development of the law and serves as evidence of its status. Scholarship can also serve as persuasive authority for the further development of international law. International Law Weekend - West (ILW - West) convened at Loyola Law School on February 7, 2003.[2] It is the second conference organized by the American Branch of the International Law Association on the West Coast.[3] The conference brought legal practitioners and academics together to discuss current issues in public and private international law. This Symposium Issue represents the ambitious scope and quality of the

---

* Professor of Law and Director of the International Legal Studies Program at California Western School of Law. Professor Aceves and Professor Laurence Helfer of Loyola Law School served as co-chairs for International Law Weekend - West. The other members of the organizing committee were: Roger Alford, Jeffery Atik, Gregory Fox, Alan Kindred, Hari Osofsky, Charles Siegal, and Beth van Schaack. Professor Aceves would like to thank Professor Helfer and the other members of the organizing committee for their work in planning the conference.

1. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, T.S. NO. 993 [hereinafter ICJ Statute]. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed. 1999); CLIVE PARRY, THE SOURCES AND EVIDENCE OF INTERNATIONAL LAW (1965) (discussing scholarship as evidence of law).

2. The International Law Weekend – West co-sponsors were: American Society of International Law; California Western School of Law; International Law Section of the State Bar of California; International Law Section of the Los Angeles County Bar Association; Morrison & Foerster, LLP; Munger, Tolles & Olson, LLP; Hirson Wexler Perl; and GVS Global Visa Solutions, LLC.

3. The International Law Association was founded in 1873 as a private organization devoted to the study of international law. It has over forty national branches throughout the world. The American Branch of the International Law Association (ABILA) was established in 1922. The ABILA consists of several committees that study and address such issues as arbitration, arms control, commercial law, environmental law, extradition, human rights, intellectual property, and trade law.

discussions that took place at ILW - West.[4] It also serves as evidence of international law and as persuasive authority for the further development of the law.

Two articles in this Symposium Issue highlight the domestic and international implications of the war on terrorism. Jaume Saura describes the use of force under international law and the requirements for the valid exercise of the inherent right of self-defense. In light of these requirements, he criticizes the use of force against Afghanistan following September 11th as lacking international legitimacy. Moreover, he finds that post-September 11th developments around the world highlight the need for a comprehensive global agreement against terrorism and a more active role for the U.N. Security Council in regulating the use of force. In contrast, George Harris focuses on the domestic implications of the war on terrorism. He examines the controversy regarding the Bush administration's use of unlawful combatant designation to detain alleged terrorists indefinitely. Like Saura, Harris is critical of unbridled power and seeks to place limits on such power through legislative oversight and judicial review.

Two articles address the highly charged Alien Tort Claims Act (ATCA) and its role in litigation involving multinational corporations.[5] Paul Hoffman and Daniel Zaheer examine complicity liability in the context of an ATCA lawsuit filed against Unocal Corporation for alleged human rights abuses in Myanmar. The authors call for the use of international law in determining the circumstances under which defendants can be held liable for aiding and abetting in human rights abuse cases. Edwin Woodsome, Jr. and T. Jason White take a different approach to aiding and abetting, calling for a narrower standard of liability. Both articles recognize the role of international law in gauging complicity liability under the ATCA, although they differ in their use of that law and in the governing standards that should apply.

---

4. Panels were convened on the following topics: 9/11 and its Aftermath; Positivism versus Natural Law – The Jurisprudence of International Law; Perspectives on U.S. Unilateralism; Unlawful Combatants?; International Copyright and Entertainment Law; Legality of the Use of Force; Structuring Cross-Border Transfers of Intellectual Property; Death Penalty Litigation and the Use of International Law to Interpret the Constitution; Extraterritoriality and the Criminal Law: Terrorism and Other Contemporary Challenges; Immigration Law: Planning Global Employment Assignments After 9/11; Sustainable Development After Earth Summit; Current Developments in Alien Tort Claims Act Litigation; and NAFTA and the Takings Clause.

5. The authors of these two articles are counsel for the respective parties in *Doe I v. Unocal Corp.*, which involves the Alien Tort Claims Act. *See* Doe I v. Unocal Corp., No. 00-56603, 2002 U.S. App. LEXIS 19263 (9th Cir. Feb. 14, 2003).

The remaining two articles address issues of increasing global concern and regulation: sustainable development and intellectual property protection. Hari Osofsky examines the uncertain status of sustainable development in international law. She notes that Earth Summit 2002 set high expectations for the advancement of sustainable development policies but that such policies have yet to materialize. She then examines the conceptual and political problems associated with sustainable development and considers the future of these policies. Finally, Peter Yu challenges contemporary understandings of copyright piracy and highlights several misperceptions. He offers a more nuanced solution to the problem of copyright piracy, suggesting states must acknowledge and address the copyright divide that separates stakeholders and non-stakeholders.

As legal scholarship, the articles in this Symposium serve two functions. Some articles chronicle the status of international law in a particular issue area. In this respect, they are descriptive and serve as evidence of the law. Other articles, in calling for the advancement of the law in a particular issue area, move beyond the descriptive and into the normative. But both functions – the descriptive and the normative – are valuable, and both contribute to a deeper understanding of international law.

Critics have recently challenged the role of scholarship as evidence of international law.[6] They argue that the use of legal scholarship as a subsidiary or secondary source of international law suffers from an anachronism. In the nineteenth century, they contend, "scholars did the hard work of collecting international practices."[7] These scholars were presumed to have a deep understanding of the status of international law. In contrast, critics charge that contemporary international law scholars "have no special claim to insight," at least in international human rights law.[8] Much of contemporary international law scholarship, then, is "characterized by normative rather than positive argument, and by idealism and advocacy."[9] Accordingly, "[t]he practice of relying on

---

6. *See Panel Discussion: Scholars in the Construction and Critique of International Law*, 94 AM. SOC'Y INT'L L. PROC. 317 (2000); *see also* Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); Daniel W. Drezner, *On the Balance Between International Law and Democratic Sovereignty*, 2 CHI. J. INT'L L. 321 (2001).

7. Jack Goldsmith, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC'Y INT'L L. PROC. 317, 318 (2000).

8. *Id. But see* Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399 (1996); Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

9. Goldsmith, *supra* note 7, at 319.

international law scholars for summaries and evidence of customary international law – that is, as secondary or 'subsidiary' sources of international law – makes less sense today" than it did one hundred years ago.[10]

Historically, these arguments seem misplaced. It is inaccurate to suggest that *contemporary* international legal scholarship is "characterized by normative rather than positive argument, and by idealism and advocacy."[11] International legal scholarship has long served both descriptive and normative goals.[12] For example, the *American Journal of International Law* has featured both forms of scholarship since its establishment in 1906.[13] The *Loyola of Los Angeles International & Comparative Law Review* has a similar history of scholarly engagement.

And there is another problem with this critique – it does not comport with international practice.[14] The use of international legal scholarship as evidence of international law was codified in the Statutes of both the Permanent Court of International Justice and the International Court of Justice.[15] Article 38(1) of the ICJ Statute provides that the teachings of the most highly qualified publicists of the various nations provide a "subsidiary means for the determination of rules of law."[16] The ICJ Statute is recognized as an authoritative guide for

---

10. Flores v. Southern Peru Copper Corp., 343 F.3d 140, 158 (2d Cir. 2003). There is, of course, a subtle irony in the court's analysis because the court relies on legal scholarship to question the use of legal scholarship as evidence of international law. For a related (but less hostile) critique of international legal scholarship, see United States v. Yousef, 327 F.3d 56, 93 (2d Cir. 2003).

11. Goldsmith, *supra* note 7, at 319.

12. Even the work of Hugo Grotius, often referred to as the "father of international law," was influenced by normative goals. His writings on the law of the sea were influenced by his desire to promote free trade opportunities for Dutch companies overseas. *See Conference: The Grotius Lectures Series*, 14 AM. U. INT'L L. REV. 1515 (1999).

13. A review of the articles that first appeared in the *American Journal of International Law* affirms the longstanding dual role of international legal scholarship. *See, e.g.*, Elihu Root, *The Need of Popular Understanding of International Law*, 1 AM. J. INT'L L. 1 (1907); John W. Foster, *International Responsibility to Corporate Bodies for Lives Lost By Outlawry*, 1 AM. J. INT'L L. 4 (1907); John Bassett Moore, *International Law: Its Present and Future*, 1 AM. J. INT'L L. 11 (1907).

14. *Cf.* The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).

15. Statute of the Permanent Court of International Justice, Dec. 16, 1920, art. 38(1), 6 L.N.T.S. 390.

16. ICJ Statute, *supra* note 1, art. 38(1)(d).

acceptable sources of international law.[17] Not surprisingly, international tribunals often cite to international legal scholarship in their opinions.[18]

It is, of course, correct to differentiate between the different forms of international legal scholarship. Some forms of legal scholarship are engaged in pure normative argumentation as they seek to promote particular causes. Other forms of legal scholarship are purely descriptive in nature as they seek to chronicle the development of the law. And some international legal scholarship contains both descriptive and normative elements.[19]

This Symposium Issue contains both forms of international legal scholarship. But whether they are descriptive or normative in nature, these articles all contribute to a deeper understanding of international law.

---

17. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 rpt. n.1 (1987) (Article 38(1) of the ICJ Statute is "commonly treated as an authoritative statement of the 'sources' of international law."); *see also id.* at § 103(2)(c).

18. *See* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. 40 (Mar. 16) (joint dissenting opinion of Judges Bedjaoui, Ranjeva and Koroma); Kasikili/Sedudu Island (Bots./Namib.), 1999 I.C.J. 1045 (Dec. 13) (dissenting opinion of Judge Weeramantry); Case 50/00 P, Union de Pequenos Agricultores v. Council, 2002 E.C.R. I-6677; Case 381/98, Ingmar GB Ltd. v. Eaton Leonard Technologies, 2000 E.C.R. I-9305; AB v. Slovakia, app. no. 41784/98, *at* http://www.ehcr.coe.int/eng (Eur. Ct. Hum. Rts., 2003); Al-Adsani v. United Kingdom, app. no. 35763/97, *at* http://www.ehcr.coe.int/eng (Eur. Ct. Hum. Rts., 2001) (concurring opinion of Judge Pellonpdd).

19. Normative scholarship is not unique to international legal scholarship. As noted by Beth Stephens, legal scholarship (and litigation) "have always reflected the goals, concerns, and beliefs of their participants." Beth Stephens, *Scholars in the Construction and Critique of International Law*, 94 AM. SOC'Y INT'L L. PROC. 317, 318 (2000). She adds, however, that the danger "is not the *overt* commitment of scholars who identify with the legal cause advanced in their legal briefs and affidavits. To the contrary, *covert*, undisclosed biases demand far greater care from judges, who must filter out the unexpressed assumptions of those who believe themselves to be removed from such influences." *Id.* (emphasis in original). Such concerns form the basis of critical legal scholarship. *See generally* Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351 (1999); Jason Mark Anderman, *Swimming the New Stream: The Disjunctions Between and Within Popular and Academic International Law*, 6 DUKE J. COMP. & INT'L L. 293 (1996); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991).