Chapter 11

Scholarship as Law

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The cosmopolitan scholar as law-giver: an intriguing vision, but hardly new. Its distant past was glorious, and it never quite succumbed to the grip of the Westphalian mindset of territorialism and statist exclusivity. “The teachings of the most highly qualified publicists of the various nations” were acknowledged, in the words of Article 38 of the Statute of the Permanent Court of International Justice (adopted in 1920, and perpetuated in the Statute of the International Court of Justice), “as subsidiary means for the determination of rules of law.”

These “subsidiary means” are hardly the poor cousins of international law. Where they come into play, they may, given the nebulousness of formulations to be found in treaties or in restatements of “custom” or “general principles,” be decisive. This may be even more true in the minds of judges and arbitrators than in their ink. Still, there is no doubt that the states who established the World Court operated on the premise that as long as they fulfilled their task of fixing the content of international law they would have the stage alone; there would be no reason for recourse to the opinions of scholars. Although the expansion of institutions of higher learning meant that an ever-growing “invisible college” of analysts and commentators stood ready to show the world where it should go, prescriptive authority belonged to jealous servants of states more inclined to co-opt scholars than to be influenced by them.

Today we perceive the limitations of the Westphalian conception. Vast literature describes the modern diffusion of power through flows of finance, business, migration, and communications. One such study, by the notable Japanese business consultant and author Kenichi Ohmae, makes an observation which is profoundly relevant to the topic of this essay: “In some companies—and in most governments—there is a gap of more than a century between the cross-border realities of the external world and the framework of ideas and the principles used to make sense of them.” It is hard but necessary to accept the marginalization of centuries of political philosophy. Theories about the authority of the state surely continue to be relevant, but are ever

less adequate. Westphalia is not dead, and it would be dangerous folly to seek its total disappearance. Still, its frozen statism is an inadequate reflection of law in today’s world.²

This mindset is losing traction in favor of more pluralistic models. The pre-Westphalian world knew lengthy periods during which scholars unambiguously held sway as expositors of the law. It seems likely, I will argue here, that the importance of the scholar may, after a very long interlude, regain its historical luster.

Let us pursue each of these two matters: first, the ambiguity of modern attitudes toward the scholar, and then the reasons for the great influence of scholars in older times. We can then consider whether our times are propitious for their resurgence.

### I. The Westphalian Ambiguity

The Westphalian perspective was conveniently simple. The State was absolute; it alone decreed the law. The known world was neatly plotted and accounted for. International law was a mere semblance of law. It assumed its forms without having any of its true authority. This was so because no rule of international law would ever be opposable to any state unless it was positively embraced by that state. The contrast with citizens within states was stark.

Yet the strength of this mindset is not to be explained by its mere convenience as a way of thinking. Rulers and their powerful servants found this system—the legitimation of political oligopoly—to be of vast assistance in their projects of aggrandizement. It should never be forgotten that for most of its existence the Westphalian world has consisted of but a handful of States and their dominions. More recently, former colonies acceding to statehood have produced leaders all too ready to seize the banner of sovereignty as a support for entitlement to personal power. But it should also be observed that scholars themselves, to different degrees depending on time and circumstance, have passionately supported the emergence of the sovereign State. Hegel viewed it as the highest level of attainment on the path from the starting point (primitive societies ruled by aimless despotism) toward the fulfillment of social development. This was not merely collectivist romanticism—although it was certainly that too³—but also a response to the specter of societies torn apart by con-

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² More than half a century ago, Wilfred Jenks, a scholar who spent four decades with the International Labor Office, ultimately heading it, was already writing that “contemporary international law can no longer be reasonably presented within the framework of the classical exposition of international law as the law governing the relations between States, but must be regarded as the common law of mankind in an early stage of its development.” C. Wilfred Jenks, The Common Law of Mankind, at xii (1958). As it has subsequently gathered momentum, this development may be more centrifugal than centripetal, as shall be seen below, but that only gives greater urgency to the scholar’s contributions.

³ One of Hegel’s followers, Adolf Lasson, took this adulation to an extreme when he concluded his otherwise highly philosophical (and much derided) study, Princip und Zukunft des Völkerrechts, with a peculiar benediction of Reich and Emperor. See Adolf Lasson, Princip und Zukunft des Völkerrechts 116 (1871). This curiosity illustrates