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Summary

Roles of legal theorists and practitioners – from a public international law perspective

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The paper reflects on the roles of international legal scholars and practitioners. It empirically describes what international lawyers do, it reflects theoretically about some core issues arising in the various roles (e.g. the task of the judge to apply but possibly also to develop international law), and recommends normatively how international legal scholars should position themselves in relation to legal practice, and how to address role conflicts.

The empirical findings are based on interviews with 17 international practitioners who are (with three exceptions) also law professors (see on method part A), and on interviews conducted by others, on personal accounts, and on existing sociological studies. Part B briefly describes the roles of the scholar as a researcher and teacher. Part C sketches out the principal practical roles: legal advisers who oscillate between technicality and apology, legal counsels in international courts and tribunals, and international judges. Part D analyses the common features and common problems of both roles: International law is a vocation, international lawyers want – in both roles – to be creative and seek recognition by their peers, they aspire to work for the common good and for justice. The critique that international lawyers are caught between sentimental humanism and cynism did not seem fully pertinent for my interviewees. Part D II compares the law-developing role of judges and publicists, both mentioned in Article 38(1) lit. d) ICJ-Statute as a subsidiary source of international law. Part D III illuminates the political character of international scholarship and practice and the issue of „speaking law to power". Part E analyses differences between both roles, such as result-orientation versus openness and innovation, pragmatism versus systematisation, standardisation versus individualism, and last but not least the measurability of success. A crucial difference lies in the institutional authority and correlative accountability of the practitioner, the lack of both being the decisive condition for enjoying academic freedom.

Part F analyses the relationship between the systems „practice" and „scholarship". It is first asked how practice can serve scholarship (part F I). It is then asked, inversely, whether and how scholarship can serve practice (part F II). This part contains a plea for a relative emancipation of scholarship from practice along three lines: in favour of foundational research alongside applied research, in favour of empirical, theoretical, and ethical research besides purely doctrinal research and in favour of normative analysis alongside the positive analysis of the law as it stands. Normative analyses (i.e. the evaluation of international legal practice and suggestions *de lege ferenda*) are an indispensable task of legal scholarship because of the relative vagueness and dynamics of international law whose positive analysis can only generate false security.

Part G analyses specific problems of holders of dual roles. First, the synergy effects are highlighted: Practitioners become better practitioners through their academic training and work, and academics become better academics through practical experience. On the other hand, role conflicts can arise: Reflexion is undermined by practical activity because this endangers the result-openness, the impartiality, and the distance to the object

of study, and prevents the scholars from controlling practice from the outside. Also, the risk of self-contradiction and fear of being challenged as an arbitrator or judge mutes free scholarship. Impediments also work in the direction from scholarship to practice. For example, the practitioner tends to be biased *vis-à-vis* his own previous scholarly findings and is prone to give it a too prominent place. International judges, in particular, can be caught in conflicts due to their parallel, previous and even subsequent academic or other practical roles. The principal management tool with regard to role conflicts is, it is submitted, transparency rather than prescribing incompatibilities or disqualification.

Part H concludes with six observations:

(1) The most oscillating practical roles are those of the legal adviser and of the judge, who work on a broad spectrum at the very end of which lurk massive legitimacy problems.

(2) Scholars are caught in a tension between academic orientation and practical relevance. Scholarship must emancipate itself from practice without completely detaching itself, because this would misunderstand the practical character of the law itself.

(3) Scholars and practitioners play the common role of the expert in international relations. But this expertise cannot substitute political legitimacy. The *consensus doctorum*, the epistemic authority of scholars, does not justify the exercise of political authority needed for law-making.

(4) For dual role holders, all aspects of mutual enrichment can turn into disadvantages when they are exaggerated. For example, realism can lead to a lack of imagination, and diplomatic smoothness to wobbly argumentation.

(5) Overall, dual roles and role switching are not a problem because so many persons participate in the legal discourse. Bad scholarship (and to a limited extend bad practice) is neutralised by the work of hundreds of others dealing with the same legal problem.

(6) Every participant can and should contribute to securing the quality of the discourse on international law by clearly keeping in mind where he or she just stands: in the invisible college or at the invisible bar of international lawyers.