Matthias Ruffert, Zwischen Quelle und Gericht: Funktion der Wissenschaft bei der Identifikation des Völkerrechts, in: Freiheit und Regulierung in der Cyberwelt – Rechtsidentifikation zwischen Quelle und Gericht, Berichte DGIR Bd. 47, Heidelberg 2016.

# Summary

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Given the universality of its subject matter, public international law scholarship can step up to the challenge of the universality of science, serve as an example within legal scholarship and claim the equality of legal scholarship *vis-á-vis* other sciences.

The identification of the law "between source and court" has to come to terms with the ambivalence of the concept of method in legal scholarship. Identification of law by an international court must be methodologically sound, but neither the process of law-finding nor its result can be understood as scholarship. Therefore, reducing public international law to the imitation of court decisions without consequences is a risk for public international law scholarship.

The starting point in terms of method is the hermeneutic method of cognition and criticism of texts. It is necessary to broaden this approach, in particular with respect to empirical research.

Following the treatment of the exponentially risen amount of legal material since 1989, public international law scholarship disposes of a high degree of self-reflection. However, at a theoretical level, the gap between apology and utopia continues to exist. Moreover, different theoretical standpoints lead to divergent approaches in methodology and thereby to differences in attributing a function to scholarship in its working with the sources of public international law.

Although the cognitive element of law identification is higher in public international law than in domestic law, the assumption of a dichotomy between law-making and law-application remains unacceptable (*Kelsen*). Dispute resolution according to public international law always has an inherent degree of law-making, and the sources of law exert an influence over this process by virtue of their nature as a result of previous recognized law-making processes (*modes of law-making*).

The phase of a scholarly-based public international law (*gelehrtes Völkerrecht*) ended at the latest with the rise of positivism in the 19th century. Repercussions of this idea are still visible in Article 38 (1) (d) of the ICJ Statute which – notwithstanding all uncertainties in its context – refers to the institutionalised mainstream of the teachings of public international law and not to single opinions, which shall be applied if public international law remains incomplete after the primary sources are analysed.

Despite it being somewhat short-sighted to measure the influence of academic writings upon public international law by merely resorting to explicit quotations in international judgments, it can be stated that its influence remains clearly marginal.

What is more important is the professional imprint on decisions under public international law caused by public international law scholarship as a "professional science". Institutionalised forms of academic work tend to intensify such influence and hold academia's ground next to precedent.

*Identification of law* is a term to designate the detection of results from law-making processes that have already been completed. The term underlines the importance of the cognitive element in public international law-making.

Public international law scholarship has the main task to instruct the process of identification of law and to evaluate it. This implies academic methods for the identification of law which offer the possibility to elaborate statements on abstract and individual norms of public international law in a rational and verifiable way.

The spheres of academic method and practice led by it overlap in the interpretation of written public international law. To preserve its autonomy towards practice, the doctrine of interpretation must create a theoretical feedback of its observations and reproductions (for example: *linguistic turn*) and conserve its potential to prepare decisions in dispute resolution by scholarly means.

Always when practice has to be systematised in order to identify the law, public international law scholarship in fact applies empirical methods. It is necessary to recognise and formulate these methods as a genuine part of academic work in public international law.

Single steps of public international law empirics are (1) the detection of elements of practice (if possible by formulating *rationes decidendi*), (2) their evaluation following existing rules and principles, (3) their assessment according to actors, frequency and density and (4) the systematisation of results. Step (2) allows us to preserve the high potential of evaluative argumentation in jurisprudence when identifying the law.

The central task of academia in public international law is to provide "ready for use"-knowledge either gained by interpretation or by empirics. Commentaries may make such knowledge more accessible for dispute settlement. Internet-based information has led to a quasi-democratisation of research in public international law. Databases may structure knowledge to be accessed by judges and arbitrators.