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## EDITORIAL

# The Future of International Legal Scholarship: Some Thoughts on ‘Practice’, ‘Growth’, and ‘Dissemination’

CARSTEN STAHN\* AND ERIC DE BRABANDERE\*\*

Like international legal scholarship, LJIL is in transition. Our colleagues, Larissa van den Herik and Jean d’Aspremont, who have shaped much of the role and plural identity of the journal over the past decade, in collaboration with our different sections, have passed leadership on to us, the new team of (co-)editors-in-chief. This editorial reflects on the changing role and function of scholarship in international law, a theme important to our predecessors and ourselves. This is to some extent a niche area. It has not received much attention in discourse.<sup>1</sup> With some notable exceptions<sup>2</sup>, legal journals are typically reluctant to address overarching meta-issues of discourse, i.e. issues of production of scholarship, the role of journals vis-à-vis other media, or the broader direction of the development of international legal scholarship. Such issues might be perceived as non-scientific by some. We feel that it is important to include such dimensions, including critical self-reflection on our discipline, in international legal discourse.

In the opening volume of 2012, Larissa van den Herik made an important contribution in this journal with her reflections on the role of ‘LJIL in the Age of Cyberspace’.<sup>3</sup> In early 2013, Jean d’Aspremont and Larissa van den Herik followed up in a joint piece on ‘The Public Good of Academic Publishing in International Law’.<sup>4</sup> Tanja Aalberts added thoughts on the ‘perils and promises of interdisciplinarity’.<sup>5</sup>

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1 For a study of the role of scholarship in international law, see generally G. Schwarzenberger, ‘The Province of the Doctrine of International Law’, in G. W. Keaton and G. Schwarzenberger (eds.), *Current Legal Problems* (1956), 235; E. Münch, ‘Zur Aufgabe der Lehre im Völkerrecht’, in Graduate Institute of International Studies, *Recueil d’études de droit international en hommage à Paul Guggenheim* (1968), 490; R. Jennings, ‘International Lawyers and the Progressive Development of International Law’, in J. Makarczk (ed.), *Theory of International Law at the Threshold of the 21st Century* (1996), 413.

2 See, e.g., EJIL editorials, including J. Weiler, ‘Impact Factor – The Food Is Bad and What’s More There Is Not Enough of It: EJIL – the Beginning of an Existential Debate’, (2012) 23 EJIL 607.

3 See L. van den Herik, ‘LJIL in the Age of Cyberspace’, (2012) 25 LJIL 1.

4 See J. d’Aspremont and L. van den Herik, ‘The Public Good of Academic Publishing in International Law’, (2013) 26 LJIL 1.

5 See T. Aalberts, ‘The Politics of International Law and the Perils and Promises of Interdisciplinarity’, (2013) 26 LJIL 503.

We would like to expand on this debate here. This theme opens up a wide array of questions that are likely to remain at the forefront of debate in the next decades.

## I. CONCEPTIONS OF SCHOLARSHIP

An initial and fundamental point relates to the understanding of scholarship. The term is generally used in a generic sense, i.e. with reference to writings of publicists in the legal discipline.<sup>6</sup> But it is helpful to make a distinction between different types of scholarship. André Oraison, in a relatively detailed study of doctrine as a source of law, identified two principal forms: ‘academic scholarship’ (*doctrine académique* or *doctrine de réflexion*) and scholarship of action (*doctrine finalisée* or *doctrine d’action*).<sup>7</sup> The former is what we generally would describe as scholarship – the result of pure academic research – while the latter includes the work of the International Law Commission (ILC) or the Institute of International Law,<sup>8</sup> for example, or individual opinions of international judges (which may mark ‘scholarship in disguise’) or possibly *amicus* briefs by individuals, experts, or non-governmental organizations. Some might question whether this second type of activity qualifies as scholarship per se, or whether it was intended to serve this purpose. We would argue that it has incrementally grown into this function, with the transformation of international law, the role of institutions, and the shaping of legal practice.<sup>9</sup> The distinction between the two lies essentially in the absence, in the former category, of any connection to a specific diplomatic, normative, or contentious procedure which regulates and indeed formalizes the scholarly outcome.<sup>10</sup> This distinction may seem formalistic. But it is rooted in a longer tradition.

Between the sixteenth century and the start of the twentieth, academic scholarship dominated the development of international law. Other scholarship was only marginal and thus rarely referred to in discourse. This evolution changed with the birth of institutions, such as the Permanent Court of International Justice, the International Court of Justice (ICJ), or the ILC. ‘Scholarship of action’, and in particular the work of the ILC, have become important sources of reference.

Nowadays, the relationship is almost reversed. Contrary to ‘scholarship of action’, ‘academic scholarship’ is only occasionally cited by courts and tribunals. While states parties to a dispute or their agents generally make ample reference to both types of scholarship to support their arguments, international courts and tribunals are more reluctant to refer to academic scholarship in their judgments and decisions. The ICJ hardly ever refers to ‘academic scholarship’ in its main judgments and decisions.<sup>11</sup> The practice of other entities varies. International investment tribunals, human

<sup>6</sup> See *supra* note 1.

<sup>7</sup> A. Oraison, ‘Réflexions sur “la doctrine des publicistes les plus qualifiés des différentes nations” (flux et reflux relatifs des forces doctrinales académiques et finalisée)’, (1991) 24 *Revue Belge de droit international* 509.

<sup>8</sup> See, generally, G. Fitzmaurice, ‘The Contribution of the Institute of International Law to the Development of International Law’, (1973) 138 *Recueil des cours* 203.

<sup>9</sup> See, generally, G. Triggs, ‘The Public International Lawyer and the Practice of International Law’, (2005) 24 *Australian Yearbook of International Law* 101.

<sup>10</sup> See Oraison, *supra* note 7.

<sup>11</sup> Note that scholarship is, however, referred to in individual opinions of judges.

rights courts, and international criminal courts<sup>12</sup> and tribunals include academic references, but practice is inconsistent. It varies sometimes among chambers in the same institution.

## 2. THE ROLE OF SCHOLARSHIP IN INTERNATIONAL LEGAL PRACTICE

This finding raises some fundamental questions related to the role of scholarship, and in particular ‘academic scholarship’. The traditional starting point for reflection is Article 38 of the Statute of the ICJ. It mentions ‘the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’ after judicial decisions. The formal subsidiary character of doctrine and judicial decisions derives from the fact that, contrary to customary law, treaties, and general principles, doctrine and judicial decisions cannot in and of themselves be regarded as independent sources of obligations for states. Paul Reuter stated this view as follows in the 1950s: ‘en ce qui concerne la doctrine, aucune hésitation n’est possible; elle n’est à aucun titre une source de droit’ (‘Regarding scholarship, there can be no doubt: it constitutes by no means a source of law’).<sup>13</sup> According to this view, which still prevails in contemporary discourse<sup>14</sup>, scholarship is thus not a formal source of law, but a source of authority.

This theoretical premise does not detract from the fact that scholarship – and judicial and arbitral decisions, for that matter – are in reality crucial for the practice of international law. Scholarship provides evidence of the law. It contributes to the exposition of rules and the understanding of international law as ‘science’.<sup>15</sup> One of the most important practical functions of scholarship is that it may set, specify, or clarify the content, or even the existence, of a formal source of international law. This was famously set out by the United States Supreme Court in the oft-quoted *Paquete Habana* case:

where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>16</sup>

The nexus between scholarship and practice in international law is thus undeniable, although it is often apparent only in latent form in the formal outcome of judicial and arbitral decisions. Sometimes courts and tribunals explicitly refer to scholarship.

12 See, generally, M. Bohlander, ‘The Influence of Academic Research on the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia: A First Overview’, (2003) *Yearbook of International Law and Jurisprudence* 195.

13 See P. Reuter, *Droit international public* (1958), at 84.

14 See M. Wood, ‘Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2012), 783 at 786.

15 On ‘international law’ as ‘science’, see L. Oppenheim, ‘The Science of International Law: Its Task and Method’, (1908) 2 *AJIL* 313.

16 US Supreme Court, *The Paquete Habana*, 175 US 677 (1900), 8 January 1900, at 701.

This is most visible when they endorse or support a specific conception of a legal rule, which may be in line with the general understanding of that rule in international law and scholarship, or deviate from it and thus cause controversy. In both cases, scholarship performs its function as originally envisaged in Article 38 of the ICJ Statute. It serves as a material source in support of the reasoning of the court or tribunal, which strengthens its authority. Even if such references are not explicit, courts and tribunals may be influenced by scholarship. In some cases, this influence might be as important as in the former cases, in particular if decisions are made by individuals who combine academic background with work in legal practice. In such instances, scholarship is law-shaping. But it might not add overt authority to the final decision or to the argument(s) presented or defended therein.

In both scenarios, the use of scholarship may cause frictions. The more judicial and arbitral decisions refer to scholarship in order to fill an indeterminacy gap in the law, the more vulnerable they become to criticism for embracing a certain policy view of what the law is or ought to be. This scepticism is reinforced in situations in which scholars use positions in practice to steer policy goals and agendas that they pursued as scholars.<sup>17</sup>

Whether explicitly cited or not, academic scholarship performs an essential function which goes beyond its role as a material source of law. It influences practice and thereby contributes to the development of international law. This process might result in regression and/or progression. But scholarship has undoubtedly exercised significant influence on both the formation of specific rules of law and the development of certain areas of international law in general. One may point, to name but one example, to the important influence of Dionisio Anzilotti on the development of the law of international responsibility, as codified by the ILC.<sup>18</sup> In this case, there is a multifaceted interaction. 'Academic scholarship' influenced 'scholarship of action', which in turn shaped judicial and arbitral decision-making. This poses important questions for the future of scholarship in legal practice: how firm is the distinction between 'academic scholarship' and 'scholarship of action' in legal practice? To what extent it is helpful to distinguish between these categories? What factors influence their impact and relevance on practice? Is scholarship ever detached from an agenda?

One of the paradoxes of contemporary developments is that the contribution of academic scholarship to the development of international law may seem less visible today than at the time of great theorists, such as Grotius, Vattel, or Vitoria. But this is partly an illusion. The balance between 'academic scholarship' and 'scholarship of action' may have shifted in practice. The birth of modern institutions, and the proliferation of executive and legislative bodies on the international plane, may have diminished the role and influence of 'academic scholarship' versus 'scholarship of action'. The forums for 'scholarship of action' have increased, with the growth of institutions, the increase of judicial and quasi-judicial dispute settlement bodies, and new procedural venues for articulation of practice-relevant positions and points of view (e.g. *amicus* briefs). Some forms of 'scholarship of action' might receive more

17 See I. Feichtner, 'Realizing Utopia through the Practice of International Law', (2012) 23 EJIL 1153.

18 See P.-M. Dupuy, 'Dionisio Anzilotti and the Law of International Responsibility of States', (1992) 3 EJIL 139.

attention than doctrinal views by single individuals because of their institutionalized character. There has moreover been a large increase of international legal instruments over the past decades which make it less necessary to look at scholarship as a subsidiary source for clarifying the existence or contours of legal rules, thus invalidating the *Paquete Habana* rationale.

But a closer look seems to suggest that this does not diminish the relevance of 'academic scholarship'. The exponential growth of norms and institutions over the past years and decades has triggered diverging and opposing views on certain specific international legal rules, and division of scholars into divergent schools of thought. This makes it increasingly difficult for courts and tribunals to take sides in debates about the existence or the contours of a certain rule, without engaging with 'academic scholarship'.<sup>19</sup> International law as such has become more relevant to different aspects of social life. This has opened a space for a greater variety of actors to shape debates and blurred the boundaries between 'scholarship' and 'advocacy'. The real challenge is to deal with the growth and diversification of forms of scholarship, and their distinction and their mutual values.

Looking at the broader picture, one may detect certain discrepancies between different areas of law. It appears that scholarship still has more influence on judicial and arbitral decision-making (i.e. by way of references and authority) in some areas (e.g. fields of law that are based on generic norms, dynamic in their terms of content, or more directly on individual conduct, such as international criminal law, human rights law, or international investment law), than on other areas of law that may be more state-driven or static (e.g. boundary delimitation).

Moreover, the very perception of the role of 'scholarship' is subject to transformation. There is growing controversy as to whether and how a proper balance may be struck between the role of scholars as 'technicians of the law' and their vocation to advocate changes in the law, and what value should be attributed to these different types of 'scholarship'.<sup>20</sup> It is increasingly clear that scholars do not operate in a vacuum. Partly due to multiplication of forums of information and debate, scholarship is implicitly forced to take positions or to make choices between different ideological or political agenda and ideals that cannot be ignored or obscured.<sup>21</sup> The degree to which such influences become visible depends not only on the nexus with litigation or adjudication, but also on subject area. In certain areas, scholars are visibly more open to advancing claims that are aimed at changing the law and influencing practice, in order to defend certain views of what international law should be and what international law can do in order to achieve a more just global society, inspired by the view that the current state of international law obstructs the realization of utopia and that it has the potential to effectively realize utopia.<sup>22</sup> In other areas, the

19 Note, for example, the opinion of the ICJ in the *Wall* case, in which the ICJ 'favored' the view expressed by the ICRC and other authors that common Art. 1 to the Geneva Conventions entails obligations that go beyond the obligation only to ensure respect for the Conventions by the state's own population, defended inter alia by Frits Kalshoven based on the *travaux préparatoires* of the Conventions. For a discussion, see H. Thirlway, *The Law and Procedure of the International Court of Justice; Fifty Years of Jurisprudence* Vol. 2, (2013), at 1211–12.

20 See A. Peters, 'Realizing Utopia as a Scholarly Endeavour', 23 *EJIL* (2012), 533.

21 *Ibid.*, at 1150.

22 See Feichtner, *supra* note 17, 1143–57.

very same scholars may adopt strictly positivist approaches. This diversity of roles is not a bad thing or unscholarly per se. The question is how well scholars manage to preserve credibility and expertise in different areas, and to what extent their expertise is recognized equally within the respective disciplines, if they transcend disciplinary boundaries. This remains a challenge for the future of international legal scholarship.

### 3. THE GROWTH OF SCHOLARSHIP

A second set of challenges relates to the production of scholarship. The number of sources of 'academic scholarship' and 'scholarship of action' increases constantly, without apparent limit. This is both an asset and a cause for critical inquiry.

International legal scholarship is not only part of scientific discourse but also an attractive industry, for scholars, publishers, etc. While the forums for 'scholarship of action' are constrained through the existence of legal mechanisms and procedures, the forms and contents of 'academic scholarship' are seemingly endless. The number of journals on specialist areas of international law has extended significantly over the past ten years. A growing number of journals run different versions, i.e. a print version and an online version of the journal that accommodates shorter comments. Specific areas are covered by a broad variety of volumes, for example, traditional monographs and edited collections, different types of commentaries, handbooks,<sup>23</sup> and compendiums<sup>24</sup> (which sometimes are unclear in their purpose). Although empirical research remains scarce, some initial statistics on 'international law references' in databases such as *Westlaw* suggest that there is an 'annual growth rate of 7.5 percent' per year.<sup>25</sup> International law has gained significant ground over traditional areas of domestic law, such as constitutional law or criminal law.<sup>26</sup> Academic commentary is supplemented by a large number of new blogs and blog entries.

This development is overall a positive phenomenon. The multiplication of forums has made international law more pluralistic, and perhaps also more exciting, than in the past. Online fora and easy access permit a more global perspective and instant feedback on legal argument and claims. Production of scholarship has become more democratic through access of a greater number of persons, including students and young scholars, to publication possibilities. International law is to some extent part of a global conversation. There is increasing debate over individual pieces of scholarship through online discussion of articles and books. But this process raises also some novel and critical questions about the role of scholars and the management of growth that merit further consideration. We wish to highlight a few of them here.

The immediate and growing availability of information may have an impact on the methods of scholarship. It makes it more convenient and tempting for scholars to take shortcuts and rely on open-access sources and easily available works (for

<sup>23</sup> See, e.g., the growing number of Oxford Handbooks and Routledge Research Handbooks in specific areas.

<sup>24</sup> See, e.g., Oxford Compendiums and Cambridge Companions.

<sup>25</sup> See R. Alford, 'The Growth of International Law Scholarship', at <http://opiniojuris.org/2013/01/08/the-growth-of-international-law-scholarship>.

<sup>26</sup> *Ibid.*

example, books and articles available in databases) to support research and satisfy reference needs. This may deprive research of some of its dimensions, such as the gratifying process of finding something original through access to primary sources or library research, or the connecting of contemporary arguments and debates to older, not instantly available, works and sources. This process bears the risk that classical works and arguments get sidelined in discourse, and that contemporary theories and claims are portrayed as new or modern although they are grounded or treated in depth in older debates. International legal scholarship might thus partially turn around in circles, rather than develop or reinvent itself.

In light of the increase of production, the role of the international legal scholar is visibly in motion. The sheer volume of output on topics makes it partly more difficult to maintain the ideal of a generalist profile that characterized historical scholarship, or to retain expertise and a full picture of debate in multiple fields.<sup>27</sup> The diffusion of knowledge and increasing competition provide an incentive for scholars to seek refuge in ever more specific niche areas, or to create new areas through legal scholarship. The prospects for discourse and interaction seem to be larger. But due to growing specificity, dialogue remains de facto often entrenched in small discourse communities that engage with each other only occasionally. It is thus still partly open to question to what extent the discourse has become more open and interactive.

The increase of scholarship makes it not only harder to follow debates, but also more difficult to attract attention. This has repercussions on the culture of scholarship. One of the indirect effects of the growth of scholarship is that scholars may increasingly be forced to become entrepreneurs in order to be read. They have to advertise their scholarship not only on the 'market of ideas',<sup>28</sup> but in different forums and at different stages (e.g. prior to publication and after publication). This requires a partially different set of skills from writing or critical reflection. The rise of new social media has reinforced this trend. For instance, it might not be far-fetched to claim that the art of blogging might in the future become one of the necessary skills of scholars,<sup>29</sup> in addition to foundational research. Similarly, the option of self-publishing in digital format and the linking of output to scholarly networks may gain greater weight for legal scholars in the future.<sup>30</sup>

Some of these factors, such as greater debate over scholarship, may ultimately strengthen international legal scholarship. But this development has also some critical side effects. The emphasis on marketing features might enhance egocentricity and personality cults and lead to greater conflation between quantity

27 One remainder of a holistic approach is the scientific 'branding' of chairs in Germany which accumulate multiple broad fields of expertise. This broad conception sits uneasily with the growing specialization of research which requires ever more specific expertise and in-depth knowledge in particular areas.

28 On scholarship and 'market', see R. C. Ellickson, 'The Market for "Law-and" Scholarship', (1997–98) 21 *Harvard Journal of Law and Public Policy* 157.

29 See, e.g., D. Jacobs, 'Some Thoughts on Social Media and Academics: Will All Academics Need to Do It in the Future', at <http://dovjacobs.com/2013/10/08/some-thoughts-on-social-media-and-academics-will-all-academics-need-to-do-it-in-the-future>.

30 For a discussion, see R. Alford, 'Self-Publishing Legal Scholarship', at <http://opiniojuris.org/2011/04/12/self-publishing-legal-scholarship>.



and quality. There is a risk that scholarship might ultimately be judged by popularity factors, such as download numbers on SSRN, impact factors of the respective journal, or number of debates, rather than content. This is a disconcerting prospect.

One of the biggest challenges for the future is to manage the growing influx of information. One way to address this dilemma is to apply greater vigilance, self-restriction, and care in the production of scholarship, and greater filtering in the selection of publications. This might require self-censorship by authors and openness towards control by journals. Journals might then not only act as forums of quality control, but also have a role in limiting the quantity of published output. This trend is already visible in the relationship with blogs, where a new division of labour is taking shape. Journals appear to be moving away from coverage of specific types of discourse (e.g. current events, case commentary), in light of the comparative advantages of blogs. There is thus a trend towards self-restriction. It raises new questions what should be published in traditional form, and to what extent it is useful for journals to outsource debates to their own or other blogs (e.g. discussion of articles, review of books).

For scholars, it is ever more difficult to keep track of the wealth of opinion on specific issues. This makes it helpful to think about new tools for the tracking of debates and the linkage of positions on core themes. Oxford University Press has taken a lead on this, with the launch of 'debate maps'<sup>31</sup> and *Oxford Public International Law*. These initiatives connect different types of scholarship and practice through links and connecting points. This is a helpful start. But it should only be the beginning of a broader process. The establishment of substantive linkages and tracking of scholarly opinion might require further input and greater accessibility if they are to have a more global reach. With the increase of the importance of blogs, there might also be a greater need to connect debates across blogs and to preserve their entries.<sup>32</sup>

The most fundamental question is the issue how far international law can grow in the future. Is it ever-expanding? Or is unlimited growth an illusion, because it will inevitably entail limits, breaking points or stagnation? Given the development in past decades, there may be a greater appetite for legal discourse and debate. But it is questionable whether this supply coincides with an infinite need and demand for more law and international legal scholarship. In some cases, it might simply be our understanding of law that is expanding and taking different shapes. These questions merit further attention. A first step in this direction is the 2014 ESIL Conference, which addresses elements of this theme, under the title 'International Law and ...'<sup>33</sup> The list of 'ands' is of course potentially endless. 'Law and' scholarship has seen rise and critique in the legal discipline over past years.<sup>34</sup> An intriguing point of debate is thus a small, but important, semantic detail, namely the imaginary question mark behind 'International Law and ...'

31 See, e.g., [http://opil.ouplaw.com/page/debate\\_map\\_syria/debate-map-use-of-force-against-syria](http://opil.ouplaw.com/page/debate_map_syria/debate-map-use-of-force-against-syria).

32 See *infra* section 4.2.

33 See ESIL Conference 2014, [http://www.esil-sedi.eu/sites/default/files/ESIL\\_Conference\\_2014\\_call\\_for\\_papers.pdf](http://www.esil-sedi.eu/sites/default/files/ESIL_Conference_2014_call_for_papers.pdf).

34 See Ellickson, *supra* note 28; R. A. Posner, 'The Decline of Law as an Autonomous Discipline: 1962–1987', (1987) 100 *Harvard Law Review* 761.

## 4. THE DISSEMINATION OF SCHOLARSHIP

A third key aspect concerning the future of scholarship is the issue of dissemination. Two themes are at the heart of discussion: open access and reliability of digital sources in ‘academic scholarship’ and ‘scholarship of action’.

### 4.1. Open-access policies

There is an increasing trend in public circles to push academic legal scholars to publish open-access. This is desirable from a scientific and a dissemination-related point of view. But the models to facilitate this trend require further fine tuning. In the UK, the Finch Report recommended that open access should be the main road for publication of research, if it is publicly funded.<sup>35</sup> It implied that the costs for open access should be borne by authors or universities through an ‘article processing or publishing charge’ (APC) paid to publishers.<sup>36</sup> This model shifts production costs from subscribers/publishers to authors/universities.

This trend raises a number of problems that directly affect academic independence and freedom. At present, scholars retain the choice of where to submit their research. This selection is typically governed by a number of factors, such as the reputation of the journal, its distribution, its link to the field of scholarship, prospects of publication, the timeline of publication, the audience of the journal, whether the author has published in that forum before, etc. Making open access a main requirement for publicly funded research restricts this choice. It might compromise the freedom of scholars to submit their work to the academic forum that they consider most suitable for their research, if authors are not equipped with the relevant resources to pay APCs by universities/grant agencies. In the current academic environment, these financing structures are still unclear, and vary largely by country and university. Under these circumstances, a strict open-access policy might, in particular, hurt younger scholars (e.g. PhD students or early career academics) who require publication in peer-reviewed journals in order to build their profiles. As an initially student-run journal, LJIL has consistently sought to support publication by younger and upcoming scholars. We would thus be cautious towards an open-access policy that would go to the detriment of the publication options of younger scholars in the journal.

### 4.2. The fragility of online citations

A second major problem of dissemination relates to reliability of online sources. As noted earlier (section 2), scholarship plays a significant role in providing evidence of law and supporting legal practice. Accessibility and reliability of resources are of key importance for the legal discipline. It has become common to use references to

<sup>35</sup> See Report of the Working Group on Expanding Access to Published Research Findings, ‘Accessibility, Sustainability, Excellence: How to Expand Access to Research Publications’, June 2012, at <http://www.researchinfonet.org/wp-content/uploads/2012/06/Finch-Group-report-FINAL-VERSION.pdf>.

<sup>36</sup> *Ibid.*, Recommendation (i), noting that ‘a clear policy direction should be set towards support for publication in open access or hybrid journals, funded by APCs, as the main vehicle for the publication of research, especially when it is publicly funded’.

open-Web resources in legal scholarship and practice. Sometimes, blogs are cited in judicial decisions. This rise of online sources may enrich the debate. But it has also some troubling consequences. While deeper inquiry into this issue is just starting, recent research suggests that 'more than 70% of the URLs within the *Harvard Law Review*, the *Harvard Journal of Law and Technology* and the *Harvard Human Rights Journal*, and 50% of the URLs found within US Supreme Court opinions do not produce the information originally cited.<sup>37</sup> This might well be only the tip of the iceberg.

This development raises serious questions about the reliability of online citations. It compromises the quality and endurance of legal scholarship which derives particular authority from primary and secondary sources and their verification. The idea that future readers might no longer be able to understand an article or a legal opinion as it was written at the time of production, because of a lack of availability of supporting sources, is disturbing. It might reduce the value and authority of scholarship as a whole. This is a concern for both legal practice and academic journals.

It is necessary to address this problem. This may require additional efforts to preserve online sources. Some initiatives are emerging. One idea is to create digital platforms that would allow authors and journals to archive citations for the future.<sup>38</sup> This would preserve sources for posterity. But there are many unanswered questions: which links would require permanent back-up? Who should take the lead in this: authors or journals? Should each journal develop its own associated Web-link library, or would it be desirable to simply encourage fewer Web citations overall, as a matter of policy? Ultimately, the link-rot dilemma seems to suggest that there is continuing merit in preserving some of the virtues of formality that are inherent in classical journal style.

## 5. NOT A CONCLUSION

We as LJIL editors recognize that these issues surrounding international legal scholarship require collective attention. We would like to discuss them in dialogue with other journals, and our contributors and readers. We welcome further feedback on this since we think that it is necessary to bring some of the issues to the forefront of broader debate. They are essential for both the future of international legal scholarship and the future of journals. More to follow ...

37 See J. Zittrain and K. Albert, 'Perma: Scoping and Addressing the Link and Reference Rot in Legal Citations', at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2329161](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2329161).

38 See, e.g., WebCite, which is an 'on-demand archiving system for webreferences', open to 'authors, editors, and publishers of scholarly papers and books, to ensure that cited webmaterial will remain available to readers in the future', at <http://www.webcitation.org/>. See also Perma.cc, which is a consortium of law school libraries and non-profit entities, at <http://www.perma.cc>.