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THE INVISIBLE COLLEGE OF INTERNATIONAL LAWYERS

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Among the many distinctions of Brunson MacChesney's notable career have been the positions of leadership to which he was elected by his fellow international lawyers. Professor MacChesney did not treat these offices as merely honorific. He devoted himself with vigor and enthusiasm to the collective efforts to strengthen the role of international law in achieving its aims of peace and justice. As President of the American Society of International Law, he had a leading part in expanding the work of research and development of the Society. He was especially instrumental in opening new paths toward interdisciplinary work and collaboration with international lawyers throughout the world.[1] In light of this aspect of Professor MacChesney's career, it seems appropriate on this occasion to offer some reflections on the professional community of international lawyers.

That professional community, though dispersed throughout the world and engaged in diverse occupations, constitutes a kind of invisible college dedicated to a common intellectual enterprise. As in the case of other disciplines, its members are engaged in a continuous process of communication and collaboration. Evidence of this process is found in the journals and yearbooks of international law, in the transnational movement of professors and students, and in the numerous conferences, seminars and colloquia held in all parts of the globe. But this communication is by no means confined to the realm of scholarship. For the international bodies and conferences of an official character are largely composed of jurists who are part of the active professional community and who maintain intellectual contact with the scholarly side of the profession. The invisible college thus extends into the sphere of government, resulting in a *pénétration pacifique* of ideas from the nongovernmental into official channels. It would be unrealistic, however, to think of

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[1] Remarks of Brunson MacChesney, 1965 PROC. AM. SOC. INT'L L. 224.

this as a one-way penetration. Individuals who move from one role to another are unlikely to remain uninfluenced by the ideas and considerations which impinge on them in their different capacities. The mingling of the scholarly and the official affects both categories, and often creates tension as individuals move from one role to another or perceive themselves as acting in the dual capacity of objective scientist and government advocate.

PROFESSIONAL INDEPENDENCE AND OFFICIAL INFLUENCE

Concern over this kind of "*dedoublement fonctionnel*" has been manifested by both government officials and scholars. Government officials often tend to suspect or disdain "objective" views as divorced from reality and insufficiently responsive to national aims. This attitude can have a significant impact on some international lawyers. It may lead them to adopt a strong "national interest" and "realpolitik" line, or it may convince them of the necessity of foregoing this dual capacity and maintaining their objectivity removed from government influence. From the latter point of view, the mingling of the nonofficial and the official roles is perceived as a renunciation of the scholar's independence and often as a capitulation to the pressures of specific governments or the dominant social system. Some have urged, for these reasons, that there be a clear and sharp separation of the scientific from the governmental and that professional associations as well as individuals should reinforce that separation.

The problem goes deeper, however, than the issue of wearing two hats. It inevitably raises the question of objectivity in international law. International law, after all, is not a scientific discipline in the same sense as physics or chemistry. It is not value-free; its concepts and norms are deeply enmeshed in the interests of national states and in the philosophic and political attitudes of diverse social and cultural societies.[2] To assume that international law can be entirely separated from these factors, to rise above them, is not borne out by experience or realistic hopes for the future. Even highly technical subjects are frequently approached in quite different ways by those who differ in their conceptions of the ends to be served and of the ordering of values. A fortiori, such diverse approaches characterize the more political subjects, such as those bearing upon peace and security, the sharing of resources or social justice—subjects which are today a significant part of international law.

In observing that international lawyers are likely to reflect their value systems and meta-juridical preferences, I do not mean to suggest that they will necessarily accept the positions of their national states.

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[2] *See* C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 71-173 (rev. ed. P. Corbett trans. 1968); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

Obviously some will select political and social ends which are not dominant in their national societies. They may do this explicitly, or they may implicitly assume value systems based on philosophical or cultural attitudes of other groups. One would hesitate today to assume that the individual members of a particular nationality shared the same political outlook and the same order of values by virtue of their nationality. We are aware of the diversification of views within most national societies, and there is ample evidence of this in the ranks of international lawyers. At the same time, it would be myopic to minimize the influence of national positions on the views taken by the great majority of international lawyers. There is no need to attribute this identification of personal and national outlook to crass influences of rewards of power and privilege, although we have to recognize that these influences do play a role. But such practical considerations may not be as important for most international lawyers as is the general phenomenon of internalization of social values shared by those brought up and educated within the same national society. In this sense, conformity to national aims may be seen "not as a duty, only a necessity" (to borrow from Mr. Justice Holmes). A corollary of this inherent parochialism is the recognition that a less biased (and therefore more credible) judgment on controversial issues of international law would more likely be made by a broadly representative international body than by persons from a single country or by persons sharing a particular political outlook, however expert they may be. Yet this conclusion, plausible as it is, does not quite dispose of the problem.

Is Objectivity Possible?

We must still face the question of what is meant by an unbiased or objective judgment when conflicting values are at issue.

The idea of objectivity presupposes that there are propositions of international law which are capable of being judged by relevant standards of truth and tested by empirical evidence. It assumes that the question of whether a proposition is legally authoritative can be answered as a scientific question in respect of its truth or falsity. It also assumes that the criteria of truth or falsity have been accepted by those called upon to resolve the issues. These assumptions find their support, as we know, in the general acceptance of the main "sources" of international law: agreements, custom and general principles of law. Each of the categories provides very broad criteria for evaluating empirical evidence and reaching conclusions of fact. At least, this is true in principle.

In actuality, general agreement on sources does not always extend to the more precise formulations that are often required to resolve concrete disputes. We need only look at the International Court of Justice cases and advisory opinions, where ample evidence of divergent formulas accepted by the majority and by dissenting judges indicates that much of the agreement on criteria (or "sources") exists only on a fairly general

level. At closer quarters, different versions of the standards of decision emerge. Thus, there are variations to the degree of generality required to prove customary law,[3] or as to the requisite evidence to show *opinio juris*,[4] or as to whether bilateral settlements are indicative of practice accepted as law.[5]

What often happens in such cases is that the international lawyers turn to other principles—especially those of a highly general and fundamental character. Common examples are sovereignty of states, equality of rights, territorial integrity, nonintervention in domestic affairs, good faith and reasonableness, *pacta sunt servanda*, the obligation of pacific settlement and the broad rules of state responsibility. The availability of these principles and the ease with which they can be used to support one or the other side of any issue produce an impression of indeterminancy and relativism. It may seem as though any side of an issue in dispute can find support in authoritative principles. Even independent scholars will often appear to be reaching their conclusions on the basis of their preferences for a particular outcome rather than by the objective application of accepted principles.

The only way this impression of relativism can be counteracted is through a disciplined and reasoned application of competing principles, including those expressing fundamental values, validated by evidence of practice and consensus in international society. I would not assert that such disciplined and reasoned application, and empirical validation, always takes place when nonofficial bodies or legal scholars consider controversies. I am only suggesting that the fact that the issue involves choices among competing principles of a highly general character and that there is no agreed overriding principle to resolve the controversy does not necessitate or justify subjective standards. Consequently, I believe there is a basis for objective judgments by lawyers of diverse views who are independent in the sense that they are not bound by government instructions and need not be governed by political interests. Such jurists will not be entirely free from their own values or their perception of the values of others. But even though human beings may not entirely escape their bias, it does not follow that the choice to be made is logically a subjective matter, as if it were a question of taste. The point is that a judgment among competing principles by an independent jurist can be made and justified on grounds that are valid for the relevant community of states, rather than on grounds held by the individual alone, or by his

[3] North Sea Continental Shelf Case, [1969] I.C.J. 3, 43-45, 226-29. *See also* the separate opinion of Judge Dillard in United Kingdom-Iceland Fisheries Jurisdiction Case, [1974] I.C.J. 3, 57-58.

[4] Columbian-Peruvian Asylum Case, [1950] I.C.J. 266, 276-77.

[5] Barcelona Traction, Light and Power Co. Case (Belgium v. Spain, 2d phase), [1970] I.C.J. 3, 40.

government.[6] This, at least, is the position that must be taken by international lawyers who are acting as nonofficial experts and not as advocates of a government or special interest.

INTERNATIONAL LAW AS A UNIFIED DISCIPLINE

The conception of the invisible college implicitly assumes that the field of international law is a unified discipline, notwithstanding its wide range of subject matter and its many subdivisions. This assumption appears to be accepted by the profession generally, as shown by the willingness and ability of most members to address themselves to the questions raised in all fields and to avoid compartmentalization.

That such generalism has continued to be the case may seem suprising when we contrast it with the trends in the natural and social sciences. In these disciplines, there has been a marked tendency to break up into subdivisions and, within such subdivisions, into smaller sections devoted to specialized areas of subject matter or methodology. This has been true for some time in the natural sciences—physics, chemistry, biology—from which generalists have all but disappeared. It also has become increasingly prevalent in the social sciences—notably in economics, sociology and political science. The specialization and division of labor that have occurred in these sciences largely reflect the different techniques of investigation and the different kinds of conceptualization mastered by the specialists. Such specialization has had the significant result of producing a situation in which the findings and judgments of the specialists in their fields of expertise are virtually unchallenged and largely unexamined by those outside those particular fields. One consequence is that scientific societies and institutes throughout the world function through subsections (and in most cases through increasingly fragmented subsections), and it is only within those restricted units that one finds a genuinely collective endeavor.

Should we expect—and even encourage—a similar development toward specialization in the study of international law? My own view is that this is not likely in the near future, nor is it desirable. Certainly those who devote themselves intensively to particular problems will make useful contributions by virtue of that specialization. But it remains both desirable and feasible to have their conclusions subjected to the judgment of international lawyers outside of the specialized field. This is so, because unlike the situation in many sciences, conclusions in international law do not involve the use of such specialized techniques of inquiry as

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[6] For discussion of an analogous situation in which a similar position is taken, see D. HAMMARSKJÖLD, THE INTERNATIONAL CIVIL SERVANT IN LAW AND IN FACT (1961), *reprinted in* 5 PUBLIC PAPERS OF THE SECRETARIES-GENERAL OF THE UNITED NATIONS 471 (A. Cordier & W. Foote eds. 1975). For a more general treatment of problems of impartiality, see T. FRANCK, THE STRUCTURE OF IMPARTIALITY 120-62, 242-89 (1968).

to be beyond the knowledge of international lawyers. Nor would such conclusions involve theories (as in physics) which have to be accepted as authoritative by those outside of the specialized field. Consequently, the criteria for passing judgment can be applied by nonspecialists on the same evidence that is available to the specialists. For example, the empirical data of relevant state practice can be checked and evaluated without recourse to esoteric procedures of investigation. It is therefore not necessary to defer to the authority of the specialist in regard to such data (as it often is in the natural sciences). For that reason, it is feasible for international lawyers as a class irrespective of specialization to take part in the communication and collaboration that define their invisible college.

Such collaboration may even modify the division between public and private international law. There is, no doubt, a widespread tendency in most countries to treat the two fields as separate and distinct. However, international developments and the expansion of transnational contacts have clearly tended to produce a greater mingling and blending of the two branches of international law. It is evident that in the newer fields of concern—as, for example, multinational companies, environmental regulation, resource development, international communications, protection of human rights, problems of nationalization and state trading—there is a recognized need to extend and apply concepts, principles and procedures from both public and private law. These recent developments lend support to the positions of those international lawyers who have maintained that a sharp separation between public and private international law is unwarranted and frustrates adequate consideration of issues that should be dealt with from a comprehensive juridical standpoint.[7] It would seem especially timely in the light of the issues mentioned above that the professional community of international lawyers reduce the gap between the two domains and consider both areas whenever appropriate.

The idea that international law is a unified discipline must, of course, face up to the dominating influence of national interests and socio-historical factors on the functioning of the profession. We have observed earlier that judgments of international law tend to be more credible and authoritative when made by an internationally representative body than by a national or "like-thinking" group of experts. This leads to the conclusion that the professional community of international lawyers should aim at a wide international participation embracing persons from various parts of the world and from diverse political and cultural groupings. In practical terms, this would entail a much more extensive exchange of views through publications and meetings and a more sustained effort to take account of the positions and practices of states in all parts of

[7] C. JENKS, THE COMMON LAW OF MANKIND 17 (1958); P. JESSUP, TRANSNATIONAL LAW 15-16 (1956); Battifol, *L'avenir du droit international privé* in INSTITUT DE DROIT INTERNATIONAL, LIVRE DU CENTENAIRE 1873-1973: EVOLUTION ET PERSPECTIVES DU DROIT INTERNATIONAL 162 (1973).

the world. The justification for this is not merely that the process of reaching solutions to complex problems can be improved by having many points of view, though this may be generally true. The principal justification is that the issues faced in international law (unlike those faced in natural science) require answers that reflect global positions and actions. The very heart of the endeavor is the inquiry into the common elements of practice and *opinio juris* manifested in the worldwide community of states.

The search for these common elements comes down to questions of fact. It therefore may be said that such facts can be ascertained by objective inquiry carried out by impartial experts, whatever their national origin.[8] There is some merit in this contention and one cannot deny that there are disinterested and disciplined scholars who can reach conclusions in an impartial manner. However, when we consider the role of the professional community of international lawyers—our invisible college—the desirability of a broadly representative quality is evident. The reason is essentially the same as that which underlies the requirements in the statutes of the International Court of Justice and the International Law Commission that international juridical bodies should be representative of the world as a whole. It rests on the probabilistic judgment that, whether or not an ideal objectivity is theoretically attainable, the individual jurists are likely to be affected by national or other particularistic factors linked to their origin and background. A more heterogeneous and representative body can be expected to balance out those particularistic influences and avoid the misperceptions and omissions that accompany them. These reasons are as applicable to the invisible college of international lawyers as they are to official legal bodies.

THE "LEGISLATIVE" ROLE OF INTERNATIONAL LAWYERS

Our discussion of the professional community of international lawyers has thus far focused mainly on their role in ascertaining and formulating existing law—the *lex lata*. This function, more than any other, is regarded as appropriate for professional opinion of a nonofficial character based on objective evidence and disciplined reasoning. We should be mindful, however, that international lawyers, both individually and as a group, play a role in the process of creating new law and in extending existing law to meet emerging needs. This legislative role is carried out principally through multilateral treaties, but it may also be accomplished through the evolution of customary law, the use of general principles and the formative effect of resolutions of international bodies. In all of these processes, the professional community may perform a significant function. It is interesting to consider some of the problems raised.

[8] *See* Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 316-21 (1968), *reprinted in* THE EFFECTIVENESS OF INTERNATIONAL DECISION 9 (S. Schwebel ed. 1971).

A threshold issue is whether international lawyers as a group have the professional competence to consider the need for a new or revised law on matters which are of a nonlegal character—political, economic, technological and so on. It is in fact widely believed that questions of that kind are more appropriately within the competence of other social sciences—political science, economics, international relations—insofar as nonofficial inquiry and opinion are concerned. Plausible as this point may seem, it suffers from a major defect—the social scientists do not, as a rule, address themselves in any detail to the need for new law or to the kind of analysis that is relevant to the legislative need. The main reason for this is that their work is either descriptive or theoretical. Scholars in these fields are concerned with examining behavior, but they are concerned only marginally, if at all, with the development of normative juridical regimes or specific rules. While social scientists have contributed much to our understanding of international developments, they have had little interest in the specific legislative problems created by changing international needs and pressures. In contrast, we may note that in fields such as outer space, the sea-bed and the environment, the international lawyers, far more than any other disciplinary group, played a central role in constructing normative and regulatory schemes where little had existed previously.

It can be argued that the lack of concern among other professional groups or scientific disciplines in international regulation is not a sufficient reason for jurists to assume a responsibility for which they are not equipped. There is some merit in this point. The traditional training and preoccupations of most lawyers may not provide an adequate basis for the kind of broadly based inquiry into needs and possible solutions in areas which are economic, political or technical. But it is also pertinent to recall that in many national legislative inquiries, the lawyer is recognized as the appropriate "generalist" for carrying out the necessary investigation into needs and legal solutions. In these situations, lawyers perform an organizing and critical role by gathering and scrutinizing relevant data and opinion from a wide variety of sources. I do not suggest that this role can be performed only by lawyers, or, that they can necessarily carry it out better than others. My point is that no other professional, nonofficial group performs this function on the international level (or seems likely to do so in the near future). Moreover, international lawyers—because of their professional interest in law—have skills and experience to enable them to contribute to the prelegislative task. Examples of such legislative contributions are found in the work of such international professional groups as the Institut de droit international (on outer space, the laws of war, pollution) and the International Law Association (the Helsinki rules on international rivers and on the sea-bed). It is, of course, obvious that work of this kind must extend far beyond the usual lawyer's analysis of

legal rules and precedent with its implicit assumptions about causal relations and the ends to be served. In order to carry out the international legislative task in an adequate manner, it is essential that nonlegal materials be examined and evaluated, and that expertise in nonlegal fields be drawn upon and utilized in a comprehensive manner. Experience has shown that this can be done by international lawyers through informal means, but much room remains for systematic collaboration with other scientific and professional groups.

Another issue raised by the participation of international lawyers in the legislative task concerns the relationship between the nonofficial activities of the profession and the official bodies engaged in the preparation of international conventions or other instruments of legislative import. One aspect of this relationship involves the phenomenon, alluded to earlier, of jurists moving between the nonofficial and official roles and through this "*dedoublement fonctionnel*" contributing to the mutual exchange and penetration of ideas. In addition, the nonofficial professional community may have a twofold impact on the adoption of new multilateral instruments. First, it may facilitate the building of an international consensus during the preparatory stages of a legislative effort. This can be done through dissemination of studies and proposals, augmented by reports and resolutions of professional bodies. Second, the international legal community may help to achieve the acceptance of a multilateral instrument by national parliamentary and executive bodies. Most governments, facing difficult choices, are likely to be influenced by professional opinion expressed through their societies and leaders. While the role of national legal associations may be more influential at this stage, the expression of an international consensus by the professional community may well have a persuasive effect in many cases.

One last point merits attention in regard to the law making role of the professional community of international lawyers. That may be summarized as a traditional concern with the requirements of "*la conscience juridique*," sometimes translated as the sense of justice. Vague as that conception may seem, it has had a considerable influence in doctrine and in decisions as a basis for legal concepts of significant practical effect. Some examples that come to mind are reciprocity, good faith, abuse of rights, nonretroactivity, prescription, res judicata, proportionality and estoppel. These concepts are often treated as jural postulates or as exemplifying "natural justice." Whatever their justification, they have been applied by international lawyers in formulating general principles of law and in proposing standards for treaties and institutional arrangements.[9] There is good reason to conclude that such concepts have penetrated into official edicts, judgments and conventions largely through the nonofficial

[9] W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 188-210 (1964); H. Mosler, *The International Society as a Legal Community*, 140 RECUEIL DES COURS 1, 138-48 (1974); O. SCHACHTER, SHARING THE WORLD'S RESOURCES *passim* (1977).

professional community. Evidence of this can be found in the resolutions, reports and proposals made by the major professional bodies—notably, the Institute of International Law and the International Law Association—which have influenced the evolution of international law during the last century.[10] Since the governments of the world are likely to be ambivalent about "*la conscience juridique*," the role of the nonofficial community of lawyers in giving that conception specific meaning and effect may well constitute the noblest function of our invisible college.

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10 *See* De Visscher, *La Contribution de l'Institut de Droit International au développement du droit international*, in INSTITUT DE DROIT INTERNATIONAL, LIVRE DU CENTENAIRE 1873-1973: EVOLUTION ET PERSPECTIVES DU DROIT INTERNATIONAL 128 (1973); Hambro, *The Centenary of the Institut de Droit International*, 43 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 9 (1973); Münch, *L'influence de l'International Law Association sur la doctrine et la pratique du droit international*, in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 23-36 (M. Bos ed. 1973).