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Annual Hudson Medal Discussion

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ANNUAL HUDSON MEDAL DISCUSSION

Bernard H. Oxman of the University of Miami School of Law, and discussant Lori Fisler Damrosch of Columbia Law School, provided the Annual Hudson Medal Discussion on Wednesday, March 24, 2021 at 12:30 p.m.

Introductory Remarks by Catherine Amirfar*

Welcome everyone to the 2021 Hudson Medal Presentation. The Manley O. Hudson Medal, the Society's highest honor, has been awarded since 1959 to a distinguished person of American or other nationality for outstanding contributions to scholarship and achievement in international law. The medal has been conferred on many luminaries, including Rosalyn Higgins, Tom Franck, Michael Reisman, Eli Lauterpacht, John Jackson, Bruno Simma, Peter Trooboff, and Stephen Breyer.

I would like to thank Paul Reichler, Larry Martin, and ASIL Law Firm Leadership Circle Partner Foley Hoag LLP, for sponsoring this program—their eighth year of continuous sponsorship.

Our honoree will engage in an informal conversation with Professor Lori Damrosch, a past president of the Society. They will have much to discuss, as they served together as co-editors of the *American Journal of International Law* (*AJIL*) for many years.

Now for the medal presentation. Upon the recommendation of the Honors Committee, the Executive Council has selected Professor Bernard H. Oxman to receive this year's medal.

Bernie is the Richard A. Hausler Professor of Law at the University of Miami School of Law and has been a global leader in forging, strengthening, and teaching the law of the sea and its application in the peaceful settlement of disputes. The award citation included the following quotation from the letter submitted in support of his nomination:

> Like Manley Hudson, Bernie has contributed to international law in many roles—as scholar, government legal adviser, and international judge, among other positions—and in all of them his contribution has been distinguished. As Assistant Legal Adviser in the U.S. Department of State and as U.S. representative and vice-chair of the U.S. delegation to the Third U.N. Conference on the Law of the Sea, . . . he played a major role in the negotiation of the United Nations Convention on the Law of the Sea and especially in the crafting of its path-breaking dispute settlement procedure. He stands at the top of the field today, for more than half a century of contributions to the law of the sea and international dispute settlement.

For his monumental contributions to international law, the American Society of International Law is honored to present the 2021 Manley O. Hudson Medal to Bernard H. Oxman. I now recognize Paul Reichler.

* President, American Society of International Law.

Introductory Remarks by Paul Reichler*

It would be difficult to overstate how happy I am that Bernie Oxman is this year's winner of the Manley Hudson award, and how privileged we at Foley Hoag feel to be part of this presentation.

Of course, we all know of Bernie's immense accomplishments over a truly stellar career. To recall them we only need to review his CV, which is as thick as the *Oxford English Dictionary*, and I am only referring to Volume I of the Oxman bio.

He has truly done it all. Preeminent scholar, with a list of publications a mile long. Outstanding educator who has brought distinction to the learning institutions that have been privileged to have him. Judge ad hoc at the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS)—the only American to ever serve in that capacity in both judicial bodies. Advocate for states before law of the sea arbitral tribunals. Legendary government lawyer for the United States, gracing the halls of the State Department and the Legal Adviser's Office. And, of course, representative of the United States at the historic Third Conference on the Law of the Sea, which produced the Montego Bay Convention, to which Bernie made immense contributions and supervised the production of the English language version.

But what few, if any of you, know is that Bernie's contribution to the law of the sea long pre-dates the Convention. According to confidential records that we were able to uncover in the deep recesses of the Dutch archives, Bernie was actually the principal research assistant to Hugo Grotius, and he ghost-wrote large sections of *Mare Liberum*, "Freedom of the Seas." But as we all know about Bernie, he is too modest to claim credit, for that treatise or for any of the brilliant accomplishments that actually do fill his CV.

What about Bernie the person? If you want to undertake Mission Impossible, go try to find someone who has an unkind word to say about him. You will not succeed, because Bernie is one of the kindest, gentlest, most generous-spirited, and most decent human beings you will ever meet. He is just a wonderful guy. Everybody loves him. He is even my own wife's favorite American international lawyer.

And he is mine, too. I was blessed to be his colleague in the Philippines/China arbitration over the South China Sea. You could not conceive of a better colleague. It was a privilege and a great learning experience to observe Bernie engaging with Rüdiger Wolfrum, last year's award winner, Tom Mensah, Jean-Pierre Cot, and other distinguished experts on the tribunal over interpretation of fundamental provisions of the 1982 Convention.

I have also had the good fortune to appear before Bernie in his capacity as a judge, in *Bangladesh/Myanmar* and *Mauritius/Maldives*. He combines a mastery of the law with an admirable judicial temperament. As a member of a tribunal he is a consensus seeker and builder. Remarkably, he often manages to co-author a separate opinion with the judge ad hoc appointed by the other party. How can we explain this?

Because he is not only a superstar international lawyer. He is also a superstar person. And I am truly blessed to have him as a dear friend. Congratulations, Bernie!

Now we turn the proceedings over to Professor Lori Damrosch, who has promised an enlightening and revealing interview.

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Remarks by Lori Fisler Damrosch*

This is such a pleasure for me. When I joined the Office of the Legal Adviser in September 1977, Bernie Oxman had just left that office for the University of Miami. His reputation was already legendary, and not only in law of the sea. I met him in person several years later, when we were introduced by our shared mentor, John Stevenson, in the mid-1980s. Soon after I joined the Columbia faculty, Jack asked me to organize an ASIL study group on the International Court of Justice in the aftermath of the *Nicaragua* case. As we were formulating our list of prospective authors, Jack proposed that Bernie should be invited to write the chapter on provisional measures because he knew everything about that topic. Indeed, he did, and his chapter on provisional measures was published in our volume, *The ICJ at a Crossroads* (1987). The collaboration was so successful that a few years later, when I was organizing another ASIL study group and editing another book, this time with colleagues from then Soviet Union, Bernie contributed a chapter to that co-authored volume, which led to a memorable Moscow trip in September of 1991.

Bernie became an editor of the *American Journal of International Law* in 1986 and welcomed me to that "fraternity" when I was invited to join the board of editors some years later. He edited the International Decisions section from 1998 to 2003. Then we were selected as co-editors in chief, serving from 2003 to 2013.

Against that background, I would like to ask about your earlier days. You were born in New York, grew up in Brooklyn, and studied at Columbia in the 1960s for both college and law school. During your New York years, were you already being drawn toward international law? Did any of your professors influence or encourage you in this direction?

Remarks by Bernard H. Oxman**

Yes. As an undergraduate, I took a course on nationalism in sub-Saharan Africa that very much piqued my interest in international affairs. I had barely begun law school when the Cuban missile crisis occurred. As you might imagine, the talk of nuclear annihilation caught my attention. I studied international law at Columbia Law School with Wolfgang Friedmann, who used Bishop's then-famous casebook with monumental notes. Friedmann definitely piqued my interest in international law. Among other things, his lively critiques of Myres McDougal and what came to be known as the Yale School caused me to check out what Mac had to say as well, which further piqued my interest.

My interests in international aspects of the law were not limited to public international law. I also studied the civil law system with Henry deVries. As his research assistant, I worked on updating his short book introducing the French legal system, coauthored with René David. Because the book had gone to press shortly before the adoption of the new French Fifth Republic constitution, that was the principal focus of my work on updating.

While my encounter with Lou Henkin while at Columbia was focused on constitutional law rather than international law, by the time I was working in the Pentagon, he acquired an enduring influence on me that lasted throughout my career.

Lori Fisler Damrosch

I am glad you mentioned your work as a research assistant in the French language! Paul has highlighted your role in bringing to completion and perfection the English-language text of the

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Law of the Sea Convention, but I am sure that a superb legal diplomatist needs to know French almost as well as English.

Upon graduation from law school, you found a job with the Navy in the Judge Advocate General Corps (JAG). How did you come to apply for the Navy JAG position and then find your way to international law?

Bernard H. Oxman

I graduated from law school in 1965, in the midst of the Vietnam War. With graduation, my deferral from the draft would end. My options accordingly were quite limited. I heard about the Navy JAG program and decided to apply. I was accepted and commissioned by the Navy just in time to preclude the Army from drafting me. (I had the pleasure of sending them a letter citing the statute that prohibited drafting members of the armed forces.) As my training in Newport was drawing to a close, two fateful events occurred that presaged the course of my future careers: I received orders to report to the Office of the Judge Advocate General of the Navy in Washington, and the Naval Justice School where I was studying invited me to remain there and teach. While I was told that it was very unlikely that a junior officer fresh out of training would be assigned to the International Law Division in the JAG office, I decided to give it a try. I placed a call to a personnel officer in JAG, whom I told that I would be coming to Washington if I were assigned to international law, but otherwise would remain in Newport to teach. I stood outside in a frigid phone booth feeding quarters to the pay phone for almost an hour before the personnel officer returned to the phone, said that he had found my file, and informed me that it said I was assigned to international law. My first task when I got there was to draft the documents for leasing a destroyer to Brazil.

Shortly after that, the Soviet Union sent a diplomatic note to the United States and a number of other countries inquiring about the feasibility of convening a new conference on the law of the sea for the purposes of agreeing on twelve miles as the maximum permissible breadth of the territorial sea. The secretary of state sought the views of other interested agencies, including the Department of Defense (DOD). As is often the way with bureaucracies, the Soviet inquiry worked its way down the ladder from the secretary of defense to the secretary of the Navy and the chief of naval operations to the JAG of the Navy to the head of the international law division, and continued its route down until it reached bottom on my desk. It was my job to help organize a multi-service multi-month study of whether to move away from the traditional three-mile limit declared by Thomas Jefferson, and if so with what conditions. But for the wise mentoring of Admiral Wilfred Hearn and Admiral Joseph McDevitt, it is unlikely that I would have survived that mission in one piece. Be that as it may, on the basis of our study, as is well known, DOD indicated that it was prepared to support further discussion of the matter with the Soviet Union on the condition that freedom of transit for all ships and aircraft through straits overlapped by the territorial sea would be expressly preserved.

Lori Fisler Damrosch

How did you move from the international law division in the Pentagon to a law of the sea portfolio at State? Who were the main influences on you in this period?

Bernard H. Oxman

When I received the Navy Commendation Medal, I perceived hints in the citation that I was awarded the medal for valor in battle against the State Department. Seriously though, not all of

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my contacts with the Department of State involved disagreements between the two agencies. While in the Navy, I was privileged to have the opportunity to be of some assistance to Steve Schwebel, who was then entrusted with responsibility by the Department of State for negotiating an agreement with Japan regarding Micronesian claims. That was the start of my enduring and immensely rewarding relationship with this towering figure in public international law on whose wise counsel I rely to this day.

Like many other Columbia Law School graduates at the time, I thought that my future after active duty would be at a Wall Street law firm. Indeed, some had offered me a summer job at the end of my second year of law school, but Herbert Wechsler convinced me that my last free summer as a student would be better spent traveling abroad with exposure to foreign languages and cultures. I was accordingly quite surprised when, in the fall of 1968, as my active duty commitment to the Navy was drawing to a close, I received a telephone call from Leonard Meeker, then legal adviser of the Department of State, inquiring whether I would be interested in coming to work at the Legal Adviser's Office. After some hesitation, I accepted the offer. The Johnson administration came to an end soon thereafter, and John R. Stevenson became the new legal adviser of the Department of State. He soon assumed principal responsibility for the law of the sea negotiations within the Department of State and eventually the executive branch as a whole. I worked directly for him in that capacity; it was an extraordinary privilege from which I learned a great deal. When Congress created a new bureau of oceans, environment, and science within the Department of State, Stevenson sought White House approval to name me as the assistant legal adviser responsible for providing legal advice both to that new bureau and to the interagency process working on the law of the sea. I might add that it was Stevenson who also created the position of counselor on international law within the Office of the Legal Adviser, and persuaded Louis Sohn to be the first person to hold that position. Louis was thus drawn into the law of the sea circle by Stevenson, and I in turn had the opportunity work closely with Louis as well. I have been extremely fortunate in the people I have had the opportunity to work with.

Lori Fisler Damrosch

Let us move to the Third UN Conference on Law of the Sea from 1973–1982, when you were vice-chair of the U.S. delegation and chair of the English language drafting committee. You worked not only with Stevenson but with others including Elliot Richardson. What are your reminiscences about these experiences?

Bernard H. Oxman

I have had ample opportunity to write about the substance of the negotiations. But my most vivid memories are of the extraordinary people, American and foreign, with whom it was my privilege to work closely. The fact that there are far too many to mention by name speaks volumes about my good fortune. The opportunity to spend years working directly with a towering figure of unwavering character like Elliot Richardson cannot be duplicated. Richardson observed that influence in a complex multilateral negotiation is not exclusively contingent on the influence of the country being represented but may depend as well on the quality of the representative. A good example in the law of the sea negotiations is Tommy Koh of Singapore, whose uncommon ability propelled him to the presidency of the conference in its climactic years.

Coordinating a huge delegation like that of the United States was a daunting task. It included not only representatives of a large number of federal government agencies, but members of Congress and Congressional staff, as well as public members representing various industries, non-governmental organizations, and even religious organizations. A *Wall Street Journal* reporter once asked me

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about the ample size of the U.S. delegation to the first substantive session of the conference in Caracas; I replied that in the spirit of participatory democracy we brought our country with us.

I remember that Jack Stevenson once reported to me on the conversations he had had with the then-chair of the Group of 77 countries who was complaining about the challenges of coordinating all of the different positions of so many countries, and Jack said that that was nothing compared to the challenges he faced of coordinating all of the different interests represented on the U.S. delegation! It was not a foregone conclusion that there would be a Convention that would be widely accepted: it took a great deal of hard work and imagination on the part of many.

Lori Fisler Damrosch

Moving to the scholarly phase of your career, your early contributions to literature on the law of the sea began with a series of annual reports in *AJIL* beginning in 1974 and continuing into the early 1980s, for which you earned *AJIL*'s Francis Deák Prize. From the mid-1990s, another cluster of influential articles has helped us lay people understand how the 1994 agreement to modify the Convention and bring it into force effectively resolved all the concerns that the Reagan administration had raised about the 1982 Convention. That article holds up beautifully, and I continue to recommend it to my students. I had the privilege of coming to the University of Miami in 2007 for a symposium on your *AJIL* centennial essay, "The Territorial Temptation: A Siren Song at Sea." I highly commend that article to anyone looking for a readable overview of a century of scholarship and practice on law of the sea, and also why we should resist temptation. And your many scholarly contributions on peaceful settlement of disputes include, but are not limited to, law of the sea disputes.

Turning now to your experiences as counsel and adjudicator in all three pillars of the law of the sea dispute settlement architecture—arbitration, ITLOS, and the ICJ—as Paul has mentioned, you are the only American to have served in all those capacities. I would like to focus now on your role as a judge ad hoc for ITLOS and the ICJ. Catherine has quoted from a letter submitted to nominate you for this award; I would like to mention another passage in the same letter which emphasizes your unique contributions as having really reinvented the role of the judge ad hoc. By joining together with another judge ad hoc and uniting in a single joint opinion, you could do something totally different from typical judges ad hoc, who would have been reciting the arguments of the appointing parties. Focusing on your experience as a judge ad hoc at the ICJ, the record reflects that the final judgment in the *Black Sea* delimitation was absolutely unanimous: the first ICJ judgment in which the full Court and two judges ad hoc joined, without *any* individual opinions. This is a testament to your consensus-building qualities.

Do you have any reflections for us on the role of a judge ad hoc at either ITLOS or the ICJ? Does the size or shape of the table matter?

Bernard H. Oxman

On the last point, physical arrangements will make a difference. At the time I served, the ICJ had a modern, relatively new circular table in the deliberation room so that most of us could see everyone else. But on the other hand, the splendid Great Hall of Justice did not work as well in terms of the modern facilities that counsel use to explain the case to the judges. The situation in ITLOS is exactly the opposite. The courtroom is large and circular: wherever you sit you are looking directly at counsel. You have all of the electronic facilities immediately at your disposal. On the other hand, the deliberation room had a very long table, with the president and registrar sitting at the head of the table where they can see everybody, and then the judges are seated by seniority. The effect is that

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the judges ad hoc are at the other end, next to or opposite each other, with a view of everybody, which also afforded an opportunity for the judges ad hoc to get to know each other.

In the *Land Reclamation* case, which was at the provisional measures stage, the other judge ad hoc was Kamal Hussein. We had not had the opportunity to work together before. It did not occur to either of us that we were breaking precedent by ending with a joint declaration. We both supported the provisional measures order of the Tribunal—one about which I wish more could be written, as an interesting environmental case—but we faced a technical issue. The ICJ had a practice in its provisional measures decisions of including a sentence that said that the order was without prejudice to the merits or to jurisdiction. This formula recurs routinely in ICJ provisional measures decisions, and the issue was whether ITLOS should adopt it. The difficulty was that the jurisdiction of ITLOS was limited to provisional measures, pending the constitution of an arbitral tribunal. ITLOS did not have jurisdiction over the merits, or over questions of jurisdiction over the merits, but the two ad hoc judges had already been appointed to the arbitral tribunal that would sit on the merits. We thought we should follow the ICJ precedent and say something together that was relevant to our future role in the case, even though it was not directly relevant to ITLOS. That emerged as a joint declaration. We then went on and said some other things that I have always hoped proved helpful. We said nice things about each of the parties, and one hopes that that contributed in some way to the cooperative implementation of the very creative order in that case, and that once it led to the studies and reports required by the order, it brought the parties to the position where they could settle, which was a very desirable result.

Similarly, in my service on the ICJ in the *Black Sea* case, no one imagined that we would end the case with a unanimous judgment and no separate opinions. There is no way to know at the outset: you simply approach the case with an open mind. One of the interesting aspects of maritime delimitation cases is that the underlying standard is a relatively flexible one. There is not only one boundary that would satisfy the legal requirements: there is a range of possibilities. Judge Schwebel in one of his opinions made this point elegantly. Therefore, you could expect one of two things to happen: fifteen judges with fifteen opinions could support fifteen boundaries, all of which could rationally be said to satisfy the criteria; or there would be a wide range for assembling a group that felt that the outcome satisfied the requirement of an "equitable result," and they could come together, as did happen in the *Black Sea* case, on one boundary. That case was a culmination of a reaction of both the ICJ and other tribunals to initial articulations of this process in earlier cases. Of course, one of the many functions of judges is to devote some concern to how the law should be articulated and developed, not only for the benefit of courts and tribunals, but for the benefit of governments that will try to implement that law in other situations.

It is true that the end result in the *Black Sea* case is something that according to Rosenne had never happened before: two ad hoc judges and no separate opinions whatsoever. That, like the joint declaration in the *Land Reclamation* case and other cases, has to be attributed to the extraordinary individuals with whom I also served as judge in these cases. Were it not for the character, imagination, and ability of these individuals, I am not sure that any of these changes would have occurred.

I did not set out to reform the system. When I was first appointed a judge ad hoc, I read Steve Schwebel's article on the subject, and I decided that, like Manley Hudson, I did not agree with Hersch Lauterpacht's criticism of judges of the nationality of the parties or ad hoc judges. But I agree with Lauterpacht that the appropriate point of departure for analyzing the duty of anyone sitting as a judge of the ICJ or ITLOS is the solemn declaration. Article 20 of the ICJ Statute requires every judge to make a solemn declaration to exercise his or her powers impartially and conscientiously. Article 11 of the ITLOS Statute says the same. While the arbitration provisions of UN Convention on the Law of the Sea (UNCLOS) do not specify the same requirement, each of the

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persons nominated for the list of Annex VII arbitrators must be a person "enjoying the highest reputation for fairness, competence and integrity." If you start out there, you have to reach the conclusion that the kinds of sharp distinctions that have been drawn between ad hoc judges and other judges are not the only way to interpret their role.

It has been argued that an ad hoc judge should try to ensure that the arguments made by the appointing party have been fully and fairly heard. In my limited experience, this is rarely a difficult or onerous task. There is widespread agreement with the underlying premise, as well as with the objective of writing a judgment that makes clear that this was the case. While others have a different view, I remain to be convinced that an individual opinion by an ad hoc judge favorable to the appointing party adds significant reassurance in this regard. I think anyone who has worked with me or read my writings would understand that waving the ensign on a sinking ship is not my idea of a job well done.

That said, of course every case has to be approached with an open mind. One cannot come in with *a priori* notions. I was of course well aware, as Judge Schwebel pointed out in his article, that not every judge has consistently agreed with the appointing party or the party of which the judge is a national. I had no idea when the ICJ began work on the *Black Sea* case that it might end with an apparently unprecedented unanimous judgment on the merits with no separate opinions by either of the ad hoc judges or anyone else. Nor did I have any idea when ITLOS began work on the *Land Reclamation* case that the outcome would include an unprecedented joint declaration by the two judges ad hoc. I would like to believe that the considerations that led me to those conclusions were not qualitatively different from those taken into account by the other judges, although of course the judges ad hoc bore the weight of a different history of practice by many of their predecessors. It is unlikely that these changes would have occurred absent the extraordinary qualities and collegiality of the other judges ad hoc with whom it was, and is, my distinct privilege to serve.

I might add that it is particularly important for law professors—or at least this law professor—to bear in mind the difference between the role of the academic and that of the judge. The former tends to concentrate on matters of interpretation and development of the law—on doctrine and policy if you will. The latter needs to do that as well, but within the context of applying the law to the particular case before the court and rendering a decision in that case that is timely, just, and effective.

Lori Fisler Damrosch

In the letter that every living president of ASIL and all but one of the living Hudson medalists signed (we could not track down one stray one), we wrote that Bernie was not only deserving but the most deserving, on so many dimensions of being a scholar, practitioner, arbitrator, and judge.

On the role of judges ad hoc, there are revealing comments in an ASIL keynote, where Judge Rosalyn Higgins referred to the role of judge ad hoc as "a security blanket to the states in front of the Court." That is the generic judge ad hoc. She added that judges ad hoc can be especially useful "when you have judges who are really and truly experts in a particular field." She gave the example of her last case as ICJ president, *Romania v. Ukraine*, where "the Court got a tremendous bonus from having Bernie Oxman and Jean-Pierre Cot. They both knew so much about the subject, and you could not have told in the discussions and in the help they gave us who had been appointed by which party" (2011 ASIL Proc. 230).

That so well illustrates the point that Bernie has mentioned, that the judges ad hoc take that solemn declaration very seriously and do their utmost in fairness and impartiality.

I end by quoting the last sentence of our letter: that Bernard Oxman "is among the most distinguished lawyers of his generation and the Society would honor itself in awarding him" this medal.

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Catherine Amirfar

The stories we have heard today are a testament and bring to life why this recognition is so well deserved, and frankly, Bernie, why you are so beloved by this community. Congratulations again!

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