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## ASIL Hudson Medal Conversation "Songs My Mother Taught Me: A Very Personal Account": Remarks by Lori Fisler Damrosch

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Academies of International law, the European University Institute, the Constitutional Court of Georgia, Qatar University, among other venues where the invisible college gathers.

Even some of those who are in this room may not be aware that Lori holds the international law equivalent of the sports world's GAAT ("greatest athlete of all time") award, or if you prefer, the arts' EGOT (a holder of an Emmy, Grammy, Oscar, and Tony). Lori is the only person I know who has ASIL's GAAT or EGOT. She outshines all prior Hudson Medal winners as the only person who has been awarded the Deák Prize (for best article in the *American Journal of International Law* written by a young author) and ASIL's certificate of merit for creative scholarship, and has been elected co-editor in chief of *AJIL* and ASIL's president.

[The conversational write-up that follows has questions from José Alvarez in italics and answers by Lori Damrosch in regular font.]

*Where does the story begin? What was your earliest encouragement in the direction of international law?*

#### **REMARKS BY LORI FISLER DAMROSCH**

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First, I am deeply appreciative of this honor, especially in the presence of so many who encouraged me along the way. I would like to acknowledge previous Hudson honorees who are present, including Charlie Brower, Edie Brown Weiss, and Bernie Oxman. Thanks to Catherine, Patrick, and the Allen & Overy law firm for sponsoring this event.

I also want to acknowledge my debts to other Hudson medalists who reached out to me early in my career—when I was, say, a twenty-five-year-old lawyer just getting started in the State Department, and that person was, say, a deputy legal adviser or an *AJIL* editor in chief. I am sure we will cover several of them in the course of this interview.

But the story really begins before I was born. In light of the annual meeting theme of "Personalizing International Law," I have thought that the best title for my remarks would be "Songs My Mother Taught Me: A Very Personal Account." The most personal way I can tell the story is to begin with the "prenatal" influence, especially my mother's studies and experiences before I was born.

Many in this room knew my mother, Jean Bauer Fidler, who attended roughly twenty-five annual meetings of this Society as a retired lawyer. She was a proud graduate of UCLA Law School's founding class, the class of 1952, and also of UCLA's college class of 1945. She passed away last year and is undoubtedly beaming her bright smile on this gathering—not just here at the Hudson lunch, but also in another room in this hotel, where UCLA Law School is also hosting a lunch today.

My mother gave the valedictory address to her UCLA undergraduate class on June 24, 1945, just two days before the San Francisco Conference would complete its work and open the Charter of the United Nations for signature. Her graduation speech pointed to the high hopes of her generation for the new UN organization, to establish the foundations for a secure peace, and to build peace through education. She could not have imagined in 1945, but it turned out to be the case just two years later, that she would soon be employed by the UN at its Geneva office.

In 1947, Jean and her friend Judy bought one-way tickets to Europe in search of adventure and found their way to Geneva, where the newly established UN Economic Commission for Europe (ECE) was hiring. They applied, and starting from September 1947 and for the next fifteen months, Jean and Judy were among the earliest UN civil servants at the Geneva office, reporting to Gunnar

Myrdal and Walt Rostow. Years later, when I introduced her to Oscar Schachter at Columbia, my mother and Oscar compared notes on people they knew in common from the UN's earliest days (one of whom figures in a famous International Court of Justice (ICJ) advisory opinion, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*). In 1948, when the ECE sponsored a costume party for the UN employees in Geneva, Jean won the grand prize for going as "The Spirit of an International Organization," or "Miss-Administration," by making a dress out of samples of all the bureaucratic forms her office had to fill out and then completely wrapping herself in red tape!

In late 1948, Jean left the UN for new adventures, including memorable travels in Eastern Europe as one of the first American civilians to venture into Hungary, Czechoslovakia, Poland, Yugoslavia, and Bulgaria after the war. Among her souvenirs, in addition to folk costumes and dolls, were two volumes on German war crimes in Poland, published in Warsaw the year before her trip "behind the Iron Curtain." Then on the last leg of her journey, she made her way to Paris in December of 1948, just as the UN General Assembly was convening to approve the Universal Declaration of Human Rights. We do not know exactly how she ended up in camera range of Eleanor Roosevelt, Trygve Lie, and Herbert Evatt, but her slides from the trip have candid shots of all of them.

Back in the United States in 1949, Jean applied for, and was accepted into, UCLA Law School's first class, where the founding faculty included a famous name in international law—Roscoe Pound. Between her first and second semesters in law school, she married Lt. Commander Pete Fisler of the U.S. Navy. They were just settling down to happily married life when the Korean War broke out and Pete was recalled to active duty and sent to command a minesweeper off the coast of Korea. So, although this all happened before I was born, I can say that on my mother's side, I am descended from an international civil servant who became a lawyer, and on my father's side, I am descended from a UN collective security and peace enforcement operation.

Fortunately, my father's tour of duty ended in late 1952, in time for my parents to be reunited and for me to be born in 1953. My mother always said that I had a head start in the law because she was studying for the bar exam when she was pregnant with me. She passed the bar, became a lawyer, and started a law practice with a focus on the legal problems of women and children. While pregnant, she even found time to speak to college groups about her work. We have a Santa Monica newspaper clipping from the week I was born, with the headline "Lawyer Speaks at Santa Monica City College, Is Mother Next Day"—with the report that the baby girl was born the day after Mrs. Fisler's address on "The Legal Rights of Women"—so my prenatal education set me up very well to become interested in international human rights law many years later.

*You spent seven years in New Haven. What impact did the "Yale School of International Law" have on your education?*

Actually, I emerged essentially unscathed: My international law education came from my Soviet Law professor, Leon Lipson. I took his Soviet law course when I was an undergraduate in Yale College, and then his international law course at Yale Law School the next year.

*The first installment of your career in international law was spent at the Department of State, Office of the Legal Adviser. What were some of your assignments from that period, and how did they affect your later trajectory?*

I had three main areas that have been continuous from my first assignments through my work in government and private practice, and also as an academic: (1) dispute settlement through arbitration and adjudication; (2) economic sanctions; and (3) the constitutional law of foreign relations and national security. We can cover the details later.

*Do you recall how you first came to join ASIL?*

Yes. Very soon after my arrival in fall 1977, I found a memo on my desk from Deputy Legal Adviser Stephen Schwebel, with the subject heading: “Why are you not a member of the ASIL?” He had attached the membership application for immediate action, and I filled it out and sent it off to Tillar House with my check for \$15. (Every time I tell this story, I have to add that in 1978, Congress enacted the Ethics in Government Act, which makes it illegal, or at least much more difficult, for government supervisors to solicit their subordinates to join their favorite organizations, but I have always been grateful to Schwebel for insisting that I join ASIL.)

*When did you begin attending ASIL annual meetings?*

Right away, and pretty consistently thereafter. (I skipped one in 1988, which you can ask me about later.)

*What was your first AJIL submission?*

I developed some ideas about dispute settlement and countermeasures, growing out of the 1978 U.S.-France aviation arbitration, which Schwebel encouraged me to write up as an article. He suggested I could send the manuscript to Oscar Schachter and Louis Henkin, who were then *AJIL*'s co-editors in chief at Columbia. I did, and they accepted it for the October 1980 issue. They later became my two most important academic mentors.

*Wasn't that first piece the winner of the Deák Prize? It also features in your casebook and in the commentary to the Articles on Responsibility of States for Internationally Wrongful Acts. Want to say more?*

Yes, the prize was awarded at the 1981 annual meeting. I was as surprised to receive it at age twenty-seven as I was to learn about the Hudson award four decades later! On the substance of the points I was making way back then, I stand by the main ideas—that countermeasures in response to breaches of international obligations can be useful in giving both sides inducements to proceed to third-party arbitration or adjudication. The United States said that France had breached a treaty, which France denied. The United States then suspended equivalent French rights under the same treaty, while simultaneously signaling our willingness to have a prompt arbitration, to get a clear legal answer to the question of whose interpretation of the treaty was correct. The countermeasures restored the balance of rights between the parties and facilitated getting the arbitration underway. In the end, the arbitral tribunal accepted all of our arguments, including the arguments on the legality of countermeasures before and during an arbitration.

*What was your first appearance as an annual meeting speaker?*

In 1982, I was invited to speak on a panel with James Crawford and others on Customary International Law in National Courts. I spoke about the *Filártiga* case, which I had worked on in government, from the perspective of whether U.S. courts should defer to positions of the executive branch, when the executive says, as it did there, that torture violates the modern-day law of nations, just as much as piracy or assaults on diplomats did in the eighteenth century.

*How did you find your way from the Legal Adviser's Office to Sullivan & Cromwell?*

Here I want to pay tribute to Jack Stevenson, a former legal adviser of the State Department (and Hudson honoree, 1997), who was then the senior partner of Sullivan & Cromwell, and who became my key mentor in the private practice of public international law. Jack was very supportive of my efforts to stay involved with public international law even at a private firm—through cases involving questions of international law, such as several of the earliest cases at the Iran-U.S. Claims Tribunal in which I had a role. He also encouraged me to become and stay involved with professional societies of international law, and to keep on speaking and writing about issues of international law that interested me. He knew that I had been involved in several arbitrations and ICJ cases at the State Department, and he encouraged me to pursue scholarship about international dispute settlement. In 1984, when the *Nicaragua* case was pending, Stevenson thought that the Society should have a study group to look into questions about U.S. policy toward the ICJ, and he recruited me to organize the study which eventually became a collaborative volume, *The ICJ at a Crossroads*. We launched that endeavor around the same time that I was leaving the firm for academia.

*How did you find your way from Sullivan & Cromwell to Columbia?*

Here I will return to Schachter-Henkin: I had met them for the first time in 1981, when they presented me with *AJIL's* Deák Prize. They discerned something of an academic inclination in that article, and although I explained that I was then leaving government practice for private practice in New York and did not envision an academic career at that time, they invited me to stay in contact and to let them know if I reached a point where academia might seem attractive. When that point arrived a few years later, they supported my appointment at Columbia. Both of them encouraged me to continue writing on various topics at the intersection of international law and constitutional foreign relations law, and of course they each, in their very different ways, had a huge influence on my later scholarship.

*One of the characteristics of your scholarship is that it evinces deep reflection about the contributions of individual members of the "invisible college"—Schachter and Henkin, and other giants like Tom Buergenthal and Jonathan Charney, among others. Any personal stories you want to share about those giants in the field and how they influenced your own work?*

Of course! This is supposed to be “Personalized International Law,” so I could go on and on (well beyond the time limit for this lunch!) about my “father figures” and my “older brothers” like Jon Charney. My published memorial tributes reflect on their influence on the field, but I take it that you would like punchy anecdotes about their influence on me specifically. It is hard to pick one sound bite about these inimitable and complex personalities, but I will try for two of them:

*Henkin:* He had a strong sense of right and wrong, coupled with analytical clarity and succinctness of expression. When the first President Bush sent U.S. armed forces into Panama in December 1989, Henkin got a question about the legal issues from a Columbia alum who seemed sympathetic to the Bush administration's position. Henkin answered essentially as follows: “There are three reasons why this intervention is illegal: (1) the UN Charter; (2) the U.S. Constitution; and (3) the War Powers Resolution.” Equally lucid explanations followed.

Flash forward a little more than a year: After Iraq invaded Kuwait and the same President Bush persuaded first the UN Security Council in November 1990 and then the U.S. Congress in January 1991 to authorize military action to eject Iraq from Kuwait, war was going to break out on January 15, 1991. It was the first day of spring semester classes at Columbia, and also the first day of my

classes, which happened to be Foreign Affairs and the U.S. Constitution before lunch, and International Law after lunch. During the lunch break, I knocked on Henkin's door in search of some sort of wisdom for what I should say to my International Law class. He replied along the lines of, "Nobody wants war, but if there has to be war, this is the most legal war we've ever had: it's fully compliant with the UN Charter, the U.S. Constitution, and the War Powers Resolution!"

*Schachter*: José, I think we have a tacit pact that I am not going to embarrass either of us by reverting to our roles in the *Wizard of Oz* skit at the annual banquet of 1997. But I cannot resist saying that when Schachter learned that I was writing a skit, he demanded to have a role in it, so I wrote him in as the Mayor of the Munchkins. Then Stefan Riesenfeld learned that Schachter was going to be in the skit, so I made them co-mayors. I was going to call the Munchkins the "Monists" and have them sing about the "law of the land." Riesenfeld had known Hans Kelsen and relished the role of "the mean Monist." Schachter refused to be cast as a Monist, calling himself a Pluralist. So, there it was—the relationship between international law and national law, all in one song. Instead of "We represent the Lullaby League," it was "We represent the Law-of-Land League"!

*Let's circle back to the Society and the Journal. Did you ever miss an annual meeting?*

Yes, when I gave birth during the meeting! ... to my daughter Eva, who is here today. This might be the moment to mention Schachter's congratulatory call to me in April 1988, when my husband David had just brought Eva and me home from the hospital the day after she was born. The call went something like this:

Oscar: Lori, I wanted to be the first to congratulate you on this wonderful news!

Lori: Thanks, Oscar, but you're not exactly the first. . . .

Oscar: What? Were you expecting this?

Lori: Well, yes, for about nine months. . . .

Oscar: Oh, I didn't mean the baby, I meant the ASIL Certificate of Merit!

Well, I had had no idea that the book I had edited, to which Oscar was also a contributor, *The ICJ at a Crossroads*, had been awarded the Certificate of Merit for creative scholarship.

Again, as with the Deák Prize and today's Hudson Medal, I had no idea that the book had even been nominated for the prize, let alone that I would receive it.

*Anyone else to mention, or any other reminiscences about the Society and Journal?*

Yes. I would like to mention influential women in the Society and *Journal*, beginning with the founding of the Women in International Law Interest Group (WILIG) at the Chicago annual meeting in 1989. My parents at that time were living in the Chicago area, and my mother came to hear me speak at an annual meeting panel on the ICJ. It happened to coincide with the first WILIG lunch, held around a table with about a dozen women of the Society. My mother got a big kick out of it—remember, this was the lawyer who gave a talk on legal rights of women the night before she gave birth to me. So, we made a point of going to all the WILIG lunches after that.

The next year, 1990, I came to the annual meeting seven months pregnant with my third child. I had been invited by Tom Franck several months earlier to speak on a plenary roundtable, on some topic like International Law After the Cold War, with about six of the Society's leaders—all male, of course. And at that same annual meeting, Tom, who was then *AJIL* editor in chief, told me that the Board of Editors had just voted to invite me to join the Board. At that time, Edith Brown Weiss and Cynthia Lichtenstein were the only two women members. They welcomed me warmly when I attended my first *AJIL* board meeting in the fall of 1990.

*What else was going on in this period?*

A combination of geopolitical developments around the end of the Cold War led to collaborative efforts to address them, with ASIL on the American side and the Soviet Academy of Sciences and Soviet International Law Society on the other side. We launched a U.S.-Soviet joint project in international law and alternated our meeting venues between Moscow in December 1989, Washington in November 1990, Moscow in 1991, Moscow and Minsk in 1992, and finally Washington again. Two books resulted from this collaboration between 1989 and 1995: *Law and Force in the New International Order* (1991) and *Beyond Confrontation: International Law in the Post-Cold War Era* (1995).

*You have been involved with the former Soviet Union and successor states for a long time. What observations do you have on the present crisis?*

I began thinking about legal and policy questions relevant to economic sanctions against the Soviet Union going back to my student days. A U.S.-Soviet trade agreement was concluded in 1972 when I was an undergraduate, but it could not go into force because of human rights sanctions which the U.S. Congress enacted with the Jackson-Vanik Amendment of 1974. My time at the State Department included the Soviet invasion of Afghanistan and President Carter's response of a grain embargo and a voluntary boycott of the 1980 Moscow Olympics. These efforts were much weaker than the present sanctions.

*A few months from now, you will be giving The Hague Academy's general course on public international law. Would you like to give a short preview?*

Yes. I chose the theme in 2017: "Democratization of the International Legal System." The intervening five years have made the "democratization" theme much more challenging, but I have stayed with it and can preview some of the concepts I am developing.

First, I need to explain that the "democratization" I am exploring relates to, but is not the same as, what Tom Franck called the "emerging right to democratic governance" in his famous 1992 article, which *AJIL Unbound* recently revisited in a twenty-fifth-anniversary symposium. Franck discerned an emergent trend, which he sought to encourage, toward democratic governance within states, in the sense of their willingness to hold periodic elections and even to accept some forms of international election monitoring, as had then recently happened in Haiti and elsewhere.

My lectures will be looking at the systemic effects of trends toward democracy on the system of international law as a whole. This involves revisiting the main topics in the international law syllabus, such as recognition of states and governments, rights of individuals, and use of military force, in light of the greater participation of many more actors in making, applying, and enforcing international law. The premise of the title is that we can look at this increasingly complex system, taking it as *one* international legal system rather than multiple fragmented regimes, and try to understand how the system is changing, given that international law is increasingly affected by how parliaments control what governments do, how civil society works across national boundaries, and so forth. It takes the themes of my comparative war powers work and applies them across a sample of other international legal problems.

*Bernie Oxman, who is here, has a question about whether you have advice for the incoming AJIL editors in chief.*

Bernie and I co-edited *AJIL* together for ten years. The *Journal* under our successors, José Alvarez and Benedict Kingsbury, innovatively established *AJIL Unbound*, and has flourished

under their successors, Curt Bradley and Larry Helfer. So, all I can say is, go from strength to strength!

*Donald Donovan, who is here, can expand this conversation to cover your role as principal author of several amicus briefs.*

I had a role in the cases involving the Vienna Convention on Consular Relations—mostly death penalty cases—for roughly a decade from 1998 to 2008. Donald reached out to me around the time that he was expecting simultaneous action at both the U.S. Supreme Court and the ICJ. He was looking for scholarly experts on the ICJ, to file a brief that would make a legal argument on why the United States should comply with an ICJ provisional measures order and thus why the Supreme Court should order Virginia not to execute the prisoner until the ICJ could have a chance to consider the merits of the case. We put together our first such brief over one weekend—Passover, Good Friday, Easter—in 1998, and continued the efforts on behalf of death row inmates from multiple nationalities in multiple U.S. jurisdictions until the Supreme Court finally closed the door in 2008. Although we did not ultimately persuade the Supreme Court to comply with international law, there was at least partial success in some lower courts, with at least one commutation of a death sentence.

The *Jam* case which I worked on with Patrick Pearsall, came about in a different way. One of my former students, whose law firm was working on the Supreme Court appeal, reached out in 2018 about a case involving interaction between the immunities of international organizations under a 1945 statute and the law of sovereign immunity, which had changed dramatically in 1952 and 1976. The issues were familiar because I had been involved with them in my State Department days. I agreed to draft a brief essentially saying that the position approved by the legal adviser in 1980 was correct in 2018, and international organizations cannot have greater immunity than states. My thanks to Patrick Pearsall for supporting that effort.

### *Wrap-Up*

I will close by referring back to my title, “Songs My Mother Taught Me,” which is an allusion to a song cycle by Dvorak. I will have to pass up a reprise of my banquet solo from the 1997 annual meeting, which some in the audience would still remember—my setting of *Missouri v. Holland* to the tune of “Somewhere Over the Rainbow.” My mother taught me many songs—joyful ones, reflecting her optimism about the future—and I have tried to pass on to my children and my students some of what those songs represent, as well as some of my mother’s wisdom about life and the law.

But I need to end on a sober note. As we prepare to leave this room for the Ukrainian ambassador’s address, I have in mind a song which I discovered in a little booklet of Ukrainian folk songs as an eighteen-year-old student many years ago—a souvenir from my first trip to Kyiv. In rough translation, the lyrics of the song say, “I look to the sky and wonder why I cannot fly like an eagle—why do I not have wings to spread to take me away from my fate on this Earth to a better place.” The song expresses the yearning for freedom that belongs to every person everywhere. I leave you with that thought as we ponder what we as international lawyers can do in the face of the greatest crisis of this generation.