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Presidents, Secretaries of State, and Other Visible International Lawyers

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Another source of divergence is the theory that the principles of Islamic jurisprudence call for qualifications of the concept of the sovereignty of states in respect of territory. This element of thinking received an affirmation in the reasoning of the court of arbitration in the second award of the *Red Sea Islands* arbitration in 1999.

This mode of thinking is similar in result to the neoliberal views of some states and some international lawyers, according to which the legal personality of states should be given only a qualified recognition. The practical results of this type of doctrine would be disastrous. The doctrine of the limited sovereignty of states is available only to certain powerful states and constitutes a feeble excuse for illegality. Its political congener is the Brezhnev Doctrine of 1968. The ancillary role of the doctrine of the limited sovereignty of states is to denigrate the role of states in the formation of general international law and to guarantee the development of a normative chaos in which states (with certain exceptions) do not count, and no general system of norms is recognized.

PRESIDENTS, SECRETARIES OF STATE, AND OTHER VISIBLE INTERNATIONAL LAWYERS

*by Lori Fisler Damrosch**

I invite you to join me on a journey back ninety years, to the 1911 Annual Meeting as recorded in the 1911 *Proceedings* (pp. 340–41). President Rovine's predecessor, the then-president of the Society, was Elihu Root, a former secretary of war and secretary of state who was at the time senator for New York (Senator Clinton, please take note!). Root would win the Nobel Peace Prize the following year. President Root proposed a toast to the honorary president of the Society, who then gave the banquet address.

Our Society's honorary president in 1911 was William Howard Taft, then the president of the United States. (When he entered the White House, he had to relinquish his post as a vice president of our Society, thereby giving that year's nominating committee a tough task.) President Taft—whose namesake in the current generation, William Howard Taft IV, would serve as legal adviser of the Department of State in the administration of President George W. Bush—was not just a dabbler in international law, but as Elihu Root said in his toast, “a real maker of international law.” Taft's earlier installments in public service had included governor of the Philippines and secretary of war. A decade after leaving the presidency he would become chief justice of the United States (1921–1930), and while sitting in that capacity, he would serve as international arbitrator in the famous *Tinoco Claims* arbitration between Great Britain and Costa Rica (1923), where he wrote an award that is still in our casebooks on the legal effects of acts of unconstitutional governments.

I mention President Taft because I would like to hope that President Bush has signaled a commitment to international law by appointing Taft's distinguished namesake and relative as legal adviser, as an augury that international law will be brought into the decision-making processes of the current administration.

But I also invoke President Taft because I love his banquet address, which has a few quotable quotes, as recounted in the *Proceedings*:

Your subject is international law. I talked once with a justice of the United States Supreme Court, who said to me, “Taft, what is law?” I thought that was a peculiar question, coming from the justice of a court that was supposed to know that definition perfectly, and I said, “Mr. Justice, I would rather have you define it.” “Well,”

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he said, “what is it but a lot of rules of conduct, established on principles of supposed general policy that were laid down some hundreds of years ago, by men who did not know anything more about it than you and I do?” I do not know that that describes municipal law as it is administered in the Supreme Court of the United States [says the man who would later become chief justice], but I think perhaps some such general definition might be given to international law.

Those who laid down the rules of international law were, I suppose, the “invisible college” of their day, and we are their visible successors.

Who were “they”? They were the elites of their time. The *ASIL Proceedings* for some years printed the roster not just of those who spoke but also of those who attended the Annual Meeting, and we can see that the elites really did participate. By this I do not mean that we are any less impressive in our collective credentials—I hope there are some cabinet-level officials, senators, and past or prospective Nobel Peace Prize winners here, and if not, we can make up for them by other distinctions in our assemblage. But there are a few notable differences in our attendance patterns.

Moving on from 1911, the 1912 Annual Meeting speaker was Senator Henry Cabot Lodge; and in 1914 we heard from Secretary of State William Jennings Bryan, whose address lacks a line quite as quotable as “crucifying mankind on a cross of gold,” but we could have made use of his talents for our fund-raising campaign!

My distinguished senior colleague, Professor Schachter, who coined the phrase “invisible college of international lawyers,” remembers well the many years when it was *de rigueur* for the incumbent secretary of state to address the Annual Meeting. In the 1930s, the then secretaries of state, Henry Stimson and Cordell Hull, regularly presented speeches and/or presided over the Annual Meeting. Although they spoke primarily to our elite audience, they drew media attention: Cordell Hull’s addresses in 1940 and 1941 were broadcast nationwide on radio. Dean Acheson addressed the Annual Meeting in 1952 as secretary of state and honorary president of the Society.

When did the custom of having the secretary of state speak at the Annual Meeting fall into desuetude? Others of you will remember better than I, but in my twenty-four years as an active member I have not had the opportunity to hear one in this forum. The last may have been Dean Rusk, who spoke to the Annual Meeting in 1965, focusing on Vietnam. In 1995 we did have a future secretary of state, Madeleine Albright, who spoke to a capacity crowd at lunch when she was UN ambassador.

I asked you to come with me on a journey to the 1911 Annual Meeting, but I will not be able to go on that journey myself, nor could Dr. Albright or a goodly fraction of our participants. A fact that I have gleaned from Rick Kirgis’s history of our Society¹ is that women were not admitted as members until 1920 and as late as 1917 could not attend the Annual Meeting banquet even as guests, so they could not have heard President Taft. Alona Evans, the first woman president of the Society, elected in 1980, wrote in a 1974 note in the *American Journal* that the *Journal* did publish a book review by a woman in 1919 but concealed her gender by identifying her as H. K. Thompson. (Her name was Hope.) Edith Brown Weiss followed in Alona Evans’s footsteps to hold the presidency in 1994–1996, and at our business meeting later today we will endorse the nomination of Anne-Marie Slaughter as the third female to hold the office occupied by Elihu Root for eighteen years and by Cordell Hull in 1939–1942 (while at the same time being secretary of state).

I do not know whether past or present secretaries of state are expected at our gathering this year; perhaps we will have a sighting later on. The most recent occasion in which a bevy of secretaries of state and defense got together to address an issue of

¹ Frederic L. Kirgis, *The Formative Years of the American Society of International Law*, 90 *AJIL* 559, 565 (1990).

concern to international lawyers may have been when former secretaries Kissinger, Shultz, Baker, Eagleburger, Rumsfeld, and Weinberger, along with former National Security Advisers Brzezinski, Scowcroft, and Allen, ex-directors of the Central Intelligence Agency Woolsey and Gates, and Ambassador Jeane Kirkpatrick wrote to Congressman Tom DeLay on November 29, 2000, in order to urge passage of legislation to block cooperation with the prospective International Criminal Court (ICC). It is not the purpose of this panel to address the merits of that question—other panels will do so—and it is obviously a question on which the membership of this Society holds a range of viewpoints, as we do on most questions of public policy. But it may suggest something of the disconnect between perceptions of international law at the level of ex-cabinet secretaries and understandings of international law by members of today's "invisible college" that ten past, present, and honorary presidents of this Society have subscribed to a letter prepared by Monroe Leigh explaining that *legal* objections to the ICC are based on misconceptions. As Mr. Leigh's letter characterizes the secretaries' letter, "Seldom in the course of public discussion of a great national issue have so many great and good former officials been so misinformed about fundamental principles of international law." And perhaps Professor Schachter's term "invisible college" is apt in relation to the letter of the international lawyers: Secretary Kissinger et al. have had their viewpoint visibly publicized, while the Monroe Leigh letter, endorsed by Oscar Schachter, William D. Rogers, Louis Sohn, Peter Trooboff, Louis Henkin, Edith Brown Weiss, Thomas Franck, and Arthur Rovine, has remained largely invisible.

When President Taft addressed our Annual Meeting in 1911, he said:

International law has no sanction except in the conscience of nations, and nations have not anywhere near the conscience that individuals have. . . . [E]ither the utilitarian spirit, or perhaps a real conscience in all nations, has ultimately brought about a sanction for what we call international law, without any power to enforce it, but simply from the general public opinion of all the peoples of the world.

President Taft scarcely could have predicted that on the day that our Annual Meeting opened in 1999, the British House of Lords would rule that a former president of Chile, Senator-for-Life Pinochet, could be extradited to a third country to stand trial on torture charges, or that a few weeks later a sitting head of state, President Milošević, would be indicted by an international criminal tribunal on charges of crimes against humanity. (It is perhaps even more startling that in 1999 the French *Conseil constitutionnel* would rule that the French Constitution would need to be amended in order to lift the domestic constitutional immunities of France's *président*, so that, if need be, he could be transferred to stand trial before the ICC; that the French Constitution would be so amended; and that France would ratify the Rome Statute in 2000.) In 1911, and still today, presidents were and are "makers of international law," but in 1911 their *dédoublement fonctionnel* was to serve simultaneously as president of the United States and honorary president of the American Society of International Law, while in 2001 our panelists will be debating whether the sanctions of international law should be applied to heads of state along the trend line suggested by the *Pinochet* decision and the ICC Statute.