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WHAT DOES IT MEAN TO BE AN INTERNATIONALIST?

*Anthony D'Amato**

This is not going to be an essay in unrestrained praise of William W. Bishop, Jr. Others who knew Bill much better than I did can write encomia in the manner they deem appropriate. All I want to say along those lines is that I liked Bill and admired him very much, and I miss him. I believe that he exhibited certain traits of mind and disposition that fit the description of the term "internationalist" that I want to present here.

I. THE "MOST HIGHLY QUALIFIED PUBLICIST"

A scholar of public international law, such as Professor Bishop, has a unique place among legal academicians. There is no other field of law where the writings of a respected scholar constitute an actual source of law. The Statute of the International Court of Justice, repeating an authoritative provision that applied to its predecessor court the Permanent Court of International Justice, lists as a subsidiary means for the determination of rules of international law "the teachings of the most highly qualified publicists of the various nations."¹ The term "highly qualified publicists," of course, is synonymous with what I've called "respected scholars."

People unfamiliar with international law might look at the quoted language and quickly assume that it denotes nothing more than the way American courts use treatise writers or the various restatements. Many courts will cite as "authority" for their decisions a text-writer such as Prosser on Torts or Wigmore on Evidence. Even more frequently they will cite the Restatement of Contracts or the Restatement of the Foreign Relations Law of the United States. They might wonder whether such citations are not at least equivalent to the way the International Court of Justice might use the teachings of publicists as a subsidiary means for determining rules of law.

There is, however, an important and subtle difference. Wigmore's text on evidence is only as good as the case authority he uses to back it

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1. Statute of the International Court of Justice, Art. 38(l)(d), entered into force for the United States Oct. 24, 1945, 59 Stat. 1055, T.I.A.S. No. 993.

up. A Restatement of the law is only as good as its accuracy in restating black-letter rules from judicial opinions. These texts can be, and are, impeached in adversary debate by argumentation over their accuracy. In such arguments, the ultimate reference is not to the text itself, but to the cases marshaled in its support.

To be sure, there is another factor that, over time, validates normal, domestic texts. Consider a section in a Restatement that is an "advance" over present law — such as Section 90 of the First Restatement of Contracts, on "promissory estoppel." If that Section is cited (and not rejected) in judicial opinions, soon it becomes authoritative *because* it was cited in those judicial opinions. The Section then begins to live a life of its own. Indeed, this is true of any successful text. If a paragraph of Wigmore on Evidence is cited by many courts, pretty soon the paragraph itself becomes a statement of the law, and there is no need to look behind it to the original supporting case law.

Certainly an international law text can be used in the same way. One consults the book to find a general statement of an international norm; then repairs to the footnote to see what authority supports the statement. But with this similarity the resemblance to domestic legal texts ends. There is a wholly different and added meaning and use for the "teachings of publicists" in international law that is not true of writers of domestic texts.

The difference, I believe, is that in a sense an international publicist is a judge. He or she writes a book that is like an extended judicial opinion, adjudicating thousands of international incidents and events and coming up with a consistent doctrine to explain them. These thousands of incidents that make up the stuff of customary international law are not themselves immediately available to others: digging them out requires extensive research. The research sometimes takes the publicist into materials that have hardly ever been looked at by anyone else — voluminous correspondence between foreign offices housed in diplomatic archives, old cases in forgotten library collections, newspaper reports on microfilm, and so on. Perhaps if all these materials were indexed and retrievable on computers, the status of the writings of international publicists as a source of law would diminish.

The status of their writings would only diminish to an extent, however. The writings of publicists would still be a subsidiary source of law because of the authoritativeness the publicist enjoys by virtue of having made judgments about all the raw material of international practice. Being exposed to thousands of hotly-debated incidents, events, and cases tends to make the publicist disinterested and neutral. The jigsaw puzzle of fitting all these events into coherent rules, princi-

ples, and generalizations becomes training in objectivity. And it is this objectivity that ultimately lends a status of authority to the work of the international publicist such that it can be used as a subsidiary source of international law.

To be sure, some writers never become objective. They see everything through nationalistic eyeglasses, and their work merely apologizes for their own country's policies. The mere fact that one is an international "scholar" by no means assures personal objectivity. Yet there is a safety valve: the work of such "scholars" does not attain general acceptance in the world community. Such persons are *not* the "most highly qualified publicists" in the words of Article 38. The term "most highly qualified" selects from the class of scholars those whose writings have commended themselves, through objectivity of reporting and judgment, to the international legal community.

What it means to be an internationalist, therefore, is to attain — through diligent research and the reduction of such research to a written text that fairly reflects international practice — a level of objectivity that can truly be said to transcend national myopia, and become (wonder of wonders!) an actual subsidiary source of international law. It does not mean that an internationalist cannot be a patriot. Indeed, Bill Bishop was intensely patriotic: he served his nation well in the legal office of the Department of State and as a consultant to the government when he was teaching. Rather, an internationalist is a patriot in the sense that many knee-jerk patriots cannot comprehend: an internationalist can say on occasion that his own nation is wrong, and that its policy in a particular instance is contrary to international law. When the internationalist who is a true patriot says this, he or she is really saying that for the long-run good of the nation it should change its policy. The knee-jerk patriot, on the contrary, sees only the short run; his government is always right by definition. This myopia can lead to disaster in the long run: "international law" is itself a long-run phenomenon; it commends itself to the self-interest of today's loser because today's loser can be tomorrow's winner.

II. THE EFFECT OF TREATIES UPON CUSTOMARY LAW

I had only one substantive disagreement with Professor Bishop, but for me it was a big one. Before I ever met him, something he had written in his famous casebook on International Law presented me with what appeared to be a huge roadblock in front of the thesis I was researching and writing. My thesis was that much of substantive customary international law comes from provisions in treaties. I looked at that historical fact and concluded that treaties must constitute an

element of state practice that gives rise to rules of customary law for nonparties to the treaty (as well as for parties). The trouble was that this apparently innocuous conclusion was totally at variance with the received wisdom of the day. When I announced it in an essay published in 1962² and in a book published in 1971,³ the idea was thoroughly "panned" by the international legal establishment.

In another essay I've just written, which will probably be published at around the same time this one is published, I've recounted some of the personal history and thinking that went into my formulation of the treaties-into-custom principle.⁴ I will not repeat that background here, but rather want to add to that story the piece of it that concerns Professor Bishop.

I remember coming across an item in his casebook about a memorandum written during the First World War. I can picture the book sitting on the shelf in the library stacks. I don't remember whether it was daytime or nighttime when I found the book, because it was in the basement of the library illuminated by an unshaded light bulb. I had been looking through every international law book in the Harvard Law School library for any reference to the impact of treaties upon custom. Here was one of the rare ones that addressed the precise question. As soon as I read it, however, my elation turned to dismay because it seemed to contradict my thesis.

Professor Bishop said that treaties "must be used with caution as sources of international law."⁵ In support, he quoted parts of a State Department memorandum to its embassy in London, containing an instruction to send it to the British Foreign Office on December 1, 1916. Great Britain had advanced an argument that there had been customary practice to remove "enemy subjects employed in the service of an enemy state" from neutral ships, and hence Great Britain was justified in removing some "revolutionary intriguers" from an American vessel. The customary practice that Great Britain had cited was evidenced by a number of bilateral treaties.

The State Department argued in its memorandum that, although such treaties existed, they evidenced "a practice recognized as permissible only under treaty agreement." They represented, indeed, "an exception to the general practice of nations."

2. D'Amato, *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. 1 (1962).

3. A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 70-71 (1971).

4. See D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988).

5. W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 32 (2d ed. 1962).

The U.S. argument, of course, was the precise one that I was attempting to refute. Conventional wisdom had it that rules contained in treaties are irrelevant to customary law, because the rule either departs from custom (in which case the treaty carves out an exception for its parties) or conforms with custom (in which case we already know what custom is, and don't need the treaty to tell us). My thesis, on the contrary, was that rules in treaties give rise to customary rules, and indeed can change the previous customary rule. Moreover, I wanted to make the radical claim that, historically, the most significant manner of changing customary rules has been through the treaty mechanism.

Here was the first instance I uncovered in my research where the treaty-into-custom argument was officially refuted. Or was it? Professor Bishop said nothing more about the matter in his casebook; there was no indication as to how the matter of removing enemy subjects from neutral ships was resolved. I read the page in his casebook again and again. It never even said that the State Department memorandum was delivered to Great Britain; all it said was that the State Department instructed the American Embassy in London to deliver the memorandum on December 1st. That seemed a bit odd. Yet I figured that the memorandum was probably delivered, with the fact of delivery not included in the published sources.

I was depressed for some time, because I did not know how to refute the American position, and feared that my thesis was in jeopardy. But then I resolved to plunge into the question that apparently divided the United States and Great Britain in 1916, and at least to check out the accuracy of the impression that Professor Bishop had given in his casebook.

I eventually found out that the U.S.-U.K. disagreement was dropped when the U.S. entered the war the year after the memorandum. More importantly, when the war was over, there was no accounting or adjustment made by Great Britain concerning the U.S. claim of violation of its neutrality. Thus, to my amazement, it turned out that Professor Bishop had only cited one side's view of an argument, and that that side's view was abandoned in practice.

Unfortunately I was intemperate in my recounting of this matter in my book on customary law, which I here quote in full:

Probably the most influential hedged statement on the subject is William Bishop's that "treaties between states not parties to the instant controversy must be used with caution as sources of international law." The statement is important because it appears in a leading American casebook of international law. To support it, Bishop cites one example only, a memorandum by the United States Department of State in-

structing its ambassador in London to protest against the removal by British authorities of certain enemies of Great Britain from neutral American ships on the high seas during World War I. The particular incident involved the removal of twenty-eight Germans and eight Austrians from the United States steamer *China*. In defense of its action, the British government had argued that a number of treaties of the seventeenth, eighteenth, and nineteenth centuries represented international practice and hence customary law. The treaties involved groups of signatories such as France-Netherlands (1678), France-England-Spain-Holland (1697), France-England (1713), France-United States (1778, 1800), Sweden-United States (1783), Prussia-United States (1785), the United States and several South American Republics (1825- 1887), France-Great Britain (1786), France-Ecuador (1843), and so on. None of the treaties included as parties both the United States and Great Britain. Although, as may be expected, the treaties were not uniform in their stipulations, they did allow for the removal of certain classes of persons from neutral vessels on the high seas without bringing such persons in for adjudication. In its memorandum, the United States argued: "If these treaties can be regarded as representing a practice of nations, as the British Government suggests, it was a practice recognized as permissible only under treaty agreement. . . . [The treaties] represent an exception to the general practice of nations." Since Bishop's casebook does not state the outcome of this diplomatic argument between the United States and Great Britain, the impression is unfortunately left that the United States' position represents a generally accepted view. However, the particular controversy concerning the removal of enemy personnel from neutral ships on the high seas, in part reflecting the more general problem at that time of British visit-and-search practices, can only be said to have been resolved decisively in favor of the British position. Great Britain never deviated from her legal position, and the incidents were closed when the United States entered the war on the side of Great Britain in 1917.⁶ No accounting or adjustment was made on this point at the end of the war. In short, to quote the American position in this controversy is much like an attempt by a domestic lawyer to cite the arguments of losing counsel in a prior case rather than the court's decision in that case.⁷

I've wished ever since that I could have toned down this passage, but, alas, an item that is published is irretrievable. The way I wrote it reflects the depression that Professor Bishop's item plunged me into when I first read it, coupled with my exasperation, after much research, that the item was a red herring. I gave Bill a copy of the book, and he wrote me a nice letter on the point, saying that he never claimed in his casebook anything more for the American position than what the casebook said.

I thanked him for the letter without replying to the point, and our subsequent friendship was apparently never impaired by the matter.

6. 1 U.S. FOREIGN REL. SUPP. 526 (1917).

7. A. D'AMATO, *supra* note 3, at 147-48.

On one nice day in 1967 during my year as a postdoctoral research fellow in qualitative statistics at the University of Michigan, Bill invited me to teach his class in International Law. It was the first time that I had taught a law school class, and although I realized I had not done a good job, Professor Bishop was very gracious about it.

III. A REASSESSMENT

Before I got to know Bill Bishop personally, three theories intruded themselves on my mind as I brooded about why he presented the World War I neutrality problem the way he did in his casebook. First, that he was not a true internationalist — he presented the American side in the neutrality debate only because it was the American side, and covered up the fact that the American position was repudiated by events. Second, that he was not a true scholar — he simply did not know that the American position was repudiated by subsequent events. Third, that he had a false view of international law — that practice didn't count.

The first two of these theories turned out to be totally wrong, and I was ashamed for even having entertained them. The third one had a partial element of truth in it. But to demonstrate that partial element, we have to reexamine the matter in the recent “deconstructionist” perspective — a view of law that emphatically was not part of Professor Bishop's intellectual environment.

As I now look back at the matter, Bill truly believed in the power of legal theory. The ever-present question to him, in teaching international law to his students, was: “Who has made the better argument?” Today we would call it “rhetoric” and we might rephrase Bill's question: “Who is the better rhetorician?” But he would never have countenanced such a rephrasing. To him, arguments were the stuff of the law; they were real.

To Bill's way of thinking, he was not doing anyone a disservice by failing to mention how the U.S.-U.K. World War I controversy was resolved: he had presented an argument to the students. This argument was contained in the State Department memorandum, and that was it. The task was left with the students to assess the forcefulness of the argument.

Argumentative forcefulness, as Bill saw it, was a function of the manner, style, and content of the argument itself. It didn't matter which way the neutrality incident was finally resolved, since the final resolution of the incident would only be pertinent to one's assessment of the propriety of removing enemy agents from neutral vessels. But Bill didn't want to charge his students with knowing the answer to

that recondite problem; rather, his casebook was meant only as a guide to the study of international law in general. He believed that he was throwing light upon the general study of the law by using the arguments in the neutrality incident. He may even have believed that by omitting the result of that incident, he was in effect conveying to his students that they need not worry about the law of neutrality but rather should think only of the problem of whether treaties can generate custom for nonparties.

To be sure, when I encountered the item in Professor Bishop's casebook, I could not understand how he could omit the "practice" element from customary international law. I could not understand how he could possibly think it irrelevant how the neutrality incident was resolved in practice. I believed then that his view of customary international law was seriously mistaken.

What I should have realized is that he had an entirely different view of customary international law. He viewed it as a matter of the relative forcefulness of argumentation. I only understand now that he so viewed it, because recent work in legal "deconstructionism"⁸ has cast many scholars of Bill's generation in the same light. Many of them viewed legal argumentation as part of the law itself, instead of rhetoric about law.

Ironically, at the same time that we can better understand the world-view of scholars such as Professor Bishop, we must distance ourselves even further from their substantive positions. In particular, customary international law must derive its content from the practice of states in their resolution of international incidents.⁹ What stands out in the State Department memorandum of 1916 is indeed the impressive recitation of international treaties. The actions which resulted from the treaties are the "stuff" of international customary law, and not what the memorandum says.

Where does all this leave William W. Bishop Jr. as an internationalist? His standing in that respect is unimpeached. He was as willing to give credit to the best argument, no matter which country put it forth, as we are today willing to give credit to the practice of states irrespective of which states — small states, Third World states, etc. — generated it. The difference between Professor Bishop and his many students now engaged in the practice or teaching of international law is simply a difference of legal perspective, not one of genuine internationalism.

8. See, e.g., D'Amato, *Deconstruction and Post-Deconstruction* (forthcoming).

9. See A. D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 124-25 (1987).