Chapter Six

THE IMMEDIATE POST-WAR YEARS

The Society is entitled to great credit for keeping alive — I might almost say arousing — the part of the members of the Bar and others, an interest in international law at a time when appreciation of its importance was at very low ebb. As things are today, people have a greater awareness — and particularly members of the profession — that it is not enough to have good solid domestic institutions unless the international situation permits you to enjoy those institutions and to develop them in peace and in cooperation with other peoples. But I think that appreciation of international law as a means to a better international society was kept alive by this Society at a time when almost no other group in our country, outside of the schools, was doing so.

—Robert H. Jackson
Remarks,
43 ASIL Proceedings 141 (1949)

A. DEFINING THE POST-WAR ASIL

1. A “Scientific” Society of International Law

Since the early years of the Society’s existence, its leaders had regarded it as a scientific body and its Journal as an organ of scientific expression. They assumed that there was a general understanding of what this meant. Perhaps there was, in the first two decades of the century. By the late 1940s it was not at all clear that any common understanding of the concept remained, even though references to the “science” of international law continued to be made.

In the early years, the concept seems to have connoted the use of research-based methods, applied by learned persons acting dispassionately, to ascertain the content of international law (lex lata) or to fashion the mechanisms by which international law could most efficiently and fairly be used to settle inter-state disputes. The concept seems then to have expanded to include a dispassionate effort, again by learned persons, to ascertain what the law should be (de lege ferenda), at least if the standards used to make the normative judgment were generally accepted among those who were respected in the discipline. To use the words of James Brown Scott, scientific discourse in international law excluded...
“the language of prejudice and bias.”¹ Nor was it infected by the politics of the day or by parochial, short-term interests.²

By the end of World War II, there was controversy over how much bias an author could display without relinquishing a claim to the mantle of science. The loss of common understanding is illustrated by an exchange of correspondence between two of the Society’s prominent political scientists, Charles E. Martin, of the University of Washington, and Pitman B. Potter, of American University. Potter at the time was Managing Editor of the Journal. Martin complained that Editorial Comments in the Journal had come to “express mere personal opinion and frequently biased opinion without contributing to the advancement of international law or extending the frontiers of knowledge of the subject.”³ Potter agreed that some Editorial Comments expressed biased personal opinions, and that such Comments did not “advance the science of international law.” On the other hand, he said, “the fact that a person has some bias does not necessarily condemn him, unless he is no longer open to information and reason.”⁴

Potter seemed to be saying that moderate bias would not remove a written contribution from the realm of worthwhile scholarship. This could be interpreted as a concession to the view forcefully expressed by others, such as those in the post-war Yale school, that values, and the interplay of competing and complementary values in an ongoing process of give and take, are at the heart of international law. Seen through that prism, international law – indeed, all law – might seem inherently (and unapologetically) unscientific. But if such a view were to be widely acknowledged, international law, as a normative discipline, might well lose its attraction to many political scientists – as it did in ensuing years. In 1946, it was still “scientific” enough to be a vital part of political science.⁵

2. Worldly Scholars as Presidents

Frederic Coudert served as President of the Society for four years instead of the constitutionally mandated three, because the “Washington meeting” in 1945 was not an official Annual Meeting and therefore no official business could be

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¹ James Brown Scott, Editorial Comment, 1 AJIL 129, 135 (1907). See Chapter One, Section B.3, supra.
² See Elihu Root, Opening Address, 15 ASIL Proc. 1 (1921), and see Chapter Two, Section D.3, supra.
³ Letter from Charles E. Martin to Pitman B. Potter, June 7, 1946.
⁴ Letter from Potter to Martin, June 25, 1946.