The invisible college of international lawyers in Private International Law today

El invisible colegio de juristas internacionales en el Derecho internacional privado de hoy

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Abstract: These pages elaborate briefly on Oscar Schachter's celebrated reflections about an invisible college of international lawyers, with a focus on today's private international law.
Keywords: "Invisible college", law-making processes, professional community of international scholars, Hague Convention 2019.

Abstract: Con un enfoque en el Derecho internacional privado actual, estas páginas reflexionan brevemente sobre la célebre idea de Oscar Schachter de un "colegio invisible" de juristas internacionales.
Palabras clave: "Colegio invisible", procesos de elaboración de leyes, comunidad profesional de académicos internacionales, Convenio de La Haya de 2019.

I. The Metaphor

1. Almost fifty years ago, Oscar Schachter published two famous articles about the "Invisible College of International Lawyers"[1]. In these writings, he described the role and the function of the legal profession, especially of academics, in international law. The first article was part of the "Livre du centenaire de l'Institut de Droit International". It primarily aimed at describing the role developed by scholars in international law-making processes when acting scientific institutions such as the International

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[1] O. Schachter, "The Role of the Institute of International Law and its Methods of Work – Today and Tomorrow", in: Institut de Droit International, *Livre du Centenaire 1873-1973,* Évolution *et perspectives du droit international*, pp. 403-451 (Basel 1973). In the second article, published four years later, the author took up the topic more explicitly: O. Schachter, "The Invisible College of International Lawyers", 72 *Northwestern University Law Review* 217-226 (1977-1978).

Law Association or the Institut de Droit International (IDI). Although Schachter was not the only one to realise and to reflect about this role[2], his metaphor became a successful, prominent quote in the legal literature of Public International Law, and has been revisited several times[3].

2. Schachter observed that the international legal profession, especially as academics are concerned, is characterized by what can be described as a particular type of "dédoublement fonctionnel"[4], meaning that they move to and from academia to positions in international organizations and national government bodies where they actively engage in developing (public) international law. This was a courageous statement, especially in the context of the Cold War and decolonization. It should nevertheless be recalled that *Schachter* mainly focused on the description of a specific mindset in international scholarship[5].

3. Schachter drew three conclusions from his above-mentioned observation [6]. First, the interplay between independent academia and political function raised the issue whether objectivity could possibly exist in international law. Second, the concept of the invisible college implied that there is a unified discipline in international law. Third, the community of international lawyers does not just ascertain the existing *lex lata*, but also plays a role in the process of creating new law and in extending the existing rules so as to meet emerging needs[7]. At the same time, however, Schachter was well aware of the heterogeneity of the "invisible college" and realistically referred to the "wide international participation [of the community] embracing persons from various parts of the world and from diverse political and cultural groupings"[8].

4. In public international law today, the idea of the "invisible college" has lost much of its appeal. In fact, even 20 years ago authors already acknowledged the increasing plurality within, and fragmentation of public international law[9]. Now, the general framework of law making has changed considerably[10]: the growing influence of elements from civil society in the international law making and adjudicative processes must inevitably be taken into account[11].

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[2] See for instance, already some years before, F. Munch, "L'institut de droit internacional: ses debuts comme organe collectif de la doctrine", (1968) *Revista Espanola de Derecho Internacional* 536-547. The author recalls that the original Article 6 of the bylaws of the IDI proclaimed the incompatibility between active diplomatic service and membership to the IDI – a prohibition that did not prevent persons assigned to other governmental positions from joining the Institute. The ban was lifted several years later. Referring to the situation at the end of sixties of the XX century, *Munch* says: "De nos jours, l'Institut se recrute essentiellement dans l'Université, et les avocats, publicistes, et les hommes politiques disparaissent. De nos jours, d'autre part, on trouverait difficilement un membre ou associé qui n'aurait pas été au moins temporairement, sous tel ou tel titre, au service d'un gouvernement".

[3] See for instance S. Villalpando, "The Invisible College of International Lawyers Forty Years Later", ESIL Conference Paper 5 /2013; L. Leano Soares Pereira, N. Ridi, "Mapping the 'invisible college of international lawyers' through obituaries", 34 *Leiden JInt'tL* 67-91 (2021).

[4] In this regard he relied on the conceptual perception of public international law that *Georges Scelle* elaborated on, according to which States were the main actors in international law, not only in their own interest, but also in the interest of the international community, cf. Villalpando (n. 3), p. 3, n. 5.

[5] Schachter, in IDI (ed.) Livre du Centenaire (n. 1), p. 405, 409 (describing the college as an ideal).

[6] Summarized by Villalpando (n. 3), p. 4-5.

[7] Schachter (n. 1), 72 NwULRev 217, 223 [1977-1978]

[8] Schachter (n. 1), 72 NwULRev 217, 222-223 [1977-1978

[9] Villalpando (n. 3), p. 6 ff; M. Koskenniemi, "Fragmentation of international law" (13 April 2006), UN Doc A/CN.4/L.682, para 65 ff.

[10] The modern approach refers to "epistemic communities" cf. F. Cardenas, J. d'Aspremont, "Epistemic Communities in International Adjudication", Max Planck Encyclopedia of International Procedural Law (2020), paras 18 ff.

[11] Typical actors are NGO's in Human Rights (such as Amnesty International) or in environmental protection/climate change (such as Greenpeace, Fridays for Future or Milieudefensie), cf. C. Voigt, "Climate Change as a Challenge for Global Governance, Courts and Human Rights" in: W. Kahl, M.P. Weller (eds.) *Climate Change Litigation* (Beck/Nomos/Hart 2021), pp. 2-20.

II. The Extension to Private International Law.

5. Does – or did - private international law[12] also benefit from an "invisible college"? Well, although Schachter mainly addressed examples of public international law, his original assumption included both public and private international law, and indeed the Institute de Droit International has academic members from both areas[13]. Furthermore, Schachter explicitly saw the college as a way of reducing of the gap between public and private international law[14].

6. Admittedly, the metaphor has not been often used in private international law scholarship. In spite of it, we can nevertheless assume that it is also suitable in the field of private international law. If we look at the three major Institutions addressing cooperation, coordination and harmonization of private international law —the Hague Conference, Unidroit and UNCITRAL[15]— the participation and influence of scholars specializing in private international law cannot be ignored[16]. Even today, these international organizations are often organized and supported by prominent scholars in the field[17], and their staff usually have strong academic backgrounds and close connections to universities.

7. Has the situation in private international law-making changed during the last 50 years? Yes, considerably. An early change was due to the regional economic integration that triggered the emergence of Regional Economic Integration Organizations[18] as new players in the international arena[19]. Today, judicial cooperation has shifted in many (although not in all) areas of the world from unilateral regulatory approaches by nation States, which were predominant in private international law 50 years ago [20], to regional cooperation where judicial cooperation is seen as a relevant element of a broader framework of economic integration[21]. Similar developments are found in relation to the constitutionalization of judicial cooperation, where mainly regional human rights' courts promote legal change[22]. Therefore,

[12] Private International Law is understood here in a broad sense, encompassing international cooperation in areas of jurisdiction, conflict of laws, recognition and enforcement of judgments and broad judicial cooperation.

[13] Schachter (n. 1), in: IDI (ed.) Livre du Centenaire, p. 403, 404 ff. did not expressly separate both branches, and at p. 414, he clearly stressed the need to regard developments in international law from both public and private perspectives, and to avoid any unnecessary bifurcation.

[14] Schachter (n.1), in: 72 *NwULRev* 217, 222 (1977-1978).

[15] W. Brydie-Watson, "The Three Sisters of Private International Law: An Increasingly Co-Operative Family rather than Sibling Rivals", in: T. John, R. Gulati, B. Köhler (eds.), *The Elgar Companion to the Hague Conference of Private International Law* (2020), pp. 23 - 41.

[16] A pertinent example is the involvement of prominent scholars in the preparation of the 2019 Judgments Convention (to mention only some of them: *F. Pocar, G. Saumier, P. Garcimartín, C. Gonzales Beilfuss, R. Brand, T. Domej, P. Beaumont* and, in earlier stages of the project, *A. van Mehren, P. Nygh, L. Silberman, A. Borrás and K. Kessedijan*). We can also mention here the Secretaries Generals of UNIDROIT, *I. Tirado* and *H. Kronke*. In the Hague Conference, the role of the founding father *T.M.C. Asser* is unforgotten.

[17] Professor *A. L. Calvo Caravaca* himself has acted as Delegate of the Spanish Ministry of Foreign Affairs to the Special Commission of the Hague Conference of Private International Law. Since 2019, he is a member of the UNIDROIT Governing Council.

[18] OAS, Council of Europe, European Union, MERCUSOR, OHADA. More informal cooperation exists among the Arabic States and in Asia where especially China with the Belt and Road Initiative has become an important player (and maybe a game changer).

[19] M. Weller, 'Mutual Trust': A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond?' in Collected Courses of the Hague Academy of International Law – Recueil des cours (Brill 2022), vol. 423. M. Oyarzábal, "The Influence of Public International Law in History and Theory and in the Formation and Application of the Law" Collected Courses of the Hague Academy of International Law - Recueil des cours (Brill 2023) vol. 428, paras 204 ff. (on regional IOs).

[20] B. Hess, "History and Evolution (Actors, Factors and debates), Chapter 2 of Part XIV (Cross-border and International Dimensions) in: B. Hess, M. Woo, L. Cadiet. E. Vallines, S. Menetrey, (eds), *Comparative Procedural Law and Justice* (CPLJ), available at https://www.cplj.org/publications/14-2-history-and-evolution-actors-factors-and-debates (last visited August 2024), paras 4 ff.

[21] Cf. Hess (n. 20) paras 26 ff.

[22] Cf. B. Hess, "The Humanization of Private International Law2, Presentation at the Hague Academy of Private International Law, May 2023, publication pending, text at n. 26 ff.

regional actors have become more important, also with regard to the protection and promotion of human rights[23]. On their side, international organizations dealing with judicial cooperation and harmonization have established regional offices to enhance cooperation at the regional level[24].

8. At the same time, additional international players such as the International Monetary Fund, the World Bank, the OECD, and of course the UN itself, have entered the scene. Current global debates, like the one on business and human rights[25] and sustainability/climate change[26] have been developed in UN frameworks. In these debates, the influence of international scholars has diminished, with NGOs and political activists playing a more prominent role.

9. Moreover, the predominant role of international law has been complemented by additional approaches, mostly borrowed from economics and social sciences, where statistics and empirical research have gained considerable influence[27].

10. As a result of the foregoing, the world of private international law today appears much more fragmented and polarized than it was 50 years ago. In what follows, we would like to elaborate further on these changes by looking at the actors, the methods and, finally, at the present epistemic community of private international lawyers.

III. The Situation in Private International Law Today

1. Actors

11. Not only law-making frameworks have changed during the last 50 years. New (political) actors have also entered the scene. Transnational enterprises and business organizations (not only as targeted defendants in lawmaking and litigation, but also acting as lobbyists behind the scene), powerful NGOs[28] along with organized investors (especially hedge funds and litigation funders[29]) as well as global law firms[30] are influencing regional and international law-making processes[31], in combination with litigation[32]. Today, issues of global and regional governance dominate law-making processes in private

[23] One should also add that regional learned societies have been established like the European Law Institute or the European Association of Procedural Law.

[24] Cf. N. Gonzalez-Martin, on the HCCH regional office in Latin American and the Caribbean; *R.* Frimping Oppong & P. N. Okoli on the office in Africa; and Y. Nishitani on the Asian office in: T. John, R. Gulati, B. Köhler (eds.), *The Elgar Companion to the Hague Conference of Private International Law* (2020), pp. 42 – 67. UNCITRAL established regional offices in the Caribbean and in Africa.

[25] The 2011 UN Guiding Principles of Business and Human Rights, endorsed by the UN Human Rights Council on 16 June 2011, have become a broadly accepted standard for the duties of MNE in this context. See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, J. Ruggie, available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A%2FHRC%2F17%2F31 (last visited August 2024).

[26] Kyoto Protocol to the UN Framework Convention on Climate Change of 11 December 1997, entered into force 16 February 2005, 2303 UNTS 162; Paris Agreement on Climate Change of 12 December 2015, entered into force 16 February 2016, 55 ILM 740. It should be noted though that these treaties do not provide for any binding dispute resolution mechanism, cf. I. Alogna, C. Bakker, J.-P. Gauci, "Introduction, in: eid. (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021), p. 10 ff.

[27] See infra, under III.2 ("The situation in Private International Law Today - Methods").

[28] Some of them like Amnesty International and Greenpeace have been active for almost 50 years and have a highly specialized network of professional staff and supporters at their disposal.

[29] Although these actors are more present in sovereign debt litigation, cf. Oyarzábal, (n. 19) RdC Vol 428 (2023), 139, paras 270 ff., they are acting as well behind the scenes in commercial disputes.

[30] B. Garth, "Transnational Arbitral Community", Max Planck Encyclopedia of International Procedural Law (2018), paras 25 ff.: the arbitral community as custodian of international commercial arbitration.

[31] Reportedly, hedge funds have strongly lobbied against the EU Commission's proposal on business and human rights: Frankfurter Allgemeine Zeitung, 30 May 2023.

[32] B. Hess, "Strategic Litigation: A New Phenomenon in Dispute Resolution", MPILux Research Paper 2022 (3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4107384, p.

international law in a similar way as in public international law.[33] Just take the example of climate change. Sustainability is a new leitmotif of international law making and it has become an issue in climate change litigation against private actors, too.[34] This movement is being driven primarily by (competitive) NGOs but also by individual activists. It brings together public and private regulators and courts as all available redress mechanisms are co-opted to promote the political objective.[35] From this perspective, the idea of an "invisible college" appears difficult to maintain.

2. Methods

12. The emergence of new actors has undoubtedly contributed (and heavily) to the changes of the law-making processes. Nevertheless, the old paradigm of international conventions, accompanied by explanatory reports, still exists, as the 2019 Hague Judgments Convention demonstrates[36]. However, modern law making requires much more empirical and statistical assessment: maybe not at the global level, but in the context of the ratification of the respective instruments.

13. Let us illustrate these changes by referring to an example, namely the accession of the European Union to the 2019 Hague Judgments Convention[37].

14. The European Commission initiated the process of ratification[38]. The ground work of said process followed the so-called "Better Lawmaking Guidelines (BLG)", a regulatory scheme mandatory for all units of the European Commission when preparing legislative proposals.[39] Under the BLG scheme, the competent unit comissions preliminary studies for legal initiatives from consultancy firms like Deloitte, Milieu, PwC and similar[40]. Their task of the latter is to evaluate the current legal and economic situation and to prepare a so-called "impact assessment". This assessment should demonstrate the economic and societal impacts of the law-making initiative and evaluate legislative alternatives. The consultancy companies usually contact individual researchers to carry out or supervise the requested studies, as they do not have the experienced staff to conduct scientific enquiries themselves. Finally, these studies focus very much on the collection of statistical or empirical data. Admittedly, the approach does not entail that lawyers (and academics) are not involved. However, they are consulted only as one among several groups of stakeholders. The identity of individual participants is not specified unless they insist to be mentioned by name.

15. Recently, we looked into the impact assessment made by EU Commission regarding the 2019 Hague Convention[41]. It presents empirical and statistical data and estimations about the impact of

[33] Often described as public and private enforcement (and vice versa).

[34] H. van Loon, Presentation at the Centenary of the Hague Academy of International Law, 26 May 2023, pending publication.

[35] Voigt (n. 11), p. 2 ff.

[36] HCCH Convention of 2 July 2019 on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Explanatory Report of F. Garcimartín and G. Saumier, www.hcch.net.

[37] Ass. jur. *Nils Elsner*, Research Fellow at the Institut für Zivilverfahrensrecht, Vienna University, assisted with the following research.

[38] COM (2021) 388 final, infra at n. 41.

[39] Commission Staff Working Document: Better Regulation Guidelines (BRG) of 3.11.2021, SWD(2021) 305 final, https://ec.europa.eu/info/sites/default/files/swd2021_305_en.pdf (last visited August 2024). The BRG provide for a uniform procedure that consists of the following steps: once a political objective has been adopted, the responsible unit within the competent Directorate General has (1) to assess the problems and (2) to evaluate alternative solutions to the existing policies. It must (3) engage actively with stakeholders and (4) prepare the legislative initiative. Central elements of this preparatory legislative process are the evaluation of the current state of affairs, consultations with stakeholders and the preparation of an impact assessment that should predict and evaluate alternatives within the law-making process. The different steps and formal benchmarks of the Regulation Guidelines are binding for all units of the EU Commission unless the Secretariat General permits deviations in the case at hand.

[40] For specific areas, the EU Commission concludes framework agreements with these consulting firms based on a public tender. Once admitted, only these firms are included in the consulting process

[41] Proposal for a Council Decision on the accession of the European Union to the 2019 Hague Judgments Convention COM(2021) 388 final of July 16, 2021 and Accompanying Staff Working Document, SWD(2021) 192. The Report of the Com-

the ratification of the Convention by the Union. As required by the Better Regulation Guidelines, DG Justice sought the involvement of stakeholders. However, the consultations proved difficult. The EU Commission launched a public consultation via the EU-portal 'Have Your Say', which resulted in only 13 responses. A consulting firm (*Deloitte*) organised an online survey where 52 persons responded. 45 of them were legal professionals from EU Member States, and 32 of those professionals came from Portugal[42]. In addition, 25 of these respondents were bailiffs[43]. No need to say, the outcome shows considerable imbalance as the involvement of bailiffs in the recognition of third State judgments appears to be very limited[44]. Therefore, it is no surprise that the study candidly notes that most of the respondents ("the vast majority") had no experience in the field – they were neither experts nor stakeholders[45]. This acknowledgment did not prevent the authors of the study from including the results of the consultations (of the bailiffs) over almost 16 pages in their Report.

16. As the BRG require, a macro-economic impact assessment was conducted by the same consulting firm (Deloitte). According to its "methodology", the calculation started with the working assumption that eight selected non-EU countries —Australia, Argentina, Brazil, Canada, China, Japan, South Korea and the United States of America— would ratify the Convention in 2021 and that the Convention would enter into force among these contracting parties in 2022[46]. The reference period for the estimated impacts of the Convention was 2022–2026.

17. In order to assess the economic impacts, the *Deloitte* Study projected economic impacts from existing EU free trade agreements concluded with the reference countries[47]. The study starts with a baseline forecasting the economic developments for the years 2020–2026 without the EU acceding to the Hague Convention[48]. The assumption was that the accession of the EU to the Judgments Convention would similarly stimulate trade and services between the contracting parties as the conclusion of a trade agreement. However, this assumption appears problematic, too: although a uniform regime for the recognition and enforcement of judgments would certainly promote international trade and investment, the impacts of a free trade agreement are much greater. Free trade agreements address a multitude of factors directly linked to cross-border commerce[49]. Thus, assuming that the economic impacts of a ratification of a free trade agreement with the ratification of the Judgments Convention would be of the same magnitude does not appear to be persuasive. In fact, the study on the macro-economic impact states: '*It is important to note that these estimations and ranges are not empirically tested and should therefore be interpreted with caution*'[50]. Nevertheless, the study presumes that the estimated benefits for EU citizens by 2026 would range from 1.1 to 2.6 million euros (per year).[51] We leave it to the reader to decide whether these figures are credible or not. To our good fortune, the EU Council adopted the Convention, obviously without reading the 80 pages of the impact assessment.[52]

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mission's Staff is 46 pages long; it has seven Annexes that include different consultations and a Study supporting the impact assessment prepared by the consulting firm *Deloitte* (comprising 80 pages).

[42] Portugal does not appear to be the most important hub in Europe for the import of judgments coming from third States, despite its cultural and economic relationships with Lusophony countries.

[43] SWD(2021) 192 final, p. 55. 78% of the answers came from Portugal, SWD(2021) 192 final, p. 163. 56% of the answers were given by bailiffs, SWD(2021) 192 final, p. 164.

[44] Bailiffs usually enforce a judgment from a third State once it has been recognized and declared enforceable by a court.

[45] Against this backdrop, it does not make sense that the *Deloitte* Study details the answers of "stakeholders" in percentages, SWD(2021) 192 final, p. 165–172.

[46] This unrealistic assumption has proved to be wrong. As of August 2024, not one of the States mentioned had ratified the Convention.

[47] The referenced free trade agreements were not specified.

[48] The study distinguishes several scenarios ranging from no ratification, to a ratification with reservations and to a ratification without reservations.

[49] Free trade agreements also include provisions on regulatory standards, health, safety rules, investment, banking and finance, intellectual property, etc.

[50] SWD(2021) 192 final, p. 74.

[51] SWD(2021) 192 final, p. 74.

[52] Council Decision (EU) 2022/1206 of 12 July 2022 concerning the accession of the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, OJ 2022 L 187/4 ff.

3. Epistemic Communities Today

18. Let us finally return to the invisible college. Does it still exist, despite all the changes in political law making? Our answer is clearly positive. Just look around: undeniably, there an epistemic community of scholars, practitioners and public servants devoted to the shared understanding that the ratification of the 2019 Hague Convention, despite its regulatory deficiencies, will improve judicial cooperation in civil matters at the global level.

19. There might be as well an epistemic community (this is the more modern designation of the invisible college)[53] in private international law, based on a common understanding of the added value of judicial cooperation in the interest of individuals and private companies. On the other hand, much as we would like to, we cannot ignore the reality of voices formulating a fundamental critique to the goals of the Hague Conference, and to its underlying values, by highlighting the "otherness" and differences of legal cultures, and stressing the difficulties to reconcile them through harmonized rules of private international law.[54] More explicitly, some authors deny the legitimacy of a "global community" in private international law which is dominated by the "Global North" and neglects the "Global South[55]. This short piece is certainly not the right place to address "post colonialism". But allow us to conclude by stating that respecting different cultures and bridging societal divergence, and even injustice, by a network of cooperation appears to us the best solution without any other viable alternative. Therefore, together with esteemed colleagues like Professor Calvo: let us continue as a more or less invisible college of private international law.

[53] Cardenas, d'Aspremont (n. 10) para 12 on "interpretative communities".

[54] H.M. Watt, "The work of the HCCH and the path of the law", in: T. John, R. Gulati, B. Köhler (eds.), *The Elgar Companion to the Hague Conference of Private International Law*, pp. 79-110, 80 ff.

[55] R. Michaels, "Private Law Theory and the 'Global Legal Community'", 23 *German Law Journal* 851-861 (2022).