

## IN MEMORIAM

DETLEV F. VAGTS (1929–2013)

*By Peter D. Trooboff\**

In August we learned of the passing of Detlev Vagts, our colleague, mentor, and friend, and this *Journal's* co-editor in chief from 1993 to 1998 with Judge Theodor Meron. Fortunately, Vagts lived to hear not only praise for his life devoted to scholarship, teaching, and academic administration at the Harvard Law School but also expressions of gratitude for his service to his country and to this *Journal*. In addition, his former students honored him during his lifetime with a Festschrift of insightful essays, providing a complete list of his publications and valuable perspectives on his career.<sup>1</sup>

Born in Washington, D.C., Vagts grew up in scholarly surroundings. His father, Alfred Vagts, was a highly regarded German historian who married Miriam Beard, the daughter of Charles A. and Mary Ritter Beard, themselves well-known American historians. His mother was a reporter for the *New York Times* and a well-regarded historian of business who may have influenced her son's decision to begin practice with a Wall Street firm. His parents were living in Germany when they fled Nazism in 1933 to settle first in Princeton, New Jersey, and then Connecticut. The family's devotion to scholarship was intergenerational and interfamilial. For example, in 1937 Alfred Vagts and Charles Beard collaborated on an article on historiography.<sup>2</sup> In 1979, Detlev Vagts worked with his father on an article in this *Journal* exploring the complex relationship between "international equilibrium" (balance of power) and the law of nations and discussing the history of scholarship concerning that relationship.<sup>3</sup> In 1989, Detlev Vagts revised a book for young adults on American presidents that his grandfather had first published in 1935.<sup>4</sup>

After graduating from Harvard College in 1948 and Harvard Law School in 1951, Vagts became an associate in New York at Cahill Gordon & Reindel. He served for three years in the Air Force as a judge advocate and then returned in 1956 to the same New York law firm where he remained until joining the Harvard Law faculty in 1959. Vagts received tenure in 1962 and, after nearly two decades of teaching, was named Eli Goldston Professor of Law. In 1984, he

\* Senior Counsel, Covington & Burling LLP.

<sup>1</sup> MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010) (reviewed by Peter D. Trooboff at 106 AJIL 215 (2012)).

<sup>2</sup> Charles A. Beard & Alfred Vagts, *Currents of Thought in Historiography*, 42 AM. HIST. REV. 460 (1937).

<sup>3</sup> Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AJIL 555, 555 (1979).

<sup>4</sup> WILLIAM BEARD & DETLEV F. VAGTS, CHARLES A. BEARD'S THE PRESIDENTS IN AMERICAN HISTORY: GEORGE WASHINGTON TO GEORGE BUSH (rev. ed. 1989) (with preface explaining the family's editing, including the 1981 revision by his mother and uncle of their father's work).

became Bemis Professor of International Law, succeeding Louis B. Sohn. In addition to his groundbreaking courses on transnational legal problems and transnational business problems, he also taught courses and seminars in the fields of corporations and the legal profession. From 1969 until his retirement from the Bemis Professorship in 2005, Vagts directed the Harvard Law joint JD/MBA program. In the late 1980s, he agreed to direct for an interim period the Harvard Law School International Tax Program following the retirement of its longtime leader Oliver Oldman.

Together with Sohn and Andreas Lowenfeld, Vagts served as an associate reporter of the *Restatement (Third) of the Foreign Relations Law of the United States* (1987), working first with Richard R. Baxter, the chief reporter, and then, following Baxter's untimely death, with Louis Henkin. In that capacity, Vagts was often viewed as a moderating force in what became, in its final stages, a sometimes controversial and difficult project for the American Law Institute.

During his final years, Vagts learned of the respect and esteem that he enjoyed among his colleagues and former students. In the Festschrift, Henry Steiner, his coauthor of *Transnational Legal Problems* (1st ed. 1968), describes Vagts as being one of the "liberal internationalists—scholars who found hope for peace and prosperity in the construction of a decolonised and more closely interrelated system of States benefiting from regulation and facilitation by an innovative network of international organisations."<sup>5</sup> Similarly, Harold Hongju Koh, who became the junior coauthor for the fourth edition of *Transnational Legal Problems* and co-author together with William Dodge for the second and subsequent editions of *Transnational Business Problems*, refers to "a supremely gentle, wise, and gracious man" who had "a wry sense of humor and an unshakeable sense of decency."<sup>6</sup> In the Festschrift's introduction, Pieter Bekker, Rudolf Dolzer, and Michael Waibel, who organized the volume, not only review their mentor's intellectual contributions but also reflect on their affection for their teacher. They explain how Vagts had taught and nurtured "new voices"—the "next generation" of scholars and scholarly practitioners" who had "profited the most from his teaching and writings."<sup>7</sup>

Given the diversity of Vagts's scholarship and activities, perhaps focusing here on a few examples will illustrate the depth of his intellectual contribution and the breadth of his influence. I have chosen writings that capture his voice, even if they may not all be well known even to those who have followed his work. (I recognize that each of Vagts's colleagues and students might well select different examples to make the same point.) Yet I hope that these references will encourage readers to return to his books and articles and to the Festschrift, which provides a valuable guide to both his scholarship and his importance to our profession.

In 2008, Vagts contributed an essay to a publication of the Fletcher School of Law and Diplomacy that addressed the complex issues raised when scholars move among nations.<sup>8</sup> Drawing on examples from Nazi Germany, the two Chinas, and the Middle East, Vagts referred to the "steady nerves" required to "navigate through the minefields" presented when authoritarian governments often hostile to the United States penalize their own citizens, while

<sup>5</sup> Henry J. Steiner, *Constructing and Developing Transnational Law: The Contribution of Detlev Vagts*, in *MAKING TRANSNATIONAL LAW WORK*, *supra* note 1, at 11.

<sup>6</sup> Harold Hongju Koh, *Foreword: The Transnationalism of Detlev Vagts*, in *id.* at xvi.

<sup>7</sup> Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel, *Introduction: A Festschrift to Celebrate Detlev Vagts' Contributions to Transnational Law*, in *id.* at 6.

<sup>8</sup> Detlev Vagts, *Ground Between the Wheels: Political Threats to Overseas Scholars*, 32 *FLETCHER F. WORLD AFF.*, Winter 2008, at 181.

at the same time this country must decide whether to grant entry, deport, or conduct surveillance of scholars who are citizens from those same countries.<sup>9</sup> Vagts illustrated the situations that arise by referring early in the essay to his own family's experience, which may not previously have been well known:

In 1936, my father, a historian and a political refugee from Nazi Germany [who left in 1933], was invited to give a lecture at The Fletcher School on the state of affairs in Germany. His talk was highly critical of the Nazi regime and therefore was treated by the university as confidential. Despite this precaution, a German student took careful notes and handed them to the German consul in Boston. That official in turn passed the notes on to Berlin with remarks about the speaker's disloyalty to the Reich. The file was circulated among the relevant agencies and ultimately to Heinrich Müller of the Gestapo, an action which resulted in the inclusion of my father on a decree terminating the German citizenship of a list of refugees. The authorities took into account that Alfred Vagts had been an officer in the German Army in World War I, that he was a Social Democrat, and that his family, being farmers, could not be Jewish. The decree ordered the confiscation of any property owned by the culprit. For good measure, they denaturalized his American wife, Miriam Beard Vagts, who had acquired German nationality by the act of marrying a German citizen. (U.S. law had already changed so that she retained her U.S. citizenship.) Fortunately, my father was naturalized in the U.S. before World War II broke out and had no property remaining in Germany. After the war, the German government made amends by including the name Alfred Vagts in the memorial to German resisters that is housed in the old general staff headquarters in Berlin.<sup>10</sup>

Vagts also set out a number of difficult situations faced by scholars in other countries and the United States. He concluded the essay by recognizing that these troubling cases will inevitably continue to arise and then added a personal plea:

We can all make contributions to the alleviation of these difficulties. We should deal with international students with sensitivity towards their anxieties and the difficulties they may face. We should exert whatever influence we have on a presidential administration and Congress to overcome individual injustices and adjust the system so that it works more effectively and humanely. We can act both individually and through professional and scientific organizations to which we belong.<sup>11</sup>

To his great credit, Vagts devoted considerable energy throughout his academic career to rebuilding U.S.-German scholarly relations by publishing in German books and journals and collaborating with German scholars.<sup>12</sup> Further, he documented in a comprehensive and searing account the previously neglected question of what happened to international law and international legal scholars in academic institutions and government agencies during the Nazi era.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 182–83.

<sup>11</sup> *Id.* at 187.

<sup>12</sup> See, for example, Vagts's entries on *balance of power* and *national socialism and international law* in the *Max Planck Encyclopedia of Public International Law* as well as his publications in German or about German scholars cited in the Festschrift. See *Bibliography of Detlev Vagts*, in *MAKING TRANSNATIONAL LAW WORK*, *supra* note 1, at 655–61. In addition, in 1991, along with Werner F. Ebke, Vagts received the Max Planck Research Award for outstanding international research achievements.

It was a subject that probably no other American or German scholar would have been as well equipped to study in depth.<sup>13</sup>

As I recounted in reviewing the *Festschrift*, Vagts, despite his often quiet demeanor, was willing to defend himself, particularly if the attacker had not done the necessary homework.<sup>14</sup> He adopted this posture whether the errant researcher was a Supreme Court justice (or his or her clerk) or a young scholar. My review recalled the example of Vagts's spirited response to Justice Antonin Scalia's criticism of the *Restatement (Third) of the Foreign Relations Law of the United States* in *United States v. Stuart*.<sup>15</sup> In countering the justice's "attack" on the relevant provisions of the *Restatement* as well as Vagts and his "long-term collaborator, Louis Henkin," Vagts compared himself to the porcupine, which, he explained, a French volume described as *méchant* because it tends to defend itself when provoked.<sup>16</sup>

Yet another example of Vagts in his own defense resulted from his work while serving as counselor on international law in the U.S. State Department on the Mexico-United States treaty that allows convicted prisoners to serve their sentences in their home countries. Two young scholars set out to criticize the treaty after its ratification. In particular, they emphasized its failure in their view to satisfy the due process requirements under the United States Constitution and to achieve all they thought the United States should have in the negotiations. In brief, they argued that the treaty allowed for American incarceration of prisoners convicted by Mexican courts that had permitted improper conduct by Mexican police and followed questionable judicial procedures.<sup>17</sup>

Vagts correctly read the authors as "stop[ping] just short" of saying that this treaty should never have been signed because of its questionable constitutionality and potential abuses.<sup>18</sup> Further, the criticizing authors seemed to advocate no future treaties along these lines. Vagts recalled that he and others had testified about and published significant research analyzing the treaty's conformity with the Constitution.<sup>19</sup> He explained carefully why the alternatives that the two authors had advocated could not be secured in the bilateral negotiations or were otherwise unwise or infeasible. In the end, Vagts revealed his highly pragmatic approach to the prisoner-exchange issues by accepting that additional American pressure would not have achieved such worthy goals as enhancing rights and protections for defendants under Mexican criminal procedures. He noted the long history of sensitivity of Mexican officials to American interference in their internal affairs. Vagts also responded to the legal grounds upon which the authors criticized the treaty. In short, it is a classic example of Vagts recognizing the optimal from his scholarly chair but accepting an achievable outcome that resulted in a significant

<sup>13</sup> Detlev F. Vagts, *International Law in the Third Reich*, 84 AJIL 661 (1990).

<sup>14</sup> Peter D. Trooboff, Book Review, 106 AJIL 215, 216–17 (2012).

<sup>15</sup> *United States v. Stuart*, 489 U.S. 353, 375–76 (Scalia, J., concurring).

<sup>16</sup> Detlev F. Vagts, *Senate Materials and Treaty Interpretation: Some Research Hints for the Supreme Court*, 83 AJIL 546, 550 (1989).

<sup>17</sup> Abraham Abramovsky & Steven J. Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275 (1979).

<sup>18</sup> Detlev F. Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty,"* 64 IOWA L. REV. 325, 325 (1979).

<sup>19</sup> See, e.g., *id.* at 325 n.5 (references to congressional testimony and analyses by Vagts and other leading scholars); Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500, 1502 (1977) (advocating that, as a condition to the authorized transfer, the prisoner waive claims based on possible constitutional objections to the local practices or procedures leading to conviction).

improvement over the past for American citizens who would otherwise be held in Mexican prisons.

Vagts was especially admired for his willingness to undertake scholarship on subjects that were new to him (and other scholars) and that, as a result, required a great deal of original research to gain an understanding of the issues. Early in his academic career, he authored what has become the definitive and oft-consulted study of a relatively obscure criminal statute dating back to 1799, the Logan Act, 18 U.S.C. §953.<sup>20</sup> That statute gained prominence because increasing criticism of the Vietnam War led to private initiatives by U.S. citizens to promote peace or bilateral policy changes by communicating with North Vietnam and its supporters. I still recall my relief as a young associate in finding this article when a senior partner asked me to prepare quickly a memorandum on the Act for a client that was considering conduct that risked approaching the edges of the statute. Vagts's title for the article, *The Logan Act: Paper Tiger or Sleeping Giant?*, captured well the essence of his analysis focused on the statute's history, requirements, and constitutionality.

Another example of his tackling new issues was the article that Vagts published in this *Journal* in the late 1990s examining the possible need for greater regulation of all participants in international litigation.<sup>21</sup> He developed his ideas on this subject in panels and other articles,<sup>22</sup> as did William W. Park<sup>23</sup> and Catherine A. Rogers<sup>24</sup> in the *Festschrift*.

Vagts reflected much of his own thinking about the law of armed conflict and humanitarian law in what may be his last published work that appeared in mid-September 2013.<sup>25</sup> In an introduction to the collection of Baxter's scholarship, Vagts discussed Baxter's writings on the rules applicable to what Baxter had labeled "unprivileged combatants" in conflicts ranging from Algeria to Vietnam and to weaponry, new and old.<sup>26</sup> Vagts then moved to the present controversies over terrorism and the conduct of warfare. Vagts was surely speaking for himself as well as the subject of his introduction when he said that "Baxter would have been aghast at the cruelties inflicted by our agents at Abu Ghraib, Guantanamo, and elsewhere, as aghast as he was at the atrocities at My Lai in Vietnam." Vagts also speculated that Baxter would have been "embarrassed" by the "clumsy" attempt at saving the American hostages in Iran after the

<sup>20</sup> Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AJIL 268, 300 (1966) (concluding that on constitutional and policy grounds a legislative reexamination of the statute was essential to allow "[a] political determination . . . as to what restraints [on U.S. citizen communications with foreign governments] are actually necessary").

<sup>21</sup> Detlev F. Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AJIL 250, 261 (1996) (suggesting that our profession needed to "expend some intellectual energies in grappling" with the "problems and uncertainties" that he had shown existed concerning the rules and requirements for judges, arbitrators, and counsel in international litigation).

<sup>22</sup> See, e.g., Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677 (2000).

<sup>23</sup> William W. Park, *The Borders of Bias: Rectitude in International Arbitration*, in MAKING TRANSNATIONAL LAW WORK, *supra* note 1, at 577 (explaining how professional rectitude found its way into the "scholarly territories where Detlev has left his intellectual footprint").

<sup>24</sup> Catherine A. Rogers, *Cross-Border Bankruptcy as a Model for the Regulation of International Attorneys*, in *id.* at 630.

<sup>25</sup> Detlev F. Vagts, *Guide to Baxter's Scholarship on Humanitarian Law*, in HUMANIZING THE LAWS OF WAR: SELECTED WRITINGS OF RICHARD BAXTER 4 (Detlev F. Vagts, Theodor Meron, Stephen M. Schwebel & Charles Keever eds., 2013); see also Stephen M. Schwebel, *A Biography of Richard Baxter*, in *id.* at 1–3 (a graceful account of Baxter's career and influence).

<sup>26</sup> Vagts, *supra* note 25, at 5.

International Court of Justice heard the United States claims and agreed with the U.S. position. At the same time, Vagts, again revealing his own prejudices, I believe, speculated that “Baxter would have been gratified to see the intense involvement of lawyers in the targeting process in [the two Gulf] wars and in the fighting in Afghanistan.” And surely Vagts also disclosed his self-imposed standard that he sought to achieve in his own writing when he described Baxter as being “always realistic and unsentimental in appraising the claims of contending parties.”<sup>27</sup>

In June 2012, I arranged to see Det in Cambridge for what turned out to be our last in-person conversation. In response to my invitation to go out for lunch, he insisted on serving me at his home. Despite the many challenges of aging that Det and his wife were facing, he and I had a typical visit in which we talked at length about many different issues of international law, about personalities and politics in the Legal Adviser’s Office at the State Department, and, finally, about the article that he was writing concerning translation issues under treaties.<sup>28</sup> After my visit, he sent me an email with a draft of the article. He also recalled my having mentioned during lunch a translation issue that arose in connection with the private international law treaties for the Organization of American States and that required adopting a new procedure to correct errors in finally agreed texts. Characteristically, he asked for a citation so that he could pursue the point for his article.

As I think back on the decades of our friendship and our last meeting, I am reminded that Det always was, beyond all else, a *mensch* as well as a respected scholar and beloved friend. His wise counsel will be greatly missed.

<sup>27</sup> *Id.* at 6.

<sup>28</sup> Detlev F. Vagts, *Treaties and Translation: A Guide for the Non-Linguist* (2013) (unpublished draft manuscript) (on file with author) (includes two interesting cases in which issues depended on treaty translation in relation to claims against German industrial firms that employed slave or forced labor during World War II (London Agreement on German External Debts) and in relation to the transfer by the United States to a third country of non-nationals who were captured in Iraq (Fourth Geneva Convention)).