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**Contemporary Issues in
International Law**

|||
**A Collection of the Josephine
Onoh Memorial Lectures**

|||
Edited by
**David Freestone, Surya Subedi
and Scott Davidson**

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Kluwer Law International

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DAVID FREESTONE, SURYA SUBEDI AND SCOTT DAVIDSON



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TABLE OF CONTENTS

	Foreword <i>Richard Wilberforce</i>	vii
	Introduction <i>David Freestone, Surya Subedi and Scott Davidson</i>	ix
	Acknowledgements	xiii
	The Josephine Onoh Memorial Lecturers 1985–2000	xv
Chapter I	New Trends in Contemporary International Law <i>T.O. Elias</i>	1
Chapter II	International Courts and International Politics <i>Sir Robert Jennings</i>	13
Chapter III	Whither International Law? <i>Bin Cheng</i>	29
Chapter IV	The Practitioner's View of International Law <i>Sir Ian Sinclair</i>	57
Chapter V	International Law and International Revolution: Reconceiving the World <i>Philip Allott</i>	77
Chapter VI	The European Commission of Human Rights from the Inside: Some Thoughts on Human Rights in Western Europe <i>H.G. Schermers</i>	99

Table of Contents

Chapter VII	The European Community: Catchwords and Reality <i>Lord Mackenzie-Stuart</i>	115
Chapter VIII	Will the Necessity to Protect the Global Environment Transform the Law of International Relations? <i>Alexandre-Charles Kiss</i>	129
Chapter IX	The New United Nations: Appearance and Reality <i>Dame Rosalyn Higgins</i>	143
Chapter X	Trusts for the Earth: New Financial Mechanisms for International Environmental Protection <i>Peter Sand</i>	161
Chapter XI	Boundary Problems and the Formation of New States <i>Ian Brownlie</i>	185
Chapter XII	International Law and Imperialism <i>Martti Koskenniemi</i>	197
Chapter XIII	Beyond Kosovo: The United Nations and Humanitarian Intervention <i>Ralph Zacklin</i>	219
Appendix	List of Recipients of the Josephine Onoh Memorial Prizes and Scholarships, 1985–2000	235

FOREWORD

It is a great pleasure for me to introduce this prestigious collection of essays based on the Josephine Onoh Memorial Lectures delivered at the University of Hull. I was involved in the presentation of the series from its conception. Having chaired the first Josephine Onoh Memorial Lecture when I was Chancellor of the University, I am now extremely pleased to present this much awaited and important volume to a wider audience of readers.

The immense distinction of the individuals involved in the series makes this introduction especially easy. It is the calibre of the lecturers and of their lectures that ensures that the series fulfils its defining and laudable ambition – namely to encourage and support the study of international law and legal thought. Rich and diverse in subject matter, the collection explores issues of the international environment, human rights, state formations and boundary disputes, war crimes, imperialism, humanitarian intervention and beyond. So, publication of these lectures in their entirety will undoubtedly promote its original endeavour still further.

Exploring, as it does, the primary concerns of international law over the last fifteen years, this collection is both a contemporaneous and a progressive record of intellectual debate, criticism and prediction. Subsequent experience as well as consequent developments have illustrated both the historic and the continuing importance of the lectures. The complex international analysis within this volume will surely not diminish in influence with time; rather it seems likely that its contribution will become increasingly valuable for its insights and intellectual perceptions.

Given also the thought-provoking nature of these diverse lectures, the volume will undeniably also serve as a comprehensive introduction to some of the most important international developments and advancements made within the last half century.

The first lecture of this series *hesitantly* suggested that the discipline of international law was relevant, exacting and expanding, and that its understanding and application might be significant to all citizens of the world

Foreword

community. The lectures that follow *unreservedly* prove this to be so. Thus the collection, edited jointly by Professors David Freestone, Surya Subedi and Scott Davidson, is certain to become an indispensable resource for theoreticians, practitioners, mature thinkers and students alike: a reading will enrich the experience of all of us.

Richard Wilberforce

INTRODUCTION

This book contains a collection of lectures which were originally delivered by a number of distinguished international lawyers as the annual Josephine Onoh Memorial Lectures – a series which has been held at the University of Hull since 1985.

Josephine Onoh, or Jojo as she liked to be known, was tragically killed in an aircraft accident at Enugu, Nigeria in November 1983 when she was on the way home to celebrate the inauguration of her father as the Governor of Eastern Province.. She was 23 years old. A graduate of the Hull Law School, she was, at the time of her death, reading for her doctorate in international law at the University of Hull. During her undergraduate studies, Jojo had developed a passion for international law, and her doctoral thesis on the right of hot pursuit on land was the product not only of her profound interest in the subject, but also her concern with the turbulent events in Africa and the Middle East during the early 1980s.

Following Jojo's death, her many friends and former teachers in the Law School proposed to her family that a Fund be established in her memory. With the active support and encouragement of her father, Chief Onoh, and the rest of her family it was decided to use the Josephine Onoh Memorial Fund to encourage and support the study of international law at the University of Hull. The administrators of the Fund decided that these twin objectives could be best met by sponsoring an annual lecture and by awarding scholarships and prizes to those undergraduate and postgraduate students excelling in international law.

Since 1985, the Josephine Onoh Memorial Lecture has been an annual event of some distinction at the University of Hull, not least because the lectures have been delivered by some of the most eminent and influential international lawyers of our time. The inaugural lecture was given by His Excellency Judge Taslim Elias, the then President of the International Court of Justice and, felicitously, a compatriot of Josephine Onoh. This first lecture was introduced by Lord Wilberforce, the Chancellor of the University, who shrewdly observed that the Josephine Onoh Memorial Lectures would 'be of great interest to theoreticians

Introduction

and practitioners alike.' Given both the eminence of the Onoh lecturers and the quality of their lectures, these words of Lord Wilberforce have proved to have been farsighted. A brief examination of the contents of this book shows that there has been a judicious mix of the practical and theoretical; a happy blend of the practitioner and the theoretician, often embodied in the same person. The second Josephine Onoh Memorial Lecture was, for example, delivered by His Excellency Sir Robert Jennings who was, at the time, a Judge at the International Court of Justice and formerly the holder of the Whewell Chair in International Law in the University of Cambridge. Sir Robert's lecture on the way in which law and politics interact in international adjudication provides a highly realist approach to the dilemmas confronting international law. Her Excellency Rosalyn Higgins, who succeeded Sir Robert at the International Court and who delivered the 1993 lecture, is also an exemplar of the practitioner-academic or academic-practitioner, as is Professor Ian Brownlie, the 1995 lecturer who at that time was Chichele Professor of International Law in the University of Oxford, and whose contribution to the doctrine as well as the practice of international law needs little introduction or elaboration. Indeed, as Sir Ian Sinclair, a former Legal Adviser to the Foreign and Commonwealth Office and himself no stranger to scholarly writing, observed in his 1987 lecture, there is often a 'tenuous dividing line' between the teacher and the practitioner of international law. Sir Ian Sinclair gives us an appraisal of international law from one whose career was spent in the front line of international legal practice in Britain's Foreign and Commonwealth Office and who has himself contributed to the wealth of doctrinal scholarly writing in the field. Perhaps it is timely to recall in this context that Article 38(1)(d) of the Statute of the International Court of Justice explicitly sanctions the use 'judicial decisions and the teachings of the most highly qualified publicists' as 'subsidiary means for the determination of rules of law'. The intimate connection between the practitioner and the academic in the field of international law could not be demonstrated more clearly or authoritatively.

The scope of the subject matter covered by the various Josephine Onoh Memorial Lectures reveals not only the range of issues with which international law has to deal, but also the ways in which international law has responded to the challenges of the contemporary world. When the lectures began in 1985 who could have envisaged either the dramatic rise of international environmental law or the new international legal issues posed by the fall of the Berlin Wall and the disintegration of the Eastern Bloc and some of its constituent states? While Judge Taslim Elias tracks the trends in the development of certain areas of international law from 1945 to 1985, and Rosalyn Higgins considers the position of the United Nations in the post-Cold War era, Ralph Zacklin deals with that UN's role in

humanitarian crises and in responding to threats to the peace in the world of the 1990s. Perhaps an answer to some of the problems identified by these lecturers lies in Philip Allot's 1989 lecture, which provides a preview of the theory later developed in his seminal work *Eunomia* (OUP, 1990) and in which he proposes a radical reconceiving of international society and international law to meet the challenges of the later twentieth century.

Other lectures in the series address some of the most significant new fields of international law and practice and provide insights into a number of the more pressing issues facing the international legal order in the last quarter of the twentieth century. The lecture by Professor H G Schermers, a former Chairman of the European Commission on Human Rights, gives an insider's view of the substantial achievements of this important institution whose functions are now performed by the European Court of Human Rights. This major institutional change within the human rights institutions of the Council of Europe means that the insights of Professor Schermers 1990 lecture have an additional historical significance. The 1991 Lecture by the late Lord Mackenzie-Stuart addresses some institutional issues in the other great family of European Institutions – the European Union. With a characteristically skilful legal analysis of some of the most important (and abused) terms used in debates on the European Union he urges us to be aware of the traps of linguistic imprecision inherent in words such as 'sovereignty', 'federal' and 'subsidiarity'. The legacy of colonialism and imperialism is discussed in differing contexts in the lectures of Professors Ian Brownlie (1995) and Marti Koskenniemi (1998). Professor Brownlie's lecture concentrates on the highly significant "Uti Posseditis" doctrine and its utilisation by international courts and tribunals in boundary disputes, while Professor Koskenniemi in his now characteristic style unpacks the legacy of colonialism. In the field of environmental law, Professor Alexandre-Charles Kiss in 1992 the year of the Rio Earth Summit and Dr Peter Sand in 1994 examine the constellation of challenges posed by the emergence of global environmental threats and the highly innovative ways in which international law has responded to these threats. Professor Kiss provides an overview of the evolution of the international dimensions of environmental law, while Dr Sand looks in detail at the inventive adaptation of a traditional funding mechanism – the Trust – to the needs of the international community.

The lectures reproduced in this book represent a rich and multifaceted contribution to the scholarship of international law by some of the leading scholars and practitioners in the field. They also have an enduring quality which readers of the lectures, previously published as pamphlets by the University of Hull Press, have long recognised. Indeed, it is the very fact that the lectures are

Introduction

no longer available in published form, and that there is a continuing demand for them, which has encouraged us to gather them into the present anthology. We hope that this collection of lectures will not only satisfy the demand for their publication, but that in their present, rather more permanent, form they will stand as a continuing and tangible monument to Josephine Onoh whose passion for the subject of international law was so sadly curtailed.

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THE JOSEPHINE ONOH MEMORIAL LECTURERS 1985–2000

(The date in brackets indicates the year in which the Onoh Memorial Lecture was delivered.)

His Excellency the late Judge Taslim Elias, former President of the International Court of Justice, The Hague. (1985)

His Excellency Sir Robert Jennings, former Judge and sometime President of the International Court of Justice and Whewell Professor of International Law in the University of Cambridge (Emeritus). (1986)

Professor Bin Cheng, Professor of Air and Space Law in the University of London (Emeritus) and sometime Dean of the Faculty of Laws of the University of London. (1987)

Sir Ian Sinclair, former Legal Adviser to the Foreign and Commonwealth Office, London. (1988)

Professor Philip Allott, Professor of Law, University of Cambridge. (1989)

Professor H.G. Schermers, Professor of Law and former Dean of the Faculty of Laws of Leiden University; former Member of the European Commission of Human Rights. (1990)

His Excellency the late Lord Mackenzie-Stuart, former President of the Court of Justice of the European Communities, Luxembourg. (1991)

Professor Alexandre-Charles Kiss, Director of Research, (Emeritus), National Centre for Scientific Research, France. (1992)

The Josephine Onoh Memorial Lecturers 1985–2000

Her Excellency Dame Rosalyn Higgins, Judge at the International Court of Justice, formerly Professor of International Law in the University of London. (1993)

Professor Peter H. Sand, Institute of International Law, University of Munich; formerly Chief of the Environmental Law Unit, UN Environment Programme, and Legal Adviser, Environmental Affairs, The World Bank. (1994)

Professor Ian Brownlie, C.B.E., Q.C., Chichele Professor of Public International Law (Emeritus), University of Oxford, Member of the International Law Commission. (1996)

Professor Christopher J Greenwood, Professor of International Law, University of London. (1998, not published)

Professor Martti Koskenniemi, Professor of Law, The Erik Castren Institute of International Law and Human Rights, University of Helsinki, Finland. (1999)

Dr Ralph Zacklin, Assistant-Secretary-General for Legal Affairs, United Nations, New York. (2000)

I. NEW TRENDS IN CONTEMPORARY INTERNATIONAL LAW

The Josephine Onoh Memorial Lecture 1985

It may be convenient to begin an account of the new trends in international law by drawing attention to the significance of the necessary distinction that must be made between the Permanent Court of International Justice and the International Court of Justice – the latter implying that the Court is international while there is only one system of justice for the several members comprising the Court, and the former seeming to emphasise that the Court was composed of a limited number of state representatives administering justice among a limited number of states. In short, the older court was assimilated in popular imagination with a European court, while the post-1945 court is regarded as truly international in the sense of being a world court on account of its universality of membership and orientation.

The Founding Fathers at San Francisco also recognised the somewhat limited scope of the pre-1945 customary international law as well as the traditional conventional international law, by making express provision in Article 13(1) of the United Nations Charter for the study and promotion of the progressive development and codification of international law. To this end, one of the first steps taken by the United Nations General Assembly was the establishment, in 1947, of the International Law Commission, based in Geneva, with an initial membership of fifteen, later increased to twenty-five and recently enlarged to thirty-four. The primary purpose is the bringing of international law up to date by a process of modifying existing rules to meet the needs of the newly-enlarged international community. In this way, some serious effort is being made to take account of the expanding frontiers of international law.¹ The keynote is the

¹ This process has been fully described in my *New Horizons in International Law* (Alphen, Netherlands: Sijthoff and Noordhoff, 1979). Further elaboration can be found in my later article

progressive development and codification of the subject, and in the discharge of that task there is to be ensured the widest possible participation, which includes the representatives of the newly-independent states hitherto denied participation in the formulation of customary international law.

It may also be mentioned that the International Court of Justice, in order to be true to its essential character of a World Court, is by tacit consent composed of five representatives from Western European countries, including Canada, Australia and New Zealand, as well as the Scandinavian countries, three representatives from Africa and three from Asia, two from the Eastern European countries and two from Latin America. No two members of the fifteen-member Court may be citizens of the same state.

By Resolution 171(II), of 14 November 1947, the General Assembly, *inter alia*, states that it is:

also of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation.²

The Resolution further draws the attention of states to the importance of their accepting the compulsory jurisdiction of the Court in accordance with Article 36, paragraphs 2 and 5, of its Statute, and with as few reservations as possible. States are also invited to appreciate the advantage of inserting in conventions and treaties arbitration clauses providing for the submission of disputes to the International Court of Justice. In addition to these exhortations the General Assembly, in Resolution 3232(XXIX), of 12 November 1974, stresses that, in view of the increasing development and codification of international law in conventions open for universal participation and the consequent need for their uniform interpretation and application, its recommendation be widely accepted that:

the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice.³

Thus, the General Assembly itself set the Court the task of employing its declarations and resolutions in the course of its judicial work, if not directly as

entitled 'New Perspectives and Conceptions in Contemporary Public International Law', (1981) 10 *Denver Journal of International Law and Policy*, pp. 409-23.

² *The International Court of Justice* (The Hague: I.C.J. Publications, 2nd edn. 1979), p. 89.

³ *Ibid.*, p. 91.

sources of international law, at least indirectly as evidence of contemporary international law. The Resolution furthermore calls upon states not to regard the reference of their dispute to the International Court of Justice as an unfriendly act between them. It finally calls upon international organisations, which have been so empowered, to use the machinery of advisory opinions in obtaining legal clarification from the International Court of Justice upon certain aspects of their activities.

One of the most important tasks of the United Nations General Assembly was the adoption of the Universal Declaration of Human Rights of 1948, which soon became the corner-stone of independence constitutions as well as of the constitutions of even some developed countries. Thus the Rule of Law and the pursuit of democracy were made the ingredients of the governments of Member States, especially the new ones. This basic document was, after years of strenuous endeavour, followed in 1966 by the International Covenant on Civil and Political Rights and by the International Covenant on Economic, Social and Cultural Rights⁴ which between them attempt to fill out most of the gaps in the generalised provisions of the 1948 Declaration.⁵ The undertaking of this early task on human rights was certainly prompted by the preambular paragraph of the United Nations Charter, which provides that one of the principal aims and objectives of the United Nations is:

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.

The same general provisions on human rights may be seen in Article 62, paragraph 2, which enjoins the Economic and Social Council to make:

recommendations for the purpose of prompting respect for, and observance of, human rights and fundamental freedoms for all.

Both these provisions of the Charter lay the foundation for the United Nations' Universal Declaration of Human Rights and the two supplementary covenants,

⁴ Although the UN Commission on Human Rights completed the drafts of both Covenants in 1952, it was only in 1966 that the General Assembly adopted them: see *UN Doc. A/29 29* (1955) for the drafting history. For the whole matter, see *Development, Human Rights and the Rule of Law*, Report of a Conference held in The Hague from 27 April to 7 May 1981, under the auspices of the International Commission of Jurists (Oxford: Pergamon Press, 1981), p. 48.

⁵ The Covenants came into force on 23 March 1976 and 3 January 1976, respectively. Although both were based on the 1948 Declaration, not all three instruments cover identical provisions; for instance, the right to self-determination is regulated by both Covenants but not by the Declaration.

and lead to the establishment of the United Nations Commission on Human Rights which has done, and continues to do, useful work not only for the promotion of human rights generally but also for the upliftment of women, especially in the field of efforts against discrimination on the grounds of sex.⁶

Thereafter was ushered in the gargantuan task of decolonization, which occupied the energies and concentration of the General Assembly and the Security Council during the period from 1948 to 1960. The right to Self-Determination, the principle of Non-Discrimination and the prohibition of *apartheid* were all promoted and pursued by the establishment of various committees and commissions entrusted with their detailed implementation. So successful was the United Nations in its decolonization efforts that its membership has now risen from the original fifty, in 1945, to the present one hundred and fifty-nine, an increase of more than three hundred per cent.

If we may now turn to consider how the International Law Commission has been fulfilling its promises in the way of promoting the progressive development and codification of international law since its establishment, we notice on the horizon the United Nations Plenipotentiary Conference of 1958 in Geneva and the four major conventions on the Law of the Sea. These were the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf, the last-named being the culmination of efforts resulting from the study and elaboration of the Truman Proclamation of 1945. It should be noted that, although many of the provisions to be found in the four conventions represent important measures of codification of customary international law rules and principles, nevertheless the elements of progressive development of the law are noticeable features. The first occasion that the International Court of Justice had of applying the 1958 Conventions, especially the one on the Continental Shelf, was the *North Sea Continental Shelf* cases (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*), 1969. The Court pointed out that *opinio juris* could be a source of customary international law and that it was not necessary for an undue lapse of time to have occurred since its first adoption or elucidation as a legal concept; this is particularly the case with the 1945 Truman Proclamation on the

⁶ The first instrument adopted by the General Assembly in 1952 was the Convention on the Political Rights of Women, guaranteeing political equality between men and women. The 1957 Convention on the Nationality of Married Women provides that marriage alone should not automatically affect the nationality of the wife. In 1967 the General Assembly adopted the Declaration on the Elimination of All Forms of Discrimination against Women; it entered into force on 3 September 1981. In 1975, the General Assembly proclaimed it as International Year for Women. Other developments have since followed.

Continental Shelf. The Court has also had occasion more recently to apply and interpret the provisions of the 1958 Convention on the Continental Shelf in the *Aegean Sea*⁷ case and in the *Tunisia v Libya*⁸ case.⁹

The next important developments on the horizon were the United Nations Plenipotentiary Conferences at which were adopted the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963. These represent the first international efforts at codifying and progressively developing existing rules and practices in international law based, as was the 1958 Law of the Sea, on drafts prepared by the International Law Commission. Both Conventions elaborate detailed rules of practice relating to diplomatic and consular property, including buildings and archives, the privileges and immunities of diplomats and consular officials, their agents and staff, and the rights and duties of their families. As in the case of the 1958 Conferences on the Law of the Sea, a significant feature of both the 1961 and 1963 Diplomatic and Consular Conventions was the active participation of the representatives of the newly independent States in the elaboration of the principles and practices which are to govern their external relations in the new international community into which decolonization has not so long ago introduced them. The new diplomatic law has received an added impetus from the Convention on Special Missions of 1969, which provides for analogous treatment of experts and specialists sent by the United Nations or by a Member State on missions of economic, industrial or cultural aid into any other state.

We may refer here in passing to the hostages issue in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*), 1979, which was the first occasion the Court has had to apply the 1961 and 1963 Diplomatic and Consular Conventions. As part of the ongoing Iranian revolution which began in 1978, the United States Embassy and Consulates in Tehran were seized and about fifty-two United States diplomats and consular staff were held hostage for well over four months. The Iranian Government refused to come to the Court which, under its rules, went on to hear the United States' Application and concluded that Iran had violated the provisions of the two Conventions of 1961 and 1963 guaranteeing specific rights, privileges and immunities to diplomatic, consular and other staff. Their unlawful confinement and subjection to inhuman treatment, evidence of which was made available to the Court, were pronounced to be not only a flagrant breach of diplomatic law,

⁷ [1978] *I.C.J. Reports* 3.

⁸ [1982] *I.C.J. Reports* 19.

⁹ See further my *International Court of Justice and Some Contemporary Problems* (The Hague: Nijhoff, 1983), pp. 45-53, 56-61, 96-9 and 137-8.

but also a particular example of violation of the Universal Declaration of Human Rights of 1948 and the two supplementary covenants on Human Rights.¹⁰ This case thus serves to illustrate an application and interpretation of the contemporary international law as enunciated in the two Conventions on Diplomatic and Consular Relations as well as the Universal Declaration of Human Rights of 1948 which for the first time the Court had occasion to apply in a concrete case before it.

The International Law Commission draft, upon which the Vienna Convention on the Law of Treaties of 1969 was based, is the high-water mark of that body's promotion of the progressive development and codification of customary international law. After almost ten years of labour, the draft was submitted by the General Assembly to the Plenipotentiary Conference in Vienna in 1968 which met for about three months in the first instance and concluded its work at the end of another three months, in 1969, when it was adopted. It did not, however, enter into force until 17 January 1980, when the last instrument of ratification was received at the United Nations. This Convention certainly indicates that a convention may acquire the status of being in force before the last stipulated instrument of ratification is submitted to the depository. The Vienna Convention would seem to have been widely regarded as already in force almost from the moment it was adopted, for the Court first referred to it with approval in the *North Sea Continental Shelf* cases of 1969; and it is well known that the Convention has also been cited in textbooks and articles in learned journals before its formal, final ratification. Why this almost instant reception by the legal community, one may ask? The answer seems to lie in the fact that, although it is not exhaustive as a convention governing all treaties and agreements, it is nevertheless comprehensive enough as an epitome of all the principles and rules relevant to the mainstream of treaty law; certain byways and ancillary issues are, of course, expressly reserved for the future. There are, however, detailed and definitive provisions on such basic principles as *pacta sunt servanda*, acceptance and renunciation, termination, ratification and fundamental change of circumstances. The most difficult part of the Vienna Convention on the Law of Treaties, however, is Part V which provides for the nullity of treaties vitiated by error, fraud, corruption of a state's representative and threat or use of force. These are the so-called unequal or leonine treaties by which territories or other

¹⁰ Tehran, strange to relate, was the venue of the UN International Conference on Human Rights held in April/May 1968, the twentieth year of the 1948 Declaration. The Conference adopted the famous Proclamation of Tehran which affirmed the responsibility of States in honouring their obligations for the full realisation of human rights while also identifying major obstacles and problems in the way of achieving human rights.

valued possessions had passed, or might in future pass, from one state or group of states to another. The state invoking any of these grounds of invalidity is under a burden of proof and, in the particular case of *jus cogens*, must first obtain a judgment of the Court that the alleged claim satisfied the requirements of Articles 53 or 64 of the Convention, that is, that there has been a violation by the defendant State of a peremptory norm of international law from which no state may derogate, as either having been committed prior to the conclusion of the treaty or since, during the currency of the treaty in question. This is to check possible abuses.¹¹

It is also to be noted that in the 1960s there occurred two important developments: the first was when the General Assembly proclaimed the First Development Decade, in January 1961, for the vigorous adoption of global measures to promote social and economic development of the developing countries by both multilateral and bilateral efforts; and the second, not unrelated to the first, was the establishment of a United Nations Committee charged with the responsibility of partly diffusing the 'cold war' which was at its peak at that time and of partly promoting greater co-operation among Member States of the United Nations in order to ensure international peace and security.¹² The result of the second endeavour was the 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter', adopted by the General Assembly in 1970. There are seven basic principles reaffirming and guaranteeing the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations, the principle that states shall settle their international disputes by peaceful means in such a manner that international peace, security and justice are not endangered, the sovereign equality of states, non-intervention in the internal affairs of states, the duty of states to co-operate with one another in accordance with the Charter, the principle of equal rights and self-determination of peoples, and the fulfilment in good faith of obligations assumed in accordance with the Charter. Of course, the

¹¹ For a full account of the episode of the Conference, see my book *The Modern Law of Treaties* (Leiden: Sijthoff, 1974), pp. 182-97. I was chairman of the Committee of the Whole Conference for both 1968 and 1969.

¹² In this connection, it is necessary to refer in parenthesis to the Declaration on the Strengthening of International Security adopted also in 1970 urging Member States to make full use of the means and methods provided in the Charter for peaceful settlement of disputes and agreeing on guidelines for more effective peace-keeping forces. The Security Council is enjoined to pay heed to the implementation of its decision in accordance with the obligations assumed in the United Nations Charter.

Declaration is little more than a set of recommendations or guidelines to Member States of the United Nations in their international relations; like the Universal Declaration on Human Rights, however, they are at least declaratory of rights and duties which states intended to assume towards one another in their mutual relations.¹³

As regards the programme of the development decade, the shift in emphasis from the political to the economic has been the most marked.¹⁴ Whereas the League Covenant contained only two clauses referring to economic or commercial matters, the United Nations Charter is replete with clauses dealing with economic, industrial and commercial development, in addition to making the Economic and Social Council one of the six principal organs of the United Nations Organisation. Various projects of global economic and social welfare development have sprung up within the last twenty years. As the fervour of decolonization began to wane among the new Member States, the United Nations soon recognised that political shibboleths had also begun to mean less in international relations. Political independence without economic development and social welfare is meaningless. Already the gap between the 'haves' and 'have-nots' would seem to be widening, the developed Member States were achieving industrial growth and high standards of living, but the developing ones were virtually stagnant or even getting poorer and poorer.

The United Nations Commission for Trade and Development (UNCTAD), with a board on which there is a fair representation of Member States of the Third World, was established as one of the means to achieve improvements in international trade and to redress the balance of the old arrangements under GATT. The limited success so far achieved as a result of the activities of the 'Group of 77' is noteworthy, but no one can say that the problems of the North-South Dialogue are over. This was why the General Assembly established a Study Group for the formulation of new principles and practices in international economic and social arrangements for human betterment. The programme of action is styled 'A New International Economic Order'.¹⁵ One of the principal bulwarks of this new order is the fashioning of a Code on Multinational Corporations to control the activities of these entities in their operations,

¹³ For a detailed consideration see M. Sahovic (ed.), *Principles of International Law Concerning Friendly Relations and Cooperation* (Dobbs Ferry, New York: Oceana Publications, 1972).

¹⁴ Article 55 of the Charter contains the fullest outline of the United Nations programme on international economic and social co-operation. Under Article 60, the Economic and Social Council has responsibility for the discharge of all functions under the general authority of the General Assembly.

¹⁵ For a succinct and up-to-date account of the salient features, see K. Hossain (ed.), *Legal Aspects of the New International Economic Order* (London: Pinter, 1980) especially pp. 45-159.

especially within the territories of the developing countries; the other is a Code on the Transfer of Technology which is designed to regulate the process whereby the developing countries could acquire new skills and industrial property without avoidable tears. The Code on Multinationals is under study, but so also is that on the Transfer of Technology as it involves intractable problems of transfer, supervision and control, especially during the transition period; equally difficult is, of course, the quantification of costs of the materials to be transferred and the mental effort involved in the process. Finally, we must question whether the two Codes should have binding force.

Another development on the horizon of contemporary international law has been the recent upsurge of interest in humanitarian law. It will be recalled that some of the inevitable aftermaths of the decolonization process have been a series of wars of national liberation, out of which have arisen new problems of the care and welfare of the wounded and the sick among the combatants as well as non-combatants, especially civilians. The four Geneva Conventions of 1949 provide fairly adequately for these persons and certain types of public property in the event of armed conflict, which expression is technically confined to conventional warfare waged according to the customary rules and under conditions laid down at least since 1899. Wars of national liberation, particularly of the more modern type, were not covered and it therefore became necessary, on the initiative of the International Committee of the Red Cross, for a series of conferences to be held in Geneva between 1975 and 1979 by representatives of States, both developed and developing, to hammer out a new Protocol in order to take account of the new phenomena of wars of national liberation. The Protocol did not entirely cover these types of war but it recognised that the activities of 'mercenaries' called for control and even possible elimination; the Protocol could not agree to a universally acceptable definition of 'mercenaries' but it contained a good number of provisions of humanitarian character not formerly envisaged in the Geneva Conventions of 1949.

The International Committee of the Red Cross (ICRC) held two conferences of government experts in 1971 and 1972. Thereafter the Swiss Government convened an International Diplomatic Conference for the purpose of revising, updating and supplementing the four Geneva Conventions of 1949 on the Victims of War as well as some parts of The Hague Law of War. After the Diplomatic Conference held between 1974 and 1977, the ICRC finally adopted, in June 1977, two Protocols, one on International Armed Conflicts, including wars of national liberation, the other on civil wars generally. The Conference of

Governments held in 1979 adopted both Protocols with important modifications into which it would be unnecessary to enter here.¹⁶

The last important episode in the new trends of contemporary international law is no doubt the United Nations Third Conference on the Law of the Sea which held its first substantive session in the capital of Venezuela in 1974 following an organisational session in New York in December 1973. Its substantive work ended in April 1980 after ninety-three weeks of meetings. The Conference met again in New York, in September 1982, to act on recommendations of its Drafting Committee and held its last meeting in Jamaica from 6 to 10 December 1982, when government representatives signed the Convention which has been described as a Charter for the world's oceans. After almost nine years of strenuous work the Convention was completed at the United Nations Headquarters on 30 April 1982 when it was formally adopted. The Conference thus completed the assignment given to it by the General Assembly in 1973 'to adopt a convention dealing with all matters relating to the law of the sea'. It is, however, to be noted that the real goal set for itself by the convention, namely, to adopt it by consensus, was not realised because the text was in fact adopted by one hundred and thirty in favour, with four against, and seventeen abstentions; the four countries that voted against were the United States of America, Venezuela, Turkey and Israel.

The Convention, nevertheless, can be regarded as a very valuable document in that it deals with almost every human use of the oceans – navigation and overflight, resource exploration and exploitation, conservation and pollution, fishing and shipping. It contains 320 articles and nine annexes and it defines maritime zones, laying down rules for drawing boundaries, assigning legal duties and responsibilities and providing machinery for settlement of disputes. The highlights of the Convention are the new limits of territorial sea which have been extended from three to twelve miles and an exclusive economic zone of two hundred miles; the new provision for participation of land-locked states in the resources of the ocean on a fairly well-defined basis; the new concept of equity and, indeed, the new international principle of the ocean as a common heritage of mankind. The sea-bed authority for the exploration and exploitation of the ocean sea-bed and the establishment of a Tribunal for the settlement of disputes, to which the International Court of Justice has been given second place among other bodies, are the other highlights of the new Convention.

It would be improper to enter into the details of the reservations that made the United States of America refrain from participating in the adoption of the

¹⁶ See A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Napoli: Editoriale Scientifica, 1979), pp. 113-27, 161-98, 310-46 and, particularly, 461-501.

Convention, but we may mention one or two aspects here. During the last days of the conference negotiations among the Western, socialist and developing countries, certain changes were introduced into the sea-bed provisions, among which were the following:

- an assured seat on the Council of Authority for the largest consumer of sea-bed minerals – expected to be the United States of America;
- a higher majority, three-quarters instead of two-thirds, for approving future amendments to the sea-bed mining provisions of the Convention; and
- a clause defining ‘the development of the resources of the area’ as the first objective of sea-bed policy.

A good number of Western and developing countries expressed the hope that these changes, coupled with the pioneer investment scheme, would enable the major industrialised countries, and the United States in particular, to ratify the Convention in December 1982,¹⁷ but this did not happen.

It must be noted in conclusion that the Convention represents the high-water mark of the new development of international law-making, not through the International Law Commission or other bodies like the UNCITRAL, but by consensus. It is also noteworthy that all the participants in the Conference were not necessarily lawyers, but included economists, industrial and other scientific experts, who contributed in no small measure to the final product. No final judgment may be passed on it until after its application and interpretation, and the various entities set up for its implementation have had a chance to try it in action.

CONCLUSION

We may now conclude our summary of the main conception and perspectives on the horizons of contemporary international law by observing that four dominant characteristics are discernible.¹⁸ These are the issues of genocide, *jus cogens*, the crime of *apartheid* and the growing concept of humanitarianism. Beginning with the Nuremberg Trial which climaxed the Second World War, it has become more than a mere shibboleth of international criminal law that genocide must be universally condemned in all its forms and varieties. Hence we have the

¹⁷ See UN Press Release SEA/154 dated 30 April 1982.

¹⁸ A possible candidate in the list of main trends is, of course, the developing International Environment Law with its UN Headquarters, established at Nairobi in 1973. Important though it is, we must await the full impact of its development as a serious element of contemporary international law.

Convention on the Prevention and Punishment of the Crime of Genocide as implied in the Advisory Opinion of the International Court of Justice on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.¹⁹ Equally, the widespread condemnation of unequal treaties has been loudly proclaimed in Articles 53 and 64 of the Vienna Convention on the Law of Treaties which has come as a fitting climax to the relentless struggle for decolonization, since the main thrust of the criticism of such treaties was that they were often the handmaid of colonialism and the acquisition of foreign territories.

The third preoccupation of the United Nations was, and still is, the theory and practice of racial discrimination which has for centuries been the inevitable concomitant of domination of one country by another. The General Assembly must be congratulated for its eventual success in adopting the convention declaring *apartheid* an international crime.²⁰ The importance of this new offence lies more in the moral condemnation of an international practice than in the effectiveness of it; there is little doubt that even South Africa cannot escape the inevitable opprobrium that must attach to the continued practice of for so long as it lasts.

Nor can we fail to appreciate the general tendency of contemporary international law to be reflective of the growing humanitarianism both of concept and of achievement characterised by the reformed law of war in both its classical and modern forms. This is noticeable in the intensive struggle for humanitarian laws for universal disarmament and the prohibition of deadly weapons of warfare like gas and other modern scientific inventions. While the ultimate aim must be the elimination of these dangerous elements from customary international law, it is reasonable to suppose that the growing humaneness of contemporary international law is a welcome development on the horizon.²¹

¹⁹ [1951] *I.C.J. Reports* 15.

²⁰ International Convention on the Suppression and Punishment of the Crime of *Apartheid*, Item 80 (c) of A/37/250 (English), 22/9/82, at p. 17; see also L. Henkin, *How Nations Behave* (2nd ed.) (New York: Columbia University Press, 1979), p. 126, particularly pp. 180-1: 'On the other hand, an overwhelming resolution declaring *apartheid* to be contrary to international law, against the strong views of South Africa, the one nation which admittedly practices it, is entitled to greater weight', e.g. General Assembly Resolution 1663; 16 UN GAOR 889 (1961); *UN Doc. A/5 100* (1962). See also Security Council Resolution 418 of 4 November 1977 which imposes sanctions for the operation of *apartheid*.

²¹ See my *International Court of Justice and Some Contemporary Problems* (The Hague: Nijhoff, 1983), pp. 156-69 and 278.

Sir Robert Jennings

II. INTERNATIONAL COURTS AND INTERNATIONAL POLITICS

The Josephine Onoh Memorial Lecture 1986

I should like first to say what an honour and a privilege I feel it to be, to have been invited to give this second international law lecture, in the series established in memory of Miss Onoh. The lectures were splendidly inaugurated last year by President Elias. To attempt to follow in his footsteps is a daunting task; but at least I can fulfil one particular role that was assigned to me. I can symbolise the Yorkshire side of this fine joint Nigerian and Yorkshire project, in a University which I shall always think of as being in the East Riding of my native County.

Disputes between states – even those over apparently clear-cut questions of law such as title to territorial sovereignty – are often important not only because of the law involved but also, and even chiefly, because of the politics involved. A dramatic example of this was the Beagle Channel dispute between Argentina and Chile, which an arbitral award of 1977¹ failed to solve (indeed the award itself almost precipitated open war) but which was very recently solved through a long-drawn-out Vatican mediation: a most important victory for peace and law which as usual in such cases passed almost unnoticed in the press. That dispute was from the legal point of view a perfect example of a clean and neat dispute over a point of law, being about the correct interpretation of a short phrase in a treaty. The whole dispute was about the meaning in the boundary treaty of 1881 of the words, ‘to the south of the Beagle Channel’, the validity of the treaty not being contested, indeed being asserted, by both parties. The interpretation of a treaty is

¹ (1978) 17 *I.L.M.* 634.

usually cited in the books as the most obvious example of a legal, or justiciable, dispute. Yet that question of law was also enmeshed with some ninety years of political convictions about legal rights, and coloured by strategic, economic and political aspirations, national pride and sensitivities.

The Beagle Channel dispute was perhaps an especially striking example of the enmeshing of law and politics. Yet that combination is not at all untypical. The parallels with the Falkland (Malvinas) Islands dispute are manifest. Nor is this problem confined to disputes about territory. One need go no further than the sort of legal questions which come before the European Commission, and the Court of Human Rights: matters such as immigration, the place of trade unions, police powers, are all clear legal problems, yet they are also intensely political.

This is far from being a new problem. One thinks immediately of the difficulties experienced by the former Permanent Court of International Justice, when it was faced with the *Austro-German Customs Union* case.² Yet today the problem has new dimensions in a world so divided between east and west and north and south, and when there is a tendency to politicise almost any question. Conversely, almost any political question can so to speak be legalized: much of the debate and contention between developed and developing countries has in fact taken the form of legal arguments over, for instance, the New International Economic Order, which in spite of its name is essentially a legal doctrine; or the movement in favour of seeing large parts of orthodox international law in a new perspective and with a new idea of purposes, which is called 'development law'.

So the question I want to try to answer in this lecture is how an international court or tribunal should approach such questions? True this is but a part of the larger question of international law and politics; but courts tend to find themselves at the sharp end of some of these questions; so it may be useful to look in general terms – you will not expect me to be able to discuss contemporary instances – at the duty of judges when they are required to tackle politically sensitive legal questions. There are of course no techniques by which a judge can exonerate himself from the mental and moral suffering that is involved, or at least should be involved, in the decision of a difficult case. Anguish is part and parcel of the job, if it is to be done properly. Yet I believe it is possible to lay down certain general principles which should be observed in all such cases; and it is these that I want us now to think about.

The first question to ask is a classical one, on which the literature is formidable, whether it is possible to make a clear distinction between legal and political disputes, and if so, by what criteria? If we can indeed separate the two

² Advisory Opinion [1931] *P.C.I.J. Reports*, Series A/B, No. 41.

kinds of disputes, the judge's task is enormously simplified because the political questions he could then leave to others. It was assumed that this distinction could be made even as early as the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes,³ which recommended arbitration as a suitable means of settling disputes 'in questions of a legal nature and especially in the interpretation and application of international treaties'. The same assumption is to be found in paragraph 2 of Article 36 of the Statutes of both the old Permanent Court of International Justice and of the International Court of Justice (the so-called optional clause, which formerly was indeed an optional clause of the treaty setting up the Court) and which, as you well know, speaks of 'all legal disputes'. It was on the basis of this distinction between legal and other questions that the hopes of achieving some measure of compulsory jurisdiction for the World Court were founded; for it was never supposed that governments might be willing to submit other than legal disputes and questions to compulsory jurisdiction. Other instruments spoke of justiciable and non-justiciable disputes, meaning thereby much the same distinction; and of course many earlier arbitration conventions specifically excepted from their application the political categories of dispute which were then referred to as either 'matters of honour' or such as affected 'vital interests'; though having mentioned these matters as being so to speak at the opposite pole from legal questions, it may be as well to remind ourselves of the wise words of one of the greatest of all international lawyers, the late Professor Brierly: 'It is too often overlooked that neither the problem of war nor that of vital interests is a specifically international problem, for both of them occur inside, as well as between, states'.

But it seems to us now doubtful whether it is possible to say that there are two entirely discrete kinds of dispute, called legal and political. Certainly some disputes, or perhaps we should say situations, are in a stage where they have not taken a legal form at all. And of those that have taken a legal or justiciable form, some are more political than others. There may indeed be some purely technical legal disputes that have virtually no political content. But there is really no way of escape from the fact that international courts, like domestic courts indeed, will for a good deal of the time find themselves having to decide upon legal questions in respect of which their decision, however technical in form, must have great political significance.

It was the appreciation of this fact which led to the establishment of another very influential school of thought, led by Kelsen and Lauterpacht, which held that all true disputes however political they might be, were also legal disputes in

³ The 1899 Convention can be found at *U.K.T.S.* 9 (1901), *Cmnd* 798, and the 1907 at *U.K.T.S.* 6 (1971), *Cmnd* 4575.

the sense that a court could always give a legal answer if only the parties would be willing to accept it. Therefore it followed, according to Lauterpacht, that:

there is no fixed limit to the possibilities of judicial settlement; that all conflicts in the sphere of international politics can be reduced to contests of a legal nature; and that the only decisive test of the justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitrament of the law.⁴

Now this, with great respect, is right. Certainly a court should never refuse jurisdiction over a case giving as the reason that it is political; or even preponderantly political. If there were such an easy solution to the problem, there would be little more to say about it. It would, however, be an instructive exercise to go through any student case book on international law to see if one could find a leading case that was not more or less political.

Nevertheless, the statement by Lauterpacht that I have just cited needs looking at closely because, as always, he chose his words with great care. I am thinking particularly of the phrase: ‘... all conflicts in the sphere of international politics can be *reduced* to contests of a legal nature’ (emphasis added). Here ‘reduced’ is the word which does introduce a crucial distinction between disputes that have been reduced to a justiciable form that courts can deal with, and those that have not. In this sense there clearly is a valid and important distinction between justiciable disputes and non-justiciable disputes. And though it may well be true that ‘all’ or at any rate most, ‘conflicts in the sphere of international politics’ could be so reduced to a justiciable form, it should not be supposed that this can be done without some change in the very nature and substance of the dispute.

This becomes clear once we stop looking just at the supposed nature of the dispute itself, and look instead at the differences between juridical means of settlement – that is adjudication and arbitration – and other ways of settlement such as negotiation, mediation, conciliation, and the rest.⁵ Cases brought before a court of law, whether a standing court or one appointed *ad hoc*, invariably have a pleadings procedure by which the matter is indeed ‘reduced’ to a specific issue, or a series of such specific issues, upon which the parties are in conflict concerning the applicable law, or the facts, or both. Everyone with experience of drawing such pleadings knows that the drafting of the submissions will be the

⁴ H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), p. 164.

⁵ See also Professor Rosalyn Higgins, ‘Policy Considerations and the International Judicial Process’, (1968) 17 *International and Comparative Law Quarterly* p. 58 at p. 74.

moment of truth for some arguments which, before the imposition of this discipline, had seemed cogent.

Take, for example, Article 46 of the Rules of the International Court of Justice, which provides in paragraph 4 that, 'Every pleading shall contain the party's submissions at the relevant stage of the case, or a confirmation of the submissions previously made, without recapitulation of the arguments presented'.⁶ Note how it is assumed that the submissions – which are the list of specific issues for the court to determine – might have to change even in the course of the written pleadings stage, as a result of their gearing with the submissions of the other party. A clear example of the latter might be the Memorials in the *Tunisia/Libya Continental Shelf Boundary* case,⁷ where the Tunisian Memorial rejected the equidistance-method solution, and the Libyan Memorial, assuming that the Tunisian argument would be based upon equidistance, also rejected the equidistance method; accordingly, at the next, counter-memorial stage, the dispute took upon itself an entirely different aspect; different from the dispute as it had appeared to be in the earlier stage of attempted negotiation; but different also from the dispute so elaborately described by the parties in the first stage of the court proceedings.

Now this process of refining the conflict into a series of quite specific issues of law or fact which a court can then determine, is indeed a reduction of the conflict as hitherto known. In this way there *is* an important distinction between a dispute which has been reduced into a form suitable for a court's determination, and one which has not been so reduced.

This is very clearly illustrated by the *Hostages* case⁸ between the United States and Iran, before the International Court of Justice. You will recollect that the application brought successfully by the United States (it was indeed one of the few cases of unanimous decision by the Court) was over the treatment of its diplomatic representatives in Tehran, and breaches of the law concerning diplomats. Iran decided not to appear before the Court, or to offer any formal pleadings. It did, however, put in a considerable legal argument in a communication to the Registrar of the Court (you will realise that a non-appearing party is nevertheless a party, and the Court will have provided it with all documents and will itself necessarily have been in constant formal communication). Part of this Iranian argument, which was considered by the Court, was about the nature of the dispute itself. The salient passage was this:

⁶ For text of revised Rules of the International Court of Justice, see (1978) 17 *I.L.M.* 1286.

⁷ [1984] *I.C.J. Reports* 18.

⁸ [1980] *I.C.J. Reports* 3.

For this question [i.e. the question submitted to the Court by the United States] only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, the numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.⁹

So, according to the Iranian Government, the Court 'cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years'.

Now it is obvious that the Court could not – and Iran was indeed assuming that it could not – undertake to examine in general terms 25 years of the history of relations between Iran and the United States in relation to 'all international and humanitarian norms'. That is not a justiciable issue; it is a matter for historians of international relations, perhaps; but not for a court of law. The Iranian argument was that, just because the Court clearly could not do this, it therefore should not examine the one question raised in the United States' application and pleadings. The answer of the Court to this was very clear. It not only could deal, but must deal, with the specific legal and factual issues brought before it in the formal submissions of the Applicant Government. As the Court said: '... no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important'.¹⁰ It later adds:

Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them.¹¹

Note here what it is that the Court can and should decide: not the legal questions raised in general terms by Iran, in its reference to all international and humanitarian norms but only 'the legal questions at issue between them'; that is to say, put as formal submissions raising specific issues between the parties; with which alone a court can deal. This is not to say that those other potential legal issues which might be distilled into specific issues but were not, might not be just

⁹ Ibid., p.8.

¹⁰ Ibid., para. 37.

¹¹ Ibid.

as important as those which were. But it is those which have been reduced by pleadings and submissions which alone the Court can and must determine.

Of course, thus to identify and dispose of questions which are but part, even a minor part, of a much larger political dispute or situation, may be an important contribution to the amelioration, or even the settlement, of the larger problem. Indeed it was in the *Hostages* case, for the hostages were eventually released and the Iran/US arbitral tribunal was established in The Hague where it is still dealing with the hundreds of legal issues arising from the dispute. As it was also in the *North Sea Continental Shelf* cases,¹² where the settlement by the Court of one legal question of general principle enabled negotiations to continue towards a rapid settlement at a political level.

Having now established the difference – a difference which may be considerable, and one not merely of form but of substance – between a dispute which has been thus reduced to justiciable form, and those that have not, it will be appreciated that we have already significantly modified the task of the judge faced with politically delicate questions. The preliminary procedures themselves will have narrowed the dispute to specific issues of law or fact, which are also, at least in a formal sense, divorced from their general context of political grievance. This of course is one very good reason why governments are rightly cautious before taking a dispute, even a mainly legal dispute, to adjudication or arbitration: the character of the dispute changes rapidly before their eyes and the changes are not wholly within their own control.

Nevertheless, the processed issues in their final form may still have a very strong political significance. The very juridical choices that the judge may have to make may themselves have a political importance which is far greater than their juridical importance. One need only think of the *Austro-Germany Customs Union* case which proved such an embarrassment to the former Permanent Court of International Justice, in which the question which appeared before them for decision, though it appeared in strictly juridical form as the interpretation of a treaty, was itself a major political issue of the day.

What then should a judge do when faced with this kind of question? How should he comport himself if he is aware that his choice may be politically momentous, however technical it may be in juridical terms? Obviously there is no rule of thumb answer to these questions. The good judge will certainly be aware, or take the trouble to make himself aware, of the political issues; and it is far better that he should have them in mind rather than attempt to venture blindly into politically perilous areas. Nevertheless, I believe that there are certain

¹² (*F.G.R. v. Denmark, F.G.R. v. Netherlands*) [1969] *I.C.J. Reports* 3.

juridical imperatives which must be observed, and which provide a kind of frame within which a court should operate in such matters. Let me try to state them, for I believe that a court ventures outside those limits at the peril of its authority and respect for its decision. What, then, are these limits?

There is one thing that a court when making and writing its decision should have constantly in mind. It is this: that the quite particular authority and obligatory character that a court's decision has, and which distinguishes it from other more or less political modes of decision, derives from the quality it should always have, of being seen to be a pronouncement and application of existing law. The decision must be clearly derived from the formal sources of law recognized by the law. This may not be an easy thing to do at a time when the law is in process of changes which affect the sources themselves. The symbiosis of treaty and custom; the lingering doubts about what the 'general principles of law' may be; the appearance of purposely ambiguous concepts such as 'soft law'; these all make an international court's task more difficult and more dangerous, but also more important and influential.

Of course the parties who have recourse to a court desire themselves a decision in accordance with the law. Governments which agree to have recourse to adjudication or to arbitration, for example to determine a sea boundary which negotiation has failed to settle, are not seeking the opinion of three, or five, or even fifteen elderly gentlemen on where *they* think the boundary should be. They are seeking a decision according to law, supported by correct legal reasoning that will stand up to analysis and examination. Certainly the International Court of Justice is empowered by its Statute to make a decision not according to law but *ex aequo et bono* if the parties ask it to do so.¹³ It is not without significance that this provision was virtually unused in the Permanent Court and has never been invoked before the present Court.

Even where a judgment is innovative these conditions can and should still be fulfilled. In a sense the *Injuries*¹⁴ case no doubt made new law; but it was based upon views and experience that went back to the days of the League of Nations. The new concept of the genuine link of nationality in the *Nottebohm*¹⁵ case was based firmly upon the rationale of the long established idea of master nationality in the case of dual nationals. The *North Sea Continental Shelf* cases gave new directions to the law, but they were based upon an examination of the inferences to be drawn from the established practice of States in this matter.

¹³ Statute of the I.C.J., Art. 38(2).

¹⁴ *Reparations for Injuries suffered in the Service of the United Nations Case*. Advisory Opinion. [1949] I.C.J. Reports 174.

¹⁵ (*Liechtenstein v. Guatamala*) [1955] I.C.J. Reports 4.

As to the importance of employing the law's authority in those cases that are of prime political import, we need surely go no further than some of the great common law decisions of the seventeenth century. Take for instance *Entick v. Carrington* (1765),¹⁶ a landmark in the history of civil liberties, by which the powers of the Crown were much restricted in favour of the liberty of the subject. How do the judges of the Court of Common Pleas set about deciding this intensely political question? Certainly not by opining that an invasion of private papers by the King's messengers is in their view undesirable. Hear then what Lord Camden C.J. had to say of the King's messenger who admits the fact of breaking and entering the plaintiff's premises in order to seize his private papers:

If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the Judges, who are to look into the books; and see if such a justification can be maintained by the text of the Statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.¹⁷

There is an old and well-known international case which shows the fate that may befall a decision which, though by a judge, is not an application of the law. In 1831, in the *North-Eastern Boundary* case between Great Britain and the United States, the King of the Netherlands was asked to determine a section of the Canada/US boundary which had been delimited by the Treaty of Peace of 1783, and the course of which according to the treaty provision, the boundary commissioners had been unable to agree. The arbitrator found that the relevant provision of the treaty was so vague that he was unable to reach any firm conclusion on the basis of it; so instead he defined a line of his own invention and which he recommended as being suitable. The United States immediately protested the award on the ground that the arbitrator, in making a subjective decision instead of an award based upon the law, had exceeded the powers conferred upon him. Great Britain made no effort to disagree and the decision was thereafter ignored. It is interesting to note that the late Sir Hersch Lauterpacht was particularly severe in his comments on this case, saying: 'An arbitrator who arrives at a final conclusion, that a provision of a treaty means nothing, has failed in his duty as a jurist and a judge'.¹⁸

¹⁶ 19 *State Trials* 1030, (1765).

¹⁷ *Ibid.*, 1066.

¹⁸ Lauterpacht, *op. cit.*, p. 131.

One can express this same idea in terms of the justice which a court of law must administer. The court must surely do justice. But the justice which a court of law must seek is not abstract justice but justice according to law. This means the justice that comes from the application of rules and principles which are applied uniformly and impartially to the class of persons with which the rules or principles are concerned. It also implies thereby a degree of predictability. Even equity, if and in so far as it is part of the law, consists of rules and principles and so differs from a complete discretion of the kind that would be necessary for a decision *ex aequo et bono*. From the consequences of justice according to law there can be no exemption for particular parties on grounds of policy or even of expediency. This point about justice has however been put much more eloquently than I can make it by the late Judge Sir Gerald Fitzmaurice:

... justice is very seldom achieved by directly aiming at it: rather it is a by-product of the application of legal rules and principles, a consequence of the general order, certainty and stability introduced into human and international relationships through the regular and systematic application of known legal rules and principles, even if these rules and principles are not always perfect and do not always achieve ideal results in every case.¹⁹

And again:

... the idealist who puts justice above law in matters where legal elements are involved, will usually automatically fail to do justice, because in fact the parties will normally have taken up their stand, or will have come to their existing position, on the basis that the law exists, that it is applicable, and that it will be applied. They may not take an identical view of what the effect of the law is, but they will each have had some view, in the light of which they will have acted, and which they will regard as determining their respective rights. To say to the parties at that stage that all this is irrelevant, and the matter must be determined by the light of nature, so to speak, is itself to work injustice.²⁰

How then is a court to set about ensuring that it administers this justice according to law? There are certain fairly obvious rules to bear in mind, obvious yet easily forgotten in the heat of making a decision. The judge, for example, will be most careful never, either for a political reason or because of a subjectively desired result, to prefer a weak juridical argument to a clearly stronger one. In interpreting a treaty, the legal force of which arises from the agreement of the

¹⁹ (1953) 38 *Transactions of the Grotius Society*, p. 135 at p. 147.

²⁰ *Ibid.*, p. 145.

parties, the judge will not seek to give it a meaning which the actual parties to the agreement clearly did not intend, or perhaps can even be shown to have rejected; and he will do this even though he may find himself subject to the temptation to consider that the parties would have given it that meaning had they been as wise as he. In dealing with areas where the law is sparse or inadequate, he will not suppose that he has a clean slate to draw on as he himself thinks fit, but will have very much in mind the classical dictum of the *Eastern Extension, Australasia and China Telegraph Co. Ltd.* case of 1923:

International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find – exactly as in the mathematical sciences – the solution of the problem.²¹

I believe also – and I accept that this is not a condition which has always been thought as important by the International Court itself, or even by arbitral tribunals, as I myself would think it – that a judge should hesitate to rest a decision on a point of pure law if the parties have not argued it, or indicated that they were aware of it, before the court. If necessary the parties should be called back to argue the point; or at least given the opportunity to comment upon it. The reason is this: where a decision is not based upon arguments which the parties themselves have thought of and argued, there must always be an uneasiness that it was not that the new point was felt to be juridically compelling, but that the decision came first and the legal reason was found later. This unease is exacerbated where the point of law itself appears to be innovatory.

Clearly, however, we cannot leave things there. It is easy enough to say that courts must apply the law no matter how politically coloured a case may be. But what law is it to apply? We all know that, within limits, the courts themselves make law. In this country indeed we even speak about judge-made law. And in international law things are little different; with the greater availability of law reports international law itself has become very much a case-law subject. This means that, even keeping well within the framework of a strictly juridical decision, the courts have to make choices. Suppose, then, that in a highly political case, the judge finds that the law itself offers him alternative roads down which he may, as a lawyer, choose to travel. Suppose also that there is a nice balance of cogent legal argument on either side; as the arguments of the parties

²¹ (1923) 4 *R.I.A.A.* 112.

may already have demonstrated very clearly. And suppose further that this choice already difficult to make on purely juridical grounds is certainly going to be a politically crucial choice. Yet choose he must. What is the conscientious judge to do?

The first thing to say is that the good and conscientious judge should also be politically sensitive and that he should have made himself fully aware of the political significance of the choices with which he is faced. A good judge should know what he is doing, and not only in a purely technical sense. There is nothing to be said for a selective ignorance. Indeed in international tribunals such an attitude is hardly possible because counsel will very likely have warned of all the pitfalls. So on occasion an international judge may have to make a choice in which political as well as purely juridical considerations play a part. Moreover, he cannot avoid the difficulty by finding he has no jurisdiction in respect of political questions – though that has sometimes been suggested – for we have agreed, if I have carried you with me thus far, that this is not a possible distinction.

So, where this stark choice of juridical argument arises, though it will rarely be so stark in practice, the court may have to make a decision with the help of non-juridical considerations, which is to say considerations that broadly are political. These considerations may sometimes be relatively unimportant; but may be very important indeed. Well, we have already had occasion to look at one of the famous constitutional law cases of an English court in the seventeenth century; and if we look at the line of those cases in a constitutional law case book, we can be left in no doubt whatever that, though the court was always astute at keeping within a framework of juridical reasoning, it often was also pointing the law in the direction of one political result rather than another. If this has been the experience of domestic courts, not so much in times of stability, but most certainly and clearly in times of political ferment and struggle, then there is surely no reason to suggest that international courts may escape from this kind of task. Nor perhaps should they wish to do so, if they are ambitious to fulfil their proper role in an international community governed by law.

There is as a matter of fact, so far, relatively little experience of this sort of situation coming before international tribunals. The reasons for this are mainly two. Jurisdiction being based on consent, the consents given do not commonly cover the kind of case where highly politicized questions are likely to arise. A glance at the reservations made in declarations under the optional clause of the International Court's Statute will quickly dispel any doubts on this point. (Of course the common case of land or sea boundaries is always politically sensitive;

but it is also one where a wholly juridical answer is possible and indeed desired by both parties.)

Another reason for the rarity of the starkly political questions before international tribunals is that, although one way and another there is today a great deal of litigation going on, there has been relatively little between countries of greatly different ideologies or cultures. Yet perhaps such litigation is now beginning to be seen; and that is indeed a sign of the general health of international law despite the common belief that it is otherwise. One cannot fail to be impressed by the simple fact of the existence of the Iran/United States Claims Tribunal in The Hague; and that it is now working remarkably smoothly, exceedingly difficult as its task must be. It may be then that the International Court of Justice and other international tribunals can expect to be faced with politically sensitive cases more and more. And if political decisions do fall to be made, there is one quality of international law itself which must govern the matter.

International law is, and must be if it is to fulfil its proper task, a universal system of law. It must not belong to any particular culture or for that matter any particular ideology. This should be clear from Article 9 of the Statute of the International Court of Justice concerning the election of the judges, in which it is provided that the electors 'shall bear in mind not only that the persons to be elected should possess the qualifications required; but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured'. This make-up of the Court is necessary not merely to assure some sort of fairness of distribution, but also because the Court is required to interpret and apply a law which comprehends those different forms of culture and of civilization. In these days of ideological frontiers, that is not easy of achievement. But it has to be done if the Court is to perform its task as a world court. It has so far as possible to be impartial and, as it were, neutral between different ideologies and cultures, because it administers international law; and an international law which does not apply impartially and generally, is a contradiction of terms.

The International Court of Justice used, indeed, to be subject to much criticism on the ground that it tended to be weighted in favour of what was called a western view of international law. It is good that, at the present time, it is not only busier than it has ever been before in its history, but that a large proportion of the issues brought to it in these busier days have been brought to it by countries of the Third World.

Yet our question remains; and indeed perhaps we have even succeeded in making it even more difficult than at first appeared. How exactly is one to set

about making a choice between political alternatives if one is also required in a broad sense at least to be politically neutral? Is it after all then just a matter of more or less skilfully attempting to lend juridical authority to political decision by clothing it in an acceptably juridical form? Well, certainly such expertise may have to play its part, and it would be wrong to say otherwise. The reduction of matters of politics and passion into matters of juridical technicality is the very civilizing purpose of law. And even when the choice between political courses appears stark, there are still juridical considerations that will help.

For instance, a court seeking to apply the law will be much more likely than a more political tribunal to give some preference to the solution which seems the more likely to be acceptable not merely to the parties to the litigation, but also to the international community in general, and for that very reason to result in a strengthening of the general fabric of the law. For a court must have in mind not only the juridical issues raised directly by a case, but their place in the context of the law as a whole.

Here it is apposite to remember one aspect of international law in general, which is closely linked with that quality of universality which the International Court is, by its Statute, designed to ensure. It is a common-place today to speak of our much divided world; indeed one seems sometimes to get the impression that it is the one aspect of international relations that excites the interest of the media. What, however, passes for the greater part unnoticed is that in this culturally, ideologically, and economically divided world, it is international law itself which provides a common language; the language in which these very differences are described and defined, explained, and the differing aspirations propagated. Take for example the way in which the political and economic aspirations and demands of the Third World, appear in the form of mainly juridical argument. The New International Economic Order is largely a statement of legal propositions which, it is argued, either are already, or should shortly become, part of general international law. Or, and this is in some ways an even more striking example, think of the ten years of the Third United Nations Conference on the Law of the Sea, at which blocs of States expressed and prosecuted their many and often conflicting political aims in the form of draft articles of an international convention: developed and developing, coastal and land-locked, naval and non-naval powers, the straits States and the oceanic States, the shelf-locked and those without continental shelves, and many others.

So political differences do, so to speak, come to meet the law half-way. Against the much noticed tendency to politicize questions, we have to set the perhaps more important tendency to cast political questions and disputes in legal form. It is partly that in legal form they are stronger. It is partly also because in

international relations, demands for a new kind of justice do take the form of demands for a new kind of justice according to law; and for this we must be thankful.

That a tribunal is therefore likely to be faced with political disputes only where the arguments have already been cast in a juridical form must be of considerable assistance in its task. In making its choices, the tribunal will, however, always be conscious that even though courts do make law, their function is not one of legislation. Therefore the question must still be asked whether a possible decision is sufficiently and reasonably derivable from existing law. The turning of the old law in a new direction is always possible for a court; and many leading cases of both domestic and international law illustrate that proposition. But the making of a new rule of law from scratch, however desirable it may seem to be, is not within the proper province of a court of law. It cannot be said too often that the justice it is called upon to administer is justice according to law. It may build even with ingenuity; but it must be seen to build, however innovatory the result, only from existing and known materials.

It must also be remembered that the right way forward is not always – one might even say is seldom – simply between apparently opposed propositions of law reflecting opposed political points of view. So often the way forward is one which is rather the product of the opposing viewpoints. The truth is often reached through the ambivalence of apparent opposites. Think, for example, of the way in which the international law concerning investments seemed only a few years ago to present two directly conflicting juridical ideas: sovereignty over natural resources and the principle of *pacta sunt servanda*; and how both are now tending to be subsumed as merely elements of a much more elaborate system in what is now called development law. Even an apparently stark choice between opposites may point to a new way forward which has some place in it for both ideas.

I have been speaking almost entirely about courts and arbitral tribunals as a means of settling international disputes. It must not be forgotten that, where a more frankly political statement is desired, there are those other ways of dealing with disputes: negotiation, conciliation and mediation, as well as many others. Governments will often, perhaps most often, prefer those methods, if only because they do not at any stage before settlement actually lose control of the dispute in the way that inevitably happens in the court of law. The moment when the talking has to stop and the question is to be left solely with the private deliberations of the bench must always seem an unattractive moment to governments.

Yet when governments do opt for juridical settlement, it is a juridical settlement they want, with juridical reasons based upon known law; not some kind of juridically rationalized compromise or formula of expediency. If courts are to have an increasing role in the settlement of international disputes – something much to be desired – it is important for them always to remember that it is a method that should be seen quite clearly to be different from the others, in that it can only be within the possibilities of the reasonable interpretation of the existing law. Within that framework of limitations, however, there is plenty of room for wise and sound development to meet new situations. And where the requirements of decision according to law are indeed fulfilled, the authority and influence of the judgment of an international court or tribunal is far greater than many people, or even perhaps governments, realize.

Bin Cheng

III. WHITHER INTERNATIONAL LAW?

The Josephine Onoh Memorial Lecture 1987

It is for me an immense honour and privilege to have been asked to give the third Josephine Onoh Memorial Lecture. The high distinction of my two predecessors in this series of lectures has made my task all the more formidable.

If, for a moment, we turn our thoughts to the origin of these lectures and of the Josephine Onoh Memorial Fund which sponsors them, we will see that their very existence is itself full of significance. The Fund was established by the family and friends of Josephine Onoh in her memory. Miss Onoh was a student from Nigeria pursuing in this University postgraduate research in the field of international law, when tragically she lost her life in an air crash. Appropriately, the Fund is being used to encourage and support the study of international law.

What in reality is this international law which Miss Onoh came all the way here to learn, and the study of which the Fund in her memory is encouraging and supporting?

I. INTERNATIONAL LAW FACING A CRISIS OF IDENTITY

International law today faces a crisis of identity. What is it that we call international law? What is its exact nature? Is there more than one international law? Is this international law any different from the law we encounter everyday? How and by whom are its rules made? How and by whom are its rules changed?

That such questions should now be asked is only a reflection of current changes, divisions and tensions in international society.

II. SOME OF THE CAUSES OF THE PRESENT CRISIS IN IDENTITY

The causes of international law's present crisis of identity are multiple and complex. I hope I may be permitted simply to mention some of the more obvious ones, and to do so in very broad brushes.

One of the key reasons is undoubtedly the rapid transformation of the international society since the First World War (WW-I). In order to appreciate the extent it has changed, and how the changes have affected international law, we need to take a look at the situation before. One has to know the past before one can assess the present.

A. *Growth of the Primarily European Law of Nations between 1815 and 1914*

Between the Napoleonic wars and WW-I, metropolitan Europe enjoyed an unprecedented by long period of peace, notwithstanding a few minor hiccups and the numerous colonial wars, and also an equally unprecedented increase in prosperity, thanks largely to the Industrial Revolution and Europe's incessant colonial expansion.

Whilst before the Industrial Revolution, Europe was often willing to accept and recognise non-European communities as equal members of a universal society, after it Europe, with its vastly increased technological and military superiority, developed a huge superiority complex and more or less regarded the outside world as only fit to be colonised.

At the time of the Vienna Congress what was then known as the Law of Nations was often referred to as the Public Law of Europe or of Christendom, applicable exclusively to the charmed circle of the Christian Family of Nations of European stock.

During this period of almost exactly one hundred years, this law which governed a thus highly homogeneous international society bound by race and religion developed at a tremendous rate on account of the continual expansion in international intercourse between its members and their people, whether private or official, and whether in peace or in colonial conflicts.

After the American Civil War, the United States emerged as one of the Great Powers. Meanwhile, Jeremy Bentham introduced the term international law. The case of the *Alabama* which arose out of the exploits during the American Civil War of this and several other Confederate ships built in Britain seriously threatened a war between Great Britain and the United States. The *Alabama Arbitration* (1872) which peacefully settled the dispute between two Great Powers raised the prestige of international law and international arbitration to a height which they have since never been able to regain. The popular myth that

sprang up then was that by themselves international law and arbitration alone could and would replace war, although in reality the reasons which led Great Britain to agree to arbitration were far more complex.¹ Be that as it may, as an illustration, it was this enthusiasm for international law generated by the arbitration which led to the establishment of the many organisations designed for the promotion of international law and arbitration, such as the *Institut de droit international* and the International Law Association. Both survive to today.

The doctrine of international law also benefited from this climate. It coincided with the rise of legal positivism which helped the writings on international law to be much more analytical and scientific and much less aprioristic. There was also more to write on. International law was enjoying a period of growing self-confidence. This was partly shown in the codifications at the First and Second Hague Peace Conferences of 1899 and 1907.²

This rather self-confident Law of Nations between 1815 and 1914 operated in a highly self-assured, homogeneous, and stable international society where states, big and small, knew their places or were, as the case may be, very much kept in their places. For instances, in those days, states were neatly divided into two classes, those with and those without 'royal honours'. The former were entitled to establish Embassies and thus to send and receive Ambassadors, while the latter were entitled to have only Legations and to send and receive only Ministers.³ Ambassadors of course ranked in law above Ministers, as was clearly established at the Vienna Congress in 1815.

According to the second edition of Oppenheim's *International Law* published in 1912, the last edition by Oppenheim himself, there were at the time altogether 46 fully sovereign states in the world, 'real members of the Family of Nations', 23 in Europe, 21 in the Americas, 1 in Africa (Liberia), and 1 in Asia (Japan).⁴ 'Morocco and Abyssinia are both full-Sovereign states, but' were, like 'Persia, China, Siam, Tibet, and Afghanistan ... for some parts only within that family'.⁵ Only Christian states, therefore, with the exception of Turkey and Japan, were full members of this Family of Nations, to which international law was applicable.

Within this cosy 'Family of Nations', a clear political, albeit non-legal, distinction was made between those which ranked as Great Powers and those

¹ See Bin Cheng, 'On the Nature and Sources of International Law', in Bin Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens, 1982), pp. 203-233 at pp. 214-215.

² See A. Pearce Higgins, *The Hague Peace Conferences* (Cambridge: CUP, 1909).

³ L. Oppenheim, *International Law* (2nd ed.) (London: Longmans, 2nd ed, 1912), para. 117(1).

⁴ *Ibid.*, paras. 108-111.

⁵ *Ibid.*, paras. 110-111.

which did not. It is interesting to see what, in Oppenheim's opinion, was the relative position of those two groups of states:

'Eight states must at present be considered as Great Powers – namely, Great Britain, Austria-Hungary, France, Germany, Italy, and Russia in Europe, the United States in America, and Japan in Asia. All arrangements made by the body of the Great Powers *naturally* gain the consent of the minor states, and the body of six Great Powers in Europe is therefore called the European Concert. The Great Powers are the leaders of the Family of Nations, and every progress of the Law of Nations during the past is the result of their political hegemony, although the initiative towards the progress was frequently taken by a minor Power'.⁶

However, the law that regulated such an orderly family of nations, as Oppenheim pointed out, was applicable strictly between its members.

'[It] *naturally* does not contain any rules concerning the intercourse with and treatment of such states as are outside that circle. That this intercourse and treatment ought to be regulated by the principles of Christian morality is obvious. *But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous*'.⁷

So this Law of Nations *naturally* did not contain any rules that provided how members of this select Family of Nations should treat all the communities they had excluded from their charmed circle, or the indigenous population in their territories which they had either colonised or appropriated as their own. This meant that, insofar as the then international law was concerned, Europeans plus perhaps the Japanese and the Turks were free to indulge in such arbitrary and barbarous practices as they saw fit towards all the indigenous peoples outside Europe and all the non-European states which were not admitted into this exclusive Family of Nations. That law also legitimised colonialism by allowing the latter's land and territories to be treated as *res nullius*. Therein lay the seeds of much of the discord to come.

⁶ Ibid., para. 116. Italics added

⁷ Ibid., para. 29. Italics added.

B. The Inter-War Period

However, by the turn of the century, tension mounted within the European Concert itself which led inexorably to WW-I. The emergence of the Soviet Union marked the first major schism in what had thitherto been regarded as a monolithic international law within a homogeneous society, although for some time before there had been claims of discrete Latin-American International Laws. However, Latin American International Law never denied that it formed part of the universal system. Apart from some regional rules applicable primarily *inter se* such as diplomatic asylum, it consisted merely in upholding what Latin American countries considered to be the correct rules, such as the Calvo Doctrine, Drago Doctrine and the standard of national treatment of aliens instead of the international minimum standard. But these were merely the natural reactions of capital-importing countries, especially vis-à-vis the gun-boat diplomacy practised not infrequently by some of the capital-exporting countries at the time in protecting their nationals and their investments. Such dissents are inevitable whenever there is a great divide between the countries concerned, in their national interests, resources, wealth or other conditions. It is a phenomenon that is not dissimilar to the respective positions and attitudes of the 'haves' and the 'have-nots' towards law in domestic societies. The emergence of such dissents is merely a symptom of the gradual loss of the kind of homogeneity that existed among the hard core of European states with the arrival of the then relatively new developing Latin-American states.

The arrival of Socialist international law, said to be based on proletarian socialism instead of bourgeois capitalism, challenged, at least in theory, the very foundation of traditional international law. However, in due course ideology gave way to realism and pragmatism, and Soviet international law meant not much more than the adoption of an ultra-conservative approach to traditional international law with great emphasis on state sovereignty. This again is perfectly understandable. First, the Soviets soon learnt to their cost that total rejection of traditional international law would deny the Soviet Union the benefits of traditional international law, including respect for its territorial integrity. Secondly, since at the time the Soviet Union was the only socialist country in the world, which was looked upon mostly with suspicion by the others, it made sense for it to insist as much as possible on the principle of sovereignty and the need for consent.

By then, the Family of Nations had lost a great deal of its pre-WW-I ideological, economic and political homogeneity. Matters were not helped by the United States' refusal to join the League of Nations, its increasing isolationism, the Great Depression, and Britain and France being militarily only a shadow of

their former selves. In the end, attempts by Japan, Italy and Germany respectively to establish their New Orders in Asia, Africa and Europe in complete defiance of international law, which were in effect unchecked by the other Great Powers until war was brought virtually to their own doorsteps, led eventually to WW-II.

During this whole inter-war period, the accommodations that were often necessary to bridge the gaps between different sections of the international legal system led inevitably to fragmentation, opportunism and bilateralism in the practice of international law and uncertainty in the doctrine. It was hardly surprising that the League of Nations efforts to codify certain aspects of international law, which were deemed at the time to be 'ripe for codification', ended, as in the case of the law of the territorial sea and of state responsibility, in utter failure.

From the standpoint of international law, perhaps one of the most important achievements of this period was the creation of the Permanent Court of International Justice. The pioneer work it performed, together with the awards of the numerous claims commissions, and arbitral tribunals that were established during the same period, lent respectability and weight to international judicial and arbitral decisions as evidence of the rules of general international law. When the large number of such awards is added to those since the beginning of modern international arbitration (marked by the Jay Treaty of 1794 between Great Britain and the United States, hitherto often erroneously deemed to be mere political compromises and much neglected) it is possible to compose a credible picture of what those rules were, based on their own testimony. Whilst international judicial and arbitral decisions are not binding precedents, being firmly anchored on state practice, they do provide the best impartial evidence of the actual rules of international law.

In fact, it is possible to separate international law as practised directly or indirectly by states into different grades: auto-interpretative, justiciable and judicial.⁸ The auto-interpretative grade that is practised when states in dispute insist on their own interpretation of the law and of the facts, and refuse in principle or in practice to accept third-party settlement. Unfortunately, in international law states are perfectly entitled to do this.⁹ It is indeed one of the

⁸ See further Bin Cheng, 'Custom: The Future of General State Practice in a Divided World', in R.St.J. Macdonald and D.M. Johnston (eds.), *The Structure and Process of International Law* (The Hague: Martinus Nijhoff, 1983), p. 513, sect. III: The Three Grades of International Law, at pp. 522-526. N.B., pp. 545 and 546 are wrongly paginated and have been transposed. See also Cheng, loc. cit. in note 1 above, sect. III, at pp. 209-215.

⁹ See *Eastern Carelia Case* [1923] *P.C.I.J Reports*, Series. B, No. 5, p. 7, at p. 27.

special features of international law being a horizontal legal system instead of a hierarchical legal system like municipal law.¹⁰ It is this feature which many municipal lawyers, not versed in international law, are often ignorant of, or find difficult to understand.

Justiciable international law is that practised by states which are willing, or are under a previously undertaken legal obligation, to resort to third-party arbitral or judicial settlement. Justiciable international law would normally be a much more reasonable grade of international law than auto-interpretative international law. Finally we have the highest grade, namely, judicial international law as interpreted and applied by international courts and tribunals.

The increasing and noticeable shift in both practice and doctrine in the post-WW-II era from relying on individual state practice and the opinions of publicists to accepting international judicial and arbitral decisions as the best evidence of international law¹¹ is probably one of the most important legacies of the inter-war period.

C. Post-WW-II

Reference has just been made to the welcome increase both in doctrine and the actual practice of international law of reliance on judicial international law as evidence of the rules of international law. Judicial international law helps to bring some objective and verifiable yardstick, and the best evidence yet, as to the existence and contents of the rules of international law. This permits a much more scientific approach to the ascertainment and study of the rules of international law by both the student and those called upon to apply them.

From this point of view, the publication by the United Nations of many of the past arbitral awards in its series of *Reports of International Arbitral Awards* is greatly to be welcomed. Previously, as my own experience has shown, finding those awards mostly meant endless quests, much disappointment, and required

¹⁰ On this subject, see Cheng, loc. cit. (1983) in note 8 above, sect. II.4: International Law is a Horizontal Legal System, at pp. 519-521; also Bin Cheng, 'The Legal Regime of Airspace and Outer Space: The Boundary Problem; Functionalism *versus* Spatialism: The Major Premises', (1980) 5 *Annals of Air and Space Law*, p. 323, sect. 4.2.1, at pp. 332-333.

¹¹ See G. Schwarzenberger's *International Law as Applied by International Courts and Tribunals*, first published by Stevens in London in 1945, which was eventually expanded in subsequent editions to four volumes. Schwarzenberger published the following year his seminal article on 'The Inductive Approach to International Law' in (1946-47) 60 *Harvard L.R.*, p. 539. See also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens, 1953), which was among the very first to have extended its investigations to all the international arbitral decisions since the Jay Treaty arbitrations of 1794.

dogged perseverance and an element of luck. Often there was not a single copy that was easily accessible or available in the country, and the search had to be extended abroad.

However, since WW-II various negative forces have also been at work.

1. *Decline in Esteem*

The failure of the League of Nations, the war itself, and the advent of atomic weapons made the world very sceptical of the efficacy and usefulness of international law in the maintenance of international peace and security. Some even considered that talks of law and justice could at times be a hindrance to the maintenance of international peace and security which was accepted by all as the supreme objective.

Thus, in the drawing up of the Charter of the United Nations, there was considerable resistance to the insertion of the words 'and justice' into its Article 2(3). For the same reason, Member States, under Articles 2(7) and 25, and Chapter VII of the Charter, entrust the Security Council, in which the five Permanent Members are well entrenched, with absolute and sovereign powers to maintain and restore international peace and security in any manner it sees fit, untrammelled by legal or any other considerations, not even the sanctity of their domestic jurisdiction.

In practice, international law has not enjoyed the highest priority in the Organisation either.¹²

The same mood was very much reflected in the immediate post-WW-II period not only in the doctrine of international law with its emphasis on the role of power, but also in law schools. Granted that there were additional causes, including heavy pressure from new subjects, many law schools, apparently more so in Common Law than in Civil Law countries, were dropping international law as a compulsory subject in the curriculum.¹³

¹² Cf. Bin Cheng, 'International Law in the United Nations', (1954) 8 *YearBook of World Affairs*, pp. 170-195.

¹³ If the countries examined can be taken at least as a guide, contrast the position in the United Kingdom with that in France and Austria as surveyed by respectively Professors E.D. Brown, Jacqueline Dutheil de la Rochère in their respective chapters, and Konrad Ginther in his Note, in Bin Cheng (ed.), *International Law: Teaching and Practice* (1982), Part IV, pp. 165-200. It is rather curious that this book has been described by Associate Professor P.H. Rohn as mostly 'on practice' (paper presented at the session on 'Reexamination of the Teaching of International Law' presided by Professor Christopher Osakwe as Moderator at the 1984 Annual Meeting of the American Society of International Law, (1984) 78 *A.S.I.L. Proceedings*, p. 202 at p. 203. While he appears to equate teaching primarily with the mechanics of it in a political science department at that, surely he would not deny that the problem of the identity and identification of international which forms one of the four Parts of the book is not merely relevant, but in fact

The low esteem with which the learning of international law is sometimes held has probably been accentuated in Common Law countries by the highly vocational bias of their legal education.¹⁴ This may perhaps be seen in what was said not so long ago in the United Kingdom by Sir Frederick Lawton, one of Her Majesty's Lords Justices of Appeal and the Chairman of the Advisory Committee on Legal Education, in the Tenth Lord Upjohn Lecture organised by the Association of Law Teachers

'Attempts at law school to remedy possible defects in school teaching in introducing into the syllabus such subjects as ... dare I say it, public international law, are, in my opinion, a waste of time and energy'.¹⁵

In the United States, Professor G.A.G. Gottlieb, speaking at a recent Annual Meeting of the American Society of International Law on the teaching of international law, lamented:

'In nearly 20 years of teaching in this field, I have rarely found the academic community less interested or committed to the advancement of international law.'¹⁶

Inevitably this can have an effect on the general level of awareness and understanding of international law problems among the non-international lawyers, not to mention laymen, in the countries concerned.¹⁷

central to the teaching of international law. Professor G.A.G. Gottlieb, speaking as a member of the same panel, seems to think so. *Ibid.*, p. 208 at p. 211. Cf. also the position of another non-Common Law country, as described by an unnamed 'professor of the University of the Netherlands Antilles' in the discussion. *Ibid.*, p. 217.

¹⁴ Cf. what Sir Frederick Lawton said in text to note below as to how he assesses the importance of international law by reference to his own professional career.

¹⁵ (1980) 14 *The Law Teacher*, p. 163, at p. 164. Relevant passage quoted at some length in Bin Cheng (ed.), *International Law: Teaching and Practice* (1982), Introduction, p. xix, at p. xix. It may be of interest to mention that Sir Frederick, the following year, in a letter entitled 'Educating judges and barristers' published in *The Times*, 27 Dec. 1983, as if to make amends, praised the modern law courses of British universities for providing students *inter alia* with a view of the world 'seen through the teaching of public international law'.

¹⁶ *Loc. cit.*, note 13 above at p. 213. See also the rather sombre tales related throughout the discussions. On the influence of the absence of international law from the Bar examinations on law school curriculum and students' choice of subjects, see the Moderator's remarks, *ibid.*, p. 199.

¹⁷ See sect. 7 below: Long Shadow of Domestic Law Over International Law. See on this point the very perceptive views of the unnamed Dutch Antilles professor in the ASIL discussion mentioned in note 13 above.

2. *Decolonisation and Disaffection with the Existing Law*

Post-WW-II international society was also vastly different from the pre-WW-II world. Decolonisation more than trebled the number of players, varying greatly in size and resources, but mostly coming within the developing country category. Perhaps understandably, not a few of them when they first joined this exalted company harboured deep suspicion and even not a little antagonism towards the law that, they felt, in the past had allowed them to be exploited and oppressed. Maybe to make everyone happy, in a grossly inflationary move in the conduct of diplomatic relations, which had in any case much changed in the modern age, the previous class distinction between states that could send and receive Ambassadors, and those which could only send and receive Ministers was soon dropped.

The sheer number of the new states stands them in good stead in the Cold War, when both Superpowers tend to wear kid-gloves in handling the Third World, and proffer favours from time to time. They have not been slow in making good use of this situation, especially in the UN General Assembly, in their attempt to bring about new rules of international law or changes in the existing ones to meet many of the problems arising from the transition from colonies to independence, and particularly their status as developing countries. Most notable is the adoption by the General Assembly on 12 December 1974 of the Charter of Economic Rights and Duties of States,¹⁸ following calls for the establishment of a New International Economic Order. The resolution was pushed through by the Third World countries with the assistance of the Soviet bloc (120 in favour). The industrialised nations mostly voted against (6) or abstained (10).

If the General Assembly had legislative power or if rules of general international law could be made by numbers alone,¹⁹ international law might be quite different today, because of the preponderance in number of developing countries. However, even in that case, basically because of the *de facto* dependence of the developing countries on the industrialised nations in many areas of economic and political concern, probably relatively little would have been achieved. There have of course been compromises, especially in the field of nationalisation and struggles for independence, but matters were generally speaking soon brought under control. One can probably find here an echo of what Oppenheim said of how international relations operated in the past: while the weak may propose, it is the strong that disposes. *Plus ça change, plus c'est la même chose!*

¹⁸ A/RES/3281 (XXIX); (1975) 14 *I.L.M.* 251.

¹⁹ Both are of course not possible. See sect. 5 below: 'New International Law'.

Nevertheless, the evidence is there that a large number of states are unhappy with many aspects of the law as it is, and the desire for change is by no means confined to the new states.

3. Technological Developments and Desire for Change

The rapid advance in technology spurred on by WW-II also prompted desires for new rules or for changing a number of the traditional rules of international law, such as those relating to the exploitation of the resources of the continental shelf, the high seas, the seabed and its subsoil; the testing and use of nuclear devices or fuel for peace or war; and the exploration and exploitation of outer space and celestial bodies. Divergent interests are often not easy to reconcile.

4. The Revival of Natural Law in the Form, inter alia, of Human Rights

The horrors of WW-II, the atomic bomb, and what was revealed of the barbarities of the Japanese and Germans during the war, including the Rape of Nanking and the Holocaust, together with the post-war feeling of the inadequacy of existing international law, led to diverse attempts to find some higher and immanent norms of human conduct independent of the whim of states, norms that would provide criteria to condemn and even a basis to outlaw, or visit retribution on, any repetition of such behaviours or actions. In brief, there was a reaction against legal positivism, which accepted even the most barbarous laws as law, and a search for a higher law, echoing similar reactions in the European Age of Enlightenment against the *ancien régime*, and, going back even further, the heroine's invocation in Sophocles' *Antigone* of the laws of the gods against Creon's cruel and inhuman laws.

Thus in 1946 the General Assembly unanimously affirmed 'that genocide is a crime under international law',²⁰ whatever that might have meant at the time, and the International Court of Justice in the *Corfu Channel Case (Merits)* (1949), in the first contentious case of its career, referred to 'elementary considerations of humanity, even more exacting in peace than in war'.²¹

No doubt one of the most remarkable phenomena in the post-WW-II period is the spectacular development of the law of human rights. Whilst the UN Charter in its Article 1(3) merely speaks of international cooperation in 'promoting and encouraging respect for human rights' and the 1948 Universal Declaration of Human Rights purports only to proclaim 'a common standard for achievement for all peoples and all nations', there is now a clear tendency in some quarters to interpret these provisions as stating obligatory rules of international law. Whilst

²⁰ Resolution 96(I) of 11 Dec. 1946.

²¹ [1949] *I.C.J. Reports* 4, at 22.

human rights, just like justice, obviously deserve to be promoted, protected and enforced, unfortunately, except where they have been spelt out in detail and equipped with properly set out enforcement mechanism as in the various human rights treaties and conventions, they are in reality a form of natural law and, as in the case of the natural law and natural rights of yore, controversy and the possibility of abuse cannot be totally excluded. The world needs to be careful that no one will ever be led to echo Madame Roland's famous lament on the scaffold, '*O liberté! que de crimes on commet en ton nom*'.

5. 'New International Law'

In largely the same vein, especially in the immediate post-WW-II years, were the various attempts to bring about a New International Law.²² Notable were the efforts of the late Judge A. Alvarez of the International Court of Justice who in his various dissenting, separate or individual opinions never missed an opportunity to expound his very personal 'New International Law' which was, however, clearly recognisable as no more than an individual's manifesto *de lege ferenda*,²³ although many of the items in it were very much in vogue at the time.

More controversial are various new-found 'sources' of general international law, such as UN General Assembly resolutions or treaties which have been accepted by a large number of states. Under the UN Charter, General Assembly resolutions are mere recommendations except in budgetary and internal organisational matters, and, as such, are not legally binding. They are not sources of international law. In that connection, I was at pains to point this out in my paper on 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?'²⁴ and to refute the view put forward at the time by the United States, when it commanded an easy majority in the General Assembly, that unanimously adopted General Assembly resolutions could 'represent the law as generally accepted in the international community', but unfortunately there appear to be many who fail to notice the question mark in the title, to read the article, or to read it properly and blithely but erroneously group me among the supporters of the view that General Assembly resolutions are, in one way or another, as such binding as rules of general international law. They are not.

Another, in my opinion, spurious view is that when a treaty has been accepted by a large number of states, then by analogy with the formation of rules of general international law which requires only the general, but not necessarily the

²² Cf. Cheng, loc. cit. in note 12 above, The 'New International Law', pp. 187-192.

²³ See e.g., *Corfu Channel Case (Merits)* [1949] *I.C.J. Reports* 4, at p. 45; *Anglo-Iranian Oil Co. Case (Jd.)* [1952] *I.C.J. Reports* 93, at 126.

²⁴ (1965) 5 *Indian Journal of International Law*, pp. 23-48; reproduced in Bin Cheng (ed.), *International Law: Teaching and Practice*, (London, Stevens, 1982), pp. 237-262.

unanimous, acceptance of all the members of the international society, such a treaty automatically binds non-parties. Merely as a minor illustration, the seven heads of government meeting at the Bonn Economic Summit Conference in 1978, in what was known at the time as the Bonn Accord,²⁵ appeared happily to assume that the rules laid down in the 1970 Hague Convention on hijacking of aircraft²⁶ were binding on all states, violations of which called for automatic sanctions.²⁷ Apart from the authority of the International Court of Justice in the *North Sea Continental Shelf* Cases (1969),²⁸ where the Court pointed out that such a metamorphosis could not be easily assumed, the correct legal position has been clearly set out in the following articles of the 1969 Vienna Convention on the Law of Treaties:

‘Article 34: A treaty does not create either obligations or rights for a third state without its consent.

‘Article 38: Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law recognised as such.’

Such a transformation of a treaty or a treaty provision from merely a treaty obligation between the parties to a rule of general (*alias* customary) international law does not depend upon the number of parties to the treaty. It is a question of a qualitative change of the *opinio obligationis conventionalis* of the parties, i.e., that they regard the duty under the provision to be a strictly treaty obligation, to one of *opinio juris generalis*, i.e., to one where they regard the duty under the provision to be one under general international law binding on all states irrespective of the treaty.

The mistake of those who believe otherwise is mostly because they wrongly assume that the rules governing treaties are the same as those governing the formation of rules of general international law. While it is true that for a rule of general international law to be considered as being in existence, all that is required is that it should be accepted by the generality of states and not necessarily everyone of them, this is not the case with treaties. Rules of general

²⁵ Joint Statement on International Terrorism, 17 July 1978, (1978) 17 *I.L.M.* 1285.

²⁶ Convention for the Suppression of Unlawful Seizure of Aircraft, ICAO Doc. 8920; (1970) 9 *I.L.M.* 669.

²⁷ See Bin Cheng, ‘Aviation Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference’, in Lloyd’s of London Press, *Speakers’ Papers for Lloyd’s of London Press International Civil Aviation Conference No. 6, Montreal, 1984* (1985), p. 35, at pp. 38-39; J.J. Busuttil, ‘The Bonn Declaration on International Terrorism’, 31(1982) *I.C.L.Q.* pp. 474-487.

²⁸ [1969] *I.C.J. Reports* 3.

international law are not tacit treaties. A rule of general international law comes into existence not because of an agreement between states, but because there is a concordance of the individual *opinio juris* of the generality of states that it is the law.²⁹

Other variants of pseudo international law include notions like 'soft law', or the 'general consensus of the international community', with varying definitions as what they are supposed to mean, or often with no definition or explanation at all. In the circumstances, it is not difficult to see how one may be confused as to the true identity of international law. It is also not difficult to see who would benefit from such a state of affairs.

6. *Doctrinal Free for All*

Perhaps politically the most traumatic phenomenon after WW-II is an almost completely bipolarised world dominated by the Cold War that reigned between the two Superpowers. The Cold War has its obvious effects upon the application of international law between the two camps. Among other evasive tactics adopted, that favoured by the Soviet Union appears to be the direct lie regarding facts, whilst the United States seems to prefer resorting to various legal acrobatics and 'creative' interpretations.

Examples of the Soviet Union's penchant for distorting facts, which probably springs from its being able to do so domestically with impunity, include its version of events after the shooting down of the United States unarmed reconnaissance aircraft RB-47 over the Barents Sea outside Soviet territorial waters on 1 July 1960,³⁰ and more recently after the shooting down of the Korean Airline flight KE007 with the loss of life of all the passengers and crew on board.³¹

The United States, on the other hand, which appears to have many lawyers with highly agile minds, tends to take from time to time what can only be described as a very flexible, not to say very cavalier, attitude towards the law. Thus while the United States is happy to use the word 'peaceful' to mean 'non-military' in the 1959 Antarctic Treaty, it insists that in the 1967 Space Treaty the same word, in similar circumstances, does not mean 'non-military' but must

²⁹ See further Cheng, loc. cit., note 8 above, sect. V.2: The Metamorphosis of Treaty Provisions into Rules of General International Law at pp. 532-533.

³⁰ See Bin Cheng, 'The United Nations and Outer Space', (1961) 14 *Current Legal Problems*, pp. 247, 268-72.

³¹ See Bin Cheng, 'The Destruction of KAL Flight KE007, and Article 3bis of the Chicago Convention,' in J.W.E. Storm van's Gravesande and A. van der Veen Vonk (eds.), *Air Worthy: Liber Amicorum Honouring Professor Dr I.H. Diederiks-Verschoor* (Deventer, Kluwer, 1985). p. 49 and especially p. 54.

mean 'non-aggressive'.³² Other examples include the extensive interpretation of the right of self-defence in the Cuban missile crisis³³ and the more recent Libyan raid.³⁴ Then there is the interception of an Egyptian aircraft over the high seas following the *Achille Lauro* hijacking which was carried out on the basis of an alleged right to apprehend terrorists wherever they might be.³⁵ In regard to the Egyptian aircraft incident, one wonders whether the United States, in taking such action, gave any thought to the thousands of United States ships and aircraft which daily sail on or fly over the seven seas. May they not sometimes carry what other states regard as terrorists on board? Would the United States be happy to see them intercepted on or over the high seas?

Despite their being the Superpowers, neither model can be regarded as conducive to the Rule of Law in international society.

But perhaps even more disturbing is the rise of the New Haven School of Policy-oriented Jurisprudence. Born essentially of, or at least during, the Cold War, it ironically echoes the Communist theory of law in subordinating law to policy. Instead of economic policy, it is a policy based on the promotion of other values. The goal, instead of creating true Communism, is to establish a New World Order based on respect for human dignity. For this purpose, as in natural law, there is to be no sharp distinction between *lex lata* and *lex ferenda*. Whichever route that leads to the ultimate objective is the law. Borrowing a leaf from Georges Scelle's theory of *dédoublement fonctionnel*, the theory basically enjoins every 'decision maker' in every country faced with a problem of international law simply to follow the correct path. In truth, if everyone were to do so, the New World Order would be established instantly.

Policy-oriented Jurisprudence enjoys a tremendous vogue at the moment. However, it has the potential to destroy international law by fragmenting it into a myriad of separate legal orders; for what is there to prevent any state from seeking to establish the world order of its own vision, or for that matter any individual decision maker?³⁶ Rules of international law, as we have mentioned

³² See Bin Cheng, 'The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use', (1983) 11 *Journal of Space Law*, pp. 89-105.

³³ Cf. Abram Chayes, *The Cuban Missile Crisis* (London: Oxford University Press, 1974).

³⁴ 14 April 1986, described by President Reagan as 'fully consistent with Article 51 of the UN Charter'. Presidential Statement of April 14 1986, US Dept. of State, Selected Documents, No. 24.

³⁵ Cf. Statement of Larry M. Speakes, Principal Deputy Press Secretary to the US President, 10 Oct. 1985, (1985) 24 *I.L.M.* 1513.

³⁶ Thus Professor McDougal is quoted with enthusiasm by Professor R.P. Anand in *New States and International Law* (Delhi: Vikas, 1972), p. 71 *et seq.*, but would the new world orders and the laws evolved to bring them about envisaged by the two professors be the same, similar, or even necessarily compatible?

before, are established by the consensus of states, and not by individual states acting in isolation, and still less by individual decision makers.

7. *Long Shadow of Domestic Law Over International Law*

As we have seen, if the universities in the United Kingdom and the United States are a guide, a good number of law graduates in many Common Law countries may have received no formal training in international law at all. A complacent and even arrogant view is sometimes taken that, not only is international law of little practical importance, but it also should be an open book to anyone competently trained in municipal law and that studying it specifically is quite unnecessary. Thus it was said by Sir Frederick Lawton in a formal lecture on legal education:

‘What most of them [i.e., students] will not find in practice are problems of public international law, so why take up the time teaching it? I met my first problem after 42 years in the law and when I did it was not difficult to solve, even though I had never been taught the beginning of that subject.’³⁷

It is hardly surprising, therefore, to find that matters of international law are sometimes handled as if they were issues of domestic law.

Thus there is the spectacle of the British Government considering it necessary in 1939, following the decision of the House of Lords in *Philippson v. Imperial Airways, Ltd.*,³⁸ to write to the United States Department of State to dissociate itself from the House of Lords majority decision, which held that the term ‘High Contracting Parties’ in a treaty included states that had signed but not yet ratified it.³⁹ The British Government sought the assurance of the State Department that it shared the British Government’s view that the term referred only to states that were effectively bound by a treaty. The US Government concurred.⁴⁰

In more recent years, in the original English transcript that was published of the judgment of the International Military Tribunal (Nuremberg), the reference given to the well-known Webster formula of the right of self-defence in foreign territory in the *Caroline* Incident (1837) between Great Britain and the United States was 6 C. Rob.461, which was the reference to the English case of *The Caroline* decided by Sir William Scott in 1808 and reproduced in the *English Reports*. Subsequently, an *erratum* slip was issued by H.M. Stationery Office,

³⁷ Loc. cit. in note above. See also generally sect. II.C.1 above: Decline in Esteem, and note the observation of the unnamed Dutch Antilles professor referred to in note 13 above.

³⁸ [1939] A.C. 332.

³⁹ This in any event was the view of the decision taken by H.M.G.

⁴⁰ Hackworth, (1942) 4 *Digest of International Law*, p. 373; see further Bin Cheng, ‘High Contracting Parties in Air Law’, *Journal of Business Law* (1959), p. 30 at pp. 34-35.

containing the following correction: For 'The *Caroline* Case (1808) 6 Rob. 461' read 'The *Caroline* Case, Moore's *Digest of International Law*, II, 412.'⁴¹

It may well have been also municipal law thinking that led the same Tribunal, with reference to the Kellogg-Briand Pact of 1928, to make the second limb of the following rather categorical proposition in its Judgment:

'In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.'⁴²

What causes at least some eyebrows to rise is that the Tribunal appears to have enunciated, as a general proposition of international law, that what is illegal under international law is automatically a crime (under international law?), all the while without subsuming it, as the judgment could easily have done, under the confines of the Nuremberg Trial where the Charter for the Tribunal expressly provides that, insofar as those on trial are concerned, waging 'a war in violation of international treaties' is a crime against peace, 'for which there shall be individual responsibility'.⁴³

Unfortunately this municipal law approach to international law issues by eminent lawyers and officials in high places who may not have any formal training in international law or who, if they did, have since forgotten it in their long years of municipal law practice or domestic politics is not uncommon. This, plus a little help from Policy-oriented Jurisprudence, may well help to vindicate the caricature of international law painted by Sir Frederick Lawton:

'[A] student ... by the time he gets to law school ... will soon learn that public international law is what prominent politicians on the world's stage think it is, not what professors claim it is.'⁴⁴

Moreover, whether trained in international law or not, there is sometimes a tendency for municipal law thinking to seep into discussions or applications of international law. This appears to be especially noticeable in Common Law countries. In fact, Policy-oriented Jurisprudence itself may well have been influenced by the successful role traditionally played by the judges in the

⁴¹ Cmd. 6964 (1946), pp28-29, and erratum. See G. Schwarzenberger, *The Law of Armed Conflict* (London: Stevens, 1968), pp. 512-513.

⁴² Judgment of the International Military Tribunal (1946), IMT, 1 *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg* (1947), p. 171 at p. 220.

⁴³ International Military Tribunal Charter, Art. 6.

⁴⁴ Loc. cit. in note 15 above.

Common Law system to adopt the law to circumstances to think that a similar function can be discharged by the individual authoritative decision maker. Whilst this may work within a hierarchical legal system where the decision is binding on all, it is not applicable to a horizontal legal system like international law, where no individual state, let alone any individual person, has such authority.

Then there are those, not confined to any legal system, who either believe or simply wish that international law is already a system of world law, that is or should be endowed with all the accoutrements of a hierarchical legal order, and behave like one. Everyone seems, however, to have his, her or its vision as who should be making and enforcing it.

Speaking of the post-WW-II tendency among the ordinary lawyers in Common Law countries to neglect international law, one should perhaps point out at the same time that, as if to compensate for the attitude of their purely municipal-law colleagues towards international law, international lawyers in Common Law countries tend to be highly committed, qualified and specialised. That may perhaps be at least one of the explanations why such a good number of them are regarded as being world-wide at the forefront of their *métier*.

8. *Flight from Justiciable International Law to Auto-interpretative International Law*

Reference has previously been made to international law being divisible into three grades: auto-interpretative, justiciable and judicial. Justiciable international law depends on the willingness and consent of the subjects of international law in question accepting the obligation of third-party adjudication of disputes in which they are or may be involved. It may be said that the law-compliance behaviour of those states which practise justiciable international law would on average compare probably more than favourably with the degree of law-abidingness in any well-ordered domestic legal system, notwithstanding the poor image regarding its observance that international law has acquired almost exclusively from the field of auto-interpretative international law.

Apart from bilateral and multilateral treaties whereby parties can accept in advance the obligation to submit any dispute which may arise between them to third-party arbitral or judicial settlement, Article 36(2) of the Statute of the International Court of Justice, known as the Optional Clause, provides a simple mechanism for parties to the Statute to submit in advance to the jurisdiction of the Court in any dispute with any other state accepting the same obligation.

At its highest point in the life of the Permanent Court of International Justice, the predecessor of the present Court, Optional Clause jurisdiction was accepted by some 75% of the states that were entitled to submit to it. Currently with the

International Court of Justice, the number is less than 30%. What is perhaps particularly distressing is the fact that, whereas immediately after WW-II, all the Permanent Members of the Security Council, except the Soviet Union, subscribed to the Optional Clause, at the moment, there is only the United Kingdom.⁴⁵

There is currently a veritable flight from justiciable international law to auto-interpretative international law where each party to a dispute is able to rely on its own interpretation of the law and version of the facts.

9. Summary

It has been said often that every country has the government it deserves. From this point of view, there is no doubt that the world has the international law it deserves. In sum, what do we have at the moment? The world society is deeply divided by political ideologies, conflicting national interests, and incalculable differences in size, wealth, human and natural resources, and industrial and technological development. The law that regulates it is being neglected, sometimes rejected, often abused, and thrown into a great deal of self-doubt and confusion by both practice and doctrine.

III. SOME REDEEMING FEATURES

A. Codification and Progressive Development

Now for the credit side. One of the positive elements in the development of international law in the post-WW-II period is the relative success in the establishment of a number of multilateral treaties which either consolidate with modifications existing, or develop entire new, rules of international law, intended for general application. After some hesitant initial steps,⁴⁶ the International Law Commission eventually scored a number of successes. It has been directly instrumental in bringing about *inter alia* the 1958 Geneva Conventions on the Law of the Sea,⁴⁷ the 1961 and 1963 Vienna Conventions on respectively Diplomatic⁴⁸ and Consular⁴⁹ Relations, and the 1969,⁵⁰ 1978⁵¹ and 1986⁵² Vienna Conventions on and relating to the Law of Treaties.

⁴⁵ See further Bin Cheng, 'Flight from Justiciable to Auto-interpretative International Law: From the Jay Treaty to the Shultz Letter', in *Liber Amicorum Ellie Van Bogaert* (Antwerp: Kluwer, 1985), pp. 3-18.

⁴⁶ Cf. Bin Cheng, 'The International Law Commission', (1952) 5 *Current Legal Problems*, pp. 251-273.

⁴⁷ *UN Doc. A/Conf. 13/L. 52-L. 55*.

⁴⁸ 500 *U.N.T.S.* 95.

At the same time, the Third United Nations Conference on the Law of the Sea (UNCLOS III) has managed to map out a comprehensive new international law of the sea,⁵³ while the UN's Committee on the Peaceful Uses of Outer Space (COPUOS) has produced five treaties and four resolutions on principles to cover some of the fundamental aspects of the law of outer space, an entirely virgin territory.⁵⁴ Although not all these treaties have been universally ratified, many have in practice been accepted as stating the existing law.

Meanwhile, especially through the various UN Specialised Agencies, hundreds of treaties have been concluded to regulate diverse international activities on a more or less permanent basis, which often can have implications beyond their own field. One can thus think of the 1970 Hague Convention on hijacking of aircraft, developed through the efforts of the International Civil Aviation Organisation, which pioneered a model of internationalising certain criminal offences of domestic law in order to make them universally punishable thus so to deny, as far as possible, any offender a safe haven in any of the contracting states.⁵⁵ Its basic features have since been followed in numerous other treaties dealing with international terrorism.⁵⁶

⁴⁹ 596 *U.N.T.S.* 261.

⁵⁰ (1969) 8 *I.L.M.* 679.

⁵¹ (1978) 17 *I.L.M.* 1488.

⁵² (1986) 25 *I.L.M.* 543.

⁵³ (1982) 21 *I.L.M.* 1261.

⁵⁴ See Bin Cheng, 'Outer Space: The International Legal Framework: The International Legal Status of Outer Space, Space Objects and Spacemen', (1981) 10 *Thesaurus Acroasium*, pp. 41-106.

⁵⁵ Convention for the Suppression of Unlawful Seizure of Aircraft, ICAO Doc. 8920, (1970) 9 *I.L.M.* 669. See Bin Cheng, 'Aviation Security: Safeguarding International Civil Aviation Against Acts of Unlawful Interference', in Lloyd's of London Press, *Speakers' Papers for Lloyd's of London Press International Civil Aviation Conference No. 6, Montreal, 1984* (1985), pp. 35-44; 'International Legal Instruments to Safeguard International Air Transport: The Conventions of Tokyo, The Hague, Montreal, and a New Instrument Concerning Unlawful Violence at International Airports', in International Institute of Air and Space Law, University of Leyden, and others, *Conference Proceedings: Aviation Security, The Hague, 1987* (1987), pp. 23-46.

⁵⁶ E.g., the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (1976) 10 *I.L.M.* 1151; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, (1974) 13 *I.L.M.* 41; the 1977 European Convention on the Suppression of Terrorism, (1976) 15 *I.L.M.* 1272; (1977) 16 *I.L.M.* 233; the 1979 Convention Against the Taking of Hostages, (1979) 18 *I.L.M.* 1460; and the 1980 Convention on the Physical Protection of Nuclear Materials, UK Parl. Papers, Misc. No. 27 (1980), *Cmnd* 8112. See further Bin Cheng, 'Crimes on Board Aircraft', (1959) 12 *Current Legal Problems*, pp. 177-207; 'Hijacking and Sabotage', *New Society* (2 Aug. 1973), p. 270;

The significance of these efforts lie beyond the resultant treaties. The conferences or meetings which draw them up sometimes appear to take an unconscionable length of time to produce any result. Often this is well worthwhile, especially when there are so many new states. In the first place, these gatherings cause all the governments concerned, sometimes for the first time, to take a serious look at the issues involved. At least a few officials will render themselves familiar with the subject. Once a government's attention has been drawn to a subject and is called upon to take a stand on specific issues, it is far from unknown that closer examination of the issues will cause it to abandon some preconceived ideological or doctrinal lines which it had previously harboured, and to adopt a much more realistic attitude in accordance with its newly perceived true national interests. At least it now has an informed stand which should help to crystallise its own *opinio individualis juris* on the subject both *de lege lata* and, if appropriate, also *de lege ferenda*.

Furthermore, conference diplomacy, both in and outside the conference rooms, enables the participants to learn from one another what the objectives and problems of each are, and hopefully in due course to reach some consensus with which perhaps no one is one hundred per cent happy but with which most if not all could live with. In the process, the major players will be made thoroughly aware of the aspirations and strength of feeling of the others and will probably be willing to accommodate them at least to the extent to which no material national interest is affected, while the junior players, realising that no rule of international law can be really effective unless supported by the major players in the field, also come to learn to be grateful for the crumbs that fall from the high table. The experience of developing air and space law in the United Nations and its Specialised Agencies amply demonstrates this situation. Rules in order to be effective have to have the support of the dominant section of the society in which they operate, i.e., the section that has the capability, the intention and the will not only to support and observe them, but also, if necessary, to see that they are complied with.⁵⁷

In fact, this reflects also the process of the creation of rules of general (*alias* customary) international law: the arrival at some consensus from individual national attitudes. Basically, rules of general (*alias* customary) international law consist of the *opinio generalis juris generalis* of members of the international

A.W.G. Kean, B. Cheng, Sir F. Tymms, 'The Latest on Hijacking', (1973) 77 *Aeronautical Journal*, p. 338.

⁵⁷ Cf. Bin Cheng, 'The Contribution of Air and Space Law to the Development of International Law', (1986) 39 *Current Legal Problems*, p. 181, The Role of the Dominant Section in the Making of General International Law, at pp. 189-196.

society, which is formed from the concordant *opiniones individuales juris generalis* of those members, including the dominant section.⁵⁸ From this point of view, the greater the consensus among states on the content of the rules, the greater is the support for them, and the greater the chance of their being observed without controversy. Consequently, the more frequently such consensus can be reached either spontaneously or through codification and progressive development, the better it is for the future of international law.

B. Growth of International Organisations

Another notable phenomenon of the post-WW-II era is the growth of intergovernmental international organisations, a large number of which have been brought under the wings of the United Nations as its Specialised Agencies. Many of these perform what I call pre-legislative or quasi-legislative functions. There is, at the moment, no international organisation with truly legislative power making rules of international law binding on all like a municipal legislature. By pre-legislation, I mean an organisation preparing treaties for states to adopt with or without further discussions or modifications, as with many of the instances that we have just mentioned under Codification and Progressive Development. In quasi-legislation, an international organisation elaborates rules which member states, depending on the organisation, can either accept, or are to observe or are presumed to be following unless they expressly opt out. Somewhat in between these two types is the International Labour Organisation which was established after WW-I and which is responsible for elaborating the International Labour Code through the adoption of successive conventions the acceptance of which members are under a duty to consider.

Even before WW-II officially ended, the 1944 Chicago Convention on International Civil Aviation was concluded which conferred on the International Civil Aviation Organisation (ICAO) it created the power through its Council, which is a relatively small and select body, to draw up and to keep up-to-date 'annexes' to the Convention on many technical aspects of international civil aviation, such as personnel licensing and the rules of the air. Under Article 38 of the Convention, Member States are free at any time to inform the Organisation that it is not observing this or that aspect of the rules enacted, but such notifications are infrequent and even non-members, though not obliged to, are

⁵⁸ See further Cheng, loc. cit. in note 8 above, sect. V.: The Nature of Customary International Law, pp. 530-548. N.B. pp. 545 and 546 are wrongly paginated and reversed in the book.

inclined to follow the ICAO rules.⁵⁹ They tend, therefore, to become rules of general application.

Many of the Specialised Agencies have more or less the same or similar procedures for elaborating primarily technical rules within their remit in a simplified and accelerated manner, thanks to which the world somehow manages to cope with the many complex technical problems that it has to face in the fast moving 20th century. The World Health Organisation and the International Telecommunication Union are merely two more examples.

Two points may perhaps be made. First, that these are essentially technical problems makes it easier for states to accept that the leading role in making the relevant rules should be openly left in the hands of the states primarily concerned, with usually a token representation of the others. Secondly that this takes place within an international organisation where membership is open to all, or at least generally speaking all recognised states, and where there is always a plenary organ does provide everyone with a sense of participation and an opportunity to be involved with the subject-matter and acquainted with one another's views and aspirations in much the same way as we have seen with ad hoc conferences, except that this takes place on a permanent basis.

C. Judicial Development

Mention has already been made of the legacy of the Permanent Court of International Justice and the beneficial effects it has on the science of international law. On the reverse side, reference has also been made to the veritable flight at the moment from justiciable international law to auto-interpretative international law.

The fortune of the International Court of Justice suffered a severe setback after its 1966 South West Africa Judgment,⁶⁰ which so incensed especially the Third World that a proposed supplementary appropriation of US \$72,500 for the Court's 1966 budget, which *inter alia* would have given the judges a rise in their salaries, was rejected by the UN General Assembly. Moreover, the General Assembly took matters into its own hand and simply terminated South Africa's mandate over South West Africa, and placed South West Africa under its 'direct

⁵⁹ See further Bin Cheng, *The Law of International Air Transport* (London: Stevens, 1962), Chap. 3, sect. 2: Quasi-Legislative and Pre-Legislative Functions, at pp. 63-76.

⁶⁰ *SW Africa Cases* (Second Phase) (1966), [1966] *I.C.J. Reports* 6.

responsibility'.⁶¹ Writing on the judgment at the time, my concluding sentence was:

'As for the future, it would appear from the 1966 South West Africa Judgment that one of the most urgent tasks facing the Court and the doctrine of international law is to seek a reasonable harmonisation of the conflicting approaches to international law lest the notion of a uniform code of conduct governing international relations become a mere fiction.'⁶²

The Court appears to have responded to what happened in two ways, one procedural or organisational, and the other substantive.

The procedural or organisational device is one which was first introduced in 1972 in a revision of the Rules of Court of somewhat dubious compatibility with the Court's Statute. Paragraphs (2) and (3) of Article 26 of the Court's Statute allow the Court to form a chamber for dealing with a particular case, if the parties so request. According to the Statute, the '*number* of judges' forming such a chamber shall be 'determined by the Court with the approval of the parties'. In the 1972 revision of the Rules of Court, a new Article 26 was introduced which provides that the President shall 'consult ... the parties regarding the *composition* of the Chamber, and ... report to the Court accordingly'.⁶³ This provision is retained in Article 17(2) of the new Rules of Court adopted in 1978, which now even explicitly says that 'the President shall ascertain their views regarding the composition of the Chamber'. This revision has the effect of allowing the parties to a case to transform the Court into an arbitral tribunal, a distinctive feature of which is the parties choosing their own judges,⁶⁴ and for this purpose to select from among the judges of the Court those whom they wish to serve as members of the tribunal.⁶⁵ This being the case, one wonders whether there is any point in the Rules of Court continuing to provide that 'Elections to all Chambers shall take place by secret ballot' (Art. 18(1)), as adopted in 1978.

Be that as it may, this move on the part of the Court seems to be popular. Compared to ordinary arbitration, cases brought before Chambers save the parties all the expenses and work of setting up an *ad hoc* tribunal. Two cases

⁶¹ See further Bin Cheng, 'The 1966 South-West Africa Judgment of the World Court', (1967) 20 *Current Legal Problems*, pp. 181-212.

⁶² *Ibid.*, p. 212.

⁶³ Italics added here as well as in the previous quotation.

⁶⁴ Cf. the definition of arbitration in Art. XV of the 1899 Hague Convention for the Settlement of International Disputes: 'the settlement of differences between States by judges of their own choice, and on the basis of respect for law'.

⁶⁵ See E Jimenez de Arechaga, 'The Amendment to the Rules of Procedure of the International Court of Justice', (1973) 67 *American Journal of International Law*, pp. 1-22.

have so far been decided in accordance with this procedure.⁶⁶ A third was brought to the Court on the 6th of this month,⁶⁷ which signals a welcome return, albeit partial, to the Court by the United States.

Substantively, the Court appears to be embarking on what might be interpreted as a somewhat bold approach to the law. In the *Fisheries Jurisdiction Case* (1974) between the United Kingdom and Iceland,⁶⁸ the Court did say very specifically that ‘the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislation has laid it down’.⁶⁹ However, one might perhaps be forgiven for sharing the Queen of Denmark’s well-known remark in Shakespeare’s *Hamlet*, ‘The lady doth protest too much, methinks’;⁷⁰ for in that very case, the Court can well be said to have indulged in a fair measure of progressive development of international law.

In fact, the Court appears to be using two different approaches in developing a ‘new’ international law.

First, in the *North Sea Continental Shelf Cases* (1969), it decided that delimitation of the continental shelf between adjacent states had to be made in accordance with ‘equitable principles’.⁷¹ What it was saying was that in such cases, the rule itself enjoined the application of ‘equitable principles’. This then gave the Court in subsequent cases of continental shelf delimitation a great deal of scope to indulge in what Judge André Gros in the *Tunisia/Libya Case* (1982) described as ‘subjectivism’.⁷²

In the same *Tunisia/Libya Case*, the Court, however, went clearly further. It made much of its power to apply equity in all cases before it, no longer because equity was part of a legal rule which specified that equity should be applied as was the case with continental shelf delimitation, but simply because the Court was a court of law. Thus it said:

‘Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it.’⁷³

⁶⁶ *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, [1984] *I.C.J. Reports* 246; *Frontier Dispute* (Burkina Faso/Republic of Mali), [1986] *I.C.J. Reports* 554.

⁶⁷ See I.C.J. Press Communiqué No. 87/2, 9 Feb. 1987. *Elettronica Sicula S.p.A. (ELSI) Case*.

⁶⁸ [1974] *I.C.J. Reports* 3.

⁶⁹ *Ibid.*, at pp. 23–24.

⁷⁰ Act III, scene ii.

⁷¹ [1969] *I.C.J. Reports* 3, at p. 53.

⁷² *Continental Shelf Case* (Tunisia/Libyan Arab Jamahiriya), [1982] *I.C.J. Reports* 18, at p. 156.

⁷³ *Ibid.*, at p. 60.

Although the Court claimed that '[a]pplication of equitable principles is to be distinguished from a decision *ex aequo et bono*',⁷⁴ in the same case, Judge Oda opined: 'The Judgment appears, to my eyes, simply as one appropriate to a case *ex aequo et bono*'.⁷⁵

It is in fact not easy to determine what the Court holds to be equity. In the recent decision in the *Frontier Dispute* between Burkina Faso and Mali,⁷⁶ the Chamber deciding the case reaffirmed the Court's power to resort to equity, but limited it merely to equity *infra legem*, excluding both equity *praeter legem* and *a fortiori* equity *contra legem*. This would appear to be equity in the Aristotelian sense, which would not cause any objection. Yet the Court somehow seems to be reluctant to admit it.⁷⁷ It is, however, difficult to see why, since the Court itself stresses the importance of looking for the 'underlying intention of the applicable rules of international law',⁷⁸ which is after all the basic Aristotelian notion of equity. The advantage of the Aristotelian notion of equity is that it has an objective point of reference, because it is linked directly to the law and the intention of the legislator.⁷⁹

If the Court, instead of embracing the Aristotelian concept, links its notion of equity, as it appears to do at the moment, to the result as perceived by the Court,⁸⁰ then the Court's application of equity or equitable principles cannot but be highly subjective, since such notion has no objective point of reference.

The second method which the Court adopts in developing its 'new' international law is to adopt a very liberal interpretation of the evidence of the rules of general international law. Suffice it from this point of view, to compare the very strict proof required by the Court in the *North Sea Continental Shelf* Cases (1969)⁸¹ with the extraordinarily lenient test it adopted in the *Fisheries Jurisdiction* Case (1974) between the United Kingdom and Iceland,⁸² and the even more liberal test applied by the Court in the recent case relating to *Military and Paramilitary Activities in and Against Nicaragua* (1986) brought by

⁷⁴ Ibid.

⁷⁵ Ibid., at p. 157.

⁷⁶ *Frontier Dispute* (Burkina Faso/Republic of Mali) (1986), [1986] *I.C.J. Reports* 554.

⁷⁷ Cf. Separate Opinion of Judge Jimenez de Arechaga in *Continental Shelf* Case (Tunisia/Libyan Arab Jamahiriya) (1985), [1985] *I.C.J. Reports* 18, at p. 105.

⁷⁸ *Continental Shelf* Case (Libya/Malta) (1985), [1985] *I.C.J. Reports* 13, at p. 41.

⁷⁹ See further Bin Cheng, 'Justice and Equity in International Law', (1955) 8 *Current Legal Problems*, pp. 185-211.

⁸⁰ E.g., in *Continental Shelf* Case (Libya/Malta) (1985), [1985] *I.C.J. Reports* 13, at p. 59, the Court said: 'The principles to be indicated by the Court have to be selected according to their appropriateness for reaching an equitable result'.

⁸¹ [1969] *I.C.J. Reports* 3.

⁸² [1974] *I.C.J. Reports* 3.

Nicaragua against the United States.⁸³ In the last mentioned case, the Court relied heavily on resolutions of the United Nations General Assembly, thus raising many of the problems which we have already discussed before.

Much of what we have said relating to the present state of international law will apply to this 'new' international law which the International Court is forging. Obviously, in the opinion of the Court, it is responding to new aspirations. From this point of view, the response that it has received from a number of new states in the form of new customers before the Court may well appear to be heartening, but whether this new development is going to be equally well regarded by others is open to question. Already, a number of judges in their separate and dissenting opinions have been reminding the Court of the voluntary character of its jurisdiction and of the danger of states voting with their feet.

Whether in the long run, the 'new' international law being developed by the Court will prove generally acceptable to states remain to be seen. Meanwhile, as has been noted, in recent years, both France and the United States have deliberately withdrawn their acceptance of the jurisdiction of the Court under the Optional Clause. In this connection, it is also to be regretted that France in the *Nuclear Test Case* (1974)⁸⁴ and the United States in the *Nicaragua Case*⁸⁵ refused to appear before the Court either from the start or halfway through the case.⁸⁶ Such behaviour and any relapse into auto-interpretative international law from justiciable international law can have only the most deplorable consequences for the international rule of law.

IV. CONCLUSION

International law today is indeed in deep malaise. Whilst it may have grown vastly in volume, it is suffering acutely from a crisis in identity. Faced with the fundamental changes in the conditions of international society in the post-WW-II era, the world, tormented by radical schisms that divide its members in their interests, ideologies, ambitions, politics, culture, aspirations, wealth, size, resources, technological capability, economic power and military might, finds its law being daily adulterated by a torrent of spurious new sources and a multitude of outrageous interpretations, not infrequently aided and abetted by the doctrine. It also sees the constraint of third-party adjudication which at one time exercised

⁸³ [1986] *I.C.J. Reports* 14.

⁸⁴ [1974] *I.C.J. Reports* 253, at p. 255. Letter of 16 May 1973 from France to the Court, I.C.J. Communiqué No. 73/11, 17 May 1973.

⁸⁵ [1986] *I.C.J. Reports* 14, at p. 17. Letter of 18 Jan. 1985 from the United States to the Court, I.C.J. Communiqué No. 85/1, 23 Jan. 1985.

⁸⁶ See further Cheng, loc. cit. in note 45 above, at pp. 5 and 8.

some degree of control being jettisoned by states, great and small, old and new, in what is fast becoming a free style struggle in pursuit of self-interests. In the mêlée, international law is often, when not pushed aside, distorted almost beyond recognition.

Codification and progressive development of international law by means of multilateral treaties have achieved a certain degree of success. New rules, especially in technical areas, are being made through numerous international organisations. And valiant efforts are being made by the International Court of Justice in a seeming endeavour to develop a 'new' international law. Much will depend, however, upon whether states have the intention, the ability and the will to reach some consensus to live in a world under law; for the new law, however elaborated, to be viable, will need to reflect the underlying realities.

In this task, the doctrine of international law will no doubt have an important role to play, if, as several speakers at a recent gathering of the American Society of International Law remind us, the basics of international law are not forgotten.⁸⁷

In the long run, there can be little doubt that, if international law is to prove an effective force in international relations, there must be, in all countries, a wider dissemination of the knowledge of international law and a better understanding of what it is so that all governments are properly equipped to comply with it and the peoples of the world are all enabled to ensure that their respective governments do so. Unfortunately, as a legal system, international law belongs to all countries and yet to none, with the result that its teaching and its study are often neglected. For this reason, the objective of the Josephine Onoh Memorial Fund of supporting and encouraging the study of international law deserves to be warmly applauded.

⁸⁷ See Christopher Osakwe (Moderator), 'Reexamination of the Teaching of International Law', (1984) 78 *A.S.I.L. Proceedings*, p. 198, especially Professor Gottlieb at p. 211.

Sir Ian Sinclair

IV. THE PRACTITIONER'S VIEW OF INTERNATIONAL LAW

The Josephine Onoh Memorial Lecture 1988

I have to begin by making a confession. The title of my lecture may be something of a misnomer, at least if it is taken to imply that the practitioner has a perspective of the substantive rules of international law which differs markedly from that of the teacher. It will, I think, be apparent from what I am about to say that the practitioner's view of international law is in no way opposed to that of the teacher; there may be differences of emphasis and occasionally of approach between them, but these differences are not such as to suggest that a sharp dichotomy can be made between the practitioner and the teacher.

But first, you may ask, what do you mean by a 'practitioner'? My working definition for the purposes of this lecture would be: a lawyer whose initial study of public international law has been broadened and deepened by experience over a number of years of its practical application, whether as legal adviser to a foreign ministry or to an international organisation, or as consultant, adviser or counsel to his own government or to a foreign government. In the field of public international law, the practitioner is *not* (as he may be in other areas of the law) the advocate who spends a good proportion of his working career in court, nor is he the government legal officer who devotes much of his time to the preparation of primary or secondary domestic legislation. The practitioner in international law is rather that rare animal who, by virtue of his knowledge and experience, is regularly called upon to advise governments or corporations on international legal problems, and, if necessary, to act for them in any litigation that may ensue, whether in the domestic courts or before international tribunals.

One of the distinctive features of international legal practice is that the dividing line between the practitioner (as I have defined him) and the teacher is tenuous in the extreme. On the one hand, there have been many renowned

scholars of international law whose principal activity has been in the teaching field, but whose special talents and skills have been utilised by governments or corporations as counsel in cases before national courts or international tribunals or, more generally, as specialist legal advisers on complex issues of international law arising in practice. On the other hand, there have equally been many prominent practitioners of international law who have made a notable contribution to the science of international law by publishing works of outstanding scholarship in the field. I propose to give just a few examples of each drawn mainly from the ranks of those British international lawyers who have been recognised as pre-eminent in the field of international law over the past forty years. For obvious reasons, I will refrain from mentioning those who are still active in the teaching and practice of international law. It can none the less be confidently assumed that, even today, there are several professors of international law who maintain an active practice, and several practitioners who devote time and effort to the wider dissemination of international law through the publication of monographs and learned articles.

I. THE SCHOLAR AS PRACTITIONER

The first example I will cite is that of Sir Hersch Lauterpacht, that profound scholar and judge whose influence and reputation still command the utmost respect from international lawyers nearly thirty years after his death in 1960. In a major study in the *British Yearbook of International Law* for 1960, the late Wilfred Jenks has analysed his academic writings, stressing his unshakeable attachment to moral and ethical values.¹ In three supplementary studies in the 1961, 1962 and 1963 issues of the *British Yearbook*, the late Sir Gerald Fitzmaurice has carefully assessed Hersch Lauterpacht's unique contribution to the jurisprudence of the International Court of Justice during the brief five year period in which he served on that body.² Both authors concur in high-lighting the breadth and depth of Lauterpacht's learning and scholarship and his dedication to an ideal of international law as a vehicle for the expression and application of moral imperatives. Jenks gave to his study the title 'The Scholar as Prophet' and Fitzmaurice followed him by styling his contributions 'The Scholar as Judge'. Both are obviously right in emphasising that Lauterpacht was, above all other things, a scholar whose forte lay in the formulation and exposition of the law.

¹ W. Jenks, 'Hersch Lauterpacht – The Scholar as Prophet', (1960) 36 *B.Y.I.L.*, pp. 1-103.

² G. Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge I', (1961) 37 *B.Y.I.L.*, pp. 1-71; 'Hersch Lauterpacht – The Scholar as Judge II', (1962) 38 *B.Y.I.L.*, pp. 1-84; and 'Hersch Lauterpacht – The Scholar as Judge III', (1963) 39 *B.Y.I.L.*, pp. 133-138.

What has hitherto not been commented on, or at least not in any detail, is Lauterpacht's work as a practitioner of international law. Lauterpacht was called to the Bar in 1936 and combined his Whewell professorship at Cambridge with a limited amount of practice until 1952 when he retired from the Bar. Of Lauterpacht's work at the Bar, one commentator has recorded:

His practice at the Bar was, however, sporadic and mainly of an advisory character – to governments and to others – in questions of international law.³

Some of Lauterpacht's opinions have been published in the four volume edition of his *Collected Papers* edited by his devoted son, Eli Lauterpacht, QC. Thus, we can note the two opinions which he rendered to the Jewish Agency on certain issues relevant to the interpretation of the Mandate for Palestine – the first, rendered in 1939, on 'The Interpretation of Article 18 of the Mandate of Palestine' (in the context of the possible introduction of a system of differential tariffs on goods imported into Palestine),⁴ and the second, rendered in 1946, on 'Article 18 of the Mandate of Palestine and the Dissolution of the League of Nations'.⁵ He gave another opinion to the Jewish Agency in 1947 on 'The United Nations General Assembly – Voting and Competence in the Palestine Question'.⁶ Lauterpacht also gave an opinion in 1949 to the Swiss Government on the legality of the action of the Swiss authorities in arresting and continuing criminal proceedings against Solvan Vitianu, a Romanian national, whose appointment as economic counsellor to the Romanian Legation at Berne had been previously notified to but not accepted by the Swiss Government.⁷ There is some evidence that Lauterpacht gave assistance to the then Attorney-General, Sir Hartley (later Lord) Shawcross, in the preparation of the legal case for the prosecution of William Joyce in 1945.⁸ He was also professionally involved in problems connected with the continental shelf in the Arabian Gulf, in particular as to whether oil concessions expressed to extend to all the territory, islands and

³ S. Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', (1961) 55 *A.J.I.L.*, p. 826.

⁴ E. Lauterpacht, (ed.), *International Law: Collected Papers of Hersch Lauterpacht*, Vol. 3 (1977), pp. 85-100, (hereinafter cited as *Collected Papers*). According to the Editor's Note prefacing this opinion, this was the first substantial opinion which Hersch Lauterpacht wrote: '... though he may have assisted the Chinese Government with a memorandum (of which I have not found any trace) at the time of the Manchurian crisis' (at p. 85).

⁵ *Collected Papers*, Vol. 3 (1977), pp. 101-10.

⁶ *Ibid.*, pp. 504-13.

⁷ *Ibid.*, pp. 433-57.

⁸ *Ibid.*, p. 221 (Editor's Note).

waters of a state extended also to that state's continental shelf.⁹ In addition, he prepared an opinion in 1946, at the request of the Inter-governmental Committee for Refugees, on the effect of certain laws issued by the Allied Military Governments and by the Allied Control Council for Germany on the status of persons, both in and outside Germany, who had been deprived of their German nationality by virtue of German laws and decrees issued during the Nazi period.¹⁰ Finally, in the early months of 1950 he submitted an opinion to the Government of Liechtenstein on the international law aspects of the detention of Mr Nottebohm (a Liechtenstein national) in Guatemala and the attempted seizure of his property by the Guatemalan authorities.¹¹

In addition to his advisory work at the Bar, Lauterpacht participated as counsel for the UK Government in two cases before the International Court of Justice – the preliminary objection phase of the *Corfu Channel* case in 1948¹² and the interim measures phase of the *Anglo-Iranian Oil Co.* case in 1951.¹³ That he also assisted in the preparation of the UK Memorial on the merits of the *Anglo-Iranian Oil Co.* case is evident from his *Collected Papers*,¹⁴ which reproduces Lauterpacht's first draft of the possible legal argument to be presented to the Court in the name of the UK Government.

Notwithstanding these many and various activities in which Lauterpacht was engaged in the course of his practice at the Bar, it is evident that he regarded his professional work as being ancillary to his primary role as teacher and scholar. His massive authority stemmed first and foremost from his many publications, illumined as they are by his integrity, humanity and fair-mindedness. The role of counsel was uncomfortable to one of his temperament, requiring, as it did, some over-emphasis of those elements favourable to his client's contentions, and some underplaying of those elements favouring his opponent's case. That he could none the less play the role effectively has already been demonstrated. But his creative talents were seen at their best when he was eventually elevated to the International Court of Justice in 1954. There is no doubt that Lauterpacht's experience as a practitioner is reflected in some of his published articles, notably

⁹ Ibid., p. 143 (Editor's Note).

¹⁰ Ibid., p. 383 (Editor's Note).

¹¹ Ibid., Vol. 4 (1978), pp. 5-20. Lauterpacht was in fact a judge on the International Court of Justice when it gave judgment in the second phase of the *Nottebohm* case (Liechtenstein/Guatemala), but he did not take any part in the decision of the Court because of his previous involvement with it as Counsel: Rosenne, loc. cit., p. 827.

¹² [1948] *I.C.J. Reports* 15.

¹³ [1951] *I.C.J. Reports* 89.

¹⁴ *Collected Papers*, Vol. 4 (1978), pp. 23-89.

his contribution on 'Sovereignty over Submarine Areas',¹⁵ and his article on 'Allegiance, diplomatic protection and criminal jurisdiction over aliens' commenting on the *Joyce* case.¹⁶ However, it would, I think, be fair to conclude that Lauterpacht's influence stemmed from his pre-eminence as a scholar and teacher rather than from his skills as a practitioner.

The career of Sir Humphrey Waldock offers a marked contrast. He was elected Chichele Professor of International Law at Oxford in 1947, having spent the war years as a senior civil servant in the Admiralty. In fact, he was head of that department responsible for the international relations of the Admiralty and, in that capacity, was intimately involved with questions of international law such as the obligations of neutrality, passage through straits, the status of the French fleet at Alexandria and the *Altmark* incident.¹⁷ Thus, even before he was elected to his chair at Oxford, he had had a significant body of experience in the practice of international law in the public service.

It was this initial experience as a practitioner of international law in the Admiralty which no doubt led to Waldock's being regularly engaged as counsel in leading international law cases after he had returned to the private sector. He was (with Lauterpacht) one of the junior counsel for the UK Government in the preliminary objection phase of the *Corfu Channel* case; but (unlike Lauterpacht) he also appeared for the UK Government in the merits phase of the *Corfu Channel* case.¹⁸ He was engaged as counsel on behalf of the UK Government in the *Anglo-Norwegian Fisheries* case,¹⁹ and addressed the Court in the course of the oral hearings. He also formed part of the UK legal team in the preliminary objection phase of the *Anglo-Iranian Oil Co.* case.²⁰ He acted for the Government of India in the preliminary objection and merits phase of the *Right of Passage* case;²¹ for the Government of Spain in the second phase of the lengthy and complex *Barcelona Traction* case;²² and for the Governments of Denmark and the Netherlands in the *North Sea Continental Shelf* cases.²³ All these were of course cases before the International Court of Justice. But

¹⁵ (1950) 27 *B.Y.I.L.*, pp. 376-433.

¹⁶ (1947) 9 *Cambridge Law Journal*, pp. 330-48.

¹⁷ I. Brownlie, 'The Calling of the International Lawyer: Sir Humphrey Waldock and his Work', (1977) 54 *B.Y.I.L.* pp. 7-74 at pp. 9-10. It may be noted that Sir Humphrey published an article on the *Altmark* incident shortly after the end of the Second World War: see H. Waldock, 'The Release of the *Altmark's* Prisoners', (1947) 24 *B.Y.I.L.*, pp. 216-38.

¹⁸ [1949] *I.C.J. Reports* 4.

¹⁹ [1951] *I.C.J. Reports* 116.

²⁰ [1952] *I.C.J. Reports* 93.

²¹ [1957] *I.C.J. Reports* 125 (preliminary objections); *ibid.* [1960] 6 (merits).

²² [1964] *I.C.J. Reports* 6 (preliminary objections); *ibid.* [1970] 4 (second phase).

²³ [1969] *I.C.J. Reports* 4.

Waldock's experience of international litigation extended also to *ad hoc* arbitrations. He was, for example, one of the counsel for the UK Government in the abortive *Buraimi* arbitration in 1955;²⁴ and he acted for the Government of Chile in the *Palena* arbitration with Argentina in 1966.²⁵ He also appears to have acted again for the Government of Chile in the early stages of the *Beagle Channel* arbitration with Argentina.²⁶

This is a formidable list of cases, particularly when it is borne in mind that the processes of international litigation involve the preparation of lengthy written pleadings and the holding of extended oral hearings, so that any one case will normally last two or three years as a minimum before judgment is finally given.

But apart from participating actively in this broad spread of leading international law cases during the period from 1947 to 1972, Waldock was also frequently called upon to give opinions on questions of international law, particularly those relating to title to territory or to the law of the sea. Some of these opinions were given to the UK Government in the context of continuing territorial disputes, and so may not yet be in the public domain. That Waldock conducted a substantial practice in public international law during the period before his elevation to the International Court of Justice is beyond doubt. Brownlie has stated:

'Waldock's practice was based on classical international law with a certain emphasis on territorial disputes, a wide range of law of the sea questions, jurisdictional issues, and the relations between foreign investors or concession holders and the territorial sovereign as host state. Some of the clients were corporations, but the generality were Governments. Waldock's clients included not less than seventeen states, involving all the continents except Africa.'²⁷

It is hardly surprising that, with this heavy burden of practice, Waldock was not very productive in terms of published academic writings. He did of course prepare the successful sixth edition of Brierly's *Law of Nations* in 1963; and he also gave the General Course at The Hague Academy of International Law in 1962.²⁸ Apart from this, he produced a number of notable articles for the *British*

²⁴ For the circumstances in which the tribunal in the *Buraimi* arbitration ceased to function, see J. L. Simpson and Hazel Fox, *International Arbitration* (London: Stevens, 1959), pp. 89, 162-3 and 253; and J. Gillis Wetter, *The International Arbitral Process*, Vol. III (Dobbs Ferry, N.Y.: Oceana, 1979), pp. 357-87.

²⁵ For the award in this case, see 16 *R.I.A.A.* 109.

²⁶ I. Brownlie, loc. cit., p. 17.

²⁷ Ibid., p. 16.

²⁸ (1962) 106 *Recueil des Cours*, pp. 1-250.

Yearbook and other international law journals, some of them on themes related to his professional activities.²⁹ It is in no way a denigration of Waldock's activities to conclude that, for him, what was significant was the practical application of international law. As Brownlie puts it:

His attitude towards theory is to be remarked. He had no deep interest in theory as such. This is not to suggest that he neglected it, and his lectures and writings would contain incisive analysis of the principal theories attending such subjects as the relation of national and international law, and the recognition of states. Waldock's penchant was to analyse the existing experience and to probe behind the facade of concepts. Analysis and legal techniques were his chosen instruments.³⁰

Here then we have in Lauterpacht and Waldock, two eminently influential international lawyers who can be said to represent the scholar as practitioner. But, as we have seen, the pattern of their careers, and indeed their own distinctive predilections, show marked differences. Lauterpacht was primarily a teacher and scholar, profoundly interested in the careful analysis of doctrine and state practice. His writings stand as testimony to the influence which he commanded during his lifetime, and still commands nearly thirty years on. As against this, one almost senses that Waldock was more at home as a practitioner than as a teacher; he had a marked ability to pick out those elements of a complex factual situation which were relevant to the legal analysis, and he had likewise the gift of articulating persuasive arguments based on those elements. No doubt his success as a practitioner, and later as a judge, owed much to his early exposure to the practical task of advising the Admiralty on the myriad of international law problems which necessarily arose during the war years. There is a neat complementarity between the two – the thoughtful and profound scholar and idealist, on the one hand, and the practical man of affairs on the other.

²⁹ For example, his article on 'The Anglo-Norwegian Fisheries Case', (1951) 28 *B.Y.I.L.*, pp. 114-71, clearly reflected his experiences as counsel in the case; his article on '*Forum Prorogatum*', (1948) 2 *I.C.L.Q.*, pp. 377-91, doubtless derived from his work as counsel in the preliminary objection phase of the *Corfu Channel* case; and it can be confidently assumed that his article on 'Disputed Sovereignty in the Falkland Islands Dependencies', (1943) 25 *B.Y.I.L.*, pp. 311-53 was based on research done in his professional capacity.

³⁰ I. Brownlie, loc. cit., p. 73.

II. THE PRACTITIONER AS SCHOLAR

A similar pattern emerges if one studies the careers of two British international lawyers who devoted much of their working life to the practice of international law in the Foreign Office.

The first is the late Sir Eric Beckett, who was Legal Adviser to the Foreign Office between 1945 and 1953, but who, tragically, had to retire early from that post on medical grounds. Beckett was a man of powerful and penetrating intellect, equally at home in the field of private international law as in the field of public international law. He has been described as a 'lawyer's lawyer', always apt to test the validity or soundness of any principle by applying it hypothetically to an extreme case and seeing whether it held good for that:

If at that point it breaks down or leads to a *reductio ad absurdum* there was, in Beckett's opinion, something wrong, however well it might seem to work for ordinary cases.³¹

All those who worked for Beckett will testify to the truth of this observation. They will also acknowledge the outstanding contribution which he made in the conduct of international litigation involving the British Government in the immediate post-war years. Beckett was Agent for the United Kingdom in the *Corfu Channel* case and appeared with Sir Hartley Shawcross (as he then was) at the oral hearing on the preliminary objections.³² He also appeared as Agent and Counsel for the United Kingdom at the hearing on the merits in this case.³³ Beckett was Agent in the *Anglo-Iranian Oil Co.* case and appeared with the then Attorney-General at the oral hearing on the application for interim measures³⁴ and at the later hearing on the preliminary objections.³⁵ He was also Agent for the United Kingdom in the *Norwegian Fisheries* case, appearing as counsel at the oral hearing.³⁶ As if this were not enough, Beckett again appeared before the Court, this time as counsel, to present the United Kingdom arguments during the preliminary objections phase of the *Ambatielos* case.³⁷

This constant involvement in international litigation placed a very heavy burden on Beckett, since there was no respite from his other duties as Legal

³¹ G. Fitzmaurice and F. Vallat, 'Sir Eric Beckett KCMG, QC (1896-1966) – An Appreciation', (1968) 17 *I.C.L.Q.*, p. 288.

³² [1948] *I.C.J. Reports* 15.

³³ [1949] *I.C.J. Reports* 4.

³⁴ [1951] *I.C.J. Reports* 89.

³⁵ [1952] *I.C.J. Reports* 93.

³⁶ [1951] *I.C.J. Reports* 116.

³⁷ [1952] *I.C.J. Reports* 28.

Adviser to the Foreign Office. Indeed, there can be little doubt that his early retirement on medical grounds resulted in large measure from overwork.

Beckett was of course much more than a brilliant practitioner and advocate. He was also a scholar of no mean attainments, as those who are familiar with his writings will confirm. Any budding international lawyer who is interested in the topic of the interpretation of treaties would, even today, do well to study the exchange of views between Beckett and Lauterpacht within the framework of the consideration of that topic by the *Institut de Droit International* between 1950 and 1956.³⁸ He would note that it was the views of Beckett which prevailed within the Institut and which now largely find expression in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As a younger man, Beckett found time to make some notable contributions to the scientific study of public and private international law.³⁹ He wrote mainly for the *British Yearbook of International Law*, but he also delivered two courses of lectures at The Hague Academy of International Law in 1932 and 1934 on questions of general legal interest in the jurisprudence of the Permanent Court of International Justice. Unfortunately, the demands on his time and energies in the immediate post-war period were such that his scholarly output suffered; but, as Legal Adviser to the Foreign Office, he was always anxious that his younger colleagues should make substantial contributions to learned journals. Indeed, as the most junior member of his staff from 1950 onwards, I can now reveal that this was jocularly but affectionately referred to as 'Eric's homework'.

Beckett was succeeded as Legal Adviser to the Foreign Office in 1953 by the late Sir Gerald Fitzmaurice, another outstanding example of the practitioner as scholar. In temperament, Fitzmaurice was more reflective than Beckett, and he has left behind him a prodigious volume of published works which attest to his deeply-held convictions. Above all, he was dedicated to the establishment of the rule of law in international relations. As Sir Robert Jennings states, in a remarkable and perceptive study of Fitzmaurice's contribution to the science of international law:

³⁸ Lauterpacht's report on the interpretation of treaties will be found at *Annuaire de l'Institut de Droit International* ('*Annuaire IDI*'), (1950), Vol. I, pp. 336-434, Beckett's written comments at *ibid.*, pp. 435-44, and the subsequent debate within the Institut at *Annuaire IDI* (1952), Vol. II, pp. 359-406, and at *Annuaire IDI* (1956), pp. 317-49.

³⁹ See, for example, his articles on 'The Exercise of Criminal Jurisdiction over Foreigners', (1925) 6 *B.Y.I.L.*, pp. 44-60; on 'Criminal Jurisdiction over Foreigners, the Franconia and the Lotus', (1927) 8 *B.Y.I.L.*, pp. 108-28; on 'Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application', (1930) 11 *B.Y.I.L.*, pp. 1-54; on 'The Question of Classification (Qualification) in Private International Law', (1934) 15 *B.Y.I.L.*, pp. 46-81; and on 'Consular Immunities', (1944) 21 *B.Y.I.L.*, pp. 34-57.

As a jurist, Fitzmaurice was a professional among professionals. Yet it must not be supposed that his remarkable dedication to public international law arose solely from the intellectual pleasure and fulfillment he undoubtedly and constantly derived from his mastery of the subject: he was above all committed, as an article of faith, to furthering, by his intellectual endeavour, the rule of law in the international field. His corpus of international law writings and opinions was consciously designed to serve that end.⁴⁰

It is therefore hardly surprising that one of his most original contributions to scholarship is to be found in his General Course at The Hague Academy of International Law in 1957 under the title 'General Principles of International Law considered from the Standpoint of the Rule of Law'.⁴¹ It is equally significant that, in 1952, he read a paper to the Grotius Society⁴² on 'The United Nations and The Rule of Law', which encapsulates much of his philosophy. Fitzmaurice was here concerned in large measure with the relationship between law and justice, pointing out that, in the United Nations, justice in the particular case was regularly sought at the expense of the application of the law. He was harsh on what he termed the 'idealist', characterising him as being 'the most dangerous of all the enemies of the Rule of Law', paradoxically because his aim was to achieve justice, that is to say, 'what he believes to be justice in relation to the particular case confronting him'. For Fitzmaurice (and here he is expressing a deeply held conviction):

... justice is very seldom achieved by directly aiming at it: rather it is a by-product of the application of legal rules and principles, a consequence of the general order, certainty and stability introduced into human and international relationships through the regular and systematic application of known legal rules and principles, even if these rules and principles are not always perfect and do not always achieve ideal results in every case.⁴³

This philosophy was central to Fitzmaurice's creed, and informed all his activities, whether as legal adviser or later as judge. Fitzmaurice was also, like Beckett, of the view that the proper role of the international lawyer was to advise on the law and not to be influenced by political considerations which were the concern of others. That he was fully sensitive to, and conscious of, the political implications of his legal advice goes without saying. As Jennings says:

⁴⁰ R. Jennings, 'Gerald Gray Fitzmaurice', (1984) 55 *B.Y.I.L.*, p. 4. See pp. 62-4 for a bibliography of Fitzmaurice's printed work.

⁴¹ (1957) 92 *Recueil des Cours*, pp. 1-227.

⁴² (1953) 38 *Transactions of the Grotius Society*, pp. 135-50.

⁴³ *Ibid.*, p. 147.

He was not in the least unaware of the inevitable interaction at all times of law and politics; nor of the political importance of decisions whether taken on legal grounds or on other grounds; nor of the need of the lawyer to be aware of the political significance of legal questions. It stands to reason that one who has through momentous decades been a legal adviser to a government very much involved in international affairs, and for seven of those years, its chief legal adviser, could hardly have lived in a jurist's ivory tower.⁴⁴

Fitzmaurice's approach to international law was often misunderstood. He was mistakenly thought to be a legal conservative, opposed to judicial innovation and insufficiently responsive to the need to adapt international law to meet the new challenges of technology.⁴⁵ That he *was* by temperament and conviction, of the view that the international lawyer, and particularly the international judge, should stick to his last and should eschew extra-legal considerations we have already seen. This view was central to his vision of the integrity of the international judicial process. But he was no narrow hidebound technician, impervious to the needs and demands of a world in flux. He has left behind him, in the form of an extended essay for the centenary volume of the Institut de Droit International published in 1973, what can perhaps be best described as his *apologia pro vita sua*. Jennings has indeed characterised that essay as '... a testament of faith and intellectual conviction for those who, after him, would continue the work in that field to which his whole career had been dedicated.'⁴⁶ In it, Fitzmaurice gave ample proof of his wide-ranging thought and of his sympathy for the need to adapt international law to meet new challenges. In analysing the unease felt by many international lawyers about the future of their discipline, he comments:

Many believe there is reason to fear that the very foundations of our discipline as public international lawyers may be in question. For this belief there are various and rather different causes. One very usually adduced is the presence and prospect of change— change so drastic that international law may not be able to cope with it. Change, however, in the context of our study, has two aspects. One of those, which constitutes another ground for the fear just mentioned, is that of 'change for the worse', or at least of a widespread challenge to what was once considered as being received law or doctrine ... The other aspect involves the need for accommodating within

⁴⁴ Jennings, loc. cit. at footnote 40 above, p. 17.

⁴⁵ A flavour of this criticism can be found in Rosalyn Higgins, 'Policy Considerations and the International Judicial Process', (1968) 17 *I.C.L.Q.*, pp. 58-84 (at p. 68).

⁴⁶ Jennings, loc. cit. footnote 40 above, p. 2.

the international legal field a whole range of new developments – economic, technological, managerial, sociological and other.⁴⁷

Fitzmaurice sums up his own view of the conflicting tendencies by arguing that ‘... the goal of international law in the future is as much bound up with certainty and stability as with flexibility and progress, but that both are necessary’.⁴⁸

I make no apology for having discussed Fitzmaurice’s philosophy at such length. It is the philosophy of one who has toiled long and hard in the vineyards of the practical application of international law. Fitzmaurice had an easy mastery of the detail of any topic which he had to consider, and his powers of analysis were formidable in the extreme. One has only to read the series of articles which he wrote in the *British Yearbook* between 1950 and 1959 on ‘The Law and Procedure of the International Court of Justice’ (some 640 pages in all) to appreciate the skill with which he could dissect judicial pronouncements and the persuasive manner in which he could illuminate obscure or hitherto unnoticed legal issues. Indeed, as Jennings has rightly said of this series of articles:

... it exhibits to the full that remarkable intellectual capacity that Fitzmaurice had of being able to deal meticulously with highly technical detail, while never for a moment losing sight of general principle.⁴⁹

Enough has been said to establish that Fitzmaurice was a prime example of the practitioner as scholar. Indeed, he was a scholar of the first order, who has been rightly termed ‘one of the greatest public international lawyers of his generation’.⁵⁰ His writings are cogently and elegantly phrased, interspersed with apt quotations from English and classical literature lending further distinctiveness to his style. But he was not averse to controversy, as is evidenced by his devastatingly critical review of a book on treaty interpretation which offended against some of his deepest convictions as a jurist.⁵¹ In short, he was a passionate and dedicated adherent to the concept that international law constitutes an intellectually coherent system of rules and principles capable, if properly applied, of injecting the necessary qualities of certainty, order and stability into the arena of international relations.

⁴⁷ ‘The Future of Public International Law’, *Livre du Centenaire* of the Institut de Droit International (1973), p. 207.

⁴⁸ *Ibid.*, p. 208.

⁴⁹ Jennings, *loc. cit.* at footnote 40 above, 49.

⁵⁰ *Ibid.*, 1.

⁵¹ ‘*Vae Victis* or Woe to the Negotiators! Your Treaty or our ‘Interpretation’ of It’, (1971) 65 *A.J.I.L.*, pp. 358-73. See also Jennings, *loc. cit.* at footnote 40 above, pp. 22-4.

The examples we have chosen, of the scholar as practitioner, and of the practitioner as scholar, show that, in the field of international law, the distinction between the two, if it exists at all, is a very fine one. Personal attributes, as much as career direction, ensure that it is far from easy to label a particular individual as being primarily one rather than the other. Indeed, even taking the examples I have given, a good case can be made out for seeing Waldock in the guise of practitioner as scholar and Fitzmaurice in the guise of scholar as practitioner. But, even accepting that no clear distinction can be made, in this field, between the practitioner and the scholar, can we none the less discern certain features which serve to distinguish the perspective of the practitioner of international law from the perspective of the scholar and teacher?

III. THE PERSPECTIVE OF THE PRACTITIONER

The practitioner is of course called upon to advise on the application of the relevant principles and rules of international law to existing disputes or situations usually arising out of complex and confused fact-patterns. If the dispute is one concerning title to territory, he will in addition have to assess the significance of historical events bearing or arguably bearing on the issue of title. Initially, therefore, he may well have to call for considerable research to be done to ascertain the facts on which his legal opinion will be based. He will already no doubt have formed a preliminary view of what are likely to be the relevant legal principles applicable to the question on which he is being asked to advise. But he would do well to be cautious at this stage and bear in mind the wise observation of the late Lord McNair:

Whereas I may have thought, as a teacher or as the author of a book or an article, that I had adequately examined some particular rule of law, I have constantly found that, when I have been confronted with the same rule of law in the course of writing a professional opinion or of contributing to a judgment, I have been struck by the different appearance that the rule of law may assume when it is being examined for the purpose of its application in practice to a set of ascertained facts. As stated in a text book it may sound the quintessence of wisdom, but when you come to apply it many necessary qualifications arise in your mind.⁵²

It is no doubt this very consideration which led Fitzmaurice, in his magisterial cycle of articles on the jurisprudence of the International Court of Justice, to

⁵² C. Parry (ed.), *Lord McNair: Selected Papers and Bibliography* (Leiden, Sijthoff Dobbs Ferry, N.Y.: Oceana, 1974), p. 257.

indulge in extended analysis of the possible consequences and side-effects of particular judicial pronouncements, while always bearing in mind their relationship to general principle. Lord McNair's acute observation may also explain Lauterpacht's astonishment at discovering, in the course of his service as a member of the International Law Commission, how many areas of disagreement could be uncovered among international lawyers when discussion turned to the detailed application of particular rules or principles of international law:

For, once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principles – even this may be an over-estimate in some cases – there is no semblance of agreement in relation to specific rules and problems.⁵³

Here then is one respect in which the approach of the practitioner may differ from that of the scholar. The practitioner is always confronted with the need to ascertain the facts underlying the particular dispute, to discuss the applicable legal rules and then to apply these rules to the facts. At each stage of this process, choices have to be made. The relevant has to be distinguished from the irrelevant. If one is involved with a dispute over title to territory, extensive historical research may well be necessary. A prime example of this is the *Minquiers and Ecrehos* case in 1953 where title to these two groups of islands off Jersey was disputed as between the United Kingdom and France. As Fitzmaurice states in commenting on this case:

... in a certain sense the dispute was centuries old, and could be said to date from the years 1202-4, when, *de facto*, the dukedom of Normandy became lost to the English Crown and was incorporated in the domains of the French Crown, or else from the date of the Treaty of Abbeville or Paris, 1259, by which Henry III of England renounced all claims to *continental* Normandy.⁵⁴

The Court in fact relied heavily on *Quo Warranto* proceedings of 1309 (enquiring into the property and revenue of the English King) to conclude that the Ecrehos were, at that time, within the domain of the English King;⁵⁵ and on entries in the Rolls of the Manorial Court of the fief of Noirmont in Jersey in

⁵³ H. Lauterpacht, 'Codification and Development of International Law', (1955) 49 *A.J.I.L.*, p. 17.

⁵⁴ G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II', (1955-6) 32 *B.Y.I.L.*, p. 26, footnote 3.

⁵⁵ [1953] *I.C.J. Reports* 63.

1615-17 relating to wreckage found on the Minquiers to support a finding that the Minquiers were then considered to be an integral part of that fiefdom.⁵⁶

It is of course highly unusual for the question of title to territory to depend, at least in part, on the incidents of feudal tenure. But the determination of any territorial dispute, particularly in relation to land territory, will inevitably involve a balancing of the conduct and activity of the states concerned in relation to the disputed territory; and this in turn will require both sides to undertake in-depth historical researches.

The practising international lawyer will therefore on occasion have to assume the mantle of amateur historian. Depending on the nature of the problem with which he is confronted, he may also have to familiarise himself with other disciplines. Many contemporary international disputes involve the demarcation of maritime boundaries. Here, the international lawyer will have to acquire at least a basic knowledge of geology, geomorphology, bathymetry and the techniques utilised by hydrographers. He may find himself, as in the *Malta/Libya* continental shelf case, arguing about the significance of plate tectonics;⁵⁷ or, as in the interpretation phase of the *UK/French* continental shelf arbitration, about the differences between loxodrome and geodesic lines when plotted on a standard Mercator chart.⁵⁸

He will of course be able to call upon the wisdom of experts in these other disciplines. In cases which come before an international tribunal, it is normal practice for each of the Parties to appoint an Agent, usually an official from the Ministry of Foreign Affairs with legal qualifications. The Agent is the channel of communication with the tribunal, but he will in addition play a major role in the selection of the team that will prepare and conduct the case, and indeed in the presentation of the case itself. That team will consist of counsel drawn from national professions and possibly experts from disciplines other than the law. It has been rightly said that:

It is better to start with a small team and to enlarge it if necessary as the case proceeds.⁵⁹

A small team is desirable, partly because of the difficulty which the Agent may encounter in co-ordinating the contributions of a large number of individuals, and

⁵⁶ *Ibid.*, p. 68.

⁵⁷ [1985] *I.C.J. Reports* 34-6.

⁵⁸ (1979) 54 *I.L.R.* 176 and 179-82.

⁵⁹ Maurice Bathurst, 'The Practitioner' in Bin Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens, 1982), p. 118.

partly because the involvement of too many people in the preparation of the written pleadings is likely to result in confusion and a loss of coherence.

The written pleadings in cases before international tribunals – normally termed Memorials, Counter-Memorials and Rejoinders – play a highly significant role in the international judicial process. By way of contrast with the position in domestic litigation, the written pleadings in international cases are voluminous. This is partly attributable to the fact that international litigation is, more often than not, the culmination of many years of ineffective negotiation which have thrown up irreconcilable differences both as to the relevant facts and the applicable legal rules. These will have to be canvassed at length in the Memorials which serve as the vehicles for each side to present its own view of the facts and the law, the Counter-Memorials being primarily directed towards answering the case put forward by the other side. Generally speaking, the oral hearings in cases before international tribunals play a less significant part than they do in domestic litigation, particularly in common law jurisdictions. In particular, there is virtually none of that interplay between the Bar and Bench which is so distinctive a feature of argument before an English judge. As one noted practitioner has put it:

To the advocate schooled in the courts of England and Wales, the silence of the bench in a case before the International Court of Justice is almost uncanny.⁶⁰

The practising international lawyer, when advising his own Government or indeed any client Government, would do well to bear in mind that international law is in a state of constant ferment and evolution. During the past forty years, there has been a vast outpouring of materials on all aspects of international law, whether in the form of books, articles, digests of state practice, reports, resolutions or recommendations. What was a trickle in the early post-war years has now become a flood which is threatening to overwhelm us all. Some of this material is of variable quality, and this can be attributed, at least in part, to the danger of over-specialisation in discrete branches of public international law, such as that law of the sea or human rights law. Brownlie has drawn attention to this danger:

It is ludicrous that the law of the sea should be studied – as may happen – by people who lack knowledge of essential aspects of general international law, including the sources of the law, the law of treaties and state responsibility. It is the equivalent of studying a ‘special contract’ topic, such

⁶⁰ *Ibid.*, p. 122.

as sale of goods or labour law, or marine insurance, without a grounding in the law of contract.⁶¹

All this is not to require of the public international lawyer, whether scholar or practitioner, that he be a polymath. But even the practitioner (and perhaps above all the practitioner) must have a deep knowledge of the basic principles of the international legal system, sufficient for him to be able to discern that there are no truly autonomous branches of international law, and that what may at first sight appear to be a pure law of the sea question (such as the delimitation of maritime boundaries) is likely to raise more general issues such as the relationship between custom and treaty, the application of the concepts of acquiescence and estoppel, or the validity and interpretation of reservations to multilateral conventions.

But, above and beyond this, the practitioner in international law must be aware of developing trends in his discipline if he is to render an effective service to his clients. He must be conscious of what I have referred to as the ferment in the law which has led to a serious questioning of the conditions for ascertaining the content of customary law and to a notable blurring of the distinction between *lex lata* and the *lex ferenda*. Indeed, Sir Robert Jennings has gone so far as to suggest that we need to look afresh at the classical tests for the formation of customary law:

Perhaps it is time to face squarely the fact that the orthodox tests of custom – practice and *opinio juris* – are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions, and it is often the focus of contention. Anything less like custom in the ordinary meaning of the term it would be difficult to imagine.⁶²

Of course, this assumes (or may be thought to assume) that what Sir Robert refers to as ‘new law’ is in fact law rather than a claim to represent law or even merely a proposal to modify existing law. What is however, undoubtedly true is that the classical tests of custom now have to be applied in a more flexible manner than was the case thirty or forty years ago. Again, I cite Sir Robert in support of this proposition:

⁶¹ I. Brownlie, ‘Problems of Specialisation’, op. cit., at footnote 59 above, p. 111.

⁶² R. Jennings, ‘What is International Law and how do we tell it when we see it?’, (1981) 37 *Schweizerischen Jahrbuch für International Recht*, p. 67.

The fabric of law on which the treaties are imprinted is still the common international customary law, inseparable from its history, though, largely as the result of the impact of the new states on the international society, more plastic and quicker to reflect change and new developments than at any previous period of the development of international law.⁶³

A potent illustration of this plasticity is the rapid embodiment into customary law of the concept of the exclusive economic zone as a result of state practice drawing upon the deliberations of the Third UN Conference on the Law of the Sea during the 1970s.

So the practitioner, no less than the scholar, has to be sensitive to newly emerging trends in the development of international law. He cannot afford to overlook or discount challenges to what he may regard as established rules of international law, since it is these very challenges which may reveal new insights into the manner and direction in which the law is or may be evolving. At the same time, he must endeavour to make his own judgment as to whether any new trend has yet crystallised into a rule of law. This is by no means an easy task, requiring, as it does, perceptiveness in assessing the strengths and weaknesses of particular claims and counter-claims. He will no doubt bring to this process his own philosophy of the role which international law plays, or should play, in the conduct of international relations. That role is not undisputed. There are some who cynically believe that the task of the legal adviser to a Foreign Ministry is simply to provide the best legal arguments he can in support of a line of policy decided upon by the Government concerned on extra-legal grounds. That is not a point of view which would be shared by those who have been charged with this responsibility, at least in this country. Indeed, the practitioner who is called upon to render legal advice to his own Government (or indeed to any foreign government) on a question of international law should not confine himself to rendering academic legal advice divorced from the realities of the circumstances which have led to his advice being sought; rather he should (as I have said elsewhere) see his role as being ‘... designed wherever possible to afford practical guidance as to what course of action to follow in the particular circumstances, having regard to governing legal principles and developing legal trends’.⁶⁴

One final point. It should not be assumed from what I have said that the practitioner in international law plays no part in litigation before domestic courts. It is becoming more and more frequent for international law issues to arise in

⁶³ R. Jennings, ‘Universal International Law in a Multicultural World’ in M. Bos and I. Brownlie (eds.), *Liber Amicorum for Lord Wilberforce* (Oxford: Clarendon Press, 1987), p. 46.

⁶⁴ I. Sinclair, ‘The Practice of International Law: the Foreign and Commonwealth Office’, *op. cit.*, at footnote 59 above, p. 134.

proceedings before national courts. Indeed, if one takes this country as an example, and looks at the law reports for 1986 and 1987, it quickly becomes apparent that the English courts have had to grapple with many different questions of public international law. These include the question whether the immunity accorded to premises of a diplomatic mission under Article 22 of the Vienna Convention on Diplomatic Relations can continue to apply to premises which have ceased to be used for the purposes of the mission;⁶⁵ the question whether judicial review can be sought of an instrument akin to a treaty, such as the Anglo/Irish Agreement;⁶⁶ the question whether a plaintiff, having lost in proceedings before the US/Iran Claims Tribunal, can commence proceedings in England against the same defendant on the same grounds;⁶⁷ the question whether Ciskei (one of the Bantustans in South Africa) has capacity to be a party to proceedings in the English courts, not being recognised as a state by the British Government;⁶⁸ various issues arising out of the insolvency of the International Tin Council, such as whether the Council enjoys immunity from suit in respect of proceedings to recover monies due on a loan, having expressly waived that immunity in the facility letter,⁶⁹ whether an international organisation, such as the Council, can be compulsorily wound up by an English court,⁷⁰ and whether a receiver can be appointed by way of equitable execution to pursue the claims of creditors against the members of the Council;⁷¹ and finally, the question whether an action for libel based on an internal Embassy memorandum was justiciable in the English courts, having regard to the inviolability of diplomatic documents and the concept of international comity.⁷²

These are just a few examples of the many differing questions of international law which have recently arisen in proceedings before the English courts and in which the practitioner may find himself from time to time involved.

These, then, are the broad areas of activity in which the practitioner in international law may become engaged. His expertise may be called upon in the context of legal advice pure and simple, possibly in anticipation of negotiations

⁶⁵ *Westminster City Council v. Government of the Islamic Republic of Iran* [1986] 1 WLR 979.

⁶⁶ *Ex parte Molyneux* [1986] 1 WLR 331 (the question was answered in the negative).

⁶⁷ *Dallal v. Bank Mellat* [1986] 2 WLR 745 (the question was again answered in the negative on the ground that comity requires the English courts to recognise the validity of decisions of foreign arbitral tribunals whose competence is derived from international law and practice).

⁶⁸ *Gur Corporation v. Trust Bank of Africa Ltd.* [1986] 3 WLR 583.

⁶⁹ *Standard Chartered Bank v. International Tin Council* [1987] 1 WLR 641.

⁷⁰ *In re International Tin Council* [1987] 2 WLR 1229 (answered in the negative).

⁷¹ *MacLaine Watson and Co v. International Tin Council* [1987] 3 WLR 508 (application refused on the ground that the Council had no arguable cause of action against its members).

⁷² *Fayed v. Al-Tajir* [1987] 3 WLR 102.

between his client and another Government, or in the context of imminent litigation before an international tribunal or a domestic court. From time to time, he may be asked to give a written opinion on a particular point for the benefit of a foreign court or arbitral tribunal, and occasionally he may be called as an expert witness before such a court or tribunal. His functions are as varied and diverse as is the content of international law itself. He does not live in an ivory tower, since his work is always directed to the solution of problems which have arisen in practice; but he must bring to these problems, not only a sound knowledge of the basic principles of his discipline, but also a sufficient degree of imagination and vision to comprehend the direction in which international law is evolving. His perspective is not opposed to that of the scholar or the teacher. In this esoteric field of international law, the practitioner has as much to learn from the scholar as the scholar may have to learn from the practitioner. The teaching and practice of international law is so closely interwoven that, as I have already demonstrated, it is sometimes difficult to distinguish between scholar and practitioner. Each has his contribution to make; and that contribution is towards the wider dissemination of international law and a fuller understanding of the role which it can, and does, play in the contemporary world.

Philip Allott

V. INTERNATIONAL LAW AND INTERNATIONAL REVOLUTION: RECONCEIVING THE WORLD

The Josephine Onoh Memorial Lecture 1989

I want to think aloud about a question which is easy to state but very difficult to answer.

Why do we put up with it all?

That question reflects a dull pain, an anguish, an anger even, that many people feel in considering the state of the world. It would be uttered as a sentimental question, not expecting an answer, at least not expecting a practical answer. But let us, for a while, treat it as a question to be answered in practical terms.

Why do we put up with it all? Obviously it is a question which implies three other questions – and it is those implied questions that give rise to all the difficulty.

What exactly is it that so troubles us in the state of the world? What is the cause or origin of the things that trouble us? What could and should we do to change those things?

Let us consider a practical example.

You will have heard of the country called Nowhere, but you may not know much about it in detail. Nowhere is an independent sovereign state with a President, a government, a single political party called the Nowhere People's Party, a population of 12 million people, consisting of two ethnic groups – the Noes and the Wheres. The ratio of Noes to Wheres is two-to-one. The Nowhere People's Party is dominated by the Wheres, the smaller ethnic group. The Wheres arrived in the country in the early nineteenth century and soon came to dominate the indigenous No people.

Nowhere's economy has been a two-product economy – copper and tourism. The copper-mining industry is controlled by a multinational company centred in a country called Superpower One. The tourism industry is controlled by Where

businessmen in cooperation with various foreign interests. The menial labour in tourism is provided by the No people. In recent years Nowhere has been flourishing as an off-shore financial centre, with foreign banks and holding companies establishing offices in the capital, Nowhere City. There has been a consumer boom, with great demand for imported video-tape recorders and cocaine. Next month is to be a state-visit by Madonna Jackson, who is to be given the country's highest honour, for services to Nowenese culture.

Nowhere's immediate neighbour is No-man's land, whose population consists almost entirely of No people. No-man's land is a multi-party state with a Westminster-style parliament. It is a poorer country than Nowhere. It has a long-standing claim to the territory of Nowhere and supports a Nowenese Liberation Army which is seeking to overthrow the regime in Nowhere. The N.L.A. is also supported by a country called Superpower Two. A sum of money equivalent to one-third of its Gross Domestic Product is spent every year by each country on arms, which are obtained from Superpower One and Superpower Two and on the international arms market.

Nowhere has a written constitution containing a Declaration of Political and Social Rights. However, the President declared a State of Exception five years ago and the Declaration of Rights was suspended. The President's eldest son is the Chief Justice of the Supreme Court, His second son is Commander-in-Chief of the Nowhere Armed Forces. His youngest son is studying at Harford Business School.

I do not need to say much more. It is all very familiar. Nowhere is a member of many international organisations. It is also an object of interest to many international organisations, including the U.N. Security Council, the World Bank, the International Monetary Fund, leading international banks, Amnesty International, and the Church of Perpetual Healing, which has missionaries in Nowhere City, in the tourist resorts and in remote villages. The President's sister is an ardent Perpetual Healer.

You will not be surprised to hear that deforestation in the north of Nowhere has turned the fertile southern plain of No-man's land into a virtual desert. Soil erosion in Nowhere is silting up the River Nouse which flows into No-man's-land, threatening a hydro-electric power-station on a tributary of the Nouse.

You react in one of two ways, when you come across news items about Nowhere and No-man's-land. Either – so what? Or – so why?

Those who react with *so what?* believe that the world is as it is, human nature is as it is, and human beings are as they are, corrupt or corruptible, sometimes decent, always long-suffering, patient of the miseries and follies of the world. And societies are as they are, some progressive and some not progressive, some

successful and some not successful. So it has always been through all human history, and so, presumably, it will always be.

Those who react with *so why?* believe that *human beings are what they could be, not simply what they have been, and societies are systems made by human beings for human survival and human prospering, not for human oppression and human indignity.*

I suppose that, from now on, I will be speaking to so-why people but hoping to be overheard by so-what people.

Let us make an abstraction of the world-situation of which Nowhere and No-man's land are one small part. And we may thereby begin to answer the first of the three subordinate questions – what exactly do we object to in the present world situation?

Here is a possible short-list, containing five intolerable things.

1. Unequal social development.

That means that some human beings worry about the colour of the bed-sheets in their holiday-home in Provence or the Caribbean, while other human beings worry about their next meal or the leaking tin-roof of the hut which is their home.

2. War and armaments.

From time to time, human beings murder and maim each other in the public interest, by the dozen and by the million, and bomb each other's villages and cities to rubble. And, all the time, human beings make more and more machines for murdering and destroying in the public interest, and more and more machines to prevent other people from murdering and destroying in the public interest.

3. Governmental oppression.

In very many countries around the world, the ruling classes are not servants of the people but enemies of the people, evil and corrupt and negligent and self-serving, torturing people, exploiting people, abusing people. And, in all countries, the people have to struggle to control the vanity and the obsessions of those who want to be their masters.

4. Physical degradation.

On the planet Earth are five billion human beings, one species of animal among countless other species of living things, a species which has taken over the planet, using the Earth's resources, irreversibly transforming the Earth as a physical structure and as a living system.

5. Spiritual degradation.

Human beings everywhere are being drawn into a single mass culture dominated by a crude form of capitalism, a mass culture which is stifling all competing values and all local cultures, a mass culture which is depraving human consciousness.

You may not like that list. You may worry about other things. You may want to challenge some item on my list, to defend something that I seem to be attacking.

You will have noticed that my list of five intolerable things consists of five clichés of so-called global anxiety. We have heard about them all until we are sick and tired of them. The mass media of communication exploit them at regular intervals, enriching their everyday fodder with an occasional healthy supplement of moral fibre – the emaciated survivor of the concentration camp, the family sleeping in the street, the mutilated body, the starving baby, the napalmed countryside, the delirious crowd at the political rally or the rock concert, hooligans on the rampage, riot police with batons and water-cannon, drug addicts killing themselves slowly, dead fish floating on a polluted river, the television set in the mud-hut.

Banal images of a reality made banal. So-why made as tedious as so-what.

And, then again, you may object that, surely, we are not simply putting up with such things. On the contrary, a lot of effort is being devoted to facing up to such things, to alleviating them, even to solving them. There are dozens of organisations and foundations and charities and conferences and good-hearted individuals worrying about each and every one of them. Surely some part of our taxes and some part of our voluntary giving is going to deal with precisely such world social problems.

I will add that as a sixth cause of our anger – perhaps the most painful of all.

6. Social pragmatism.

We treat the symptoms of worldwide disorder, because we cannot, or dare not, understand the disease. We see the effects because we cannot, or will not, see the cause.

So that brings us to the second question. What is the origin or cause of the things we find intolerable?

You will say, especially if you are a so-what person, that we cannot comment on the causes of the situation of Nowhere and No-man's-land unless and until we know more of their territories and resources, their cultural characteristics, their

history. Each is a sovereign independent state, with its own destiny to work out, its own possibilities, its own constraints. Who are we to know what is the best for them, let alone to do anything to bring about what is best for them?

I would ask you to notice three things about the two well-known unknown countries I have described, three features of their structural situation.

The first is that they are not very independent. The market-price of Nowenese copper is determined in London, where demand is related very directly to the general state of world manufacturing industry at any particular time. Nowenese tourism depends on the international holiday companies which send their packaged tourists to fill the Nowenese hotels which have been built by foreign construction companies, using cement brought half-way round the world in ships controlled by foreign shipping-lines. The off-shore companies established in Nowhere City are there because taxes are low, because few questions are asked, because the climate is pleasant. They may leave as suddenly as they arrived. And the territory of No-man's-land, its physical environment, its climate even, depend on what is done in the territory of Nowhere. And even the minds of the Nowenese people are not their own. Their values and their wants are a function of forces far beyond their control – capitalism, foreign religions, international crime, world popular culture, militarism, materialism.

And, of course, Nowhere is not nowhere. It is everywhere. All the world is more or less Nowhere. Remember that the most economically successful countries in the world maintain their economies and their standard of living by selling goods and services to other countries. There must be other countries willing and able to buy. And even the most successful countries depend on the value of their currency, which depends on international economic relativities, as well as on internal economic realities. And they depend on investment which, particularly if they have a substantial budget deficit, may be foreign investment, created and terminable through decisions made elsewhere. And they depend on technology which may be originated and controlled abroad. And they depend on cultural tides which sweep across the world, shaping human wants and human expectations and human anxieties.

Every country, from the most prosperous to the least prosperous, is at an intersection of internalities and externalities. Our independence is a function of what we control and what we do not control.

The second thing to notice about Nowhere and No-man's-land is that their national identities do not coincide with their political identities. The No people in Nowhere feel more kinship with the No people in No-man's-land than with the Where-dominated state of which they are said to be nationals. The No people in No-man's-land feel that Nowhere and its incoming Where people have usurped

some part of the No birthright. By the sound of it, they have taken the more valuable part of the traditional No territory, the part which contains the deposits of copper and the best beaches.

We know that this problem of national identity has been one of the greatest social problems through all human history, giving rise to endless wars, endless struggle and suffering, endless oppression and exploitation. And, of course, it is very much with us today. It is hard to think of a single country in the world which is not significantly affected by one or more problems of national identity, including the United Kingdom of Great Britain and Northern Ireland.

The fact is that the political frontiers of the so-called nation-states have evolved under the pressure of forces other than merely those of national identity. And yet it is the political systems of the so-called nation-states which have, somehow, acquired the power to control the social development of all the peoples of the world, to determine the well-being of humanity, to determine the future of humanity.

The third thing to notice about the structural situation of Nowhere and No-man's land is that their population consists of human beings. They share with us the species-characteristics of human beings. They think and want and hope and suffer and despair and laugh and weep as human beings. The mothers of their sons who are killed in their wars or their prisons or their hospitals have hearts as tender as the hearts of our mothers. Their children look to the future as our children look to the future. Whether we are so-what people or so-why people, we cannot stop ourselves from feeling *sympathy*.

And yet somehow we stop ourselves from feeling *responsibility* for them. They are aliens. As human beings, we know that we are *morally* responsible for all that we do, and do not do, to and for other human beings, a responsibility which we cannot think away, a responsibility which we owe to a billion human beings as we owe it to one human being. Every alien is also our neighbour. And yet as citizens, we have somehow been led to believe that we are not *socially* responsible for them – and that even our moral responsibility is qualified by their social alienation from us.

I have mentioned three structural features of the situation of two countries which are also structural features of the world situation. They are like geological fault-lines running through the world structure.

First, our single human destiny must nevertheless be pursued in isolated state-structures. Second, our national identity may be in conflict with our legal and political identity. Third, we are not able to take responsibility for human beings for whom we know we are responsible.

What I want to suggest to you is that there is a direct connection between the things which we find intolerable in the world situation and these three structural faults in the world system.

And that direct connection is located nowhere else than in our own minds. It is not a matter of physics or biology or physiology or geography or history. It is a matter of philosophy – that is to say, of human self-conceiving and human self-creating.

What we have to discover is not how the present world structure came about as a story of historical events, but how the present world structure came to seem natural and inevitable. The question of causation I am considering is the question of what causes certain social and legal situations to be accepted within human consciousness. In particular, what is the origin of the consciousness which makes possible, which legitimates, which naturalises, the way in which we conceive of international society and international law?

Why do we put up with it all? We put up with it all because our consciousness contains ideas which cause us to put up with it all. Who makes our consciousness? We make our consciousness. And so, if we can change our consciousness of the world, we can change the world. It is as simple as that.

That is the revolution I am proposing to you. A reconstruction of our understanding of the world in which we live, a reconceiving of the human world, and thereby a remaking of the human world.

Let us treat it as a mystery to be solved, how we got into our present state of consciousness about international society and international law. If we treat it as a whodunnit for a moment, I can name one of the guilty parties and I can explain the *modus operandi*.

Whodunnit? *It was Emmerich de Vattel in his study with an idea.*

That sounds unlikely. One particular Swiss writer, writing in 1758, making a certain use of certain words. Let me put the evidence before you.

I can express the same thing almost as briefly, but in a more abstract form.

Humanity, having been tempted for a while to conceive of itself as a society, chose instead to conceive of itself as a collection of states.

State-societies have undergone a long process of internal social change since the end of the Middle Ages. That process has been conducted on two planes – the plane of history and the plane of philosophy. There has been the plane of historical events, power-struggles, wars and civil wars, revolutions, institutional change, legislative reforms, everyday politics. And there has been the plane of philosophy, as human consciousness has sought ways to express what is and what might be in society, to legitimate what is, to bring about what might be.

On both planes – of history and philosophy – there have been two developments which have dominated all others in the evolving of the state-societies since the end of the Middle Ages: democratisation and socialisation. Democratisation and socialisation are words to describe two revolutions which have made the state societies we know today.

So, returning to the mystery of international society, I can now reformulate the story as follows.

International society, having chosen not to conceive of itself as a society, having chosen to conceive of itself as essentially different in kind from the state-societies in their internal aspect, has managed to avoid both forms of social revolution. The social world of humanity has been neither democratised nor socialised because humanity has chosen to regard its international world as an unsocial world.

What have democratisation and socialisation meant *within* the state-societies?

Democratisation has meant that societies became able to conceive of themselves as composed of the people, as governed by the people, and as serving the people. *Socialisation* has meant that societies acquired the capacity to form socially their social purposes.

The development of the idea of *democracy* was a response to the greatly increasing energy of national societies at the end of the Middle Ages, as their economies and the international economy developed dramatically, as humanity rediscovered the self-ordering capacity of the human mind, and hence the world-transforming possibilities not only of philosophy but also of natural science and technology, and as new areas of the world were visited, offering new possibilities for the application of human energy, individual and social energy.

The response at the level of philosophy was to take up an old idea, the idea of sovereignty: the idea that a society is structurally a unity, and that that structure depends on an ultimate source of authority, an unwilled will, which is the ultimate source of social self-ordering, the source of law in society. The idea of sovereignty was structurally necessary to turn amorphous national societies into more and more complex self-organising systems.

But there was obviously an inherent anti-social danger in sovereignty, an anti-systemic, self-disabling uncertainty. Who was to be the sovereign? How was the sovereign to be controlled? The difficulty was that the sovereign societies, as they developed, generated a particular sub-system which came to be known as *the state*.

The state came to be conceived as a public realm within society under the authority of the government. The public realm was loosely separated from the private realm, in which individuals remained, as it were, sovereign. But the state

could determine for itself the limits of the public realm, by taking control of both physical power and law-making power.

The development of democracy at the level of *philosophy* took place primarily in the development of various theories of social contract and in their sub-theory of constitutionalism. Sovereignty could be retained to provide the systematic structure of society, with its public realm under the government. But sovereignty would be reconceived to contain the idea of self-government. A society was to be a structure of sovereignty, but also a structure of self-government. And that structure came to be expressed in the new-old form of the so-called *constitution*.

The development of democracy at the philosophical level was, of course, accompanied by dramatic developments at the historical level. Much blood was shed. Many suffered, in their person and their property, in the process of social change.

The new philosophy, of democratic constitutionalism, had the effect of increasing the actual power of those who controlled the power of government, who actually controlled the public realm. In other words, the constitution proved to be an excellent means of organising democratic power but it proved incapable by itself of *determining social purpose*, of deciding how the great power of the state-society would be used.

Society had to find some means, at the philosophical level and at the historical level, to organise, from day to day, social willing and acting. Democracy had to become something more than constitutional democracy. That was the historical function of *socialisation*.

Especially in the nineteenth century, society developed as a system for generating value. The public realm came to be not merely a realm of power but a realm of value. Through the development of a professional bureaucracy, through the reform of the legal system, through the reform of parliaments, through the universalisation of elementary education, through the reform of secondary education and the reform of the universities, through the development of mass communications (in public libraries, mass production of books, mass circulation newspapers, and then radio and television) – through such means society became not merely a structure of political power but a system of shared social consciousness, a system for generating social values and social purposes. But communal values and social purposes would be generated not merely within the decision-making organs of government. They would be generated within the minds of people. The social sharing of consciousness became the sharing of our most intimate consciousness.

The application of science and technology to agriculture and industry meant that the increase in social wealth was able to keep ahead of the increase in

population, so that there was more wealth to be distributed, so that there was the possibility of social improvement not merely as an ideal but as an actuality. Society became a means for human self-creating, human self-perfecting through human interaction. And we have seen the wonderful results in the improvement of the living conditions and the opportunities of the mass of the people in a number of countries.

The question is – what happened to the organising of the interaction between such societies, their international interaction, while all these developments were taking place internally?

What happened was that the sovereign was turned inside out and became the external manifestation of the society in question. What appeared on the international scene was not the totality of the evolved national societies. What appeared on the international scene was merely the internal *public realms* externalised. The internal public realms, the governments, were turned inside out like a glove.

Louis XIV is supposed to have said: *L'État, c'est moi* – *I am the state*, meaning that he was the embodiment of the French nation by being the embodiment of its public realm. He might have gone on to say: *Le monde, c'est nous, les états*, meaning that the international system should be regarded as consisting of the governments meeting each other externally.

The result was that we came to have an international system which was, and is, post-feudal society set in amber. Undemocratised. Unsocialised. Capable only of generating so-called *international relations*, in which so-called *states* act in the name of so-called *national interests*, through the exercise of so-called *power*, carrying out so-called *foreign policy* conducted by means of so-called *diplomacy*, punctuated by medieval entertainments called *wars* or, in the miserable modern euphemism, *armed conflict*. That is the essence of the social process of the international non-society.

It is as if the external life of our societies were still a reflection of the internal life of centuries ago, a fitful struggle among Teutonic knights or European barons or Chinese feudal lords or Japanese shoguns. It is as if Thomas Hobbes were the world's only social philosopher. It is as if there had never been Locke and Rousseau and Kant and Hegel and Marx, let alone Plato and Aristotle and Lao tzu and Confucius. It is as if the revolutions had never occurred – 1789 and 1917 and all the other dramatic and undramatic social revolutions.

Nowadays people believe that such an international system is natural and inevitable. Far from it. It is not necessarily natural and it was not simply inevitable. And this is where we get back to Emmerich de Vattel in his study. It is

not difficult to unravel the story by which the misconceiving of international society was perpetrated. I will present it as a drama in five acts.

Act One. In the sixteenth century, a critical question for theologians and philosophers was the question of how there could be a law applying both to the nations of Europe and to the peoples of the lands which had been newly visited or revisited. It was necessary to reconsider the question, which had been familiar to ancient Greece and Rome and medieval Christendom, of whether there could be said to be a universal legal system. The idea was proposed, particularly in Spain and not for the first time in human history, that all humanity formed a sort of society and that the law governing the whole of humanity reflected that fact.

... international law has not only the force of a pact and agreement among men, but also the force of a law; for the world as a whole, being in a way one single state, has the power to create laws that are just and fitting for all persons, as are rules of the international law.¹

Francisco de Vitoria (1492-1546) took the view that the basis of a universal law for all human beings was found in natural reason, the rational character of human nature, which generated what he called a law of natural society and fellowship which binds together all human beings and which survives the establishment of civil power (*potestas*) over particular peoples (*gentes*). The rules of the law of nations were to be derived from natural law and from a 'consensus of the greater part of the whole world, especially in behalf of the common good of all.'²

Francisco Suarez (1548-1617) conceived of a moral and political unity of the human race.

The rational basis, moreover, of [the *ius gentium*, the law of nations] consists in the fact that the human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species, but also a moral and political unity (as it were) enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation.

Therefore, although a given sovereign state [*civitas*] commonwealth [*respublica*], or Kingdom [*regnum*] may constitute a perfect community in itself, consisting of its members, nevertheless each one of these states

¹ Francisco de Vitoria, *Concerning Civil Power* (1528), §21; tr. G.L. Williams, in James Brown Scott, *The Spanish Origin of International Law*, (Oxford: Clarendon Press London: H Milford, 1934), App. C, p. xc.

² *On the Indians Lately Discovered* (1532) III. 4; tr. J.P. Bate, in James Brown Scott, op. cit., App. A, p. xxxviii.

(*communitas*) is also, in a certain sense, and viewed in relation to the human race, a member of that universal society ...³

Act Two. In the seventeenth century, Hugo Grotius (1583-1645) began the process of separating the law of nations from the law of nature, but he did so precisely in order to make clear to the new sovereigns that their will was not the sole test of what is right even if it was the practical basis of what is lawful under the law of nations. The nations are sovereign and independent of each other. But they are all equally governed by the law of nations which is the product of the common will of nations acting in the common interest of all nations. And they are governed by natural law, which is the product of human nature and hence indirectly is the work of God who made human nature to be as it is, including its sociability and its rationality. And they are governed by a moral order which comes directly from God.

But just as the laws of each state [*cuiusque civitatis*] have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage not of particular states, but of the great society of states [*magnae universitatis*]. And that is what is called the law of nations, whenever we distinguish that term from the law of nature.⁴

³ Francisco Suarez, *On Laws and God the Lawgiver* (1612) Bk. II, ch. XIX.9, tr. Williams, Brown, and Waldron (Oxford: Clarendon Press/London: H Milford, 1944), pp. 348-9. The passage continues as follows:

Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters; therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations. For just as in one state or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations (*loc. cit.*, p. 349).

⁴ Hugo Grotius, *Of the Law of War and Peace* (1625) Prolegomena, 17. Edition of 1646, tr. F.W. Kelsey (Oxford: Clarendon Press/London: H Milford, 1925) p. 15. The continuation of Grotius' argument should also be noticed:

Many hold, in fact, that the standard of justice which they insist upon in the case of individuals within the state is inapplicable to a nation or to a ruler of a nation. The reason for this error lies in this, first of all, that in respect to law they have in view nothing except the advantage which accrues from it, such advantage being apparent in the case of citizens who, taken singly, are powerless to protect themselves. But great states, since they seem

Act Three. In the eighteenth century, an attempt was made by a German philosopher to construct a coherent and self-contained system of international law derived from natural law. That philosopher was Christian von Wolff (1679-1754). He proposed the view that the society of the whole human race continues to exist even after the creation of the nation-states.

If we should consider that great society, which nature has established among men, to be done away with by the particular societies, which men enter into, when they united into a state, states would be established contrary to the law of nature, inasmuch as the universal obligation of all toward all would be terminated; which assuredly is absurd. Just as in the human body individual organs taken together constitute one organ; so likewise individual men do not cease to be members of that great society which is made up of the whole human race, because several have formed together a certain particular society. And in so far as these act together as associates, just as if they were all of one mind and will; even so are the members of that society united, which nature has established among men. After the human race was divided into nations, that society which before was between individuals continues between nations.

to contain in themselves all things required for the adequate protection of life, seem not to have need of that virtue which looks toward the outside, and is called justice ...

If no association of men can be maintained without law, as Aristotle showed by his remarkable example drawn from brigands, surely also that association which binds together the human race, or binds many nations together, has need of law; this was perceived by him who said that shameful deeds ought not to be committed even for the sake of one's country. Aristotle takes sharply to task those who, unwilling to allow anyone to exercise authority over themselves except in accordance with law, yet are quite indifferent as to whether foreigners are treated according to law or not ... Bravery itself the Stoics defined as virtue fighting on behalf of equity. Themistius in his address to Valens argues with eloquence that kings who measure up to the idea of wisdom make account not only of the nation which has been committed to them, but of the whole human race, and that they are, as he himself says, not 'friends of the Macedonians' alone, or 'friends of the Romans',* but 'friends of mankind'. The name of Minos became odious to future ages for no other reason than this, that he limited his fair-dealing to the boundaries of his realm. (Ibid., 21, 23; loc. cit., pp. 17-18).

(*Grotius' other notes cannot be reproduced here, but at this point he characteristically notes: 'Marcus Aurelius exceedingly well remarks: "As Antoninus, my city and my country are Rome; as a man, the world." Porphyry, *On Abstaining from Animal Food*, Book III: "He who is guided by reason keeps himself blameless in relation to his fellow-citizens, likewise also in relation to strangers and men in general; the more submissive to reason, the more godlike a man is."')

... the purpose of the society therefore, which nature has established among all nations, is to give mutual assistance in perfecting itself and its conditions, consequently the promotion of the common good by its combined powers.⁵

Act Four. And then a critical event occurred. The trouble with Wolff was that his book on international law was the last volume of a nine-volume work on natural law. And it was written in Latin. Only the learned read it, among them was Emmerich de Vattel (1714-67). He decided to communicate Wolff's Volume Nine to the world. But he decided not simply to publish a translation. He wrote his own book, using Wolff's ideas so far as he approved of them. On Wolff's essential theoretical point, Vattel explicitly parted company with Wolff.

Vattel agreed that there was a universal society of the human race governed by the law of nature, but the formation of the states made an important difference in the situation.

... when men have agreed to act in common, and have given up their rights and submitted their will to the whole body as far as concerns the common good, it devolves henceforth upon that body, the state [*L'État*], and upon its rulers, to fulfil the duties of humanity towards outsiders in all matters in

⁵ Christian von Wolff, *The Law of Nations Treated According to a Scientific Method* (1749), Prolegomena, s. 7. Edition of 1764, tr. J.H. Drake (Oxford: Clarendon Press London, 1934), p. 11. Wolff argues as follows:

Nature has established society among all nations and binds them to preserve society. For nature herself has established society among men and binds them to preserve it. Therefore, since this obligation, as coming from the law of nature, is necessary and immutable, it cannot be changed for the reason that nations have united into a state. Therefore society, which nature has established among individuals, still exists among nations and consequently, after states have been established in accordance with the law of nature and nations have arisen thereby, nature herself also must be said to have established society among all nations and bound them to preserve society ...

Since nature herself has established society among all nations, in so far as she has established it among all men, as is evident from the demonstration of the preceding proposition, since, moreover, the purpose of natural society, and consequently of that society which nature herself has established among men, is to give mutual assistance in perfecting itself and its condition, the purpose of the society therefore, which nature has established among all nations, is to give mutual assistance in perfecting itself and its condition, consequently the promotion of the common good by its combined powers. (Ibid. ss. 7, 8; loc. cit., pp. 11-12)

which individuals are no longer at liberty to act and it peculiarly rests with the state to fulfil these duties towards other states.⁶

⁶ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (1758), tr. C.G. Fenwick (Washington, 1916), Introduction, pp. 5-7.

Other parts of Vattel's argument expose the tension between the universalism of the law of nature and the incipient individualism of the law of nations:

Such is man's nature that he is not sufficient unto himself and necessarily stands in need of the assistance and intercourse of his fellows, whether to preserve his life or to perfect himself and lives as befits a rational animal ... From this source we deduce a natural society existing among all men. The general law of the society is that each member should assist the others in all their needs, as far as he can do so without neglecting his duties to himself – a law which all men must obey if they are to live conformably to their nature and to the design of the common Creator; a law which our own welfare, our happiness, and our best interests should render sacred to each of us. Such is the general obligation we are under of performing our duties; let us fulfil them with care if we would work wisely for our greatest good.

It is easy to see how happy the world would be if all men were willing to follow the rule we have just laid down. On the other hand, if each man thinks of himself first and foremost, if he does nothing for others, all will be alike miserable. Let us labour for the good of all men; they in turn will labour for ours, and we shall build our happiness upon the firmest foundations.

Since the universal society of the human race is an institution of nature itself, that is, a necessary result of man's nature, all men of whatever condition are bound to advance its interests and to fulfil its duties. No convention or special agreement can release them from the obligation. When, therefore, men unite in civil society and form a separate State or Nation they may, indeed, make particular agreements with others of the same states, but their duties towards the rest of the human race remain unchanged; but with this difference, that when men have agreed to act in common, and have given up their rights and submitted their will to the whole body as far as concerns the common good, it devolves henceforth upon that body, the state, and upon its rulers, to fulfil the duties of humanity towards outsiders in all matters in which individuals are no longer at liberty to act, and it peculiarly rests with the state to fulfil these duties towards other states. We have already seen (s. 5) that men, when united in society, remain subject to the obligations of the Law of Nature. This society may be regarded as a moral person, since it has an understanding, a will, and a power peculiar to itself; and it is therefore obliged to live with other societies or States according to the laws of the natural society of the human race, just as individual men before the establishment of civil society lived according to them; with such exceptions, however, as are due to the difference of subjects.

The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be regarded as so many persons living together in a state of nature, are bound mutually to advance this human society. Hence the end of the great society established by nature among all nations is likewise that of mutual assistance in order to perfect themselves and their condition.

On Wolff's idea of a society of the nations, Vattel said:

From the outset it will be seen that I differ entirely from M. Wolff in the foundation I lay for that division of the Law of Nations which he terms voluntary. M. Wolff deduces it from the idea of a sort of great republic [*civitas maxima*] set up by nature herself, of which all the Nations of the world are members. This does not satisfy me, and I find the fiction of such a republic neither reasonable nor well enough founded to deduce therefrom the rules of a Law of Nations at once universal in character and necessarily accepted by sovereign states. I recognise no other natural society among Nations than that which nature has set up among men in general. It is essential to every civil society [*civitas*] that each member should yield certain of his rights to the general body and that there should be some authority capable of giving commands prescribing laws and compelling those who refuse to obey. Such an idea is not to be thought of between

The first general law, which is to be found in the very end of the society of Nations, is that each Nation should contribute as far as it can to the happiness and advancement of other Nations.

But as its duties towards itself clearly prevail over its duties towards others, a Nation owes to itself, as a prior consideration, whatever it can do for its own happiness and advancement ...

Since Nations are free and independent of one another as men are by nature, the second general law of their society is that each Nation should be left to the peaceable enjoyment of that liberty which belongs to it by nature ...

In consequence of that liberty and independence it follows that it is for each Nation to decide what its conscience demands of it, what it can or can not do; what it thinks well or does not think well; and therefore it is for each Nation to consider and determine what duties it can fulfil towards others without failing in its duty towards itself. Hence in all cases in which it belongs to a Nation to judge the extent of its duty, no other Nation may force it to act one way or another ...

Since men are by nature equal, and their individual rights and obligations the same, as coming equally from Nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights ...

Since Nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfil its duties, the effect of this is to produce, before the world at least, a perfect equality of rights among Nations in the conduct of their affairs and in the pursuit of their policies. The intrinsic justice of their conduct is another matter which is not for others to pass upon finally; so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights (Ibid, Introduction; op. cit., pp. 5-7).

Nations [*On ne peut rien concevoir, ni rien supposer de semblable entre les Nations*].⁷

Those words have determined the course of history. They have made the world we know. Vattel has used the sovereignty theory of the state to disprove the possibility of a natural society among states. It is fascinating to see, through the course of his book, the word *state* coming to have its modern double meaning. It comes to refer both to the internal organisation of the public realm of a society and to the whole of a society when seen externally.

Vattel's book was written in French, which was in those days the international language of the ruling class from London to St. Petersburg. The book was archetypally eighteenth-century – elegant, clear, rational, easy to understand, full of good sense and worldly wisdom. Vattel himself was the very model of an eighteenth-century gentleman – cultivated, leisured, occasionally leaving his study to take part in public affairs and diplomacy. And his book, unlike Wolff's, was read by everyone who mattered, was on the desk of every diplomat for a century or more. It was a book which formed the minds of those who formed international reality, the international reality which is still our reality today.

Act Five. In the nineteenth-century, natural law ceased to have any hold on the mind of most philosophers, let alone diplomats and politicians. Natural law was swamped by utilitarianism, positivism and marxism. Natural law was dead beyond resurrection.

Throughout the nineteenth century social and legal philosophers continued to emit streams of discordant ideas about the true nature of international law. They might have saved themselves the mental effort. Vattel-minus-natural-law filled comfortably the busy minds of those whose job it was to act internationally. And their seemingly rational reality became international society's actual reality.

The natural law framework of Vattel simply evaporated, leaving an international society consisting of so-called states interacting with each other in a social wasteland, subject only to a vestigial law created by their actual or presumed or tacit consent. International society would be, and would remain, an unsocial interstitial system.

It must have been an agreeable discovery for post-revolutionary ruling classes when they found that, internationally, they could continue to deal with each other government-to-government, like in the good old days, free of the encumbrances of democracy and socialisation, and yet, oddly enough, sustained in the atavism of a permanent international *old regime* by such famously progressive words as *sovereignty* and *freedom* and *equality*.

⁷ Ibid., Preface; loc. cit., p. 9a.

In the course of the nineteenth century, the *law of nations* came to be known as *international law*, giving a veneer of spurious universalism to a law which knew itself now to be merely inter-statal.⁸ The voice of invincible Anglo-American common sense became the representative voice of self-misconceiving international society and its law.

International law consists in certain rules of conduct which modern civilised states regard as binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement.⁹

Late in the nineteenth century there came to be newly unified and newly powerful states, bringing an immense increase of economic and political and military energy into an international system which was undeveloped, unsophisticated, unable to socialise the overwhelming volume of the new social energy. We have lived with the consequences in the twentieth century. We are living with the intolerable consequences today.

⁸ Jeremy Bentham (1748-1832) had proposed the change of name in his *Principles of Morals and Legislation* (1790), ed. 1823, vol. II, p. 256. Cf. Bentham's footnote in 1823 ed.:

The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of the law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor d'Aguesseau has already made, I find, a similar remark: he says that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens* (Oeuvres (ed. 1773) vol. II, p. 337).

The substance of Bentham's proposal had also been anticipated by Zouche in his *Iuris et iudicii feccialis, sive iuris inter gentes* (Oxford, 1650) (Neudrieck Washington: Oxford, 1911), explicitly substituting the phrase *ius inter gentes* for the traditional *ius gentium*. See Wheaton, *Elements of International Law*, (London: Sampson Law, 1864) (Lawrence's 2nd annotated edition) pp. 19-20, where Lawrence's note traces the gradual acceptance of Bentham's proposal in English and other languages.

⁹ William Edward Hall, *A Treatise on International Law* (Oxford: Clarendon Press 1880), p. 1. Cf. L. Oppenheim, *International Law – A Treatise* (London, New York: Longmans, Greens and Co., 1905):

Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law. States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty and of the fact that the Law of Nations is a law between, not above, the States (Chap. II.14, at pp. 19-20).

It is a speculation which is not only of intellectual interest. It is a might-have-been of history with a significance which is still practical. If Christian Wolff had written in simple lucid French like Vattel, or in excited and exciting French like that other Swiss citizen of great influence, Jean-Jacques Rousseau, the world's conception of itself might have been fundamentally different, the history of the world might have been different, the story of the twentieth century might have been different.

Instead, we have the world as it is, a human world which human being in general think is natural and inevitable but which requires each of us to be two people – with one set of moral judgments and social aspirations and legal expectations within our own national society, and another set of moral judgments and social aspirations and legal expectations for everything that happens beyond the frontiers of our national society.

And the post-Vattel ethos which supports this wretched spiritual and psychological dislocation has turned itself into an articulated system which is all-too-familiar. I will call it the *old regime* of the human world and of its law. I will epitomise it in eight principles. And then, finally and equally brief, I will put before you a *new view* of the human world and its law.

The old regime, which subtends everybody's everyday view of the human world and its law, can be stated as follows:

1. The human world consists of a collection of states, approximately one hundred and seventy-five of them, together with a number of inter-governmental organisations (so-called international organisations).
2. International law is made by and for the states and international organisations, which are the only legislators and the only subjects of international law.
3. Individual human beings and non-governmental entities of all kinds, including industrial and commercial enterprises, are not subjects of international law.
4. International law organises the interaction of the states, that is to say, the interaction of their public realms, the governmental aspect of their activity.
5. Other international transactions are a matter for international law only in so far as they involve action by governments, either international action, or consequential internal action.
6. The internal realms of the state are independent of each other, protected by a formidable series of defensive concepts – sovereignty, the sovereign equality of states, sovereignty over territory, domestic jurisdiction, political independence and territorial integrity, non-intervention. From behind these

conceptual barricades, each state is free to formulate its own policies and pursue its own interests.

7. States are thus, as Vattel proposed, inherently free and equal and independent sovereigns. International law is accordingly conceived as an act of sovereignty by which states choose to accept limits on the exercise of their natural freedom.
8. The only international responsibility for governmental activity is thus a form of legal responsibility, called state responsibility, for a breach by one state of another state's rights. And that breach takes one of three forms – a breach of territorial rights (property wrong), a breach of a general duty owed to another state (delictual wrong), a breach of a treaty (contractual wrong).

Beyond this, there is no systematic conception of an international society at all – no international social purposes, no international morality, no international moral responsibility, no international social accountability, no systematic international economy, no systematic international culture. And the people of the world do not govern themselves internationally. If anything, they have only a marginal effect on the international activity of their own government.

International social progress comes, if at all, as an incidental external consequence of internal activities, and as a more or less random outcome of so-called development assistance, and, especially, as a by-product of the wealth-creating and wealth-distributing effects of international capitalism, including rudimentary cooperation among some of the governmental managers of international capitalism (in G.A.T.T., the I.M.F., O.E.C.D., the European Community, the Group of Seven).

What can we do about it? What should we do about it?

You will not be surprised to hear that the solution I propose is conceptual. I do not propose institutional change, whether root-and-branch or fabian. I do not propose that we take arms to expropriate the expropriators. I do not propose that we use the power of the people to disempower the powerful.

What we will take up is not the power of arms but the power of ideas. We will let our best ideas of society and law flow into our imagining and our understanding of the human world. By *best ideas* I mean ideas that are philosophically fruitful, psychologically empowering, morally inspiring, practically effective. Within ourselves we can find unrealised best ideas of society and law which are an inheritance secreted from more than five thousand years of intense social experience. We will, at last, take up our best ideas of society and law. We will make them into humanity's ideal. We will choose them as the programme of a revolution.

I will put a *new view of the human world and its law* also in the form of eight principles.

1. International society is the society of the whole human race and the society of all societies. In other words, everything human that happens in the world is part of the social process of international society. We, the people, are members of international society – as are all the countless subordinate societies that we form, including, among many others, the family, the industrial and commercial corporation, the state-societies, and non-governmental and intergovernmental international organisations.
2. International society has a constitution like every other society, which carries the systematic structure of society from its past to its future, determining the way in which all social power is created and distributed throughout the world.
3. The state-societies and intergovernmental organisations are constitutional organs of international society, with special functions and powers in relation to the world public-realm, functions and powers delegated by international society under the international constitution and under international law.
4. International law is the law of international society, the true law of a true society. It is made, like all other laws, through the total social process of international society, in which we all participate, the people of the world and all our subordinate societies, including the state-societies.
5. The constitution of international society, like any other constitution, is not finally fixed. It is a dynamic thing, liable to unceasing change under the pressures of international society, constantly reformed by the ideas and aspirations of humanity. The era of unsocial interstatal society is ending – the era of international relations, state-power, foreign policy, diplomacy, and war, the era of the old international law. The era of social international society has begun.
6. The responsibility of the state-societies, as organs of international society, is not merely a matter of property, delict, and contract. Nor is their responsibility merely legal responsibility. Their primary responsibility is for abuse of power. All governments everywhere are socially and legally responsible for the way in which they exercise the powers delegated to them by international society. And the same is true of all those individuals and societies, including industrial and commercial corporations, which exercise social power affecting human survival and prospering.
7. International law, like all law, is inherently dynamic – developing structurally and systematically, developing substantively, flowing into new

areas, embodying and responding to the social development of the world – human rights law, environment law, natural resources law, sea law, space law, telecommunications law, intellectual property law, economic law of all kinds, and international public law to control the use and abuse of public power.

8. International society and international law embody the social purposes which humanity chooses for itself and which are realised in the social power, legal and non-legal social power, which human beings exercise with a view to human survival and prospering.

Our consciousness extends throughout the world passing freely across political frontiers. Our sympathy extends to the whole of humanity. Our moral and social responsibility extends to the whole of humanity and to the whole of the physical world which we transform by our actions.

But our social ideals and our social possibilities are trapped and stifled within the mental structures which divide and disable the human world, structures which human consciousness has made and which human consciousness can remake.

The necessary revolution will free human consciousness from its self-subjection, from its self-disabling, from its self-destroying, allowing our ideas and our ideals, as well as our willing and our acting, to include the whole world, the physical world and the human world. The necessary revolution will leave us free to make and remake a human society which does not abolish our national societies but embraces and completes them.

The necessary revolution is a world revolution. The world revolution is a revolution not on the streets but in our minds.

VI. THE EUROPEAN COMMISSION OF HUMAN RIGHTS FROM THE INSIDE: SOME THOUGHTS ON HUMAN RIGHTS IN WESTERN EUROPE

The Josephine Onoh Memorial Lecture 1990

EXPERIENCE IN THE EUROPEAN COMMISSION ON HUMAN RIGHTS

For eight years I have been a member of the European Commission of Human Rights. This is not a particularly long period of time. Half of the members of the Commission have served longer. But it is a long enough period to look back and to make some general remarks.

What has struck me most in the Commission is the degree of uniformity in European legal thinking. One might expect that lawyers from 21 different countries with different cultural and legal backgrounds would think differently about concepts such as fair trial, freedom of the press or corporal punishment, but in the Human Rights Commission, however divergent its composition, the members think much the same on such issues. This may be due in part to our common roots in Roman law, and in part to modern communication systems which ensure that increasingly we all read the same news, and often the same law books. Of course, there are differences within the Commission as there are differences in any society. Some members are more willing than others to leave a large degree of discretion to national authorities and national courts; some are more willing than others to care for individual criminals. And there are eternal disputes. In the *Case of Cecilia and Lisa Eriksson*, for example, a child was claimed both by her natural mother, with whom she had lived only briefly, and by the foster parents, with whom she had lived for more than ten years and with whom she wanted to continue living. Who had the stronger right? The Commission decided in favour of the natural mother. In that case I dissented and pleaded for the protection of the family life of the child with its foster parents, if

necessary against a natural parent.¹ It is my strong conviction that the ties that grow from educating a child and from living together may be more important than the ties of blood. But others think differently, not because they are from other countries, but because of their personality and experience. Such divergences are good. They keep the debate going and they offer some guarantee that sufficient attention is paid to all interests involved. This is also a reason why it may be good to discuss all important questions in the plenary organ.

The different personalities of the members and their different backgrounds, the great variety of issues and the confrontation with the weaker points of many different legal systems make the European Commission a fascinating organ to work for. Today I would like to focus on three issues.

- 1) What do I see – in my subjective view – as the most important achievements of the European Convention?
- 2) What do I see (again subjectively) as its most important defects?
- 3) Once we have looked at the defects, what can be done about them?

1. The Benefits of the European Convention on Human Rights

On the whole the European Convention on Human Rights has been successful. In my opinion the value of the Convention is threefold.

- a) It promotes the protection of human rights,
- b) it promotes the independence and self-confidence of the individual citizens of Europe, and
- c) it promotes European integration.

Each of these merits some comment.

a) Promotion of Human Rights Protection

The protection of human rights is the purpose of the Convention. One may, however, doubt whether the founding fathers really considered it the most important aspect. When the Convention was established there was strong conviction that human rights were sufficiently protected in the domestic legal systems of Europe. After the initial failure of the United Nations to accept a binding document in this field, the European states wanted to demonstrate to the other states of the world that they were willing to accept a binding document for the protection of human rights. To a large extent this was a political gesture to the

¹ *Cecilia and Lisa Eriksson Case* (11373/85), Report of the Commission of 14 July 1988.

other regions of the world. But history has demonstrated that, even in states which take human rights closely to heart, violations do occur. This means that as a final remedy the European Convention performs an important function.

I think that the Convention helps significantly to promote the protection of human rights. Many weak points in national legal systems have been identified through proceedings under the European Convention and have subsequently been amended or replaced by rules that better guarantee human rights. Of course, the protection is limited to some fourteen fundamental rights – and that may not be enough – but for the enumerated rights the Convention is of great importance.

b) Promotion of the Independence and Self Confidence of Individual Citizens

The second value is of a largely psychological nature. In modern society government power has increased enormously and, because of the complicated problems of society it will increase further in the future. To an ever-growing extent citizens are dependent on their government and unable to resist its wishes. In cases of disagreement with their government some people feel subdued or oppressed because of this dependence. One cannot stand alone against an omnipotent government. All the bodies and courts which one can use stem from that same omnipotent state. In this situation the possibility of bringing an action against the state, of going to an international body when treatment by the national government is considered unfair, strengthens the independence and self-determination of the citizen. If you compare Western Europe with other regions of the world, you may realize how important this is.

c) Promotion of European Integration

The European Convention promotes European integration mainly in the legal field. The decisions of the Commission and especially the case-law of the European Court of Human Rights create European Law. One really feels European when listening to the pleadings of a Swedish lawyer before the Commission invoking the *Marckx* case or the *Bentham* case and referring to further developments in Belgium and the Netherlands. The Convention and its organs not only create a body of European law, but they also open the eyes of lawyers to developments in other parts of Europe. And gradually they bring the national legal systems closer together. In Austria, for example, libel and insult are traditionally taken more seriously than in many other European countries. This means that the balance between these offences and the freedom of the press also differs from that in many other countries. Austrian journalists run a greater risk than others of being convicted for defamation or libel. This is the background to a number of cases against Austria in which, finally, the European

institutions gave priority to the freedom of the press.² Inevitably, this will influence the Austrian courts and gradually move the Austrian position closer to that of its European partners. Similarly, the rejection of corporal punishment by the vast majority of its European partners and – consequently – also by the European Court of Human Rights has stimulated the abolition of corporal punishment in Britain.

To achieve an integrated Europe, it is not necessary to harmonise all legislation. The variety of culture which Europe offers is a dear heritage which should not easily be sacrificed. But, when people move freely throughout the Continent, their fundamental rights should not differ from one country to another. Because of the nature of a human right one should be certain of its protection wherever one goes. It is, therefore, important that the extent and the applicability of each human right is uniform, so far as possible, throughout Europe. This is not an easy task. It may take years before problems of harmonisation are even identified. A problem caused by the lack of harmonisation became apparent over the issue, for example, of the *jus standi* of associations of members of a particular profession. In the German-speaking countries such associations cannot act in court on behalf of their members. In the case of a complaint against a state the victim himself must bring the action. The Commission followed this practice in its interpretation of Article 25 of the Convention. Cases brought by professional associations on behalf of their members are declared inadmissible. The individual members must themselves lodge the application. Only after many years did it become clear that this could be unfair to Scandinavian applicants. In Denmark, for example, it is the normal procedure for professional associations to act on behalf of their members. They thus act in all domestic procedures and logically they continue the proceedings to Strasbourg. Declaring their complaints inadmissible placed the Danish associations in a worse position than their German equivalents, who in national proceedings are accustomed to having, as co-actor, an individual member of the association who is an actual victim.

2. *Defects of the European Convention on Human Rights*

However important the benefits of the Convention, there are also important defects. When working with the European Convention on Human Rights one inevitably meets issues that one would rather solve in a different way. It is not the purpose of this lecture to criticise the work the work of the Commission nor even

² See the *Lingens* judgment of the European Court of Human Rights, 8 July 1986, Series A, No. 103, pp. 14-38, and especially the survey of national views collected by 'Interrights'. It is hoped that they will be published in Series B.

to assess my own position within the Commission. But it may be useful to raise some issues for public discussion, which may lead to improvements in the long run. During my membership of the Commission I have participated in some five thousand cases. Inevitably, one cannot feel equally involved in all of them. The interests and backgrounds of the members of the Commission vary, which means that each member's perspective on the cases also varies. I cannot claim, therefore, that the cases which impressed me most are the most important cases, or are the cases which deserve more attention than others. In many respects the underlying survey is a subjective choice out of a vast field. One may distinguish three groups. In the first place there are human rights not protected by the Convention. Secondly, the application of the Convention may be expanded in some fields and thirdly there are some developments which in my opinion merit criticism.

a) Rights Not Protected

The borderline between human rights and other rights is vague. All rights are human rights in one way or another. It is possible therefore to 'promote' many more rights into the category of human rights. The more successful the protection of human rights, the stronger the tendency to do so. Whenever a state, a political party, or even an individual parliamentarian or civil servant considers a right particularly important there may be a proposal to 'promote' it into the category of a human right. One should be careful in this respect. More human rights will lead to more complaints and to a further overburdening of the Strasbourg institutions. Furthermore, too many human rights will water down their special character and therefore, in the long run, weaken their protection. Many possible, and important, human rights are of a different nature than the ones enumerated in the European Convention and should therefore rather be codified in separate treaties, such as the European Social Charter. If the protection envisaged by that Charter is insufficient, then the Charter should be enforced, rather than bringing social rights into the European Convention. In my opinion there is no need to add many new human rights to the Convention; many of the existing rights are so vague that they can be easily expanded without formal amendment (see below under 3.c).

b) Rights that could be Expanded

- i) When the convention was drafted it was impossible to know how it would develop. The needs of 1990 could not be foreseen in 1950. Several Articles of the Convention are unclear or too vague. One of them is the right to a fair process before an independent court, guaranteed by Article 6, the

application of which is restricted to civil rights and criminal charges. That means that large fields of administrative and fiscal litigation are not covered.

- ii) An issue not regulated in the Convention is the question of interim measures. Sometimes individual applications are made, complaining of the risk of a violation of the Convention before the violation actually occurs. The most frequent example is the complaint by the alien who claims that extradition would be 'inhuman', or could even cause his death. For such cases the Commission and the Court have provided in their Rules of Procedure (Art. 36 in both Rules) that they may indicate to the parties any interim measure, the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings. Usually states will comply with such a request and a customary law rule is developing that they are obliged to do so. A formally binding rule would help this development and would also help the states in their internal proceedings. The Netherlands, for example, has a constitution providing that decisions of international organisations – and that includes a binding interim instruction – have force of law and priority over domestic legislation. But even without an express constitutional provision, it is still easier to instruct a generally independent branch of Government to follow a binding rule of international law than it is to expect it to follow the request of an institution from which it would normally not accept instructions.
- iii) The most painful injustice in Western Europe is probably against immigrants. They are often looked upon almost as 'bad' people who upset the natural order of society by trying to intrude into another country. But, more often than not, they are the most enterprising and energetic individuals in their own nation. They face great problems at home which they cannot hope to solve. They then show considerable courage by cutting their ties in order to start from scratch elsewhere. The people who come to Europe in order to build a better life for themselves and for their children are faced with great difficulties. Only when they are in real and serious danger at home may they hope to acquire asylum. If they cannot prove the danger to which they are subjected, asylum may be refused. They are sent back and may be faced with serious countermeasures in their own state. The very act of seeking to obtain asylum may force them to enumerate many activities which they undertook against their state. This enumeration will worsen their position at home. Seen from the purely humanitarian

angle, most immigrants to Western Europe deserve far better treatment than they get, but the Convention cannot help them. The humane solution of welcoming all immigrants and helping them to build a new life in Western Europe is economically and socially impossible. The only possibility of solving the problem of economic migration is probably to assist other parts of the world in their economic development and thus to remove the causes of this migration.

Political immigrants are also faced with problems, mainly because they cannot always prove the necessity for their migration. The Convention does not offer them much help. The decision to admit foreigners is mainly left to the national authorities. Even after they are admitted, immigrants often face more difficulties than ordinary citizens. Relatively minor offences, such as shop-lifting, may cause their expulsion.

In extreme cases, the institutions of the Convention have the power to act. Under Article 8 of the Convention the participating states undertook in principle to secure to everyone the right to respect for his private and family life. It is not an unconditional recognition. Under the second paragraph of that Article the states are entitled to make a number of different exceptions to the principle, whenever they are 'necessary in a democratic society'. The European Court of Human Rights has interpreted the word 'necessary' as including a duty to balance the interests of the state against the interests of the individual. On the one hand this does not make the Article too onerous for the contracting states, but on the other hand the Article as a whole is sufficiently wide and vague to permit the Commission and Court to grant some protection to people whose private or family life would be ruined by expulsion or by a refusal to allow them to enter a country. But the Convention organs must be careful. Immigration policy is not only outside the Convention, it is also a field that each society wants to govern for itself. As long as each state has its own people, it must also have the responsibility for its immigration. So far, the Commission has not accepted expulsion or refusal to enter a state as an infringement of someone's private life and therefore in violation of Article 8 para. 1. The question of whether the infringement could be justified on one of the grounds mentioned in Article 8 para. 2 has not, therefore, yet arisen. In several cases, however, the Commission has accepted an expulsion, or a refusal to allow an individual to enter a state, as an infringement of family life. This will be the case whenever the expulsion or refusal leads to the separation of husband and wife or of parents and minor children, or, in other words, when the other members of the family

cannot reasonably go to the state to which their family member is expelled or where he, or she, is to remain.

The reason that the Commission takes family life into account in the cases of aliens but does not (or has not to date) considered possible violations of private life, should probably be found in the vagueness of the notion of 'private life'. Any order given to a person infringes his private life to some extent. In extreme cases, such as the expulsion of a second generation immigrant, it would be possible, however, to find an infringement of someone's private life. It would then have to be considered whether any of the grounds of Article 8, para. 2 could be invoked as a justification. Maybe one could go further and accept that expulsion from a country where one has lived for some considerable time is always an infringement of the right to respect for private life. This would not mean that expulsion is no longer possible, but only that the criteria of Article 8, para. 2 should be fulfilled, or in other words, that the expulsion should be necessary in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or of morals, or for the protection of the rights and freedoms of others. These conditions are not too severe and it might be reasonable to require their fulfillment and thus to prohibit the expulsion, without reasonable cause, of foreigners who have lawfully lived in the country for some time.

- iv) An issue on which the Convention may help member states to amend their legislation is the position of second generation immigrants. Public opinion in most countries is more lenient. The most pressing example of the problems arising in practice is the case of the child of foreign nationality born in a member state who has lived there all his life and who commits a crime before he reaches the age at which he may choose to take the nationality of the country in which he lives (i.e. his home), rather than that of his parents' country of origin. Then his criminal record may later prevent him from obtaining the nationality of his home country. If he subsequently commits a further crime he may be expelled to the country whose nationality he has, but with which he has no ties whatsoever. The expulsion is unfair to the individual, who after having been punished for his crime gets the additional punishment of being banished from his home country. It is also unfair to charge the country of origin with the resocialisation of a criminal who has never lived in that country and whose criminalisation can be blamed on no other state than the home country.

States should accept full responsibility for people educated within their boundaries. Individuals should be allowed to go on living in the country where their home has been for a considerable time.

As indicated above, Article 8 so far has been of help only when family life was at stake, but it might be applied also to protect the private life of the person concerned. Expelling a person from the country where he has always lived can reasonably be seen as an infringement of his private life.

- v) Another problem with respect to foreigners is the 'shuttlecock'. A good example would be the case of a foreigner granted political asylum in a first European country, who subsequently moves illegally to a second, where he establishes a family. After committing a crime in the second country, he is expelled to the first – it being the country of first reception. Then the 'shuttlecock' begins, the first country sends him to the second as the country where the person has his ties, and the second country refers him back to the first, as the country of first reception. In the Commission we have had cases where persons have been sent backwards and forwards between countries more than ten times. When finally his complaint is brought to Strasbourg that complaint is necessarily addressed to one of the two countries concerned. This makes a solution of the problem difficult. It could be helpful if the Commission were empowered to bring the other state into the case as well, in order to find a friendly settlement between the two states concerned or to obtain the approval of both states to arbitrate as to which should accept the foreigner.

c) Some Critical Remarks

There are not many cases where I find it difficult to accept the results obtained. There are however some defects. Here are two examples.

- i) In one situation there may be too much protection of a human right. Article 5 para. 1(f) provides that the arrest of a person with a view to deportation or extradition must be in accordance with a procedure prescribed by law. In present day Europe, where crossing borders becomes ever easier, this leads to practical difficulties. After committing a crime a person can easily go to another European country, but difficult legal proceedings are needed to return him. This leads to an imbalance. A person who commits a crime in Milan and is arrested in Sicily can be brought before a Milan court without any special difficulties. But if he escapes in the other direction and is finally arrested in France, then difficult legal proceedings before French

courts are needed before the criminal can be brought before the Milan court. A good example of the problem is offered by the *Bozano* case. Mr. Bozano was sentenced *in absentia* in Italy to life imprisonment for having murdered a thirteen-year-old Swiss girl and for trying to extort a ransom of fifteen million Italian lire from his victim's father. He had taken refuge in France where he was arrested on 26 January 1979. As the Italian procedure for trial *in absentia* was incompatible with French public policy the French courts rule against extradition. Mr. Bozano was released. Shortly after his release three policemen stopped Mr. Bozano in the road, forced him into a car, served him with a deportation order and took him to Switzerland. From there he was extradited to Italy. In several respects this extradition procedure was illegal. Obviously, the French police tried to circumvent the law in order to take a criminal to where they thought he belonged. As the extradition was not in accordance with a procedure prescribed by (French) law it infringed Article 5 of the Convention. Mr. Bozano successfully appealed to Strasbourg and finally obtained FF100,000 as damages and FF138,350 in respect of legal costs.

The case is a good example of the need in law to protect the rules. One cannot tolerate police officers, or anybody else, making their own legal system. But it also demonstrates that our rigid rules for extradition are outdated. In an integrated Europe a much easier system for sending suspected criminals to trial is needed.

- ii) Another issue which deserves some careful consideration, if not criticism, is the procedure before the Commission as it is gradually developing. The Commission meets *in camera*. I think that is a good principle. One of its main tasks is to find a friendly settlement. Often, that can be reached more easily when there has not been too much public attention. Many complaints are totally unfounded. It could be detrimental to all concerned if they were to get extensive public attention before the facts have been established. Discussion *in camera* may also facilitate an open debate with the Government. Government representatives would be much more strictly bound to follow their Government instructions if every word they said (on behalf of the Government) could be published in the press and perhaps be used against the Government in a different context. Discussion *in camera* also means, however, that there is no control by public opinion. The vast majority of the Commission's cases is never published. Many other cases are published only after long delays. This may mean that the – relatively few – cases which are made public, (i.e. those that come before the Court) are seen by the outside world as representing the opinion of the

Commission. Often this creates a wrong impression. The few cases where the Commission decided that an alien should have the right to stay in the country are, for example, outbalanced by many unpublished cases where applications by aliens have been declared inadmissible. The few cases where the Commission has asked for interim measures (under its Rule 36) are heavily outbalanced by a large number of unpublished cases where the application of Rule 36 was refused. Thus the impression created for the outside world is distorted. This is not to plead for public sessions of the Commission, but for more – and faster – publication of its case law, or at least for publication of surveys thereof.

3. Methods of Improvement

The above mentioned defects, or critical remarks, are simply those which are dear to my heart. Other people will have other points of criticism. What can be done about them? In general, there are three ways to improve the Convention:

- a) The most drastic solution for all problems would be to create a new Convention on Human Rights;
- b) A less drastic solution would be to amend the existing Convention;
- c) Finally, there is amendment through judicial development.

Each of these possibilities has its advantages and disadvantages.

a) A New Convention

There have been repeated proposals for the creation of a separate Convention on Human Rights for the European Community. The most recent example is the resolution of the European Parliament of 12 April 1989³ in which a Declaration of Fundamental Rights and Freedoms was adopted for the Community. An advantage of a new Convention for the Community would be to give the Community its own fundamental rights which would increase the Community's standing both in international society and with respect to its own citizens. Human rights are usually a fundamental part of the constitution of a sovereign state. A Community with human rights is therefore more important than a Community without. Furthermore, as the Community is more homogeneous than the Council of Europe, it might be possible to agree to stronger protection of human rights within the Community. In practice, however, there is no proof that this latter argument would hold true. So far, the other member states of the Council of

³ Doc. A.2-3/89, OJ 16 May 1989, No. C 120/51.

Europe have been no less willing to expand the Convention than the member states of the Community.

The principal objection to a new human rights convention is that it would inevitably harm the present one. When individuals are posed with a choice as to which convention to invoke, they would be most likely to refer to the most recent one. While the support of the European Community would be likely to give the new convention extra authority, this would inevitably be to the detriment of the protection of human rights in those European countries which are not Members of the Community.

Another objection to a new convention is that it would interrupt a legal development of more than thirty years. The articles of the European Convention have been refined by a large amount of case-law. For the definition of human rights – which change with the changes of society – case-law is important. Not only the European institutions, but also the American Supreme Court – with respect to the human rights in the amendments to the US Constitution – have demonstrated the great importance of case law for the clarification and development of human rights.

b) Amendment of the Convention

Amendment of the existing Convention is a more natural way for it to develop. Whenever a new human right, or a change in existing rights, is desired, the contracting states adopt an additional protocol to the Convention containing the wanted amendments. So far the European Convention has been expanded or changed by eight protocols which have usually improved the Convention. Still, there may be cases where development by the European Court of Human Rights should be preferred. Human rights are needed to protect individuals against their governments. Governments are parties in human rights conflicts. One may question, therefore, whether they are the most suitable drafters of the rules concerning human rights. Though parliaments have some influence on treaties, the main drafters of treaties and of additional protocols to the Convention are the governments. Will they always be willing to draft a new protocol in the way most profitable to the individual? When the Seventh Protocol to the European Convention was drafted, it was considered desirable to include the fundamental rule of penal law – *Ne bis in idem*: no one should be tried or punished again for an offence for which he has already been finally acquitted or convicted. But, as governments were not confident enough in each other, the final text reads:

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has

already been fully acquitted or convicted *in accordance with the law and penal procedure of that state*.⁴

This means that someone who has been tried and punished in one country can subsequently be tried and punished again in another. One may doubt whether that provision of the Seventh Protocol is helpful. Had it not been adopted, the European Court of Human Rights could have interpreted the requirement of a fair trial, incorporated in Article 6 of the Convention, as including the general rule of *ne bis in idem*. Such an interpretation would no longer seem justifiable after the adoption of a separate, restrictive, article on the issue.

The principle of fair trial before an independent and impartial tribunal is incorporated in Article 6 of the Convention, but only 'in the determination of civil rights and obligations or of any criminal charge'. Initially the Article has been interpreted as excluding disputes under administrative or tax law. Gradually, however, the Court has expanded the Article to administrative disputes which affect the property of an individual, and it is possible it could be expanded even further. Now, the member states are considering the adoption of a special Article 6 *bis* for administrative law disputes. This may be profitable as it will bring more litigation under the control of the Convention. It will offer the additional advantage that for a special kind of litigation special rules will be made. But there also is the risk that the new Article will restrict, rather than expand, the requirements of fair trial for this kind of litigation under administrative law which might also be brought under the present Article 6.

c) Judicial Development of the Convention

This leads us to the next method of improving human rights protection: amendment through development. Some articles of the Convention are extremely vague. Article 3 prohibits 'inhuman treatment'; Article 8 gives everybody the right to respect for his private life, Article 9 the right to freedom of thought and conscience, Article 1 of the First Protocol guarantees the peaceful enjoyment of possessions. Almost any human right is covered by one or more of these provisions. The right of asylum, for example, is not incorporated in the Convention, but that does not necessarily exclude the possibility that the refusal of asylum can be inhuman treatment or an infringement of respect for private life. In other words: the Convention can easily be expanded by the European Court on Human Rights through interpretation of the existing rights. We have seen the same in the US. When the Supreme Court prohibited racial discrimination it interpreted the US Constitution in a way different from that which the founding

⁴ Seventh Protocol, Art. 4(1), italics added.

fathers originally intended. In their time racial discrimination was a normal phenomenon.

Leaving legal development to the Court of Human Rights has the great advantages of objectivity and flexibility. The Court is more objective than the governments as the governments are themselves involved in litigation. The Court is more flexible as it can rule whenever a problem comes before it, whilst amendments by the governments need to go through the long route of establishing treaty law.

A disadvantage, on the other hand, is the risk of a 'government by judges'; of decision making by an organ that is not controlled by Parliament and over whose decisions parliaments can exert virtually no influence.

Therefore judicial development alone cannot be correct. It must always be possible for the democratically elected legislators to overrule the Court's case law. Improvement by means of additional protocols must remain possible and should be the norm for the most important changes. None the less, in addition, improvement through judicial development should be supported.

CONCLUSION

On the whole, my conclusion about the European Convention on Human Rights is clearly positive. The Convention has gradually gained more influence and its influence is for the benefit of the peoples of Europe and their mutual relations. Of course, improvements are possible. In a dynamic society all issues of any importance can – and must – continuously be improved. Thus there will always be a challenge for lawyers and we can also guarantee to our younger generations a chance of actively participating in the most rewarding task of further developing human rights in Europe.

ADDENDUM 2000

Most of what I wrote in 1990 still applies in 2000, but there are three issues which need some further attention. (1) Is the promotion of human rights still the most important aim of the Convention? (2) The structure of the control machinery of the Convention has been changed and (3) the European Union drafted its own Charter on human rights.

(1) Is promotion of human rights protection still the most important aim for each of the participating states?

When the Convention was established in 1950, protection of fundamental human rights was the only purpose of all participating states. This is clearly demonstrated by the full co-operation which the founding states have always given to Commission and Court. As much as the institutions, the states were worried by possible violations and willing to remedy infringements. Gradually, the Convention was developed as an essential element of European unity and European culture. Other European states wanted to join the Convention not primarily because of their wish to protect human rights but rather to demonstrate that they belonged to the European culture and that they met the high European standards. This different attitude is demonstrated when these states are accused of serious violations of human rights. Instead of fully co-operating with Commission and Court in seriously investigating the complaints they refuse co-operation by stating that the complaints must be lies aiming at damaging the reputation of the state.

The success of the Convention causes the danger of states participating for reasons other than human rights protection.

(2) The control system

Protocol 11 changed the system of control over the Convention. Commission and Court were merged into a permanent Court which took over the task of both previous organs.

The Court is doing well. It continued the case-law of the previous Court and it protects the human rights no less than its predecessors. Still, I regret the merger of the two organs. The enormous growth of the case-law creates increasing problems for the new Court, problems which can be met only by restricting the number of cases which get full judicial attention. In the former structure the Commission could have regulated that only a limited number of serious cases would come before the Court. Thus, the Court could have been protected against the flood of cases without running the risk of becoming less serious in human rights protection.

Under the new system the Court itself will have to cope with the problem of the rapidly increasing number of applications. Hopefully, a good solution will be found.

(3) The Charter of Human Rights of the European Union

At the time of writing the European Union has drafted a Charter of human rights for the Union. This Charter will not replace the Convention. In principle it will only apply with respect to acts of the Union. As the Convention is not applicable to the Union the Charter can be seen as a supplement to the Convention. Duplication may arise, however, when Member States execute acts of the Union. In that case the Charter may be applicable and the Convention may be applicable as well. This kind of duplication may then cause problems of competence.

It is not clear, yet, whether the Charter will finally obtain a binding character. By the end of 2000, at the Conference in Nice, no such character was granted. Still, the Charter was so officially adopted that the Court of Justice of the European Communities cannot ignore it. Most likely, it will apply the provisions of the Charters (binding) general principles of law.

VII. THE EUROPEAN COMMUNITY: CATCHWORDS AND REALITY

The Josephine Onoh Memorial Lecture 1991

In recent months events in the Middle East have banished other pre-occupations from our minds, including the upheavals taking place in the former Soviet dominated countries of Eastern Europe. Here we must be on our guard. In the long term it is the latter which may be of more consequence to the Western Alliance.

Inevitably the Inter-Governmental Conferences on Political Union and Economic and Monetary Union which are now in session have been banished to the back pages of the press except in so far as defence is the issue. Yet the decisions taken by those Conferences, if embodied in treaty form and ratified by the Member States, may continue to affect us all long after the current crises are forgotten.

There is a view widely held in the responsible press that the uneven, indeed contradictory, response by the Member States of the European Community to the United Nations Resolutions on the Gulf has rendered further talk of political union irrelevant. The counter argument is that it is just because the Gulf crisis has demonstrated the weakness of the Community as a political unit that further efforts are essential to strengthen the Institutions of the Community so that they may carry political weight commensurate with the economic strength which the Community commands. It is not, however, my intention to embroil myself in this debate. The Conferences are already in session and my intention is rather to make some attempt to clear the ground so that we may understand the better what the Conferences may achieve, or even, what they may fail to achieve. In particular I would like to draw attention to some of the verbal traps which are already evident in the discussion so far. The Inter-Governmental Conferences were agreed, you may remember, at the European Council meetings of December 1989 and of June

1990. The first had as its remit to prepare 'an amendment of the Treaty with a view to the final stages of economic and monetary union', and the second was to report on 'political union'.

These terms are, inevitably perhaps, imprecise but it is that imprecision which is the subject of this lecture. The object of the lecture is to persuade you that while imprecision may be dangerous, not to be aware of the danger can be disastrous.

Indeed, it must never be forgotten that as a medium of communication words are intrinsically dangerous things. To quote from a classic work which has influenced generations of English-speaking students:

Tens of thousands of years have elapsed since we shed our tails, but we are still communicating with a medium developed to meet the needs of arboreal man ... We may smile at the linguistic illusions of primitive man, but we may forget that the verbal machinery on which we so readily rely was set up by him, and may be responsible for other illusions hardly less gross and not more easily eradicable.¹

The same authors quote F.M. Cornford, the philosopher member of that remarkable clan, as saying:

The common inherited scheme of conception which is all around us, and comes to us as naturally and unobjectionably as our native air, is none the less imposed upon us, and limits our intellectual movements in countless ways – all the more surely because, being inherent in the very language we must use to express the simplest meaning, it is adopted and assimilated before we can so much as begin to think for ourselves at all.²

Few people these days read that great wit of the twenties and thirties, Philip Guedella, but he was the author of a splendid essay on the writing of history which he prefaced by saying:

It was Quintillian or Mr. Max Beerhohm who said 'History repeats itself: historians repeat each other.' The saying is full of the mellow wisdom of either writer, and stamped with the peculiar veracity of the Silver Age of Roman or British epigram.³

¹ C.K. Ogden and I.A. Richards, *The Meaning of Meaning*, (New York: Harcourt, Brace and Company/London: K. Paul, Trench, Truber and Co. Ltd, 8th ed, 1946), p. 26.

² Ibid.

³ From *Supers and Supermen* (1920). Quotations taken from *Essays of Today and Yesterday* (London: Harrap, 1926), p. 45.

Alas, not only historians but far too many of our politicians and political commentators repeat each other and perpetuate the same misunderstandings.

In the context of the forthcoming Conferences there are three difficult and dangerous words which I should like to submit to your scrutiny: 'federalism', 'sovereignty' and 'subsidiarity'. I am aware of the strictures of Dr Andrew Adonis of Nuffield College, Oxford, who with Dr Andrew Tyrie, also of Nuffield, has written an interesting and provocative paper on 'Subsidiarity' for the Institute of Economic Affairs.⁴ Dr Adonis comments, that

... professional Europhiles are ever wont to pounce on unwary users of words like 'sovereignty', 'democracy' and 'federalism', and to pronounce the Community a 'unique' construct in the context of which they are largely irrelevant. Such language may be simplistic, but it is certainly not irrelevant, for the Community cannot realistically be viewed as anything less than a confederation, and those terms go to the heart of its present predicament.

With great respect, this must be to beg a series of questions. How is it possible, for example, to assert that the Community is a confederation without first defining what is meant by 'confederation'?

To return to the words 'federalism', 'sovereignty' and 'subsidiarity'; the concepts which they represent, or may represent, are interwoven but the words are best taken individually.

Of these three, perhaps the most difficult and dangerous is 'federalism'. Dangerous because it has in recent years attracted to itself emotive and pejorative undertones. Phrases such as 'federalism by the back-door' or 'creeping federalism' have become common coin and used to describe a state of affairs which is essentially unsatisfactory and, even worse, un-British. I might add, in parenthesis, that those who use the word 'federalism' in this denigratory manner seldom pause to examine the constitutional relationship between England and Scotland arising out of the Treaty of Union of 1707 – Europe's first Common Market – which from a London based stand-point continues to remain entirely satisfactory.

The word is also difficult because of its extreme lack of precision. At one end of the scale there are definitions of federalism so wide that they cover any form of association between independent political units short of that brought about by classic international treaty. At the other end of the scale there are definitions which underline certain factors of a political relationship and assert that when those factors are present the result is federation.

⁴ Institute of Economic Affairs (IEA) Inquiry, No. 19, December 1990. Hereafter 'IEA Inquiry'.

Let me give two examples. The first is taken from a most valuable book published in 1973.⁵ There Professor Bernier said that 'formally' federalism

... would appear to exist when the following features may be found in a political entity: (1) a division of powers between a central and regional government; (2) a certain degree of independence between central and regional governments; (3) direct action on the people by the central and regional governments; and (4) some means of preserving the constitutional division of powers. In its practical functioning, federalism is characterised essentially by the political interdependence of the central and regional authorities.

An example of the second type of definition arises when it is said that the essence of a federation is to be found where there is a common foreign policy, a common foreign ministry and a common army.

Both definitions are useful if you already know the stance, the *Weltanschauung*, of the user. The first and broad definition is serviceable enough if you seek to highlight the distinction between a classic alliance formed by treaty as opposed to a more integrated association; the second, if the inquirer is posing the question in international law: 'With whom should I do business'?

Some political commentators place the adjectives 'federal' and 'confederal' in opposition. It is true that these words affixed themselves to the opposing sides in the American Civil War. I must resist the temptation to embark on the conceptual differences which were at the heart of that unhappy struggle. They are not relevant to our use of language today. It is more to the point to recall that for many of the framers of the American Constitution the words 'federal' and 'confederate' were inter-changeable. In the end one is driven to agree with A.H. Birch who, in 1966, wrote that federalism as a concept

has no fixed meaning: its meaning in any particular study is defined by the student in a manner which is determined by the approach which he wishes to make to his material.⁶

The best phrase which I know to describe the abstraction invoked by the word 'federalism' is to be found, along with much other good sense, in the work of Montesquieu. He uses the expression 'a society of societies' or to use the words of the first English translation of *L'Esprit des Lois*,⁷ an 'assemblage of societies'.

⁵ Ivan Bernier, *International Legal Aspects of Federalism*, (London: Longman, 1973).

⁶ Quoted *ibid.*, p. 2.

⁷ *L'Esprit des Lois* (Edinburgh: 1748), Vol. I, Book IX, p. 183.

So understood, the word 'federalism' – Montesquieu uses the expression a 'confederal republic' – becomes wholly neutral.

If one adopts this approach there is no need for the word 'federalism' to be mentioned in the Inter-Governmental Conferences, either by the participants or those who comment upon their labours. If the debate is unencumbered by the words 'federalism' or 'federation' – it is worth noting that these words are nowhere to be found in the United States Constitution – it can concentrate on the things that matter. For example, in whose hands is power to reside, to what degree and who has the last word in any given sector? Is your society or societies to have the last word in matters of peace or war? Who is to have treaty-making power and in respect of what matters? Too few people realise that as far as the common commercial policy of the European Communities is concerned the treaty-making power is already, and has been since 1st January 1958, wholly a Community matter. At the other end of the scale, is the guaranteed fat content of skimmed-milk powder a matter for a 'society of societies' or is it a matter for each society itself to decide? This is not a ridiculous question. Under the Common Agricultural Policy of the European Community with its highly complicated method of dealing with agricultural surpluses this very technical matter necessarily concerns the Community for the good reason that the Community's elaborate system of cross-frontier trading rules, designed to stabilise agricultural prices, requires uniformity in all the Member States. Whether we any longer need the Common Agricultural Policy is an altogether different issue.

As I have already said, politicians and those who write about their activities do no service to international understanding by using words such as 'federalism' and 'federation' unless they define their words in advance. If they did, I suggest that they would find much less to argue about, or, at the very least, the argument would be much more clearly structured.

For the current Inter-Governmental Conferences it is vital that their debates be properly structured. Those who represent the Member States and the Community Institutions at these conferences start with certain basic assumptions. For example it would be unthinkable that the degree of integration so far achieved should be sabotaged, that the *droit acquis*, to use the jargon expression, would not be maintained. It cannot be over-emphasised that this *droit acquis* goes far further and far deeper than a number of political speeches might seem to suggest. In this connection may I say that it is much more important to pay attention to what judges have decided rather than to what politicians say.

Such, however, is the degree of political ignorance that I feel obliged to quote for the hundredth time the words of the Court of Justice in a case decided as long

ago as 1963. There the Court said that the Treaty which created the European Economic Community

... is more than an agreement which merely creates obligations between the contracting states. It established institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. The Community constitutes a new legal order ... for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals ...⁸

All this leads inexorably to the next word, the vexed question of 'sovereignty'.

The link between 'sovereignty' and 'federalism' is obvious. If you form part of a 'society of societies' you are *ex hypothesi* permitting the centralised authority to exercise certain powers which you would otherwise have retained within your own competence. The phrase, so often used pejoratively, 'surrender of sovereignty' is entirely apt. The reply must be: 'What else do you expect?' If what you seek is joint action, taken as a result of joint decision, you must participate in joint negotiation where you seek to attain what is in your national best interests. Sooner or later, you agree on a compromise which gives you, the individual Member State, part of the cake which you originally had thought to appropriate entirely for yourself while making sure that no-one else gets a disproportionate slice on his plate. More positively you hope that by combined decision and action there will be advantages for all.

There is, I suggest, nothing so very terrible about a surrender of sovereignty when that term is properly understood. Nonetheless, it continues to arouse strong emotions. Lord Jenkins has said: 'The British react to the word 'sovereignty' with all the predictability of Pavlov's dogs'.⁹ But this is only to describe a state of affairs, not to explain it.

The best examination of the nature and meaning of the word 'sovereignty' is to be found in the recent Report of the House of Lords Select Committee on Economic and Monetary Union and Political Union.¹⁰

Judge Edward of the European Court of First Instance in his evidence to the Select Committee quoted Lord Bryce:

The frontier districts, if one may call them so, of ethics, law and political science have been infested by a number of vague and ambiguous terms which have provoked many barren discussions and caused much needless

⁸ Case 26/62, *Van Gend en Loos* [1963] ECR 1 at 12.

⁹ *European Diary, 1977-81* (London: Collins, 1989).

¹⁰ 30 October 1990, HMSO, HL Paper 88, 1.

trouble to students. No offender of this kind has given more trouble than the so-called doctrine of sovereignty. The controversies which it has provoked have been so numerous and so tedious that a reader, even the most patient reader, may feel alarmed at being invited to enter once again that dusty desert of abstraction through which successive generations of political philosophers have thought it necessary to lead their disciples.¹¹

The Report analyses three principal uses of sovereignty. Without asking you to make a burdensome excursion into Lord Bryce's dusty desert may I try to summarise them.

In the first usage, 'sovereignty' is employed to describe the supreme authority in the internal order of a state, in the United Kingdom, the Queen in Parliament. This, as the Report correctly says, is 'the fundamental principle of the United Kingdom's constitutional law'. The Report contrasts that position with other Member States of the European Community where a written constitutional may prevail. Viewed in this light, the European Communities Act, 1972, which recognised the internal effect of Community legislation and of the judgments of the Court of Justice, was no more than an exercise of parliamentary sovereignty. To this I would add a caveat. First, it is important to distinguish the theoretical from the practical. There are, of course, practical limitations on parliamentary sovereignty. Members of Parliament must always be looking over their shoulder to the impact of what they do upon the electorate. The other point worth making is that it is a little bland to describe the principle as a United Kingdom one. The situation in Scotland, having regard to the entrenched clauses in the Treaty of Union of 1707, may be somewhat different. That, however, is a digression.

Secondly, 'sovereignty' may be used in international law to describe the characteristics of a state. As the Report puts it:

A sovereign State must possess a settled population, a defined territory, a government having the power to maintain its internal legal order, and independence in the conduct of international relations.¹²

The third sense, continues the Report, is political rather than legal. 'This' said the Report,

was the meaning of sovereignty used most often by witnesses. When Lord Jenkins of Hillhead, for example, said that governments 'cling on to their shadow of sovereignty' over monetary policy when 'the substance has

¹¹ Ibid.

¹² Ibid., para. 14.

flown out of their grasp some time ago', he was using the word in this sense.¹³

I would add that here the word 'power' could well be substituted for the troublesome 'sovereignty'. No-one seems to be concerned that every treaty made by the United Kingdom since the beginning of time is a diminution of sovereignty used in this third sense. Obviously no country incurs treaty obligations without expecting something in return, but, nevertheless, sovereignty has been surrendered in so far as the power to act unilaterally has been voluntarily restrained.

To return to my central point. This paragraph of the Report ends with the sentence:

Many heated exchanges about the 'loss of sovereignty' or 'threats to sovereignty' take place between those who are using the word in different senses. The arguments can be greatly simplified by defining the sense in which the word 'sovereignty' is used.¹⁴

These wise words should be engraved on the heart of all those who find it necessary to pontificate. Lugubrious regret for loss of economic brawn and gun-boat diplomacy do not help constructive debate. The task now facing the Inter-Government Conferences is to take stock of the state of economic and political integration within the Community as it exists today and to decide how much further along the road the Member States should travel and at what speed they should progress. The discussion would be the better understood by the world at large if the word 'sovereign', like the word 'federalism', was never used by the participants.

All this leads to the third word of my trio, 'subsidiarity'. This is a neologism, both in English and in French where *subsidiarité* has yet to receive the *imprimatur* of the Académie Française. It conveys the notion that a rule-making power should be exercised as close to the ruled as necessity or efficiency may allow. Unlike 'federalism' and sovereignty', it is a useful word but like them it needs adequate definition.

It is fashionable to attribute the first expression of what has come to be called the principle of subsidiarity to the Encyclical Letter of Pope Pius XI, *Quadragesimo Anno*, of 1931, where His Holiness said, in the context of the social order of his day:

¹³ Ibid.

¹⁴ Ibid.

It is an injustice, a grave evil and a disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.

Leaving aside any possible debt to classic philosophy, some authors have cited Althusius and Locke.¹⁵ In a most valuable paper produced for the Royal Institute of International Affairs¹⁶ Marc Wilke and Helen Wallace quote John Stuart Mill as saying: 'It is but a small portion of the public business of a country which can be well done, or safely attempted by the central authorities'.

I suspect, but as yet cannot give you chapter and verse, that an analysis of the debate which took place at Philadelphia in the summer of 1787 would provide many an apt quotation. It goes without saying that the heart of that discussion concerned the question of where certain powers should reside in the new society of societies created by the Declaration of Independence. The solution finally adopted is to be found in Tenth Amendment to the United States Constitution which provides that:

The powers not delegated to United States by the Constitution or prohibited by it to the States, are reserved to the States respectively, or to the people.

Today it is not essential to indulge in historical research, entertaining though that might be. My object is rather to explain why, in the context of the Inter-Governmental Conferences, the principle of subsidiary has become important. Dr Adonis has put the matter succinctly:

In its Community guise, subsidiarity has been not so much translated as entirely transplanted from its original context. Devised by the Vatican as a principle to defend the autonomy of the Catholic Church and to restrict the scope of state action of any kind, it is now used indiscriminately by British ministers as a supposed guarantee for member states fearing encroachments on their 'sovereignty' from Brussels' and by others for a whole range of different purposes.¹⁷

One example of why certain other Member States invoke the principal of subsidiarity to a different end lies in the fact that many of them are themselves a 'society of societies'. This is true of Belgium under the recent constitutional changes; Italy, and this is perhaps insufficiently appreciated, where substantial

¹⁵ E.g. Professor Chantal Millon-Delsol, *Le principe de subsidiarité: origines et fondements*, Institut le Boetie, April, 1990.

¹⁶ Royal Institute of International Affairs, Discussion Paper, No. 27, 1990. Hereafter 'RIIA Discussion Paper'.

¹⁷ IEA Inquiry, p. 4.

legislative powers are conferred upon the regions. It is even true of the United Kingdom where, in varying degrees, a power of independent action exists in Scotland, Northern Ireland and Wales. In this connection, however, the most important example is the Federal Republic of Germany, divided into *Länder* whose autonomy, particularly as regards culture and education, is guaranteed by the German Constitution, the *Grundgesetz*, which now, of course, applies equally to the new *Länder* in what was formerly East Germany.

As Marc Wilke and Helen Wallace have put it:

It should be borne in mind that the concern of the German *Länder* is not about the balance of powers between the Community and the Member States, but about the impact on the regional level of government for a country with a federal constitution. The logic of their complaint is that the EC should not be empowered to make EC legislation in areas of *Länder* competence unless the *Länder* themselves have endorsed the measure.

The authors envisage parallel arguments being advanced:

Thus within the UK one could envisage the supporters of Scottish devolution, who in any event can plead differences between Scottish and English law, rushing to exploit the precedent. There is an important question here about whether this regional dimension should be recognised in any way at the EC level or left to the constitutional rules and political practice of individual Member States.¹⁸

In any event there remains the vital question of how the principle should be formulated. Among the many suggestions two principal approaches have emerged. The first stresses necessity. Is it necessary that action should be taken at the level of the Community? If not the Member States are free to make their own rules according to their own constitutional practice. Within each Member State logic would dictate that the same doctrine should apply, and this whether or not the Member States is a 'society of societies'. Is it necessary that national control be retained at the highest level or can the appropriate decisions be taken by the land, region or some other subdivision – indeed by the parish or district council? However, logic does not always operate in the internal workings of a Member State. At the moment we see Whitehall supporting the concept of subsidiarity as a principle of Community administration while seeking, at home, to remove powers from local authorities, for example in the field of education.

The 'necessary' approach was the one adopted by the authors of the 1984 'Draft Treaty establishing the European Union' which was approved by the

¹⁸ RIIA Discussion Paper.

European Parliament.¹⁹ It also seems to be the one favoured by the Foreign and Commonwealth Office.

The other approach stresses effectiveness. The only place, to date, where subsidiarity has been incorporated in a ratified treaty is in the Single European Act in the Article bringing control of the environment expressly within Community competence. The formula there used (Article 130R) is as follows:

The Community shall take action relating to the environment to the extent to which the objectives referred to ... can be attained better at Community level than at the level of the individual Member States.

There is a real difference between the two approaches. To tackle a problem at Community level may not be necessary although all would agree that it could be more effective. Once again, clarity of definition is vital since the material content of the principle will vary according to the words employed.

If, at this stage, you feel that I have laboured to excess the need for precision and clarity in the use of the catchwords 'federalism', 'sovereignty' and 'subsidiarity', may I end by underlining that I have done so not in any spirit of academic purism but because the use of these words has practical consequences and as a lawyer it is those practical consequences which concern me most.

In the case of 'subsidiarity', definition is only the first of many difficulties. Let us assume that it is decided that 'subsidiarity' should be incorporated in the treaty amendments to come. But how is this to be done? One can add the magic word, in one formulation or another, to the preamble to the Treaties. This means that it may serve as a guide to the Court of Justice in interpreting other Treaty provisions but it will not be regarded as having an independent life of its own. The limited function of the preamble can be demonstrated by a number of the Court's decisions,²⁰ and is in line with Article 31(2) of the 1967 Vienna Convention on Treaties.²¹

Alternatively the principle of subsidiarity can be embodied in the operative text of the new Treaty of Amendment. This is the method, it is understood, preferred by the Commission. Here again, a number of formidable drafting problems arise. Is the principle to be expressed in a single article of universal application? Or is it to be attached to each specific chapter or sector of the

¹⁹ OJ 1984 C77/27.

²⁰ *Van Gend en Loos*, above, [1963] ECR 1 at 12; Case 136/79 *National Panasonic v Commission* [1980] ECR 2033 at 2057. And in the Opinions given by the Advocates-General, of which a recent example is that of Advocate-General Darmon in Case 229/83, *Leclerc v Au Blé Vert* [1985] ECR I at p. 10.

²¹ 1155 U.N.T.S. 331; U.K.T.S 58 (1980); *Cmd* 7964; 8 I.L.M. 679 (1969); 63 A.J.I.L. 875 (1969).

Treaties as was done in the case of the protection of the environment? Is the principle to apply only to new Community activity or to the existing corpus?

The complications facing the Inter-Governmental Conference do not stop there. The next matter to be faced by the Conference on Political Union, should it be able to overcome the difficulties which I have described, is the machinery which is to be employed to resolve disputes concerning the application of the principle. Various suggestions have been made. Dr Tyrie and others have canvassed the possibility of the decision being taken by the Council of Ministers, or by a new Institution set up for the purpose – a Committee of ‘Wise Men’ – or, of course, the Court of Justice. There is also the important question, at what stage is such a body to intervene? Is it, like the French *Conseil Constitutionnel*, only to have jurisdiction at the draft or proposal stage? It is the complexity which may arise should the Court of Justice be chosen as the ultimate arbiter which concerns me most. Is the principle of subsidiarity one which is truly ‘justiciable’? By this I mean, is this a problem which the Court of Justice of the Communities can fairly and properly try? Is it a question that judges who are not economists or political scientists should seek to solve? I have quoted, time without number, the pertinent observation of the late Professor John Mitchell of Edinburgh University that too much is expected of the Court of Justice either because of what it has achieved or by the mere fact of its being there. Indeed, at the risk of seeming cynical, are we not reminded of the dictum of General De Gaulle:

There is a hierarchy of values: necessity in the first place, politics in the second, and the law only in so far as one is able to respect it.²²

In my view, I cannot do better than end this paper with the words of the House of Lords Select Committee to which I have already referred:

One new role which has been proposed for the Court is that of interpreting the principle of subsidiarity. The Committee do not believe that subsidiarity can be used as a precise measure against which to judge legislation. The test of subsidiarity can never be wholly objective or consistent over time – different people regard collective action as more effective than individual action in different circumstances. Properly used, subsidiarity should determine not whether Community legislation is necessary or appropriate at all, but also the extent to which it should regulate or harmonise national divergencies, and how it should be enforced. But to leave legislation open to

²² See this author's Hamlyn Lectures, *The European Communities and the Rule of Law* (London: Stevens, 1977), p. 6.

annulment or revision by the European Court on such subjective grounds would lead to immense confusion and uncertainty in Community law.²³

I can only respectfully agree.

The rationale of all this, you might say, is that the Inter-Governmental Conferences should keep silent on the principle of subsidiarity. At least one powerful argument has been mounted to that effect.²⁴ This seems to me unduly negative. Even the authors of the IEA paper accept 'that as a slogan ... subsidiarity serves a useful purpose'. Let it, then, enter the treaties as one of the objectives, by way, perhaps, of an additional preamble to the Treaty of Rome. There, it will not only serve as a guide to the Court of Justice but to all the officials of the Commission and of the Council of Ministers engaged in framing or revising legislation and to the politicians who, in the end, have the last word. As the President of the Commission, M. Delors, himself has acknowledged, the Commission must never give way to 'the drunkenness of power' but must always 'rigorously apply the principle of subsidiarity'.²⁵

If, within the limits imposed by the European Treaties themselves, those Treaties can be regarded as the constitution of a European 'society of societies', then it behoves us to recall that other great exemplar, the United States of America. The early New England settlers felt strongly that there were few problems that could not best be resolved at village, that is to say parish, level. The New England representatives contributed as much to the debate as Virginia's Madison, or New York's Hamilton.

The agenda for the Conference on Political Union is vast. The subjects include not only Foreign and Security Policy but the extension of Community competence in many other areas. The Conference will discuss the Democratic Legitimacy of the Community and Parliamentary Control. The efficiency of the Community Institutions will come under review. High on the list, however, is the Principle of Subsidiarity. Is it too much to suggest that the approach to this problem may hold the key to many others?

²³ Above, note 10.

²⁴ Above, note 4, *passim*.

²⁵ Speech at the College of Europe, Bruges, October, 1989.

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VIII. WILL THE NECESSITY TO PROTECT THE GLOBAL ENVIRONMENT TRANSFORM THE LAW OF INTERNATIONAL RELATIONS?

The Josephine Onoh Memorial Lecture 1992

I feel particularly honoured to have been invited to give the 1992 Josephine Onoh Memorial Lecture: 1992 is the year of the global environment: we are all preparing for the huge conference which is to meet in June at Rio de Janeiro. So, the choice of the theme of international environmental law by this University is fortunate. I think that it would also have been approved by the late Judge Elias who gave the inaugural Onoh lecture in 1985. Everybody here must be aware that Judge Elias was for fifteen years a member of the International Court of Justice, the world's highest judicial authority and that from 1982 to 1985 he was the President of that Court. I may add that he also was an active member of the International Council for Environmental Law. His wisdom, a true image of the old African wisdom, helped us many times in the past with the work of our Association.

1992 is the year of the world's environment, it is also the year we commemorate the discovery of the New World. This event was, 500 years ago, the ultimate evidence that our planet is a sphere. And yet still we have not learned all we should from this fact. Indeed, if we stand in front of a globe representing the planet, we usually try to turn it in such a way that our own country is on the top, which means that it is higher than all the others, dominating in a way all of them. At the same time, there are quite a few parts of the world, on the opposite side of the globe, which we do not see. This is an old reflex: even 500 years after the discovery of America, we need a trigger to face reality: in

spite of history, our planet cannot be cut into pieces, we are obliged to learn solidarity.

This trigger may be the challenge of the dangers which we, humans, have created for our planet, the Earth. In order to be able to cope with it, we need world-wide international co-operation, which means specific rules of international law.

However, international law itself has to be adapted to global change and, indeed, it is in many regards changing. In the present lecture I will submit to you several ideas on the effects of environmental problems on international law and on the innovations which characterize the present development of our discipline.

What is environmental law? Any lawyer will answer that it is a collection of legal norms concerning the environment. This reference to 'a collection of legal norms' implies a certain coherence among existing standards, a coherence which derives from the ultimate objective of protecting the environment. Although it is difficult to define the scope and contents of the latter, a useful definition is found in an European Community directive which refers to 'water, air and soil as well as the relationship of these elements among themselves on the one hand and with all living organisms on the other'.¹ Given this, the role of law must shift from its traditional function of regulating the status of persons or things, to concern itself instead essentially with relationships, which is where the difficulties begin which characterize this new field dominated by law.²

Environmental law is not like other fields of law. In order to appreciate its uniqueness, it is most useful to consider it from two perspectives: horizontally, in geographic or spatial terms; and vertically, or in temporal terms.

¹ Directive 67/548/EEC Relating to the Classification, Packaging and Labelling of Dangerous Substances, 27 June 1967, OJ No. L 196 of 18 August 1967, Article 2(1)(c).

² See Alexandre Kiss, *L'écologie et la loi* (Paris: L'Harmattan, 1989). This is a collective study of lawyers, political scientists and ecologists. This characteristic of international environmental law is evidenced in particular in environmental impact procedures such as those contained in the 1985 EC Directive (OJ L 175 05. 07. 85 p. 40), Article 3 of which provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case in accordance with Article 11, the direct and indirect effects of a project on the following factors:

- human beings, fauna and flora.
- soil, water, air, climate and the landscape.
- the inter-action between the factors mentioned in the first and second indents.
- material assets and the cultural heritage.'

I. THE SPATIAL CONTEXT OF ENVIRONMENTAL LAW

The element which initially is striking in environmental law is that delimiting its applicability in spatial terms is not easy. It is therefore perhaps more appropriate to use the term 'biosphere' as applied in the UNESCO 'Man and Biosphere' programme.³ The term biosphere refers to the totality of our environment, that part of the universe in which, as far as we know, all life is concentrated.⁴ The environment itself is difficult to confine within precise limits. This becomes evident when considering the question of who should be consulted when a proposed activity or construction – a building, a freeway, a factory, etc. – may have an environmental impact. The problem becomes much more vast when it is a matter of elaborating norms for larger areas in which local needs and elements must be balanced with the necessity for certain uniform rules. In fact, the environment – the seas, rivers, air, wildlife – knows no boundaries. Above a certain restricted level, environmental problems become international and must be solved by norms superimposed on national law by international law. This tendency increasingly is reinforced with the appearance of planetary problems which no state in the world, no matter how powerful, can solve on its own: marine pollution,⁵ depletion of the ozone layer,⁶ disappearance of genetic diversity,⁷ global climate change.⁸ Of course, numerous problems which exceed

³ *Man Belongs to the Earth: UNESCO's Man and the Biosphere Program*, (Paris: UNESCO, 1988).

⁴ Cf. A. Kiss and D. Shelton, *International Environmental Law* 2nd ed. (Ardsley, New York, Transnational Publishers, 2000) p1.

⁵ Examples of global agreements are the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1046 *U.N.T.S.* 120; 1973/78 Convention for the Prevention of Pollution by Ships (MARPOL), (1973) 12 *I.L.M.* 1319 and Part XII of the 1982 United Nations Convention on the Law of the Sea, *UNDOC A/Conf. 62/122*.

⁶ See the 1985 Vienna Convention for the Protection of the Ozone Layer (1985) 26 *I.L.M.* 529; 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and the 1990 London adjustments and amendments, reproduced by R. Churchill and D. Freestone (eds.) *International Law and Global Climate Change* (London: Graham and Trotman, 1991) and the Helsinki Declaration on the Protection of the Ozone Layer, 2 May 1989, (1989) 23 *I.L.M.* 1335.

⁷ See for example, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (1971), the Convention to Regulate International Trade in Endangered Species of Flora and Fauna (1973) 12 *I.L.M.* 1085 and the Convention on the Conservation of Migratory Species of Wild Animals (1980) 19 *I.L.M.* 15, and UNEP Council Decision 15/34 on the Preparation of an International Legal Instrument on the Biological Diversity of the Planet (1989).

⁸ United Nations General Assembly Resolutions on the Protection of Global Climate for Present and Future Generations of Mankind 43/53 of 6 Dec 1988, 44/207 of 22 Dec 1989 and 45/212 of 21 Dec 1991, UNEP Council Decision 15/36 on Global Climate Change, Noordwijk Declaration

the artificial national frontiers created by humans can and should be dealt with on the regional, more homogeneous level.⁹ This is the case, in particular, with the European Community, which can be particularly effective in this as in other fields.¹⁰

Environmental law thus should be understood as a combination of superimposed rules. Three levels are important, particularly in Europe: national norms, the law of the European Communities, and international law. It is, however, understood that the three levels intersect. International law should be respected by Community law and by national laws. However, the latter are increasingly overridden by Community legislation in the twelve Member States. For example, in France it can be estimated that more than half the norms relating to environmental protection are derived from international law, especially Community law.

The influence of international law on the laws of national states is not a one way street. It must be noted that the first step in preparing an international or Community text is most often a study of existing national legislation in various countries.¹¹ Neither regional nor global institutions can afford to ignore the

on the Atmospheric Pollution and Climate Change 5/7 Nov 1989. All reproduced in Churchill and Freestone, above, note 6.

⁹ There indeed needs to be no inherent incompatibility between regional and global environmental regimes. In respect of the control of marine pollution see for example C. Odidi Okidi, *Regional Control of Ocean Pollution* (Alphen aan den Rijn: Sijffhoff & Noordhoff, 1976); J.A. Yturriaga 'Regional Conventions of the Marine Environment', *Recueil des Cours*, Academie de Droit International (1979); D.M. Johnston and L.M.G. Enomoto, 'Regional Approaches to the Protection and Conservation of the Marine Environment' in D.M. Johnston (ed.) *The Environmental Law of the Sea* (Berlin: Erich Schmidt Verlag, 1981).

¹⁰ It should be noted that the EEC Treaty acknowledges the need for 'sub-regional approaches' in Article 130R(3), which provides that in preparing its action relating to the environment the Community shall take account of, *inter-alia*, 'environmental conditions in the various regions of the community'. One example of such a regional Community programme is Regulation 563/91 on action by the Community for the protection of the environment in the Mediterranean region (MEDSPA) OJ L 63 09.03.91 p. 1. See generally D. Freestone, 'European Community Environmental Policy and Law' *Journal of Law and Society*, vol. 10 (1991) p. 135; S.P. Johnson and G. Corcelle, *The Environmental Policy of the European Communities* (London: Graham and Trotman, 1989) and L. Kramer, *The EEC Treaty and Environmental Protection* (London: Sweet & Maxwell, 1990).

¹¹ The inter-relationship between national, and supra-national environmental law is particularly evident in the case of EC environmental law where an 'Agreement of the Representatives of the Governments of the Member States meeting in Council on 5 March 1973 on information for the Commission and for the Member States with a view to possible harmonization throughout the Communities of urgent measures concerning the protection of the environment', institutionalized the dialogue between Member States and the Community. (OJ C 09 15.0373 p. 1 and OJ C 86 20.07.74 p. 2).

national legislation which best responds to everyday realities and which reflects a certain experience with possible solutions to environmental problems. Thus new legislative techniques such as the environmental impact assessment – the preparation of a preliminary study on the ecological impact of proposed projects – was first introduced in certain states, then taken up by others, further extended into all EC member states, and finally was adopted in an international treaty concerning all Europe and North America.¹²

However, the spatial dimension also should be understood in a more abstract sense. It has been recalled that horizontally, environmental law does not only affect one country or another, one continent or another, but the entire planet. Now, it also impacts on other scientific disciplines besides law. The constant which is the foundation of all environmental protection can only be based on those Earth sciences which give us an understanding of the environment and its deterioration. All the same, 'hard' science and its technology must seek remedies for the environmental harm. All remedial decisions must still be taken within the political context by governmental bodies, which have to examine economic and social conditions of each given situation. And the decisions taken by public authorities inevitably take the form of juridical acts: the application of existing norms or the creation of new ones, recourse to institutions or, if necessary, creation of new organs. Thus, an interdisciplinary chain is indispensable to respond to environmental problems. Each discipline has its place and its special role. It may even be argued that in all legal systems, environmental law is the branch which is most open to the maximum number of other scientific fields, and thus it best expresses the interdisciplinarity which has become necessary to respond to modern social problems.

Finally, this horizontal dimension is also present in the evolution of environmental rules themselves. Towards the end of the 1960s there arose a new consciousness about environmental deterioration. This produced an extremely rapid mobilization of public opinion which was unique in being formed from the outset on the international level. In addition, legal norms which were adopted responded to the most pressing problems: seeking to remedy massive pollution of the oceans and rivers, to halt or at least to delay the disappearance of animal and plant species. Adding air pollution, the true dimensions of which were only

¹² This procedure, which originated in the U.S. Environmental Protection Act of 1969, has been adopted by the French law of 10 July 1976 on the Protection of Nature. It subsequently was expanded to cover the entire EC through Directive 85/337/EEC of 27 June 1985, on the Assessment of the Effects of Certain Projects on the Environment (OJ L 175). More recently, the UN Economic Commission for Europe has adopted a Convention on Environmental Impact Assessment in a Transboundary Context, in Espoo (Finland) 25 February 1991, 30 *I.L.M.* 800 (1991).

understood towards the end of the 1970s, one can speak of a sectoral method of addressing problems, considering the four principal sectors of the environment: seas, inland waters, atmosphere, wildlife.¹³

This compartmentalization could not continue because of the interrelationship of the different sectors; atmospheric pollution harmed soil and fresh waters which in turn interpenetrated and transmitted the pollution to wild animals and plants. In addition, it became understood that pollution could itself produce different effects in various milieu, so that it was more sensible to attack the causes rather than the symptoms. This led to a new phase in environmental law: trans-sectoral or trans versal regulation.¹⁴ These norms were superimposed on sectoral regulations, without nullifying them. The principal elements are norms relating to the production, transport, commercialization, utilization and elimination of dangerous substances: the last part, relating to wastes, has grown to the point that it is often considered independently of the other aspects of regulation. Additionally, there are specific norms concerning the problems posed by radioactive substances, including nuclear wastes.

The last phase of environmental law confirms this tendency to expand and globalize the subject. Everything began with air, with the discovery that air pollution was not only a local phenomenon, but that it could produce long distance effects.¹⁵ This was followed by recognition of the danger presented to all life by depletion of the ozone layer. Faced with this problem, even wide multilateral cooperation comprising a continent is insufficient; the necessary dimension is resolutely planetary.¹⁶ Similarly, it is obvious that measures must be taken to prevent, as soon as possible, global climate change due to human

¹³ On this 'sectoral approach' see A. Kiss and D. Shelton, *op. cit.* p. 297ff.

¹⁴ This re-orientation is particularly apparent in the European Communities where the fourth environmental action programme marked a clear departure from the sectoral approach in favour of 'an integrated substance-orientated approach'. (Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992) OJ C 328 07.12.87 p. 1). This new approach is embodied especially in Directive 87/217 on the prevention and reduction of environmental pollution by asbestos, OJ L 85 28.03.87 p. 40.

¹⁵ In order to face this challenge, all the European States, Canada and the U.S. adopted on 13 November 1979, the Convention on Long-Range Transboundary Air Pollution, which was later completed by the Helsinki Protocol on the Reduction of Sulphur Emissions (8 July 1985) and the Sofia Protocol Concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes (31 December 1988).

¹⁶ Vienna Convention for the Protection of the Ozone Layer, (1987) 26 *I.L.M.* 1529 and Montreal Protocol on Substances that Deplete the Ozone Layer, (1987) 26 *I.L.M.* 1951, as adjusted and amended in June 1990.

activities. Again, this can only be done on a global level. Given their likely effects on the world economy, as well as on the daily life of everyone, the provisions which must be adopted could be the most important ever undertaken by the international community. They must be at least in part based on elements submitted by scientists; yet the entire world, including all legal systems, will be profoundly marked by these measures which will truly express the global character of environmental law.

II. ENVIRONMENTAL LAW IN A TEMPORAL CONTEXT

The temporal dimensions of environmental law are multiple and may characterize this body of law, challenging traditional concepts of law, even more than the spatial context.

The first given is that, closely dependent on scientific evidence, environmental modifications which occur have an inevitable consequence on legal norms. Since the end of the 1960s, the period in which the birth of environmental law can be placed, our knowledge concerning the environment itself has not ceased to grow; an example would be the development of our understanding of the functioning of ecosystems. Similarly, we are continually discovering new forms of environmental deterioration, such as the regular and increasingly menacing appearance of the ozone hole above certain regions of the earth. Finally, new sources of potential pollution continue to appear: thus, each year between 1000 and 2000 new chemical substances are produced for sale.

Law, one of whose functions is to assure a certain social stability and which, as a consequence, generally has a rather conservative image, finds itself confronted by these facts with the problem of constant adaptation. Also, the normal procedures for creating law, which initially contain respect for process and other rights for the subjects of law – such as respect for the sovereignty of people and of states expressed by the role of Parliaments and governments – must give way to legal mechanisms permitting a rapid adjustment.¹⁷ The result is

¹⁷ Many international environmental treaties cope with this problem by the so-called 'list system' whereby pollution by new substances identified as potentially harmful to health and the environment can be simply added to a List Annexed to the Treaty without the need to formally revise the Treaty. See generally, P. Contini, and P.H. Sand, 'Methods to Expedite Environmental Protection, International Ecostandards', (1972) 66 *A.J.I.L.* pp. 37-59 and P.H. Sand, 'The creation of transnational rules for environmental protection', in M. Bothe (ed.) *Trends in Environmental Policy and Law*, IUCN Environmental Policy and Law Paper No. 15 (Gland, 1980), pp. 311-320.

European Community environmental directives likewise often contain a clause facilitating their adaptation to technical progress. In addition, Article 130S empowers the Council acting

a dynamic law, which does not always escape the danger of being poorly understood on the one hand, or rapidly outdated on the other. Laws and decisions must be frequently modified. Unfortunately, international treaties and especially the normally long procedure for their conclusion can be overtaken by events even before the norms are in force and thus applicable. This poses a major challenge to the entire legal system on all levels: national, community, international.

Another problem linked to time is that environmental law is essentially based on prevention. The new formulation of the Treaty of Rome instituting the EEC, resulting from the Single European Act of 1987, announces that Community action in regard to the environment is founded on the principles of preventive action and correction, by priority at the source, of attacks on the environment.¹⁸ Effectively, the golden rule in environmental matters should be that deterioration of the biosphere should be avoided as much as possible, because remedies are now always possible.¹⁹ A new concept, particularly disturbing, has thus made its appearance, that of the irreversibility of certain facts: extinction of living species, desertification, disappearance of the ozone layer. At the same time, experience shows the difficulty of even evaluating, much less repairing according to the traditional rules of law, certain damage caused to the environment. Thus, responsibility or liability plays a less important role in this field than in general civil law, and regulation, whose sanctions are not always truly guaranteed, takes on a much more important role.

A particularly interesting procedure should be recalled in this regard: that which consists of evaluating in advance the impact of certain proposed activities on the environment.²⁰ This is in the process of being completed in certain texts by

unanimously to define 'those matters on which decisions are to be taken by a qualified majority'.

¹⁸ The Treaty on European Union which will come into force after its ratification by the National Parliament of the Twelve Member States will further reinforce the Community's commitment by embracing the more stringent 'precautionary principle'. The Treaty on European Union is published in *Europe Document* 1759/60 07.02.1992. As amended, Article 130R(2) states that the Community's policy 'shall be based upon the precautionary principle and on the principle that preventative action should be taken, that environmental damage should be rectified at source and that the polluter should pay'.

¹⁹ Embracing the preventative or precautionary principle should not lead, however, to the devaluation of repressive instruments, in this respect, a major development is the European Community's proposed directive on civil liability for damage caused by waste, on which see L.M. Sheenan, 'The EEC's Proposed Directive on Civil Liability for Damage caused by Waste: Taking Over When Prevention Fails', (1991) *Ecology Law Quarterly*, p. 405 *et seq.*

²⁰ See the instruments cited in note 12.

an environmental audit, particularly by a control exercised after the beginning of the functions of the foreseen installation.²¹

The temporal factor, with all the dynamism and uncertainty which can result from it, thus enters into law due to the need to protect the environment. In fact, one can say that all environmental law is essentially justified by reference to the future. If there is no need to protect nature, species, and natural resources, why be preoccupied not only with development, but with sustainable development and all which derives from that concept, especially its legal implications? The aim of environmental conservation is in the future, not in the present, as is the case with the majority of legal norms relating to, for example, the status of persons, with family, property, public order, even the guarantees of human rights. Without a forward vision, environmental law lacks meaning and justification. Moreover, in this context the rights of future generations are present: we have inherited the Earth and we should transmit it to our children and the generations which follow such that they can have the same possibilities as us, knowing that it is likely that they will be more numerous than us. Our responsibility in this regard has been proclaimed repeatedly, notably in the Stockholm Declaration of June 1972. This fundamental text concerning environmental protection states that:

Man bears a solemn responsibility to protect and improve the environment for present and future generations ... (Principle 1)

The natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate. (Principle 2).

Clearly this principle poses formidable problems to law and in particular to international law. How can 'future generations' be legally defined? How can their interests be recognized and protected?²² The question of their representation is particularly difficult and ultimately tied to that of the legal status of all humanity.

This is where we arrive when considering the need to protect the environment by legal mechanisms and means however ill-defined. It is not only intellectual pleasure, provoked by the observation that law is faced with the greatest

²¹ UN Convention on Environmental Impact Assessment in a Transboundary Context, February 1991, Espoo (Finland), (1991) 30 *I.L.M.* 800.

²² One way would be to confer a status similar to legal personality upon the biosphere. Article 136 of the 1982 Convention on the Law of the Sea moves in this direction, which proclaims the deep seabed and its mineral resources to be the common heritage of mankind and invests all humanity with rights and responsibilities over the Area. See further A. Kiss and D. Shelton, *op. cit.* at p. 249.

challenge in its history, that renders this new field so compelling. Much more is implied: ethical positions and, in truth, an entire vision of the universe. To protect the environment is not only a choice for society, it is a choice for the universe and thus those of the universities who study the present and the future must take account of it.

POSTSCRIPT DECEMBER 1992

The publication of the present lecture gives me the welcome opportunity to add this postscript to the text delivered in January 1992. The passage of time now permits a global view of what occurred at the Rio de Janeiro Conference in June 1992.

It is well known that 177 countries attended this huge meeting, 114 of which were represented by their heads of state or of government, in the presence of 4000 journalists and the representatives of 1650 non-governmental organisations – altogether approximately 30,000 persons. Specialists also know that five texts were approved or adopted during the conference.

- Two conventions: the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity;
- Two declarations which are non-binding: the Rio Declaration on Environment and Development and ‘Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests’; and
- a vast Programme of Action, called Agenda 21, that is composed of 41 chapters covering the whole field of environmental protection and its relationship with development.

It seems to me that three points can be made concerning these texts and the global results of the Conference.

1. *The five texts confirm certain rules recognised as customary international environmental law, reinforce several emerging norms and formulate several new ones.*

a) Five basic norms fall into the category of customary law rules confirmed at Rio, beginning with the obligation of states to co-operate in order to safeguard the environment.²³

In addition, Principle 21 of the Stockholm Declaration was slightly redrafted as follows:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental *and developmental* policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.²⁴

Third, in accordance with a substantial number of existing international treaties, the Rio texts also provide that states shall develop national and international law regarding liability and compensation for the victims of pollution and other environmental damage, in particular for environmental damage caused by activities within their jurisdiction or control, to areas beyond their jurisdiction.²⁵

Fourth, the obligation is again proclaimed for states to immediately notify other states of emergencies that are likely to produce sudden harmful effects on the environment.²⁶

Finally, the principle of peaceful settlement of disputes is reaffirmed²⁷ and procedures proposed.²⁸

²³ Declaration, Principles 7, 14, 27; Preamble, Articles 3(1) and (2), Article 4 Climate Change Convention; Article 5 Convention on Biodiversity; Articles 1(b) and 3(b) Declaration on the Forests. This principle is also the basis of the entire Agenda 21.

²⁴ Rio Declaration, Principle 2. The underlined words were added in Rio. See also Article 3 Convention on Biodiversity; Climate Convention, Preamble; Article 1(a) Declaration on Forests.

²⁵ Declaration, Principle 13; Article 14(2) Biodiversity Convention.

²⁶ Declaration, Principle 18; Articles 14(1) (d) and (e) Biodiversity Convention.

²⁷ Declaration, Principle 26.

²⁸ Biodiversity Convention, Art. 27 and Annex II; Article 14 Climate Convention.

b) Reinforcement of emerging customary law rules

These rules mainly concern the prevention of environmental damage. According to Principle 19 of the Rio Declaration, states shall provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant adverse transboundary environmental effect and shall consult with those states at an early stage and in good faith.²⁹ Environmental impact assessment procedures also are advocated for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.³⁰

Although the 'right to environment' proclaimed by the first principle of the Stockholm Declaration is not explicitly confirmed by the texts issuing from the Rio Conference, its essential elements – the right to information concerning the environment that is held by public authorities, the right to participate in decision-making processes as well as effective access to judicial and administrative proceedings including redress and remedy – are stated.³¹

c) New rules

One of the most important new principles, the legal consequences of which will certainly be developed during the coming years, is that of the common but differentiated responsibilities of states 'in view of the different contributions to global environmental degradation'.³²

However, the most innovative new norm is the precautionary principle – although the text uses the terms 'precautionary approach', it seems to be a real principle. It means that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing the necessary measures to prevent environmental degradation.³³

The Rio Declaration also proclaims that the polluter-pays principle should be applied. However, due regard should be paid to the public interest and international trade and investment should not be distorted.³⁴

²⁹ See also Article 14(1) (c) Biodiversity Convention.

³⁰ Declaration, Principle 17; Article 14(1) (a) and (b) Biodiversity Convention; Article 8 (h) Declaration on the forests; Agenda 21, Chapter 22.

³¹ Declaration, Principle 10; Articles 5(b) and 6(d) Declaration on the forests; Agenda 21 chapters 8, 11 and 25-32.

³² Declaration, Principles 7 and 11; Climate Convention, Preamble.

³³ Declaration, Principle 15; Article 3(3) Climate Convention.

³⁴ Declaration, Principle 16 and Agenda 21, Chapter 20.

2. *The concept of sustainable development led to a merger between environment and development concerns*

The key concept of the Brundtland Report on Environment and Development which is at the origin of the Rio Conference, is that of sustainable development. It means development that meets the needs of the present without compromising the ability of future generations to meet their own needs.³⁵

The requirement that development be sustainable integrates environmental protection into the development process. Evolution leading to the Rio Conference shows that in fact one can speak of a merger between environment and development. All the documents adopted at Rio reflect this approach. Although the legal content of the concept of sustainable development can hardly be defined, political use of it is likely to result in important consequences for international cooperation, in particular for environmental law. One may quote Article 20(2) of the Biodiversity Convention according to which the developed country Parties shall provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs to them of implementing measures which fulfil the obligations of the convention. The Convention on Climate Change is even more systematic, by designating the contracting Parties which should bear the principal financial burden of the measures to be taken.³⁶ Finally, it is very clear that the implementation of Agenda 21 is linked to and dependent upon its funding by industrialised countries. In effect, this means that developing countries co-operate to protect the environment only so far as international assistance is provided for their development.

3. *A role emerged for new actors in environmental protection*

Another extra-legal development is the emergence of non-state entities in the combat for the protection of the environment. Individuals – in particular scientists – and associations have always played an important role in this regard inside states. The negotiation of the Vienna Convention on the Protection of the Ozone Layer³⁷ and of the Montreal Protocol³⁸ has shown the usefulness of associating concerned industries in international action. The preparation of the Rio de Janeiro Conference enlarged this circle with representatives of non-

³⁵ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) p. 43.

³⁶ Articles 4(3) and (4).

³⁷ 22 March 1985, (1987) 26 *I.L.M.*, p. 1529.

³⁸ Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, (1987) 26 *I.L.M.* 1541.

governmental organisations: they played an important role before and during the meeting. The Rio Declaration stresses the importance of the participation of all concerned citizens in responding to environmental issues³⁹ and several chapters of Agenda 21 detail the beneficiaries of such participation, including among them indigenous populations,⁴⁰ local authorities,⁴¹ trade unions,⁴² trade and industry,⁴³ the scientific community⁴⁴ and farmers.⁴⁵ Principles 20 and 21 of the Rio Declaration also mention the vital role of women and of the youth.

Of course, the new partnership between state governments and non-state entities which are thus represented does not create new legal categories and even less new subjects of international law – at least not immediately. However, such a role already has been accorded to individuals and associations in the field of human rights protection, where a right exists to address petitions to organs created at an international level (European, American and African Commissions of Human Rights) and NGOs participate in the discussions between state representatives (UN Commission of Human Rights). One may take the risk – and one may hope – that this will be the evolution of environmental protection.

In all the fields that have been mentioned, the results of the Rio Conference are not final results: they constitute steps forward. However, while few final decisions were taken, almost no ways have been definitely closed. Rio appears to be a stage in an evolution that started a quarter of a century ago: it makes one think of a door which has been opened. It depends on us whether we will enter and what we will do once we have entered it.

³⁹ Principle 10 and also Chapter 27 of Agenda 21.

⁴⁰ Chapter 26.

⁴¹ Chapter 28.

⁴² Chapter 29.

⁴³ Chapter 30.

⁴⁴ Chapter 31.

⁴⁵ Chapter 32.

IX. THE NEW UNITED NATIONS: APPEARANCE AND REALITY

The Josephine Onoh Memorial Lecture 1993

In the last three years the political world around us has altered beyond all recognition. In watching the changes unfold we have shared in the initial incredulity at what we were seeing and hearing, and then in the exhilaration of believing that a better tomorrow had truly arrived. Each of us has our personal memories about the unfolding of these extraordinary changes. The political world has changed. And as we now know, those changes have brought not only new possibilities but disorder, despair, and problems of unimaginable complexity.

This lecture seeks to look at some of the new possibilities, and the new problems, within the United Nations, from the perspective of an international lawyer. Within that context, it is well to recall that, notwithstanding the extraordinary developments of recent times, the stated purposes of the Charter have a timeless quality, and seem to reflect some eternal truths. Recalling the scourge of war, reaffirming faith in human rights and in the dignity and worth of the human person, and referring to the need for just conditions under which the obligations of international law can be maintained, the Charter then states as the first of its purposes:

the maintenance of international peace and security;

the taking of effective collective measures to that end;

and the bringing about, in conformity with the principles of justice and international law, or adjustments or settlements of international disputes.

The ending of the Cold War, with the increasing convergence of Western and Soviet interests, and the cessation of the abusive use of the veto, seemed to hold great promise for progress in the achievement of these purposes.

And the coalition against Iraqi aggression in Kuwait, regrettable as the need for it was, seemed to evidence that indeed a new international order was with us, in which, at last, the intentions of the Charter could begin to be fulfilled.

But, two years on, we see the United Nations in disarray. This lecture looks at some of the legal problems facing the new United Nations. And, at the United Nations, international law is never far away from the reality of international politics.

PEACEKEEPING

Chapter VII of the Charter provides for the application of enforcement measures, including the military use of force under Article 42. Standing arrangements for such measures were to be concluded between the Security Council and the UN members, under Article 43. Because of the Cold War, it was never possible to proceed to the Article 43 arrangements. Over Soviet opposition, the view prevailed that nonetheless the United Nations could proceed to use military action, provided it was for a purpose within the Charter and of a type not dependent upon the agreements specified in Article 43. Accordingly, the concept of peacekeeping was born, first employed in its current form in the establishment of the United Nations Emergency Force in Suez in 1956. As the Secretary General made clear at the time, the deployment of peacekeeping forces would require the consent of the states to which they were sent; and UN members could not be required to contribute to them. Participation would be voluntary.

Over the years there have been many such peacekeeping activities. Some have been more successful than others. In the early years it was regarded as axiomatic that the Big Powers should not participate – UNEF, ONUC and UNOGIL were exactly designed to remove the Big Powers from the arena, or to insulate it against their intervention. Later some flexibility was introduced on this point: from 1964 the United Kingdom has played an important part in UNFICYP (United Nations Peacekeeping Force in Cyprus). In 1978 France was asked to contribute to the new UN Force in Lebanon, UNIFIL (United Nations Interim Force in Lebanon). And by the mid 1980s, the Soviet Union and the United States both were contributing to UNTSO (the United Nations Truce Supervision Organisation, established initially in 1948).

The basic task of a peacekeeping force was to secure a ceasefire, with the agreement of the contending parties, and to oversee their withdrawal to the line ordered by the Security Council. Often subsequent events on the ground required additional tasks to be added to that mandate. It became not unusual for a humanitarian function to be added – ensuring the safe passage of convoys,

making sure that crops could be cultivated. There was, of course, always a certain danger, even in such operations, and regrettably there was from time to time a loss of life to UN peacekeepers. But these were exceptional incidents: the UN was respected, because it had no foreign policy save securing the purposes of the UN Charter. These attributes remain true of the old established peacekeeping activities still in existence today – UNTSO (Jerusalem), UNMOGIP (India-Pakistan), UNFICYP (Cyprus), UNDOF (Israel-Syria), UNIFIL (Lebanon). But in many of the newer para-military activities the basic prerequisite of securing an agreed ceasefire has been lost sight of. The ancillary functions have become predominant, or even the sole function. Thus the securing of human rights has been integral to the maintenance of the ceasefire by ONUSAL in El Salvador. And the purpose of the UNTAC in Cambodia has been to support nation-building efforts. In the former Yugoslavia, where the members of the Security Council have until now simply accepted the violence and unlawfulness of the various parties as a fact to be lived with, the peacekeeping provided by UNPROFOR II in Bosnia-Herzegovina has been limited to the provision of humanitarian aid, without a ceasefire being either agreed or imposed. It is in my view not surprising that, in spite of the heroic effort of the UN personnel on the ground, these activities have met with little success. The conditions do not exist to achieve this humanitarian mandate. The wrong form of UN activity has been chosen. And every suggestion that the UN should move to more appropriate activity is met with the response that it would jeopardise the existing (and in my view, inappropriate) mission already there.

The recent tendency to establish peacekeeping forces of a type unsuitable for the mandate they are given has had a necessary consequence: their impotence leads to a loss of respect, and a loss of respect leads to loss of life. Almost everyday, in Cambodia as well as in Bosnia, UN forces are deliberately fired upon. To feed “the enemy” while war continues is to be treated also as the enemy.

ENFORCING THE PEACE

The collapse of communism makes it possible, at least in theory, for the UN to move towards the collective security system envisaged under the Charter, whereby military sanctions can if necessary be ordered against an aggressor state. There have turned out to be prodigious problems in achieving this.

The major contributors – the United States, the United Kingdom, France – believe that militarily a single nation command under UN authorisation is preferable to an integrated UN command. And political control is better retained

by a general authorisation by the Security Council to take necessary measures to secure a specified end, with a limited number of like minded states participating in the activity. This was the pattern set by the Gulf military action by the coalition forces, authorised by the Security Council but carried out under US command.

This model undoubtedly has its advantages. But it clearly has its limitations also. Because it necessarily entails the burden so heavily falling upon a few states, and because states now begin to feel so heavily stretched, they are extremely reluctant to fulfil that role. They insist that they should not get 'sucked in' to military activities whose outcome they cannot foresee with certainty, which may endanger their forces, and which does not represent a major national interest. But the wider community interest in maintaining peace, and not rewarding violence breaches of international law, would seem to require that the ability of the United Nations to respond is decoupled from short-term considerations of the national interest. Collective security under Chapter VII of the Charter was never meant to be dependent on such understandable considerations of the national interest. It is only by ensuring that forces are pre-committed to such action, if and when the Security Council determines the need for it, that there can be effective collective security through military enforcement. And the burden needs to be shared, although the Permanent Members, and the sole super power at the present time, will necessarily have a major responsibility. The logic would point to serious examination of the possibility of moving to put in place the standby and commitment arrangements intended under Article 43. In effective enforcement in the new world, the Military Staff Committee would have a useful role in planning and strategy; the day-to-day command would be in the hands of the Secretary-General (though delegated, if the Security Council chose, to a single national command or a regional agency with constitutional competence and experience in the military field); and the political authorisation would be that of the Security Council.

What seems to me clearly unacceptable is for Security Council members to fail to address the fact that in some circumstances enforcement measures are required, on the grounds that a few states cannot be expected to bear every burden; but to refuse to move to implement those UN measures that would allow the burden to be shared.

THE QUESTION OF *VIRES*

As we survey the legal problems of the new United Nations, there are other closely related matters which merit our attention. The Security Council is

regarded as selective in what problems it considers important, and in those it makes subject to sanctions. There has been widespread comment that while the Security Council has ordered sanctions against Libya and against Iraq,¹ largely for failure to comply with binding resolutions, it has not done so against Israel for its expulsion of the Hamas, notwithstanding its failure to comply with the resolution condemning this expulsion.²

The United States takes the view that aerial terrorism, causing great loss of life to persons totally uninvolved in any dispute, merits the attention of the Security Council; and that if it calls for something to be done to rectify the situation its decision must be obeyed, with sanctions properly invoked if it is not. The Hamas, it says, said, are not total 'third parties', as were the passengers on Pan Am 103; Israel was rightly condemned for their expulsion, including by the United States, and there is still a serious possibility of substantial compliance with the Security Council's demands as evidenced by Israel's agreement to let 194 of the Hamas return.³ The United States further notes that it has in fact been willing to commit military forces, even beyond a mere peacekeeping role, in order to ensure some stability – and thus food – to the people of Somalia. It has also rejected the charges of ignoring the non-permanent members by stating that they are in fact fully consulted, and share the same perceptions and goals, as evidenced by the high percentage of resolutions adopted by unanimity or near unanimity.

This controversy – controversy of murmurs in the corridors of the United Nations, and no less damaging for that – in my view masks a serious issue which requires urgent consideration. Now that consensus *can* more readily be achieved in the Security Council, what should its policy be on sanctions? Should sanctions be limited to events such as the Iraqi invasion of Kuwait – that is to say, where one state massively violates Article 2(4) of the Charter, the peace has been breached and aggression has occurred? Or should sanctions (economic or military) be employed to end *other* violations of international law (such as the state support of terrorism)? With regard to the latter, there are two further international law issues in play. A finding of a threat to the peace, or an act of breach of the peace or act of aggression, is a prerequisite for sanctions under Chapter VII. Should the Security Council be able to declare various situations, not involving military invasion, a threat to peace, and thus trigger the possibility of enforcement of resolutions. That was done in the air-transport sanctions against Libya. The UN authorised military intervention by the United States in

¹ E.g. SC resolutions 687 (1991), 707 (1991), 715 (1991); and statements of the Security Council issued on 8 January 1993, SC/5534; and on 11 January 1993, SC/5536.

² SC resolution 799 (1993).

³ A view apparently accepted by the Security Council.

Somalia is not, contrary to widespread belief, some form of 'humanitarian intervention' by the United Nations. The enabling resolution finds the situation a threat to international peace.

Alternatively, is the legal basis for military action in the new UN the failure of a country to comply with the legally binding demands of the Security Council? Shortly before Christmas, the United States, the United Kingdom and France took military action in Iraq, which was continuing to violate Security Council resolutions. All but one of those actions (and the entirety of the actions engaged in by the United Kingdom and France) were in fact articulated by these states as action in self defence – the Iraqi hostile action in the no-fly zones requiring such measures to be taken for the safety of patrols. But the matter needs resolving.

It would of course be cleaner, and simpler, to stipulate that economic and military enforcement should only be taken against transfrontier aggression. But that is not what the Charter provides. It *does* envisage sanctions to restore international peace – and a threat to international peace is not limited to invasions. I believe the Security Council *must* retain this power, but should use it carefully and evenhandedly.

I find it less easy to see in the Charter an authority to engage in sanctions to compel compliance with international law in general, or the Security Council's resolutions in particular. The key *must* remain the test in Article 39 – namely, whether such a violation of international law or an obligation under a resolution, is a threat to peace in a particular case.

The convergence of American and Russian interests, and the disappearance of a veto wielding communist Soviet Union, has led to another phenomenon which deserves some consideration this afternoon. The Security Council is now able much more easily to reach agreement on issues, and on proposals for action. Asserting its primary responsibility for peace and security,⁴ the Security Council has determined to end the old practice whereby long public sessions were occasions for exchanging accusations and charges. The new practice is for the Permanent Members to meet in private, often away from the UN building, to exchange views and begin to identify the way forward. A draft resolution will follow. The non-permanent members are then brought into the dialogue, and eventually there emerges a resolution acceptable to all, or nearly all. This new practice seems in every way better than what went before, for forty five often sterile years. But it is idle to ignore the fact that there is an important groundswell of criticism within the UN system.

⁴ Article 24 of the Charter.

The criticisms go to procedure and substance. States complain that the Security Council is in effect being bypassed and that the decisions are in reality being taken by the United States and its closest allies. The disquiet is about how the Security Council proceeds; what it chooses to address; and what problems it does not concern itself with. As to procedure, the developing countries, in particular, feel that they are excluded from the decision-making process. The feeling of exclusion, and of a Security Council dominated to an uncomfortable degree by the one Super Power, is widely shared even in the developed world.

The United States and the United Kingdom reject this charge, pointing out that close consultations are held with the non-permanent members, and that these countries are representative of the wider UN membership as a whole. But there is within the United Nations a widely expressed view that the agenda of the Security Council is now really the agenda of the United States. The Security Council will devote time and energy, and commit its considerable power, to matters perceived by the Western Permanent Members as important, though others may have difficult priorities. These others may either consider the effort being expended disproportionate to the result sought, perceiving the result as relatively unimportant; or they may think that there are other more deserving cases for the Security Council's attention and enforcement power.

The reservations about the Security Council's handling of the *Lockerbie* matter fall into the former category. Representatives of many states wish to explain that they too abhor the terrorism that caused the loss of Pan Am 103 over Scotland, and the appalling loss of life; but they consider the resolutions calling for the handing over of named suspects to the United States or Scottish legal authorities⁵ as inappropriate, and the limited sanctions directed to that end⁶ as excessive. As for the perception of there being more 'deserving' cases than those selected by the new Security Council for action, we may cite the reluctance of the Secretary General to commit peacekeeping forces to the former Yugoslavia. That commitment was being asked at a moment when the Security Council had yet to show any serious interest in the problems of Somalia. It is in this light too that we may understand the Secretary General's reported comments when airlifted out of the horrors of Sarajevo 'I know ten worse places than this'.

These are political perceptions. But they are a relevant background for the appreciation of the issues as they present themselves to international lawyers. The directly related legal issues, arising out of these same political phenomena, are twofold, and closely connected: first, does the Security Council have a non-reviewable competence in the field of peace and security, or may its decisions be

⁵ SC resolution 731 (1992).

⁶ SC resolution 748 (1992).

judicially reviewed by the International Court of Justice? Second, may the Security Council, if it can secure the necessary majorities, do whatever it wants, or is it restrained by the concept of *ultra vires*?

The primary responsibility for international peace is under the Charter clearly given to the Security Council. It is also the Security Council, and the Security Council alone, that 'shall determine the existence of any threat to the peace, breach of the peace, or act of aggression', by virtue of Article 39. This determination is the necessary precondition for any sanctions, economic or military. The determination – i.e. whether there *really* exists a threat to the peace – has from time to time been challenged by those who do not want to see sanctions, or who think the finding is a purely artificial device to secure sanctions in dubious legal circumstances. Thus, when the Security Council moved to mandatory sanctions against Rhodesia, whose minority government had unilaterally declared independence from the United Kingdom, it found that the situation 'constitutes a threat to the peace'.⁷ South Africa and Portugal believed that to be unjustified, and would have liked an Advisory Opinion of the Court. My view was, and is, that in the very determination of the existence of a threat to peace, there is a non-reviewable competence given to the Security Council. The collective security system of the Charter clearly could not work if such findings were to be subject to judicial review, with the Court taking on the task so clearly assigned under the Charter to the Security Council, and the measures ordered consequential upon that political determination held up in the meanwhile.

A particular facet of this question, on very special facts and with very special legal considerations in play, arose in the recent case before the International Court concerning the *Lockerbie* affair. After resolution 731 (1992) had been passed, Libya asked for a series of provisional measures to be indicated (the international equivalent of an injunction). Inevitably, there was a great deal of attention directed, by counsel and bench alike, to the question of the relationship between the Security Council and the Court. Could the Security Council proceed further with a matter in respect of which there was a request for interim measures before the Court? And should the Court deal with a matter that was already being dealt with by the Security Council? It is very important to remember that the Order of the Court is not a general pronouncement on the relation between the two bodies, but concerns *only* the award of interim measures. Nonetheless, some interesting observations are made. The Court found that all UN members are bound to accept and carry out decisions of the Security Council in accordance with Article 25 of the Charter; that rights claimed by Libya, which might not be consistent with the new mandatory resolution 748 (1992) were thus not

⁷ See, e.g. Security Council resolution 221 (1966) para. 1; and 232 (1966) para. 1.

appropriate for protection by the Court through injunctive relief. The Court said it was not 'at this stage called upon to determine definitely the legal effect of Resolution 748 (1992)'.⁸ This appeared to leave open the possibility of a later 'definitive determination'. But it seems upon a careful reading that the Court was addressing the possibility of reviewing, on the merits, what exactly was the legal effect of the substantive provisions of the resolution, rather than determining whether the Security Council was or was not entitled to decide, without possibility of judicial review, that a threat to the peace existed.

The relationship between the Court and the Security Council, as Judge Lachs – whose sad death three weeks ago we all mourn – so felicitously put it, must be one not of 'a blinkered parallelism of functions but of fruitful interaction'.⁹

Can the Security Council do anything it chooses in this new era? Judge Shahabuddeen, while concurring with the majority decision on interim measures, satisfied himself with pointing to the complexities of an issue that has yet to be resolved. He said:

'Are there are limits to the Council's powers of appreciation? In the equilibrium of forces underpinning the structure of the United Nations within the evolving international order, is there any conceivable point beyond which a legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?'

The Judge then offered these cautious comments:

'If the answers to these delicate and complex questions are all in the negative, the position is potentially curious. It would not, on that account, be necessarily unsustainable in law; and how far the Court can enter the field is another matter.'¹⁰

In short, these questions await judicial determination, though we each for the moment have our own views.

There is a different matter relating to *vires* to which I now turn. Leaving entirely aside the question of judicial review (which is what we have been discussing), may the Security Council determine not only that there is a threat to

⁸ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Request for Interim Measures), [1992] *I.C.J. Reports*, Order of 14 April, para. 39.

⁹ *Ibid.*, separate opinion, p. 26.

¹⁰ *Ibid.*, separate opinion, p. 32.

peace, and decide what measures should be taken to restore peace; but may it also itself act as a quasi-judicial body? Recent events in the United Nations have put this question in sharp focus.

From time to time the political organs of the United Nations have, in the context of dispute resolution, made decisions that, often in an incidental fashion, make determinations of international law. An early resolution on whether belligerent rights could be claimed after an armistice came into existence affords a rather clear example.¹¹ The Security Council has on several occasions passed resolutions determining entities claiming to be independent governments as 'having no validity', or as being 'illegal regimes'. Resolutions on Southern Rhodesia ('an illegal racist regime'), on the South African bantustans ('totally invalid' and on the Turkish Republic of Northern Cyprus ('legally invalid') are cases in point.¹² It is of course, desirable that the Security Council should be keen to play a role in upholding international law, and invoking international law is an important element in application. But certain points would seem to fall for consideration. The first is when determinations that purport to pronounce authoritatively on international law are made, it is important that they are made with care, upon proper legal advice, with an understanding of the issues – and not merely as an almost casual description for political purposes.¹³ There was little evidence in the debates concerned that the Security Council reached its determinations by careful legal analysis.

The second point we must consider is the extent to which quasi-judicial determination by the Security Council is in fact appropriate. This is a very difficult question, but one that has been made particularly pertinent by recent events. But let us retrace our steps.

Occasionally the Security Council will not merely point the parties towards the various options open to them for the political settlement of disputes, but will make its own proposals for the substance of the solution. Without in terms saying so, it is necessarily implied that the specified elements in the solution are those required by international law. The celebrated Resolution 242 (1967), on a solution to the Arab-Israeli dispute, affords an excellent illustration. This resolution affirms the following elements as necessary for a solution, all of them

¹¹ See Security Council Resolutions 95 (1951), 1 Sept. 1951, in which the Security Council called upon Egypt to terminate its restrictions on the passage of international commercial shipping and goods through the Suez Canal.

¹² See SC resolution 217 (1965), 20 Nov. 1965; S/13549, 21 Sept. 1979; and SC resolution 541 (1983), 18 Nov. 1983, respectively.

¹³ See E. Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge: Grotius, 1991) at pp. 37-48; also R. Higgins, 'International Law in the Settlement of Disputes by the Security Council', 64 *A.J.I.L.* 1 (1970).

resonant of international law obligations: the inadmissibility of the acquisition of territory by war; the withdrawal of armed forces from occupied territory; the termination of claims of belligerency; the acknowledgment of the sovereignty, territorial integrity and political independence of every state; the right to live in secure boundaries free from threats or acts of force; freedom of navigation through international waterways; a just settlement of refugee problems. So here we have an example of the rights and wrongs of claims made being implicitly passed upon in the context of decisions as to how peaceful settlement should be achieved. It is a fine line between this and those resolutions seeking to identify realistic solutions without basing them on the legal rights and wrongs of the claims. The 1992 proposals of the Secretary-General for the settlement of the Cyprus dispute are in point, as are the 1993 Vance-Owen proposals on Bosnia-Herzegovina.

Some determinations of international law are necessarily part and parcel of decision making on collective measures (non-recognition, the withholding of diplomatic relations) in response to violations of Charter law. The Security Council is not only entitled, but required, to decide if there has been an act of aggression. And it is into this context that Security Council Resolution 662 (1990) falls, when it 'Decides that the annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity and is considered null and void'. It may be quasi-judicial, but it also is integral to rejecting aggression and containing its fruits so far as third parties are concerned.

Other determinations of international law can also be considered as a necessary element in the Security Council's role of maintaining peace and security. It could, for example, certainly not have failed in the Gulf conflict to have taken a position on the applicability of the Geneva Conventions and on humanitarian law generally. Again, it was understandable and appropriate, in responding to events, that the Security Council should determine that there had been violations by way of the law relating to the protection of diplomatic personnel and premises – and once again the phrase was used that 'Iraq is fully responsible for any use of violence against foreign nationals or against any diplomatic or consular mission'. Security Council resolution 667, of 16 September 1990, in terms spoke of violations of international law, as did subsequent Security Council resolution 670, which declared the mistreatment of Kuwaitis and their property as violating international law. But subsequent resolutions on the Gulf seem to go very much further, and contain determinations that it is extremely unusual to see coming from a political body. Let me give some examples: In Resolution 674 of 29 October 1990 the Security Council stated that 'under international law it [Iraq] is liable for any loss, damage or injury arising in regard to Kuwait and third states'. That is an assertion of

international law that a Tribunal might want to make in somewhat more qualified terms. Further, the resolution invited states to collect relevant information concerning claims. In Resolution 687 of 3 April 1991, passed after hostilities had ceased, the Security Council drew attention to the legal position of Iraq in relation to chemical and biological weapons. The resolution also determined that the international boundary should be delimited on the basis of what had been agreed between them in 1964. It is one thing for the Security Council to insist that one state cannot use force to settle its frontier with another. It is another thing for it to purport to determine, in a sentence or two, where the frontier should run. Although I believe that legal analysis *would* show that the 1964 agreement was still in effect between the states concerned, the Security Council's determination of these matters simply ignored the claims that Iraq had advanced that, for various reasons the 1964 treaty no longer applied. Had the matter of where the boundary lay fallen for determination by a legal tribunal it would have been expected that an opportunity would have been given for these arguments to be deployed, and legal reasons for rejecting them (if that was the tribunal's conclusion) would have been given. It was further affirmed (without any legal hearing, and notwithstanding that a tribunal might well have reached comparable decisions) that Iraq was liable for direct¹⁴ loss and damage for environmental harm, depletion of natural resources, injuries to foreign governments, nationals and corporations, as a result of the invasion. The repudiation by Iraq of its foreign debt was declared 'null and void', as though the Security Council was a tribunal of competent jurisdiction. And it was decided that a Fund should be established to pay for compensation for claims and a Commission established to administer the Fund.

FINANCE

In a world of change, one thing at the UN has remained constant. One matter has remained utterly unaffected by the fall of the Berlin Wall, the end of communism in Eastern Europe, the disintegration of the Soviet Union and Yugoslavia: states do not pay their dues. The calls for a new world order, the insistence that the UN can now fulfil the role intended for it, the burgeoning UN peacekeeping activity around the world, have yet to be matched by a change of behaviour regarding the payment of assessed contributions.

Two key questions have always been present: how should costs be apportioned between the UN on the one hand, and the contributing states on the other? And how should these costs allotted to the UN be apportioned among its members?

¹⁴ Security Council Resolution 674 had omitted to limit liability to *direct* loss and damage. This qualification was then introduced in SC Resolution 687.

There has been a varied practice over the years on the former question. Contributing states have borne substantial parts of the costs, most usually in the form of pay, equipment, supplies and services. The underlying theory is that, at least in those states with regular forces, those forces have in any event to be engaged somewhere in training or exercises, and to be paid for. Actual operational activity does, however, necessarily entail additional costs. And at the time of the first UN peacekeeping operation, UNEF I, in 1957, the principle was established that 'extra and extraordinary costs' should be reimbursed by the United Nations.¹⁵

But it was clear that the UN would need both a start-up fund and funds to cover contingencies, as well as resources to meet the expenses attributable to the organisation as a whole. It has never properly had this capacity, though a variety of techniques have been tried over the years. But, above all, there have been difficulties about calling in the assessments apportioned among the membership.

The UN has never managed to meet peacekeeping expenses solely from apportionment according to the regular budget scale. The apportionment has been to cover the gap between the special account authorised for peacekeeping and voluntary contributions. In the early years it was contested that such apportionment should occur at all. The Soviet Union insisted that 'the aggressors' should pay for UNEF, with the United Kingdom, France and Israel financing the costs of the UN force set up after the Suez intervention. The Soviet Union also took the view that a force set up by the General Assembly was *ultra vires* the Charter, and could not form the basis of a general apportionment. The Soviet Union later refused also to contribute to the UN Force in the Congo (ONUC) although that was set up by the Security Council. And France too refused to pay its assessed share, on the grounds that the matter was simply one of sovereign choice. The International Court, in the *Expenses Case*,¹⁶ held otherwise, determining that ONUC and UNEF were each actions within the purposes of the Charter, based on the consent of the states to which they were sent, and were thus legitimate expenses which were to be apportioned among the membership on the same basis as their contributions to the regular budget.

The struggle to achieve that has occurred ever since. The failure to pay spread from those states who had advanced arguments of principle about the legality of the forces to states who simply saw the opportunity not to pay. It also spread from the peacekeeping budget to the regular budget. The UN has had problems with its regular budget and *severe* problems with its peacekeeping budget.

¹⁵ General Assembly resolution 1001 (ES-I) para. 5.

¹⁶ Certain Expenses of the United Nations Case, [1962] *I.C.J. Reports* 151.

With the advent of glasnost, the Soviet Union publicly stated that it had been in error in its attitude to financial contributions, and would now not merely pay for future peacekeeping but would seek to pay for accrued expenses related to past peacekeeping.¹⁷

Ironically, the United States had begun to move in the opposite direction. General dissatisfaction with the UN in the 1980s – on grounds of both policy and efficiency – led it to resent having to contribute the major percentage share. Two pieces of legislation, the Kassebaum amendment¹⁸ and the Gramm Rudman Act,¹⁹ (neither, in fairness, originating from the Administration but from the Congress) led to substantial withholdings of funds. The allies of the United States have publicly stated that these withholdings are in violation of Charter obligations.²⁰ As the United States is a high percentage contributor to both the regular budget and to special peacekeeping accounts, this has had a very damaging effect. After certain internal reforms at the United Nations, designed at capping the overall budget and tackling waste and duplication (objectives generally shared in the West), the United States Administration declared itself satisfied. After the alienation in the 1980s of the United States from the United Nations, from 1990, following the collapse of the old order in the Soviet Union, the United States again harnessed its foreign policy to the United Nations and became heavily committed in UN peacekeeping and UN-authorized military action. The United States Administration urged the Congress to authorize resumption of budgetary dues.

This has only been partially achieved. \$299 million has recently been paid to the regular budget and \$100 million to various peacekeeping accounts. And Congress has appropriated \$376 million for peacekeeping payments for US financial year 1993. But substantial shortfalls remain.

However, a schedule of repayments has just been agreed between the United States and the United Nations, so there is every reason to hope that this particular aspect of the problem will soon be resolved. And the Russian Federation has stated its intention of paying \$130 million of arrears under the regular budget by the end of March this year.

Some facts may illustrate the extent to which the financial irresponsibility of the members of the UN jeopardises what it can today achieve, notwithstanding the changed political climate.

The UN is financed through a mixture of assessed and voluntary contributions. Assessed contributions – which constitute a binding legal obligation on members

¹⁷ See Gorbachev's statement of 7 December 1988, *Pravda* 8 December 1988.

¹⁸ 22 USC 178e, 99 Stat. 405, 1985.

¹⁹ 99 Stat. 1037, Dec. 12, 1985.

²⁰ See (1986) 25 *I.L.M.* 482.

under Article 17 of the Charter – apply in respect of the regular budget and those costs of peacekeeping activities which are not borne by the contributing states. As a general rule, operational activities by the UN in humanitarian and development assistance rely on voluntary contributions, while administrative costs are met through assessment.²¹ The contribution by member states to the regular budget is set on a sliding scale that reflects ability to pay – by reference to the average national income over a ten year base period, refined in various ways.²² As for peacekeeping assessments, states are assigned to various economic groupings. There is an ad hoc scale whereby developing countries pay 1/5 or 1/10 (depending on the group to which they are assigned) of their regular rate of assessment. The five Permanent Members bear a compensating surcharge. The rest of the membership pays for peacekeeping at the same rate as for the regular budget.

The United States pays 25% of the regular budget and 30% of the peacekeeping budget. The Russian Federation (the legal successor to the Soviet Union) pays 9.5% of the regular budget and 11.4% of the peacekeeping budget. The United Kingdom pays 5% of the regular budget and 6% of the peacekeeping budget. France pays 6% of the regular budget and 7% of the peacekeeping budget. And China pays 0.77% of the regular budget and 0.9% of the peacekeeping budget. It is interesting that Germany and Japan are higher percentage payers than all other members, and higher indeed than nearly all of the Permanent Members. Germany pays 8.9% and Japan 12.45%.

The scheme seems fair enough. The regular budget is now set within the limits of zero real growth. And the donors are, since the reforms of 1986, much better placed to control the content of the budget. The total budget sums are, in fact, relatively modest. And the peacekeeping activities are all willed by the Permanent Members, which clearly regard them as necessary and desirable.

But as of October 1992, the United States owed \$462 m (\$295 m on the regular budget and \$167 on the peacekeeping); the Russian Federation owed \$410 m (\$120 m on the regular budget and \$290 on the peacekeeping). Germany and Japan, high percentage payers both, are up to date with their regular budget dues, but \$21 m and \$54 m behind, respectively on peacekeeping. And many other countries are significantly overdue on one or both accounts. As at the end of October 1992, the unpaid contributions to the UN regular budget totalled \$467 m. The US plans for repayment will certainly alleviate the problem, but the fact

²¹ Foreign Affairs Committee, *The Expanding Role of the United Nations and its Implications for UK Policy*, Minutes of Evidence. Supplementary Memorandum submitted by the Foreign and Commonwealth Office, HMSO, 2 December 1992, p. 62.

²² *Ibid.*

remains that 93 members are in arrears.²³ The arrears on the regular budget represent 55.5% of the net annual expenditure. And the arrears for the peacekeeping stand at a staggering further \$800 m²⁴ – a modest amount for the countries concerned to clear, but crippling for the UN's operational efficiency.

The Secretary General, in his *Agenda for Peace Proposals*, urges that peacekeeping contributions be financed from defence budgets, rather than foreign affairs budgets. He also advances further specific suggestions. He suggests interest should be charged on overdue contributions; that there should be a standing Peacekeeping Reserve Fund, at a level of \$50 million, to meet the stand up costs of peacekeeping pending receipt of assessed contributions; that there should be a Humanitarian Fund of similar dimensions; and that the Secretary General should be able to borrow commercially. He also refers to the possibility of a UN Peace Endowment Fund of £1 billion, created by a mix of assessed and voluntary contributions. Other proposals have been publicly discussed, including a levy on arms sales related to the keeping of an arms register by the United Nations.

I am very pessimistic about these proposals. Several of them seem very desirable, but they would either require payment by states clearly already disinclined to pay (the standing start-up fund proposals, and the UN Peace Endowment proposals). Or they would require the recalcitrant states to vote to be punished (the proposal for interest to be charged on late payments). The response of those states who have a good record of contributions – and the United Kingdom and France both fall into this category – is interesting. The idea of interest on late payments is of course attractive, although an adjustment is sought for those who pay promptly but are marginally late because their own budgetary year does not fully coincide with the UN budgetary year. But all other proposals, such as commercial bonding, levies on arms sales or air travel, worldwide lotteries, are resisted:

We do not favour these ideas as they are all open to the objection that they would increase the burden on the taxpayers and governments of Member States that pay on time and in full without offering any guarantee that the performance of others will improve.²⁵

I cannot quarrel with this view.

* * *

²³ Ibid., p. 63.

²⁴ *Agenda for Peace*, p. 28.

²⁵ Supplementary Memorandum presented by the FCO to the Foreign Affairs Select Committee, p. 64.

It has been a privilege to give one in the series of distinguished lectures honouring the memory of Josephine Onoh. I have endeavoured to show that all too often new opportunities bring new problems; and that the international lawyers continue to have an important role to play in the common task of controlling the social and political problems of the new world in which we find ourselves.

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Peter Sand

X. TRUSTS FOR THE EARTH: NEW FINANCIAL MECHANISMS FOR INTERNATIONAL ENVIRONMENTAL PROTECTION

The Josephine Onoh Memorial Lecture 1994

I was honoured and touched by your invitation to deliver this year's Josephine Onoh Memorial Lecture; honoured because over the past ten years, this lecture series has established a prestigious tradition for the University of Hull in the field of international law; touched because the lecture is in memory of an African lawyer, and I happen to have a highly personal rapport with African law, having spent six years of my professional life in Africa – first as a law teacher and then as an international civil servant.

Today, I am expected to speak to you about financial mechanisms for international environmental protection – in other words, about money: 'protection money' as it were, in the somewhat flippant jargon of a recent article in *The Economist*.¹ Yes, of course we know that the environment needs protection money. It seems not altogether unreasonable to measure a country's seriousness in environmental protection by the percentage of its national budget allocated to environmental financing. The same need for protective financing is evident at the international level, as the UN Conference on Environment and Development (UNCED, Rio de Janeiro 1992) amply documented.

Once we reach the global level, however, protection mechanisms tend to get more complicated. For one, global environmental benefits (even though they

¹ 'Buying Diversity', *The Economist*, October 2, (1993) 16; see also the response letter by I. Johnson, 'Paying for Diversity', *The Economist*, October 30, (1993) 8.

accrue to all of us, including all of us right here in this country) may require that our money be spent elsewhere, including some far-away countries on the other side of the globe. Secondly, global environmental protection may require that our money be spent today, even though it will not benefit us at all but rather our children and our children's children.

Professor Alexandre Kiss, in his Onoh Memorial Lecture two years ago, drew attention to this dual perspective of international environmental law: the new *space frame* of transnational concerns; and the new *time frame* of intergenerational concerns.² Our task as lawyers is to come up with the appropriate legal instruments that will fit both of these perspectives.

Paradoxically – though perhaps not unpredictably – when lawyers had to find international mechanisms for these new environmental perspectives, they came up with one of the oldest mechanisms they knew: the time-honoured device of the common law trust, and its counterparts in other legal systems. I shall try to illustrate this rediscovery of the trust on a case-by-case basis – from *the World Wildlife Fund* to the *Global Environment Facility*. Applying the trust concept to the global environment also has implications for the general evolution of contemporary international law, including some interesting doctrinal ‘spin-off’ which I intend to consider later.

I. REDISCOVERING THE TRUST IN INTERNATIONAL LAW

In an illuminating article first published in 1978,³ Sir Joseph Gold, former General Counsel of the International Monetary Fund, noted the remarkable proliferation of arrangements bearing the name of ‘trusts’ in the practice of international organizations. While some organizations have been expressly empowered by their constitutive act to serve as trustees under agreements with the parties concerned,⁴ the vast majority of these arrangements – including more than 1600 trust funds currently administered by the World Bank – were established under generally recognized ‘implied powers’ subject only to the

² A.C. Kiss, ‘Will the Necessity to Protect the Global Environment Transform the Law of International Relations?’, *8th Josephine Onoh Memorial Lecture*, (Hull: University of Hull Press, 1992), p. 2.

³ J. Gold, ‘Trust Funds in International Law: The Contribution of the International Monetary Fund to a Code of Principles’, (1978) 72 *A.J.I.L.*, pp. 856-866; reprinted in J. Gold, *Legal and Institutional Aspects of the International Monetary System: Selected Essays* (IMF: Washington 1984), (Vol. 2), pp. 862-75.

⁴ E.g. the Bank for International Settlements (BIS) in Basel/Switzerland; see G.K. Simons & L.G. Radicati, ‘A Trustee in Continental Europe: The Experience of the Bank for International Settlements’, (1983) 30 *Netherlands International Law Review*, pp. 330-45.

requirement of consistency with the aims of the organization serving as trustee.⁵ Even more surprising, many of the states that are parties to the creation of these trusts under international organizations have systems of national law in which the trust is not recognized, but seem to be comfortable enough with the concept for the purposes of international arrangements.⁶

To be sure, many procedural obstacles to transnational recognition of trusts have been removed by the 1985 Hague Convention.⁷ Furthermore, there are historical parallels to the trust in a number of legal systems outside the common law family, including the *fiducia* and *fideicommissum* of Roman ancestry or the charitable *wagf* of Islamic law.⁸ In most of these countries, however, fiduciary devices of this kind are narrowly defined by legislation and much more limited in scope and economic relevance than Anglo-Saxon trust law. In particular, charities in most civil law countries are likely to be established more effectively by way of foundations⁹ rather than by trust equivalents.

Nevertheless, even a cursory glance at international financial mechanisms in the environmental field shows an amazing – and clearly growing – variety of legal instruments that either call themselves trusts (regardless of what they really are) or could be categorized as trusts (regardless of what they call themselves). As already pointed out by Sir Joseph, ‘the establishment of trust funds for administration by existing international organizations under implied or express powers avoids the need to create new organizations with limited purposes and makes use of the experience and demonstrated skill of organizations already in the field’.¹⁰ Whether that eminently rational idea did indeed prevent the proliferation of new international bureaucracies or will in time be overtaken by the rules of *Parkinson’s Law* is, of course, another story again on which we may have an opportunity to reflect as we go through some of the sample cases to which I shall now turn.

⁵ See G. Schermers, *International Institutional Law* (Leiden: A.W. Sijthoff, 1972) (Vol. 2), pp. 19-20.

⁶ Gold, above, note 3, at p. 858.

⁷ *Convention on the Law Applicable to Trusts and on Their Recognition*, signed at The Hague on July 1, 1985; text at (1984) 23 *I.L.M.* 1389, and introductory note at (1986) 25 *I.L.M.* 593.

⁸ W.F. Fratcher, ‘Trust’, *International Encyclopedia of Comparative Law* (The Hague: 1972) (Vol. 6, chap. 11) 84-120.

⁹ See Fratcher, *ibid.*, at 104, on the role of the *fondation* (*fundación*, *Stiftung*, *stichting*).

¹⁰ Gold, above, note 3, at p. 860.

II. A SPECTRUM OF INNOVATIVE ENVIRONMENTAL FUNDS: CASE HISTORIES

In order to illustrate the wide range of legal devices available for environmental financing through international organizations, I propose to select a few case histories: from the *World Wildlife Fund*, the *World Heritage Fund* and the UNEP Convention Funds to the more recent environmental trust funds initially set up as pilot programs under World Bank auspices in cooperation with other agencies and now being restructured in the wake of the Rio *Earth Summit*.

While these cases cover more or less the past 30 years – which we may call ‘our’ generation of environmental law – the selection is, of course, highly arbitrary. I could have included other multilateral mechanisms for the compensation of environmental harm, such as the IMO-based Oil Pollution Fund,¹¹ or specific bilateral arrangements such as debt-for-nature swaps.¹² But I hope you will bear with me for not trying to be exhaustive, given the limitations of the lecture format, and for not hiding an eclectic bias towards institutions which are more familiar to me than others.

I. WWF

I shall start with the *World Wildlife Fund* (now renamed ‘World Wide Fund for Nature’), for two reasons. First, one tends to forget that international environmental protection, and much of international environmental law, had its beginnings in non-governmental initiatives and can sometimes be traced to the vision of a few outstanding individuals. Secondly, it helps to keep an overall sense of proportion when we look at international environmental funding: during the current fiscal year, World Wildlife Fund USA (i.e., just one national affiliate of the WWF network) is expected to raise close to US\$ 90 million¹³ – which is equivalent to the total annual budget of the United Nations Environment Programme (UNEP).

WWF was set up in 1961 for the purpose of raising funds for international nature conservation, at the initiative of a group of concerned scientists and advertising/public relations professionals – mainly in response to a series of

¹¹ *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage* (Brussels, December 18, 1971, as amended), 1110 U.N.T.S. 57. See R. Ganten, *International System for Compensation for Oil Pollution Damage* (Oslo: 1981).

¹² E.g., see D. Asiedu-Akrofi, ‘Debt-for-Nature Swaps: Extending the Frontiers of Innovative Financing in Support of the Global Environment’, (1991) 24 *International Lawyer*, pp. 557-86.

¹³ Representing an estimated 40% increase over the fiscal 1993 income of US\$ 62 million; see WWF/US, *1993 Annual Report* (Washington, D.C.: 1993).

alarming reports on Africa's disappearing wildlife published in the *Observer*¹⁴ by Sir Julian Huxley, the first Director-General of UNESCO and co-founder of the *International Union for Conservation of Nature and Natural Resources* (IUCN, the 'World Conservation Union').¹⁵ In order to ensure close cooperation with the Swiss-based IUCN, WWF was established as a foundation under Article 80 of the Swiss Civil Code, considered to be the closest analogy to a charitable trust in Switzerland; curiously, even today the international board of the foundation is officially referred to as its 'Board of Trustees'.¹⁶

The initial system of WWF 'national appeals' for fundraising (launched in the UK, the US and Switzerland in 1961) has since been replaced by a global network of affiliated/associated National Organizations in 28 countries. Basic international administrative costs are covered by the interest from a special \$10 million endowment fund;¹⁷ and a growing portion of the total income (currently about 20%) is now earned from trademark licensing and similar promotional activities.¹⁸ Over the past decade, the overall gross income of the WWF international network of organizations more than quadrupled, from about \$50 million in 1983 to about \$217 million in fiscal year 1993. Roughly one-third of this amount is centrally managed by the Swiss-based *WWF International*,¹⁹ which is 'accountable to the National Organizations, donors and the Swiss authorities'.²⁰

¹⁴ See WWF, *A History of WWF* (Gland/Switzerland: June 1993), p. 2.

¹⁵ Established in 1948. For historical background on both IUCN and WWF see R. Boardman, *International Organization and the Conservation of Nature* (Bloomington: University of Indiana Press, 1981), pp. 43-44, 108. The legal status of IUCN is that of an 'association' registered under Article 60 of the Swiss Civil Code; see *IUCN Statutes and Regulations*, Article XV.

¹⁶ See WWF, *1993 Review* (Gland/Switzerland: 1993). Under the foundation's new 1994 statutes, the 18-member Board comprises 12 representatives of the national WWF affiliate organizations, appointed on a regional basis.

¹⁷ The fund was launched in 1970 by Prince Bernhard of the Netherlands, then president of *WWF International*, under the name of 'The 1001: A Nature Trust', to which 1001 individuals contributed \$10,000 each. Even though the endowment has since been replenished repeatedly (also by replacement of deceased members), its interest covers only part of the foundation's overhead costs.

¹⁸ Especially licenses for commercial use of the WWF panda logo, originally designed by Sir Peter Scott on the basis of sketches by Gerald Watterson.

¹⁹ An initial 'rule of thumb' for revenue-sharing was that one-third of the funds raised by national appeals would be retained for national programs, one-third forwarded to *WWF International*, leaving one-third 'to be negotiated'; see Boardman, above, note 15, at 109. According to the *1993 Review* (above, note 16, p. 27), about 52% of *WWF International* expenditures and commitments went to fieldwork, as distinct from policy, awareness, ethics/education and institutional development (including administrative costs other than those covered by the '1001 Trust', above, note 17).

²⁰ *A History of WWF* (above, note 14), at 4.

Along with this phenomenal financial growth – and as its very prerequisite – came a high rate of corporate expansion. While retaining its original legal form as a foundation and its primary focus on fundraising, WWF has evolved as a major international organization of its own. This has not been without problems in terms of relations both with its original foster nurse, IUCN (whose institutional structure and several of whose functions WWF tends to rival and eclipse), and with some of the legally autonomous national WWF organizations (which in turn have developed into powerful civic action groups whose influence is commensurate with their membership and/or financial ranking). In terms of organizational dynamics, it probably was the distinct corporate legal identity conferred on *WWF International* by its ‘foundation’ status (in other words, the very fact that it was *not* set up as a genuine trust after all) which enabled it to grow to its present dimensions.

2. *World Heritage Fund (WHF)*

My second example is the *World Heritage Fund*, established in 1972 under the auspices of UNESCO. The idea of a ‘world heritage trust’ to manage outstanding natural and cultural sites ‘for the present and future benefit of the entire world citizenry’ goes back to a 1965 White House Conference on International Cooperation.²¹ At the initiative of Russell E. Train, then Chairman of the US Council on Environmental Quality (and now Chairman of the Board of WWF/US), President Nixon included the proposal in his 1971 environmental message.²² It was taken up by the Preparatory Committee for the UN Conference on the Human Environment, which recommended merging an ongoing UNESCO draft for cultural monuments with another draft by IUCN on natural heritage.²³ While the combined draft was not ready in time for the Stockholm Conference in June 1972, it was finally adopted by the General Conference of UNESCO at Paris in November 1972, as *Convention Concerning the Protection of the World Cultural and Natural Heritage*.²⁴ In force since 1976, with a current membership of 136 countries it is the most widely accepted conservation treaty today.

²¹ See R.N. Gardner (ed.), *Blueprint for Peace* (New York: McGraw-Hill, 1966), pp. 154-5; and R.L. Meyer, ‘Travaux Préparatoires for the UNESCO World Heritage Convention’, 2 (1976) *Earth Law Journal*, pp. 45-81.

²² Council on Environmental Quality, *Second Annual Report* (Washington, D.C.: CEQ, 1971), at 302-3; see also R.E. Train, ‘A World Heritage Trust’, in E.R. Gillette (ed.), *Action for Wilderness* (Sierra Club, 1972) at 172, and R.E. Train, ‘Convention for the Protection of the World Cultural and Natural Heritage’, (1973) 9 *Nature and Resources*, pp. 2-7.

²³ UN Doc. A/CONF.48/IWGC.I/II (September 1971), at 5.

²⁴ 1037 *U.N.T.S.* 151.

Although the term 'trust' was eventually deleted from its title, the WHF according to the Convention constitutes 'a trust fund in conformity with the provisions of the Financial Regulations of UNESCO'.²⁵ The Fund consists of contributions from member countries, set at 1% of each country's contribution to the regular budget of UNESCO.²⁶ From the current annual WHF income of approximately \$3 million,²⁷ some \$300,000 go towards administrative costs of the Paris-based 'World Heritage Center', and about \$1 million is available for the protection of natural heritage sites (as distinct from cultural heritage) – mainly in the form of technical cooperation, training, monitoring, promotion/education, and preparatory assistance. The allocation of funds, upon request by the member country concerned, is determined (by a two-thirds majority) in the 21-member *World Heritage Committee* elected on a rotation basis at the biennial UNESCO General Conferences, with expert advice from IUCN.

The *World Heritage Fund* at the time of its establishment certainly was an innovative concept, anticipating much of the current North-South debate over environmental financing. The basic idea of the Fund – to compensate heritage 'host' countries for the special conservation efforts they make on behalf of the world community – went well beyond the original 'charitable' motivation of international environmental protection, and recognized an entitlement of the recipients in return for the global benefits which their local action generates. By linking its revenues to the regular UNESCO scale, the WHF also ensured a certain degree of predictability and continuity of funding. Yet the level of assessed contributions – with the lowest common denominator for contributions towards *natural* heritage funding being equivalent to less than 0.5% of a country's annual UNESCO fees – is but a token of the international community's concern and bears no relation to the actual needs of protection.

3. *UNEP Convention Funds*

My next category comprises twelve separate 'trust funds' established since 1978 under the auspices or at the initiative of the *United Nations Environment Programme* (UNEP), for the implementation of several regional and global conventions.

²⁵ Article 15(2).

²⁶ Though giving countries an option between 'compulsory' and 'voluntary' contributions, the contribution system is in practice mandatory for both categories. See S. Lyster, *International Wildlife Law* (Cambridge: Grotius Publications, 1985), p. 230.

²⁷ World Heritage Committee, 17th Session, World Heritage Fund: Draft Budget 1994 (UNESCO Doc. WHC-93/CONF.001B/3, Annex II/Corr. 2, December 1993). In addition, there were \$2 million reserve assets, and a \$1 million emergency reserve.

Let me recall here that UNEP itself derives the bulk of its financial support from the special 'Environment Fund' established after the Stockholm Conference in 1972 by UN General Assembly Resolution 2997 (XXVII), 'to provide for additional financing for environmental programmes'. Modelled after the fund of the *United Nations Development Programme (UNDP)*, the UNEP Fund has covered both the project activities and part of the administrative costs (programme support costs) of UNEP since 1973, on the basis of voluntary pledges from contributing governments. The annual budget figures for the core Environment Fund, as approved by the UNEP Governing Council, have risen from \$30 million in earlier years to about \$60 million today.²⁸

Under general procedures adopted in 1973, 'trust funds for specified purposes' may be established within the framework of this Fund and in accordance with the Financial Rules of the United Nations.²⁹ The first of these trust funds for extra-budgetary contributions, approved by the UNEP Governing Council in 1978, was for an initial \$5.8 million to implement the *Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution*.³⁰ It was followed in 1979 by trust funds to implement the *Convention for the Protection of the Mediterranean Sea against Pollution* (the 'Barcelona Convention'),³¹ and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*,³² and in subsequent years by trust funds for other UNEP-sponsored global or regional conventions and protocols.³³

²⁸ See UNEP Governing Council Decision 17/32 of May 21, 1993, reprinted in (1993) 23 *Environmental Policy and Law* 168; and the report of the Executive Director on the Environment Fund, Doc. UNEP/GC.17/16 (1993).

²⁹ Chapter II, article V, of the UNEP Fund General Procedures adopted by Governing Council decision 2(I) on June 22, 1973. UN Financial Rules 106.3 and 106.4 provide for the establishment of trust funds; see UN Doc. ST/SGB/Financial Rules/1/Rev. 3 (1985).

³⁰ 1140 *U.N.T.S.* 133; UNEP Governing Council decision 6/13/D, section 9, of May 24, 1978.

³¹ (1976) 15 *I.L.M.* 290, and text of 1975 Action Plan in (1975) 14 *I.L.M.* 475; UNEP Governing Council decision 7/14/D of May 3, 1979.

³² 983 *U.N.T.S.* 243; UNEP Governing Council decision 7/14/E of May 3, 1979.

³³ As of July 1993, UNEP trust funds had also been established for implementation of (a) the 1979 Bonn Convention on Conservation of Migratory Species of Wild Animals; (b) the 1981 Abidjan Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the Eastern African Region; (c) the 1983 Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region; (d) the 1985 Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region; (e) the 1985 Vienna Convention for the Protection of the Ozone Layer; (f) the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; (g) the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; and (h) a separate technical assistance trust fund for the

Each of these trust funds was expected to cover the international costs of administering and implementing a specific treaty regime, including secretariat and meeting costs as well as in some cases project costs for joint follow-up activities or for meeting attendance by developing countries. The rationale for establishing the trust funds was to shift the burden of these costs away from the core UNEP Environment Fund towards those countries which were members of the treaties concerned. In the case of the Mediterranean, UNEP had come under fire from its Governing Council for 'subsidizing' that particular regional sea at the expense of other programs;³⁴ and in the case of CITES, where UNEP also had provided initial subsidies for secretariat and conference costs, the UNEP Governing Council passed a resolution announcing the phase-out of its support over a four-year 'sunset' period during which the CITES member countries were expected to take over as trust fund contributors.³⁵ Similarly, the parties to the 1979 *Convention on Long-Range Transboundary Air Pollution*,³⁶ which did not even operate under UNEP auspices but had received initial UNEP support to finance a monitoring program, received their 'sunset' notice from UNEP and as a result decided to set up a trust fund of their own under UN auspices in 1984.³⁷

Establishment of these trust funds had the desired result of making the conventions financially self-supporting, 'weaning' them from UNEP Fund grants – and in the process empowering the treaties' member states to reclaim their

latter convention. See the UNEP Executive Director's report on management of trust funds and counterpart contributions, UNEP/GC.17/19 (1993).

³⁴ See P.M. Haas, *Saving the Mediterranean: The Politics of International Environmental Cooperation* (New York: Columbia University Press, 1990) at 125; UNEP Governing Council decision 6/7/B of May 24 1978; and the Report of the Meeting of Experts on the Mediterranean Trust Fund and Other Institutional and Financial Matters, UNEP/WG.19/6 (September 1978).

³⁵ UNEP Governing Council decision 6/5/D of May 24, 1978, which prompted the Conference of the Parties to *CITES* at their second meeting in San José/Costa Rica (March 1979) to initiate formal amendment procedures and to adopt Resolution Conf. 2.1 requesting UNEP to establish a trust fund. For background see the report of the meeting, vol. I (1979), at 31-4, 305-19.

³⁶ 18 *I.L.M.* 1442 (1979). The convention is regional in scope (Europe and North America); secretariat and meeting services are provided by the UN Economic Commission for Europe in Geneva.

³⁷ See UNEP Governing Council decision 11/7/D of May 24, 1983, and the 1984 *Protocol on Long-Term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe (EMEP)*, text in (1985) 24 *I.L.M.* 484; for background see P.H. Sand, 'Regional Approaches to Transboundary Air Pollution', in J.L. Helm (ed.), *Energy: Production, Consumption, and Consequences* (Washington, D.C.: National Academy Press, 1990) 246-64. Current annual contributions to the EMEP Trust Fund total about \$1.8 million; see budget details in UN Doc. EB.AIR/GE.1/R.86 (July 1993).

'ownership' and autonomy as a group.³⁸ One important side-effect was growing recognition of the need to provide special funding to developing countries, to enable them to join on a more equitable footing in treaty negotiations and treaty governance, either by granting them subsidies from the regular treaty budget³⁹ or by establishing separate trust funds for the sole purpose of assisting developing countries to participate in the treaty.⁴⁰

The sums involved are comparatively modest: The two largest of the UNEP convention funds – the CITES Trust Fund and the Mediterranean Trust Fund – each have an annual income of about \$4 million,⁴¹ which is small by comparison with other financial mechanisms operating in this field, such as the *Mediterranean Environmental Technical Assistance Program (METAP)* co-sponsored by the World Bank, UNDP, the European Investment Bank and the EC Commission.⁴² Nonetheless, the sum total of additional financial resources channelled through UNEP convention trust funds is now equivalent to about one-third of the core Environment Fund contributions.⁴³

Whether these convention-specific mechanisms deserve to be called 'trust funds' is another matter. Even though they were all established under UN Financial Regulations relating to trust funds and special accounts,⁴⁴ they are

³⁸ Claims for more administrative independence from UNEP usually followed, e.g., as regards the procedure for hiring and firing senior staff of treaty secretariats (the *Lapointe* appeals case under CITES).

³⁹ E.g., 10% (since 1991) of the budget of the *Bonn Convention* (above, note 33/a). See also M.K. Tolba, *Costs and Benefits for the Developing Countries of Becoming Parties to Environmental Treaties* (Nairobi: UNEP, 1992), p. 6.

⁴⁰ E.g., the multilateral technical assistance trust fund for the *Basel Convention* (above, note 33/h); and a bilateral trust fund for technical cooperation on the *Montreal Protocol*, sponsored by the Swedish International Development Agency (SIDA).

⁴¹ See Annex II of UNEP/GC.17/19 (1993) (above, note 33). For details of the current CITES budget see the report of the 8th meeting of the Conference of CITES Parties (Kyoto 1992); for a synopsis of the Mediterranean Trust Fund budget since 1978 see Haas, above, note 34, at 126.

⁴² Cycle II of the Program (1993-1995) is expected to have a level of funding between \$26 and \$32 million; i.e. annually more than twice the UNEP/MEDFUND figures (above, note 31). See *Mediterranean Environmental Technical Assistance Program; 1993 Activity Report* (Washington, D.C.: CEC/EIB/UNDP/World Bank 1994) and *World Bank Environment Bulletin* vol. 6 No. 1 (1994), p. 7. Cooperation between the EC Commission, the European Investment Bank and the World Bank is covered by a *Memorandum of Understanding* of March 15, 1991.

⁴³ For Biennium 1994-95, estimates for the 10 convention trust funds listed in notes 31-3 above, add up to over \$43 million, compared to the \$120-130 million forecast for the Fund Programme; see UNEP/GC.17/19, Annex II, and Governing Council decision 17/32 (1993).

⁴⁴ See note 29 above, and the series of UN administrative instructions on the acceptance and administration of trust fund contributions, UN Doc. ST/SGB/146 as revised. While some of the managerial functions have been delegated to the UNEP Fund Administration, all convention

perhaps best defined by their official designation in French as *fonds d'affectation spéciale*, which literally means 'earmarked funds'. Most of the money serves to defray recurrent annual administrative expenses under budget lines pre-approved by the competent governing bodies of each convention. While contributions are sometimes mis-labelled as 'voluntary', they are in reality based on agreed percentage shares usually following the UN assessment scale; however, instead of being included in a country's overall annual UN contribution, they are deposited in special sub-accounts earmarked for the environmental conventions concerned.⁴⁵ When channeling these contributions to the convention secretariats for disbursement, with minimal discretion and minimal controls, the United Nations can hardly be said to act as a 'trustee'. Its role is more comparable to that of a financial (collection) agent – and of a kind of Postmaster General, whose efficiency tends to get rated by the speed at which earmarked contributions are delivered to their destination.

4. Enter the Bank: GEF-OTF-RFT

Let me now turn to some mechanisms of international environmental financing which directly involve the institution for which I work, the World Bank.⁴⁶ I should perhaps start by reassuring you that the Bank has come a long way since the days when it was the preferred villain of the environmental movement. Major changes have taken place over the past ten years – under the watchful eyes of our critics from the NGO community⁴⁷ – including a number of innovative financial and legal procedures and instruments for environment-related operations.⁴⁸

trust funds remain under the authority of the UN Controller as representative of the trustee; i.e., the United Nations.

⁴⁵ As with other trust funds, the UN Secretariat charges a standard 13% overhead fee for administrative costs ('programme support costs'). In the case of at least two environmental convention funds, this practice was successfully challenged and modified: For the *EMEP* Trust Fund (above, note 37), a waiver of the charge was granted; and for the *CITES* Trust Fund (above, note 32), the UNEP Secretariat agreed to reimburse part of the charge 'in kind', by outposting UNEP-funded administrative staff to the Swiss-based *CITES* Secretariat.

⁴⁶ Reference to the 'World Bank' in this context includes the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). For current information on environment-related activities see *The World Bank and the Environment: Fiscal 1993* (Washington/DC: World Bank 1993), and the quarterly *Environment Bulletin* of the Bank's Environment Department.

⁴⁷ E.g., see R.E. Stein & B. Johnson, *Banking on the Biosphere: Environmental Procedures and Practices of Nine Multilateral Development Agencies* (London: International Institute for Environment and Development, 1979); P.G. Le Prestre, *The World Bank and the Environmental Challenge* (Selingsgrove/PA: Susquehanna University Press, 1989); D.A. Joannides, 'Reconstructing the World Bank: The Environmental Light Shines on the Funding of

Historic landmarks such as the 1987 Report of the *Brundtland Commission* have played their role in this. One of the few specific institutional proposals of the Brundtland Report was indeed that ‘serious consideration should be given to the development of a special international banking programme or facility linked to the World Bank.’⁴⁹ It took a while before that suggestion was taken up – first by an influential research group at the *World Resources Institute*, which after wide international consultations came up with recommendations for a global ‘International Environmental Facility’ (IEF) or regional facilities that ‘should start with a commitment by sponsoring governments to provide a total of about 3 billion over an initial five-year period in additional conservation financing’.⁵⁰ Almost simultaneously with the publication of the WRI report, French and German government proposals to the 1989 World Bank meeting⁵¹ – backed up by pledges of substantial financial support – triggered the first serious diplomatic negotiations. By the end of 1990, there were actually three initiatives underway, all involving the World Bank:

- a *Global Environment Facility* (GEF), finalized at a Paris meeting in November 1990, with a commitment of about \$1 billion over a three-year phase;
- an *Interim Multilateral Fund* for about \$240 million, agreed as part of the amendments and adjustments to the *Montreal Protocol on Substances That Deplete the Ozone Layer*, at a London meeting in June 1990; and

Development Projects’, (1989) 2 *Georgetown International Environmental Law Review*, pp. 161-84; B.M.Rich, *Mortgaging the Earth: The World Bank, Environmental Impoverishment, and the Crisis of Development* (Boston, MA: Beacon Press, 1994); and I.F.I. Shihata, ‘The World Bank and Non-Governmental Organizations’, (1992) 25 *Cornell International Law Journal*, pp. 623-41.

⁴⁸ See I.F.I. Shihata, ‘The World Bank and the Environment: A Legal Perspective’, (1992) 16 *Maryland Journal of International Law and Trade*, pp. 1-42; R.J.A. Goodland, ‘Environmental Priorities for Financing Institutions’, 19 *Environmental Conservation* (1992) 9-21; K. Piddington, ‘The Role of the World Bank’, in: *The International Politics of the Environment* (A. Hurrell & B. Kingsley, eds) (Oxford: Clarendon Press, 1992), pp. 212-27; and the annual ‘year in review’ sections on the World Bank in the *Yearbook of International Environmental Law*, vols. 1-4. (1990-93).

⁴⁹ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), p. 338.

⁵⁰ World Resources Institute, *Natural Endowments: Financing Resource Conservation for Development* (Washington/DC: WRI, September, 1989), p. 14.

⁵¹ P. Bérégovoy (French Minister of State for Economy, Finance and Budget) and J. Warnke (German Federal Minister for Development and Cooperation), Statements to the Board of Governors of the World Bank, Washington/DC, September 26, 1989.

- a joint funding proposal of about \$255 million for a *Pilot Program to Conserve the Brazilian Rain Forest*, emanating from a 'G-7 summit' in Houston in July 1990.

All three initiatives shared one distinctive legal feature: rather than establishing new international institutions to give effect to new financial commitments, they each envisaged using the form of a trust, with an existing international organization designated as trustee. I shall now consider these three mechanisms one by one.

(a) Global Environmental Trust Fund

On March 14, 1991, the World Bank's Board of Executive Directors adopted Resolution No. 91-5 establishing the Global Environment Facility (GEF) for a three-year pilot phase.⁵² The resolution was supplemented on October 28, 1991, by tripartite procedural arrangements among UNDP, UNEP and the World Bank for operational cooperation to implement the GEF.⁵³

The Facility consists of the 'core' *Global Environment Trust Fund (GET)*, related cofinancing arrangements, and the *Ozone Projects Trust Fund (OTF)* (described below). Contributions pledged for the pilot phase by 30 participating governments (the 'GEF Participants')⁵⁴ amount to over \$800 million, and total cofinancing to over \$320 million.⁵⁵ The World Bank serves as trustee for the fund, with specific fiduciary powers and duties specified in the resolution. It also serves, together with UNDP and UNEP, as implementing agency for a major part of the projects carried out on the basis of a joint work program approved by the Participants, and in this capacity enters into project-specific grant agreements

⁵² Text in (1991) 30 *I.L.M.* 1735. See Shihata, above, note 48, at 31-36; W.P. Ofosu-Amaah, C. Di Leva & R. Osterwoldt, 'World Bank', (1991) 2 *Yearbook of International Environmental Law*, pp. 403-8, at 407; E. Helland-Hansen, 'The Global Environment Facility', (1991) 3 *International Environmental Affairs*, pp. 137-44; H. Tazi Sadeq, 'Le Fonds pour l'Environnement Mondial (F.E.M.)', *Revue Marocaine de Droit et d'Economie du Développement* No. 27 (1992), pp. 217-29; and Lin Gan, 'The Making of the Global Environmental Facility: An Actor's Perspective', (1993) 3 *Global Environmental Change*, pp. 256-75.

⁵³ *Ibid.*, Annex C, replacing earlier arrangements based on a joint statement by the three heads of agencies on September 17, 1990.

⁵⁴ Including 19 OECD member countries and 11 developing countries, with minimum contributions set at 4 million Special Drawing Rights (currently equivalent to \$5.6 million, which for several developing country participants were subsidized by the Bank or by OECD countries). This 'entrance fee' has since been waived for the post-pilot GEF.

⁵⁵ As of September 30, 1993; see the *Report by the Chairman to the December 1993 Participating Meeting* (GEF 1993), Table 7 at p. 15.

with recipient countries⁵⁶ or into related agreements with other executing agencies.⁵⁷

After program approval (by the Participants, with the advice of a Scientific and Technical Advisory Panel, STAP), projects undergo a preparatory cycle of appraisal and negotiation, including the required environmental assessments in consultation with local affected groups and non-governmental organizations.⁵⁸ By the end of 1993, 45 of the 113 projects in the GEF pilot phase program had reached the stage of final project approval in the respective implementing agencies (UNDP 22, World Bank 20, UNEP 3).⁵⁹ Within the full program, 54 projects (with 42% of the funds) address biodiversity issues; 43 projects (with 40% of the funds) address global warming; 14 projects (with 17% of the funds) address problems of international waters; and 2 projects (less than 1% of the funds) deal with ozone depletion problems not covered by the separate *Ozone Projects Trust Fund* which I shall mention later.

Recipients of GEF grants have been 'developing countries and territories with UNDP programs' in accordance with agreed eligibility criteria.⁶⁰ Funding has also been provided to non-governmental organizations, through a small-grants program administered by UNDP,⁶¹ and is envisaged (through a consortium of local NGOs) in at least one major country project. In November 1993, at the

⁵⁶ GEF grant agreements generally follow the standard format of World Bank loan agreements and (with some important modifications) the IBRD *General Conditions Applicable to Loan and Guarantee Agreements* (January 1, 1985). See C. Miner, 'The World Bank Global Environment Facility: First Project Approved in Poland', (1992) 33 *Harvard International Law Review*, pp. 642-48.

⁵⁷ E.g., a recent interagency agreement with the *Interamerican Development Bank* (IDB) for execution of a GEF wind-power project in Costa Rica (January 14, 1994).

⁵⁸ Operational modalities of the GEF project cycle were outlined in the 'enabling memorandum' submitted to the Board when Resolution 91-5 (above, note 52) was adopted; text in (1991) 30 *I.L.M.* 1739. They were subsequently codified – for Bank-implemented projects – in Operational Directive 9.01, *Procedures for Investment Operations under the Global Environment Facility* (May 1992). Several other operational policies and procedures also apply expressly to GEF projects, including Operational Directive 4.01 on *Environmental Assessment* (October 1991) and Bank Procedure BP 17.50 on *Disclosure of Operational Information* (September 1993).

⁵⁹ GEF *Bulletin & Quarterly Operational Summary* No. 10 (January 1994), p. 2; and Chairman's Report (above, note 55) at pp. 6-7.

⁶⁰ *Per capita* income level not exceeding \$4000 at 1989 value (i.e. currently \$4715); see enabling memorandum (above, note 58), p. 5.

⁶¹ For a summary description, see *Partners* (GEF-UNDP Newsletter) vol. 1 No. 2 (September 1993), p. 8. See also D. Reed, 'The Global Environment Facility and Non-Governmental Organizations', (1993) 9 *American University Journal of International Law and Policy*, pp. 191-213.

request of the GEF Participants – and partly in response to NGO criticism⁶² – an independent panel of experts completed a comprehensive evaluation of the GEF pilot phase and submitted its report to the Participants,⁶³ as part of the negotiations for restructuring and replenishing the GEF beyond 1994 (see below).

(b) *Ozone Projects Trust Fund*

Simultaneously with the GET, the World Bank established a separate global trust fund which operates entirely within a single environmental treaty, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.⁶⁴ The Parties to the Protocol had agreed at their London meeting in 1990 to set up an 'interim financial mechanism', including an Interim Multilateral Fund (\$240 million for 1991-1993) – additional to the existing UNEP convention trust funds⁶⁵ – to finance the incremental costs incurred by developing countries for their compliance with the Protocol, mainly the phase-out of ozone-depleting substances.⁶⁶ The World Bank had agreed, together with UNDP and UNEP, to assist in implementing the tasks of the new fund; and in July 1991, it concluded a bilateral 'Ozone Projects Agreement' with the Montreal Protocol's Executive Committee to manage investment projects with resources to be transferred from the Multilateral Fund to the Bank's *Ozone Projects Trust Fund (OTF)*.⁶⁷

⁶² E.g., see D. Reed (ed.), *The Global Environment Facility: Sharing Responsibility for the Biosphere*, (Washington, D.C.: WWF International, 1993) (Vol. 2) and B. Rich (above, note 47), pp. 175-81.

⁶³ *Report of the Independent Evaluation of the Global Environment Facility Pilot Phase* (Washington/DC: UNEP/UNDP/World Bank, November 23, 1993), 191 pp.

⁶⁴ (1987) 26 *I.L.M.* 1541. See generally R.E. Benedick, *Ozone Diplomacy: New Directions in Safeguarding the Planet* (Cambridge, MA: Harvard University Press, 1991).

⁶⁵ See above, note 33/e-f.

⁶⁶ Amendments and adjustments to the Montreal Protocol adopted at the second meeting of the Conference of the Parties, decision II/8; reprinted in (1991) 30 *I.L.M.* 537. See E.A. Parson, 'Protecting the Ozone Layer' in P.M. Haas, R.O. Keohane & M.A. Levy, (eds.), *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge, MA: MIT Press, 1993) 27-73, pp. 49-52; and J.M. Patlis, 'The Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms in Protecting the Global Environment', (1992) 25 *Cornell International Law Journal*, pp. 181-230.

⁶⁷ See Resolution 91-5 (above, note 52), Annex D and Supplement; Shihata, op cit, above, note 48, pp. 29-31. For background, see the letter of April 30, 1990, from the President of the World Bank to the UNEP Executive Director, UNEP/Ozl.Pro WG.III (2)/Inf.8 (1990); and A. Wood, 'The Interim Multilateral Fund for the Implementation of the Montreal Protocol' in Reed, op cit, above, note 62, pp. 79-92.

Over the first two years of operation, the World Bank via the OTF managed about 80% of the total project funds generated by the Multilateral Fund.⁶⁸ Subsequent meetings of the Parties to the Protocol in Copenhagen 1992 and Bangkok 1993 converted the Montreal Fund from interim to permanent,⁶⁹ and raised the overall funding level (based on assessed contributions following the UN scale) to \$510 million for the next three-year period (1994-1996).⁷⁰ Taking into account the past ratio of contributions, administrative costs and interagency division of work, this means that the World Bank will manage about \$100 million per year for OTF projects over the next three years.

Though established by the same Board resolution as the GET, the Ozone Projects Trust Fund follows its own project procedures within the Bank⁷¹ – including technical review by a separate international advisory body, the Ozone Operations Resource Group (OORG) – and is subject to intergovernmental guidance from a 14-member Executive Committee (7 from the North, 7 from the South) established under the Montreal Protocol.⁷²

(c) *Rain Forest Trust Fund*

On March 24, 1992, the Board of Executive Directors of the World Bank adopted Resolution No. 92-2 establishing the *Rain Forest Trust Fund (RTF)* to finance a pilot program to conserve the Brazilian Amazon and Atlantic rain forests. The 'enabling memorandum' submitted to the Board at the time of adoption of the resolution had been prepared at a Paris meeting in December 1991 where seven donor countries and the Commission of the European Communities pledged about \$60 million in core fund contributions and approximately \$230 million of associated bilateral aid for a three-year pilot phase.⁷³ After authorization by the

⁶⁸ World Bank, 'Impact of World Bank Operations as an Implementing Agency of the Multilateral Fund of the Montreal Protocol: A Report on the First Two Years of Operation', Report presented to the Fifth Meeting of the Parties to the Montreal Protocol (Bangkok, November 1993).

⁶⁹ Fourth Meeting of the Parties to the Montreal Protocol (Copenhagen, November 1992), Decision IV/17, text in (1992) 32 *I.L.M.* 874. Proposals to merge the Multilateral Fund with the GEF were unsuccessful; see I.H. Rowlands, 'The Fourth Meeting of the Parties to the Montreal Protocol: Report and Reflection', (1993) 35 *Environment* No. 6, pp. 25-34, at 28-29.

⁷⁰ Fifth Meeting of the Parties to the Montreal Protocol (Bangkok, November 1993), Decision V/9. The new total includes \$55 million carried over from the interim period.

⁷¹ Operational Policy and Bank Procedure OP/BP 10.21 on *Investment Operations Financed by the Multilateral Fund for the Implementation of Montreal Protocol* (November 1993).

⁷² E.g., see the provisions regarding approval by the Executive Committee, in paragraph 5 of the Agreement of July 1991; Supplement to Annex D of Resolution 91-5 (above, note 52).

⁷³ See G.J. Batmanian, 'The Pilot Program to Conserve the Brazilian Rain Forest', in Reed (above, note 62), at 93-100.

Brazilian Senate in August 1993, a framework agreement between Brazil and the World Bank was signed on February 25, 1994, to implement the pilot program. Brazil has pledged to provide 10% of total funds available for the program either from government counterpart funding or in some cases from project beneficiaries.

The pilot program – elaborated by the Brazilian government, the EU and the World Bank in response to the 1990 Houston summit recommendations of the G-7 countries – comprises 12 projects, two of which have undergone appraisal so far and are expected to be finalized in the form of grant agreements early in 1994.⁷⁴ The program operates under guidance from a local Coordinating Commission (including NGO representatives) hosted by Brazil's National Environment Secretariat (SEMAM), and from an International Advisory Group of experts.

* * *

The three mechanisms which we have just reviewed share a reliance on the World Bank's trusteeship role and status which – though mentioned nowhere explicitly in the original Bretton Woods instruments⁷⁵ – has developed over decades of institutional experience. Sir Joseph Gold, in the article on IMF practice which I quoted earlier, attempted to synthesize six basic (unwritten) principles of trust law applicable to these international mechanisms as follows:⁷⁶

- '(i) The rights of ownership of property subject to a trust are divided between the trustee and the beneficiary or beneficiaries.
- (ii) A trustee must keep trust property separate from his own property and from the property of other trusts, and must earmark trust property as such, unless relieved of this obligation by law or the terms of the trust.
- (iii) A trust is not a legal entity in the sense that it is the bearer of rights or the subject of duties.
- (iv) A trustee may not engage in 'self-dealing' in administering the trust.
- (v) A trustee must administer the trust solely in the interest of the beneficiary.
- (vi) In administering a trust the trustee must use reasonable care and skill and avoid unreasonable risk.'

⁷⁴ For current information see the quarterly newsletter, *Rain Forest Pilot Program Update* (Washington, D.C.: World Bank, vol. 2, 1994).

⁷⁵ K. Piddington, 'Environment and Tomorrow's World Bank', (1993) 3 *Global Environmental Change* 315-19, at 315.

⁷⁶ Gold, (above, note 3), at 863-5. He submitted these principles as being of 'wider relevance' than the IMF context, for possible international codification. *Ibid.*, p. 865.

These basic principles – with the possible exception of the ‘divided ownership’ concept in principle (i), to which I will come back – may also be said to describe current World Bank practice with regard to the three new environmental funds I have outlined. They are at least partly reflected in the terms of the international ‘trust deeds’ concerned (i.e., the constitutive Board resolutions) and in related operational policies and procedures.⁷⁷

Another basic rule of trust law concerns the procedural capacity of the beneficiaries to enforce the trust terms against the trustee. While for most World Bank trust funds the trustee is accountable to donors only,⁷⁸ the restructured GEF is likely to introduce a new accountability to all ‘Participants’; i.e., donor *and* recipient governments (represented by a North-South balanced Council), thereby enabling the primary beneficiaries to invoke the trust’s terms against the trustee if necessary. Following the recent establishment of an independent *Inspection Panel* to watch over compliance with operational rules of the World Bank,⁷⁹ it may be argued that even ‘secondary’ trust beneficiaries other than states (in particular, locally affected groups) are now empowered to invoke the Bank’s fiduciary duties – to the extent that these have been embodied in rules subject to review by the Panel. So the system does seem to be evolving towards wider recognition of beneficiaries’ rights. I do not believe, however, that we have reached the point yet where ownership of these trusts could be said to be legally shared between the trustee and the beneficiaries.

5. *Rio and Beyond*

Even as the GET-OTF-RTF triad of environmental trust funds emerged, the Rio de Janeiro *Earth Summit* (the 1992 United Nations Conference on Environment and Development, UNCED) was already on the horizon. Simultaneously, negotiations were underway for a climate change convention, a biodiversity convention and overall reform of the UN system – all of which called for

⁷⁷ See the GEF and OTF procedures referred to in notes 58 and 71 above and see generally Operational Directive 14.40 on *Trust Funds and Reimbursable Programs* (December 1990).

⁷⁸ Typically, even though the IBRD or IDA acquires legal ownership of these funds, most trust fund agreements stipulate that upon termination of the agreement any uncommitted balance shall be returned to the donors.

⁷⁹ IBRD Resolution No. 93-10/IDA Resolution No. 93-6, on the *World Bank Inspection Panel* (September 22, 1993). Its mandate is to look into claims that the Bank may have failed to adhere to its operational policies and procedures in the design, appraisal and/or implementation of its operations, and to carry out a full inspection in those cases where the Board decides that an investigation is needed. See R. Gerster, ‘Accountability of Executive Directors in the Bretton Woods Institutions’, (1993) 27 *Journal of World Trade*, pp. 87-116 at pp. 104-5.

financial mechanisms.⁸⁰ (In the case of the climate convention, the negotiation process itself and the participation of developing countries was financially supported through two special-purpose trust funds established by UN General Assembly Resolution 45/212, paragraphs 10 and 20, along the lines of the UNEP convention trust funds outlined in section 3 above).

In a different context, 'trusteeship' also was among the first institutional options on the UNCED agenda. As early as 1988, Maurice Strong (the designated Secretary General of UNCED) had floated the idea of converting the existing UN Trusteeship Council into a global environmental body.⁸¹ The concept was quietly abandoned, however, when it turned out to require formal amendment of the UN Charter, which was considered unrealistic.⁸² Another proposal that remained longer on the table was a new global 'green fund', originally suggested by Indian Prime Minister Rajiv Gandhi at a Non-Aligned Summit in Belgrade in 1989,⁸³ subsequently taken up by various other meetings and groups of developing countries, and with some variations (e.g., a 'global commons trust fund') by others.⁸⁴

As the UNCED preparatory process hurtled along to its final PrepCom sessions, and as the two convention drafts moved towards their final stages in parallel, it became clear that there was no majority support for radical institutional innovations. Both the UN *Framework Convention on Climate Change* and the *Convention on Biological Diversity* settled for interim use of an existing mechanism, the GEF,⁸⁵ subject to confirmation by the future

⁸⁰ On the Rio preparations see the comments on financial mechanisms by I.F.I. Shihata, in: *The Role of Law in the 1992 United Nations Conference on Environment and Development*, pp. 13-14 (Washington, D.C.: American Bar Committee on Environmental Law, 1992); and generally P.H. Sand, 'International Law on the Agenda of the United Nations Conference on Environment and Development: Towards Global Environmental Security?', (1991) 60 *Nordic Journal of International Law*, pp. 5-18.

⁸¹ M.F. Strong, Statement to the *World Federation of United Nations Associations (WFUNA)*, at Halifax, June 5, 1988; see also M.F. Strong, 'The United Nations in an Interdependent World', *International Affairs* (Moscow), No. 1 (1989), pp. 11-21 at p. 20.

⁸² See P.C. Szasz, 'Restructuring the International Organizational Framework', in E. Brown Weiss (ed.), *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992), pp. 340-84 at p. 362.

⁸³ In response to Mr. Gandhi's proposal of a 'planet protection fund' on September 5, 1989, the Ninth Non-Aligned Summit adopted a declaration calling for the creation of a 'special international fund to promote international cooperation in the field of the environment'.

⁸⁴ See C.D. Stone, 'A Proposal in Observation of Biosphere Day: Repairing the Biosphere Through a Global Commons Trust Fund', (1992) 19 *Environmental Conservation*, pp. 3-5.

⁸⁵ Articles 11 and 21 of the Climate Change Convention, and Articles 21 and 39 of the Biodiversity Convention; texts in (1992) 31 *I.L.M.* 814. For background see D. Bodansky, 'The United Nations Framework Convention on Climate Change: A Commentary', (1993) 18 *Yale*

Conferences of the Parties. The Rio Conference's contact group on finance, after arduous last-minute negotiations, also reached a compromise giving the GEF a prominent role in financing Agenda 21 activities related to the global environment – responding in part to the preference expressed by most donors for a unitary single fund rather than further separate convention 'windows'.⁸⁶ One important condition for these designations was the 'restructuring' of the GEF in accordance with declared principles of universality, transparency and democracy.

GEF restructuring had in fact already been recommended and initiated by the GEF Participants in April 1992.⁸⁷ Negotiations on this subject, with the participation of more than 70 countries, resulted in a new legal instrument finalized in Geneva on March 16, 1994, and a replenishment of \$2 billion for the period from 1994 to 1997. After formal adoption of the instrument by the three implementing agencies, expected to be completed by the end of June 1994, the Conferences of the Parties to the two conventions (scheduled for December 1994 and April 1995) will then have to decide whether or not to continue their relationship with the GEF.

One of the recurrent themes of the restructuring process – in addition to the declared goals – has been the undeclared goal of transforming the present Bank-dominated structure of the GEF into a more balanced interagency mechanism, while 'avoiding the creation of new institutions'.⁸⁸ To be sure, interagency cooperation in the UN system no longer is a 'new problem of international organization' as when it was first introduced by Sir Wilfred Jenks forty years

Journal of International Law, pp. 451-558; and F. Burhenne-Guilman & S. Casey-Lefkowitz, 'The Convention on Biological Diversity: A Hard Won Global Achievement', (1992) 3 *Yearbook of International Environmental Law*, pp. 43-59. See also J.D. Werksman, *The Convention, Its Financial Mechanism and the GEF: A Legal Agreement on Accountability*, Working Paper submitted to the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (London: Foundation for International Environmental Law and Development, March 1993).

⁸⁶ Section 33.14(a), Report of UNCED, UN Doc.A/CONF.151/26/Rev.1, vol. I (1992), as endorsed by UN General Assembly Resolution 47/190 of December 22, 1992. See R. Ricupero (chairman of the Rio contact group, and now Brazil's Environment Minister), 'Chronicle of a Negotiation: The Final Chapter of Agenda 21 at the Earth Summit', (1993) 4 *Colorado Journal of International Environmental Law and Policy*, pp. 81-101.

⁸⁷ Global Environment Facility, *The Pilot Phase and Beyond*, GRF Working Paper No. 1 (Washington, D.C.: GEF, May 1992). See J.W. Ashe & J. Daniel Paul, 'Restructuring the Global Environmental Facility (GEF): The Developing Countries' Perspective', Working Paper for the *International Consultation on Sustainable Development: The Challenge to International Law* (London: Foundation for International Environmental Law and Development, April 1993).

⁸⁸ *The Pilot Phase and Beyond*, above, note 87, 3, Principle VI.

ago.⁸⁹ Drawing on past experience,⁹⁰ suitable forms of partnership and efficient division of functional responsibilities among GEF implementing agencies and intergovernmental bodies can certainly be found. It will also be important, however, to ensure that these arrangements safeguard the basic trusteeship relationship under which the GEF was established, and which protects the interests of the beneficiaries as well as those of the donors.

III. TRUSTS FOR TREATIES?

Let us now take a retrospective look at the whole range of environmental funds over these past 30 years. It is true that we are looking at a rather mixed bag here, even considering the few samples which I selected for this presentation. Yet there already is a distinct pattern of functions which these international mechanisms have begun to take on in contemporary treaty law.

- i) First, there is a standard type of 'trust funds' for earmarked contributions to support the international administration of different treaty regimes – be it the EMEP monitoring program under the Transboundary Air Pollution Convention,⁹¹ UNEP's Mediterranean Action Plan⁹² or the Black Sea program assisted by the GEF.⁹³ Increasingly, this type of funding now includes direct support to developing countries for their national participation in those regimes; and in some cases, it is only through such support that they can build up the capacity to join an environmental treaty – as in the GEF project to upgrade port facilities in the Caribbean, to bring them up to the ship-waste standards of the MARPOL Annexes.⁹⁴

⁸⁹ C.W Jenks, 'Coordination: A New Problem of International Organizations', (1950-II) 77 *Hague Academy of International Law*, pp. 157-302 and (1951) 28 *British Yearbook of International Law*, pp. 29-89.

⁹⁰ E.g., see P. Contini, 'Methods of Coordinating the Activities of Different International Organizations and Team-Work Among Them', (1973-II) *Uniform Law Review*, pp. 38-62; and V. Umbricht, 'Joint Activities of International Organisations' in R.J. Dupuy, ed., *Handbook on International Organisations* (Hague Academy of International Law, 1988). The relationship between the United Nations and the World Bank is defined in a 1947 Agreement, 16 *U.N.T.S.* 346.

⁹¹ above, notes 36 and 37.

⁹² above, notes 31 and 34.

⁹³ See the *Convention on the Protection of the Black Sea Against Pollution* (Bucharest, April 21, 1992, with related protocols), text/disk in (1992) 3 *Yearbook of International Environmental Law*; and Global Environment Facility, *Report by the Chairman to the April 1992 Participants' Meeting*, Part 2 (Washington, D.C.: GEF, March 1992), pp. 130-8.

⁹⁴ See Global Environment Facility, *Report by the Chairman to the May 1993 Participants' Meeting*, Part 2 (Washington, D.C.: GEF, May 1993), pp. 122-3, referring especially to Annex

Ironically, the very success of the 'convention trust' formula also has pathological side effects: with the recent proliferation of autonomous environmental treaty regimes, the growing number of special funds raises problems of transaction costs and operational inefficiency similar to the 'treaty congestion' syndrome which has already been diagnosed in environmental law.⁹⁵ The real risk here is that acute 'trust fund congestion' could lead to chronic funding fatigue.

- ii) Another category of funds is designed to compensate states for certain environmental activities in the global interest (such as the protection of UNESCO World Heritage sites on their territory),⁹⁶ or actually to subsidize national compliance with international environmental treaties, by picking up the 'incremental costs' of developing countries to meet their obligations under the Montreal Protocol⁹⁷ and the Climate Change and Biodiversity Conventions.⁹⁸ The overall impact of these subsidies on North-South financial transfers is still comparatively small.⁹⁹ They may, however, open up fundamental new questions in the field of treaty law, where old principles of egalitarian reciprocity among Parties are being replaced by 'asymmetrical' obligations, differentiated and balanced on grounds of equity.¹⁰⁰ One follow-up question which does not seem to have been answered so far concerns the consequences for earlier environmental treaties that did *not* provide developing countries with the same entitlement to incremental subsidies: should those treaties now be revised, and failing that, could they be considered 'unequal', i.e., inequitable?¹⁰¹

V of the 1973/78 *International Convention for Prevention of Pollution from Ships*, 17 *I.L.M.* (1978).

⁹⁵ E. Brown Weiss, 'International Environmental Law: Contemporary Issues and the Emergence of a New World Order', (1993) 81 *Georgetown Law Journal*, pp. 675-710 at pp. 697-702.

⁹⁶ See above, note 24.

⁹⁷ See above, note 64.

⁹⁸ See above, note 85. See generally J.C. Dernbach, 'The Global Environment Facility: Financing the Treaty Obligations of Developing Nations', (1993) 23 *Environmental Law Reporter*, pp. 10124-32.

⁹⁹ The sum total of GET-OTF-RTF grants available per year amounts to less than \$0.5 billion, compared to currently \$2 billion of World Bank lending for environmental projects; see *The World Bank and the Environment: Fiscal 1993* (Washington, D.C.: World Bank, September 1993), p. 18.

¹⁰⁰ P.H. Sand, *Lessons Learned in Global Environmental Governances* (Washington, D.C.: World Resources Institute 1990), pp. 6-9; and E. Brown Weiss, above, note 95, pp. 706-7.

¹⁰¹ For historical background see L. Caflisch, 'Unequal Treaties', (1992) 35 *German Yearbook of International Law*, p. 52. The question was actually raised in Working Group III of the UNCED

- iii) A third group of international trust funds – possibly the most innovative variety – steps into territory where no treaties dare to tread: environmental resources that remain under strict national sovereignty, such as forests, even though their sustainability is of global concern. It is perhaps significant that most developing countries at the Rio Conference categorically (and successfully) resisted all attempts to conclude a binding treaty on forests,¹⁰² unimpressed by subtle Northern references to the ‘common heritage of mankind’¹⁰³ and less subtle references to ‘ecological intervention’ by UN ‘green helmets’.¹⁰⁴ The Amazon region’s military commander is on record as having stated: ‘If those *babacas* try to come here, we will hit them like guerrillas’.¹⁰⁵ Yet the Brazilian Senate had no difficulty approving an agreement with the World Bank for arrangements concerning the *Rain Forest Trust Fund* for the Amazon with the active involvement of foreign donor countries.¹⁰⁶ The RTF International Advisory Group, headed by a German scientist, held its first meeting in Brazil in August 1993, including field visits to the Amazon – without helmets.¹⁰⁷
- iv) Finally, I wish to recall an aspect of our operational work for the Global Environment Facility, which illustrates the continuing vitality of that

Preparatory Committee, in the context of Chapter 39 of *Agenda 21*. See in particular section 39.1(c), above, note 86.

¹⁰² See the ‘non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests’, UNCED Doc. A/CONF.151/26/Rev.1, Vol. I, Annex III, 480. Another major obstacle – Northern opposition to a treaty regime including temperate-zone forests – also blocked the negotiations for a new *International Tropical Timber Agreement*, until the recent breakthrough in Geneva, January 1994. See (1994) 33 I.L.M. 1014.

¹⁰³ J. Pronk (Dutch Minister for Development Cooperation), ‘A New International Ecological Order’, (1991) 14 *Internationale Spectator* 728, calling for the international community to assume its ‘joint responsibility for areas whose ecological significance far surpasses that of the countries in which they are situated geographically: the Amazon region, the Himalayas, Antarctica, certain seas, and areas constituting part of the ‘common heritage of mankind’.

¹⁰⁴ E.g., see U. Kulke, ‘Grenzenlose Einmischung’, *Natur* No. 12 (1991) 34; C. Cans, ‘L’ingérence verte: assistance ou intervention’, *Les Cahiers du Futur: Environnement – Développement* No. 2 (August 1992) 12; and the more cautious analysis in *UN Green Helmets: A Model System for the Settlement and Prevention of Environmental Disputes* (F. Cede, ed., Vienna: Austrian Federal Ministry for Foreign Affairs 1992).

¹⁰⁵ General Sotero Vaz, interview of August 28, 1991, in *Crosscurrents*: No. 10 (1991) 12. For a more diplomatic approach see H. Mattos de Lemos, ‘Amazonia: In Defense of Brazil’s Sovereignty’, (1990) 14 *Fletcher Forum of World Affairs*, p. 301.

¹⁰⁶ See above, note 73.

¹⁰⁷ See *Rain Forest Pilot Program Update*, vol. 1 No. 4 (October 1993) 1.

classical legal instrument, the trust. In order to ensure the long-term financial continuity of GEF projects for biodiversity, the World Bank came to the conclusion that the most suitable approach often is to use local endowment funds or foundations. GEF-financed trust funds have thus been set up in Bhutan, in Peru and in Uganda; and others are in preparation.¹⁰⁸ Similar initiatives for 'national environmental funds' are also being promoted by other international organizations.¹⁰⁹

Indeed, a characteristic feature of the trust is its capacity to serve the interests of future beneficiaries, in keeping with the concept of sustainable development as defined by the Brundtland Report, i.e., 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.¹¹⁰ That brings us back to Professor Kiss's remarks on the *intertemporal* dimension of environmental law, which I mentioned at the beginning of this lecture. Let me therefore conclude by quoting an author who is not generally known as an environmental lawyer (and who, I am afraid, is not generally very popular these days); but he did write this definition of global environmental trusteeship more than one hundred years ago:

Even society as a whole, a nation, or all contemporary societies together, are not owners of the Earth. They are merely its occupants, its users; and as diligent guardians, they must hand it down improved to subsequent generations.¹¹¹

¹⁰⁸ See Global Environment Facility, *Bhutan: Trust Fund for Environmental Conservation* (Washington, D.C.: GEF Project Document, May 1992); and Peru: Decree Law No. 26154 of December 29, 1992, establishing the GEF-financed National Fund for Natural Areas Protected by the State (FONANPE).

¹⁰⁹ See 24 *IUCN Bulletin* No. 4 (1993) 25, and Resolution 19.54 adopted at the 19th IUCN General Assembly (Buenos Aires, January 1994); see also B. Spergel, *Trust Funds for Conservation* (Washington, D.C.: WWF/US, January 1993); and the 'national desertification trust funds' proposed by non-governmental organizations during negotiations for the Draft Convention to Combat Desertification, in January 1994.

¹¹⁰ *Our Common Future*, above, note 49 at p. 43.

¹¹¹ K. Marx, *Das Kapital*, vol. 3, ch. 46 (F. Engels, ed., 1894). See E. Brown Weiss, 'Intergenerational Equity: A Legal Framework for Global Environmental Change', in *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992), pp. 385-412 at p. 400.

Ian Brownlie

XI. BOUNDARY PROBLEMS AND THE FORMATION OF NEW STATES

The Josephine Onoh Memorial Lecture 1996

It is a particular honour to be invited to contribute to this series of lectures established in honour of Miss Josephine Onoh, and it gives me added pleasure to recall that the series was inaugurated by President Elias. President Elias was a friend of my mentor, Sir Humphrey Waldock, and was also a friend to me.

This series of lectures deals with the subject of public international law, the rules which, by custom and general acceptance, govern the relationships of states *inter se*, and also the relations of states with international organizations. In cases before international tribunals, public international law will normally be the applicable law or, on other occasions, it will form part of the applicable law.

As far as I know, all states employ experts on international law, usually in the form of civil servants with appropriate expertise. The Foreign and Commonwealth Office employs about twenty-four full-time international lawyers. Many governments, and not only those of the smaller states, employ freelance professional lawyers as counsel. The application of international law may be imperfect but for the most part the system works and many disputes are resolved by recognised procedures of peaceful settlement. I have myself worked on substantial problems for some thirty-five states.

And so, however academics may classify international law, in my opinion and in the opinion of many who have the opportunity to experience it at first hand, it is there, it exists.

The problems of enforcement within the system of international relations are by no means peculiar to international law. The use of municipal law as a comparator is problematic on many grounds but, if it is to be taken as a

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comparator, the true analogue is surely that of public law. Both in public law within the state, and in international law, the special character of the rules derives from the fact that it is government, or a plurality of governments, which is, or are, both the makers of the rules and the addressees of the rules.

If one had the time more could be said about the curious inability of one's fellow lawyers to give a fair performance rating to international law. Thus it never occurs to them that massacres in Ruritania involve as much the failure of the law of Ruritania as they do the failure of international law. Moreover, it would not occur to municipal lawyers to take the many examples of civil strife within states as the test of the efficacy of municipal law *as a type of law*. And yet every armed conflict or civil war may be taken as a test of the efficacy of international law.

With my preface completed, I need now to move closer to the subject matter of the lecture.

As a public order system, international law has a number of discrete but overlapping elements.

First, there is the principle, embodied in the United Nations Charter, that the international community, in this case the political organs, has a monopoly of the use of force and that resort to self-help is permitted only by way of exception.

Secondly, there is a system of enforcement primarily by means of the Security Council and also through regional organizations.

Thirdly, there is a somewhat asymmetrical but generally effective system of adjudication and arbitration, which is centred upon the International Court of Justice but includes distinguished *ad hoc* courts of arbitration.

To these elements should be added the passive public order system constituted by the concepts of states and of international boundaries. In this context it is worth pointing out that, essentially, the international community of independent states constitutes a sort of traffic system based upon the three-dimensional boxes of territory and territorial jurisdiction of which individual states consist. In this context it is the role of boundaries which is critical in dividing the spheres of action of states and their police and security forces, and thus in avoiding breaches of the peace. In the result there is a series of legal concepts which correspond to political reality and which, operating jointly, provide a simple but efficacious system of international public order. These concepts are the existence of states as such, the concept of title to territory, the principle of territorial integrity, and the role of boundaries.

If I can turn first to the significance of states. In spite of the scepticism of political science, the state has remained as the preferred model of political self-determination. This observation is not made in a spirit of Hegelian euphoria. The

state for me has no particular mystique. It is a vehicle and, like the motor car, can be used for banditry or for taking people to hospital. The important point is that there are few alternative models.

The only alternative models available appear to be confederations, economic communities, and trusteeships and condominiums. Such other models tend to be complex and transitional either in purpose or in fact. States thus remain as the standard model and oppressed and subordinated communities in all parts of the world adopt a programme of statehood.

The concept of statehood must be taken in conjunction with the concept of title to territory. Governments have an acute sense of territorial entitlement. This is recognised by the law but is by no means a mere legalistic construct. Politicians and ministers have a natural sense of entitlement based on historical considerations and a sense of the role of the individual state in relation to other states. It is no coincidence that a significant proportion of disputes taken to the International Court or to arbitration are concerned precisely with title to territory.

Title to territory may have various origins. A principal source of title is the independence of the state and its recognition as such. Title, apart from the case of islands and reefs, connotes boundaries and it is boundaries which play a major role in the public order system.

This role has three constituents:

- a) firstly, the allocation of territory and thus the implementation of the notion of entitlement;
- b) secondly, the separation of jurisdictions;
- c) and thirdly, the separation of the physical operations of police and security forces.

The international order is thus based upon the allocation of territory as between states. The territorial space of states can only be penetrated by consent. And threats to the peace are avoided by the physical separation of jurisdictions and the areas in which police and security forces may carry out patrolling and enforcement actions.

There is a wealth of experience based upon the peaceful settlement of boundary disputes and the evidence relied upon by international tribunals in relation to the determination of boundaries. Such evidence includes administrative practice, such as the collection of taxes, legislation, official maps, expert opinion evidence in the form of atlases and other reference works, and, in the case of traditional boundaries, repute or public knowledge.

At this point I can pause to summarise the basic elements of the public order system, that is to say, the existence of a system of states, the concept of title to territory, the principle of trespass (which is the municipal version of territorial integrity), and the role of boundaries.

This system provides a simple but attractive framework for the maintenance of order and the preservation of stability. However, the efficacy of the system faces threats from a number of sources.

In the first place, the stability and efficacy of the system outlined above may be threatened by the formation of new states, and especially by situations of civil strife in which the forces unleashed may have political purposes unrelated to the dimensions of existing public law units. In the case in which the reformation of states is carried out by multilateral decision-making in which those affected genuinely acquiesce, there are no serious problems. This was probably the case with the reformation of the territories of the Austro-Hungarian Empire into new states like Czechoslovakia. Nor will there be serious difficulties in the case of a voluntary union of two existing states or of a peaceful secession of a discrete political unit as in most cases of decolonisation. The difficult situations are those in which secessions take place which are incomplete or strongly opposed by significant groups within the populations of the areas concerned. Such was the case in relation to the appearance of Israel in 1948 and the secession of Croatia and other republics from the Socialist Federal Republic of Yugoslavia quite recently.

In this context it is of great importance to determine what happens to international boundaries when there is a change of sovereignty. This class of problems is usually described as state succession, although this classification is not necessary to the solution of problems. In the doctrine of international law it has long been accepted that a change of sovereignty does not as such affect international boundaries. This principle was assumed to apply by the International Court in the *Temple* case (on the Merits) between Thailand and Cambodia.

However, this principle would not cover the problems arising when the former sovereign relinquishes control over large areas of colonial empire which then fragment into new states. In Latin American practice the principle of *uti possidetis* was adopted in order to deal with the situation within the former colonial domains.

The American jurist Hyde reported the principle of *uti possidetis* by quoting the words of two Spanish jurists:

When the common sovereign power was withdrawn, it became indispensably necessary to agree on a principle of demarcation, since there

was a universal desire to avoid resort to force, and the principle adopted was a colonial *uti possidetis*, that is, the principle involving the preservation of the demarcations under the colonial regimes corresponding to each of the colonial entities that was constituted as a State.

This principle thus originated as a political policy but evolved into a legal principle which represented the political practice within the Spanish empire applicable in Latin America. The legal principle involves an implied agreement to base territorial attributions on a rule of presumed possession by previous Spanish administrative units in 1821 (in Central America, the states' choice of arbitrary date) and in 1810 (in the rest of Latin America). The principle has played a significant role in arbitrations and cases before the International Court involving Latin American states.

Apart from the principle of continuity of former administrative boundaries, the concept has two corollaries. First, it was presumed that the dissolution of the Spanish Empire did not have the effect of leaving any territory as *terra nullius*, in other words the intention was not to allow space for intervention and occupation of territory from outside the continent. Secondly, given the difficulties of proving the precise locations of ancient administrative divisions in poorly mapped areas, the strict principle of *uti possidetis juris* was supplemented in the practice of international tribunals by *uti possidetis de facto*. This involved reference to the exercise of jurisdiction and the carrying out of acts of administration by governments. Both in origin and function the principle constituted a part of Latin-American regional international law, and was seen as such in the literature of the law.

Although there are dissenting voices, the principle of *uti possidetis* has now been accorded universal acceptance. It was recognised in substance by the Organisation of African Unity in the Cairo Resolution of 1964 and was applied by the Chamber of the International Court in the *Frontier Dispute* case decided by the International Court in 1986.

Whilst there has been no multilateral declaration concerning *uti possidetis* in an Asian context, there can be no doubt that the principle applies also in relation to Asian territorial disputes. The principle of stability of boundaries was affirmed in the *Temple* case (Merits) and the essence of *uti possidetis* was recognised in the Award of the Arbitral Tribunal in the *Rann of Kutch Arbitration* between Pakistan and India. Moreover, the Chamber in the Case concerning the *Frontier Dispute* again (Burkina Faso/Mali) stated that *uti possidetis* 'is therefore a principle of a general kind which is logically connected with this form of decolonisation wherever it occurs': this form being the disintegration of a colonial

territory into its separate administrative units which then appeared as independent states.

The principle has been adopted also in the practice of European states in relation to the changes in Eastern Europe and in the Soviet Union. Thus the European Community and its Twelve Member States issued a Declaration on 16 December 1991 of 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'. One of the conditions for recognition of the new states was 'respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement'.

On the same date the European Community and its Twelve Member States issued the 'Declaration on Yugoslavia' relating to recognition of the independence of 'the Yugoslav Republics'. This incorporated the same Guidelines and included the following:

The Community and its Member States agree to recognise the independence of all the Yugoslav Republics fulfilling all the conditions set out below.

The conditions included a reference to 'the above-mentioned guidelines'. The Guidelines on Recognition were in due course applied by the Arbitration Commission of the International Conference on Yugoslavia in a series of Opinions on the recognition of the Republics of Yugoslavia, of which Opinion No 3 recognised *uti possidetis* as a general principle.

Apart from the practice of states the principle has received ample judicial recognition of its status as a principle of general international law. The following decisions attest to this:

- a) The *Guinea-Guinea (Bissau) Maritime Delimitation* case, Award of 14 February 1985
- b) and also the case I have referred to several times, the *Case Concerning the Frontier Dispute* (Burkina Faso/Republic of Mali)

By way of clarification it is necessary to emphasise that *uti possidetis* does not freeze boundaries. It consists essentially of the single principle that the change of sovereignty does not as such change the status of a boundary, and thus pre-existing disputes will subsist as an aspect of the principle of continuity.

It has a certain effect but it is limited and thus the principle of *uti possidetis* has played a significant role in limiting the possibilities of instability deriving from the formation of new states. In this regard, it has been reinforced by the general importance given to 'the fundamental principle of the stability of boundaries' by the jurisprudence of the International Court, as, for example, in

the Judgment in the important *Libya/Chad* case of 1994, which resolved a major dispute between Libya and Chad relating to an area known in the press as the Aouzou strip.

There remain certain other threats to the public order system. One such threat derives from an element of historical accident. In cases like that of French West Africa, at the time of decolonisation, the units which emerged as states were equal in constitutional status and so there was no particular problem when they decolonised. They all decolonised on the same basis, all became independent. In contrast, when the Soviet Union dissolved, the constituent units were various in constitutional status, although each unit apparently reflected the distribution of a particular national group. Thus there were Union Republics, Autonomous Republics, Autonomous Regions and Autonomous Areas. After the disintegration occurred, some of the 'lesser' units assumed, not without reason, that they also had the right to independence along with the Union Republics.

International law as such obviously cannot provide direct answers to such political issues, but the principle of self-determination is relevant both legally and politically in such situations. After all, lawyers tend to prefer consistency and thus may wonder why Croats and Slovenes have the right to self-determination but not Chechens.

The principle of *uti possidetis* militates in favour of stability. Can it be reconciled with self-determination which, at first sight, constitutes a source of change and territorial instability? The answer is unavoidably complex and has several distinct elements.

In the first place, few writers express the opinion that a condition of the validity of a transfer of territory is the provision of opportunity for the expression of opinion concerning the transfer by the inhabitants. Secondly, it must be appreciated that there is a complementarity between *uti possidetis* and the principle of self-determination. It is *uti possidetis* which creates the ambit of the pertinent unit of self-determination, and which in that sense has a logical priority over self-determination.

This complementarity is evident in the practice of the European Community relating to the Republics of Yugoslavia. In particular, Opinion No 4 of the Arbitral Commission of the International Conference on Yugoslavia adopts the territorial unit of the Socialist Republic of Bosnia-Herzegovina as the relevant unit for the purposes of its Opinion on international recognition. On this premise the Commission applies the EC Guidelines on the recognition of new states and decides that 'the will of the peoples of Bosnia-Herzegovina to constitute' Bosnia as a sovereign state 'cannot be held to have been fully established'.

And so there is a combination of *uti possidetis* as the basis of the unit, Bosnia-Herzegovina, and that unit is then being subjected to a test of self-determination by the Arbitral Commission.

And finally, the principle of self-determination is in any case subject to a procedural process of certification and validation and I want to complete the lecture by a further look at self-determination. Its historical background is quite rich and one can find writers, especially of Balkan nationality, writing about self-determination in the late 18th century, and in those days it was called the principle of nationalities. It remained an influential political principle. Whilst it was not applied consistently, it appeared as the basis for many of the decisions by the Allied Supreme Council in the Versailles Peace Settlement and Associated Peace Treaties of 1919-1920.

I think that although in those days it clearly was not a legal principle, and was not regarded as a legal principle, it was relied upon in relation to the affairs of Europe. Norms tend 'to go round', and it became fairly obvious that if the principle applied in some areas of the world, it should perhaps apply in other areas of the world. It then appears as one of the principles of the United Nations Charter but there is still a certain deliberate ambiguity about self-determination in the drafting and at least on one view the references in the Charter are perfectly compatible with the ordinary concept of the independence of states.

And then it is given a prime place in the United Nations General Assembly's Declaration on the Independence of Colonial Peoples (Resolution 1514) adopted in 1960, which was a part of the process of decolonisation which was then at its height.

Now even in 1960 there was still a debate as to whether self-determination only applied to colonial peoples or whether it had a broader application. In the Helsinki Final Act of 1975 it is fairly clear that the principle was applied to the peoples of Eastern Europe and the former Soviet Union. And it is certainly my view that by 1975 it was difficult to say that the principle of self-determination was not a legal principle and that it only applied to the colonial agenda. But let me put the other point of view. A number of distinguished writers, Thomas Franck for example, of New York University and Rosalyn Higgins, who is now the British Judge on the International Court, have the view that, although it is a legal principle, self-determination only applied in the form of the right of secession within the agenda of colonial freedom, that it does not apply otherwise, and that as far as it applies now it is a reference simply to the rights of minorities within independent states.

I have a number of problems with that, and I do not understand why self-determination should apply to Zambians or Kurds but not to, for example,

Palestinians. I simply do not understand why, if the principle ever had any validity, it should only apply to the classical colonial agenda.

And I think that, it is now a legal principle, but, like the early development, for example, of the concept of title to the resources of the continental shelf, it is in the stage of development, its ramifications are still not worked out, but as a core principle it is a legal principle, and is recognised as such by many states.

The problem of course is to define the unit of self-determination. That is the key and that is the area in which the principle is not yet fully developed. One of the reasons why respectable lawyers do not like the principle of self-determination, there may be other reasons, but one of the more objective reasons is that they precisely see it as a form of instability which will create a basis for civil strife and civil war. I think that is, of course, a valid and important concern and it is a part of my subject matter today.

Part of the answer to the question of its causing instability is precisely this process, this procedural process of certification and validation of units of self-determination that I have referred to. There is some analogue with the process of the recognition of new states, and there is an overlap in fact, with the procedure for the validation of new units of self-determination and they are part of the same process. It is this process of validation and recognition which explains why self-determination does not cause instant instability everywhere. As with the appearance of new states, there is a procedural process which stems the tide. There is a door to be entered, which involves international recognition either in the form of action by political organs of the United Nations, or in the form of collective recognition by the acts of the unilateral acts of individual states.

And so, for example, General Assembly Resolutions over a period of years have recognised that the Palestinians are a unit of self-determination with large votes in favour of that view.

In 1960 a group of states took the view that the Island of Cyprus, as a whole, is a unit of self-determination. In the affairs of the United Kingdom, there is legislation recognising Northern Ireland as a discrete unit of self-determination. And so by various means, as in the case of the development of the recognition of new states, units of self-determination are given appropriate recognition, usually as new states.

Now there are certain conditions applicable. Thus, there is a requirement of legality. If a putative unit of self-determination arises from a foreign invasion and the occupying power invokes the principle of self-determination in order to disguise what is in fact, an annexation, an intervention without lawful justification, the unit does not qualify for recognition and it was on that basis that many states refused to recognise the Government of Manchukuo in the 1930s. It

is on that basis that no State apart from Turkey has recognised the 'Turkish Republic of Northern Cyprus'. There is also the requirement of authenticity. If the putative unit of self-determination has been the object of a great deal of demographic manipulation so that the nature of the population has been substantially changed, it quite simply lacks authenticity as a unit of self-determination.

And so my view is that it is necessary to keep an eye on the weather in the context of self-determination and it is not perhaps such a threat to stability as some of our colleagues would have us believe.

And I would like to conclude by returning to the general theme of the stability of boundaries between states. International tribunals, and especially the International Court, have affirmed an overall policy of finality and stability. The principle of state succession in the case of boundaries complements that general policy. But I would like to point out that even these concepts themselves must have certain limits and Judge Shahabudeen (in his separate opinion) in the Libya/Chad case warns that the concept of stability is question begging and that one should look at the legal situation generally and therefore the concept of finality does not in itself provide an answer or a short cut. This is also true of the principle of *uti possidetis* itself, to which I have given a very high rating as an element in maintaining stability in international affairs and I think that is a correct assessment, but again just to remind you that it does not mean that no disputes arise, what it means is that disputes do not arise simply as a result of the change of sovereignty. Thus, if at the time of decolonisation there were existing ambiguities such pre-existing disputes will subsist. At the same time subsequent modification of the colonial boundary by agreement is perfectly lawful and the boundary is not frozen. And so Gambia has made an agreement with Senegal making local changes so that certain villages will have a more comfortable position in relation to neighbouring villages. The Cairo Resolution does not forbid lawful changes in African boundaries but simply provides that decolonisation as such does not change the legal status of a boundary.

And *uti possidetis* applies so to speak in retrospect. Thus in the Rann of Kutch case, that followed a small war between India and Pakistan, the distinguished Court of Arbitration actually applied the status quo. They investigated the status quo in the 19th century, within the paramountcy of Great Britain and India which treated the state of Kutch as an independent state subject only to the overarching paramountcy system and the part of British India known as Scind. It treated that relationship as though it were a relationship between completely independent states. This was exactly the way the two now independent parties India and Pakistan had fought the case. And so *uti possidetis* was, as it were, taken back

into the affairs of British India. Why? because that provided a legal outcome to a difficult dispute. And so in the Libya/Chad case, although Chad had only become independent in 1960 and the treaty in dispute was concluded in 1955, the International Court had no difficulty in applying the principle of *uti possidetis*, although in formal terms it was only approved by the African states in 1964 and so it was applied in retrospect. Good public order and public policy made that a sensible solution.

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XII. INTERNATIONAL LAW AND IMPERIALISM

The Josephine Onoh Memorial Lecture 1999

Let me thank the Law School of the University of Hull, especially Surya Subedi and William Lucy for inviting me to join the distinguished list of guests to give the Josephine Onoh memorial lecture. I have chosen as my title 'Imperialism and International Law' not because I come from a country whose credentials in the field of Empire-building are less than impressive – and whose feelings about that topic might therefore be laden with less ambivalence than, I understand, those of our host-country's. I want to speak on imperialism and choose my examples from Africa only in part as this seems to link well with the founding of these lectures, as you all know, by Chief Onoh in memory of his daughter Josephine who was killed tragically in an air accident when flying from here to what once with its 350,000 sq. miles was much the largest British possession in Africa (Nigeria). This is also fitting because the first Governor-General of that colony, nominated in 1914, was one of the foremost theorists of the Empire, Fredrick John Lugard, Baron Lugard, whose concept of the 'Dual Mandate' nicely captures the historical meaning of Empire from the Empire's own perspective as a responsibility to the indigenous population and to the world at large.¹ Most of all, however, I want to speak about imperialism and international law because I am intrigued by that relationship. For there appear to be two equally plausible alternatives: either international law with concepts such as statehood and sovereign equality is an anti-imperialist programme *par excellence*, providing a boundary of non-intervention that weak communities can rely upon against strong ones. Or then international law is a Western heritage, carrying Western ideas about political organization, and Western privileges, onto the international

¹ Cf. John Lugard, *The Dual Mandate in British Tropical Africa* (Edinburgh, 1922).

plane. In the latter case, international law may appear as an intrinsic part of imperialism, of the domination by the West of everyone else.

So this is my conundrum: is international law imperialist, or anti-imperialist? Should international lawyers feel proud, or guilty? To anticipate my answer, I think there is reason for both sentiments. For as Judge Taslim O. Elias of Nigeria, the holder of the first of these lectures and a former President of the International Court of Justice has pointed out, it is precisely through the conceptual system of sovereign equality, enshrined in the UN Charter and exemplified in the legislative activities of the UN and other intergovernmental organizations, that Africa has been able to receive a voice in public diplomacy.² But it seems no less true that, as Mohammed Bedjaoui of Algeria, also a former President of the ICJ has observed:

Classic international law in its apparent indifference [that is to say, its conceptual neutrality] was *ipso facto* permissive. It recognized and enforced a 'right of dominion' for the benefit of the 'civilized nations'. This was a colonial and an imperial right, institutionalized at the 1885 Berlin Conference on the Congo.³

There is an ambivalence about international law. Sovereignty and international governance seem both good and bad, liberating and threatening at the same time: neither provides a recipe against domination. The tension between the two, I think, reflects the tension between relativism and universalism that is part of our shared modernity, lying for example, at the heart of the debates about the pros and cons of globalization. Is globalization a natural part of humanity's march from fragmentation to unity; or an arrogant strategy for the perpetuation of the hegemony of Western economy and culture?

In this lecture I propose to do no more than to look at the period when professional international law was born, a period that dates from the 1860's to the end of the last century. By a remarkable, although I think not fortuitous, coincidence, this was also the period of transition from informal to formal empire and the beginning of the end of Western expansion. Through a snapshot of this bygone era, I want to characterize the sensibility of a new generation of international lawyers who had no doubt about the beneficiality of Western modernity or its apparently fantastic ability to transgress its own cultural limitations. This confidence may no longer be there. But the international law

² T.O. Elias, *Africa and the Development of International Law* (Leiden: A. W. Sijthoff/Dobbs, Ferry, New York: Oceana Publications, 1972).

³ Mohammed Bedjaoui, *Towards a New International Economic Order* (Paris: UNESCO/New York, London: Holmes and Meier Publishers, 1979), p. 49.

that it created still prevails, albeit as part of a public diplomacy increasingly marginalized by the globalizing pull of the present *fin-de-siècle*.

My thesis is this: a new, reformist generation of late 19th century jurists thought of themselves as the 'organ of the legal conscience of the civilized world'.⁴ They were imperialists, but also, in a sense, culturally sensitive. They held international law a heritage of Western civilization – for them 'civilization' *tout court* – and therefore inapplicable in the relations between Europe and their 'Orient'. Their liberal conscience required that they react to what they saw as problems or dangers in the process. They tried to harness European rule over Africans by formal 'sovereignty' or by 'internationalization'. Both strategies failed for reasons that we have learned as obvious: for buttressing an alien rule that was felt as ultimately wrong.

However, these two strategies – sovereignty and internationalization – are the heritage late 19th century jurists left us to think of African crises today. In some ways, post-colonial sovereignty has failed to live up to expectations. We debate about intervention and even trusteeship again though we no longer speak of civilized and non-civilized countries. The world in which a notion such as 'conscience juridique' has a definite legal meaning is alien to us, perhaps not only to our advantage. But I suggest that in order to understand the dialectic of sovereignty and internationalization, to grasp the ambivalence of the choices, it may be useful to take a snapshot at the Scramble for Africa when both strategies were conceived as parts of imperial rule at the service of Lugard's 'dual mandate'.

Before introducing the ideas of the new generation, let me say a word about the old one that came into prominence after 1815. After the Napoleonic wars, European expansion took place with little sense of a conscious process. Europeans had expressed systematic interest in the exploration of non-European spaces in the eighteenth century, but the upheavals of the century's end made the society turn inwards. Great Power diplomacy sought to reconstruct the European equilibrium and with the exception of the Eastern question, the European Concert focused until 1885 exclusively on European affairs.

Official Europe was losing ground. The independence of Spanish America (1822/3) and the secession of Brazil from Portugal brought the decay of the two empires to a conclusion. French energies were absorbed by three revolutions. The

⁴ Cf. Statute of the *Institut de droit international*, adopted on 10 September 1873, Article 1, I *Annuaire de l'Institut de droit international* (Bruxelles: Impr. Lesigne, 1877), p. 1.

seizure of Algeria in 1830 had led France into an endless and unpopular guerilla war. Likewise, the 'great mass of German bourgeoisie wanted no part in colonial adventure'.⁵ German attention was focused on the continent, on unification as well as on constitutional and social conflict at home.⁶ Italy, too, was busy getting united. Russia moved back and forth in the east and Austria was preoccupied in the Balkans.

European populations had little interest in colonies. Questions relating to non-European regions were the preserve of humanitarians. The main interest in Africa was not colonization but the prevention of slave trade, organized through bilateral treaties whereby Britain had been granted the privilege of patrolling the African coasts.

The years 1815-1870 constituted the heyday of British predominance overseas. But in Britain, too, successive prime ministers from Castlereagh onwards opposed the formalization of British rule. As Macaulay pointed out in 1833: 'To trade with civilized men is infinitely more profitable than to govern savages'.⁷ Britain's 'empire of free trade' was maintained by unchallenged naval supremacy and the absence of serious industrial or diplomatic competition from potential European rivals.⁸ Britain's advocacy of free trade was firmly grounded in self-interest. Colonization was understood to be contrary to free trade and colonies were regarded as an economic burden.⁹

At this time, no profession of international law existed. Influential continental jurists such as Georg-Friedrich von Martens (1756-1822) or Johann Ludwig Klüber (1762-1836) were experts in public law, counsellors to European Princes

⁵ L.H. Gann – Peter Duignan, *Burden of Empire. An Appraisal of Western Colonialism in Africa South of the Sahara* (London: Published for the Hoover Institution on War, revolution and Peace by Pall Mall Press, 1971), p. 187.

⁶ Still in the 1870's Bismarck rejected proposals by the German *Kolonialverein* to set up colonies. He thought them expensive and was against the idea of having to request funds from the *Reichstag* in a way that might have strengthened the latter's hand against the Chancellor. Cf. e.g. Henri Wesseling, *Le Partage de l'Afrique 1880-1914* (Paris: Denoël, 1992), pp. 152-154.

⁷ Quoted in Ronald Hyam, *Britain's Imperial Century, 1815-1914. A Study of Empire and Expansion* (London: Macmillan, 1976), pp. 106, 105-108.

⁸ Cf. generally Ronald Robinson – John Gallagher, with Alice Denny, *Africa and the Victorians. The Official Mind of Imperialism* (London: Macmillan, 2nd ed., 1981). This did not mean that there would have been no advances in official empire at the time. Between 1839 and 1851, for instance, Britain attained as formal colonies New Zealand, the Gold Coast, Natal, Punjab, Sindh and Hong Kong. Cf. Hyam, op. cit., pp. 8-15, 86-90.

⁹ Cf. e.g. Gann-Duignan, op. cit., pp. 12-14, 18-19.

who wrote for the education of diplomats and men of public affairs. Henry Wheaton (1785-1848) whose influential *Elements of International Law* was published in 1836 was an attorney with the United States Supreme Court and a diplomat posted in Europe. The first chairs of international law proper were set up only in the latter part of the century (in Britain in 1859 and 1866). The first systematic treatises written by professional international lawyers, intended for general academic as well as diplomatic use were published even later in the 1880's and 1890's.

The first treatises of the post-Napoleonic era reflected the aim of reconstruction of the European states-society. The introduction of the concept of the *Droit public de l'Europe* presumed that the origins of modern international law lay in the settlements of Westphalia and Utrecht. The discussion of the law was invariably opened by a classification or even an enumeration of European states. The rest of the law followed in terms of their absolute and relative rights. Legal texts became portraits of European political society in 1815.

These lawyers had little to say about the relations between Europeans and non-Europeans. In a general way, however, they agreed with Montesquieu who had argued in *L'ésprit des lois* that laws in particular were to be founded on the 'manners and customs' of the communities for which they were to be applied – conceding however that human reason did govern 'all inhabitants of the earth'.¹⁰ They combined historicism with rationalism to explain the difference between laws to be applied between European states and those between European and non-European communities. The first edition of Wheaton's *Elements of International Law* (1836) pointed out that:

The ordinary *jus gentium* is only a particular law, applicable to a distinct set or family of nations, varying at different times with the change of religion, manner, government, and other institutions, among every class of nations.¹¹

From this it followed that:

... the international law of the civilized, Christian nations of Europe and America, is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christian, is another and a very different thing.¹²

¹⁰ Baron de Montesquieu, *The Spirit of the Laws* (Transl. by T. Nugent, Intr. by Frantz Neumann, New York and London: Hafner, 1949).

¹¹ Henry Wheaton, *Elements of International Law. With a Sketch of the History of the Science* (London: B. Fellowes, 1836) (Vol. I), pp. 50-51.

¹² *Ibid.*, p. 51.

Alongside a culturally based European law, there was a non-cultural, rational law. Both von Martens and Klüber, writing in 1821 and 1819, applied quite a liberal conception of rational law. Von Martens, pointed out that:

Le droit de propriété étant le même pour tous les hommes, indépendamment de leur religion et de leurs mœurs, la loi naturelle n'autorise pas les peuples Chrétiens à s'attribuer des districts déjà effectivement occupés par des sauvages contre le gré de ceux-ci, quoique la pratique n'offre que trop d'exemples de semblables usurpations.¹³

And Klüber agreed:

aucune nation n'est autorisée par ses qualités, quelles qu'elles soient, notamment par un plus haut degré de culture quelconque, à ravir à une autre nation sa propriété, pas même à des sauvages ou nomades.¹⁴

To us, this seems nice. But natural law is – as Rousseau pointed out in his famous critique of Grotius – a weak legitimization and always amenable for the justification of the policies of the day. As Robinson and Gallagher observe in their important study of British expansion in Africa after 1879:

Because those who finally decided the issue of African empire were partly insulated from pressures at Home, and remote from reality in Africa, their historical notions, their ideas of international legality and the codes of honour shared by the aristocratic castes of Europe had unusually wide scope in their decisions.¹⁵

In other words, rational law was flattened into what diplomats and colonial officials thought as their 'moral duty to the rest of humanity', indistinguishable from the cultural sensibility of the late-Victorian generation.

By 1870, British overseas predominance had eroded. Other powers assumed an increasingly active imperial policy. Britain reacted by intensifying informal influence. Expansion in Africa had always been conducted by mercantile associations (Royal African Company, African Company of Merchants) led by ambitious capitalists such as George Goldie, William Mackinnon and Cecil

¹³ G-F de Martens, *Précis du droit des gens moderne de l'Europe* (Paris: Guillaumin, 3ème éd., 1821), pp. 79.

¹⁴ J.L. Klüber, *Droit des gens moderne de l'Europe* (Stuttgart: J.C. Gotta, 1819), p. 194.

¹⁵ Robinson-Gallagher, *op. cit.*, p. 21.

Rhodes.¹⁶ With the setting up of the British North Borneo Company in 1881¹⁷ a precedent was created for the exercise of informal rule in Africa without having to request funds from the Parliament or the Treasury. By the time the scramble was over, more than 75 per cent of British territory south of the Sahara was acquired by chartered companies.

German colonization followed similar lines. What eventually became German South West Africa was acquired by a tobacco merchant from Bremen, Adolf Lüderitz to whom Bismarck, irritated by British obstinacy in the area, wrote a *Schützbrief* in April 1884. In the following June he reiterated his negative attitude towards annexation, however. Material responsibility for the colony should always be left to the company.¹⁸

The problem was that the companies either resorted to protectionist practices (in breach of their charters), proved unable to administer territories granted to them, or failed to forestall expansion by other powers. Governmental interference was required to protect traders and settlers or to prevent anarchy and, eventually, to take over formal rule. In West Africa, for example, Sir George Goldie's United (National) African Company had started out in the Niger region in 1879 where France and Germany were also seeking possessions. In 1883, Sir Percy Anderson, the head of the Foreign Office's African bureau wrote:

Action seems to be forced on us ... Protectorates are unwelcome burdens, but in this case it is ... a question between British protectorates, which would be unwelcome, and French protectorates, which would be fatal.¹⁹

¹⁶ For example, in 1870 British possessions in West Africa were restricted to isolated coastal spots while occasional military excursions (e.g. Wolseley against the Ashanti 1874) were without lasting territorial effect. A Parliamentary Select Committee in 1865 even advocated partial withdrawal – no such withdrawal took place. Cf. Gann-Duignan, op. cit., pp. 171-2; Winfried Baumgart, *Imperialism. The Idea and Reality and British and French Colonial Expansion, 1880-1914* (New York: Oxford University Press, 1982), pp. 14-15.

¹⁷ Its powers included 'life and death over the inhabitants, with all the absolute rights of property vested in the Sultan over the soil of the country', Cf. M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green and Co., 1926), pp. 100-101. For the early activities of the chartered companies in Africa and elsewhere, cf. J. Flint, *Chartered Companies and the Transition from Informal Sway to Colonial Rule in Africa*, in: Förster et al, *Bismarck, Europe and Africa. The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford, New York: Oxford University Press, 1988) (hereafter '*Bismarck*'), pp. 69-71.

¹⁸ Quoted in K.J. Bade, *Imperial Germany and West Africa: Colonial Movement, Business Interests, and Bismarck's 'Colonial Policies'*, in: *Bismarck*, p. 137.

¹⁹ Quoted in G.N. Sanderson, *The European Partition of Africa: Coincidence or Conjecture?*, in: E.F. Penrose (ed.) *European Imperialism and the Partition of Africa* (London: Frank Cass, 1975), p. 11.

The British received a free hand in the area from the powers united at the *Berlin West Africa Conference* in December 1884. Goldie's company was chartered in June 1886 to 'enforce treaty rights, to collect customs duties and to spend the receipts solely on the expenses of rule'.²⁰ But Goldie never had any intention to implement the free trade or the humanitarian provisions agreed at Berlin.²¹ He immediately excluded all competition in the river (including competition by Africans). In 1891 Britain decided to increase its direct administration in the region and two years later to set up the Niger Coast protectorate.²²

In East Africa as well, formal rule fell upon Europeans as a result of private pre-emption. In March 1885 Bismarck brought the Zanzibar inland regions that had been the object of frantic treaty-making between Karl Peters and native chiefs under a German protectorate whose administration was granted to the German East Africa Company (DOAG).²³ William Mackinnon, the founder of the British and India Steam Navigation Company insisted that the British make a similar move. In October 1886 Britain and Germany divided the area formerly claimed by the Sultan of Zanzibar between themselves. Mackinnon's Imperial British East Africa Company (IBEAC) was chartered on 3 September 1888.²⁴

Neither company lived up to the imperial expectations. Mackinnon remained on the brink of bankruptcy and projects to subsidize his company fell to naught. The company's agents were withdrawn from Uganda in 1891. After a period of indecision and political conflict, formal protectorate was finally established over Uganda on 27 August 1894 and over all territory between Buganda and the coast on 1 July 1895.²⁵ The charter of the IBEAC was withdrawn. *The Deutsche Ost Afrika Gesellschaft* mismanaged its territory by excessive taxation with the result that a rebellion ensued. German officers and a force of African mercenaries were sent in to crush the rebellion – a task that was carried to a conclusion by 1889. Two years later, Germany took over German East Africa as a formal

²⁰ Robinson-Gallagher, op. cit., p. 182.

²¹ J. Flint, *Chartered Companies and the Transition from Informal Sway to Colonial Rule in Africa*, in *Bismarck*, pp. 78-79.

²² Cf. Robinson-Gallagher, op. cit., pp. 180-189; Wesseling, op. cit., pp. 253-264. Goldie's charter was withdrawn in 1900.

²³ The Charter of Protection was granted to the German Kolonialverein (Colonization society) on 27 February 1885. The Charter went as follows: 'We grant unto the said Society, on the condition that it remains German ... the authority to exercise all rights arising from the Treaties submitted to us, including that of jurisdiction over both the natives and the subjects of Germany and of other nations established in those territories ... under the superintendence of our Government ...', Sir E. Hertslet, *The Map of Africa by Treaty II* (No. 209) (London: Frank Cass, 3rd ed., 1915), pp. 681-2.

²⁴ Cf. Robinson-Gallagher, op. cit., pp. 193-202.

²⁵ Cf. Robinson-Gallagher, op. cit., pp. 290-294, 307-330.

protectorate.²⁶ With the brutal crushing of the Herero uprising in South West Africa in 1905 and the 'Maji-Maji' war in German East Africa the following year the German informal empire was irreversibly turned into military conquest and direct imperial administration.²⁷

On 29 November 1889 a charter was granted to Cecil Rhodes' British South Africa Company.²⁸ In exchange for requiring no subsidy from government, and against the opinion of humanitarian societies, Rhodes was given practically a free hand to administer the area north of the British Bechuanaland.²⁹ His irresponsible policy and his association with the privately organized Jameson raid on the Transvaal government at the end of 1895 led 'almost inevitably' to the most devastating colonial war ever, the Boer War.³⁰

The technique of the 'cat's paw', i.e. the use of local rulers such as the Sultan of Zanzibar or Ismail Pasha in Egypt to carry out imperial purposes failed because it could not work.³¹ Buttressing Arab Rule in East Africa, for instance, involved an intolerable conflict: it was impossible not to rule and yet insist on internal reform or abolishing the slave trade.³² Gladstone's second cabinet that had come to power in 1880 on an anti-imperialist platform blundered into military occupation of Egypt two years later. An international administration was set up to deal with the financial crisis and the British repeatedly failed to live up to the promise of withdrawal – until in 1914 a formal protectorate was declared.³³

Perhaps the most striking strategy of avoiding formal sovereignty but reaping the benefits was the process that led to the establishment of the 'Independent State of the Congo' separate from the Belgian state but with King Leopold II as its formal sovereign. By the end of the Berlin Conference in 1885, the blue flag of the King's International Association had become recognized by all powers as

²⁶ Cf. Wesseling, op. cit., pp. 200-203, 221-2; Thomas Pakenham, *The Scramble for Africa. White Man's Conquest of the Dark Continent 1876 to 1912* (New York: Random House, 1991), pp. 346-9.

²⁷ For the two wars, cf. e.g. Pakenham, op. cit., pp. 602-628.

²⁸ In this case, the British Government might have extended direct rule had it wished to do so. But '[t]he British public opinion, Parliament, the Treasury, and the Cabinet were no more eager in 1889 to undertake new costs in Africa than they had been in 1884. In fact, it was British government intervention and prodding, as much as Rhodes' ambition, which secured the granting of the charter in 1889', Flint loc. cit., pp. 81-82.

²⁹ As Robinson and Gallagher put it, 'the company in operation was a colonial enterprise effectively under colonial, not imperial, control', op. cit., p. 243.

³⁰ Flint, loc. cit., p. 72.

³¹ Cf. e.g. P. Hyam, op. cit., pp. 117-118; Sanderson, op. cit., pp. 15-16. This was a strategy that could only work in colonies whose organization was paternalistic rather than tribal.

³² Gann-Duignan, op. cit., p. 185.

³³ Cf. e.g. Robinson-Gallagher, op. cit., pp. 122-159.

the flag of a sovereign state.³⁴ An agreement had simultaneously been attained on free navigation and free trade in the enormous area of the Congo and Niger regions without administrative burdens for any one of the powers.³⁵ It is a well-known paradox that to secure freedom of trade, someone has to be given exclusive powers to enforce it. To deal with the paradox, the powers chose an apparently neutral outsider with philanthropic pretensions.

The Berlin Conference also enacted two articles on the acquisition of new territory in Africa.³⁶ Not surprisingly, international lawyers have been disappointed by them.³⁷ They dealt with territorial acquisition through general formulations whose applicability was limited to an almost meaningless minimum. Article 34 required powers to inform each other of new acquisitions. Article 35 read:

The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon.

The principle of effective occupation had been originally aimed against British informal influence. The British, however, had no difficulty to agree as no criteria for 'authority' were laid down. Chartering a company would suffice. In fact, Bismarck's letter of protection to the German East Africa Company was signed only one day after the Conference had ended.

³⁴ Formal United States recognition was received on 22 April 1884. Already the previous year, Leopold's diplomacy in the US had bore fruit. In the President's address to the Congress of 4 December 1883 he stated: 'The objects of the society are philanthropic. It does not aim at permanent political control, but seeks the neutrality of the valley.' Pakenham, op. cit. 244. Apart from Pakenham's colourful study, for the story of the recognitions, cf. also Robert Stanley Thomson, *Fondation de l'État indépendant du Congo. Un Chapitre de l'histoire du partage de l'Afrique* (Brussels, Office de publicité, 1933), p. 147 et seq. and Georges-Henri Dumont, *Léopold II* (1990 Paris, Fayard), pp. 179-186.

³⁵ As Ronald Robinson observes, the Congo Free State was an elaborate (although faulty) attempt to provide a neutral, international framework under a King whose 'international credentials seemed unimpeachable', *The Conference in Berlin and the Future in Africa 1884-1995*, in *Bismarck*, p. 23.

³⁶ In his opening words, Bismarck emphasized the internationalist and humanitarian objectives of the Conference that aimed to: '... d'associer les indigènes d'Afrique à la civilisation en ouvrant l'intérieur de ce continent au commerce, en fournissant à ses habitants les moyens de s'instruire, en encourageant les missions et entreprises de nature à propager les connaissances utiles et en préparant la suppression de l'esclavage, surtout de la traite des Noirs.' *Protocoles de la Conférence de l'Afrique occidentale réunie à Berlin, du 15 novembre 1884 au 26 février 1885*, De Martens, *Nouveau Recueil Général, 2ème série*, tome X (1885-6), p. 201.

³⁷ Cf. e.g. Jörg Fisch, *Africa as terra nullius. The Berlin Conference and International Law*, in *Bismarck*, pp. 348.

The rule was also limited in space and time: it was to apply only to *new* acquisitions and only to acquisitions on the coasts – at a time when there was practically no coast any longer to occupy. The Conference refused to apply it to the African interior because this would have required an exact determination of the formal claims of the powers and would have resulted ‘en fait à une partage de l’Afrique’ – something the Conference was desperate to avoid.³⁸

In any case, at a British proposal, protectorates were excluded from Article 35 – although they had become the main form of European influence in Africa and were often indistinguishable from annexation – despite criticism about such an unscrupulous blurring of jurisprudential distinctions.³⁹ By setting up (merely) a protectorate one avoided the financial and administrative burdens for keeping the peace, enforcing its laws and, for example, abolishing the slave trade that would have resulted from formal occupation.⁴⁰

Formal sovereignty is useful in two circumstances: as an absolute barrier by a weak community against a more powerful one and where between powers of approximately equal strength, one’s options are being irreversibly pre-empted by others – i.e. in a situation of uncontrolled scramble. The first condition was not applicable in regard to the European powers. The American proposal for recognizing indigenous right of self-determination was never seriously considered.

But for imperial powers, requiring the setting up of formal sovereignty is negative, a burden to the one who has it and limiting everyone else’s freedom of action. It too easily encompasses the wrong situations: the British, for instance, were certain that it would go against their claims all over the world.⁴¹ It was better to leave conflicts to be settled by *ad hoc* agreements by reference to whatever conditions the powers might think relevant. Much of +the larger part of

³⁸ Conférence de Berlin, de Martens, loc. cit., p. 343.

³⁹ For as John Hargreaves notes, ‘Europeans reinterpreted their doctrine of protectorates to justify arbitrary exercises of power’, *The Berlin Conference, West African Boundaries, and the Eventual Partition in Bismarck*, p. 319. As Lindley points out, a treaty of protectorate secures exclusive control over the area concerned ‘with the ultimate right of annexing it.’ op. cit. p. 186.

⁴⁰ Not being British territory, British law, including that against slavery, for instance, did not apply in the British Bechuanaland protectorate of 1884. As Lindley notes, it: ‘... is an interesting example of a protectorate in which the internal as well as the external sovereignty has passed to the protecting Power, but the territory has not been formally annexed, so that, in the eyes of British law, it is not British territory’. Lindley, op. cit., p. 187.

⁴¹ Which is why the Franco-German invitation to the Conference ‘sent Granville and his officials scurrying to consult legal experts and compile the precedents and places likely to be affected’, Ronald Robinson, *The Conference in Berlin and the Future in Africa 1884-1995 in Bismarck*, p. 9.

the Conference was in fact used in bilateral behind-the-scenes talks.⁴² Hence the two Treaties of 1890, the Anglo-French Treaty on the spheres of interest in Western Sudan and the Anglo-German treaty on East Africa had nothing whatsoever to do with the application of formal rules on occupation. The exchange of Zanzibar to Helgoland by Germany in the latter treaty – the absolute *sine qua non* of the agreement – would never have been attained by staring at a fixed rule.

Today, historians dismiss the Berlin Act as in practice irrelevant for the scramble.⁴³ However, this is not altogether right.⁴⁴ Although the words of the General Act did not determine the behaviour of European states, they both divested European expansion of some of its potential burdensomeness by allowing private greed to parade as public interest and excluded any pretensions to sovereignty that indigenous communities might have had. Article 35 defined ‘authority’ in such a way as to divest the empire of any clear-cut obligations. ‘Acquired rights’ were to be protected but how, this was left for the powers to agree on a case by case basis. As Ronald Robinson concludes:

The leading powers who decided the issue were clearly intent on avoiding colonial liabilities, on averting a scramble for the interior, and frustrating the supposed colonial ambitions of their rivals.⁴⁵

Moreover, the provisions on free trade and freedom of navigation never became reality. The international commission planned for the Congo was never set up and Leopold established a fully exclusionary system in the river. Goldie’s monopoly in the Niger has already been mentioned. As Sheryl Crowe has written in her authoritative history of the Conference:

Free trade was established in the basin and mouths of the Congo and the Niger. Actually highly monopolistic systems of trade were set up in both these regions. The centre of Africa was to be internationalized. It became Belgian.⁴⁶

⁴² For an overview of the ‘bilateral agenda’ of the Conference, cf. Robinson loc. cit. pp. 11-15.

⁴³ Cf. e.g. Pakenham, op. cit., p. 254.

⁴⁴ Cf. also G.N. Uzoigwe, *The Results of the Berlin West Africa Conference: An Assessment in Bismarck*, pp. 542-544.

⁴⁵ Robinson, loc. cit., p. 25.

⁴⁶ S. Crowe, *The Berlin West African Conference 1884-1885* (London, New York: Published for the Royal Empire Society by Longmans, Green and Co., 1942), p. 3.

In 1894, as European states were losing their struggle in Africa to minimize colonial liabilities, yet to maximise informal influence, John Westlake, the holder of the Whewell Chair in Cambridge and a key figure in a new generation of lawyers wrote:

International law has to treat natives as uncivilized. It regulates, for the mutual benefit of the civilized states, the claims which they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded ...⁴⁷

Westlake insisted that treaties with indigenous chiefs could not come under international law. Just like a person cannot transfer what he does not have, the chief cannot transfer sovereignty of which he has no concept.⁴⁸ The Indians do have a right of occupancy, but in European eyes this can only be a private law matter; such 'treaties' may create 'acquired rights' under article 35 of the Berlin Act but cannot transfer sovereignty.⁴⁹

There are two important riders in Westlake's statement. First, he assumes that sovereignty *is* allocated to someone, namely to the European state that has established its presence in 'uncivilized' territory. This was not a foregone conclusion. As we have seen, imperial powers waged a long battle against having to assume the burden of expensive sovereignty. Second, Westlake's reference to the 'conscience' of the imperial state was not altogether empty. I will try to explain why.

A few decades before, something like a distinct international law profession had emerged out of a series of private initiatives. In 1869, Westlake had met with two young central European lawyers, Gustave Rolin-Jaequemyns of Belgium and T.M.C. Asser of Holland to establish the first international law journal, *the Revue de droit international et de législation comparée*. All three were liberal activists. Westlake had been Secretary-General of the British Association for the Advancement of Social Sciences, advocating internationalism, religious tolerance, freedom of opinion and free trade. He had been elected to the Parliament as a liberal radical in 1885, though lost his seat in 1892, probably for his having voted against Home Rule for Ireland. Rolin, too, became a member of Parliament in Belgium, even a minister in Frère-Orban's liberal government in

⁴⁷ John Westlake, *International Law* (Cambridge: The University Press, 1894), pp. 142-3.

⁴⁸ John Westlake, 'Le conflit Anglo-Portugais', *RDI*, XVIII (1891), pp. 247-8.

⁴⁹ *Ibid.* pp. 247, 249.

1878-1885. They had become friends a few years earlier in meetings of Westlake's Association and Rolin had even set up a continental equivalent to it.⁵⁰

In the manifesto that headed the first issue of their Journal, Rolin pointed out the incompleteness of international law and called for a new 'esprit juridique et historique'. Because there was no formal legislation in international law, the burden for its development fell upon science:

Dans le droit externe, c'est la science ou plutôt la conscience de l'humanité qui est la source, le tribunal et la sanction qui est la source de la loi positive.⁵¹

For the new generation of international jurists, formal state acts were not real sources of the law as they could be just or unjust, right or wrong. Instead of appealing to natural law, however, as the men of the previous generation had done, Rolin looked inside. Where does the jurist find the law?

... dans le témoignage de sa conscience, éclairé et fortifié par tout ce que les plus sages d'entre les hommes ont décidé avant lui dans des cas analogues. Ainsi les principes posés par les publicistes en matière de droit externe, tirent leur autorité juridique et législative de leur conformité présumée avec la conscience du genre humain.⁵²

Yet Rolin was no philosopher but a man of action. His reflections express the liberal generation's supreme confidence that its sensibility adequately expressed history's progressive spirit.

With Rolin as the indefatigable organizer, he and Westlake met together with nine other lawyers in Rolin's home town Ghent to establish the *Institut de droit international* in September 1873. Article 1 of its Statute laid down as its purpose:

De favoriser le progrès du droit international, en s'efforçant de devenir l'organe de la conscience juridique du monde civilisé.

'Organ of the juridical consciousness of the civilized world'. The language comes from the pen of the Swiss lawyer, Johann Caspar Bluntschli (1808-1881), Professor of Political Science at the University of Heidelberg, an accomplished publicist in civil and public law, a moderate-liberal politician and an active Protestant. He had suggested this language to Rolin a year earlier, having also

⁵⁰ For some of the story behind the *Revue* and the biography of Rolin, cf. the obituaries and personal notes collected in *Revue de droit international et de législation comparée (RDI)*, 2/IV (1903), pp. 88-122.

⁵¹ Gustave Rolin-Jaequemyns, 'De l'étude de droit international et de la législation comparée', *RDI*, 1 (1869), p. 225.

⁵² *Ibid.*, p. 226.

used it in a 1867 book⁵³ that had taken the form of a prepared codification because, Bluntschli explains in his memoirs, he had not wished to report merely the contents of existing treaties or customs – this would have been unnecessary (as many books already did this) but also counterproductive inasmuch as it would have frozen the law's development.⁵⁴

Through Bluntschli, the idea of a scientific institute acting as an 'organ' of legal conscience can be traced to the German historical school of law, associated with Friedrich Carl von Savigny (1779-1861). Savigny had argued that 'In dem gemeinsamen Bewusstsein des Volkes lebt das positive Recht ...'⁵⁵ Law was connected to the *Volksgeist* like language,⁵⁶ not as abstract rules but as living institutions. This did not contradict the possibility of a general human law, however:

Was in dem einzelnen Volk wirkt, ist nur der allgemeine Menscheng Geist, der sich in ihm auf individuelle Weise offenbart.⁵⁷

But even if law has an organic relation to the conscience of the people, it is not whatever uneducated whim by the masses. Savigny was a conservative, not a revolutionary. It was the task of the jurist to bring the *völkisch* law into the surface. Lawyers were the organ of the people's conscience.⁵⁸ Now, Bluntschli had been a pupil and an admirer of Savigny. And when Rolin suggested the establishment of a collective body of international lawyers he, too, expressly referred to Savigny.⁵⁹

So when Westlake said that international law was culturally limited to Europe and that it was up to European conscience how it dealt with others, lawyers were not disarmed. They were to examine their own liberal sentiments and from these to articulate the forms of behaviour that Europe should follow in its relations with 'the Orient'. Bluntschli, the theorist of the group, argued that though international law was a European heritage its basis lay in human nature. It was *allgemeinmenschlich*, on its way from a primitive stage to a Kantian *Weltbürgerrecht*. Indeed, it already consecrated general human rights, applicable

⁵³ *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (Nordlingen: Beck, 1867).

⁵⁴ Cited in Dietrich Schindler, *Jean-Gaspard Bluntschli*, in Institut de droit international, *Livre du centenaire* (Bale: S. Karger, 1973), p. 35.

⁵⁵ Friedrich Karl von Savigny, *System des heutigen römischen Rechts*, Band 1 (Berlin: Veit und Comp, 1840), p. 14.

⁵⁶ *Ibid.*, pp. 15-16

⁵⁷ *Ibid.*, p. 21.

⁵⁸ *Ibid.*, p. 45.

⁵⁹ Gustave Rolin-Jaequemyns, 'De la nécessité d'organiser une institution scientifique permanente pour favoriser l'étude et le progrès du droit international', *RDI*, V (1873), p. 474.

irrespectively of formal state boundaries. The prohibition of slavery, for instance, was a remarkable reflection of the development of the legal conscience of the civilized world.⁶⁰

The new generation lawyers insisted that the work of 'civilization' required direct rule and effective sovereignty for the European colonizer. Laissez-faire had shown its negative effects both as the outcome of domestic industrialism and through disappointments in the colonies – such as the Indian mutiny of 1857. The lawyers were thus critical of the dilution of the legal meaning of 'protectorate'. In 1889, Rolin observed that colonization by chartering companies to deal with territorial administration failed to distinguish between ownership and *imperium* and to guarantee the humanitarian treatment of the populations – of this, the Abushiri rebellion in German East Africa should have taught a lesson: direct rule was infinitely better.⁶¹ Therefore, too, conclusion of protectorate treaties with 'ignorant Chiefs' was pure arbitrariness.⁶² If it were to be annexation, let us call it that and insist on the duties of the administrator in regard to the protection of all the populations residing in that territory.

The members of the Institut worried about the formulation of article 35 of the Berlin Act. The German Professor M. Martiz prepared a draft declaration making it clear that both occupation and protectorate ('occupation à titre de protectorat') should lead to formal rule.⁶³ There were to be clear conditions for effective possession. Obligations in regard to the protection of acquired rights and protection and education of the natives were to be identical. Another proposal by the French diplomat Edouard Engelhardt differed in details but also put occupation and protectorate at the same level with regard to protective duties. Neither proposal was accepted, however. Members were unwilling to limit the flexibility that was provided to European powers by the system of Article 35.

The new generation lawyers no longer relied on natural law as Klüber and von Martens had done, but on sovereignty and civilized conscience. This meant that native sovereignty was not to be excluded if it could be proved to share that civilization: The question was to what extent the Oriental nations were similar to the Europeans:

⁶⁰ Bluntschli, *op. cit.*, pp. 58-61, 67, 21-23.

⁶¹ Gustave Rolin-Jaequemyns, *L'année 1888 au point de vue de la paix et du droit international*, XXI *RDI* 1889, p. 192. Nonetheless, he presumes that '... si mauvaise que puisse être l'administration d'une compagnie de marchands européens, elle est toujours meilleure que celle d'un sultan.', *Ibid.* Cf. also *Ibid.*, pp. 193-6.

⁶² Cf. also Ernest Nys, *Le droit international*, Tôme II (Bruxelles: A. Castaigne, 1912), pp. 111-116.

⁶³ Rapport de M. Martiz, *Annuaire de l'Institut de droit international* (Bruxelles: Impr. Lesigne, 1885-1891) (édition abrogée), p. 429.

Tout se réduit donc, au point de vue de droit international, à apprécier, si un état, par son organisation, par ses lois, par ses moeurs, presente les conditions nécessaires pour être admis sur le pied de légalité dans la communauté générale de droit international.⁶⁴

In 1875, the *institut* commenced a study on the possibility to apply European international law 'in the Orient'. A questionnaire was sent out with the purpose of finding out whether the beliefs of Oriental and Christian states as regards the position of foreigners were sufficiently similar to admit the oriental 'dans la communauté générale du droit international'. It turned out that the question could not be answered in general terms. A distinction was to be made by reference to the degree of civilization of the country concerned. While some Orientals were 'des pirates et même des cannibales', other non-European communities such as Turkey, Siam, China and Japan had long and stable relations with the West.⁶⁵ The project was reformulated so as to focus on what reforms were needed in the judicial institutions of these developed Oriental nations so as to give up consular jurisdiction and other extraterritorial preferences. It was continued by special studies on individual nations⁶⁶ – with not a few lawyers arguing in favour of abolishing consular jurisdiction in Japan from early 1890's onwards.⁶⁷

Sovereignty, then, was one technique whereby 'Oriental' otherness could be dealt with. The formal administrative structures of the Western polity would do the work of 'civilization' whether in the hands of the Western colonial state or in the hands of the indigenous state, organized through the Western model. The important thing was administrative control: the 'law of the jungle' either as practiced by Western adventurers and companies or by the natives themselves was to be abolished. Decolonization brought this process to a conclusion.

Yet many others – including Rolin – felt that the best way to deal with non-civilized countries was to take them under an international trusteeship. The ideology of this argument was most clearly expressed by a German-Swiss member of the *institut*, Joseph Hornung, in a series of five articles in Rolin's journal on the relations between civilized and barbarian nations. Hornung condemned European behaviour against the indigenous in Africa and elsewhere.⁶⁸ The barbarian is not such because he is bad: 'Ceux qui les

⁶⁴ Paternostro, 'La revision des traités avec le Japon au point de vue du droit international', *RDI*, XVIII (1891), p. 7.

⁶⁵ Sir Travers Twiss, *Rapport*, *Annuaire de l'Institut de droit international* (Bruxelles: Impr. Lesigne, 1879), p. 301.

⁶⁶ *Ibid.*, p. 311.

⁶⁷ Cf. e.g. Paternostro, *loc. cit.*, pp. 10, 177-182.

⁶⁸ Joseph Hornung, 'Civilisés et barbares', *RDI*, XVII (1885), pp. 552-3.

connaissent bien disent qu'avec de bons traitements, on en obtient beaucoup'.⁶⁹
The barbarians are children:

Ils sont des enfants, je le veux bien, mais alors, traitons-les comme on traite les enfants, avec douceur et à cherchant à les persuader ... Nous admettons l'hégémonie et la tutelle des forts mas dans l'intérêt des faibles et en vue de leur pleine émancipation dans l'avenir.⁷⁰

The civilized must provide an example! The West had intervened in favour of oppressed Christians.⁷¹ Hornung observed that the law's secular basis required that intervention be now applied everywhere. It must become collective and organized. A Kantian *Völkerstaat* must be created, 'dirigé, dans l'intérêt commun, par les nations les plus éclairés et les plus liberales'.⁷² Such world state would not be based on the independence of local communities – in fact, the urge to independence is a primitive drive. What must be recognized is the existence of common interests.⁷³ At the highest level, the law becomes individualistic, cosmopolitan.⁷⁴ The rudiments of existing community – the provision of justice to aliens, policing the seas, abolishing slavery and slave trade – must be generalized into a world federation.

Hornung's views were extreme but although other lawyers avoided using his language, I do not think they disagreed. Agreement with those views would not have meant a change in substantive policies. The new generation's enthusiasm about the Berlin Conference reflects Hornung's views. Sir Travers Twiss, himself a member of the British delegation, compared it to the Vienna Congress of 1815. The free trade regime will '... prépare la civilisation des populations qui occupent un territoire plus grand, peut-être que l'Europe entière.'⁷⁵

Institute members credited the very idea of the Berlin Conference to a proposal by Gustave Moynier, one of the 11 founding members of the Institute who had in 1878 drawn attention to Stanley's explorations and suggested that the regime of free navigation in the Congo be taken up in order to create an international commission after the example of the Danube. An analogous proposal was made by the Belgian economist and member of the institut, Professor Laveleye in

⁶⁹ Ibid., p. 559.

⁷⁰ Ibid. *RDI*, XVIII (1886), pp. 188, 189.

⁷¹ Ibid. *RDI*, XVII (1885), p. 14.

⁷² Ibid., pp. 542-4.

⁷³ Ibid., pp. 448-9. And in fact independence is a primitive urge, the more valued by the community the more primitive it is.

⁷⁴ Ibid., p. 456.

⁷⁵ 'Le Congrès de Vienne at la Conférence de Berlin', *RDI*, XVII (1885), p. 216.

1883.⁷⁶ Moynier followed up his suggestion in 1883, observing that with Stanley's more recent discoveries, an uncontrolled scramble was beginning and action needed to be taken soon.⁷⁷ In September 1883 the institut appealed to the powers for the realization of freedom of navigation in the Congo in the interests of the powers as well as the natives.⁷⁸

After the Conference had ended, the institute expressed its gratitude for King Leopold for having assumed the humanitarian obligation of administering the Congo.⁷⁹ Two Belgian members of the institut – Rolin and Laveleye – in fact redefined the Congo Free State as an international protective regime. The Baltic-Russian member, De Martens who doubted the colonial venture generally thanked the King in gracious terms:

Il est hors de doute que, grace à la générosité et au génie politique du Roi Léopold, l'Etat du Congo sera doté d'un régime entièrement conform aux exigences de la culture européenne.⁸⁰

Internationalisation was the other strategy the new generation proposed as an instrument for the work of civilization. Their views, however, remained ambivalent and often turned into apologies for the imperialism of their own homeland. Reading through the first three decades of Rolin's *Revue*, one gets no sense that colonization would have been viewed as a common European venture. Although everybody spoke in terms of a homogenous 'Europe' acting upon an equally homogenous 'Orient', in fact everyone's conception of the *conscience juridique du monde civilisé* came to support the controversial colonial policy of the speaker's homeland.

Heinrich Geffcken, a distinguished member of the *institut* defended German colonialism in Africa quoting Leroy-Beaulieu's statement that 'la nation qui colonise le plus est le première, et que, si elle ne l'est pas aujourd'hui, elle le sera demain'.⁸¹ None of the Belgian jurists in the institut were critical of King Leopold's administration in the Congo and their writings occasionally

⁷⁶ 'La neutralisation du Congo', *RDI*, XV (1883), p. 254.

⁷⁷ Gustave Moynier, *La question du Congo devant l'Institut de droit international* (1883), p. 9.

⁷⁸ *Navigation sur le fleuve Congo*, Résolution du 17 septembre 1883, Annuaire de l'Institut de droit international (Bruxelles: Impr. Lesigne, 1875-82) (Édition abrogée), p. 1198. Moynier's proposal encountered opposition as well – particularly in view of its 'unrealistic' nature, *Ibid.*, pp. 1178-81.

⁷⁹ Déclaration, Bruxelles 1885.

⁸⁰ F. de Martens, 'La Conférence du Congo à Berlin', *RDI*, XVIII (1886), p. 268.

⁸¹ Heinrich Geffcken, 'L'Allemagne et la question coloniale', *RDI*, XVII (1885), p. 131. He also defends the way German colonizers put indigenous cultivation under European supervision – this was both morally and commercially defensible.

degenerated into propaganda.⁸² Particularly striking is the fact how, as the abuses in the administration of the 'Free State' had become a matter of general international concern, Belgian international lawyers such as Ernest Nys or Baron Descamps rallied to the vocal defence of their King.⁸³ De Martens defended the Russian penetration into the Caucasus. Catellani defended the Italian reading of the Treaty of Ucciali with Abyssinia's Menelik in the controversy about whether Article XVII of the Treaty created an Italian protectorate over the country.⁸⁴ Torres Campos saw Spain as the great civilizing force in the 'dark continent' and foresaw a development of four great linguistic empires (English, Chinese, Russian and Spanish) in which Spain will be 'the great representative of the Latin family'.⁸⁵ Castonnet des Fosses argued that the French annexation of Madagascar by an act of Parliament in 1884 only affirmed a state of law that had existed since France first colonized the island in the 17th century: French right was based on effective possession and consent of the population (the Hovas having been incited for rebellion by the British).⁸⁶ Nor does Westlake seem to have taken a position in his academic writings or his attitudes at the *institut* that would have gone against the British interests. His arguments on the conflict between England and Portugal or England and the Transvaal Boers faithfully ratify the British position.⁸⁷

The generation of 1873 used the two techniques of sovereignty and internationalization as instruments for the imposition of European 'civilization' in Africa and elsewhere: sometimes it was best to insist on colonial sovereignty; sometimes on international administration. Yet, the techniques were ambivalent: 'sovereignty' was sometimes explained as international protection. Catellani, for instance, redefined the colonial protectorate as an international protectorate, emphasizing in this way Lugard's dual mandate for the colonizing power.⁸⁸ On

⁸² Cf. M.-F. Cattier, 'L'État indépendant du Congo et les indigènes', *RDI*, XXVII (1895), pp. 263-281. He interprets the Berlin Conference as an essentially humanitarian undertaking in paternalistic terms: 'le conférence a assumé vis-vis d'eux le rôle d'un tuteur officieux. Elle les a considérés comme des mineurs incapables de se protéger et elle a adopté des règles de nature à les défendre contre toute oppression'. *Ibid.*, p. 263.

⁸³ Cf. Ernest Nys, 'L'État indépendant du Congo et le droit international', *RDI*, 2/V (1903), pp. 333-379; le chevalier Descamps, 'Le différend anglo-congolais', *RDI*, 2/VI (1904), pp. 233-259.

⁸⁴ M.E. Catellani, 'Les possessions africaines et le droit colonial de l'Italie', *RDI* XXVII (1895), pp. 423-425.

⁸⁵ M. Torres Campos, 'L'Espagne en Afrique', *RDI*, XXIV (1892), pp. 445, 472-2.

⁸⁶ H. Cantonnet des Fosses, 'Les droits de la France sur Madagascar', *RDI*, XVII (1885), p. 442. The French arguments are challenged in E.-L. Catellani, 'Les droits de la France sur Madagascar et le dernier traité de paix', *RDI*, XVIII (1886), pp. 151-8.

⁸⁷ John Westlake, *loc. cit.* and 'L'Angleterre et la République Sud-Africaine', *RDI*, XXVIII (1896), pp. 268-300.

⁸⁸ Catellani, *loc. cit.*, p. 421.

the other hand, international regimes easily came to look like exercises of monopolies by the administering power – Leopold’s Congo as the prime example.

Which technique was chosen seems, in retrospect, much less significant than how, in fact, the administrator behaved. From this perspective, perhaps, the new generation lawyers’ emphasis on ‘conscience’ was not entirely misplaced – although they looked for it in the wrong place, in the mind of the European liberal. However, the language of ‘conscience’ – as we have learned from Marx and Freud – is deeply deceptive. For many a lawyer, it hid racist prejudice only thinly. Writing on consular jurisdiction in the Orient, some doubted whether legislative changes would be sufficient to abolish consular jurisdiction. It was not the laws but how they were applied. And of course, the Turk was not to be trusted.⁸⁹

One should be wary about giving lessons. So I state my conclusions in the form of theses: First, empire comes under many disguises. While we often associate it with formal colonies, in fact the more efficient form of hegemony may be invisible, or indirect; the use of freedom to create constraint. In such case, anti-imperialism consists in a struggle for formalism: the establishment of formal administrative structures, police and government. Second thesis: formal sovereignty can undoubtedly be imperialist – and this is the lesson of the colonial era which in retrospect seems merely a short interval between structures of informal international domination. Third thesis: internationalism is the Dr Jekyll for the Mr Hyde of imperialism. The Congo Free State, the mandates in the inter-war era and the UN trusteeship system, just like a globalized trading system under a World Trade Organization or a Multilateral Agreement on Investment may be used for freedom and for constraint. Fourth thesis, administrative structures – whether those of sovereignty or internationalization – only marginally determine the policies for which they are used. We recognize their character only by reference to substantive ideals about the political good we wish to pursue. The lawyers of 1873 felt that history itself was embedded in a normative purpose that expressed itself in gradually increasing degrees of what they thought of as ‘civilization’. It was reflected in the juridical consciousness of the legal elite. Today international lawyers may lack words to express what we expect from administrative structures and the persons that occupy them. This is

⁸⁹ M. Kebedgy, ‘La juridiction consulaire et les affaires mixtes en Orient’, *RDI* XXVII (1895), p. 326.

not, however, proof against someone, a hundred years from now, concluding that the marginalization of public law vis-à-vis informal transnational governance concluded modernity's attempt to determine its own history.

Ralph Zacklin*

XIII. BEYOND KOSOVO: THE UNITED NATIONS AND HUMANITARIAN INTERVENTION

The Josephine Onoh Memorial Lecture 2000

PROLOGUE

A deadly century has ended. It was in the words of the historian Eric Hobsbawm 'without doubt the most murderous century of which we have record by the scale, frequency and length of the warfare which filled it'.¹ In the last six months of the last century alone ethnic conflicts in Kosovo, East Timor and Chechnya were added to numerous on-going international conflicts in the Horn of Africa, the Great Lakes region and Kashmir, while civil wars in Afghanistan, Colombia, Sudan, Sri Lanka, Angola and the Sudan showed no signs of abating. The enumeration is not exhaustive

What is particularly significant is the nature of these wars. Wars are increasingly fought within states, not between them. Civilians rather than soldiers are the victims and among the civilians the most vulnerable are the children, the poor and the elderly. As Mary Kaldor has pointed out in her recent book *New and Old Wars*,² the ratio of military to civilian casualties at the beginning of the 20th century was 8:1; by the time of the wars of its last decade, the ratio had been almost exactly reversed.

* The views contained herein reflect the personal views of the author and do not necessarily reflect the views of the United Nations of which the author is an Assistant Secretary-General.

¹ Eric J Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991* (London: Michael Joseph 1994).

² Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Cambridge, England: Polity Press, 1999).

In the *Twentieth Century*, Professor J.M. Roberts' single volume history of the world from 1901 to 2000,³ the historian tells a story that most thinking people would like to forget and that those of us who are professionally engaged in the practice of international law and international relations must regard with dismay.

If the century has seen unimaginable and unparalleled progress in science, technology and medicine, this very progress seems paradoxically to have created more not less conflict. The laws of human nature appear to be infinitely more difficult to tame than the laws of science.

For the United Nations, the second attempt in the twentieth century to create an international organization of universal competence and authority to maintain international peace and security, the last decade of the century proved to be tumultuous.

Beginning with the end of the cold war and the successful reversal of Iraq's aggression against Kuwait, the fulfillment of the Organization's role in maintaining peace and security through an engaged and, finally, relatively cohesive Security Council appeared to be realizable. A New World Order was proclaimed.

Then, in swift succession, came Somalia, Bosnia and Rwanda. The Security Council's credibility and by extension that of the United Nations as a whole was grievously damaged. In Somalia, what began as a humanitarian mission ended in ignominious withdrawal after a succession of failed operations; the casualties sustained by the United States' and other contingents blighted peacekeeping and peace-enforcement in Bosnia and led directly to the inability to deal with the single worst crime of the second half of the century, the genocide in Rwanda. The United Nations will live with the consequences of these failures for a very long time, even as it strives to learn from them.

By the end of the last decade, with UN credibility hugely diminished, if not entirely destroyed, the Security Council was unable to find a working consensus on Kosovo. A NATO-led coalition undertook an enforcement action without the prior authorization of the Security Council or in self-defence, in violation of UN Charter principles including the prohibition on the use of force, thereby plunging the Organization into a political, legal, institutional and moral crisis. The decade ended with the utility and the future of the UN very much in doubt.

³ John M. Roberts, *Twentieth Century: The History of the World, 1901 to 2000* (New York: Viking, 1999).

THE CHALLENGE OF KOSOVO

NATO's actions in regard to Kosovo presented a serious threat to the United Nations and the conception that had prevailed since 1945 that as the only universal political organization it represented the international community of states and that the principles contained in its Charter formed the cornerstone of international relations. Quite suddenly, fundamental principles such as the respect for sovereignty, territorial integrity and the prohibition on use of force except in self-defence or when authorized by the Security Council were cast into doubt. The very fabric of the organized international society as we knew it appeared to have been dissolved.

It was particularly worrisome that the decision to proceed to the use of force without UN authorization was so overt – more so than the closest precedent at the end of the Gulf War when the coalition intervened in Northern and Southern Iraq on the basis of Security Council resolution 688 – and that among the countries most politically and militarily engaged were those who historically have most consistently upheld the principles of the Charter and the importance of the authority of the UN as the foundation of the present system of peace and security.

The action in Kosovo caused considerable unease among Member States but also among senior Secretariat officials. The unease deepened as the bombing was stepped up, as civilian installations such as the bridges across the Danube were destroyed, as innocent civilians were killed and injured and as questions began to surface as to the means and method of warfare and the lack of proportionality in the use of force. It was impossible for the Secretary-General to remain silent. The difficulty was that, on the one hand, he could do no less than defend the Charter principles and its institutional framework while at the same time recognizing that massive and systematic violations of human rights could not be permitted to unfold without an appropriate response from the United Nations. With its credibility already severely damaged in Somalia, Bosnia and especially in Rwanda, the United Nations could not afford to be seen as indifferent to the human suffering in Kosovo. In brief press statements at the beginning of the hostilities, the Secretary-General deplored that the situation in Kosovo had not been resolved by peaceful means and that the Security Council had not been able to fulfill its role. However, he also made it clear that, in his view, there were circumstances in which unauthorized force could legitimately be used in the defence of peace and to prevent massive and systematic violations of human rights. As events in Kosovo unfolded, the need for an authoritative and more comprehensive statement on humanitarian intervention became necessary. The occasion for such an address presented itself in The Hague on 18 May 1999 during the centennial commemoration of the first International Peace Conference.

THE SECRETARY-GENERAL'S ADDRESS, THE HAGUE, 18 MAY 1999⁴

The Secretary-General began his address by noting that the meeting was taking place at a time of war, a reference to the then on-going armed intervention regarding Kosovo.

He stated that a renewal of the effectiveness and relevance of the Security Council was a cornerstone in protecting and preserving the legal regime of the Charter. It was, therefore, a cause for concern that the Council had been disregarded on such matters as mandatory sanctions, cooperation in disarmament and non-proliferation and implementation of decisions of the Yugoslav and Rwanda war crimes tribunals. The case of Kosovo, he said, 'has cast into sharp relief the fact that Member States and regional organizations sometimes take enforcement action without Security Council authorization'. Such marginalization of the Council was regrettable. The inability of the Security Council in the case of Kosovo to unify two equally compelling interests – its primary responsibility for the maintenance of peace and the legitimacy of using force in pursuit of peace and the defence of human rights – was a source of great danger. It was clear that 'Unless the Security Council is restored to its pre-eminent position as the sole source of legitimacy on the use of force, we are on a dangerous path to anarchy'.

The core challenge of the Security Council and the United Nations was 'to unite behind the principle that massive and systematic violations of human rights conducted against an entire people cannot be allowed to stand'. The choice should not be between Council unity and inaction in the face of genocide as in Rwanda and Council division and regional action as in Kosovo.

THE SECRETARY-GENERAL'S ADDRESS TO THE GENERAL ASSEMBLY ON
20 SEPTEMBER 1999⁵

Between the Hague address and the Secretary-General's address at the opening of the 54th session of the General Assembly on 20 September 1999, two significant events occurred in relation to the ongoing debate on sovereignty vs. humanitarian intervention. The first was that the use of force against Yugoslavia in relation to Kosovo was brought to an end and the situation in Kosovo was brought back into the fold of the Security Council which authorized a far-reaching military and civilian operation in Kosovo (1244). The second was that

⁴ The full text of this address was issued as a Press Release SG/SM/6997 of 18 May 1999. The speech has also been reproduced in a pamphlet published by the Department of Public Information entitled 'The Question of Intervention'. Sales No. E.00.I.2.

⁵ Official Records of the General Assembly, Doc. A/54/PV.4 of 20 September 1999.

violence erupted in East Timor in the immediate aftermath of a popular consultation favouring independence from Indonesia which resulted in large-scale violations of human rights, a situation which yet again confronted the United Nations with the problem of how far it could or should go in intervening militarily in the eventuality that the state exercising sovereignty rejected such intervention. Unlike Kosovo, however, the United Nations in this case was able to act expeditiously, first in authorizing a military intervention under Chapter VII which obtained Indonesia's acquiescence and subsequently in authorizing a comprehensive military and civilian operation, with very broad powers of governance, to act as an interim civilian administration pending full independence for East Timor. The extent to which the lessons learned in Kosovo influenced the decision-making on East Timor is unclear. What is certainly true is that the Secretary-General was determined in this situation to exercise all the powers at his disposal in order to ensure that action to halt the human rights violations be immediate and that the framework of the United Nations be respected.

In the light of these dramatic events, the Secretary-General's speech to the General Assembly took on an added significance. Placing the problem of what he termed 'the prospects for human security and intervention' in the wider context of the need to adapt the United Nations to a transforming world – one transformed by global geo-political, economic, technological and environmental changes – in which new actors, new responsibilities and new possibilities for peace and progress were emerging – the Secretary-General put forward two propositions:

Firstly, that state sovereignty which for all of the 20th century had been regarded as the fundamental unit, the very foundation of organized international society as enshrined in the United Nations Charter, was in its most basic sense being re-defined by the forces of globalization and international cooperation, that 'The State is now widely understood to be the servant of the people, and not vice versa' and secondly, that individual sovereignty – the human rights and fundamental freedoms of each and every individual as enshrined in the United Nations Charter – has been enhanced by a renewed consciousness of the right of every individual to control his or her destiny.

These parallel developments demanded a willingness to think anew about how the UN responds to political, human rights and humanitarian crises, the means employed and willingness to act. While genocide in Rwanda defined for our generation the consequences of inaction the conflict in Kosovo prompted important questions about the consequences of action in the absence of complete unity on the part of the international community. Kosovo demonstrated the

dilemma of humanitarian intervention, the questionable legitimacy of an action taken without United Nations authorization on the one hand and the imperative of halting gross violation of human rights on the other. It had been the inability of the international community (United Nations) in Kosovo to reconcile these two competing interests that had resulted in the tragedy in Kosovo.

Some commentators and scholars had attacked the Charter and its system as being outmoded or irrelevant. The Secretary-General took issue with this view. The Charter's principles still defined the aspirations of peoples everywhere. 'Nothing in the Charter preclud[ed] a recognition that there are rights beyond borders. The source of the dilemma lay not in deficiencies in the Charter but in its application – more precisely applying its principles in an era when sovereignty and human rights had taken on new meanings in relation to one another'. The Secretary-General concluded by affirming that:

Just as we have learned that the world cannot stand aside when gross and systematic violations of human rights are taking place, so we have also learned that intervention must be based on legitimate and universal principles if it is to enjoy the sustained support of the world's peoples. This developing international norm in favour of intervention ... will no doubt continue to pose profound challenges to the international community. Any such evolution in our understanding of State sovereignty and individual sovereignty will, in some quarters, be met with distrust scepticism, even hostility. But it is an evolution that we should welcome.

The Secretary-General's speech achieved its principal goal which was to encourage an internal and public debate on the issue of humanitarian intervention. The debate, however, also revealed a substantial polarization of views largely along north-south lines which does not augur well for the early evolution of a norm of international law.

While the events of the last 12 months in Kosovo, East Timor and Chechnya have focused renewed attention on the role of the United Nations and humanitarian intervention and the Secretary-General's address was a timely, even bold attempt on his part to frame the debate and provoke new thinking about a doctrine of humanitarian intervention which may or may not be evolving normatively, thus far very little clarity has emerged. The debate has predictably given rise to much political posturing but it has also served to highlight a number of underlying issues such as the imperative need for reform of the Security Council which lies at the heart of the disenchantment of the great majority of member states. It is therefore, opportune to take a closer look at the question of humanitarian intervention and to analyze it from a legal as distinct from a purely

political point of view. What exactly does humanitarian intervention entail, what might its elements be and lastly whether it is possible to envisage the emergence of a norm of humanitarian intervention, that is to say a binding rule of international law, either through the development of a customary rule or through a codified international instrument.

DEFINITION OF HUMANITARIAN INTERVENTION

Historically, humanitarian intervention has had several meanings or has come to encompass different concepts, not all of which have the same legal significance. It is important, therefore, at the outset of any discussion of an evolving norm of humanitarian intervention to define its specific meaning. It may be noted that the Secretary-General in his General Assembly speech quite deliberately placed his remarks within a broad definition of humanitarian intervention to include a wide spectrum of action from the most pacific to the most coercive, placing a good deal of emphasis on preventive diplomacy through the pacific dispute settlement mechanisms of Chapter VI of the Charter. There is little doubt today as to the legal standing of these consensual forms of intervention which trace their origins to the Hague Peace Conferences of 1899 and 1907 and which have acquired a normative value which is largely uncontested.

However, the recent debates on intervention whether in the General Assembly or in the public at large have focused almost exclusively on coercive humanitarian intervention and since the use of force is permissible under the Charter in certain well-defined circumstances, it is situations such as Kosovo, East Timor or Chechnya, which lie at the heart of the matter. That is to say whether in the absence of a specific authorization of the Security Council, it may be legitimate for a state or group of states to intervene in the territory of a third state, including through the threat or use of force, to halt massive and systematic violations of human rights within that state. Humanitarian intervention in this sense does not have the same meaning as other forms of intervention with which it is sometimes confused such as the protection of foreign nationals (e.g. Grenada, Panama) or humanitarian assistance offered through the international NGO community. These forms of intervention pose somewhat different legal problems and have attained a relative degree of recognition under international law.

A good starting point in the legal analysis of humanitarian intervention as understood in the narrow sense outlined here, is therefore, the UN Charter itself in order to see to what extent its principles and mechanisms might permit such humanitarian intervention. From the perspective of the UN Charter and

international law in general, the development of a norm of humanitarian intervention would have to overcome two major obstacles of principle: the prohibition on the use of force and the principle of non-intervention in the internal affairs of states.

NON-USE OF FORCE: PRINCIPLES AND MECHANISMS

The fundamental rule on the basis of which any examination of humanitarian intervention must proceed is Article 2(4) of the Charter according to which all Members of the United Nations ‘shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations’.

It is generally understood that the prohibition on the use of force in international relations contained in this article was intended at the time of its adoption and is still regarded today to be comprehensive in nature. Indeed it is this provision of the Charter which marked the historic evolution of organized international relations in the twentieth century, prior to which no general prohibition on the use of force existed.

The Hague Peace Conferences – the Centenary of which ironically enough took place during the Kosovo intervention – are considered as the beginning of the process to prohibit the use of force in international relations in international law. The 1907 Hague Convention however did not prohibit the use of force it merely formalized resort to it. The Covenant of the League of Nations likewise failed to establish a general prohibition of war, a step that was not achieved until the Kellog-Briand Pact in 1928. Although the Kellog-Briand Pact soon came to be regarded as part of customary international law, it too had its shortcomings. It did not contain a general prohibition on the use of force (as distinct from war) and it was not linked to a system of sanctions.

Article 2(4) of the UN Charter therefore represented a considerable advancement in the law in the sense that the use of force is prohibited in general as is the threat of force.

The Charter provides for only two exceptions to this rule: the first is the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations (Article 51); the second exception finds its source in Chapter VII of the Charter which is the foundation of the collective security system established in San Francisco, according to which the Security Council, if it determines that a threat to the peace, breach of the peace, or act of

aggression has occurred, may take (or authorize) military enforcement action involving the armed forces of the Member States.

For the great majority of international lawyers today, any threat or use of force that is neither justified as self-defence against an armed attack nor taken or authorized by the Security Council is a violation of the Charter and is therefore contrary to international law.

Viewed in this perspective, it is clear that what is illegitimate unilaterally may be legitimate if it is the subject of a collective decision of the United Nations; that coercive humanitarian intervention is not excluded by the Charter provided that the Security Council determines that massive and systematic violations of human rights occurring within a state constitute a threat to the peace and then calls for or authorizes an enforcement action (i.e. a collective United Nations action or an authorized coalition of the willing).

As correct as this conclusion may be from the stand point of *lex lata*, the question arises whether this view of the law is morally acceptable today. Can we really accept that a collective or authorized action to halt massive and systematic violations of human rights is entirely dependent upon the political ability of the Security Council to make a determination that such violations constitute a threat to the peace – a determination which at a minimum requires the affirmation or acquiescence of all five permanent members of the Security Council. The choice, as the Secretary-General has put it, must surely be more than unity and inaction as in Rwanda, or division and unauthorized action as in Kosovo.

THE PRINCIPLE OF NON-INTERVENTION

The second major obstacle to be overcome is the principle of non-intervention in the internal affairs of states: a customary principle which in the eyes of the overwhelming majority of international lawyers has the character of *jus cogens*, that is to say it is a peremptory norm from which no derogation is permissible. This principle is reflected in numerous international instruments adopted by the United Nations General Assembly, including the Declaration on Friendly Relations,⁶ and has been affirmed on several occasions by the International Court of Justice most notably in the *Corfu Channel* case⁷ and in the *Nicaragua* case.⁸ In the context of the debate regarding humanitarian intervention the *Corfu Channel* case is particularly instructive since the demining operation carried out by the Royal Navy in the Corfu Channel which gave rise to the dispute could be

⁶ Resolution 2625 (XXV of 24 October 1970).

⁷ [1979] *I.C.J. Reports* 35.

⁸ [1986] *I.C.J. Reports* para. 202 at p. 106 and para. 207 at p. 108.

characterized as having a humanitarian objective. Is it possible then to envisage a deviation from the principle of non-intervention on the grounds of a competing norm of humanitarian intervention?

Today, it is frequently observed that human rights are no longer the exclusive concern of the sovereign state, that they have become a core concern of the international community and that obligations to respect such rights are *erga omnes*. To some degree this has always been the case – who now remembers the attempts to impose sanctions on the Spanish Fascist regime of Franco, or the use of comprehensive mandatory sanctions to end the racist policies in Rhodesia and South Africa.

The trend has become far more pronounced in the last decade which has even witnessed the remarkable institutional development of the establishment of two ad hoc war crimes tribunals by the Security Council acting under Chapter VII.

Whether the trend might be said to constitute a deviation from or an exception to the principle of non-intervention is a question which must be approached with great caution for the reasons advanced by the ICJ, i.e. the risk of abuse.

The principles of non-use of force and non-intervention represent serious obstacles to the development of a norm of humanitarian intervention, although such principles are not immutable and their meaning may change over time through their interpretation in the practice of states. In order to overcome these obstacles, an emerging norm of humanitarian intervention would have to accommodate these principles or, as the case may be, be able to demonstrate that state practice has achieved what amounts to a *de facto* amendment of the controlling principle.

THE QUESTION OF AN EMERGING NORM OF HUMANITARIAN INTERVENTION

In his statements on various occasions over the last twelve months, the Secretary-General has clearly and expressly aligned himself with those scholars and members of civil society who for some time now have advocated what has been perceived as the embryo of a rule of humanitarian intervention in international law. In April 1999 in an address to the United Nations Human Rights Commission, he stated that:

Emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty.

As we have seen, he returned to this vision in his address to the General Assembly. However, in this last address he acknowledged that the evolution in our understanding of state sovereignty and what was termed individual

sovereignty would almost certainly be met with distrust, scepticism and hostility in some quarters. There is no doubting the commitment of the Secretary-General to the promotion of human rights which he has made a cornerstone of his administration. His advocacy of humanitarian intervention is both courageous and far-sighted. But as his address to the General Assembly shows his idealism is tempered by realism. A norm of humanitarian intervention may be a desirable goal – what international lawyers would refer to as *lex ferenda* – but it is far from acquiring the character of a rule *lex lata*.

To those who are familiar with the formation of rules of international law through customary or conventional means, the notion of an emerging norm is a familiar one. There are numerous areas of international law where today's rules 'emerged' over time through a developing practice of states which achieved wide recognition either as customary principles or became codified in conventions. The development of the law of the sea, in particular in relation to such concepts as the continental shelf, the territorial sea and the exclusive economic zone, are examples of emerging norms having been developed through the practice of states.

The current state of the emerging norm of humanitarian intervention and the many difficulties which it poses may be gauged from the reactions of Member States to the Secretary-General's address to the General Assembly.

As was to be expected, the Secretary-General's address provoked a lively debate among Member States, 51 of whom took part.⁹ An analysis of the positions taken shows that the views of states can be grouped into three major tendencies: (i) the smallest group, represented by Germany and Sweden are strong advocates of immediate intervention in situations of grave human rights violations; (ii) a larger group, composed of states from the three regional groups of Africa, Asia and Latin America, expressed strong opposition to humanitarian intervention and defended *national sovereignty* as an unchallengeable principle; (iii) a third and by some margin the largest group aligned itself somewhere between the other two. Many of the states in this group while not opposed outright to humanitarian intervention nevertheless emphasized the need to provide clear and consistent criteria to ensure that the doctrine of humanitarian intervention is applied on an equitable basis. Taken overall, of the states which took an explicit position on the issue, some 32 were either against or negatively inclined while only 8 were generally supportive. Equally significant, and an indication of the perceptions underlying the positions, the polarization of those

⁹ For the analysis of this debate, I am indebted to an internal UN Secretariat paper prepared by a group of interns in the Policy Planning Unit of the Department of Political Affairs.

generally in favour and those generally against was strictly along north-south lines.

Importantly, among those overtly opposed or negatively inclined towards a doctrine of humanitarian intervention were both China and the Russian Federation two of the 5 permanent members of the Security Council.

While the views expressed by Member States in a general debate such as this may be regarded as essentially impressionistic, nevertheless, it is almost certainly a reasonably reliable guide as to current state thinking. Although not encouraging to those inclined towards the view of an evolving norm of humanitarian intervention some encouragement may be drawn from the fact that the largest group of states did not reject the idea of humanitarian intervention but expressed the need to build a political consensus in the General Assembly and the necessity of establishing clear and consistent criteria if such a doctrine were to be developed.

KOSOVO AS A CATALYST FOR CHANGE

The late Georg Schwarzenberger, professor of international law at University College, London and who was known for his so-called inductive approach to international law – a form of strict empiricism in which state practice as evidenced through the decisions of international courts and tribunals was elevated to a high degree – stated in his *Manual of International Law*¹⁰ that ‘the totality of the rules of international law can be explained as a constantly changing and dynamic interplay between the rules underlying the principles of sovereignty and those governing the other fundamental principles of international law’. Nowhere is this more apparent than in the interplay between the principles of sovereignty and the principles underlying the promotion and protection of fundamental human rights. Law – whether domestic or international – is by nature a conservative discipline and change usually comes about slowly. But there are crises or events of such magnitude that they produce tectonic changes not only in the political landscape but also in the legal landscape. Thus we can see how the two world wars wrought lasting changes on international law. The Charter of the United Nations was, of course, a product of the second World War and remains so to this day with its emphasis on state sovereignty. And yet, as the Secretary-General has frequently pointed out, the Charter was issued in the name of ‘the peoples’ not the governments of the United Nations and its aim is not only to maintain international peace and security but also ‘to reaffirm faith in fundamental human rights, in the dignity, and worth of the human person’.

¹⁰ (London: Stevens, 4th ed., 1960), p. 84.

Furthermore, the Charter has proved to be a flexible instrument, responsive to change more readily than its purely formal amendments would lead us to believe.

It is undeniable that as slow and painstaking as it may have been, there has been a steady evolution of the human rights principles of the Charter, first with the elaboration of the fundamental human rights instruments such as the Universal Declaration of Human Rights and the Covenants and subsequently through the various mechanisms for their implementation. Side by side with this normative and institutional development we have witnessed the rise and growth of civil society and what might be called humanitarian action at both the inter-governmental and non-governmental levels.

The question whether the Kosovo intervention will recede into history as a singular exception to the prevailing law or whether it will prove to be an event which acts as a catalyst for change resulting in a new norm of humanitarian intervention remains to be seen. Judging by the intensity of the debate which it has already provoked it may well come to be regarded in the future as such an event. The challenge for the international lawyer is to seize the opportunity created by the particular conjuncture of policy and practice which is represented in a general sense by the Kosovo conflict and to explore the possibilities for achieving that elusive common ground that could provide a basis on which the international community can develop a norm of humanitarian intervention without at the same time eroding the principles and purposes of the Charter. This is, to say the least, a daunting task but as the General Assembly debate has demonstrated there is a substantial consensus among states that the issues underlying the new dynamics in the relationship between sovereignty and human rights must be discussed. This is a starting point. While we are no doubt some way removed from a definitive framework of a normative doctrine of humanitarian intervention on the basis of the contemporary discussion, it is possible to outline some of the legal and institutional elements of such a doctrine which, if it is to become a rule of law must be clear, equitable, principled, and authoritative.

TOWARDS A NORM OF HUMANITARIAN INTERVENTION

The degree of hostility or suspicion with which the intervention in Kosovo was received in many countries, particularly among the non-aligned who perceived it as a form of neo-interventionism under humanitarian pretexts, underscores the necessity of agreeing on certain criteria for humanitarian intervention linked to the Charter's substantive and institutional framework. Nothing short of this is likely to overcome the deeply held view that, as presently conceived,

humanitarian intervention is an instrument of dubious legality, inequitable of implementation and a weakening of the foundations of organized international society.

A number of substantive and institutional criteria or pre-conditions have already been suggested by governments or by scholars or have emerged from the debate in the General Assembly.¹¹ It is around these elements that the eventual formation of a norm might develop.

(1) Primacy of Preventive Measures

Since the use of force in international relations must always be treated as an exceptional measure and is an extremely grave matter under any circumstances, every effort must be made to exhaust all possible peaceful means of resolving the humanitarian crisis. Primacy must therefore, be given to preventive measures including the greater use and development of early warning systems, preventive diplomacy, preventive deployment and preventive disarmament. As the Secretary-General has said, 'Even the costliest policy of prevention is far cheaper, in lives and in resources, than the least expensive use of armed force'. The primacy of resort to and the exhaustion of preventive measures must be made an integral part of any humanitarian intervention doctrine.

(2) A Demonstrated Inability or Unwillingness to Uphold the Law by the State Concerned

If the violations of human rights are the result of a breakdown in the organs of the state, it must be ascertained that the governmental authorities are not only incapable of ending these violations but at the same time have refused assistance from other states or international organizations. If on the other hand, the violations are in fact attributable to the government, it must be shown that the authorities concerned have consistently withheld their cooperation from the UN or other international organizations or have systematically refused to comply with appeals, recommendations or decisions of such organizations.

¹¹ One of the first and most notable scholars to outline the elements of an emerging customary rule was Antonio Cassese, then a Presiding Judge of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia (ICTY) and its President from 1993-1997, in an article entitled 'Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' in (1999) 10 *E.J.I.L.*, p. 23.

(3) The Primary Role and Responsibility of the Security Council Must Be Recognized

Under the Charter, the Security Council has the primary and exclusive authority to authorize the collective use of force. The inability of the Security Council to fulfill this primary function because of disagreement among the members or because one or more of the permanent members exercises its veto must be clearly established.

(4) The Violations of Human Rights Must Be Massive and Systematic

In order to give rise to intervention involving the threat or use of force, the violations must be massive and systematic such as genocide in Rwanda, large scale ethnic cleansing, as in Bosnia and Kosovo, and crimes against humanity as defined in the relevant international instruments or by the jurisprudence of the international criminal tribunals for the former Yugoslavia and Rwanda. The threat which is posed to civilian life must be overwhelming and immediate allowing of no alternative action.

(5) Action Must Be Collective or Collectively Legitimized

Humanitarian intervention must have the support or acquiescence of the international community at large. Such support may be demonstrated in a number of ways but obtaining the views and support of the overwhelming majority of states in an organ such as the General Assembly of the United Nations would be an indication of the necessary support.

(6) Limitations on the Use of Force

The use of force must be limited to the purpose of halting the violations and restoring respect for human rights. The intervention must be discontinued once this limited goal is achieved. It must not undermine the territorial integrity of the state concerned, it must be proportionate in the use of means and be conducted in accordance with international humanitarian law.

It should be noted that these criteria are not the product of any one group of states but represent a broad cross-section of positions advanced by states of all regional groupings.¹²

¹² The UK Government has espoused a set of ideas along similar lines in an effort to encourage the development of what it calls 'a set of pragmatic understandings on action in response to

The criteria, taken individually, reflect, for the most part, the existing Charter based law and practice: they re-affirm the basic principles of the Charter and the central goal of non-use of force by emphasizing the primacy of preventive measures and the primary role of the Security Council; the exceptional nature of humanitarian intervention is invoked by requiring that the violations of human rights which give rise to intervention must be massive and systematic; the limitations of intervention are strictly confined through the express reaffirmation of the principle of territorial integrity; and the exceptional use of force is subject to the rules governing proportionality and respect for international humanitarian law.

It will be readily appreciated that such criteria lend themselves more to a 'political' understanding on a case by case basis than to a fully grown normative outcome. This is an inevitable stage in the process. Given the highly political nature of the problem it is probably premature to think in terms of a norm of international law reflective of such a radical transformation of established principles and mechanisms. However, it is undeniable that an evolution is taking place and one which will have a transforming effect on international law and the international institutions which give effect to it. The law must evolve from the practice of states, it cannot create that practice but as lawyers we have a duty and an opportunity to point the way and offer a road-map to the desired destination.

humanitarian crises' which it believes could assist the Security Council to reach consensus when such crises occur.

LIST OF PRIZE WINNERS FROM JC ONOH MEMORIAL FUND

<i>Year</i>	<i>Undergraduate</i>	<i>Postgraduate</i>
1984	Richard A Wyvill and Roland E Lane	EL Brenner
1985	Stephen J Gidney and Mark Bury	William M Sutherland
1986	Dallal Stevens	Olusoji Elias and Anne E Reynolds
1987	Adrian Slater	Filip Sunaert
1988	no award	Surya P Subedi
1989	Katherine O'Donnell	Walter van Overbeek
1990	Graham Di Duca	Thomas Weidlich
1991	Samantha Peel	Shaheen Sardar Ali
1992	no award	Nils Behrndt
1993	Lincoln CW Wee	John Carrington
1994	Malcolm Lomers	Benedict Chigara
1995	Steven James Ball and Claire Elizabeth Leahy	Anastasia Kaltsa
1996	no award	Mathias Nordmann
1997	Susanne Lorraine Gee	Wanjiru Njoya
1998	Neil G Davies	Stefaan Depuydt
1999	no award	Sean Marriott
2000	Victoria Moseley and David Sears	Norbert Windeln

ONOH POSTGRADUATE SCHOLARSHIPS

<i>Year</i>	<i>Postgraduate Student</i>
1990	Javaid Rehman and Lillian Tiong
1991	Javaid Rehman and Fadi Ali Makki
1992	Lincoln Wee and George Zekos
1993	Paul Arnell
1994	Paul Arnell
1995	Irene Loh
1996	Toshi Kawai
1996	Pankaya Pathak
1997	Dhananjay Kore
1998	Mirijana Bormann
1999	no award
2000	Ruwan Perera
2000	Costas Kombos