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# AN INTERNATIONAL LAWYER TAKES STOCK

SIR ROBERT Y. JENNINGS\*

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It was in 1933 that I made my first acquaintance with international law, under the guidance of Arnold McNair. His excellence as teacher and lecturer gave me the idea that an international lawyer was the thing to try to become. He encouraged me in this eccentric ambition; but I well remember him warning me, in his gravest manner, that the subject of international law attracted a considerable following of dilettante enthusiasts; and it was well to beware of them. Public international law is now so importantly different from what it was in the early 1930s that I thought it might be a good idea, in this article, to look at some of the more significant changes that have taken place in this half-century, or rather more. Let us begin by looking very briefly at international law as it was in the 1930s, between the two world wars.

## I. INTERNATIONAL LAW IN THE 1930S

I still have a copy of McNair's printed syllabus, bound in Cambridge blue card, for his Tripos lectures. He begged us to use this syllabus, which had full references, for making our lecture notes before the lecture, so that we could "sit with an intelligent look on our faces." The aim of the lectures was to set out the elements of the whole field of international law at that time, including besides the law of peace, war neutrality, and some prize law. Indeed, McNair rather dwelt on prize law, for Stowell was one of his heroes; and of course the British Prize Court has always applied international law as the law of the court.

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International law was thought of as simply the law binding upon States in their relations with one another. In the words of the *Lotus*, the classic World Court case of the period:<sup>1</sup>

International Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.

International law and municipal law, therefore, manifestly operated at quite different levels; though questions of piracy *jure gentium*, diplomatic immunities and the like could come before domestic courts and so provided a case law, in addition to international arbitrations and matters before the Hague Court itself.

The sovereign independent State was discussed in contrast to the then several forms of dependent States or territories; protectorates, suzerain and vassal States, the three classes of mandates, etc., ready illustrations coming from a still flourishing British Empire. There was a fairly detailed study of the effects of recognition and non-recognition, especially as shown by English cases like *Luther v. Sagor*.<sup>2</sup> There was much about the immunities and privileges of sovereigns (with, happily, some memorable cases); and of diplomatic representatives, and the then distinct office of consul. The law of treaties received careful attention. There was little on international organisation; but the main provisions of the Covenant of the League of Nations, the idea of "collective security," the peculiarities of International Labour Organisation Conventions, and the role of the Permanent Court of International Justice were explained.

#### A. *Lex Lata and Lex Ferenda*

There was a question, thanks to Austin's dominance in the teaching of jurisprudence in England, whether public international law, like a large part of the British constitution, was really law at all. So, courses on public international law, other than those of McNair (who was impatient of what he regarded as little more than a matter of terminology), tended to begin with an assurance that, whatever the lecturer on jurisprudence might be saying, international law really was law; the inevitable result on the tyro of these assurances, was to sow doubts in a mind hitherto innocent of any suspicion that any "law" taught in the Cambridge University Faculty of Law might not really

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<sup>1</sup> 1927 P.C.I.J. (ser.A) No.9, at 18.

<sup>2</sup> [1921] K.B. 456.

be law at all. Those doubts were not helped by the required reading of the then Whewell Professor's 1910 inaugural lecture, provocatively entitled "The Binding Force of International Law" by Pearce Higgins, in which he sought to assure his reader that international law was not something "carefully thought out by University professors and bookworms in the quiet and seclusion of their studies."

Yet, much of what students read in the introductory chapters of standard textbooks seemed to be precisely that: summary descriptions of the ideas of the principal early writers on international law. Even Brierly's *Law of Nations* began with brief paragraphs about Bodin and Hobbes on sovereignty, followed by a few paragraphs about Grotius, Gentili, Zouche, Pufendorf, Bynkershoek, and Vattel; rather as if one were introduced to modern common law by way of summary paragraphs about Bracton, Glanvil, Coke and Blackstone; winding up perhaps with a mention of Bentham. The historical place of actual rules and principles of law in the behaviour of governments was only just beginning to be investigated in this country, thanks to the researches of A.D. McNair and of H.A. Smith, not in the works of legal philosophers but in the foreign office papers deposited in the Public Record Office. The way had of course already been shown across the Atlantic in John Bassett Moore's famous *Digest* of international law materials, particularly as illustrated by the practice of United States governments.

From the earliest times the law of nations has been preoccupied with attempts to control war. Dr. Whewell, the famous mid-nineteenth-century Master of Trinity, a polymath and philosopher who had translated Grotius, left in his will the money to found his chair of international law at Cambridge, being:<sup>3</sup>

. . . moved by the Christian and noble wish of diminishing the evils of war when it happens, lessening the chances of its happening, and finally extinguishing it, so far as lies within the reach of man's foresight.

Even before the First World War, however, international law had come to recognise war as a legal institution. War was no illegality. The discretion to make war was, within some limits, one of the attributes of the fully independent and sovereign State. Once war occurred the law merely moved into trying to mitigate unnecessary or unjustifiable excesses. War was an unpleasant affair even then, but it was still something that international society could afford to tolerate.

The terrible experience of the First World War had brought a desire for change. By the Covenant of the League of Nations, and the Peace Pact of 1928,

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<sup>3</sup> The Law Times, Oct. 27, 1866.

there was a partial and rather vague change from the acceptance of war as an institution within the law. But the reforms were inadequate to the problem even in legal terms - the confusion was well illustrated by the uneasy way we had to learn the law of war alongside learning about the 1928 Pact; and the 1930s saw the defiance of the new law in Manchuria, Abyssinia and Albania, before the final tragedy of 1939.

From all this it was easy for the student, and much more so the public, to get the idea that the *whole* of international law, like its attempts to control war, existed largely in the realm of proposal and to become sceptical about the even then important body of international law which was working pretty well. My generation at Cambridge were accordingly fortunate to have started out under the influence of McNair (though he was not yet the Professor), who saw these dangers so clearly. McNair was devoted to identifying and distinguishing what he called "hard law" and from the beginning taught us to learn rigorously to distinguish between a proposition *de lege lata* and a proposition *de lege ferenda*; recognising also what still needed to be done.

### B. Peaceful Change

There was a feature of international relations and law that worried many of the 1930s: the problem of "peaceful change;" i.e. how to bring about changes in a system where important changes had in the past been brought about by war, there being no adequate peacetime machinery for legal change; other than perhaps Article 19 of the covenant, which spoke in the vaguest terms of the reconsideration of "treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."

There was at this time a feeling of guilt and unease over the Versailles treaty settlement. Inevitably, international law was itself identified with what had come to be regarded in many quarters as probably an unjust and certainly an unwise peace settlement. Lauterpacht went so far as to say "the rule of law has become synonymous with injustice;"<sup>4</sup> though of course the then ideas of what was injustice - for example that Germany had been arbitrarily deprived of its African colonies - were not at all what the newly emerging States of Africa and Asia were to regard as international injustice in the postwar decades. But the Kellogg-Briand Pact of 1928 had outlawed war as an instrument of national policy and therefore also as an instrument of lawful change without putting anything in its place. For all its good intentions the 1928 Peace Pact had thus destroyed the balance and *symmetry* of the old international legal system. Thus, machinery for "peaceful change" was seen as a necessary complement to the success of "collective security."

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<sup>4</sup> See Lauterpacht, in PEACEFUL CHANGE 138 (Manning ed. 1937).

These worries about peaceful change were, however, very soon to be submerged in the complete breakdown of the attempt to abolish war as an institution of international relations, in six years of world war, from which the world emerged in 1946 with the United Nations Charter offering a new basis for the organisation of peace. That system has had its ups and downs, but there can be no doubt that it has ushered in a period of important changes in the system and content of international law.

## II. INTERNATIONAL LAW FROM 1946 ONWARDS

The problem of peaceful change as it was seen in the 1930s simply disappeared from the intellectual scene after the war. It was partly perhaps that the peace settlements and the United Nations system, though often subjected to robust criticism, did not, for whatever reason, attract those maudlin feelings of guilt which resulted in the essentially negative preoccupations about "peaceful change" of the 1930s. In any event, from 1946 onwards the changes in the form, content and even the sources of international law were to be bewildering in their intensity and rapidity. In the decades since the end of the Second World War international law, and international legal relations, have been transformed; a transformation which probably has no equal in the four centuries or so of the existence of modern international law as a working system between States.

The question that must occur to a 1930s lawyer contemplating our present acres of new, often elaborate, international law, is what is the new machinery of law-making that has made this possible? His problem after all had been how to effect peaceful change of the legal position at all. It is not easy to answer this question, for the changes have been so rapid and so recent and are still very much on the move; and we are still perhaps too near to the changes to see their nature clearly. It is precisely those things that later will appear as obviously characteristic of a period that contemporaries take so much for granted that they fail to notice them at all. But we must try to answer.

The most important new factor since the war is, however, tolerably obvious: the great changes in the make-up of the community in which international law operates; and especially the dissolution of a long-established colonial system, with the resulting explosion in the number of independent sovereign States. At the Hague Codification Conference in 1930 there were 48 members of the League and nine other States; at the Geneva Law of the Sea Conference in 1958 there were 86 States; at the Conference on the Law of the Sea, 1973-82, there were 164 States, giving the so-called "Third World" a working majority. There are also the quite new, and general, pressures and problems, such as the depletion of certain natural resources hitherto supposed to be practically inexhaustible, and the related, frightening, exponential increase in the world's population. The latter is probably by far the most important and urgent problem today, though attention tends to be concentrated on some others, such as conservation and pollution, which are probably but symptoms of that principal but seemingly often unmentionable ill.

Changes in the law itself were inescapable, given such radical changes in international relations generally. They seem broadly to have been in two directions. First, there have been changes and developments in the core subjects of international law: the subjects that featured in the 1930s syllabus. Second, this period has seen the emergence of a great deal of quite new international law. Let us look first at the changes and developments in the core subjects. Obviously it is not possible to trace these changes topic by topic, but it will be useful to call attention to the attendant changes in the ways of developing the law; and this will partly at least answer the question about the new means of "peaceful change."

#### A. *Progressive Development and Codification*

It would, I am sure, have astonished the 1930s international lawyer in the United Kingdom, and not least those so preoccupied with the problem of "peaceful change," to be told that one potent vehicle of change would prove to be codification. In the 1930s what little one heard about the codification of international law reflected the common lawyer's prejudices against it. It was supposed that a code must petrify the law and so actually prevent its development. Nevertheless, it should be remembered that codification had at an earlier period been a principal aim of the two great associations, the International Law Association and the *Institut de Droit International*, each founded in late Victorian times with a view to the codification of international law. Perhaps the 1930s' temporary disillusionment with codification was the result of the 1932 Hague effort at codification which was, in James Brierly's words, a "dismal failure."

New life was, however, breathed into codification by Article 13.1(a) of the Charter of the United Nations, which required the General Assembly to encourage "the progressive development of international law and its codification;" thus linking codification with change and development. To put it in common law terms, what was required was not something like the Sale of Goods Act of 1893; but something like the Law of Property Acts of 1925. The result has been the highly significant work of combined codification and development produced by the International Law Commission in its great productive period, which resulted in the four Geneva Conventions on the Law of the Sea of 1958; and the Vienna Conventions on Diplomatic Relations of 1961; on Consular Relations in 1963; and the Vienna Convention on the Law of Treaties of 1969.

In thinking about the ways of changing and developing the core subjects of international law, one cannot omit the still surprising, and even disturbing, 1982 Convention on the Law of the Sea, with its 17 Parts and 320 Articles; a hotch-potch of existing custom, some of it word for word as it was already codified in the Geneva Conventions, much also of newly devised regimes, some of it new customary law developed as general law by the practice of States, even during the ten-year period during which the Conference was sitting and partly

under the influence of its drafts. The Convention is not yet in force, but much of the customary law, both old and new, there codified, is. As a whole, the Convention represents a fundamental reorganisation of the law of the sea, not only in detail but in principle, the former seemingly unassailable rule of the freedom of the high seas being changed fundamentally. Obviously much of the Convention is controversial and there are many well-known doubts which cannot be entered into here. But it is certain that the law of the sea - always a specially significant part of the entire international law system - has been dramatically changed in almost every department; a most extraordinary reversal of the former so-called problem of "peaceful change," and one wrought not so much by conscious planning as by sheer necessities of events and needs.

These rapid advances in the development of the old core subjects have exacted a price in the form of some confusion about the basic sources of international law. No longer is there a clear and easily made distinction between treaty and custom; a perhaps inevitable result of successful codification and development of custom in law-making treaties. Unfortunately a treaty can make a new law for the parties to it, but it is not so good at sweeping away the old - an important aspect of a true process of codification. The old law tends to remain alongside the new, and how far it was itself changed by the new code is a moot question; there are even problems about successive codifications of the same topic but which can be made to yield different answers. In short the "sources" of international law - and I mean the tests of validity, analogous to statute and law reports - are now a maze rather than a series of avenues leading to the law.

Frequently any worker with modern international law must wish that all were as neat and clear as it used to be in the days when treaty, and customary law and "general principles," were readily distinguished one from another; yet this confusion and flux in the sources of international law is probably a necessary symptom of progress. At a time when there is an urgent need for rapid law-making processes, under the pressures of rapidly changing demands, new ways of change and elaboration will be rightly devised and used by governments, whether or not they fit in nicely with what the textbooks say. It is up to the academics to make an efficient and elegant pattern out of it all in due course.

### *B. Decisions of Courts as a Source of International Law*

Mention should also be made of a change in the sources of international law, which had already begun to be felt even in the early 1930s: international law has become a case law. That section of Article 38 of the Statute of the International Court of Justice which ranks decided cases alongside learned commentators as "subsidiary means for the ascertainment of the law" is out of line with contemporary practice, according to which decided cases are certainly more important than writings. The major reason for this change has been the gradual effect of the reporting of decisions of international and domestic courts



in the *International Law Reports*, formerly the *Annual Digest*; a venture first instituted (the first volume was for 1925-26) by Arnold McNair and Hersch Lauterpacht.

It is also important that, as is shown by a glance at the volumes (now 79) of the *International Law Reports*, so much international law is applied in domestic courts. Domestic courts, when it comes to enforcement, have the immense advantage, lacking in an international court, of having a territorial jurisdiction. Indeed, we now have a curious position. With the important qualification in very recent years of the former doctrine of the "absolute immunity" of recognised foreign sovereign States from the jurisdiction of municipal courts, domestic courts, including our own, now find themselves exercising jurisdiction over foreign States in the important area of commerce; a jurisdiction which was unthinkable before the Second World War. It is a curious and interesting position to have reached, because the jurisdiction of the International Court of Justice is still strictly consensual (for consensual jurisdiction and immunity from jurisdiction are but manifestations of the same basic principle).

### C. New Areas of Law

We may turn from the changes in the core subjects to those important *new* areas of law which have appeared in recent decades. A principal thrust behind these novel developments has been technological changes. The paradigm might be the law governing the uses of outer space. In 1955 the late Wilfred Jenks submitted to me, as a then editor of the *International and Comparative Law Quarterly*, one of the first legal articles to speculate on the need for a law for outer space and the resources of the moon and other celestial bodies. A much revered international lawyer who had also seen the manuscript pleaded with me not to risk such reputation as I might have by publishing what he regarded as fanciful nonsense: "he talks about the moon," he said. I did publish the article, not from superior wisdom but because I hesitated to say "No" to Wilfred Jenks.

Two years later the Sputnik was launched. By its orbit the hitherto universally accepted rule of sovereignty over airspace *usque ad caelum* was changed virtually in a matter of hours. By the early 1960s the basic principles of a law of outer space and the celestial bodies were in place; what Professor Cheng's famous paradox felicitously called "instant custom." Today the law of outer space is a highly elaborated body of technical rules, extending to such mundane uses as satellite commercial broadcasting, and what used to be a topic warranting perhaps half an hour in a course of Tripos lectures is now a branch of law in its own right, demanding intensive specialisation by the sheer extent of its materials and inherent problems.

Outer space is perhaps the most dramatic example of the new international law - part practice, part opinion, part treaty, sometimes defying orthodox classification - the product of new economic and technological pressures,

creating legal questions which have to be tackled on an international basis in the first instance. Other headings of largely new law, and often also of new international organisations, readily come to mind:

- (a) The use of radio frequencies, where technology is constantly overtaking the legal framework;
- (b) communications generally - educational, commercial, military, etc.;
- (c) the availability, exploration and exploitation of resources and raw materials; of land, of the sea, and the seabed; and the resources in Antarctica;
- (d) multinational corporations, and the multifarious highly technical and often also highly political problems which arise;
- (e) energy, including distribution, the use of raw materials and methods of manufacture;
- (f) currencies and exchange problems;
- (g) trade, investment and finance;
- (h) poverty, famine;
- (i) pollution in all its forms, land, rivers, the sea, airspace;
- (j) drug abuse; internationalisation of crime; and of the international "laundering" of the proceeds of crime;
- (k) the conservation of the environment, not only on an international and global scale but, indeed, on a universal scale.

Most of that list of important and considerable areas of international law consists of matters which, even so recently as the 1930s, 1940s and early 1950s were hardly contemplated even on a speculative basis.

#### *D. New Subjects of International Law*

There has been another change in the very character of international law. In the 1930s international law was essentially a law between sovereign, independent States and concerned almost entirely with the relations and activities of States. Where it touched individuals, for instance diplomats, it was only because they represented and acted for the State; or, for instance, pirates, it was because their position was relevant to defining the criminal jurisdiction of States. Even then there were signs of change. Sir John Fischer Williams, as early as 1930, had prophetically spoken of "the exclusive possession of the field of international law by States . . . being broken down by the invasion of bodies which are neither States nor individuals, but right-and-duty bearing international creations."<sup>5</sup> But the radical change in the scope of public international law came during these same remarkable decades following the end of the Second World War.

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<sup>5</sup> 24 A.J. 665, 666 (1930).

In 1949 the International Court of Justice in the *Reparation for Injuries* case pronounced the end of the old orthodoxy that States are the only subjects of international law,<sup>6</sup> by advising that the United Nations, though not a State, had the capacity to bring certain kinds of claims directly against a State on the plane of international law. Already, Lauterpacht's pioneer work of 1945, "An International Bill of Rights of Man," heralded the enshrining of human rights in the United Nations Charter, the Universal Declaration of 1948, and later in the European Convention and the two United Nations Covenants. Today human rights are not only firmly part of international law but have significant political importance. This is a radical change from the traditional law which protected individuals only in the capacity of aliens, and only then in terms of the injury done not to the individual but to the State of his nationality.

#### *E. Overlap of International and Municipal Law*

A consequence of these transformations of the scope and function of international law has been that the former boundaries between public international law and private international and municipal law have become less clearly defined, and in their place are grey, often puzzling, boundary zones. New terms such as "transnational" law have appeared in order to recognise if not to explain one such grey area. It is no longer always obvious whether, at a given moment, one is dealing with public international law, private international law or municipal law. For treaties are no longer only political arrangements between States, and concerned only with the relations between States and governments. Very many treaties now lay down rules of law which require application to individuals or corporations within the territory of a State party. This means that they must be applied by the local courts: whether as such or in the form of an enabling statute matters not. In either case the Court is applying and interpreting international treaty law, and the efficacy of the treaty regime depends upon its ability to do so. On the other hand, municipal courts find themselves nowadays applying the local law to sovereign States in certain commercial matters. English judges have shown themselves aware of the process: Sir Michael Kerr has vividly described the dramatic increase in the amount of arbitration in international matters that is attracted to London; and Sir Michael Mustill has expounded the principles and rules of a new *lex mercatoria* that has already developed from arbitration practice: a law which almost by definition defies characterisation according to the old, rigid categories of international law and municipal law.<sup>7</sup>

It works the other way too. The International Court of Justice - in theory - applies and knows only international law and, governed still by what is essentially a 1920s Statute, it still deals only with States. But in the recent *ELSI*

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<sup>6</sup> *Reparation For Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Advisory Opinion of Apr. 11).

<sup>7</sup> See *LIBER AMICORUM FOR LORD WILBERFORCE* (1987), at 111-130, 149-183.

case a chamber of the Court found itself having to learn a great deal about Italian bankruptcy laws, Italian administrative law, about municipal law notions of property, and even about accounting methods for the valuation of assets.<sup>8</sup>

### III. INTERNATIONAL CUSTOM AND TREATIES IN ENGLISH LAW

I should at this point make some observations on the attitude of English courts to the many different kinds of cases with an international element, which must increasingly come before them.

Difficulties arise, as is well known, from the different treatment of customary international law, and treaty law, by English courts. It has always been held that general, customary international law is a part of the law of England and, therefore, will be applied "as such."<sup>9</sup> Thus international law is a matter of judicial notice, and there is no question of having to prove it by evidence. It is argued and applied in exactly the same way as any other part of the common law. On the other hand, for constitutional reasons, a treaty which requires for its carrying into effect an alteration of English law, or a charge on public funds, requires an Act or other instrument making the needful changes to English law if the courts are to give effect to it.

This position seems clear enough in the textbooks; but some problems are bound to arise when the classical dichotomy between custom and treaty is no longer so clear, even in international law. Moreover, those whose task it is to advise the government whether domestic legislation is needed before a treaty can be accepted by the United Kingdom must often find themselves in a position where it is not possible to be sure whether legislation is required or, if there is to be a statute, or perhaps merely a statutory order, how far the instrument should go in attempting to prepare the ground for the implementation of the treaty provisions. By way of illustration it is necessary only to refer to the notorious case of the European Convention on Human Rights. Nevertheless, even where the advice has been perhaps wide of the mark, this would appear to be precisely the kind of problem to which common law courts, proceeding from case to case, looking at each one on its merits, would seem admirably fitted to provide working and sensible solutions directed to making the thing work.

These sorts of questions are of course aptly demonstrated in the recent massive course of litigation in English courts about the International Tin Council.<sup>10</sup> This is not the place to attempt to go into the many difficult questions involved in that litigation; but it seems relevant to the theme of this

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<sup>8</sup> Case Concerning Elettronica Sicula S.p.A (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, reprinted in 28 I.L.M. 1109. See also Adler, *The Exhaustion of the Local Remedies Rule After the International Court of Justice's Decision in ELSI*, 39 INT'L & COMP. L.Q. 641 (1990).

<sup>9</sup> See Lord Alverstone in the *West Rand* case [1905] 2 K.B. 391.

<sup>10</sup> See in particular 3 W.L.R. 969 (H.L. 1989).

article to look briefly at the way the House of Lords approached a question involving international law. Take for instance this passage from Lord Oliver's very important speech:<sup>11</sup>

A rule of international law becomes a rule - whether accepted into domestic law or not - only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.

This, despite the somewhat period ring of the phrase "civilised nations," is an important statement of a difficulty modern domestic tribunals should be aware of when asked to make a finding based wholly or in part upon international law. In effect, Lord Oliver is saying, obviously rightly, that where a domestic tribunal is invited to decide on the basis of an alleged rule of international law, that tribunal must be reasonably certain that the alleged rule is indeed a generally agreed rule of international law; and if it is not so, then it is certainly not the business of a domestic tribunal itself to try to create a rule of international law, even though it be only for the purposes of its own domestic law. And he emphasises this position by saying that an alleged rule of international law must, if it is to be taken account of by a domestic tribunal, be one that could be demonstrated, as a generally accepted rule, before the International Court of Justice.

It would be unfortunate, however, if this part of Lord Oliver's speech were to be read as suggesting in any way that a rule of international law is the business of the Hague Court but not of the House of Lords; for that would have been to revert to a view of the relationship of international law and domestic law more appropriate to the commencement of our half-century survey than to the present. The gist of this part of their Lordships' decision is of course that the appellants had wholly failed to convince them of the existence in international law of the rule they were alleging to exist and on which they relied; and one could perhaps wish that it had not been thought necessary to say more than that.

There is another passage of Lord Oliver's speech that troubles me rather more:<sup>12</sup>

It must be borne in mind, furthermore, that the conclusion of an international treaty and its terms are as much matters of fact as any other fact. That a treaty may be referred to where it is necessary to do so as part of the factual background against which a particular

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<sup>11</sup> *Id.* at 1014.

<sup>12</sup> *Id.* at 1003.

issue arises may seem a statement of the obvious. But it is, I think, necessary to stress that the purpose for which such reference can legitimately be made is purely an evidential one. Which states have become parties to a treaty and when and what the terms of the treaty are are questions of fact. The legal results which flow from it in international law, whether between the parties inter se or between the parties or any of them and outsiders are not and they are not justiciable by municipal courts.

One might take issue with the assumption that the question which States have become parties to a treaty is a question of fact; it is, one might have thought, a question of mixed law and fact, the points of law (certainly of international law) often rather difficult ones. What disturbs the writer more is the seeming assertion in general terms that the legal results in international law flowing from a treaty are not justiciable before a municipal court, though it may apparently be referred to as "factual background." In any case involving States other than the United Kingdom, whether directly or indirectly, there are very many legal reasons why a municipal court may be constrained in the exercise of its jurisdiction. One thinks of matters of judicial propriety and the precedents pertinent thereto, of immunities, of act of State doctrine, and the like. There is also the constitutional rule, mentioned above, that the court will not give effect to an "unincorporated" treaty, in so far as this would require a change in the law, or a charge on public funds, or which would require an addition to the powers of the Crown not already possessed by it - all this subject to some special rules for treaties affecting belligerent rights, or the cession of British territory.<sup>13</sup> It seems, however, unnecessary to erect from these rules some kind of general doctrine of the "unjusticiability" of "unincorporated" treaties. Such a "doctrine" in general terms would be contrary to precedent, to reason and to common sense. The kind of question at the centre of the Tin litigation, about the legal nature of entities created by treaty, is bound to come up before municipal courts more and more frequently; for such creations already abound.<sup>14</sup> The more flexible approach found in the Court of Appeal's judgment seems, therefore, preferable on practical as well as theoretical grounds; one citation from the judgment of Kerr LJ must suffice:<sup>15</sup>

Any issue between the parties to an unincorporated treaty is a non-justiciable issue in our courts.

But that is as far as the doctrine goes. It does not preclude the decision of justiciable issues which arise against the background of an unincorporated treaty in a way which renders it necessary or convenient to refer to, and consider, the contents of the treaty.

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<sup>13</sup> See A. McNAIR, *THE LAW OF TREATIES* ch. IV. (1961).

<sup>14</sup> See, e.g., *Arab Monetary Fund v. Hashim and Others (No.3)* 1 All E.R. 685 (Ch.) (Hoffman J), *reversed* (C.A.), *The Times*, Apr. 17, 1990 at 26.

<sup>15</sup> *J.H. Rayner Ltd. v. Dept. of Trade (C.A.)* [1989] Ch. 72, 164.

Even so, there seems to be an assumption that it is no business of an English court to apply international law as such; and that an "incorporated" treaty (whatever that and "unincorporated" might mean, which is far from clear),<sup>16</sup> would then be applied as English law, not as international law.

#### IV. CONCLUDING REMARKS

In the course of a single article it is not possible to review all the changes in 50 years even to the elements of an entire system of law. Accordingly, the parts of the law I have elected to treat necessarily represent a personal and selective sample. I have, for example, hardly mentioned the United Nations. This is not because I think it, or other international organisations, of a less importance; but because what I wanted to emphasise was the changes in substantive international law and their extended reach into the domain of municipal law and courts.

This present time of rapid and still accelerating change is, without doubt, a particularly important and critical moment for international law and for the international community. An international law which is strong and adequate to today's situation is not just something to be desired - something to be in favour of - it is absolutely essential. None of humanity's most serious problems can now be solved without it. Only a little while back, there were distinct and rival views of international law, varying not merely according to interest but also according to ideology. Now the ideological rivalry seems to be giving place at least to an important extent to grave common anxieties which demand recognition of the primacy of international law.

Moreover, modern international law is now, probably to a greater degree than ever before, a universal juridical language. One of the questions most frequently asked of a judge of the International Court of Justice is how far one finds difficulty in understanding the thoughts and attitudes of one's colleagues from other "principal legal systems" and other "forms of civilisation" (to use the language of Article 9 of the Statute). That is a question which hardly occurs to one when going about the work of the Court. There are of course nearly always different ways of approaching a particular legal problem. But there is never any difficulty in recognising the structure and meaning of a colleague's legal argument, or the familiar sources and material from which it is derived. The only time, in the writer's experience, when a difference of legal cultures seems to appear is when a counsel trained in the common law begins to cross-examine a witness; a procedure which one's colleagues from a different legal tradition

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<sup>16</sup> Kerr LJ also observed that in the particular case there was also the consideration that "the claims of the doctrine of non-justiciability are particularly weak in cases such as the present, since the 1972 Order in Council refers expressly to the Headquarters Agreement and ITA (to be read for ITA 4). That appears to be an unprecedented hybrid situation between an incorporated and wholly unincorporated treaty." See, however, Nourse LJ, who saw no constitutional bar to having a good look at the treaty and its implications in international law.

often find odd and even embarrassing. But on matters of substantive international law, there may be difficulties of getting agreement, but hardly at all of understanding.

At the present time there are indeed eloquent voices impatient of the present international law which I have been commending, and which assert an imperative need for an entirely new concept of international law; one which would be community-based rather than State-based. These voices are important and must command respect. This is not, however, the first time that a new kind of international law has been demanded. Such a demand was made by the then "new" southern and Central American States at the Second Hague Conference in 1907, and indeed had an immediate result in the Porter Convention of that year. Such a demand was certainly seen at the end of the First World War.<sup>17</sup> We have already had occasion to mention the demand of the Third World countries of Africa and Asia, at the end of the Second World War, for a new international law which would represent their interests more fairly than one which, according to them, represented a European, Christian and colonialist culture. All these movements had a salutary effect on international law and helped bring about much-needed changes, which I have been endeavouring to describe. But there is no need - indeed it is neither possible nor desirable - to discard the existing system. It would seem perverse even to wish to do so at a moment when international law is needed as never before and when it is showing itself remarkably capable of adaptation to meet the new needs of a world made so much closer and smaller, and more dangerous, by the seemingly inescapable pressures of technological development.

It is undeniably important that scholars with imagination and vision should publish ideas for a better international law. Good ideas, if they are timely and blessed by good fortune, possibly accomplish as much as, or more than, the diplomatic conferences, with their compromising drafts of articles, so beloved by those who seek to further the "progressive development" of international law. Yet it is important not to carry the campaign for a "new" international law so far as possibly to weaken the authority and respect which our present international law enjoys. And it is still important to distinguish between *lege lata* and proposals *de lege ferenda*; not merely as a technical matter but because of the trap into which the layman so easily falls of supposing all international law to be a proposal. Certainly it is still the position that international law or rather civilised humanity, has still to solve the problems of war and violence and inhumanity, which international law has sought to cure from the very beginning. But hope lies perhaps not so much, or only, in new laws directly concerned with the endeavour to control war and violence, as in the gradual but undoubted

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<sup>17</sup> John Basset Moore mentions, perhaps with unnecessary asperity, "the sublime and jocund supposition, now exhilarating certain circles, that international law having died of its wounds in the late war, they may now regulate the world's affairs by the creations of their unrestricted fancy." See Moore, *Fifty Years of International Law*, 50 HARV. L.R. 395, 448.



penetration of international law into new parts of routine, peaceful life, thus building up the habit and expectation of legal ordering of international society.

Mention of the layman brings me to my last point, which I must mention only briefly. We do now have this much extended body of working international law, which is the very fabric of such international community as we have achieved, and upon the survival and improvement of which civilised existence ultimately depends. There can be few things more important. Yet so few people are aware even of its existence. Ask the man on the Clapham omnibus and he will still probably say there *is* no international law. How many people - not just the man or woman in the street, but politicians, civil servants - are to any extent aware of the true nature and scope of this thing which is crucial to civilised existence? It is especially aggravating that even those who have devoted themselves to the avoidance of nuclear war, and sometimes arrogate to themselves a peculiar entitlement to the word "peace," are frequently totally innocent of any notion that law is the very first requirement of that assured peace they seek.

This lack of awareness about the existence of international law is highly dangerous. In this respect things are probably worse than they were in the early 1930s. The answer of course is education. I must not be tempted to elaborate on that, for it would be to enter upon the subject for another discussion. But it is an urgent problem that all of us can do something to alleviate. The last time I lectured in the Old Hall of Lincoln's Inn was for the Council of Legal Education,<sup>18</sup> for the paper on international law which for several years was an optional paper in the Bar examinations. It is perhaps symptomatic of our present difficulties about education, even within the profession, on this surely at the present time crucially important topic of law, that that optional paper has long since been banished from the course.

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<sup>18</sup> Prior, of course, to the lecture on which this article is based.