

Conversations with Sir Christopher Greenwood
Part 3: Scholarly Works
by
Lesley Dingle¹ and Daniel Bates²
Date: 1st February 2022

This is an interview with the thirty-fourth entrant in the Eminent Scholars Archive. Sir Christopher was Assistant/Lecturer at Magdalene College from 1981-96, Professor of Law LSE from 1996-2009, and a judge at the ICJ from 2009-18. He is currently Master at Magdalene College. The interview was recorded in person at the Master's Lodge, Magdalene College.

Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle. Her questions are in **bold type**.
Sir Christopher's answers are in normal type.
Comments added by LD, [*in italics*]. Footnotes added by LD.

148. Sir Christopher, in your first two interviews we looked at your early life, your academic career, your time on the Bench at the International Court of Justice, and your post-retirement Mastership at Magdalene College. In this third interview can we survey your scholarly work between 1983 to 2017 - 34 years? You've produced a large and varied repertoire of written work. Clearly, I've not been able to go through it all and for today I've selected a cross-section which I hope will give readers a good appreciation of your versatility which ranges, *inter alia*, over the law of armed conflict, international arbitration, trade, border disputes, and general matters.

Could we start three of your book chapters, which I hope will give an overview of the range of general aspects in which you are an acknowledged authority, and later we can move to your other contributions on the laws of armed conflict for which you are particularly well known?

The book chapters were all written while you were a judge on the International Court of Justice and they deal with topics which are of immense interest to international lawyers: your 2015 'Unity and Diversity in International Law'; your 2015 'Reflections on Most Favoured Nation Clauses in Bilateral Investment Treaties'; and your 2017 'Development of International Law by National Courts'.

The very interesting chapter from the 2015 CUP volume tackles the thorny question of what constitutes international law and its integrity as a defined legal category. This is the paper "Unity and diversity in international law", in Mads Andenæs³ and Dr Eirik Bjørge⁴ (eds) *Farewell to Fragmentation*, CUP, p.37-55.

¹ Foreign & International Law Librarian, Squire Law Library, Cambridge University.

² Freshfields Legal IT Teaching and Development Officer, Faculty of Law, Cambridge University.

³ Mads Andenæs, QC (b.1957), Professor of law University of Oslo, Former director British Institute of International and Comparative Law, London, former director Centre of European Law at King's College, London.

⁴ Dr Eirik Bjørge, Senior Lecturer in Law at Bristol University. Previously Shaw Foundation Junior Research Fellow at Jesus College, University of Oxford.



Fragmentation is a topic which Professor Koskenniemi⁵ mentioned several times during his ESA interviews in 2008-9, so I had a particular interest in reading your views on this subject in your extensive article. Could you explain the circumstances of your contribution to this volume?

Yes, certainly. The idea for this article, this chapter, came about because I gave the F. A. Mann⁶ Lecture in London in about 2010 or 2011. I took unity and diversity as the subject for that and then I expanded the lecture and revised it to take account of other developments, and contributed it to this collection of chapters on fragmentation in the Andenæs and Bjørge book.

149. You start, on page 37, by saying that the concept of fragmentation, as expounded by scholars such as Martti, was exaggerated and the ‘end of the world was nigh’ syndrome hasn’t come to pass. Why is it so important that the heterogeneous conglomerate that is international law is seen to hold together?

I think it’s important for a number of reasons. First of all, at the core of international law there are certain rules and principles about conclusion of treaties, treaty interpretation, reservation, and state responsibility which really have to apply across the whole of international law. If you start getting a different approach to treaty interpretation in investment arbitration from the approach that applies more generally then the result is that it doesn’t just amount to different courts going different ways, I think you begin to undermine the whole fabric of international law. States conclude a treaty on the assumption that it will be interpreted and applied in accordance with certain basic principles and those basic principles are common to all their treaties. I think it’s a very unfortunate development if international law starts to fragment the way Koskenniemi predicted it was doing.

Where I differ from Koskenniemi is, I don’t think the problem is anything like as bad as he made it out to be. In a sense, that’s the sort of thing a judge says because if you’re writing a PhD or hoping to get a Chair it’s very important to show that something dramatic is going on, but if you’re a judge you want to try and calm down the drama and to look at things a little more coolly, but I do think that the fear of fragmentation was exaggerated. I gave some examples in that article of ways in which I think international law has pulled back from that particular brink, for example, the European Court of Human Rights, in its judgments on Jones and the United Kingdom on sovereign immunity, for example, and its judgments on... I’m afraid I’ve forgotten the name of the case now....

150. I think it was the *Al-Adsani v United Kingdom*⁷.

That’s it, thank you. Had the European Court of Human Rights decided, as it might have done, and as the dissenting judge thought it should have done, that detaining an enemy combatant in wartime or in armed conflict, in accordance with the Prisoner of War Convention, was still a violation of the European Convention on Human Rights, I think that would have been catastrophic. I think there was a real risk that the European Convention could have been interpreted by the European Court in a way that made it impossible for

⁵ Martti Antero Koskenniemi (b. 1953). Professor of International Law and Director of the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki. Visiting Goodhart Professor of Legal Science (2008-09).

⁶ Francis A. Mann, (1907–1991), solicitor, Jewish emigre to UK from pre-War Germany, specialising in public international law and international monetary law, the doctrine of jurisdiction in international law, the law governing state contracts, problems faced in the courts in cases involving foreign affairs, conflict of laws, and arbitration.

⁷ 123 *ILR*, 24.



military operations to be conducted. That would include a large slice of UN peacekeeping; that's what's often misunderstood.

151. So, assuming that Koskenniemi's litany of new courts and new areas of jurisdiction wasn't a fiction, but that by 2015 the process had stopped, do those then new institutions still exist, and do you think that did cause some form of compartmentalisation?

Well, there are certainly lots of new institutions, but if you have a look at some of the most obvious cases, the creation of the Law of the Sea Tribunal, at the moment you could have, if you have a maritime boundary dispute it might be determined by the Law of the Sea Tribunal; it might be determined by an *ad hoc* arbitration under Annex 7; it might be dealt with by the International Court of Justice. The interesting thing is that they haven't gone in separate directions. If you look at the International Court's judgments in the main maritime boundary cases it's decided – the ones in the last decade or so, Romania, Ukraine, Nicaragua, Colombia, Somalia, Kenya – they make extensive reference to the arbitrations and to the Law of the Sea Tribunal's case law and vice versa. There was a time when there was a bit of an arrogance on the part of the International Court that it didn't refer to other people's judgments. Happily that's gone. The Law of the Sea Tribunal never, I think, made that mistake and the Annex 7 arbitrations didn't either, so there's a much richer willingness to look at one another's case law than there used to be.

152. Thank you. So it's really the Law of the Sea Convention, which you mentioned in this very interesting piece which, by creating three possible routes led to the, if you like, the break-up of this logjam because although it might have been predicted that by having three possible routes, namely the ICJ, ICLOS and arbitration, courts would go different ways but they didn't.

No, I don't think that they have gone different ways. There's always the argument that you get that it's different appearing in one tribunal from another and of course it's different. There's a world of difference between standing up in the Great Hall of Justice in the Peace Palace or in the Chamber of the ICLOS where you stand in formal conditions to address a court, or sitting in a hotel basement room in a conference facility addressing an arbitration tribunal, which you more often do seated. So the style is different and there's always a degree of difference between one group of people hearing a case and another group of people hearing a case. We're human beings; we do have views of our own and we differ, but what is striking is that that hasn't turned into an institutional rupture the way that it was predicted to do. It's probably a pity that we have these three different methods of settlement; it's very much a product of the time of the later stages of the Cold War, the thawing Cold War, if you like. I doubt that a Law of the Sea Convention today, if it were being drafted now, would come up with something as complicated as that, but it hasn't been the disaster it was predicted to be.

153. Thank you. Could we pass to your book chapter written in 2015, also while you were with the ICJ, which deals with the topic which you brought into the previous article on fragmentation, namely the issue of the most favoured nation clauses in BITs?⁸ This book honours Charles Brower which was edited by D Caron. Can you briefly say what your relationship was with Charles Brower, and the circumstances of David

⁸ 2015 "Reflections on "Most Favoured Nation Clauses" in Bilateral Investment Treaties", in D. Caron (ed) *Practising Virtue: Essays in Honour of Charles Brower* Oxford University Press, p.556-564.



Caron approaching you to contribute?

Yes, certainly. I've known Charles Brower⁹ for more than 30 years. I think I first met him when we were both counsel, he for the US, I for the UK, in the Lockerbie case, in the first round of the Lockerbie case in the International Court. He's considerably senior to me and we both have an interest in investment arbitration, but also, in a sense, I'm his... sadly, I suppose, I'm his arbitral grandson because David Caron¹⁰, who edited this collection of essays, took the seat that Charles Brower vacated on the Iran-US Tribunal. Sadly, David then died very suddenly and I became the arbitrator in his place so, in a sense, I sit in Charles Brower's office.

154. Yes. Interesting. You start by saying, on page 556, that most favoured nation clauses have been a bone of contention in investment treaty arbitrations since the 2000 *Maffezini v the Kingdom of Spain* ICSID¹¹ case. Could you outline what the issues were?

Yes. The most favoured nation clause has been around for a long time. I've always wondered slightly why it is in an investment treaty. I think it's because the antecedents of investment treaties, the modern day bilateral investment treaties, were the Treaties of Friendship, Commerce and Navigation and those dealt with imports and exports as well. Now, in that context a most favoured nation clause is very important indeed; the fact that you have a right to import goods into another country will not help you greatly if they're undercut by goods being imported from another state at a quarter of the tariff, but they were carried over into the bilateral investment treaties and there they have an obvious use if, for example, Treaty A protects against expropriation, but not unfair and inequitable treatment, and Treaty B doesn't. So, taking the substantive standard from one and, in effect, writing it into the other is perfectly coherent. The debate is over whether you can do the same with the arbitration provision. In *Maffezini*, if I remember rightly, I haven't looked it up again before this interview, the issue was whether the investor could use the most favoured nation clause in the treaty that it was relying on, to bring in from another treaty the right to go to arbitration without first having to resort to local remedies. At that point I think you have a very different issue because you're trying to use the procedural jurisdictional provision of another treaty as a way of getting round a jurisdictional limitation in your own treaty. I've looked at the treaties that a number of states have concluded and, you know, you do wonder, if that approach is right, if you can indeed use the MFN clause in that way, you wonder why some states bothered with some of their treaties; they seem to have negotiated at length, limits on the right to go to arbitration, but because they have another treaty which doesn't have those limits they've wasted their time. So I take a slightly more restrictive view about most favoured nation clauses and their effect on the scope of arbitration. Having said that, as I said in this article, one of the things I feel very strongly about is each treaty is an instrument in its right and you have to look at that treaty rather than looking at treaties more generally. Even in the investment treaty field I think we're a little too ready to skate over the differences in language.

⁹ Charles N. Brower, Former State Department official, international judge, judge of the Iran–United States Claims Tribunal (1983-). He has also served as a Judge ad hoc in three cases before the International Court of Justice (ICJ) since 2014.

¹⁰ David D. Caron, (1952-2018), international judge, arbitrator, and academic, Dean King's College London School of Law (2013-16), professor of UC Berkeley School of Law (1987-2013). Member of the Iran-United States Claims Tribunal (2015-), Judge ad hoc ICJ.

¹¹ Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction <https://www.italaw.com/cases/641>



155. Thank you. You consider the means of taking effect and the 1952 Anglo-Iranian Oil Company case which turned on the issues that you've outlined. Does this sort of dispute still occur? I mean, to an outsider and a lay person, it seems fairly obvious that the third treaty couldn't be relied upon but, as you've explained, it's not quite so straightforward. Are these disputes still quite prevalent?

A dispute of the precise contours of Anglo-Iranian would be comparatively rare today. That was an attempt to argue that what was an agreement between a company and a state was, in effect, to be treated as though it were a treaty. I think that's a very difficult argument to run and that's largely a debate of the past. If you go back to the, I think, the very first article I published that was of any length was about the Libyan oil arbitrations¹². That's this world of oil concessions where the company was almost treated as though it were a state in its own right. That has been almost completely superseded by the bilateral investment treaties and by treaties like the Energy Charter Treaty. Now it's a question of an inter-state agreement and what rights does that confer upon the individual investor, the investor being a beneficiary of the treaty, but not being a party to it, so I think that's rather different.

While Anglo-Iranian is unlikely to recur, the issue about most favoured nation clauses in bilateral investment treaties is a very live one indeed and it's probably the most divisive issue in international investment law. In a footnote, I think, in the MFN article, and I think I refer to it in the unity and diversity article as well, the Argentine cases alone, there are something like 20 arbitral awards split down the middle as to whether you could use an MFN clause in this way or not. In several cases you've got divergent views from different tribunals about the same MFN clause in the same treaty, so even if you limit things by my stricture that each treaty has got to be looked at in its own right, you've still got the problem that different arbitrators have come up with different solutions. That's extremely unfortunate but it's one of the very few cases where you do get this marked divergence.

156. You mentioned in the article that there might be occasions when one might have to look at the *travaux*. Has this ever been something that you've been confronted with? Where are these usually held; is this sometimes quite difficult?

Yes. It's extremely difficult. Some states carefully maintain vast archives with all the correspondence that precedes a treaty, others don't. I'm afraid some investment treaties ended up being signed in a hurry on the basis of, you know, a ministerial trade visit, there had to be some documents to sign for the press conference at the end. So sometimes you can get hold of *travaux préparatoires*, sometimes you can't. The other thing is you'll only ever be able to get hold of one side's documentation, usually you'll only be able to get hold of it. If you have, say, a bilateral agreement between Turkey and Libya and a Turkish investor sues Libya, now, the Libyan government might have access to its own set of the *travaux* but getting at the Turkish government's *travaux* is a different matter altogether.

157. Thank you. Then, finally, you give your conclusions, from page 563-4, and from the lay person's point of view this would seem to be like commercial law, so why is it placed under the international law umbrella?

I think because it comes from a treaty, and these are treaty standards you're applying; it's not a commercial law approach. In particular, for most, but not all investment treaty cases, the fact that national law might permit what the government has done is not an answer to the argument that it might be a breach of international law.

But you've put your finger on a very important issue which is that with a lot of

¹² 1982. 'State Contracts in International Law' *British Year Book of International Law*, 58, 27-81



investment arbitration there is this crossover with the commercial arbitration world and some of the people who sit as arbitrators are primarily commercial arbitrators not international lawyers. On the whole I think that works quite well if you have a mix of the two. Sometimes it can give rise to difficulty. Just to give you one example. One of the most important guides to the interpretation of a treaty is the subsequent practice of the parties to that treaty; if that demonstrates an agreement between them about what the treaty means, then the Vienna Convention on the Law of Treaties gives that a very important position. In English commercial law and in the law of many countries that follow the English model the subsequent practice of the parties to a contract is not admissible, or even if it's admissible it's not very significant as an aid to the interpretation of the contract. There you can get a real culture clash between the two worlds.

The other thing that sometimes gives rise to difficulty is that commercial lawyers are used to dealing with arguments about commercial confidentiality; international lawyers are more accustomed to arguments about state secrecy so you sometimes find in an investment treaty dispute a real clash between the corporate mindset, which is, "We can't possibly be expected to disclose something that would be of use to our competitor," and the state mindset which is, "These are classified documents and we don't release them to the public." Balancing the two can be quite an interesting task.

158. If we could briefly now consider another book chapter, and this was your most recent publication, which deals with some fundamental principles of what international law is, and it gives an opportunity for you to express your views thereof. It's a particularly important paper and, again, it was written while you were on the ICJ. This is the, 'Development of International Law by National Courts,' in Maluwa¹³, du Plessis¹⁴ and Tladi¹⁵, who edited a festschrift¹⁶ in honour of John Dugard¹⁷.

You say that you were pleased to contribute to a volume on John Dugard, can you say something about your relationship with him?

Well, again, I've known John Dugard for many, many years, I think probably going back something like 40 years, through conferences and he was a good colleague here when he was Deputy Director and Co-Director of the Research Centre. He's a super international lawyer. I think it was a great sadness that he wasn't elected to the International Court of Justice, because he would have made a real contribution there, but I did have the pleasure of sitting with him when he was an *ad hoc* judge on one occasion. One of the few dissenting opinions I think I ever wrote on the Court, he was one of the three other judges who joined me in that dissent.

159. Interesting. Page 194 introduces us to the terms monism and dualism, and I

¹³ Tiyanjana Maluwa, H. Laddie Montague Chair of Law and International Affairs Penn State, Legal counsel of the OAU, Professor of Law University of Cape Town, Professor of Law University of Pretoria, Ph.D., Cambridge University, LL.M., University of Sheffield, LL.B., University of Malawi.

¹⁴ Max du Plessis, Professor, Honorary Research Fellow, School of Law, University of Kwazulu-Natal.

¹⁵ Dire Tladi, Professor of International law, Fellow at the Institute of Comparative and International Law in Africa, University of Pretoria, legal advisor to the South African Permanent Mission to the United Nations (2009-13).

¹⁶ 2017 "Development of International Law by National courts", in Maluwa, T, du Plessis, M & Tladi D. (Eds) *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard*, Brill Nijhoff, 193-211.

¹⁷ Christopher John Robert Dugard, (b. 1936 -), Professor of Public International Law, University of Leiden (1998-). Professor of Law, University of Witwatersrand (1975-1990), Goodhart Professor, Cambridge (1995-96), Professor of Law at the Centre for Human Rights of the University of Pretoria (2006-).



wonder ideologically into which school of thought you would place yourself.

That's an easy question to answer; neither. I think that the late John Collier¹⁸ put it in a lecture I went to when I was a student, "There is less to this than meets the eye." I don't think you can deal with this via a straightforward monism and dualism approach. The real question is more one of the constitution under which a national court operates. In most countries the constitution, written or unwritten, will take priority over anything else, including a rule of international law. On the other hand, a country's courts may be open to looking at customary international law so long as it doesn't conflict with basic norms of their own law; they may be open to looking at treaties. I think it has much more to do with the culture of the court and its constitutional tradition than a straightforward approach of, "Is this a monist country or a dualist one?"

160. You state, however, that ultimately international law requires each state to comply with its international legal obligations and this is a seminal statement which gets to the heart of the matter. By what force, if I can put it that way, does international law do this? Is it a moral obligation or a threat of force by the majority of nations as in some sort of a democratic process, bearing in mind that some UN members aren't democracies?

Well, I don't think I would accept that it's a choice between a moral obligation or a threat to use force. You can have a legal obligation even if there is no means at the moment of enforcing it. I think it is very clear that the legal position is that at the international plane an obligation under international law prevails over any rule of domestic law, including a constitutional law. You see that in a microcosm, which isn't really ordinary international law, but the European Court of Justice has always maintained European Union law prevails over anything in domestic law, whether it's of constitutional rank or not. So it's no defence in the International Court for a state to say that, "Our constitution doesn't permit us to do this," if they are party to a treaty or bound by a rule of customary international law which says that they must, then they must do it. One of the examples of that is the famous *Alabama* arbitration from the 1870s where the fact that British – sorry English domestic law did not permit the United Kingdom government to prevent the *Alabama* from sailing was not a defence to the liability for breaking a rule of international law of neutrality¹⁹.

How you enforce that, of course, can be very difficult. You see an example of that in the fact that the International Court's judgment that the United States was required to reopen various cases in which Mexican nationals have been convicted of murder, usually in Texas, because the Consular Rights Convention had not been complied with. The US Supreme Court upheld the position of Texas which was to say the fact that the United States has this international obligation does not prevent us from applying our domestic law. That's, however, a reflection not of a monist or dualist approach so much as the fact that the Supreme Court interpreted the US constitution as meaning that the federal authorities could not compel compliance on the part of the Texas.

161. That's very interesting. You say, on page 195, "The extent of the impact which judgments of national courts have had on international law is evident in any leading textbook." The footnote to that, footnote eight, says that, "International law reports contain some 8,000 decisions." Now, that reminded me of your activities which have been long term, this huge reservoir of reports, many of which were written or

¹⁸ John Collier (1933-2016), Fellow of Trinity Hall (1966-2001), International lawyer. Co-author with Vaughan Lowe of *The Settlement of Disputes in International Law*, 2000, OUP.

¹⁹ <https://history.state.gov/milestones/1861-1865/alabama>



summarised by yourself, must have given you an immensely valuable repertoire on which to draw.

It ought to have done. I'm horrified how easily I forget the cases that I wrote up for the *International Law Reports* myself. I completely forgot about one in an advice I had to give when I was at the Bar many years ago. Yes, it's great fun doing the *International Law Reports*. I thoroughly enjoyed working with Eli Lauterpacht²⁰ on them. I remember that when I was reading for my Bar exams, Eli had just come back from Australia after his two years setting up the Australian foreign ministry's legal department and he invited me to go round to his house in Herschel Road and offered me a position working for the *ILR*, which I happily accepted and we've gone on ever since. The first volume I worked on was volume 52 and I've just put volume 196 on my shelves. There are three more in the press at the moment.

162. A huge range, including many on constitutional law, fascinating cases on domestic constitutional law.

Yes. Well, we publish any case where international law and domestic law cut across one another so, to give you an example, the two Gina Miller cases about Brexit²¹; the first one is in the *ILR* because it raises questions about treaty making and treaty termination of the United Kingdom. The second Gina Miller case is much more a domestic UK constitutional case and doesn't have the same international law impact.

163. That's very interesting. I wondered about that because I found the first one and I wondered, perhaps, why you hadn't done the second one. You mentioned in an earlier point the European Court of Justice, which brings me to Lord Justice Diplock²² who said that if parliament does legislate - this was in 1967 - clearly in conflict with an international legal obligation, the local law must have precedence. How did that stand once we joined the European Union?

Well, that's the great constitutional conundrum, that one. The answer is that parliament legislated in 1972 with the European Communities Act to provide for the prevalence of European Community law but they did it in language that's less than straightforward. However, in theory, in the British constitution, Parliament could simply repeal that provision in the European Communities Act or it could legislate in a way that clearly differed from European Union law. The approach of the courts was to say that in the second case, where Section 2 of the European Communities Act is not directly overridden, then we will take it that parliament intends to give precedence to European law, but they left open the question of what happened if parliament ever passed a statute that said, "Notwithstanding anything in Section 2 of the European Communities Act," etc. In the end that didn't matter because we left the European Union anyway, to my regret.

164. You look at direct influence, on page 204, and judgments which contribute to the formation of customary laws of war and state practice. You say that a judgment has to

²⁰ Sir Elihu Lauterpacht (1928-2017), Hon. Professor of International Law (1994-2017). Lecturer in Law (1958-81), Reader in International Law (1981-88). Director, Research Centre for International Law (1983-95).

²¹ *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5. United Kingdom Supreme Court.

²² William John Kenneth Diplock, Baron Diplock, PC (1907-1985), Justice of the High Court England and Wales, Lord Justice of Appeal, Law Lord (1968-)



be seen in the context of a state's practice as a whole and will carry no weight unless the court is important enough. Nevertheless, state practice can be established by local court if the incident is significant enough. The best example that you cite is the US Supreme Court in 1812, in the *Schooner Exchange v McFadden*²³ case based primarily on quality reasoning of Chief Justice Marshall²⁴. So my question, Sir Christopher, is in 1812 the United States was keen to become a member of the international community. Do you think that it would have come up with Chief Justice Marshall's ruling today, seeing as the US *Schooner Exchange* had been illegally taken, turned into a French warship and sent back to a US port in peaceful times?

That's a very interesting question. The US obviously was a member of the international community in 1812 but I think it was keen to make its impact as such in what was still predominantly a European state system. Marshall, of course, was one of the finest judges of his day and I think he saw what was going on in the *Schooner Exchange* case and what the issues were very clearly. Ironically, in more recent Supreme Court cases in America about sovereign immunity they have, in my view, gone down a bit of a blind alley in suggesting that sovereign immunity is not a requirement of international law, but merely a matter of comity. Now, as a matter of international law that's just plain wrong; look at the ICJ judgment in the jurisdiction immunities case which takes a completely different view and I think the same is true of the European Convention on State Immunity, the UN Convention on State Immunity and the case law just about everywhere. What's interesting to me is that as a matter of US constitutional law it's probably wrong as well, because if you read what Marshall said in the *Schooner Exchange* case it's very clearly not suggesting this is just a matter of comity, in the sense in which we use the word comity today, meaning courtesy, politeness. Comity in 1812 was used largely interchangeably with international law to set it aside from domestic law obligations. I regret that the US Supreme Court, in a case where I'm quite happy with the outcome, but not the reasoning, has gone down that road.

165. Interesting. You mention in your conclusions that there are general principles of domestic laws which international law can draw upon, as well as procedural practices and evidential rules. Is it possible to summarise what the most important of these are?

I'm sorry, could you repeat the question, please, I didn't quite catch it?

166. You mentioned that there are general principles of domestic laws which international law can draw upon, this is page 211 of your piece, as well as procedural practices and evidential rules. I wonder if it's possible to summarise what the most important of these are?

Well, I think rules such as the importance of due process and the two broad principles of due process, of *audi alteram partem*, hear the other side, and that nobody could be judge in their own case but the judge must be impartial. I think those have been imported through the medium of general principles. What I was trying to say in this article is that judgments of domestic courts impact on international law in three different ways: they impact through the medium of general principles; they can impact as judgments in their own right if they are sufficiently persuasive, but whether they're persuasive or not, whether they reflect general principle or not, they may still be an aspect of state practice which can't be ignored, even if you don't like it. That's certainly an issue that arose in the jurisdictional immunities case,

²³ 11 U.S. (7 Cranch) 116 (1812), US Supreme Court, jurisdiction of federal courts over a claim against a friendly foreign military vessel visiting an American port. The court interpreted customary international law to determine that there was no jurisdiction.

²⁴ John Marshall (1755-1835), American politician and lawyer, 4th Chief Justice of the United States (1801-35).



that the idea that concepts of *jus cogens*, war crimes, crimes against humanity prevailed over state immunity is something which national courts had almost uniformly rejected. That's state practice of a kind that can't simply be ignored.

167. Sir Christopher, perhaps we can turn now to the topic on which you devoted much of your research and scholarly writings, namely the law of armed conflict.

If we look at two of your contributions on this subject we will also be able to cover some of your journal articles which are incorporated therein. So, your manual, 'Command and the Laws of Armed Conflict'²⁵ was written in 1993, and your 2006 compendium 'Essays on War in International Law'²⁶ is a collation of papers written over a period of 1983 to 2003 while you were assistant lecturer at Cambridge and then professor at LSE.

If we could start with your 'Command and the Laws of Armed Conflict'. This is a veritable gold mine of facts and possible scenarios. It was written while you were a lecturer for the Strategic and Combat Studies Institute at Camberley in Surrey. Could you say what this institute is and how you came to be associated with it?

Yes. During the late eighties and early nineties there was a very valuable, thriving dialogue between the military, particularly the army but not exclusively so, all three armed services, and those of us who worked on the international law of armed conflict. The Strategic and Combat Studies Institute²⁷, which is mainly about military thinking of a broader kind, also touched on this issue of the law of armed conflict and asked me if I would write a pamphlet about it. It's not really a book, I wouldn't wish to claim it as such, it's only about 80 pages long, but it was an attempt to summarise some of the central issues in the laws of armed conflict for a military audience. So it's not good their engaging in long and abstract debate about the law; you've got to actually get down to how it's applied on the ground. I very much enjoyed writing it. I keep meaning to update it but I'm afraid I've just been too busy.

168. Well, that was one of my questions actually and whether you know if anyone else has brought it up to date.

No, they haven't.

169. I came across two references to it, both were written ten years after the manual appeared and they raised points that I wonder if you could address. First reference was by Professor G Mettraux²⁸ in his piece 'Crimes Against Humanity and Jurisprudence in International Criminal Tribunals for the Former Yugoslavia and Rwanda.' It's in *Harvard International Law Journal*²⁹. He mentions on page 247, "Attacks which must not endanger civilians, even against military objectives, if it's likely to cause civilian casualties," and he says, "It must be proportional." There are two footnotes to that citing to your manual.

I wonder whether you could comment on the subjectivity of such an assessment,

²⁵ 1993 "Command and the Laws of Armed Conflict". *Strategic & Combat Studies Institute, Occasional Papers*. No. 4, 1-43pp.

²⁶ 2006 *Essays on War in International Law*. Cameron May, London 701pp.

²⁷ [https://kclpure.kcl.ac.uk/portal/en/publishers/strategic-and-combat-studies-institute\(96d5572e-2fcf-4bef-8193-b390c5ee9e89\).html](https://kclpure.kcl.ac.uk/portal/en/publishers/strategic-and-combat-studies-institute(96d5572e-2fcf-4bef-8193-b390c5ee9e89).html)

²⁸ Guénaél Mettraux, Professor of International Criminal Law University of Amsterdam. Research on the judicial, legal and procedural system surrounding international crimes such as war crimes, genocide, piracy and crimes against humanity.

²⁹ *Harvard Int Law Journal*, 43 (1), 237.



because in most cases this can't be made until after the event, so who's responsible for making such assessments, courts or military tribunals?

Well, I think in the first instance it's the commander who decides to carry out an operation who has to make that assessment and that's one of the points I was at pains to stress in the pamphlet. A court might, though in 1993 they weren't doing so, but a court might subsequently question that judgment. There have been lots of examples of that happening in the International Tribunal for the Former Yugoslavia which dealt with a lot of these armed conflict cases. I think it's important that the law here should be one that is capable of being applied by a commander in often very difficult circumstances who is deciding to conduct a military operation.

One of the things here that I feel very strongly about is that lawyers tend to let the military down on this. We engage in long and complicated debate about what a particular provision might mean; it has to be applied by people with very little, if any, legal training, usually without the benefit of being able to ask a solicitor for advice, and there's inevitably got to be a certain amount of leeway in the way in which we approach the decisions that are taken. Now, having said that, there are two other things that I think are worth keeping in mind: one is that we talk about proportionality and, again, lawyers are careless about this, I'm afraid. We talk about proportionality without looking at what it really means.

Proportionality is not a principle in my view; proportionality is a set of scales in which you have to strike a balance between consideration A and consideration B and the example that you're giving here, between the gain to be expected from the attacking a military objective against the likely civilian casualties. Now, that's not an easy assessment to make. If you are a commander you are likely to be much more concerned about the military gain, for example the risk of loss of life of your own soldiers, and the enemy civilians may be of a lower order of priority to you. The key thing here is try and redress that balance and to make sure that the commander does weigh the likely civilian casualties more heavily in the scales. Elsewhere when we talk about proportionality you're weighing quite different things, so I think it's important to keep that in mind whenever you look at this area.

The other point I'd make is that there's no absolute rule against causing civilian casualties. There is a principle that in armed conflict you are not to attack the civilians themselves, but in attacking a military objective you have to keep the likely civilian casualties in mind and if that is going to be excessive in relation to the military gain then the attack would be illegal, but that some civilians may lose their lives in an operation of that kind is not in itself a bar to carrying it out.

170. Professor Judith G. Gardam³⁰ in her 'A Role for Proportionality in the War on Terror' in the *Nordic Journal of International Law*³¹, on page eight, said that, "Re the notion that self defence can also include action to make sure hostilities don't happen again or come from another source." She's cited you as saying that a propos the Falklands, the UK had every right to ensure that there were no further attacks. So presumably any state can station troops in its own territory without referring to the laws of armed conflict. One thinks here of the Putin³² and Ukraine scenario current situation, so unless you attack someone, can you say that the law of armed conflict does not apply?

Well, I think the law of armed conflict has nothing to do with the question of where

³⁰ Judith Gardam, Professor Public International law, Adelaide Law School.

³¹ *Nordic JI Int Law*, 74, 3-35.

³² Vladimir Vladimirovich Putin (1952-), Russian politician, former KGB intelligence officer, President of Russia (1990-2008, 2012-).



you station troops. The law of armed conflict only comes into play once an armed conflict begins. It's the UN Charter and the rules on self defence, threats to international peace and security which are particularly pertinent to how you station troops, where and when. The point I was making in the booklet was simply that a state that has been the victim of an armed attack is entitled not merely to repel that attack; it's entitled to take certain steps to ensure that the attack isn't simply repeated the following year or a decade down the road.

Russian troops stationed near the Ukrainian border, there is nothing that prohibits a state from stationing its troops on one part of its territory rather than another but, of course, it can have a massively destabilising effect; it could constitute a threat to the peace in the eyes of the Security Council. I don't think the principle of self defence would assist Russia in this case because there is absolutely no evidence whatever that Ukraine poses any threat to Russia. Nobody - and I follow this debate quite closely - has ever suggested that the Ukrainian army is going to invade Russia. It's a nonsense.

171. If we could now look at the text of your manual. On the question of states paying attention to various rules and regulations, you mention on page two that although there is no world governing body, the rules have to be derived from treaty and custom and virtually every state is a party to the Geneva Conventions. If we look at a list of parties we'll see that the United States signed but not ratified both clauses one and two; China was signed up in 1956 but this was by Taiwan, and Russia was signed up as the USSR. So, do these anomalies actually affect the situation in reality?

Right. I think there's a danger here of confusing two different treaties. There are the four Geneva Conventions of 1949; virtually every state in the world is a party to those. I haven't looked at the list recently, it's possible every state is. Certainly all the big powers. Any state that has armed forces of any size is a party to those, so the People's Republic of China has been a party to them for years, there's no problem about that. The difficulty arises with the two protocols additional to the Conventions, that were adopted in 1977. Now, they have an overwhelming majority of states that have signed up to them, but several big, key players have not. So the United States, for example, has not ratified either Protocol 1 or Protocol 2. India has not ratified Protocol 2. China, I think, has not ratified Protocol 2. I'd have to go and have another look, I'm afraid. I haven't got this information at my fingertips the way I once did. So, yes, there is a problem there but it's a problem that relates to the two additional protocols not, I think, to the Geneva Conventions themselves.

172. Thank you. Page four looks at the right of self defence in case of armed attack. You mentioned that this provision was added to the original draft of the charter on the insistence of Latin American countries. Why was this?

Well, there's a separate treaty in Latin America which deals with questions of mutual assistance in the event of an armed attack and the Latin American states were very keen to have that reflected in the preservation of the right of collective self defence, which is part of Article 51 of the Charter. The view taken in Britain and, I think, in a number of other countries is the use of force in self defence was lawful anyway and that was implicit in the prohibition on other uses of force in Article 2 of the Charter. It's not helped, unfortunately, by the fact that the language of the different provisions in the Charter isn't the same. Article 2, paragraph 4 prohibits the threat or use of force against the territorial integrity, political independence of a state or in any other manner inconsistent with the purposes of the United Nations. Article 39 on the powers of the Security Council then talks about threats to the peace, breach of the peace or act of aggression. Article 51 uses the term 'armed attack' which doesn't appear in any of the other provisions. So it wasn't perfectly drafted, from that



point of view.

173. I noted with interest, on page five, that you believe force could be used to rescue one's nationals abroad. Now, this is very topical in the recent case of Afghanistan. Would the United States have the law on its side to rescue any of its nationals in a country in which they might be in mortal danger?

I think you'd have to look very carefully at the facts of the case before generalising about that. My point, which is controversial, is that an attack on a state could take the form of an attack on its citizens abroad. I think a very striking example of that was the Entebbe incident³³ in the 1970s where those people who were held hostage in Uganda were held hostage either because they were nationals of Israel or because they were Jewish. That seems to me to be an attack on the state of Israel. The reason why these people were singled out and why they were treated in this way was because either of their nationality or because of an ethnic link to Israel.

I don't see the logic of saying that an attack on an uninhabited rock is an attack on the state, but an attack on maybe hundreds of its citizens isn't, but that doesn't mean that the right of self defence extends to giving a state carte blanche to invade another country in order to protect its citizens there; you've got to look and see from whom does the threat come; could it be dealt with in other ways; is the likely loss of life, injury, damage out of proportion to the value of rescuing the hostages or those at threat? I think you have to look at all those questions and look at them very carefully.

174. Thank you. Coming to enforcement on page ten of your manual. When you published it in 1993, the Cold War had ended and things were normal, hence the UN sanctions re. Iraqi invasion of Kuwait was approved in the Security Council with no veto. Would you agree that we have now effectively stepped back into a new Cold War situation?

I don't think we're back in a Cold War situation in the Security Council. You know, there are circumstances where there would undoubtedly be a veto - you will not get a Security Council Resolution on Ukraine, for example, because Russia will veto it. You would not get a Security Council Resolution about China if it used force in respect of Taiwan because China would veto it. Back in the seventies and for most of the eighties it was impossible to get any kind of action under Chapter 7 at all anywhere in the world. I don't think we're quite back to that stagnation yet, but I think it's unlikely you would get the cooperation. You certainly wouldn't get the cooperation today that was obvious in the Security Council in 1990-91 over Kuwait.

175. A propos the law of targeting, I don't believe that when you wrote the manual in 1993, a propos bombing of civilians, etc, being against the law it mentioned the modern use of drones controlled from afar. Have the laws been modified to take this form of warfare into account?

No. There's no modification of the law and some people suggest there should be. I'm not entirely persuaded by that, I think you can deal with drone warfare by applying the same principles, you just have to look at the different context in which they're being applied.

³³ 1976. Hostages held in Uganda by Palestinian hijackers, and rescued by Israeli commandos.
<https://www.britannica.com/event/Entebbe-raid>



176. Coming to your conclusions, you cite Sir Charles Napier³⁴ (1782-1853), as implying that with all these laws, war should be fought by lawyers commanded by the Lord Chancellor, and you touched on this at the beginning.

Well, Napier was a brilliant general of the Napoleonic wars and quite a staunch liberal, actually. He wasn't at all the reactionary figure that you might imagine from this quotation. He was suggesting that if you, I think wrongly, that if you have all these elaborate laws on warfare then the military are unable to do their job. There is always that risk, but I don't think the Geneva Conventions and the two Protocols cross that line.

177. Sir Christopher, could we come now to the compilation *Essays on War in International Law* published in 2006, of some of your very important papers over several years on various aspects of the laws of armed conflict? Could you tell us how this compendium came about?

Yes. The May, of Cameron May, called me up and asked me if I'd like to produce a collection of my articles in a single volume. I was very happy to do that. I dug them out, wrote a short introduction, squirmed over a mistake I'd made in a very early article and carried on.

178. I found a review by Harrison Andrew Halpenny³⁵ who said, on page 73 of his review³⁶, that it was an immensely practical volume; it can easily be used as a unique reference work by lawyers, scholars and students. Were these, in fact, your chosen audience?

Yes, I think they were. The articles were written in very different conditions and with different audiences in mind, some of them are much more practical; some of them more theoretical but I'm ashamed to say I've never read the *Canadian Year Book of International Law* review. I hadn't heard of it until you drew it to my attention so I shall go away and read it and probably write Harrison Andrew Halpenny a letter of thanks.

179. Well, he has high praise for Chapter 3, which he says is the longest paper, it's the centre piece of the collection in his view and is recommended for study by any serious student of international humanitarian law. It's about the 1899 Hague Peace Conference where five of the major areas dealt with the Conference are still less than settled even today, including the entitlement to combatant status, the law of weaponry and targeting. Would you agree with his conclusion, which is now 13 years ago?

I think there's still a lot of ambiguity around the law in those three areas, yes. I don't think I would say that they were less than settled. I think that particularly on combatant status the rules are now quite clearly understood. One of the things that has changed since that review was written is that we now have a much more extensive case law from the Yugoslav Tribunal which, I think, helps to flesh out some of the uncertainties that existed before.

180. Coming then to specific articles, obviously, I couldn't look at the 21 papers so I selected three that span the development of your ideas on the laws of armed conflict

³⁴ General Sir Charles James Napier (1782-1853). Veteran of the British Army's Peninsular (Iberian) and 1812 campaigns, Major General of the Bombay Army, Governor of Sindh, and Commander-in-Chief in India.

³⁵ Harrison Andrew Halpenny, CD, B.A. (Manitoba), LL.B. (Queen's), LL.M. (Ottawa). Legal officer in the Office of the Judge Advocate General of the Canadian Forces. Legal adviser for the Canadian Forces Provost Marshal on legal and policy matters relating to the Military Police.

³⁶ 2008, *Canadian Yearbook of International Law*, 46, 736-741.



over the whole period represented in this book: the 1983 ‘Relationship of *Ius ad Bellum* and *Ius in Bello*’; your 1992 ‘New World Order or Old? The Invasion of Kuwait and the Rule of Law’ and then your 2003 paper ‘War, Terrorism and International Law’.

The first paper, the ‘Relationship of *Ius ad Bellum* and *Ius in Bello*’ was written when you were an assistant lecturer³⁷. It was after your very first paper on state contracts the Libyan oil cases. I wondered what prompted you to move into the topic of armed conflict.

The dates these articles came out are quite a bit later than the dates on which they were written, in particular the Libyan oil arbitrations article was written in the winter of 1980 and spring of 1981 but didn’t come out until early ’83. The reason why I shifted my focus more to the laws of armed conflict was that I was appointed as an assistant lecturer in 1981 and I had the great good fortune to be given a course to myself, which was a 16 lecture course in the LLM, on the laws of armed conflict. This article about *Ius ad Bellum* and *Ius in Bello* came out of that. I started thinking about the relationship between the law in the Charter that says you may not use force except in certain very narrowly defined circumstances, that’s the *Ius ad Bellum*, the law on going to war; and humanitarian law, the *Ius in Bello* if you are in an armed conflict this is what you must and mustn’t do.

In a sense, the fact that international law has both of these rules is rather bizarre; we wouldn’t say burglary is prohibited but, if you commit burglary you must follow the following standards. No country would have a law like that, this just reflects the strange nature of international law. In fact, there is nothing inconsistent in the two principles, one is designed to preserve peace; the other is designed to preserve an element of humanity when the first body of rules breaks down. That, in turn, led to the question of how you assess certain acts that take place in an armed conflict. What concerned me there was the sinking by the Royal Navy of the *General Belgrano*, the Argentine cruiser³⁸.

Now, in terms of the law of armed conflict that’s absolutely straightforward: the armed conflict between the two states already existed; the *Belgrano* was a warship; it wasn’t in neutral waters or protected in any other way; it was a perfectly lawful target. The question, to my mind, was rather one of, since you can only take in self defence actions which are proportionate to the goal of your self defence, was this an appropriate or a disproportionate reaction? Now, in the end I came to the conclusion it was an appropriate one, but I still think one of the things that we don’t really bother about in international law is we don’t look at the relationship between proportionality and self defence and the requirements, the restrictions of the law of armed conflict, the *Ius in Bello*.

181. When you wrote this piece did anybody give you any critical comments? Professor Bowett³⁹ was then in the Whewell Chair.

I don’t think I discussed it with Derek. I might have done, but I don’t have a clear memory of a discussion about that. Derek was always very helpful to me and to other young members of the Faculty at the time. Quite a lot of people in the law of armed conflict, the humanitarian law world, thought this was nonsense, it was adding an extra level of complexity, but logically I don’t see how you can escape that. Once you accept that the law of self defence doesn’t just limit you to when you can use force, it also limits what degree of force you can use and everybody appears to accept that, then it must have repercussions for the conduct of hostilities which means that certain actions during hostilities you’ve got to appraise under both *Ius in Bello* and *Ius ad Bellum*.

³⁷ 1983. The Relationship of *Ius ad Bellum* and *Ius in Bello*. *Review of International Studies*, 9, 221-234.

³⁸ 2nd May 1982 during the Falklands War by the nuclear powered Royal Navy submarine HMS *Conqueror*.

³⁹ Sir Derek William Bowett (1927-2009), Whewell Professor of International Law (1981-1991).



182. Since you wrote this paper most armed conflict is not between states but ill-defined groups and similarly cyber warfare has become a big business. How have lawmakers kept up with these developments?

I don't think I'd agree with you that most armed conflicts haven't been between states. You've had some massive armed conflicts between states in the last 40 years: the two Iraq wars; the Iran-Iraq conflict which had just started at the time I wrote this piece; the Falklands conflict between Britain and Argentina; you've had the conflict that's already taken place in Ukraine. I agree that the line between internal conflicts and international conflicts is now a much more difficult one to draw and I think the wars in the Former Yugoslavia were particularly problematic in that regard, but I think it's a mistake to write off the traditional law of inter-state warfare and say nowadays we've got to concentrate on terrorism or cyber warfare.

Cyber warfare does present particular problems. One of the difficulties, somebody once said, "Lawyers spend their time legislating for the last war and therefore always miss the things that are coming in the next one." The same person, by the way, said, "Soldiers fight the last war, lawyers legislate for the last war and pacifists oppose the last war." So we all get it wrong, it's not just the legal profession. One of the difficulties with cyber warfare is I don't think very many people in the law understand the technology of it; I certainly don't claim to. My younger daughter finds it hilarious watching me try to make my computer work properly. The core principles of humanitarian law can be applied to the cyber context as well. If, by using computer techniques, a virus or whatever, you cause planes to crash on landing, it strikes me that's no different from shooting at them. It's more difficult when you get into the world of economic use of cyber techniques, so you crash a nation's banking system and bring its currency down. Is that an attack? Would it fall within the concept of an attack in the Geneva Conventions and Geneva Protocol? That's a much more difficult question to answer.

183. Yes, it's fascinating. You cite judicial practice on pages 21 and 22 of this article, saying that the rules apply equally to both sides in the conflict and the case here was the *US v List*, 1947 US Military Court at Nuremberg⁴⁰ in relation to this, where German generals' activities in the Balkans and Norway was found to be legitimate defence against attack because the attackers weren't combatants. My question is, are military courts dealing with foreign combat considered as applying international law?

Well, that's a difficult question to give a general answer to. International courts, when they deal with that, the answer is yes. The International Criminal Tribunal for the Former Yugoslavia applied the Geneva Conventions, the Geneva Protocols, the customary law of armed conflict. The International Criminal Court would do the same. How they can apply it may be shaped by their own statute but, in essence, the substantive law they'll apply is international. When you come to a domestic court marshal the position is rather different; that's applying domestic law. It may take account of international law in doing so, it may not. One of the difficulties, for example, it's often said that in the aftermath of World War 2 you didn't find the British or the Americans prosecuting their own soldiers for war crimes. Well, that's not actually true, there are instances of courts marshal for that, but they would court marshal somebody for murder, not for the war crime of killing a prisoner of war or killing an enemy civilian. One of the reasons for that is, at least in the common law countries, a jurisdictional limitation. In Britain, for example, British law, English law, UK

⁴⁰ Footnote 25 in paper.



law, however you like to describe it, relating to crimes such as murder applies to the activities of British Armed Forces outside the United Kingdom. There would be no jurisdiction normally to try a German national or a Japanese national, to take World War 2 cases, for a murder committed outside the United Kingdom. So, instead there is a special jurisdiction in relation to trying war crimes. What that means is that if a German soldier had murdered a British prisoner of war in Germany in 1944, 1945 and a British soldier had murdered a German prisoner of war two days later, also in Germany, the British soldier would have been prosecuted for murder; the German soldier would have been prosecuted for a war crime. It's the same crime; it's the same factual scenario, it's just that unfortunately the records we have from that period make it very difficult to distinguish between cases where a soldier was court marshalled for a crime that would also be a war crime, and those cases where the soldier was prosecuted for something that is purely domestic.

184. Thank you. Coming to the distinction between *ad Bellum* and *in Bello*, pages 28 and 29, and unlike most international law, the rules can apply to individuals, not just states. *Ad Bellum* self defence applies to states, while *in Bello* can apply to military and civilian individuals as well as states. So, the consequences of the rules differ and the number, you make the interesting point, the number of individuals exposed is much greater under *in Bello* and only those in very high positions in actually pursuing war get caught under *ad Bellum*. So does that position still hold after all the wars and the trials since 1983?

Well, that's an area where the article is clearly dated because the creation of the International Criminal Court 15 years after I wrote this article has changed the ground rules there. It is now possible for somebody to be prosecuted for the crime of aggression which would be a crime against the *Ius ad Bellum* rather than the *Ius in Bello*. It hasn't happened yet and I would still stick by the proposition that if there were to be prosecutions for crimes against *Ius ad Bellum* they would be likely to be limited to people at the very top of the command structure. Obviously I would take that into account and write the article differently if I were writing that point today.

185. Right. Which brings me to the final question on this paper, that what have been the major developments that might induce you to rewrite this chapter, and perhaps you've answered the question already, 40 years later?

I think I would stand by virtually everything in that article. Some of it would need a lot of refinement and most of it would need to take account of new practice, new examples and so on, but I don't resile from the basic theory.

186. Your next paper was written in 1992 in the aftermath of the invasion of Kuwait by Iraq. You were a lecturer at Cambridge at the time, "New World Order or Old? The Invasion of Kuwait and the Rule of Law", published in the *Modern Law Review*⁴¹. George W Bush⁴² said that this heralded a new world order, where diverse nations are drawn together in a common cause. Does this analysis still stand?

Well, my view was that what Bush said was fine in terms of political rhetoric. I didn't think it was right in international law. The first part of the article was saying that this wasn't, in fact, a new world order; it was an attempt to enforce one of the key planks of the

⁴¹ 1992. 'New World Order or Old? The Invasion of Kuwait and the Rule of Law' 55 *Modern Law Review* 153-178.

⁴² George Walker Bush (b. 1946). 43rd President of the United States (2001-09), 46th Governor of Texas (1995-2000).



existing world order. Where it was new, was in the way that there was that enforcement and Bush was right in pointing to the role of the Security Council there.

187. You describe Iraq as, “No major global power,” so that the international community had the capacity to reverse the annexation of Kuwait. Does international law in regard to military intervention only apply then to weak states?

No, I don't think that's the case. International law applies to all states. What you can do about it will vary, there's no doubt about that. The scope for dealing with Iraq's invasion of Kuwait was very different from the scope for dealing with the Russian Federation's annexation of Crimea.

188. A propos the background to the invasion. In your opinion, Iraq's accusation that Kuwait was using the oil price to cripple its economy, even if true, would not have justified the use of force. In a modern context, does this suggest then that actions such as cyber warfare to cripple an economy would also not be justification for the use of force?

The two situations are very different. The Iraqi claim was nonsense. It's true that Kuwait was agreeing, if memory serves me right, to pumping more oil, which was bringing the price down which was making it more difficult for Iraq to pay off its very extensive war debts. By no stretch of the imagination could that be a legitimate cause for war today. Some of the cyber warfare techniques, on the other hand, might be. In particular if you, for example, were able to manipulate computer technology in such a way that you could open the dam on a major reservoir and flood large areas of country, that's, I think, much closer to using shellfire or bombs to do so.

189. It was claimed that Iraq's assertion was that it acted at the request of the Kuwait opposition for support (on page 521). This discussion of invitations to invade reminds me of Professor Allott saying that it was Eli's account of the Russian invasion of Hungary in 1956 at the invitation of the Hungarian Communist Party, that put him off international law as a moral force for life. I wondered what your thoughts are on such spurious excuses 30 years later.

Well, they're complete nonsense. The argument that the Soviet Union was invited to intervene in Hungary is ridiculous. What happened was that the Soviet Union set up a puppet government, got the puppet government to invite them to intervene, and then said, “Well, we're going in at the invitation of this outfit.” The Iraqis did exactly the same thing in 1990, the Provisional Government of Free Kuwait, or whatever it was they called themselves, had no legitimacy whatsoever. It seems to have consisted mainly of Iraqi army officers.

190. A propos UN Resolution 678 authorising the use of force, it was passed in 1990 and it didn't insist on UN control. Also, use of force wasn't stated, but “all necessary means” was interpreted as such. China abstained and I wonder if you could comment on this absence of unanimity.

Well, of course, if you go back to the early days of the United Nations the original scheme for the Security Council was that all five of the permanent members had to vote in favour. That's what the relevant provisions of the Charter say, Article 27. It's the way, if there's any doubt it, that's the way it was explained in the *travaux préparatoires*, but by 1951 the practice had grown up that instead of requiring all five to vote in favour, it was enough that none of them actually voted against. In theory you could have a resolution that the Security Council adopted with all five permanent members abstaining, although that's never



happened. I think it was unfortunate in Resolution 678 that the P5 didn't all vote in favour, but China was very reluctant to do so and that's why the text talks about all necessary measures rather than the use of force, but nobody was in any doubt about what it meant. You'd have to stop and ask yourself, given that there were already comprehensive economic sanctions against Iraq, what other necessary measures could there have been other than force?

191. Page 550 comes to the situation in northern Iraq during 1991, when the uprisings of the Kurds in the northern part, and the Shia uprising in the south, were brutally put down and that these amounted to genocide. The United States, the UK, France, and the Netherlands sent forces to protect the area north of the 36th Parallel. My question, Sir Christopher, is that I wonder what you thought, or think, of Tony Blair's⁴³ 1999 'Doctrine of the International Community'⁴⁴ which allowed interventions for humanitarian grounds and under which British troops were sent to Sierra Leone in May 2000 under the code name Operation Palliser?

There wouldn't be any difficulty with Sierra Leone anyway because there was a functioning government in Sierra Leone and they had requested assistance. People like John Kampfner⁴⁵ and his book about "Blair's Wars"⁴⁶, I think fail to see the differences between the difference cases. I was one of definitely a minority, quite a small minority of writers on international law who took the view that there are circumstances in which the way a state treats its own citizens is so terrible that other states have a right of military intervention. I have to say that if I were writing again I think I would have to say that that is what I think the law ought to be; I'm not sure any longer that it's what the law is. I think the reaction to these interventions was generally unfavourable.

192. In the last paragraph of the paper you refer again to Bush's new world order and you conclude that the Kuwait conflict was more about saving a fragile part of the old, ie post-1945 legal order. You posed the question, what would have happened if Iraq had been allowed to retain Kuwait? I wonder what your thoughts are 30 years later.

Well, I think it would have done immense damage to the structure of the Charter and also to any hope of peace and stability in that part of the Middle East. Stability in the Middle East is a problem in its own right. If a relatively weak state like Iraq, strong militarily in its own area, but not one of the big players, had been allowed to get away with invading its neighbour and annexing it, then it would be very difficult to see how you could shore up the key provisions of United Nations Charter.

193. Thank you.

Finally, your most recent paper in this compendium, your 2003 paper 'War, Terrorism and International Law'⁴⁷, written at LSE six years before you went to the International Court of Justice. It was published three years after 9/11 so no more than a year or so after the event, when things were still in turmoil. I wonder what prompted you to write it.

⁴³ Anthony Charles Lynton (Tony) Blair (b. 1953-) UK Prime Minister (1997-2007).

⁴⁴

https://edisciplinas.usp.br/pluginfile.php/5058109/mod_resource/content/1/The%20doctrine%20of%20the%20international%20community.pdf

⁴⁵ John Kampfner. British author, broadcaster and commentator. He was Founder Chief Executive of the Creative Industries Federation and Founder Chair of Turner Contemporary. Senior Associate Fellow at the Royal United Services Institute.

⁴⁶ John Kampfner, Simon and Schuster, 2003 - Great Britain - 367 pages.

⁴⁷ 2003. 'War, Terrorism and International Law' *Current Legal Problems*, 56, 505-530.



I think I was interested in this theory that there was a global war against terrorism. At the political level I could understand people saying things like that although I think it was a mistake politically as well because. Let's face it, a global war against terrorism, like a war against drugs, it's very difficult to see how you could ever win it, how you could ever define that it had ended. You could have greater or lesser degrees of success but that's not what we generally associate with the term war; I think it's a degree of hyperbolic rhetoric that doesn't really help anyone.

In law, I think it's nonsense and I was trying there to show why you could not manipulate the law of armed conflict simply by talking about a war against terrorism; you had to apply it where it applied and apply other rules where it didn't. So, for example, the fighting in Afghanistan that followed the attacks on New York and Washington in September 2001. The fighting in Afghanistan was clearly covered by the law of armed conflict, and once that law kicks in then you can't manipulate it so as to exclude groups of people from it. Equally, you can't use the language of a war against terrorism as a way of circumventing normal requirements of due process, normal requirements of human rights and so on. What I'm thinking of here is the Guantanamo Bay detention centre.

194. At the time of writing you said that the UN General Assembly had not reached a consensus on a definition of what terrorism was; is it well defined now, 20 years later?

No. No, and it's never going to be. I think the search for a definition of terrorism really is like the search for the Holy Grail, it just wastes everybody's time. Let me give you this as an example. There are certain acts which might take place for political reasons which I do not think anyone rational, with a sense of morality, would exclude from a definition of terrorism; that would include, for example, something like the Ariana Grande concert bombing⁴⁸. You know, what could possibly be the justification? How could you exclude from a concept of terrorism an act of that kind? That's what I call the inner circle of acts but then, if you focus only on those you leave out of the count attacks on soldiers by people wearing suicide vests or whatever. Now, many people would not accept that as terrorism, or at least they would not accept it as terrorism in certain contexts.

I think trying to find a definition that covers the cases you would like to cover in that sphere, while excluding the ones you don't want brought in, such as the Mujahideen fighting against Russian soldiers in Afghanistan or whatever particular cause you want to try to support, is almost impossible to do. That's why I suggested that it's better just to focus on treaties that deal with specific types of action that we will deem to be terrorist such as putting a bomb on an aeroplane, hijacking an aeroplane. Those are easy; we can get agreement on that. Looking for a general purpose definition, I think, doesn't work. There are a couple of treaties that come close to doing it obliquely on financing terrorism but I don't think that those definitions reflect a sufficient degree of consensus to be really usable in practice.

195. You mentioned the 1970 Declaration adopted by the General Assembly which was regarded as declaratory of customary law by the International Court of Justice. It included provision that every state has a duty to refrain from organising, etc, terrorist acts, so at what point did the judiciary realise that there was as much danger from non-state actors?

Did the judiciary realise? I think the international community began to wake up to the danger from non-state actors quite a long time ago. There was, perhaps, an excessive focus

⁴⁸ 22 May 2017, an Islamist suicide bomber detonated a shrapnel-laden homemade bomb as people were leaving the Manchester Arena following a concert by American singer Ariana Grande. Twenty-three people died, including the attacker, and 1,017 were injured, many of them children.



in some circumstances on the Cold War environment. I think you could take that, for example, with attitudes towards Afghanistan in the 1980s and also the idea that states were sponsoring terrorism, which is an important issue, but a lot of terrorism isn't state-sponsored, as we know now.

The difficulty, I think, with understanding different types of terrorism – and here I'm getting a bit outside my comfort zone as a lawyer – is that at the time, for instance, that we were writing about this in relation, say, to Northern Ireland, you could identify what a particular group was using violence to try and achieve. In the last 30 years or so, there has been much more of an almost nihilistic violence where it's no good even thinking of sitting down and talking to these people. To whom would you talk, and what would you talk about are questions that are unanswerable? Perhaps it's better to go back to some of the violence of the very end of the 19th century, the nihilist movements, the anarchist movements that sprang up then. I found Joseph Conrad's⁴⁹ book very, very interesting, his figure of the professor in 'The Secret Agent' is a fascinating one, manipulated in part by a government but largely engaged in what we would now call terrorism for ends that nobody could possibly understand.

196. Well, looking back on the evolution of your own thoughts on the laws of war or armed conflict as expounded in your book, and the trajectory of how the international community has altered its views, if it has, are there any areas where you now diverge from where we are now in comparison with the early part of the 21st century?

Yes. You know, wasn't it Maynard Keynes⁵⁰ who said, "When circumstances change, I change my mind. What do you do?" I certainly think differently about some of the things I wrote in the past and, would do it differently if I were doing it all over again today. I first started writing on international law more than 40 years ago and it would be amazing if, in the space of 40 years, things didn't happen to make you change your mind. I'm still very much wedded to the core concepts though that humanitarian law is important and that it's important that we insist on its observance, however vicious an armed conflict might be.

197. Sir Christopher, in summary, looking back on your large scholarly contribution to a very wide range of topics in international law, overall where would you consider you've made your most important contribution to this broad subject?

I think that's probably more for others to say than for me. I've enjoyed writing on international law across a wide spectrum. You'll realise, of course, that once I became a judge I had to be more circumspect in what I wrote which is why the articles from that period tend to be of a more theoretical bent, more generalist. I don't think it's a good idea for judges to write the sort of pieces I used to write in the eighties and nineties. I think the area of my writing that I'm most proud of is about the laws of armed conflict.

198. Thank you. You've made major contributions in teaching, research, in arbitrating disputes, and in participating in judicial decisions at the highest level. Which has given you the most personal satisfaction?

Do you know, I find it impossible to pick because I've enjoyed them all in different ways. I thoroughly enjoyed teaching, something that I haven't tried to go back to it now, but I very much enjoyed my career as a teacher, both here in Cambridge and at the LSE. I enjoyed the contact I had with students; I'm still in touch with many of my old students. I

⁴⁹ Joseph Conrad (born Józef Teodor Konrad Korzeniowski), (1857-1924). A Polish-British writer

⁵⁰ John Maynard Keynes, 1st Baron Keynes, CB, FBA (1883-1946). English economist.



enjoyed my research and writing. I found advocacy extremely exhilarating and I like to think I contributed to the changing attitudes in the English courts towards international law through some of the cases I was able to argue. I enjoyed my judicial and arbitral work and still do.

199. Finally, you are now Master of one of the senior and most prestigious of the Cambridge Colleges, what are your hopes for your tenure and how would you wish your post-Magdalene career to evolve?

The second part of the question is easy, when I've finished as Master of Magdalene I'm going to retire. My term of office comes to an end when I'm 72 and I think at that point I might continue doing a bit of arbitration work and writing a bit, but I'm certainly not going to work full-time any more.

As for my aims for Magdalene and my Mastership. I have all sorts of ideas about what I would like to achieve, but the most important priority at the moment, here as in the whole of the University of Cambridge, is to get the place back on its feet after COVID and to see how we now have to respond to a very much changed environment.

200. All that remains is for me to thank you most sincerely for another truly fascinating account. I'm extremely grateful to you. Thank you very much.

Thank you very much for coming and talking to me and your patience with my rants about various subjects.

201. It has been a great privilege and hugely informative.

