Contemporary Issues in International Law

A Collection of the Josephine Onoh Memorial Lectures

Edited by
David Freestone, Surya Subedi
and Scott Davidson

Kluwer Law International

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KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

Published by
Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands
sales@kli.wkap.nl
http://www.kluwerlaw.com

Sold and distributed in North, Central and South America by
Kluwer Law International,
101 Philip Drive, Norwell, MA 02061, USA
kluwerlaw@wkap.com

In all other countries, sold and distributed by
Kluwer Law International,
Distribution Centre, P.O. Box 322, 3300 AH Dordrecht, The Netherlands

A C.I.P Catalogue record for this book is available from the Library of Congress.

Printed on acid-free paper

ISBN 90-411-1587-0

Printed and bound in Great Britain by MPG Books Limited, Bodmin, Cornwall.

FOREWORD

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

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

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

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

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

David Freestone, Surya Subedi and Scott Davidson (eds.), Contemporary Issues in International Law, vii–viii.

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

Richard Wilberforce

David Freestone, Surya Subedi and Scott Davidson

INTRODUCTION

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

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

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

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

David Freestone, Surya Subedi and Scott Davidson (eds.), Contemporary Issues in International Law, ix–xii.

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

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

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

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

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

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

ACKNOWLEDGEMENTS

The editors would like to thank the following people for their assistance in the publication of this book: Annebeth Rosenboom of Kluwer Academic Publishers for her encouragement of the project; Phil Johnstone, also of Kluwer, for his final editing; Lee-Anne Robins for proof-reading the entire manuscript and Ann Ashbridge for her invaluable secretarial assistance. The editors would also like to thank the Ferens Trust for providing financial support for some of the administrative tasks associated with the production of a book of this kind.

THE JOSEPHINE ONOH MEMORIAL LECTURERS 1985–2000

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TABLE OF CONTENTS

T.O. Elias

I. NEW TRENDS IN CONTEMPORARY INTERNATIONAL LAW

The Josephine Onoh Memorial Lecture 1985

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

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

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

David Freestone, Surya Subedi and Scott Davidson (eds.), Contemporary Issues in International Law, 1–12.

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

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

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

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

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

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

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

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

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

3 Ibid., p. 91.

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

One of the most important tasks of the United Nations General Assembly was the adoption of the Universal Declaration of Human Rights of 1948, which soon became the corner-stone of independence constitutions as well as of the constitutions of even some developed countries. Thus the Rule of Law and the pursuit of democracy were made the ingredients of the governments of Member States, especially the new ones. This basic document was, after years of strenuous endeavour, followed in 1966 by the International Covenant on Civil and Political Rights and by the International Covenant on Economic, Social and Cultural Rights[4] which between them attempt to fill out most of the gaps in the generalised provisions of the 1948 Declaration.[5] The undertaking of this early task on human rights was certainly prompted by the preambular paragraph of the United Nations Charter, which provides that one of the principal aims and objectives of the United Nations is:

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

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

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

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

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

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