

**Conversations with Professor Sir Elihu Lauterpacht
Third Interview: The Sixties**

Date: 13th March 2008

Between January and May 2008, Sir Elihu was interviewed seven times at his home in Herschel Road Cambridge to record his reminiscences of seventy years of his own, and his father's associations with the Faculty. The interviews were recorded, and the audio version is available on this website with this transcript of those recordings. The questions and topics are sequentially numbered in the six interviews for use in a database of citations made across the Eminent Scholars Archive to personalities mentioned therein.

Interviewer: Lesley Dingle (**questions and topics are in bold type**)

Sir Elihu's answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

36. 1940-44. Sir Eli, this is the third interview. Last time, we followed the list of your notable achievements, which you kindly provided. I have listened to what you said very carefully and I found it fascinating. But there are three points, which I wondered if we could amplify. First of all, in the 1940s you spent four years in the States and when you came back to Britain, both countries were at war with Germany - one had been very badly affected, the other far less so. You were an impressionable boy then and I wonder if you can remember some of the comparisons that must have hit you quite forcibly when you returned?

You say that I was an impressionable boy then. I suppose I was, but I am not sure that I was always conscious of the nature of the impressions that I was receiving. However, there were, of course, significant differences between my life in America and my life in Cambridge. In America, I had been very much on my own and I had become much more self-reliant; I organised my life as I thought best. When I came back to England, I fell immediately under the considerable sway of my father, who had certain views as to how I should behave and I think I mentioned that when I came back, I had an American accent and I had to get rid of it. I was told to sit in my room and listen to the wireless in English, which I did and in due course I learned to speak English. But as between the two countries, of course, there were massive differences. In America one, for example, was not exposed to rationing, there was plenty of food and so on. Coming back to England, one was in the middle of rationing, the war was still on. I came back just after the invasion of Europe – D Day, and so when I went back to school at Harrow, I went back for another year of the war in Europe. It was only in May '45, I think, that Germany collapsed and thereafter the Japanese war had also been brought to an end. So I came back to a wartime, war-oriented country and one was conscious of that. But the effect upon me personally was really, I think, quite limited. I just got on and did the things I was told to do.



37. 1956. That brings us then to the next point, which is the Sinai Mining and Suez. These were points, which we never spoke about, in the previous interview, Suez and Sinai Mining.

Oh yes, well I do remember very well the development of the Suez conflict in 1956. I was then living in a flat in Chaucer Road in Cambridge and when I heard the news about the Egyptian nationalisation of British assets, I remember saying to my wife [LD: *Judith*] in a gleeful voice, “Happy days are here again”. By that I meant that there would undoubtedly be a lot of new work to cope with at the Bar and indeed, there was. I was taken into the Suez matter by John Foster [LD: *Sir John Foster QC*], who was the leading Counsel instructed by Linklaters on behalf of the Suez Canal Company and our first task was to consider what devices might be available to the company to alleviate its position. It had been dispossessed from its control of the canal and of course from the revenue accruing to it from the passage of ships through the canal. We had to figure out what, if anything, there was that we could do.

Our reaction to that was to suggest, though we realised that there was significant legal limitation upon its prospects, the device of threatening to sue the owners of those vessels that passed through the canal under Egyptian control, who paid their dues not to the Suez Canal Company but to the Egyptian government. This certainly bothered the owners of ships who didn’t want to have to pay double tolls. But we never actually had to sue anybody because that idea faltered quite quickly. Another aspect of the Suez matter was that individual British companies found that their assets had been seized by the Egyptians. One company, in particular, was the Sinai Mining Company, which had access to manganese deposits in Egypt, for which there was a very specialised and limited international market. When the Company was cut off from its supplies, it threatened the Egyptian government with the same kind of proceedings that Anglo-Iranians had threatened the Iranians in relation to oil. It said that anybody who buys manganese from the Egyptian government without acknowledging the Company’s title or paying for it, would be sued. Again, this did not need to happen because that threat was sufficient to inhibit normal purchasers from buying manganese ore from the Egyptians; the purchasers did not want to buy a lawsuit. And it was only after the settlement of the crisis by the Financial Agreement that it was possible for Egypt to resume sales of manganese ore.

That was again, an interesting application of what by then had come to be called the *Rose Mary Doctrine*. I think I mentioned last time that I was involved in that case [LD: *item 23 Interview 2*] because John Megaw, who had been instructed to conduct the proceedings in Aden, had turned to me for some help on the international law side. The interesting point, that I did not really make last time was this: the attitude of English lawyers towards recognition of foreign expropriatory legislation was, at that time, totally dominated by their recollection of cases like *Luther v Sagor*¹ and *Princess Paley Olga v Weisz*², both in the 1920s, involving assets that the

¹ *Luther v Sagor* [1921] 1 KB 456; 3 KB 532.

² *Princess Paley Olga v Weisz* [1929] 1 K 718, 730



Russians had seized in Russia, which were subsequently exported to the United Kingdom. The English courts had said that if the purchaser of those assets had acquired a good title under Russian Law - the place where the goods were situated at the time of the transfer of title - then the English courts would recognise it. In effect, they were understood as saying that the English courts will not question the validity of the seizure under the foreign law.

Now the significance of *Rose Mary* was that it introduced an additional element into the equation. It said, yes, *Luther v Sagor* may well be right, but that was because the wood, the commodity in question in that case, the wood had belonged to Russian nationals and therefore the seizure by Russia did not involve any violation of international law. But, in the case of the *Rose Mary*, the situation was different, because the assets belonged to a foreign national, i.e. Anglo-Iranian, and so the seizure by the Iranians of the oil was a violation of the rights of Anglo-Iranian under international law. The Company was entitled to protection from expropriation without compensation. So, it was the introduction into the thinking on that subject, that was original. That is to say, that if there was an uncompensated taking involved, the transfer of title in the state of origin would not be recognised. That was the novel element and one in which I think I played a significant role in collecting up the material and preparing the arguments.

38. 1964. Could we talk then about the British South Africa Company?

Yes, well it was around about that time the independence of Northern Rhodesia was approaching. The British South Africa Company had significant rights to royalties in respect of activity in that country which it was about to lose and so consideration was to be given to the measures that might be taken to protect the company's interests. I cannot remember the exact details of it, but I do recall that Maurice Bathurst, who was then a Silk, and I were instructed to consider these matters. We came up with certain proposals, which I think indirectly led to a negotiated solution of the problem but did not give the company the kind of compensation that it sought.

39. Sir Eli, we come then to the rest of the topics on your list, Palena followed by several other topics that you have listed for the 1960s.

So, going on with the rough outline that I have prepared, there is one item that calls for mention and that is the development of the so-called Nyerere Doctrine³ in relation to state succession and treaties. I was instructed by the Attorney General of Tanganyika, as it then was, to consider what position Tanganyika should take in relation to the proposal by the British Government that Tanganyika should conclude with the United Kingdom a so-called Inheritance Agreement, that is to say, an agreement under which Tanganyika undertook to take over the liabilities (as well as the rights) under various treaties, which had been concluded by Britain during the period of colonial administration and which would have normally persisted after the

³ Nyerere Doctrine:

<http://www.unep.org/DEC/OnLineManual/Compliance/Resource/tabid/594/Default.aspx>



independence of a country.

Well, the first suggestion I made to Tanganyika was that they should ask the British Government for a list of the treaties that the British Government considered would be taken over by this Inheritance Agreement. The Foreign Office produced a list. This list had certain very significant omissions, whether deliberate or negligent, one could not tell. But I was obliged to advise the Tanganyikan Government that, in effect, they were being asked to take a “pig in the poke”; that is to say, they were asked to take over all treaty obligations without having a complete list of treaty obligations. So I suggested to them that instead of doing that, they should declare that they would require a period in which to consider what treaties they would take over, and they would then notify the parties concerned and act accordingly. Either they would acknowledge their continuance, or they would deny their continuing relevance. This approach was embodied in a statement by the then Prime Minister of Tanganyika⁴, Mr Nyerere, and became known as the Nyerere Doctrine.

40. 1966 Palena Dispute.

So the next thing, I think, that calls for mention is the Palena case between Chile and Argentina. I was instructed on behalf of Chile by a London firm of solicitors, Messrs Bischoff & Co.

The Palena dispute related to the boundary between Chile and Argentina quite a way south from Santiago and related to an area in and around the River Encuentro. The question was whether it was Chilean or Argentinean⁵. There was a particular piece of disputed territory that was inhabited by Chileans, so Chile contended. My instructing solicitor, John Walford⁶ and I went out there together to look at the area and I remember riding over the ground, up this Valley California and visiting all these families that lived there. It was an interesting valley, because it had been very heavily forested and then there had been a great forest fire that had destroyed the trees and so the trees were lying on the ground like matchsticks and one had to find one’s way round them. Then, in the normal process of regeneration, the seeds from the trees would have taken root and the forest would have built up again over a period of years. However it had not then yet done so. So, John Walford and I traversed all of this territory.

⁴ In 1964 Tanganyika merged with Zanzibar (independent 1963) to form Tanzania.

⁵ 38 *ILR* 10.

See: <http://www.law.fsu.edu/library/collection/LimitsinSeas/IBS101.pdf>

⁶ 1927-2008, Gonville & Caius. Made Commander of the Order of Bernardo O’Higgins for service to Chile. See also the Beagle Channel Case (item 61). *Times* obituary: <http://www.timesonline.co.uk/tol/comment/obituaries/article3677210.ece>



In this case I had the inestimable help of my Cambridge colleague, John Collier⁷, who was then a young Fellow of Trinity Hall. Between us we worked out exactly what families lived where and we found a rather strange occurrence, that in a given family, where there might be a father but no wife and a group of children, the families increased year by year. Obviously, it was self-induced, it was an interesting phenomenon. But anyway we identified each of the families as Chilean and that was significant in helping the tribunal to determine that the Valley California fell within Chile. I recall that during the hearing, Lord McNair, who was presiding over the tribunal, when I was arguing about the Valley California, said to me, “Mr Lauterpacht, you convey the impression of knowing this area as well as your own garden”, which I had temporarily to admit. Anyway, in due course, Lord McNair and his colleagues, the then secretary of the Royal Geographical Society and a British army general determined where the boundary line should run. This was then implemented by a demarcation carried out by a group of British soldiers, engineers, under the command of Colonel Rushworth⁸, who was an excellent cartographer; that was the Palena case.

It was acceptable - the decision was so to speak a fair compromise between the claims of both sides and was accepted by both. The implications of the decision were subsequently written about by Athene Munkman in a remarkable article published in the *British Yearbook of International Law* on territory and boundaries; it was an interesting case⁹. Unfortunately, I did not speak Spanish at the time and I failed to have the sense to learn Spanish then, with the result that in my later involvement in these boundary cases in Latin America, I didn't have the Spanish. I would have liked and probably was not invited to participate in others on the grounds of that language defect. International lawyers certainly need to know some languages and I would have thought that, obviously, French and Spanish were essential, German not so important. And I was guilty, I think, of the rather Philistine observation that if something is not written in English, then it isn't worthwhile reading, which, of course, is not true. But there is so much written in English that one cannot cope with everything that is written.

41. 1967. *Jerusalem and the Holy Places.*

Anyway, so we go on from the Palena case to the little work that I wrote in 1967. I say, little work, it was a volume that was eventually published by the Anglo-Israel Association on

⁷ Lecturer in Law and Fellow at Trinity Hall. Author (with Vaughan Lowe) of *Settlement of Disputes in International Law: Institutions and Procedures*, 1999, OUP, 424pp

⁸ Rushworth, W. D. & Smith, W. P. 1968. Mapping and demarcation for the Argentine-Chile Frontier Case. *The Photogrammetric Record*, 6 (32), 150-167.

⁹ Munkman, A. L. W. 1972-3. Adjudication and adjustment - international judicial decision and the settlement of territorial and boundary disputes. *British Yearbook of International Law*, 49, 1-116.



Jerusalem and the Holy Places and it came to about 70 pages or so¹⁰. It took a great deal of labour on my part, because it became necessary to examine in detail the legal basis of the establishment of the State of Israel. Up until that time, there had been no such analysis. I was very pleased when Julius Stone¹¹, who was a very considerable international lawyer, in later years, said that he agreed with my approach. But it was subject to criticism and obviously, there is room for criticism by the same Athene Munkman, who was given the book to review by the editor of the *British Yearbook of International Law*, at that time, Ian Brownlie. I was a little bit miffed that Ian should have given a book of mine to be reviewed by a lady, no matter how capable, who was my research student. I thought that she could not have quite the detachment that I would have liked or the authority at that time. However, she identified certain features with which she disagreed and the book has remained on people's shelves and been looked at with approval. But, of course, it reflected the position in 1967. Everything I said then has to be read in the light of a mass of subsequent Security Council resolutions and other acts of international organisations.

42. Teaching at university in the 1960s.

And then we go on from that, and do bear in mind that there is a danger, in my moving from episode to episode in the practice of international law, that one may forget that I am, at the same time as all of this, continuing with a full-time teaching commitment in the university. I was doing up to twelve hours of supervision in Trinity each week and four hours of lectures in the University each week. So, I really had quite a heavy academic programme. At about that time, I developed a new approach to the tedious burden of reading undergraduate essays every week. The normal practice had previously been that prior to each supervision, the undergraduate would hand in his essay, which he would expect me to have read before the supervision, or if not by then to be read soon after and returned to him at the next supervision

But I found it difficult to keep up with these essays. So instead, I devised a system by which I indicated to my undergraduates times at which I would invite them to come and sit with me while I read the essays, in their presence. So that in addition to their regular supervision times, they had these essay reading times and I would read the essays. I would allocate 20 minutes per student with a view to reading in ten minutes each of two essays. And I was able, thus, to convey to the student, a much clearer impression of my reaction to what he was doing - I

¹⁰ Pamphlet No. 19 of the Anglo-Israel Association.

Website: <http://www.angloisraelassociation.com/>

also: <http://middleeastfacts.org/content/book/Jerusalem-and-the-Holy-Places.htm>

<http://www.mythsandfacts.org/ReplyOnlineEdition/chapter-3.html>

¹¹ 1907-85. Challis Professor of Jurisprudence and International Law at the University of Sydney (1942-72). See: <http://www.law.usyd.edu.au/jurisprudence/juliusstone.shtml>



could indicate that it was right or wrong or well written or poorly reasoned and I believe that it was much more satisfactory for the student to bring his essay into the room with him and take it out with him, it having been read in the meantime. So I had an elaborate programme of these individual supervisions.

43. Did they feel they benefitted from that?

I think they did, yes. They seemed happy. I had a system of traffic lights installed outside my room and if the light was red, nobody was allowed to knock on the door and it was only when it turned green and one undergraduate emerged, that the next undergraduate could enter and so on. Oh, we all had a nice time but it was a much more effective method of dealing with written work than the traditional method, which I believe is, nonetheless, still widely used.

44. 1967-69. North Sea Continental Shelf.

In the middle 60s we began to have to face problems relating to the limitation of maritime areas. And the first case that came before the International Court was the North Sea Continental Shelf case or, in fact, cases in the plural, because there were two, one between Denmark and Germany and the other between Holland and Germany¹². And the issue was how to demarcate their respective areas of continental shelf in the North Sea. Denmark's interest in the matter was largely controlled by the firm of Møller (big ship owners and people who were involved in deep-sea exploration¹³) and they instructed myself and Sir Humphrey Waldock, the professor at Oxford¹⁴, to assist them. I did a great deal of the written work in the evolution of that case. Sir Humphrey did all of the advocacy and he kept the ICJ proceedings rather to himself, not that that mattered. But the case did lead to a somewhat unexpected decision by the Court. Whereas Denmark had been claiming that the delimitations should take place on the basis of the doctrine of equidistance – that is to say a line that was equidistant from the nearest points on the coasts of the two States, the Court ended up with a somewhat adjusted view of the matter, which introduced into the problem the application of equitable principles. That was rather surprising at the time.

45. Sir Eli, I was looking at a map before this interview and I noticed that the coastline of Germany is concave, which of course would have affected their...

Well, that is what created the problem because by applying a doctrine of equidistance,

¹² North Sea Continental Shelf, Judg. 20 Feb. 1969 (*ICJ Reports*, 327, 1969, p. 3) (ISBN 92-1-070330-8).

¹³ Now Mærsk Oil & Gas: <http://www.maerskoil.com/en>

¹⁴ 1904-81. Chichele Professor of Public International Law (1947-73); President of the International Court of Justice (1979-81) and the European Court of Human Rights; and Member, UN International Law Commission (1961-72). See also item 136, interview 6.



Germany's area was significantly restricted. I remember very well one of the Counsel for Germany, I think it was Professor Jaenicke¹⁵ getting up before the Court and putting his hand on the area that would have been Germany's on the application of a doctrine of equidistance. He put his hand on the map and he said, "Too small". That was a very effective piece of advocacy because obviously it hit home to the Court, and the Court said that there had to be a negotiated settlement. Eventually there was, which gave Germany a somewhat larger area.

46. Did that mean that they gained access to the oilfield that Denmark had its eye on?

Well, it wasn't clear then and nor is it quite clear now, what oil there was in that area but the Court took the view that the existence or not of oilfields was not the determining factor. It was an essentially legal rather than an economic division.

47. I see, well Sir Eli, we come then to the 70s, which saw continued upheaval on the international scene and the first item on your list here is the ICSID case.

Well, I think that it might be better to lead up to that by referring to a matter that took place in the 60s, namely the development of the ICSID Convention¹⁶. Now, the ICSID Convention is the convention establishing the International Centre for the Settlement of Investment Disputes¹⁷, which was a major development.

Up until that time, or indeed afterwards, the big issue in matters relating to the treatment of alien property was the extent of compensation to be paid when such property was nationalised by the host state. The Americans had developed, before the war, a doctrine requiring the payment of prompt, adequate and effective compensation. And it was this doctrine which is obviously asserted by the governments of investment-making companies. But agreement on that formula could not be obtained from developing countries or investment-receiving countries, and the question therefore was how was this impasse to be overcome. At that time, the General Counsel of the World Bank was Mr Broches, Ronnie Broches of Dutch origin, a very capable and innovative man. And he decided to promote this initiative of establishing a convention which would enable investors to sue host governments. Therefore the issue was less one of how much compensation and rather an issue of how to get the matter before an independent or impartial tribunal, which would then apply international law whatever it might be found to be.

So, Ronnie developed this convention, the ICSID Convention of 1966 which contained

¹⁵ Günther Jaenicke (1914-2008), Heidelberg, Frankfurt and Max-Planck Institute.

¹⁶ The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on March 18, 1965 and entered into force on October 14, 1966.

¹⁷ Website - <http://icsid.worldbank.org/ICSID/Index.jsp>



an important article, Article 42, relating to the law to be applied. In effect, the law to be applied was the law prescribed in the agreement between the investor and the receiving state, or if there wasn't such a provision then it should be the law of the investment-receiving state but coupled with applicable international law. International law thus became, by agreement, to be applicable directly in relations between a state and an individual. So that in terms of the theory of international law, which had previously always been that international law was a law between states, it was now accepted that international law could also be directly applicable between the state and an individual investor.

At first there were not very many cases in the ICSID system but its work has now exploded and the current dossier of the ICSID system, I think, covers more than 130 cases. So it is a major field of international litigation. The arbitrators are always people of standing in the field and so one has had a very interesting problem arise, namely how does one resolve differences in the expression of views between various distinguished arbitrators.

The answer is that there is no ready-made answer. One simply has, if one is an arbitrator coming to the same problem which has already been determined in two different ways by two other arbitrators, the other arbitrator or the later arbitrator cannot simply say there is a precedent for this because the precedents go both ways. He has to sort it out for himself. Hopefully, an accumulation of precedent in one direction, or an accumulation of decisions, I should say, in one direction may form a precedential series.

48. 1970. Became a Queen's Counsel.

So then there were these early ICSID cases. It happens that in 1970, I took Silk, that is to say I became a QC. Now, for an academic to become a QC in those days was a very rare event and I should emphasise that I applied for and was granted Silk not on the basis that I was an academic but that I was a practicing barrister. Nowadays it has become the practice to award honorary QC's, honorary Silk to academics, a perfectly reasonable recognition of their distinguished position in the field, but in terms of an acknowledgement of their activity or prowess on the professional side it does not really convey very much. But in 1970 my Silk was what they call an "earned Silk" and was a reflection of the position that I had, by then, developed at the Bar.

49. 1973. Adviser to Central Policy Review Staff: Britain and Norway shelf delimitation.

In 1972 we had the oil crisis when the oil producing countries established OPEC, the Organisation of Petroleum Exporting Countries, increased the price of oil considerably by unilateral action, which was, for most part, in breach of the terms of the agreements that they had with the investors or the oil producing companies. This gave rise to significant international economic consequences and I was much involved in the problems arising from that. My next



door neighbour in Cambridge at that time was Lord Rothschild, Victor Rothschild¹⁸, who had recently been made head of a new government institution called the Central Policy Review Staff or the Think Tank, which was assigned to look into various aspects of governmental conduct without reference to divisions or distinctions between departments and to come up with suggestions. And he was very much aware of the significance of the action of the oil producing companies and he asked me to take on the role of giving international legal advice to the CPRS. So I became their consultant on international law in the early 70s. One of the items on which I worked was the consequence of the agreement between Britain and Norway relating to the division of the continental shelf in the North Sea. That division had taken place largely on the basis of a median-line division or equidistance division between the Norwegian and the British coasts. I took the view that, in the circumstances, this was not the right line to adopt. The correct line would have been to have taken into account the fact that the Norwegian continental shelf broke off along a line, called the Norwegian Trough, which was much closer to the Norwegian coast than the median line drawn in the sea. Therefore, if we had adhered to the view that Norway was not entitled to continental shelf beyond the Norwegian Trough, we would have got a larger area of continental shelf, which, as it turned out later, contained very large oilfields. But the government had not taken that view and I wrote a paper, a critical paper, called *Billions down the Trough*, which went to Cabinet to inform them of the position. But, in fact, Great Britain never did seek an alteration of the line in the North Sea. As a result, Norway has become much richer than it might otherwise have become. But I had this very agreeable relationship with Victor Rothschild over the North Sea oil and other matters in the early 70s.

50. 1973. Biographical Dictionary of International Law.

Then around about that time, on the academic side, I began to nurture the idea of a biographical dictionary of international law, which in international law terms would be comparable to the Dictionary of National Biography and would simply contain articles about various international lawyers of the past, not current ones but ones who were no longer living. That was a good idea and I was helped initially a lot by Francis Meadows and one or two others, but unfortunately we couldn't, any of us, devote to the task the detailed attention and time it required. So for the last 35 years, the scheme has languished. If only someone would come along and pick it up. A great deal of basic material has been accumulated and it needs a year or two of solid work by a good editor with the assistance of contributors from various countries to pull it all together and provide us with a major contribution to the history of international law. But at that time, in 1973, I spent quite a bit of time on that.

51. There was nothing like it at the time?

No, there was nothing like it at the time, nor indeed now. There isn't a biographical dictionary of international law.

¹⁸ Nathaniel Mayer Victor Rothschild (1910-90).



52. 1973-74. Pacific Nuclear Tests.

In 1972, there was a change of government in Australia and the Labour government of Gough Whitlam came into power¹⁹. They were very much opposed to the conduct of nuclear tests by France on the island of Mururoa in the Pacific and they wanted it stopped. So they sought, from various international lawyers, the most prominent among them being the then professor at Oxford, Dan O’Connell²⁰. Dan O’Connell and I were instructed to help the government in the formulation of a case in the International Court, intended to require the French to stop their experimental activity²¹. The Australian contention was that this gave rise to nuclear fallout which spread and fell onto Australian territory and thus violated Australian sovereignty. Well, the case came to a successful conclusion in the sense that the French were led to undertake unilaterally that they would discontinue the tests after 1973 or 1974. That is to say, they would discontinue atmospheric nuclear testing, not that they would discontinue underground nuclear testing. The continuation of that underground nuclear testing led, in due course, to further proceedings initiated by New Zealand to try and get them stopped by demonstrating that this underground testing could, in due course, lead to the destruction of the Mururoa Island and the release into the atmosphere of significant amounts of polluting material. Well, that case did not succeed because the Court was not persuaded that this would actually happen. But in 1973 the nuclear test case, as started by Australia and New Zealand, was seen as a major development in environmental protection and so I participated in that case quite actively.

I worked very closely with the then Australian Attorney General, Lionel Murphy²², a man of charismatic quality and his Solicitor General, Bob Ellicott²³, an absolutely first-class lawyer and advocate, and with them also, in due course, was Maurice Byers²⁴ who succeeded Bob Ellicott as Solicitor General - we had a very happy relationship.

¹⁹ Born 1916.

²⁰ 1924-79. Daniel Patrick O’Connell. Born in New Zealand. Chichele Professor of Public International Law, Oxford, 1972-79. Student of Sir Hersch Lauterpacht while at Trinity College in 1951. See <http://www.adb.online.anu.edu.au/biogs/A150596b.htm>

²¹ 1974 *ICJ Reports* 235 and 457.

²² 1922-86. Academic, High Court Judge (1975-86), Acting Chief Justice. See: http://lionelmurphy.anu.edu.au/lionel_murphy.htm

²³ Robert James “Bob” Ellicott, b. 1927. Australian Solicitor General 1969-73, various posts in Malcolm Fraser’s administrations: Attorney-General (1975-77), Minister for Home Affairs (1977-80), and Judge of Federal Court (1981-83).

²⁴ Commonwealth Solicitor General 1975. Later Sir Maurice Byers QC



53. 1975-77. International Legal Adviser to Australian Government.

Out of the blue one day, the nuclear case being over, Bob Ellicott telephoned me from Australia and said that Murphy and he, Ellicott, and Gough Whitlam, the Prime Minister, had thought up the idea of having a proper legal international legal adviser in the service of the Australian Government with a rank and statutory status comparable to that of the Solicitor General in Australia, who was a statutory person. They invited me to come out to Australia and assume that role.

54. I wondered about that, Sir Eli. I wondered how you came to be the adviser to the Foreign Office in Australia.

What happened was that Bob rang me up and said would I think about it. I said I can tell you straightaway, I am very happy doing what I am doing, the academic work; the professional work in the UK and I do not think I would like to come out. Then three weeks later, Bob rang me up and said, well here's another thought, what about coming out for three or five years? And I said to him straightaway on the telephone, I could not refuse three years. We agreed on three years and in due course at the end of 1974, I went out to Australia with my wife and three children to assume the position of legal adviser of the Department of Foreign Affairs.

In those three years '75, '76 and '77, I was enormously active both on the governmental and diplomatic side in terms of international law and also in trying to pull together the academic side of international law teaching in Australia. At the end of the three years, the Australian Government asked me if I would like to continue and I said I would love to, but I think not. I think I had better go home, I took the decision to come here for three years and I had better stick to that because I am already learning the tricks of the trade here. That is to say I will soon know only too well how to achieve my objectives, which might not always suit those around me. So I left Australia at the end of 1977 on very good terms with the Australians, having, I think, done a lot of work for them.

55. 1975-76. NARA Treaty with Japan, extradition negotiations in Paraguay.

Included in that work was one minor and one major item. The minor item was the participation in the negotiation of a bilateral treaty of friendship with Japan, the so-called NARA²⁵ Treaty of 1975/76. I went out to Japan very soon after my assumption of position in Australia to help in the negotiation of that, the principal negotiator being an excellent man called Michael Cook, who was the First Assistant Secretary in charge of the Asian section of the department. That was a very interesting situation because the dispute really centred on the extent to which we were prepared to incorporate into the treaty the concept of equitable treatment, there being no objective standard of what is meant by equitable treatment. Well, eventually they put it in and a fair amount of discussion ensued as to exactly what it meant afterwards. That was a

²⁵ Australia-Japan Treaty of Friendship and Co-operation. See: http://www.dfat.gov.au/publications/1976_treaty_aust_japan/japan_treaty_extract.pdf



lesser item.

Oh, there was another quite fun item also at the very beginning of my time in Australia. Two Australian businessmen had fled first to Brazil and then to Paraguay, to escape prosecution for company fraud in Australia and I was sent out to Paraguay to try and negotiate their return. The issue there was whether the Extradition Treaty that had been concluded between Britain and Paraguay some years previously extended also to Australia, having regard to Australia's subsequent emergence into international independence. Well, the problem was quite quickly solved because within 24 hours of my arrival, I had seen the Paraguayan Foreign Minister, who was perfectly happy to put his signature to an exchange of notes in which we confirmed the applicability of the Treaty. Well, that was a nice adventure, flying out from Australia to Paraguay, not a very straightforward journey.

56. 1975. Delegation to Law of the Sea Conference.

Then, the other and most important activity during my period in Australia was my participation as deputy leader of the Australian delegation in the ongoing Law of the Sea Conference. That conference grew out of the work of the International Law Commission on the codification of the law of the sea. In 1967 the idea of a conference to codify, to pick up the work of the International Law Commission and translate it into an international convention took root and ended in some meetings. Eventually there was a meeting in Caracas in 1972²⁶.

By the time I got to Australia in 1975, the whole process was in full swing. I accompanied the delegation to the next session of the Law of the Sea Conference in Geneva²⁷ in the spring of 1975 and spent several weeks there in negotiation. That was a very interesting time because you had these various interest groups all concerned to promote their particular concerns, and it was my first exposure to the realities of such a multilateral negotiation and in particular the role of the Group of 77, who had their interests to promote, the group of landlocked states and so on. It was a great law-making activity which certainly deserves its own story.

I spent in my three years of Australian service a considerable amount of my time on the Law of the Sea negotiations. And combined with them in an activity which also took me away from Australia quite a lot of the time, was my role as Australia's representative in the Sixth Committee of the meetings of the General Assembly of the United Nations: the Sixth Committee being the Legal Committee. And there, I had to play a role particularly in the consideration of the annual reports of the International Law Commission and an indication or suggestion as to how the Commission might continue its business. Those three years in Australia were very, very

²⁶ The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session, 1975 *American International Law Journal*, 69, 1.

²⁷ The 1975 Geneva Session, 1975 *American International Law Journal*, 69, 763.



satisfying and very well-filled.

57. Were you involved in Antarctica at this point, Sir Eli?

Oh yes, thank you for reminding me, yes. Antarctica was one of the issues that I had to deal with and there, I think, I brought a certain influence to bear which was quite important. At one point in my period there, one of the senior officials in the Australian Department of Foreign Affairs was urging Australia, which as you will remember is one of the principal claimants of territory in Antarctica, to give up its claim in the interest of what was then called the common heritage of mankind, in other words, to vest it in the United Nations.

This was a reflection of an initiative of the government of Malaysia. I suggested to the Australian Government that this would be a mistake, I said you really have no right now in 1975 to give up your claim to Antarctica when you do not know what there may be in Antarctica that may be of significance to you, in particular, what mineral reserves may lie under the ice. Many people at that time said, well, so what, it's deep under the ice, we will never be able to get it. As events have turned out now in the ensuing decades, the possibility of ultimately being able to exploit Antarctica's mineral resources is a real one and subsequent to my return from Australia, when I was no longer involved, there was negotiated a convention for the treatment of Antarctic mineral resources. So I argued very strongly that Australia should not give up its claim to Antarctica and it did not, so it is still one of the principal claimants.

Of course, its conduct is limited by the terms of the Antarctic Treaty of 1958²⁸ and the vital need for the preservation of the Antarctic environment. My argument to the Australian Government was that nothing should affect that, but that you simply should not give up your claim to title.

58. Sixth Committee of the UN General Assembly (Multilateral treaties).

Amongst the other things, in which I was involved during my time in Australia, was the development of an initiative in the General Assembly on multilateral treaty making. I thought that it might be helpful if we could establish various techniques to assist countries, particularly developing countries, to consider and ultimately adopt multilateral conventions that had been produced in international conferences but which were, so to speak, languishing by reason of non-ratification. I was able to take that initiative part of the way before my time in Australia ended and I fear it rather withered away after I left.

²⁸ See for details of the Treaty:

<http://www.atcm2006.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1127732266171>

<http://www.unlockingthearchives.rgs.org/resources/documents/Antarctic%20treaty%20-%20100px.pdf>



Then the other interesting item was the negotiation between Australia and Papua- New Guinea regarding maritime delimitation between those two countries. Again, it was a negotiation in which I could only play a limited part because I left the government service whilst it was still going on. But I did succeed in leaving behind me an idea, which subsequently has been applied in other places as well: the idea of drawing curtains, that is to say you would, instead of trying to do an equidistance line, drop a north/south line, or something like that, from the appropriate points of the states so as to embrace their respective maritime claims.

59. Mid-‘70s. BP/Libya.

So that brings me, well that does not quite bring me to the end of that period, because even while I was working on the central policy review staff matters and the nuclear test cases and nurturing the biographical dictionary of international law, I was engaged in a rather substantial arbitration between British Petroleum and Libya relating to the expropriation by Libya of BP’s interests in that country [*LD: 1973-74*]. That reached a conclusion in 1974, which is reported in the *International Law Reports* Volume 53, page 297. Interesting case but very detailed, and also, it gave rise to an issue as to the correct way in which the arbitrator should exercise his powers. That was all time consuming.

60. Mid-‘70s, Beagle Channel.

Then also, alongside all of this, I became involved in the earlier stages of another dispute between Chile and Argentina, one relating to the boundary in the Beagle Channel [*LD: 1973-77*]²⁹. There again, I worked with Sir Humphrey Waldock and we had a very interesting visit to the region. We flew from Santiago down to Punta Arenas and there we got onto a Chilean destroyer to sail southwards through the Cockburn Channel into the Beagle Channel, then to Puerto Williams, a Chilean port on the main island of Tierra del Fuego, where I transferred into a motor torpedo boat to go and visit the three disputed islands in the Beagle Channel - Picton, Lennox and Nueva.

61. Fascinating, places most people can only dream about.

Oh yes, and all very interesting and it was really quite fun because of two things. First of all the Chilean navy cooks were not really very good and so they had beautiful fresh fish, which they caught in the sea, but they mauled in the cooking process. However, to offset that, there was always plenty of wine – red and white - on the table and I must say that the constant mixture of the two did not improve my mental facilities while involved in it. I shared a cabin with Sir Humphrey Waldock, he had the lower bunk and I had the upper bunk and across the passage was

²⁹ Report of the International Arbitral Awards. Dispute between Argentina and Chile concerning the Beagle Channel. 18 February 1977. Vol. XXI, 53-264.

http://untreaty.un.org/cod/riaa/cases/vol_XXI/53-264.pdf

Dispute partially settled by Vatican intervention (via 1979 Treaty of Montevideo) with agreements signed in 1985.



another cabin, which was occupied by my instructing solicitor, John Walford³⁰ and a Chilean professor of International Law of substantial dimensions, he had the upper bunk, John had the lower one. During the night I was conscious of a great deal of activity going on outside our cabin and learned the following morning that the Chilean professor, having got up during the course of the night to go down the corridor, when climbing back into his bunk, the chains that held the bunk up parted and the bunk came crashing down - luckily not hitting John Walford. But there was no other bunk into which he could be placed, the ship was full. And so in the middle of the night, they had to call out the ship's engineers to weld together the chains and restore the bunk to its professor-holding capacity. It was a great adventure, because the islands were simply beautiful. I remember actually landing on Picton, Lennox and Nueva and on one of them, I cannot remember which one now, there was a graveyard on a cliff overlooking the sea. We were very fortunate because at that time of year, when the sea would normally have been rather rough, a great calm prevailed and I stood in this cemetery overlooking the sea and thinking how marvelous to be buried here in an area of such total tranquility.

62. But it is settled, Sir Eli? Is this dispute still not resolved?

Oh yes, it is resolved. What happened was that a very distinguished arbitral tribunal sat to consider the matter consisting of Sir Gerald Fitzmaurice, Judge Sture Petré³¹ of Sweden and I have forgotten for the moment who the other members were, but it was a powerful tribunal and they reached a conclusion very favourable to Chile³². This was not acceptable to Argentina, who indicated that they would not accept it and the two countries came close to conflict. At this point, the Pope intervened and there was a Papal mediation, which led to a satisfactory result. It involved some adjustment of the decision of the tribunal, particularly to encompass Argentina's concern about the area of Atlantic Ocean that it was receiving. So there has been a successful outcome, although not quite what the arbitrators determined on the basis of a strictly legal approach to the question of title.

63. 1977. World Bank Administrative Tribunal.

So we come now to my return from Australia and the first thing that happened then was that, of course, I had come to an England where my practice had withered away because I had

³⁰ See item 40.

³¹ Who unfortunately died during the proceedings.

³² Judge Sir Gerald Fitzmaurice (President), Judge André Gros, Judge Sture Petré, Judge Charles Onyeama, Judge Hardy C. Dillard
Award of Her Britannic Majesty's Government Pursuant to the Agreement for Arbitration (Compromiso) of a Controversy between the Argentine Republic and The Republic of Chile Concerning the Region of the Beagle Channel by Great Britain and Court of Arbitration (Beagle Channel case) Hardcover, H.M.S.O., ISBN 0115916490 (0-11-591649-0)



gone away. But I was greatly helped by Heribert Golsong³³, who was at that time the Vice President of the World Bank and their General Counsel, who set up the World Bank Administrative Tribunal³⁴ to resolve disputes between the Bank and its staff. I was appointed a member of that tribunal and remained a member for many years, eventually becoming Vice President and then President. I left the tribunal, I suppose, about ten years ago.

I left it, I think, in better shape than I found it because I secured for it an excellent executive secretary, Nassib Ziadé, who had been here at Cambridge, one of our Cambridge Mafia. He has now gone on to become Deputy Secretary General of the ICSID. So, I dealt with that tribunal and of course it was very, very interesting work. Unfortunately, although there are books on international administrative law, none of them reflect the exceedingly detailed and interesting discussions that took place within the tribunal prior to the adoption of a decision. And the decisions, themselves, do not say all that much but it is the discussions that preceded them that would, if properly written up with all due regard to confidentiality, of course, have been of great interest to people.

64. 1978. Declined IMF appointment.

Shortly after my return from Australia, I was asked by the President of the International Monetary Fund whether I would like to go to the Fund as its Legal Counsel. Now, this was a very tempting invitation, but quite daunting. The International Monetary Fund had, until that time, had as its general Counsel and had for many years previously had as its general Counsel, a remarkable individual, Joseph Gold³⁵. He was a considerable economist and had developed a very advanced technical knowledge of the work of the International Monetary Fund. He had written books about it and articles, and he was reaching the retiring age. It was he who had recommended me to the President of the Fund and the President saw me in London and asked me if I would like to the job. I reflected and I said, no I thought not, because it was not the kind of law that I was used to dealing with, I would have been out of my depth, I could not do the same job as Joseph Gold, and so I didn't take it. I just remained as I had been before, as an academic and a practitioner.

65. Was that a hard decision for you, Sir Eli, did you mull over it for some time?

1978. LSE, Grotius Publications and *International Law Reports*.

³³ 1927-2000

³⁴ Formally set up 1980. See:
<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:64055917~menuPK:64319213~pagePK:36726~piPK:36092~theSitePK:29506,00.html>

³⁵ Sir Joseph Gold (1912-2000). Joined IMF 1946, retired 1979, but served as Senior Counsel until 1999.



No, I disposed of it quite quickly. I mean, I knew what I was capable of and what I was not capable of. And in pursuit of my academic ambitions, at about that time a Chair of International Law at the London School of Economics became vacant on Ian Browlie³⁶, I think, going into Oxford and I was one of the candidates for that Chair. I have to say that my failure was the most honourable failure I could have hoped for. They appointed instead Rosalyn Higgins³⁷, and she has been absolutely first-class in that position. She brought to it great academic talent, a good lecturer, excellent writer and at the same time combined with it an active practice in international law at the Bar in London. So, although I was disappointed at the time, I could see the virtue of their selection of her and, as you know, in due course she became a candidate for and was elected to the International Court of Justice, where she still is as President.

One thing I did on the side, when I came back from Australia, was to cope with the problem of the publication of the *International Law Reports*. As I told you, this was a series of which I took over the editorship on the death of my father in 1960 and I had the problem of keeping it going. I had had great editorial help from Gillian White³⁸ until she went to Manchester as professor. On returning from Australia, I had to find a new assistant and I was fortunate enough to find Christopher Greenwood³⁹, who was then just finishing his post-graduate work at Cambridge. He came onboard and he has had a remarkably successful career in international law, happily continuing the whole time with assisting me on the *International Law Reports*, and, in effect, virtually assuming total responsibility, as my own ability to contribute declined with other pressures. Chris has done a marvelous job, he is now joint editor. In the meantime, he has become professor of international law at the London School of Economics in succession to Ros Higgins and is now the British candidate for election to the International Court when Ros Higgins' term expires in February 2009.

That was how I dealt with the editorial side of the *ILR*. But the publishers, Butterworths, had expressed some difficulties about the irregularity of the production of volumes by the editors and threatened to discontinue the publication, whereupon I said to them, well don't worry about that, I will publish it myself. So I took over the publication side of the *ILR*, creating a company, which was called Grotius Publications Limited for that purpose.

So Grotius Publications took on the publication of the *ILR* and also began to develop a sideline of publishing other books on International Law and acquired a good reputation in so

³⁶ Chichele Professor of Public International Law 1980-89.

³⁷ b. 1937. President of ICJ 2006-, Girton College & Yale.

³⁸ Professor of International Law, University of Manchester.

³⁹ See item 33, interview 2



doing. Well, by 1993, that is to say within 15 years of creating Grotius, I realised that what I had originally started simply as a hobby was going to become rather a larger task; we could not go on in cottage industry publication, as I saw it. So I sold it to the Cambridge University Press, which used it as the foundation for its own subsequent and very successful development of a legal title list. Grotius Publications, unfortunately, as a name has disappeared except that it still appears on the back of the volumes of *International Law Reports*.

Shall we stop there?

That would be a good place to stop. Next time we can begin with the 80s, which were an important decade for you personally, inter alia you set up the Lauterpacht Research Centre and we will deal with that next time. So all that remains is for me to thank you very much for this interesting interview.

And we will come back as there is quite a lot left, my goodness.

Yes, lovely.

Very good, well thank you, Lesley.

Thank you, Sir Eli.

