LAW IN THE WORLD COMMUNITY

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In 1956, as a recent appointee to the Chair responsible for the teaching of international law, I delivered this inaugural lecture in which I defended the study of international law. In the lecture I contested the view of American diplomat and commentator, George F Kennan, that his countrymen had exaggerated the role that moral and legal principles could usefully play in international life. They had, he said, neglected the realistic analysis and pursuit of international interests. In response, I endeavoured to show that the international lawyer, along with others, had a contribution to make "to the development of a world community which projects into the international sphere the ordered peace, free institutions, economic well-being and social advancement which are objectives in the municipal sphere."

I am fortunate to have the opportunity to reflect on what I said over forty years ago and to stand by it today.

The address was given against the background of the cold war. We have a very different world today. We now live in a global community at the centre of which is an integrated global market facilitated by developments in communications and computer technology. There are serious environmental impacts and we are faced with the globalisation of the drug trade, terrorism and traffic in nuclear materials. Another consequence of the loosening of the straitjacket of the cold war has been the encouragement of nationalist aspirations and the incitement of ethnic and religious rivalries and purges of which the crisis in Kosovo is the example as I write.

These developments call for appropriate international action. An effective and peaceful global community must have its institutional framework along with rules and regulations governing state, corporate and individual behaviour. In other words, there must be a body of community or international law. The centre of the institutional framework continues to be the United Nations and its associated commissions and agencies. There are, in addition, many institutions at both the international and regional level with particular functional

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responsibilities. Of these the World Trade Organisation has a vital contribution to make to the regulation and development of the global market.

These institutions depend on and are in turn responsible for a vast body of international legislation in the form of treaties, conventions, agreements, institutional regulations and informal arrangements. These are, of course, supplemented by a host of multilateral and bilateral instruments that fall outside institutional activity.

Perhaps the most significant development in international law since my address has been in the international recognition of human rights. The Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, to which I referred in 1956, were eventually adopted and, despite my doubts, the Optional Protocol to the Covenant on Civil and Political Rights gives a right to individuals to petition the United Nations Human Rights Committee. New Zealand is a party to the Protocol and the cases of a number of New Zealand petitioners are now before the Committee. Paul Lauren says in his recent book The Evolution of International Human Rights: Visions Seen:[1]

> *... a vast array of organizations, declarations, resolutions, judicial rulings, binding covenants and conventions, treaty-monitoring bodies, special procedures, technical assistance, NGOs, and thousands of experts and servants are now devoted to promoting and protecting international human rights.*

It is now clear that individuals as well as states are subjects of and have rights under international law. The implementation of these rights can involve significant intrusions on what were once considered the domestic affairs of the states involved.

I can conclude this introduction, as I began it, by reference to the views of George F Kennan, this time as expressed in Around the Cragged Hill, *published in 1993.*[2] *He there endeavours to set right the "misunderstanding" that he had advocated "a cynical and amoral policy" for his country. He shies away from any specific reference to the need for anything in the way of legal rules to govern the relations between states, but he does acknowledge that "New modalities and institutions for international collaboration will have to be devised" and that the United Nations will have an intimate interest in any attempt to find answers to the problems involved. Kennan, while expressing some reservations about the international human rights movement, goes on to say:*

> *... I must now do penance by recognizing that the worldwide effects of the human rights movement in which both the United Nations and the US government have invested so much of their energies and enthusiasm have been in a number of respects beneficial.*

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1 University of Pennsylvania Press, Philadelphia, 1998, 297.

2 W W Norton & Company, New York / London 208, 91 and 72. I am indebted to Sir Kenneth Keith for this reference.

As a former practitioner in the fields of international and constitutional law, I have welcomed the opportunity for more extensive reading and quieter reflection which are to be associated with academic life. There is nothing more stimulating than the necessity of having to seek to verify the assumptions and re-examine the judgments which one has made in the more hurried conditions of active practice. Particularly is this the case when one is teaching international law. For it is an inquisitorial and relatively mature student who faces this last barrier to the University Degree which will enable him to embark on more traditional legal practice.

The student can perhaps call in aid the views of legal practitioners who question the usefulness of the study of international law. He may also share the opinion of the layman, who, whether looking back on the events of the present century or considering the headlines in his daily newspaper, can see little evidence that there exists in inter-state relations anything of the order and justice which he associates with a developed system of law. If the student reads more widely, he can find material - the work of distinguished writers on the problems of international politics - which, at first sight at least, appears to attach little significance to international law.[3]

I should like to take as my starting point the views of Mr George F Kennan, who may be remembered as a former officer of the United States State Department and the architect of the policy of containment. In his book, *American Diplomacy 1900-1950*, written in 1951, Mr Kennan, in setting out his belief that power politics should serve as the basis for United States policy, alleges that the failures of that policy during the twentieth century can be attributed to what he describes as the "legalistic-moralistic approach to international problems".[4] His countrymen have exaggerated the role that moral and legal principles can usefully play in international life and have accordingly neglected the realistic analysis and pursuit of their own national interests. In Mr Kennan's opinion the place of international law in international affairs is limited:

> The function of a system of international relationships is not to inhibit ... change by imposing a legal strait-jacket upon it, but rather to facilitate it: to ease its transitions, to temper the asperities to which it often leads, to isolate and moderate the conflicts to which it gives rise, and to see that these conflicts do not assume forms too unsettling for international life in general.

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3 Some of these writers are listed by Jenks "The Scope of International Law" (1954) 31 British Yearbook of International Law 1, 4.

4 G F Kennan *American Diplomacy 1900-1910* (London, 1953) 95, 98. See also G F Kennan, *Realities of American Foreign Policy* (Princeton, 1954) in which Mr Kennan develops some aspects of his argument [*Realities of American Foreign Policy*].

This, Mr Kennan says, is the task for diplomacy, not law. Law is "too abstract, too inflexible". Law cannot "adjust to the demands of the unpredictable and the unexpected".

So far as the moral aspect of his argument is concerned, Mr Kennan criticises the "carrying-over into the affairs of states of the concepts of right and wrong, the assumption that state behaviour is a fit subject for moral judgment". National interest and not the standard of morality should be the American guide to the conduct of foreign affairs.

At least one critic of Mr Kennan's thesis has convincingly shown that the shortcomings of the "legalistic-moralistic" approach are not substantiated by Mr Kennan's own account of American Diplomacy over the past fifty years.[5] This I do not intend to pursue. Nor do I propose to develop the far-reaching implications for a small country like New Zealand of an outlook on international politics which seeks to justify the pursuit by a major power of its own self-interest. Need I do more than refer to the disastrous effects indiscriminate disposal of United States farm surpluses could have on New Zealand prosperity.

I have taken Mr Kennan's approach as one typical of the views of many who are sceptical of the usefulness of international law. It therefore provides a useful point from which to begin an estimate of the part international law has to play in achieving world peace and stability. I propose to attempt such an estimate and to conclude with a few comments upon Mr Kennan's strictures against the "moralistic" approach.

I TRADITIONAL INTERNATIONAL LAW

International law is traditionally defined as the body of legal rules which states feel themselves bound to observe in their relations with each other. As so defined, International law is to be regarded as exclusively a law between sovereign states, and the perusal of a textbook on international law will show that by far the greater part of the rules deal with the way in which states carry on their intercourse. They are directed to defining the nature of the state, the conditions attaching to its birth and demise (for instance, the law relating to recognition and state succession), the extent of state jurisdiction, and the actual procedures by which states carry on their relations. The rules relating to appointment and immunities of diplomats and the conclusion of international treaties and agreements obviously fall within this last category. There will also be some treatment of methods for the settlement of international disputes. It will be found that the textbook will devote some attention to the rules delimiting the competence of states, but very little to what one Scandinavian writer

5 Oliver "Thoughts on Two Recent Events Affecting the Function of Law in the International Community", in G A Lipsky (ed) *Law and Politics in the World Community* (University of California Press, Berkeley, 1953) 197 ff.

calls "norms intended to render state intercourse harmonious with due regard to other interests, a social co-ordination for the promotion of common purposes...."[6]

There are two glosses on what I have just said which should be made at this point:

The first is that legal philosophers have devoted a great deal of attention to the question whether international law is "true" law or law "properly so-called". They ask such questions as: Whence does international law derive its binding character? How can it claim to be law if there is no machinery of enforcement? I cannot now embark on a discussion of these questions, except to state the view, which has respectable support, that the concern about the legal character of international law is concern about a false problem.[7] It is no more than an argument about words. Whether or not they conform to the tests we are accustomed to use at municipal law, there are rules governing the relations of states which are called law, are regarded as binding and, despite popular belief to the contrary, are generally observed.

My second gloss - and one which is central to my whole approach - concerns the emphasis international law places on procedures. It might be consonant with our ideas of law in the municipal sphere that under the heading of settlement of disputes there should appear a treatment of judicial settlement, and even of arbitration, but we should not expect a discussion, under the sub-heading "political settlement", of mediation, enquiry and conciliation. Yet all these methods of peaceful settlement are regarded as fit subjects for the student of international law, and their importance can perhaps be assessed in the light of the discussions that have taken place on possible procedures for handling the Suez crisis.

I must emphasise one particular international procedure – the conclusion of treaties. I include within this term international agreements even if they be of the most informal character. These are the nearest equivalent in the international sphere to the part played by the legislature under municipal law. Distinctions can be drawn as to the law-making characteristics of various types of treaty, but the fact remains that any treaty between states, be it between two states or between sixty, creates legal obligations for those states in their relations between themselves. Thus the treaty-making process – however informal – is the main method by which international law is developed. There is an impressive body of treaty law dealing with every imaginable subject. This begins with bilateral agreements regulating the trivia of inter-state relations, includes a wide variety of multilateral instruments, to which few or many states are parties, and extends to the near-universal constitutions of the specialised agencies and to the Charter of the United Nations.

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6 Ross *A Textbook of International Law* (London, 1947) 57.

7 Glanville L Williams, "International Law and the Controversy Concerning the Word 'Law'" (1945) 22 British Yearbook of International Law 146.

We have seen that traditional international law consists of rules governing the intercourse of sovereign states and delimiting their competence. This means that the sovereign state is not called upon to admit any legal restraints on its freedom of action – whatever the effects may be on other states – other than those contained in the rules of international law to which it is subject. That this is the position which Kennan has in mind is shown by a passage in his more recent book *Realities of American Foreign Policy*:[8]

> If this were really a stable world, if national forms had really set and mellowed everywhere, if nations were remaining static, or progressing strictly in parallel in such things as population and economic growth and ability to contribute to the life of the world, then I think I would be willing to join with the more eager and hopeful of my fellow countrymen in seeking a legal framework for the perpetuation of the present *status quo*, in shifting from the political to the legal plane the criteria for determining what is tolerable and what is intolerable in the intercourse of nations. But it is only too plain that this is not a wholly stable world, and cannot now be, and will not be in our time.

This is a statement with which the traditional international lawyer would find it difficult to disagree; and I myself have no quarrel with it. But I am concerned that he should draw the conclusions that the United States should reject the possibilities of dealing with the problems of change by legal techniques and procedures and should pursue national interest without regard to moral considerations.

II ANOTHER APPROACH

The approach of Sir Alfred Zimmern[9] is a more satisfying one. He has pointed out that traditional international law was developed "as a means for regulating external contacts rather than as the expression of the life of a true society...". In an earlier passage, in discussing the relationship between law and change in the municipal society, he had said:

> ...the notion of law and the notion of change, so far from being incompatible, are in fact complementary. The law is not a solid construction of dead material, a fixed and permanent monument: it is an integral part of a living and developing society created and transmitted by men... And it is because it is felt to have life in it, to be living with and through the society which it exists to serve, that it commands men's respect, their obedience, their loyalty and, if need be, their self-sacrifice.

The necessarily close relationship between international law and the society or community whose relations it is designed to regulate has led a number of contemporary international lawyers to attempt an assessment of the characteristics of the eighty or so

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8 *Realities of American Foreign Policy* above n 2, 37-8.

9 *The League of Nations and the Rule of Law* (2 ed, Russell & Russell, London, 1939) 98-99, 96.

members of the world community.[10] Clearly their main feature is their very diversity. They differ in size, geographical features, natural resources, racial composition and stages of development, and these differences account for dissimilar economies, cultures and traditions. When we recall, as well, that the community is numerically small, we can appreciate the difficulties of evolving rules of conduct for its members which meet Zimmern's test by forming an integral part of a living and developing community. As Professor Edwin D Dickinson has said:[11]

> ... the architects, builders, and administrators of a useful international law must be prepared at all times to support their work on firm understandings of the nations with whose problems or relationships they may be concerned. They must be prepared to approach each nation, not primarily as a metaphysical concept, but rather as a body compounded of land, people, economy, and polity, a way of living and a cultural tradition and a veritable complex of hopes, fears and aspirations. These things may not be by-passed safely as matters outside the law. They are bone, flesh, and life of the law, largely explaining its frustrations and failures in the past and pointing up its prospects for expanded usefulness in the future.

The problems to be faced may emerge more clearly if I compare the international with the municipal community. The analogy between the sovereign and independent member of the international community and the citizen of the state immediately suggests itself, but it is more helpful to compare the international entity with the various pressure groups which daily exercise their influence on the machinery of government within the state.[12] Just as modern states differ in size, resources and population, so pressure groups vary in numbers and the influence they can bring to bear. In New Zealand, the Federation of Labour and Federated Farmers are perhaps the colossi of the state community, while the lesser pressure groups, among whom we must classify the University body, provide some comparison with the less powerful members of the world community. The political scientist will tell us that it is the balance of these various pressure groups at a particular time which determines the actions governments will take. It is the function of good government to keep all these groups in equilibrium. The changes which may be necessary to achieve this result are normally made by appropriate legislative or administrative action. You and I, as individual citizens, can take our personal differences to the courts; and, if we are dissatisfied with the law or the policy to which it gives effect, we join with our particular interest group - political,

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10 See Edwin De Witt Dickinson *Law and Peace* (University of Philadelphia Press, Philadelphia, 1951) [*Law and Peace*] and the references given by F Stone *Legal Controls of International Conflict* (Maitland Publications, Sydney, 1959) 37 ff.

11 *Law and Peace* above n 8, 31.

12 For a development of this theme see Brierly *The Outlook for International Law* (Oxford, 1944) Chapter IV.

professional, social, recreational or parochial - and seek a change in the law, whether it be the removal of import restrictions, a higher guaranteed price, abolition of capital punishment, changed drinking hours - or full University status for Victoria University College. We have moved away from the nineteenth century idea of the state as a political society, organised to defend itself against external enemies and to maintain peaceable and orderly relations within, to the conception of the social service state. The state now concerns itself with every field of social and economic activity, and most subjects in which we interest ourselves have become potential spheres of government action. It is because the government of the day, while enforcing existing law, is prepared to - and must - make continual adjustments between our varying interests that civil strife and disorder are avoided. The methods of adjustment available to meet new developments include legislative action to change the law. It can thus be ensured that our courts, when called upon to resolve legal conflicts, can maintain their reputation for justice and impartiality.

I have been trying to describe how in the modern state law becomes in Zimmern's words "an integral part of a living and developing society created and transmitted by men". I suggest that this description has some lessons in the international sphere. Within the state, we have moved from a period when the organisation of the state allowed free rein to the social and economic activity of individuals to a period when the state itself takes an intense interest in social and economic questions. In the international sphere, we have moved from the era, in which international law was concerned to delimit the area within which sovereign states could exercise freedom of action, to an era in which it is called upon to provide rules of conduct for the highly complex and varied relations of the community of nations. As, within the state, the legislature and the judiciary provide the machinery by which the law is adjusted or developed according to changing interest-need, so, in the world community, machinery must be found which can at the same time adapt and develop the rules by which nations will determine their conduct.

The Suez Canal crisis[13] provides an apt illustration of the problem. The nationalisation by Egypt of the Canal Company has been justified as an exercise by Egypt of her sovereign rights to nationalise a company domiciled in Egypt and to obtain full control over a waterway situated in Egyptian territory. It must be conceded that, in broad terms, the Egyptian action cannot be attacked as illegal under traditional international law. There is, however, probably an obligation to pay compensation to the company's shareholders and certainly an obligation to observe the imprecise provisions of the Convention of 1888.

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13 This lecture was delivered on 11 September 1956.

Egypt and her friends have sought to give legal justification to Egyptian action by resort to the doctrine of national sovereignty - a doctrine which has in the past been regarded as respectable enough by even the most vocal of the opponents to the seizure. It is accepted that any Egyptian interference with transit through the canal would have serious economic implications for many maritime states. If this interference did occur, we would have a clear demonstration that unyielding adherence to the conception of national sovereignty by one state can seriously prejudice other members of the world community. Over the past few weeks, the world has, therefore, anxiously watched the attempts which are being made to reconcile the independence and prestige of Egypt with the interest of the world community in obtaining assurances that the canal will be kept open. President Theodore Roosevelt defended arbitrary United States action which preceded the creation of the Republic of Panama and the construction of the Panama Canal by laying down the doctrine that "the possession of a territory fraught with such peculiar capacities as the isthmus in question carries with it obligations to mankind."[14] We are again faced with the problem of how to assert the claims of the international community to paramountcy over the rights of the individual state.

III POWER IN THE WORLD COMMUNITY

The diplomatic manoeuvres in the Suez crisis have included indications that the British and French might be prepared to use force to gain their ends. This attitude is a reminder, if one were needed, that power is the final determinant in the world as in the state community. In the internal affairs of a mature and stable state, this power is seldom evident. It is but the background against which orderly activities are pursued under the beneficent guidance of a relatively small police force. There are small and homogeneous countries, like the United Kingdom and the Scandanavian states, with a tradition of respect for institutional government; and there are large heterogeneous countries, like the United States and Canada, which have been able to manifest their overall unity of purpose by fitting their diversities into the rather rigid framework of a federal system. It is these federal systems which have in the main provided the models for the proponents of world government; but these visionaries do not appear to appreciate that there is not within the world community the geographic unity, the degree of social and economic integration or the singleness of purpose, which characterise the most complex, or even the least stable, of the federal states.

We have, however, seen in this century two attempts to mobilise the power of the nations behind a world order of sovereign and equal states. The League of Nations received such irresolute support - from our own country as from others - that prospects of success were, from the beginning, remote. The United Nations, a more ambitious attempt, sought to draw

14 Quoted in J Fischer Williams *International Change and International Peace* (Oxford University Press, London, 1932) 20.

on the lessons of the previous twenty-five years; but, so far as its collective security machinery is concerned, the procedures laid down in the Charter are even more rigid and difficult to work than those of its predecessor. Based on the pious assumption that the two major power blocs would maintain their enforced war-time unity, the structure of the Security Council is ill-adapted to deal with problems which are the direct consequence of conflicts of interest between these two blocs. Nevertheless, to allocate blame, either to the procedural device of the veto, or to the machinations of either the United States or the Soviet Union, is to ignore the strains and pressures which exist within the world community. Any realistic appreciation of the present world situation must recognise that there is no possibility of achieving within any measurable period - unless it be by world conquest - that concentration of power which we associate with the regime of the national state. There is even less chance now than there was in the time of the League of Nations. The Soviet Union and the United States now dominate the world scene and international tensions in a large part reflect their mutual fears and ideological rivalries.

The pattern of these fears and rivalries has changed markedly since the Soviet Union acquired the ability to wage nuclear war. Each of the two major power groups must know that nuclear attack will lead to immediate retaliation, with its resulting havoc for all. This nuclear stalemate has given the Soviet Union a greater sense of security, and has already led it to take the initiative in reducing the sizes of conventional armed forces. The Communists have, therefore, been able to redirect some of their economic resources to the provision of help and assistance to the uncommitted areas of the world. These include that great arc of countries from North Africa and the Middle East to South and South-East Asia, most of which are revelling in their escape - or imminent escape - from political dependence on the Western world. We cannot be led into the belief that Soviet intentions are any the more amiable now that they are expressed in economic and social terms; but the West is faced with the opportunity - and the necessity - not only of increasing its own economic and social help to under-developed countries, but also of showing by example that its moral imperatives and conception of justice under law have more to offer to peoples emerging from dependence than has totalitarian Communism.

This situation presents a challenge to the Western world which cannot be met by the resources of any one discipline; but I should like to attempt a statement of some of the issues upon which international law can profitably concentrate, if it is to have the inner strength and adaptability which are required to meet the needs of a world community in transition.

IV THE UNITED NATIONS

It does I think follow from what I have said that at the higher political level - or, to use a familiar expression, at the level of the vital interests of states - we cannot at this stage expect very much in the way of formal rules of conduct binding upon states. Here it is that diversity of interest militates most against the development of general rules of conduct, and

that emphasis must be placed on procedures for adjustment and compromise. The traditional methods of diplomacy - whether at the level of Heads of State and Foreign Ministers or of the working diplomat - will continue to provide opportunities for negotiation and the building up of confidence. Mediation, enquiry and conciliation have already been noticed; and let us not be too ready to overlook the United Nations, which - now that many of the outstanding applicants for membership have been admitted - has a near claim to universality. With the exception of Korea, the world organisation has achieved little in matters affecting direct East-West relations; but it has shown that it is better equipped to handle problems in the uncommitted areas of the world. Some success can be claimed in respect of aspects of the Palestine issue and in the cases of Kashmir and Indonesia; and the General Assembly has provided a forum in which the nationally conscious and under-developed countries of Asia and the Middle East have been able to press claims for independence.

It is in dealing with the painful problems - whether they be of politics, economics, strategy or merely of prestige - associated with emerging nationalism that traditional international law is particularly ill-equipped. Emphasis by colonial powers on their own sovereign integrity, and failure to develop procedures for what has been known as "peaceful change", command little sympathy from the inhabitants of those areas which, whatever their nominal status, have fallen under the broad canopy of "colonial territories". As I have just suggested, the United Nations has not been without its achievements in this field, and, now that the Arab-Asian group has obtained an accession of strength from amongst the recently-admitted members of the United Nations, we can expect that still more attention will be devoted to such questions as the self-determination of peoples, fundamental rights and freedoms, and the social and economic welfare of under-developed countries. This means that the United Nations will be dealing with issues which concern, directly or indirectly, most members of the world community, and which also affect the daily lives of millions of people. The organisation can make a real contribution to the problems involved if, on the one hand, the so-called colonial powers and their supporters are prepared to use the machinery provided to follow flexible and realistic policies; and if, on the other hand, the anti-colonial group of powers temper stridency with restraint. There would then be created an atmosphere in which the United Nations could perform the dual function of distilling a moral approach acceptable on all sides and of providing machinery for evolving generally acceptable rules of conduct. And, let it be said, only in these conditions can our much vaunted freedom and respect for order under law continue to be an influence outside the more mature countries of the West.

There are certain conditions which must in my view be fulfilled if the United Nations is to play the part I have suggested in providing machinery for resolving conflicts of interest.

In the first place, the organisation must be a universal one. At the 1955 session of the General Assembly sixteen new members were admitted, but Japan,[15] Outer Mongolia and the divided countries of Vietnam and Korea are still outstanding applicants, and East and West Germany are unrepresented. A means must also be found of introducing a spokesman for Communist China, whether or not this involves exclusion of Nationalist China.

In the second place, it must become clear that the organisation is not regarded as an instrument for giving effect to purely Western policies. Some lowering of direct East-West tensions, and increased membership, provide hope that voting alignments will be less rigid, and that more opportunity will be provided for adjustment and reconciliation of points of view.

In the third place, a liberal and flexible, rather than a formal and literal, approach must continue to be adopted in the interpretation of the Charter. It is to the credit of both the Security Council and the General Assembly that they have not hesitated to adapt their procedures to the circumstances of cases and to adopt courses of action which, if not rigidly in accord with Charter provisions, have been calculated to serve the overall objective of maintaining peace and security.[16] This is the kind of development with which we are familiar in our own constitutional experience where conventions have played a big part in keeping the law in step with changing conditions.

There are other ways in which the adaptability and inherent vitality of the United Nations can be displayed. Thus, in his 1955 Report on the work of the organisation, the Secretary-General, Mr Hammarskjold, made it clear that he recognised the limitations of conference by public debate. He called for more informal diplomatic contacts within the United Nations, whether directly between representatives of Member Governments or in contacts between the Secretary-General and Member Governments, and concluded "It is my hope that solid progress can be made in the coming years in developing new forms of contact, new methods of deliberation and new techniques of reconciliation".[17]

Mr Hammarskjold has given other evidence – including his negotiations in Peking on the release of American fliers, and his recent activities in Israeli-Arab disputes – that he has a broad approach to the functions of his office. And many believe that the prestige that now attaches to his position would enable him to play an important role in the Suez crisis, either as a conciliator or as chairman of any international body that may be established.

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15 Japan was admitted to the United Nations on 18 December 1956.

16 This development is brought out in L M Goodrich and A P Simons *The United Nations and the Maintenance of International Peace and Security* (Washington DC, 1955).

17 *Annual Report of the Secretary-General on the Work of the Organisation 1 July 1954-15 June 1955* General Assembly Official Records, 10th Session, Supplement No 1, A/2911, (New York, 1955) xii.

V *INTERNATIONAL ACTIVITY IN THE FUNCTIONAL FIELD*

So far, I have been dealing more particularly with the work of the United Nations in the political field – with the contribution it can make in matters of high policy. But the United Nations and its related agencies have been performing much effective work in what I shall describe as the functional field – in the social, cultural, economic and humanitarian problems which daily affect the lives of us all. The statesmen who wrote the Charter gave the organisation a wide competence. They looked across the state frontier to what the Charter described as "the Peoples of the United Nations", and recognised that the economic and social development of these peoples and respect for their rights and freedoms "without distinction as to race, sex, language, or religion"[18] was the only basis on which a peaceful and ordered world community could be built.

The achievement of these aims is a declared function of the United Nations, and it would take a long time to give even the most summary account of the comprehensive work of the organisation and its associated agencies. Much of the work is difficult and undramatic, but it can provide the foundations of a living and developing world community. There is the Economic and Social Council, and its Commissions on such subjects as transport and communications, statistics, human rights, narcotic drugs and the status of women. The Trusteeship Council and the Committee on Non-self-governing Territories concern themselves with the welfare of trust and dependent peoples, while the programme of technical assistance to underdeveloped areas has become one of the greatest importance in the field of international co-operation.

The Specialised Agencies include the Universal Postal Union, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organisation and the International Monetary Fund, as well as other world organisations whose activities have an impact on practically every sphere of human activity. The techniques with which they work are infinitely varied. The technical conference, the visiting expert, information material, the training of students, financial aid, the laying down of standards, discussion and recommendation, or the conclusion of agreements and conventions – each is used as the circumstances demand. Moreover, the agencies provide each state with the opportunity of contributing in the fields in which it is best equipped. New Zealand, although a small country, obviously has more than most to offer to the Food and Agriculture Organisation; also her particular experience has enabled her to play an active part in the International Labour and World Health Organisations.

Civil Aviation provides examples of a number of techniques. The International Civil Aviation Organisation is authorised to lay down international standards and recommended

18 Charter of the United Nations, Article 1.

practices. These include uniform air regulations, without which international flying would come to a standstill. In addition, a number of multilateral conventions, on such subjects as the liability for damage caused on board aircraft to passengers and goods and the liability for damage caused by aircraft to third parties on the surface, have been negotiated. Then there is the vast network of bilateral agreements covering the operation of the many international air-routes. New Zealand is a party to a number of multilateral conventions and to bilateral arrangements with the United States, Canada and France.

VI ACTIVITY AT THE REGIONAL LEVEL

The very size and diversity of the world community within which these international agencies and bodies operate has led, too, to a wide extension of activity at the regional level. The Charter of the United Nations, with the example of the inter-American system before it, did not preclude the establishment of "regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action...".[19] However, regional security pacts - like NATO, ANZUS, SEATO and the Warsaw Pact and Uniform Arms Accord concluded by the European Communist States in May 1955[20] - are hardly consistent with the Charter aim that the United Nations should retain the primary responsibility for the maintenance of international peace and security. They are, indeed, a recognition that the collective security machinery provided in the Charter has not proved effective.

The regional concept, as applied to functional fields, is particularly significant from the point of view of the development of the world community. The United Nations has itself established the Economic Commission for Europe and equivalent Commissions for Asia and the Far East, and for Latin America. Most of the Specialised Agencies have found it profitable to establish subordinate bodies with responsibilities in particular geographic areas.

There are, besides, instances of autonomous regional bodies. In Europe there are political groupings like the Council of Europe and functional groupings like the European Coal and Steel Community. The Colombo Plan is Commonwealth-inspired, and provides technical assistance and economic aid in South and South-East Asia. The South Pacific Commission, with which New Zealand is also associated, is concerned with the welfare of peoples in the South Pacific. During a recent visit to some of the Islands of the South Pacific I had the opportunity of meeting some of the representatives, indigenous and European, who had been attending the third South Pacific Conference, held under the auspices of the South Pacific Commission. It was gratifying to learn how active and effective had been the part

19 Article 52(1).

20 For text of the Warsaw Pact see *External Affairs Review* Vol V, No 5 May 1955, 20.

played by the indigenous peoples of the area in the work of the Conference. I saw, too, that Commission experts who are working in the territories at the invitation of the Governments concerned are proving of real assistance to the local administrations.

The range of this functional and regional activity is so comprehensive and pervasive that it cannot but have some impact on the daily lives of many millions of the world's inhabitants. And this is as it should be. Although the international machinery and procedures involved are sponsored by governments, they are designed to further the welfare of individuals, and I have already pointed out that the United Nations Charter has emphasised the necessarily close connection between world order and the economic and social advancement of all peoples. The Charter also requires the United Nations to promote and encourage respect for human rights and for fundamental freedoms for all. Already, many of the most contentious United Nations issues have concerned some aspect of this wide mandate, whether it be apartheid in South Africa, slave labour in the Soviet Union or self-determination for Morocco and Algeria. In 1948 the Assembly was able to obtain near unanimity on a Universal Declaration of Human Rights, which, although it does not afford legally enforceable rights, does provide in the terms of its preamble "a common standard of achievement for all peoples and all nations". The Commission on Human Rights and the General Assembly have since been engaged in the drafting of two covenants, one on civil and political rights, the other on economic and social rights. The intention is that member states on accepting the covenants should be legally bound to give effect to the rights as enumerated. It would be a mistake to believe that the difficulties associated with the drafting of these covenants will be quickly disposed of, involving as they do significant inroads on the concept of state sovereignty. Thus, if the covenants are to be adopted, there is no prospect that, initially, they will contain procedures which will enable the individual to seek redress from an international authority. This United Nations activity and the entry into force of a European Convention for the Protection of Human Rights and Fundamental Freedoms are, however, an earnest that the international lawyer recognises that individuals are indeed the ultimate members of the world community and now regards the international guarantee of the rights of the individual as one of his goals.

It may be felt that I have placed too much emphasis on the proliferation of international organisations which is a feature of the past ten years. I have done so because I believe that only by activity at the functional and regional levels and by concern for the protection of the individual can we build a world community which has the unity and homogeneity necessary to sustain a developed system of law.

VII ARBITRATION AND JUDICIAL SETTLEMENT

I must next say something about the part played in international law by arbitration and judicial settlement. The nineteenth and early twentieth centuries saw the development of arbitration as a method of settling state differences; and in 1920 the Statute of the Permanent

Court of International Justice was adopted by the League of Nations. The Permanent Court was responsible for the development of an impressive body of international jurisprudence, and when in 1945 the International Court of Justice was established as a principal organ of the United Nations this new court to a large extent succeeded to the jurisprudence and traditions of its predecessor.

In estimating the contribution that judicial settlement can make in the development of the rule of law in the international community, account must be taken of the fact that submissions to the jurisdiction of the International Court of Justice are voluntary, and that there is no world legislature which can ensure that the development of the law keeps pace with needs in the community which it serves. In these circumstances, a distinction has been drawn between legal or justiciable and political or non-justiciable disputes. A justiciable dispute is one which the parties recognise as being a conflict as to "rights" under international law and as such susceptible to arbitral or judicial settlement. On the other hand, in a non-justiciable dispute, one, or both, of the parties is claiming that it is just and equitable that their mutual rights and obligations should be revised. The essence of a non-justiciable dispute is that a change in existing rights is sought. In other words, it is the kind of situation which in the municipal sphere is dealt with by legislative action or by the invocation of sanctions against someone who has not succeeded in having the law altered to suit him.

I believe, therefore, that, having regard to the absence of authoritative procedures for peaceful change, judicial settlement of international disputes will not in the immediate future play the part in the development of the law which some might expect. It is significant that during the first ten years of its existence the new International Court of Justice has had less business than the old Permanent Court during the corresponding period. Nevertheless, I do not wish to understate the achievements of the new Court. In many of its decisions it has been faced with a choice either of upholding national sovereignty by a rigid or literal interpretation of international obligations, or of extending international accountability by a more flexible and dynamic approach. The Court has frequently made the second choice, and by so doing has extended the frontiers of international law. There has been criticism that the Court has, indeed, gone too far in making new law for the parties, but there are cases, particularly those involving advice to the United Nations on its functions and powers, in which the Court has spoken with constructive authority. I can instance the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*.[21] This opinion arose out of the murder of Count Bernadotte in Jerusalem, and the Court advised that the United Nations was itself entitled to bring an international claim in respect of an injury suffered by one of its agents. In the Advisory Opinion on the *Effect of Awards of*

21 ICJ Reports 1949, 174.

Compensation made by the United Nations Administrative Tribunal,[22] the Court, in the face of United States argument to the contrary, advised that the General Assembly was bound to give effect to awards of compensation made by the independent Administrative Tribunal to certain United States nationals who had been wrongfully dismissed. This opinion is a landmark in the establishment of the international and independent character of the United Nations Secretariat.

VIII MORAL PRINCIPLES IN INTERNATIONAL AFFAIRS

I have tried to show that international law now provides us with basic commitments and procedures which we can use in making the slow and painful transition from a world of states, jealous of their national sovereignty, to a community of nations which can sustain a developed system of law. I can go some way towards Kennan's views by agreeing that these commitments and procedures have a limited effectiveness in matters concerning the vital interests of states; but not so far as to accept his apparent rejection of the part they can play in the gradual emergence of a world community which has the institutional framework equipped to handle the problems of change with which he is so much concerned.

Nor can I accept his rejection of "morality as a general criterion for the determination of the behaviour of states and above all as a criterion for measuring and comparing the behaviour of different states".[23] Mr Kennan advocates, in the place of morality, the pursuit of national interest and return to the "forgotten" art of diplomacy. Now, clearly no government can fail to have regard to national interest. Its pursuit is itself a function of government. But what are the criteria for identifying that interest? Should it serve certain values or should we reconcile ourselves to the fact that the issue between the free world and the communist world is simply one of naked power, in which ideas like morality and justice have no part?

It seems incontestable that to deny the application of moral principles in international affairs is to reject one of the foundations of human society. In the present context we must also realise that, in the struggle for men's minds which is going on in the uncommitted areas of the world, the influence of the West will ultimately depend not on the deterrent of the nuclear bomb, not even on generous economic aid, but on the extent to which we can demonstrate that the moral and legal principles on which our free institutions are based have a universal validity. A great American lawyer and statesman, Elihu Root, has said:[24]

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22 ICJ Reports 1954, 4.

23 *Realities of American Foreign Policy* above n 2, 49.

24 Quoted by McDougal "Law and Power" (1952) 46 Am J of Int'l L 102, n 54.

> ... in the most important affairs of nations ... there is an indefinite and almost mysterious influence exercised by the general opinion of the world regarding the nation's character and conduct. The greatest and strongest governments recognise this influence and act with reference to it...
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> ... It is difficult to say just why such opinion is of importance, because it is always difficult to analyse the action of moral forces; but it remains true and is universally recognised that the nation which has with it the moral force of the world's approval is strong, and the nation which rests under the world's condemnation is weak, however great its material power.

In my view, this statement has some relevance to the Suez crisis. I believe that the United Kingdom and France, were they to forsake the course of negotiation and compromise, including resort to United Nations procedures, and to seek to establish the international status of the canal by force of arms, would lose more in terms of prestige and moral stature than could conceivably be gained by force. At one stroke, the fund of goodwill, which Britain gained by withdrawal from India and imaginative handling of other issues in which her imperial interest came into conflict with nationalist aspirations, would be dissipated. Goodwill would be lost in Asia as well as in the Middle East, and the withdrawal of India and Ceylon could mean the end of the multi-racial Commonwealth, that unique free association of nations, the very existence of which recognises the illusion of complete national independence and the realities of interdependence.

I should like to conclude by emphasising that, today, the international lawyer must be concerned, along with the economist, the social scientist, the technician, the teacher, the international civil servant and the diplomat, to make a contribution to the development of a world community which projects into the international sphere the ordered peace, free institutions, economic wellbeing and social advancement which are objectives in the municipal sphere. At the higher level, this involves a commitment to change by peaceful means and the development of procedures for the compromise and adjustment of divergent interests and policies. At all levels, and, immediately, at the bottom rather than the top, it involves either the arduous and undraqmatic extension of the areas of community interest or the acceptance and reconciliation of divergent national characteristics and ideas. The United Nations, the Specialised Agencies and the regional organisations provide us with the basic framework. With them we can build a world community which has as its values, freedom, peace and plenty.