Erratum

Volume 2, Supplement II

Page 1. Line 7. For "understand" read "underestimate."

GEORGIA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW

VOLUME 2 1972 SUPPLEMENT 2

DIVERGING ANGLO-AMERICAN ATTITUDES TO INTERNATIONAL LAW

INTRODUCTORY STATEMENT

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Ladies and Gentlemen: In this regional meeting of the American Society of International Law, held in conjunction with the Royal Institute of International Affairs, we have chosen the theme of *Diverging Anglo-American Attitudes to International Law*. This is, in a sense, a curiously untopical theme for a regional meeting, when such current issues as, for example, hijacking, pollution, or the deep sea bed are available to us. I do not understand the importance of these and comparable issues; nor do I denigrate the frequent custom in regional meetings of looking at a burning contemporary topic. But the deliberate selection of this theme rather emphasizes that there is an even more important, longer-term theme deserving of discussion—namely the extent to which Anglo-American attitudes to international law are diverging.

The positions we take on any particular subject—whether the legal aspects of Vietnam or of pollution—depend in large part upon our basic approach to international law. It may therefore be useful, for once, to discuss the underlying approaches rather than the controversial topics themselves. There seems to me to be ample evidence that the time has come to examine these basic approaches—and indeed, that until we do, much of our discussion of the specifics of international law is going to be unfruitful.

The very title of this meeting is based on a premise which I appreciate is arguable—namely, that such differences as we can detect in our basic approaches to international law are in large part differences between American views, on the one hand, and British views on the other. C.

Wilfred Jenks, in his recent and as yet unpublished Maccabean Lecture on Jurisprudence,[1] has doubts about this proposition. He appears to think that although there is an element of truth in it, it is premature to perceive a rift of any magnitude; and that indeed, the very stating of such a divergence is perhaps to encourage the appearance of a rift. I am with Dr. Jenks all the way in urging bridge-building, but think that first we must identify and recognize the chasm which we are seeking to repair. To be sure, the fundamentally different attitudes which are held about international law are not simply differences between the Americans and the British. Of course monolithic views are not held in either place. Fierce debate is to be heard within the United States on what one might term the jurisprudence of international law; and though the debate is more muted in Britain, it exists, and varying views are expressed. And because views are not monolithic either side of the Atlantic, there will be certain British and American lawyers who seem, both to themselves and others, as not so very different.[2]

I nonetheless think that certain broad generalizations are valid, and that these perhaps might serve as a focus for our discussions today.

(1) I think, first, that in the United States there is a greater conscious concern with the question of different approaches to international law; whereas in England an instinctive preference for pragmatism over doctrine frequently masks the intellectual premises on which legal views are based.

(2) I believe that in England international law is still seen primarily as being concerned with rules, and with neutral rules at that. In the United States, however, the concern with rules is less central, and more emphasis is given to law as a process, as an aspect of decision-making, a communication.

(3) It follows from this that in the United States there is a readily accepted relationship between law and policy. In England, by contrast, there is a profound mistrust of the injection of policy considerations into international law. If our American colleagues believe that international law is a tool of social engineering, ours to build with, the British prefer to emphasize its neutrality in respect of social values, and further suggest that *policy* rapidly becomes indistinguishable from *politics*. The intro-

[1]The lecture, entitled "Orthodoxy and Innovation in the Law of Nations," was delivered by Dr. Jenks in London on May 12, 1971.

[2]Such perceptions were later to be evident in the papers delivered by Professor D.H.N. Johnson and Mr. Henry Darwin. In some cases, however, I think the British perception of common ground is not always shared by their American colleagues.

duction of policy considerations, many British would argue, makes international law unscientific and unpredictable. They urge that neutral rules are the protection of the weak against the strong; that the acknowledgment of policy considerations introduces a subjective element; and that the outcome will be an even greater reluctance by states to use the international legal process.[3] The place of policy in international law is, of course, the subject matter of our first panel and we are likely to have four excellent statements from different positions along the spectrum. I will leave it to you to identify the conservatives, the moderates, and the radicals.

(4) Method and style are a further important cause of dissent between Britain and America. In the United States there has been a considerable acceptance of the relevance of the social sciences to international law; and this in turn has led to the use of language or—to use a more value-laden term—jargon, which is as unfamiliar to the British lawyer as is legal jargon to the proverbial man in the street. In Britain I do not believe that international law is integrated with the social sciences to anything like the same degree, and I think there is a widespread bafflement, skepticism, and finally resentment about the language barrier that this is seen to represent.

Now all of the above statements can be qualified in some way or other. As I have said, there is no monolithic view of international law on either side of the Atlantic. The New Haven approach is very different from that of Harvard or Columbia; and the intellectual foundations of the views of, for example, Dr. Jenks are not the same as those of Judge Fitzmaurice. And yet I think that what I have said fairly represents the *mainstream* of thinking in each country; and no one who has had the pleasure of attending international conferences with a mixed British-American participation can fail to be aware of this fundamental gap in attitudes and language to which I have been referring.

The panel topics today have been chosen to highlight these important underlying questions of attitude, though I believe that each of them represents a fascinating theme in itself. We have panelists of the highest caliber to make statements on the place of policy; the reach of extraterritorial jurisdiction; the role of the International Court of Justice; the functions of the government legal adviser; and teaching methods in international law. And in each case, the presentations, which will deliberately

[3]These three points, interestingly, were later made in two British papers: the first by Professor R.Y. Jennings and the second and third by Professor D.H.N. Johnson.

be fairly brief and informal, will be followed by discussion from the floor.

So I wish to elaborate no further on this brief introductory statement, but to let you hear our panelists. It remains for me to say that the Royal Institute of International Affairs with its longstanding interest in international law and organization, is delighted to have the opportunity to host a regional meeting of the American Society of International Law.