THE TEACHING OF INTERNATIONAL LAW IN AUSTRALIAN LAW SCHOOLS

by

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"The soft, blue, humanless sky of Australia, the pale unwritten atmosphere of Australia. Tabula rasa. The world a new leaf. And on the new leaf, nothing."

D H Lawrence, *Kangaroo* (1922)

J D Pringle, a perceptive English journalist who spent some years in Australia in the 1950's, concluded with Lawrence that the land was too big for the people; it overwhelmed them with its size, its indifference, its lack of human history.[1] In the law school classrooms of today, where competition for places has ensured that its members are drawn from the top ten percent of matriculants, few will know what a *tabula rasa* is, or the capital of Venezuela, or what the Congress of Vienna was about. Nor would many more be able to point to Kiribati on the map, or explain the significance of ASEAN.

Why do we teach Public International Law in Australia, and with what general and particular aims? Is the Australia of Lawrence and Pringle changing? When the subject of International Law is but one among a large number of optional subjects in the law school curriculum, what attracts a student to elect it? And how should that interest be rewarded?

It seems appropriate to engage in these reflections on the occasion of the present essays. Adelaide was the birthplace of Pitt Cobbett, the first of Australia's international lawyers of stature, and the home of two other famous exponents of the subject, Coleman Phillipson and D P O'Connell. The Law Library of the University of Adelaide has an International Law collection unsurpassed elsewhere in Australia. International Law is a popular option in Adelaide. Some Adelaide students have become distinguished exponents of the subject, and Adelaide teams have acquitted themselves well in the Jessup International Law Moot Competition in the United States. It might seem an unlikely soil for such plants to grow, but no more so, except in slight degree, than are the larger centres of Australia.

The subject of this essay therefore essentially concerns the relevance of public international law to the intellectual equipment of Australian

1 *Australian Accent* (1958) 37.

lawyers. In tracing the development of the teaching of the subject in Australian law schools, there will inevitably be some degree of special pleading for its place in the curriculum. But in a wider focus the subject must also reflect Australia's perception of itself in the world, even though the contribution of lawyers to that perception cannot alone be decisive.

It is proposed to pursue these broad themes, however inadequately in the space available, through a sketch of the history of the teaching of international law in the Universities of Adelaide, Melbourne and Sydney to 1960. A more adequate outline may, it is to be hoped, be written one day that would also take account of the Universities of Queensland, Tasmania, and Western Australia, as well as of the universities established since 1945. With the benefit of further historical perspective, it should also be possible for such a study to assess objectively the particular syllabuses of international law courses currently offered in Australian law schools as well as of their teachers. For the present such judgments would be both premature and presumptuous.

The study covers three broad periods: (1) the period from the foundation of the first universities in Australia to the First World War, when Australia was a collection of colonies, sheltering under the Imperial umbrella; (2) the period between the two World Wars, when Australia achieved full independence and recognized international competence to act for itself; and (3) the post-1945 period, with its rapid development of natural resources and population growth, marked also by the hesitant assumption by Australia of a significant role in the world, especially in the affairs of Asia and the Pacific.

The Early Period : 1855-1914

The foundations of the Universities of Sydney (1850) and Melbourne (1852) occurred at a time when great changes were taking place in legal education in England. The rather haphazard instruction given in the four Inns of Court, which was the only form of vocational legal education available, was replaced by a systematic course begun jointly by the Inns under a Council for Legal Education in 1852. The Universities of Oxford and Cambridge had long taught the civil law, but only spasmodic courses in English law had been offered, notably in Oxford by Blackstone from 1753 until 1766, and in Cambridge from the founding of the Downing Chair of English Law in 1800. Even so, a graduate from the universities wishing to qualify to practise in the courts had to be called by an Inn (if as a barrister) or be apprenticed to an attorney (if as a solicitor). This separation between academic and practical legal education remains essentially the same today in England.

The influence of the civil law remained dominant in academic law teaching until well into the twentieth century. International law was regarded as part of that legacy, and some holders of the Regius Chair of Civil Law in Oxford were distinguished exponents of it, such as Alberico Gentili (1587-1608), Richard Zouche (1620-1660), and Sir Travers Twiss (1855-1870).[2] A chair of "Public Law and the Law of Nature and of Nations" was created in Edinburgh in 1707, but no occupant of it before

2 See generally on the development of international law in England, Johnson, "The English Tradition in International Law" (1962) 11 ICLQ 416.

James Lorimer, appointed in 1862, is remembered today. Notwithstanding the influence in jurisprudence of John Austin, for whom international law was part of a class of rules "improperly termed laws" and enforced by "mere opinion", specialized chairs in public international law were established in Oxford[3] in 1859, and Cambridge[4] in 1869.

As in England, the first courses in law in Australian universities were given in the Faculties of Arts, and were associated with the teaching of history. Hearn in Melbourne, for example, arrived in 1855 to teach in the areas of history, political economy and law, and did not assume the title of professor of law until the establishment of a separate Faculty of Law in 1873.[5] In Sydney there was no regular curriculum in law until the establishment of a School of Law, and the appointment of Pitt Cobbett as its first professor, in 1890. The same year saw the establishment of the first chair of law in the University of Adelaide, with Dr F W Pennefather as its incumbent, although the School of Law itself had been formally created in 1883.

These developments were roughly parallel to those in Britain. In Oxford a School of Law and Modern History was established in 1850 and was not divided until 1872. Cambridge was rather more advanced with the introduction of a separate Law Tripos in 1858. Scottish universities were even further advanced in as much as Scots law had been taught in the universities on a systematic basis at least 50 years before English law was similarly taught in English universities. A point of special significance, when it is recalled that Scottish influence was pronounced in Australian education, particularly in South Australia and Victoria, is that from 1874 onwards in Scotland a university law degree exempted its holder in whole or in part from professional examinations. This soon came to be so in Australia too, a significant departure from English models.

At the beginning, the influence of Oxford and Cambridge was clearly evident in the structure of the Australian curricula. Regulations for the Honour School of Jurisprudence in Oxford, passed in 1872, made the following subjects compulsory: (1) General Jurisprudence; (2) History of English Law; (3) Specified departments of Roman Law and English Law; (4) International Law. It was provided, however, that International Law might be omitted by a candidate who did not "aim at a place in the first or second class". This curriculum remained basically the same until 1948.

Regulations for the degree of LL B at Sydney University from 1862 until 1890 were similar. Candidates were to be examined in (a) Civil and International Law; (b) Constitutional History and the Constitutional Law of England, and (c) General Law of England. In 1891 a new curriculum

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3 The holders of the Chichele Chair since its foundation have been: Montague Bernard, 1859-1874, T E Holland, 1874-1910, Sir Erle Richards, 1910-1922, James Brierly, 1922-1947, Sir Humphrey Waldock, 1947-1972, D P O'Connell, 1972-1979, Ian Brownlie, 1979- .

4 The holders of the Whewell Chair since its foundation have been: Sir William Harcourt, 1869-1887, Sir Henry Maine, 1887-1888, John Westlake, 1888-1908, L F L Oppenheim, 1908-1919, A Pearce Higgins, 1920-1935, Sir Arnold (later Lord) McNair, 1935-1937, Sir Hersch Lauterpacht, 1938-1955, Sir Robert Jennings, 1955-1981, D W Bowett, 1981- .

5 William Edward Hearn (1826-1888) was Professor of Greek at Galway College, Ireland, before appointment to Melbourne as Professor of Modern History in 1855. See biographical note by La Nauze in 4 *Australian Dictionary of Biography* 370, and Campbell (ed), *A History of the Melbourne Law School 1857-1973* (1977).

was introduced for a five year degree, consisting of two years of study in the Arts Faculty, intermediate examinations in Jurisprudence, Roman Law, Constitutional Law and International Law, and final examinations in Real and Personal Property, Common Law, and Equity.

At Melbourne University the two year law course instituted in 1857 prescribed a mixture of vocational and general subjects, with readings from Blackstone's Commentaries and other general works. For the optional "extended course" (the precursor of the honours degree) Vattel's Law of Nations was set for reading. With the introduction of a separate LL B in 1864, extending over four years, the curriculum was widened to include more vocational legal topics, but at least half the curriculum consisted of Arts subjects. At this point Roman Law and International Law were dropped from the undergraduate course and transferred to the LL D which was a degree gained entirely by coursework. The six examinations for the LL D consisted of: (1) The Law of England, both common and statute; (2) The Statute Law of Victoria; (3) The Practice of the various courts of Victoria in their respective jurisdictions; (4) Roman Law; (5) International Law; (6) General Jurisprudence. In 1894 International Law was removed from the LL D requirements and put back into the LL B as a compulsory fourth year subject, where in one form or another it remained a separate compulsory subject until 1918.

In the University of Adelaide, the curriculum for the LL B adopted in 1890 prescribed a four year course consisting of, in the first year, Latin I, Roman Law, Constitutional Law, English language and literature; in the second year, Latin II (or Greek I), Property, Logic (or Elementary Pure Mathematics); in the third year, Jurisprudence, Equity, Contract; and in the fourth year International Law (both public and private), Wrongs (civil and criminal), Procedure (or Mental and Moral Science).

Disregarding differences in detail, it is possible to see in these patterns up to 1890 clear evidence of an intention, however formed, to equip law students with a broad background in the humanities and in processes of reasoning, in the expectation that applied legal skills would be acquired through apprenticeship. In the last decade of the nineteenth century pressures began to be felt for a greater emphasis on vocational subjects at the expense of traditional or cultural subjects. One response was the trend to associate the teaching of international law with conflict of laws, or public law generally. But the intensification of the vocational elements in the curriculum was not as rapid as some would have liked. For example, Professor W Jethro Brown wrote in 1908:

> "When law schools were established in Australia, a great opportunity was afforded of carrying out some reforms which were difficult if not impossible in the older English Universities. At least one such reform was effected. The work of law teaching was divided between a professor (devoting his whole energies to teaching and organization), and lecturers who were also practising lawyers. Moreover, a far greater relative importance was attached to the study of English law." [6]

The tension arising from the competing merits of vocational and general elements in the curriculum is reflected in particular in the debates

6 "Law Schools and the Legal Profession" (1908) 6 Commonwealth LR 3, 9.

concerning the place of public international law in the LL B course in Melbourne in 1890-1891. Edward Jenks was appointed Professor of Law in 1889 in succession to Hearn. At the age of 28 he came from England and a Fellowship at King's College, Cambridge with a brilliant academic record and with much promise. But he proved to be quarrelsome and tactless, and one of his defeats contributed to his early retirement from Melbourne and his return to England.[7] Jenks had proposed to the University Senate that International Law be no longer included in the list of compulsory subjects for the LL B. He proposed that Constitutional and Legal History be substituted for it. He revealed himself a follower of John Austin in contending that international law bore only the faintest analogy to law "usually so called", and that it was "simply diplomatic history, and the School of History is the place for it".[8] The proposal was defeated, largely through the reaction of non-academic members of the Senate for whom anything instituted in Hearn's time was sacrosanct. Jenks made a final appeal to the State Governor, as University Visitor, but in vain.[9]

MacDonald, in describing the teaching of international law in Canada at about this time, explains why there was little published scholarship in international law before 1914:

> "Energies and resources were devoted to teaching and administrative responsibilities and to the development of library collections. Bearing in mind, however, that Canada was an integral part of the British Empire, without semblance of international personality, that pioneer conditions prevailed in most regions of the country, that the number of full-time law professors could be counted on the fingers of one hand, and that (obviously) there was no career structure for students of international law, it seems remarkable that the subject was taught at all, let alone as early as 1851 in Montreal, 1858 in Toronto, and 1883 in Halifax. Of particular interest is the fact that international law was required as a pre-requisite for a law degree in the law schools of nineteenth century Canada. The subject was not at the outset regarded as 'too academic' or 'too non-vocational'. Nor was it in any way marginal to the mainstream of the curriculum ... the early explorers of legal education in Canada looked far beyond the immediate concerns of settlement, agriculture, transportation, and natural resources. They took a wide view of the responsibilities

7 Edward Jenks (1861-1939) was Professor of Law in Melbourne from 1889 to 1891, then at Leeds University from 1892 to 1896. He was Reader in English Law at Oxford and a Fellow of Balliol College, 1896-1903, and then Principal and Director of Studies of the Law Society, 1903-1924. His appointment to Oxford in 1896 had been opposed, partly because of his quarrelsome reputation, and partly because of a snobbish disdain for "a gentleman who appears to have acquired his academic experience in Australia". He proved, however, to be an excellent teacher. His only unfortunate legacy to Oxford was the putting back by 60 years of the acquisition of a separate law library. Joining forces with A V Dicey, he opposed certain of the terms of the proposed Squire bequest, which, as a result, went instead to Cambridge and to the foundation of the munificent Squire Law Library there: Lawson, *The Oxford Law School 1850-1965* (1968) 93-97.

8 Scott, *A History of the University of Melbourne* (1936) 161-162.

9 The detailed story is recounted in Campbell, supra n 5 at 88-97.

> of a law faculty, the practice of law, and the possible future of their young country in the international community. They fully reflected in their professional domain the optimism that was the characteristic and ruling passion of Canada until the end of World War I." [10]

Much of what MacDonald says of Canada would appear true of Australia. Canada and Australia both emerged to full international personality through the evolutionary process of Dominion status after the First World War. Both were pioneer countries with no indigenous traditions relevant to the study of law. But perhaps MacDonald's attribution of a conscious element of choice in early curricula, even if it were true of Canada, is too high-minded in the case of Australia. All of the law professors in Australia from 1855 to 1910 were educated in Great Britain or Ireland. All not only prescribed Roman Law and International Law in the curricula of their new law schools but also taught them personally. If any advanced students, keen to pursue an academic career in law, wished to engage in advanced study, it was to the universities of the United Kingdom, primarily Oxford and Cambridge, that they would go and where without Roman Law and International Law they would be lost. Above all, the conservatism of the judiciary and the legal profession in Australia in all dictated that English models should be followed in Australia in all essential features of the organization and procedure of the courts,[11] undoubtedly found expression in the field of legal education.

Whether by design, or through the force of inherited tradition, law school teaching was certainly less compartmentalized than today. The sole professor lectured in all the core subjects of the curriculum, with help from local judges and practising lawyers. That the "non-academic" teachers were not confined to the vocational subjects is evident, for example, in Adelaide where Mr F L Stow assisted in the teaching of international law under both Professors Pennefather and Salmond. This in itself must have made an impression on student minds of the law having a unitary theme, rather than being made up of disconnected elements, each being the subject of competing claims for attention and the pressure of individual enthusiasts.

In this sense, all the early law professors in Australia were exponents of international law. Hearn and Jenks taught it in Melbourne, and Pennefather, Salmond and Jethro Brown in Adelaide. Among the "generalist" law teachers, however, only Pitt Cobbett, the first Challis Professor of Law in the University of Sydney, is remembered for his contribution to the literature of the subject.

William Pitt Cobbett[12] can be accorded the title of Father of International Law in Australia. He was born in Adelaide, the son of Pitt Cobbett, wine merchant. His father received a late vocation to the priesthood, and returned with his family to England for theological

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10 MacDonald, "An Historical Introduction to the Teaching of International Law in Canada" (1976) 14 Can YBIL 224, 249. Earlier parts of this article are to be found in vol 12 (1974) 67-110, and vol 13 (1975) 255-280.

11 See generally Castles, *An Australian Legal History* (1982) chs 9, 13.

12 Pitt Cobbett was born in 1853 and died in 1919. See biographical note by Mr Justice Hutley in 8 *Dictionary of Australian Biography* 40.

studies. Pitt Cobbett Sr became Vicar of Crofton in Hampshire from 1874 to 1901, while Pitt Cobbett Jr went to school at Dulwich College, and later to University College Oxford (BA 1876, BCL 1880, DCL 1887). After going down from Oxford Cobbett tutored in London and Oxford, and produced the first edition of his only major work, *Leading Cases and Opinions in International Law*, in 1885.[13] He was appointed to the first Challis Chair of Law at Sydney University in 1890 and retired in 1909. During World War I he acted as an adviser to the Federal Government in international law matters.

Pitt Cobbett was a pioneer in the use of cases and readings in international law teaching. His book owes something in inspiration to W Forsyth's *Cases and Opinions in Constitutional* Law (1869), and perhaps also to Charles de Marten's monumental 5 volume work *Causes Célèbres du Droit de Gens* (1858-1861). But its appearance preceded the introduction of the "case-method" of teaching at Harvard by Langdell, and the first American international law casebook by Freeman Snow in 1893. Cobbett's book was widely prescribed for students of international law in Australia, England and elsewhere until the Second World War.

It is one thing to observe a secure place in the curriculum for international law in Australian law schools before 1914, but another to judge the breadth and depth of that subject as actually taught.

The course prescription at Sydney was relatively bland. International Law consisted of "(1) an account of the nature, history, and sources of public international law, and (2) an account of the rules generally accepted as determining the conduct of States in their normal relations, in the relation of war, and in the relation of peace". This was the rubric under which Pitt Cobbett (and later Charteris) taught the subject, with the prescribed texts being the treatises of Hall and Wheaton, and Pitt Cobbett's casebook. It is not clear from the calendars before 1890 how the subject was taught, except that from 1862 until 1890 it was combined with civil law, and that questions on international law were not always set in the annual examinations. But from 1890 onwards, in the hands of an acknowledged expert, one can safely assume it to have been taught comprehensively.

This raises yet another question. International law could be "taught well", but entirely in an historical vein, or with an exclusively European focus. To what extent was a concern for Australia's place in the world revealed? The curriculum for Melbourne gives us a clearer idea. In 1874 the course prescription read: "The law of allegiance, of aliens, of naturalization, and of extradition; the rights and duties of nations in time of peace; the rights and duties of nations in time of war; the principles of private international law, and intercolonial law." The prescribed books were Abdy's edition of Kent's *Commentaries on International Law,* Savigny's *Private International Law,* and the Letters of "Historicus".[14] For honours students, Twiss's *Rights and Duties of*

13 A second edition appeared in 1892, and a third, in two volumes, in 1909. A fourth edition was prepared, after Cobbett's death, by Hugh Bellot in 1922, a fifth edition by F T Grey and Legh Walker in 1931, and the sixth and final edition by Legh Walker in 1947.

14 "Historicus" was the nom-de-plume of Sir William Harcourt, first Whewell Professor at Cambridge. His letters to *The Times* on international legal matters were collected and reprinted, with additions, in 1863.

Nations and Tudor's *Leading Cases in Mercantile and Maritime Law* were prescribed in addition. In the absence of contemporary accounts, one would guess from such a prescription that the treatment of general principles of international law would have been fairly broad. The apparently detailed treatment of nationality law and extradition indicates a special concern with the movement of persons, both from outside the continent (as in the case of the Chinese and Pacific Islanders) and between the Australian colonies themselves. To cover the general principles of private international law in the same course would — again one must guess — be at the expense of public international law, since the former covered topics of such obvious practical importance to practitioners, then as now, as domicile, recognition of foreign marriages, and the proper law of contract.

Nevertheless there is evidence that a nice balance could be maintained between the discrete subjects of private and public international law, which were taught together in Adelaide from 1892 until 1906, in Melbourne from 1874 until 1913, and briefly in Sydney in 1910 and 1911. The examination paper of the University of Adelaide in 1897 set 12 compulsory questions to be answered in three hours, six of which exclusively concerned private international law, five public international law, and one both ("What essential difference in nature is there between the rules included under 'public international law' and 'private international law'?"). The public international law questions have a universalist rather than a parochial ring. Indeed (a sad reflection on the modern textbooks which confine themselves to the "Law of Peace") all of them could be set today and answered with contemporary illustrations:—

> "— Under what circumstances, and to what extent will the right of self-preservation justify a State in violating the ordinary rights of another State? Quote instances.
>
> — By what principles should a neutral State be guided when the question arises whether it shall treat a revolted province (a) as a belligerent community, (b) as an independent State?
>
> — What is necessary to constitute a title by occupation under public international law? Give the principal arguments of each side in one of the following boundary disputes: (1) The Texas boundary; (2) The Oregon boundary.
>
> — Define 'War'. Explain clearly the general view which international law takes of the relation of belligerency.
>
> — Discuss the rights, according to public international law of (a) any one State, (b) of all the 'Great Powers' of Europe, to interfere in the internal government of any State on humanitarian grounds."

It can be concluded that, up to 1914, all Australian law graduates would have been exposed to at least an elementary introduction to the principles of public international law, both of peace and of war, and some would have obtained an advanced knowledge of the subject. Although the place of the subject in the compulsory curriculum was coming to be questioned, and it was, at different times, combined with

the teaching of other subjects, especially conflict of laws, its relevance to the education of lawyers was generally accepted.

The Middle Period : 1914-1942

This period, beginning with Australia's entry into the First World War and ending with the adoption of the Statute of Westminster, marks the stages of Australia's gradual acquisition of international personality.[15] Australia, together with the other self-governing British dominions, was a separate signatory of the Treaty of Versailles, 1919. It became an original Member of the League of Nations in its own right. On behalf of the Imperial Crown it assumed the rights and responsibilities of the League's Mandates with respect to the Territories of Nauru and New Guinea.[16] In 1936 Australia proclaimed sovereignty in its own name over a large sector of Antarctica.[17] The evolution of separate treaty-making powers, which began before Federation with separate adhesion mechanisms available to self-governing colonies under imperial treaties from 1883,[18] was accelerated by the recognized power to sign and ratify treaties in the name of Australia alone after the Imperial Conference of 1923, even though consultation procedures were required in the case of "political" treaties and in the case of certain mutilateral treaties. A completely untrammelled treaty-making power emerged gradually through the subsequent Imperial Conferences of 1926, 1930 and 1937.[19] A separate Department of External Affairs was established in Canberra in 1935, although the first Australian ambassador (other than a High Commissioner in London) was not sent abroad until 1940. Foreign consuls were accredited to Australia from pre-Federation times, but were not reciprocated until after World War II. The clearest mark of acquisition of unrestricted international personality by Australia is usually taken to be the adoption in 1942 of the Statute of Westminster, with retroactive effect to 3 September 1939.[20]

It might have been expected that the heady period of emergent international personality and active participation by Australia in world affairs would have stimulated a response in the university law schools. The demand for courses in public international law, however, diminished, if anything, rather than increased.

With regret, it must be recorded that Adelaide's record is the sorriest of the universities surveyed here. Public International Law disappeared from the undergraduate curriculum in 1906 and did not find a place again until more than 50 years later. Despite the deanship from 1920 to 1925 of a renowned international lawyer, Coleman Phillipson, International Law was prescribed only in the coursework requirements for the LL M degree, which no one took (or at least, no one appears to

15 O'Connell, "The Evolution of Australia's International Personality" in O'Connell (ed), *International Law in Australia* (1965) 1-33. Mr Justice Murphy argues for the attribution of international personality to Australia at Federation: *Mistricic* v *Rokov* (1976) 135 CLR 552, 565-567, but see criticism of this view by Bickovskii in (1977) 8 Fed LR 460, 468.

16 Castles, "Australia's Overseas Territories" in O'Connell, supra n 15 at 292-340.

17 Castles, ibid at 296-297; Castles, "The International Status of the Australian Antarctic Territory" in O'Connell, supra n 15 at 341-367.

18 O'Connell, ibid at 2-7.

19 Aust, Department of Foreign Affairs, *Australian Treaty List 1970* (TS 1971, No 1) ix-x.

20 Statute of Westminster Adoption Act 1942 (C'th).

have successfully completed), before its replacement in 1930 by regulations requiring a thesis alone.

In Melbourne there was a semi-eclipse of the fortunes of Public International Law between 1918 and 1932 when the subject was removed as a separate compulsory subject and absorbed within a new subject, Modern Political Institutions, taught by Harrison Moore and P D Phillips. This subject originally consisted of three parts – (a) British political institutions, (b) international relations and law, and (c) modern political ideas; but was later expanded to include also the history of colonial government with particular reference to Australia, and the development of inter-Imperial relations. A further watering down occurred when control of the subject was handed over to the Faculty of Arts in 1930. In 1933 the subject Public International Law was restored to the LL B curriculum as an optional subject, where it has since remained.

Only in Sydney did international law enjoy, for an uninterrupted period, a place in the undergraduate curriculum. It was also (more controversially perhaps) a compulsory subject for all students from 1862 until 1959. Its teachers, following Pitt Cobbett and J B Peden, were A H Charteris, from 1921 to 1940, and Julius Stone from 1942.

Even if the response of the universities to the challenges faced by Australia in the 1920's and 1930's was slow and uneven, measured by attention in the curriculum, there was a significant awakening of interest at the scholarly level.

In 1920 a second Challis Chair of Law was endowed at the University of Sydney in International Law and Jurisprudence, to which A H ("Archie") Charteris was appointed in 1921. Charteris[21] was a Scot, born in Glasgow in 1874. His father was a professor of medicine at Glasgow University. He was educated at schools in Scotland and Germany and at Glasgow University. He lectured at that University in Public and Private International Law from 1904 until 1919. During World War I he worked for the British Government in the War Trade Intelligence Department.

Charteris was not a prolific writer, and no book was produced by him other than the posthumously published *Chapters on International Law* (1940) and a non-legal work *When the Scot Smiles* (1932). But he wrote for journals on a variety of topics,[22] and was responsible for innovating the International Legal Notes series in the Australian Law Journal.[23] He was already a member and councillor of the International Law Association before his appointment to Sydney, and appears to have been the only member of that body resident in Australia until 1947.[24] In

21 See Starke's biographical note on Charteris in 7 *Australian Dictionary of Biography* 619.

22 Principally "The Legal Position of Merchantmen in Foreign Ports and National Waters" (1920-1921) 1 BYIL 45; "Habeas Corpus in respect of Detention of Foreign Merchantmen" (1926) 8 J Comp Leg & Int L (3rd ser) 246; "Australian Claims in Antarctica" (1929) 11 J Comp Leg & Int L (3rd ser) 226; "The British Commonwealth Relations Conference at Toronto, 1933" (1934) 19 Grot Soc Trans 137. Also papers at ILA Conferences: "Territorial Jurisdiction in Wide Bays" (1907) Proceedings of the 23rd Conf Berlin 103-132; "Recent International Disputes Regarding Territorial Bays" (1912) Proceedings of the 27th Conf Paris 107-127.

23 (1939) 13 ALJ, and (1940) 14 ALJ. The series was later continued by his former pupil J G Starke.

24 The International Law Association (ILA), founded in London in 1873, is a world-wide non-governmental organization open to all interested in international law. An Australian branch was formed in 1959.

1920 he was elected to membership of the Grotius Society,[25] and was Australian correspondent of the British Yearbook of International Law from its foundation in 1920 until his death in 1940.[26] He was President of the New South Wales Branch of the League of Nations Union and a renowned broadcaster on current affairs. In 1933 he was a member of the Australian delegation to the British Commonwealth Relations Conference in Canada. As a result of part of his schooldays being spent in Germany, followed by a brief sojourn in Berlin in 1920, he was fluent in German, as well as in French; competence in these languages was vital then, as now, to keeping abreast of important developments in international law.

In Melbourne a second chair was established at the instance of the Supreme Court judges in 1930. Sir William Harrison Moore had resigned as sole professor of law in 1927, and had been replaced by K H (later Sir Kenneth) Bailey. In 1930 the new chair was designated as a Chair of Public Law, while the earlier one was designated a Chair of Jurisprudence. Bailey moved to the former, and G W (later Sir George) Paton was appointed to the latter.

Harrison Moore had continued to teach international law in its truncated form after 1918, but he was not primarily an international lawyer.[27] His reputation as a public law generalist, and as an administrator, however, drew him into close involvement with the Federal Government, and in the capacity of adviser or delegate he attended meetings of the League of Nations Assembly in Geneva and the Rome Conference revising the Berne Convention on copyright. After retirement from the chair, he served as a member of the 1930 League of Nations Codification Conference, and also participated in the revision of the Rules of the Permanent Court of International Justice. He represented Australia at the London Conference which drew up the Statute of Westminster, 1931.

K H Bailey's transfer to a separate chair of public law opened the way to a revitalization of interest in public international law. He was Rhodes Scholar for Victoria in 1919, and was a member of Corpus Christi College, Oxford where he took out first class honours in the BCL in 1923. He returned to Melbourne as Vice-Master of Queens College, and was appointed Professor of Law and Dean of the Faculty in 1927. Like Charteris, Bailey never published a book on international law, but he produced several important articles.[28] A visit to the United States in 19[illegible] as a Carnegie Fellow was influential in his development of the international law curriculum in Melbourne as well as in the introduction

25 The Grotius Society was a prestigious association of British judges, officials, and academic lawyers which met between 1915 and 1959, and published the *Transactions of the Grotius Society*, 44 vols (1916-1960).

26 Charteris was later joined by K H Bailey and Sir Robert Garran as its Australian correspondents. The British Yearbook is the most selective of all international law journals.

27 See note in tribute by Bailey in (1936) 17 BYIL 165. In the field of international law Moore published an article, "Suits between States within the British Empire" (1925) 7 J Comp Leg & Int L (3rd ser) 155, and a lecture, "The Imperial and Foreign Relations of Australia" in *Great Britain and the Dominions*, Harris Foundation, Chicago (1927).

28 "Australia and the International Labour Conventions: Some Aspects of the Treaty Power in the Commonwealth" (1935) 1 Proc Aust & NZ Soc Int L 100-121; "Australia and the International Labour Conventions" (1946) 54 Int Lab Rev 285-308; "Dependent Areas of the Pacific" (1946) 24 For Aff 494-512.

of the Socratic case-book method. In the same year he was a member of the Australian delegations to the Imperial Conference in Canada and the League of Nations Assembly in Geneva. The Second World War interrupted Bailey's academic career, when he was appointed a member of the Aliens Tribunal in 1941, and then full-time adviser to the Federal Government in constitutional matters from 1942. He was a member of the team under Dr H V Evatt that helped draft the UN Charter in 1945.

The most prolific publicist of the inter-war period in Australia was Coleman Phillipson, who held the Chair of Law in Adelaide from 1920 to 1925. His influence in Australia was, however, slight, for his extraordinarily numerous publications all pre-date his arrival in Australia.[29] During his tenure, and after his resignation, he appears to have produced nothing more of significance to international law.[30] Indeed a great deal of mystery surrounds Phillipson, and only sketchy details are available of his activities before arriving in Adelaide and after his abrupt resignation and return to England in 1925.[31] He appears not to have held an academic appointment prior to his appointment to Adelaide, but to have engaged in unspecified "educational work in Leeds, London and Lincoln". He clearly carried out the most energetic research and writing. During World War I he was engaged in "confidential work for the British Government", and accompanied the British Delegation to the Paris Peace Conference in 1919 as Counsel and Legal Secretary to the Law Officers of the Crown. In that capacity he prepared the Handbook on War Indemnities for the use of the British plenipotentiaries.

If outstanding published scholarship in Australia was lacking in the inter-war period, there appeared to be – at least transitorily – interest in the subject outside the universities. Dr T P Fry,[32] Lecturer in Law at the University of Queensland, took the initial steps in the formation of the Australian and New Zealand Society of International Law. The Society was formally constituted at a meeting held at Sydney Law School

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29 His works were: *Two Studies in International Law* (1908); *The Effect of War on Contracts and Trading Associations in Territories of Belligerents* (1909); *The International Law and Custom of Ancient Greece and Rome*, 2 vols (1911); *International Law and the Great War* (1915); *The Question of the Bosphorus and the Dardanelles* (with N E Noel-Buxton) (1917); and *Alsace-Lorraine: Past, Present, and Future* (1918). In addition to these works, Phillipson prepared the following editions: the 4th edn of Foote, *Foreign and Domestic Law: a Concise Treatise on Private International Jurisprudence* (1914); the 5th edn of Wheaton, *Elements of International Law* (1916); the 5th edn of Smith (Lord Birkenhead) *International Law* (1918); the 8th edn of Taswell-Langmead, *English Constitutional History* (1919); and the 9th edn of *Mayne on Damages* (1920). Phillipson also wrote valuable biographical sketches of the founders of international law for the Journal of the Society of Comparative Legislation in 1908, 1909, 1911, 1915, and 1919, some of which are reproduced in *The Great Jurists of the World*, edited by Sir John MacDonell and E Manson (1913).

30 During his period in Adelaide he published *Three Criminal Reformers: Beccaria, Bentham, Romilly* (1923). After his return to England he published only *The Trial of Socrates* (1928), and an introduction to J C Rolfe's translation of Gentili's *De jure belli* (1933). He died in 1958.

31 See Edgeloe's contribution, supra.

32 Thomas Penberthy Fry, MA (Qld), BCL (Oxon), SJD (Harvard) attended the Hague Academy of International Law, and received its diploma, in 1928, probably the first Australian to do so. He later became Reader in Law at the University of Queensland, and is especially remembered for his published study of the maritime boundary question between Queensland and Papua in the Torres Strait. He died in 1952 while working in the Dept of Territories, Canberra, on a consolidation of the Laws of Papua-New Guinea.

on 21 February 1933, attended by Sir John Peden, the Hon Mr Justice H V Evatt, Mr V Le Gay Brereton, Professor A H Charteris and Dr Fry. Charteris was appointed president and Bailey was one of the vice-presidents. Fry acted as secretary/treasurer. The Society made a promising start, with 100 members and a very distinguished group of patrons. At the first conference sponsored by the Society, in 1933, Sir Owen Dixon of the High Court of Australia said that "the need for such a Society has probably been felt by very many teachers of international law who have for many years perhaps felt that they have taught a most important subject in a most unreceptive community".[33] The last part of this statement was prophetic; whether as a result of Charteris' death in 1940 or the outbreak of war, the Society disappeared from view, never to be resuscitated. The Australian Institute of International Affairs, affiliated with Chatham House, and also founded in 1933, fared better, being more broadly based and perhaps also because of its association with other bodies elsewhere in the Commonwealth.

Several factors seem to have combined to weaken interest in international law during this period. There was a paradoxical strengthening of Imperial sentiment through the First World War. Before and immediately after Federation, republican feeling had been widespread, in part because of geographical isolation and in part because Britain was thought to be indifferent to Australia's fate. The Anglo-Boer War and the First World War, however, proved to be the stages on which Australians made an international appearance and also the means by which Australia's importance in the Empire was proved. Despite its geographical irrelevance to Australia, participation in the First World War was given wide, even hysterical, popular support. After it, most Australians felt that by their loss of blood they had more than repaid any debt to the Mother Country and indeed were now owed its future protection. This pledge could only be secured through remaining part of the Empire. While revisions of the definition of Dominion status had to be made in order to accommodate the individual needs of the constituent self-governing parts of the Empire, Australia sought security in the concept of the essential indivisibility of the Imperial Crown and the seapower of Great Britain.

This conception of Australia's place in the world, unchanged until the fall of Singapore in 1942 and Curtin's famous speech declaring that Australia now looked to the United States for protection, was scarcely affected by Australia's membership in the League of Nations. Faith in the League seems to have run a distant second, not far ahead of isolation, to the integrated Empire system of security in the official and popular views of Australia's preferred choice of posture.[34] Moreover, the series of disappointments with the League, the abstention from it of the United States, and preoccupation after 1929 with the Great Depression, were inimical to ideals of international cooperation.

Law school curricula in this period show a marked trend towards increasing the component of vocational subjects. American law schools were looked to more for models than Oxford and Cambridge, and greater use was made of part-time teachers from the practising profession

33 *Proceedings of the Australian and New Zealand Society of International Law*, vol 1 (1935) xix.

34 Phillips in Duncan (ed), *Australia's Foreign Policy* (1938) 17.

to provide a complete course of preparation for legal practice (subject only to the service of articles). The 1930's was a decade of austerity in which few intending lawyers could afford an education with such "frills" as international law seemed by then to be. Scholarship continued to suffer, as before 1914, from the heavy administrative and teaching loads of those otherwise competent to engage in it. As yet there was no Australian diplomatic service to which one could aspire, nor any significant number of openings for careers in the League of Nations organs.

The Beginning of the Present Era : 1945-1960

In the Second World War, unlike the First, Australia fought for its own survival. Between 1942 and 1945 it had to grapple with the full implications of a sovereignty bestowed years before but comfortably neglected. Largely through the aggressive personality of its Foreign Minister, Dr H V Evatt, Australia played a prominent role in the drafting of the Charter of the United Nations and assured a political role for itself in that organization quite distinct from that of the United Kingdom. Dutch power collapsed in the Netherlands Indies, and new nationalisms there and elsewhere in South-East Asia confronted Australia for the first time with the urgent need to formulate foreign policies of its own. The ANZUS alliance with the United States and New Zealand was signed in 1951.[35] Even by the end of 1946, 17 new Australian diplomatic posts had been opened abroad as well as a Permanent Mission to the United Nations. The British Nationality Act, 1948, spelled the beginning of the end of the unitary concept of British nationality by creating separate citizenships for each of the Dominions.

Australia was not prepared in advance for the consequent explosion of demand for specialized international law advice. Lawyers were quickly recruited to the Department of Foreign Affairs[36] where for many years to come they enjoyed a competitive edge in selection procedures. For the first time in Australia's history distinct career opportunities for international lawyers were opening up, not only within Australia, but also within the burgeoning United Nations' and Associated Agencies' bureaucracies.

There was little immediate change, however, in the emphasis given to international law in the law schools. In Sydney the subject had always been compulsory in the LL B programme, and remained so until 1959. In Melbourne it had been an optional subject since 1933, where, together with International Relations, it had formed but one of five optional groups of subjects, one of which had to be selected by all students. The law of war and neutrality had been hastily added to the subject

35 Negotiated by the Minister of External Affairs, Sir Percy Spender, later to become a Judge and President of the International Court of Justice. Sir Percy's famous "casting vote" in the *South West Africa Case* (Judgment on the Merits) 1966 ICJ Rep 6, is said to have been the reason for the narrow failure of Sir Kenneth Bailey to secure election to the Court.

36 W Anstey Wynes (LL D Adelaide) was already within the Department of External Affairs, and later became Legal Adviser to the Department (1952-1959) and author of a standard work of reference on the Australian Constitution. K G Brennan, later to become head of Australia's delegation to the Third United Nations Conference on the Law of the Sea, and Alan Renouf, later Secretary of the Department of Foreign Affairs, were among the lawyers recruited at about this time.

description in 1939. At least the war had the effect of tightening the options, for in 1946 International Law and Roman Law became the only options in a required group (the latter replaced, in 1952, by Comparative Law). In Adelaide international law continued to be totally neglected in the curriculum until 1958, despite O'Connell's appointment in 1953. The possibility of curriculum development was impeded by lack of funds until the Murray Commission brought about a massive programme of expansion in the universities in the late 1950's.

After the Second World War K H Bailey returned briefly to his chair at Melbourne from secondment to the Federal Government, but resigned in 1946 on his appointment as Commonwealth Solicitor-General. It was undoubtedly his standing and experience in public law generally that secured this appointment. As yet the Federal Government saw no need to create a special post of international law adviser; but in Bailey's case the two roles were combined in fact. While Bailey's lengthy tenure of the office (1946-1964) ensured that due account was taken of international law factors at the centre of Australia's legal advice, it paradoxically had the effect of inhibiting the development of a specialist body of international law advisers in the Department of Foreign Affairs. Bailey's stature as an international lawyer was recognized by his election to the *Institut de Droit International,*[37] the first Australian to be so honoured.

Bailey was succeeded in the Chair of Public Law at Melbourne by Wolfgang Friedmann.[38] Friedmann was a scholar of wide interests in jurisprudence, the sociology of law and in international law. He is remembered especially for his *Legal Theory,* first published in 1944, *Law in a Changing Society* (1959), and *The Changing Structure of International Law* (1964).[39] During his time at Melbourne he produced the first Australian monograph on administrative law. His stay was unfortunately too short to have had any lasting impact on the development of international law in this country. In 1951 he accepted appointment to a chair in Toronto, and later as Director of International Legal Research and Professor of International Law at Columbia University.

At Sydney, after Charteris' death in 1940, J G Starke lectured in international law until the arrival of Julius Stone in 1942. Thereafter Starke, who had served in the League of Nations Secretariat in Geneva, and who had developed a scholarly interest in international law, gave lectures on a part-time basis while practising at the Bar. Later Starke moved to Canberra to the Institute of Advanced Studies at the Australian National University, where he combined research with editorship of the Australian Yearbook of International Law, and later of

37 The *Institut de Droit International,* founded in 1873, is the acknowledged body of the most eminent scholars in international law. Bailey was elected an associate in 1947, and promoted member in 1965. The only other Australians to have become members are Julius Stone (1957) and D P O'Connell (1967).

38 Friedmann was born in Germany in 1907 and became a labour court judge in 1933. In 1934 he left Germany to find asylum in England where he became Reader in Law at London University, 1938-1947. He met a violent death at the hands of a robber in New York City in 1972.

39 His other major works in international law were: *The Contribution of English Equity to the Idea of an International Equity Tribunal* (1935); *What's Wrong With International Law?* (1941); *Introduction to World Politics* (5th edn 1965); his general course on international law at the Hague Academy in 127 Hague Recueil (1969) 39; *The Future of the Oceans* (1971).

the Australian Law Journal. Starke's *Introduction to International Law,* first published in 1947, is a popular student text throughout the English-speaking world, and has been through nine editions.[40]

The teaching of international law at Sydney by Julius Stone for more than 30 years strongly influenced two generations of students at the critical time of Australia's need for international lawyers. The chair to which Stone was elected in 1942 was a Chair of Jurisprudence and International Law, a combination of special importance and perhaps (outside Scotland) unique. Stone was able to bring distinction to both branches of his avocation. He had already published widely in international law before his appointment, particularly in the field of the rights of minorities.[41] But two books above all brought him international renown: *The Province and Function of Law* (1946), and *Legal Controls of International Conflict* (1954).[42] Stone did not aspire to become an international law generalist; his writings are concentrated mainly on the issues of the use of force and the resolution of disputes. For that very reason his impact was felt more keenly in areas of fundamental concern transcending traditional categories of subjects. Without denigrating the achievements of his predecessors, it can be said that Stone was the first academic lawyer in Australia to convince a sceptical legal public that international law was not just diplomatic history or a species of so-called law, but a living body of law deserving serious analysis. Not only was international law worthy of serious analysis in the philosophical sense, but in the vital service of mankind it required the utmost care and intellectual rigour in its development and application. He foresaw long before others the dangers in a slackening of juristic integrity and in the rise of the tyranny of majorities.

D P O'Connell, who taught international law at Adelaide from 1958 to 1972, complements rather than contrasts with Stone. Both maintained high intellectual standards and, though they may have differed in approach to particular issues, had a common dedication to the integrity of the discipline of international law. O'Connell taught Jurisprudence for many years at Adelaide but published little in that field; instead he concentrated on becoming an international law generalist (whilst in the meantime producing a specialized monograph on the law of state succession) and published in 1965 a two volume general treatise.[43] In the same year he edited the first collection of essays on the application of international law in Australia since the publication of the proceedings of the ill-fated Australasian Society of International Law in 1935.[44] He

40 His other major works in international law are: *Studies in International Law* (1965); *The ANZUS Treaty Alliance* (1965); and *An Introduction to the Science of Peace, Irenology* (1968).

41 *International Guarantees of Minority Rights : Procedure of the Council of the League of Nations in Theory and Practice* (1932); *Regional Guarantees of Minority Rights : a Study of the Minorities Procedure in Upper Silesia* (1933).

42 Among his later major works in international law are: *Aggression and World Order* (1958); *The International Court and World Crisis* (1962); *Of Law and Nations* (1974); *Conflict Through Consensus : United Nations Approaches to Aggression* (1977).

43 A second edition was published in 1970. His other books were: *The Law of State Succession* (1956), which was the developed version of his PhD thesis at Cambridge under the supervision of Sir Hersch Lauterpacht; *State Succession in Municipal Law and International Law,* 2 vols (1967); *The Influence of Law on Sea Power* (1975); and *The International Law of the Sea,* 2 vols (1982). He also wrote a biography, *Richelieu* (1968).

44 *International Law in Australia* (1965).

played a leading role in the foundation of an Australian Branch of the International Law Association in 1959, and later became its President. He appeared as counsel in the International Court of Justice in 1974 in the *Nuclear Tests Case*, so far Australia's only experience in litigation before that body. In 1972 he was elected to the Chichele Chair of International Law at Oxford in succession to Sir Humphrey Waldock.[45]

Until 1960 only basic general courses in public international law had been offered at Australian universities. Specialized courses in such related subjects as international organizations, international air law, and international humanitarian law, have had to await the great increase in funds for staff development that came in the 1960's. Sydney was the first to introduce a course in international organizations, and appointed Professor C H Alexandrowicz to an Associate Chair in that subject in 1961. Alexandrowicz, who was born in Poland, had lectured in London before appointment as Research Professor of International Law at Madras University. During his period in Madras (1951-1961) he was also Honorary Legal Adviser to the Government of India. Alexandrowicz published two major works on international organizations, *International Economic Organizations* (1952), and *World Economic Agencies — Law and Practice* (1962). His other major interest was the history of international law, particularly in Asia.[46] He returned to England in 1968 to become Chairman and Director of Studies of the Grotian Society.[47]

At this point we approach the present, and it is not intended to survey present courses in international law or their teachers. Indeed to do so would require that universities other than the three selected for this brief outline be included. But some final points will be offered in an attempt to complete the historical background to present courses.

International lawyers have always had greater difficulty than other lawyers in gaining access to the raw material of their craft, the practice of States. The institution of the Australian Yearbook of International Law in 1965 helped overcome this difficulty, although articles in that journal are not restricted to subjects with an Australian orientation. A "practice section" is, however, now a regular feature compiled by officers of the Department of Foreign Affairs. The first book of cases and materials on international law, prepared for Australian students, and containing Australian practice, appeared in 1972.[48]

In 1975 a series of informal meetings of international lawyers in the Departments of Foreign Affairs and of the Attorney-General with academic international lawyers was begun. The first entry of Australian student teams into the P C Jessup International Moot Court Competition, which also occurred in 1975, has stimulated much interest at the undergraduate level, and by reason of the annual Australian

45 For further biographical details see (1981) 7 Aust YBIL xxiii, and for an appraisal of his contributions to international law, see Crawford, "The Contribution of Professor D P O'Connell to the Discipline of International Law" (1980) 51 BYIL 1-87.

46 See his course at the Academy of International Law in 123 Hague Recueil (1968) 117; and *Introduction to the History of the Law of Nations in the East Indies in the 16th, 17th, and 18th Centuries* (1967).

47 Not to be confused with the Grotius Society, supra n 25, the demise of which occurred at about the time of the birth of the Grotian Society, dedicated to the study of the history of international law. The Society publishes intermittent Grotian Society Papers.

48 Holder and Brennan, *The International Legal System, With Emphasis on the Australian Perspective* (1972).

elimination rounds, the competition has provided a regular informal rendez-vous of teachers and students of the subject throughout Australia.

Perhaps the most significant recent development in international law teaching has been the move towards offering specialized international law options in post-graduate courses. There has been a growing demand for coursework LL M degrees, and subjects with an international law dimension are included among the options. At the Australian National University there is now a course leading to the degree of Master of International Law (or a diploma for an abbreviated course), which may be taken on a full or part-time basis. These developments should in time produce the desirable by-products of increased scholarship, and the availability of advice in a wide variety of governmental and private transactions.

There is a common danger, however, in the trend towards specialization within the general field of international law, both in undergraduate and postgraduate curricula. Unless students taking these courses are also offered (or have already taken) a thorough course in general principles of international law, specialized studies are likely to produce only superficial results.[49] The roots of international law run deep into history and legal theory; time is needed to acquire a feel for it, and even to become adept at mining the resources of a library for its substance. Students coming to the subject must have a genuine interest in history and current affairs, and a conception of Australia's place in the world. They should also accept without incredulity the suggestion that their readings should not be confined to the English language.

The earlier experiments in Melbourne associating courses in international law and international relations have not been continued. With the increasing flexibility now allowed by universities in the direction of interdisciplinary studies, more should be made of such possibilities whilst at the same time ensuring that the juristic integrity of international law is maintained.

In this important respect we have much to learn still from the broad, unspecialized curricula of the past where the foundations were regarded as of greater importance than the superstructure. That "there is nothing more practical than a really sound theory" is as true for international law as for any other branch of the law.

49 See also Brownlie, "Problems of Specialization" in Bin Cheng (ed), *International Law : Teaching and Practice* (1982) 109-113.