

**Conversations with Professor Sir Elihu Lauterpacht  
Fifth Interview: The Nineties and new Millennium**

Date: 28<sup>th</sup> March 2008

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

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

Sir Elihu's answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

Sir Elihu. It's a great day today, because it's the first time in 15 months that I've been able to even begin to get back to dealing with my father's biography, other things have just kept on intervening.

**Yes, that must be very satisfying.**

Bearing in mind his interests, I hope it will be!

**100. Well, Sir Eli, we've come to the fifth talk in our interviews. Last week, we reached the mid 1990s. I wonder if we could begin today with the time when you were knighted in 1998. I wonder whether you have any recollections of the ceremony when you met the Queen? 1999.**

Yes, I have some recollection of a very pleasant occasion. I ought just to say that I do not know why I was knighted. The official statement just said for services to Public International Law, but there are others who've also served the subject who haven't got knighthoods. I have never been told why I had the good fortune to be selected. However, that happened and very agreeable it was. The honour was announced in the Queen's Honours List in June of whichever year it was, 1989, I think... 1999 sorry, and the actual investiture, when one goes to Buckingham Palace to receive the accolade, did not take place until some time in November that year. One simply goes to the Palace along with a number of other recipients of honours and everything is beautifully organised. There is a master of ceremonies who has obviously presided over these matters many times, who gives you very explicit directions as to exactly how you should approach the Queen then turn round and face her and kneel down and she will then tap you with a sword and you rise and you bow and you back off, and it's all over in a twinkling. There's a large audience in which members of one's own family are included and then after that we all went off and had a good lunch at The Connaught.



**101. Sounds delightful.**

So, it was very nice. It's been a very agreeable thing to have received. It actually made no difference to one's life. And what is remarkable and it's really quite amusing in a way, is the number of people who do not know how to address you. Many people go on addressing you as mister. That's perfectly acceptable, I don't get in a state about that, although there are others who in correspondence, instead of using the usual form which is Sir plus your first name, just say Sir Lauterpacht or something like that. But again, it doesn't matter. I think these days it matters much less than it would have 30 or 40 years ago.

**102. It is surprising, though.**

Well, it is in a way it's surprising and equally in a way it's not surprising because people are just less concerned about these things now and people certainly are not educated about them. One, therefore, just accepts it for the condition that it is.

**103. Well, Sir Eli, we come then to the first item on your list which is the Namibia-Botswana or Kasikili Sidudu Arbitration. 1996-99.**

Well, that was actually not an arbitration, that was an ICJ case between Namibia and Botswana relating to the boundary of the eastern end of the Caprivi Strip. That's at the north of Botswana and the northeast of Namibia<sup>1</sup>. The subject matter was really quite trifling. It related to where the boundary lay in the Chobe River. At a certain point, the river divides and goes round a small island, Kasikili Island, which is hardly bigger than a couple of football pitches, but each side attached importance to having its title to that island recognised and so they eventually agreed to go to the ICJ. The Namibian team on which I served was led by Professor Abram Chayes of the Harvard Law School<sup>2</sup>. Abram Chayes was a very striking character, a very clever man indeed, very quick. He had been legal advisor of the State Department during the Kennedy administration in the United States and he returned to Harvard. Quite how he got involved in the case I don't know, but we were a very agreeable team which also included Julio Faundez at Warwick University. He's a very fine man and was the link with the Namibians.

In the preparation of the case, we met occasionally in London at the Namibian High

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<sup>1</sup> Case concerning Kasikili/Sedudu Island (Botswana/Namibia). Summary of Judgment December 1999. <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=b7&case=98&code=bona&p3=4>  
768 Kasikili/Sedudu Island (Botswana/Namibia), Judg. 13 Dec. 1999 (*ICJ Reports* 1999, p. 1045) (ISBN 92-1-070840-7)

<sup>2</sup> 1922-2000.



Commission and Chayes dominated the proceedings<sup>3</sup>. It didn't bother me particularly. I was assigned my bit of the case and I just got on and did it. We gradually got ourselves ready for the ICJ hearings which were very straightforward and eventually the Court decided that the island belonged to Botswana on the basis that the main channel of the river ran north of the island and thus, brought the island into Botswana territory<sup>4</sup>.

**104. I see. I was wondering whether there was any evidence that the court looked at maps that might have been used or produced by the South African Defence Force during the time of its military activity against Angola?**

The court didn't look at maps produced by the South African Defence Force, at least not that I can recall, but it used maps a great deal and went back to try and figure out where exactly the boundary makers, who sat in London then, thought the line was going. So they didn't help us all that much, but it was a very interesting experience and of course, it takes one back into nineteenth century colonial history in a very specific manner.

**105. Very interesting. I also wondered whether during the proceedings there was cognizance of the dispute between the Caprivi people and the Central Government in Namibia<sup>5</sup>.**

No, that was not involved in the matter at all. We just focused on that one small point on the boundary in the region of the Chobe River, of the Kasikili Island.

**106. Where were you based, Sir Eli, when you were actually there? Did you go to Kasani?**

We flew into the capital of Namibia.

**107. Oh Namibia, Windhoek.**

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<sup>3</sup> Legal team: Professor Abram Chayes, Felix Frankfurter Professor of Law, Harvard Law School, Mr. Jean-Pierre Cot, Professor Emeritus, Université de Paris 1 (Panthéon-Sorbonne), avocat aux barreaux de Paris et de Bruxelles, Vice-President of the European Parliament, Professor Dr. Jost Delbrück, Director of Walther-Schücking Institute of International Law, University of Kiel, Professor Dr. Julio Faundez, Professor of Law, University of Warwick. See: <http://www.icj-cij.org/docket/files/98/4753.pdf>

<sup>4</sup> See site for history of dispute:  
[http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational\\_tools/course\\_modules/reference\\_documents/sharinginternwatercases/sciencehistory.pdf](http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/reference_documents/sharinginternwatercases/sciencehistory.pdf)

<sup>5</sup> Caprivi Liberation Army: see National Society for Human Rights:  
<http://www.nshr.org.na/modules.php?op=modload&name=News&file=article&sid=449>



Windhoek, yes. And we stayed in a hotel there for a night and then we were put into a plane and we flew out to the region, it was quite a long way away. I think we spent one night in the region just surveying... and during the day, we surveyed the area to become familiar with it. We flew back to Windhoek and oh, I don't suppose we were in Namibia for more than three or four days.

**108. 1998-99. Well that brings us then to the next item which is the Coomaraswamy case.**

Well, the Coomaraswamy case was, again, a very interesting one. It was a dispute between Malaysia and the United Nations. Coomaraswamy, who was a Malaysian, was the special rapporteur of the UN Human Rights Commission and Malaysia needed, or wanted, to take proceedings against him in the Malaysian courts, relating to certain conduct of his in Malaysia.

The United Nations claimed that he was entitled to immunity. This was denied by Malaysia and the question really was who was entitled to determine whether what he was doing fell within the scope of his activities as rapporteur. Malaysia maintained that it was their courts that were entitled to do that because the issue arose in Malaysia.

The UN contended otherwise. Well, eventually, the matter came to the ICJ and in a judgment which was four fifths concerned with other matters, the Court seemed to be deciding in favour of the UN, but when it came to this crucial question, which was the one around which the whole issue had begun, the court concluded that it was really for the Malaysian courts to decide that issue<sup>6</sup>. And so there it was and thereafter the UN and Coomaraswamy and Malaysia worked out a solution that was acceptable to all.

**109. 1998-2000. I see... which then brings us to the Ligitan and Sipadan case.**

Ligitan and Sipadan, that was a lovely case because it related to such a beautiful part of the world. Ligitan and Sipadan are two islands off the east coast of Borneo and title to them was disputed between Indonesia and Malaysia<sup>7</sup>. Sipadan<sup>8</sup> is known to the scuba diving fraternity of the world as one of the great places to go, because it is, in fact, a mushroom of coral that comes up from the bottom of the ocean then flattens out into this small island. But once you equip

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<sup>6</sup> See: *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Order 10 Aug. 1998. (*ICJ Reports* 1998, p. 423) (ISBN 92-1-070779-6).

<sup>7</sup> See: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=df&case=102&code=inma&p3=4>

<sup>8</sup> See: [http://www.marimari.com/cOnTENT/malaysia/popular\\_places/islands/sipadan/sipadan.html](http://www.marimari.com/cOnTENT/malaysia/popular_places/islands/sipadan/sipadan.html)



yourself with diving gear and you go out over the edge of the island and down underneath the mushroom top, you enter an incredibly beautiful world of multicoloured fish and all the splendour that goes with that kind of experience. Unfortunately, I couldn't share it, because I wasn't much of a scuba diver. But I did put on a mask and goggles and have a look underwater and began to see what it was all about. And so the question was, to whom did the islands belong?

This was a matter of demonstrating which of the two sovereigns had exercise power over the island. Malaysia was in a position to show that people who expressed their allegiance to it and being local rulers were given licences, for example, for the collection of turtle eggs, that being a major commodity in that place, and eventually the Court decided in favour of Malaysia<sup>9</sup>.

**110. Sir Eli, if I cast my mind back to other cases that you've mentioned that involve border disputes, many of them seem to have been influenced by precedents set by colonial powers. Is this because the adjudicators or the judges prefer to fall back upon old status quos rather than creating potential new disputes?**

I don't think one can put it quite like that. These cases, so many of them, involved history and the parties to them were usually states that had emerged from colonial status into independence. Therefore if one had to go back into their history, necessarily one had to go back into colonial times. In the case of Sipadan and Ligitan one was going back into a time when Britain was the colonial power in the northern part of Borneo. So, together with Kasikili, it was a matter of looking back to see what Britain on the one hand, and Germany on the other, had done in relation to the area.

**111. It must have been very enjoyable poring over the history books and looking at the maps.**

Oh, it was always great fun doing those cases because it took one into a world into which one had not otherwise entered. And especially, as you mentioned earlier, looking at the maps and seeing if they help. The ICJ has taken a fairly conservative or restrained view of the value of maps. They serve, on the whole, to support rather than to be the main prop of a case. A case has to be established otherwise and the maps provide some supportive guidance.

**112. 1999. Sir Eli, this brings us then to Famfa on your list (a local Nigerian oil company).**

It really came to nothing. A bit of time was spent by myself as an arbitrator managing the case, but eventually it settled. There was no decision.

**113. 1999-2000. Pakistan and India.**

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<sup>9</sup> See: Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia/Malaysia*), Judg. 17 Dec. 2002 (*ICJ Reports* 2002, p. 625) (ISBN 92-1-070964-0)



So we go on to the next case of that period which was the dispute between Pakistan and India relating to the shooting down by India of a Pakistan naval aircraft that was flying over Pakistan territory, I believe, at the time.

**114. Sir Eli, where exactly was it... was it over a disputed border zone?**

No, that was not over a disputed border no, it was just an episode. That is to say, this Pakistan plane was simply shot down by the Indians and the case was, in a sense, doomed to failure because Pakistan, of course, was the complainant.

India was disinclined to allow the matter to be judicially considered and the basis for compulsory jurisdiction of the ICJ was really weak and I so advised the Pakistan government. But they felt, and I think understandably felt, that the matter was so serious for them that they were obliged to pursue it, even though the prospect of success was small. And so we started proceedings in the ICJ invoking the compulsory jurisdiction acceptance of India. However that actually excluded disputes between members of the Commonwealth and that is why the Court could not exercise jurisdiction and in due course, the case was decided against Pakistan. The Court upheld India's preliminary objection and the merits were never reached<sup>10</sup>.

**115. Despite Pakistan's argument of estoppel?**

Yes, despite all Pakistan's arguments.

**116. Very interesting. Well, that brings us then to the new millennium and your first item here is the Southern Bluefin Tuna Case.**

Yes, I should just perhaps intervene at this point to say that we are focusing very heavily on my practice as if there was no other activity. But I should mention the fact that I had a very enjoyable, albeit relatively short, interlude when I resumed lecturing at the London School of Economics. Rosalyn Higgins<sup>11</sup> had been elected as the British judge at the International Court of Justice and she took up her position<sup>12</sup>. There was a gap between her departure from LSE and the following academic year when Professor Christopher Greenwood<sup>13</sup> took over. So I gave about

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<sup>10</sup> See: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=b5&case=119&code=pi&p3=4>.  
Aerial Incident of 10 August 1999 (*Pakistan v. India*), Order 19 Nov. 1999. (*ICJ Reports* 1999, p.1038) (ISBN 92-1-070838-5)  
Also, American Society of International Law Insight: <http://www.asil.org/insights/insigh47.htm>

<sup>11</sup> See item 65, interview 3

<sup>12</sup> 1995-, President 2006-09

<sup>13</sup> See item 33, interview 2



half the course for that year at LSE and greatly enjoyed it. I have no doubt in my mind that if one is going to be a capable international lawyer one really has to be a teacher of the subject. It is only by teaching that you really keep up or keep abreast of a whole range of topics embraced within International Law. Otherwise, you become committed to relatively small points that happen to be the subject of litigation. So, going back to LSE was for me a very enjoyable and useful experience.

So now we come, as you were suggesting, to the period from 2000 onwards and that involved a very interesting and controversial case between Australia and Japan relating to the taking by Japanese fisherman of southern bluefin tuna in the seas around Australia. This was a case that was brought, not before the International Court of Justice but before arbitration under the Law of the Sea Convention of 1982. There was a distinguished tribunal of which Judge Schwebel<sup>14</sup>, formerly a judge of the International Court of Justice, formerly indeed a President of the International Court of Justice, was the presiding arbitrator. And the Japanese who were being pursued by the Australians took the position that this was not a matter that fell within the jurisdiction of the Law of the Sea tribunal. This was the first issue that had to be decided.

The contention of the Australians was that it fell directly within the terms of the Law of the Sea Convention, Japan's position was that the Law of the Sea Convention was not the only possible source of jurisdiction at that time in respect of this class of matter. The case really turned on the fact that quite a number of conventions, or I should say bilateral agreements, had been concluded since 1982 between states that were also parties to the Law of the Sea Convention in which provision had been made specifically for arbitration of disputes, thus countering the Australian contention that the Law of the Sea Convention was the sole possible source of jurisdiction. The tribunal eventually decided in favour of Japan and denied that it had jurisdiction<sup>15</sup>. This led to quite a lot of controversy and of course was of concern to environmentalists for whom this was a fairly early significant international case.

Environmentalists have, of course, pursued litigation in other spheres since then. For an international lawyer, put it this way, of the old school such as myself, environment was a really quite new issue. When I first started International Law back in 1950, nobody talked about environmental problems. It wasn't an issue and only gradually crept into the body of International Law over the next two decades. When I went to Australia in 1975 and became the deputy leader of the Australian delegation to the Law of the Sea Conference, I was confronted by environment as a major issue and, as you know, environmental matters are dealt with in the Law of the Sea Convention. But by then it was becoming an issue that could not be neglected.

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<sup>14</sup> See item 22, interview 2

<sup>15</sup> SBT Case (2000) 39 ILM 1359, 1393.



### 117. 2000. ICSID - Gruslin case.

So that was southern bluefin tuna. And that was followed by an interesting case within ICSID, the International Centre for the Settlement of Investment Disputes.

This was a case brought by a Belgian gentleman called Gruslin - a case brought against Malaysia within ICSID. He claimed that he had bought shares in a Luxembourg investment trust that specialised in investment in Malaysia. Malaysia had a currency crisis and suspended dealings in such shares. Gruslin claimed that this was a violation of a bilateral investment treaty between Belgium and Luxembourg on the one hand and Malaysia on the other.

The case did not at first seem of any particular importance, but then it was recognised by the Malaysian Government that if Gruslin were to succeed in his claim that would open the door to many other claims against Malaysia and possibly in due course against other countries.

If Gruslin had succeeded this would open the way to subsequent proceedings affecting the ability of states to deal with their economic affairs and could lead to very heavy claims. So Malaysia objected to the jurisdiction of the ICSID tribunal on the grounds that this was really a case that was not brought in relation to an investment in Malaysia.

The explanation of their position was that Gruslin had bought shares in a Luxembourg investment trust and so his investment had been in Luxembourg. The fact that the Luxembourg investment trust had subsequently placed his money in Malaysia did not generate a claim under the bilateral treaty and that was the holding of the tribunal. It was a relatively straightforward case decided by a single arbitrator<sup>16</sup>.

### 118. 2000-02. Eritrea-Ethiopia Boundary Commission - Permanent Court of Arbitration.

**Well, that brings us to the Eritrea-Ethiopia Boundary Commission and I find it very interesting that both you, Sir Eli and your father, Sir Hersch should have Eritrea-Ethiopia as issues in International Law.**

Yes, I think Lesley, the connection between his involvement and mine is really rather distant. It's true that in the period before the war he viewed the Ethiopian situation and the Italian invasion of Abyssinia as a manifest violation of International Law and a reflection of the weakness of the League of Nations. He also had another small connection with Abyssinia in that when Emperor Haile Selassie<sup>17</sup> left Abyssinia as a refugee monarch he came to Cambridge and

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<sup>16</sup> *Philippe Gruslin v. Malaysia* (ICSID Case No. ARB/99/3). Arbitration Proceeding Date Registered May 12, 1999. Composition of Tribunal - Gavan Griffith. Outcome of Proceeding: The Tribunal rendered its award, declining jurisdiction on November 28, 2000. Award of November 27, 2000, 5 *ICSID Rep.* 484 (2002).

<sup>17</sup> 1892-1975. Emperor 1930-1974.





sought some instruction on International Law from my father, but that's as far as my father was ever involved in matters Ethiopian.

But my own involvement in EEBC was of an entirely different - a very demanding and interesting character. Eritrea and Ethiopia had fought a very bloody war in the period 1998 to 2000 in which many thousands of lives were lost – very tragic that there should have been a war over the boundary between them. It's a thousand kilometres-long boundary stretching from Djibouti in the east, westwards, virtually to the Nile. Eventually, the two sides were prevailed upon to enter into an agreement by which the hostilities were stopped and it was agreed that the dispute about the boundary would be submitted to arbitration<sup>18</sup>. The agreement provided that there should be a commission... a boundary commission of five members, two to be appointed by each side and the four members thus appointed were to select a president. Ethiopia chose Sir Arthur Watts<sup>19</sup> and Judge Ajibola<sup>20</sup>. Sir Arthur Watts was, of course, a very prominent British international lawyer, having been Legal Adviser at the Foreign Office and then, after he retired from that position, he entered private practice and was active in arbitration as an arbitrator and litigation as counsel. Judge Ajibola, who was a Nigerian, had been a Judge of the International Court and was a greatly respected African international lawyer. The Eritreans chose two prominent American international lawyers.

### **119. EEBC continued.**

The two Americans selected by Eritrea were Judge Schwebel, whom I've already mentioned, who had been President of the ICJ and was a very experienced judge and arbitrator and Professor Michael Reisman<sup>21</sup>, of Yale Law School, who was also a very active arbitrator and litigator - an outstandingly fine international lawyer. And the four of them got together and selected me as the prospective president and offered me the position, which I was glad to accept, though I did not realise when I accepted it that it would be quite as long or arduous an

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<sup>18</sup> Permanent Court of Arbitration, The Hague: [http://www.pca-cpa.org/showpage.asp?pag\\_id=363](http://www.pca-cpa.org/showpage.asp?pag_id=363)

<sup>19</sup> 1931-2007. Downing College, Whewell Scholar, pupil of Arnold McNair, Hersch Lauterpacht and Clive Parry. See Times obituary: <http://www.timesonline.co.uk/tol/comment/obituaries/article3012812.ece>

<sup>20</sup> b. 1934, Prince Bola Adesumbo Ajibola, Royal Family of Gbadela II, Ago-Owu, Abeokuta, Ogun State, Nigeria. University of London, Member ICJ 1991, Member UN International Law Commission 1986-91.

<sup>21</sup> 1939-. William Michael Reisman, Myres S. McDougal Professor of International Law, Yale..



appointment as it turned out to be<sup>22</sup>.

In the agreement the parties had rather unusually, in fact I think uniquely, required that the Boundary Commission should not only delimit the boundary - by delimitation, we mean determining in words where the boundary line runs - but should also demarcate the boundary, which means putting pillars in the ground to show where the delimitation line actually ran. I say involved putting pillars in the ground because that was the approach generally conveyed by the word 'demarcation' but, as I'll explain in a moment, that was not how we were able to finish it up. They also prescribed a very short time limit of six months within which this work was to be done. Well, that was quite an unrealistic approach to the subject. You can't determine a boundary dispute in six months unless things are very different from what they were in this case I don't, myself, know of any boundary disputes so quickly resolved. So, more especially, if you have to demarcate the boundary as well.

### **120. And when you think this was going back to the last century...**

Well yes, again this problem goes back into the period of Italian invasion of Eritrea and Ethiopia.

We did our very best to produce a delimitation decision quickly and we were able to produce one by April 2002, having begun in February 2001<sup>23</sup>. So, it took us just a little over the year to do the delimitation of this thousand-mile long boundary. The parties had undertaken in their agreement that they would accept the decision of the Boundary Commission as binding. When we gave the decision, both sides declared their acceptance of it. But that was when our problems began. In truth, Ethiopia did not like the decision.

There was a particular section of a boundary that ran near a location called Badme. Ethiopia maintained that Badme was Ethiopian, but Badme actually lay on the Eritrean side of the line that was called the traditional signature of the boundary. This was a straight line running in a northeast-southwest direction and Badme lay on the Eritrean side. Ethiopia contended that that, in fact, lay further to the north and west and that would have brought Badme within the Ethiopian area. However, this was a strange feature of the case : Ethiopia did not argue specifically about Badme and only came to a few observations about Badme at an advanced stage in the exchanges of the written pleadings.

In the end, the Commission concluded that the traditional signature was the correct one.

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<sup>22</sup> [http://www.pca-cpa.org/showpage.asp?pag\\_id=1150](http://www.pca-cpa.org/showpage.asp?pag_id=1150)

<sup>23</sup> See UN summary, April 2002. <http://www.un.org/NewLinks/eebcarbitration/>



When I talk about signature, I'm not talking about names appended to a piece of paper. We're talking about, using the phrase loosely, to describe the line that people were accustomed to seeing on maps. The Commission concluded that the traditional signature was the one... or virtually the traditional signature, was the one that was operative and this left Badme in Eritrean territory, though Ethiopia at that time occupied it, and in fact still does, contrary to the terms of the Commission's decision. So, as I say this was not really agreeable to Ethiopia and it began raising various obstacles to the continuance of the Commission's task of demarcating the boundary. We were able to demarcate the eastern end of the boundary in the desert, a very hostile desert, which includes the lowest and hottest part of the world. But when it came to demarcation further to the west, then we ran into difficulties. The area was being monitored, or policed, by a UN force, the United Nations mission to Eritrea and Ethiopia (UNMEE) which was costing a great deal of money and that force is still there, although somewhat attenuated. But from April 2002 until this day, and the day we're talking about is March 2008, there has been no physical demarcation of the boundary in the rest of the line.

The Commission found this situation of inactivity, or forced inactivity, very troublesome and eventually it said to the parties: "Look, this is November 2006. We are able now, with modern methods of photography and measurement, to determine to within a metre where the boundary pillars should be placed and so we are attaching to this statement a list of coordinates covering the rest of the boundary where the line should be. If, within one year (that is to say by the end of November 2007), the parties are not agreed on the demarcation, on the physical demarcation of the boundary along that line, or have not asked us to go and demarcate physically along that line, then that line will nonetheless stand as the boundary". So we have, in effect, a demarcation not by pillars, the previously normal meaning of demarcation, but by coordinates. As a precedent for this, there had been a demarcation by coordinates of the boundary between Kuwait and Iraq following the Iraqi invasion of Kuwait in the 90s.

So during that year we hoped that the parties would reach some agreement on the matter, but they did not. Although the Commission gave them the opportunity of doing so by summoning meetings to which the parties came, Ethiopia, in particular, was an unwilling participant and this led Eritrea to change what had previously been a cooperative position into a non-cooperative position. It began making the task of the Commission even more difficult and in particular, it made difficulties for the operation of the United Nations force.

Both states were at fault in their attitude to the Commission. So eventually, as I say, at the end of November 07, the Commission suspended its activity<sup>24</sup>. There was nothing more it

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<sup>24</sup> See announcement of news of Boundary Commission in Eritrea Daily for 26 September 2007. <http://www.eritreadaily.net/News0407/article0907261.htm>. This includes a photograph of Sir Arthur Watts, Professor Reisman, Sir Elihu Lauterpacht, Prince Bola



could do and that's how things stand now.

Very fortunately, the ceasefire, the termination of hostilities that the parties had agreed to back in 2000, has held and the parties have not resumed fighting. That's how we hope it will remain until eventually, a condition of peace becomes a habit and they permit the boundary to be properly illustrated by pillars.

**121. A fascinating account.**

It was a very, for me, unique and fascinating period in which not only was one deciding about law and facts, but for me as President, I was managing a very complex diplomatic relationship.

This required some sensitivity on my part, a sensitivity in which I was greatly aided by my colleagues' views, including Sir Arthur Watts who sadly died shortly afterwards. When I say shortly afterwards - in November of 2007.

So that's EEBC. The history of that case really needs to be written. There are some points which would be of value to future boundary-makers, but when it'll be ready to be written is a different question.

**122. Yes, it certainly re-emphasises the point about colonial boundaries again. In this case, a colonial power, Italy, against a weaker Abyssinia.**

Well, it wasn't quite like that. Well, three treaties and other states besides Italy were involved, but it certainly involved one in going back into the 1890s to see what these treaties which were the controlling instruments meant.

**123. 2004-2006. Barbados/Trinidad Arbitration: Permanent Court of Arbitration.**

In parallel, in terms of time, with EEBC, there was another very interesting arbitration between Barbados on the one hand and Trinidad and Tobago on the other regarding the determination of the maritime boundary between those two countries<sup>25</sup>. It involved consideration of such concepts as equidistance and consideration also of the role of equity in the determination of boundaries. It was a detailed case, I won't go into it now, but eventually the arbitral commission, which consisted of Judge Schwebel and Sir Arthur Watts and others, reached a conclusion which both sides seemed to be able to live with<sup>26</sup>.

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Adesumbo Ajibola and Judge Stephen Schwebel.

<sup>25</sup> International Dispute Resolution Centre.

<sup>26</sup> [http://www.pca-cpa.org/showpage.asp?pag\\_id=1152](http://www.pca-cpa.org/showpage.asp?pag_id=1152)



**124. 1992- 2001. Belize.**

Belize. Belize is a longstanding, again, if you will, colonial matter.

**125. The only British colony in Central America.**

Is that right? So Belize is, of course, the current name of British Honduras and going back as far as 1859 there was a dispute between Guatemala and Britain regarding the western boundary of British Honduras. This was resolved by an agreement in 1859 and so everyone had hoped the matter was settled. However, it was not in the eyes of Guatemala settled and Guatemala had consistently been raising doubts about the continuing validity of the 1859 agreement.

One of the grounds for the Guatemalan opposition was that the 1859 agreement contained a provision that Britain would build a road from the border with Guatemala across British Honduras to the sea, to the Caribbean and that road had not been built. This, I think, was largely because other factors intervened making the road unnecessary. However, Guatemala has complained about that, so the dispute began to fester visibly after Belize became independent - in 1992, I think it was. I gave an opinion in conjunction with, again, Judge Schwebel, Professor Francisco Orrego Vicuña from Chile and Ambassador Rosenne from Israel on the question of the border. We came quite clearly to the conclusion that the present border was a valid legal border<sup>27</sup>. But that didn't really resolve the issue because by then the matter had increased in geographical range. Guatemala was also contending that it was entitled to certain islands and maritime areas off the coast of Belize. Negotiations took place between the two sides but didn't seem to get anywhere.

The Organization of American States involved itself and the present position is that there is some hope that the two sides may eventually agree that the dispute should be submitted to the International Court of Justice for a final determination. But the agreement for the submission to the International Court has not yet been concluded.

So that was the problem of Belize. My involvement in it has gone back as far as the preparations for the 1992 opinion. So, effectively, from some time in 1990 and it continues here today in 2008 - sixteen years. It will probably go on longer than that.

**126. 2003-04. Sir Eli, coming to the Avena case.**

Avena was a case between the United States and Mexico in which Mexico was contending that the United States had failed to meet its obligations under the consular agreement between the two sides in not allowing Avena, a Mexican national being tried in the US courts, access to Mexican consul.

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<sup>27</sup> See Belize Govt. Site: [http://www.belize-guatemala.gov.bz/library/legal\\_opinion/foreward.html](http://www.belize-guatemala.gov.bz/library/legal_opinion/foreward.html)



I was merely one of the counsel that participated on behalf of the United States in the hearings on the preliminary objection that the United States raised to the Mexican claim. So my involvement in that was quite short-lived and related purely to the technical legal point of the preliminary objection. I wasn't involved in the subsequent substance of the case<sup>28</sup>.

**127. 2003-07. Sovereignty over Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)<sup>29</sup>.**

So we come to Pulau Batu Puteh. It was a lovely case again, going right back in history. Pulau Batu Puteh is the name given in Malaysia to a small rock, again no bigger than a football pitch, if that, lying about seven miles off the coast of southern Johor in the eastern entrance to the Straits of Singapore. The other name for Pulau Batu Puteh is Pedra Branca (White Rock), because it's a place where birds deposited guano. Back in the 17<sup>th</sup> and 18<sup>th</sup> centuries, the Straits of Singapore were a very important part of the Far Eastern route from Britain to Hong Kong and Captain Horsburgh, who was the chief navigator of the East India Company, drew up some navigational instructions for sailing from London to Hong Kong<sup>30</sup>.

These instructions, I may say, are contained in a most beautiful volume which is in the University Library, accompanied by a volume of charts, wonderful pieces of cartography and were of great value in promoting the East India trade. When Captain Horsburgh died in 1836, the merchants of Hong Kong felt that there should be some memorial erected in his honour, or in his memory, so a subscription was raised and the money was sent to the Governor of Singapore to be applied to the construction of a lighthouse to mark the eastern entrance of the Straits of Singapore and thus, be an aid to navigation, because it was quite a dangerous place in which to sail without that facility.

So, in the 1840s, steps were taken towards the building of a lighthouse and by 1851 a

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<sup>28</sup> Judgment. *Avena and Other Mexican Nationals (Mexico v. USA)*, Judg. 31 Mar. 2004 (*ICJ Reports* 2004, p. 12) (ISBN 92-1-070989-6)

<sup>29</sup> Sir Elihu, along with, *inter alia*, Professor James Crawford represented Malaysia, while *inter alia* Professor Ian Brownlie represented Singapore. See ICJ site: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=masi&case=130&k=2b>  
Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Order 1 Sep. 2003 (*ICJ Reports* 2003, p. 146)(ISBN 92-1-070977-2)

<sup>30</sup> *Directions for Sailing to and from the East Indies, China, New Holland, Cape of Good Hope, and the interjacent Ports, compiled chiefly from original Journals and Observations made during 21 years' experience in navigating those Seas*



lighthouse had been constructed on Pulau Batu Puteh. It was being run by Britain, as a colonial power in the area. I may say that in this case we had to do a lot of delving into history to figure out exactly who said what and when, relating to the acquisition of this island.

This island, or rock as it really is, is the site of the lighthouse, and the lighthouse has been run by the Singapore authorities, initially Britain, and then subsequently after independence by Singapore itself.

The dispute arose between Malaysia and Singapore around about 1979, because Malaysia indicated on maps that the island was Malaysian, i.e. belonged to Johor, which is one of the constituent states of Malaysia. One of the crucial disputed elements of fact in the case was exactly how did Britain come to occupy the island for the purpose of building a lighthouse, which meant going back to the correspondence of the 1840s to find, if one could, a letter from the Governor of Singapore to the Sultan of Johor asking him for permission to build a lighthouse.

The letter that could be found actually asked for permission to build a lighthouse, not on Pulau Batu Puteh, but on another rock nearer the Johor coast. The Sultan of Johor and so-called Temenggung, associated ruler in the area, gave their consent. Singapore now maintains that that consent did not extend to Pulau Batu Puteh, itself, and that the title that Britain acquired in the late 1840s was a title by way of occupation of what is called a *terra nullius*, an island that had no previous sovereign.

So really, that was what the case was about and we await the decision of the International Court even to this day because the substance of the case was heard in the Court in November of 2007 and I suppose that sometime soon the ICJ will hand down a decision. It will be very interesting to see what it is<sup>31</sup>. It'll be an important decision, but one that turns largely on the facts, the situation being slightly complicated by the fact that in 1953 the Singapore authorities addressed the Johor authorities with an enquiry as to whether Johor claimed the rock and the answer that was given was that it did not. So there's an important legal issue here as to what is the validity of that response from Johor.

### **128. 2006. Cyprus.**

All these cases, as you probably realise, would take quite a lot of time. When they were running in parallel, one was really quite busy.

I became... well I had for some time previously, been involved in questions relating to Cyprus. The division of Cyprus is, as you know, into two parts - the Turkish part in the north and the Greek part in the south. I have been giving advice to the Turkish Cypriots and to the

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<sup>31</sup> Judgment delivered 23 May 2008: <http://www.icj-cij.org/docket/files/130/14480.pdf>



Government of Turkey and those issues are still alive, so I won't go into them now<sup>32</sup>. It's a great shame that the island has been divided in this way since 1974 and hopefully, there are signs now that there may be productive, fruitful negotiations on the subject.

### **129. 2006. Permanent Court of Arbitration.**

In 2006 I was honoured to be made a member of the British national group of the Permanent Court of Arbitration. Under The Hague Conventions various countries became parties to the statute of the Permanent Court of Arbitration and in the statute of the International Court of Justice a role was accorded to these so-called national groups in the nomination of candidates for election to the court. So it's a matter for the British National Group to nominate a candidate for election to the ICJ. The members of the British National Group at the time that I was appointed to it, were President Higgins, Rosalyn Higgins who is currently the President of the ICJ, Lord Bingham<sup>33</sup> who is the Senior Law Lord and Sir Arthur Watts. I was added to them as the fourth member. Then very sadly since then, Sir Arthur Watts has passed away and his replacement has not yet been nominated by the government. We had to spend time together in determining who the British candidate would be for election to the ICJ when Judge Higgins reaches the end of her term of office next year. The British National Group have selected Professor Christopher Greenwood as the candidate. These elections will take place in November of this year, 2008, and we will then know how successful our nomination has been.

While he was still alive, Sir Arthur was the member who was responsible for running the group. Now that he's gone that has fallen to me, which takes a certain amount of time because you've got people who are very busy and not easy to get together. But that's an interesting experience.

### **130. Will someone else be nominated to fill Sir Arthur's place?**

Somebody will be, but that's not for us. That's for the Government. The Government makes the nomination of the members of the PCA.

### **131. That is how you were nominated?**

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<sup>32</sup> Re. ownership of land in northern Cyprus. e.g. European Court of Human Rights (application 46347/99), *Xenides-Arestis v Turkey*, judgment 2006; and 2006 English High Court decision in *Orams v Apostolides*

<sup>33</sup> b. 1933, Thomas Henry Bingham, Baron Bingham of Cornhill, High Court 1980, Court of Appeal 1986, Master of the Rolls 1992, Lord Chief Justice 1996, Senior Law Lord 2000. On Thursday 16 November 2006, he delivered the sixth annual Sir David Williams Lecture hosted by the [Centre for Public Law at the Faculty of Law, University of Cambridge](#), entitled "[The Rule of Law](#)".





Yes, it was the Government that nominated me to be a member of the PCA. The whole idea is to try and insulate the process of nomination a little bit from direct government pressure. In the case of the British group, it's quite true we do act quite independently of the Government. That may not be equally so in other countries. Some certainly respect the idea, others place their members under direct governmental pressure or indeed, their members may be legal advisers of their foreign office and so on.

**132. Sir Hersch's biography.**

That brings us to the last item on my list of developments or events. I have for the last several years been engaged on the preparation of a biography of my late father's, Sir Hersch Lauterpacht. This is a fascinating undertaking, but unfortunately one that has fallen into a second or even a third place in the light of the other commitments in which I've been involved. I'm hoping now that I may be able to get back to it, because it's something I'm most anxious to complete before it's too late. It's a very interesting task, and for me, quite cathartic. I have to relive the years in which I lived with my parents. They were very good years and so hopefully, I'll get something done in due course.

**133. Well, Sir Eli perhaps we should stop at this point and next time we can talk about some people that you remember during the course of your illustrious career. Thank you, again, for a fascinating interview and look forward to resuming next week.**

Yes, I'll be very happy to do that, because there are lots of people whom I've known and whom I would like to recall in the course of these interviews.

**I can't wait, thank you.**

