
A National Lawyer Takes Stock: Professor Ross' Textbook and Other Forays into International Law

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Abstract

In Denmark, Professor Alf Ross was the legal icon of the twentieth century. His sharp and daring intellect made his eloquent writings stimulating reading and attracted many readers abroad. His astute and uncompromising style of analysis, carrying principles and assumptions to their ultimate conclusion, made Ross' writings in the field of international law a fine study of the general conditions of international lawyers as well as of the basis of international law. This was the case, even though Ross was not primarily an international lawyer; indeed, it might have been precisely for this reason that Ross was so thought-provoking. Ross' key interest was to study the concept of law when removed from the context of national law. But far more than a 'realist' theory of law, his writings provide witness to the possible impact of national legal thinking on international law. Ross' Textbook of International Law, in which he took stock of international law, offers a good illustration of a more complicated relationship between national and international law, and between national and international lawyers — then as well as today.

1 Introduction

In his lifetime Professor Alf Ross (1899–1979) enjoyed a pre-eminent position among legal academics in Denmark. Ross was the advocate of a 'realist' theory of law based on ideals taken from natural science and the author of significant works on legal philosophy, constitutional and public law, criminal law, land law, and international law. When in 1938 Ross was appointed to the chair in international law at the University of Copenhagen, his publications in the field consisted in a paper on

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sovereignty and the League of Nations.¹ However, in 1942 Ross launched his *Lærebog i folkeret*, the second edition of which was published in 1946 and translated into *A Textbook of International Law* from 1947.² At the threshold of the age of the United Nations, Ross ‘attempted an analysis of the fundamental concepts and problems of International Law on the basis of a specifically Scandinavian view of the nature of law and the aims of jurisprudence to which there is probably nothing exactly similar in the Anglo-American literature’.³ The Danish original, and the translation, dated back to the time of the opening of the San Francisco Conference, in April 1945. However, Ross did not think ‘that the new instruments, however powerful and important they will be, will essentially invalidate the theoretical analysis and criticism of the fundamental concepts and problems of International Law which form the nucleus of this book’.⁴

Together with his subsequent writings on the ‘new instruments’, including *Constitution of the United Nations* from 1950 and *United Nations: Peace and Progress*, an interdisciplinary study from 1966, the textbook was Ross’ main contribution to international law and international relations. Its focus on the obscurities and illusions said to be found in other introductory texts was, though overstated, stimulating and thought-provoking. This was certainly the case for the six eloquently written editions in Danish,⁵ although the English translation has had similar effects, as has been acknowledged by, among others, Professors Philip C. Jessup and Roberto Ago,⁶ Judge Sir Gerald G. Fitzmaurice,⁷ and Professors James Lesley Brierly,⁸ Robert Y. Jennings,⁹ Edward McWhinney,¹⁰ and Ian Brownlie.¹¹ Two former students of Ross, Mogens Blegvad and Isi Foighel, have written about his textbook and its part in legal education at the University of Copenhagen:

The students are confronted with this book during their first university year, and although the

¹ See Alf Ross, ‘Folkenes Forbund og Staternes Suverænitet’, 33 *Statsvetenskaplig Tidskrift för Politik, Statistik, Ekonomi* (1930) 414, also published as ‘Völkerbund und Staatssuveränität’, 11 *Zeitschrift für öffentliches Recht* (1931) 441, and ‘La souveraineté des Etats et la Société des Nations’, 12 *Revue de droit international et de législation comparée* (1931) 652 and 13 *Revue de droit international et de législation comparée* (1932) 112 (hereinafter *Souveraineté des Etats*).

² In 1951, the textbook came out in a German translation also based on the second edition in Danish: see Alf Ross, *Lehrbuch des Völkerrechts* (1951) [hereinafter *Lehrbuch des Völkerrechts*].

³ Alf Ross, *A Textbook of International Law* (1947) 10 [hereinafter *Textbook of International Law*].

⁴ *Ibid.* Only Chapter XII on international dispute settlement had been partly updated, taking note of the substitution of the International Court of Justice for the Permanent Court of International Justice, *ibid.*, 294–97.

⁵ The first four editions came out in 1942, 1946, 1951 and 1961, respectively. Ole Stig Andersen, Tyge Lehmann and Per Magid took part in editing the fifth edition from 1976 and edited the last edition, which appeared in 1984.

⁶ See Philip C. Jessup, *Transnational Law* (1956) 2 and Roberto Ago, ‘Droit positif et droit international’, 3 *Annuaire français de droit international* (1957) 14 at 57, note 105.

⁷ ‘Some Problems Regarding the Formal Sources of International Law’, in *Symbolae Verzijl* (1958) 153 at 153, note 1.

⁸ *The Law of Nations*, 6th edition by Sir Humphrey Waldock (1963) 163, note 2.

⁹ ‘General Course on the Principles of International Law’, 121 *Recueil des cours de la Haye* (1967) 323 at 330.

¹⁰ *The International Court of Justice and the Western Tradition of International Law* (1987) 33.

¹¹ *Principles of Public International Law*, 5th edition (1998) 138.

subject has its inherent limitations, the book has always been seen as a significant introduction to modern legal analysis and forensic reasoning. Compared with similar text books abroad, the book is highly untraditional, and for this reason it has always been a controversial one. However, hardly anyone has read this book, without thereby acquiring a special and distinct relation thereto. This is, in fact, as fine a result as any teacher and scholar could achieve through a text book.¹²

In a foreword to the English translation, Professor Brierly introduced the textbook as being in line with 'the true Continental tradition' of combining philosophical concepts and a training in law;¹³ an impression that might have been strengthened by the translator's frequent use of 'civil law' as a synonym for 'national law'. Brierly added that 'if International Law is to be a genuinely international object of study, as it should be, it is very desirable that the students of one country should understand a method of approach which, though they may at first find it a little strange, comes naturally to those of another'.

Alf Ross achieved his ambitions in international law long before retirement in 1969. In 1950, the same year in which Ross was elected an *associé* of the Institut de Droit International,¹⁴ he was appointed to the chair in legal philosophy at the University of Copenhagen. In 1958, he was also appointed to the chair in constitutional law, although he held the chair in international law until 1963 (the same year in which he was elected a member of the Institut).¹⁵ Ross' credo was a 'realist' view based on 'socio-psychological experiences', which he repeatedly contrasted with 'formalist', 'fictional' and 'metaphysical' positions. According to *A Textbook of International Law*, '[t]he judicial decision is the pulse of legal life' and so '[a] source of law . . . means the general factors (motive components) which guide the judge when fixing and making concrete the legal content in judicial decisions'.¹⁶ Although this judge certainly was a phantom, akin to a Judge Hercules,¹⁷ Ross set out to deduce the sources of international law from this definition and the accompanying notion of the judge as 'a living member of the community'. In Ross' view, there were three kinds of sources: (1) 'objective', written sources (treaties); (2) 'partly objective' sources derived from previous practice, whether in courts or among subjects of law (precedent and custom); and (3) '[t]he free, not formulated, not objectified factors

¹² Mogens Blegvad and Isi Foighel, 'Alf Ross', in Mogens Blegvad *et al.* (eds), *Festskrift til professor, dr. jur. & phil. Alf Ross, 10. juni 1969* (1969) 13 at 17.

¹³ *Textbook of International Law*, 9.

¹⁴ See 43-II *Annuaire de l'Institut de Droit International* (1950) 166 and 420 f.

¹⁵ See 50-II *Annuaire de l'Institut de Droit International* (1963) 90. Ross never attended a session of the Institut as a member and he withdrew his membership before the Edinburgh session in 1969, see 53-II *Annuaire de l'Institut de Droit International* (1969) 44.

¹⁶ *Textbook of International Law*, 80 and see Alf Ross, *On Law and Justice* (1958) 29–107 [hereinafter *On Law and Justice*]. Ross' theory had a certain impact on Max Sørensen, *Les sources du droit international* (1946) 24; cf. Ross' review in 80 *Ugeskrift for Retsvæsen* (1947) B 161 at 163–65 and 169, according to which Sørensen, and not Ross himself in his textbook, was first in applying his 'realist' theory to international law. See also M. Koskenniemi, *From Apology to Utopia* (1989) 265, n.4.

¹⁷ Cf. Ronald Dworkin, *Taking Rights Seriously* (1977), 105 and Ronald Dworkin, *Law's Empire* (1986), 239.

spontaneously arising in the judge as the mouthpiece of the community to which he belongs and which he serves'.¹⁸

To consider judicial decisions merely as 'subsidiary means' in accordance with Article 38(1) of the Statute of the Permanent Court of International Justice was seen as a mistake.¹⁹ In Ross' view, '[t]hat this fact has not so far been recognised is connected with the circumstance that until quite recently there did not exist any permanent, organised court'. 'There is reason to believe', Ross wrote, 'that gradually, as the number of precedents of the Permanent Court increases, an international judge-made law will be established by practice, a law which will be of the greatest importance by giving to International Law that stability in which it is now so wanting'.²⁰

Against this background, leaving aside the fact that in 1946 the Permanent Court had been abolished (and its position taken by the International Court of Justice), one may wonder why Brierly, and also Ross himself, warned the reader schooled in common law about the different ('somewhat strange') approach adopted in *A Textbook of International Law*. But then in Ross' analysis of actual problems of international law the decisions of the Permanent Court,²¹ or other courts and tribunals for that matter, did not carry much weight. After all, a theoretical approach to 'realism' was a theoretical approach; at least in the case of Alf Ross, theory was not self-defeating. It is true that at the University of Copenhagen, Ross' textbook was used together with a collection of cases and materials compiled and organized by Ross and younger members of the faculty — notably Professors Isi Foighel and Allan Philip — the scheme following the pattern of American law schools.²² However, the collection of cases and materials was merely an appendix to Ross' textbook and international law, as a subject, persisted in being pervaded by the professor's great analytical mind and theoretical inclination,²³ leaving a wide gap between his 'realist' theory and his legal analysis. Following in the footsteps of his predecessors, Ross' textbook was yet another contribution to what Professor Lassa Oppenheim has termed the '*Buchrecht*',²⁴ an instructive example being Ross' initial claim that the current definition of international law was circular. One frustrated reviewer, and possibly a few students

¹⁸ *Textbook of International Law*, 80–82. As to the freedom of the judge, see also *ibid.*, 80, 82 and 92.

¹⁹ *Ibid.*, 87. See also M. Shahabuddeen, *Precedent in the World Court* (1996), at 78.

²⁰ Cf. *ibid.*, 56 f.

²¹ The main exceptions were his critique of the *Legal Status of Eastern Greenland* case, *ibid.*, 146 f. and 208, the *Nationality Decrees Issued in Tunis and Morocco* opinion, *ibid.*, 149, note 1, and the *Mavrommatis Palestine Concessions* case, *ibid.*, 264, note 1, while he approved of *The Lotus*, *ibid.*, 156, 173 f. and 179. Cf. *ibid.*, 235, note 5.

²² *Studiebog i folkeret* was originally published in 1954; new editions came out in 1964 and 1975 under the title *Studiebog i international ret*. It had been preceded by *Folkeretlig materialesamling* published in 1944 and 1949.

²³ See, e.g., *Textbook of International Law*, 75–78 and 136 f.; cf. *ibid.*, 225.

²⁴ See L. Oppenheim, *Die Zukunft des Völkerrecht* (1911), 11.

preparing for the exam, saw in Ross' theoretical approach only 'ordinary nonsense',²⁵ while Professor Georg Schwarzenberger used the term '*Begriffsjurisprudenz*'.²⁶ This, however, was neither felicitous, nor fair. Ross' astute and uncompromising style of analysis, carrying principles and assumptions to their ultimate conclusion, made his textbook an enjoyable exposition of the general conditions of international lawyers as well as of the basis of international law.²⁷

This essay on Ross' textbook, seen in the light of his other writings within the field, falls into five further parts. The first is an examination of the definition of international law and Ross' claim about it being a vicious circle. This remarkable claim not only unmasks Ross' approach to international law and the flavour of his textbook; it stresses the importance to international law of concepts taken from national law, including the concept of sovereignty found at the root of national legal reasoning. It may be remembered that Brierly ended his foreword to Ross' textbook as follows: 'In any case for the lawyers of different countries to understand one another is to make their own small special contribution to that feeling of international community upon which the very possibility of an effective International Law depends.'²⁸ As suggested in the following section, Ross' circle points to the reason why 'the lawyers of different countries', i.e., national lawyers, share a sense of internationalism and indeed a need for international law. The international lawyer is in part a national lawyer and it takes a national lawyer like Ross to approach international law in the first place. The subsequent section examines an area in respect of which national lawyers have traditionally rejected any need for international law, viz. relations involving individuals, and the resulting complications, also in Ross' work as a member of the European Court of Human Rights. The next stage of the essay involves examples, taken from the law of treaties and state responsibility of the ways in which Ross responded to the need felt by national lawyers in other areas, particularly by drawing analogies from national law. The final section consists of conclusions and some cursory remarks concerning the evergreen aspirations for an international community (of which, for example, the international judge may be 'a living member'). Such aspirations had an effect on Ross' understanding of the United Nations and international law in general, using the national legal system as a blueprint.

²⁵ L.C. Green, 2 *The International Law Quarterly* (1948) 275 at 277 and 1 *Western Political Quarterly* (1949) 346 at 348, quoting, it should be noted, from *Textbook of International Law*, 34, note 1. Cf. D.H.N. Johnson, 24 *British Yearbook of International Law* (1947) 513 at 515, Josef F. Kunz, 43 *American Journal of International Law* (1949) 197 at 197, William W. Bishop, 44 *Illinois Law Review* (1949) 416 at 416 f., Georg Schwarzenberger, 1 *The Journal of the Society of Public Teachers of Law* (1947-51) 233 at 233 and Wolgast, 3 *Archiv des Völkerrechts* (1951/52) 115 at 115 and also the foreword by Professor Herbert Kraus to *Lehrbuch des Völkerrechts*, 5 and Strebel, 14 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1951/52) 573 at 574 f.

²⁶ See Georg Schwarzenberger, 7 *Yearbook of World Affairs* (1953) 379 at 385. Cf. *Textbook of International Law*, 45.

²⁷ Cf. K. Lipstein, 10 *Cambridge Law Journal* (1949) 305.

²⁸ *Textbook of International Law*, 9.

2 A Circular Definition of International Law

When opening Ross' textbook, the English reader immediately faced the proposition that the 'current' definition of international law was circular. Referring to a definition of international law as 'the body of legal rules binding upon states in their relations with one another', Ross wrote: 'The term "International Law" is defined with reference to the term "state" and the definition of the term "state" again refers back to the term "International Law"'. A definition thus biting on its own tail is circular. The consequence is that on the point in question the definition is in reality a blank.²⁹ This vicious circle was based on the following definitions: '(1) A definition of International Law as the law valid between states; (2) A definition of the state by the concept of sovereignty; and (3) A definition — explicit or implicit — of sovereignty as sole subjection to International Law.'³⁰

Ross' analysis found a precedent in Professor Hans Kelsen's *Das Problem der Souveränität*, which in 1928 had appeared in a second edition.³¹ In respect of international law, as well as legal philosophy and constitutional law, Ross' debt to Kelsen was considerable, though not always acknowledged.³² When first entering the field of international law, in 1930, in his paper on sovereignty, Ross followed in Kelsen's footsteps. Although never their main specialization, both Ross and Kelsen published 'textbooks' on international law; in this respect Ross preceded Kelsen.

Ross' reader was advised that the circle could be avoided by changing the definition of the concept of state. Ross substituted the term 'self-governing community' for the term 'state' and held that 'a legal community is called self-governing when and in so far as it is the highest legal power in relation to its individual members'.³³ On a closer look, however, what Ross changed was not the definition of the concept of state but the definition of the concept of sovereignty. The 'external' definition of sovereignty that existed in the circular definition (sovereignty being independence, or the state only being subject to international law) had been exchanged for an 'internal' definition of sovereignty (sovereignty being the supreme power in a state). Whereas the external definition completed the circle — bringing the reader, or at least the author, back to the definition of international law — the internal definition referred to sovereignty in the sense of being the master of a national legal system, that is, a key value in national law and, in Ross' words, 'the original core of the concept of sovereignty'.³⁴

²⁹ *Ibid.*, 12.

³⁰ *Ibid.*, 12, note 1, and 41. According to Ross, the first definition — of international law — was actually based on another definition, namely that 'International Law is the body of rules created by the common consent or mutual agreement of states', *ibid.*, 20–23 and 40 f.

³¹ Cf. Hans Kelsen, *Das Problem der Souveränität*, 2nd edition (1928) 308.

³² But see *Souveraineté des États*, 113 f., according to which Ross' study of 'la théorie de la souveraineté et des associations d'États . . . concorde sur des points essentiels avec l'étude de Kelsen'. Cf. Ross' review of Hans Kelsen, *The Law of the United Nations* (1950) in 2 *Jus Gentium* (1950) 250 and also *On Law and Justice*, 66 f. and 338 f.

³³ *Textbook of International Law*, 15.

³⁴ *Ibid.*, 44 and see also 21 and 37 f.

At this point Brierly's students might well have started wondering whether Ross had really bridged the gap between legal philosophy and a training in law. In the preface, Ross had expressed the hope that his analysis of the concept of sovereignty, and also the 'dogma' of the equality of states, pointed 'towards the future course of development'.³⁵ Ross' analysis impressed some Continental lawyers like Professor Alfred Verdross,³⁶ the writings of whom were often referred to in the textbook,³⁷ yet the fact remains that, according to Ross, the 'current' view 'is ... not far from correct'.³⁸ To some the circle may have sounded like sophistry, a 'philosophical' complication with little bearing on the law.³⁹ It was hardly fair to claim that the dual definition of sovereignty, the external/internal dichotomy, was a novelty, nor was it said to be so in other parts of Ross' textbook.⁴⁰ On the contrary, the dual definition having been generally accepted,⁴¹ it ought to be admitted that the circle was devised by a theoretically-minded newcomer, who in a seemingly relentless pursuit of iconoclasm had possibly been confused by 'the mystical, vague, ambiguous concept of sovereignty marked by an emotional attitude'.⁴² It is significant that Ross' critique of sovereignty did not result in a new definition of the concept, much less in its abandonment, but on the contrary in Ross focusing on 'the separate "effects of sovereignty" as positive legal situations created directly by rules of law', that is, 'self-government', 'capacity of action', and 'liberty of conduct'.⁴³

However, even if not novel, and despite sounding utterly Continental, Ross' circle and the way in which it was undone illustrates the importance to international law of the internal definition of sovereignty. Indeed, the circle challenges an aspect of the

³⁵ *Ibid.*, 11.

³⁶ See Alfred Verdross, *Völkerrecht*, 2nd edition (1950) 10 and also Lech Antonowicz, 'Definition of State in International Law', 1 *Polish Yearbook of International Law* (1966/67) 195 at 195 and 207. Ross' analysis has also been referred to in Martti Koskenniemi, *From Apology to Utopia* (1989) 262, note 279.

³⁷ See also *Lehrbuch des Völkerrechts*, 7 and Ross' review of Alfred Verdross, *Völkerrecht*, 2nd edition (1950) in 2 *Jus Gentium* (1950) 218 at 219 f.

³⁸ *Textbook of International Law*, 12. Ross characterized his solution as 'more complete' and 'completing and deepening', *ibid.*, 16 and 19; cf. *ibid.*, 20–23 and 41.

³⁹ For the view that a definition is neither true nor false, but more or less 'convenient', see *ibid.*, 12, note 1, 34, note 1, and 51 f. and also Alf Ross, *Constitution of the United Nations: Analysis of Structure and Function* (1950) 189–193 [hereinafter *Constitution of the United Nations*].

⁴⁰ Cf. *Textbook of International Law*, 35 f., 40 and 191.

⁴¹ Writers such as Lassa Oppenheim and Paul Fauchille, in the works of whom Ross found the 'circular' definition, used this dual conception of sovereignty, see L. Oppenheim, *International Law* (1905) 101 and Paul Fauchille, *Traité de Droit International Public*, vol. 1, 8th edition by Henry Bonfils (1922) 224 and 427 ff.

⁴² *Textbook of International Law*, 46 and 33 f.

⁴³ See *ibid.*, 44 f. The latter 'effect of sovereignty', that is, 'liberty of conduct', would appear to be equivalent to a residual principle applicable where there is no international law in a given matter: see also *ibid.*, 88 f., 192, 193 and 279. However, Ross' coincident references to 'extensive liberty of conduct' were suggestive of a presumption of sovereignty resting with the state, *ibid.*, 36 and 42 f. Cf. on this point Ole Spiermann, 'Lotus and the Double Structure of International Legal Argument', in Philippe Sands and Laurence Boisson de Chazournes (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 131 at 132–36.

‘current’ view that even Ross did not think challengeable.⁴⁴ This is the view that international law is ‘a legal system connected with a certain society, the society of states’, and thus ‘forms a contrast to British [*sic.*], German or Danish law as individual legal systems’.⁴⁵ In my view, Ross’ circle, and his ‘luminous’ analysis of the traditional, dual definition of sovereignty,⁴⁶ corroborates the impression that international law cannot be fully appreciated unless seen in the light of the internal definition of sovereignty and other ideas and values ingrained in national legal systems. As a legal system in its own right, with its own source of validity, so to say, international law is coordinated with national law. Accordingly, ‘the whole legal universe may be divided into the legal systems valid in the individual states (national law) and the legal system valid for all states (International Law)’.⁴⁷ In his textbook, Ross adopted a system of exposition ‘which is based on the fundamental structure characterising all legal systems (according to the scheme: preliminary, central, secondary, tertiary rules), and yet at the same time adapted to the peculiarities of the international system (the subdivisions within the central rules)’.⁴⁸

Ross’ textbook was a witness not only to a Scandinavian, or ‘Continental’, approach to international law but to international law in general. This was so even though the book did not point towards the future course of developments. The very fact that Ross’ textbook was written, revised and translated — in order to teach international law for almost half a century to students of national (i.e., domestic) law, in particular at the University of Copenhagen — suggests that, after all, national lawyers have more than indifference towards international law. The textbook, in which Ross took stock of international law, was a fine illustration of a more complicated relationship between national and international law, and between national and international lawyers.

3 Internationalism and the Scope of International Law

Ross adhered to the traditional definition of customary international law, as being based on the presence of a consistent and general practice among states (*usus*), and a consideration on the part of those states that their practice was in accordance with international law (*opinio juris*). However, not all state practice was relevant in determining the content of international law. According to Ross,

[a] state’s international attitude may reveal itself in all acts of state that are connected in some way or other with International Law. This applies in the first place to such actions as appeal directly to other states. Thus for instance the claims addressed to or recognitions given to

⁴⁴ Cf. as regards deductions from sovereignty, *ibid.*, 36 f., 39 and 45, and also, regarding self-limitation, *ibid.*, 39 f. and 61.

⁴⁵ *Ibid.*, 11.

⁴⁶ See G.G. Fitzmaurice’s second report on the law of treaties, *Yearbook of the International Law Commission*, vol. 2 (1957) 16 at 42, note 31.

⁴⁷ *Textbook of International Law*, 11 and also 13, 16, 18 and 25.

⁴⁸ *Ibid.*, 78.

foreign states; the procedure adhered to in the conclusion of treaties; the reception and sending out of envoys, and all diplomatic negotiations. But it also largely applies to such actions as merely directly or indirectly, actually or contingently, affect the interests of other states. Thus for instance the way in which foreign ambassadors and citizens are treated, the conduct of states towards foreign vessels in territorial waters, their legislation and administration in matters relevant to other states and their interests, their judicial decisions in so far as these are based on International Law.⁴⁹

The suggestion seemed to be that the scope of international law was defined prior to international law; in other words, international law did not define its own scope. It accommodated issues that 'affected', or related to, the interests of two or more states. Therefore, to quote Ross, '[a] plurality of "sovereign" (self-governing) states is a prerequisite of International Law without which no "Society of Nations" would exist but a total world state';⁵⁰ international law 'will exist as long as its subjects are the self-governing states and not individuals'.⁵¹ Those acts of the state that Ross found of possible relevance in determining the content of so-called customary international law came within an area that had been defined in advance: state practice had to bear on issues that affected the interests of a plurality of states; otherwise, such practice was not relevant to so-called customary international law. This international law rested not on consent, or *opinio juris*, a point on which Ross was clear,⁵² but on a sense of internationalism growing out of the national context. Prior to international law there was a distinction between national and international issues; or, in Ross' words, '[t]he international or internal character of a rule of law is dependent on its content alone (whether or not it is binding upon a self-governing community) not on the basis of its validity (its coming into existence, possibility of amendment)'.⁵³

That the scope of international law is defined not by international law, but prior to it, points back to Ross' use of the internal definition of sovereignty in order to avoid a circular definition of international law. Each state is 'self-governing', the essential feature of this being that each state is the supreme master of a national legal system. Due to this conception of the state as a national sovereign, which is in accordance with the internal definition of sovereignty, national law is unsuited to govern issues conceived by national lawyers as being related to more than one state; for if subjected to the national legal system of another state, one state would be subjected to another state. Hence the former would no longer be a state, or at least not a sovereign and independent state. In order to preserve the sovereignty of the several states without leaving lawyers with no alternative to a *non liquet* (that is, the answer in a specific case

⁴⁹ *Ibid.*, 87 f.

⁵⁰ *Ibid.*, 36.

⁵¹ *Ibid.*, 54.

⁵² See *ibid.*, 20–23 and also 48 f., 61 and 95. As noted by Ross, new states are automatically bound by customary international law: see, also regarding a 'droit public européen', *ibid.*, 114 and 129.

⁵³ *Ibid.*, 22. One may also point to Ross' interpretation of Article 2(7) of the Charter of the United Nations concerning 'matters which are essentially within the domestic jurisdiction': see Alf Ross, *United Nations: Peace and Progress* (1966) 63, 69 f., 76 f., 219 f. and 357 (hereinafter *United Nations: Peace and Progress*). Cf. 45-II *Annuaire de l'Institut de Droit International* (1954) 115 f. and 146.

being that the law gives no answer),⁵⁴ issues that national lawyers (and others) relate to a plurality of states may be referred to international law. International law is a residual and complementary legal system, which covers legal issues that national lawyers assume not to be conveniently dealt with by a national legal system.

Ross would not necessarily have agreed with this analysis, yet his textbook contained several examples of the insufficiency of national law being the *raison d'être* of international law, among which I have selected three. Thus, states enjoyed immunity from the exercise of jurisdiction by other states; for '[e]ven if the judgment pronounced would often be without effect ... still the mere pronouncement of the judgment is felt as the exercise of a "sovereignty" which one state does not possess over another: *par in parem non habet imperium*'.⁵⁵ Likewise, local insurgent parties were recognized as subjects of international law due to their 'state-like character'; for '[i]t would lead to obviously offensive results if the insurrection were regarded from a purely individualist, internal angle and the insurgents looked upon as a group of criminals'.⁵⁶ Ross also objected to '[t]he widespread view that according to International Law the state has unlimited freedom to give whatever content it likes to its laws of nationality'.⁵⁷ 'This is at once evident', Ross explained, 'from the fact that all international rules regarding aliens would then in principle be dependent on the discretion of the state. By bestowing citizenship on all persons staying on its territory it might set aside all obligations'.⁵⁸ One may also point to Ross' narrative of the genesis of international law:

It is a historical fact that the various states are separated from each other and bounded territorially. This of course is not fortuitous but deeply rooted in the nature of the case. The states are primarily an organisation of power. Each of them claims to be, within a certain territory separated from others, the supreme power in relation to its subjects (a self-governing community). The simplest principle, almost a matter of course, for the individualisation and separation of these competing instruments of power is the spatial or territorial. This of course is not an invention of International Law. Already before any International Law existed the separate states did in fact, grow up round a centre of power territorially determined. It is not until we have a multiplicity of states facing each other and each of them claiming respect for its actual territorial possessions that what was originally a mere fact develops into a legally recognised delimitation. Here as on other fundamental points International Law can only defer to the facts and invest them with legal validity (the maxim of effectiveness).

In conformity herewith the fundamental international legal norm of the distribution of

⁵⁴ *Textbook of International Law*, 278 f.; cf. *ibid.*, 58 f., and 140 f.

⁵⁵ See *ibid.*, 189 and also 157 f. According to Ross, immunity was reserved for a few persons, *ibid.*, 197 and 201, while he did not reach a conclusion as to whether immunity was restricted to *jure imperii* acts, cf. *ibid.*, 190 f.

⁵⁶ *Ibid.*, 122.

⁵⁷ *Ibid.*, 149 and 152.

⁵⁸ *Ibid.*, 149 f. Of course, control can be carried out in two ways: either international law contains principles on nationality, as claimed by Ross, or international law reserves the right in specific cases not to give effect to nationality as defined in national law, cf. *ibid.*, 133, 150 and 153. The latter approach was adopted by the International Court of Justice in *Nottebohm Case* (Second Phase), ICJ Reports [1955] 4, at 20–23, and is compatible with the famous dictum in *Nationality Decrees Issued in Tunis and Morocco*, PCIJ (1923) Series B, No. 4, 24.

competence is to the effect that every state is competent, and exclusively competent, within its own territory to perform acts which — actually or potentially — consist in the working of the compulsory apparatus of the state (the maxim of territorial supremacy).

Intercourse between states without such an actual territorial delimitation would in practice be inconceivable. On the other hand, a delimitation on this basis alone would be quite conceivable.⁵⁹

A similar view had been expressed by Judge Loder in his dissenting opinion appended to the judgment of the Permanent Court of International Justice in *The Lotus*. Referring to what Ross termed ‘the maxim of territorial supremacy’, Judge Loder had ventured to say that ‘[t]his fundamental truth, which is not a custom but the direct and inevitable consequence of its premise, is a logical principle of law, and is a postulate upon which the mutual independence of States rests’.⁶⁰ In Ross’ view, however, Judge Loder’s dissenting opinion was an example of ‘unreal conceptual constructions’, deducing the content of international law from a conception of sovereignty.⁶¹ Unlike Judge Loder and the other dissenters in *The Lotus*, Ross did not apply ‘the maxim of territorial supremacy’ to the legislative competence of a state;⁶² but he reached more or less the same result, limiting jurisdiction to prescribe to the state’s own territory, at least *prima facie*, on the basis of ‘the general law relating to aliens’.⁶³ Ross also took a narrow view of the applicability of ‘the maxim of territorial supremacy’ to the jurisdiction to enforce, restricting it to what he regarded as necessary to avoid serious clashes between state interests:

There is — for International Law, be it said — no sensible reason to forbid, for instance, a clergyman from performing a marriage service, or a chief constable from issuing a licence, abroad. Nor can it be said to affect the interests of another state should a British judge pass a sentence during a stay on its territory, or should the Parliament assemble there. All these acts are just as harmless in relation to another state as the King’s signature to a law which is generally recognised to be internationally allowed.⁶⁴

The price to be paid for restricting the field of application of ‘the maxim of territorial supremacy’ was that these organs then ‘are as a rule subject to the police authority of the foreign state’.⁶⁵ They would be treated as non-state organs, not invested with immunity and so outside the international law of coexistence in all respects. These results may raise doubts as to whether such a narrow field of application satisfied the need for coexistence in the first place.

Ross was clear that customary international law — or, in my terminology, the international law of coexistence — enjoyed a special status from the point of view of the national lawyer. Formally, as a matter of national law, the national sovereign is not prevented from regulating single-handedly in its national legal system also those

⁵⁹ *Ibid.*, 137 f. and also 155, 181 f. and 184 about ‘the fundamental rights and duties of states’.

⁶⁰ PCIJ (1927) Series A, No. 10, 35.

⁶¹ Cf. *Textbook of International Law*, 45, note 4.

⁶² *Ibid.*, 155 f. and also in 47-II *Annuaire de l’Institut de Droit International* (1957) 181–83 and 240 f.

⁶³ *Ibid.*, 172–74.

⁶⁴ *Ibid.*, 156.

⁶⁵ *Ibid.*, 157.

issues that concern a plurality of states. But national lawyers are unlikely to feel comfortable with such regulation. As regards so-called customary international law, referring to the common law doctrine according to which international law is part of the law of the land, Ross argued as follows:

There is reason to believe that the tribunals will to a great extent come to the same results as in the case of an incorporation, by implying, or by their interpretation introducing, such corrections as are necessary to make national law accord with International Law. For the fact is that the British system is not based solely on ideas of natural law but is also sustained by the claims of practical life which must be felt with special force in a country like Great Britain with its highly developed intercourse with other nations. It would often lead to undesirable results if the courts were to base their decisions on a national law in conflict with International Law. As a rule, however, it may be taken for granted that the legislator has not really intended to legislate in conflict with the principles which are recognised by the country itself in its intercourse with other states. . . . Starting from such considerations we may probably presume, at any rate in countries such as Denmark where the courts have considerable liberty in their interpretation of the law, that national law must be interpreted with such reservations as will make it agree with generally accepted International Law. . . .

The difference between this presumption and the rule of interpretation . . . lies in the fact that it can be applied even where national law by its wording is unambiguous.⁶⁶

The rule of presumption applied to so-called customary international law, which, according to Ross, consisted of ‘rules in the main merely intended to delimit the spheres of dominion of the various states for the purpose of separating them and avoiding infiltrations and conflicts’.⁶⁷ They served national law by complementing it and so were presumably enforceable before national courts and other authorities.

In my view, the international law of coexistence is one of two basic categories into which issues governed by international law fall. The international law of coexistence involves issues international in substance, the subject-matter of which national lawyers relate to the interests of more than one state; as has been seen, it is normally referred to as general or customary international law. The other category — in my terminology the international law of cooperation — involves contracts that states have entered into with one another, i.e., treaties. They also relate to the interests of a plurality of states. However, they do so because of their form — the contracting parties being states — as opposed to their content; these issues are international in form, but not necessarily in substance. Indeed, treaties may regulate issues that national lawyers do not consider as international, thereby challenging rather than complementing national law. Treaty law will not normally attract the same attention as the international law of coexistence, at least not from the point of view of the national lawyer.⁶⁸

The structure of exposition caused Ross trouble as he moved from the international law of coexistence to the international law of cooperation,⁶⁹ and he took the view that

⁶⁶ *Ibid.*, 67 f.

⁶⁷ *Ibid.*, 77 and 181 f.

⁶⁸ Cf. *ibid.*, 85.

⁶⁹ See *ibid.*, 225; cf., e.g., *ibid.*, 75–78 and 136 f.

as regards the transformation of international law into national law the rule of presumption laid out in the above-quoted passage did not apply to treaty law.⁷⁰ Nevertheless, Ross did not seem to have considered drawing a fundamental distinction between an international law of coexistence and an international law of cooperation. On the contrary, defining international law as ‘the law valid for (i.e. binding upon) self-governing communities’,⁷¹ Ross saw international law as being restricted to issues international in substance, as opposed to international in form; international law was not the law valid for or made by states (or self-governing communities).⁷² In this light, Ross found room for treaty law by broadening the need for international law and essentially treating the international law of cooperation as a variant of the international law of coexistence. ‘[G]eneral International Law is’, Ross submitted, ‘in the main restricted to an individualistic delimitation of the living space of the states, and leaves social co-ordination to be organised by treaty’.⁷³ Without treaty law, or the international law of cooperation, international law was ‘a struggle of all against all’ where peace was simply ‘a war by other than military means’.⁷⁴ In a sense, this judgment was not surprising given that Ross applied a principle of effectiveness to such issues as the creation of new states,⁷⁵ a change of government,⁷⁶ and title to territory,⁷⁷ and that in general he believed that international law was unsuited to govern politically sensitive issues such as the use of force.⁷⁸ However, there was more to Ross’ concerns:

[i]f only a state keeps formally within its own living space it can there with unrestricted liberty settle questions concerning immigration and emigration, imports and exports, raw materials and other items of trade policy, national minorities, political and racial ideologies, rearmament and fortification, problems of exchange and labour conditions, traffic conditions and many other problems, and all this though these are questions that vitally affect the interests of other states.⁷⁹

In this way Ross justified ‘the international law of social co-ordination’, which was found only in treaties, in terms of clashes of interests between states and, to a certain extent, the need for coexistence.⁸⁰ For example, as regards the scheme for the protection of national minorities Ross wrote: ‘The state of origin . . . will be interested in extending protection to the minority for the preservation of its national peculiarity; and the community of nations as a whole will be interested in a legal regulation on

⁷⁰ *Ibid.*, 70.

⁷¹ *Ibid.*, 17.

⁷² Cf. *ibid.*, 20–23 and 40 f.

⁷³ *Ibid.*, 223 and 78.

⁷⁴ *Ibid.*, 184.

⁷⁵ *Ibid.*, 114 f.

⁷⁶ *Ibid.*, 197.

⁷⁷ *Ibid.*, 139, 145, 184 and 197.

⁷⁸ *Ibid.*, 185 f. and 246 f.; cf. *ibid.*, 187 f. and 270. See also as regards the validity of peace agreements, *ibid.*, 210, 220 and 243 f. Cf. Alf Ross, ‘Denmark’s Legal Status during the Occupation’, 1 *Jus Gentium* (1949) 3 and *United Nations: Peace and Progress*, 104 f.

⁷⁹ *Ibid.*, 184 and also 57 and 223.

⁸⁰ E.g., *ibid.*, 78, 223, 227, 228 f., 230, 237 and 239.

general humanitarian principles and for the maintenance of peace'.⁸¹ Likewise, as regards international dispute settlement, Ross held that '[i]f the social peace is to be preserved, it is necessary . . . that the discussion between the parties should be brought to an end by a settlement which establishes with authority whether there is responsibility and, if any, of what kind it is in the concrete situation';⁸² 'when a dispute cannot be brought to an end there is no guarantee for peace. One day the dispute will break out into open hostility: war'.⁸³ One may consider whether Ross had given the international law of coexistence too narrow a scope; if the clashes of state interests reserved for 'the international law of social co-ordination' were so evident and serious as Ross claimed these issues should, in my view, have come within the international law of coexistence — or so-called customary international law — in the first place. However, the better view would seem to be that a narrow definition of international law, not on the face of it embracing the international law of cooperation, led Ross to magnify the need for coexistence.

Justifying treaty law in terms of the need for coexistence was a double-edged sword. On the one hand, it was possible for Ross to group treaties together with so-called customary international law under the same conception of internationalism, as issues the subject-matter of which affected more states. As national lawyers tended to refer such issues to international law, this conception did presumably not overlap with, nor did it challenge, national law. On the other hand, it also had serious repercussions. According to Ross, '[t]he prerequisite for international legal relations is said to be that the self-governing community has acted *jure imperii*, not *jure gestionis*'.⁸⁴ Contracts between states not international in substance, the subject-matter of which fell within '*jure gestionis*', belonged to national law. Similarly, as regards state responsibility, Ross held that the acts of organs belonging to the executive were attributable to the state 'but only for the exercise of actual governmental power, thus it does not apply to officials in the economic concerns carried on by the state, such as railways, forestry and the like'.⁸⁵ Both suggestions were clearly wrong. However, the most dramatic manifestation of Ross' restriction of international law to issues international in substance was the rejection of individuals as subjects of international law.

4 The Involvement of Individuals in International Law

Having defined international law as 'the law valid for (or binding upon) self-governing communities', '[i]t follows', Ross added, 'that self-governing communities and these alone are capable of international duties'.⁸⁶ Ross' definition of 'self-governing communities' centred on states but it also included local insurgent parties and the

⁸¹ *Ibid.*, 230.

⁸² *Ibid.*, 271 and also 77.

⁸³ *Ibid.*, 272.

⁸⁴ *Ibid.*, 17 and see as regards state immunity, *ibid.*, 190 f.

⁸⁵ *Ibid.*, 253 f.

⁸⁶ *Ibid.*, 24 f. and also, regarding state responsibility, *ibid.*, 259 f.

Roman Catholic Church.⁸⁷ In an attempt to justify the limitation of international personality to 'self-governing communities', and so the limitation of his definition of international law, Ross relied on the argument that:

self-governing communities alone are by nature suited to be subject to international duties. For they and they alone can control the conduct, that is to say, the internal legal act, required of them as subjects of a superior legal system. For the self-governing communities were defined precisely as communities which, in internal matters, are the highest legal authority. . . . It is for this reason that legal relations between other than self-governing communities are practically inconceivable'.⁸⁸

To conceive of individuals as subjects of international law may to Ross have been a theoretical conundrum; for a 'self-governing' community was 'the highest legal authority' in the sense that it was the supreme authority over individuals.⁸⁹ Relations involving individuals were not international in substance. In accordance with tradition, individuals were not treated as subjects under the international law of coexistence,⁹⁰ the best example being 'the fundamental ideas of civilised intercourse expressed in the international law of aliens'.⁹¹ As regards conflicts between two states the cause of which was one state's treatment of a national of the other, Ross took the view that 'these may often be adjusted by negotiation or by judicial decisions, since state interests are not directly involved'.⁹² Nevertheless — as had been stressed by the Permanent Court of International Justice⁹³ — to the extent that the dispute was indeed defined as a dispute between two states, as distinct from a dispute between a state and an individual, the international law of coexistence applied. This was so, in particular, in respect of double nationality: '[h]e serves two masters and may easily find himself in painful situations of conflict if the demands of the two states do not agree. It is the task of International Law to try to bring about harmony by a delimitation of the competence of the competing states'.⁹⁴

In defining international personality Ross was only concerned with duties imposed by international law. Holders of the corresponding rights were not considered subjects. Referring to his *Towards a Realistic Jurisprudence* from 1946, in the main a translation of the Danish original from 1934, Ross argued that a right is a duty 'regarded in its relation to a certain individual [*sic.*] other than that bound by the

⁸⁷ See in general *ibid.*, 20, 24 f. and 97; cf. *ibid.*, 241, 250, 260 and 263. As for local insurgent parties, see *ibid.*, 103, 122 f., 166 and 188, and regarding the Roman Catholic Church, *ibid.*, 103 f. As regards constituent states in a federation, see *ibid.*, 99 and 100 f.

⁸⁸ *Ibid.*, 26.

⁸⁹ See *ibid.*, 14 f., 17, 19, 137 and 155 and also *Souveraineté des Etats*, 668.

⁹⁰ *Ibid.*, 230; but see as regards private international law: *ibid.*, 74 f., 161 and 169–74.

⁹¹ *Ibid.*, 170.

⁹² *Ibid.*, 160. As to the importance to the international law for the protection of aliens of changes in national legal systems, see *ibid.*, 166 f. and also Isi Foighel, *Nationalization and Compensation* (1964) 59 f., 95 and 130–34.

⁹³ See *Mavrommatis Palestine Concessions* (Preliminary Objection), PCIJ (1924) Series A, No. 2 12 and *The Panevezys-Saldutiskis Railway Case* (Preliminary Objections), PCIJ (1939) Series A/B, No. 76, 16.

⁹⁴ *Textbook of International Law*, 168.

duty'.⁹⁵ Ross had not foreseen that in 1949 the International Court of Justice would treat the United Nations as a subject of international law because it was capable of bringing international claims.⁹⁶ On the other hand, Ross' narrow conception of international personality made it possible for him to adopt a relatively liberal approach to the involvement of individuals in international law, without having to engage in endless discussions with colleagues over personality.⁹⁷ Thus, Ross held that individuals could be holders of rights,⁹⁸ a view that was a clear improvement on a tradition of categorically rejecting any involvement of individuals also in the international law of cooperation.⁹⁹ It is true that Ross added that while the interests protected by international law may belong to individuals, individuals did not have the capacity to bring a claim in international law and so could not avail themselves of obligations incumbent upon (other) subjects of international law.¹⁰⁰ However, this was a matter of 'current International Law' and changing it would have been compatible with Ross' understanding of international law.

As a member of the European Court of Human Rights from 1959 to 1971 Ross had occasion to test and possibly revise his understanding of the involvement of individuals in international law. The embryonic institution was not overburdened with cases, indeed Ross referred to it as 'a court out of work',¹⁰¹ nor did the judges sit in all cases. Judge Ross had his first appearance on the bench in the *De Becker* case against Belgium, which came to an end in 1962. The case was about the freedom of expression protected under Article 10 of the European Convention on Human Rights. Before the case could be heard by the Court, Belgium had amended its legislation relevant to the case and so the Belgian Government asked the Court to strike the case out of its list with neither the applicant, nor the European Commission of Human Rights objecting. The Court decided by six votes to one to comply with the request,¹⁰² Judge Ross dissenting. In a dissenting opinion that echoed his theoretical approach to individual rights, Ross held that

[t]his question could be answered in the positive if the function of this Court had been to enforce private claims, which a claimant may, if he wishes, modify during proceedings. This is not, however, the case here. According to the Convention, the function of the Court is 'to ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention' (Article 19 of the Convention). In view of this the Applicant is not recognised as a

⁹⁵ *Ibid.*, 27 and also 109; cf. *ibid.*, 24. And see Alf Ross, *Towards a Realistic Jurisprudence* (1946) 176 and also 182 and 266 [hereinafter *Towards a Realistic Jurisprudence*], Cf. *On Law and Justice*, 170–88 and Alf Ross, *Directives and Norms* (1968) 134 f.

⁹⁶ See *Reparation for Injuries suffered in the Service of the United Nations*, ICJ Reports [1949] 174 at 178 f. Cf. *Textbook of International Law*, 106 on the League of Nations as a confederation, but see *ibid.*, 51 for a reference to 'the world-embracing community of the Universal Postal Union'. See also *Constitution of the United Nations*, 189–99.

⁹⁷ Cf. Carl Aage Nørgaard, *The Position of the Individual in International Law* (1962).

⁹⁸ *Textbook of International Law*, 28, 96, note 1, 110 f. and 263.

⁹⁹ Cf. *Jurisdiction of the Courts of Danzig*, PCIJ (1928) Series B, No. 15, 17 f.

¹⁰⁰ *Textbook of International Law*, 263 and 110 f.

¹⁰¹ Alf Ross, *En arbejdsløs domstol* (1964).

¹⁰² ECHR (1962) Series A, No. 4, 25–27.

Party before the Court. His Application can only cause the Commission to make investigations; and, if the result of these investigations substantiates to a reasonable extent the complaint and a friendly settlement is not achieved, the Commission may bring the question for final decision before the Committee of Ministers or before the Court. When the proceedings have gone that far, the public interest requires that the question whether a violation has or has not taken place shall be decided regardless of whether the Applicant is or is not interested in the continuance of proceedings.¹⁰³

Judge Ross added that '[t]he belief, however mistaken, that a defendant State might be able to turn the tables on the Court and evade responsibility, would be highly damaging to the authority of the Court and to the prestige attaching to the ... Convention'.¹⁰⁴ Professor J.G. Merrills has commented on Judge Ross' dissenting opinion in the following way: 'As regards both the interests of the applicant and the public interest, the views of Judge Ross, who alone saw the significance of these matters in 1962, now represent the approach of the Court. It would be hard to find a more striking example of the value of the separate opinion as an institution nor, more generally, of the influence of considerations of effectiveness in the current work of the Court.'¹⁰⁵

As many other great theorists elected to an international bench, Judge Ross turned out to be a 'great' dissenter. He appended dissenting or separate opinions in the three proceedings in which he took part. In construing the substantive rights and freedoms protected under the Convention, Judge Ross leant towards what may be called a national lawyer's approach to treaty interpretation. This is best illustrated by the *Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* decided in 1968,¹⁰⁶ which had to do with the prohibition of discrimination guaranteed under Article 14 of the Convention taken in conjunction with Article 2 of the First Protocol protecting the right to education. The Court approached Article 14 in the following way:

In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.¹⁰⁷

In other words, in interpreting the Convention the Court's task was to review the

¹⁰³ *Ibid.*, 31.

¹⁰⁴ *Ibid.*, 32.

¹⁰⁵ J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd edition (1993) 59.

¹⁰⁶ See also the joint separate opinion of Judges Sigurjónsson and Ross and the joint separate opinion of Judges Holmbäck, Rodenbourg, Favre, Bilge and Ross in *De Wilde, Ooms and Versyp*, ECHR (1971) Series A, No. 12, 49–51 and 69–75, respectively.

¹⁰⁷ ECHR (1968) Series A, No. 6, 34 f.

application of the Convention by national authorities, not itself to subsume the specific case under the Convention. There may be many reasons for this approach, one being that the members of the Court came out strongly in favour of international institutions and law yielding to state authorities as the natural masters of individuals. The Court held that Article 14 would only be violated ‘when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised’.¹⁰⁸ This approach was taken even further by the seven judges who dissented from the Court’s finding that one minor aspect of the Belgian legislation in question violated the Convention.¹⁰⁹ According to the joint dissenting opinion of Judges Holmbäck, Robenbourg, Wiarda, Mast and Ross, disproportionality and so discrimination had not been ‘clearly established’;¹¹⁰ on the contrary, the majority had ‘lost “sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention”’.¹¹¹

This was an example of applying a principle of restrictive interpretation, according to which the interpretation which is less onerous to the obligated state, causing less interference with its freedom or sovereignty, should be preferred. It is a principle that comes naturally to a national lawyer who distinguishes the international law of cooperation from the international law of coexistence and regards it as a challenge to national law, rather than serving as a complement to it. On balance, when there is a choice between giving a treaty provision a broad or a narrow scope, national lawyers guided by the conception of the state as a national sovereign normally prefer the latter, especially where national law would otherwise have to be amended.¹¹²

Returning to Ross’ definition of international law, while individuals could enjoy rights under international law it followed that they could never be the subject of duties. Cases of piracy and war crimes, among others, were not seen as examples which proved the possibility of international law imposing duties on individuals. ‘The meaning of the aforementioned rules of International Law is’, Ross wrote, ‘merely that the states in these cases are authorised to exercise an extraordinary jurisdiction which would otherwise conflict with the law of aliens’.¹¹³ This view, of course, does not reflect the present state of international criminal law, which in 1942 would have been difficult to foresee. More importantly, Ross’ view was bound to be problematic, for what if statesmen were not impressed by his definition of international law and actually decided to impose duties on individuals by way of treaties? In respect of administrative unions, Ross had submitted that

[i]t is of fundamental importance to note that direct administration is not normally taken

¹⁰⁸ *Ibid.*, 34.

¹⁰⁹ Cf. *ibid.*, 70 f.

¹¹⁰ *Ibid.*, 89 f.

¹¹¹ *Ibid.*, 95.

¹¹² It may be recalled that as regards interpretation Ross had at an earlier point argued that ‘[t]he practical interests which are decisive here may either be those that directly dominate the judge as an individual influenced by his community, class, or profession, or they may be those which the judge supposes has [sic] influenced the legislator’. *Towards a Realistic Jurisprudence*, at 150.

¹¹³ *Textbook of International Law*, 29.

charge of by the union organs . . . but by the usual national administrative authorities. The international organs have no power to pass resolutions and no power to take measures of coercion. Legally their task is restricted to preparing, guiding, and stimulating the national administrations in the spirit of the international union. Thus the administrative unions restrict neither the self-government nor the capacity of action of the member states and are not, therefore, real state unions. There is no international community of administration but only an internationally organised co-operation between national administrations.¹¹⁴

However, there were organizations that did not fit this description, such as the Danube Commission, which exercised a 'common supreme authority' directly over individuals. According to Ross, and others, this made the Danube Commission 'the organ of a special "River State"'.¹¹⁵ For the very reason that the Danube Commission exercised authority over individuals, it belonged not to international law but to its own national legal system. Subsequently, this argument gained currency in the case-law of the European Court of Justice: because individuals are subjects under Community law, it is 'a new legal order' and different from international law.¹¹⁶ The European Court of Justice has developed the notion that Community law is somehow 'integrated' in the national legal systems of the member states. In comparison, in later editions of his textbook in Danish, Ross followed Professor Verdross and categorized Community law as a third kind of legal system which was different from national law as well as international law.¹¹⁷ This was a rather dramatic conclusion to draw from a definition of international law, which by then had become somewhat misleading and would certainly not seem to pass the test of convenience.¹¹⁸

5 The Content of International Law

In my view, while the *scope* of international law is determined by the limits of national law, from an international lawyer's perspective the *content* of international law is determined by international law. The questions faced by international lawyers are referred to international law because of the insufficiency of national law; but the answers given to these questions are the product of international law. International law is coordinated with national law as regards its scope, yet it is separate from national law as regards its content. It is, of course, also separate from national law regarding what may be termed its source of validity; for it only makes sense to refer

¹¹⁴ *Ibid.*, 224 f.

¹¹⁵ *Ibid.*, 30 and also 22, 176 and 225.

¹¹⁶ See Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1 at 12 and Case 6/64, *Costa v ENEL*, [1964] ECR 585 at 593. See also Ole Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order', (1999) 10 *European Journal of International Law* 763 at 765–75.

¹¹⁷ Ross took this step in a review of a doctoral thesis on the European Coal and Steel Community, Paul Henning Fischer, *Det europæiske Kul-og Staalfølesskab* (1957), see 91 *Ugeskrift for Retsvæsen* (1958) B 1 at 4. For his original critique of the concept of 'Internen Staatengemeinschaftsrechts', see Alf Ross' review of Alfred Verdross, *Völkerrecht*, 2nd edition (1950) in 2 *Jus Gentium* (1950) 218 at 225 f.

¹¹⁸ Cf. *supra* note 39.

questions or issues from national law to international law if international law is believed to be an independent legal system whose source of validity is different from the ultimate source of national law.

As with other introductory texts, Ross' textbook centred on the international law of coexistence. Because issues dealt with under the international law of coexistence are referred to international law due to the insufficiency of national law rather than the sufficiency or wealth of international law, international lawyers often look in vain for general, substantive answers to the questions referred. This is particularly felt in theory, while in practice answers can normally be provided, and so a *non liquet* avoided, by referring to and creatively interpreting the particular circumstances of the case. Again Ross did not himself analyse international law from this perspective, yet his textbook provided some examples, including the question of the extent of a state's territorial waters under so-called customary international law. According to Ross, 'there is no rule of International Law directly determining the extent of the territorial waters'.¹¹⁹ On the other hand, as this question interested other states, 'a state cannot itself arbitrarily decide upon the extent of its territorial waters'.¹²⁰ On this basis, and referring to the failure of the codification conference under the auspices of the League of Nations in 1930, Ross recommended a solution that foreshadowed the judgment of the International Court of Justice in the *Fisheries* case and resembles present-day use of the concept of equity following the *North Sea Continental Shelf* cases:

Owing to the geographical conditions and the great dissimilarity of interests a general arrangement must probably be considered unattainable. The object should rather be an individual settlement and regulation by the marking of the boundaries of the territorial waters for each country on charts in which account should be taken of the necessity for establishing different boundaries in connection with the different protected interests (fisheries, sanitation, customs, neutrality etc.).¹²¹

In my view, this summarizes the international law of coexistence in a nutshell. As for the specific issue, there was an unmistakable need for separating state powers, which could hardly be satisfied by some state's national legal system. Accordingly, attention was turned to international law. But, in the absence of treaty law, this need did not necessarily imply that an operational legal principle was available. Generally speaking, an international court will often have either to engage in an act of significant law-making, or to develop an argument specific to the facts of the case. In the context of an international court, it clearly begs the question to speak — as Ross indeed did in respect of international rivers, another issue under the international law of coexistence, overlooking the judgment of the Permanent Court of International Justice in the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder* — 'only of a certain duty for the riparian states to co-operate in making

¹¹⁹ *Textbook of International Law*, 140.

¹²⁰ *Ibid.*, 141.

¹²¹ *Ibid.* and see *ibid.*, 142 as regards the Norwegian coast, which should be compared to *Fisheries Case*, ICJ Reports [1951] 116 and also *North Sea Continental Shelf cases*, ICJ Reports [1969] 3 at paras 83–85.

treaty arrangements on the basis of the general principle of free and equal traffic for the ships of all states'.¹²²

However, vagueness is not an all-embracing characteristic of the international law of coexistence, parts of which are less open-ended in content and approximate rules. Ross entertained many such issues. In determining the content of the international law of coexistence, he did not rely on state practice, although this was suggested by his definition of custom; or at least there were very few references to state practice in Ross' textbook. Nor was there a flurry of references to judicial precedent. Much more important were tradition, theory, and 'domestic' analogies from national law, in particular Danish law. Unlike 'the general principles of law recognized by civilized nations', referred to in Article 38(1) of the Statute of the Permanent Court of International Justice,¹²³ these were analogies taken from a specific national legal system. It was not simply a pedagogic device to help students appreciate international law, but, on the contrary, often the thrust of Ross' argument. Suffice it here to mention two examples, viz. the law of treaties and state responsibility.

A *The Law of Treaties*

According to Ross, 'the whole international doctrine of treaties . . . is merely a more detailed development and definition of this duty, expressed in the sentence *pacta sunt servanda*', which he regarded as a 'fundamental duty',¹²⁴ if not a *Grundnorm*. Accordingly, 'the main task of International Law is to establish when an international agreement is valid'.¹²⁵ I shall dwell on this question, although there are other significant aspects of Ross' treatment of the law of treaties, including his lucid analysis of reservations to multilateral treaties, which had some similarity to the approach adopted by the International Court of Justice in the *Reservations to the Convention on the Prevention and Punishment of the Crimes of Genocide* Opinion.¹²⁶ Ross' discussion of the competence of state representatives is to the point. According to Ross,

[t]he question as to what representatives may validly bind a state is fundamentally one of International Law. But in conformity with the principle of effectivity International Law answers this question by a reference — at any rate as the point of departure — to the rules of competence of national constitutional law. Constitutional law in this case, however, must not be understood to mean the written constitution as expressed in a fundamental law, but the constitution as actually practised when customary constitutional law is taken into consideration. . . . It means, which is of great importance in practice, that one need not study laws and theories but may simply take it for granted that a representative who regularly acts on behalf of the state in external affairs is competent to do so both under National and International Law.¹²⁷

However, according to Ross it gave rise to 'serious difficulties' if the representative authorized to act on behalf of the state 'by doing so has transgressed internal

¹²² Cf. *ibid.*, 176, but see PCIJ (1929) Series A, No. 23, 26–28.

¹²³ Cf. *ibid.*, 73 and 94.

¹²⁴ See *ibid.*, 195 and also 54, 202 and 220.

¹²⁵ *Ibid.*, 202.

¹²⁶ *Ibid.*, 216 f. and see ICJ Reports [1951] 15.

¹²⁷ *Ibid.*, 203.

constitutional precepts restricting the constitutional authority of the representative'.¹²⁸ In Ross' view, the question was whether 'the reference of International Law to national law only concerns the individuality of the competent representative', or also 'the restrictions constitutionally binding upon the representative in the exercise of his function'. In approaching this question, Ross had recourse to the Danish law of agency.¹²⁹ He was clear as to the weakness of this argument and stressed that it was merely 'an instructive illustration';¹³⁰ moreover, according to Ross, '[i]t must especially be noted that the solution is not limited to the possibilities indicated by the analogy'. Nevertheless, the Danish law of agency coloured his conclusion:

In the first place it follows from the fundamental view of the international competence of the representative that in those cases where the constitutional guarantee manifests itself externally in relation to the co-contractor so that the latter is by custom prepared for it, an international effect must also be ascribed to this guarantee. This applies to the demand for a minister's countersignature.

In other cases similar considerations to those determining the rules for agency in civil law should probably be applied. This means that only such restrictions in the competence which are either usual in a given situation, or objectively recognisable by the co-contractor, are binding in relation to the latter. Applied to interstate affairs these views will lead to the result that importance is only attached to such internal precepts as are either customary in the practice of constitutional states or clearly stated in the constitution of the states. According to the special nature of these cases it should further be required that it is possible for the co-contractor to find out whether or not the requirement has been fulfilled.¹³¹

However, as suggested by the judgment of the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case,¹³² the law of treaties pays much less respect to national law than Ross suggested. This became clear in the context of the International Law Commission when preparing the Vienna Convention on the Law of Treaties, if not before. According to Article 46 of the Convention as finally adopted in 1969, a state may not invoke a provision of its national law as a ground of invalidity unless the violation 'was manifest and concerned a rule of its internal law of fundamental importance'; a violation is 'manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'.

Another significant aspect of Ross' analysis, also possibly influenced by superfluous analogies taken from national law, was his suggestion that rights of third states and morality were further grounds of invalidity.¹³³ Deeming rights of third states to be a ground of invalidity might have been due to Ross confusing the questions of validity and effect on third states. Be that as it may, Ross saw no reason to depart from a principle of Danish law: 'If the conflicting rights concern the same individually

¹²⁸ *Ibid.*, 204.

¹²⁹ See *ibid.*, 205 f.

¹³⁰ *Ibid.*, 206.

¹³¹ *Ibid.*, 207 f. Cf. the misinterpretation of Article 110 of the Charter of the United Nations in *Constitution of the United Nations*, 27–30.

¹³² Cf. *ibid.*, 208 and see PCIJ (1933) Series A/B, No. 53, 71 and 91 f. (Judge Anzilotti).

¹³³ As for the latter, see *ibid.*, 210.

determined object or service, the first acquirer takes precedence of the second, at any rate if the latter was in bad faith; if the rights are merely quantitatively determined claims and property (monetary claims), on the other hand, they compete on an equal footing.¹³⁴ Such a doctrine would supposedly have pre-empted the acceptance of the concept of *jus cogens* in international law referred to in Article 53 of the Vienna Convention.

B State Responsibility

Ross was one of a number of writers, mostly Continental, who referred to the law of state responsibility in terms of 'secondary rules' long before the term was taken up by the International Law Commission in its work eventually leading to the adoption of Draft Articles on Responsibility of States for Internationally Wrongful Acts in 2001.¹³⁵ According to Ross, 'the fundamental condition for an international responsibility is the occurrence of an objective violation of the law, for which it is required':

1. that an act (omission) should have been performed which is objectively in conflict with the primary norms of International Law imposing duties not covered by the general reservations ...
2. that the action should have been performed by a person under such circumstances that it is ascribable not to himself but to a state . . . ; and
3. that this has caused a violation of interests which the international legal rules are intended to protect.¹³⁶

In contrast to this order of conditions, the first two conditions have been inverted in Article 2 of the Draft Articles adopted by the International Law Commission. This seems logical, as does the omission of the third condition, which did not have to do with responsibility; its purpose was to define who was entitled to invoke responsibility.¹³⁷

The condition concerning primary rules, or wrongfulness, had a bearing on 'general reservations' or circumstances precluding wrongfulness.¹³⁸ Besides consent,

¹³⁴ *Ibid.*, 209 and also 218. According to Ross, '[b]ad faith must presumably always be assumed to be present'.

¹³⁵ *Ibid.*, 76, 241, 254 and 271. Cf. *ibid.*, 263–66. See J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 14 n.43, and J. Dugard's Second Report on Diplomatic Protection, UN Doc. A/CN.4/514 (2001), at 5.

¹³⁶ *Ibid.*, 242.

¹³⁷ See *ibid.*, 255. Cf. Roberto Ago's second report on state responsibility, *Yearbook of the International Law Commission* (1970) vol. 2, 177 at 188, note 54, and 194, note 100, and third report on state responsibility, *Yearbook of the International Law Commission* (1971) vol. 2, part 1, 193 at 215, note 67, and 223, note 116, and also commentary on Article 3 as adopted on first reading, *Yearbook of the International Law Commission* (1973) vol. 2, 183, note 93.

¹³⁸ In this respect, Ross' textbook was relied upon in Roberto Ago's eighth report on state responsibility, *Yearbook of the International Law Commission* (1979) vol. 2, part 1, 3 at 30, note 128 and 129, 34, note 151, 37, note 168, and 45, note 198, and addendum to eighth report on state responsibility, *Yearbook of the International Law Commission* (1980) vol. 2, part 1, 13 at 48, note 167. See also the commentaries on the following chapters and provisions as adopted on first reading: Chapter V, *Yearbook of the International Law Commission* (1979) vol. 2, part 2, 108, note 554; Article 29, *ibid.*, 111, note 565, 112, note 566, and 133, note 578; Article 30, *ibid.*, 119, note 603; and Article 33, *Yearbook of the International Law Commission* (1980) vol. 2, part 2, 48, note 172.

self-defence and reprisals, Ross listed ‘self-preservation in emergencies’,¹³⁹ which covered the same ground as do *force majeure*, distress and necessity in the Draft Articles. In addition, drawing an express analogy with ‘Scandinavian theory’, Ross held that ‘prohibition of acts which imperil benefits to which others are legally entitled must be interpreted with the general reservation that when the danger is slight, illegitimacy can be abrogated owing to the usefulness of the act in other respects’.¹⁴⁰ However, in the same breath Ross added that this completely open-ended formula, ‘[o]wing to the primitive and formalistic character of International Law . . . will hardly play any important role in international questions’.

In respect of the condition concerning attribution, or ‘ascription’, Ross again referred to the Danish law on agency,¹⁴¹ as he had done in respect of the invalidity of treaties. However, as for ‘military organs’ the analogy yielded to the principle laid down in Article 3 of the regulations appended to the Hague Convention IV of 1907 respecting the Laws and Customs of War on Land; Ross inferred that a state ‘is responsible for all actions committed by persons belonging to its armed forces’.¹⁴² Ross had not foreseen the much wider application of this principle in Article 7 of the Draft Articles, possibly because he was deceived by the analogy taken from Danish law.¹⁴³

In addition to the two conditions of wrongfulness and attribution, Ross introduced a third condition, also by reference to national law, namely some degree of culpability or negligence. It has not been adopted in the Draft Articles and indeed Ross himself was in doubt:

It is probably right to say that International Law — through the acceptance of a generally recognised legal maxim — as a main rule makes the culpa rule the basis of responsibility, though it does not acquire the same practical importance as in civil law, partly because many of the norms of International Law are formal norms of competence in which the question of guilt in most cases falls into the background; partly because in international relations due diligence must be strictly demanded so that responsibility is often taken for granted without any special discussion of the question of culpability. The latter question is of special importance for the legal acts of a state . . . since it must be assumed that the organ ought always to realise the international significance of these acts, so that the result will practically be the same as a quite objective responsibility.¹⁴⁴

If responsibility could be established, Ross took the view that ‘[i]nternational claims are always in principle of such a political character that they are incompatible with a compulsory transformation into a pecuniary claim’.¹⁴⁵ Accordingly, the injured state was bound to seek restitution. But if restitution would require a change of the constitution, ‘the state must be able to satisfy its obligation by paying compen-

¹³⁹ See *Textbook of International Law*, 247–50. Cf. Gaetano Arangio-Ruiz’ fourth report on state responsibility, *Yearbook of the International Law Commission* (1992) vol. 2, part 1, 1 at 27, note 165.

¹⁴⁰ *Ibid.*, 250.

¹⁴¹ *Ibid.*, 252 and also 262.

¹⁴² *Ibid.*, 253.

¹⁴³ Cf. Roberto Ago’s fourth report on state responsibility, *Yearbook of the International Law Commission* (1972) vol. 2, 71 at 88, note 76, and 91, note 99.

¹⁴⁴ *Textbook of International Law*, 257 f.; cf. *ibid.*, 164 f.

¹⁴⁵ *Ibid.*, 266.

sation'.¹⁴⁶ The restrictions on the right to compensation would seem to be due to a tribute to state sovereignty being substituted for the oft-quoted dictum of the Permanent Court of International Justice in the *Case concerning the Factory at Chorzów*, according to which it is 'a principle of international law that the reparation of a wrong may consist in an indemnity' and that '[t]his is even the most usual form of reparation'.¹⁴⁷ When compensation could be sought, Ross promoted another domestic analogy defining the sum that could be claimed in compensation: 'It is probably right to say in accordance with the recent Northern doctrine of compensation that the responsibility comprises the consequences which are a normal realisation of the visible injurious tendencies of the action.'¹⁴⁸

6 Conclusions

International law was one of the first legal disciplines to which Ross applied his 'realist' theory of law, the edifice of which was *On Law and Justice* from 1958, essentially a translation of the Danish original of 1953. Yet, leaving aside a few introductory chapters, the 'realist' theory would not seem to have been capable of exercising much influence on, for example, *A Textbook of International Law*. It may have been responsible for Ross occasionally to have recourse to common sense, his preferred solution to treaty interpretation,¹⁴⁹ or to 'sociological' ideas, many of which were linked to a principle of effectiveness. But otherwise, as will hardly be a surprise to practitioners and others with a training in law, there was a fairly wide gap between Ross' 'realist' theory and his legal analysis when finally embarked upon. If the style of analysis had been genuinely 'realistic', the first editions in Danish from 1942 and 1946, respectively, would have been markedly different from, for example, the fifth edition published in 1976. However, despite being revised five times over nearly forty years the textbook did not change significantly. Rather than being 'realist', the underlying approach to international law was that of a national lawyer, an approach that required much less revision than, for example, an international lawyer's approach, whether 'realist' or not. This was all the more significant as Ross was not alone in taking this approach: the majority of his contemporaries probably did the same.

Thus, as a lawyer, as opposed to a philosopher, Ross was primarily a national lawyer, schooled in and working with and within the Danish legal system. He never really moved away from taking national law and the national legal system as the starting-point of his international legal analysis. Unlike Brierly,¹⁵⁰ among a few others, Ross insisted on international law being judged against the standards, or ideals, of a national legal system. Differences would prejudice international law, the

¹⁴⁶ *Ibid.*, 72.

¹⁴⁷ PCIJ (1928) Series A, No. 17, 27 f.

¹⁴⁸ *Textbook of International Law*, 267.

¹⁴⁹ *Ibid.*, 92.

¹⁵⁰ *Ibid.*, 51 and 58.

latter being accordingly ‘an order of a much weaker character with respect to its ability to direct human conduct towards social purposes’.¹⁵¹ In Ross’ view, ‘International Law is of a conventional non-compulsory order with a derived character of law’.¹⁵²

However, as suggested by Ross’ textbook, a national lawyer also needs international law; indeed, national lawyers are crucial to international law. In order to approach international law, one has to be a national lawyer, or at least has to be familiar with national lawyers’ methods of reasoning. International law is the response to a need felt by national lawyers for a law that complements and separates the several national legal systems. This is why international law, though ‘international’, is still ‘law’,¹⁵³ and why it is often taught as part of university courses in national law (and still rarely taught as part of anything else). This is also why, as demonstrated by Ross’ circle, international law rests on the conception of sovereignty found at the root of national legal reasoning, that is, the conception of the state as a national sovereign in accordance with the internal definition. The questions dealt with in international law have been referred from national law because of the insufficiency of the latter; but the answers given to these questions have to be the products of international law. International law is coordinated with national law as regards its scope, yet it is separate from national law as regards its content.

Ross’ textbook demonstrated the importance of national lawyers to international law, but at the same time it exposed the dangers that they represent. His textbook was underpinned by a conception of internationalism delimiting the scope of international law prior to international law. But Ross’ conception of internationalism was somewhat narrow. It centred on issues international in substance, thereby relying on the conception of the state as a national sovereign upon which national law is based: national issues are those that national lawyers relate to one national sovereign, or to no state at all (the legal persons involved then being individuals); international issues are those that national lawyers relate to two or more national sovereigns. The latter are issues in respect of which national lawyers almost inevitably turn towards international law — hence Ross’ rule of presumption in respect of the applicability of the international law of coexistence before Danish courts and authorities.

On the other hand, national lawyers prefer to deal with national issues in a national legal system, presupposing this system to be self-contained; this presupposition may be referred to as the ‘national principle of self-containness’. Actually, Ross was first to acknowledge that the Danish Constitution rests on the national principle of self-containness (although not referred to in the text) to the effect that only Danish

¹⁵¹ *Ibid.*, 54 and also 18 f.

¹⁵² *Ibid.*, 54 and also *On Law and Justice*, 59 f.

¹⁵³ Cf. *On Law and Justice*, 36.

authorities may exercise authority over individuals in Denmark.¹⁵⁴ Nevertheless, as a matter of international law, even issues national in substance can be regulated by international law because internationalism is not restricted to issues international in substance; it also contains issues international in form, that is, issues that are governed by treaty law. This broader conception of internationalism is not based on the conception of the state as a national sovereign. In contrast, treaty law, or the international law of cooperation, calls on conceptions of the state different from those known to national law: while the making of treaties relates to a conception of the state as an international sovereign, treaties, once made, are associated with a conception of the state as a subject of international law. Since at least the latter conception of the state is unfamiliar to national legal systems, the international law of cooperation easily provokes resistance among national lawyers when regulating issues that are not international in substance.

Such resistance was clearly felt in Ross' textbook, notably as the international law of cooperation was restricted to issues that bordered on the international law of coexistence and so could be justified by reference to a certain, though not serious, clash of interests between national sovereigns. The rejection of individuals as subjects of international law was merely an example — as was the use of the rival, and in this context jealous, conception of the state as a national sovereign — to justify restrictive treaty interpretation, in particular Judge Ross' interpretation of the substantive rights and freedoms protected under the European Convention on Human Rights. It goes without saying that international lawyers, as distinct from national lawyers, ought to desist such impulses flowing from the national principle of self-containness, and thus to take an approach different from the national lawyer's approach to international law in this respect.

Another difference between the international lawyer's approach and that taken in Ross' textbook had to do with determining the content of the international law of coexistence. From an international lawyer's perspective, the answers which the international law of coexistence gives to questions referred from national law — and with what specificity and bearing — depends on a variety of factors, the most important being tradition and the values associated with coexistence. State practice and international or national precedents are other important factors, as are in many respects analogies taken from national law. However, as was the case with Alf Ross himself, there is a risk of lawyers construing the content of international law in the light of a peculiar national legal system. It is true that both the law of treaties and the law of state responsibility to a large extent are based on analogies taken from national legal systems; thus, at one point in its work on state responsibility the International

¹⁵⁴ Alf Ross, *Grundlovsrevision: Hvorfor — hvorledes* (1948) 48 and see the judgment of the Danish Supreme Court regarding the Maastricht Treaty in *Carlsen and others v Rasmussen* [1999] 3 CMLR 854 at 857, according to which the special authorization in Section 20 of the Danish Constitution was included in 1953 'to enable Denmark to participate — without amending the Constitution . . . — in international co-operation implying that the exercise of legislative, administrative or judicial authority is entrusted to an international organisation with direct effect in this Kingdom'. See also *United Nations: Peace and Progress*, 62 and 79 f.

Law Commission referred to Ross, Lassa Oppenheim (and Hersch Lauterpacht) and Bin Cheng as ‘lawyers representing other legal systems [than the German and the Italian]’.¹⁵⁵ However, what cannot be justified from an international lawyer’s point of view are analogies taken from a specific national legal system.

Let it be reiterated that Alf Ross was not alone in overstating the role of the national lawyer. Because lawyers are educated in a specific national legal system, which is also the context in which most lawyers earn their living, to curb the would-be national lawyer lurking within most international lawyers is a persistent challenge. One further example may suffice, namely the evergreen references to an international community, which academics and theorists concerned with international relations have sought for centuries. ‘Interdependence’ was a word also used in Ross’ household,¹⁵⁶ and despite his ‘pessimistic’ comparisons with national law, Ross did not abandon all hope on behalf of international law. In his opinion, ‘the way onward towards the overcoming of the . . . condition of anarchy can only be traversed step by step, along with a development of an organised power for the enforcement of law in international intercourse’,¹⁵⁷ the ideal clearly being the national legal system.¹⁵⁸ Thus, in *Constitution of the United Nations* from 1950, referring to ‘the tendency of the sovereignty dogma to resist progress’,¹⁵⁹ progress, or the future, of international law was but a better approximation to a national legal system. Whether this was ‘realist’ was clearly another question.¹⁶⁰ The progress of international law was intrinsically linked to the weakening of sovereignty only because sovereignty, a key value of national law, was treated as fundamental also to international law.¹⁶¹ The only solution imaginable to the ‘optimists’ has been to reinvent international law as a world state system modelled on national law and the conception of the state as a national sovereign to replace the residual and complementary system required by national lawyers. But, of course, the better way forward is to acknowledge that the conception of the state as a national sovereign, though relevant to international law, is not omnipotent. International lawyers should not always think and argue as if national lawyers. Like Ross, he or she ought to be ‘a living member of the community’, but not a community entirely modelled on a national legal system.

¹⁵⁵ Commentary on Article 2 as adopted on first reading, *Yearbook of the International Law Commission* (1973) vol. 2, 177, note 55.

¹⁵⁶ See *Textbook of International Law*, 58 and 301.

¹⁵⁷ *Ibid.*, 55.

¹⁵⁸ See *ibid.*, 56.

¹⁵⁹ *Constitution of the United Nations*, 129.

¹⁶⁰ Cf. *Textbook of International Law*, 59 and 194 and see *United Nations: Peace and Progress*, vii, 145 f. and 272 and also, concerning a world state, *ibid.*, 262–76 and 402 f.

¹⁶¹ Cf. *Textbook of International Law*, 39 f., 45 f. and 55 f.