Some Practical Problems of International Adjudication

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The fiftieth anniversary of the International Court of Justice is a milestone in the history of international law and adjudication and is being marked around the world by a series of seminars and other events in the Americas, Africa, India and the Pacific.[1] At the Court we have just concluded a major seminar, attended by the law officers and legal advisers of governments from around the world.

This paper draws attention, *inter alia*, to some of the practical aspects of the conduct of the Court's business. In discussions of the Court, it is essential that some of these practical aspects be taken into account. Some of them are not very well known outside the Court.

All of us — those who function on the Court, as well as the users and potential users of the Court — are at one in our desire to improve the efficiency, the reach and the impact of the Court. We would wish more people around the world to know of the Court and its availability for the resolution of international tensions and the development of international law.

The Size of the Court

For very good reasons, those who so carefully devised the structure of the Court decided that it should consist of fifteen members. This was necessary having regard to the need for representation of the principal legal systems and the main forms of civilization. A truly global court cannot be satisfactorily constructed with lesser numbers, and it should be recalled that at both the Peace Conferences of 1899 and 1907, the proposal for an international court foundered owing to the inability to devise a satisfactory formula for its structure.

While this size of Court is necessary, a bench of fifteen presents certain practical problems which need to be appreciated.

For a judicial body sitting *in banco*, fifteen is an immense and almost unwieldy number.

Having functioned as a domestic appellate judge, I am very conscious of the differences between such a tribunal and the comparatively smaller tribunals of domestic jurisdictions. A domestic tribunal may sit in benches of two or three

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and, in cases of exceptional importance, in benches of five, seven or even nine. Even if it sits as a bench of nine, it is always possible to know one's colleagues' views and to engage in discussions at an informal level, which are quite adequate for all practical purposes. There is little need for formal sessions to discuss the case in hand and at the most the judges could meet in each other's chambers even for an extended discussion.

With a bench of fifteen that is not possible, for we have passed the level of adequacy of informal discussions. It is necessary for the judges to meet in formal deliberations more than once and sometimes for days at a time. True, these discussions are extremely rich and lead to invaluable exchanges of views and insights. Yet they involve an enormously increased load of paperwork and a great expenditure of time.

The Different Backgrounds of the Judges

The problem is compounded by the fact that the judges of the International Court come from different legal backgrounds. Although all of them are fluent in one or other of the official languages (English and French), their native languages are different and for many of them the Court languages are a second language.

They have done a lifetime of legal work in their own language — be it Russian or Japanese or Hungarian or any other — and the demands made upon them in having to work with masses of documents in English and French call for considerable extra time and effort. In the case of some judges they even do their primary thinking and writing in their own language and then translate it into one of the official languages.

Translations

Unlike most domestic courts, the International Court functions in two languages (English and French). Every document, however voluminous, needs to be translated and this applies even though the brief consists of dozens of heavy volumes. Oral proceedings have to be simultaneously translated and all transcripts of proceedings are required to be in both languages.

The total staff of the Registry is surprisingly small — around 55 in all, including secretaries, messengers and drivers. Work of this sort therefore strains the Court's meagre resources to their limits. This is an additional factor which to some extent retards proceedings, but given the resources available, and the imperative requirement of functioning in two languages, this cannot be overcome. Current budgeting difficulties in the United Nations render it extremely difficult to procure an increase in these numbers. Rather, the tendency is to freeze all posts when they become vacant.

The Civil Law/Common Law Dichotomy

All the judges have a background of training in the civil law or the common law systems. The methodologies of these two systems are sometimes quite different and so are their approaches to the judicial process. The common law conception

of the judge and the process of judgment is vastly different from that of the civil law, for in the first system the judge is a much more elevated functionary, speaking more expansively and with greater authority than his or her civil law counterpart. The civil law judge likes to formulate his decision very shortly and succinctly, with the personal element being submerged almost to the point of anonymity.

This makes for differences of approach, not only in judicial reasoning, but also in judicial draftsmanship. We see this reflected also in the manner of advocacy of the lawyers who appear before us, for the civil lawyers tend to argue in a much more conceptual manner, often moving rapidly from concept to concept in a manner to which those trained in the common law are unaccustomed.

The result benefits from the wisdom of both systems, but that benefit is bought at a price in time and effort.

The Formulation of the Judgment

With a bench of fifteen, structuring the Judgment presents many problems, quite apart from the different judicial backgrounds and styles of the judges.

The majority, whose decision becomes the decision of the Court, are not necessarily always agreed on the legal route by which they reach their common conclusion. To give you the simplest scenario, some judges may reach that result through an application of principle x exclusively, others by principle y and yet others by a combination of x and y. Of course, the principles involved in a case are numerous and, in the result, we have various permutations and combinations of perhaps ten or more applicable principles. This multitude of legal principles will be applied in varying measure and with differing emphases by the different judges who form the majority.

When a drafting committee is appointed (usually three judges), to turn out a draft they need to strike a balance among the different views of the majority and this calls for considerable effort and more than one tentative draft which has to be revised in the light of written comments sent in by every judge, and in further discussions. In the result, the Judgment of the majority tends to be framed in terms of the lowest common denominator of agreement rather than an amplified legal exposition of the governing principles of law. For this reason, the judgment of the majority tends sometimes to be rendered in rather general terms. To the legal scholar, they may sometimes appear even to be lacking in depth, for the circumstances prevent that full exposition of the law or facts which is possible with a small bench, particularly under the common law system when the personal profile of the judge is high and is not submerged.

From this factor, other problems arise, as some of the judges who are in the majority may well feel that the point of law they view as important in leading to the final result has not been sufficiently dealt with in the majority judgment. Hence arises the need for separate opinions, in which some of the majority judges clarify the reasoning and expand on the legal principles which lead them

to their eventual result. Such separate opinions are often important sources for the consideration in depth of the principles on which the judgment is based.

The drafting committee makes every effort and is given every opportunity to include these separate views in its draft but can only go a certain length in accommodating them. It therefore becomes an essential part of the process of adjudication that separate opinions will emerge after the draft has been seen. Understandably this takes time, but if the judgments are to be of the quality of excellence which is expected of the world's highest international court, there is difficulty in attempting to short-circuit these procedures.

Dissenting judges are of course free to write their dissents and, since the dissenting judge is free of the restrictions of functioning as a group, his expositions of law or fact tend to be fuller than those in the Court's collective Judgment. Quite often dissenting opinions, as in domestic systems, give a stimulus to the further development of the law.

The Magnitude of the Average Case

The cases that come before the International Court are generally of immense magnitude, not merely in regard to the issues they involve but also in respect of documentation. It is not uncommon for the stacks of documents to be three or four feet high and all of these need to be studied. For example, in the recent case between Libya and Chad the briefs provided to the judges comprised around 30 thick volumes of documents, somewhat resembling the *Encyclopedia Britannica* when assembled. These documents had been extracted from the archival records for many decades of the various powers that had an interest in the region — the British, the French, the Italian and the Ottoman — not to speak of various other records, letters, reports and maps.

The preparation of such a case by the judges, the presentation of it by the lawyers, and the deliberations thereon by the judges cannot be likened to the average case that comes before a domestic tribunal. Moreover, the task before the Court is not merely the settlement of a dispute between two parties, but the adjustment of an international dispute which may sometimes result in armed conflict. The disputes have generally festered for decades. Their resolution in a matter of a few months is not an easy task — nor is it always desirable, as haste in this sort of dispute resolution can sometimes be counter productive.

Each party must have the full satisfaction that it has been fully heard and that its positions have received the most careful consideration. The procedures thus far devised by the Court are intended to achieve just that and any gain achieved by speeding up the process may well be at a cost of unacceptability of the result — which may not be worthwhile.

The mistake is sometimes made of taking statistics of the number of cases decided by a domestic appellate court in a given period of time, and comparing them with statistics of the International Court of Justice — much to the detriment of the International Court! Such comparisons are misleading. Moreover, even with courts in domestic jurisdictions, there are special cases of great commercial or engineering complexity — or even criminal cases of great

complexity — for which domestic courts require sometimes a year or 18 months of special hearings because of the vast volume of evidence and detail involved. Most cases before the International Court may be likened to such exceptional cases, which are far from being the average sort of case dealt with by a domestic court.

Another factor to be borne in mind is that when a case comes before an appellate court, the issues have already been refined to a large extent. The matter goes to appeal only on certain special points of law and the factual issues have in the main been resolved. With the International Court there is no such prior narrowing down of issues. Law and fact are both up for consideration. The Court is not steered into a narrow adjudicatory track by all the processes of prior adjudication that have preceded the appearance of the matter before the appellate tribunal.

The Dual Role of the Judge

I speak here entirely in a personal capacity, but my view of the function of a judge of the International Court is that he or she has two functions to perform. The first is the decision of the matter in hand; the second is the development of the law, to the extent that the facts of the case permit. I am fortified in this view by the views of Judge Lauterpacht. Fitzmaurice observes of Lauterpacht:

> ...Lauterpacht was by temperament and training, and because of his long academic experience, a firm adherent of the view that a judge who only decides the case in hand only accomplishes half his real task, the other half of which is to impart judicial backing and authority to as many principles and rules of law as possible and to the way in which these should be applied to particular situations. For this reason, his judgments and opinions constitute a particularly rich mine in which to quarry for general pronouncements of law and principle.[2]

Fitzmaurice observes of this attitude of Lauterpacht that it formed part of his basic approach to the question of the nature of the judicial function in the international law field for as long as he had been writing and teaching on international law topics.

Fitzmaurice himself expresses his own view in terms that:

> the sort of bare order or finding that may suit many of the purposes of the magistrate or county court judge will by no means do for the Court of Appeal, the House of Lords or the Judicial Committee of the Privy Council and their equivalents in other countries. International tribunals at any rate have usually regarded it as an important part of their function, not only to decide, but, in deciding, to expound generally the law having a bearing on the matters decided.[3]

It will be seen then that this task of the international judge requires considerable expenditure of time and effort. Moreover, it may well be asked whether if the International Court did not discharge this function, there was any other tribunal in the world which would have the authority to do so. All this needs to be taken

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2 Fitzmaurice Sir G, *The Law and Procedure of the International Court of Justice* (1986) vol 2, p 648.

3 *Ibid.*

against the background that international law is still very much a developing discipline and that the comparatively few cases that surface before the International Court provide unmatched opportunities for such development of the law.

I would disagree therefore with views which are held in some quarters that the Court's function is merely to decide the case, and indeed, to do so with the minimum possible discussion.

Sensitive Nature of Issues Dealt With

The matters that come before the Court are of an extremely sensitive nature — disputes that have smouldered for years, if not generations. They can scarcely be disposed of in the authoritative manner in which a domestic dispute is handled. At every stage of proposal and counter-proposal, submission and counter-submission, it is a sovereign State the Court is dealing with and the Court needs always to be conscious of this fact.

While the Court is indeed engaged upon a judicial task, there are also nuances of diplomacy and conciliation in the processes that go on from the time a case is instituted until the time of final Judgment. These processes tend to accelerate particularly after the Court has made a preliminary order and sets the case down for hearing on the merits. We have had much experience of this in recent years as, for example, *Nauru v Australia*[4] or *Passage through the Great Belt.*[5] The latter was a case concerning the construction of a bridge over the Great Belt which was objected to by Finland on the ground that it would hinder Finland's ship-building industry. Both these cases were settled after preliminary orders, although, earlier, the disputes did not seem amenable to settlement. In both cases, the preliminary orders were perhaps factors that assisted in the diplomatic processes that led to the eventual settlement.

The Turnaround Time of Cases

Those not acquainted with the internal procedures of the Court may find it difficult to appreciate the extra periods of time required for a matter to be handled to completion. The comparison of the time taken in domestic courts with the time taken by the International Court is often a comparison of incomparables.

To start with, let us take the case of a simple application for provisional measures of protection. A domestic tribunal faced with an application for an injunction can make its order almost instantly after hearing the lawyers on both sides. Sitting as a domestic judge, I have not infrequently issued provisional orders within minutes of the conclusion of oral submissions — sometimes by an oral order dictated from the bench. In the International Court, however grave the matter, there needs to be a process of consultation among the fifteen, or maybe seventeen, judges who have heard the application. They have probably heard the

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4 *Certain Phosphate Lands in Nauru v Australia* ICJ Rep 1992, p 240.
5 *Passage through the Great Belt (Finland v Denmark)* ICJ Rep 1991, p 12.

matter argued in Court for two or three days and meet in deliberation immediately thereafter to exchange their preliminary views.

Owing to the urgency of such matters, the usual procedures of writing separate Notes on the basis of which there is a fuller deliberation, may be dispensed with and the judges, after their initial discussion, may feel that their views are sufficiently clear to enable a drafting committee to be appointed.

The drafting committee then goes into session and needs to look at all the precedents in the Court's jurisprudence, giving them the different alternative ways in which similar reliefs have been ordered in the past. Past procedures and formulas need to be adapted to the particularities of the matter in hand.

At this stage there will always be discussions among the members of the drafting committee in regard to possible alternative formulations and recitals, even if the relief that is to be awarded is agreed upon. Where the particular form of relief is itself not a subject of full agreement, this leads to additional discussion. The matter is complicated further by the need for the formal recitals which fortunately can be handled by the trained staff in the Registry. This is necessary because any order the Court may make has to be preceded by a fairly lengthy recital of preliminary material, which may extend to around 10 or 15 pages of text.

The completed draft, which in cases of extreme urgency, may be finalised by the drafting committee after two to three days of session, must then be translated into the other language of the Court and circulated to all the judges who will then meet in a day or two to discuss the draft.

At this stage, judges will come into the discussion who hold points of view which may be different from those of the drafting committee.

The operative parts of the draft are read paragraph by paragraph to the assembly of judges who will come in with comments ranging from minutiae to substantial matters affecting the entire tenor of the draft. These discussions could then take upwards of a full day from 10 am to 6 or 7 pm and may require more than one day. The drafting committee then assembles all the results of these discussions and incorporates them in another draft which can only be produced after a further meeting or meetings of the drafting committee.

This draft is circulated and discussed at another meeting of judges when a vote will be taken upon the reliefs proposed.

Granted the best will in the world, it will be seen that these procedures require a minimum of two to three weeks.

Comparisons between the speed of handling of such matters between domestic fora and the International Court do not take account of such procedural details as have been recounted above.

To the time taken on the procedures just described, there must of course be added the time required for the preliminaries before the hearing even begins — that is to say, the application for the grant of provisional protection and the objections thereto, along with the procedural step of fixing a date for argument which suits the States parties involved.

So much in regard to matters of special urgency.

In regard to substantive cases, the paperwork is magnified several-fold in volume and scope, and the time required is consequently similarly lengthened.

The "Note" System

I shall now deal with a case which does not call for urgent provisional measures.

After the oral hearings are concluded, the practice is for the judges to meet immediately for a short deliberation. They may then exchange their preliminary views on a totally informal basis without any commitment to the views expressed.

The judges then adjourn for the purpose of writing their "Notes". The Note is a document embodying the judges views on the facts and the law — in short, it is the judgment that the judge would write had he or she the responsibility of deciding the case alone.

Notes may vary in length from twenty to even a hundred pages. New judges are informed that they should if possible try to keep their Notes short. Around four weeks would usually be allowed the judges for the preparation of this Note. Deadlines are rigid and it is hard work preparing such a Note. The Notes, when ready, are translated into the other Court language and circulated.

Thereafter the judges meet in deliberation when the most junior judge has the privilege (or the burden) of expanding his Note to his colleagues and bearing the brunt of the friendly criticism that ensues. Each judge from the most junior to the President makes his presentation, every issue is discussed and, at the end of this very thorough process of examination, one emerges from the deliberation room with the satisfaction that the case has been turned inside out with no aspect left unconsidered.

Depending on the discussions, a drafting committee is appointed (usually three judges) and the processes are gone through which have been described earlier.

The process of writing Notes is dispensed with in cases of extreme urgency.

It is a matter for consideration whether this process of writing Notes can be continued if, for example, the work of the Court should double or treble in the years ahead. It has great advantages, not the least of which is thoroughness of preparation of every judge, for under this system no judge can "freewheel" on the views of the majority.

Staffing Problems

The United Nations is currently passing through a financial crisis and this is reflected also in the recruitment and replacement of personnel. Currently there is a freeze order which requires that the positions of staff who leave the service or retire are frozen. In the past few months, around five positions that have become vacant have been "frozen".

Situations thus arise where there is an overload of work so great that occasionally even essential documentation does not reach the judges in time. For

example, in the emergency procedures described earlier, it may be that judges have to move to a later stage of the proceedings without having in their hands a translation of the previous day's proceedings or documentation. This handicaps the judges and causes them to work under additional pressures.

Lack of Research Assistants

It may be thought in the outside world that the judges have all the professional assistance they require. Superior court judges in most domestic systems have at least one research assistant. In some jurisdictions, they have two, three and even four.

Not a single Judge of the International Court has the benefit of a research assistant. All their professional work has to be done by themselves — a practice dating back to the 1920s when the Permanent Court of International Justice began its judicial work in an era when the institution of research assistants was not a well-established feature of the judicial scene. This position continues to the present day — however anomalous and anachronistic it may seem to the outside observer. Ever so often I receive applications from young lawyers describing themselves as the best students of their year in their respective universities, who assume that the judges have research assistants, and applying for such a position. It is disheartening and somewhat embarrassing to have to inform them that no such positions exist when the judges of superior judiciaries have up to four research assistants each!

It is true the judges have competent secretaries, but even in this respect, a basic requirement that each judge should have a secretary to himself or herself is still not fully observed and some judges are still required to share secretaries with others.

The matter is complicated further by the presence of a number of *ad hoc* judges who come in from to time on separate cases. When they come in, they need secretarial help and in the absence of the necessary staff for this purpose, the secretaries serving the permanent judges must also work for the *ad hoc* judges.

The literature of the law has ramified and expanded several-fold beyond what it was in the days when the Permanent Court was set up in 1922. It is a pity that the universally recognised principle of judicial organisation which gives judges the benefit of a research assistant has not been accepted and recognised in relation to the International Court. Requests have been put up from time to time to the relevant budgetary authorities of the United Nations but have met with no response. If a judge is to concentrate on his decisional work, he needs to be spared the drudgery of the laborious physical search which is involved in researching all the available legal literature.

There is a slender but competent library staff attached to the judges' Library, but this staff has neither the time nor the opportunity to digest or summarise a matter in the manner which becomes necessary in the course of judicial work. For example, a judge may require to have before him all the literature on some particular point of law such as the avoidance of a treaty for bad faith or the

operation of doctrines of estoppel in some particular situation. He could send a Note to the library requiring references to this matter, and the result will be the arrival in the judge's chambers of a load of books, maybe forty or fifty of them, which the judge must himself personally handle, read and digest.

All this is on top of the physical task of handling the vast briefs that are part and parcel of the international judicial process. As already indicated, the brief may consist of 30 rather large volumes of documents covering a historical span of perhaps 100 years. The judge may need to satisfy himself that a particular position has not been referred to anywhere in this vast mass of documentation. If he is to make a confident statement about this in his judgment, he would need to wade through this vast mass of 30 volumes, physically handling every page himself before he can be satisfied that his proposition is sound enough to warrant its being mentioned in his judgment or opinion. This is surely work which is appropriate to a research assistant.

Again, one of the important sources of international law is "the general principles of law recognised by civilised nations".

I have observed earlier that one of the tasks of the international judge is the development of the law. One of the means of developing the law is to draw upon concepts recognised in municipal law. In order to do this, one may from time to time need a comprehensive survey of domestic law in various countries. It may be that the judge is searching for the applicability of some aspect of equitable doctrine and he needs to know what the situation is in relation to this in the major legal systems. It may be necessary for him to familiarise himself with the stand taken on this matter by the jurists in the Islamic system or in the system of Roman-Dutch law or in the legal system of the communist world. It may be necessary to check whether there is a statutory provision of a particular nature in the American legal system or whether some distinguished judge has made a pronouncement on some question of legal principle. It is impossible for the judge to be expected to research these matters himself. A bright law graduate, fresh from the university, would be the ideal person to be engaged in this sort of research, and to place before the judge a well-considered summary of the position in these different systems with necessary references to authorities.

I have stressed elsewhere that we are entering an age where comparative law assumes greater importance and the insights from the world's different cultures need to be fed into the developing process whereby international law is enriched. Who could research this for the judge more appropriately than a personal research assistant?

In short, what I am stressing here is that the work of the International Court is rightly expected to be work of special excellence. The judges of this Court, all of them lawyers with an immense fund of legal experience, are ready and willing to perform this task. They must be given the tools wherewith to turn out the product that is expected of them. If the International Court has thus far turned out a body of worthwhile jurisprudence, it has done so entirely through the industry of its judges.

Library Facilities

The Court has a truly excellent international law library. However, the library facilities of the Court have their limitations.

I speak here again in the context of the growing importance of the knowledge of various cultural and legal backgrounds which would be essential for building the Court's jurisprudence in the next century when every effort will be made to make the Court a truly international court.

In the fields of legal philosophy and comparative law the library holdings of the Court are extremely meagre. If, for example, a judge requires, as indeed has been my experience in particular cases, some reference from the literature of Buddhism or Hinduism, or some reference from the field of jurisprudence, it may well be that the library would not only not have it in stock, and would be unable to procure it for the judge for several days, if at all. I personally have had this experience in relation to many well known texts in the field of legal philosophy and once had the almost incredible experience that I could not lay my hands on Hinduism's basic text *The Bhagadvita* which I wanted very urgently for the purposes of an opinion on equity which I was preparing.

Nor does the library have the computer facilities which most well-equipped university libraries have. Efforts are being made to remedy this latter deficiency, but financial constraints are necessarily slowing down the process. Judges who have access to even a moderate university library facility have much more chance of securing the sort of literature they need than the judges at The Hague.

I draw attention in this context also to the fact that the interface areas between law and virtually every other discipline are growing. It may be therefore some authority in the field of law and technology, law and medicine, law and economics, law and religion, law and sociology, law and history, which a particular judge may be researching is needed. The material is not at hand. Cases involving the interrelationship between law and technology will come before the Court with increasing frequency in the years ahead, especially with the development of environmental law. Ready access to materials of this sort needs to be worked out.

Multicultural Nature of Future International Law

As we look towards the future of the World Court functioning in the twenty-first century, it becomes self-evident that it must function as a court which is truly a *World Court*, that is, it should be a world court in its composition as well as in its jurisprudence. The first element is dealt with in another section of this paper and I shall here concentrate on the multicultural jurisprudence which the world would expect to emanate from the International Court of Justice in the years ahead.

The jurisprudence the Court has administered thus far is jurisprudence cast in a monocultural mould. It is the jurisprudence of international law which evolved after Grotius and Westphalia in the Grotian and Westphalian mould.

At that time, European jurists put together the principles of international comity in the manner known to them from their cultural traditions, combing the whole range of available knowledge for this purpose. Grotius for example ranged over all available literature from classical times, whether literary, religious, biographical or juristic from which he culled those principles which he felt could stand on their own, on the basis of human knowledge and experience, quite apart from religious dogma and teaching. Such principles, standing independently of church authority, were felt to have the potential to commend themselves to all nations and people at a time of strong religious conflicts. Against that original corpus of principles worked out by the founding fathers, international law developed for three centuries in the West and it is that jurisprudence which the Court has been administering.

The inadequacy of such a monocultural mould is becoming increasingly evident as new issues surface which require the creation of new principles, drawing their strength from the cultural traditions of diverse civilisations across the globe. A prime example is the need for new concepts which are essential for the development of environmental law and for the principle of active co-operation among nations which will replace mere co-existence as the guiding principle of future international law. Let me illustrate my proposition.

Traditions relating to land drawn from across the world can enrich the evolving international law of the environment. This can be illustrated by numerous examples and I shall start with an item of evidence that came to my notice when I was chairing the Nauru Commission. We were then examining traditional attitudes towards land in Pacific societies, in the context of the Nauruans' deep attachment to their land. One of the items that attracted our attention was a statement of a witness before the first Land Commission in the British Solomon Islands (1919–1924), who told the Commission that "his land was not like the land of the white man in that it had a name only and did not have four sides like a box".[6] In other words, there was a certain sanctity attaching to land which distinguished it from mere articles of merchandise which could be bought and sold in the marketplace. Consequently, it had to be treated with greater respect than a mere chattel which its owner could damage or destroy at his will.

When spending a short time at the University of Papua New Guinea as a Visiting Professor, I noticed that there were pockets of undeveloped land in the heart of Port Moresby. Their owners were families or tribes who wished to preserve them in their pristine state and resisted attractive offers made to them for their sale for purposes of development. When I was in the common room of the Law Faculty one day, a young lecturer who belonged to one of those families was questioned by someone on the basis that having regard to the escalating land values in the city, he was sitting on a gold mine and had he not thought of selling his ancestral land? The questioner received a tirade from the

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6 See Weeramantry CG, *Nauru: Environmental Damage under International Trusteeship* (1992).

young lecturer who said, "This land came to me from my forebears and belongs to my descendants. How dare you suggest that I can sell it?".

Similar ideas prevail in African society where the land is considered as an object to be treated with respect, if not reverence. Some cultures among Amerindian society have the strongly ingrained belief that before a decision is taken regarding land, the decision-makers must consider the interests of seven generations to come. Islamic law likewise has the notion that land cannot be absolutely owned, but is only held in trust by the owner who must tend it for the benefit of future generations as a good trustee would, for all land belongs to God.

Principles ingrained in cultures such as this can strongly reinforce modern environmental law which seeks to prevent the despoiling of land and its impairment for generations to come. As increasing demands and population force upon the world the realisation that land, the seas, the rivers and the atmosphere constitute a very delicate network of life support systems for all inhabitants of the planet, the wisdom of these many cultures can strengthen environmental law on its way to being an instrument of greater utility for the times and generations ahead of us.

This is only one example. Many more could be cited. The literature and traditions of other cultures are rich in such concepts as humanitarian laws of war, respect due to foreign representatives, the sanctity of treaties, the dignity of the human person and the whole range of concepts which are classed as economic and social rights. What has happened unfortunately is that there has not been any input from these cultures into the law the Court administers. The deep insights of Hinduism, Buddhism and Confucian tradition, to mention some, have never been fed into the corpus of principles of modern international law.

From my own part of the world, I could instance the literature of Buddhism and Hinduism which is a vast encyclopedia of moral teachings, having a bearing on some of the basic principles of international law. These have never been culled for their possible input into international law. No Grotius has combed them to extract from them the many ways in which they could reinforce existing principles of international law, build new principles and otherwise reinforce the universality of international law. You could delve in vain through all the reports of the International Court and its predecessor, the Permanent Court, for references to any of these and you would scarcely find a single mention.

The world of the future will expect more than this from the World Court of the future and this is an area which in my view urgently needs attention.

Multicultural Composition of the Court

This discussion leads naturally to the importance of a truly multicultural court. The Permanent Court and the present Court have both, despite all efforts made to achieve this, lacked the quality of being truly representative of the cultures of the global community.

It is significant that in the discussions of the Root-Philimore committee which led to the drafting of the Statute of the Permanent Court (which Statute

was substantially taken over for the present Court), the original proposal was that the judges of the Court should be representative of the principal legal systems of the world.

Mr Adatci, the only Asian member of that Committee, strongly drew the attention of the Committee to the need to provide representation also for the world's cultural traditions. Representation of the world's principal legal systems would mean, basically, representation of the common law and the civil law, the two dominant legal systems in the world and perhaps some representation of Islamic law. All other systems would be excluded. Mr Adatci insisted the world's *cultural* traditions should necessarily be represented on the Court, despite the fact that there may not have been modern *legal systems* based upon them. Japan for example, had a culture of thousands of years, but had only commenced its relationship with the West in the past seventy years or so, and had a legal system based upon the civil law model. Owing to Mr Adatci's insistence, the clause relating to the selection of judges reflected the need not merely for the representation of the principal legal systems but also for representation of the "main forms of civilisation".

To what extent has this been achieved? The composition of the Court today is as follows: Europe 6, North America 1, South and Central America 2, Africa 3, Asia 3.

The disproportion between Europe and Asia will be seen at once despite the much smaller population of Europe and the rich cultural tradition of Asia.

Speaking as one of the Asian members of the Court, I could say this — that apart from China and Japan who are invariably represented on the Court there is only one representative for the entirety of the other forty or so countries of Asia which have a population of around two billion. The Pacific also is included in the Asian block, while Australia and New Zealand are considered to fall in the category of "Europe and other".

All this is anachronistic and inadequate. The Pacific has a vitality and a culture of its own. Asia has more to contribute than it can while being represented with half the strength of Europe.

Moreover, there is a tradition that has evolved of the Court being a mirror image of the Security Council, in the sense that the five permanent members of the Security Council are considered entitled each to a seat on the Court. How long this tradition will continue to be accepted is an important question for the future. The Security Council is a political organ and the Court a judicial organ, and considerations appropriate to the one are not necessarily appropriate to the other.

In this regard, it is to be observed that the tradition referred to is one which is only a tradition and is not written into the UN Charter or the Statute of the Court, so that no alteration of those instruments is required for an alteration of the practice.

The one Asian representative, representing the vast range of countries already mentioned, must under the current dispensation, reflect, on the Court, the cultures and traditions of that wide and disparate range of nations that

comprises the Middle East, the subcontinental region, the South-East Asian region and the Pacific. Each of these is a cultural universe in itself and one may be forgiven for thinking that the present representation is totally inadequate having regard to the richness and diversity of these cultural traditions.

Lack of Enforcement Power

It is often said, sometimes in criticism of the Court, that it has no power to enforce its decisions and therefore lacks even the authority of a domestic court.

Lack of enforcement authority is inherent in the composition of a global tribunal, for no world tribunal can match the armed force available to the more powerful member States. Almost by definition, therefore, a global tribunal relies for its strength not upon force, but upon the moral authority of the tribunal and of the body of jurisprudence which it administers. This was visualised from the very foundation of the Permanent Court of International Justice and for this reason the provision was built into its constitution that its jurisdiction depended upon the consent of States.

States' consent to the jurisdiction of the Court by an instrument, be it a compromise or a treaty, is bound up with the principle of the sanctity of treaties. *Pacta sunt servanda* is a basic principle of international law and no State likes to be seen in the guise of a treaty-breaker. Consequently there is much binding force attaching to a judgment which the parties before it have undertaken by treaty to accept and respect.

Even more than this, there is also the respect which the Court commands by virtue of having functioned now, if we include the period of the Permanent Court, for nearly three quarters of a century. The idea of international adjudication was a new and untested idea when the Permanent Court began its work in 1922. The Permanent Court, by its intense professionalism and the dignity and competence of its members, earned for itself a niche in international judicial dispute resolution by proving that the philosophical idea of an international court could actually work in the hard world of practical affairs. The International Court has kept up that tradition, and the concept of international adjudication is now a well tested and well accepted idea. Consequently, the decisions of this Court automatically receive respect and command moral authority.

Moreover, the Court has over the years built up a substantial and respected volume of jurisprudence. Many areas of international law have been fertilised by it. Indeed some major branches of this discipline are today built around the judgments of the Court. To mention two examples, the law of treaties and the law of the sea, as they presently exist, derive their basic structure and principles from some outstanding decisions of the Court.

There are thus three claims to respect which can be singled out as assuring to a large extent a general compliance with the judgments of the Court — the principle of *pacta sunt servanda*, the moral authority of the Court and the authority of a well respected body of jurisprudence. However the world may develop in the next century, the authority of the Court will have to continue to

depend principally on these. The precedents set by the Permanent Court and this Court are happy auguries for the future and the successors to the present Court have a firm foundation on which to build an even more impressive superstructure of international justice in the years ahead.

The Institution of *ad hoc* Judges

Questions are sometimes raised as to whether the institution of *ad hoc* judges serves a real purpose. *Ad hoc* judges are the nominees of parties to litigation who do not already have a person of their nationality as a judge of the Court. They are appointed with the consent of the Court. Do *ad hoc* judges by reason of their appointment by a party to the litigation lose some of the objectivity that is expected of a judge?

Ad hoc judges have always acted with great dignity and judicial poise. It is true their voting record has been overwhelmingly in favour of the countries appointing them, but this does not necessarily mean that there is a lack of judicial approach to the problems before the Court. My personal reaction to the institution of *ad hoc* judges is that they provide a useful corrective to the tendency of the legal mind to proceed from logical proposition to logical proposition by a process which sometimes takes it away from practical realities. Fifteen judges deciding upon a question of law relating to Peru or Mongolia, conditions in which are totally unfamiliar to them, may by a strictly logical process arrive at a conclusion which is imposing in logic but totally impractical in reality. Not aware of the realities of conditions on the ground, they may produce a result which anyone familiar with the totally different conditions that prevail on the spot may see as too far remote from reality to be acceptable. The *ad hoc* judge with knowledge of these conditions can always bring the Court back to reality, advising his colleagues of matters which otherwise may be quite unknown to them. I have always valued the input into our discussions of the *ad hoc* judges and I personally would not be in favour of proposals that have been made from time to time of doing away with the institution or of distinguishing them by some such title such as "Judge Advocate".

The Rules of the Court

The Rules of the Court have been revised periodically and even currently the Rules Committee is examining the prevailing set of Rules. External observers tend sometimes to want to prescribe procedural rules for the Court which do not quite take into account the special problems encountered in the International Court. They tend to suggest rules which are born out the experience of domestic courts. These may not be entirely suitable because in the International Court the judges come from varied cultural backgrounds, with a training in different legal systems and procedures. The rules adopted in one procedural system may suit some judges and may not suit others.

To give a specific instance, at a recent conference on the Court, held by a concerned and experienced body of international lawyers, a suggestion was made that the issues in a case should be worked out by the judges before they

commenced the hearing of a case. The thought behind this suggestion was that such a formulation of the issues would have the advantage of focusing the judges' attention upon the essentials. Such proposals lose sight of many factors among which are the impossibility, in a case of vast dimensions, of pinpointing the issues at such an early stage before the judges have had the advantage of a presentation of the case by counsel. All too often one learns, after a case has opened, of new perspectives, new problems and new approaches which are brought home to the judge only after the hearing and which then cause his attention to be focused on aspects of the case which he might have deemed unimportant before. My experience of working a few years on the Court has shown me how dangerous it is to try to summarise the essentials of a case at too early a stage in the proceedings.

Furthermore, with this wide variety in judicial backgrounds and legal systems, it is dangerous to carry too far the concept of standardising judicial methods. Different judges have different ways of approaching a judicial problem and they do so in the manner with which they are most familiar during their lifetime of legal experience. It can be dangerous to introduce stereotyped methods against such a rich background of legal diversity.

Preliminary Jurisdictional Issues

The International Court does not of course have a general jurisdiction in the manner of a domestic court. Its jurisdiction rests on consent and the interpretations of the exact terms of consent can be a prolific source of argument.

It is therefore quite common for the Court to receive preliminary objections to its jurisdiction, which have to be dealt with at a stage anterior to the consideration of the merits. The frequency with which these objections are received and the time that must be spent on the pleadings for the jurisdictional stage alone are a further factor to be borne in mind in making comparisons with domestic courts where jurisdictional issues are much more infrequent.

Jurisdictional problems also result in delay. Objections need to be filed and dates given for responses to the objections. Dates convenient to the parties must then be found and the issue argued. All the processes outlined earlier need to be gone through, and the time required for what appears to be one case may, for all practical purposes, be doubled.

Domestic courts are not usually faced with this problem, except in a very small percentage of cases, if at all.

The Fact that Parties appearing before the Court are Sovereign States

In contentious litigation, the parties before the Court are sovereign States and cannot be treated in the same way as litigants are treated in a domestic court where they are all subjects of State authority appearing before a State authority.

Various aspects of procedural difference result from this, when compared with a domestic court.

While it is true that these States are litigants, the whole operation of the Court proceeding has about it some of the old world flavour of the world of diplomacy. Diplomatic courtesies pervade the proceedings, and are evident in the relationships between counsel *inter se* and between counsel and the bench.

One does not have, for example, the situation of counsel being taken up by the bench on an argument and being questioned searchingly upon it to test whether it can stand analytical scrutiny. One does not have the situation familiar in a domestic court of counsel being gently taken to task for inadequacies in preparation and presentation of an argument. Never does one see a sign of impatience on the part of the Court with counsel who unnecessarily belabour a point.

Likewise, counsel exude courtesy towards their opponents and the bench. It is a charming old-world atmosphere that takes one back in spirit to the gilded halls of diplomacy in an earlier age.

The practice in regard to questioning from the bench is that a judge desirous of asking a question must first clear it with his colleagues at the judicial meeting that immediately precedes each public session. While it is acknowledged to be the right of each judge to ask such questions as he may desire, the heavy tradition of the Court is that questions are asked only after consultation with one's colleagues. Rarely, if ever, are they spontaneously asked from the bench in the thrust and counter-thrust of discussions so familiar in a domestic court. Colleagues often point out inadequacies in the question or its object, and not infrequently the intending questioner modifies his question or sometimes even drops it.

The questions when decided upon are typed and read out from the bench by the judge concerned at the conclusion of a party's argument. Counsel are given time to reply in writing, on the basis that this is a question asked of a sovereign State whose special instructions might be necessary on the particular subject-matter of the question.

Yet the analytical tools and the customary machinery of the judicial process are in full operation. Propositions must be dissected and analysed, facts subjected to searching scrutiny, documents perused for inconsistencies, jurisprudence analysed for precedents, juristic writing combed for new developments and fresh analyses.

The free questioning of counsel would be an aid to all these processes. In the absence of such questioning, the burden on the bench is increased.

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These are a few aspects of the practical working of the Court. All this is part of the intense re-examination now taking place of every aspect of the functioning of the Court, in this memorable year of its golden jubilee.