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The International Court of Justice and some contemporary problems

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Introduction

This book groups together recent studies of some of the most significant features of contemporary public international law. It straddles some five differing aspects of the *living* law of the United Nations. Although written on diverse occasions and for different purposes, they are nevertheless animated by the common ideal of analysing and synthesising current issues with which the International Court of Justice, the United Nations Organization itself and related law-making organs and institutions have been grappling in the last five years or so. The treatment of the subjects with which they deal and the manner of their orientation naturally differ both in scope and in depth of analysing, depending upon the particular aspects of international law under consideration. They open up not only new horizons but also, as one of its chapters indicates, new conceptions and perspectives in current international law. Old topics are re-examined from new angles, some new topics are studied in such a way as to relate them to their customary roots and pristine significance in legal thought.

There are five main parts. The first and inevitably the longest division deals with the international judicial process in nearly all its modern ramifications as exemplified in the work of the Court. The first study deals with problems of method associated with the internal judicial practice of the Court from the moment the public hearings have been completed up to the delivery of the judgment; in other words, how the Court judges a case. The organization of the discussions of the various aspects of the case in the Deliberations Room, the submission of Judges' opinions based upon the 'List of Issues' for determination provisionally circulated by the President, the appointing of a drafting committee to draw up a preliminary draft Judgment, followed by a first and a second reading of the

Judgment, and, finally, the adoption of the text of the Judgment. There follows a discussion of some of the problems relating to issues of admissibility of a case, as well as jurisdictional problems including questions of competence of the Court to accept to deal with a particular case and also other incidental questions such as intervention and provisional measures of protection, ending up with the difficult issues connected with the rendering of an advisory opinion. It is therefore clear that there are methodological problems with which the Court is often faced in its application of international law to particular cases. Where there are 15 Judges from as many different legal systems having to adjudicate upon disputes brought before it, there is bound to be the initial problem of which law to apply; but this has been solved by the provision of Article 38 of the Statute of the Court which lays down the applicable rules.

The next chapter is concerned with the phenomenon of the non-appearing respondent in a case brought to the Court by the application of one party, the complainant, where the other party either does not accept the jurisdiction of the Court or refuses to enter into a *compromis* with the other party in bringing the case. Since the Court's jurisdiction is based upon the consent of parties, the applicant may be willing to bring its complaint to the Court, but the other party cannot be compelled to appear. In order, however, that the applicant's case may not be stultified by the refusal of the defending party, the Statute of the Court provides, in Article 53, for the applicant to bring its complaints, provided that the Court, before answering a call to enter into any determination of the applicant's claim, must satisfy itself that it has jurisdiction as otherwise provided by the Statute, and also that the claim is well founded in fact and law. The fact remains, nevertheless, that the non-appearing respondent in such a case throws a burden upon the Court in ascertaining the dispute issues dividing the parties in the absence of the open confrontation which a contentious case necessarily makes available in the resolution of the conflict between the parties. A number of recent cases are then examined to illustrate the role which the Court has been compelled to play, often *proprio motu*, in fulfilling what it has found necessary if it is to satisfy its truly judicial character. It is, therefore, clear that the Court is at its best in discharging its functions when it secures the presence of both parties to a case before it, rather than when it finds itself compelled to assist a

non-appearing respondent who is not available to argue its own case.

Another recent phenomenon in the jurisdictional process of the Court has been the insistence of the resort to interim measures by parties to cases coming before the Court since 1970. Chapter 3 is therefore devoted to examining the circumstances which have led to the growing intensification of the judicial process necessitating the recent use of interim measures as a result of parties asking the Court to grant them provisional measures of protection pending the actual disposal of the cases themselves; thus the parties appear to be behaving more and more like their counterparts before municipal courts, in respect of applications for injunctions as a preliminary means of seeking redress. Notice is also taken of the changes made in the procedures by the new Rules of Court adopted in 1978 in response to the new demands. It is important to observe that one of the most crucial problems facing the Court as to whether to grant or not to grant an application requesting an indication of interim measures is to determine the factors upon which it should act in a particular case before it. It is, for example, necessary for the Court to satisfy itself that it has the necessary jurisdiction to entertain the merits of the application presented to it, and it must ensure that the measures it is to indicate will preserve the respective rights of either party and maintain, as far as possible, the *status quo ante*. In any case the Court must not indicate provisional measures if the application before it relates not to interim *protection* but to what would amount to an interim *judgment* in favour of parts or the whole of the claim formulated in the request.

In the fourth chapter is examined the question regarding the limits of the right of intervention in a case pending before the Court, a problem with which the Court had only once been faced, in the *Asylum* case in 1950, but which recently recurred in 1981 in the *Tunisia/Libya* case. The question is to determine the circumstances in which, when there is a case between two States before the Court, a third State proposes to intervene in order to protect an alleged interest of a legal nature likely to be affected by the decision in the case. The State which wishes to intervene may submit a request to the Court to be permitted to intervene and it is for the Court to decide upon such request. Another occasion for a State to seek to intervene in a case between two other States is when the construction of a treaty or convention is in question

which affects not only the two parties to the case but other States as well. But the intervening State, if allowed to do so, will be regarded as equally bound by the construction given to the convention or treaty by the judgment in the case between the two litigating parties. What generally gives trouble is to determine what interest of the intervenor is to be regarded as "interest of a legal nature," but this is not a difficult issue that has to be determined where it is only an international convention that is involved.

Aside from the issue of legality or otherwise of the detonation of nuclear devices in current international practice, the application brought to the Court by Australia and New Zealand against France brings into sharp focus two major issues of general international law: the binding nature and effects of unilateral declarations of States and States' representatives in respect of public activities, and the question when a dispute before the Court could be regarded as spent or become "moot" as a result of one of the parties publicly declaring a change of its position regarding the subject matter of the dispute. The bone of contention in this particular case is that it calls into question whether a State's unilateral declaration, made outside the Court proceedings and not as the subject matter of official communications between the two States to the case, could be regarded as valid and acceptable in deciding the matter in dispute before the Court. In Chapter 5 this whole problem is agitated with a view to bringing the two major legal issues into their proper perspective.

The subject matter of the study in Chapter 6 arises out of the universalization of international law as enshrined in the doctrine of intertemporal law, sometimes regarded as an inchoate rule of customary international law, sometimes as theory and at other times as a principle or doctrine of intertemporal law. It is sometimes regarded in one sense as one of substantive rule of law and in another sense as a rule of interpretation. At one stage of its development it was incorrectly regarded as confined to the acquisition of territory, especially as regards the establishment of dominion sovereignty over territory. Judge Huber has, however, dispelled that notion and established the fact that the doctrine is a practice in customary international law, including the general law of treaties. Judge Huber's formulation of the doctrine, in the *Island of Palmas Arbitration*, is as follows:

> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the

so-called intertemporal law) a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestation, shall follow the conditions required by the evolution of law.

The controversy was recently brought to the surface in the *Aegean Sea Continental Shelf* case between Greece and Turkey regarding the determination of the respective continental shelf rights claims between Greece and Turkey, in respect of the islands in the Aegean Sea. The issue that was much in controversy was the true meaning and scope of the term "territorial status" as used in the General Act of Pacific Settlement of International Disputes, 1928 and the treaties concluded between the two contending States in 1931. The principle question, therefore, was whether the term "territorial status" must be regarded as having one consistent meaning between at least 1928 and 1978, when the Court was asked by Greece to be seized of the matter. The treatment of the doctrine by the International Law Commission in dealing with formulation of the principle of the non-retroactivity of treaties in Article 24 of its 1966 draft, shows some of the difficulties that will surround the controversy as to whether it is a rule of law or one of interpretation only. Whatever happens, the intertemporal law seems to have been designed to govern a situation in which the need for stability in international relations of States is to be preserved while at the same time due recognition is given to the necessity for change in the evolution of those relations and of the law regulating them.

Finally, in Chapter 7 is discussed that which has emerged as new perspectives and conceptions in contemporary public international law. Under these headings have been subsumed a summary of recent problems in the field of human rights and in diplomatic law, culminating in a recent case, *United States Diplomatic and Consular Staff in Tehran*. The Third United Nations Conference on the Law of the Sea inevitably receives a somewhat detailed consideration of the latest developments, on account of its contemporary relevance. One of the inevitable aftermaths of the process of decolonization, in which the United Nations has been engaged for the past 30 years or so, has been the occurrence of wars of national liberation, particularly in Asia and Africa, and the revision of the four Geneva Conventions to take account of the problem of those wars, including the emergence of mercenaries.

Humanitarian law is now a subject of current discussion and revaluation. Also included in this survey, under this heading, has been a consideration of the legal aspects of the New International Economic Order which has held the attention of the international legal community in the past decade or so, but dealt with only in outline, as the subject is taken up again in Part III of the present study.

Part II continues to develop further certain changes occurring in the current judicial process in the field of both principle and doctrine. The principle of international law laid down in the *Parliament Belge* whereby State commercial and trading activities enjoy immunity from State jurisdiction has in recent years been eroded so as to make foreign States more and more liable in local municipal courts. This development has taken place as a result of State practice which has been supported by municipal legislation in the United Kingdom, Federal Republic of Germany and the United States of America within the last thirty to forty years. The old rule of international law of absolute State immunity from local jurisdiction in respect of foreign trading transactions has largely given place to a new one of relative immunity because modern States have embarked upon increasingly larger trading activities in a manner rendering States scarcely distinguishable from other non-State entities which are normally so liable. The fact that there has so far been no case before the International Court of Justice nor probably even before an arbitration tribunal, is some evidence that the new trend has become a rule of customary international law. The prevalence of the new widely accepted practice has been demonstrated in Chapter 8.

This new trend in international transactions is also underlined by the noticeable shift in emphasis from political to economic affairs in international relations. With the task of decolonization nearing its end, the United Nations Organization has ushered in an era of economic and social development especially in the Third World. While it is true that the Economic and Social Council has from the outset been included among the five principal organs of the United Nations, it is only since the 1960s that it has taken on new and significant dimensions in the contemporary international relations of States. The six principles of the Declaration on Friendly Relations and Cooperation among States, the Convention on the Rights and Duties of States and the current New International Economic Order programme all serve to give a new complexion

to the evaluation of international characteristics. An attempt has been made in Chapter 9 to delineate the task as well as the role of international organizations in the economic field. The crucial role of the Specialized Agencies as organs of development and social change are well brought out. Whereas the League Convenant contained no more than two provisions dealing with economic issues of any great significance, the United Nations Charter is replete with provisions for economic cooperation and development. The International Labour Organisation, the UNESCO, the World Health Organization, the Food and Agriculture Organization, to name only the most well-known, all perform functions not only in the economic and scientific fields but also in the legal field. Their workings are intertwined within the judicial process of the Court at a number of points mentioned in other parts of the present study.

In Chapter 10 we return to the problem posed for law by the emergence of the new States. Decolonization has produced not only proliferation of economic activities and their attendant problems but also proliferation of methods of law-making to govern the new situations. Already, there has been enough scepticism about the General Assembly and Security Council resolutions and declarations as types of "legislation." They are stigmatised as "soft law," whatever their origin or provenance. With respect to conventions drafted by the International Law Commission that have been adopted, there is still noticeable reluctance on the part of States to ratify them. Not all the rules that need to be made can be made in this way, and so ancillary rule-making bodies like UNCITRAL and UNCTAD have been brought into being to supplement the International Law Commission's work. There are also certain learned international institutions that traditionally serve as sources of law-making, albeit on a very limited scale and in somewhat indirect ways; their contribution is mainly in the sphere of emergence of new norms of customary international law: such bodies are the International Law Association, the Institut de Droit International and the Hague Academy of International Law. Perhaps the one mode of international rule-making that has provoked a good deal of controversy among the experts is law-making by consensus, which is not necessarily achieved by bodies composed only of lawyers or indeed by counting heads through a vote The current Third United Nations Conference on the Law of the Sea is the most frequently cited example. The work of the

Court in the future judicial process of interpretation and application of the various texts adopted by this procedure does not promise to be an exciting one.

The Legal Aspects of the New International Economic Order are examined briefly in Part III. These problems are an emanation from, and indeed a culmination of, the consideration of the economic and social shifts observable in the United Nations work programme in the last twenty years or so. The United Nations took the initiative of establishing a study group charged with the responsibility of charting a course for the formulation of a meaningful programme for the reconstruction of a new international economic order. The workings of bodies like GATT and UNCTAD, the rise of the so-called Group of 77 and the upsurge of the North-South Dialogue prompted the idea that the old economic arrangements between the rich and the poor, between the old and new States are in dire need of reorientation and readjustment in order to meet present-day requirements of the international community.

In this milieu, the well-known Brandt Report must loom large in any serious consideration of the subject, since it not only puts forward a meaningful programme of action which takes stock of the immediately preceding decades of international economic relations but also what may be practicable in the forseeable future. It is far from being a perfect programme of action; it is, however, pragmatic enough to be given a trial. The implications of the Report lead to a reflection on the place of human rights in the whole economic historical perspective. It is a sobering thought.

There is, accordingly, an understandable return to human rights and diplomatic law problems in Part IV. This is because the whole of the international community has been greatly preoccupied with both issues in recent years on account of the *Iran/United States* case On the one hand, it was the first time that the Court had the opportunity to apply and interpret the Vienna Convention on Diplomatic Relations of 1961, and the Vienna Convention on Consular Relations of 1963, in dealing with the fifty-one American diplomats and United States Embassy staff taken and kept as hostages by Iran. On the other hand, the more than four months in which the hostages were kept in captivity, under inhuman conditions and many of them mistreated while so kept, inevitably raised the issue of fundamental human rights and freedom of the hostages themselves and generally in regard to United Nations

concerns in this field. The trilogy of the Universal Declaration of Human Rights, the Convention on Political Rights and the Convention on Economic and Social Rights calls for a re-examination of the broad issues of human rights and the implementation of the legislative programme fashioned by the United Nations itself over a period of over twenty years of constant endeavour. Chapter 13 also takes account of the problems concerning certain prerequisites for promulgating and implementing human rights machinery on a regional basis throughout the world, including Africa. In Chapter 14 the opportunity is taken to analyse the provisions of the two Vienna conventions on diplomatic law, privileges and immunities generally, as well as their relation to the special case of the United States diplomats and citizens involved in the hostage issue.

In this final part V is a consideration of the judicial process of the Court in so far as Africa is concerned. Although two modern *causes célèbres* afford the real occasion for the whole portion – namely the *South-West Africa* case of 1966 and the *Namibia* case of 1971 – the opportunity has nevertheless been taken to attempt a fairly rapid survey of all the cases in which Africa has appeared before the Court in one capacity or another. The treatment is in three divisions: the era of Protectorates (covering Tunisia and Morocco), colonies and capitulations (mainly in Egypt); the era of decolonization, covering mainly South-West Africa; the disappearance of the Mandate and Trusteeship systems, covering the Cameroons, Nigeria and Namibia. What is of great interest are the crucial tests to which the judicial process of the Court has been put, particularly in the 1966 Judgment, on the issue of the *locus standi* of Ethiopia and Liberia, and in the 1971 Advisory Opinion on Namibia, as regards the question of the validity of the resolutions of the General Assembly and the Security Council. *Namibia*, it may be properly said, has assuaged the frayed feelings in many quarters over *South-West Africa*. It is interesting to note the perceptive analysis of the whole question made by Schwarzenberger in his "The Judicial Corps of the International Court of Justice" in the *Yearbook of World Affairs 1982*, pp. 261–265.

Indeed, the Court has on the whole followed the narrow path of judicial restraint and probity in dealing with delicate issues of law and justice in the series of decisions and opinions it has handed down since 1966. The possible exception has, of course, been the *Nuclear Tests* cases in which the Court would seem, to many eyes, to have somewhat over-stretched the limits of hitherto acceptable