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REFLECTIONS FROM THE INTERNATIONAL COURT

HE President Rosalyn Higgins

I have been asked to offer a short prefatory reflection on the role and responsibility of a Judge of the International Court of Justice in the contemporary international legal system.

There are aspects that seem to me both broad and narrow. To take the broader issues first: I am sympathetic to the current trend of thinking that no international actors are immune from scrutiny. It is only natural there should be public interest in their independence from national or other pressures, and in the absence of any possible conflict of interest. The maintenance of these standards, which both the legal profession and the informed public are entitled to expect, requires the active support of the presidents of international courts and tribunals. The maintenance of these standards within a court, and the visible manifestation of this commitment, is part of the job-description of judicial leadership.

That being said, I do not believe that a Judge of the International Court is in any more narrow sense 'responsible to' any other organ or international actor. The International Court is a main organ of the United Nations. Each year it presents a written report to the United Nations on its work. And in recent years the practice has grown whereby the President addresses the General Assembly and its Sixth Committee (and perhaps even the Security Council). But the Court is not 'responsible to' any of those bodies in the sense that its role is to please or 'satisfy' them. The Court is not 'answerable' to them if its legal decision is not the pronouncement that they might have hoped for on any particular occasion. And indeed, that is well understood by all concerned. The General Assembly is interested in, and generally appreciative of, the work that the Court reports to it. But members of that body—and certainly the Assembly as such—carefully refrain from observations on the Court's findings in particular cases.

Certainly the international judge is not 'responsible to' the particular States appearing before him/her. It is totally inappropriate for a State to assume, still less to say, that a particular Judge's vote in a case was due to his or her nationality (or race, or religion). Only those present in the Deliberation Chamber can know what views were held, by whom, and on what grounds. In fact, the dynamics of the legal exchanges between the Judges of the International Court in no way reflect tired stereotypes. Assumptions based on such ideas would be surprisingly wide of the mark.

Even if a Judge of the International Court is not 'responsible to' any particular organ of the United Nations, or any government, the very fact of being elected to this high office does carry with it enormous responsibilities. What does this mean in practical terms? It means the responsibility to work at maximum capacity, to continue systematically to read the literature in the field, to study the pleadings meticulously, to

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make every effort to see arguments from all points of view, and to make up one's mind only after reading everything, listening to everything, and considering the viewpoints of others.

In my view, this generalized responsibility of the Judge also puts an emphasis on collegiality. I do not believe that Court Judgments are 'weakened' by separate or dissenting opinions. A Judgment is as good or as bad as the reasoning it relies on. A poor Judgment will be no more persuasive by virtue of unanimity. That being said, the first task of the Judge is to contribute to the common enterprise of the Court. Ideas should be shared, suggestions made in timely fashion. The main priority is to contribute to an impressive and authoritative Judgment. There is necessarily some measure of give and take required. But in a successful Court this is in no way synonymous with Judgments that are merely the lowest common denominator of the views of the various Judges.

A judge is not an academic and judicial opinions should not be academic articles. They should, in my view, be resorted to only exceptionally, in respect of points of real importance for the particular case at hand; and should not go beyond that either as regards frequency or as regards the subject matter traversed.

Of course, the Courts as such, and not only the Judges who comprise them, bear this generalized responsibility to the international community too. This requires that all Judgments are fully reasoned and that all arguments of the parties that could affect the outcome are properly addressed or answered. There are sometimes grounds for judicial economy but this concept cannot excuse an absence of reasoning nor can it provide grounds for avoiding issues simply because they are hard to resolve. (And no more can solace in the face of difficulty be sought in invocation of a '*non liquet*'). A Court's job is precisely to decide difficult, and often sensitive, points of law.

Courts must also constantly strive to maintain that difficult line between the maintenance of the highest quality judgments and the achievement of an efficient throughput of work. This has been a high priority for the International Court of Justice. The last fifteen years have seen an enormous growth in its docket. Mindful of the need to be responsive to the trust placed in it by States engaged in litigation, the Court now has its work methods under more or less constant review. The heavy docket means there is no longer the luxury periodically to review, at leisure, the entirety of the Rules of Procedure, simply as an exercise that should be engaged in from time-to-time. Instead, the Court has moved to a practice of entrusting its Rules Committee with a 'watching brief' on particular Rules that are proving problematic in the practice of the Court, and making proposals for their amendment. Revisions of Rules 79–80 are resulting examples. Other Rules are under review.

Other changes in the Court's methods of work have also been reported to the General Assembly. They include no longer generally having recourse to Judges' Notes in Preliminary Objection cases and the introduction of Practice Directions.

The International Court of Justice is the Court of the entire United Nations. While the Judges are elected in their personal capacities, they must through their work serve the entire international community, and not any one particular region or legal system. It follows that the work-model within the Court must be collegial, involving everyone, and not delegated to particular Juges-Rapporteurs. This involvement of the entire Bench in every phase of all Court Judgments is, of course, time consuming. Even though judicial efficiency is of great importance, it is perhaps of even greater

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importance for States to be confident that all Judges have listened to and thought about their arguments, and have fully participated in the Judgment ultimately rendered. A not inconsiderable side-benefit is that Judgments are normally very detailed and thorough, with the points in issue fully canvassed.

How one regards the role and significance of international law today can be answered either at the level of philosophy or pragmatic observation. In this very brief prefatory comment I can do no more than offer a personal outline-sketch. I have elaborated elsewhere why I regard international law as a special and stylized system of decision-making, rather than as a purportedly mechanistic application of 'rules'. This particular perception of international law has the virtue that it makes clear where these so-called 'rules' (or applicable norms) come from, who is purporting to apply them, and in what factual context. It also makes it explicit that international law is a vehicle for the attainment of certain values—which values in turn must be open to scrutiny and debate.

I find it hugely pleasing that legal theory is no longer unfashionable. In the last twenty years there has been a tremendous debate about the nature of international law, engaged in by protagonists whose work challenges us intellectually at every turn. There is no longer a rigid division between 'the theoreticians' and 'the practitioners'. Indeed, some of the leading theoreticians have had distinguished careers as practitioners.

I find it equally pleasing that national Courts everywhere now routinely engage in issues of international law. They, too, have come to recognize that it is not an arcane and mysterious subject, upon which only 'others' should pronounce, but is simply part of the law of the land. Without minimizing the difficulties that flow from the diverse ways in which treaty law is received into national law, this new phenomenon of engagement by domestic Courts is visible everywhere. The impact upon our daily lives of the decisions of international organizations, the renewed importance of the United Nations, and the open embrace of the values of human rights, have all contributed to this welcome trend.

Whether one regards international law as 'rules that restrain', or as 'a common language', or as a 'normative guidance in the making of decisions', it is clear that it has a significant role to play in today's contemporary problems. That being said, there are several points to be made. First, the judicial element in that role should not be exaggerated. There has been an explosion of international litigation and arbitration—but this is a reflection of an improved international climate, and not the cause of it. Secondly, the invocation and use of law has its place in diplomatic discourse and negotiation, both procedurally and substantively: it is not reserved to litigation. Thirdly, the role that international law can play in the resolution of the fearful problems of the day *does* depend, to a degree, on how one views this creature 'international law'. A disembodied set of rules may be functionally ill-suited to respond to the problems of applying 'law' to entirely novel circumstances. The function of international law is to find that fine balance between legal expectations generated by the experiences of the past and the solving of problems as they present themselves today.

We should not underestimate the difficulties. They have been particularly evident as we struggle with notions of self-defence, reprisals, terrorism, non-State actors and all the new realities of our troubled world. The Charter is a living instrument: but where

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is the end of creative interpretation and where is the beginning of illegality? Is the legal stairway from Article 43 of the Charter to 'peace-keeping' to 'peace enforcement' to 'coalitions of the willing' an infinitely extending staircase? Does the answer to that question lie in process and form (that is, in knowing that there has been a binding decision of the Security Council) or in substance? And who is to articulate that substantive answer?

There are many comparable conundrums to wrestle with. What is the reach of exceptions to the normal requirements of 'the rule of law'? What, indeed, is meant by 'the rule of law'? Is the contemporary interest in ethics an intrusion into legal rules or simply the articulation of a value inevitably present in international law as legal process?

It is useful to step back from analysing today's legal problems (on which there has been a profusion of interesting and useful writing) to think about these fundamental, over-arching questions. We should not pretend that on these profound dilemmas there are clear answers—'correct rules' which simply wait to be impartially applied. There are *not* clear answers. There *is* a process by which optimal answers can be arrived at, with leading guidance given by those decision-makers entrusted by the international community with that task. This is the contemporary challenge in international law, and the particular responsibility of the international judge.