The late Sir Ian Brownlie, CBE, QC, FBA was a leading barrister renowned in the fields of international law and human rights. Written in 2003, this is a personal perspective on practicing international law as a barrister.

THE PERSPECTIVE OF INTERNATIONAL LAW FROM THE BAR

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The literature often addresses the question of the 'relevance' of international law and, at the outset of studying the subject, such discussions are useful. It is a particular characteristic of international law that it is not easy for the observer or student to develop the necessary empathy. The problem of perception is increased by the distance between ordinary experience and the wavelength of international affairs.

Experience of legal practice reveals the impressive diversity of contexts in which reference to international law is necessary. The following list is illustrative and by no means exhaustive but it does address the issue of relevance. The focus of the classification is upon the legal function and context in each case.

(1) Advice to government delegations involved in negotiations with other governments, for example, concerning maritime delimitation or the creation of the mechanism for the peaceful settlement of a dispute.

(2) The drafting of written pleadings in relation to cases in front of courts of arbitration or the International Court of Justice, together with the preparation of oral arguments.

(3) Assistance to government delegations involved in procedures of mediation or conciliation in order to settle, or to ameliorate, disputes between States.

(4) Advice to the armed forces of a State relating to the application to the humanitarian law of war in an armed conflict, including civil strife, and the drafting of the rules of engagement to be observed in the military operations envisaged.

(5) The provision of legal advice to national liberation movements, to organized minority groups within States, and to political parties.

(6) Assistance to non-governmental international and national organizations, such as Amnesty International and Greenpeace International. Such organizations may be involved as parties in international dispute mechanisms, and as parties, or interveners, in cases in national courts.

(7) The giving of evidence and, or, advice to the committees of parliamentary assemblies involved in the investigation of particular incidents or crises.

(8) Assistance to temporary administrations set up with the authority of the organs of the United Nations, as in the case of East Timor.

(9) Advice to private corporations on questions of international law, for example, in relation to the protection of investments, concession agreements, access to natural resources, and questions of human rights.

(10) Acting as Counsel and Advocate in proceedings before international tribunals and specialized bodies, such as the United Nations Compensation Commission and the International Tribunal for the Former Yugoslavia. The international tribunals include the ad hoc courts of arbitration, such as the Arbitration

Tribunal created to determine issues of sovereignty and maritime delimitation in the Red Sea Islands case, or the Eritrea-Ethiopia Boundary Commission, established pursuant to an agreement dated 12 December 2000.

(11) Acting as Counsel in municipal court proceedings involving matters of public international law, such as the appeals and other proceedings concerning the International Tin Council, and the two appeals in the Pinochet case.

The above list of types of work provides a simple but effective indication of the responsibilities of a member of the Bar specializing in matters of international law. However, the picture needs to be rounded out by reference to the not inconsiderable number of constituencies involving specialized areas of public international law, including human rights, the legal protection of the environment, international criminal law, petroleum law, trade law, refugee law, and monetary law. In the field of arbitration the applicable law in bilateral investment treaties will involve a multiple reference to municipal law, public international law, the treaty provisions themselves, and perhaps other elements.

Members of the Bar will, in the setting of national courts, and in providing episodic advice, normally work as individuals or in small groups. In the practice of international law the clients are normally States, organizations and corporations. The milieu calls for working in groups and, perhaps, in a series of overlapping groups. States are not infrequently concerned to establish a degree of internal accountability and the team working on a problem, or preparing litigation, may thus consist of three elements: the in-house government lawyers (of the Foreign Ministry, the Attorney-General's Office, or some other relevant ministry), the external lawyers, and a nationally based monitoring group, which will include persons representing local and regional interests.

It is necessary to point out that, in the International Court and before other international tribunals, it is not necessary to belong to the Bar of any State, or to be otherwise a member of the legal profession. Locus standi depends upon the authority to appear conferred by the client concerned. It is quite normal for States to be represented by distinguished academic lawyers or other legal specialists who have no professional qualifications. Moreover, it is a pleasant and necessary characteristic of practice that other professions are directly involved. Thus teams may encompass economists, petroleum engineers, members of the armed forces, hydrographers, surveyors, geographers, and social anthropologists. These specialists will often have the role of expert witnesses, subject to cross-examination, but the State involved in litigation must make its election. Provided their names are formally indicated on the delegation list presented to the tribunal, such specialists may address the tribunal in the role of advocates, but will not then, of course, appear as expert witnesses.

Tribunals may, and sometimes do, make practice directions which impose certain duties on Counsel. More often the only source of professional discipline will be the governing bodies of the legal profession (or two professions in some common law jurisdictions) of the State of origin of the individual concerned. Thus, the English Bar, of which the writer is a member, prohibits the practice of touting for work and, in addition, the English barrister is not permitted to select the clients (this injunction is known familiarly as the 'Cab Rank' principle).

Beyond the formal and institutional imposition of rules of conduct, the standards of conduct applying to international law practice tend to reflect the fact that the clients are often States and organizations. Such clients value confidentiality. For this and other reasons, it is tempting fate to publish material about litigation one has been

concerned with, even when all appears to be said and done. New issues may arise and the discussion of a case in a journal may, in retrospect, be discovered to contain hostages to fortune.

It is important to appreciate the idiosyncratic aspects of a practice which involves acting for States and working within the context of governmental action and diplomacy. In the preparation of written and oral arguments before international tribunals the freelance pleaders are working exclusively as representatives of the State concerned and not as unauthorized experts or amici curiae. Consequently, all material presented to the tribunal must have the authorization of the government-appointed head of the team, the head of the delegation, usually designated as 'the Agent'. In this context Counsel cannot be permitted to answer questions of substance addressed to him or her by the Tribunal except with the permission of the head of delegation. In cases before the International Court and in inter-State arbitrations the practice is for questions to be addressed to the parties at the end of the first round of the oral hearings, these questions to be answered in the course of the second round speeches or within a period, usually two or three weeks, after the close of the session. There is a special culture of speech preparation with its own difficulties and points of protocol. Time-keeping is of the essence.

It is often the case that the association with a State engaged in a major boundary dispute or resource-related maritime delimitation will last for three or four years, commencing with the giving of general advice on the merits and the often difficult question of establishing an appropriate forum for peaceful settlement of the dispute. However, the freelance adviser retains, and should retain, the independence of approach which is characteristic of the professional lawyer. Confidential advice to the client must involve frankness and objectivity, otherwise it is worthless, and probably harmful.

Working in a milieu in which the clients are States presents problems of a special sort, relatively unknown in a single jurisdiction practice. Within the United Kingdom the Bar would consider appearance against the government and its agencies as perfectly normal and a necessary concomitant of the Rule of Law. But should this principle apply to disputes between States, in which Counsel will appear against his own government? The principle must surely remain applicable, if the Rule of Law is to be maintained. And does the principle apply in a situation in which the client is a State which is, or is likely to be, in a state of armed conflict with Counsel's State of nationality? No doubt there is a clear prima facie constraint here. But, once more, the ultimate source of guidance is the Rule of Law and, in the present context, which is, the practice of public international law, the principles of general international law, and the principles enshrined in Article 2 of the United Nations Charter.

The general principle applicable to practice at the English Bar is that the barrister does not select his or her clients, and this principle of objectivity applies to the nature of the causes which a client may espouse and the type of conduct with which the client is allegedly associated. Without such a principle the Rule of Law would be set at naught and in criminal trials defendants would lack representation. In some circles the claim is made by certain lawyers that they will only work for good causes. Apparently, such good causes do not include the giving of practical reality to the Rule of Law. It is surely of the essence of the principle of legality that the law should be available to all.

In conclusion it is worth emphasizing that, at least in the tradition of the English Bar, the legal adviser or advocate represents the client, but retains a significant degree

of independence and aloofness. If the barrister simply identifies with the client in all respects, his value will diminish. The purpose of advocacy is to establish a link with the court and, if a client ignorant of or indifferent to the judicial context imposes inappropriate instructions the desired link with the court will be weakened or broken. Pleasing the client is one thing, winning a case is another, although if one is fortunate, both outcomes may be achieved.