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Resolving International Disputes: The Role of Courts

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By looking back in a very selective way at the experience of courts in resolving international disputes over the last 100 years, I will try to suggest what that experience may mean for their role in the future. The early 1900s mark the beginning of organized international arbitral and judicial process. That development occurs at the time of extensive globalization as seen in foreign trade, foreign investment, foreign travel and migration and huge changes in science, technology, communications, art and sport – as well as many assassinations and other acts of terrorism. The turn of that century was also a time of major peace movements, one intergovernmental manifestation of which was the Hague Peace Conference of 1899, followed by that of 1907, called on the initiative of Czar Nicholas who was greatly alarmed at the rate at which European countries were arming. The particular results of those conferences on which I focus are the establishment of the Permanent Court of Arbitration and the building of the Peace Palace, greatly facilitated by the munificence of Andrew Carnegie. That building housed the Library, the courtroom, the judges and registry first for the Permanent Court of International Justice from 1922 and from 1946 the International Court of Justice. As some of you will know, the judges and their support staff are now in a new wing to the 1913 building.

The 1899 and 1907 Conventions, which were the subject of Professor J.W. Salmond's inaugural lecture at Victoria University College, contain high sounding rhetoric. The High Contracting Parties expressed their resolve to promote the friendly settlement of international disputes, their desire to extend what they refer to as the empire of law and to strengthen the appreciation of international justice. The Parties undertook to use their best efforts to ensure the peaceful settlement of disputes with a view to avoiding as far as possible recourse to force in the relations between States. To that end, the Conventions provide for the peaceful settlement of disputes by good offices, mediation, inquiry and arbitration. That linking of the obligation to pursue peaceful methods of settlement and the avoidance of, and later the prohibition on, the resort to armed force is also to be seen in the Covenant of the League of Nations in 1919, the Kellogg Briand Pact in 1928 and, in 1945, in the Charter of the United Nations, article 2(3) of which requires all states to settle their international disputes by all means in such a manner that international peace and security and justice are not endangered. Article 33 provides a longer list of means than did the drafters of 1899 and 1907 – negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or other means of their own choice. That final phrase – of their own choice - underlines a major limit on the availability and use of dispute settlement processes, particularly arbitration and adjudication. States are not required to engage in those processes unless they have consented – as of course, they have, in many cases and increasingly, to take just three

examples by becoming members of the United Nations or of the World Trade Organisation or a party to UNCLOS. In particular the ICJ has jurisdiction over them to give a judgment in a contentious case only if they have consented which they may do in a variety of ways. At Washington and San Francisco in 1945, the New Zealand delegation, notably Sir Michael Myers and Colin Aikman, fought valiantly for more extensive advance acceptance of compulsory jurisdiction but without success. It was plain that the USSR and the USA would not accept that step at that time. The report of the relevant committee at San Francisco nevertheless saw advances in the provisions included in the Statute of the ICJ which was annexed to the Charter of the UN. The committee foresaw a significant role for the new Court in the international relations of the future:

The judicial process will have a central place in the plans of the UN for the settlement of international disputes by peaceful means, A long road has been traveled in the effort to enthrone law as the guide for the conduct of States in their relations one with another. A new mile post is being erected along that road. In establishing the ICJ, the UN holds before a war-stricken world the beacons of Justice and Law and offers the possibility by substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.

You might think – and, as I shall say later, I would agree – that this makes an impossible claim for judicial processes. For one thing, it ignores all the other ways in which States resolve or handle their disputes. The Court's travels since 1945, to return to that metaphor, have since 1945 had some serious interruptions and reversals. They began with major decisions of long lasting effect relating to the law of the sea, the legal personality of the UN, the independence of the Secretariat (another matter to which New Zealand gave major attention at San Francisco), UN peacekeeping, the legal status of South West Africa and the law of treaties. But by the late 1960s, especially after the disaster of the 1966 South West Africa cases, it was barely active and by 1970 after the Barcelona Traction decision – also the subject of severe criticism – its docket was completely empty. The wider landscape beyond the ICJ road, was not encouraging either. The European Courts, especially that on Human Rights, were still to make their presence felt and the PCA which had been active in the first decade of the century was not visible. National courts too appeared to have at most limited significance. One paper, published in 1965, surveyed the New Zealand cases considering international law matters decided over the previous 100 years and found only about 15, including a number relating to the Western Samoan mandate and to the Treaty of Waitangi which were mainly to the effect that it was not a treaty in international law. I return to that issue later. The valuable international law reports containing national court decisions back to 1919 had reached only thirty volumes. But 20 years later, at the end of the Cold War, and 40 years later, to come to the present day, the landscape is transformed. There are now international courts and tribunals of one kind or another dotted across the landscape, some of them growing lustily. Some are criminal tribunals, set up to try alleged offenders for crimes against humanity, war crimes and genocide. They may be permanent, as with the International Criminal Court, or temporary as with the tribunals for former Yugoslavia and Rwanda. They may be established by treaty – the ICC - , by Security Council resolution as with the

Yugoslav and Rwanda tribunals or by agreement between the country concerned and the UN, as with the Cambodian and Sierra Leone institutions. The busy WTO dispute settlement bodies resolve disputes between States about compliance with the treaties of the WTO. The ITLOS decides disputes between States arising under UNCLOS which also confers jurisdiction in certain circumstances on the ICJ or on a specially constituted tribunal. Hundreds of investment disputes and free trade disputes between foreign corporations and their host States have been and are the subject of arbitration under BITs and ICSID and other arrangements. And other interstate disputes are submitted to tribunals specially appointed for the purpose. In a recent publication, the Permanent Court of Arbitration provides a valuable account of the 30 decisions of tribunals given in the past 10 years, primarily in State v. State matters, for which it has provided the Registry. Many other matters are decided with the PCA's assistance without any publicity, the parties taking advantage of the privacy that they may attach to arbitration as opposed to adjudication. The subject matter of the cases reviewed in that volume includes the legality of the use of armed force, the law regulating warfare, matters of sovereignty over land and sea, environmental matters, access to information and river administration. Another category is of regional bodies, concerned with human rights and economic matters, Finally, among international bodies may be mentioned the committees set up to monitor compliance with, and to consider complaints of, breach of labour and human rights treaties. National courts too increasingly address issues of international law as appears from the more than 100 volumes of the ILRs published in the last 50 years and the very extensive OUP and CUP websites dedicated to such decisions. The young academic who in 1965 discussed the 15 or so international law cases decided in New Zealand in the previous 100 years participated in many more such cases in his 10 years as a New Zealand judge, between 1996 and 2006. The last three cases he can remember were all about international law matters-arbitration based on legislation giving effect to the UNCITRAL model law, the Zaoui case relating to the refugee and torture conventions and a case about retrospective sentencing in which the principle stated in the International Covenant on Civil and Political Rights was prominent and decisions of the Privy Council and the European Court of Human Rights were rejected as not being true to that principle.

I now give greater attention to the work of the ICJ over the last decade or so. It has great variety in terms of the parties, the subject matter and the evidence presented to the Court. The States in dispute come from all continents – among the recent cases are Argentina v. Uruguay (in which judgment will be given in 12 days' time), Malaysia v. Singapore, Guinea v. DRC (in which the hearing begins on 19 April), Djibouti v. France, Romania v. Ukraine, Germany v. Italy and Mexico v. US, More than 40 States participated in the advisory proceedings relating to the unilateral declaration of independence issued by the provisional institutions of government of Kosovo, including for the first time all five permanent members of the Security Council. The subject matter of recent cases extends from territorial disputes, maritime boundaries, the use of rivers, and diplomatic protection, matters traditionally part of the Court's fare, to the legality of the use of force, compliance with IHL and with human rights law, including the prohibition on genocide, international criminal law – extradition, prosecution, cooperation, jurisdiction and immunities. The evidence presented may extend back over several centuries, may cover

extensive areas of land and sea and many different incidents, and may include diplomatic correspondence, maps, newspaper stories, decisions of other courts, reports of an official and unofficial character, treaties, national legislation, dictionaries and historical, technical and scientific reports. The business of the Court is much more extensive in all of those respects than it was in earlier decades.

That increase in the volume and complexity of the work of the ICJ – as of other international tribunals – and the increased willingness of States to resort to them have a number of explanations or apparent explanations. They include the record of the work itself carried out by judges and tribunal members who, as best as I can assess, are seen to be independent and qualified and who follow careful processes which enable the State parties to present their arguments and evidence in a full and equal way. Those processes, to focus on the ICJ, also include all 15 Judges, sometimes complemented by nationally appointed Judges ad hoc, deliberating at length on the decisions they are to reach. I will return to those processes later.

Another explanation may be the recognition of States that it may be better to seek binding third party resolution of their disputes than to leave them to fester or, to go back to the 1945 language, to be resolved by the vicissitudes of war or by brute force. This motivation may be seen more in particular areas of increasingly close regulation such as trade and investment, both in regional and universal bodies. No doubt the end of the Cold War and all that accompanies that is a factor in the increased willingness to litigate or at least to consider litigation.

This major change in attitude is to be seen not just in particular actions of States, such as the legal advisors in the State Department in Washington and the Foreign Ministry in Moscow appearing in the Great Hall of Justice just months apart in 2008 for their States in proceedings brought by Mexico in the one case and Georgia in the other, but also in the more general declarations by the world community. In 1970 on the 25th anniversary of the UN, the General Assembly unanimously adopted the Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States. The statement about the obligations of peaceful settlement emphasized each State's free choice of means (the phrase you will recall at the end of article 33 of the Charter) and their sovereign equality and the necessity of agreement on the means. The Declaration made no reference at all to the ICJ, the principal judicial organ of the UN. Recent events and the recent record of the ICJ were no doubt very much in the minds of those responsible for that text and also in the minds of those who developed the proposals for dispute settlement under the law of the sea convention which was being negotiated then. By contrast, when the world leaders came together on the 60th anniversary of the UN in 2005 they emphasized, along with references to the international rule of law, the role of the ICJ, an emphasis which was reinforced a few months later by President Putin when he addressed the Court, under the Presidency of Judge Shi of China, with recollections by both of Russia's long commitment to international law and its role in 1899 and 1907. Shades of the Czar, a portrait of whom hangs in the small court room in the Peace Palace.

It is however important to keep a sense of perspective. Have the expectations expressed so optimistically in San Francisco in 1945 that the Court would have a central place in the settlement of international disputes, and that orderly judicial process might be substituted for war and the reign of brutal force been fulfilled? From recent decades it is possible to refer to the rulings of the ICJ and international criminal tribunals relating to the dreadful conflicts in the Great Lakes, the Balkans, Cambodia and East Timor, but many would say too little, too late. The Economist had a nice comment late last year as the Kosovo hearings got under way about all the litigation relating to the Balkans with a final line about it having advantages over widespread bloodletting. And the real resolution of such situations requires action far beyond the competence and powers of courts. That is also true nationally. I make just one national reference.

Alexis de Tocqueville in his magisterial “Democracy in America” wrote that there is no political event in the United States in which the authority of the judge is not invoked (93, 1.1.6). And yet a dreadful civil war and constitutional amendments, within a generation of his travels, and much else was needed before the scourge of slavery – and its supporting law – was swept away.

At the international level, treaty action – the equivalent of those national constitutional and legal changes – was also required to end the slave trade, as practiced well into the nineteenth century. The need for change by treaty, by political action, by unilateral State action – by means that is other than, or in addition to court process – also appears in many other areas. This experience demonstrates what should be obvious but is sometimes neglected by those who appear to think that courts can provide all of the answers. For my example I move away from warfare, genocide, slavery and other gross abuses of human rights to just one aspect of the law of the sea – the delimitation of maritime areas.

50 or 60 years ago the commonly accepted position, at least among the maritime and naval powers, a position shared by New Zealand, was that coastal states had sovereignty over an adjacent strip of water, usually said to be no more than three miles – the territorial sea. Coastal powers might extend a little further, for instance to prevent smuggling, but beyond those the narrow strip the high seas were essentially free to all to use and exploit. In the context of commercial rivalries across the North Sea 400 years ago, it was the Dutch view, propounded by Hugo Grotius in his *Mare Liberum* that prevailed over the English, John Selden’s *Mare Clausum*. But already by the 1940s and 1950s the possibility of exploiting submarine oil resources lying far beyond three miles was being envisaged by the Americans and the British among others, the viability of certain high sea fish stocks was coming into question, and South American States were claiming 200 mile patrimonial seas. As is well known, through national action, some of it regional, international action and negotiations and court and arbitral proceedings, the law as it was at mid-century has been almost completely remade. The ICJ has had a part in all of that, beginning with a major decision in 1951 in the Anglo Norwegian Fisheries case in which it rejected the British argument of strict rules for Norway’s fishing zones and adopted a more flexible approach based on principle, including the dependence of coastal communities on the fishing resource. In 1969, in its first continental shelf case

which related to the North Sea, the ICJ again rejected a rule-based approach and emphasized equity. Both those judgments had a real impact on the ongoing development of the law through UN law making conferences and in the 1958 and 1982 Conventions. But the existing state of parts of that law as found by the Court and as understood by states could quickly be shown to be unsatisfactory, as appears from the Icelandic fisheries cases in the 1970s and the reservations to their acceptances of the Court's jurisdiction made, for instance, by Canada and New Zealand. Those countries, like others, considered that aspects of that law at a certain point was or might be contrary to their interests – for instance in Canada's north and in respect of both countries' fisheries and other maritime resources – and not yet sufficiently clarified.

The New Zealand reservation was made while the 1982 Convention was still being negotiated. But as recent cases relating to the Black Sea and the Caribbean show, some of the law – that relating to maritime delimitation between states – is now relatively well settled and accepted. In many, the great bulk of such cases, states are able to resolve their differences by negotiation on the basis of that settled law. It is important not to neglect the role of the law in facilitating and regulating the coexistence of, and cooperation between, states and helping them reach agreement without their needing to resort to third party settlement. Some cases nevertheless continue to come to the ICJ, special tribunals, and recently for the first time ITLOS from the Caribbean, North Atlantic, Gulf of Maine, the Mediterranean, the Bay of Bengal, the Pacific and the Black Sea.

I now return to the issues of process I mentioned briefly earlier. I will, I hope, avoid unnecessary detail, but some detail is important, I think, in building up the trust and understanding of States that the Court does work in a careful professional independent way in deciding the matters States bring to it. The public process involves very extensive written and oral proceedings, now available on the Court website. There are generally two written rounds with evidence annexed, but in the case between Argentina and Uruguay, the Court on the initiative of the Parties allowed for a third round which, speaking for myself, I thought was essential. The Court was then provided with extensive sets of up to date technical data relating to the impact of the pulp mill in issue, installed on the Uruguay bank of the Uruguay River, on the water quality of the river. Counsel were then able to address that material in two rounds of oral argument. Those public processes are not unlike those which can be seen here but with two major differences. As a first and last instance court-its decisions are final and binding and not subject to appeal-the Court does not have the advantage which appeal courts have of an earlier assessment of the facts and the issues by a lower court-an advantage to counsel as well as to the judges. Nor does it have the comfort, if that is the right word, of a court of first instance that an appeal is available to put things right if they have gone wrong. A second major difference is that the ICJ is a largely passive body with the judges asking a very few questions.

Now a word or two about the internal processes of the Court. They provide another sharp contrast to my earlier experience. After the oral hearing, the 15 members, more sometimes, write notes addressing what they see as the main questions to be resolved and their answers, more or less tentative, to these. Those notes of 5-100 pages are translated

into the other working language-the court works in French and English- and distributed. We then have the first of three deliberations, each of which may last for several days. The first deliberation begins with the most junior judge and proceeds up the table to the President. There is much questioning and commenting in the course of the process. At the end of it, the President – whom we elect every three years as the membership changes following the regular election of five of the 15 judges – sums up where the main lines of agreement appear to be and the Court elects two members to a drafting committee, additional to the President if in the majority. They produce a preliminary draft in both languages, we have a short period to propose written amendments and then we have the first reading of the amended draft. Each substantive paragraph is read out in French and English and is debated, often with amendments being suggested and accepted or not. At the end of that process, those members of the Court who plan to dissent or write separate opinions indicate that. They distribute their drafts, ideally in time for the drafting committee to take them into account in preparing the second reading text. All members engage in a deliberation on that text, particularly on the passages that have been amended. That process ends when we vote, again from the most junior member up, on the final text, the dispostif. All must vote and their vote becomes public when the Court’s judgment is delivered, following final adjustments being made to it and to the separate and dissenting opinions and declarations.

I have mentioned some of the detail of that process of deliberation – I must have participated in more than forty of them by now – to emphasize the commitment called for from each and every judge, in addition to the preparation, researching and writing they do by and for themselves, but mainly to underline the world wide character of the product which results from that very inclusive process. An earlier President of the Court has said that the process may be seen as matching the composition of the Court – the 15 of us come from all corners of the earth, and from different traditions and cultures, and bring different qualifications and experiences. States electing the members are to have those various qualifications and backgrounds in mind and our processes too must incorporate those elements. The number and differing life experiences of my colleagues also provide a major difference from being a judge here.

I have been emphasizing an aspect of the ICJ’s process which is particular to it. I should also make a contrasting general point about the processes of international courts and tribunals. There is a great deal that we can learn from each other about the written and oral phases, about the role of counsel, about the calling and handling of evidence and about deliberating. Those involved in setting up, funding and the electing of members of international courts and tribunals are also increasingly able to draw on comparative experience. The borrowing is also from national systems, as very recently I might mention in respect of court design. That national borrowing occurs all the time, often unconsciously.

That reference to national legal systems brings me to a final point about what I do as a judge in The Hague. Much of it is not all that different from what I did as a judge in Wellington- I try to work out, on the basis of the evidence put to us, the arguments presented and my own and my colleagues’ thinking, what the facts are, what the law is

and apply the one to the other, with questions about remedies possibly then arising. Of many possible issues I take just one which relates back to the early writing I mentioned about cases on the Treaty of Waitangi. That writing may be linked to the Court of Appeal's decision on 2003 on the foreshore and seabed and most recently in 2008 to other nineteenth century treaties, relating to Singapore and neighbouring areas, concluded between the East India Company and the Sultan of Johore. They were at issue in a dispute between Malaysia and Singapore. What was their effect? How were they to be interpreted? As with other cases in the past 50 years in the International Court, from the sub-continent, Africa and the Gulf, the existence and validity of the treaties was never in issue. So much for the 'orthodoxy' of the time I was a student and indeed for some time later. Rather the Court in the Malaysia Singapore case, as in the others, engaged in the standard task of finding the meaning and effect of the written texts. That is something that many judges do much of their time, whatever, their jurisdiction, their title, the parties before them and the procedures they follow.

In the light of this recent experience, what may I conclude about the future role of courts in resolving international disputes? My general conclusion is cautiously optimistic. States are increasingly willing to make the serious decision to enter into international litigation and to open themselves to that possibility in advance. That is so, although as Prime Minister said to Professor Quentin Baxter as we headed off to The Hague in 1973, lawyers – and their clients – lose half their cases. For that reason Mr Kirk did not have much faith in lawyers! He was also very clear throughout that whole process that litigation was just one means of addressing the great threat of nuclear weapons.

That willingness to submit to international litigation may be related to a number of factors which I recall:

- (1) the changing international context which increasingly includes extensive international regulation the application of which gives rise to more and more disputes;
- (2) the related recognition by States that third party settlement may have a necessary place in more and more of those areas of international relations;
- (3) their increasing recognition, at least as I see it, that the courts and tribunals are composed of well qualified, independent, conscientious judges following fair proceedings and deciding according to law.

The hopes of Czar Nicholas and of the delegates who gathered at the Palace in the Woods in 1899 for an "empire of law" are being fulfilled if in limited but widening areas. In those areas, in terms of the rhetoric of the early part of the last century, law may be seen to be replacing war or, more commonly, stalemate. Those developments may be seen as now having a certain momentum. I would be surprised and disappointed if that momentum were to be reversed. The contrast with 50 years ago is very striking. Those professionally involved with international legal practice at that time would, I think, be astonished at the extent of present day international adjudication and arbitration.

But, as I argued earlier and as Mr Kirk's position on nuclear weapons demonstrated, courts can only ever be one part of the constitutional arrangements for any community, including the international one, to meet the challenges facing it. I think it is becoming

clear that they are a necessary part of the international system but they are certainly not sufficient. International administrative and legislative processes are also required. On the latter we may contrast aspects of the lawmaking processes in much but not all of the law of the sea with those recently in respect of the environment. Those are huge matters which others are much better placed than I to discuss.

My final word is about the role of New Zealand and New Zealanders in all this enterprise.

This particular New Zealander benefited greatly, notably in the electoral process, from New Zealand's outstanding international reputation and from the extremely professional and hard-working MFAT staff in Wellington, New York and many other places. Ministers were also critically important in that. In the context of the ICJ and international litigation, that very positive attitude is to be traced back to the work of the then Chief Justice and Colin Aikman in Washington and San Francisco in 1945, the work of the teams in the Nuclear Tests cases and in the WTO including the judging of Chris Beeby, and more generally the work in international legal arenas.

Supporting all that is New Zealand's commitment in international affairs to principle, to multilateral processes and to hard professional work. That inheritance gives this New Zealander real confidence in meeting his current large responsibilities and in attempting to make a contribution to the international rule of law.