(b) Constitutional and Institutional Developments

The Function of the International Court of Justice in the Development of International Law*

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It is always a pleasure and privilege to address a body of students as they commence their graduate studies. You have climbed the foothills successfully and have reached the first plateau. But there are many peaks ahead, and as you commence your ascent of one of them today, I wish you the very best of luck in reaching the sunlit plateau that lies ahead. When you arrive there, you will no doubt see other peaks which you may wish to climb, because any branch of study reveals ever higher and higher peaks. The higher you go, the more you see. These summits are sometimes even hidden in the clouds. You keep discovering them, and even if their existence is known, they are often unexplored territory. Pathways have to be found through them. That is part of the intellectual excitement you will commence today as you leave the well-trodden paths and begin to carve out pathways for yourselves. I congratulate you and wish you God speed on your journey.

This is a particularly exciting time for the International Court for a variety of reasons. Not only has it a full docket of cases, it has a geographical spread of areas from which these cases come, which is truly global. This spread is far more than was ever the case with the Permanent Court of International Justice. There is also a whole array of new problems arising from what may be called the new international law - an international law of active co-operation, rather than passive coexistence, an international law oriented towards collectivism, rather than concentrated upon individual rights of states. Until the end of World War II, it could perhaps be said that

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international law was tailored to meet the needs of individual states pursuing their individual interests, but yet compelled to recognize some common rules of conduct because they had to co-exist with other states pursuing like attitudes. It was a highly individualistic system, with a minimal recognition of collective interests.

All that has changed. It has become more apparent with every passing year how dependent each State is upon every other. International law sees the world of states as a closely knit community rather than a series of distinct individuals.

We are passing through a period of great transformation - political, technological, economic, attitudinal. This occurs at a time when international law is still comparatively in its infancy. It is going through that formative stage where a little change here, a little nudge in a given direction there, can bend the forming stem to give shape to a great emerging branch of international law.

And you see this point forcefully if you compare the age of current international law with the age of the established legal systems of the world. Take the common law. It has about a 1000 years of existence; the civil law has over 2000 years; Islamic law around 1500 years; Buddhist law 2500 years; Hindu law about 4000 years; Jewish law a similar period. They all measure their history in millennia. But come to international law as a system, and take classical international law, and you just have about 300 years of development. But modern international law, as distinguished - if you may make that distinction - from classical international law, is just about 50 years old. And I say this for a very good reason - that modern international law began after the era of empires which ended with World War II. Until 50 years ago, international law by and large served the age of empires and the needs of empires, with strong individualist overtones. It is only half a century since it started serving the whole world, the entire community of nations.[1] A recognition of this change is to be found in the Opinions of Judge Alvarez, whose *dicta* on the matter were remarkable for their prescience, going back as they do to the immediate post-war years, before the impact of the changed situation could be seen with the perspectives now available to us, nearly half a century later.

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1. *See, generally*, E. McWhinney, *The Concept of Co-operation, in* M. Bedjaoui (Ed.), International Law Achievements and Prospects 425-436 (1993), in particular 434-435 on the principles of the 'New International Law of Co-operation'.

Thus Judge Alvarez observed:

> [t]his case must not be decided in accordance with the precepts of traditional or classic international law, which were established on an *individualistic* basis and have hitherto prevailed, but rather in accordance with the *new international law*, which is now emerging.
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> There is no doubt that the Court must apply the existing law to the case which has been referred to it.
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> What is this law today? Since the recent social upheaval which opened the greatest period in the history of humanity, profound changes have suddenly appeared in almost all spheres of activity, particularly in the international field. The psychology of peoples has undergone a great change; a new universal international conscience is emerging, which calls for reforms in the life of peoples. This circumstance, in conjunction with the crisis which classic international law has been traversing for some time past, has opened the way to a new international law.[2]

Against this background, the role of the Court in developing international law is a particularly important one. The first problem we face in addressing the extent to which the Court has helped in developing international law is that there is a widely shared belief that judges should not make law and do not make law. According to this belief, it would be inappropriate for judges to make law, or even to be perceived as making law. So runs a common belief. And it is true, of course, that Article 59 of the Statute of the Court states that judgments of the Court have no binding force except between the parties and in respect of that particular case.

Yet lawyers look to these decisions as stating the law. Judges tend not to depart from them, except for very compelling reasons. Scholars are guided by them. International organizations treat them as authoritative. Legal advisors of governments advise their governments on the basis that this is the law. Other tribunals invariably follow them. Therefore they matter far beyond the range of the immediate parties. In the *Aegean Sea Continental Shelf* case,[3] the Court observed that even though its judgments were of no binding force, except between the parties and in respect of that particular case, they would have implications in the relations between states other than Greece and Turkey who were the immediate parties. So it is important, having regard to this aspect of the influence of the judgments

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2. Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 ICJ Rep. 12 (Judge Alvarez, Dissenting Opinion).
3. Aegean Sea Continental Shelf case (Greece *v.* Turkey) (Jurisdiction), Judgment, 1978 ICJ Rep. 16-17.

of the Court, to consider to what extent the Court develops the law in fact.

I have thus far mentioned only one difficulty - the difficulty that there is a general belief that the Court should not and does not make law. Later in this lecture, I shall mention a dozen other factors that tend to inhibit the Court from exercising to the full its authority and potential to develop international law.

Despite this, the Court has made significant contributions in a number of fields: decolonization, the law of the sea, the law of treaties, international organizations. It is in the course of developing new concepts: the concept of rights and obligations *erga omnes*; concepts relating to the common resources of mankind; the intergenerational concept; the concept of trusteeship for future generations; new implications of the age-old concept of equity. But all of this is to some extent held back by a number of factors. I shall deal with my topic under two broad heads.

The first deals with the widely shared belief that it is not the function of judges to make law, and that therefore judges should not make law. I shall give you a number of reasons showing that judges do in fact make law in all systems. This holds for international courts as well, and I hope to show by this analysis that the International Court does have a law-making role. I shall also give you some illustrations of the fields in which the Court has made a significant contribution.

Under the second head, I shall draw your attention to the inhibiting factors which prevent the International Court from being as useful an instrument for guiding international law as it has the potential to be.

My first major proposition is that in any system - examine whatever system you will - the judges *do* in fact make law. They may be told that they are not making law. They may believe they are not making law. Yet, in fact, they are making law. As Cardozo says, "[w]e do not pluck our rules of law full-blossomed from the trees".[4] Somebody has developed those principles and a principal agency of development has been the judges. There is another famous phrase which encapsulates this idea - 'Lord Wright's conundrum'. In the context of the common law, Lord Wright asked the question how the same body of law which served the needs of the age of feudalism, and which theoretically is still applied by the judges in its pristine form, successfully does duty today in the age of the atom. It has surely been developed over the generations despite the fiction that the

4. B.N. Cardozo, The Nature of the Judicial Process 103 (1921).

judges are still applying the self-same system of law. What has been the agency of development? It has surely been judicial action, however unacknowledged be the process of judicial alteration of the law.

It is an incontrovertible fact that a decision choosing one of two or more alternative courses equally available to the judge has an impact upon the understanding of the law in the future, whether by the judge, the lawyer or, indeed, by the public. Especially if it is an important or path-finding decision, the living law is not the same thereafter. The judge has become the instrument of change through which the process of adaptation takes place to the needs of the time. Decisions piled upon decisions thus make a whole corpus of law, whether or not the process be prohibited by state authority or settled tradition.

The system in which judicial creativity is most active - the common law - has for policy reasons long stressed the tradition that the judges do not make law, but only apply pre-existing principles to the new case that comes before them. That fiction has long been exploded. To quote another expressive analogy of Cardozo, the common law operates as though there is a beautifully crafted statue which has existed from time immemorial.[5] All that the judge does is to throw off the wrappings and unveil the statue in its pristine glory - and, there, lo and behold, is the law applicable to the matter in all the fullness of its development. That is not so. The process is a process of continuous development and we must take a realistic view of the process as it truly operates, leaving out what may be described as the 'childish fiction' that the judges do not make law.

Since there are numerous ways in which the judge does make law, it is necessary to enumerate a few of them.

In the first place, there may be a gap in the law and the judge fills that gap. In the words of Julius Stone, the law may be a 'seamless web',[6] but it has its tears and patches. It is like a fisherman's net. It still catches many fish, but some still slip through its tears and patches. Those tears and patches need to be repaired and filled as and when they are revealed. One cannot wait for the legislature to do this. It is the judge who performs the task. This is then the first in my list of areas in which the judge makes law. He or she fills gaps in the law.

Secondly, there is what Julius Stone calls the 'plurisignation of

5. *Id.*, at 125.
6. J. Stone, Legal System and Lawyers' Reasonings 28 (1964).

words'.[7] The law can only function through language. It does not function through mathematical formulae or symbols. And since it functions through language - and since most words have a multitude of meanings and shades of meaning - a choice has to be made from that multitude of meanings when that law is being applied. And the act of choice is an act of creation. By choosing this meaning of the word, rather than the other, the judge is in fact creating law. Much light has been thrown upon this process by recent developments in the science of linguistics.[8] For example, take even the question of interpretation, which Savigny described as "extracting from dead letters the living thought and placing it before our eyes."[9] There are various approaches possible: the literal approach, the contextual approach, the teleological approach, and others. How does one ascertain the intention of the parties? The judge decides these questions and the act of choice involved is an act of law making.

A third factor is that, just as there may be a plurality of meanings applicable to a word that has to be construed, there can be a plurality of principles applicable to the case that has to be decided. There is never a dearth of principles that can be invoked on one side or the other for each aspect of the argument. And lawyers are always invoking a whole series of principles in support of their respective contentions. They are not simply saying that it is just that a particular result should be reached. They tell the court, "for this reason, on the basis of this principle, you are obliged to hold in favour of my client". So, when there is a plurality of principles available, the judge again has the duty of choice. Once that choice is made, there is a determination that the law is as is stated in that judge's opinion. The rule that the judge chooses is amplified in importance. The rule or principle that the judge rejects is diminished in importance. There is thus a shift of emphasis and a process of movement from that which was uncertain to that which is acquiring certainty through the judge's determination of his choice as between different alternatives.

If logic were the only factor determining the judge's choice, the judge's law-making role would be minimal. He or she would be like a computer churning out a given result according to preordained principles of oper-

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7. *Id.*, at 34.
8. *See, generally*, the chapter *The Loom of Language*, in the author's The Law in Crisis: Bridges of Understanding 131-175 (1975).
9. Savigny, Le Droit des Obligations, Vol. 2, S. 71 (1863).

ation. The human factor would be minimized. However, the choice among the principles involved is not dependent purely upon logic. Logic is only one factor. The axioms of law are not the axioms of a text book of mathematics as Holmes said. The life of the law is not logic but experience. Logic is one factor, it is an important factor, but it is only one of several factors involved in the process. There is a varied range of other factors that can influence a judge. Questions of logic, philosophy, history, tradition, sociology, the felt *mores* of the community are interpreted by the judge - all of these can exercise an influence upon the judge's thinking and offer a whole series of alternative possibilities from which a choice must be made. I shall have more to say on this later.

Fourthly, law can be made through the rejection of an outmoded rule. Every rule originated because there was some reason which justified its creation. When that reason dies away, that rule itself must die with it. But that does not always happen. The result is that rules continue to linger on long after their underlying rationale has ceased to exist. In the words of Justice Holmes, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV".[10] The judge, when he comes to decide a case involving that rule, will have to exercise his choice and determine whether he is now deciding to reject that rule as outmoded. He or she will take the rule, study its underlying rationale, and examine whether it has ceased to be valid and then discard the rule. Though it is a negative act, that is also an act of law making.

A fifth consideration is that a judge may visualize a new concept such as estoppel. The judge may go further and visualize an analogous concept such as promissory estoppel. The judge may support it in terms of pre-existing principles. Common lawyers will be very familiar with Lord Denning's creation of the doctrine of promissory estoppel in the *High Trees* case.[11] He created this new doctrine, but based it upon prior principles. But out of the judicial mind a new concept had emerged which took the law further and added a new strand to the repertoire of legal principles available to handle certain situations. That is an act of law creation as we know all too well. After Lord Denning gave expression to it, it has been followed time and again in numerous cases. It is true this occurred in the common law, but I would venture to suggest that the civil law as well does

10. O.W. Holmes Jr., *The Path of the Law*, 10 Harvard Law Review 469 (1896-7).
11. Central London Property Trust *v.* High Trees House Ltd., [1947] K.B. 130.

not prevent a judge from doing justice by evolving a fresh approach from existing principles. I visualize the same for international law, without which the system would be denied the benefit of thoughtful and necessary evolution. I shall later give you several examples of such judicial formulation of new concepts in international law.

A sixth possibility is that a judge may find that the existing law needs to be adapted to suit new conditions. This is of course merely a reflection of the perpetual conflict between the need for stability and the demand for change. A famous illustration of modernization of the law through a judicial act is furnished by the case of *Donoghue* v. *Stevenson.*[12] The age of mass production had given rise to a new situation which rendered inappropriate the continuance of the old idea of remedies being restricted to individual relationships between the producer of the goods and the consumer. The judge, Lord Atkin, realized that in this era of consumerism there may be a whole chain of contracts intervening between the producer and the user of the product. Traditional principles of law would render the consumer unable to make a claim against a producer who was thus many steps removed from the consumer along the chain of supply. Lord Atkin had a choice of merely falling back upon the prior principles or of giving them an interpretation more in keeping with the needs of the time. He chose the latter alternative and implemented it by taking a more extended view of the circle of persons to whom the manufacturer owed a duty. When the judge does that, he is creating new law. Of course, he is applying pre-existing principles, but he is creating new law, and that is a very important aspect of the judicial function.

Seventhly, judges are always refining existing principles. They are carving out exceptions, amplifying principles, modifying principles, clarifying principles. That is again a process of law creation. A principle once applied soon shows up the need to realize that this principle is not cast in stone. In the infinitely variegated circumstances of domestic and international life, it would need to be clarified as to its exact sphere of operation. At what stage does its application yield to that of another principle also competing for recognition in the same case? What exceptions does experience dictate? No one can predict the life story of a new legal principle. Like a newly formed river, it will find its track and level under the influence of a myriad of forces it will encounter on its way.

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12. [1932] A.C. 562.

An eighth factor, very important in the context of international law, is the introduction of perspectives from other systems. I feel quite strongly that international law has not helped itself sufficiently from the repositories of wisdom available to it in the various cultures of the world. It is so far a monocultural construct. It might even be described as a 'Eurocentric' product. We need to tap the wisdom of other systems as well. This again can be done by the judges. It is exactly what Lord Mansfield did in the development of English commercial law, when time and again he invoked the wisdom of Roman law in developing English law. He had no direct authority to do that, but he was doing it all the time and in the result he considerably enriched English law, even to the extent that it is said that modern English commercial law would not be what it is but for the work of Lord Mansfield. He encountered much resistance in his time, but he perceived the wisdom and the necessity of the method he was following - a method which was to the lasting benefit of English law. The wisdom of other systems and the comparative method can, likewise, be used to the lasting benefit of international law.

A ninth aspect of judicial law making is through the action of the judges in giving concrete formulations to a principle which, though implicitly accepted, is not yet part of the specific corpus of principles in a legal system. For example, the principle that breach of an agreement involves an obligation to make reparation - almost self-evident in domestic law - had not received precise formulation in international law. In the *Factory at Chorzów*, the Permanent Court expressly formulated this principle for international law, observing that it was a principle of international law and a general conception of law.[13] Later applications of the law tend to take note of the deficiency and to repeat the method adopted of overcoming that particular defect or injustice. In the course of time, the deficiency or defect is righted, and judicial action would have played a signal role in achieving this result. So, also, judges can make law by highlighting deficiencies in the law. The judge deals *ad hoc* with the instant case to remedy the injustice but, in doing so, draws attention to the injustice and the deficiency in the law.

The tenth method I shall refer to is one of the most important. Judges often make law by modifying the strictly legal result through the applica-

13. Factory at Chorzów (Claim for Indemnity) (Germany *v.* Polish Republic) (Merits), Judgment, 1928 PCIJ (Ser. A) No. 17, at 29.

tion of equity. Equity is always available as a means of softening the rigour of a legal rule. That is so in international law, no less than in domestic law. For example, according to strictly legal principles, the owner of a right can use it to its fullest extent. Yet a right can, in reliance on this principle, be so uncaringly used as to amount to an abuse of right. Equitable principles can then be brought in to check this abuse.

Domestic law in some legal systems needed desperately at a time of legalism to be softened by the tempering influence of equity. That is precisely what happened in the English legal system where equity jurisdiction had to develop side by side with the common law jurisdiction to mitigate the rigours of the common law. Civil law systems, on the other hand, being combined systems of law and equity, did not experience this dichotomy. Yet the need to use equitable principles was constantly felt. Equity, being integrated into the whole system of law, was always ready at hand, and perhaps the lawyers and judges using such systems were not always as conscious as lawyers were, in the common law system, that they were drawing upon equitable principles. I know this from my own experience of the Roman-Dutch legal system which was a combined system of law and equity which we used in Sri Lanka. The equitable principles came naturally, without any conscious effort to invoke them.

The many methods of use of equity in a case include: (a) balancing interests of parties; (b) equitable interpretation of a rule of law; (c) choice of an equitable principle; (d) filling in gaps in the law through use of equity; and (e) testing a result to see whether it is inequitable.[14]

Equity is of course used by the Court, not in the sense of an arbitrary equity *ex aequo et bono*, but an ordered and restrained use of equity in accordance with the principles now well accepted for its use by the International Court.

In short, where a legal rule produces a strictly legalistic result, equity is available wherewith to modify it, and the judge who achieves an amalgam of the legal rule and the equitable principle is in the process of creating law.

The judge can even go a step further. In the course of modifying the principle and applying it to the particular case, a new equitable principle can also be evolved. Here, again, all equitable systems will bear witness to this, as happened through the action of judges over the centuries, where

14. *See* the author's Separate Opinion in Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark *v.* Norway), Judgment, 1993 ICJ Rep. 211 *et seq.*

new principles of equity have been developed which become principles in themselves.

An eleventh way in which a judge can evolve a rule of substantive law is through an application of rules of procedure. As has been so well said, the rules of substantive law are often secreted in the interstices of procedure. The rules relating to consideration, an important part of the substantive English law of contract, evolved because of certain procedural peculiarities of the English system. Substantive law thus resulted from the action of the judges in applying procedural rules. In the International Court, likewise, when rules of procedure are used - as, for example, rules relating to applications for interim relief - rules of substantive law are being created, for the procedural decision affects the content, scope and applicability of the right sought to be enforced.

I shall close this list of methods of judicial law making by citing a twelfth method. This relates to the transformation of social developments and attitudes into legal principles. Take the case of unbridled freedom of contract. Unbridled freedom of contract was the philosophy of nineteenth century social systems which were not sufficiently conscious of the need to protect the weaker of the two contracting parties. The legal mind could argue, "well, after all, these are two freely consenting minds, each vested with full autonomy. They have met and created an area of private law. Let not the courts interfere. That ground is sacred". That sounds fine in theory. But social attitudes in this century began to be more conscious of the inequality of bargaining power between two parties who have supposedly entered into a free contract. There was a realization that the law must interfere. Judicial action also intervened through an insistence on principles of fairness of contract, thus redressing the imbalance that existed. In so doing, the judges are reflecting the transformation in social attitudes and translating it into legal principles. By their constant action in providing redress to the weaker contracting party, the judges created new law, for we had a whole series of decisions on fairness of contract in all jurisdictions. This was in addition to whatever action legislatures might have taken in this regard.

I would like to observe also that a court has advantages, which a legislature does not enjoy, of being provided with the details of particular cases, and being required to fashion a just result which is in consonance with the infinite variations of fact that can exist in the application of a particular principle. It also has the requisite legal expertise for doing so. It is therefore

better equipped than any legislature for making law on a micro scale. A series of these micro decisions built around the general principle give it a degree of considered elaboration which no legislature has the opportunity to achieve. In their totality, these micro decisions can build into a macro principle of law, bolstered by the judiciary's technical expertise and moral authority, which legislatures do not always enjoy.

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Having said that, let me deal with the two competing views, so far as concerns the International Court. The first view, that is what one might call the civil law view, was expressed by Judge Gros in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, in these terms: "[a] court only decides the case before it without being able to deliver judgments of principle with a general scope".[15] That is the classic formulation of one view.

On the other hand, there is the other view formulated, among others, by Judge Lauterpacht and endorsed by Judge Fitzmaurice, that the judge who decides only the case in hand, only accomplishes half his real task. The other half is to impart judicial backing and authority to as many principles and rules of law as possible, as to the way in which these should be applied to the particular situation before the judge.[16] For these reasons the judges' judgments and opinions constitute a particularly rich mine in which to quarry for general pronouncements of law and principle.

Those are two diametrically opposed views. What I am giving you in this lecture is purely my personal view. My personal preference is for the latter. The Judge of the International Court does not sit up there in the seat of judgment like a magistrate determining the narrow question of guilt or innocence in the traffic offence before him. The magistrate's task ends when he decides whether this man should go off scot free or pay a fine. As Judge Lauterpacht points out, the Court of Appeal, the House of Lords or the Judicial Committee of the Privy Council, and their equivalents in other countries, are expected to play a wider role when they decide a case.

15. Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, 1982 ICJ Rep. 143, at 152 (Judge Gros, Dissenting Opinion).
16. Sir G. Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. 2, at 648 (1986).

Society expects more by way of legal guidance from them than the mere determination of the immediate case which is expected of a magistrate.

> 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.*[17]

The international judge is, in my view, appointed by the world community, not only to decide the immediate case, but also to make his or her contribution to the development of international law. There is no superior judicial agency that can discharge this role with more authority or acceptance than the International Court of Justice, and its role and duty must extend beyond the immediate case to the elucidation of relevant principles that have arisen for discussion in the context of the case, thereby helping in the development of the law.

I am fortified in this view by such statements as that of Judge Lauterpacht. In *Certain Norwegian Loans*, he expressed his belief that a tribunal such as the International Court of Justice has a duty, both to the parties and in the general interests of the community, that may go considerably beyond a bare decision and beyond the consideration of those views which technically suffice to motivate the decision. He gave effect to this view of the international judicial function when he observed:

> [i]n my opinion, a Party to proceedings before the Court is entitled to expect that its Judgment should give as accurate a picture as possible of the basic aspects of the legal position adopted by that Party. [...]
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> Accordingly, although I am of the opinion that there is before the Court no valid Declaration of Acceptance by reference to which it can accept jurisdiction, I consider it my duty to state my opinion as to the principal Preliminary Objections of Norway.[18]

My view is thus not unsupported by judicial *dicta* and writings of the highest authority. I share with those eminent judges the belief that the judgment of the Court serves a dual function. That second function yields a rich mine of experience and principles in which future workers in the field of international law may work with profit, to quarry what is necessary to help them in the solution of the problems of their time. Failing to provide these insights, the Court would fail in its duty of leaving to the

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17. *Id.* (emphasis added).
18. Certain Norwegian Loans (France *v.* Norway), Judgment, 1957 ICJ Rep. 34, at 36 (Judge Lauterpacht, Separate Opinion).

future the benefit of its experience of the given problem, and of the insights which have resulted from a careful judicial consideration of the legal principles involved.

In the *Genocide* case[19] between Bosnia and Yugoslavia, the Court delivered its opinion a few months ago. There was a question there as to whether international law contained within itself a rule of automatic succession to humanitarian treaties. The case could have been decided, as indeed it was, without reference to this question. According to what I might call the Lauterpacht view, it might have been appropriate for the Court to have looked into that matter and expressed its view because, after all, such matters are important and do not come up very often. A view expressed by the Court upon this question, though not essential to the determination of the immediate matter before it, could have been a valuable contribution to the development of international law in the humanitarian field.

In regard to this belief that judges should go beyond merely deciding the immediate case, Judge Tanaka, in the *Barcelona Traction* case, observed:

> [t]he more important function of the Court as the principal judicial organ of the United Nations is to be found not only in the settlement of concrete disputes, but also in its reasoning, through which it may contribute to the development of international law. It seems hardly necessary to say that the real life of a decision should be found in the reasoning rather than in the conclusion.[20]

When there is an important issue which is argued before the Court, but which is not considered in the Judgment although relevant to the issues before it, there could well be some sort of criticism that the Court missed an opportunity to consider a matter it might have considered. Thus Judge Mbaye, in *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, said that the Court should take advantage of the excellent opportunity afforded to it to breathe life into Article 62 of its Statute and make a clear pronouncement on the very important question of the 'jurisdictional link' between the intervening state and the parties. He thought that while the Court had dispelled some of the doubts and uncertainties surrounding the

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19. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina *v.* Yugoslavia (Serbia and Montenegro)) (Preliminary Objections), Judgment, 1996 ICJ Rep.
20. Barcelona Traction, Light and Power Company, Limited (Belgium *v.* Spain) (Preliminary Objections), Judgment, 1964 ICJ Rep. 65, at 65-66 (Judge Tanaka, Separate Opinion).

exercise of the procedural faculty of intervention under Article 62, this by itself was probably not sufficient.[21]

> [t]hus in the present case, in my opinion, the Court had a duty to tackle the question "whether a jurisdictional link with the parties to the case [was] a necessary condition of a grant of permission to intervene under Article 62 of the Statute". Nobody could reproach it for doing so. I personally regret that it has not done so.[22]

I might remind you also, in that connection, of a General Assembly Resolution of 1947, Resolution 171, which recognized and stressed the Court's right to develop international law. The General Assembly categorically said that the Court had a right to develop international law and this was itself referred to in some of the later judgments of the Court. For example, Judge Elias, in *Aegean Sea Continental Shelf*, referred to this General Assembly Resolution 171.[23] Likewise, Judge Alvarez, in *Competence of the General Assembly for the Admission of a State to the United Nations*, referred to Resolution 171, and observed that

> the Court was entrusted with a mission which was not conferred - at any rate not in express terms - on the Permanent Court of International Justice, namely the *development* and consequently the *creation* of law.[24]

There is thus strong support in the general literature of international law, as well as in the jurisprudence of the Court, in favour of the view that the Court should contribute what it can, in the context of the cases before it, to the development of international law.

Having said so much in regard to judicial lawmaking in general, I will now give you some concrete instances of the manner in which the International Court has made law.

In the first place, the Court and its predecessors have made law by exercising a choice among alternative possible interpretations of an important international instrument, as the Court did when it interpreted the mandate instrument relating to *South West Africa*,[25] or when it interpreted the

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21. Continental Shelf (Libyan Arab Jamahiriya/Malta), 1984 ICJ Rep. 35, at 36 (Judge Mbaye, Separate Opinion).
22. *Id.*, at 37.
23. Aegean Sea Continental Shelf (Greece *v.* Turkey) (Interim Protection), Order, 1976 ICJ Rep. 28, at 29 (Judge Elias, Separate Opinion).
24. *See* Competence of the General Assembly, *supra* note 2, at 12 (Judge Alvarez, Dissenting Opinion) (emphasis added).
25. South West Africa (Ethiopia *v.* South Africa; Liberia *v.* South Africa) (Second Phase),

Treaty of Lausanne.[26] In so doing, the Court gave the stamp of authoritative legal recognition to the interpretation which it decided upon and in this manner made law for the future.

A second method could be by an analysis of the practice of states from which the Court deduces the existence of a customary rule of international law. A notable example was its consideration of the question whether there was an obligation to give notice of the existence of a minefield in Albanian waters[27] - incidentally the first decision of this Court - in which the Court referred to "elementary considerations of humanity, even more exacting in peace than in war".[28] So, also, in *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, the Court referred to the "well-established and generally recognized principle of law" that "a judgment rendered by [...] a judicial body has binding force between the parties to the dispute".[29]

The 'clean hands' principle was authoritatively included into the corpus of international law in such cases as *Factory at Chorzów* in 1927,[30] and Jurisdiction of the Courts of Danzig.[31] Under this principle a party cannot invoke the failure by the other party to fulfil an obligation, if the first party has by some illegal act prevented such fulfilment.

The Court may likewise infer the existence of a rule of customary international law from pre-existing principles. The Court may, in doing this, commence with modest applications of the principle which may grow in scope and strength through repeated use. There is an act of judgment here when the Court draws the line at the extent to which it considers the application of the principle permissible.

Examples of the incorporation of such principles into the corpus of customary international law are the *Free Zones* case,[32] and *Certain German*

Judgment, 1966 ICJ Rep. 6.

26. Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne, Advisory Opinion, 1925 PCIJ (Ser. B) No. 12.
27. Corfu Channel (United Kingdom *v.* Albania) (Merits), Judgment, 1949 ICJ Rep. 4.
28. *Id.*, at 22.
29. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 ICJ Rep. 47, at 53.
30. Factory at Chorzów (Claim for Indemnity) (Germany *v.* Polish Republic) (Jurisdiction), Judgment, 1927 PCIJ (Ser. A) No. 9.
31. Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who Have Passed into the Polish Service Against the Polish Railway Administration), Advisory Opinion, 1928 PCIJ (Ser. B) No. 15.
32. Free Zones of Upper Savoy and the District of Gex (France *v.* Switzerland), 1932 PCIJ

Interests in Polish Upper Silesia.[33] In the first case, the Court added a reservation regarding abuse of a right to France's entitlement to levy duties in the Free Zones territory, and in the second, the Court observed, in relation to the German right to dispose of State property in Upper Silesia, until the Peace Treaty came into force, that "only a misuse of this right could endow an act of alienation with the character of a breach".[34]

Estoppel likewise is a principle that has received development in the field of international law at the hands of the Court and its predecessor. In *Legal Status of Eastern Greenland*,[35] the Permanent Court developed this principle by holding that through its recognition of the whole of Greenland as Danish, Norway had debarred herself from contesting Danish sovereignty. So, also, this Court, in considering the *International Status of South West Africa*,[36] held that declarations by South Africa constituted a recognition of the obligation to submit to continued supervision, and were not to be looked upon merely as declarations relating to future conduct. I have already dealt with the creation of law by the visualization of a new concept (*erga omnes - Barcelona Traction*).

The absence of a relevant rule of law places the Court in a situation where it is bound to examine the question independently and, in so doing, to formulate a principle which has applicability for the future. Two examples are the *Fisheries Case*[37] (determination of the base line of territorial waters), and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*,[38] where there was an absence of a generally accepted legal rule relating to this matter. In *Mavrommatis Palestine Concessions*,[39] the Permanent Court adopted a principle which it considered to be best calculated to ensure the administration of justice, and most in conformity with fundamental principles of international law.

The International Court of Justice has also played a role in developing

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(Ser. A/B) No. 46.

33. Certain German Interests in Polish Upper Silesia (Germany *v.* Polish Republic), Judgment, 1926 PCIJ (Ser. A) No. 7.
34. *Id.*, at 30.
35. Legal Status of Eastern Greenland (Denmark *v.* Norway), Judgment, 1933 PCIJ (Ser. A/B) No. 53, at 22.
36. International Status of South West Africa, Advisory Opinion, 1950 ICJ Rep. 128.
37. Fisheries (United Kingdom *v.* Norway), Judgment, 1951 ICJ Rep. 116.
38. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 15.
39. Mavrommatis Palestine Concessions (Greek Republic *v.* Great Britain), 1924 PCIJ (Ser. A) No. 2.

what may be described as a body of international constitutional law, as it did in the *Reparations* case (relating to the legal personality of the United Nations),[40] and in the *Application for Review of Judgement No. 333 of the UN Administrative Tribunal*, where Judge Lachs observed, regarding steps taken by the General Assembly to enact legislative measures regarding a uniform administrative procedure between the ILO and the UNAT, that

> [t]his indicates that, in its functioning, the principal judicial organ of the United Nations may not only decide contentious issues or give advisory opinions, but may also contribute in practical terms to the improvement or operation of the law within the United Nations system.[41]

Likewise, the Court has contributed to the development of international arbitration law. For example, in *Arbitral Award of 31 July 1989*,[42] it clarified notions relating to an arbitrator exceeding his authority; and in *Ambatielos*,[43] the International Court examined the question of the arbitrability of a dispute.

An important area where the Court has made a major contribution is in regard to decolonization law. *Northern Cameroons*[44] and *South West Africa*[45] are instances.

Major contributions have also been made by the Court and its predecessor to the development of international law in the fields of the Law of the Sea and Treaty Law. In both of these areas the fundamental interna-

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40. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 ICJ Rep. 174.
41. Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, 1987 ICJ Rep. 74, at 75 (Judge Lachs, Declaration). It is interesting also that the case illustrates the manner in which observations made by an individual judge -Judge Lachs - had in fact been taken up by the United Nations General Assembly with a view to enacting some measures to meet the concerns expressed by that Judge. Judge Lachs had, 14 years earlier in Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal (Advisory Opinion, 1973 ICJ Rep. 214), envisaged an improved procedure in relation to review of administrative decisions. To quote Judge Lachs, "I welcome these developments, not only in themselves but because observations made by a Member of the International Court of Justice have been taken up by the United Nations General Assembly with a view to enacting some legislative measures in their respect" (1987 ICJ Rep. 75).
42. Arbitral Award of 31 July 1989 (Guinea Bissau *v.* Senegal), Judgment, 1991 ICJ Rep. 53.
43. Ambatielos (Greece *v.* United Kingdom) (Jurisdiction), Judgment, 1952 ICJ Rep. 28; and Ambatielos (Greece *v.* United Kingdom) (Merits), Judgment, 1953 ICJ Rep. 10.
44. Northern Cameroons (Cameroun *v.* United Kingdom) (Preliminary Objections), Judgment, 1963 ICJ Rep. 15.
45. See South West Africa, *supra* note 25.

tional jurisprudence upon the matter has developed upon a firm base of International Court rulings.[46]

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I come now to my next broad topic - the several inhibiting factors which prevent the International Court from making its fullest possible contribution to the development of international law.

The first of those is what I would call the civil law/common law dichotomy of approach. There are judges on the Court who come from a basically civil law background of training, and others who come from a basically common law background. There is a wide disparity in their views as to the law-making function and the law-making potential of the Court. This acts as a restraining factor which I will deal with in a moment.

Another attitude requiring discussion is the view that the Court should keep away from political issues. The problem with this approach is that there is scarcely any legal issue that comes before the Court which does not have political implications and, if the Court is to steer clear of political issues, it may not be able to discharge its proper functions and responsibilities.

A third restraining factor is the belief that cases should be and are decided on logic alone. In the language of some of the writers on this topic, this belief panders to the illusion of a certainty which does not exist. I have referred to this already. As Cardozo says, law is always the quest for a probability, not a certainty.[47]

A fourth inhibiting factor is the supposition that international law is now a black-letter system, that it is already formed, and is a repository of principles ample and definite enough to provide the particular principle that has to be applied in a particular case. That belief is altogether premature.

A fifth factor is the neglect of the inspiration available from multicultural sources. The International Court is not a monocultural court. It is a court that must draw its inspiration by virtue of being a world court,

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46. *See, e.g.*, Corfu Channel (1949), Fisheries (United Kingdom *v.* Norway, 1951), North Sea Continental Shelf (1969), Continental Shelf (Tunisia/Libyan Arab Jamahiriya, 1982), Gulf of Maine (1984), Genocide Convention (1951), Rights of Nationals of the United States of America in Morocco (1951), Ambatielos (1953), and Temple of Preah Vihear (1961).
47. B.N. Cardozo, The Growth of the Law 69 (1924).

from world traditions. Thus far, it has done so inadequately, in my view.

Sixthly, there is a tendency to regard the Court as concerned exclusively with state rights and not with individual rights. The result is a belief that the vast area of human rights is not strictly the province of the Court, and that the Court consequently has no human rights jurisdiction. Modern international law must concern itself with individual rights and quite often state disputes that come before the Court are intimately linked with individual rights. States are made up not only of territory, but also of people; and their rights are not always separable from state rights.

The Court does receive from time to time cases which have profound human rights implications. Among these are cases pertaining to decolonization, cases such as those of *Nauru*[48] and *East Timor*[49] which bear on claims of deprivation of the resources of peoples; cases on personal or family rights, such as *Application of the Convention of 1902 Governing the Guardianship of Infants*.[50] In this last case, even such a personal matter of individual rights such as the question who shall appoint a guardian over an infant came before the Court.

One recalls, in this context, the address of Pope John Paul II when he visited the Court on 13 May 1985:

> [e]ven while the Court sits in the Peace Palace, the cries continue to ring out in many parts of the world of the imprisoned and the oppressed, the cries of people who are being exterminated, the cries of people whose cultural and spiritual freedom is being shackled - whose personal liberty is being denied.[51]

Another serious limitation on the Court coming up to its full potential is the neglect to make the fullest use of the resources of equity. I shall have more to say about this later.

A serious limiting factor of a different kind, which is not always appreciated by the reader of a judgment of the Court, is what I would call the 'highest common denominator' approach. This arises from the fact that the Court consists of fifteen judges, the decision is by a majority, and there has to be one judgment for the majority. In drafting that judgment for the

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48. Certain Phosphate Lands in Nauru (Nauru *v.* Australia) (Preliminary Objections), Judgment, 1992 ICJ Rep. 240.
49. East Timor (Portugal *v.* Australia), Judgment, 1995 ICJ Rep. 90.
50. Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands *v.* Sweden), 1958 ICJ Rep. 55.
51. Cited in N. Singh, The Role and Record of the International Court of Justice 332 (1989).

majority, it is necessary for the drafting committee so to draft that judgment as to command the acceptance of all the members of that majority, some of whom may have reached the same conclusions as others, but for different reasons. In doing so, the drafting committee cuts the reasoning down to the highest level of common agreement, so that all the members of that group of judges would accept it. This therefore prevents the fuller development of any particular principle that some of the judges might like to develop, but which some of the others may not feel is appropriate. Since the drafting committee cannot go beyond the 'highest common denominator' approach, I call this the 'highest common denominator' factor.

Related to this there is a tendency to decide a case only on the minimum number of issues, necessary to reach a decision. Let us say there are five issues arising in a case, and three of them are sufficient to dispose of the case - issues A, C and E. Any one of them could determine the case altogether. There is a tendency, having decided A and finding that the result of the case can well be determined by the decision on point A, to avoid considering issues C and E. Points C and E may each be equally deserving of consideration, and each of them could equally determine the case. Still the world is deprived of the Court's opinion on C and E, and must rest content with the Court's opinion on point A.

To round off this list of inhibiting factors, I would refer to an attitude of discouragement of separate and dissenting opinions. There is a fairly widely held belief that a monolithic judgment of a monolithic court conveys the law in the most authoritative fashion and, therefore, that judges ought not to deliver/append separate or dissenting opinions. Even if there are, they should be reduced to the minimum.

I have given you a wide range of factors which inhibit the development of law to the full potential of which the Court is capable. I shall have no time to elaborate on all of them, but I wish to make some further observations on some, and particularly on the first point mentioned - the common law/civil law dichotomy. This assumes special importance in the International Court, owing to the fairly even distribution of judges between those trained in the two systems. There is indeed a slight preponderance of judges with a common law background, but this does not make a considerable difference to the points I shall discuss.

This dichotomy arises from two totally different attitudes to the judicial process and to the standing of a judicial decision. The civil lawyers believe that a judgment should be short and succinct. It should go straight

to the point with a minimum of verbiage and should tell you exactly what the court feels as clearly as possible upon that point. To quote a book upon the sources of law, Allen's *Law in the Making*, the French judgment, to English eyes, is highly compressed.

> A judgement of a French court is, as we should expect of the Gallic genius, a meticulously constructed piece of logic - a pared and polished judicial syllogism, as it were. The narrative is given in a series of concise premises, and the judgement, by a succession of logical steps, states the main relevant facts and the statutory provisions which are applicable to them and which thus lead to the conclusion.[52]

Therefore you cut down the judgment to the barest minimum. That is the continental tradition and it has deep historical reasons. In fact, it goes all the way back to the Roman law. It goes back 2000 years, long before even Justinian's Code to the civil law concept of the judge, the *judex*, being a person in a somewhat inferior position to the jurisconsult. The jurisconsult was the master of the law. The *judex* was not necessarily a legal expert. The *judex*, a cross between a bureaucrat and an arbitrator, had to decide the immediate matter between the parties. There was even a custom that the opinions of the most eminent jurisconsults could be obtained in writing and placed before the judge - an unthinkable procedure for the common law trained lawyer.

The relative position of judge and jurisconsult in the Roman law system was reinforced by Justinian's Code, because Justinian had the idea that nobody but the Emperor should make or declare the law. Consequently his prohibition of reliance on decisions as precedents *non exemplis sed legibus judicandum est*.[53] 'Not on precedents but on the laws should judgment be made'. That was very clearly and categorically stated by Justinian. The judge in that tradition was not the same elevated personality we are familiar with in the common law, who exercises a certain prerogative of stating and expounding the law. The civil law judge is there just to decide the immediate problem between the immediate parties. Somewhat in the manner of Justices of the Peace or jurors, without the same legal training, legal background, and prestige in society enjoyed by the common law judge, they decide the particular disputes brought to them without preten-

52. C.K. Allen, Law in the Making 168 (1946).
53. C.7.45.13.

sions to developing or expounding the law. Vinogradoff[54] tells us that German courts used regularly to send up documents in their difficult cases to the law faculties of prestigious universities, such as Halle, Greifswald and Jena, in order to obtain a consultation as to the proper decision. In some continental systems, they had access to a *concilium* of jurists to whom they could turn for legal advice. Nor were their judgments always systematically recorded. The French Code insists that the judge confine himself to the process of deduction from rule to case. Such is the civil law tradition.

The common law tradition is markedly different. If you go even as far back as the time of Bracton in the 13th century, he maintained a notebook of over 2000 decided cases, which he would not have maintained so carefully unless he thought that each decision was important in itself and could be cited as a precedent. Moreover, the English legal system adopted, quite early, the system of Yearbooks to report the decisions of the judges, so that later judges could act on the precedents of earlier cases. The principle on which the common law has grown has thus been the principle of precedent - the decisions in earlier cases being looked upon as laying down the law in authoritative fashion - the system "where freedom slowly broadens down from precedent to precedent", to quote Tennyson. Underlying the whole system is the idea that out of the decisions in individual cases are evolved the principles which determine the decisions in later cases.

Another factor to bear in mind in seeking the background to the common law judges' authority to pronounce upon the law in a far-reaching manner was that the king's justices would go out from London in the early days when the common law began to evolve, with all the central authority necessary to administer a *common* law for the entire realm, at a time when different sets of laws had till then existed for the different parts of England. Their mission was to decide cases in the king's name, thus creating a common law for the whole realm. This was just the opposite of the situation of the Roman *judex* who was consciously kept away from all law-making authority. We thus find two totally different judicial backgrounds in the two systems, and in the International Court we have to reconcile these backgrounds, with judges coming from these markedly different backgrounds of legal thinking. The result is the contrast between the amplitude, on the one hand, of common law judicial thinking and, on the other hand, the cryptic curtness of the civil law judgment.

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54. *See* Sir P. Vinogradoff, Common Sense in Law 147 (1946).

If critics of the Court look at our judgments and sometimes feel that they do not expound as fully as they should the various principles that they apply, this conflict of judicial traditions and the need to find a *via media* between them is one of the reasons. Moreover, in the building up of international law, there is a very strong continental tradition, in consequence of which the civil law tradition that judgments do not have precedential value is built into it.

The earlier discussion as to how judges in any system do in fact make law by their decisions is relevant also to the question we have just been examining.

I would now like to make a few additional comments on the second inhibiting factor - the belief that the Court should not consider questions which have political implications. I do not need to deal with this at great length because that has now been definitively disposed of by the Court in its Opinion in answer to the General Assembly on the Legality of Nuclear Weapons. However, there have also been a number of earlier cases where the Court's position has been quite categorically stated. In *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*,[55] the Court said that in situations in which political considerations are prominent, it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles involved. Indeed, as the Court observed, the fact that there is a heavy political dimension to it may be the very reason why those requesting the Opinion - perhaps the General Assembly, perhaps any other organization entitled to ask the Court for an Opinion - may want an opinion on the law. What the Court is concerned with here is a question of law. And almost every question of law which is of sufficient importance to come to the Court must have some political overtones. The fact of those political overtones ought not to deter the Court from hearing it. As Fitzmaurice says, if the question put to the Court is a legal question, the fact that it has a political element is irrelevant.[56] I will not dwell further on this, except to observe that it is difficult to conceive of a case fraught with greater political implications than the Nuclear Weapons Advisory Opinion sought by the General Assembly.

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55. Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 ICJ Rep. 73.
56. Fitzmaurice, *supra* note 16, Vol. 1, at 116.

The third factor I mentioned at the commencement raises important juristic issues - the belief that cases should be decided on logic alone. I refer you to the famous Holmesian dictum on this matter that the life of the law has not been logic but experience. In his words:

> [t]he law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.[57]

Holmes says that:

> [b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet *the very root and nerve of the whole proceeding*. You can give any conclusion a logical form.[58]

So we have to recognize that logic alone does not make law. Logic alone does not deduce for us the movement from general principle to particular case. There are other factors at work and it is unwise in this age to shut our eyes to that.

I had the great privilege for some years of teaching a Masters course in Theories of Justice in association with the late Professor Julius Stone, one of the great jurists of this century. Stone was an international lawyer as well. One of his principal aims in the sphere of legal philosophy was to try to disabuse the minds of lawyers and judges of this old and erroneous belief that the movement from general principle to particular decision takes place on the basis of logic alone. He was anxious to point out that logic is an important factor, but it is only one factor, and there are numerous other factors that mix that produce the judicial decision. I would recommend that you peruse, if you are not already familiar with it, his masterly study, *Legal System and Lawyer's Reasonings*, where he exposes the ways in which there is a misplaced belief in logic as making law. He draws attention to the most famous cases you can think of and exposes logical flaws in those cases. In doing so, he draws attention to numerous logical errors that can occur in judgments, such as errors of circular reference, indeterminate reference, and concealed multiple reference. Each of these categories is illustrated with judgments from some leading cases. He also deals with extra-logical factors

57. O.W. Holmes Jr., The Common Law, Little, Lecture 1, at 1 (1881).
58. Holmes Jr., *supra* note 10, at 466 (emphasis added).

that come into play in the exercise of leeways of judicial choice, and competing views of *ratio decidendi*. A whole catalogue can be compiled of the errors that judges make, merely because of their mistaken belief that their process is a logical one. In their anxiety to base their reasoning on logical considerations alone, they could lose sight of the fact that the processes they use are not all purely logical. In fact, Stone used to organize seminars for judges to disabuse their minds of the fallacy that they proceeded by logic alone and were not themselves making law.

In the disciplined manner which is characteristic of the judicial function, the judges have played a fruitful and meaningful role in developing legal systems domestically. There is no reason why they should be seen as not playing this role in the field of international law which, perhaps more than most domestic systems, is in urgent need of development if it is not to lag behind the needs of our time. The law-creating function, in the ways and within the limits I have indicated, is in my view an essential part of the judicial role - a role which no other agency can perform with such fine-tuned efficiency to meet both the nuances of the particular case and the larger interests of general principle.

I would now like to say a few words about the premature supposition that international law is a black-letter system. As I stressed earlier, it is still in its most initial and formative phase, where whole new areas are still not even on the drawing board. They are about to be created - areas of social rights, economic rights, developmental rights, human rights, environmental rights, law and technology, space law, communications law. All these will be areas which will bring cases to the International Court in the future. Taking space law as an illustration, this is potentially a fruitful field to come to the International Court. So much is this a recognized fact that there is now, already in its fifth or sixth year, a Manfred Lachs International Space Law Moot which, incidentally, is to be held next week in Beijing, where law students from all over the world compete on a question of space law which is supposedly presented to the International Court. If you look into newly developing fields like this, you will find vast undeveloped areas which will come to the International Court in the future - areas which are largely amorphous at the moment, and which need to be given shape and form. The fields of social rights, economic rights, rights to development, law and technology, communications law - all of these will need development, whether by way of advisory opinions or even as issues involved in inter-state litigation. The International Court has a great task

ahead of it in giving form to all these developing areas.

Take environmental rights which will be a major area of international litigation in the future, where the Court has not done very much, as yet, to develop this vital field. The question of intergenerational rights; matters such as the *erga omnes* principle (Judge Lachs briefly formulated this in the *Barcelona Traction* case, but it has not been developed); the precautionary principle; the 'polluter pays' principle; the principle of prior impact assessment; the principle of trusteeship - all of these principles are principles waiting to be judicially applied. That will be a field *par excellence* for the International Court.

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I refer next to the multicultural dimension I mentioned earlier, when I referred to current international law as largely a Eurocentric system. The International Court is a universal court. It must take account of global traditions, and global traditions are exceedingly rich in principles with great potential for the future development of international law. Take, for example, Hindu law. There is ingrained in Hindu law the idea of an international regime of righteousness with all nations alike living under a common rule of law. This beautiful concept is well accepted in Hindu law. Indian cultural tradition has long entertained the notion of a *chakravarthi*. A *chakravarthi* is a universal ruler, that is, a human being who achieves universal dominion. Hindu law has embodied the idea that the international regime of the future will go far beyond the almost puerile conception of a *chakravarthi*, because, far beyond such physical sovereignty is the idea of the universal authority of the law. The sovereign of the future will be 'the kingless authority of the law'. That shows the extent to which notions of international law - and the justice that underlies international law - received recognition in that tradition.

Buddhist law is of immense importance to the environmental law of the future, for it contains the concept that all living things on this planet are entitled to protection. Our current concepts of law are extremely narrow. We are only concerned with ourselves, we who are alive here and now. We are not concerned even with the next generation. And we are concerned only with human beings. But Buddhism is imbued with the idea of concern for all human beings all over the world. It is concerned with human beings past and human beings to come. It does not stop here, but is

also concerned with all living things, for they have a place and a function in the scheme of life upon this one planet, which is our common home.

Consider African traditional law. Bishop Tutu has referred in his sermons to the fact that traditional African law embodies the concept that the community of humans is not merely us who are alive here and now. It is three-fold - those who went before us to whom we owe a duty, those who are with us here and now, and those who are to come after us. That three-fold entity, that trinity so to speak, is the human community to whom the law owes a duty, to whom legal systems and traditions are obliged to pay their respects.

And therefore when you are considering the justness of a particular rule, you must bear in mind those past, those present and those future who will form the common community of humans to whom the law owes a duty.

Take Melanesian law. It is permeated with the idea that land has a special character, that land is deserving of special respect. The idea that we can deal with land as we deal with a piece of merchandise which we can buy and sell, and which the buyer can destroy at his pleasure, is not a concept that accords with Melanesian law. When I was the Chairman of the Nauru Commission some years ago, we needed to research some of the materials on attitudes towards land among Pacific peoples. We came across evidence given by a Solomon Islander before a Land Commission in the British Solomon Islands who said, that with his people, land is not like a six-sided box which one can buy and sell in the market place, and which the purchaser can treat as he pleases, or even destroy. It is something sacred. It is something to be treated with reverence, and therefore to be carefully protected, because there are others who are to come after us to whom we owe a duty.

The idea of trusteeship of land is well developed in Islamic law. Islamic law has the idea ingrained within it that we are not the owners of any land which we may possess. We are only its trustees. As trustees, we must look after it and pass it over to those who come after us in at least as good a condition as we received it, if not better.

All these are illustrations of the multitude of rich and far-reaching ideas which can fertilize the environmental law of the future. They can be invoked for the benefit of international law; and the International Court and the lawyers who practise before that Court should invoke them, and are not only entitled to, but obliged to, pay attention to them. A World

Court can do no less.

The idea that international law is a Eurocentric construct is very strongly present in the minds of many of the litigant states which come before the Court and that idea needs to be displaced. Rosenne refers to this in one of his books,[59] when he says that there is a widespread questioning of contemporary international law, based upon the feeling that the greater part of international law is the product of European imperialism and colonialism, and does not take sufficient account of the completely changed pattern of international relations which now exists. Many countries that were formerly colonies still entertain the idea that the body of international law that is now administered is the international law that was worked out for the era of empires. The era of empires was over at the end of World War II, but its influence is perceived as still continuing in the world of international law. A corrective is that there should be an injection into it of some of the perspectives of people who were not part of the community of nations at that earlier stage.

While on this topic, I would like also to mention a fact that is not very generally known - that Islamic law is probably the precursor of European law in the development of classical international law. As early as the 8th century, 800 years before Grotius, there were text books on international law, treatises of international law in the Islamic world. For example, Al-Shaybani, in the 8th century, wrote a treatise which included the principles relating to the law of war, conduct on the battlefield, treatment of prisoners of war, the law of treaties, the sanctity of treaties, the *pacta sunt servanda* idea of Grotius, the question of diplomatic privileges, and so on. This became the subject of a four-volume commentary by Shamsal-Aimma Sarakhsi, long before the topic became the subject of organized Western juristic writing.[60] The fairly elaborate treatises of Islamic law on the topic, written centuries ago, were known in Islamic Spain, and were available to the early Spanish writers on Islamic law, such as King Alfonso of Castile. His *Siete Partidas*, a veritable encyclopaedia of law in his time, has a section on international law which draws heavily on the work of the Islamic writers. Those Islamic writings were a development of some high religious principles, such as the sanctity of promises, into the area of the conduct of states. For example, the principle that even though two countries are at

59. S. Rosenne, The Law and Practice of the International Court 17 (1985).
60. *See* M. Khadduri, The Islamic Law of Nations: Shaybani's Siyar (1966).

war, the contracts that they have entered into before war must be honoured despite the outbreak of war between them, was written into early Islamic international law. So, also, was the principle that a prisoner of war must be treated as well as one's own soldiers, and if he has correspondence it must be transmitted across the line of battle to his home country. All those are found in the old Islamic texts. There is thus a vast amount of research to be done on these sources, and a wealth of wisdom contained in them that can be incorporated into the international law of the future.

Again, equity is, in my view, an underutilized source of international law. I shall not labour that point, but if you are interested in it, you may care to see my examination of its applicability in international law in my Separate Opinion in the *Jan Mayen* case.[61] Equity can fertilize international law, not merely in one, but in numerous ways, and anyone interested in the ways in which equity can assist in building up a fairer and sounder international law in the future cannot afford to lose sight of the wide variety of its possible applications. I would refer you also to *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, where the Court observed the distinction between principles and rules of international law, and the equitable criteria used in concrete situations.[62] Every case involves a concrete situation which may well be different from anything that has come before the Court before, and this may require the finely nuanced application to that situation of the principles of equity - without which the general rule may not do justice in the particular case.

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I would like, before closing, to say a word about dissenting and separate opinions. Separate and dissenting opinions do help to clarify the law. They indicate in what way new developments are possible, and what the weaknesses are in an existing legal rule. By bringing into relief the strengths of the Judgment and drawing attention to its weaknesses, they reinforce the strengths and prompt a reconsideration of the weaknesses. All the textbooks give you examples of new developments and trends that have been triggered off by separate opinions and dissenting opinions. As Fitzmaurice

61. *See* Jan Mayen, *supra* note 14.
62. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, 1984 ICJ Rep. 246.

observes, separate opinions "clearly form a valuable supplement to those of the Court".[63] Another factor to be borne in mind is that every judge must satisfy his or her individual conscience. One cannot expect judges who do not agree with the principal judgment to register a false agreement in order to achieve a solidarity of opinion that does not exist. That would indeed be contrary to the judicial function and the judicial oath.

M. Politis of Greece, a member of the Committee of Jurists who drafted the Statute of the Court in 1920, was one of those who, at that stage, opposed separate and dissenting opinions. In 1929, however, when sitting on the Committee of Jurists studying the Revision of the Statute of the Permanent Court, he observed that, nine years ago when this matter was discussed, he had opposed it, but had accepted it in a spirit of conciliation. However, on the basis of the workings of the Court, he had become so convinced of the value and importance of dissenting opinions, that if by any chance representatives of the Anglo-Saxon world were now to make a move for their abolition, he would oppose it. He said he was now so convinced of its value that even if the Anglo-Saxon world had changed their mind, he had changed his mind in the opposite direction.[64]

Sir Cecil Hurst, sitting on the same Committee, observed that the views of distinguished judges who happened to be in a minority were as important to the building up of an international system of law as the views of the majority.[65] It would certainly not be accepted in Great Britain that the views of dissentient judges were of no value in the development and strengthening of the laws of the country.

If I may conclude this particular topic with a reference to Fitzmaurice, it is important to note his observation that, even when contrary to the views of the Court, it may be useful to cite them "because it is often the case, particularly with difficult or controversial questions, that a decision can only properly be appreciated in the light of a contrary view".[66]

It must not be thought that anything I have said thus far means that I overlook the need for judicial caution. Considerations of caution are built into any theories regarding the law-making capacities of *any* tribunal. Courts will always have regard to the importance of their rulings for the

63. Fitzmaurice, *supra* note 16, Vol. 1, at 2.
64. Committee of Jurists on the Statute of the Permanent Court of International Justice, Minutes, Geneva, at 51 (1929).
65. *Id.*
66. Fitzmaurice, *supra* note 16, Vol. 1, at 2.

future development of law and their impact on existing principles of law. This aspect of caution is built into the judicial function. It tends sometimes to be overemphasized, as though it gives expression to some new-found verities concerning the judicial process.

Judges must always be cautious. It is, has been, and always will be part of proper judicial attitudes. Judicial caution must not be blown up into an excuse for inaction.

I would like to terminate this talk on a note of exhortation to those who will be the standard bearers of international law in the future. Please give your special and considered attention in your studies to the role of the International Court in developing international law. In the Court there is an unmatched instrument for developing the law to meet the needs of a troubled world, especially during this formative period of international law. There are uncharted waters lying ahead through which international law must steer its course. The Court embodies a great concentration of legal expertise, a great spread of global perspectives, a combination of the principal legal systems and cultural traditions of the world, a totally non-political body. It represents the quintessence of human achievement in seeking a peaceful means for the resolution of international disputes and, although visualized by idealists and philosophers through millennia of recorded history, was only able to reach fruition in the form of a real court in this century after World War I. It was placed on a stabler footing as part of the United Nations family after World War II. Millions have died for the ideal the Court represents, and the hopes of billions for a more peaceful world order and a more mature system of international law ride upon it. It is perhaps the richest justice-oriented resource which the world enjoys, and should therefore be used to its fullest capacity.

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