## Governor's Forum

# The World Court: Its Conception, Constitution and Contribution

AN ADDRESS BY
HIS EXCELLENCY JUDGE C G WEERAMANTRY

*This address was given at Government House, Melbourne, on Wednesday 27 July 1994 on the occasion of the inaugural 'Governor's Forum'. The Forum was hosted by His Excellency the Honourable Richard E McGarvie, AC, Governor of Victoria. In the course of his opening address, His Excellency the Governor said:*

Governors naturally investigate the potentialities of the office of Australian Governorship so that the resources available are used in the best way for community advantage. It is for that reason that we have decided to initiate Governor's forums to deal with issues of importance to the whole community. In particular we will be concentrating on our system of government, or perhaps more accurately governments, covering the whole field spanning local government, state government, national government and international government. I do not suppose there is anyone present who would not share the view that one of the most important things for the future of humanity is the establishment, quite quickly, of a viable system of international order. So it is particularly appropriate, we think, that we have been able to commence tonight in dealing with the International Court of Justice, a Court of great importance well established at the international level. It is very appropriate that a forum of this type should discuss issues such as this because, of course, in a Governor's Forum in Government House, the discussion takes place on neutral ground.

*Following the Governor's opening remarks, a speech was delivered by Mr Barry Connell on the contribution of Judge Weeramantry to the International Court of Justice. This speech is reproduced in an Appendix following the address by Judge Weeramantry.*

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It is indeed a very special honour to address this inaugural Governor's Forum and I deeply appreciate the privilege Your Excellency has conferred upon me of addressing this first forum in what we all hope will be a long and fruitful series on topics of general interest. I believe I voice the sentiments of all here present in felicitating Your Excellency on your pioneering vision in instituting such a forum at this highest level in the state.

My topic today is the International Court of Justice on which I have now been privileged to serve for three years. Each day I learn something new of its history, its responsibilities, and its potential, and I am filled with awe at the magnitude of the task it faces. I also feel some pride and satisfaction at the way

in which in the face of monumental difficulties, it has held out some degree of assurance to the global community, that somewhere, in the chaos of a world torn by violence and racked by conflict, there is a place in which the rule of law holds its own internationally and from which the rule of law radiates outward to the global community.

In this decade of International Law proclaimed by the United Nations, the UN has stressed the need for greater awareness at all levels of society of the work of the International Court. And forums such as these have been strongly advocated to that end. In choosing the topic for this inaugural forum, the Governor's thoughts have therefore been very much in line with the most current trend of thought in the international community.

This forum includes some of the most eminent judges and law professors in the land as well as community leaders from all walks of life whose training has not necessarily been in the discipline of the law. I shall not therefore be speaking in legalistic terms but hope I shall be able to give you some perspectives on the court which would be of interest to all.

Let me take your minds back nearly 100 years to 24 August 1898, to a golden moment in the history of international justice. Under the ornate chandeliers of a splendid building in Imperial Russia the Ambassadors and Ministers accredited to the court of the Czar were meeting for their regular briefing from the Russian Foreign Office. Instead of the usual communique to which they were accustomed they were handed a written statement in the name of Nicholas II, the Czar himself. This was in itself unusual, but the contents were more unusual still. The Czar was addressing the sovereigns of Europe and suggesting to them that war as a means of resolving international disputes was outmoded. He urged the reduction of armaments which were imposing a crushing burden on the world and leading to a cataclysm 'the horrors of which make every thinking being shudder in advance'. To avoid this, he suggested a conference 'to make the great conception of universal peace triumph over the elements of trouble and discord'. Such a conference, he said, would be a happy augury for the century which was about to open.

This was unusual, for the 19th century was a century of war, aptly called the Clausewitzian century after the German military writer, Karl von Clausewitz, who taught that war was a natural extension of diplomacy. This approach had indeed entrenched itself in the thinking of 19th century rulers, statesmen, and diplomats. Moreover, this was also the century of Napoleon and Bismarck. The military genius and the Iron Chancellor had surrounded the concept of national sovereignty within fortifications of steel. In this context the great resolver of international disputes was the sword and not the law.

Philosophers had indeed been thinking along the lines suggested by the Czar, but it was unimaginable that the sovereign — the absolute sovereign — of the world's largest military power, should even suggest that the very system on which the power of rulers depended, was so grossly at fault that it should be superseded. This was so out-of-line with political thinking at the time that contemporary observers reported that the diplomats and ministers who

received the letter looked at each other in blank amazement and disbelief, but their duty was to dispatch this letter to their capitals.

The response varied, from the extremely guarded German response, to a cordial response from America. In deference to the Czar, the sovereigns intimated a reserved willingness to meet. The young Queen Wilhelmina of Holland offered the hospitality of her country and the great Peace Conference of 1899 took shape at The Hague. It was that conference which gave birth to the Permanent Court of Arbitration and to its successor, the Permanent Court of International Justice, and in time, to the International Court of Justice, commonly called the World Court. For the first time in world history, an institutional mechanism had now been set up for the resolution of international disputes.

The Czar's letter was the catalyst which set off the chain of events that resulted in the Court. However, beyond the Czar's letter lay the thinking of generations of theologians and philosophers, and his letter was, in a sense, a bridge between the philosophers and the kings. For centuries a peaceful means of settling disputes between nations, had been both a religious vision and a philosopher's dream. The ultimate vision was of course a court for the settlement of international disputes. This vision splendid had at last been translated into reality.

Let us look back for a moment at this vision. All the great religions are permeated by thoughts of peace and justice. The literature of Hinduism and Buddhism provides us with a beautiful phrase, capturing with crystalline clarity the essence of the idea we are pursuing. The world order of the future is to be ruled, according to these religions, by the kingless authority of the law. This phrase — the Kingless authority of the Law — tells us that the ideal ruler of the future is not a universal sovereign in the physical sense — not a Chakravarti or a lord of the universe — but that the sovereign of the universal kingdom of humanity would be, and should be, the law.

Judaism emphasised at all points in its sacred literature that justice was crucial to every form of human relationship. The all-pervading nature of this concept is neatly encapsulated in the Book of Amos: 'let justice roll down like waters and righteousness like an ever-flowing stream.' All human activity would thus be constantly fertilised by human justice, abundant enough to serve at whatever level, continuous enough to serve at whatever time.

Christianity is saturated with the notion of peace — peace in the family, peace among the flock of the good shepherd, peace in the nation, peace among the nations. Peace on Earth was the song of the angels at the birth of Christ. 'My peace I leave you' was the message left to the Apostles shortly before the death of Christ. The 'Prince of Peace' was a favoured description through the ages of the mission of Christ.

In Islam, justice was a central principle upon which all authority rested. Justice was the essence of rulership. All power was held on trust and a condition of that trust was that such power should be exercised in accordance with justice. Justice lay at the heart of international relations and was the cardinal principle stressed in the elaborate treatises on international law worked out by the Islamic jurists.

In all these cultures, a vast literature grew up on law and justice, rather than force, on conciliation rather than war, on peace rather than conflict. It is important to note the close interconnection on these matters between philosophy and religion. Early writers on international law were much inspired by the great religions. Early treatises were full of references to scripture. Even Grotius's great work on the law of war and peace, which tried consciously to distance international law from religion, is strewn with scriptural justifications for his propositions. There is thus a strong bridge between the religious and the secular writings on this theme.

Moving now to the secular writings, Grotius, the father of modern international law, saw the need to rescue the newly emergent states of Europe from the lawlessness which followed the collapse of the Holy Roman Empire during the 30 years war (1618 to 1648). He advocated arbitration as the best means of resolving disputes. So important was his work that the US Ambassador to the 1899 conference, in laying a wreath upon his tomb at The Hague, on 4 July 1899 said: 'My honoured colleagues of the Peace Conference, the germ of the work on which we are all so earnestly engaged lies in a single sentence of Grotius's great book.'

But even more than Grotius, there were other philosophers who elaborated on the theme of arbitration. The 18th century French philosopher, Saint-Pierre, for example, suggested a scheme for compulsory arbitration between nations with disobedient states being punished by the collective army of the 24 states of Christian Europe. Saint-Pierre had spotted the key weakness in international tribunals — the problem of enforcement. Cardinal Fleury, Prime Minister of Louis XV, when he saw Saint-Pierre's scheme, made the following comment: 'There would be a need,' he said, 'for missionaries to dispose the hearts of the Princes of Europe to submit to such a diet.'

Just as Saint-Pierre had spotted the weakness of international tribunals, Cardinal Fleury had deftly put his finger on the weakness of the suggested solution. Fleury's remarks have relevance to this day. How can the sovereign states of today's world be persuaded to submit to such a diet — a diet of international adjudication and of submission to the authority of such an external body? Is this a diminution of their internal autonomy? They need to be persuaded that this is not so. They are possibly half-persuaded now. If they were fully persuaded, there would be peace on earth.

Rousseau was among others who addressed this question. He suggested compulsory arbitration, with sanctions and bans being imposed on the violator. He was uncompromising. 'It is no longer a question of persuading, but of compelling,' he said. 'Instead of writing books, we must raise armies.' That was Rousseau's view.

Immanuel Kant was even more forthright, and he threw down a scornful challenge to the sovereigns of his time. He observed that rulers played out the tragedy of war in the same way that we ordinary people play a game of chess. In the gilded splendour of their palaces, waited on hand and foot by their retainers, they move battalions on the battlefield as we move pawns on a chessboard. Thousands of their subjects, writhing in the agonies of death on some foreign field, did not trouble them. If the ruler lost the battle, he simply

cleared the board, and prepared for his next encounter, still in the luxury and security of his palace. Kant argued that there was something seriously wrong with such a state of affairs. He therefore advocated an international reign of law based upon moral principles. He exposed the absurdity of war as a means of solving disputes.

Jeremy Bentham, with his passion for precision and codification, for clear-cut and logical structures, advocated a code of international law in preference to the vagueness of customary international law, and a common court of judicature in preference to mere diplomacy. There are many other illustrious names which can be mentioned. The intellectual thrust towards a saner solution was strong but the practical will in that direction was weak.

The third strand in the thrust was the Peace Societies. They added their strength to the strengths of religion and philosophy. They multiplied after the Napoleonic wars terminated in 1815 and by the end of the century numbered around 400. All over the world, all dedicated to the peaceful resolution of conflict, they sprung up in profusion in Europe, in the US, in Latin-America, in the far East. The movement suffered some temporary eclipses during the Crimean War, the American Civil War, and the Indian mutiny when pacifists tended to be derided, but they held regular international Peace Conferences and maintained a veritable crusade against war.

The American Peace Societies were particularly prominent. Their literature strongly advocated a world organisation and a world court. William Ladd, for example, visualised a Court of Nations and a Council of Nations with a separation of powers between them, and his work was a clear anticipation of the structure of the United Nations and of the League of Nations.

The ideas that came to fruition with the creation of the International Court were thus not new. The Court as eventually structured was in fact picking up many intellectual trails from the past.

So much in regard to the Conception of the Court. Let us move now to its Constitution. The three constitutional stages as already mentioned were The Permanent Court of Arbitration, The Permanent Court of International Justice ('PCIJ') and the present International Court of Justice ('ICJ'). In the structuring of each of these the main problem was to overcome the international community's historic deference to the principle of state sovereignty.

The first of these, the Permanent Court of Arbitration, was not a court in the strict sense but offered a panel of arbitrators from whom nations so inclined, could make an ad hoc choice of arbitrators for their dispute. The panels would therefore be different from case to case. This Court performed a very important function at that incipient stage of organised dispute resolution in the international arena, and still continues in existence. Efforts are currently being made to step up the interest of nations in using the arbitral services that it offers. It decided altogether about 20 cases, some of great importance, and was a great success. Yet the desire for a court proper as opposed to an arbitral body was keenly felt. It was decided to seek to establish such a court on a permanent basis and the second Peace Conference held in 1907 considered this matter in some depth. The creation of a court was high

on the agenda but the proposal failed through lack of agreement on the manner of selection of judges.

It needed a world cataclysm to overcome this difficulty. The horrors of World War I prompted a feeling of guarded optimism that the brutalities of war were too terrible for mankind ever to want to risk war again. It was widely felt that at long last the hour of Grotius had 'struck'. The creative ingenuity of the international community was mobilised to work out a pattern of election that would satisfy all countries, and a formula was eventually found. It insulated national nomination from political interference through the creation of 'National Groups' consisting of each country's members of the Permanent Court of Arbitration, who would have responsibility for selecting each country's most suitable jurists as candidates for the Court. It enabled the Great Powers to have representation on the Court. It provided for the representation of the principal legal systems and main forms of civilisation, and provided for triennial elections so as to combine the principle of continuity with the principle of renewal and change. With this hurdle overcome the path was clear for the creation of an international court.

Although the Permanent Court of Arbitration continued to exist, the Permanent Court of International Justice which was created in 1920 became the chief forum for the resolution of international disputes. It was in fact a court: it had all the accoutrements of a court, it offered a panel of permanent judges, parties had no choice of judges, it developed a continuous jurisprudence, it issued law reports like any other court, it maintained a registry, it was ready to function at any time, it made its own rules of procedure. Here truly was a court, but yet it was not an integral part of the international system. It was not an integral part of the League of Nations.

That difficulty was overcome when the International Court of Justice, commonly called the World Court, commenced in 1946 as an integral part of the United Nations. It carried forward the main features of its predecessor under an almost identical statute. With its predecessor, the World Court has now had a continuous jurisprudence of nearly 75 years.

The two courts have many features in common. Both courts were granted jurisdiction only between states. That is a fact that is not very well known, and each year our Court receives nearly 2000 individual petitions from individuals who seek redress from the Court in the expectation that the Court has jurisdiction to give individuals personal redress.

Secondly, both these courts have no enforcement processes — no armies, no sheriffs, no constables, to enforce their decrees. The jurisdiction of both courts was founded on consent. In this respect they differ considerably from domestic courts and might appear to have a weaker structure than domestic courts.

In the context of this weakness one recalls the speech of the Belgian delegate at the First Assembly of the League of Nations when the Statute of the proposed court was under consideration, in 1920. The delegate lamented the failure of the proposed Statute to vest the Court with fuller jurisdiction. He said an expectant world has been waiting for the creation of an International Court — a Supreme Court of the World. That would be the only effective

antidote to the dread supremacy of force. He waxed poetic after that, and said 'we need a Demosthenes, a Mirabeau . . . on this platform.' Apologising for his lack of eloquence and asking his audience to bear with him, he said 'listen to the sound that comes from beyond these walls. You will hear a great moaning like to that of the sea'. What was that sound? That, he said, was the voice of the mothers and the wives, mourning for those they have lost. That was the voice of those who are sleeping, buried on the battlefield, who gave their youth that there may be a better world. Although their expectations were not fulfilled, nevertheless, we the Assembly had at least obtained a Statute giving member States the means of accepting a compulsory jurisdiction for the Court. He called upon all delegates to accept that compulsory jurisdiction and make the Statute work effectively. The reference was to the clause in the Statute of the Court which enabled countries to file a declaration that they would accept the jurisdiction of the court as compulsory in a case against another country that had filed a similar declaration.

Now, while the two courts have all these similarities, they also have important differences. Firstly, the Permanent Court was not a part of the League of Nations structure. I have dealt with that already. The present court is built into the UN structure and the Statute of the Court is co-ordinate with the Charter of the United Nations.

A second important difference is a conceptual difference. The League of Nations represented a transitional phase between the international law of the 19th century and the international law of the 20th century. The international law of the 19th century emphasised the individualist concept of state sovereignty. The international law of the 20th century emphasises the collective duties of states and the interdependence of states. This factor provided very different settings for the functioning of the two courts. If I may illustrate the difference from domestic jurisprudence it is very much as we now approach questions of contract or manufacturer's responsibility with a much less individualistic and far more collectivist orientation than did the judges of the 19th century.

Thirdly, it should be remembered that the PCIJ, the former Court, still functioned in the era of empires. The present Court saw the light of day amid the sunset of empires. Consequently, the intellectual atmosphere in which international law is administered by the two Courts, has changed considerably and with it, the character and attitudes of the Court.

A fourth point of difference is that the ICJ has also become an integral part of the United Nations work of preventive diplomacy. Modern diplomacy functions largely through public conferences and the ICJ is very much part of the institutional structure available for resort in the event of its being needed as part of this diplomatic process.

I come now to the jurisdiction of the Court. Article 36(1) of the Court's Statute gives the Court jurisdiction over all cases which parties refer to it. That is to say, two countries may, by special agreement between themselves, agree that they will abide by the Court's decision in the dispute between them. This is a treaty and it is binding upon them.

A second category of jurisdiction is provided for in the same article, which

gives the Court jurisdiction to determine matters in which treaties expressly state that disputes in relation to their interpretation or application shall be determined by the International Court. Today there are upwards of 300 treaties which stipulate that in the event of a dispute between the signatories in relation to the application or interpretation of the treaty the matter shall be referred to the International Court, whose decision upon the matter will be final. Examples are the Antarctica Treaty and treaties relating to such matters as air transport, performing rights, consular conventions, navigation, narcotics, torture, marine resources and mercenaries. The number of such treaties is steadily on the increase.

A third head of jurisdiction appears in art 36(2) of the Statute which provides that states may file a declaration to the effect that they recognise as compulsory and without special agreement the jurisdiction of the Court. That is the clause to which the Belgian delegate referred in the speech which I cited.

A fourth area of jurisdiction, of a very different type, is conferred by art 96 of the UN charter. This enables the Court to give an advisory opinion on a question of law at the request of the General Assembly or the Security Council or of other organs specially authorised by the General Assembly. For example, as Mr Connell said, we now have pending before the Court a request for an advisory opinion from the World Health Organisation in regard to nuclear weapons. Likewise, other organisations which have a right to ask the Court for opinions are the International Labour Organisation ('ILO'), the Food and Agricultural Organisation ('FAO'), UNESCO, the World Intellectual Property Organisation, the International Monetary Fund, and many others.

I come now to the third segment of my address — what is the Contribution of the Court? Let us start with the Permanent Court of International Justice. The Permanent Court functioned for 18 years from 1922 to 1939. It rendered 27 advisory opinions and delivered 32 judgments. It also has great achievements to its credit. For the first time in international history an international court had been in actual operation. Its record inspired confidence that the experiment was justified. It resolved some very serious disputes, for example, the question of sovereignty over Eastern Greenland. It developed international law very professionally.

However, one limitation was that much of its work arose from one sector of the global scene, resulting largely from the tensions between Germany and her immediate neighbours. There were problems, for example, between Germany and Poland, Germany and Lithuania, Germany and Austria. All these resulted in cases before the Court and it could be said that the centre of gravity of the Court's work was that section of Europe. True enough there were cases from Africa, such as that relating to phosphates in Morocco, and the *Tunis and Morocco Nationality Decrees* case, but by and large the work of the Court was centred on that region of Europe. It did not operate on a broad global canvas.

Another achievement of the Court was that its judgments carried strong moral authority owing to the high integrity and the professionalism of the judges. This laid a solid foundation for the later authority of the ICJ.

Yet another achievement was that the Permanent Court demonstrated that a permanent judicial organ could integrate with the political organisation of the international community. This great new experiment in world government, as yet untested, was in this sense a resounding success. The Permanent Court thus had great achievements to its credit.

Coming now to the work of the ICJ, it operates as a truly global Court. The disputes it handles come from all regions of the world and are not concentrated in any one area. We have disputes before the Court today from Africa, Latin America, the Gulf states, Eastern Europe, Scandinavia, and the Pacific. The entire globe is covered, so to speak, and the reach of the Court is much greater than that of the Permanent Court. To give you just a couple of examples, we had a case which we determined just about two months ago between Libya and Chad — a boundary dispute involving a large chunk of disputed territory known as the Aouzou strip, several times the size of Holland — and the Court delivered a judgment settling the boundary in favour of Chad. In terms of that judgment a few weeks ago, possession of that area of land was ceremonially given over the Chad. This was indeed a great victory for International Law. Likewise we have cases from the Gulf states. We currently have a case between Qatar and Bahrain relating to maritime and land disputes. We have had some very interesting cases from Scandinavia. For example we had a case between Denmark and Finland in which Finland expressed concern that Denmark was proposing to construct a bridge over the entrance to the Baltic which might impede the passage to and from the Baltic of shipping carrying very tall oil rigs which Finland was constructing. The Court made an interim order in that case and it has now been settled. From Eastern Europe we have a case between Hungary and Slovakia relating to the waters of the Danube and from Latin America there was recently a case between El Salvador and Honduras involving a series of very complex boundary disputes.

So we have a variety of cases coming from all over the world and the result is that the international jurists have commented that the Court has made a more spectacular contribution to the specific settlement of disputes than its predecessor, The Permanent Court of International Justice. Indeed the Court has never before in all its history been as busy as it now is.

A second achievement of the Court is its contribution to the resolution of international tensions. We notice that the parties who come before the Court often say in their very opening address that the matter they bring before us is one which constitutes a grave threat to international peace. That has been mentioned to the Court time and again. For example, the *Corfu Channel* case of 1948 arose from damage done to British destroyers which struck mines in the Corfu Channel within the territorial waters of Albania. Sir Hartley Shawcross, the Attorney-General of the UK, in his opening address before the Court said that this was a dispute which could constitute a grave threat to international peace. In the *Fisheries* case between UK and Norway, the Norwegian Government had, by decree, delimited a zone within which fisheries were reserved for Norwegian nationals. The UK complained that this was contrary to international law. Similar remarks were made about its being a grave threat to peace. In the *Anglo Iranian Oil Company* case of 1952, arising

from the nationalisation of oil companies, Dr Mossadeq of Iran made a similar statement. There are thus many cases which come before the Court at a time when tensions between two countries are rising to fever pitch and the very fact that the dispute has been brought to the Court can allay those tensions and has often led to some peaceful resolution of the dispute. So that is a second achievement of the Court.

A third achievement lies in the sphere of building up international law. The Court has made a very positive and substantial contribution to the task of building up international law. In regard to the law of the sea, the baseline method for determining the territorial sea was worked out by the Court in the case between UK and Norway. This was accepted by states generally and was later embodied in the articles of the *Law of the Sea Convention*. Indeed, the *Law of the Sea Convention* derived much inspiration in regard to several of its basic principles from the jurisprudence of the Court. On the question of treaty interpretation, the main rules for the interpretation of treaties, which have now been codified in the *Vienna Convention on the Interpretation of Treaties*, spring from the decisions of the Court. Its four main articles dealing with treaty interpretation are directly based upon decisions of the International Court. Likewise, in what may be termed international constitutional law, the question of the personality of the international organisations, the conditions of admission of a state to the UN, the relations between the International Court of Justice and the Security Council — all of these are the subject of the jurisprudence of Court decisions. The judgments of the Court elucidating these matters have laid down certain broad principles which in the future will have the gravest importance in determining these and similar questions. Departments of the law, too numerous to mention, have thus been built up — for example, the law regarding international arbitration, the law relating to territorial asylum, the law relating to mandate and trusteeship, and even the law relating to such principles as estoppel, which are much used in domestic jurisdictions. All of these have been invigorated and built into the structure of international law through the judgments of the International Court. Its contribution to building up the customary international law of the future, has been considerable.

We also observe that, when the Court makes an interim order, it seems to provide a kind of atmosphere conducive to the settlement of disputes that have sometimes been of long standing. In the case of Denmark and Finland which I mentioned to you, the Court made an interim order and the case was settled. So also in *Nauru* v *Australia* where there was a preliminary order made by the Court, the matter has been settled. It may therefore be the case that there is some value in the pendency of a matter before the Court, as clearing the atmosphere in a manner conducive to a settlement.

Furthermore the judgments of the Court carry great authority. The reasons for this have been analysed by jurists. Of course constitutionally it is the principal international tribunal in the world. It is the principal judicial organ of the UN. It has a continuous jurisprudence which now extends for nearly 75 years. Its record of achievement, despite its lack of enforcement procedures, has been great. It has elucidated the law in a manner acceptable to the inter-

national community. It has worked harmoniously within the UN system. It is always available in the background for resort when necessary, and the thoroughness of its procedure, which I have no time to describe, ensures that scarcely any aspect of an important international matter passes without due attention.

In conclusion, it could be said of the International Court of Justice that it is the most valuable instrument yet available to the international community for developing international law adequately to meet the needs of a changing world, for providing a focal point for the peaceful resolution of international disputes, for radiating through the entire global community a consciousness of the international rule of law and for injecting an authoritative legal element into the processes of preventive diplomacy. But the Court cannot play this role to the fullest without the co-operation of the world community. That means the co-operation not merely of governments but of concerned citizens — groups of citizens, such as are assembled here in this hall, who take an active interest in the work of the Court and in its unmatched potential for the service of international law. But the Court cannot by itself open the portals to a fairy kingdom of international justice as many expect it to do. It needs the co-operation of all. It needs *your* co-operation.

I thank you therefore for your attendance and for your attention, and invite you to join in the task of spreading among all sections of the community a greater awareness of the existence, the significance, and the potential of a court which represents the quintessence of human achievement thus far on the road to a world order governed by law, a court which offers a sheltered haven for the international rule of law amidst the raging currents of the international scene, a court which is without precedent in the long and lawless annals of international conflict. Thank you.

## Appendix

# Contribution of his Excellency Judge Weeramantry to the International Court of Justice

BARRY CONNELL*

It says something of the qualities of Judge Weeramanty that observers can so readily speak of his contribution when he has at this stage completed only a third of his first term of nine years on the Court.

Both I and numerous of my international law colleagues, following the election of Professor Weeramantry to the Court, were eagerly anticipating his work. He had, prior to his election, published often and spoken widely in international fora on matters relating to human rights, the role of the law in

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international society, and the large issues of peace, disarmament and the use of nuclear weapons.

On the latter, I interpolate that a number of us here, aware of the advisory opinion presently sought by the World Health Organisation relating to the legality of the use of nuclear weapons, will be awaiting with some evident interest the opinion of the Judge on the major issues which it inevitably raises. However, we for the moment should not get too excited, for the Court hearings on the World Health Organisation request are a long way off.[1]

I think it fair to say that at the time of his election, Judge Weeramantry brought to the Court a reputation as a global thinker with an attractive humanitarian philosophy, but one who also had a keen eye for the detail of the law born of his forensic upbringing from his days as a barrister and Supreme Court judge in Sir Lanka. His judgments in both the *Libya* v *USA* case (the Lockerbie incident),[2] and *Norway* v *Denmark* (the Jan Mayen island case),[3] exhibit both of these attributes.

The International Court of Justice breeds Court watchers. Whilst presently the Court has a full docket of cases, by the nature of the system, each case is a leading case. This has the tendency for the professional watchers and annotators to dissect every word of the judgments and of every dissenting opinion. True there is no system of precedent, as in Anglo-Australian law, but the importance of each judgment of the Court for the future development of international law cannot be downplayed and certainly is not lost on the intelligent watcher.

With a full bench of fifteen judges sitting on the great majority of the cases, it is relatively easy for a judge to avoid the public gaze by simply subscribing to the majority judgment. But that is not the course chosen by Judge Weeramantry, nor, for any of us who know him, would we expect that. He is an indefatigable and independent worker. It was no surprise, then, that he should have written a strong dissent in his first case, *Guinea-Bissau* v *Senegal*,[4] a case relating to an Arbitration Award which raised important issues of interpretation of arbitral agreements and problems of nullity as they relate to arbitral awards.

But I move to three cases where Judge Weeramantry has given more than ample demonstration of his wide conceptual framework within which he sees the proper role of the Court in the international system.

First, in the Lockerbie aerial incident case, where Libya sought the granting by the Court of provisional measures against the United States of America, the very important and real question arose of the relationship between two of

[1] Australia has already made a written statement to the Court, but under art 106 of the Rules of Court such statements will not be publicly disclosed until the opening of oral proceedings.

[2] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v *United States of America)* (request for the indication of provisional measures) 1992 ICJ Rep 114, reported in (1992) 31 ILM 665.

[3] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v *Norway)* 1993 ICJ Rep 38.

[4] *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau* v *Senegal)* 1991 ICJ Rep 53, reported in (1992) 31 ILM 36.

the principal organs of the United Nations, the Security Council and the International Court of Justice. His Excellency wrote a powerful dissent to the majority judgment which had denied provisional measures. His dissent, whilst giving full credence to the binding force of Security Council resolutions, was argued acutely to show that provisional measures '*proprio motu*' could be granted against both parties, thus preventing aggravation of the dispute and yet still being in accord with the Security Council Chapter VII resolution.

In the conclusion to his dissent, he ended with these words:

> A great judge once observed that the laws are not silent amidst the clash of arms. In our age we need also to assert that the laws are not powerless to prevent the clash of arms. The entire law of the United Nations has been built up around the notion of peace and the prevention of conflict. The Court, in an appropriate case, where possible conflict threatens rights that are being litigated before it, is not powerless to issue provisional measures conserving those rights by restraining an escalation of the dispute and the possible resort to force. That would be entirely within its mandate and in total conformity with the Purposes and Principles of the United Nations and international law.[5]

In the second case, *Bosnia and Herzegovina* v *Yugoslavia*,[6] Judge Weeramantry, in supporting the Court's order, delivered a separate opinion taking his argument further on provisional measures, which had earlier been developed in the Lockerbie case, to explore the vexed question in international law of the binding nature of provisional measures. As his opinion unfolded, he put his considerable judicial weight behind the binding nature of provisional measures using arguments based both on strict legal analysis and on international policy. He concluded:

> To view the Order made by the Court as anything less than binding so long as it stands, would weaken the regime of international law in the very circumstances in which its restraining influence is most needed.[7]

The third case I mention, is that surrounding a delimitation problem with respect to maritime boundaries between the large continental island of Greenland and the small almost uninhabited island of Jan Mayen. Such maritime cases, of which there are many, present many problems as to the adjustment of delimitation lines between countries. Many here this evening will recall the acute divisions of opinion regarding the Timor Sea boundaries between Australia and Indonesia — now a matter of contention on other grounds before the International Court of Justice.[8]

Judge Weeramantry, no doubt influenced through his past legal education

[5] *Libyan Arab Jamahiriya* v *United States of America* 1992 ICJ Rep 114.
[6] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v *Yugoslavia* (*Serbia and Montenegro*)) (further requests for the indication of provisional measures) (unreported, 13 September 1993).
[7] See fn 6 supra.
[8] *Case Concerning East Timor* (*Portugal* v *Australia*).

and practice, and a contract lawyer at heart,[9] has long been an advocate of using equitable principles in international law. This case gave him full scope. In a fascinating opinion, he fully explores the general equitable jurisdiction of the Court and, in particular, its use in maritime cases.[10] For students of international law, as for practitioners, this opinion represents, in its entirety, a powerful argument for the use of equity in international law, a matter still of some contention amongst academic and international legal practitioners. Not the least of its virtues is the analysis in Part C of the opinion, 'Equity viewed in Global Terms', which for some of us steeped in Anglo-Australian tradition will bring us sharply back to earth to learn the comparatively broad acceptance of equitable principles across a wide spectrum of judicial systems.

In recent times, the Court has been strengthened by the election of three judges, all educated under the common law, but with firm roots in the traditions of the Third World: Judges Shahabudeen, Ajibola and Weeramantry. Judge Weeramantry has the decided additional advantage of a civilian background and his roots also in Roman/Dutch law. Unfortunately, Judge Ajibola, one of today's outstanding international arbitrators, is no longer on the Court. However, the other two have had a major impact, with a tendency to analyse tightly born no doubt of their forensic experience but with a sensitive understanding of the broader reaches of international law.

In assessing his present contribution, I can put it no higher than to say that Judge Weeramantry, perhaps, more than any other present member of the Court, may take over the mantle of one of the greatest international jurists of this century, the late Judge Manfred Lachs[11] — a person with immense influence as teacher, writer, diplomat and judge on the modern development and role of international law. Judge Weeramantry follows closely, though independently, I think, Manfred Lachs' philosophic and forensic approach. After such an auspicious beginning, we now look forward to the remaining six years of his first term.

[9] C G Weeramantry, *The Law of Contracts: Being a Treatise on the Law of Contracts as Prevailing in Ceylon and Involving a Comparative Study of the Roman-Dutch, English and Customary Laws Relating to Contracts* (1967).

[10] *Denmark* v *Norway* 1993 ICJ Rep 38.

[11] See O Schachter, 'In Memoriam: Judge Manfred Lachs (1914–1993)' (1993) 87 AJIL 414. Reference should also be made to a notable article written by Judge Lachs not long before his death: M Lachs, 'Thoughts on Science, Technology and World Law' (1992) 86 AJIL 673.