FOREWORD

Historical Contradictions in Contemporary State Attitudes to the International Court

The United Nations General Assembly, by Resolution adopted on 9 January 1990, officially designated the 1990s as the United Nations Decade of International Law. The Resolution recalled, in terms, in its Preamble, the earlier, by-now famous Resolution of 1970 on Friendly Relations and Cooperation among States, (Resolution 2625 (XXV)), and also the Resolution of 1982 embodying the Manila Declaration on the Peaceful Settlement of International Disputes (Resolution 37/10). The Resolution also specifically cited the *First* Hague Conference of 1899, which adopted the Convention for the Pacific Settlement of International Disputes and also created the Permanent Court of Arbitration, in going on to establish, as main purposes of the U.N. Decade of International Law, the "promot[ing] means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice".

The contemporary "great debate" over the principle of judicial settlement of international disputes involves radically competing conceptions of Court jurisdiction and justiciability at the present day. It is highlighted by the U.S. Administration's political and legal reactions to the International Court of Justice's rulings in the *Nicaragua* cases of 1984 and 1986. The contemporary debate is, however, no more than a latter-day *reprise* of a legal controversy first unloosed, with rather different State actors, in the aftermath of the International Court's earlier, much-attacked, single-vote majority decision in *South West Africa. Second Phase*, in 1966.

International Law *doctrines* on legal institutions and processes and even substantive legal ideas necessarily reflect, in measure, Municipal, national law thinking and attitudes. On the issue of judicial settlement, contemporary International Law could hardly remain unaffected by Municipal, national legal debates over the principle of judicial review of constitutionality. In particular, the long-range evolution, in Western legal

thinking in general and in U.S. legal thinking in particular, of basic conceptions of the *rôle* of the national judge in community decision-making involves frank and open acceptance, by the courts and by their individual judges, of the opportunities, and obligations of national courts for creative, legislative, policy-making interpretations of statutes, executive-administrative decrees and other legal acts coming before the courts, and for a critical re-examination of those courts' own past *jurisprudence* when it seems to fly in the face of contemporary societal needs and community expectations of what is right and reasonable.

A significant element in the formation, in the plural World Community of today, of a new, inter-systemic, International Law consensus on the *rôle* of the International Court and of the international judge, is the widespread transfer or "reception", between different national legal-cultures, of distinctive legal attitudes and legal thought-ways worked out, experientially, in any one particular society, at any one particular time, in response to that society's own community needs or expectations. The distinctive American constitutional law institution of judicial review has, by now, its own even more contemporary Continental European analogues, with all the implications, from the successful judicial practice over the years, that the judges' constitutional responsibilities go beyond any merely mechanical restatement of old legal *doctrines*, and involve, instead, active participation in changing the law. This, – the American Legal Realist lesson –, has been amply "received" and understood, by now, by several generations of foreign graduate students who studied Law in the United States in the post-World War II era. Those foreign students carried back to their home countries, on graduation from major U.S. legal centres, basic U.S. constitutional law ideas on the *rôle* of the Courts in community policy-making, and introduced them into main-stream legal thinking all around the World. One of the curious historical ironies in the U.S. Administration's angry, reactive measures directed against the International Court after the Court's *Nicaragua* rulings of 1984-6, is that the Court majorities that decided against the U.S. on the issues under contest in the *Nicaragua* cases applied what amounted to a "U.S. constitutional law" approach that the great liberal-activist judges on the U.S. Supreme Court in the Roosevelt era would certainly themselves have understood and approved.

A still further, if more specific, historical contradiction in the *Nicaragua* cases is to be found in the fact that the objection unsuccessfully raised by the U.S. Administration, in the preliminary hearings in *Nicaragua*, that the Nicaraguan Government's complaint against the U.S. was no more than a part of a larger political problem which, *ex hypothesi*, a court should not decide, replicated the Iranian Government's unsuccessful legal objection, in

U.S. Diplomatic and Consular Staff in Tehran, that the U.S. complaint against Iran could not properly be examined by the Court when "divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last twenty five years". [I.C.J. Reports 1980, p. 3, p. 19].

We are rightly reminded today that the present-day International Court has some direct ties of intellectual-legal consanguinity to late 19th century Continental European (including Imperial Russian) legal thinking on the merits of independent, Third Party resolution of international conflicts and of a Court-based system of settlement as a necessary part of that. The sometime enthusiasm in U.S. legal circles for international judicial settlement was a latter-day, supervening development, especially strong in the late 1940s and the 1950s when U.S. political-military power in international relations was at its *apogée*.

In examining the current paradox that the International Court majority, since *South West Africa. Second Phase* in 1966, has so largely accepted an American-style, judicial policy-making *rôle*, in terms of which the old, postulated *a priori* dichotomy between "Law" and "Politics" is rejected in favour of a more nuanced, essentially pragmatic approach to issues of justiciability, two points should be borne in mind.

First, the International Court judges' claims to constitutional-legal legitimacy in the exercise of such a new, community policy-making *rôle* are, – having regard both to the constitutional system of election of judges to the International Court and also to the actual patterns of voting practice in those elections, – at least as great as those of any of the great national, Special Constitutional Courts (whether *de facto* or *de jure*), of our times. For the International Court is now, in a very real sense, a representative tribunal, whose membership, in its ethno-cultural, legal-systemic, political-ideological, and even geographical make-up, fully reflects the new, plural, inclusive World Community of today.

Second, though the International Court, as a plural-systemic tribunal, is able to draw freely on all the World's legal systems for purposes of fleshing out the bare bones of the Court Statute as to the Court's internal organisation and procedure and also for purposes of the development of the Court's own substantive legal philosophy, the Court does have its own *corpus* of established *jurisprudence* and its own rich, autonomous experience extending, now, for seven decades back to the establishment of the old, Permanent Court of International Justice. In the International Court's approach to resolution of the contemporary political-legal conflict over recourse to numerically-limited, Special Chambers of the Court, it is right to remember that, over those seven decades, the International Court always made its

decisions collegially, as a *plenum* or Full Court of fifteen judges; so that attempted analogies today from the practice of some Continental European and other tribunals that do permit usage of a multi-Senate or multi-Chamber system, may be alien to the International Court's own acquired experience and its cumulative tradition of internal organisation.

In approaching its new policy-making *rôle*, the International Court has sensibly felt free to disengage itself from some overly rigid, Municipal, national Constitutional Law *doctrines*, – now, being discarded in the more advanced Municipal, national legal systems themselves – that would insist on an absolute separation-of-powers between the different, coordinate institutions of community policy-making. Such a postulated constitutional separation-of-powers, when projected at the International level, had seemed to amount, at times, to a notion of a necessary and inevitable jurisdictional conflict between Court on the one hand, and the Security Council and the General Assembly, in the approach to World Community problem-solving. The new International judicial approach, rejecting, in passing, old-fashioned notions of *litispendence* that hardly appear persuasive or even legally relevant in a contemporary Court context, is to look to a complementarity of problem-solving competences of the different World Community organs – Security Council, General Assembly, and International Court, – and to seek and foster mutual cooperation in the devising of measures which, if they are to be successful in resolving the World Community problems involved, will necessarily have to be interdependent and interrelated. The new judicial pragmatism, in this regard, is reflected in new notions of institutional comity [*Organtreue*] within the United Nations organisation, and of obligations of mutual cooperation and also mutual restraint, *inter se*, on the part of the different, coordinate United Nations organs. It implies a common responsibility of the Court, together with the Security Council and the General Assembly, in international conflicts-resolution, particularly in situations involving Threats to the Peace, or Breaches of the Peace, or Acts of Aggression of the sort referred to in Article 39 of the United Nations Charter. Inherent in that is a further, necessary notion that has some obvious links to the American Constitutional Law-inspired "Uniting for Peace" Resolution that was adopted by the United Nations General Assembly in the Korean crisis of 1950, when Security Council-based peace-keeping action appeared threatened with constitutional-legal paralysis because of the threat of arbitrary or capricious exercise of the Big Power (Permanent Members') veto in the United Nations Security Council. That is the proposition that the Court must be fully legally competent and able to move in, if necessary, and affirmatively to fill any constitutional gap if a vacuum would otherwise result in World Community decision-making for crisis-situations.

Some questions of basic methodology and approach to the subject perhaps warrant some preliminary discussion. It is customary to differentiate or separate the work of the International Court over the, by now, almost seven decades of its existence into what is conveniently referred to as the era of the "old" Court (the Permanent Court of International Justice of the between-the-two-World-Wars period), and the era of the "new" Court (the re-named International Court of Justice) that became its lineal successor in 1946. There are, to be sure, some technical-legal distinctions – commented on in the succeeding text – that can be made in the constitutional base and establishment of the two Courts, the "old" and the "new". Yet it is readily apparent, in the empirical record of the *jurisprudence* of the two Courts, that there is no sudden, sharp break or hiatus between them in 1946 or indeed for the next several decades, in terms not merely of basic philosophy of law and judicial thought-ways and conceptions of the *rôles* and missions of the Court, but also of the character and composition of the Court and its individual judges and even of the Court's main client-States and the nature of the litigation that they choose to bring before the Court. While some basic intellectual differences and divergences within the Court's judicial ranks begin, finally, to emerge by the opening of the decade of the 1960s, it is not until the bitterly contested, single-vote-majority decision of the Court in *South West Africa. Second Phase*, in 1966, that an historical turning-point can be said to have been reached, in the Court's evolution. That case, clearly, represents a watershed decision, in that, while it was a triumph of the traditional, "classical", conception of the International Court's proper function, it also had within it the intellectual seeds of the overthrow of that earlier, long-dominant approach to the judicial process and judicial decision-making. By 1971, the erstwhile majority position in *South West Africa. Second Phase* only five years before, is completely routed and the Court is entered on a new phase which, with some dialectical, trial-and-error experimentation and testing, is confirmed and consolidated to the present day. It is in this sense that it seems more correct to classify the Court's *jurisprudence*, temporally, in terms of an earlier "classical", *Eurocentrist* era that lasted up to, and through, the year 1966, and a new, post-1966, "contemporary" Court.

A further, basic methodological question has to do with how best to explain and demonstrate the changes within the Court, in its internal composition and in judicial reasoning and judicial thought-ways and in the goal values or policies rendered by the judges in actual, concrete cases or references coming before the Court. The Court, of course, is not bound by any Common Law doctrine of Precedent, and its decisions have, in terms of the Court Statute, Article 59, "no binding force except between the parties

and in respect of that particular case". Nevertheless, some Court decisions, because of their timing, or perhaps because of the intellectual quality of the judicial Opinions filed in them (whether the official Opinion of Court, or even individual Concurring or Dissenting Opinions), or because of the intrinsic political importance of the issues involved and the weight attached to them by different State actors, do clearly come to acquire the character of "leading cases", attested to, as such, in the learned *doctrines* and academic commentaries, and also in the public appraisals and critiques advanced in the United Nations General Assembly and in other international political, diplomatic, or professional-legal arenas. In the present study, the author has chosen to give most weight and authority, political and legal, to those leading cases; and to focus the detailed analysis and appraisal of the Court's own internal processes of reasoning and decision-making, and its Opinion-writing in explanation and rationalisation of the ultimate decisions, upon those very cases. While there is necessarily a certain element of the subjective, – once one departs from the obvious enough point that not all of the Court's decisions over the years are of equal value or equally deserving of study – in choosing some fewer cases as worthwhile and passing over very many more in silence, I am struck by the fact that Richard Falk, in a study I had not examined until after I completed writing up the lectures, was in agreement with me as to the major choices. In this context, from the work of the "old" Court of the between-the-two-World-Wars era, only *Eastern Carelia*, and *Austro-German Customs Union*, seem particularly relevant to the contemporary International Court. In the early, post-World War II years, *Corfu Channel*, and the two *United Nations Membership* rulings, indicate the larger, inter-systemic (legal, and political) consensus within the "new" Court as to basic judicial reasoning and conceptions of the judicial decision-making *rôle*; while *United Nations Expenses* in 1962 indicates how firmly that methodological consensus can be maintained in spite of the more obvious substantive law, "policy" pressures the other way. *South West Africa. Second Phase* and *Namibia*, heralding the achievement of a "Court Revolution", and the transition from the traditional or "classical" Court to the modern or "contemporary" Court must be there, of course, as also with *Nuclear Tests*, *Western Sahara*, *Aegean Sea Continental Shelf* and other cases that demonstrate the still-remaining, empirical, trial-and-error testing that must be gone through before the contemporary Court can arrive, – as it seems finally to have done with its *Nicaragua*, 1984–1986, rulings, – at its new, activist, policy-making *rôle*. This will be exercised confidently, and with a sophisticated awareness of the complementarity of the Court's functions, in World Community problem-solving, with those of the General Assembly and Security Council, by a tribunal that is now fully repre-

sentative in "regional" terms (legal-systemic, ethno-cultural, and political-ideological, as well as the more conventional geographical definition of earlier years).

A witness to the dramatic changes in dominant judicial philosophy within the Court's ranks who was also a leader in that process of internal transition from the "old" to the "new", was Manfred Lachs. First elected to the Court, in replacement of his fellow-countryman Winiarski, in the regular elections of 1966 that were held only two months after the Court's single-vote-majority decision in *South West Africa. Second Phase,* Judge Lachs is still there a generation later, having been reelected twice, each time with impressively large majorities, and with co-nominations from the main Western states as well as from the Third World and Eastern Europe. More perhaps than any other member of the Court, Judge Lachs is seen as personifying the new judicial thinking, with its renouncing of the "dead-hand control" of old *doctrines* and old *jurisprudence* developed in other, earlier times, in favour of rational contemporary solutions to contemporary problems of the World Community. On literary-stylistic and legal-argumentation grounds, it is not too difficult to identify as Judge Lachs' personal drafting the *Namibia* Advisory Opinion of 1971, with its conscious openings to the rapidly evolving juridical conscience of the World Community. At the same time, the Court's final Judgment in *Nuclear Tests,* an historically correct and necessary result, is recognisably from Judge Lachs' pen and stands as an exercise in judicial pragmatism by a Court President (as Judge Lachs then was) trying carefully to build a majority among judges still cautious, then, as to venturing on the *avant-garde* in doctrinal-legal terms. In recognition of his long-time services to the progressive development of International Law and also in celebration of professional-legal ties and personal friendship going back, now, more than thirty years, the present study is respectfully dedicated to Judge Lachs.