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## THE REALITY OF INTERNATIONAL ADJUDICATION AND ARBITRATION

JUDGE STEPHEN W. SCHWEBEL\*

It is a pleasure to deliver the Paulus Lecture at the Willamette University College of Law. It is a particular pleasure because my host is Professor James Nafziger. Jim and I had occasion some thirty-five years ago to work closely together as members of the staff of the American Society of International Law. We have maintained a warm relationship over the years, which I am happy to mark on this occasion. Jim has made his mark in more than one respect, as a teacher, as a scholar, and as a leader in the American Branch of the International Law Association and in the American Society of International Law. Willamette is lucky to have Jim, and, as I look around, I can see that Jim is lucky to have Willamette.

My topic is “The Reality of International Adjudication and Arbitration.” You may ask, why “the reality”? I would reply that within my memory, in the very years that Jim and I were together in Washington, international adjudication seemed to be moribund. The International Court of Justice had few cases on its docket. International arbitration was thought to be passé. Those perceptions at the time were exaggerated but not baseless.

Today the scene is very different. When I took my seat on the International Court of Justice in January 1981, there were two cases on the docket, one of which was active. When I retired from the Court in February 2000, there were twenty-three cases on the docket, ten of which however consisted of Yugoslavia’s actions against Members of NATO for the bombing of Yugoslavia. Since that time, the Court has continued to be very busy.

Today the Court has twenty-two cases on its docket, eight of which concern the bombing of Yugoslavia. Permit me to say a word or two

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\* Sponsored by Willamette University College of Law Ninth Annual Speak Series—John C. Paulus Lecture, Salem, Oregon, March 15, 2004. Judge Schwebel served on the International Court of Justice from 1981 to 2000, during which he was vice-president, 1994-1997, and president, 1997-2000. His work in dispute resolution has also included service as an arbitrator or president in thirty-six arbitral proceedings and as a member of the Panels of Conciliators and Arbitrators of the International Center for Settlement of Investment Disputes (ICSID).

about these cases, because that will give you a sense of what the Court does, or the reality of international adjudication.

The court currently has under deliberation its judgment in a case brought by Mexico against the United States, on behalf of a Mexican national, Avena, and other Mexican nationals similarly situated. These Mexican nationals were arrested in the United States and tried in courts in the United States. Under the Vienna Convention on Consular Relations, to which the United States and Mexico are parties, the competent authorities of the receiving State—here, the United States—shall without delay inform the consular post of the sending State—here, Mexico—if a national of the latter State is arrested or detained; and that person shall be informed without delay of his rights under this provision by those authorities. In the case of the Mexican nationals in question, no such notifications were made by U.S. courts to Mexican consulates. The current litigation in the International Court of Justice is concentrated on what follows from this admitted treaty breach, a question of significant practical importance to the administration of criminal justice in the United States.

The Court also is in the midst of its consideration of a request by the General Assembly of the United Nations for an advisory opinion on the legal consequences of the construction of what the request calls a “wall” in Occupied Palestinian Territory. Depending upon what that opinion says, it could be significant for the continued building or not of the barrier, perhaps for the status of settlements in the West Bank, and possibly the eventual border between Israel and Palestinian State. The opinion will be advisory for the General Assembly, but its effect on the development of the larger dispute should not be discounted.

Then there are two cases long pending concerning the commission of genocide. One was brought by Bosnia and Herzegovina against Serbia years ago; it now is moving to the top of the docket. The other was brought more recently by Croatia against Serbia. Both allege that Serbia was complicit in the commission of genocide in the course of Yugoslav wars. You are familiar with the cases in the International Tribunal for the Prosecution of War Crimes in the former Yugoslavia against Milosevic and other individuals. But the two cases to which I have just referred are inter-State cases which are the first ever to confront charges of genocide by one State against another.

There are further cases involving the former Yugoslavia, the eight pending cases brought by Serbia against Belgium, Canada, France, etc., Members of NATO, for the bombing of Yugoslav territory as a result of Serbia's actions in Kosovo. Judgment in these cases, if given, could be

important for rights of States or international organizations to use force without the explicit authorization of the Security Council.

There are two more cases involving the use of force internationally, brought by the Congo against Uganda and against Rwanda alleging unlawful armed intervention.

Guinea has brought a case against the Congo on behalf of one of its citizens, claiming that the Congo unlawfully expropriated his investments. This is the classic kind of North/South case, the sort of case in which a developed State espouses the claim of its national against a developing State; but in this instance, one developing State is espousing the claim of its national against the other developing State.

There are several territorial and maritime disputes before the Court. One concerns maritime delimitation between Nicaragua and Honduras in the Caribbean Sea. A second concerns not only maritime claims but claims by Nicaragua to sovereignty over important islands in the Caribbean which Colombia has exclusively administered for some two hundred years. A third territorial dispute is a frontier dispute between Benin and Niger, which is being dealt with by a Chamber of the Court. And a fourth territorial dispute, between Malaysia and Singapore, concerns sovereignty over certain minor territorial features. Over the years, the International Court of Justice has handled many territorial and boundary disputes, and maritime delimitations, with notable success. Some of these disputes, such as those between Libya and Chad, Qatar and Bahrain, and Cameroon and Nigeria, have been very important. The Court's contributions to the development of the law of maritime delimitation and of territory are significant.

There is a case brought by Liechtenstein against Germany in respect of property taken during the Second World War. Finally, the Congo has a case against France because of the indictment by a French court of a minister of the Government of the Congo. As you can see, Congo is an active litigant.

The International Court of Justice thus is concerned with cases large and small, concerning a wide range of international legal questions, some of much importance, others of less. The State parties to these cases are in the Americas, Europe, Africa, and Asia. The Court is no longer the preserve of Europe and the Americas; on the contrary, substantial numbers of cases are African or Asian in origin.

The reality of international adjudication is demonstrated not only by the judgments and advisory opinions rendered by the International Court of Justice. It is enhanced by the influence that they have on the progressive development of international law. That influence may not

equate with that of common law courts in the formation of the common law. But the impact of judgments of the Court on the shaping of customary international law is considerable.

The International Court of Justice is the principal judicial organ of the United Nations. But it is not the supreme court of the world. It is not an appellate court of last instance. And in recent decades, quite a number of other international courts have been established, so many that concern has been expressed about the "proliferation" of international tribunals. I see the point of that concern—that it could lead to conflicting views of international law being handed down by various tribunals—but I am not inclined to accept it. In the absence of an international legislature, an international executive, and an international court that enjoys general compulsory jurisdiction over States, the processes of the creation and development of international law always have been untidy. Customary international law has been shaped by the interplay of State practice, practice which is self-serving. If it is also shaped by the differing perspectives of international courts—to the extent that they actually do differ, and they need not and generally do not—international law can live with that. And the essential virtue of the multiplication of international tribunals is that many more disputes are internationally adjudicated.

The reality of international adjudication may be illustrated by a mere listing of some of these courts:

- the Appellate Body of the World Trade Organization;
- the Law of the Sea Tribunal;
- the European Court of Human Rights;
- the Inter-American Court of Human Rights;
- the Court of Justice of the European Communities;
- the International Tribunals for the Prosecution of War Crimes in the Former Yugoslavia and in Rwanda;
- the Iran-United States Claims Tribunal (a kind of hybrid between a court and international arbitration);
- the United Nations Compensation Commission (treating claims against Iraq arising out of its invasion of Kuwait).

All of these tribunals exercise particular rather than a general jurisdiction, unlike the International Court of Justice. The Law of the Sea Tribunal, however, while confined to maritime disputes, has a remit so broad as to approach though not match that of the ICJ. Since the International Court of Justice and its antecedent, the Permanent Court of International Justice, have dealt with maritime matters since 1923 with

notable success, it may be asked, did it make sense to establish the Law of the Sea Tribunal? The answer is, probably not. It is true that the Law of the Sea Tribunal has a jurisdiction that the ICJ does not have. The ICJ is restricted to adjudicating disputes between States, whereas the law of the Sea Tribunal has not only that jurisdiction but jurisdiction over disputes involving international organizations, i.e., the Seabed Authority and Enterprise, as well as disputes to which non-State entities may be party involving prompt release of vessels. But rather than creating a whole new international court, it might have made more sense to amend the Statute of the International Court of Justice to enable it to perform these narrow functions.

For not very good reasons, this was not done. The Law of the Sea Tribunal sits from time to time in its splendid seat in Hamburg, and occasionally deals with a case, but it is yet to consider the major sort of maritime case that the International Court of Justice has adjudicated over the decades. But in the fullness of time, it maybe expected that the law of the Sea Tribunal will play an increasing part in dealing with the tide of international adjudication.

Some of the specialized courts that I have listed are extremely important, because they deal with many cases of great practical and legal significance. The WTO Appellate Body, the European Court of Human Rights, and the Court of the European Communities adjudicate streams of consequential cases.

When I was President of the International Court of Justice, I advanced, in my annual report to the UN General Assembly, the suggestion that such courts could seek advisory opinions of the ICJ on questions of broad significance in international law that arise in cases in those courts. The suggestion was supported by my successor as Court President. But it has not, as far as I know, elicited interest on the part of other international courts, and that is not surprising.

The sum of the question of the reality of international adjudication is that it is more extensive, more intensive, more consequential, today than at any previous time in the history of the international community. More cases, and more important cases, are being internationally adjudicated than ever before. Nevertheless, since compulsory jurisdiction of courts of international disputes remains more the exception than the rule, large numbers of international legal disputes not otherwise settled are not adjudicated.

What of International arbitration?

Modern international arbitration dates from the Jay Treaty of 1794 which brought the American Revolutionary War to an end. In some 150

years before the establishment in 1922 of the Permanent Court of International Justice, there was a considerable number of arbitrations between States, the most famous and influential of which was the *Alabama Claims Arbitration* of 1871 between Great Britain and the United States. The Dutch scholar, A.M. Stuyt, in his classic *Survey of International Arbitrations* (1939, 1972) lists some 400 arbitrations during the period 1799 to 1939. That list however accords only one entry to each claims commission, no matter how many individual decisions were rendered by that commission; and some of those commissions rendered hundreds, a few even thousands, of individual arbitral awards. The tradition of claims commissions endures, as today exemplified by the Iran-United States Claims Tribunal, which has published some thirty-three volumes of its awards, and the United Nations Compensation Commission, which has adjudicated large numbers of claims against Iraq arising out of its invasion of Kuwait.

Despite the fact that States can take inter-State disputes to the International Court of Justice, they may alternatively opt for arbitration. I have sat on three such tribunals: one that dealt with territorial and maritime boundary disputes between Yemen and Eritrea; a second which, under the Law of the Sea Treaty, dealt with a dispute between Australia and New Zealand on the one hand, and Japan on the other, over Southern Bluefin Tuna; and a third which currently deals with a land boundary dispute between Ethiopia and Eritrea.

Among the cases which since the International Court of Justice began work in 1947 that might have been submitted to the Court but instead went to international arbitration are a fisheries dispute between France and Canada, land boundary disputes between India and Pakistan, Argentina and Chile, and Egypt and Israel, maritime disputes between Guinea and Guinea-Bissau, Iceland and Norway, France and the United Kingdom, and Argentina and Chile; a dispute relating to the sinking of the *Rainbow Warrior* between New Zealand and France, the interpretation of air service agreements between France and the United States and Italy and the United States; a dispute between France and Spain relating to the use of the waters of Lac Lanoux; and three are several others as well.

Claims Commissions, formed between States to deal with a multiplicity of the claims of the nationals of one State against the other, have been recurrently active for the last two hundred years. Traditionally the Government of the State whose nationals were claimants espoused their claims thus transposing them to the international plane. But nowadays the claimants themselves are empowered to bring their claims

directly, as in the Iran-United States Claims Tribunal.

The World Bank created the International Centre for the Settlement of Investment Disputes (ICSID) almost forty years ago, but it is only in the last decade that it has become busy. ICSID currently has some seventy cases on its docket. Most derive from bilateral investment treaties, which afford investors of one State the right to invoke arbitration against the government of the State in which they have invested. About 2200 bilateral treaties have been concluded in strikingly similar terms, to which States from almost all the world have subscribed. The concordant provisions of these treaties not only have given impetus to international arbitration. The consistent State practice which they manifest has reshaped the body of relevant customary international law as well. International law plays a part in these arbitrations, turning as they do on allegations of breach of treaty obligations.

Quite apart from interstate arbitration, and from arbitrations between States and companies, there is a vast industry of international commercial arbitration. A company contracting with a foreign company may not wish to submit disputes that may arise under the contract to the courts of the foreign company, nor may that foreign company wish to submit such disputes to the courts of the other party. So they agree to do neither, but instead submit disputes to international commercial arbitration. Nowadays quite a number of practitioners do well as counsel and arbitrators in what is a growth industry, international commercial arbitration. The number of disputes submitted to international commercial arbitration far exceeds those submitted to the other forms of arbitration that I have described. Normally the law applied in international commercial arbitration to the substance of the dispute is the law governing the contract, but occasionally questions of international law may arise as well.

I believe that I have sufficiently shown that international adjudication and international arbitration are real enough. How well they function is another question, and it is not an easy question to answer. They necessarily take time and money. Some judges and arbitrators are better than others. There may be special problems of the enforcement of international judgments and international arbitral awards, though those problems are not as large as the layman supposes. Domestic litigation has its problems as well. Clearly there is a perceived need for international adjudication and arbitration, and just as clearly that need is being increasingly met. In the large, that is certainly to the benefit of the maintenance of international peace and the promotion of international prosperity.



