50TH ANNIVERSARY OF THE INTERNATIONAL COURT OF JUSTICE OPENING OF COLLOQUIUM, The Hon Sir Gerard Brennan

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OPENING OF COLLOQUIUM - 9.30AM, 18 MAY 1996

HIGH COURT OF AUSTRALIA, CANBERRA The Hon Sir Gerard Brennan, AC KBE

Chief Justice of Australia

On behalf of the High Court of Australia, I welcome you as you come to commemorate the 50th Anniversary of the establishment of the International Court of Justice. Others, who know little of the work and influence of the International Court, may think it curious that such a commemorative seminar should be held here when the respective jurisdictions of the High Court and the International Court are so different. The jurisdiction of this Court is conferred by the Constitution and by statutes enacted in exercise of constitutional power. Its decisions are binding on the people, the governments and the courts of the Australian federation. It possesses no advisory jurisdiction. The International Court of Justice, by contrast, exercises a fragile contentious jurisdiction. Like all international tribunals, it acknowledges the basic rule that no State can be compelled to submit a dispute with another State to international arbitration. Its jurisdiction depends upon special agreements made by the parties or by declarations voluntarily made under par 2 of Art 36 of the Court's Statute - oftentimes subject to reservations that might be invoked to abort an exercise of the Court's jurisdiction. It is a badge of Australia's commitment to international citizenship that, without special agreement, it has accepted the compulsory jurisdiction of the International Court in relation to any other State accepting the same obligation and without any reservation save in relation to disputes "in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement" [1]. In recent years, Australia invoked the jurisdiction of the International Court in a matter relating to nuclear testing in the South Pacific [2], was made a party to suits in the Court relating to the phosphate lands in Nauru [3] and relating to East Timor [4] and applied for permission to intervene in proceedings between New Zealand and France relating to further atmospheric nuclear tests in the South Pacific [5]. It is not for me to comment on the work of the International Court in areas that are primarily the concern of the Executive Government of this country, but I note that Henry Burmester has offered this assessment [6]:

> "as a middle ranking power with a high regard for international law, Australia considers its interests are best served by accepting the risks of action being brought against it in return for being able by its commitment to the process to enhance its status as a good international citizen and being able to invoke, or threaten to invoke, the mechanisms itself when it considers that appropriate."

It is obvious that Australia's national interests have been exposed voluntarily to significant affection by decisions of the International Court. Australia has thus reposed great confidence in the integrity of the International Court and in its capacity to define and apply the principles of international law which this nation accepts as binding in its conduct of international affairs. The law administered by the International Court, principled though it be, must be continually developed in discrete cases to accord with rapidly changing international conditions, taking account especially of the emergence of developing nations. An increasing invocation of the Court's jurisdiction evidences the need for the Court's services and a broadening acceptance of its deliberations.

At the judicial level, there has been a modest association between the High Court and the International Court in the appointment of Sir Garfield Barwick and, later, Sir Ninian Stephen, as ad hoc Judges of the International Court. And, of course, Sir Percy Spender, elected to the

International Court of Justice in 1958 - the only Australian to have been elected - was President of that Court from 1964 to 1967. But there is a connection between this Court and the International Court other than the merely personal.

The more significant relationship is in the realm of legal principle. The opinions of the Judges of the International Court - not always the majority opinions - have been taken in this Court as expositions of principles of international law when those principles have arisen for consideration here. In cases in this Court relating to Commonwealth power in respect of fisheries and territory below the low water mark (Bonser v La Macchia 7 ; New South Wales v The Commonwealth (Seas and Submerged Lands Case) 8 and Raptis (A) & Son v South Australia 9) the reasons for judgment of Justices of this Court drew on the opinions of the Judges of the International Court in the North Sea Continental Shelf Cases 10 a nd the Fisheries Case , United Kingdom v Norway 11 . In cases relating to racial discrimination and Aboriginal land rights (Koowarta v Bjelke-Petersen 12 ; Mabo v Queensland [No 2] (" Mabo [No 2] ") 13 a nd Gerhardy v Brown 14) reference was made to the judgments in South West Africa Cases 15 ; the Advisory Opinion on Minority Schools in Albania 16 ; Namibia (S W Africa) Advisory Opinion 17 ; Advisory Opinion on Western Sahara 18 and Barcelona Traction, Light and Power Company Limited 19 . In dealing with the sources and nature of international law, judgments in this Court in The Commonwealth v Tasmania. The Tasmanian Dam Case 20 and Polyukhovich v The Commonwealth 21 drew on Barcelona Traction , the North Sea Continental Shelf Cases and Nicaragua v United States of America 22 . Nationality - a question that fell for consideration in Sykes v Cleary 23 - evoked references to the Nottebohm Case , Liechtenstein v Guatemala 24 .

A growing familiarity on the part of municipal courts and the practitioners who appear there with the judgments of the International Court of Justice will add to the increasing influence of international law on the municipal law of this country.

Sir Anthony Mason has referred to what he calls "an overhang of the old culture in which international affairs and national affairs were regarded as disparate and separate elements". He notes 25 :

"That culture is giving way to the realisation that there is an ongoing interaction between international and national affairs, including law."

Interaction there must be. International transactions, whether between public or private parties, are not confined by a boundary drawn between international and municipal law. To resolve disputes about transactions having both international and municipal elements, it would be desirable to have a consistent body of law. The experience of Britain in respect of the European Convention on Human Rights illustrates the difficulties which can arise when the law administered by a municipal tribunal does not comprehend the law administered by an international tribunal considering the same set of facts. In so far as judges may play a part in producing consistency between international and municipal law, one wonders whether the traffic in legal concepts should be all one way. Has the experience of the world's municipal systems anything to offer international law?

While the distinguished judges of the International Court bring with them some familiarity with the leading municipal systems of the world, membership of the Court is more frequently drawn from the ranks of distinguished statesmen and academics than it is from experienced municipal judges. It is not to be expected that international tribunals should rely directly on the municipal law of a particular country but judges with a working familiarity with a particular legal system could bring to an international tribunal the wisdom and insights of that system. As we move towards a globalisation of legal concepts - particularly in the areas of human rights and territorial asylum - the divide between international and municipal systems will become less and I venture to suggest that there will be an increase in the movement of judicial officers both ways across the boundary that has thus far divided the international from the municipal tribunals. But that - at least in the

vast majority of areas of international law - is a development that awaits the coming millennium.

For the present, let us extend felicitations to the International Court of Justice on attaining its 50 years of service to the cause of peace and international order, joining in the observation of HE Professor Diogo Freitas do Amaral who, speaking on behalf of the United Nations General Assembly at the sitting in The Hague on 18 April, referred to the characteristics of the International Court of Justice:

" Its authority and integrity , namely in the manner it has been interpreting and executing the principles governing its mission;

Its impartiality and total independence as guaranteed by the intellectual honesty of its member-judges and other personnel;

Its judicial realism as displayed when assisting the parties in achieving a political settlement, a solution often seen as preferable to a judicial decision.

Such characteristics or principles of action have shaped the contribution the International Court of Justice has given to the advancement of the rule of law and to the promotion of justice among nations, for which the Court deserves every praise."

I am pleased formally to open this Colloquium.

1See Henry Burmester, "National Sovereignty, Independence and the Impact of Treaties and International Standards", (1995) 17 Sydney Law Review 127 at 140.

2 Australia v France [1974] ICJ Reports 253.

3 Nauru v Australia [1992] ICJ Reports 240.

4 Portugal v Australia [1995] ICJ Reports 90.

5 New Zealand v France [1995] ICJ Reports 288.

6"National Sovereignty, Independence and the Impact of Treaties and International Standards", (1995) 17 Sydney Law Review 127 at 142.

7(1969) 122 CLR 177 at 186, 190, 201, 214; and see 215-216.

8(1975) 135 CLR 337 at 451-452, 454, 466, 475, 500-501.

9(1977) 138 CLR 346 at 387.

10[1969] ICJ Reports 3.

11[1951] ICJ Reports 116; [1952] 1 TLR 181.

12(1982) 153 CLR 168 at 205, 219.

13(1992) 175 CLR 1 at 40-41, 181-182.

14(1985) 159 CLR 70 at 128, 129, 135-136.

15[1966] ICJ Reports 3.

16(1935) Ser A/B No 64.

17[1971] ICJ Reports 16.

18[1975] ICJ Reports 12.

19[1970] ICJ Reports 3.

20(1983) 158 CLR 1 at 222.

21(1991) 172 CLR 501 at 559-560.

22[1986] ICJ Reports 14.

23(1992) 176 CLR 77 at 106-107, 109, 111, 131.

24[1955] ICJ Reports 4.

25"The Influence of International and Transnational Law on Australian Municipal Law", (1996) 7 Public Law Review 20 at 23.