

H.E. Judge Joan E. Donoghue
President of the International Court of Justice

THE ROLES OF INTERNATIONAL JUDGE AND FOREIGN MINISTRY LAWYER

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Madam Chair of the Sixth Committee,
Mr. President of the General Assembly,
Excellencies,
Ladies and Gentlemen,

I am honoured to address the Sixth Committee of the General Assembly on behalf of the International Court of Justice. I welcome this annual opportunity to strengthen the bonds that unite our two institutions.

I would like to congratulate Her Excellency Ms Alya Ahmed bin Saif Al-Thani on her election as Chair of the Sixth Committee for the seventy-sixth session of the General Assembly.

Last fall, the COVID-19 pandemic compelled my predecessor, Judge Abdulqawi Yusuf, to address the Committee remotely from The Hague. I am grateful that there has been enough of an improvement in conditions that the Registrar of the Court and I were able to travel personally to United Nations Headquarters in New York this fall.

I am sure that many of you share my disappointment that the 2021 International Law Week takes place in a hybrid format, without the usual side events that can be of great substantive interest and with fewer opportunities to chat informally with long-time colleagues and to make new friendships.

The hybrid format is adequate for formal meetings and presentations, but we lose the opportunity for personal engagement that is so vital to those of us in the field of international law.

I was mindful of this loss of opportunities for informal exchanges when I chose today's topic. Delegations to meetings of the Sixth Committee usually include persons who provide advice to their respective governments on matters of international law, whether in capitals or here in New York. Until I was elected to the International Court of Justice in 2010, I was one of you. I had been a foreign ministry lawyer for many years, most recently serving for three years as the senior career attorney in the Legal Adviser's Office of the United States State Department.

So I speak to this group, whether you are in New York or joining remotely, to address a subject about which I am often asked when chatting with people who advise their own governments on matters of international law, whether from within a foreign ministry legal office, an attorney general's chamber or another government office. I am asked, "what is it like to be a judge on the ICJ? How does your current job compare to that of a government legal adviser working in the field of international law?"

At first blush, it might seem that these two roles have little in common other than the subject of public international law. After all, a government ministry and an international court are very different institutions. However, there are important similarities between the two roles, so I shall begin with those before turning to some differences.

First, and most obviously, the core substantive work of both a foreign ministry legal adviser and an international judge involves public international law. As legal advisers, you interpret treaties and advise on the existence and the content of customary international law. You use the same tools in this work that are available to a judge. For example, in your advice to ministers, you can be expected to apply the rules of treaty interpretation that are reflected in the Vienna Convention on the Law of Treaties, as do judges of the ICJ.

Second, in neither role does one have the freedom to select the topics that find their way into one's inbox. As a government legal adviser, especially at a senior level, one must be prepared to answer questions on every aspect of international law, having no control over world events and national priorities that will drive questions from ministers. I am sure that many of you have had exactly the experience that I had as a government lawyer. One arrives at the office expecting to devote some time to a question about diplomatic immunity, but is instead faced with an urgent problem of treaty law, followed by an inquiry about the law of the sea, and so on.

Similarly, as ICJ judges, we do not control the kinds of legal issue that we are called to address. These depend on the contentious and advisory proceedings that States and UN bodies bring to the Court. In my eleven years in The Hague, for example, the substantive issues before the ICJ have ranged from the law of foreign state immunity to the delimitation of land and maritime boundaries, international environmental law and reparations for violations of international humanitarian and human rights law, among many others.

Both as a foreign ministry lawyer and as a judge, I have been at times envious of academic colleagues who choose their areas of specialization. That is not an option for ICJ judges. We must be generalists, equipped to address the full range of issues that arise under international law. And in my experience as a government lawyer, I also found great value in being a generalist in public international law, someone who has broad knowledge of the entire field and a sufficiently deep understanding of each of the sub-fields to be able to delve into a precise question in a probing and insightful way. In negotiating treaties in one sub-field of international law, for example, I was often able to draw inspiration from approaches followed in treaties in another sub-field.

Third, the idea of precedent is an important consideration both for government legal advisers and for international judges. In formulating advice on the issue of the day, the government legal adviser must look back at the positions that his or her State has taken in the past. Equally, the legal adviser must look forward, mindful of the possible precedential implications of a position to be taken on a

particular matter. If one interpretation of an extradition treaty would support your State's request that a treaty partner extradite an individual to your country, you can be expected to point out to your ministers that the same provision applies to extradition from your country to the treaty partner. More generally, it falls to the legal adviser to broaden the analysis beyond that particular treaty. You can be expected to remind policymakers that they must consider not only whether a specific proposal is legally available, but also the implications of that decision for your State's overall reputation as a reliable treaty partner.

The International Court of Justice is not bound by precedent in the manner of a common law court, of course. However, we attach great importance of the consistency of our jurisprudence, which we usually describe using the French expression – a *jurisprudence constante*. When we take stock of what the Court has said in the past and think about the implications that one Judgment might have for matters that could arise in the future, the considerations that we face within the Court bear much similarity to the questions that are debated within your governments.

The importance of a reliable jurisprudence means that it is incumbent on the Court to think carefully about the way that we frame our pronouncements on the law. In virtually every case, we must make a choice about whether to state a legal proposition broadly or narrowly. This is a consideration that you also face in the advice to your governments.

For example, suppose there is a question whether your government should recognize the immunity of a particular foreign official in a specific case. And let's suppose that you, as the legal adviser, reach the conclusion that the law entitles that official to immunity. You must then consider whether your government should explain this decision based on considerations very particular to the circumstances of that official – such as the purposes of a particular visit or the activities in which the official was engaged when an incident occurred. Alternatively, you must consider whether your government should ground its decision on a broader assertion about the scope of immunity of

officials. As legal adviser, you are undoubtedly weighing these options in light of precedential considerations, among others.

At the ICJ, each judge is mindful of the role that our legal pronouncements will play in our *jurisprudence constante*. But within the Court, we often differ on whether we wish to frame a particular statement of law in general terms, with potentially broad application, or instead to make a pronouncement that is limited to the particular situation presented to us in that case. Staying with my immunity hypothetical, we can imagine a situation in which there is broad agreement within the Court that a particular individual is immune in the particulars of a case, but some judges may wish the Judgment to make a general statement about the immunities of officials while others may favor reasoning that is very focused on the particular case before the Court.

I would add in this regard that academic commentators are often eager for broad pronouncements on the law. After any judgment or order on provisional measures, one is likely to see comments from scholars who state that the Court missed an opportunity to develop or clarify a particular area of law.

Having been trained in the common law tradition and, in particular, in a United States law school, I find that, during the drafting of a Judgment, I am constantly conducting mental exercises in which I test possible formulations of legal propositions against hypothetical factual situations. Knowing that our legal pronouncements will become part of our *jurisprudence constante*, I want to satisfy myself that a general proposition of law is robust enough to remain valid in the face of facts that might be very different than those in a particular case. If I have doubts, I often consider how we might refine our statement of the law to avoid unwarranted implications. This intellectual exercise has much in common with the approach that I might have taken in reviewing a proposed statement by the State Department's press office. In either role, one of my responsibilities is to look around corners.

Because considerations of precedent are important both to a legal adviser and to an international court, there are also occasions when it can be attractive to avoid expressing a position on a particular

issue. Often an issue presents uncertainties as to both the facts and the law. A difficult question of law can at times be avoided if a factual pronouncement renders the legal question irrelevant. And the converse is also true. A conclusion of law can obviate an inquiry into contentious facts. We see this dynamic at play in judgments and orders of the ICJ. For example, if the Court decides that a claim fails on one ground, it need not address additional arguments that the opposing party put forward in its defense to that claim.

I turn next to a third similarity that I see between the work of a government legal adviser and that of an international judge. Both in the Court and in government, confidentiality about the deliberative process is important to high-quality decision-making.

The legal proceedings before the ICJ are held with transparency. Both the written pleadings and the hearings are open to the public. However, the Court must be able to deliberate with absolute confidentiality.

Of course, agents and counsel would love to know what gave rise to the Court's decision and to understand what happened in the ICJ deliberation room. Why does a certain paragraph seem to be oddly worded? Why was one issue addressed even though it may not have been strictly necessary? Which judges had the greatest influence in shaping the reasoning on a particular point?

However, there are strong institutional imperatives against revealing what took place during our deliberations.

It must be borne in mind that the judges of this Court are elected with the expectation that they will bring diverse perspectives to the Court. It is entirely appropriate that we do not always agree, but also important that we have freedom to learn from each other, to adapt and revise our own views after we hear from our judicial colleagues. Once we complete our deliberative process, the Court communicates its views only through its written judgments and orders. On our Court, judges are free

to express their individual views in written opinions that are appended to a Judgment. But the exchanges within the Court are maintained in strict confidence.

A government has more channels than a Court for communicating externally its views on a question of international law. It can do so through litigation, in a negotiating position, in a speech by a senior official, in a press release or in remarks in meetings of groups like the Sixth Committee. But on any difficult issue, one can expect that the words have been chosen with care and with consideration of their specific and more general implications. And, quite often, the words are chosen after internal disagreements about how to proceed. As with deliberations within the Court, confidentiality of the internal processes of government is very important to a sound process of decision-making that permits full consideration of a range of equities and factors.

I shall now offer some observations on three differences between the role of a government legal adviser and that of a judge.

First, a legal adviser to a government has a client – the State. Ministers personify that client at any given time, setting the direction of the State's policies, which then play an important role in framing the questions that the legal adviser faces. The legal adviser takes into account those policy objectives in analyzing the legal implications of options. Of course, this does not mean that the legal adviser should always find a way for the minister to pursue a favored option, even if it raises legal concerns. However, the existence of a client does mean that the focus of the legal advice is to enable the ministers to pursue objectives that they set, in a manner that is consistent with the legal adviser's appreciation of the law.

This focus on the policy options under consideration in a government is especially relevant in circumstances in which the content of international law is indeterminant, for example, when the legal adviser considers that there is more than one reasonable interpretation of a treaty. In that case, the legal adviser might indicate to the ministers that the path that the ministers favor is legally available,

while cautioning that the legal interpretation underlying it is subject to valid questioning by other States.

For international judges, on the other hand, there is no minister serving as the captain of the ship. The judge is her own captain. So what are the parameters that should guide a judge's approach to situations of legal indeterminacy, for example, when the choice between two competing interpretations of a treaty is a close one? One can answer this question with platitudes, for example, by saying that the judge should always seek to render justice. That is true, of course, but it is not illuminating.

One can quickly exclude certain possible answers to the question that I pose. The judge should not decide on the basis of his or her overall attitude to the two States parties to a case or the relationship that those States have to the judge's State of nationality. Beyond that, however, I suspect that judges of the Court would answer my question differently. Some might emphasize that each judge is elected in his or her personal capacity. While that statement is true, I do not consider that this frees a judge from duly weighing considerations beyond his or her individual inclinations.

The requirements of the Court's Statute and the traditions governing the election of judges to the ICJ recognize that States are sovereign equals but they are also different from each other. Elections to the Court take place in full awareness of the differences among States, such as their regions, their kinds of governments and their levels of development. This is as it should be. We cannot expect homogeneous perspectives among a group of judges that is representative of the membership of the United Nations. On matters such as human rights and self-determination, for example, it is entirely appropriate for the views of judges to be influenced not only by their individual lived experiences, but also by the historical experiences of their respective States of nationalities. It is through the genuine airing of a variety of perspectives in frank, confidential and detailed deliberations that the ICJ operates truly as a World Court. A judge of the Court must never lose sight of the fact that he or she is elected by the entire UN, and thus is accountable to all Member States.

By recognizing that each of us is influenced by our prior experience, we can also strive not to be imprisoned by it. I believe that a judge of the Court should always be cautious not to proceed reflexively on the basis of one's initial impressions. She must instead take time to reflect on the perspectives of others before forming a view. Former ICJ President Manfred Lachs stressed that a judge must also be mindful of the impact that his or her particular training, background and legal tradition may have on the impulses that lead her in a particular direction. I endorse his advice that that a judge must always test his or her legal analysis against the highest standards of intellectual honesty.

I shall mention briefly a second difference between the role of a government legal adviser and that of a judge, which is the matter of pace. The work of a legal adviser is akin to a series of furious sprints, day after day, week after week, as you are asked for advice by the close of business or, if you are lucky, perhaps by the next morning. By contrast, the ICJ, which has been extremely busy during my time at the Court, is running multiple marathons at any one time. The drafting of a Judgment is intense and time consuming, but our internal deadlines are normally set in terms of weeks, not hours. Our role as a "World" Court places a priority on collaborative and inclusive working methods and on the involvement of all judges in matters of procedure and substance. While our deadlines may be less immediate than those legal advisers are used to, we produce lengthy, detailed legal analysis that is not typical of the day-to-day work of government legal advisers. In addition, several cases are usually under deliberation before the Court at the same time, requiring the Court and the Registry to manage competing priorities in parallel.

I turn finally to a third difference – the more limited strategic space in which a judge operates, as compared to a government legal adviser. We might say that a judge paints on a smaller canvas and with a more limited palette of colors than is available to a government legal adviser.

The limited scope of a judge's role, in comparison with that available to a government legal adviser to a ministry, can be illustrated by the following hypothetical set of facts.

Suppose that a river runs through two States and one State lies downstream the other. The environment minister of the downstream State has determined that the water in the river is being polluted by industries in the upstream State. She approaches the legal adviser, looking for ways to solve the problem.

The legal adviser can be expected to analyse the rights and obligations of the two States and to advise the minister on whether the upstream State has breached its international legal obligations, and if so, whether reparations are owed to the downstream State.

If the downstream State's legal adviser finds that her State has a strong legal case, what next? The downstream State could propose a treaty in which the two States agree that the upstream State is liable and will pay compensation. But those of you who work or have worked as a legal adviser can immediately see the obstacles to such an agreement.

The members of this audience might therefore devise some other options to present to the minister. Several options might spring to mind. First, the two States could settle the dispute through an *ex gratia* payment by the upstream State, skirting the question whether the upstream State had met its legal obligations. Second, the downstream State might decide that the most efficient solution would be for it to contribute to the costs of pollution control measures to be taken by the upstream State. Third, the two States might agree to establish a claims commission or similar mechanism to settle claims by the nationals of the downstream State who allege that they were injured by the pollution. Fourth, the two States might decide to engage a mediator to assist them in reaching an agreed solution

These options are not normally available to a court that is asked to decide a legal dispute.

An application to a court by the downstream State in my hypothetical would normally present the question whether the upstream State violated its legal obligations. The task of the court would be to look back at what has occurred, to evaluate the legal consequences and, if it finds that the responsibility of the upstream State is engaged, to order reparations. And its decision will bind the parties.

Having served as a judge for a number of years, I can say that the limited scope available to the Court can at times leave me feeling a bit frustrated, wondering whether options not available to the Court might have been more constructive ways for the two States to move forward.

However, this bounded strategic space is a deliberate part of the design of international courts. The jurisdiction of international courts and arbitral tribunals is based on the consent of States. The consent to jurisdiction means that the two States no longer control the outcome of their dispute. That outcome is placed in the hands of an institution that is empowered to bind the two States. The two States thereby relinquish their autonomy of choice. It is therefore appropriate that a court is limited to settling legal disputes in accordance with the applicable law, without the scope to impose solutions that are not legally mandated.

The relationship between any two States is inevitably complex and multi-faceted, even when they enjoy close ties with each other. A case before the International Court of Justice provides a way to channel one particular legal dispute into a highly structured proceeding in which both States have a chance to present their cases on the law and fact on the basis of equality. This is by no means the only way for two States to settle a dispute, but it is unquestionably an option that can contribute to peace and security. As a judge of the Court and now as President, it has been a true privilege to participate in this work.

On this note, Madam Chair, I propose to conclude my remarks. I would like to thank participants for their attention and I look forward to a fruitful exchange of views. I am aware that some Member

States are involved in contentious cases before the Court and I am confident that you'll be careful not to raise questions about specific cases or pending matters. With that exception, I am open to a discussion of whatever topics interest the members of the Committee.