

IF WE ARE ARE HONEST TO OURSELVES

International law currently is positivistic and accords great deference to the realities of power, making it less responsive to the broader international purposes which international law should subserve.

It is indeed a paradox that we can, in international law, shut our eyes to the central realities of the international scene by too much reliance on “realism.”

One of these central realities is, in the stark of words of Jonathan Schell, that “if we are honest with ourselves we have to admit that unless we rid ourselves of our nuclear arsenals, a holocaust not only might occur but will occur – if not today, then tomorrow, if not this year, then next.

Another is that under the current regime of international law we are slowly but surely working towards the irreversible crippling of our eco-system, polluting our atmosphere, and making our land a desert.

There are other central realities of which the North-South cleavage and the conservation of the common heritage of mankind are important examples.

Nuclear weapons and Scientific Responsibility,
Vishva Lekha Publishers & Kluwer Law International,
1987, p. 107.

GIVING PERSPECTIVE AND DIRECTION: JUDGE WEERAMANTRY’S CONTRIBUTION TO INTERNATIONAL LAW

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*O brave new world,
That has such people in’t!”
Shakespeare, The Tempest (Act V, Scene I)*

It is an honour and privilege to be asked to contribute a collection of writings to mark the ninetieth birthday of His Excellency, Judge Christopher Weeramantry. It allows me to send my best wishes, of course, but more than that it provides me with an opportunity to reflect again on his belief in, his influence on, and his legacy to international law. My academic career has intersected with the work and, occasionally, the life of Judge Weeramantry on a number of discrete occasions.

One of the pieces of published work, of which I was most proud at the time of completion, and remain so today, was an article I wrote on the separate and dissenting opinions of the judge whilst he was at the International Court of Justice. Entitled in part “The Heroic Undertaking?...” it was appropriately, and very deliberately, published in the *Asian Yearbook of International Law*.¹

It being over a decade since I wrote that piece, this much shorter note does at least offer me the chance to consider afresh not only his contribution to international law, but also to highlight how his very ethos and understanding of the international system, and international fairness more generally, is as necessary now as it was when he was on the Bench.

¹ AYBIL 11 (2006),

But to return to how the judge has affected my career. Despite being fully cognisant of his passionate views on the illegality of nuclear weapons as demonstrated in his 1996 dissent in the *Nuclear Weapons Advisory Opinion*, my first serious engagement with his work was as a PhD student at Cardiff University. I had just started in September 2007. I knew the broad parameters of my topic – sustainable development and international law – but had little sense how to convert that into a meaningful thesis.

A few weeks into the PhD study that changed, dramatically and irreversibly, with the issuing of the judgment in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* and, in particular, through reading Vice-President Weeramantry's Separate Opinion. Rarely had I read such a sweeping narrative in my legal education up to that point. This was not international law dryly taught, and dryly applied. This was living – breathing – international law, where the wisdom of the past connected with the imperatives of the present.

There was also poetry about how it was written; unmistakably so. More than that it included references to poetry, to history, to ancient sermons, to the world's religions, and to literature, as well as the diversity to be found in traditional legal systems. As Judge Weeramantry noted: “[t]his is a rich source which modern environmental law has left largely untapped.”²

From recollection, I think I have also met the judge on two or three occasions, but the most recent was also the most memorable for me. Judge Weeramantry accepted my invitation to give the inaugural speech at the opening of the Lincoln Centre for Environmental Law and Justice in August 2015. It was a wonderful opportunity for me to host the judge, to show him Lincoln (more on which in a moment) and, of course, to listen to him again.

In front of a room packed full of people, Judge Weeramantry

² I.C.J. Reports 1997, p. 98.

spoke movingly, passionately and with wisdom about the challenges faced by the world, and the role of environmental law in harnessing political will to counter that. He, in particular, talked about the importance of the world's religions and what values they teach us about being stewards for the planet.³

Whilst in Lincoln, I also had the opportunity to show him one of only four remaining original copies of the 1215 Magna Carta, which was celebrating its 800th anniversary in 2015. Magna Carta symbolises the importance of the rule of law over brute political force and the judge was truly taken with having seen this most important of documents. But, as he told me, many similar documents exist in many traditions and together they comprise our body of legal principles and heritage. That continues to be one of his central messages; don't limit your scope to simply what you already know.

So in reflecting on his own legacy to international law, I am struck by the risk that international law can – not always – but can slide into being instrumentally shallow and doctrinally rigid even, or especially, when interpreted by the International Court. Thus international law can seem ill suited to the challenges of modernity and the inevitability of “progress”.

Judge Weeramantry's writings remind us, I think, of two essential elements; namely context and purpose. Context as regards how disparate aspects of the law fit together (internal context) and how law must make sense with the world in which it must operate (external context). And purpose, that international law is not simply about maintaining uneasy co-existence, but that promoting values such as peace, justice, humanity and ecology are fundamental to the normativity of law.

Each element is important and its inclusion in jurisprudence

³ The talk can be seen at <https://www.youtube.com/watch?v=0HJW37YxqUc>.

would go some way to promoting a richer source of international law, but it is only when they are considered together does international law truly become something much more powerful and potential.

Of course, international law is consensual and the written rule is paramount, but as Weeramantry showed time-and-again, the written rule needs both context – or perspective – and purpose – or direction – to make it ultimately meaningful. By seeking to instil perspective and direction in his opinions, Weeramantry highlighted the significance of giving substantive meaning to otherwise inchoate words and putative phrases.

The importance of such a “joined-up” approach is only going to become more urgent as we seek to respond legally to the challenges of the anthropocene. Recognising that we, as humanity, have changed our planetary systems to such an extent, and by such a degree, that we have entered a new geological epoch is as remarkable as it is frightening. For it recognises not only humanity’s ability to affect the fundamental biospheric, geological and atmospheric processes that provide – or deny – life on Earth, but the reality that we have already done so.

The Book of Genesis in the Bible describes humanity as stewards of their environment. In a particularly famous verse, it says

The Lord God took the man and put him in the Garden of Eden to work it and take care of it.⁴

In another version, it describes the same responsibility as “to tend and guard and keep it”.

The arrival of the anthropocene would suggest that we have failed as a species in whatever duty – however framed – is imposed upon us. Mixing my metaphors, we have begun to cross some – though not all – of the environmental Rubicons presented to us.

⁴ *Genesis* 2:15.

The arrival of the anthropocene provides an opportunity for us to reflect on the social, moral and normative aspects of the way we live

In law, we might describe this point as a constitutional moment – a key point in a society’s political time-line where either by choice or through necessity society is confronted with a significant challenge and is required to take stock of its governance arrangements and to consider making fundamental change. Such societies can be local, national or global in nature.

Throughout history, we can point to various of these moments; the US Declaration of Independence, the Treaty of Versailles following the end of the first World War, the establishment of the UN, the end of apartheid in South Africa. But has a country – has the world – ever faced an environmental constitutional moment? Perhaps not yet, but as low-lying countries come to decide whether to vacate their territories due to sea-level rise, as desertification destroys more and more of sub-saharan Africa and as species extinction threatens food security and ways of life, each in their own way will raise a “constitutional” moment.

It is also essential when we consider environmental matters – even at the macro-level of the anthropocene – is to recall that we are not all the same. There is systemic unfairness in our global system. The global South faces innumerable hurdles in its development; absolute poverty may be falling but hundreds of millions still face the daily prospect of hunger, land tenure insecurity, poor life chances and little access to essential medical care.

Such injustice isn’t invariably caused by environmental crises, but such crises will exacerbate already existent social, economic and political inequality. Thus, when discussing the anthropocene, and focusing on the prefix “anthro-” as in the anthropogenic causes of the new geological epoch (and rightly so), we must also not neglect the anthropocentric nature of our concerns; that environmental

destruction does not hurt all people in equal measure. The poor of today will become the ancestors of the poor of tomorrow. Poverty breeds poverty.

One of the earliest pieces of writing I did was to look beyond the now-generally accepted idea of inter-generational fairness between generations to consider the legal implications of intra-generational equity. I remain as convinced as I did then – if not more so – that to respond effectively (“sustainably”) to environmental issues, we must also tackle such issues equitably.

International law, and the international system, will have to respond to the challenges of the anthropocene. For me, at its heart, is a contradiction. The first is that the acceptance of the move into the anthropocene must almost, by definition, be a rejection of sovereignty as presently devised as an effective political device to achieve global common concern.

The second is that we have failed, yet, to conceive of anything better than sovereignty to aggregate our interests between the private, the local and the global. The systemic and structural features of the global system continue to struggle to capture and respond – but not be captured by – local circumstances and preferences.

One response to this is to accept that this is the reality of things; that this is an inevitable part of how the system works. Another is to hope for a better way – a more ordered, centralised and structured approach to international governance. To replace the self-interest of States with the collective interest of the international community. The challenges remain as great as they ever did, and to that extent Professor Weeramantry’s work will continue to have resonance.

At the beginning of this note, I quote from *The Tempest*. Of course, this is not the Brave New World of Adolf Huxley’s novel – though Judge Weeramantry has often written of the dangers of

developing new technologies without consideration of their ethical and social implications – but it is the passage from Shakespeare’s play, which gave Huxley the inspiration for his novel. It is a passage, which on the face of it, describes Judge Weeramantry effortlessly.

In the brave new world in which he has now lived for 90 years, it is essential that we have people such as him “in’t” to give us a sense of our history, to help us develop our own moral compass, and to ensure we engender these values in our systems of law. It was thus unsurprisingly that when The Hague celebrated its 750th anniversary in 1996, Judge Weeramantry was one of 18 persons in various fields celebrated for contributing to the city’s global reputation for excellence.

Of course, literary scholars would point out that the words in the play are, in fact, deeply ironic as the men described here turn out to be not the noblest of men. But in Weeramantry’s work, there is no need for such irony or, indeed, fatalism. Judge Weeramantry’s writings are clear, direct and speak very honestly about not only the challenges we face, but also the ideas – and ideals – at our disposal.

I send His Excellency my best wishes and thank him for how he has supported my career in, and opened my eyes to, the wonder of international law. To quote again from *The Tempest*:

*The cloud-capp'd towers, the gorgeous palaces,
The solemn temples, the great globe itself...
Shakespeare, The Tempest (Act IV, Scene I)*