STELLUNGNAHMEN UND BERICHTE

Presentation to His Excellency Shigeru Oda – Judge at the International Court of Justice – of the Liber Amicorum in His Honor*

Editors' Remarks: *Professor Nisuke Ando, Kyoto*
Professor (em.) Edward McWhinney, Q.C., Vancouver
Professor Dr. Dr. h.c. Rüdiger Wolfrum, Heidelberg
Keynote Address: *Professor Michael Reisman, New Haven*

Remarks of Nisuke Ando

Judge and Mrs. Oda, Ladies and Gentlemen;

It is a great honour and privilege for me to be given this opportunity to speak at the memorable Presentation Ceremony of Liber Amicorum Judge Shigeru Oda. I am given this honour because my name is among the three editors of the *Festschrift* and my family name happens to begin with "A", the first letter in alphabetical order. However, I must hasten to add that, of the three editors, my contribution is the least. Professor McWhinney, another editor, has written an excellent book on Judge Oda's individual opinions, and the book forms an essential background for his article in the *Festschrift.* Professor Wolfrum, the third editor, and, under his leadership, some staff of the Max Planck Institute for Comparative Public Law and International Law have devoled their time and energy for all the editorial labours to bring this voluminous *Festschrift* to completion. To all of them I owe very, very much.

Now, in this brief speech of mine, I would like to focus on three issues, all relating to Japan: First, on the significance of Judge Oda's presence in the International Court of Justice for Japan in its relations with the rest of the world.

* The presentation took place at the Max Planck Institute for Comparative Public Law and International Law on 16 March 2002.

You may remember that, after World War I, Japan emerged as one of the victorious "Principal Allied and Associated Powers" with a permanent seat at the League of Nations Council. Japan also joined the Permanent Court of International Justice from the beginning and sent three judges to its bench. All these factors indicated that Japan chose, not to settle international differences with power and use of arms, but to try to live in peace and harmony with all other peoples and nations. Unfortunately, however, in the aftermath of Great Depression, Japan failed to reach agreement with the international community, eventually left the League of Nations, invaded the Asian continent, and met with complete military defeat in World War II. In the subsequent years, Japan failed to rebuild its economy and rejoin the world community. In 1956 Japan was admitted to the United Nations. Already in 1954 Japan acceded to the Statute of the International Court of Justice, and Japan sent two judges to the bench of the International Court: Judge Kohtaro Tanaka and Judge Shigeru Oda. This has been a message from Japan to the world community that Japan will never again resort to threat or use of armed force but it will follow the path to international order and cooperation through pacific means. At the same time Judge Oda's presence in the World Court has been a constant reminder to the Japanese people that Japan should endeavour to do its share in building the global order based on law and justice.

The second issue that I would like to focus on in my speech is Judge Oda's encouragement and support for younger generations of Japanese international law scholars to become more active on the international plane. You may be surprised to hear that the Japanese Society of International Law, an independent academic organization of international law scholars in Japan, celebrated its centennial in 1997. To commemorate that occasion the Japanese Society organized an international symposium in the same year. Being the chairperson of the Planning Committee for the symposium, I asked Judge Oda to make the Banquet Speech, the title of which was "One Hundred Years of the Japanese Society of International Law and Fifty Years of the International Court of Justice". The proceedings of the symposium were published in 1999 as the fifth volume of the series entitled "International Law in Japanese Perspective". Well, if you look into the monographs of this series, you will find the name of Judge Oda as the general editor together with the names of several Japanese scholars, all of whom belong to younger generations. This symbolizes the efforts that Judge Oda has been making in order to encourage and support younger generations of Japanese international law scholars to be more active on the international plane. Through its long history Japan has learnt a lot from the outside world: Korea, China, Europe and America. In fact, Japan has taken so much from the rest of the world. But, frankly speaking, I think that Japan should give something back to the rest of the world, and one way for Japanese academics to do this is to express their views, orally or in writing, on matters of their professional interest: In this regard, Judge Oda's encouragement and support for younger generations of Japanese international law scholars to publish in the series is indeed significant.

The third and last issue that I would like to focus on is, if I am allowed to be a little personal, a special relationship between Judge Oda and a group of international law scholars in Kyoto. Kyoto is my home town and the ancient capital of Japan. Tokyo is the new capital. Judge Oda is a graduate of the University of Tokyo, and I am a graduate of Kyoto University, the two universities having been good rivals. Now, in Kyoto, international law scholars connected with Kyoto University in one way or another meet every Saturday afternoon to study and discuss various questions of international law. This meeting started soon after the Second World War and has been continuing since, now well over half a century. Judge Oda has been a frequent visitor to the meeting. As a matter of fact, Judge Oda was a close friend of the founder of this meeting, the late Professor Tabata of Kyoto University, and whenever he came back to Japan, Judge Oda paid a visit to the meeting on his way to his parents who used to live in Osaka, only fifty kilometers to the west of Kyoto. Needless to say, all the participants in the meeting have greatly benefited from Judge Oda's visit, and it is my hope that Judge Oda will continue to privilege us with this practice.

Before closing I would like to point out that the fields which international law has to cover are expanding all the time. Nowadays the fields extend from the traditional topics of inter State relations to the topics of daily life of every individual such as human rights and environmental protection. In this world-wide trend I wish that, through his experience as the longest standing judge of the International Court of Justice, Judge Oda will continue to contribute to the promotion and consolidation of the rule of law in the world community.

May the best of health be with Judge and Mrs. Oda! I thank you very much for your attention.

Remarks of Edward McWhinney, Q.C.

Address at the Max-Planck-Institut in Heidelberg, on March 16, 2002, on the presentation to Judge Shigeru Oda of the International Court of Justice of a Liber Amicorum tribute.

It is a privilege and an honour for me to be part of this festive gathering in Heidelberg in tribute to Judge Shigeru Oda as he approaches his retirement from the International Court of Justice in early 2002, having completed, by then, a record 27-year continuous term on the Court. It is an additional pleasure to be associated with this *Festschrift* collection as one of the three Editors, each of whom reflects, in measure, one or more of the several different intellectual-legal strands in the development of what might be called Judge Oda's legal culture, richly eclectic and pluralistic as that is. I salute, here, my two distinguished colleages, Professor Nisuke Ando and also Professor Rüdiger Wolfrum. I know Professor Ando would concur with me that Professor Wolfrum has really assumed the heaviest burden in providing, through the Max Planck staff, the organisational infrastruc-

ture and continuing administration necessary to produce a multi-author, two-volume collection of essays of this magnitude and to publish it on time.

The concept of legal culture, – jurisculture, in the technical-legal terminology – was employed by Gray Dorsey to describe the scientific-legal emphasis of the distinguished philosopher of the sciences, and later (non-Law-trained) Professor of Philosophy of Law at the Yale Law School, Filmer Northrop. It focuses upon the cultural relativism of basic systems of legal reasoning and their underlying thought processes, not as an argument for maintaining any static, regional particularism in International Law and its main schools but as a plea for creating a threshold of general legal acculturation that students and teachers must strive to attain before any genuinely pluralistic, representative, postulated universal body of International Law principles and rules and processes can be attained. The general legal history of the late 19th and early 20th centuries, of course, is one of frequent large-scale borrowing or transfer – "reception", in the technical legal language – from one country to another, not merely of particular institutions and procedures on a more or less *ad hoc* basis, but also of complete, highly detailed legal codes. This was so with the extensive "reception" of the *Code Napoleon* or the *Bürgerliches Gesetzbuch* in parts of Asia and Latin America as the governing political élites of the day in the countries concerned made the decision to try to enter the mainstream of international trade and commerce, and, as part of that opening of the windows to larger international relations, to modernize and rationalize their own national legal systems and to harmonise them as much as possible with the legal systems of the major world powers with whom they would be dealing. The decision by the Japanese government, in the Meiji era, to "receive" the *Bürgerliches Gesetzbuch* is one of the best known and certainly most comprehensive legal ventures of this sort.

The scientific identification and then assessment of Judge Oda's own distinctive personal philosophy of law has the advantage of the existence of a very substantial body of empirical demonstration. This is in the official record of the published opinions he has rendered on concrete issues coming before the Court in the very many cases in which he has sat during his three successive judicial terms. In strictly *a priori* terms, it is possible to speculate, usefully, on the disparate influences, – successively from the time viewpoint – from his law teachers in different countries, as well as from non-legal, casual environmental factors to which he was exposed over the years. Some elements in this particular type of *a priori* approach have been touched on in the 1993 collection of Judge Oda's Opinions on the International Court rendered during the period of his first two judicial mandates – Judge Shigeru Oda and the Progressive Development of International Law. But any final judgement may require rather more subtle and nuanced interpretations that owe as much, or more, to purely aesthetic judgments as to logical, empirically-based methods. The complexities are amply indicated in Kensaburo Oe's sensitive approach to the somewhat antinomic concepts of "Japanisation" and "modernization", in post-Meiji Japanese culture, – a thesis developed in a celebrated Franco-

Japanese cultural summit meeting some years ago, that is also referred to in the 1993 collection of Judge Oda's published Opinions (at pages 2-3).

We are aware of two great influences on Judge Oda as a student – first, Professor Kisaburo Yokota of the University of Tokyo and then, later, Professor Myres McDougal of the Yale University Law School, with whom he studied as a post graduate student in the early post-war years. It has been noted that, among the many students whom McDougal taught, Oda never wrote a joint work with him; but, then, neither did Oda's contemporaries as students at Yale, Stephen Schwebel (later Judge and President of the International Court of Justice), and Richard Falk, perhaps the most radically innovatory of the U.S. students of that time and leading legal critic later on of the U.S. involvement in the war in Vietnam. The influence of McDougal on Oda seems to have been much more of a personal character, producing a generous sponsorship in the early professional years and a warm continuing friendship that endured until McDougal's death almost half a century later. Comment has been made, by Michael Reisman among others, of the impact of the Second World War on Oda's intellectual-legal development; but this was an experience shared by most of the students with whom Oda worked in the U.S. certainly and no doubt in Japan too; and, as personal experience, something well able to be put aside when one puts on the judicial robe, or takes on similar high public-professional office.

The German element in his cultural formation was certainly a pervasive one, and it certainly carried over, practically, to Oda's early years as a student in the United States when he had very little or no English. He would, with the aid of several distinct and different language dictionaries, have to translate what for him were sometimes difficult English-language terms from his daily lectures, first from English into German and then, later, from German into Japanese, in order to comprehend them. In those days, German was certainly his first European language, and he also had sufficient French – more so than English. He would later go on, as a member of the International Court, to write good, clear, eminently readable English-language Opinions, and this on some of the more complex Law of the Sea issues in extremely detailed and scholarly judicial essays. The German ties would later be reinforced by his stays, as a post-doctoral student, at the Max Planck Institute in Heidelberg, where he became close to the Director, Hermann Mosler, (later the first German to be elected, post-World War II, to the International Court), and to Karl Doehring and Rudolf Bernhardt. He was co-opted to the German legal team as an associate counsel in the three-way litigation that produced the judgment of the International Court of Justice in the *North Sea Continental Shelfin* 1969.

My conclusion, after studying all Judge Oda's Opinions (Declarations, Separate Opinions, Dissents) on the International Court over the period of his first two judicial mandates, for purposes of the 1993-published collection of his Opinions, is that he really belongs, intellectually, in the Historical stream of legal philosophy, but not in the static, jurisprudence-of-concepts (*BegriffsHimmel*) school that insisted on the dead-hand control of the past and of past judicial decisions. His feel-

ing, rather, is for a historical-developmental approach that proceeds, first, on a rigorously empirical study of the origins of claimed legal principles and rules in the particular space-time dimension in which they were first formed and in the context of the societal interests and needs to which they then responded. The challenge for the jurist, as authoritative decision-maker in a contemporary time-period, is seen as being to identify the new societal facts and background against which decisions are to be made today, and to make any necessary adjustment of the old legal principles and rules accordingly. It is a form of progressive, generic interpretation well-known, historically, to the great classical expositors of the European Civil Codes of the late 19th century when their ideas were first being "received" in Japan in the late 19th century. If it is a form of historical positivism, it is an enlightened one that captures the dynamic of legal change in response to a society itself undergoing continuing transformation through emerging new social forces.

One other aspect of Judge Oda's training and formation as a jurist is worth special comment today – his multi-disciplinary experience, in strictly professional-legal terms, as first, career University teacher; then as jurisconsult and adviser to a national Foreign Ministry; further, as diplomatic negotiator, at the successive United Nations Conferences on the Law of the Sea – the First, the Second, and finally the Third (until his own election to the International Court); and, lastly, as international judge over a full three, successive mandates in The Hague. (Only the direct, public, political decision-maker *rôle*, as Parliamentary legislator or government Minister, is missing!) This multiple, professional-disciplinary exposure to the different opportunities and demands for the progressive development of International Law under the United Nations Charter, is not unique; for it was replicated, though never quite to the same length and depth, among some of his contemporaries on the Court, Manfred Lachs, Hermann Mosler, Nagendra Singh and Taslim Elias. The perspectives of each of these distinct professional *rôles* are different, and necessarily so. The combination of experiences in the different roles usually makes, also, for a certain enriched sense of practical wisdom, – the knowledge not merely of what may be deemed right in terms of logical deduction and projection from the past Court jurisprudence, but also of what makes good sense, both in concrete problem-solving in the instant case, but also in terms of sending the competing parties back home with a will to cooperate in the implementation and furtherance of the Court's ruling, long-range. This "practical" element in his approach has observably led Judge Oda from time to time to file Declarations or Separate Opinions that, in terms of their legal reasoning and argumentation, might more properly have been categorized as Dissents. They are made "veiled dissents", however, because of the judge's instinct or belief that it is wiser not to impede the formation of a Court majority in the particular case, and that one's judicial reservations can effectively be communicated to the parties and to the legal community at large in carefully nuanced phrasing while still adhering to and helping in making a Court majority.

What of the future of Judge Oda, after his retirement from the International Court in early 2003? As Mr. Justice Felix Frankfurter of the U.S. Supreme

Court reminded us in a subsequently much noted Court decision, only fragments of a social problem are seen through the narrow windows of a litigation. One may hope that in an active life after the Court, Judge Oda will take the time to try to synthesize his judicial thinking, as revealed in so many assorted cases over the years, and to identify the larger, unifying principles in his philosophy of law – on the Law of the Sea of course, but also on issues of basic Court organization and structure, now to some extent put in question by the proliferation of specialized international courts and tribunals without any apparent prior examination and thinking, by the political leaders who brought the new tribunals into being, on their hierarchical relations, *inter se*; and on procedures and techniques for avoiding competitions for jurisdiction or for rationalizing and harmonizing apparently conflicting decisions by different tribunals seized with the same case or parts of it. In the absence of the political will to act, the challenge may be for wise judges to lead in resolving these contradictions themselves. Judge Oda who first saw, several decades ago, the conflicts of jurisdiction and also of jurisprudence in judgements rendered, – inherent, for example, in the creation of limited-member, Special Chambers of his own Court and in the proposed establishment of an International Law of the Sea Tribunal, would render a further great service to International Law if he were to make this one of his priorities for post-retirement study and reflecting and doctrinal writing.

Remarks of Rüdiger Wolfrum

Your Excellencies, Colleagues, Ladies and Gentlemen, with today's ceremony we hand over a *Festschrift* or, in other words *liber amicorum*, to a judge and scholar who has significantly influenced the development of international law and its interpretation. I can only but hope that he will continue to do so in the years to come. We, as the editors of the *liber amicorum*, hope that the areas of interest to him in international law have been adequately covered by the contributions in the two volumes. Therefore the *liber amicorum* is as much acknowledgement of past achievements as well as encouragement for the future.

May I, in my brief contribution at this occasion, highlight one issue where Judge Oda has consistently advocated a particular approach which, up until now, has not been followed by others; I refer to the possibility of a State to intervene in proceedings in accordance with Article 62 of the Statute of the International Court of Justice. It is to be expected that his views on intervention in proceedings become common ground since they will enhance the impact of international adjudication on the settlement of international disputes.

In one of his recent Dissenting Opinions in the case on *Sovereignty over Pulau Litigan and Pulau Sipadan* (Judgment of 23 October 2001) Judge Oda has outlined why in his view the Philippines should have been granted the right to intervene in the proceedings of the case between Indonesia and Malaysia. His interpretation of Article 62 of the ICJ Statute differs from the one taken by the majority in

the International Court of Justice, namely, that a State may be permitted to participate, in principle, in a dispute as a non-party even if there was no judicial link between that intervening State and the parties to the dispute. The restricted approach requiring a judicial link taken by others in this respect can be related to the concept of party autonomy in international adjudication. According to this approach, States may, within the framework of Chapter VI of the United Charter, decide freely how to settle their disputes. Intervention in the proceedings is seen by those who favor a more restrictive approach as an interference of a third party into the dispute of two or more States likely to endanger the peaceful settlement of such dispute. It has been argued that third parties should initiate a separate dispute settlement procedure rather than to seek to have their interests protected within the framework of proceedings amongst other States.

In the Dissenting Opinions already referred to Judge O d a stated that Article 62 of the ICJ Statute should be interpreted liberally so as to entitle a State, even one not having a jurisdictional link with the parties, but which shows "an interest of a legal nature which may be affected by the decision in the case" to participate in the case as a non-party, not necessarily on the side of either the applicant State or the respondent State in the principle case. His main argument rests on the question as to whether or not the respective judgment would be binding upon the third State, that is the intervening State. Judge O d a stated "[T]he mere fact that an intervener may arguably not be regarded as a party within the meaning of Article 59 of the Statute cannot suffice to override the requirements of equity which are evident here." What he means is that Article 62 of the ICJ Statute should be not read as to suggest that an intervener under Article 62 of the ICJ Statute is free to adopt a less responsible position than an intervener under Article 63 of the ICJ Statute.

Let me now turn to the Statute of the International Tribunal for the Law of the Sea. It has already accomplished the modification concerning the right to intervene Shigeru O d a is recommending. The most striking difference rests in Article 31, paragraph 3, Statute of the Tribunal. According to this provision, the decision of the Tribunal shall be binding upon the intervening State, as regards the matter for which it has intervened. This deviates from the practice of the International Court of Justice as stated in the Judgment on the Land, Island and Maritime Frontier Dispute *(El Salvador/Honduras).*

The Statute of the International Tribunal for the Law of the Sea is silent as to whether the intervening State is to be considered as a party to the conflict, a question the International Court of Justice and Shigeru O d a have denied. This is however the approach underlying the Rules of the International Tribunal for the Law of the Sea. Article 103, paragraph 4 states that the intervening State is not entitled to choose a judge *ad hoc* and that it is not entitled to object to an agreement of the parties to the dispute to discontinue the proceedings. The provision thus makes it quite clear that the intervener has not become a party to the dispute after its application for intervention has been granted.

As far as the interest of a legal nature-restriction for intervention is concerned there is no difference between the rules for the International Court of Justice and

the International Tribunal for the Law of the Sea, respectively. They both use the same ambiguous terminology. However, the Tribunal decided against requiring the intending intervener to specify the jurisdictional link between itself and the parties to the dispute. Article 99, paragraph 3, of the Rules of the Tribunal even states that the "permission to intervene may be granted irrespective of the choice made by the applicant under Article 287 of the Convention on the Law of the Sea". This is a clear indication that the Tribunal has decided against the traditional requirement of a jurisdictional link as an unwritten precondition for intervention. The Tribunal has omitted a clause contained in Article 97, paragraph 2 (c) of the Draft Rules prepared by the Preparatory Commission according to which the intended intervener had to specify the basis of jurisdiction which is claimed to exist as between the State Party applying to intervene and the parties to the case. This shows that the changes compared to the Statute of the ICJ are of an intentional nature.

To briefly summarize I would like to emphasize that the rules for international adjudication which for so long time were somewhat static are undergoing changes or modifications due to the proliferation of international tribunals and, accordingly the drafting of respective rules. A case where modifications are evident is, for example, for the right to intervene. Any attempts made in the past to give this right a more flexible interpretation have failed. The stumbling block is the view that a dispute is a matter as among the original parties to the conflict and no third State should be allowed to interfere. One has to reconsider as Shigeru Oda did as to whether legal disputes are really to be seen from the perspective of bilateralism. This is not necessarily correct any more. Judgments on disputes may touch upon the legal interests of third States even if those States may not be in the position to initiate own proceedings. The ICJ Statute does not stand in the way to allow third States to bring those interests to the attention of the International Court of Justice. Therefore it is time to put to an end the vexed question whether a jurisdictional link is required as Shigeru Oda has recommended.

Keynote Address by Michael Reisman

Judge Shigeru Oda: A Tribute to an International Treasure

National treasures are placed reverently in museums, a practice which celebrates the object of creativity rather than the creator and his living genius. In 1955, however, the Japanese government, recognizing a need to commemorate the creator, designated the artists Tomimoto Kenkichi, Ishiguro Munemaru, Hamada Shoji and Arakawa Toyozo as "Living National Treasures". Were the international legal community to follow suit, one of the first to be so designated would be Judge Shigeru Oda. He is, indeed, a living international treasure. As such, it is proper and entirely fitting to take this occasion to reflect, not simply upon his immense production as scholar – 18 books – and as a judge – a larger *oeuvre* than any one

who has sat on the International Court of Justice or its predecessor – but also upon the man – the living treasure.

The unique drama of each of our lives is indispensable to understanding ourselves and what we do. No drama is richer or more important than any other, but some prove more influential than others. This is especially so if, following a traumatic internal struggle – one thinks of Leonardo, Luther and Gandhi – we go on to discharge roles that project and amplify our inner lives so that they embrace many others in our community and, eventually, in other communities.

The importance of the inner drama of each life is not limited to those who serve as our spiritual or political leaders. We are all important, but our judges are distinctive and special. For they are empowered to issue binding decisions that confirm, adapt, or rework the basic values of society, the values at stake in what Karl Llewellyn called the great "trouble cases" of each era. The artist may touch, sometimes change those who choose to be his audience. The judge affects the normative structure of the world in which we live, the structure upon which we rely and with which we contend daily. The structure that shapes us and our actions. In this sense, we all find ourselves ineluctably members of the audience in each great judge's theater.

If personality is one factor accounting for what each of us does, the personality of the judge in his or her judicial role may be of substantial and immediate importance. Because of the way judges work, an inquiry into their personalities is, in some ways, easier than a similar inquiry into those of other decision-makers. Every decision-maker leaves material that can be studied, but judges, particularly dissenting or concurring judges, leave a distinctive record, a written corpus in which the evidence of how he or she reacted to events and how then rationalized and incorporated those reactions can be examined in terms of the forces that worked on and in their personalities. Studying that material can help the student better explain how decisions are made, how law evolves and how and why the judge conceived of his or her self and the judicial function.

The conception of a living national treasure assumes that the real miracle is not the object created, but the creator and his unique creative process. In a parallel fashion, any inquiry into the personality of a judge presupposes certain important jurisprudential assumptions. In classical positivism, law is a body of rules and judges are technicians. Consistent with this jurisprudential frame, the prerequisite to being selected as a judge on the International Court of Justice is, according to Article 2 of the Statute of the International Court, only legal expertise and high moral character. Lapses in moral character may be investigated. Beyond that, the personality of the judge is no more than the subject of idle curiosity. Since the judge is not considered central in shaping the law, and information about the judge's personality is not supposed to be useful for the predictive or explanatory tasks of the practitioner or legal scholar, why study it?

American Legal Realists, effecting a paradigm shift in jurisprudence as radical as Copernicus's in astronomy, provided a ready answer to this question. Oliver Wendell Holmes spoke to the practicing American lawyer when he said that the

practice of law is nothing more pretentious than the prediction of what courts will, in fact, do. The Legal Realists understood that one could not explain past decisions or predict future decisions merely by extrapolating rules, no matter how rigorously logical one tried to be. Explaining why past decisions had been made the way they were and predicting how future decisions might be made required the observer or practitioner, as the case might be, to take account of history, culture, current politics, economics, and, in particular, the personality of the judge. The judges of United States domestic law were moved center stage; the rules were moved to the wings and the "who" of the legal process along with its "what" became a legitimate – and professionally useful – focus of scholarship.

In contrast to the situation in the United States where, from the earliest days of the Republic, judicial decision has been fundamental and central to the political experience, judicial decision was long a marginal part of the international political system. Thus, although serious and searching biographies have been written of critical international political personalities, there has been, until Professor McWhinney's studies, no comparable biographical interest in the lives of international judges. Prior to the formation of the Permanent Court of International Justice, adjudications were carried out only by consent of the states concerned. The issues submitted were carefully circumscribed, as were, often, the principles of law to be applied. This left little room for judicial creativity, and creativity was hardly invited. In addition, the persons selected to decide the issues operated *ad hoc* so that, outside claims commissions, few international lawyers could expect to decide more than one or two cases in their careers. The result was that, when it came to individual judges, there was neither a jurisprudential "who" nor a "what" worth studying.

While the formation of the Permanent Court of International Justice created new possibilities for the "who" and "what," another, more troubling, obstacle arose virtually contemporaneously with the creation of the International Court of Justice, keeping many of its judges from leaving any kind of personal stamp on the law. During the Cold War, totalitarian dictatorships contributed a significant number of judges to the International Court of Justice. Unpleasant as it may be to observe, there is no reason to believe that the judges appointed to external arenas by those dictatorships were allowed to be any more independent than those appointed to internal arenas. Where judges, the myth of judicial independence notwithstanding, are subject to concealed, but effective political control, their personalities are not critical to understanding how the power process operates. Who remembers the names of Stalin's judges, let alone produces *Festschriften* for them?

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Judge Oda is a particularly attractive subject for inquiry, since he may well have had the most dramatic inner life of any judge now on the Court, and his *oeuvre* is so distinctive that certain questions practically shoot out of it. Of course

one wonders, as one would in the case of any intriguing judge, about Oda's parents, his class origins, his childhood, his adolescence, his faith and religious struggles, his relations to those closest to him in his family, and his culture. Happily, Professor McWhinney has supplied us with much of this material in the first of a series of biographies of judges of the International Court of Justice that he is editing. But there is another critical question particular to Judge Oda's life: how he dealt with the collective trauma that ripped apart Japan during his formative years. For Judge Oda is a member of what the Japanese called the "mid-war" generation, those who were shaped by the pre-war political culture but came of age in the immediate post-war, with virtually all of their cultural preparation shattered – indeed atomized – into irrelevance.

As Judge Oda has mentioned to students he has addressed in the United States, he was a university student during the war and had been trained as a *kamikaze* pilot, the quintessential personal implementation of the war catechism, "[t]o match our training against their numbers and our flesh against their steel"[1]. The young Oda was destined to die in a suicide attack and would have – if atomic bombs had not brought the war to an abrupt end.

One cannot help but wonder about the inner dynamics of a man whose life was saved by the weapon that destroyed so many of his countrymen and the memory of which continues to traumatize so many members of subsequent generations. What were the implications for Judge Oda of then almost directly entering the law faculty of a private university in the United States that was well-known for its influential contacts with the American government? Judge Oda was the first Japanese student to come to the Yale Law School after the war. What did it mean to him to study there with Myres S. McDougal, a man who had held high posts in that government during the war, had supported the decision to drop the bombs, and, indeed, had led America's international legal defense of post-war atmospheric testing of atomic and hydrogen bombs in the Pacific?

Kenzaburo Oë, the brilliant Japanese novelist who became an unofficial spokesman for the mid-war generation, relates a daily ritual that must have been a profound formative experience:

> [T]hroughout the war, a part of each day in every Japanese school was devoted to a terrible litany. The Ethics teacher would call the boys to the front of the class and demand of them one by one what they would do if the Emperor commanded them to die. Shaking with fright, the child would answer: "I would die, Sir, I would rip open my belly and die." Students passed the Imperial portrait with their eyes to the ground, afraid their eyeballs would explode if they looked His Imperial Majesty in the face.[2]

The empire collapsed. The emperor, a god-king and the linchpin of the world of the Japanese of that period, was revealed as an ordinary, fallible human being.

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[1] R. Benedict, The Chyrsanthemum and the Sword: Patterns of Japanese Culture, 24 (1946).

[2] J. Nathan, "Translator's Note", in: Kenzaburo Oë, A Personal Matter viii (1968). For a moving depiction of a child's life at the time of Japan's surrender, see K. Oë, The Day the Emperor Spoke in a Human Voice, New York Times (May 7,1995) (Magazine) 103.

Moreover, in a Confucian society in which the authority of superiors was to be unquestioned, the superiors were exposed as not simply fallible, but often wicked, sometimes criminal, and, above all, unworthy of trust. John Nathan, translator of Oë's remarkable novel, A Personal Matter, writes of the continuing, perhaps lifelong consequences for a Japanese of that period of having been denied his "ethical inheritance":

> The values that regulated life in the world he knew as a child, however fatally, were blown to smithereens at the end of the war. The crater that remained is a gaping crater still, despite imported filler like Democracy.

To be sure, in this century much of this sort of trauma is not a uniquely Japanese phenomenon. It has recurred, *mutatis mutandis,* in other settings: for Germans in their on-going and courageous *Vergangenheitsbewältigung*, for those Catholics for whom God has died, for Communists listening to Khruschev's exposure of Stalin's crimes and watching their empire crumble, and perhaps for Muslims who must now confront the implications for their faith of Al Qaeda's fundamentalist challenge. But in few places could it have been more individually wrenching than in Japan, a fact that makes Japanese intellectuals of this period so fascinating and makes their literature, which has tried to describe and plumb the experience, such haunting human documents of remarkable intensity and brilliance.

Judge Oda survived the experience and, ever since, he has presented a serene persona to the world around him. One can only struggle to imagine the trauma he may have suffered as he, with all the others in his generation, went through the process of the disintegration and reconstruction of their inner world and the ways in which that process might relate to the remarkably consistent jurisprudence to be found in the judicial *oeuvre* of Shigeru Oda.

Given his centrality in international decision, Judge Oda's inner life will remain a subject for further inquiry, but his qualities are so distinct that one can easily sketch something of his personality merely by observing his behavior and by reading his judicial opinions.

– As an individual, Judge Oda is famous for his extraordinary self-control in personal comportment: Who has ever seen him angry, indeed less than perfectly courteous and dignified? Yet Judge Oda is not aloof or compulsively private. He is open and reflective.

– As a judge he is a study in independence. His resolution is legendary, reminiscent of a line in one of Chikematsu's late plays: "... you are stubborn ... once you've spoken, right or wrong, good or evil, you never recant"[3]. At the International Court of Justice, he has produced an unmatched number of dissents and separate opinions, some differing only slightly from the majority. In none of them was he joined by another member of the Court. Yet the dissents do not reveal a "wrecker", a person who is at all "anti-institutional", as some dissents, unfortunately, sometimes do. Indeed, in reading through the corpus of Judge Oda's work, one is struck by the number of cases, especially in the latter part of his career,

[3] Chikematsu, The Tethered Steed and the Eight Provinces of Kanto (Aunt Mita).

in which Judge Oda expresses serious doubts about the core issue of the majority conception of the law or the facts as narrated in the opinion and yet supports the majority.

– Judge Oda is also known for his distinctive *ex cathedra* style: the extraordinarily detailed and systematic exposition of every step in the logical process, as if the writer craftsman were unwilling to allow himself to make a leap or to take anything for granted. It is a demand for the most explicit rationality and an extraordinary concern and respect for the political and legal commitments actually made and discoverable. Judge Oda does not dig into texts and legislative histories. He excavates them.

– Judge Oda offers a disciplined and realistic vision of policy. Judge Oda's positions, for example his commitment to equidistance in maritime boundary delimitation, are neither impractical nor impracticable. Quite to the contrary – equidistance may be more practical than equitable principles!

– Just as Judge Oda labors to find the legal rule that correctly fits each set of facts, he also disciplines his opinions, writing no more than necessary to address the problem at hand. He has written short opinions – one of his later concurrences is only two sentences – and the longer opinions owe their length to the complexity of the problem, which Judge Oda acknowledges and addresses explicitly. Future generations will argue over which of his opinions are more persuasive or even correct, but all will agree that no opinion is wordy or windy.

– Of Judge Oda's remarkable intellectual independence and strength of will, much could be said but one telling example, particularly close to my own experience, will suffice.

Although Judge Oda studied with Myres McDougal for three years and won his close and lifelong friendship, Judge Oda was one of the few students who largely resisted the influence of McDougal, who, as many in this room know, was a magnetic and overpowering personality. Instead, Oda selected and incorporated only those concepts, techniques, and linguistic components from the master's *opus* that served his own purposes. His doctoral dissertation, The Riches of the Sea and International Law, which conceives of the oceans in classic McDougal fashion as a multi-purpose resource, proceeds in a manner that is distinctively not McDougal. In a charming tribute to his teacher in a book he dedicated to him in 1977, Judge Oda wrote that without Professor McDougal's "kindness and friendship over the past quarter of a century, I could not have carried out my research in international law, although I have become somewhat heretical". I would not call it heretical and do not believe Professor McDougal would have. It shows the influence of New Haven, but it is different and distinctively Judge Oda.

Incidentally, I know of no other instance in which Professor McDougal accepted a non-McDougal dissertation, yet took such pride in his student.

II

Students of the judicial process appreciate that while all decision is concerned with the future, much of judging turns on certain "givens", inherited factors, such as past agreements and past decisions. Theories of interpretation are, in effect, philosophies of how one relates to the "givens" of the law and can provide an important insight into the values and methods of a judge. Judge Oda has a clear and distinctive theory of judicial interpretation, compiled from what may be a unique set of influences. His legal formation began at the "Japanese School of International Law", and this was later tested and transformed by his exposure to the policy sciences approach at Yale. The method shaped by Professors Yokota and Taoka, powerful influences in Japanese jurisprudence at the time the young Oda was a student, emphasized, on the one hand, a Kelsenian normativity and, on the other, the social function or role and the political origin of particular rules. In contrast, Myres McDougal's theory focused on the decisionmaker and his or her tasks and sought to equip the decisionmaker with a set of intellectual tools that would facilitate the performance of those tasks: tools for scrutinizing the self, the ultimate instrument of perception and evaluation, for organizing relevant data in the environment, for identifying and clarifying the policies at stake and, finally, procedures for actually making choices. With respect to the specific task of interpretation, McDougal and his associates ransacked the social science literature for methods for determining the genuine shared expectations of the parties; methods for supplementing them when unanticipated contingencies arose; and methods for tempering and policing expectations that ran against critical community policies.

Judge Oda appears to have drawn from both of these sources. But he has fashioned his own distinct interpretive method, which has manifested itself most consistently in his approach to the recurring problem of international jurisdiction. Judge Oda's decisions reflect his lifelong conviction that the ICJ must not legislate, and that his leeway in decision-making is confined by certain limits inherent in the role of the international judge. Some of Judge Oda's colleagues on the Court and many commentators disagree. In domestic courts, and certainly in the United States, contingent lawmaking competences are accepted as legitimate, if not mandatory, functions of the courts concerned; the quality of the work of the courts engaged in this function is, in large part, judged by the quality of its legislative creativity. However these various courts operate in domestic political contexts in which this contingent judicial lawmaking is accepted. The International Court of Justice, by contrast, requires an explicit authorization to engage in decision *ex aequo et bono*. It seems clear that the Statute was not intended to bestow a general power of equitable decision.

Sir Robert Jennings has said:

> *Ad hoc* tribunals can settle particular disputes; but the function of the established "principal judicial organ of the United Nations" must include not only the settlement of disputes but also the scientific development of general international law ... there is therefore nothing strange in the ICJ fulfilling a similar function for the international community.

But, with respect, the Court seems particularly ill-structured for a progressive development role. Law-making is not a philosophical or scientific exercise. It is quintessentially political, requiring knowledge of the diverse interests and the intensity of demand of the political actors engaged and then skill in trading support and forming coalitions. The Court cannot do this and even trying would compromise its judicial character. As for the ILC, which has an explicit "progressive development" competence, it can engage in this only *ad referendum*, with the ultimate decision in the hands of the General Assembly or an international diplomatic conference, both explicitly political institutions. Could a court – indeed, any court – render judgments *ad referendum*? I do not address the moral issue of purporting to make law for communities that have not authorized or agreed to it, which is the moral basis of the demand of national communities for sovereignty.

Judge Oda's jurisprudence reflects a nuanced appreciation of the very special position of the international adjudicator. The conception of the proper judicial role that emerges from the corpus of Judge Oda's decisions is neither general "progressive development" nor the caricature of blind application of "rules", legislation, or agreements. It is, rather, a conception of a judicial role, restricted like any other, with limitations that are accepted and honored by the role player. Within this role, rules are properly seen as communications carrying relevant and authoritative policy information that must be shaped in the idiosyncratic texture of each controversy, to provide a decision that best approximates the minimum order and larger policy objectives of the community. Make no mistake: this is no easy task. The constant possibility of infiltration, whether in factual characterization or legal specification, of personal preferences and prejudices, some operating at levels of consciousness so deep that the judge may be unaware of them greatly complicate the judge's job. Hence Socrates' injunction, "know thyself", is as fundamental and constant a requirement for the judge as it is for the philosopher. One thinks, in this regard, of Judge Oda's reflection on himself, one of the very few in his entire corpus of work, in *Nuclear Tests (New Zealand v. France)*. He voted with the Court to dismiss the request to reopen the case but added, "as the Member of the Court from the only country which has suffered the devastating effects of nuclear weapons, I feel bound to express my personal hope that no further tests of any kind of nuclear weapons will be carried out under any circumstances."

To be sure, the judicial function involves "supplementing and policing" the application of inherited law,[4] which becomes particularly urgent in periods of rapid transition. This is not judicial activism, but an appropriate discharge of the judicial function. It is quite distinct from an active lawmaking role that deems itself entitled to ignore expressions of authoritative policy and assume a competence to determine itself, case-by-case and "progressively", what the law should be. That is a conception which Judge Oda has steadfastly resisted.

[4] M. S. McDougal *et al.*, The Interpretation of International Agreements and World Public Order (1994).

While several of the majority's initiatives have won praise in some quarters, they have, in the view of others, led the Court into unsuccessful initiatives in international constitutive change. For a period of time, the Court seemed to be elaborating a theory of jurisdiction no longer based on consent. Judge O d a steadfastly resisted this initiative and the Court has essentially returned to his view. The majority's initiatives have also led to the Court's assumption, especially in the area of maritime boundary delimitation, that it is entitled to change the law on a case-by-case basis. Here again, Judge O d a 's work is marked by a consistent and detailed examination of existing prescriptions, on the basis of which he tries to fashion the appropriate legal response. Indeed, in many cases in which the ICJ arguably had a substantive impact on international law, Judge O d a has raised a voice of reservation and opposition.

In my view, Judge O d a is right. If the Court reaches for jurisdiction in cases in which there is no consent or tries to engage in legislative exercises without authorization, it puts itself in an awkward position, for a far-reaching judicial lawmaking role requires subterfuge. Article 38 of the Statute is clear, so the Court cannot say, "Formula A is the law, but we are now putting on our judicial-legislative hats and are going to decide on the basis of formula B, in the exercise of our competence to engage in discretionary 'progressive development'." In the pretense that formula B is the law, the Court will have to engage in legal legerdemain that will confuse the community as to the methods by which law is to be inferred, will undermine confidence in legal expectations, and will undermine the confidence of others in itself. All of this will have proliferating consequences for the international legal system.

Beyond the erosion of stability of expectation, these lawmaking initiatives often have high institutional costs. States are not obliged to turn to the Court for the resolution of their disputes. When they do, their legal advisers have presumably studied the relevant parts of international law and enter the Court with some confidence that it will be applied. To have the Court *ad hoc* "progressively develop" new norms with retroactive effect will hardly encourage responsible legal advisers to refer cases to the Court.

III

Judge O d a 's personal judicial *oeuvre* is the largest in the history of the Permanent and the International Court. It is theoretically consistent and provides a picture window on the jurisprudence and intellectual *modus operandi* of its creator. But it is comprised of dissents and of separate opinions that sometimes read like dissents. It has often been a minority view. The judges who have the most manifest influence on any court will be those who write the majority opinion (which of course appears anonymously in the International Court's practice) or those who, in cameral deliberations, had the greatest influence on shaping the judgment. The author of the separate opinion, whether concurring or dissenting, in effect acknowledges that the position he or she espoused was not accepted by the majority.

But do not minimize the contribution of the dissenting opinion. Justice Brennan of the American Supreme Court said that "The dissent ... safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision." Justice Frankfurter said that "Dissent is essential to an effective judiciary in a democratic society." Charles Evans Hughes, who sat on the Permanent Court of International Justice until he was recalled to become Chief Justice of the United States Supreme Court, said famously that "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day."

IV

I have said enough to show why Judge Oda is an international "living treasure" and why he himself and his contribution to international law through his scholarship and his service as a judge will continue, like great art, to be studied and to influence us. Judge Oda: all in the College of International Lawyers are grateful to you, for your scholarship, your judicial opinions, above all, for your steadfast custodianship of what you called in your Declaration in *Bosnia v. Yugoslavia* "the legal conscience".

Thank you.