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Reflections on the Role of the International Court of Justice

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Preface

I was invited to the University of Washington to deliver the lecture which follows at the suggestion of Professor Ted Stein, a former colleague for whom I had the greatest regard and affection. His tragic and bitterly premature death is a profound loss not only to his family, friends, and colleagues, but to international law, of which he was one of the most promising students.

I greatly appreciate the privilege of giving the Jurisprudential Lecture this academic year at the University of Washington at the invitation of the *Washington Law Review*. It is a pleasure to return to this distinguished law school, which I visited years ago at the invitation of Professor Henderson. It is a particular pleasure for two reasons, apart from those of being at the University and revisiting Seattle. This occasion gives me the opportunity to see again one of my most valued former colleagues at the Office of the Legal Adviser of the Department of State, Professor Ted Stein. Professor Stein and I worked closely together in that great Office—perhaps the world's greatest office of the practice of public international law—in that happier day when the United States was plaintiff rather than defendant in the International Court of Justice—happier not of course for the imprisoned hostages; but I am sure you know what I mean when I use the word "happier."

Another reason why it is a particular pleasure to speak is that I do so under *Law Review* auspices. I wonder how many of you appreciate how uniquely and refreshingly American is the institution of the law review. I refer not to legal journals, which are widespread throughout much of the world; I speak of law reviews, produced at law schools not by faculty but by students. Law reviews are remarkable instruments of legal scholarship, of legal education, and healthily American irreverence. The law review editor does not hesitate to edit whatever and whomever he or she can get his or her hands on. It may irritate the contributor of an article or book review to have his principles and prose challenged by a youngster whom the contributor may see as more presumptuous than profound. But the process generally does both the contributor and the editor some good. In any event, it is an element in spurring the American lawyer to challenge authority, to ask questions, to demand citations, to seek the truth. I may add that I feel free to say these nice things about law review editors not having been one; I

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declined an invitation to compete for membership in the *Yale Law Journal* for reasons that, subsequently, potential employers never found persuasive.

I would like this evening to share with you some reflections on the role of the International Court of Justice in an unjust world. You will appreciate that, while I shall try to speak the truth as I see it, I am not able to speak the whole truth; not only because I do not know it, but because of the constraints of my position and the confidentiality of aspects of the work of the Court. In particular, I shall not speak about matters which are sub judice, either in these remarks or in the answers to questions which some of you may wish to ask after them.

The Court is a body of high achievement and unused potential. But it is not a body of uniformly high achievement or unlimited potential. In the early years of this century, such a court was looked upon by the peace movement of that day as a means—if not *the* means—for avoiding resort to the use of force in international relations. It was thought that states should and even would submit to arbitration rather than the arbitrament of war. The Hague Peace Conferences of 1899 and 1907, which had a number of successes, particularly in codifying the law of war, succeeded in forming the Permanent Court of Arbitration. Actually, it was not a court which was permanently formed, and it arbitrated relatively infrequently. But arbitral panels drawn from the membership of the Permanent Court of Arbitration did dispose constructively of more than a score of international legal disputes, nearly all in the first three decades of this century. Nowadays, while the processes of international arbitration, and especially international commercial arbitration, go forward actively elsewhere, the main function of the Permanent Court of Arbitration lies in nominating candidates for election to the International Court of Justice. Each state party to the Hague Convention of 1907 may nominate four persons as potential arbitrators, and these persons in turn nominate candidates of whatever nationality for election to the International Court. A state that is not a party to the Hague Convention may form a comparable national group to make nominations. Judges of the Court are elected in concurrent elections of the Security Council and General Assembly.

It is interesting to recall that in 1907 the United States took the lead at The Hague in pressing for the establishment of a true international court of justice. Agreement then proved elusive, especially on how the judges were to be elected. It was not practical to have a judge from every state, even though in 1907 there were fewer than fifty states, but the mechanism for selection or election was not at hand. With the conclusion of the Covenant of the League of Nations, however, a mechanism became available. Judges of the Permanent Court of International Justice were chosen by the concurrent election of the League Assembly and Council, thus balancing the

predominant role of the smaller powers in the assembly with that of the larger powers in the Council.

In 1922, the first World Court in the world's history came into operation, in the Peace Palace in The Hague. A gift of Andrew Carnegie had built the Peace Palace for the Permanent Court of Arbitration.

All too obviously, that Court did not succeed in preventing the Second World War or lesser wars. Nevertheless, it was regarded as a marked success, not only by international lawyers but also by diplomats and politicians. Between 1922 and 1940, it successfully disposed of twenty-nine contentious cases between states and rendered twenty-seven advisory opinions to the League of Nations (and, through the League, several advisory opinions to the International Labour Organisation and a few to other international bodies). While those disputes almost invariably were not the stuff of war, they were often important, not only because of the substance of the issues (many concerned the peace treaties), but also because the Court's judgments, which were of high quality, contributed so significantly to the progressive development of international law. Consider the contributions of the courts in a common law system to the development of the law. While the situation is not altogether the same in international law, there is ample room in that skeletal and primitive system of law for its development through the judicial decisions of a truly international court, representative of the principal legal systems of the world. As the late Judge Sir Hersch Lauterpacht so convincingly demonstrated in his classic study, *The Development of International Law by the International Court,*[1] that contribution has been significant indeed.

Thus, at the San Francisco Conference on International Organization at which the United Nations Charter was concluded, and in the preparatory meetings of the Committee of Jurists which prepared a revision of the Statute of the Permanent Court, there was not the slightest doubt about the utility of maintaining a world court. While it was found to be politically and legally desirable to create a new court, the International Court of Justice, its Statute was in fact a very modest revision of the Statute of the Permanent Court. Every effort was made to maintain continuity between the two Courts. It was recognized on all sides that the Permanent Court had created a heritage worth preserving and nurturing. In this regard, attitudes towards the League of Nations and towards the World Court stood in striking contrast.

What has been the record of the International Court of Justice? In terms of numbers of cases the Court has considered between the time it began

1. Sir Hersch Lauterpacht, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1958).

functioning in April 1946 until the end of 1984, it gave forty-five judgments in contentious cases between states, and eighteen advisory opinions to the United Nations and certain of its specialized agencies. The number of contentious cases compares to that with which the Permanent Court dealt between the two World Wars, even though for some years the Court had markedly less business than it had earlier. In fact, in a world full of international legal disputes between states, too few are submitted to the Court, in spite of the fact that its docket is relatively full for the moment. Moreover, the United Nations and its specialized agencies have resorted to the Court for advisory opinions proportionately far less frequently than did the League and the International Labour Organisation resort to the Permanent Court of International Justice in the eighteen years of its activity. It is widely agreed in the international legal community that the judgments and opinions of the Court generally have been sound and of high quality—though some maintain that there are a few extraordinary exceptions. The Court has been criticized for elliptical conclusions which at times are not sufficiently supported by reasons, and for insufficient citation of authority. Very recently, questions of observance of due process have been raised. But as a whole and over the years, the Court's procedural and substantive record is very good.

A critical weakness of the World Court which has been manifest from 1922 persists. Its jurisdiction is at root optional and consensual. States must agree to bring their disputes to the Court, either in advance of a particular dispute or when a dispute has arisen. States may, if they wish, bind themselves in advance of particular disputes to submit disputes of that character to the Court. A large number of treaties—at the latest count, no less than 244—contain clauses providing that, if a dispute as to the treaty's interpretation or application arises, any party may submit the dispute to the International Court of Justice.

Such clauses have produced some cases: for example, the dispute between Iran and the United States over the detention of American hostages was submitted to the Court under such treaties. The Court sustained its jurisdiction under the multilateral Vienna Convention on Diplomatic Relations and the bilateral Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran. Iran did not appear, though it challenged the Court's jurisdiction. But the treaties in which the Imperial Government of Iran had submitted to the Court's jurisdiction remained in force, and they provided a valid basis for the Court to issue not only its order of provisional measures—an interim injunction—but also its judgment.

More often, the parties agree to bring a dispute to the Court after it has arisen by concluding a special agreement to do so. This was the procedure in the *Gulf of Maine* case which Canada and the United States submitted to

the Court, in which judgment was rendered last year. It is the procedure in the current case before the Court between Malta and Libya over the continental shelf boundary between them. There is nothing to stop states from submitting considerable numbers of cases in this way to the Court, apart from their apparent unwillingness to do so, about which I shall say something more in a moment.

States may generally and even comprehensively bind themselves to the Court's compulsory jurisdiction, most notably by making a declaration under the so-called "Optional Clause" of the Court's Statute. There is a lot of history attached to the Optional Clause, and some of it is in the making. The Statute of the Permanent Court of International Justice was drafted in 1920 by a Committee of Jurists formed by the Council of the League. It was a distinguished committee, whose distinguished secretariat included League Under-Secretary-General Anzilotti, later President of the Court, and Ake Hammarskjold, later the Court's first and longest-serving Registrar, and subsequently a Judge (and the eldest brother of Dag Hammarskjold). The draft Statute as prepared by that committee provided for general compulsory jurisdiction over legal disputes arising between the states parties to the Statute.

It also provided, incidentally, that the sole official language of the Court should be French. Balfour, in a declaration for which he is not as well known as another, raised an objection, and English became (and remains) one of the two official languages of the Court.

As a result of discussion in the League Council, and subsequently in the League Assembly, the critical draft provision for the Court's mandatory, compulsory jurisdiction was deleted, a decision which was due to the influence of the Great Powers. In its place was put the Optional Clause. By its terms, states parties to the Statute may agree—and that is their option—to submit to the Court any legal dispute which may arise in the future between them and other states reciprocally so agreeing. It soon became the practice to attach reservations to the scope of such agreements.

The Optional Clause was regarded in 1920 as a sensible and promising compromise between, on the one hand, confining the Court to jurisdiction over such disputes as the parties could agree to submit to it after a dispute had arisen, and, on the other, endowing the Court with general compulsory jurisdiction over all legal disputes between parties to the Statute. If most states were progressively to adhere to the Optional Clause, it was believed, then the Court would, step-by-step, achieve that general compulsory jurisdiction which the Great Powers thought premature in 1920. And, in fact, in the interwar years, the Optional Clause went a long way towards achieving that goal, since the very large majority of the states then in existence adhered to it. Forty-four states at one time or another deposited declarations

accepting the jurisdiction of the Permanent Court of International Justice under the Optional Clause. They included Great Britain, France, and China. They did not include the United States, which, despite a good deal of effort in various quarters, never became a party to the Statute of the Permanent Court; and they did not include the Soviet Union.

Moreover, these forty-odd adherences did not contain crippling reservations. But today the situation is radically different—if one can apply the word radical to so regressive a tendency. Today, only forty-eight of the 162 states parties to the Statute of the International Court of Justice are bound at all under the Optional Clause. Only nineteen of those adherences are not expressly subject either to unilateral termination by the declarant state at any time, or to modification at any time. The Soviet Union has never adhered to the Court's compulsory jurisdiction under the Optional Clause; neither China nor France currently adhere. The only Permanent Member of the Security Council party to the Optional Clause other than the United States is the United Kingdom, which has reserved "the right at any time . . . and with effect from the moment of . . . notification, either to add to, amend or withdraw" any of its reservations, and this in a declaration which has been made "until such time as notice may be given to terminate" it.[2] Many other leading states, including Algeria, Argentina, Brazil, the Federal Republic of Germany, Italy, Poland and the other states of Eastern Europe, Senegal, and Syria, do not adhere to the Optional Clause.

Furthermore, far-reaching reservations are not merely temporal. Most notable, some would say notorious, are self-judging reservations, of which there are about a half-dozen. The United States was the pioneer with the Connally Reservation, which withholds from the Court's compulsory jurisdiction "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America."[3] While as a matter of legal principle self-judging reservations are most objectionable, conflicting as they do with the authority of the Court under its Statute to determine its jurisdiction, in practice other reservations may have more effect in withholding disputes from the Court.

These and other dolorous facts led a distinguished scholar who later became President of the Court, Sir Humphrey Waldock, to write a noted article entitled *Decline of the Optional Clause*.[4] Despite recent events on which I am not free to comment, it is not possible to conclude that that decline has been arrested. On the contrary, there are indications that it may

2. *Declarations Recognizing As Compulsory the Jurisdiction of the Court*, 1983–1984 I.C.J.Y.B. 57, 89–90 (1984).

3. *Id.* at 90.

4. Waldock, *Decline of the Optional Clause*, 1955–1956 BRIT. Y.B. INT'L L. 244 (1957).

accelerate. The government of the United States has announced that it will examine reformulating the terms of its adherence to the Court's compulsory jurisdiction. That will be a matter of national concern, on which not only the Administration—and of course the Senate—but also the bar, the academic community, and learned societies all have a contribution to make.

In sum, the Court's compulsory jurisdiction is not general, is not increasing, and is under attack insofar as it does exist. The blame for that deplorable situation lies in various quarters. The situation is not helped by the tendency of some of those who have refused to submit themselves to the Court's jurisdiction to cluck at the disadvantages and discomfiture of those who have not refused. Moreover, some states, whose distrust of international adjudication is a matter of ideology, have strongly and rather successfully resisted writing the Court's compulsory jurisdiction into treaties concluded under the auspices of the United Nations.

The Court is confronted by another problem no less grave than the decline of the Optional Clause and the resistance to other avenues of its jurisdiction: the refusal in some cases of certain states defendant to appear in Court even where the Court clearly or arguably has jurisdiction. This has happened five times in the history of the International Court of Justice. It is a development which contrasts painfully with the record of the Court between the two World Wars, when states regularly appeared for oral argument and invariably abided by the Court's decisions. Whatever view one takes of recent developments, it may be noted that of all the states which have been the object of a request for an order of provisional measures in the International Court of Justice, only the United States has appeared, and it has done so in two cases.

Still another fundamental problem of the Court is that of conformity with its judgments. That too was not a problem of the Permanent Court. But it is a problem which has arisen so far no less than three times in the history of the International Court of Justice. I am speaking now not of conformity with orders of the Court for provisional measures, which are not binding upon the states to which they are addressed, but of final judgments of the Court. Again, this is a problem which shows no sign of amelioration, but rather of exacerbation.

Still another weakness of the current structure of international adjudication reinforces the failure of states to comply with judgments of the Court. Even though under the United Nations Charter the Security Council is authorized to make recommendations or decide upon measures to be taken to give effect to a judgment of the Court, the Security Council does not appear to be seen as a reliable enforcer of the Court's judgments. Its voting to give effect to Court judgments is subject to the limitations which govern voting upon its other substantive matters. Parties in whose favor the Court

has ruled have not generally resorted to the Security Council, presumably because they have apprehended that the Council would not effectively support the Court's judgment.

Still another pervasive weakness of the structure of modern international adjudication is that states and international organizations freely resort to the Court less frequently than they did and certainly less frequently than they should. Why? That is not clear in the nature of things, but various explanations have been proffered:

International relations are in large measure run by politicians and diplomats who like to keep their hands on the disposition or indisposition of problems; they do not want lawyers and the law telling them what they must do, but prefer "to keep their options open."

States are unwilling to lose cases. They too often are prepared to go to Court only when they believe that they will win. Thus they sacrifice their higher, long-term interest in a working system of peaceful settlement for the transient interests of a particular case.

The content of international law is uncertain, that is to say, the law to be applied by the Court is uncertain.

The Court is unpredictable in its application of the law.

The United Nations (and too often its specialized agencies) act on the basis of political rather than legal considerations and wish to remain free to do so, unrestrained by the Court's advisory opinions.

All of these theories—and there are others as well—may have some basis in fact. Whatever the causes, the effects are clear. The processes of international adjudication, particularly those concentrated at its summit in the International Court of Justice, are underused.

At the same time, one must bear in mind that there are not thousands or millions of potential litigants before the Court. Only states may be parties to contentious cases, and there are some 170 states in the world.

Nevertheless, it could not be more obvious that peaceful settlement of international disputes is preferable to continuing conflict. It is equally obvious that peaceful settlement on the basis of law builds expectations of consistency and stability in international life, and that application of the law by an impartial international court not only solves particular disputes but also contributes to the development of the law.

At the same time, for the Court to be seen as impartial, it must be impartial, and act impartially. That requires the most scrupulous adherence to its rules and the most careful regard for its precedents. The structure of international adjudication is fragile. The states which have a tradition and a practice of devotion to international arbitration and adjudication are in a minority. If the impression should be given and should grow that the interests of such states are expendable, that when it comes to them, or some

of them, the Court can take liberties not earlier taken, then the Court risks losing the support of those states which have created and sustained it.

I am afraid that I have spoken so far in a predominantly pessimistic way. I am sorry to say that there are in fact grounds for pessimism. But there are more promising countervailing trends as well.

In the first place, the Court is a far busier place these days than it has been for some years; its docket has been fuller the last twelve months than it has been for some twenty-five years. Second, there appears to be an increasing tendency among some of the newer states to bring cases to the Court. Third, the Court has grappled, and is soon to grapple, with new problems, such as intervention by a third state in proceedings between two other states, or interpretation or revision of a judgment already handed down. There may be room for a difference of opinion about how constructively the Court has dealt with these new problems, but the fact that it is being confronted with them is—or so I am determined to think—a sign of life and vitality. And finally, there is a new departure in the practice of the Court: the constitution of a chamber of judges out of the membership of the full Court which renders a judgment in the name of the Court.

More than a decade ago, the Court, faced with the paradox that in a world full of international legal disputes, it had relatively little business, set about revising its rules. A primary revision was to facilitate access by states to chambers of the Court—to a group of judges less than the whole Court—for a particular case. The main change, a former President of the Court wrote, was "to accord to the parties a decisive influence in the composition of *ad hoc* Chambers."[5] This was done by introducing into the Rules of Court the provision that where the parties to a case have agreed upon the formation of a chamber to deal with a particular case, the President of the Court "shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly."[6] By the terms of the Court's Statute, a judgment given by a chamber "shall be considered as rendered by the Court."[7]

The first such chamber was constituted by the Court in response to a request of the United States and Canada in the *Gulf of Maine* case.[8] It was not easily constituted, but constituted it was.[9] Despite the differences in the Court about the composition of the chamber, it functioned extremely well.

5. de Arechaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L L. 1, 2 (1973).

6. International Court of Justice, Rules of Court, art. 17, para. 2.

7. Statute of the International Court of Justice, art. 27.

8. Delimination of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12), *reprinted in* 23 I.L.M. 1197 (1984).

9. *See Work of the Court in 1983–1984*, 1983–1984 I.C.J.Y.B. 125, 131–32 (1984).

It rendered an important judgment determining a single, comprehensive maritime boundary, governing both the continental shelf and fishing above it, which Canada and the United States have accepted and implemented. And now a request from Mali and Upper Volta—renamed Burkina Faso—has been approved by the Court for constitution of another chamber, to pass upon a land boundary dispute.[10]

Chambers of the Court offer what could prove to be an attractive halfway house between international arbitration and adjudication. While recourse to the full court is closer to the ideal, in the real world chambers may sometimes afford states a likelier forum by permitting them a voice in the choice of judges. Thus, the chamber system provides that advantage of arbitration while at the same time providing the advantages over arbitration of an accepted body of rules of procedure and the facilities of the Court in The Hague. Proceedings before a chamber of the Court should be less expensive for the parties than those which require forming and funding an arbitral tribunal.

There will remain an important role for international arbitration, which the current Iran-United States Claims Tribunal, also at work in The Hague, demonstrates in dealing with some thousands of damage claims. But the chamber system may well mark a marriage between the processes of international arbitration and adjudication which holds some promise for a more effective rule of law in international life. It may offer the opportunity to states otherwise unwilling to submit disputes to the Court to make use of its facilities and possibilities. At the same time, the chamber system may perhaps present dangers of fractionalizing the Court and disrupting the universal development of international law. But in my view, it presents markedly more opportunity for progress than dangers to that progress. Certainly there is nothing in the judgment of the chamber in the *Gulf of Maine* case that suggests a regional or parochial view of international law.

Human institutions rarely grow and prosper in an unbroken pattern of progress. It is not surprising that so frail an institution as international adjudication not only has congenital weaknesses but also may have caught some of the diseases of its environment. We live in a world in which international law and international institutions, while enormously valuable, are nevertheless dangerously far from being as effective as they need to be, if this is to be a less troubled and precarious world. There is no use in pretending that we have the sort of international law we need simply because we need it. On the contrary, there is a need for realism, for sobriety, for a critical spirit—and for a constructive spirit. On the whole, the World Court has a distinguished record of achievement—even if that

10. Frontier Dispute (Burkina Faso v. Mali), *reported in* 9 BULL. OF LEGAL DEV. 98 (1985).

record is not as extensive or exemplary as one might wish. It is one of the principal tasks of the student and practitioner of international law, and, for that matter, of people the world over who are concerned with promoting a more peaceful and less lawless world, to give their critical but constructive support to the strengthening of the institutions of international adjudication, and especially the only universal such institution, the International Court of Justice.