THE PLACE OF POLICY IN INTERNATIONAL LAW

D. H. N. Johnson

I did not know what Rosalyn Higgins was going to say this morning. But I have assumed, I think rightly, that she would be following more or less the lines of that very stimulating and thought-provoking article which she wrote in *The International and Comparative Law Quarterly* in 1968 called "Policy Considerations and the International Judicial Process,"[1] which perhaps in a sense was a starting-point of this valuable conference. She may have slightly modified some of the statements she made there, but the substance certainly remains the same. Perhaps the audience will therefore forgive me if I to some extent base my remarks on what she said in that article, which I think is such an important one.

In that article she made some rather serious charges against the British approach to international law. Referring to an "increasing divergence" between the British and the American approach, she says that "[t]he typical American international lawyer regards his English counterpart as rigid, narrow, and making little contribution to the needs of contemporary society; while the average English international lawyer regards his American colleague as having become obsessed with politics and jargon, and increasingly indifferent to the standards of meticulous legal scholarship."[2] The gravamen of the charge appears to be that "most British international lawyers seem united in their belief that it is improper and harmful for the International Court to consider 'political' disputes."[3] This arises no doubt from the fact that "the great majority of British international lawyers regard international law as a set of neutral rules, which it is the task of the judge to apply objectively to the facts before him."[4] Whereas the correct (*i.e.*, American) way of looking at international law is to see it not as a body of rules but rather as "a continuing process of authoritative decisions" made "by authorised persons or organs, in appropriate forums, within the framework of established practices and norms." That is said to be "*legal* decision-making." If, however, "decisions are made by persons without author-

[1] Higgins, *Policy Considerations and the International Judicial Process*, 17 INT'L & COMP. L.Q. 58 (1968).

[2] *Id.* at 60.

[3] *Id.*

[4] *Id.* at 58.

ity, relying only on effective strength, or when they are made by authorised persons, but on a basis only of expediency or pragmatism, then what occurs is *political* decision-making."[5]

On this I wish to make a few points. First, if you have no rules, how are you to determine whether the decision-maker is a person with or without authority? Secondly, how can you tell whether his decision is one made within or without the framework of established practices and norms or whether it has been made only on a basis of expediency or pragmatism? Thirdly, how can the injunction to dispense with rules be reconciled with the language of article 38 of the Statute of the International Court of Justice? On any reasonable construction of that provision, it seems to me that the Court is required to apply rules: indeed paragraph 1(a) expressly commands the Court to do so.[6] To be fair, I have never understood the writings of Professor McDougal to prescribe the total rejection of rules. It seems to me that possibly Dr. Higgins has carried the doctrines of what is called the Yale school to excess here: perhaps the exponents of that school who are present today will clarify that point.

Also it seems to me that to say that political decision-making consists of decisions made by persons without authority, relying only on strength or on decisions made only on the basis of expediency or pragmatism, is grossly to undervalue the role of the politician, and still more the statesman, and of course by implication, or if you like *a contrario*, to exaggerate the role of the lawyer.

Dr. Higgins gives as examples where "this deep division of attitudes," as she calls it, is prevalent, the scope of extraterritorial jurisdiction (which is a matter that we are going to discuss this afternoon, I believe) and the act of state doctrine.[7] Yet I have not noticed that even American international lawyers are particularly agreed on those points. Also in that article Dr. Higgins produced little evidence to substantiate these charges, apart from some references to the famous (or, if you like, notorious) *South West Africa Cases*.[8] She referred to a passage by Sir

---

[5] *See id.* at 58-59.

[6] I.C.J. STAT. art. 38, para. 1(a) provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

[7] Higgins, *supra* note 1, at 60.

[8] [1966] I.C.J. 6.

Francis Vallat,[9] who in any case is here to defend himself and who approved the decision of the Court in that case, and she also made one or two references either to the Spender/Fitzmaurice dissenting opinion in 1962[10] or the judgment of the Court itself in 1966. There were some quotations from these sources which Dr. Higgins relied upon to substantiate her charges and which were designed to ram home the point that British international lawyers are obsessed with the idea that international judges should apply rules, instead of realizing, as they should do, that "policy considerations, even though they differ from 'rules,' are an integral element of that decision-making process which we call international law."[11] Whereas British international lawyers, it is said, are not sufficiently skeptical as to "the possibility of differentiating realistically between political and legal matters."[12] Another way of putting that would be to say, I think, that British international lawyers are too inclined to postulate that such and such is politics and such and such is law, and that there is a rigid difference between them.

However, I find that it was an American, not British, authority on the International Court of Justice, Professor Leo Gross of the Fletcher School of Law and Diplomacy, who, referring to "decisional procedures" for settling international disputes (and by this he meant arbitration and adjudication by the International Court), said that in the case of these procedures "depoliticization is complete," and that it is even more complete in adjudication by the Court than in arbitration, and that "once the Court is seized, politics are minimized in the work of the Court as completely and as fully as they can be in any human institution, whereas the rôle of law is maximized."[13] He said that in 1962. More recently Professor Gross has written: "It is generally agreed that adjudication by the Court ensures the greatest degree of objective and impartial consideration of an international dispute on the basis of the law."[14] I do not think that any British international lawyer would object to that. The leading British international lawyers, I think, have always been well aware of the delicate relation between law and policy in international affairs. After all, many of the leading early British international lawyers were politicans and even Members of the Cabinet. I am referring to Sir

[9]Higgins, *supra* note 1, at 60.

[10]South West Africa Cases (Preliminary Objections), [1962] I.C.J. 319, 465.

[11]*See* Higgins, *supra* note 1, at 62.

[12]*Id.* at 60.

[13]Gross, *Some Observations on the International Court of Justice*, 56 A.J.I.L. 33, 41-42 (1962).

[14]Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Rôle in the International Legal Order*, 65 A.J.I.L. 253, 273 (1971).

William Vernon Harcourt and F.E. Smith (Lord Birkenhead) in particular. In his Inaugural Lecture at Cambridge in 1888 Professor Westlake, who had himself been a Member of Parliament, expressed the view that international law was "no more a subject for specialists than home politics are."[15] A few years later he said that everyone should reflect on the principles of international law who, in however limited a sphere of influence, might help "to determine the action of his country by swelling the volume of its opinion," and that one of the chief reasons for the teaching of international law was the preparation of men for the duties of citizenship.[16] That outlook can hardly be described as "rigid" or "narrow," even though in accordance with the spirit of his time—which still lives on, be it said, in the famous Connally reservation, attached to the United States Declaration of 14 August 1946,[17] accepting the compulsory jurisdiction of the International Court of Justice. Westlake drew a fundamental distinction between the legal and political claims of states, *i.e.*, "between those which admit and those which do not admit of being made the subject of compulsory arbitration."[18] This distinction has been much criticized, but in my view it is a realistic one and, so far I am afraid, an enduring one. Of course I agree with Westlake's further comment: "What is wanted is earnest effort to bring more or less within the range of arbitration differences which do not at first sight admit of it."[19] But it seems to me—and this point is perhaps rather lost sight of by Dr. Higgins—that the more her authorized decision-makers of the international legal process are encouraged to apply "policy-oriented jurisprudence" as opposed to legal rules as traditionally understood, the fewer the occasions on which they will be authorized to take any decisions at all.

I would now like briefly to refer to another slightly less well known British international lawyer who, I think, also had something useful to say on the relation between law and politics, and particularly on the role of international courts. In his work *International Change and Interna-*

---

[15] J. WESTLAKE, *Introductory Lecture on International Law*, in THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 394, 413 (L. Oppenheim ed. 1914).

[16] *Westlake, Preface* to J. WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW at v (1894).

[17] 61 Stat. 1218 (1947), T.I.A.S. No. 1598, 1 U.N.T.S. 9.

[18] J. WESTLAKE, INTERNATIONAL LAW pt. 1, at 287-312 (1904).

[19] *Id.* at 349.

tional Peace which was published in 1932, Sir John Fisher Williams wrote the following:

> We cannot internationally send Castlereagh and Canning into retirement and look for salvation to the legal acumen of Eldon. . . . A court is not an organ of change. In our search for an organ of international change we cannot content ourselves with a court. And at the same time we may remind ourselves how inadequate for the settlement of grave political issues must be the mere application of principles of law. Burke's language on Conciliation with America may surely be borne in mind. "I am not determining a point of law: I am restoring tranquillity . . . ." The restoration of tranquillity by the recognition of the need for change is the task of the statesman and not of the lawyer.[20]

Perhaps by the advocates of "policy-oriented jurisprudence" such sentiments would be regarded as heretical, but I think they do sum up very characteristically the British attitude on this point.

Brierly of course was another British international lawyer who discoursed several times on this theme, and many times actually in this building. For example, I select from an address he gave in 1925 where he made the point that every serious difference between states was both legal and political and that, if some disputes were non-justiciable, this was not because there were no rules applicable or because international tribunals were incapable of applying such rules, but simply because states were "less ready than individuals to accept the decision of their disputes on the basis of their legal rights."[21] Those observations now sound rather trite, but at the time they were perhaps rather original and important. What is interesting, though, is that the remedy which Brierly proposed lay not in any premature attempt to extend the jurisdiction of international tribunals, but in the improvement of international law so that it would win the confidence of states. To a limited extent he thought this could be done by codifying the law, but to a greater extent it must be done, as Brierly said, "by the organizing of international life in general"—surely "the task of the statesman and not of the lawyer." Brierly was always very conscious of the limitations of international law. For instance, it was characteristic of him that he wrote, in relation to

---

[20] J.F. WILLIAMS, INTERNATIONAL CHANGE AND INTERNATIONAL PEACE 10 (1932).

[21] Brierly, *The Judicial Settlement of International Disputes*, in THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 93, 102 (H. Lauterpacht ed. 1958).

the doctrine of *rebus sic stantibus*, which has been under discussion again recently, and so often is:

> [I]t is a mistake to think that by some ingenious manipulation of existing legal doctrines we can always find a solution for the problems of a changing international world . . . . Law is bound to uphold the principle that treaties are to be observed; it cannot be made an instrument for revising them, and if political motives sometimes lead to a treaty being treated as "a scrap of paper" we must not invent a pseudo-legal principle to justify such action. The remedy has to be sought elsewhere, in political, not in juridical action.[22]

More generally, Brierly wrote a little further on: "[T]his problem of peaceful change belongs to international relations rather than to international law."[23] That again is a very typical British sentiment, and perhaps one of the main differences is the continual emphasis by the British writers on the importance of the role and the duty of statesmen. It may well be that they are not exactly undervaluing the role of the lawyer, but I think one does find more emphasis in the British writings on the important role of statesmen and politicans.

Finally, I should like to refer to one or two other points which Dr. Higgins made in this very important article.[24]

Firstly, I would like to reject the suggestion that British international lawyers consider their American colleagues to be "increasingly indifferent to the standards of meticulous legal scholarship."[25] Certainly I would yield to no one in my admiration of the scholarship involved in the works of the New Haven and Princeton schools, or whatever one chooses to call them. For sheer industry and breadth of approach these works far surpass anything that we have been able to do in this country since the war.

Secondly, I should like to refer to this rather delicate question of "jargon."[26] I have some hesitation whether even to refer to this matter, because it is a very delicate one, and it might appear to be somewhat arrogant to criticize someone else's literary style! It is certainly an area where Englishmen should tread warily, because after all the English language is a very rich one which has developed along different lines in

---

[22] J. BRIERLY, THE LAW OF NATIONS 339 (6th ed. 1963).

[23] *Id.* at 339-40.

[24] Higgins, *supra* note 1.

[25] *Id.* at 60.

[26] In her article Dr. Higgins wrote that "the average English international lawyer regards his American colleague as having become obsessed with politics and jargon . . . ." *Id.* at 60.

different parts of the English-speaking world. This is an invaluable thing, and there is room, is there not, for a Damon Runyon as well as an Edgar Wallace, for a J.B. Priestley to coexist with a Tennessee Williams, and no one is worrying about the differences of their styles. But if I raise the matter at all, it is partly because Dr. Higgins did refer to it again this morning, and partly because Sir Gerald Fitzmaurice may have brought the matter to a head with his recent full-length review of the important book *The Interpretation of Agreements and World Public Order* by McDougal, Lasswell and Miller. Of this book Sir Gerald says, "it is written in a highly esoteric private language,—we do not say jargon, but a kind of juridical code which renders tracts of it virtually incomprehensible to the uninitiated [or at least to the unpracticed and unversed] . . . ."[27]

I think the term "juridical code" is a fair one, because it conveys the impression which I think is to some extent correct, that if the ordinary English lawyer reads works of this kind, they are, to begin with certainly, found to be very difficult to comprehend. If one continues reading, I have no doubt that one begins to appreciate more the significance of the important message that these works are endeavoring to convey. But I think it is something rather like a code. I remember in the war one learned the Morse code, and if one was in practice it was all very well, but when one was out of practice it became more difficult to take the message down. I think this question of language cannot be dismissed as unimportant, especially at the present time. I do feel that in the English-speaking world, when we are now dealing with so many new countries who are very keen to learn the subject, but whose command of English is not always of the first order, it is incumbent on anyone writing in the English language, be he British or American, to endeavor to be as clear as possible. I think that if we cannot achieve this, then to some extent we are failing to discharge our responsibility. I shall leave it at that. I hope I have not offended anybody by these remarks.

Certainly Monsieur Pompidou has not studied international law if he thinks that by allowing British civil servants to speak English in Brussels, he will be providing an open sesame enabling American influence to come charging in! There is no "hot line," I think, between New Haven and Whitehall! We need then to look at this question of language. We need to analyze perhaps what exactly the difference is. Does it lie in

[27]Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?*, 65 A.J.I.L. 358, 360 (1971).

fundamental education? Does it lie in our training as lawyers? Is it due to the influence of sociology, as Dr. Higgins was suggesting? Or of Roscoe Pound, as Dr. Schachter was suggesting? Is it symptomatic of an even more substantial difference of approach? I do not really know the answer to these questions, or why it is that we have drifted apart, if indeed we have. Then there is the other question: Does it really matter if we have drifted apart? If there is this "increasing divergence" to which Dr. Higgins refers, is this a matter to welcome or to deplore? May not a difference of approach even be healthier than drab uniformity? I really do not know the answer to these questions myself, but I am very much hoping to learn the answers to them today.