THE FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE IN THE WORLD COMMUNITY

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We are agreed, I think, that we are faced with a decline in the use of the Court, and it is of this that I would like to speak.

Many factors have been suggested and are familiar to you as contributing to this decline. Probably a much more systematic inquiry is needed before any conclusions could really be made. Much of it is guesswork. I would not be surprised if a number of member governments of the United Nations on close examination were found to know little or nothing about the work of the Court and its availability. But the questionnnaire which the United Nations Secretary-General has circulated to governments now about the Court may well be revealing and useful. It is possible, of course, that judicial settlement itself, as Sir Francis Vallat perhaps suggested, may be now of less functional importance than it appeared to be 50 or 60 years ago. Some of the large proposals for the reform of the Court—giving it a constitutional role in relation to international organizations, giving it an appellate jurisdiction, or extending its advisory opinion procedure—seem to me to overlook many of the factors which are said to be causing its decline.

The question itself of whether regional chambers of the Court would increase its work is something certainly to be considered. But it may well be that there are ideological factors which would again make this not very fruitful.

A second general point I would like to make is the distinction between law and policy, which I mention with caution in the light of what has already been said today. I would only say that I think this distinction is quite artificial in terms of any reshaping of the Court. The notion that one can in some way separate legal questions on the international plane from policy seems to me quite unrealistic. It may be that the Court can give an opinion or a declaration on some specific point of law that can be isolated, but it is a mistake to suppose that by isolating it one can give the Court an independent function, independent of the policy motivations and issues which would be involved even in that isolated point. There is no case that goes to Court that does not have some elements of policy.

If we look at the *Anglo-Norwegian Fisheries Case*,[1] we will find that those elements were enormous. In fact this was a decisive decision in the history (you may say) of the maritime world—I would put it as high as that.

So what I would like in the short time we have is to ask, first of all, what changes might be made to increase the use of the Court, and perhaps improve its standing *by the Court itself*, without embarking on large enterprises of widening its jurisdiction and making extensive amendments of the Statute. On amendments of the Statute, I would say that I do not think we want to be afraid of them. It is part of the Charter, but I think amendments of the Statute could probably, if they were reasonable and generally accepted, go through quite easily in a way of course that amendments of substantial parts of the Charter could not. So I do not think the fact that one would have to amend the Statute is necessarily a very great obstacle.

I have no doubt that one or two suggestions I shall make will no doubt be controversial (I think that all suggestions about the Court are controversial), and this may be very good in these particular discussions we are having.

I would like to start first with two points on the procedure of the Court. I was counsel in three cases before the Court, and did notice what seemed to me unsatisfactory points in the procedure, and I do not find that they have been changed. However, the Court, as you know, has its procedure under revision at the moment, and it may be that the rules that emerge will bring about a number of improvements.

Firstly, as regards proceedings in their written and oral form one has to bear in mind that the higher courts in most countries do give different weight to these two forms. That is to say, if a court is relying, as some courts do, largely on written procedures, then the oral element will be very small, and perhaps in the proceedings in the courts in this country, at least in the lower courts, it is rather the other way round: that the written proceedings are relatively slight and the oral proceedings are really the main body.

The Court is suffering, it seems to me, from the failure to separate and give a proper weight to each of these two proceedings. There are already very inflated written proceedings followed by equally inflated oral proceedings. Anyone who has studied the proceedings in the *Barcelona Traction Case*[2] can only conclude that this has almost an "operetta" quality about it.

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[1]Fisheries Case, [1951] I.C.J. 116.

[2]Barcelona Traction, Light and Power Co. Case, [1970] I.C.J. 3.

I suggest that what the Court should do is two things. First of all, it should be more strict on time limits. I feel that the Court is too deferential to governments, and that all experience shows that once governments are before the Court, they will cooperate and they will in fact make effort when necessary. Nor do I think that it should be automatic that a request for another three months' extension should be granted.

That is the less important point. The other suggestion that I would make is that the Court must direct the parties as to what it wants to hear in the oral proceedings. It is perfectly absurd, in my mind, that after very extensive written proceedings, parties appear before the Court, which remains totally silent, having given no direction as to what points it wants to hear, what points it pays no attention to, and so on. This is a perfectly simple process which most national courts follow almost automatically.

The second procedural point is related to separate opinions. I believe that the Court must, if it is to retain and increase its authority, exercise far greater restraint on separate opinions. Some comparison could be made here, at least in the advisory procedure, with the Judicial Committee of the Privy Council. This was a body which originally gave advice to the Crown, and technically I think its decisions are still "advisory opinions," executory effect being given to them by an Order in Council, though for a century and a half it has been accepted that the Judicial Committee is a court, and that its decisions are judgments in effect.

But the Judicial Committee, which is not unlike in some respects the International Court, has had a very wide jurisdiction of appeal over many different legal systems and different cultures; it has had something of a function of an international court, and one of its great strengths in the long years of its development was its use of a single opinion. This was the opinion of the Committee. Now, it is true that it has recently changed that procedure and it now does admit separate opinions. But with all respect to the International Court, there is a great difference between a body that may have been sitting for a century and a half with some degree of authority and a body that is still in some respects relatively new. I think that in the advisory opinion procedure, the Court should produce an opinion, and that should be it, without any published separate opinions or any dissenting opinions.

In the contentious procedure, I see no case for publishing separate opinions. These could be kept in the records of the Court for future use by the Court.

Dissenting Opinions are different; they have to be stated; they have to be published. But I think even there, as Sir Percy Spender suggested in his observations on separate opinions, the Court should show far greater restraint than it has shown, particularly where judges go so far as to criticize in detail the majority opinion. I cannot see how this serves the Court or the world community in any way.

On the advisory opinion procedure, I would suggest that the distinction that is made between the advisory procedure and contentious procedure is exaggerated. I do not think they are as different as all that. As Sir Francis Vallat pointed out in a very interesting article on declaratory judgments, the decisions of the Court in contentious cases are substantially declarations; they are declarations of the rights or obligations of the parties; and the order of the Court—or direction, as it were—which results from this conclusion tends to be in some way a separate part of the procedure. That is one point.

The other point is that advisory opinions are binding. I know that formally of course they are opinions, but just as the opinions of the Judicial Committee come to be judgments, the reality about advisory opinions is that no United Nations organ and no international organization can easily invite and receive an opinion of the Court and disregard it. This is embarrassing for everyone; it puts the action of the international organization in doubt inevitably, and of course it must be felt as in some degree an affront to the Court. That is the reality. It is no good treating advisory opinions as if these were formally what they appear to be. These are as much authoritative judgments of the Court as the declarations in contentious cases, and perhaps even more so.

Therefore in regard to the question of advisory opinions and the form of the judgment of the Court, and the formal way the opinions are distributed, I believe there is no essential distinction here between the two lines of procedure.

The last point I would like to suggest, and I am sure this is probably very disputable, is that more attention should be given to the possibility of access of individuals to the International Court. I know this is dismissed with the quick reply, "Oh, states would never stand for it," and such like. With respect, I think that is the thinking of 1907; that would have been a very acceptable and conclusive answer in 1907, but I do not think it is in the 1970's. There are areas where the notion that an individual may go to an international body, even against his own government, has become not only accepted, but we hope rather a matter of course.

So I do not think this should be excluded. There are difficulties, I know, about it, and of course it would involve an amendment to the Statute. But what I would propose perhaps for discussion is, first, that article 34(1) of the Statute might be amended to give the possibility of individuals or corporate bodies, or groups of individuals perhaps, to go before the Court as litigants on, say, three conditions: firstly, that the state of which the individual or corporation is a national should be free to intervene in the proceedings; secondly, that the application should have been found by a committee of three judges to be compatible with the Statute, and not an abuse of the procedure of the Court, and that it should show on the facts, prima facie at least, a breach of the treaty or of some customary rule (if I may use the word) of international law; lastly, the finding by the committee of three judges should not preclude, of course, the respondent government from raising any preliminary objections it wished to raise to the jurisdiction of the Court.

Those are mere suggestions, but with that sort of protections of the Court and of the respondent state from unreasonable or abusive applications, I believe that a very useful door could be opened not only for a greater use of the Court, but also for the many people who are involved and are clearly shown to be involved in much of the litigation before the Court since 1920. It is perfectly true that there are large issues perhaps of boundaries and fisheries, and so on, which can be said to be state issues in the true sense. But many cases have already gone to the Court that really have turned round individuals, and it very often happens that states for various reasons may have no great interest in taking up the case of an individual before the Court. There may be various reasons why a state does not wish to do that, and its reasons may be perfectly legitimate, but it does leave individuals or these groups of individuals without the kind of protection that I think they could usefully have.