

THE PLACE OF POLICY IN INTERNATIONAL LAW

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This is rather a large topic that we are discussing this morning. I think I should say straightaway that I rather deprecate this establishment of a divergence between English and American attitudes on this subject. I did not know how to approach it when I began to prepare myself to participate, but as I have thought of it and as I have listened to the talks of my colleagues here, I fail to perceive any fundamental difference of approach. It is a pity that we should think in such terms. Our attitudes are basically the same. It may be that we are not doing things in quite the same way. Perhaps it is a sort of race—some are hares and some are tortoises! (You will be able to categorize me perhaps presently!)

The idea of relating the roles of law and policy in international law suggests a dichotomy between the notion of law and the notion of policy which bears a little closer scrutiny. One tends to say: Well, I know that the law is law; that it is certainly not “not law”; that it is something different, for example, from *ex aequo et bono*; and that therefore it is also different from policy. This is a very nice, simple approach which it would be wise to adopt when first approaching the subject. On the other hand, it would be wrong to ignore the valuable work that has been done by those whose disciplines have spread wider than the relatively narrow range of law. They have led us to understand that, when dealing with international law, it is difficult to point to anything and say, “That is the law,” because on virtually any topic one may care to select, one will find that there are substantial “gray” areas, marginal areas of imprecision which have to be completed by a creative process; and in that creative process, of course, there must be room for policy. So when one is dealing with those areas, one cannot always distinguish clearly between law and policy. Indeed, some go so far as to say that law and policy are but two words to describe different factors which are employed in this process of reaching decisions.

I apologize for being somewhat elementary in my approach. Perhaps it is because I have not been deeply involved in the kind of thinking in which we are collectively participating today. I fear that something which Dr. Higgins has written may at any rate in part be applicable to me. In her admirable article in *International Organization* recently upon

"Policy and Impartiality: The Uneasy Relationship in International Law," she has a footnote in which she comments on English attitudes towards the role of policy. There she says: "Unlike in the United Kingdom [she is contrasting this with something she had said in the main text] where there is little interest in, and a certain hostility to, the notion of international law as an instrument for the promotion of community policies. The tendency is rather to regard law as a neutral set of rules, the impartial application of which will guarantee protection of the weak and strong alike."¹

It may be that that comment is applicable to people like me. Certainly I have myself been a trifle antipathetic to examining too closely the relationship of law and policy. Now, I ask myself, why am I antipathetic to this examination? Partly it is because the relationship is so difficult to unravel. The answer also lies in something which Dr. Schachter mentioned earlier when he listed the various objections to the role of policy: that is, because of the "subjective" element in the application of policy. It may well be that policy considerations are unavoidable in the field of international law. It is quite true that we should recognize that. But very often (and this also relates to what Professor Johnson has said about vocabulary) it is more than this; the analysis of the role of policy involves considerations which are simply not part of my legal habit. Perhaps I could be specific by illustrating the difficulties which occur to me in relation to the subjective element in policy.

When we talk about the role of policy in law, we have to ask ourselves, whose policy? There are various possibilities. There is the possibility that we are talking about the policy of a particular state which is invoked for the purpose of determining the content of a rule of law which may operate either in its favor or against it. For example, some may say that the Soviet Union, when it invades Hungary or Czechoslovakia, is applying considerations of policy to the determination, as it understands it, of rules of law which are applicable in the situation. That is a highly individual determination of state policy. Or to take perhaps a more helpful illustration: When one comes to the law of the sea, a state may take the view that it is desirable that it should enjoy a substantial belt of territorial waters in excess, say, of 12 miles. The considerations which lead it to that view are of course considerations of policy dependent on its own fishing or mineral interests. So again it is state policy.

¹Higgins, *Policy and Impartiality: The Uneasy Relationship in International Law*, 23 INT'L ORGANIZATION 914, 920 n.21 (1969).

Apart from state policy, you have a second possibility: that is, that you can talk about a "community" policy. I think this is one of the important factors of which Dr. Schachter was speaking earlier. You can have a community policy which can be invoked in a certain context for the purpose of assisting in the formulation of the relative rule of law. One illustration of this may be taken from the proceedings in the *Barcelona Traction Case*,² of happy memory. One issue in that case, as you will remember, was whether Belgium, as the national state of certain shareholders in a Canadian company, was entitled to bring proceedings in the International Court of Justice arising out of a wrong initially done to the company, but effectively injuring the shareholders. It is worthwhile bearing in mind that this was an area of law upon which there was no clear authority, no express judicial decision, so that whatever decision the International Court might reach would necessarily involve some element of law creation: if you will, of the application of policy.

I recall that when, on behalf of the Government of Belgium, I was arguing this point before the Court, I adduced some material to demonstrate that from the point of view of the benefit of the community at large, it was desirable to extend the range of protection from merely protecting companies to protecting also the shareholders in those companies. The elements in the argument were that by extending such protection, the Court would encourage the flow of private investment funds and that this would of course assist developing countries. I put it in terms of what may be called "community" policy.

All of you will know that the argument failed. But there must have been some counterpolicy that carried more weight than the one which I have just suggested to you. As I understand it, the counterpolicy was a very simple one. It was this: There are on the whole in this world more states that are likely to be wrongdoers in this particular area than there are states that are going to be right-doers. In other words, it is quite wise not to lower the barriers that stand in the way of the establishment of a state's responsibility. As a matter of policy, let us maintain as rigidly as possible the old law on nationality of claims so as to protect developing countries from oppressive action by investors from larger and more powerful nations. This is a counter consideration of policy—the policy of particular states, but of so many states that it can be said to represent a type of community interest, but not the interest of the whole community.

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

Both these types of policy—the policy of the state, or the policy of the community—are, in my assessment, too subjective to be of great value to us, although obviously in any given context it is worthwhile trying to calculate what the policy elements are.

On the other hand, there are two other types of policy which are perhaps worthwhile identifying because in relation to them there is less room for subjectivity.

The first has been touched on by Dr. Schachter. One can speak of it as the policy of an international organization. An international organization is controlled by its constitution. Problems arise in the application of that constitution. They have to be determined either by the members of the organization, by the secretariat, or by an international tribunal. All of this involves the interpretation of the constitution. Frequently the constitution is incomplete. Again, a law-creating function has to be performed which involves the application of a policy. What policy? The answer is that if one looks, for example, at the jurisprudence of the International Court, one finds that the Court is applying the policy of the organization—not the policy of any particular state, but a policy which is intended to fulfill the purposes for which the organization itself was created. The standard illustrations of this are to be found in those cases which deal with the doctrine of implied powers, the Advisory Opinions on *Reparations for Injuries*³ and on the *Binding Force of Awards of the United Nations Administration Tribunal*.⁴ The Court was in both those situations extending the reach of the purely literal contents of the constitution by the importation and application of policy considerations derived from the character and purpose of the organization itself.

The fourth type of policy which may be mentioned as being acceptable because, like the one just spoken of, it is less subjective is the policy of the law itself. Those of us who profess the law do so, I suppose, because we are attracted by the notion of the law's integrity, its predictability, its objectivity. So there are certain situations in which a particular course of conduct can raise in our minds the question of whether those criteria of integrity, predictability, and objectivity are being maintained.

You will, I am sure, recall the circumstances in which the so-called "automatic reservation," attached to the United States' acceptance of

³Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174.

⁴Advisory Opinion on the Effect of Awards of Compensation made by the United Nations Administrative Tribunal, [1954] I.C.J. 47.

the compulsory jurisdiction of the Court,⁵ was first questioned. It was questioned by reference to this very class of consideration. What is the policy of the law itself in relation to a declaration which seeks to withhold from the Court a particular category of dispute at the instance of the defendant state? It could be said that this criticism of the United States Declaration is in part a logical application of strict legal principle rather than an application of legal policy. But I tend towards the latter interpretation.

Another illustration of this same idea of the policy of the law (I think it is one which will ring a bell with Professor Falk) is that the policy of the law itself demands that there should be within each national system an effective way for the national courts to apply rules of international law in those cases where they may arise. In other words, the policy of international law, I would suggest, runs against the strict application of what we have come to know in the United States doctrine as the "act of state" concept. The policy of international law requires that wherever international law is relevant to an issue in litigation, be it in an international tribunal or, for our present purposes, in a municipal tribunal, this policy requires that international law should be capable of full application. International law should not be excluded by reference to some notion that the courts of one state will not sit in judgment upon the public acts of another state.

It seems to me that one is entitled to derive considerations of policy from the nature of law itself, and that one can legitimately apply them to the content of the law without being exposed to the charge of excessive subjectivity.

It may perhaps strike you that I am taking a rather narrow view of the problem of the relationship of law and policy. I have to do this, because otherwise I would have to go on very much longer. But it seems to me that in answering this general question about the relation of law and policy, one is really obliged to identify the discipline to which one belongs. I see no reason why people who have gone through the discipline of the law should fail to take pride in it. That discipline involves of necessity an exclusion of nonlegal considerations—though not a total exclusion, because, as I hope I have adequately demonstrated, nonlegal considerations have a part to play in the identification of legal rules. But if one is a lawyer, I believe one is a lawyer first and foremost. That is

⁵Declaration of the United States Recognizing as Compulsory the Jurisdiction of the International Court of Justice, Aug. 14, 1946, 61 Stat. 1218 (1947), T.I.A.S. No. 1598, 1 U.N.T.S. 9.

not to deny that there is room for association with other disciplines or that it is proper to apply other disciplines to measure the adequacy of the content of the law. But in doing so, my plea would be that we should at any rate identify the disciplines which we invoke and be able to define reasonably clearly what are the elements with which we are concerned. None of this, I venture to suggest, leads to a total exclusion of policy considerations from the law. I would hope that the sort of observations I have made this morning would confirm what I started out by saying: that there really is no fundamental divergence of attitudes between those of us who profess the subject in England and our colleagues in the United States.