

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

*Ernest A. Gross*

I want to start with the declaration that I do not bring joyous tidings on this subject which has been assigned to us this afternoon.

Before plunging into my subject, I have a word of tribute to an eminent late Professor of International Law who has been referred to this morning, that is Professor Brierly. He was my first introduction to international law at Oxford and the first professor on the subject with whom I studied; and he set my feet on the path which has in one way or another marked my career since, both in government and in practice.

Sir Francis Vallat has referred to the Charter provision which makes what I would venture to call a rather bold declaration, that the Court is "the principal *judicial* organ of the United Nations."<sup>1</sup> For the purpose of my approach, I stress the word "judicial" in that phrase. It raises the somewhat haunting question as to where and what are the principal *executive* and the principal *legislative* organs of the United Nations; and of course they do not exist.

The Secretary-Generals, past and present, have seen the need of the executive function and have, with greater or lesser effect from time to time, taken bold and imaginative initiatives in asserting a prerogative which the Charter itself carefully refrains from conferring upon that organ of the United Nations. (The Secretary-General, as you all know, is defined as the *Administrative* Head of the Organization.)

The legislative function is of course not allocated to either the Security Council or to the General Assembly. The Security Council does indeed perform a supranational function, or it can, under chapter 7. But we must concede, I think, that in so doing it is exercising a diplomacy of coercion that normally will be marked more by pragmatic considerations and political considerations than by the application of norms of international law.

These are not disparaging comments; they are simply analytical and a fair analysis, I think, of the simple proposition which I make and

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<sup>1</sup>U.N. CHARTER art. 92 (emphasis added).

which I take to be germane to the subject, which is the pretension, if I may say, that the international Organization is endowed with what may *truly* be called a *judicial* organ.

There is some inference to be drawn from the fact that the same Charter does not attribute to any other organs the other two major aspects of any system of law and order, which are of course the companion functions of legislation and the executive.

Why have the nations not conferred legislative or executive functions upon the international body? And why have they not accepted literally and in good faith the designation of "principal judicial organ," which they have seen fit to confer upon the Court? I think we come back here to the question which was posed by Madam Chairman at the opening and was picked up by Sir Francis, and that is: What is the world community? And where is the world community? Of course the world community in a governmental sense does not exist, and the nations have not shown the slightest indication that they are prepared to act in substantial derogation of the principle of sovereignty: the principle of sovereignty meaning, from a practical point of view, the preservation of freedom of action and room to maneuver. This, of course, I take to be the real reason why judicial recourse has been so few and far between, if I may say, and why the governments have not been prepared to resort to the "sudden death" aspects of litigation.

There is of course no doubt—and as a practitioner I would say no room to doubt—that the mere existence of courts is a crucial element of any social system, domestic or international. But I would also point out that it is not necessarily a defect of a system—or an evil inherent in a system, if you like—that states or organizations or potential parties hesitate very much to litigate. Litigation in our national societies is a matter of last resort, taken when all other efforts to solve a dispute have failed. This is a general, practical observation with which, I think, all must agree. In my own firm, in talking with young associates who are interested in litigation or joining our litigation department, I have frequently proceeded from an assumption (perhaps some of you may think it erroneous) that the best litigator is the best settler. In fact, one of the most important aspects of the existence of a court, if I may say so, is that the court has steps, because the greatest contribution that a lawyer can make to a client, including a government, would be to reach a settlement on the courthouse steps, if necessary, on the way in to the courtroom.

But reverting now to the reluctance of governments to have recourse to judicial process, I believe that there are some broad principles which may be deduced.

It must be said that the assertedly "central place" which was promised for the Court in the settlement of disputes (this phrase is found in the Report of the Committee at San Francisco in charge of the Court Statute), and that the Court would have a central place and the judicial process would be in the forefront of the settlement of international disputes, has not in practice been accorded to the Court.

When it came time to transform this rather abstract declaration into a program of action, the Charter in article 33 listed (quite appropriately, I think) recourse to the Court in sixth place, in the means by which disputes should be settled, or attempted to be settled. Moreover, article 36 of the Charter, in what I think is significant language, merely exhorts the Security Council, when recommending procedures or methods of adjusting disputes, "to take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice."

However wise and practicable so guarded an admonition may be, it surely does not, in terms or in spirit, accord to the Court that "central place" which the Charter, in another context, promised for it.

Let me try to gather together a few of the major deductions which these somewhat discursive remarks seem to justify.

One must admit that the practices of the Court, which have been so well brought out by Mr. Fawcett, do not in themselves encourage recourse to judicial process: the expense, the time, the cumbersome procedures and all the rest. We, who were involved in the *South West Africa Cases*,<sup>2</sup> have good cause to query the procedures, and reference has been repeatedly made during the course of the day to the *Barcelona Traction Case*.<sup>3</sup> But I would submit that, as onerous, as expensive, as time-consuming and as really intolerable as the Court procedures have been in these two very important cases, governments nonetheless would seek recourse to the Court and accept what a famed labor arbitrator in the United States has described as that "consent to lose," which brings parties in a labor dispute to the bargaining table, if the prerequisites of a disciplined society were at all prevalent in the world and if there existed something that could reasonably be called "a world community."

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<sup>2</sup>[1966] I.C.J. 6.

<sup>3</sup>Barcelona Traction, Light and Power Co. Case, [1970] I.C.J. 3.

The reason, therefore, for the failure of nations, North, South, East, and West, rich and poor, small and large, to seek judicial recourse must have something to do with the fact that an international community, a world order, does not indeed exist, and that looking at it quite realistically, courts like other human institutions are normally *creatures* of a community rather than *creators* of a community, although of course they must exist in order to preserve, strengthen, and expand the sense of community. They are, like the European Court of Human Rights and the other courts under the Rome Treaty,<sup>4</sup> institutions created by a community in being, weak as it may be. The World Court is an institution of a system waiting to be born. I believe that we all must contribute to improving and rationalizing the procedures of the Court, opening its doors to more parties—and here Mr. Fawcett's suggestions are admirable and deserve a most sympathetic study. I think that the United Nations might be given a place, a standing, under this Statute as a party to a contentious proceeding perhaps. There are amendments that might be considered.

But I do think, and with this I would like to conclude, that the proper functioning of an international community must inevitably be a by-product, a fallout (if you like) of the orderly functioning of the domestic societies which compose the nascent international order. Unless and until our domestic societies order themselves with a degree of discipline, with an indication of goals and of priorities which ensure that necessary change shall take place, with justice; unless national societies order their own internal structures, institutions, and procedures in a way in which we come to associate with the requirements of human welfare and advancement, then no international community can be expected to be born, because that international community will, as I say, be a by-product of healthy, self-disciplining functioning and well-structured domestic societies. It will not and cannot come about in any other way.

So I close with what may be a gloomy note, as I warned at the outset; these are not joyous tidings, because it is not predictable within a foreseeable future that the Court will achieve its deserved place, the dignity and the use which we expect of our highest national courts. But I do not think that we should be bemused by the fact that this is not likely to happen in the foreseeable future. We must turn our attention and devote our

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<sup>4</sup>Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11.

energies to the strengthening of our own societies in ways that are necessary, in order to build the international community on a sound and solid structure of national communities. Then, I think, we may expect that the Court will truly be the "principal judicial organ" of the United Nations and that there may even be principal legislative and executive organs of that same august body.