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Judicial Reasoning at an International Court

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JUDICIAL REASONING AT AN INTERNATIONAL COURT

I would like to say first how honoured I am to be asked again to lecture in this University in which you have made me so very much at home. The thought-provoking subject "Judicial Reasoning at an International Court" was not my own but was given me by Professor Ress. It is a splendid subject, but I speak upon it with a great deal of trepidation in the presence of so many judges of longer and greater experience than myself and whose excellent example I have in some degree endeavoured to follow. I am afraid I do not have a structured lecture on the doctrine involved in this kind of judicial reasoning. I merely have some thoughts that occur to the mind of one who has for some time endeavoured to be a reasonably useful judge of an international court.

I think, first one must put the subject in the context of an *international* court, for the title "Judicial Reasoning at an International Court" rather suggests that this is somewhat different from judicial reasoning in other courts, and in particular in municipal courts. That may to some extent be true. The cases before international courts are different; different not least in their dimensions. At least that is true of the sort of cases that come before the International Court of Justice. For in many of those cases, there is a degree of complexity greater in degree, almost indeed in kind, than is found in the kind of situation that normally comes before the domestic court. Take for example the case pending at present before a Chamber of the International Court between El Salvador and Honduras (Nicaragua intervening) which involves six separate sections of land-frontier, and also the legal status of the Gulf of Fonseca, as also of islands in the Gulf and maritime areas outside the Gulf. Now, quite apart from the many questions involved, as soon as one begins to think of the question of boundaries and sovereignty in that part of the world, immediately one is involved also with the principle of *uti possidetis juris*, which in this El Salvador/Honduras case takes one straight back to 1821, which was the date of the independance of these countries and thus a primary critical date. And since this legal principle refers to the position in 1821, it also takes one further back to inquire into Spanish colonial times in earlier centuries. So one has to investigate a very large tranche of diplomatic history of considerable complication; because it is not only a question of establishing facts but also a question of interpreting a large number of documents of some antiquity.

Given a case or cases of that sort certain things follow concerning the process of judicial reasoning involved in attempting a judicial decision. Thus, the idea that there might be a simple answer in terms of what may be called doing justice between the parties has to be abandoned. We have in England a famous and great judge called Lord Denning, you may have heard of. He has throughout his career been very fond of saying that his purpose as a judge was to do justice and if need be, he would not hesitate to change the law if this was

necessary in order to do justice between the parties. Now, if you are faced with the kind of case that comes before the International Court of Justice that simple approach of doing justice is no good. There is no simple answer. There is a lot to be said in terms of sheer merit on *both* sides of the vast majority of international cases, and one must therefore find another more technical, sophisticated and even "artificial" (in a good sense), way of deciding. It is no good telling yourself that "I will see that right is done in this case". It is, at least in my experience, *never* so simple. Were it otherwise, the case would hardly be before the International Court of Justice at all; because, contrary to popular belief, the cases brought to the Court or likely to be brought to the Court are cases of great importance to the countries concerned; and indeed a very large proportion directly involve territorial sovereignty, probably the most sensitive of all subjects of international relations. Moreover, it is easy to understand that on matters of this kind, a government may be able to accept an unfavourable decision that is essentially a technical, legal one, whereas it simply could not in terms of practical politics accept a decision ostensibly based upon a simple notion of right and wrong.

It is perhaps worth asking what this process of judicial reasoning is for? Why give reasons at all? Why do courts have to go through this exercise? Tribunals indeed do not always give reasons. Sometimes, they have been appointed simply to decide without giving reasons. But courts properly so-called always have to give their reasons. And many special agreements submitting cases require the court to give reasons. The Statute of the International Court of Justice, in Article 56, requires a judgment of the Court to "state the reasons on which it is based". Why? There are of course several possible answers some of which we have noted above. But a principal reason has to do with authority. The layman's constant question about courts, especially international courts, is always, how are the decisions enforced? I think the lawyer's question, the practitioner's constant question, is a prior question. What is the source of our authority? And the only authority a court has is to apply the law to a case submitted to it and to come to a decision accordingly. It is, therefore, not only that in international cases the thing is too complicated to have a simple answer purporting to be doing justice. That is in any event not what governments come to the Court to get. They want justice according to the law for various very important, including political, reasons. So the courts' business is to do justice according to law by the interpretation and the application of the relevant law to the facts of the case. To use the words of another great English judge, Sir Edward Coke (1552-1634), what is required is not "every unlearned man's reason but that technically trained sense of legal right". This is the main reason why courts have to give their reasons because their only authority is derived from the fact that they have been established for the purpose of doing precisely that. And of course, the doing of justice according to law does reflect also the general interest

not only of the parties but the general interest in the maintenance of law and order within a society.

How should a court set about performing this task? Again, I think we have to begin with a distinction between decisions by courts applying the law and decisions of other kinds of tribunal applying different *criteria* for their decision. And here I cannot do better than to cite another English lawyer, a contemporary one, Sir William Wade, who is our authority on administrative law and I want just to quote a passage where he distinguishes between decision according to law and an administrative decision which seems to me to go to the heart of the matter and expresses what I want to say at this point more clearly than I could. This is what he says about it:

> "A judicial decision is made according to law. An administrative decision is made according to administrative policy. A judge attempts to find what is the correct solution according to legal rules and principles. An administrator attempts to find what is the most expedient and desirable solution in the public interest. It is true, of course, that many decisions of the courts can be said to be made on grounds of legal policy and that the courts sometimes have to choose between alternative solutions with little else than the public interest to guide them. There will always be grey areas. Nevertheless, the mental exercises of judge and administrator are fundamentally different. The judge's approach is objective, guided by his idea of the law. The administrator's approach is empirical, guided merely by expediency."

I think that distinction is fundamental to the understanding of what a court of law is supposed to set about to do.

Let me now quote another lawyer, Professor Bowett, an international lawyer, from a passage which I found in his review of the book on international relations in which the author apparently expressed disappointment with the role that international law had played in international relations and complained that there is very little in the way of legal machinery for "peaceful change in the law". On this basis the author criticized both international law and the role it played in international relations. This is Professor Bowett's observation on that criticism. He says this book reveals some misunderstanding of the role of law. The lack of provision for "peaceful change" is not a defect of the legal system, but of the political system. "The prime movers in "peaceful change" ought to be the political organs, namely the General Assembly and the Security Council, not the International Court. And it is axiomatic that in the role of dispute threatening world peace the solution has to be political rather than legal." Now, this raises some difficult questions because every big political question has elements of legal decision involved and it very often can be helpful,

perhaps sometimes even more than helpful, to attempt to isolate and settle those legal questions as a foundation for a political settlement. But, I think the distinction needs to be made. Bowett goes on to illustrate the point from our own troubles in the United Kingdom, he says that to take a parallel, "no one expects the solution of the problems in Northern Ireland to be provided by the law and the courts. Why should one expect the situation to be different in relation to world peace?" Well, that is as it were my introduction of the kind of task, the context of the task, the nature of the task an international judge is faced with. How does one set about it?

First I want to draw your attention to an aspect of the rules of pleading before an international court, and indeed before any court; rules and traditions of which flow from the very nature of the process of judicial decision as I have tried to explain it. The particular phenomenon that I want to draw to your attention is, I think, constantly underrated in academic commentaries upon the judicial function. That is the requirement - to take the International Court of Justice as our example - that the parties shall at each stage or phase of the pleading written and oral, submit their "submissions" to the Court. And the submissions mean of course, reducing the whole thing to a series of issues which are to be a difference about fact and law, difference between the parties about the proper answer. And in a form which can be expressed in a list. These are the issues which we want the court to decide. And then, of course, the Court and the parties themselves re-examine their submissions in the light of the submission of the other party and perhaps revise them somewhat. Perhaps even revise them radically. To take one example, a dramatic example in a way that some of my friends here will remember: the case about the continental shelf boundaries of Tunisia and Libya. The first Memorials, the written pleadings, were as is normal where parties submit their case together under a special agreement, exchanged between the parties at the same time. There it appeared that the Memorial of Libya was much devoted to a long argument that the principle of equidistance had no place in this particular situation, and that it would be quite wrong to apply it. But the parallel Memorial of Tunisia, however, for various reasons we need not go into, argued exactly the same, that the principle of equidistance would not give the right answer. So that here was an important area where there was nothing for the Court to decide. The Parties, to their surprise, were agreed. At the next stage, of course, the arguments submitted became quite different, and revealed disagreements that the Court must decide. But it is interesting to notice that though this parallelism between the two arguments when reduced to submissions provided nothing for the court to decide, they would of course have provided a vast amount of material for anybody doing a doctoral thesis on the relations of Libya and Tunisia. And no doubt a diplomatic historian investigating the relationships between them in relation to this particular matter would have found an extremely interesting theme. But

preparing a case for adjudication is different in kind from that. It is a process of reduction and abstraction.

The effect of this process of drafting submissions involves a refinement and a reduction of the dispute by abstraction of parts of it and in particular the abstraction of some essentially political rather than legal arguments which may well hitherto have been considered important. It will even mean the modification or abandonment of legal arguments, hitherto serviceable, but which might not survive confrontary argument in open court. It is this reduction, or refinement, of a dispute to a series of technical issues that leads to the reasoning of the court in a process, the product of training and experience, which is in a sense - and I use the word not in a pejorative sense - artificial, and intellectual.

It is this kind of decision that governments resort to the Court for; a decision based upon an appreciation of it in the light of the applicable law. The very notion of the application of law makes its own sanction. Even if the result be disappointing for a party, it may be more acceptable than a political decision. Furthermore, it also means that when the forensic argument is over and the dispute is handed over to the Court those involved on either side free themselves to an important extent from direct responsibility for the result, whatever it might be. This is not a solution that they control to the very last moment as they do in a negotiation and therefore are directly blamable at home for it.

A variation of this theme was found in the dispute between Canada and the United States over the Gulf of Maine. The Parties found a solution in a detailed set of draft treaties by strenuous negotiations over ten years. But it then appeared that the Senate of the United States were unlikely to ratify without introducing unacceptable amendments; and there also emerged some political opposition in Canada to what the successful negotiations had produced. Whereupon both Governments said, in effect, if you won't have our solution we will go to the Court and you will have to accept whatever they say. And that is precisely what happened.

I must now make it clear that I am not suggesting at all that by careful study of the law you can get one right answer. That is not the position at all. In any case likely to come before the International Court of Justice, there are choices to be made even in terms of the meaning of the applicable law. If the law was clear the case would never have been brought to the Court. The legal choices to be made comprise also political consequences of the choice. A good judge will be at least aware of those political consequences and implications. Nevertheless his choices must be within the framework of legal possibilities, and the reasoning must be such as to withstand intellectual requirements for legal reasoning.

Yet a purely legal reasoning which fails to take adequate account of the practical and political consequences of a legal type of decision may be erroneous. This is well illustrated by a famous and classical decision of the Permanent Court of International Justice, the case of the *Lotus* (in 1927) where, you remember, there had been a collision on the high seas between a Turkish ship and a French vessel and Turkish lives were lost. The damaged French vessel had to put into the nearest port of Constantinople, whereby its master, a French national, was charged with manslaughter. The Turkish claim to jurisdiction was disputed by France which asserted that only France had jurisdiction over a vessel flying the French flag. The Court decided in favour of Turkey with a formula, the so-called effects-doctrine. The idea was that there was jurisdiction in Turkey because what had been done or omitted to be done on the French vessel had an effect on the Turkish vessel which for this purpose could be regarded as Turkish territory or at least a place of Turkish jurisdiction; and therefore, there was a kind of territorial jurisdiction in Turkey. It was an application of the simple rule that, for example, one who shoots from one territory into another may be subject to the jurisdiction of the "objective" territory. This is so sensible a conclusion that it bears its own justification. But the Hague Court in the *Lotus* case greatly extended the idea by applying to a case not of an intended extra-territorial effect but of an unintended one.

In purely intellectual terms this was perhaps a satisfying solution of the problem; but in practical terms it proved unacceptable in its results. It meant that any sailor might, as a result of bad weather or just ill luck, find himself liable to the criminal law of a country that he had never contemplated in connection with his intended voyage. The result of the *Lotus* decision was that global maritime interests both of shipowners and of sailors were so opposed to this decision in respect of collisions at sea that it was reversed in the Brussels Convention. This reversal of the *Lotus* decision in respect to collisions on the high seas did not, however, mean the end of this expanded "effects" doctrine. As you will doubtless recollect it was to have important results concerning the jurisdiction of courts in the matter of anti-trust and competition law, especially in the United States. Such is the power of an intriguing intellectual idea; though here again it seems too often to have been resorted to as "lawyers' law", and without overmuch attention to the results in economics and international trade. It does, I think, illustrate my thesis that the judge should be aware of the practical and political implications of the decision even whilst he is being careful to keep within the parameters of a decision according to law, which kind of decision is his only remit.

A very important aspect of this process of applying the law must be the question of the use of precedents; and there I feel some difficulty about the way precedents are often used in international law. I feel the doctrine has not been fully worked out. I come from a country

where we have a system of binding precedent. But if you do have a system of binding precedents you have to think very hard about what is the precedent. Accordingly we try to establish the strict *ratio decidendi* of a case; that is the essential reasons for the decision on these facts, discarding *obiter dicta*, namely the non-essential observations of the court, which may be wise and quotable but not binding. In the international law field there is no such discipline as yet. There is a tendency rather to look at a prior judgment almost as it were a more authoritative academic writing which is to be consulted for nice quotations. This is all very well provided an isolated passage of a Judgment is not regarded as being of itself binding as a precedent; as if it were a passage from the Holy Writ. Rather should the entire decision, including its factual situation, be consulted when trying to decide law how far it is proper or necessary to follow its precedent.

I have tried to indicate some of the problems of judicial reasoning on the international plane, and ways in which I feel they should be tackled. Two things more need to be said. First, there is no doubt that public international law is now a case-law system, and the rich store of case law now available is a most important and valuable source of law and of the development of law. Second, the process of judicial reasoning which underlies this jurisprudence, in Brierly's words

> "does not mean the unassisted reasoning powers of any in telligent man, but a 'judicial' reason, which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid, for example, the consideration of precedents, the finding of analogies, the disengagement from accidental circumstances of the principles underlying rules of law already established." (*Law of Nations,* 5th ed., p. 67)

I hope that, in this consideration of some of the points a judge needs to bear in mind during the Court's deliberations and decision, I have been able to give some impression of the delicacy of touch that is called for. The good judge is surely conscious of walking a tight-rope. He must decide by an artificial (in the good sense of creating an artifact) and intellectual process of applying principles and rules of law, for otherwise he forfeits his authority and his persuasiveness. But he must also, in making his legal choices, always be aware so far as maybe of the political and practical consequences that may result from his decision.

There is one more point to mention before I end this lecture. We have been talking all the time about disputes and the settlement of disputes by one particular method. Do let us remember, however, that the law is not concerned only with disputes. The law is concerned with the daily routine of running a civilized kind of society. In one sense a dispute is

where the law has to some extent broken down and there is something that has to be decided. Where the law is really working ideally, it is simply applied as a routine matter which can hardly be questioned. This happens for example, I feel sure, in many matters which cross the desks of foreign office legal advisers most of the time. It is this law - the essential stuff of routine civilized society - that unfortunately tends to escape the notice of people generally, and even of professional lawyers. I fear that the intellectual training of lawyers is so concerned with disputes that we sometimes forget that disputes are only a part of the entire scene of working international law. So I want to put all I have said this morning in this context. The law is not just about disputes but about the proper decent ordering of a civilized society.