

General Assembly
Fiftieth Session
Plenary, 12 October 1995

THE INTERNATIONAL COURT OF JUSTICE: WHAT WILL ITS FUTURE BE?

Statement by H.E. Judge Mohammed Bedjaoui,
President of the International Court of Justice

Mr. President, Mr. Secretary-General, Your Excellencies, Ladies and Gentlemen,

Portugal, which is so well endowed with intelligent citizens, was not - I am sure - long in doubt as to the choice of a politician to be put forward for election by the nations of the world to the office of President of the General Assembly. Looking behind the image of the Prime Minister, or Minister, or the Head of a democratic party - which posts you have occupied or still occupy - it chose in the first place, I am sure, the academic, the intellectual, the man of culture that you likewise personify.

In other words, the international community is honoured to be able to welcome you, as you take the chair of the highest Assembly of the world, in your capacity of a man of political action - of course - but likewise as a thinker and a humanist who has, throughout his life, made generous choices in the service of

justice and progress. I would also say how delighted the International Court of Justice was to learn that an eminent professor of public law had been chosen to preside over this Assembly.

Moreover, how can the Court have failed to rejoice in your election when - in an unprecedented gesture - you made a point, from your very first statement as President on 19 September last, of ranging the work of the United Nations under the banner of the primacy of international law and paying tribute to the Court as one of the principal organs of the United Nations, dedicated to the promotion of respect for that international law that you do not cease from teaching and inculcating to the rising generations?

How can the Court fail to express its gratitude, through me as intermediary, when you have launched an exalted appeal to all States to accept the jurisdiction of our Court?

You are presiding over the Assembly of peoples of the United Nations at an exceptional period in the life of the Organization, as it celebrates its admirable Fiftieth Anniversary. I am sure that you will conduct this celebration with all the wisdom and the mastery that we expect of you. My warmest good wishes go with you for the complete success of this exalted task which you are so well fitted to undertake.

*

* * *

Giving the floor to the President of the International Court of Justice when the Court's Report is being considered has become a tradition which the General Assembly has accepted with a good grace for some years now. This gesture seems to me to be highly symbolic. In this year in which we are celebrating the Fiftieth Anniversary of the United Nations, I would like to lay particular stress upon the extremely privileged nature of this regular contact, an exemplary expression of the close collaboration which should unite the principal organs of the United Nations as they strive to attain the purposes of the Organization, but also providing a striking testimony to the interest that the General Assembly - and through it the whole international community - takes in the activities of the Court. I am accordingly delighted to be able to thank the General Assembly for having once again been so good as to devote a few minutes of its precious time to listening to the President of the International Court of Justice.

The celebration of the Fiftieth Anniversary of the United Nations - and the Fiftieth Anniversary of the ICJ in a few months time - provides me with an opportunity to share with the Assembly, and with each of the States here represented at the

highest level, some thoughts on the current role and the future of the principal judicial organ that I have the honour to represent.

*

*

*

When confronted by the large number of conflicts in the world of today which fall outside the jurisdiction of the International Court of Justice, the general public is frequently led to wonder *what exactly an international court is supposed to do.*

To wonder about the role and future of permanent international justice is to try to find a proper answer to that kind of question. It is to wonder how the "scales of justice" can operate and extend their influence when not backed up by a powerful "sword" - if I may transpose into the international sphere the familiar thought-patterns of the municipal order which has accustomed us to a trilogy - dear to Montesquieu - of legislative, executive and judicial powers. One is once more led to wonder whether, given the requirements of the municipal "model", one can really conceive, for the international order, of a judicial power in an international community whose real existence is a matter of some doubt in certain quarters and in which there is, moreover, neither an authentic legislature nor any real power of enforcement.

One could carry on asking questions of this kind until one reached the point of paradox, such are the difficulties involved in resolving the mystery surrounding the future of international justice. Indeed the International Court of Justice, as principal judicial organ of the United Nations, is no more than one part of a whole, a mere cog - albeit an important cog - in a complex mechanism conceived in accordance with a set of precise specifications. One might properly be led to think that the future of that organ naturally depends upon the future of the United Nations. This is an obviously sensible line of argument but nonetheless implies a simplification which has to be moderated in the light of the point I would now like to make. It would seem that the current situation of the International Court of Justice is characterized by a certain singularity - I would even say a certain paradox. This relates to the good fortune currently attending the Court, at the very same time as the mother Organization as a whole is coming up against considerable difficulties on a variety of fronts.

The world legislative power exists only in outline. It is represented by your exalted Assembly, fortified by its composition representing all the peoples of the United Nations, but which can only legislate by means of resolutions which are not, as a general rule, legally binding. As for the Security Council, which is constitutionally freed from any such limitation, it may doubtless

be compared to a quasi-world executive power but, as it has scarcely recovered from the paralysis to which it was long condemned by the cold war, it is currently experiencing new difficulties in maintaining and consolidating international peace and security. However, it is in this context of the laborious building of the proclaimed new world order that States, and even national public opinions, are turning to the Court - a singular but encouraging trend.

Now that we are engaged in a stock-taking exercise, the Court's stock actually seems to be in better shape than some others. It would seem that the judicial function may - on an international level as well - lay claim to a necessary measure of autonomy and independence. When the founding fathers of the 1945 Charter forged close structural links between the Court and the United Nations, they obviously intended that the Court should be fully integrated into the new system for the peaceful settlement of disputes that had just been devised, but did not in any way wish to deprive the Court of the autonomy indispensable to the sound administration of justice. In that regard, they refrained from making any fundamental changes to the situation brought into being by their predecessors at the League of Nations with respect to the former Permanent Court.

It would however be unforgivably imprudent - if not totally disproportionate - to claim to be able to predict a separate future for the United Nations and for the Court, as their mutual and indissociable fate remains sealed by the Charter, that "Magna Carta" of mankind.

For the time being, and more cautiously, my aim is to look briefly at the Court's current good fortune and to explore the reasons for it. I shall then consider the improvements that could well be made to a judicial institution that will soon be fifty years old, to enable it to meet the new and numerous challenges with which it is confronted.

*

*

*

The International Court of Justice has been thriving for the past few years. Never has it been so much in demand, never has it been so active. There seems to be every indication that that tendency will only grow stronger in the years to come.

Indeed, certain profound changes that have come about in the international community and, more particularly, the end of a world divided into two camps as a result of the cold war, are still too recent to have been able to have their full positive effect upon

international judicial settlement. This new period was ushered in by a momentous event, the collapse of the Berlin Wall - on one memorable day in November 1989. However it does seem that on all sides, other walls, erected in the minds of the world's leaders and which previously constituted so many additional impediments to the work of the Court, are now beginning to fall - to such an extent that the States parties to the ten contentious cases now on the Court's General List, are located on every continent.

The International Court of Justice is currently displaying an unprecedented vitality. In line with the unusual number of cases of which it is seised, the Court has seen its jurisdiction steadily expand, in terms of both the number of declarations made and the compromissory clauses included in treaties - or in terms of the withdrawal of reservations to such clauses. Moreover, the Court's current vitality is not merely to be measured by the yardstick of the confidence currently placed in it by States, but must also be assessed in accordance with the way in which States comply with its decisions.

But what is the source of the Court's new vitality?

References have been made in turn, and with a greater or lesser degree of relevance, to the decisions reached by the Court in certain cases, the end of communism, the greater trust placed in

the Court by Third World countries, and a more generalized psychological rallying to the applicable international law.

I must stress that the Court's success has not derived from the "*transactional justice*" or "*compromise justice*" which has sometimes been ascribed to it. It is of course true to say that, in certain cases, the seisin of the Court has been no more than a means of pressure exercised by one party upon another in a bid to lead it to a political settlement, seen as preferable to a judicial decision. Under such circumstances, the Court, fully aware of its responsibilities as an integral part of the system of peaceful settlement of international disputes established under the Charter, has displayed judicial realism and has considered itself obligated to assist in bringing the parties closer together, while not at any time departing from its primordial task of applying the law.

However that in no way signifies that the Court hands down "judgments of Solomon". Far from it. It goes without saying that it has never attempted to do any favours to anybody, nor has it ever compromised the integrity of its judicial function or the principles governing its mission. Its strength - and doubtless its success - will have been that it knows how to do justice in all legal rectitude, in all intellectual honesty and in a spirit of total independence without, for all that, shutting itself away in an ivory tower or failing to take account of the facts of life.

The vitality of the Court can be explained. The International Court of Justice ultimately has the strengths of its weaknesses or, if you prefer, the virtue of its principal vice. The international judicial function still bears the image of the international society whose disputes it is called upon to settle: *it operates on a consensual basis*. The success of the Court may well be due precisely to the fact that its office seems ultimately to be fairly well adapted to the concerns and the system of values predominating in the States to which it is open. Has not *consensualism* become, more than ever, a value in which to take refuge in a society of States that is still resistant to the advances of supranationalism?

Of course States may undertake in advance to accept the compulsory jurisdiction of the Court, thus giving it what may be described as a free hand, just as they give a free hand to the Security Council when they accede to the Charter. However, such a comparison immediately requires one to relativize, in so far as the abandonment of sovereignty conceded in each case is not done under identical conditions, or with identical consequences. There can be said to be a far greater exercise of free will in a State's decision to accept the jurisdiction of the Court than in a decision to submit to the decisions of the Security Council.

Another partial reason for the present good fortune of the Court might be found in a wider context, namely, that of the

general evolution in international relations. It would appear to be a truth of experience that legal settlement is more widely supported, and even more sought after when the international atmosphere is less tense. The counterpart proof is provided by the fact that it was during the periods of extreme international tension in the cold war that the Court was bereft of cases and could not perform its function. Moreover, is it not true to say that the "tension", without any clearly defined object, generally prevented the emergence of specific legal disputes, which are the only ones appropriate for submission to the Court?

However, this argument must be treated with caution, for it is no secret that the disappearance of the bipolar international order has not resulted in the creation of a peaceful world, since the world of freedom which has succeeded it is also more fragmented and uncertain.

Be that as it may, if it is to guarantee its future, the Court needs new means to enable it to meet the new challenges with which it will be confronted in the coming years.

*

*

*

Before briefly outlining some of these means, let me make two introductory observations, which seem to me as self-evident as they are fundamental and also to govern the future direction of the Court.

The first of these is that, although permanent international jurisdiction made forward strides with the Charter, this progress was not as decisive in this field as it was, for example, in the political one. With the major changes which occurred on the world stage after the Second World War and the outlawing of the use of force, the overall profile of the political organs of the United Nations, as well as the links and relations between these organs, have been fundamentally reshaped and streamlined. On the other hand, the judicial organ, the ICJ, has, barring a few details, remained virtually a replica or a continuation of the Permanent Court of International Justice. From the League of Nations to the United Nations, the political organs would appear to have "matured" more than the judicial organ, which, 73 years after its birth, remains essentially the same.

My second introductory observation concerns the new functions and powers which have been granted to the United Nations and to many other international organizations since 1945. It cannot be claimed today, in 1995, that the World Organization plays the same role, is vested with the same mission and has the same legal status

as its predecessor in the 1920s. Still more, at a time when the international organizations have more legal means at their disposal - which, admittedly, they do not always use - in order to become *full players* in international relations, the State, traditionally the exclusive subject of these international relations, is undergoing internal and external changes which affect this traditional role of solo player.

It is clear that these new situations create new needs and that the future of the International Court of Justice will be measured by its ability to win a status which is not simply a replica of the status of the former Permanent Court of International Justice. There can be no doubt that adjustments are necessary.

*

* *

These adjustments must first of all be made to the contentious function of the Court.

The Court's jurisdiction *ratione personae* has remained frozen as it were since 1922. The Court is open only to States. Today, when inter-governmental organizations have grown up, it is important to give them access to contentious procedure.

States, subjects traditionally described as "primary" or "necessary" components of the international legal order, are, in reality, no longer the only players in international relations, or the only interlocutors where peacekeeping is concerned. International life shows us every single day that, at this level, greater account must be taken of other entities, notably, the international organizations. Access to the Court's contentious procedure, currently reserved for States alone, may therefore now seem too narrow. Among the remedies found for these shortcomings has been the incorporation, into certain treaties, of *ad hoc* clauses laying down that, in the event of a dispute between the international organization and the States specified therein, that organization will request the Court for an advisory opinion, which the two parties agree will have a "decisive" or "binding" effect. The technique referred to as that of "*compulsory* advisory opinions" - whose very name underlines its singularity - is, however, no more than a stopgap, which cannot be a substitute for full access by organizations with international legal personality to the contentious procedure of the Court.

Where the Court's jurisdiction *rationae materiae* in the context of contentious procedure is concerned, it would not seem, on the other hand, that there are any measures to be taken with a view to increasing accession to the optional clause of compulsory jurisdiction. To date, fifty-nine (59) States have acceded to the

clause; this number, compared with the total number of Member States of the Organization (185 States) represents a ratio which has not appreciably altered since 1945.

I fear that this ratio cannot be significantly improved, failing a spectacular *momentum* in international relations. When President Mikhail Gorbachev called upon the five permanent Members States of the Security Council to set an example by submitting their disputes to the International Court, this aroused great interest which, regrettably, quickly waned. The Five held a number of meetings at legal adviser level with a view to drawing up a list of subjects which the Court would be likely to entertain in the event of a dispute. But no agreement was reached.

It is the natural and inevitable consequence of the conception of international relations which nowadays always prevails. States remain attached to the political and diplomatic liberty available to them for settling their disputes in line with their own interests and prevailing circumstances. All they want is to see all existing procedures relating to the peaceful settlement of disputes open. And this, after all, is what counts.

Moreover, since every case has its political aspects and its legal aspects, it is difficult *a priori* to draw a distinction, in general and definitive terms, between cases which it would be

desirable to submit to the Court and those which it would be appropriate to settle by other means. It is the States which must choose. This is why it seems so rash to try and predict which categories of cases could be submitted to the Court in future.

The desire for the International Court of Justice to be better known by all so that it can be better utilized and play a greater role in the day-to-day life of chancelleries and international organizations has often been expressed. With a view to this, some of them have suggested that it should be seised of small cases, whose rapid settlement would enable it to become part of the mechanics of international relations in the everyday life of peoples. This is an interesting idea but in fact an unrealistic one; States and international organizations cannot contemplate mobilizing the heavy and complex procedural apparatus of the International Court of Justice for small cases, nor exposing themselves to expenses which would seem substantial for such modest issues.

Other jurists have contended, on the contrary, that it would rather tend to be cases of medium importance which would, by nature, be suitable for submission to the Court, such as, for example, the existence, the scope or the limits of the rights of jurisdiction of States, in particular where land frontiers or maritime delimitations are concerned.

In reality these two approaches, however ingenious they may be, are not part of the political will of States, which remains the only objective determining factor of the Court's activity. Today, the Court is not seised of minor issues, nor is it seised only of disputes of medium importance. On the contrary, it is seised of a series of vital issues ranging from the application of the Convention on the Prevention and Punishment of the Crime of Genocide to the lawfulness of the use of nuclear weapons, a question with which this Assembly is very familiar.

*

*

*

As regards the *advisory jurisdiction* of the Court, it seems that thought should also be given to widening its field of application *ratione personae*. The Secretariat, represented by the Secretary-General, is to date the only principal organ of the United Nations not authorized to request an advisory opinion of the Court on any legal question related to its activity in the service of the Organization.

A widening of the group of international organizations authorized to request opinions might also usefully be considered, admitting certain organizations which do not fall within the present definition of the Charter, but whose access to the advisory

procedure would be desirable for various reasons. Authorizing access to this procedure might also be extended to include inter-governmental organizations with a more or less universal status, such as the World Trade Organization or the Organization for the Prohibition of Chemical Weapons, and regional inter-governmental organizations.

Lastly, the question of the participation of non-governmental organizations in the Court's advisory procedure should be given serious study. N.G.O.s are today important bodies representing world public opinion. Many of them enjoy permanent *consultative status* with principal organs of the United Nations. They may now have access to the Security Council or the General Assembly.

*

*

*

In conclusion, the future of the International Court of Justice depends on many factors which, to a broad extent, elude the control of the Court itself. These include:

1. the emergence of certain categories of so-called internal conflict, but with clear international repercussions, which international law does not yet cover except in a very fragmentary fashion;

2. internal and external changes in States, which affect their traditional role as key players in international relations;
3. the emergence of international inter-governmental organizations on the world stage, including with respect to judicial settlement;
4. the growing place of non-governmental organizations voicing the wishes of an international public opinion more concerned with and motivated by world affairs; and
5. *last but not least*, recognition of the essential role the Court must play in sanctioning a form of international law governing a world and a society of law.

Thank you.