

Crisis as Catalyst

The World Court Between Principle and Power

Arthur Eyffinger

As we gather here tonight, we have reason both for celebration and for concern. This year marks a remarkable milestone. Eighty years of the ICJ, together with the twenty productive years of its predecessor, have brought us to the centenary of the international judiciary. Yet this anniversary is overshadowed by a striking paradox. While the Court and its Registry are straining under an ever-growing caseload, the international legal order is crumbling under our very eyes and the international judiciary is increasingly coming under attack. Once again, the upholding of the Rule of Law within the Realm of Power appears a distant aspiration. We seem to pursue a forever shifting target.

The same ambivalence characterizes the anniversary that has brought us together today. Exactly thirty years ago, the World Court rendered an Advisory Opinion that had first been proposed in 1950 but had then foundered on political deadlock. In 1996, the Assembly's Request in itself was identified as a token of a changing international order. It was hailed as reflecting the new spirit of dialogue that had broken the Cold War Deadlock. Confidently, The Hague embraced its emerging role as the Judicial Capital of the World. Three decades later, much of that optimism has evaporated. New storm clouds have gathered and, with bitter irony, the spectre of nuclear weapons has once again moved to the forefront of international concern.

The current overhaul of former parameters, values and norms in international relations are by all means alarming. Yet, in the wider perspective, it is just another episode in the recurrent fits of crisis that typify the uneasy coexistence of the Rule of Law and the Realm of Power. Indeed, it reminds us of the virtual inexorability of these relations. In our unstable international order, the two conflicting outlooks and aspirations are like communicating vessels - like the two pans of a balance: movement in one inevitably affects the other. The two are, in short, condemned to each other.

This should not surprise is. One should never forget that the rise of our discipline came in response to the most incisive identity-crisis the Western world of politics had endured. Grotius' aim was to define incontestable norms of universal applicability to substitute the failing pretensions of Pope and Emperor and the crumbling realm of the Two Swords. In our times, where narrow nationalism and naked, brazen self-interest wreak havoc on the global fabric and scoff at moral parameters, it is the sacred mission of our discipline and institutions to insist on the indispensable role of the law.

History emphatically confirms the tragic inevitability of this rivalry between Right and Might. Paradoxically, it also offers us grounds for cautious optimism, offers us a glimmer of hope that may guide us these days. Time and again, advances in the rule of law have precisely

been instigated by moments of crisis in the realm of power. In no domain of law is this phenomenon more palpable than in the rise of humanitarian concepts in Western society. Moral outrage at the massacres in the New World gave rise to the incisive debate at Valladolid on the fundamental rights of the native Indians. The Thirty Years' War inspired Grotius' pioneering treatise. The carnage of Balaclava, Solferino and Gettysburg produced the Geneva Conventions, the Lieber Code and the St Petersburg Declaration. The same dynamic has underlain the constitution of the Nuremberg Tribunal, ICTY, OPCW and ICC.

Does the above justify hope for our discipline and the international judiciary? The full implications of the present upheaval in international relations are as yet difficult to assess. Yet precisely gatherings such as ours invite, indeed compel us to pause and take stock - not only of the challenges ahead, but also of the extraordinary legacy entrusted to us. They remind us of the dedication of generations of scholars, practitioners and statesmen who toiled to bring the World Court into existence.

Proposals for a League of Nations had circulated for almost six centuries before Versailles. From the outset, the idea of a permanent international tribunal formed an integral part of that vision. It was the technological revolution of the nineteenth century and the unprecedented destructiveness of modern warfare that galvanized the discipline into collective action. In 1873, Ghent and Brussels witnessed the birth of two legal reform bodies whose influence on the progressive codification of the law has continued unabated to the present day. These were the *Institut de droit international*, the epitome of the continental civil law tradition, and the *International Law Association*, which harboured the representatives of the Anglo-Saxon world and the common law tradition.

But then, why two competing research bodies? Despite shared aspirations, civil-law and common-law jurists proved unable to agree on policies. Tellingly, the fault line ran precisely through their attitude towards power politics. Should international law confront political reality or rather accommodate it? Should it seek to exclude power from the legal order, or precisely incorporate it? It was a watershed. It told lawyers the unique character of the discipline - and it quintessential challenge. It also revealed to them that a World Court could never replicate the status and role of a supreme court within the domestic legal system.

In our domain of research, politics and the law are inextricably linked. Their interaction has consistently shaped the course of history. The two Hague Peace Conferences emphatically proved the point. In 1899, determined jurists in a pivotal struggle with equally dogged diplomats and military men, sought to transform arbitration from a voluntary into a compulsory procedure, and to establish a permanent court capable of streamlining procedure and enhancing the consistency of awards. They were checked mid-way by political recalcitrance.

Undeterred, they returned in 1907, resolute to replace or to complement the PCA with a genuine court of justice. The very principles of law were turned against them. During the discourse over the composition of the Bench, the smaller Powers insisted that the sovereign equality of States before the law must be reflected in judicial representation. Deaf to political realities, they preferred even the odds of war to surrendering what they regarded as their

rightful place on the Bench. That setback, too, proved a blessing in disguise. The Conference failed, yet its abortive skirmishes proved an indispensable wake-up call. They exposed the conceptual dilemmas lawyers had to overcome before genuine progress could be achieved.

Sheer appallment at the First World War generated an abundance of ambitious schemes for both a League and a World Court. At Versailles, most of these aspirations were diluted - or forthwith dismissed - in the clash between the competing visions of Wilson and Clemenceau. Wilson himself attached little importance to the Court. He accepted it on the understanding that the Court would function as the legal arm of his political world organization. Henceforth, it was the Council that dictated policies – with dramatic consequences. Alongside the contentious jurisdiction, it catapulted an institutional innovation on the Court that has shaped the role and record of international adjudication ever since. The Court was instructed to facilitate requests for advice from Council and Assembly on "any legal issue or question". From the first, critics discredited the formula as an essentially political device, designed to get the Court drawn into the tentacles of the World Organization.

Politics also dictated the last stage of the formative period of the World Court. In 1920, the drafting of its Statute was entrusted to an Advisory Committee composed of ten distinguished legal experts, albeit carefully selected to evenly represent the Great Powers and the smaller States. Invariably, politics lurked around every corner. Once again, civil-law and common-law representatives stood deeply divided on virtually every aspect of organization, jurisdiction and procedure. Ignoring repeated warnings, the Committee proceeded on the assumption that the compulsory jurisdiction of the Court was being generally accepted.

It was a fatal misconception with dramatic consequences. The Council swiftly rejected that premise, leaving the Statute with an institutional imbalance that has never entirely disappeared. In the First Assembly, courageous, if futile efforts were made to persuade the Council to reconsider its position. The compromise that eventually emerged was the Optional Clause: the device was hailed by some as an ingenious constitutional innovation, if dismissed by others as little short of capitulation to power politics.

By now, the drift and central message of this historical survey should be clear. International adjudication does not exist in a vacuum. The World Court forever faces two enduring challenges: to uphold the Rule of Law in an imperfect international order, and to preserve its own moral and judicial integrity. Neither objective can be pursued in isolation from political realities. The Court must uphold legal principle in a world of sovereign States governed by the logic of power. That tension was also at the heart of the Advisory Opinion whose thirtieth anniversary we commemorate today. To that extent, the Opinion was true to principle.

From the beginning, advisory proceedings have occupied an ambiguous position within the architecture of the international legal order and raised profound controversy. To the present day, scores of scholars and judges have doubted whether the function is at all compatible

with the nature of a proper court of law. American scepticism proved particularly persistent. The Advisory role of the Court was the principal reason why the US Senate throughout the Interbellum obstinately refused to ratify the Protocol of Signature of the Court.

In obliging Geneva, the Court, too, considered it prudent to proceed with caution. It entrusted advisory requests to a chamber of three judges, thereby preserving the full Court's freedom to decide, unconstrained by *res judicata*, should the same legal issue subsequently arise in contentious proceedings. It also reserved for itself the discretionary power to decline to answer a request. The Court actually exercised this power in 1924, when a State's refusal to accept the Court's jurisdiction and its absence from the proceedings led the Court to conclude that it could not make bricks without clay.

The Court's cautious approach was justified. The initial rationale of the advisory proceedings was to invite the Court to pronounce its views upon requests from the Council or Assembly which, in principle, were to touch on abstract or general questions of law, detached from the political arena and unrelated to specific disputes between States. For all this, the formula was soon overtaken by political realities. Before long, States discovered that advisory proceedings could serve as an indirect means of bringing contentious disputes before the Court, as a juridical sounding board, allowing them to test the legal waters without the procedural consequences of litigation.

The distinction between advisory and contentious jurisdiction became blurred when national judges were invited to these so-called "contentious" advisory proceedings before a full court. The Court drew the logical conclusion and in 1931 joined the series A and B of its publications into a combined series A/B. To make a long tale short, none of the forty-seven Opinions the World Court handled before 1996 concerned a genuinely abstract legal issue detached from an identifiable dispute or an immediate institutional need. One may reasonably suggest that the spirit of *détente* during the 1990s created the political space for such a development. In a sense, the formula of the advisory jurisdiction had come full circle.

The Opinion from 1996 has much to recommend itself, also in ways one would least expect. In the final analysis the Opinion, tellingly, never quite satisfied any of the judges. Six judges dissented, three delivered separate opinions and five appended declarations. Its operative paragraph, dramatically, only secured a majority through the President's casting vote. It brings to mind the sharp division that had marked the South West Africa judgment three decades earlier. That judgment, in the midst of the political turmoil of the Decolonisation Process, inflicted severe damage on the Court's authority. By contrast, the Nuclear Weapons Opinion owes much of its enduring significance precisely to the richness and diverse reasoning of the individual opinions, which come as a balm to the soul.

Some judges held that the Opinion failed to go far enough by declining to pronounce an unequivocal prohibition. Others, in turn, argued that it afforded insufficient weight to State practice and the inherent right of self-defence in extreme circumstances. There was broad agreement that the cardinal principles of international humanitarian law – distinction between the military and civilians, proportionality, and the avoidance of unnecessary suffering - formed the essential legal framework, and that the use of nuclear arms was hard

to comply with these norms. Beyond that point, however, agreement was wrecked on the primacy of legal principle and State practice respectively.

The above diversity of thought inevitably calls to mind the endless polemics regarding the propriety of the institute of (the publication of) dissenting opinions as such. The issue had divided the two Hague Peace Conferences, which reached opposite conclusions. Critics feared that published dissents would weaken the authority of the Court. Advocates argued that they enriched judicial reasoning and illuminated the inevitable tension between *lex lata* and *lex ferenda*. The controversy came to a head within the very first Bench of the Court. The dissents of Judges Anzilotti and Huber in its very first contentious case profoundly affected the internal cohesion of the Bench.

By the same token, they revealed the intellectual pluralism that would become one of the Court's defining characteristics. The Nuclear Weapons Opinion is a case in point. As an academic one can't help chuckling at Judge Higgins' brilliant demolition of the failing logic of the operative paragraph. As a concerned human being one cannot but admire Judge Weeramantry's lofty and passionate defence of humanitarian principle and morality. Yet, as citizens of the world, we must equally heed Judge Schwebel's sobering words of warning about the realities of State practice.

Judge Higgins' verdict recalled a vexed issue of long pedigree. The narrow majority of the Court concluded that, in the present state of international law and in the absence of a sufficiently established *opinio juris*, it was unable to determine conclusively whether the use of nuclear weapons would be lawful or unlawful in the extreme circumstance of self-defence for sheer survival. Judge Higgins forcefully observed that such a conclusion came perilously close to a judicial *non liquet* - and in effect, a denial of justice. Such an approach sat uneasily with the intentions of the drafters of the Statute in 1920 and seventy-five years of jurisprudence.

Drawing upon an extraordinary range of legal traditions, philosophical thought and religious teaching, Judge Weeramantry in a historical analysis of lasting moral value purposefully rejected any attempt to qualify the supreme dictates of the public conscience. Paramount, he argued, stood the enduring authority of the *Martens Clause*, the dignity of the human person, the preservation of life on earth, and the responsibility owed to future generations. It is difficult to imagine a more elevated vision of the judicial vocation.

At the other extreme of the spectrum stood Judge Schwebel. His reasoning goes to the very heart of the argument I wish to make this evening. To the American judge, the case epitomized the enduring tension between the normative aspirations of international law and the realities of State practice. Ironically, he agreed with much of Judge Weeramantry's legal analysis. Yet that viewpoint presented one side of the equation. Quite another question was whether international law could responsibly deprive States of what by overwhelming majority they regarded as the ultimate guarantee of survival in an imperfect world: the instrument of deterrence. However sincere the universal aspiration towards nuclear disarmament, disquieting State practice called for a more cautious and a qualified approach.

In all its moral grandeur and constitutional complexity, the Nuclear Weapons Opinion encapsulates the perennial dilemma of the World Court: how to reconcile competing legal and political realities without allowing principle to yield to expediency, or practice to eclipse justice. This brings me to a last issue of paramount interest, which may also serve us as a beacon of hope. Among the Dissenting judges, the Japanese Judge Oda took a position all of his own. Precisely because the Request raised a legal question of a general and abstract nature, he felt the Court should have exercised its discretionary power to decline giving an Opinion. The Request, he feared, would open the floodgates to academic issues which only diverted the Court from its primary judicial function of deciding contentious disputes between States. Judge Oda always considered the Court's advisory function merely 'incidental' and an accessory role.

From a distance of thirty years, I venture to disagree with the outstanding Japanese lawyer, with whom I, three decades ago, endlessly discussed his idol, Hugo Grotius. The current marginalization of global institutions, the erosion of universal norms, and the growing disregard for moral and ethical constraints present the Court with a unique opportunity. Indeed, when opportunity knocks, it all but compels the Court to bring the full weight of its authority to bear and to speak out forcefully on issues of paramount global importance.

The Advisory Opinion on Nuclear Weapons marked a historic turning point by inaugurating an expanded understanding of the advisory function. The second Advisory Opinion discussed at this Conference - the Climate Change Opinion – only confirms the opportunity offered. Faced with challenges for which the traditional political institutions offer no adequate response, States increasingly look to the Court for guidance, not merely as the judicial adviser to Council and Assembly, but as the institution best placed to articulate the legal principles capable of guiding all of humanity through questions of existential global concern.

The two Opinions of 1996 and 2025 share another remarkable feature. Neither originated with the Powers, or with the Security Council or the General Assembly. Both resulted from the initiative, perseverance, and sustained pressure of civil society. Here, too, history offers a striking parallel. On the eve of the First Hague Peace Conference, it was the unprecedented alliance of the *Inter-Parliamentary Union*, the *International Peace Bureau*, the *Institut de Droit International*, and the *International Law Association* that mobilized public opinion and inflicted the first serious breach in the entrenched conservatism of diplomacy and the military establishment. Through their advocacy, the first disputes reached the PCA despite the indifference - and at times the outright resistance - of the Great Powers.

Perhaps never before has civil society been so well organised, possessed such formidable technical expertise, or exercised such influence over the channels of public communication as it does today, at a moment of profound global anxiety. Throughout this study we have emphasised the almost inextricable relationship between Right and Might. Yet alongside these two classical pillars, a third may now make its influence count: organised civil society. The device of the advisory jurisdiction offers it a powerful instrument through which the World Court may be called upon to pronounce on the most urgent dilemmas confronting humankind. Through a series of carefully conceived and strategically coordinated requests,

civil society may encourage the Court to weave an increasingly coherent fabric of international law capable of responding to the formidable global challenges that lie ahead.

Returning, then, to 1996. No, on that occasion the Court could not eliminate the perennial tension between Right and Might. Yet, it did something no less essential: it ensured that Right remained an indispensable part of the equation. Nor did the Nuclear Weapons Opinion resolve the dilemma confronting the international community. Our present predicament bears painful witness to that reality. But the Court has never claimed to provide definitive political solutions. What it claimed thirty years ago, what it claims today, and what it has consistently claimed for more than a century, is the authority - expressed through fifteen independent voices - to pronounce on one indispensable element of every international equation: the unassailable authority of the law.

Precisely at those moments when political leaders are tempted to believe they can dispense with that precious component, the Court has reaffirmed its necessity. Standing at the crossroads of competing ideologies, it has, time and again, sought the golden mean: carefully shaping a legal framework that provides a normative standard by which conflict may be assessed, contained, and ultimately resolved. It has done so from its profound awareness of its high responsibility towards humanity.

For let there be no misunderstanding. The World Court was never created to serve an ideal world. It owes both its origin and its continuing relevance to the recognition that human affairs are inherently imperfect. For that very reason, the Court becomes all the more indispensable in times of crisis. In asserting this role, the Court has history firmly on its side. History teaches a lesson of enduring significance: crisis serves as the catalyst for institutional renewal. Time and again, precisely when confidence in the rule of law appeared to have reached its lowest ebb, new institutional pathways were forged to place the uneasy coexistence of law and power upon a more stable foundation. By every measure, this is such a critical moment. If history is any guide, the omens are favourable. Why, then, should we fail where so many generations before us succeeded?