COUR INTERNATIONALE DE JUSTICE INTERNATIONAL COURT OF JUSTICE

THE LIMITATIONS ON THE CONTRIBUTION BY THE INTERNATIONAL COURT OF JUSTICE TO THE MAINTENANCE OF PEACE

Statement by Judge Mohammed Bedjaoui, President of the International Court of Justice, made in plenary meeting of the General Assembly at its 51st session

15 October 1996

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

It is a renewed pleasure and honour for me to have the opportunity once again to address this eminent Assembly on behalf of the International Court of Justice. I cannot reiterate too often how important, in my view, is this direct and truly privileged contact - now, happily, a regular event - between the Court I represent and the General Assembly. The independence and serenity which must, in all circumstances, preside over the exercise of the judicial function presuppose, of course, that a court will maintain a certain distance between itself and the upheavals of the society in the service of which it is required to fulfil that function; but the profoundly social nature of that function at the same time implies that a court must constantly be alert to the problems of that society, and remain in contact with those who are subject to its jurisdiction. I therefore wish to express my sincere thanks to the Assembly, which is not only the major plenary organ of the United Nations but also the cradle of international democracy, for having kindly set aside, this year too, a little of its precious time for the President of a Court open to all the States of the world and whose vocation is to deal with all the legal questions those States may wish to submit to it.

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I am all the more alive to the privilege that is mine as I take the floor before you today, in that you have just elected to the presidency of this august Assembly an illustrious personage, His Excellency Mr. Tan Sri Razali Ismail, to whom I extend my warmest congratulations.

Mr. President, let me tell you what great hopes your election raises for the international community, which is honoured to welcome you to this eminent post. Your brilliant diplomatic career has led you to become acquainted with many of the peoples of the world, who will henceforth place in you a very special trust, knowing as they do that you understand all their diverse aspirations. The noble struggle in which you have engaged over the years for the promotion of human rights, the development of peoples and respect for the global environment compels our admiration. As a citizen of Malaysia, you are also a symbol, a symbol of a nation which has achieved an exemplary blend of rich age-old traditions and a modernism as courageous as it is effective in its promotion of economic renewal and social well-being.

Mr. President, the International Court of Justice is especially delighted by your election since you recently did it the honour of setting out before it, with consummate skill, the profound concern engendered in your people - as in so many others! - by the question of the threat or use of nuclear weapons.

I am convinced that, strong in the ideals which have always guided your action, and with your particular talents and experience, you will successfully accomplish the exalted mission which the international community has this year entrusted to you. I wish you every success in that difficult enterprise.

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Your Excellencies, Ladies and Gentlemen,

In 1994, I shared with your Assembly some reflections on the role of the International Court of Justice in the general system for the maintenance of peace instituted by the Charter. Last year - the 50th anniversary of the United Nations and, consequently, a year of stocktaking - I followed up on that reflection by attempting to sketch out the future of the Court, taking account of its various achievements. I should now like to complete this triptych with some considerations on the difficulties encountered by the Court in the performance of its truly unique mission in the service of peace. The wealth of its achievements throughout the past half-century and the very evident renewal of the interest shown in it in

recent years, should not cause us to lose sight of the constraints under which it operates. A proper perception of those constraints seems to me essential to a sound understanding of the action of the Court and thereby reinforcing that action.

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The International Court of Justice is a component, not only of the machinery for the peaceful settlement of disputes created by the Charter, but also of the general system for the maintenance of international peace and security it established. The Court is the principal judicial organ of the United Nations and, as such, its responsibilities are considerable. While it does not bear exclusive responsibility for the peaceful settlement of legal disputes, it does in a way bear a "principal" responsibility for peaceful settlement. In order to carry out the tasks thus incumbent upon it, it has at its disposal two instruments: the contentious procedure, at the end of which the Court settles the dispute submitted to it by handing down a judgment that is binding upon the parties; and the advisory procedure, at the end of which the Court may respond, by rendering an advisory opinion, to a legal question put to it by an organization authorized to do so. The contentious procedure would seem to be the pre-eminent peacemaking instrument available to the Court. I have already had occasion to stress the advantages of the advisory procedure, in this regard also. Apart from the fact that it can be an effective instrument of preventive diplomacy, that procedure may make a substantial contribution to the solution of a dispute that already exists. It can moreover provide the Court with an opportunity to deal with some of the major questions under discussion by the international community. There is scarcely any need for me to refer at this juncture to the momentous issues which, both from the standpoint of the development of the law and from that of world peace, are at stake in advisory proceedings such as those instituted by this Assembly with respect to the *Legality of the Threat or Use of Nuclear Weapons*.

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The International Court of Justice is endowed with both a privileged institutional status and procedural instruments whose potential is frequently underestimated. Nonetheless its action in the service of peace suffers from certain limitations over which it has scant control. Some of these are structural, deriving from the very essence of the function of courts and also from the essence of contemporary society

in the service of which international courts operate. The others are circumstantial and relate, *inter alia*, to the material resources made available to the Court. Whereas the former limitations are constant and could only, in principle, be removed at the expense of a distortion of the judicial function or a profound transformation of the political environment in which it is performed, the latter are reversible, but have the drawback of being extremely unpredictable.

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Let us first consider the structural limitations.

The function of a court might be said to be to restore social peace by applying the rule of law in relations between those subject to its jurisdiction. There is no disputing the pre-eminent role of the rule of law as a factor for harmony and stability in any society. The law is always an instrument and never constitutes an end in itself. But it is an indispensable instrument for the ordering of relations between the various components of a society with a view to attaining the objectives sought by that society, given the changing system of values of that society. It is therefore a truism to assert that by endeavouring to achieve respect for the rule of law in relations between its subjects, a court is performing a peacemaking function essential to the promotion of the social good. In this sense, it is not incorrect to say that a court's function is "political", which does not mean - and this must be stressed - that it can be partisan in any way whatever. It is "political" in the sense that a court is one of the protagonists contributing to the building of human society. However fundamental it may be, the action of a court cannot, however, serve as a panacea for the many and varied ills that may afflict a society - for a whole range of reasons.

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In the first place, there are many disorders or imbalances which, by their very nature, substantially - if not totally - elude the grasp of the law, and hence of the courts. Even the most advanced societies cannot be completely "juridicized". The law cannot claim, by virtue of its instrumental dimension, to apprehend all aspects of the real. In any society, there are tensions which, to a greater or lesser extent, are diffuse or apparent, chronic or acute and which, when they have no clearly defined object, pose a threat to the social order. Such tensions, which cannot be left unchecked moreover, inherently elude the application of the law, which thus appears unsuited to the task of controlling them.

As for more clearly characterized disputes, their complexity is frequently such that, even when they possess a legal dimension, tackling that dimension by judicial means - useful though this exercise may be - is not enough to settle them, not to mention reduce their intensity.

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The peacemaking function of courts thus encounters its first limitation in the inevitable limitation on the degree to which the law permeates social relations and on its effectiveness. Admittedly, although the law never exhausts the real, the place it occupies in the diverse societies is eminently variable. This place depends upon the social reality of which the law forms part, in other words, upon a given social milieu, with its ethical imperatives as well as its political, economic, cultural and other factors. The frequency and impact of the crises which then escape the benefits of intervention by courts are themselves determined by the state of that social milieu.

In the international order, the social fabric is less impregnated by law than it is in the domestic orders. As international society is less integrated, the legal relations in it are weaker, if not cruder. It scarcely needs to be said that today this society is still strongly marked by the "horizontalism" stemming from the co-existence of State sovereignties. In the absence of a universal legislative power, which, through general channels, would lay down the rules corresponding to the reconciled needs of all the actors in international life, international law continues to be the direct product of its subjects, each of them, through voluntarism, retaining control of that part of international law whose application to itself it would accept. There is no doubt that this singular situation, in which the creator of the rule of law is also its direct target, is less favourable to the development of a legal system which is "balanced" whether as regards its normative scope or the material content of its rules. The intensity and the object of the "legislative" action of the subjects of the international legal order are, it is no secret, too often still directly dependent both on the power and interests of each of those subjects, or of their regroupings according to various criteria. International law, not yet a law of solidarity, remains both heterogeneous and fragmentary.

Here, therefore, is a further difficulty and a challenge for an international court, whose work in the service of peace is entirely dependent on the application of that law. However, I would add that, by a kind of paradox, this handicap under which the international judicial function labours at the same time confers upon it a quite specific social role. Indeed, since the subjects of international law are concurrently the creators and the targets of the rules of that law, in the vast bulk of cases it falls to them to interpret and apply those rules. This being so, it seems somewhat unusual to submit legal disputes between them

to a third party. When an international court is called upon to settle such disputes, its decision is thereby thrown into even sharper relief. It is all the actors on the international stage which are then affected by the decision rendered, even if that decision is formally binding on the parties alone; this decision is all the more eagerly anticipated and then scrutinized as intervention by such a court remains the exception. This is still true even at a time when recourse to international courts is increasing, as it is for the International Court of Justice at present.

Without seeking to enter into doctrinal disputes regarding the incompleteness or otherwise of international law, it must be acknowledged that, in the field of the application of this law, there are quite remarkable contrasts of normative density. Whether international law has shortcomings or just uncertainties, it is undeniable that these weaknesses of the instrument are also, necessarily, weaknesses of whomever is called upon to have recourse to that instrument, even if they may also contribute to the grandeur of its role. I would add that the grey areas in international law can affect issues of particular sensitivity as regards the peace and future of the world. The International Court of Justice experienced at first hand the anguish of these grey areas when it considered the question of the *Legality of the Threat of Use of Nuclear Weapons* at the request of your Assembly. While the imperfections of a legal order may make greater flexibility in the interpretation and application of the rule of law by a court acceptable, or even promote such flexibility, this does not mean that a court can take the legislator's place. Indeed, the International Court of Justice said as much with the utmost clarity in the advisory opinion it delivered on the question I have just referred to, stating that:

> "The Court . . . states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend."

There are many systems of law which make it an obligation for a court to rule, even when the law is silent or obscure, but at the same time prohibit it from legislating. By definition, the law cannot provide for every eventuality. Scarcely is it adopted than the courts are faced with a thousand and one problems. The function of the courts consists, precisely, in translating the law into action by imbuing themselves with its spirit, by applying its general precepts, with wisdom and discernment, to the particular eventualities, and, in cases which it has not resolved, by completing the law through "doctrinal" interpretation. The administration of justice would clearly be impossible if courts were to refrain from ruling whenever the law is obscure or incomplete. What, on the contrary, courts are forbidden to do, this not falling within their functions, is to interpret "authoritatively", in other words, to reply to essential doubts - or even a legal vacuum - by the creation of a new norm. The creative power of courts, as expressed in the jurisprudential function, is in a relation of dependency as regards the various formal

sources of law. It has been said on several occasions that courts must compensate for the shortcomings of the law, but cannot fill the lacunae in the law. When the law itself makes it impossible to reply, in whole or in part, to a question submitted to a court, the court's duty consists in, and is limited to, registering this state of affairs, however disappointing this may seem.

By virtue of the very structure of international society, only States, in an elevated and responsible conception of their sovereignty, can remedy such a situation by speeding up the construction of international law. In this respect, the International Court of Justice can but hope for an expansion and an improvement in the legal bases of its function. Pending that development, the Court's task may in many ways appear thankless, but this does not mean that it therefore ceases to be useful, far from it.

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In order to properly assess the contribution of courts to social peace, it is not enough to consider the potentialities or limits of the rule of law which it is their task to apply. For there are other characteristic elements of the judicial function which, although elementary, are nevertheless fundamental: regardless of the legal order in which they operate, courts can only act when requested to do so; and as a rule, they only intervene *a posteriori*.

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Courts are always seised; they never seise themselves. In this respect particularly, their function is distinct from the function of the executive. Although this is the well established principle, the ease with which courts may be seised - and thus the accessibility of their function - as well as the effects of the seisin, nevertheless vary quite appreciably from one legal order to another.

In this respect too, access to courts in highly integrated societies is semi-automatic. Not only are courts competent *a priori*, but if the interests of society as such are challenged, society has adequate means at its disposal for initiating corrective measures by itself, seising the courts by taking legal proceedings. In the international order, however, there is nothing comparable. The respect for the sovereignty of States is echoed in the cardinal principle of consensualism. No State can be made subject to the verdicts of courts unless it has already agreed to do so. The International Court of Justice cannot be expected, in the

manner of the Security Council, to entertain all the disputes likely to pose a threat to international peace and security. The Court can only intervene at the request and with the consent of the interested parties. However, this structural limitation hampering the Court's action can, in part, be removed; progress towards this end is possible. It probably depends on a more permissive approach to the Court's jurisdiction, on more limited use of preliminary objections by States engaged in proceedings, on a less lax conception of State consensualism, and lastly, on a clearer perception by all States of the advantages they may jointly derive from submitting their disputes to the Court.

Furthermore, whereas in "vertical" societies the rulings of courts are not only compulsory but also enforceable, in the international order, the absence of executive power essentially leaves it for the legal subjects themselves to ensure that legal decisions are respected. The Covenant of the League of Nations, then the Charter, sought to offset the potentially dangerous effects of this situation, in which "self-help" prevails. In this respect, Article 94 of the Charter has a number of weaknesses, such as the fact that intervention by the Security Council is subordinated to a request by one of the parties; also, the Council is given very wide discretionary power: it "may" act "if it deems necessary". However, it is pleasing to note that, happily, the Judgments of the International Court of Justice have in the past almost always been scrupulously respected.

The fact nevertheless remains that the formal limits placed on the seisin of the international court and on the execution of its rulings render its task all the more arduous when it has to act in a crisis. This therefore further limits its contribution to the maintenance of peace.

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A moment ago, I referred to another trait of the judicial function as characteristic as it is constant. It is the function of courts to heal rather than prevent: contrary to the legislator or the executive, the decisions by which courts perform their function are decisions *a posteriori*. Contentious jurisdiction presupposes the existence of a dispute; and, in most legal systems, the party appearing before a court must prove what is commonly termed an "existing and pending interest". From this angle, the function of courts is more to "restore" than to "maintain peace"; the way they function is rendered all the more delicate because, as is the case in international society, this function does not form part of a structure with an operational machinery. In this respect, the wholly unique nature of the advisory proceedings before

the International Court of Justice, whose "preventive" virtues no longer need to be demonstrated, must be stressed once again.

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In addition to these constraints which I have termed "structural", inherent as they are in the functions of courts, or in the present state of international society, there are some whose character is by no means necessary; I am referring in particular to all those related to the material resources placed at the disposal of courts by society to enable them to fulfil their task. What resources are provided is essentially dependent not just on the prevailing economic, but also the prevailing political situation. Indeed, the resources allocated to courts vary markedly from one society to another - and even, in a given society, vary from one period to another - depending on the importance of the role courts are recognized to have in each of those societies and on the resources at their command. Alas, courts are often the poor relations in our societies and it is still all too common an occurrence that only crises highlighting the impecunity of the judicial apparatus prevail over the parsimony of the budgetary authorities towards it. But justice can obviously only be sound if it has a minimum of resources with which to operate, and on a permanent basis.

In its Report to the General Assembly, it is not customary for the International Court of Justice to mention the material difficulties it encounters in performing its duties. This year, for the first time, it has been compelled to do so. The gravity of the situation left it with no alternative. In fact, however, there is nothing strange about this since, under Article 33 of the Statute of the Court, "The expenses of the Court shall be borne by the United Nations in such a manner as shall be decided by the General Assembly." It was therefore most certainly the Court's duty to draw the attention of the Assembly to a situation which seriously imperils the very discharge of the Court's duties. It is not appropriate for me, in this forum, to go into this matter in detail. It is considered at some length in Chapter IV of the Court's Report. Suffice it to say that there the Court voices the fear that the reductions in resources required of it are "beginning to curtail its established levels of judicial service" and are engendering "delay . . . in discharging its duties". Among other things the Court states that:

> "The reality is that the funding of the Court falls considerably short of what is required for it to fulfil its functions . . .

> The costs to the Court of ensuring that a case is fairly and impartially heard may not be sufficiently appreciated . . . Yet it has always been recognized that the Court cannot render justice without performing [certain] tasks and it falls to the United Nations to provide it with the requisite means."

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

It is a particular attribute of any responsible institution to consciously question the limits imposed on its action. Such questioning is all the more essential for an institution which, like the judicial institution, performs a crucial social role; indeed, all the beneficiaries of its work are entitled to know, unambiguously, what they can and cannot expect from it. It was in this resolutely constructive spirit that I wished to share with you these few comments. Let no one see them as betraying apathy or pessimism! Quite the contrary, I cannot conceal my outright satisfaction at being able to state that, notwithstanding all the constraints under which the organ of which I am President has to labour, its activity during the past year has been fruitful as never before.

During the period from 1 August 1995 to 31 July 1996, the Court rendered no less than five decisions, in cases of extreme complexity. To bring off this *tour de force*, the Court, contrary to its usual practice of considering only one case at a time, constantly had to deliberate on an average of three cases simultaneously. In response to France's resumption of nuclear testing, New Zealand filed a *Request for an Examination of the Situation in Accordance with Paragraph 63, of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *case*. After hearings on whether the request submitted by New Zealand fell within paragraph 63 of the 1974 Judgment, the Court found, in an Order of 22 September 1995, that it did not. It then held three weeks of hearings in October and November 1995 conjointly on two well known requests for advisory opinions, one filed by the World Health Organization on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the other filed by this Assembly on the *Legality of the Threat or Use of Nuclear Weapons*. An unprecedented number of States submitted written statements and took part in the hearings on what may be the most important questions ever put to the Court in advisory proceedings. The two Opinions, which required consideration of exceptionally difficult problems, were rendered on 8 July 1996. While considering these requests, the Court was also seised with a request for the indication of provisional measures in the case concerning the

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. *Nigeria)*, and issued an Order on that request on 15 March 1996. The Court also held hearings from 29 April to 3 May 1996 on issues of jurisdiction and admissibility raised in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina* v. *Yugoslavia)*, and delivered a Judgment on those questions on 11 July 1996.

Since last month, the Court has also been engaged in settling the case concerning *Oil Platforms* destroyed in the Gulf during the Iraq-Iran war, a case between the Islamic Republic of Iran and the United States of America.

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In conclusion, I should like once again to stress that the place of the law and of courts in international society can only be consolidated, or even expanded, if you as legislators and we as judges together recognize that this process depends on both respect for the task already accomplished - not to say the legal edifice already constructed - and on the meticulous acknowledgment of the new realities of human society. It is absolutely essential that this twofold condition be met if lasting progress is to be ensured in the development of a true community of law at the international level.

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At the end of my short statement, I should like to voice a hope as simple as it is fervent: that it be vouchsafed the Court, against all odds, to pursue the awe-inspiring task conferred upon it, with all its grandeur and its limitations. This hope will, I am convinced, be fulfilled if all the States here represented with such distinction, and the Organization which unites us, lend the Court the support it cannot do without.

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