THE JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES

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RECENT statements by leading American statesmen, including the President himself, in support of a 'Peace through Law' campaign, coupled with the proposal presented at the N.A.T.O. congress in London that the N.A.T.O. countries should establish a Court of Justice to solve their mutual differences, lead one to suppose that the cause of judicial settlement of international disputes is once again coming into favour. This cause is one which has been successively in and out of favour ever since the first and second Peace Conferences were held at The Hague in 1899 and 1907. It is proposed in this article to set out, in a manner as free from technicalities as possible, the present situation in regard to the judicial settlement of international disputes; to consider, from a practical point of view, the advantages and disadvantages of this means of settling disputes as compared with other means; and finally to consider the matter in its moral aspect.

In article 2(3) of the Charter of the United Nations one of the principles of the Organization is stated as follows: 'All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. On being construed carefully, however, it appears that this principle does not impose a positive obligation to settle all international disputes so much as a duty not to settle them in a certain way. The reason for this is the feeling that international law cannot compel its subjects never to be in dispute with one another; its primary concern is rather to prevent them from taking the law into their own hands and disturbing the peace.

The principle of article 2(3) of the Charter is carried further in article 33, which provides as follows: 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'. From this it

is clear that judicial settlement is only one among many means of settling their disputes which States may use, if indeed they use one at all. States commit no offence if, by express or tacit agreement, they decide to put a dispute into cold storage for several years in the hope that in the meantime it will either solve itself or at any rate become easier to solve later on. It is only when a dispute becomes one 'the continuance of which is likely to endanger the maintenance of international peace and security' that the parties become bound under the Charter to seek a solution by one of the various means mentioned in article 33. The duty of seeking a solution can thus be avoided altogether provided both parties, whilst standing on their rights, are prepared to abstain from the use or threat of force.

Even when danger to the maintenance of international peace and security is present, the parties, though bound to seek a solution of the dispute, are not bound to find one; and they commit no offence so long as the danger to peace and security remains merely likely, and does not become actual. This is so because, of all the means of settlement mentioned in article 33, only two (arbitration and judicial settlement) are designed with a view to procuring a binding award. For example, negotiations between the parties themselves may or may not succeed. Since the dispute is already, by definition, one which endangers the maintenance of international peace and security, the chances of such negotiations being successful are probably slight. Inquiry, mediation and conciliation are all techniques through which third parties endeavour to persuade the disputants to agree, without having the power to compel them to do so. Particular interest, therefore, attaches to the only means so far evolved by international society for settling in a peaceful, yet definitive manner, disputes among its members.

In article 37 of the Hague Convention for the Pacific Settlement of International Disputes, 1907, it was provided that 'International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award.' International arbitration thus has three features: (i) the arbitrators are chosen by the States themselves; (ii) the arbitrators must decide according to international law; and (iii) the States must carry out the award. Judicial settlement shares

with arbitration the second and third of these features, but not the first. In the case of international judicial settlement the judges are not chosen by the disputing States directly involved, but constitute a permanent bench which is renewed from time to time by elections. For example, the International Court of Justice has fifteen judges, no two of whom may be nationals of the same State. The judges are elected by the General Assembly and the Security Council for a term of nine years and are eligible for re-election. Normally five judges are elected every three years. This system is not ideal but is about the best possible in the circumstances. A feature of it which has aroused some criticism is that a judge is not required to stand down if his own State is involved in a case. Even more reprehensible is the provision that, if a State is involved in a case and has not a judge, it may add an *ad hoc* judge for the purposes of that case.

It follows from the above that, although in an arbitration both parties are under a duty to accept and carry out the award, this remains an essentially voluntary method of settling international disputes for the simple reason that an arbitral tribunal cannot be established unless both parties are willing to establish one. Attempts to introduce into international society the principle of compulsory arbitration, whereby a tribunal with power to give a binding award can be set up over the objections of one of the parties, have not yet proceeded very far. Once, however, there has been constituted a permanent court of judges, operating under a basic statute drawn up not by the disputing States themselves but by the international community as a whole, there at least exists the possibility of one State obtaining a judicial remedy against another even if the latter wishes to evade a binding settlement. Whether that possibility will be real or merely theoretical will depend on the statute of the court concerned, as well as on the practice developed by that court.

For the present International Court of Justice to acquire jurisdiction to deal with a case, it is, in principle, necessary that such jurisdiction shall have been conferred upon it by the States concerned. This may happen in one of three ways, the first two being regulated in article 36(1) of the Statute and the third in article 36(2) thereof. The first and simplest way is for the States in dispute to negotiate an agreement providing for the submission of the dispute to the Court. The second method is for the parties

to a treaty to agree (as they often do) to insert in the treaty a clause providing that any dispute relating to the interpretation or application of that treaty may be referred to the Court at the instance of any party. The third method is more complicated, but also more significant, in that it goes some way towards establishing a system whereby a country aggrieved by the action or threatened action of another may go to the International Court of Justice for a remedy, in much the same way as a private citizen may in a proper case apply to a court of law in any civilized country for an award of damages or an injunction.

Article 36(2) of the Statute provides that 'The States parties to the present Statute (this phrase comprehends all Members of the United Nations as well as a few other States) may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes. . . .' This ingenious system, known appropriately enough as the 'Optional Clause', was devised in 1920 when the Court at The Hague was first established. It represented a compromise between those who sought to keep the jurisdiction of the Court voluntary and those who wished to make it compulsory. The essence of the system was that States could by a voluntary act render the Court's jurisdiction compulsory in their regard. Although the system got off to a slow start, by 1934 as many as forty-two States—a fair proportion of the international community of the time—had signed the necessary declarations. The effect of many of these declarations was limited by reservations, but the Court, on the theory that half a loaf was better than no bread, decided to accept these. The Court also instituted a practice whereby a defendant State was entitled to rely not only on its own reservations but also on those made by the plaintiff State. Although the immediate effect of this was to limit still further the jurisdiction of the Court, the practice was a wise one since it tended to discourage excessive reservations. A State which made such reservations would automatically injure its own prospects should it ever wish to appear before the Court as a plaintiff.

At the San Francisco Conference of 1945, when the decision was taken to substitute the International Court of Justice for the old Permanent Court of International Justice, it was agreed that the Optional Clause system should continue. Unfortunately, since

the end of the Second World War, conditions for the judicial settlement of international disputes have been less propitious than they were, for instance, during the decade between 1923 and 1933, when the Court delivered as many as twenty-one judgments. Although the present Court has had bursts of activity, it has on the whole been less busy than its predecessor. If one takes into account the increase in the size of the international community and the growing complexity of its problems, the conclusion is inescapable that resort to judicial settlement for the composition of international differences is relatively less common than it was even in the uneasy period between the two World Wars.

Cogent proof of this conclusion lies in the fact that, out of a possible number of some ninety signatories, only about thirty States are at present parties to the Optional Clause, and many of these have attached to their signatures reservations more sweeping than those in use during the League of Nations period. The United States, for instance, excludes 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America', and this example has been copied by many countries. The current United Kingdom declaration contains a long list of exclusions and reservations. Some of these are of a technical nature and are not likely to exclude many disputes in practice. One, however, excludes all disputes that arose before 5th February, 1930; another excludes all disputes with regard to situations or facts which occurred before that date, even though the dispute itself arose since that date; another excludes disputes with Commonwealth countries; another excludes disputes arising out of events occurring between 3rd September, 1939, and 2nd September, 1945; and yet another excludes 'disputes arising out of, or having reference to, any hostilities, war, state of war, or belligerent or military occupation in which the Government of the United Kingdom are or have been involved'. The United Kingdom reservation concerning matters of domestic jurisdiction is much less sweeping than that of the United States, although during the period between 18th April, 1957, and 26th November, 1958, the United Kingdom excluded disputes 'relating to any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or any of its dependent territories'. This exclusion is still maintained as

regards disputes relating to events that occurred during that period.

It is easy to criticize the United States and United Kingdom declarations as being contrary to the best principles of international law and morality, until one remembers that declarations under the Optional Clause are the exception rather than the rule in Latin America, in the Afro-Asian world, and above all in Eastern Europe. Even so, it is arguable that the principal Powers of the West, with their traditional belief in the rule of law, should set an example to the rest of the world. We may be sure that that is what their Governments would be only too glad to do, if they felt able to take the risk, because it certainly does not suit the Western Powers that it should be difficult to settle international disputes by judicial means. The truth is that these restrictive declarations are the symptoms of a disease rather than its cause. What then is the cause?

Leaving aside obvious and immediate political considerations, such as the Cold War, a number of objections are often advanced against judicial settlement as a means of dealing with international disputes. There are two reasons why it is important that these objections should be understood. The first is simply because they explain why, in fact, despite more than half a century of effort, the international community has still not established a really effective system of judicial settlement and is in many respects further away from that goal than it was thirty years ago. The second reason is that there is a tendency for moralists and others unduly to extol the virtues of judicial settlement. This leads to an unhealthy difference of approach between 'idealists' and 'realists', with the international lawyers suspended unhappily between the two extremes. For the international lawyer cannot, without being disloyal to his calling, denigrate the cause of judicial settlement. Yet he, perhaps more than anyone else, is aware of its limitations.

As an example of a moralist approach may be cited the excellent Code of International Ethics, prepared by the International Union of Social Studies.[1] Without in any way discounting other methods of settlement, the Code says: 'Arbitral awards and judicial decisions, when they are freely administered and honestly accepted by the contending parties, constitute the best means of settling

1 Translated and edited with a commentary by John Eppstein. The Newman Press. 1953.

international disputes in a peaceful manner'. And again: 'The honour of a nation, its dignity, or even its vital interests, can never be incompatible with respect for the rights of others. When a dispute arises about the requirements of the law, private citizens agree to submit their differences to the judgment of an impartial tribunal. It is difficult to see how the sovereignty and independence of States cannot allow them, in similar circumstances, to submit their quarrel to arbitrators or judges freely chosen by them. It is quite possible to constitute international courts of arbitration or justice which offer every guarantee of fairness and impartiality.'

In other words, what appeals to the moralist about judicial settlement is naturally the feature (to which we have drawn attention) that the parties allow the final decision with regard to their dispute to be taken out of their own hands. This, it may be recalled, is exactly the point where the otherwise admirable teaching of the neo-scholastic writers on the subject of the Just War tended to become obscure. Vittoria, it is true, taught that the prince's personal belief in the justice of his cause was insufficient to justify a resort to war. Yet the doctrine that the State was a perfect community seems to have prevented him from drawing the conclusion that there was a duty always to resort to international arbitration before proceeding to the extreme sanction. Suarez, while stressing that a pacific means of settlement was required by natural law, yet wrote: 'But it must be noted that a supreme ruler is not bound to abide by the decision of judges whom he has not chosen or not constituted as such: the judges therefore ought to be chosen by the mutual consent of each party: but this recourse is becoming all the more unusual because it is already rarely employed. For very often one ruler holds foreign judges in suspicion.'[2] The Foreign Minister of a modern State, prepared to accept arbitration when the occasion arises but reluctant to take the further step of adhering to the Optional Clause, might argue in very similar terms!

The neo-scholastic writer who perhaps came closest to the position now contended for in the Code of International Ethics was Suarez's fellow-Jesuit and compatriot, Gabriel Vasquez, who wrote: 'For a controversy of opinions demands a solution by judgment and not by arms: and since . . . the judgment of one prince does not suffice against another for the conclusion of the

2 De Caritate: De Bello, Sect. VI, 6.

conflict, it necessarily follows that the conflict must be ended by the judgment of some other'.[3]

It remains to examine briefly—for a comprehensive examination would take us far beyond the bounds of this article—the principal objections to judicial settlement, and to consider whether they are genuine or whether they are fraudulent arguments put forward by those whose only concern is to preserve freedom of action for their own States. If, as we believe, some of the objections are genuine, the conclusion will not necessarily be that the moralists are wrong and hopelessly unrealistic in urging greater recourse to judicial settlement. It will rather be that the problem needs to be tackled on a wider front, and that the cause of judicial settlement only suffers from the misplaced enthusiasm of those who see in it a cure for nearly all international ills.

The first objection to judicial settlement is that, *pace* the Code of International Ethics, the Court cannot be relied upon to be impartial. The second is that international law itself is too uncertain. The third—not easily reconcilable with the second—is that the rules of international law are only too certain in that most of them are biased in favour of those Powers who wish to retain the *status quo*, whereas many international disputes take the form of a clash between revisionist and anti-revisionist Powers. The fourth is that, even if a judgment can be obtained from an international tribunal, there is no guarantee that it will be enforceable. The fifth and final objection is that international disputes are often inherently unsuitable for judicial settlement and require a different form of treatment. Let us now examine these objections in turn.

It is difficult to consider objectively the complaint that international tribunals cannot be relied upon to be impartial. An international judge might be said to be partial if, knowing that international law pointed one way, he nevertheless gave a decision the other way either because he personally, or more probably his Government, was unsympathetic towards a particular State. This danger can never be entirely removed, but it is believed that it could be reduced to manageable proportions if the rules of international law themselves could be rendered more certain. It is no coincidence that Governments are already some-

3 Commentariorum et Disputationum in Primam Secundae Sancti Thomae (Tomus I) Disputatio LXIV, Cap. XIV.

what less reluctant to refer to international courts disputes arising under treaties than they are disputes relating to the much more uncertain rules of customary international law. It is believed, therefore, that on close examination this objection is seen to be inseparable from the second one.

As for the second objection, it can hardly be doubted that, if the rules of customary international law could be codified and rendered more certain, States would be more willing to submit disputes to judicial settlement than they are at present. In recognition of this, the Charter of the United Nations, in addition to establishing the International Court of Justice, enjoined the General Assembly to encourage 'the progressive development of international law and its codification' (article 13(1) a.). The General Assembly created for this purpose the International Law Commission, a body of legal experts which has for a decade been doing quiet but useful work. The great value of this work was proved last year when the United Nations Conference on the Law of the Sea adopted four important conventions largely on the basis of drafts prepared by the Commission. Provision was also made for the judicial settlement of disputes arising under these conventions. This example shows how the area of activity open to the Court may be extended by efforts on another level altogether.

The third objection is largely of a psychological character and for obvious reasons is felt very strongly in some quarters at present. In proportion, however, as States which have only recently acquired their independence establish themselves, grow in confidence and take part, as they are now beginning to do, in the creative work of the International Law Commission, this objection may tend to disappear.

The fourth objection is, however, more serious. It raises the whole question of the organization of international society. It is often said that before there can be law there must be order; and yet without law there can be no order either. The problem for international society here, as in so many respects, is to advance on a broad front, recognizing that there can be no peace without justice, and no justice without peace. All that can usefully be said in answer to this objection is that it is just as easy, or just as difficult, to enforce a judicial award as any other kind of settlement. To use the difficulty of enforcement as an argument against

judicial settlement is, in the last analysis, to stand aloof from all efforts to obtain the peaceful settlement of international disputes. In actual practice, the position is less unsatisfactory than might be presumed, and the awards of international courts are usually carried out. This is the consequence of the rule that international tribunals cannot exercise jurisdiction except over consenting parties. A State which goes so far as to consent to an international court having jurisdiction is hardly likely to mar its good name by refusing to carry out the award. When difficulties arise, as for instance over Albania's refusal to pay to Great Britain the damages awarded in the case resulting from the explosions in the Corfu Channel, it is almost always because the defendant State, though it had at an earlier stage formally conferred jurisdiction on the Court, was nevertheless at the time of the hearings, due perhaps to supervening circumstances, unwilling to allow the Court to adjudicate.

The fifth objection is that international disputes are often inherently unsuitable for judicial settlement. In so far as this objection is put forward by professional diplomatists, whose only concern is to keep for themselves control over all aspects of the foreign relations of their countries, it is clearly not tenable. Such an attitude would prevent the gradual erosion of State sovereignty by the development of law, on which the future of international society largely depends. At the same time, there is substance in the view, often overlooked by moralist writers, that a dispute settled by diplomatic negotiation is likely to be more effectively settled than one submitted to a court. It is rare indeed that a court will be able to pronounce upon all aspects of an international dispute. There will generally be loose ends, which in any case will be left to the diplomatists to settle. The argument in favour of a diplomatic, as opposed to a judicial, settlement is, after all, only the application in another sphere of the principle that it is on the whole better for private citizens to settle their own differences than to take them to the courts. Especially is this so when there is a large number of parties involved. A court is at its best when pronouncing on a definite issue between a limited number of parties. When an international dispute involves many parties and is likely to have all sorts of repercussions, it is clear that only a diplomatic accommodation is likely to be viable. The recent dispute over Cyprus provides a good example of this.

If this dispute had been referred to the International Court of Justice, the Court could hardly have done more than confirm the one point which was not in dispute, namely, that the existing sovereignty over the island was vested in Great Britain. This would not have advanced a solution one whit.

The point that needs to be brought out of course is not that judicial settlement is necessarily a satisfactory means of solving all international disputes but that it is better than none. Compared with the last century, international law has advanced far in outlawing self-help as a means of solving disputes. The prohibition of self-help can, however, only be justly and effectively maintained if the law can in the last resort provide an alternative remedy for the adjustment of grievances and if parties are not allowed to evade the duty of settlement altogether. In this respect, as we have seen, the system of the Charter remains deficient.

The conclusion must therefore be that the judicial settlement of international disputes is a cause which deserves to be encouraged, but the potentialities of which should not be overrated. What is rather needed is a simultaneous advance on several fronts. The duty not to resort to self-help must be balanced by the right to obtain a remedy by alternative means, if one is due. The duty to submit to a binding form of settlement must be matched by the right to obtain an award that is just and enforceable. The strengthening of the international judicial process must be accompanied by a corresponding development of the legislative and executive agencies of international society.