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Stephen M. Schwebel

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BLAINE SLOAN LECTURE

**THE PERFORMANCE AND PROSPECTS
OF THE WORLD COURT†**

His Excellency Judge Stephen M. Schwebel††

Thank you so much Dean Black, Mr. Varon and Professor Sinha for your very gracious remarks.

I am delighted to be in White Plains and to deliver the annual Blaine Sloan Lecture, in the presence of another distin-

† The Blaine Sloan lecture is presented annually by the Pace International Law Review and the Pace International Law Society to promote scholarly debate in international law.

The lecture series honors Blaine Sloan, Professor Emeritus of International Law and Organization, Pace University School of Law. Professor Sloan has had a distinguished career in the field of international law; serving as Director of the General Legal Division of the United Nations Office of Legal Affairs from 1966-1978, and as Deputy to the Under Secretary-General, Legal Affairs, 1978.

†† Judge Stephen M. Schwebel was born in New York City, educated at Harvard and Cambridge Universities, and received his LL.B. from Yale Law School in 1954. He has taught at Cambridge, the Hague Academy of International Law, the Graduate Institute of International Studies, Geneva, and Johns Hopkins University, where he was the Edward B. Burling Professor of International Law and Organization.

A world-renowned legal authority, Judge Schwebel has served as Counselor on International Law and Deputy Legal Advisor to the United States Department of State and has been a representative and chairman of the United States delegation to various committees of the United Nations. He was a member of the International Law Commission of the United Nations.

guished professor of International Law, Professor Ben Ferencz, who is another very old friend, as is, indeed, Blaine Sloan.

I was saying to the Dean a few moments ago, that I first became aware of Blaine Sloan as long ago as 1947 or 1948 when he published a seminal article in the British Yearbook of International Law on United Nations Resolutions. He became the Director of the General Legal Division of the United Nations and served with great distinction in that post and I don't doubt, equally so, in his years of teaching here.

I was sorry to hear that he has been unwell, but I understand that he is recovering and I know we all wish him very well.

I would like to talk to you this evening about the performance and prospects of the World Court; let me first say a historical word or two.

The peace movement of the latter part of the 19th century and the earlier part of the 20th century was transfixed with the idea that a way, perhaps the way, of preventing recourse to force in international relations was through international arbitration or, better still, international adjudication.

You may remember the Confederate cruiser the Alabama, which so successfully carried out attacks on Union shipping during the Civil War. After the Civil War, the United States brought a claim against Great Britain, alleging that it had violated its neutral duties by allowing the building, outfitting and arming of the Alabama in a British port. That was a very serious dispute, which for a time even looked as if it might provoke hostilities between the United States and Great Britain.

It was submitted to international arbitration. A panel of five arbitrators ruled in favor of the United States, and a very large sum of money was paid by Great Britain to the United States in settlement.

Judge Schwebel was elected by the United Nations Security Council in 1981 and re-elected in 1988 to sit as a Judge on the World Court at the Hague. He is the only American Judge on the Court.

He is the author of numerous books, articles, notes and book reviews in legal and other publications. His books include: *International Arbitration: Three Salient Problems*; *The Secretary General of the United Nations: His Political Powers and Practice*; and *The Effectiveness of International Decisions*.

That experience gave impulse to the ancient and medieval idea of international arbitration. There had been, indeed, a considerable number of international arbitrations beginning as early as the Jay Treaty and throughout the 19th century. They generally concerned rather obscure claims of one state against the government of another. The Alabama claims, on the contrary, concerned a political issue of great concern at the time. And so, pursuant to it, a substantial number of Treaties were entered into; particularly by the United States and by Great Britain, between themselves and among third States, providing for arbitration of disputes.

Now, almost 100 years ago the First Hague Peace Conference took place in the Hague, the initiative of all people of the Russian Czar, was followed by the Second Conference of 1907. The Conference of 1907 was the first Conference in the whole history of mankind in which all States of the world were invited. I think it is a measure of how far we have come in International Law and Organization, however, primitive and imperfect today's system is, when you recall that until 1907 a Conference of all States of the world had never even been called.

The 1907 Conference and the 1899 Conference did important work in qualifying the Law of War. The Law of War was concerned with the prevention of war, and included the Hague Convention on the peaceful settlement of disputes. The Hague Convention set up the so-called Permanent Court of Arbitration ("PCA"), which is actually a panel of perspective arbitrators.

At that 1907 Conference, the American Secretary of State, Elihu Root, instructed the American delegation to propose the creation of a Permanent Court of International Justice to essentially displace arbitration and be a body of judges who would do nothing but adjudicate cases between States and, consequentially, develop the body of International Law. That proposal attracted a lot of support. It failed particularly on this point. There were approximately forty-five States at the Second Hague Peace Conference, the Conference of 1907. The great powers all insisted that each of them should have a national of their State as a judge on the Permanent Court of International Justice. The smaller States claimed that they wished to be represented on the Court as well. The state of international society was so primitive, that there was no mechanism for the election

of judges and clearly, a Court of forty-five judges would have been unworkable. So, particularly on that seemingly elemental point, the Permanent Court was not created. One was not created until, with the founding of the League of Nations in 1919, there was a mechanism at hand which could elect judges.

The Covenant of the League provided that the League should take steps to constitute a Permanent Court of International Justice. The League set about that immediately. It set up a distinguished advisory committee of jurists, to draft a Statute of the Court. Fittingly, Elihu Root, who was no longer very young, was a member of that committee.

The Statute the committee prepared, is essentially the Statute which governs the International Court of Justice today with a few changes on which I will now remark.

The Statute, as it was proposed by the advisory committee, would have given the New World Court compulsory jurisdiction over legal disputes arising between States. When the Statute containing that *proviso* came to the Council of the League, roughly speaking the equivalent of today's Security Council, the great powers which were represented recoiled at this proposal. Great Britain and Japan, in particular, believed that giving a World Court compulsory jurisdiction, over any legal dispute between States, was in advance of its time. States were not willing to accept this and so commit themselves. This provision was simply deleted.

And then Lord Balfour, in a Declaration for which he is less famous than another, proposed a second change, which was to add English as a language of the Court. The Statute as drafted by the advisory committee contemplated only French as the language of the Court. With those two changes, the Statute went to the Assembly of the League for adoption as a Treaty subject to ratification by States.

Well, the small powers were very unhappy about the deletion of the provision for compulsory jurisdiction. There was a long wrangle. The result was to add the so called "optional clause," a clause pursuant to which any party to the Statute of the Court could opt, could decide, to invest the Court with compulsory jurisdiction over legal disputes which arose between it and another State in the future (*vis-a-vis* any other State that also so agreed). The hope was that over the years, bit by bit,

States would invest the Court with compulsory jurisdiction with which they were not willing to do at the time that the Court was founded. In fact, by 1938, some forty-five States had given the Court jurisdiction and there were only some fifty odd States independent in the world at the time. That was a very high proportion, quite obviously, of the International Community.

Well, how did this first experiment in international adjudication fend? I think one has to say, very well. Clearly, it was a failure if the standard of success was prevention of war. The Second World War quite clearly occurred and the Permanent Court of International Justice played no role in its prevention. I think this suggests that the hope of the peace movement of the late 19th and early 20th centuries, that international adjudication was the substitute for war, was an ill-founded and unduly idealistic hope.

If one puts that aside, I think that on any other standard the Court has to be judged a success. The Court adjudicated a substantial number of disputes between the States, rendering judgments which were regarded as sound and sensible. All of its judgments were carried out with the exception of one on the very eve of the Second World War, which may have been physically impossible to implement. It also rendered a large number of advisory opinions to the Council of the League of Nations, which were influential in the work of the League, the International Labor Organization and a number of other international organizations, some of which were a transient kind like those which settled the exchange of populations after the Greek and Turkish wars.

When planning was undertaken during the Second World War for a post-war international organization, while it was taken for granted that the League of Nations would disappear and be replaced by a newly designed and hopefully more effective international organization, it was equally assumed that the World Court would survive. This was the judgment arrived at not simply by international lawyers, but by international statesmen and politicians, all of whom recognized the value of the Court.

In fact, the Court was maintained with very minor changes in its Statute. The primary change was a provision for the Constitution of a Chamber of the Court, which allows a group of

judges less than the full Court in a particular case if the parties to the case so request. Such care was taken to preserve the Statute, that the number of the articles are the same in both the Statute in the PCA and of the International Court of Justice. The Court continued to sit in the Peace Palace of the Hague which was built through a gift of Andrew Carnegie to the PCA in 1902. The Secretariat of the Court, known as the Registry, carried over from one Court to the other. Indeed, the very last president of the Permanent Court served as the first president of the International Court of Justice ("ICJ").

Now, what of the record of the ICJ since the War? I think one has to say that it is mixed. It got off to a strong start, adjudicating a substantial number of contentious cases between the States and giving advisory opinions to the United Nations General Assembly at a considerable clip. By the 1960's, its workload began to decline so much so that by the 1970's the United States and a number of like-minded States placed an item on the General Assembly of the U.N. with a view to reviving recourse to the ICJ.

At the end of the 1970's, and the last dozen or so years, business in the ICJ has picked up very considerably. So much that today it has about a dozen cases on its docket. I will refer to those in just a few moments. The recourse of the Court has been uneven, though currently it is as healthy as ever.

You who know the dockets of American courts may smile to hear that the ICJ has a dozen cases on its docket. If you compare that to the United States Supreme Court, it sounds so ludicrously small. You must bear in mind the fundamental point that the constituency of the World Court, those eligible to litigate before the ICJ, in contentious cases as the Statute now stands, is a constituency restricted to States. Well, there are now 183 State Members of the U.N. and two others who are parties to the Statute of the Court, that is 185 potential litigants. If in the State of New York there were only 185 potential litigants, one would not see the jams in the courts of the State of New York one sees. And so indeed, having twelve cases out of a litigating potential public, so to speak, of 185 is a fair percentage.

Now, the Court's judgments, I think on the whole, have been well received. Some have been quite strongly criticized

and perhaps some are open to criticism. That is not unusual in judicial processes. Again, I think one might say the same of various judgments of leading National courts.

There have been a few disturbing phenomena in the history of the ICJ since the war. One is that in a number of cases in which the applicant has moved unilaterally, asserting a preexisting title of jurisdiction, the defendant party has denied that there is any basis for the Court's jurisdiction. The defendant has said that it is so obvious that there is no jurisdiction, that he would not appear in Court to defend the matter. Even in some of those cases where the Court found that it did have jurisdiction and it did proceed to render judgment, the defendant did not appear to argue the case and did not carry out the judgment.

I should recall to you that there are essentially two roots by which the Court establishes its judgment in a case. It may be that after a dispute has arisen, the parties agree to take the case to the ICJ. They conclude a mini-treaty called a "Special Agreement." For example, we now have before the Court and are writing a judgment in a massive territorial dispute between Chad and Libya. After that dispute arose, the Organization for African Unity brought the parties to a cease-fire. The parties were actually warring over the territory. They agreed that if they could not settle their dispute within a year, they would submit it to the Court. In that event, both did. Well, there was no dispute about jurisdiction there.

In roughly the other half of the Court's cases, the applicant moves to the Court, claiming that the defendant has agreed to the Court's jurisdiction, not in that particular case, but in that class of cases. Therefore, there is jurisdiction either through adherence to the optional clause, which I described earlier, in which a State generally invests the Court with jurisdiction or by concluding a Treaty on a particular subject which provides that the dispute arising under that Treaty shall at the request of a party to the Treaty be taken to the Court.

In a number of cases of this latter type, in six I think—to be more precise, the defendant has not appeared at all. That of course, from the Court's point of view has been unhappy, particularly if followed by a holding by the Court that it does have

jurisdiction and nevertheless, the defendant party does not carry out the consequent judgment on the merits.

Those developments clearly have not enhanced the ICJ's prestige. For a time, it appeared that that trend might be catching, because there was a series of cases in the 1960's, 1970's, 1980's in which this pattern of non-appearance manifested itself. It has not lately, and the hope is that it will not again, but no one knows.

Let me describe to you what the current docket of the Court is, because I think it will give you a better sense than anything else I can say of what the ICJ does.

It has ten or eleven contentious cases on its docket and one request for an advisory opinion. Advisory opinions can be requested by United Nations or specialized agencies. This one has been requested by the Assembly of the World Health Organization, which has asked the Court whether the use of atomic weapons is lawful under general international law and the Constitution of the World Health Organization. As you can appreciate, a delicate and difficult question. Now as for the contentious cases, I mention that the Court is currently dealing with a territorial dispute between Libya and Chad. You may remember that there was large-scale fighting between those two countries not long ago. Libya has been in occupation of a strip of territory, known as the Aozou Strip, which is either in the south of Libya or the north of Chad, depending on who is pleading this territorial dispute for some twenty years. Actually, Libya is laying claim to a much larger area of what appears on maps to be part of Chad. This is obviously a very important dispute to the people of Chad and the people of Libya.

We had, in this case, some 8,000 pages of printed pleadings. We had five weeks of oral hearings. We don't operate on a thirty-minute rule, it's more like a thirty-day rule. Indeed, essentially the parties were given the time they want to have. We are now in the process of writing a judgment which should appear very early in 1994.

Now, otherwise there is the case brought by Iran against the United States for the shooting down of an air-bus in the Persian Gulf in 1988. This provides an illustration of a defendant contesting the existence of an alleged preexisting type of jurisdiction. Iran is maintaining that the Court has jurisdiction by

reason of a provision in the Constitution of the International Civil Aviation Organization ("ICAO") which provides, quite unusually, for appeal from decisions of the Council of ICAO to the ICJ. Iran complained to the ICAO about the shooting down of the air-bus. The disposition by ICAO was not to Iran's satisfaction. The ICAO found that the shooting down was indeed an error, and not an attack which is contrary to Iran's interpretation. Iran, essentially relying on that basis of jurisdiction, and the subsidiary one as well, claims that the ICJ is entitled to deal with it. However, the United States claims that it is not, for reasons which are quite complex and I can explain if you are really interested. At any rate, there again, we have an illustration of the Court's jurisdictional problems. The Court will hear argument on jurisdiction this spring.

Another case is one that was settled two weeks ago, but I will mention it. A very interesting one between the island of Nauru and Australia. Nauru is a dot in the South Pacific, now having a population of about 10,000. Nevertheless, it is an independent State. The people have their own language and per capita, they are amongst the richest people in the world, because of phosphate deposits which exist on the island which have been mined throughout the 20th century.

The island was under German imperial rule. It passed into the hands of Australia in the First World War and became a League of Nations Mandate which Australia, New Zealand and Great Britain enjoyed. Then, it was turned into a trusteeship which terminated some twenty years ago.

Nauru's contention was that the mining of the phosphate during the years of the mandate and trusteeship, did not take proper account of the environmental needs of the people of Nauru. The center of the island was gradually hollowed out over the years and looks like a moon scape or a jumble of immense tombstones. Nauru's claim was that Australia in particular, as the chief administrative authority, was bound to pay for the island's rehabilitation. Australia maintained that it had left a very tidy trust fund, built up through royalties on the phosphate exploitation, which was more than sufficient to rehabilitate the lands if this was what the people of Nauru wanted.

In any event, we had a classic confrontation of jurisdiction. The Court was divided on this issue, but the majority found that

there was jurisdiction. Thereafter, in a fashion very much like the one you would find in any litigation, the parties settled on the terms substantially demanded by Nauru. Australia has agreed to pay for the rehabilitation of the lands and is levying on New Zealand and the UK to contribute.

Then there is a case brought by Portugal against Australia over East Timor which still more graphically illustrates our jurisdictional contortions. Portugal is claiming that Australia has violated the rights of Portugal and the rights of the people of East Timor to self-determination. You may recall that East Timor is a portion of an island now ruled by Indonesia, part of the Indonesian archipelago, which was a Portuguese colony for some 400 years. It was abandoned, at least physically abandoned, by Portugal after the Portuguese revolution which overthrew Salazar. Whereupon the territory was occupied by Indonesian troops.

Portugal has never recognized the validity of the Indonesian presence. Australia lies to the south of this island. In the waters between Timor and Australia, on the Continental Shelf, it is believed that substantial valuables exist, perhaps petroleum. Australia concluded a Treaty with Indonesia providing for a maritime and Continental Shelf boundary in the Timor Gap with a view to joint exploration by those two States of the prospective petroleum desserts.

Portugal now claims to the ICJ that Australia has trenched upon its rights as the true sovereign of Timor. Portugal maintains if Australia had wished to negotiate such a treaty it should have negotiated it with Portugal, and not with Indonesia.

Well you may ask, why is Portugal proceeding against Australia if its complaint is essentially against Indonesia? The reason is that Australia is party to the Optional Clause and, therefore, is subject generally to the Court's compulsory jurisdiction. Whereas, Indonesia is not, and Portugal apparently has concluded that the best legal way of making its point, is to proceed in this fashion.

Now we have another maritime deliberation, not quite as exotic as the case I just described, between Guinea Bissau and Senegal. These two States earlier had submitted their maritime boundary to international arbitration. Guinea Bissau

challenged the validity of the resultant arbitral award in the International Court of Justice. On an interesting note, the president of the arbitral tribunal appended an opinion in which he indicated that while he voted for the opinion, he wished it had been otherwise cast. Guinea Bissau then claimed that in fact the two-member majority was an illusory majority, because the president had indicated that he preferred an award other than the one for which he had voted. Therefore, Guinea Bissau maintained that the arbitral award was a nullity, and asked the Court to so declare, which the Court declined to do. At any rate, that left part of the maritime boundary unadjudicated and it is that remaining portion which may come before the Court, though the parties are actively negotiating a possible settlement.

We have still another maritime limitation case, this between Qatar and Bahrain, two States in the Persian Gulf and again, there is a jurisdictional charge.

Then there are a pair of cases of an unusual sort, the so-called Lockerbie cases, in which Libya sought to enjoin the United States and the United Kingdom from moving in the Security Council to impose sanctions on Libya. Libya has refused to surrender two Libyan nationals for trial either in Scotland or in the United States. The two Libyan nationals were accused of blowing up Pan American flight 103. The claim that Libya made before the Court was this: all the States concerned are parties to the Montreal Convention on the Suppression of Attacks on Civil Air-crafts. The Montreal Convention provides that, persons accused of such acts may be tried by the State having jurisdiction over them or may be extradited to another State which has been concerned with the action against the civil aircraft concerned. Libya's contention was that it had jurisdiction over the two Libyan nationals accused. The two Libyan nationals were present in Libya and under house arrest. Libya did not choose to extradite them. It claimed that the demands of the United States and the United Kingdom in the Security Council were unlawful, in violation of its Treaty rights, and were improper pressure being exerted upon Libya through the medium of the Council.

Before the Court had disposed of this request, which was a request for what in our parlance we would call an interim junc-

tion, the clause called provisional measures or interim measures of protection, the Security Council passed a second resolution. This was clearly under Chapter 7 of the United Nations Charter (binding resolution), demanding that Libya surrender the two accused. The Court then held, that since this was a resolution adopted under Chapter 7 (binding on all States), and since under the terms of the U.N. Charter the obligations of a State under the Charter supervene obligations under any other international treaty, any rights that Libya might have which impleaded under the Montreal Convention were so supervened. So the Court declined to order the provisional measures requested. The case is still pending on the merits.

Now, in addition to the case I first referred to, about the shooting down of the air-bus. Iran has brought a second case against the United States for shooting up oil platforms in the Persian Gulf at the time the U.S. Fleet was escorting tankers in the Persian Gulf. That case is at the very preliminary stage. Two final cases: one has been brought by a special agreement between Hungary and Slovakia. It concerns an immense dam which has been built on the Danube pursuant to a Treaty between Czechoslovakia and Hungary. That Treaty was denounced by Hungary after the fall of the Communist Government. Hungary had concluded that it is an environmental threat. Whereas Slovakia maintains that it is not, and that a few billion dollars have been invested in it, and that the electricity it will produce is vital to its economy. Slovakia claims that Hungary is in breach of its Treaty obligations by not joining in implementing the project and supporting the realization of the dam and its operation.

Finally, you may have read in recent weeks that there is a case before the Court brought by Bosnia against Yugoslavia, that is to say Serbia and Montenegro, alleging that Yugoslavia has been promoting genocide in the territory of Bosnia. The jurisdiction claimed is based on the Genocide Convention which, as you know, is designed to interdict the elimination or attempted elimination of a group of persons identified by their race, religion, nationality, ethnic connection and the like, to eliminate the core or part of such a people. That Genocide Convention was concluded in the wake of the Holocaust, adopted by

the General Assembly in 1948. It gives the ICJ jurisdiction in the fashion I described of treaties. Bosnia acceded to that Treaty once it became independent. Yugoslavia has been a party all along.

Well, Bosnia asked the Court to do many things, most of which the Court found were not in its jurisdiction. For example, there have been two rounds of provisional measures and two oppositional. After the hearings that took place at the end of July, Bosnia asked the Court to hold that, any agreement which would be concluded in the Geneva negotiations between Bosnia and Yugoslavia would be a nullity: void as having been extorted at the point of a gun and also to hold that any partition of Bosnia would be unlawful.

The Court found both of those requests as not within the scope of its jurisdiction granted by the Genocide Convention. The Court did issue an order, first in April and reaffirmed it in the beginning of September, which calls on the parties to take no action which leads to genocide. The order calls in particular on Yugoslavia to ensure that any paramilitary organization, regular military organization, or any other organization or group of persons over whom it may have control or influence, take no measures which can lead to the commission of genocide.

In the second order, the Court took note of the continuing heinous atrocities in the territory of former Yugoslavia and called upon the parties to heed the order that it had issued the previous April. Now, in fact, the orders of the Court appear to have had no more effect than have the many Resolutions of the Security Council of the United Nations regarding that tragedy.

At this juncture Professor Sinha expressed the appreciation and thanks of the Pace University School of Law faculty and student body, and honored guests for his Excellency, Judge Schwebel's remarks at the Annual Blaine Sloan Lecture.

Professor Sinha commented, "my great compliments go to the Pace University School of Law students. I am very proud of my student team, especially Mr. Michael Varon who is the Editor-in-Chief of the Pace International Law Review and Mr. John Sarcone who is the President of the Pace International Law Society, and all the many others who made this Blaine Sloan Lecture possible."