Book Review

The Price of International Justice by Philip C. Jessup, 1971, New York: Columbia University Press. Pp. viii, 82, $6.55.

The International Court of Justice is the principal judicial organ of the United Nations. When it was formally opened in 1946, as the successor to the Permanent Court of International Justice, it was expected that the court would play an important role in the settlement of international legal disputes by peaceful means. Since the 1960s, however, there has been a marked decrease not only in the number of contentious cases referred to it for settlement but also in the number of requests for its advisory opinions. The court has delivered to date thirty-one judgments and fourteen advisory opinions. Since 1960 it has received and decided only four contentious cases and given only two advisory opinions; there are four cases pending.

The declining interest of states in the court is also reflected in the diminishing popularity of its compulsory jurisdiction. All member states of the United Nations — 137 to date — are *ipso facto* parties to the Statute of the court. In addition, there are three non-member parties, namely, Lichtenstein, San Marino and Switzerland. The court is also open to two other states, West Germany and South Vietnam, by virtue of their voluntary declarations. Of these 137 parties, only 47 have accepted the court's compulsory jurisdiction, many with reservations. This record compares unfavourably with that of the Permanent Court whose compulsory jurisdiction was accepted by as many as 38 of the 54 member states of the League of Nations.

It was against this background of "crisis" that on 15 December 1970 the General Assembly agreed unanimously to launch a general review of the role of the court. States parties to the Statute were invited by the Secretary-General to submit by 1 July 1971 their views and suggestions on the following points: (i) the role of the court within the framework of the United Nations; (ii) the organisation of the court; (iii) the jurisdiction of the court; (iv) the procedures and methods of work of the court; and, (v) future action by the General Assembly. On the basis of the thirty-one replies to the questionnaire, the Sixth Committee considered the

item during the Twenty-Sixth Session of the Assembly in 1971; this debate produced resolution A/C 6/L 831 of 2 December 1971, the result of which was to continue the work to the Twenty-Seventh Session.

The thirty-one replies include the views of the major powers as well as the views of the major dissenters, though, in numerical terms, the number hardly reaches a quarter of all the parties invited to reply. Broadly speaking, the opinions expressed in the replies and during the debate fall into three categories: those that favour the creation of an *ad hoc* committee to study the problem; those (mainly socialist states) that regard the whole issue as an exaggeration of a problem that can be left to the court itself and to individual sovereign states; and, those in the middle. It may be noted that the resolution adopted by the General Assembly in 1971 was a compromise between the first and the second group of opinions. The major points that are raised by the thirty-one respondent states are briefly discussed here in accord with the headings of the questionnaire.[1]

I. The Role of the Court

a. *The Disinclination of States to seek International Adjudication*

In spite of the reluctance of states to settle their international legal disputes by recourse to the court, none of the respondents denies the importance of the role that the court plays as well as the influence of its judgments and advisory opinions on the progressive development of international law. At the same time, the respondents, though not the great powers specifically, agree that the court is playing an insufficient role. This is said to arise from a number of factors: (1) General: the lack of a unified concept of international justice; the lack of confidence in the court; doubt about the competence and objectivity of the court; reluctance to rely on third-party adjudication; dislike of court-going. (2) Political: attachment to national sovereignty; disbelief in the possibility of accommodation at the ideological level; present structure of international relations; and, the dominant importance of national interests. (3) Procedural: unfamiliarity with the forum; length of time required for litigation; costs of litigation; dissatisfaction with the composition of the court; dissatisfaction with the mode of election of the judges.

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[1] A/8382 Add. 1-4.

This is a fairly full catalogue of the major factors that contribute to the reluctance of states to seek the services of the court. Numerous as they may be, few, if any, of them would prevail over the genuine intention of a state to settle a dispute by resort to judicial settlement. At the risk of oversimplification, therefore, it can be asserted that the basic cause of states' disinclination lies not in minor technicalities, but in their lack of will to resort to adjudication, as is rightly observed by Japan and Switzerland. The truth is that, in contrast to the inter-war period, states have moved away from the idea of judicial settlement as a central part of their concept of the development of international order. It is quite possible that there will be a swing back — who, for example, would have thought in 1971 that there would be four cases pending in 1972? — but at the present time it seems that the preferred method of dispute settlement is one that emphasizes flexibility and freedom to control the proceedings and the outcome.

b. *The law Applied by the Court*

This is one of the most controversial points in the current debate. A number of developing countries, Cyprus, Ethiopia, Guatemala, Iraq and Mexico, among others, have pointed out that paragraphs 1(B) and (C) of Article 38 of the Statute are badly in need of amendment; they are said to be anachronistic and discriminatory. This allegation is based on the historical-political fact that the majority of the parties to the Statute did not take part in the process by which much of customary international law was created; it challenges the continued use of the familiar phrase "civilized nations" and, by implication, it brings into question the authority of certain parts of customary international law itself.

It is true that much of modern international law springs from the practice over the past four hundred years of the states within the Christian civilisation. On the other hand, the community of nations has expanded rapidly since 1945, when the Charter of the United Nations, of which the court's Statute is an integral part, was signed by only fifty states at San Francisco. There are now nearly three times as many independent states. These newly emerged members have come to question — and they are fond of doing so in an open forum where majority rule prevails — the objectivity of certain rules of customary law that date back to the time when the world was in the hands of a few leading powers. As is well known, this challenge is part of the process of accommodation and adaptation that is being sought by the new majority and the established minority.

Of course it is possible to argue that the problem of customary international law may prove to be more academic than realistic. International custom is only one of the sources of law to be applied by the court; the effect of a particular custom will not prevail over the *ex aequo et bono* provision if the parties agree to use this provision; and the creation of customary international law does not necessarily depend on the efflux of a lengthy period of time. This latter point is admirably illustrated by the doctrine of the continental shelf, which was formulated almost irrespective of the time factor, having required little more than a decade to be recognised by the majority of coastal states.

However, the problem of customary international law is a basic problem and I believe that it is not likely to wither away. For example, while it is true that the third world states are dissatisfied with certain rules of customary international law, for example, those applying to the expropriation of foreign property, it is also true that they are quite happy to recognise new rules of customary international law, for example, the rule that colonies have a right to self-determination. The court, in its latest Advisory Opinion, does not limit itself to holding South Africa bound to its Mandate obligations as interpreted by the court, but it seems to impose on South Africa a whole body of "United Nations law" relating to non-self-governing territories. The court could only do this through the channel of customary international law. If the court is willing, as it seems to be, to consider a series of United Nations resolutions on a particular subject as evidence of a new rule of customary international law, customary international law may become the very channel through which the countries of "the third world" are going to have their way.[2]

In this connexion, it seems to me that the suggestions of Cyprus and Austria to include some sort of "United Nations law" as one of the sources that the court would administer will deserve attention when, in the still distant future, there arises the probability of amending Article 38.[3] Another reason for paying attention to these suggestions is the effect that the I.C.J. is willing to give to Security Council resolutions. In its latest Advisory Opinion the court made it clear that not only those resolutions taken under Chapter VII can have binding effect; other resolutions can also bind Member

[2] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 31.

[3] A/8382, at pp. 23, 25-26.

States through the operation of Article 25 of the Charter; whether the Security Council intended a particular resolution to be binding must be decided on an *ad hoc* basis.[4] It may be true that Article 38 is incomplete, for example, as regards United Nations resolutions and declarations, and that it is slightly out of date, in that it overemphasizes custom and consent, two elements that were strongly reaffirmed by the court in the North Sea Continental Shelf Cases; but I believe that at the present stage it is probably unwise to try to change the formal sources contained in this Article. The actual impact of many so-called law-making declarations on the practice of states remains obscure; and the fact is that much can be done under paragraph 1(b) as it now stands. Until such time as there is greater consensus on the meaning of declarations and other acts that are adopted unanimously, it seems to me that the technical effect of United Nations law can be left to the court to articulate on a case-by-case basis.

With regard to paragraph 1(c), on the general principles of law recognised by civilised nations, the controversy does not appear to be directed so much at substance as at the expression "civilised nations". In this connexion, an interpretation based on the original 1920 version of this unfortunate modifier may be noted with interest: "as all nations are civilised, as 'law implies civilisation', the reference to 'civilised nation' can serve only to exclude from consideration primitive systems of laws".[5] If, in 1920 and in 1945, this interpretation was acceptable to the members of the League of Nations and the United Nations respectively, it does not appear to be acceptable to the large number of new members that have acquired their independence since 1945. The point at issue is not whether some nations are legally more civilised or less civilised than others, but whether it is permissible to retain a reference to civilisation when it carries overtones of discrimination and even of colonialism. In point of form and substance, a definition of one of the sources of law to be applied by the principal judicial organ of the United Nations should not be open to question as to its objectivity and representative character. From this standpoint, it seems wholly appropriate to reword paragraph 1(c), as suggested by a number of states, to read: "the general principles of law recognised by the international community".

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[4] I.C.J. Reports 1971, p. 16, at pp. 52-53.

[5] Manley O. Hudson, *The Permanent Court of International Justice 1920-1942* (New York: MacMillan Company, 1943), at p. 610.

c. *The General Approach to the Problem of Review*

On the general approach to the question of how to strengthen the role of the court, three major opinions were expressed in the replies and during the debate: those favoring the creation of an *ad hoc* committee to be appointed by the President of the General Assembly after appropriate consultations with regional groups, on the basis of equitable geographical distribution; those (expressed mainly by the socialist states) that would merely draw the attention of members to the possibilities now afforded by the Statute for the purpose of settlement of legal disputes and would urge the court to accelerate the revision of its rules; and, those that would strengthen the court but not at the price of creating a committee to study the problem. The majority of states appear to have favored the first view; however, it was the third that was adopted by the Sixth Committee in resolution A/C.6/L.831 of 30 November 1971. This resolution merely invited states that had not yet done so to reply to the questionnaire; urged the court to complete the revision of its rules as soon as possible, and put the item over to the 27th Session.

Though the majority of states were in favor of measures to rescue the court from its current state of inactivity, the move to create a committee, as proposed (and strongly supported by Canada) in draft resolution A/C.6/L.829, does not seem to have been sufficiently attractive to the supporters of the two other points of view. The opposition from the socialist group is based on the fact that recourse to the court is only one of the possibilities open to sovereign states for the peaceful settlement of their legal disputes. The socialist states point out that the court should be permitted to complete the revision of its own Rules which it started in 1967. There is also apprehension, unjustified in my view, that there are hidden designs or ulterior motives (amendment of the Statute) behind the idea of establishing an *ad hoc* committee. In principle, the third opinion, like the first, is in favor of strengthening the court, but it places more importance on the prevaling international climate (which is indifferent) toward the court than on the immediate need for institutional and technical revisions. The very fact that in the Sixth Committee these differences of opinion have become so marked is itself an indication of the crisis before the court. If, as I believe we can assume, the need for review is sufficiently established, there remains the question of its method and extent. The international climate toward international adjudication is not likely to be changed by tinkering with technicalities. What is needed is a new understanding and acceptability of the possibilities of judicial settlement.

II. The Organisation of the Court

a. *The Composition of the Court*

Some states have suggested an increase in the number of judges in order to ensure equitable representation among states parties; others have opposed this idea on the ground that such an increase would make the deliberations of the court more difficult and its business more cumbersome.[6] The suggestion to expand the size of the court is based on the argument that there is, at the present time, a geographically inequitable representation. Of the 47 (15 incumbent and 32 past) judges elected since 1946, 18 (6 + 12) are from Europe, 16 (3 + 13) from the Americas, 9 (3 + 6) from Asia-Australia, and only 4 (3 + 1) from Africa.[7] Finland has suggested (rather ambiguously) that an increase "would obviously mean in practice raising the numbers to at least 25".[8]

In the absence of any agreed basis on which the number of judges can be determined in numerical terms, the present size of the court, consisting of 15 judges, as was its predecessor, must be assumed to be reasonable and practical, even though arbitrary and artificial, as would be all other suggested figures, such as

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[6] Philip Jessup's remark on this point is as follows:

> Some say that the number of judges should be increased in order to make the Court more widely representative. Such suggestions remind one of a letter written by Mr. Justice Story in 1838 after the Act of March 3, 1837, increased the number of justices on the Supreme Court of the United States from 7 to 9. He wrote:
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> > 'You may ask how the Judges get along together? We made very slow progress, and did less in the same time than I ever knew. The addition to our number has most sensibly affected our facility as well as rapidity of doing business. "Many men of many minds" require a great deal of discussion to compel them to come to definite results; and we found ourselves often involved in long and very tedious debates. I verily believe, if there were twelve Judges, we should do no business at all, or at least very little.'

Philip Jessup, *The Price of International Justice,* (1971), at p. 71.

[7] International Court of Justice, Yearbook 1970-1971, No. 25, pp. 6-8.

[8] Still another number was suggested by the Institute of International Law in 1954. The Institute resolved that:

> It is desirable to avoid an increase of the number of judges, which would be calculated to make the deliberations of the International Court of Justice more difficult.
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> Should new circumstances make some increase necessary, the number of judges should not exceed eighteen.

Annuaire de l'Institut de Droit International, (1954, vol. 45, Book 2), at p. 297.

18 or 25. It seems, therefore, that the argument about the size of the court is not so much the real issue — it is equitable representation that is at stake — since expansion merely in physical terms is not in itself likely to lead to an increased use of the court. If, as I say, the above distribution is not thought to be equitable from a geographical or other point of view, there would have to be an agreed basis upon which to determine a more equitable distribution. By no means, however, would this be a matter of easy agreement among members whose interests vary so widely. A number of criteria have been suggested, such as geography, population, cultural or historical traditions, or even a favourable record of recourse to the court.

Though it it obvious from the above distribution, and from the court's record, that the traditional users of the court (or their regions) have produced the majority of judges, it is doubtful whether a past record would bear any significant relation to the present endeavor of the United Nations to enhance the role of the court; the majority of prospective or possible clients are new states that are skeptical about its composition. Furthermore, dissatisfaction over the composition of the court may even produce proposals to adopt a quota system based on criteria determined by the strentgh of a majority in the General Assembly. This would not only affect the standing of the court as a specialized judicial organ, but might even reflect on the professional status of the judges and prospective judges, all of whom are elected in their individual capacities. The whole subject is likely to remain a source of controversy unless there is acceptance of the present system or a readjustment.

b. *The Mode of Designation of Judges and the Length of their Mandate*

A compulsory retirement age of 72 has been suggested by the United States and of 75 by Sweden and Switzerland. These suggestions certainly appear to be in keeping with the idea of increasing the use of the court. The complexity of international adjudication requires legal minds of experience. At some point, however, this advantage is bound to come into conflict with the limitations on the physical — as well as mental — capacities of the human beings concerned. Though, from a practical point of view, it is highly improbable that the absence of a compulsory retirement age under the present system would ever reduce the court to "a home for the legally aged", the increased role that is being projected for the court will place proportionately heavier demands

on the judges. It would therefore be appropriate to set a compulsory retirement age. In this regard, the average age of the 47 judges including the incumbent 15 is 72 years of age; the youngest was 57 years of age (Azevedo of Brazil) and the oldest 87 (Alvarez of Chile), with the highest concentration of 22 judges in the age bracket 70-79 years of age.[9]

The mode of designation of the judges has not provoked a large number of serious comments. However, the reply of the United States, while recognising that "many highly qualified jurists have been elected to the court", pointed out that "the nomination and election procedures have been subject to intensive political pressures which have caused some States to raise questions concerning the independence and objectivity of the Court". Accordingly, "before making nominations, national groups should conduct extensive consultations with national and regional bar associations, universities, judicial authorities, legal scholars and other concerned groups in order to obtain recommendations regarding nominations".[10] Much the same suggestion has been made by non-governmental observers and commentators, including, in 1954, the members of the Institute. The point here seems to be that there is a need to ensure an appropriate balance, in composition, between practitioners who have had practical experience, but who may be thin in their knowledge of international law, and (usually) professors who have a deep understanding of the subject but little practical experience. While it is true that Article 2 of the Statute provides for the necessary balance, I believe that we must emphasize the fact that adequate knowledge of international law is a condition precedent to appointment. As Dr. T.O. Elias has noted, this requirement goes to the question of the capacity of the court to contribute significantly to the progressive development of international law. What counts is the recognized competence of the individual in international law; the prevailing municipal standard may not be sufficient.

c. *Recourse to Chambers, as provided in Articles 26-29 of the Statute*

The respondents have generally favored the chamber system as defined in Articles 26-29 of the Statute; however, their support appears to be based not so much on the intrinsic value of this possibility as on the absence of any particular reason to oppose it. The chamber system has never been used. In this regard, it is

[9] See: Yearbooks of the I.C.J., Volumes 1 — 25, 1946 — 1971.
[10] A/8382, at p. 41.

worth recalling that in his address to the American Society of International Law in 1970, on The Rule of Law and the Settlement of International Disputes, the U.S. Secretary of State, Mr. William Rogers, observed that greater use might be made of the chambers of the court in order to relieve apprehensions about submitting disputes to the court *en banc*. Judge Jessup approves of this proposal, whose acceptance, he emphasizes, depends only on "the will or un-will of the parties". He demonstrates, in convincing fashion, how the Statute and the Rules can be used as they now stand to achieve the same result as when the parties set up an *ad hoc* arbitral tribunal, but making use of the court.[11]

One of the most important effects of the new rules that were adopted on 10 May 1972 is that the parties will now be consulted about the composition of an *ad hoc* chamber to deal with a particular dispute. The new Article 26 goes fairly far to give effect to the will of the parties; and though it is subject to Article 27, which calls for elections to all chambers to be by secret ballot, I believe that the majority of the members of the court would not ignore the expressed intentions of the parties. The result of this revision of the Rules should make *ad hoc* chambers more attractive to potential litigants, expecially as it now seems possible for the parties to a regional chamber to choose judges from outside the region. As Judge Jessup rightly predicted, the system has become sufficiently flexible to permit of an *ad hoc* chamber in theory but an arbitral tribunal in actuality.

d. *Creation of Regional Courts*

Some states have supported this idea. Other states have argued that regional courts would lead to a regionalisation and eventually to a fragmentation of international law and that unforeseen difficulties might arise from cases involving different legal systems in different regions. The regional court idea is not the same as the idea of *ad hoc* chambers presently available under Articles 26-29 of the Statute. Under Article 26(1), the court may "form one or more Chambers... [for dealing with a] particular category of cases..." and, as Judge Jessup points out, "the categories could be geographical".

The arguments against regional courts are evident from a number of points of view. First, in view of the preference of states for the full court rather than for the *ad hoc* chambers already available,

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[11] Jessup, *op. cit.*, n. 6, at p. 64.

there is little reason to believe that such preferences would be less strongly operative in the case of regional courts. Secondly, the fact that some regional organisations already maintain their own judicial organs would in no way help the idea of regional courts within or without the system of the International Court. Thirdly, the existence of a regional court would pre-suppose the inclusion of 'regional judges' in its membership, judges with special knowledge of the region in question. However, it is a fact that many states in a region, Latin America for example, do not want regional judges to decide regional disputes; they want the objectivity of judges from outside the region. It may be added that special knowledge in international adjudication is not beyond the reach of a judge of the International Court. Fourthly, there is a growing unity and universality of general international law and the creation of regional courts would not assist in this development. Therefore, it would seem undesirable to attempt to enhance the role of the International Court at the expense of the very law that it is striving to develop and apply.

Despite all these arguments, some of which are obviously more cogent than others, we cannot overlook the fact that for certain specialized topics, for example, the resources of the sea and the ocean floor, regional and functional courts may become a necessity because the parties concerned, for example, organisations and individuals, are precluded by the Statute from appearing before the International Court. There is also the distinct possibility that the entire judicial system might be strengthened and envigorated by an appeal structure from "lower" to "higher" courts; a variety of tribunals might stimulate rather than fragment international law. In any event, it was the opinion of the Canadian representative in the Sixth Committee during the Twenty-Fifth Session that there should not only be chambers for particular categories of cases, but that there should be regional chambers and a system of functional and regional courts. It seems to me that we probably need a good deal more discussion and clarification about the nature of regional chambers and regional courts before we can predict their effect upon the development of general international law.

e. *Other Comments*

(i) Granting preferential rights to states accepting the compulsory jurisdiction of the court. Cyprus and Switzerland have raised the possibility of granting preferential rights, in allocating seats, to states accepting the compulsory jurisdiction of the court. I suggest, with respect, that this is not desirable. First, it would

require an amendment to Article 2 of the Statute, which stipulates that judges are elected in their personal capacity regardless of their nationality. If a candidate's nationality was to be one of the conditions of his eligibility, the purity of the court's character as a judicial organ would be compromised by the impurity of politics. Secondly, as is well-known, the court's so-called compulsory jurisdiction has been accepted by many states with many reservations, some of which render the acceptance almost meaningless. Thirdly, discrimination on the basis that Cyprus and Switzerland suggest would tend to divide the members of the court (and the states parties) into an "in-group" and an "out-group", a situation that would be detrimental to the endeavor to broaden support for the court on a comprehensive basis.

(ii) Identical composition of the court in different phases of the same case. This point has been raised by Sweden and Switzerland in connexion with Article 13(3) of the Statute, which stipulates that judges "shall finish any cases which they have begun", even after they have been replaced. The interpretation of this provision depends upon the definition of an 'identical case' and on the length of interval that elapses between one phase and the next phase of an identical case. The identity of a case with different phases requiring separate adjudication would usually be self-evident, as may be seen from such recurrent cases as the Nottebohm Case, the Right of Passage Case, the South West Africa Case, and the Barcelona Traction Case. With regard to the interval between different phases of a case, therefore, Article 13(3) should be taken to apply to cases which continue not very far beyond — and not ones which recur long after — the time of replacement of one or more of the judges. It would certainly be unreasonable to interpret it to mean that former judges may be recalled to finish cases that were referred to the court during their term of office. On balance, it may be suggested that the point at issue here is a matter of efficiency in adjudication rather than a matter of substance, in the sense that, under normal circumstances, the judges of the court are quite capable of familiarizing themselves with any new cases placed before them.

(iii) The question of judges *ad hoc*. This question has been raised by three states, Cyprus, Madagascar and Switzerland. As is well-known, the system of *ad hoc* judges dates back to 1920, when the Committee of Jurists was preparing the Statute of the Permanent Court. The formula agreed upon by the Committee of Jurists and adopted unanimously by the Assembly of the League was intended to protect the character of the court as a world court;

to avoid "ruffling national susceptibilities"; and to maintain equality between the parties to a case.[12] It is the third of these reasons that makes the most sense, even though equality could have been maintained as effectively, and in a simpler way, by removing from the case in question a judge holding the nationality of either party, instead of adding a judge *ad hoc* to "represent" the party without a national on the Bench. The preparatory body on the present court argued, in 1944, that national judges "fulfill a useful function in supplying local knowledge and a national point of view".[13] This raises the question whether, assuming its essentiality in adjudication, local knowledge and a national point of view can only be obtained through national judges. There is also the fact that the practice of states in selecting judges *ad hoc* appears to be undergoing a change; in three cases no judges *ad hoc* were appointed; and in six cases those appointed were of foreign nationalities.[14] This change makes the reasons for the system less convincing. From a purist's point of view, the judge *ad hoc* is undesirable: the system introduces into the judicial organ a feature that is characteristic of courts of arbitration. However, it is unlikely that the Great Powers would agree to a situation in which they were "unrepresented" on the court.

III. The Jurisdiction of the Court

1. Contentious cases

a. *The Question of Compulsory Jurisdiction*

It is the opinion of many states that the court's compulsory jurisdiction should be more widely accepted and that reservations should be less restrictive than they now are. At present, 47 states have accepted compulsory jurisdiction but mostly with reservations. Undoubtedly this is one of the most controversial points in any discussion on the role of the court. The draftsmen of the Statute (on both occasions) regarded reserved acceptance as preferable to non-acceptance; they hoped that the former would in time lead to general acceptance. However, this has not been the case; accept-

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[12] Hudson, *op. cit.*, n. 5, at p. 354.

[13] Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, Supplement to (1945), 39 A.J.I.L. pp. 1-42, Section 4, at pp. 11 ff. This is still a useful document.

[14] Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, (1971), 65 A.J.I.L. 253.

ance has sharply decreased in proportion from 38:54 in 1938 to 47:137 at present. In view of the influence of the leading powers, it is worth referring here to the examples provided by the five permanent members of the Security Council. Russia has not accepted compulsory jurisdiction from the beginning, nor has China, unless Peking happens to have acceded to the declaration of 1946 made by the Nationalist regime. This leaves for consideration Britain, France and the United States. These powers are the traditional clients as well as the major producers of judges for the court. However, they have little to be proud of so far as the restrictive character of their reservations is concerned. Since the leading powers are themselves reluctant to use the court, they are not in a strong position to encourage other states to accept its compulsory jurisdiction. Understandably, therefore, their response to the Secretary-General's questionnaire on this point is silence, with the exception of France, which made a brief generalization not exactly to the point. It is arguable that there will be little likelihood of the widespread acceptance of compulsory jurisdiction until one or more of the great powers shows the way. On the other hand, it could be argued with equal conviction (by Canadian scholars?) that the smaller and middle powers should set an example for the great powers. This would involve a review and revision of existing declarations of acceptance. Apparently Canada put this very idea forward as long ago as 1963.[15]

b. *Access to the Court*

With regard to Article 34(1) of the Statute, which stipulates that "only states may be parties in cases before the Court", the majority of respondents believe that access to the court should also be granted to international organisations, including the United Nations itself. Cyprus has suggested that such access should be extended to individuals as well; and the same point was touched upon by the Ivory Coast. Support for an extension to international institutions is based on the view that Article 34(1) originated in the last century when only states were regarded as the proper subjects of international law. Though France has argued that the possibility might arise of having to subject the United Nations itself to one of its own organs, it appears that the idea of granting selected international organisations access to the court is one of

[15] Sydney D. Bailey, *Peaceful Settlement of International Disputes: Some Proposals for Research*, (3rd revised ed., 1971). UNITAR PS No. 1, p. 40, para. 19.

the few points on which states parties to the Statute are prepared to agree. Unfortunately (in my view) extension of such access to individuals is not yet acceptable. I have argued elsewhere, as have many others, that the idea of referring certain fundamental values to a point of reference beyond the nation-state fits comfortably and usefully with the heritage of the liberal democracies and expresses theoretically what is likely to be done in numerous practical ways in the future; in other words, that the individual must be recognized as a direct subject of international law; however, this position is still regarded by most states as incompatible with their national sovereignty.

c. *Disputes Relating to the Interpretation or Application of Treaties*

Interestingly, in view of previous Soviet practice, not a single state has opposed the view that important bilateral and multilateral conventions should include provisions for reference to the court of disputes relating to the interpretation or application of such conventions. As a matter of fact, this is not at all a new suggestion; it has been the practice for many states for several decades, though mostly on an optional basis. This is a matter that can be put into affect outside the Statute.

2. Advisory jurisdiction

Most of the respondents that make reference to the point favour the idea of extending the court's advisory jurisdiction to a wider range of international organisations, including regional organisations, than is currently permitted under Article 65 of the Statute. Austria has suggested that access to the court for advisory opinions should be extended to supreme courts and other national institutions. And a few members have suggested that individual states themselves be permitted to seek advisory opinions. France has objected to these proposals on three grounds. First, the Permanent Court received as many as 27 requests for such opinions between 1922 and 1935, when the last request was made, whereas the International Court has received to date no more than 13 requests, despite the fact that as many as 19 organisations and agencies are authorized to seek such opinions. Secondly, if individual states are authorized to seek advisory opinions, it would be difficult to protect the fundamental principle that a state cannot be subjected to third party settlement without its consent; and if such consent is necessary it will rarely if ever be given. Thirdly, an advisory opinion handed down in response to a request by a single state

might complicate the situation should a contentious case develop out of it at a later date.

It seems reasonable, in principle, to extend the court's advisory jurisdiction to more international organisations. If states were to be given the same privilege it would probably have to be (as the French suggest) on the condition in every case that the consent of the other party was obtained. I believe that the international system is still too incomplete to permit of a situation, analogous to the declaratory action in municipal law, under which a state, merely by virtue of its membership in the international community, or on the ground of its alleged interest in a particular rule, is entitled on its own motion to raise a question of law before the court. On the question of including supreme courts or other government institutions as parties eligible to seek advisory opinions, Judge Jessup points out that an amendment to the Statute would be necessary. In line with the thinking of W.R. Bisschop and Sir Hersch Lauterpacht, he thinks that this proposal "could open new avenues of greater usefulness for the International Court", but he is not optimistic about its chances of acceptance.[16]

3. Procedures and Methods of Work of the Court

In the opinion of many states the court's proceedings are too rigid and cumbersome. It has been suggested, though this is hardly new, that in contentious cases questions relating to jurisdiction and other preliminary issues should be decided before considering the merits. Other suggestions for expediting procedures and reducing the costs of litigation include: (i) more efficient pleading during the oral phase of the proceedings and more extensive use of the chamber system; (ii) the application of more stringent standards in granting extensions of time for preparation of pleadings and other presentations; and (iii) a special fund within the framework of the United Nations to which a needy state might apply for financial assistance in appropriate cases. It is in the context of these suggestions that the current effort of the court to review its own Rules is genuinely welcomed.

The length of time required to decide the question of jurisdiction and other preliminary issues could and should be reduced. On an average, the jurisdictional phase of a contentious case required more than a third of the time that the court takes to conclude a case. An outstanding example of an unnecessarily lengthy

[16] Jessup, *op. cit.*, n. 6, at p. 76.

case is the Barcelone Traction Case: the new application was filed on June 19, 1962, the judgment on its preliminary objections given on July 19, 1964, and the final judgment on its merits on February 5, 1970. In all fairness, it should be added that, in this example, the delay was not that of the court alone; the parties deserve a large measure of the blame.

It has been suggested that the bulk of the written material could be reduced, a process in which the Registrar could play a more active role than is customary, and that the oral presentations could be related more directly to the points in issue. Indeed, Articles 57 and 67 (6) and (7) of the new Rules go some distance in this direction; the preliminary hearings will now be enlarged to include all points that bear on jurisdiction and there will be an earlier decision on preliminary objections. All this is to the good and is to be welcomed; however, we need to remember that we are dealing here with states, not individuals, and that, in truth, no state has ever been known to refuse to go to court on the ground that the proceedings would take too long. A particularly valuable statement on this point is to be found in the Swiss reply to the Secretary-General's questionnaire (p. 113).

4. Future Action by the General Assembly

I have already indicated that many delegations had doubts as to the advisibility of setting up an *ad hoc* committee at the present stage. It was felt that there was too little information from governments; that the replies received to the Secretary-General's questionnaire indicated considerable disagreement as to how to proceed; that the terms of reference of the proposed committee were vague; that some delegations feared that the committee might embark on a revision of the court's statute; and that there was even disagreement as to the underlying cause of the present crisis of the court. In the result, the members concerned were invited to transmit their comments to the Secretary-General, the court was urged to complete the revision of its rules, and the item was included on the provisional agenda of the Twenty-Seventh Session.

Needless to say, this was not the position for which Canada had contended. Mr. J. Alan Beasley, the Legal Adviser to the Department of External Affairs, argued with great skill that inasmuch as this whole question had been carefully studied during the last two sessions of the General Assembly and that governments had had ample opportunity to submit their comments in writing, there was no need to postpone a decision on the establishment of the

ad hoc committee. He emphasized that the proposed committee (which was the most practical way of carrying the work forward) would not amend the Statute "by the back door" but would identify a number of important areas in which the court's role could be enhanced without affecting its statute. Canadians who are interested in this subject owe a considerable debt of gratitude to Mr. Beasley for the interest, understanding and imaginative support that he has given to it. No doubt another effort will be — and should be — made at the forthcoming session of the Assembly. However, the fact that there was such a deep division of opinion over the proposal to create a committee to study the problem in depth says a good deal about the prospects for international adjudication as it has developed over the last one hundred years and as it is presently understood in the Western world.

Judge Jessup's book "tries to give a picture of the modest but important role of adjudication in a world where we see violence rampant". It is based upon three lectures given by the former judge of the International Court of Justice at Columbia University in 1970.

The first lecture, "The Rocky Road to International Justice", considers five cases in which decisions were eventually rendered by courts on the basis of international law, but only after protracted difficulties. This lecture includes a brief discussion of the Alaskan Boundry dispute, the bad blood that it created between Laurier and Theodore Roosevelt, and (still relevant today) the quite different conception of the role of the international judge that was entertained not only by the Canadians an Americans, but by different personalities within the United States itself. The second lecture, "Who Will Pay the Price for Peace?" considers a number of cases where states in dispute refused to pay the price of peace by judicial settlement. In these pages, in which reference is made to some specific situations for which judicial settlement appears to be appropriate, Judge Jessup observes that over the years Britain and the United States have settled their disputes by reference to judicial tribunals. However, he adds, wistfully, "that the United States has not maintained its fine early tradition of willingness to pay the judicial price for peace".

The third lecture, "The international Machinery of Justice", examines the record of settlement through various international tribunals since the end of World War II and considers a number of suggestions for improving the usefulness of the International Court. In this, by far the most interesting part of the book, we see Judge Jessup, as "the old pro", so to speak, discussing with

great charm, elegance and wit a few of the procedural and technical problems that have been examined so ponderously elsewhere. He deals with the speech of Secretary of State Rogers point by point, saying what is possible and what is not possible; he speaks about the increased use of chambers; he defends the impartiality of the Judges; he brings in appropriate comments from Frankfurter, Carl Llewellen, Sir Hersch Lauterpacht and others who have studied the nature and function of judicial bodies; and in his conclusion he implies what he has said at the outset: that an international adjudication can contribute significantly to the development of international law even though the bone of contention is insignificant. This is not a major academic study — Judge Jessup has long since worked that part of the vineyard — but it is a kind of general tour by one who has been there before and who obviously knows the problems and the possibilities that are available to get around them or at least to reduce them.

IV. Conclusion

At the end of all this, what is one to say? It seems to me that we in the West will not only do well to publicize more vigorously than before the extraordinarily wide range of possibilities that even now exist within the four corners of the Statute and the Rules, but that we must prepare ourselves (despite the strictness of our technical perspectives) for the day when the large majority of the members of the international community will wish to use the court in a more flexible, mediational manner than we normally associate with adjudicatory bodies. The Chinese — and it is pertinent to observe that neither the Sixth Committee nor Judge Jessup himself mention the Chinese — will certainly prefer mediation as a method of dispute settlement; and in this they are likely to express an attitude shared by many other states. Therefore, it seems to me that while we must press on with our present efforts in the Sixth Committee and elsewhere, we must also begin to contrast very carefully the possibilities of informal dispute resolution with the strictness of international law and the formality of traditional international adjudication.

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