THE INTERNATIONAL COURT OF JUSTICE

The United Nations has been described as a stage in the process of institutionalizing international politics. As the Court is one of the principal organs of the United Nations, it is part and parcel of this process. It represents more particularly, a stage, the most advanced stage, in the institutionalization of the procedures for the peaceful settlement of international controversies, the most primitive, yet the most basic form of which is represented by diplomatic negotiations. All of these procedures are integral aspects of international politics. The choice between the different procedures depends upon the political decision of the states at variance. The unique feature of the Court is to render binding decisions or advisory opinions by majority vote and following a rigorous, carefully constructed procedure of written and oral pleadings the purpose of which is to illuminate all aspects of the case, the legal as well as the social and economic aspects.

Among the procedures available to the states, adjudication by the Court is the only one which can be described as "completely de-politicized", in the sense that the judgments or advisory opinions of the Court are independent of the relative power of the states at variance and are based on consideration of law and justice or, as some writers say, on the "impersonal criteria of the law". Before the Court and only before the Court, the parties, large and small, enjoy sovereign equality.

It is the purpose of this article to argue that the Court is the best protector of the sovereignty, independence and equality of the states. As the late Secretary-General of the United Nations, Dag Hammerskjold wrote in one of his Annual Reports:[1]

> In the larger view, it is surely in the interest of all Member States to restrict as much as possible the sphere where sheer strength is an argument and to extend as widely as possible the area ruled by considerations of law and justice. In an interdependent world a greater degree of authority and effectiveness in international law will be a safeguard, not a threat, to the freedom and independence of national States.

It is not my purpose to argue that international adjudication is the sure road to world peace. Wars do not originate in legal disputes, that is in disputes between states as to their respective rights nor could a court hope to settle disputes which lead to war or other extensive uses of force, although it could be argued that even such disputes may have aspects which could be settled by the judicial process once a political decision has been taken to depoliticize those aspects. It is submitted that the Court could make a larger contribution than it has been permitted to make so far to the clarification, adaptation and extension of international stability; to make an important contribution to peace. International adjudication in short "is an adjunct to and not a substitute for

1. Annual Report (1954-1955), p. xiii.

international organization or economic policy or diplomacy."[2]

There was a time — the Hague Peace Conferences of 1899 and 1907 and the League of Nations — when the potential of arbitration and adjudication for peace was over-estimated. During the last decade or so the pendulum has swung in the direction of under-estimation. As Dr. Rosenne put it:[3]

> The Court is today caught in a vicious circle — insufficient business on the one hand, and an atmosphere of mistrust on the other. The sparsity of judicial pronouncements prevents the development of appreciation of the general potential offered by the judicial approach, and thus forestalls attempts to view the work of the Court in broad perspective.

Mistrust and insufficient business have indeed been the lot of the Court, and it is proposed to explore briefly some of the reasons for this condition without trying to determine whether mistrust begets insufficient business or *vice versa.*

To demonstrate or to illustrate the insufficiency, some statistics may be given. It is customary to compare the workload and the production of the present court with that of its predecessor, the Permanent Court of International Justice. The Permanent Court during the time of its activity from 1922 to 1940 was seised in 65 cases, of which 37 were contentious cases, and 28 were requests for advisory opinions. The Court gave 32 judgments and 27 advisory opinions having declined to give an advisory opinion in one case.

However, a word of caution must be added: the majority of cases, whether contentious or advisory, related to the application and implementation of the peace treaties — the peace settlement of 1919. The International Court of Justice, the Court of the United Nations, between 1946 and 1964 was seised in 49 cases, of which 37 were contentious cases and 13 were requests for advisory opinions, 10 of which came from the General Assembly of United Nations and one each from specialised agencies — UNESCO and IMCO.[4]

The Court gave 28 judgments of which 13, including the most recent judgment, were on merits; the other judgments were on jurisdictional points. At the present moment there is one case on the docket of the Court and no new cases and no request for advisory opinion have been submitted to the Court for at least 4 years. The pending case, the *Barcelona Traction Company* case between Belgium and Spain, may yet be settled out of court. The decline is particularly noticeable in the advisory function of the Court, not only in absolute numbers (less than one half of that of its predecessor), but in view of the part that the number of organs or agencies which have been authorised to request advisory opinion is much larger now than it was in the case of the old Court. The old Court could only give advice at the request of the Assembly or the Council of the League of Nations *viz.* of two agencies

2. C. W. Jenks, *Prospects for International Adjudication,* p. xiv.

3. "On the Non-Use of the Advisory Function of the I.C.J." (1963) ***B.Y.B.I.L.*** at p. 53.

4. Inter-Government Maritime Consultative Organization.

only. The present Court may give advisory opinions at the request of 27 agencies — 27 organs of United Nations and of specialised agencies, including the International Atomic Energy Agency.

In one recent case where the Security Council was asked to request the court for an advisory opinion, it was, strangely enough, the Soviet Union which took the initiative. It was a question whether Cuba was or was not rightfully suspended from membership in the Organization of American States. It was the first time that the Soviet Union made a proposal to refer a question pending before the Security Council to the Court. It is somewhat ironical that the United States was the chief opponent against this proposal. It was noted that "the debate was conducted in excessively political terms with little attempt to explore whether there were 'legal questions' that might legitimately form the subject of a request for an advisory opinion".[5] The words "in excessively political terms" describe very aptly nearly every discussion which has ever taken place in the Security Council or in the General Assembly on such matters.

A few years ago when I wrote a study on the work of the Court, I went a little bit further in statistics and I counted that the number of public meetings held by the Court varied from 3 in one year, in 1956, to 57 in 1959. I also tried to determine how one could find out the workload of the Court. There may be but a few cases, but the cases involve a large amount of written documentation and oral hearings and the only way to do it is simply to count the time which lapsed between the end of oral hearings, if oral hearings were held, which is normally the case, and the date the judgment was rendered. I counted a minimum of 7 days in one case and 205 days in another case.[6] The most recent judgment required 229 days from the close of 99 oral hearings in the course of which 14 witnesses were heard.

One can also make, and this has been done by Mr. Jenks, a sort of geographical breakdown of the "clients" of the Court: the United Kingdom was involved in 10 cases: in 6 it was an applicant, in 3 it was a respondent. In one dispute with France, the case was submitted by special agreement. The United States comes next because it also applied to the Court, or was involved in 10 cases. In 3 cases it was cited as respondent, and in 7 cases it was an applicant. The United States seems to hold the record in submitting applications to the Court against other states knowing full well that it has no jurisdictional basis for the case at all. Four of the cases involved the Soviet Union whose attitude was well known to the United States and one case each involved Soviet satellite states, Czechoslovakia and Hungary. France was involved in 7 cases of which 2 were discontinued and settled out of court. Asian states were involved in one case: the so-called *Temple* case. African states were involved in 2 cases and the Latin American states were involved in 3 cases.[7]

5. Rosenne, *op. cit.*, p. 12.

6. Gross, "Some Observations on the International Court of Justice", (1962) 56 *Am.J. of I.L.* at p. 45.

7. Jenks, *op. cit.*, p. 84.

There is another indicator of the interest which members of the United Nations and other States show in the Court, and here the statistics are not encouraging either. The jurisdiction of the Court can be based upon a special agreement for a particular case — an existing dispute, or it can be accepted in advance by a declaration in which a declaring state undertakes to accept the jurisdiction of the Court as compulsory in certain types of legal disputes. Now in the League of Nations, in the peak year which was 1934, 42 out of 49 states which were legally qualified to do so had accepted the jurisdiction of the court as compulsory. In the United Nations in 1956 when there were 80 qualified states, there were 33 declarations and this remained virtually unchanged in spite of the fact that the membership rose rapidly from 80 to 120, and now out of the 120 qualified states only 40 have accepted the jurisdiction of the Court as compulsory. Two out of the 40 are not members of the United Nations. Amongst the 40 states, there are 9 born after 1945. Thus, the record for the new states compares favourably with the record of the old states.

Another index for the decline of the compulsory jurisdiction of the Court is the frequency with which governments include so-called jurisdictional clauses in treaties. These clauses provide for the compulsory settlement of disputes arising from the application or interpretation of a specific convention. Here the figures are that during the lifetime of the League, 405 bilateral conventions included such clauses. The figure for the United Nations era is 126. The decline in compulsory jurisdiction is not merely visible in absolute numbers. Perhaps, even more striking is the decline in the quality of the acceptances of the jurisdiction of the Court. Governments have been trying to out-do each other in inventing the reservations which they attach to a declaration accepting the jurisdiction of the Court. One of the newest inventions, and perhaps one of the most damaging inventions, is the so-called self-judging clause which the United States attached to its declaration of 1946 whereby the United States reserved out of the jurisdiction of the Court disputes relating to matters essentially within the domestic jurisdiction of the United States of America, as determined by the United States. This was followed by seven other states including the United Kingdom which made a similar self-judging reservation not with respect to domestic jurisdiction but to matters affecting national security. Another reservation which has appeared in some of the declarations is particularly obnoxious because it tends to put other states at a disadvantage. Some governments attach a reservation to the effect that they reserve the right to exclude from the scope of their acceptance any given category of dispute or they reserve the right to terminate their acceptance at any time by giving notice to the Secretary-General of the United Nations and, with effect from the moment of such notice so that the balance between the various states which have accepted the jurisdiction of the Court can be changed at a moment's notice and without any warning.

There is another damaging invention, a sort of nuisance procedure which has been pioneered by Portugal, i.e. that a state when it becomes a member of the United Nations may deposit a declaration of acceptance of the jurisdiction of the Court as compulsory and at once institute proceedings against another state. Portugal was admitted to membership of the United Nation on December 19, 1955. On December 22 it

instituted proceedings against India in connection with the right of passage over Indian territory. Needless to say, the Indians were annoyed and cancelled at once their declaration accepting the jurisdiction of the Court. However, the Court decided in complete serenity that the critical date was the date when Portugal instituted the proceedings and on that date India was still bound by its declaration. Although India urged the Court to find that the Portuguese action constituted an abuse of both the optional clause, and the process of the Court, the Court did not think that this was correct because all that Portugal did was to use its right as a sovereign member of the United Nations.

Now governments have also invented a counter-strategy, and here the United Kingdom has pioneered a formula which was designed to protect it against steps comparable to those taken by Portugal. The United Kingdom has now a reservation providing that the acceptance of the Court's compulsory jurisdiction on behalf of any other party or parties to a dispute must have been deposited or ratified no less than 12 months prior to the filing of an application bringing a dispute before the Court. Thus, the United Kingdom has one year in which to reflect what possible disputes might be brought against it by a new declarant state and has one year in which to take, if necessary, steps to protect itself.

It is proposed at this juncture to discuss briefly some of the reasons which have been advanced by various governments and writers for the mistrust in the Court. An argument one sees frequently is that the Court lacks impartiality. This argument has been traditionally advanced by communist countries, by the Soviet Union, particularly, simply on the ground, which one can take or leave, that in disputes between a capitalist and a socialist state there can be no impartial authority. In more recent years it has been said in particular on behalf of some of the newer members of the United Nations that they lack confidence in the Court because of its composition and because of the law which the court applies.

As for the composition of the Court, it is said that the Court is insufficiently representative of the large increase of membership of the United Nations. Two councils of the United Nations were enlarged: the membership of the Economic and Social Council has been increased from 18 to 25 and that of the Security Council from 11 to 15, but no specific proposals for enlargement of the Court have so far been submitted. They would require like any other amendment to the Charter a vote of 2/3 of the members of the General Assembly and ratification by 2/3 of the membership including the permanent members of the Security Council. In other words it would not be easy to get an amendment accepted and if it were accepted a dilemma might arise: if the new states aim at a radical transformation of the bench of the Court, they may sow mistrust amongst the Western states which traditionally, have been the best clients of the Court. It is probable that a modest increase e.g. from 15 to 18 judges might be acceptable to all concerned. It might be said in this context that at the last election, for the first time, a judge from Africa was elected for the regular nine-year term: Judge Foster of the Senegal.

The argument that there is something wrong with the law which the Court applies is frequently heard from spokesmen of the new states,

and this is a little more difficult to assess. According to some of these spokesmen, the new states distrust customary international law in the making of which they had no share because they did not exist at the time, and it is further argued that this law reflects the interests of the formerly dominant states i.e. the colonial powers. In my view, there is insufficient basis for judging the accuracy of these propositions since there were only very few occasions on which the Court could disclose its position. In the *Right of Passage over Indian Territory* case which was the first sort of colonial case to come before the Court, the Court applied traditional international law, but it would be difficult to say that the law which was applied reflected the interest of any particular group of states. It would appear that what worries the new states more than anything else is the question of expropriation and nationalisation of the property of aliens or alien corporations. The Court has had no chance so far to adjudicate a case involving expropriation or nationalisation. It is submitted that the fear of the new states appears unfounded because generally the Court has insisted on a strict proof of customary international law and this requirement may, in the case of expropriation, militate in favour of the new states because the law on the subject is far from clear or set.

In any case, the argument that the Court applies law in the making of which the new states had no share cannot apply to the new multilateral law-making conventions such as those on the law of the sea of 1958, or diplomatic intercourse of 1961 or consular relations of 1963. The new states participated fully in the drafting of these conventions in the United Nations and then in the conferences themselves; yet they together with the Soviet bloc and other states opposed the inclusion in the conventions of a clause which would confer upon the Court compulsory jurisdiction with respect to disputes over the application and interpretation of those conventions, not of customary international law, but of those conventions in the making of which they had a large share. As a consequence of this attitude and in order not to jeopardise the ratification of the conventions themselves the clauses concerning jurisdiction were put in optional protocols i.e. separate instruments. However, very few states have yet ratified any of the three optional protocols although they did ratify the conventions themselves. In this connection, the United States considers itself a new state and while it ratified the law of the sea conventions, it did not ratify the optional protocol.

Amongst the reasons for the non-use of the Court, there are several rationalisations, e.g. states are normally disinclined to submit disputes to the Court because they simply do not wish to take the risk of an unfavourable decision. The prevailing tensions in international relations militate against a more frequent recourse to the Court and the use of the judicial technique for solving inter-state controversies. States do not want to face public opinion, and sometimes, governments may be more reluctant to submit their case to the judgment of public opinion than even run the risk of an unfavourable judgment from the Court, because from the pleadings which are made public eventually it may appear that governments are not as careful in protecting the national interest as they would wish public opinion to believe. Traditionally, governments have not been disposed to submit disputes to adjudication which involve their vital interests of sovereignty, territory or domestic jurisdiction. In some cases, governments simply refuse to take a case

into Court because they do not wish to create a precedent for the future. If a government agrees to arbitrate one case why should it not do the same in another case. Then, of course, governments argue that some disputes are not justiciable in the sense that there is no applicable rule of law or that the applicable rule is obsolete or inadequate, or that what they really want is not a confirmation of the *status quo* but a change in the *status quo.* There are some cases where governments wanted a decision for *aequo et bono* rather than a decision based on law. Two reasons appear more frequently than others in modern literature, and they have been advanced by authoritative writers. These two reasons are: one, the prohibition of the use of force or the threat of force has contributed to the decline of the judicial settlement of disputes; and the other reason is that the United Nations provides more attractive forums, mainly the General Assembly and the Security Council.

As for the first reason, the impact of the prohibition of the use of force or threat of force, it is true that in the pre-United Nations days, force or war was available as ultimate means of inducing a state to accepting a third party decision and that the blanket prohibition of the use of force in the Charter of the United Nations has removed this ultimate inducement. However, does this really explain or does it really support the proposition that the prohibition has had a negative effect on the attitude of the states with respect to international adjudication? It is submitted that there is something to this line of reasoning but not very much. It over-estimates, on the one hand, the possibilities even for the super-powers to resort to force or war for the purpose of settling a dispute in the precariously balanced international system in which we live; on the other hand, it revives the old fallacy that governments go to war with respect to controversies which otherwise could be resolved by third party procedures. This is the fallacy to which I referred earlier in connection with the Hague Peace Conference. Furthermore, it could be argued that such use of force as there was during the life time of the United Nations occurred not in cases in which an adverse party refused the offer of a judicial settlement, but because no third party decision could or would have given the state using force what it wanted. The case of the use of force of India against Goa is a case in point. So is the use of force by the United Kingdom and France against Egypt in 1956.

As to the second argument, the attractiveness of the United Nations forums, this argument has more validity. Certainly, the record of the United Nations would support the view that more disputes were submitted to the General Assembly and the Security Council than to the Court. In the United Nations the weaker state can count on the sympathy of the majority of members, and if what it wants is a stalemate this is what it will get, but will it get a settlement acceptable to the adverse party? The record of the United Nations shows that both the General Assembly and the Security Council with one or two exceptions have been singularly unsuccessful as organs for the settlement of disputes. One example is the dispute between India and South Africa over the treatment of Indians in South Africa. The dispute was brought before the General Assembly in 1946 and has been on the agenda of the General Assembly ever since. The extremely politicized procedures of the United Nations may seem more attractive than the de-politicized

procedures of the Court, but if a state really wants a settlement of a dispute it would be ill-advised if it went to the United Nations rather than to the Court. In the United Nations a complaining member may receive a consolation prize, a resolution which is no solution; there may be mobilization of public opnion and mobilization of shame, but the members of the United Nations have developed, over the years, an immunity to both. The point which is sought to be made is that a resort to the political organs of United Nations need not exclude resort to law or even to the Court. The Court is the principal judicial organ of the United Nations and according to the Charter, specifically pursuant to Article 36 paragraph 3, the Security Council, in making recommendations in connection with disputes pending before it, should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice. In other words, there is an express directive to the Security Council, to the political organ to use the judicial organ in cases of legal disputes or legal aspects of political disputes. The United Nations Security Council has adopted in only one case a recommendation to the effect that the parties take the dispute to the Court, and that was the *Corfu Channel* case which involved Great Britain on the one side and Albania on the other. It is interesting also to note that the original proposal came from the Soviet Union. The organs of the United Nations may also get the judicial assistance of the Court by asking the Court for advisory opinions. The ten advisory opinions referred to earlier[8] were all requests from the General Assembly. The Security Council has never yet requested the Court for an advisory opinion.

In the United Nations, the argument is frequently heard that it is useless to refer a question to the Court because the states would not accept the opinion of the Court and this, in fact, has been so in those cases where something like a dispute crystallised before the United Nations. But the United Nations General Assembly and Security Council have also taken the position that they would be abdicating their political responsibility for maintaining peace and security if they were to refer certain questions to the Court. Furthermore, both the Security Council and the General Assembly flatter themselves that they know international law at least as well as the Court, but on other occasions when legal arguments are advanced in support of one case or another, they may say "well, we are not a court of justice, we are a political organ and with us political considerations come first and last". In some of the cases where a proposal was made to refer a question to the Court, the position was taken by many members that it would be undesirable to refer that question at that particular time to the Court because it might crystallise the law at a premature stage. That argument was used in 1946 in connection with the domestic jurisdiction clause of the United Nations Charter. Since then, twenty years have passed, and the time is still not yet ripe to refer that question to the International Court of Justice.

The decline of the judicial function may be linked, at least to some extent, with the decline of Western Europe in international affairs, the loss of the dominant position by the Western European States which traditionally had supported arbitration and adjudication, and which even

8. See ante, at p. 11.

in the League of Nations, a political organisation, favoured the method of law. The League was known for what was called its legalistic character. It used committees of jurists, committees of rapporteurs, and as mentioned earlier, the Council referred many cases to the Permanent Court of International Justice for advisory opinions. However, this method has not been followed in and by the United Nations.

As power migrated from Europe to the United States and Soviet Union it moved to two centres which for different reasons adopted either negative attitudes, as the Soviet Union, or ambiguous attitudes, as the United States, towards the Court. The Soviet Union trusts negotiations and distrusts the Court. It may be, as some discriminating scholars suggest, that the attitude of the Soviet Union is undergoing a change. An indication of this is seen in the fact that in the *Expenses* case the Soviet Union for the first time participated in the oral hearings held before the Court, and it was the first case in which the Soviet Union did not object to the jurisdiction of the Court to interpret the Charter. In all other cases, the Soviet Union has taken the position that the Court had no right to give any interpretation whatsoever on any point relating to the Charter of the United Nations. Furthermore, it may be pointed out that the Soviet Union accepted the compulsory jurisdiction of the Court in connection with the International Atomic Energy Agency and in connection with the Antarctic Treaty.

The attitude of the United States is more difficult to define. Traditionally, the United States has been in the forefront of those who favour arbitration, but the United States favours voluntary, *ad hoc* arbitration as opposed to compulsory adjudication, i.e. the United States prefers to refer an existing dispute to a tribunal, the composition of which is controlled by the parties, the procedure of which is under the control of the parties and the law to be applied by the tribunal is also subject to the control of the parties. Reference has already been made to the ambiguous attitude of the United States to the Court as may be seen in the Connally reservation. Another reservation which the United States attached to its declaration relates to disputes arising in connection with multilateral conventions, and today the world is covered with multilateral conventions; The United States will not accept the jurisdiction of the Court in connection with a multilateral convention unless all other parties accepted the jurisdiction of the Court in the matter, or unless the United States specifically agreed. They are both extremely difficult conditions to meet. In connection with the Connally reservation a rather curious thing happened. A few years ago, there was an aerial incident in Bulgaria which involved an Israeli commercial aeroplane. It was shot down by Bulgarian security forces and as a result of this, Israel, Britain and the United States brought action against Bulgaria before the Court. Other states, Sweden, Holland and France all made claims but they were settled out of court. In the suit brought by the United States against Bulgaria, Bulgaria invoked the Connally reservation against the United States, since under the rules applied by the Court there must be sovereign equality: any reservation which is made by one party can be invoked by the other party. In that case, Bulgaria invoked the American reservation as a shield against the United States, and the State Department was in the position of having to concede that Bulgaria was entitled to rely on the Connally reservation and therefore the United States had to withdraw its case. This had previously happened to France but with different reaction. France was

faced with a similar situation in a case which it brought against Norway over loans which went back to pre-World War I days. France had made a reservation similar to that made by the United States and this reservation was invoked by Norway, and the Court held that since both parties accepted the validity of the reservation, it could be invoked by Norway against France, and therefore the Court had no jurisdiction. France promptly withdrew the reservation because it did not protect her, it protected her adversary. However, the United States did not withdraw its reservation after the Bulgaria incident.

In my view, and this is open to debate obviously, the policies of the two super-powers *vis-a-vis* the Court and international adjudication in general have different impacts. The Soviet Union is still largely on the periphery of international relations. It is certainly not in the mainstream of international relations. The United States on the other hand is not merely a super-power in military terms, but in every other meaning of the term as well. The United States is involved in every phase of international relations in every corner of the world, and therefore its attitude is much more relevant than the attitude of the Soviet Union. It is certainly possible to envisage a fruitful development of international law and international adjudication without the participation of the Soviet Union but not without the active participation of the United States. Perhaps, gradually, the Soviet Union might change its attitude towards the Court. At the present moment, there does not seem to be any indication of a change in the American attitude toward international adjudication in general or the Court in particular. It must be emphasised again that the United States is still in favour of arbitration. As a matter of fact, there were a number of cases within the last few years in which the United States agreed to arbitration, but it maintains its attitude towards the Court and the role of law in the United Nations.

What can one expect of the new states and of the rank and file of the members of the United Nations? By and large having no military power, and as resort to force as an ultimate means of settling a dispute is simply not available to them, it would seem that they should have an interest in cultivating the law habit and place more reliance on international law as a shield against great power coercion. But the rules, and rules of law, certainly, do not operate by themselves. They need to be interpreted, applied, and enforced, preferably, by impartial tribunals. In my view no minimal world order, no workable international system is conceivable without a tribunal. Contrary to what is argued by some writers I do not believe that a greater use of the Court needs preclude efforts on a wider front. It is not suggested that governments should worship at the altar of the tribunal at the Hague and neglect economic development, social welfare or other pressing national or international problems. It is suggested that without a court there can be no stability, and no predictability in international relations. There can be no expectation that disputes will be decided on the basis of law and justice rather than on the basis of power.

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