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FACT FINDING BY THE WORLD COURT

NEILL H. ALFORD, JR.†

I.

INTRODUCTION.

THE WORLD COURT is the principal judicial organ of the United Nations Organization.¹ As a judicial organ, it is probably not indispensable.² What would happen to the United Nations Organization without the Court is pure speculation. Quite possibly the General Assembly would compensate for the loss by developing judicial functions much as it has developed executive functions to offset the creeping paralysis of the Security Council. Certainly the loss of the Court would not mean the breakdown of all international machinery for the peaceful settlement of differences. But an efficient World Court may prove to be a major asset of the United Nations by performing three important functions. The Court can give the Organization legal guidance³ and can handle certain kinds of disputes between States.⁴ It

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1. U.N. CHARTER art. 92. "World Court" is used henceforth to embrace the Permanent Court of International Justice, which functioned from 1922 to 1940, and the International Court of Justice, the present court which began its work in 1946. The Permanent Court was not a part of the League. The International Court of Justice is a part of the United Nations Organization although it has a separate statute. See Hudson, *The Succession of the International Court of Justice to the Permanent Court of International Justice*, 51 AM. J. INT'L L. 569 (1957).

2. Undiscriminating laymen, particularly those who have lost lawsuits, have observed from time to time that the world might be much better off without lawyers.

3. The World Court, as of 1956, had given thirty-eight advisory opinions. All of the requests to the Permanent Court of International Justice for advisory opinions were made by the Council of the League. All of the requests to the International Court of Justice, except one made by UNESCO, have been made by the General Assembly. The General Assembly, the Security Council, and other organs of the United Nations and specialized agencies authorized by the General Assembly to make the requests, may request advisory opinions. U.N. CHARTER art. 96.

4. Prior to World War II, state disputes were sometimes presented to the Court in the form of requests for advisory opinions. This practice is discussed in greater detail subsequently in this Article. With some possible exceptions, such as the right of the United Nations to protect its employees, only a State can be a party to contentious proceedings before the Court. A respondent State cannot be brought before the Court without its consent. Consent may be expressed in a special agreement submitting the case to the Court, or it may be expressed in advance of the dispute by acceptance of compulsory jurisdiction. The "optional clause" in the statute of the Court provides a procedure whereby States may accept compulsory jurisdiction in relation to other States accepting the same obligation in certain classes of disputes. These disputes are those that are "legal" and which involve a question of treaty inter-

can also create in the minds of the human members of the amorphous international society in which it works a symbol of the United Nations as a leadership institution — and this is what the United Nations needs most of all.

Fact finding has an important relationship to these three major services which the Court can offer. The legal guidance which the Court gives or the judgment which it renders will be a useless abstraction unless it is based upon actual events, formulated in the light of existing events, and designed to influence the shape of future events. The tendency of national courts to decide cases which are in effect hypothetical because of fact-finding lapses is dismally familiar to lawyers and litigants. The World Court has obstacles to the finding of facts which national courts do not encounter. The tendency of the Court to decide hypothetical cases therefore is stronger. The more efficient the fact finding processes of the World Court become, the better are its opportunities to render useful decisions and give sound legal guidance to the Organization.

The work of the Court as a creator of symbols and the relationship to this work of fact finding are less obvious matters. There is now a plateau in the growth of the United Nations from which we are unlikely to move without a dramatic shift in human attitudes concerning world government. The problem of the Organization is somewhat analogous to that of a human being who must create in his own environment his rational fiction of what he believes himself to be. Once the human being creates his fiction he feels obligated to measure up

pretation, of international law, or of the existence of any fact which if established would constitute a breach of an international obligation, or of the nature or extent of the reparation to be made for the breach of an international obligation. STAT. INT'L Ct. JUST. art. 36.

The members of the United Nations are *ipso facto* parties to the statute of the Court, and only parties to the statute can accept compulsory jurisdiction. Thirty-three acceptances of compulsory jurisdiction were in force in 1956, although most of these are expressly subject to a condition of reciprocity and exclude special kinds of disputes. The United States declaration, for example, excludes disputes essentially within the domestic jurisdiction of the United States as determined by the United States. 15 DEP'T STATE BULL. 452 (1946).

In addition to acceptances of compulsory jurisdiction, a great many treaties made after the establishment of the Permanent Court and before World War II and many treaties being made at the present time provide that disputes concerning interpretation shall be taken to the Court or that appeals may be taken to the Court from decisions of arbitral tribunals which the treaties establish. The statute provides that a reference in a treaty to the Permanent Court will be taken as a reference to the International Court of Justice. STAT. INT'L Ct. JUST. art. 37.

The Security Council may recommend that parties to a dispute of a legal character submit the dispute to the Court for decision. U.N. CHARTER art. 36. Whether States to which such a recommendation is made are obligated to take their dispute before the Court is presently unsettled. See Corfu Channel case, Judgment of March 25, 1948, [1947-1948] I.C.J. Rep. 15, at 28. For some considerations relating to inherent limitations of the World Court in handling contentious litigation see LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE 71 (1951).

to it. If he does not create his fiction for some reason, he has nothing to live up to. Not only is there now lacking any consistent demand from the people of the world that the United Nations be the focal point where national and other differences can be settled peacefully, but the permanent personnel of the Organization and the State officials concerned with its affairs seem to lack a sense of obligation to act boldly to stimulate such a demand. This is not to impugn the good intention or deny the manifest ability of any statesman involved. The observation is intended only to illustrate the point that no dynamic symbol of international government has been created in the minds of men or, apparently, is in the making. A living organization is an image in the minds of men, an image of what men think the organization *should be* rather than a collection of constitutions, by-laws, organizational routines, functionaries and filing cabinets.

Ignoring for immediate purposes the complex variables that are involved in establishing a pattern of human conduct, three basic steps are necessary to create a leadership symbol in the mind of a man. He must be provoked to respond to a principle since a response to principle is more intense and enduring than a response to other stimuli. He must also be permitted to respond to inconsistent principles.⁵ A man is prepared to give his primary loyalty to a leadership symbol if he can reserve loyalty to secondary symbols. If loyalty to secondary symbols is not permitted, loyalty to a primary leadership symbol is never developed or, if developed, is greatly weakened. A man stoutly resists slavery of his mind. It is in his mind that the defenses of self-respect are erected. It has been aptly remarked that a loss of self-respect is the first step to treason. But a third step is also necessary to create a new leadership symbol. The mind must be helped to reconcile its response to inconsistent principles. Some rational and acceptable explanation must be forthcoming to justify response to a primary leadership symbol while a response to other symbols is continued. New leadership symbols are constructed in the human mind and old symbols are diffused or subordinated in importance in this process of reconciling conflicting principles.

It is in the third basic step in developing leadership symbols that the judicial system of an emerging political society usually figures so prominently. In England, for example, the Common Law courts hammered out the concept of a fictional and responsible Crown to which paramount loyalty was due. The conflicting loyalties and confused

5. For the classic discussion of this problem see ARNOLD, *THE SYMBOLS OF GOVERNMENT* 9-22 (1935).

mesh of rights and obligations that passed as Feudal and German law were diffused and subordinated in importance to the fiction of the Crown. Again, the Commerce Clause has been applied by the Supreme Court of the United States to events produced by a growing industrial society in such a way that the federal government has assumed the direction of economic affairs while the role of state authority has been correspondingly reduced. The task of the World Court is to create an image of the United Nations in the minds of men as a primary leadership symbol *without* eroding to any appreciable degree the response of men to State and other parochial symbols.

The part played by courts in developing leadership symbols in the early stages of formation of a political society differs radically from their role when a political society has matured. When leadership symbols have been developed and are firmly implanted, an insistence upon loyalty to primary leadership symbols appears to produce minor but frequent shifts in attitudes concerning subordinate symbols. In this situation, the minds of men are more easily manipulated through representative bodies with flexible procedures and in close contact with the daily life of a community than the courts. In the United States the disorderly growth of fraternal benefit societies and business corporations after the Civil War required action by the Congress or by the state legislatures. The courts could not deal with public utility holding companies in the Twentieth Century until the Congress enacted legislation for that purpose. The function of a court in a matured political society tends to become of an interstitial and housekeeping nature.⁶ The court of an emerging political society must be a laborer of all work.

Since peace was sought unsuccessfully in the League experiment, it would not have been shocking to those who follow the work of international organizations closely if the San Francisco Conference had produced an international court system designed to spark a sound and orderly growth of world government. It is the drive for resolution of conflict that provides the incentive for the formation of new political societies. As a principal resolver of conflict, the adjudicator has always been an obvious choice, for it is in its courts that an emerging government has its closest contact with the governed. But a court in an inchoate political system must be more than the simple adjudi-

6. The term "interstitial" is used here in the sense that the Court functions as an auxiliary to institutions which are charged with the continuous making, undoing and remaking of policies that the management of a complex community requires. The Court, of course, creates conditions under which policies are made by other institutions, but it does this spasmodically without clear cut policing of the effects of its decisions and consequent necessary adjustments.

cater that it may be in the matured political society. It must have the power and the techniques to build a symbol of its own authority and the authority of the government it represents. The World Court must be able to direct its efforts into two channels. A leadership image must be created in the minds of the officials responsible for the affairs of the United Nations, and the necessary transfusion of ideas to the Organization must be administered to keep the image alive.⁷ The Court must also be able to aid in shaping and restricting the growth of the leadership symbol which these officials may possibly succeed in engrafting in the minds of the mass of men. We are not now concerned with the role of the World Court in a matured political society. That problem can be faced many generations hence by people better prepared to deal with it.

The Court established at San Francisco in 1945 is primarily an adjudicating institution in the "national" sense.⁸ The statute of the Court is almost the same as that of the Permanent Court of International Justice with which it maintains, practically speaking, an unbroken tradition and skein of experience. To the ordinary man,⁹ the man whose influence will determine ultimately whether there will be effective international organization or not, the World Court is as remote as the Supreme Court of Saturn. The statute of the Court can be formally amended only in the manner provided for amendment of the Charter of the United Nations.¹⁰ Neither the statute nor the charter are likely to be amended at any time in the foreseeable future. What can be done to utilize the Court in such a way that its work will enhance the appeal of the United Nations to the "mass mind" as a leadership symbol and thus increase the prestige and effective action of the Organization at a time when effective action is sorely needed? How can this be done without amending formally the statute of the Court?

The writer does not pretend to have pat answers to either of these questions, and doubts that anyone does. The Court is in a good tactical position for a move towards greater power. The Court is the final

7. Consider in this connection two of the advisory opinions rendered by the World Court. In *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of April 11, 1949, [1949] I.C.J. Rep. 174, the Court held that the United Nations had the status to make an international claim to protect its agents. In *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of July 13, 1954, [1954] I.C.J. Rep. 47, the Court held that the United Nations had implied power to establish an administrative tribunal to handle its internal administration.

8. See note 6 *supra*. It is a Court designed for interstitial operations in a society which has no interstices. There is no continuous legislative or executive body in the world community, the action of the single major executive body having been blocked by the veto.

9. The "ordinary man" is everyone except the person who is talking about him.

10. STAT. INT'L Ct. JUST. art. 69.

interpreter of its statute and makes its own rules.¹¹ But the Court will be powerless if it attempts to act alone. Only the States have access to the Court in contentious proceedings and they must be prepared to bring cases before it.¹² The General Assembly and other international organizations which are authorized to seek advisory opinions¹³ must be prepared to seek the opinions and ask the proper questions. The Court will lose its major basis of power if it forfeits its enviable position of respect and loses its reputation for integrity. Those who seek more for the Court and for the United Nations must tread lightly and speak softly.¹⁴

The single factor that perhaps will prove most rewarding if given adequate attention is improvement of the fact-finding techniques of the Court. Improvements in fact-finding techniques will arouse less opposition than direct demands for compulsory jurisdiction or related extensions of the Court's statutory powers. Many such improvements might be made without formal amendment of the statute. Improvements in fact-finding techniques will tend to bring the Court into direct contact with the individual and thus within the attention frame of the individual whose mind is an influence target. A major need today is not access of individuals to the Court but access of the Court to individuals.¹⁵ Historically, improvement of fact-finding techniques has presaged an elaboration of court organization, an extension of jurisdiction and, ultimately, an increase in judicial influence. This development may occur in the case of the World Court.

11. *Id.* arts. 36, ¶ 16; 60; 30, ¶ 1; 68.

12. *Id.* art. 34, ¶ 1.

13. U.N. CHARTER art. 96.

14. The concept that a court should be used for anything except the decision of cases is a somewhat dangerous one. The hazards involved in turning courts to political ends are well documented, *e.g.*, *United States v. Alstoetter*, 3 Nuremberg Military Tribunals, Trials of War Criminals, Case 3 at 31 (1947); VYSHINSKY, *THE LAW OF THE SOVIET STATE* 497-98 (1951). A number of the able jurists associated with the Permanent Court or the International Court of Justice have argued for moderation in seeking an extension of the Court's authority or more reasonable expectations concerning the type of work the Court is to do. *E.G.*, DeVisscher, *Reflections on the Present Prospects of International Adjudication*, 50 AM. J. INT'L L. 467 (1956). Judge Krylov in his dissenting opinion in *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion of May 28, 1948, [1947-1948] I.C.J. Rep. 57, quotes Judge Hudson, a former Judge of the Permanent Court, upon the point that the activity of the Court should not be "artificially stimulated."

15. In certain rare instances individuals have had an opportunity to get their cases before the Court. In *Danzig Legislative Decrees*, P.C.I.J., Ser. A/B, No. 65 (advisory opinion 1935), the Court considered a dispute concerning a statute enacted by the Danzig Senate applying the criminal law doctrine of analogy. The Court determined that the Free City of Danzig should have State status for this proceeding. This meant, in effect, that the Court would hear only one side of the case since the Senate represented the Free City and the Senate was Nazi-controlled. The President of the Court therefore received an explanatory note from the opposing political parties in Danzig, although these parties were not allowed to be represented in the oral proceedings.

What are the fact-finding techniques of the World Court and how well do they work? Although it is somewhat misleading to treat generally the functions of any institution, it may be helpful to view fact gathering by the World Court from the perspective used to examine fruitfully national intelligence systems.

Fact gathering is an endless process. Some facts must be available to the fact-finder in the beginning to enable him to *appraise* his fact-finding task. Who are the fact finders of the World Court? Why are they looking for facts? What facts are they looking for? How is a flow of basic information necessary for the appraisal process maintained to the Court and the people who appear before it? What legal doctrines condition their access to this information and their use of it?¹⁶

How are fact-finding missions allocated once the intelligence task is appraised? Whose decisions determine the allocation? To what extent does the allocation of the fact-finding task condition the facts available to the Court for decision?

Once the fact-finding task is determined and missions allocated, how is the actual surveillance executed? What legal doctrines determine the facts that will get before the Court and those that will not? Whose decisions determine what facts will be considered and what facts ignored?

These are some of the questions that ought to be asked about the fact-finding functions of the World Court. This Article does not purport to answer all of them. The conclusions which international courts are prepared to draw from facts embrace most of the traditional doctrine of international law. This article considers primarily the fact gathering functions and suggests some tentative thoughts concerning their improvement.

II.

THE FACT FINDERS AND THEIR APPRAISAL OF THE INTELLIGENCE TASK.

The World Court has fifteen judges elected for nine year terms by the General Assembly and Security Council of the United Nations.¹⁷ The first elections were for staggered terms so that the terms of one-third of the judges now expire at three year intervals. In the decade between 1946 and 1956 the membership of the Court has been fairly constant. Three members of the Court died.¹⁸ Judge Golunsky resigned

16. It must be observed in this connection that part of the "background" information of the fact finder will be facts derived from the appraisal of the results of earlier surveillance tasks.

17. STAT. INT'L CT. JUST. arts. 3, 4.

18. Judges Azevado, Benegal Rau and Hsu Mo.

before the expiration of his term. All of the judges elected originally for three year terms were reelected in 1948.¹⁹ In the elections of 1951 and 1954 two of the five judges subject to election were re-elected.²⁰ A quorum of nine judges suffices to constitute the Court.²¹

The average age of the judges at the time of their election has been between 60 and 61. The eldest at the time of his election was Judge Alvarez, who was 78; and the youngest, Judge Kojevnikov, who was 50. The geographical distribution of judges has been fairly even. Latin America has enjoyed a slight preponderance, having from three to four seats during the decade.²² The Far East has been under represented.²³ No State can have two of its nationals on the Court.²⁴ The Permanent Members of the Security Council have had judges on the Court throughout the decade. All of the judges elected have had distinguished legal backgrounds, about half of the Court having had some international or national judicial experience at the time of their elections.²⁵

The statute of the Court provides for appointment of an *ad hoc* judge at the option of a State which is before the Court but has no national among its membership.²⁶ This may be done in contentious proceedings and in some advisory proceedings when the outcome of the advisory proceeding may directly affect the interest of a State which has appeared to offer information.²⁷ *Ad hoc* judges have been named in eight of the twenty-one contentious cases submitted to the Court between 1946 and 1956.²⁸ The *ad hoc* judge may serve as an analgesic to the tender feelings of a State which has no judge. In contentious proceedings in which one State party has a national on the Court, the appointment of an *ad hoc* judge may offset his vote.²⁹ A

19. Judges Winiarski, Zorocic, Badawi, Read, Hsu Mo.

20. In 1951, Judges Hackworth and Klaestad; in 1954, Judges Guerrero and Basdevant.

21. STAT. INT'L CT. JUST. art. 25, ¶ 3.

22. In 1956 there were four Latin American Judges, Guerrero, Armand-Ugon, Quintana and Cordova.

23. Judge Hsu Mo was elected in 1946. Sir Benegal Rau was elected in 1951 and Sir Muhammad Zafrulla Khan succeeded him in 1954.

24. STAT. INT'L CT. JUST. art. 3, ¶ 1.

25. Biographical sketches of the judges may be found in the Yearbooks of the Court.

26. STAT. INT'L CT. JUST. art. 31.

27. The provision for *ad hoc* judges in advisory proceedings is made in RULES INT'L CT. JUST. art. 83.

28. Three of the cases grew out of the Haya de la Torre dispute between Columbia and Peru and the same *ad hoc* judges were named in each. The other cases were the *Corfu Channel* case, the *Ambatielos* case, the *Anglo-Iranian Oil Co.* case, the *Case of Monetary Gold Received from Rome in 1943* and the *Nottebohm* case.

29. This assumes, of course, that the national judge will usually vote in favor of the claim his State asserts. This is not invariably the case. Thus Judge McNair voted in favor of Iran on the preliminary objection to jurisdiction in the *Anglo-Iranian Oil Co.* case, Judgment of July 22, 1952, [1952] I.C.J. Rep. 93.

judge is not disqualified simply because he is a national of one of the parties.³⁰ The *ad hoc* judge may also bring to the Court a knowledge of local conditions affecting one of the parties which the Court would otherwise lack. This might be true if the *ad hoc* judge is a resident of the State which appoints him or is especially familiar with its law and political traditions.³¹

The rules of the Court provide for the appointment of technical assessors to sit with the Court in particular cases without vote.³² The assessors are appointed by the Court by majority vote. A provision was also made for assessors in the statute of the Permanent Court³³ but assessors have not yet been used in any case.

The statute permits the Court to form Chambers composed of three or more judges to deal with particular cases or with particular types of cases requiring specialized knowledge, such as labor or transit cases.³⁴ Chambers were constituted by the Permanent Court but never used. Chambers have not been constituted by the International Court of Justice. The statute requires the Court to form annually a Summary Chamber composed of five judges for the speedy dispatch of business at the request of the parties. The *Mosul Case*³⁵ was decided by the Court sitting as a Chamber of Summary Procedure but otherwise, although the Chamber is constituted annually as the statute requires, it has not been used in regular proceedings.³⁶

Parties before the Court must be represented by agents and are entitled to the assistance of counsel and advocates.³⁷ There are no rules restricting the right of pleading before the Court and any person appointed by a State to represent it may be admitted.³⁸ The agent is the channel of communication between the State he represents and the Court. Obviously, parties who appear before the Court take care to be represented by agents and counsel of outstanding ability.³⁹

30. STAT. INT'L CT. JUST. art. 31, ¶ 1.

31. In the *Corfu Channel Case*, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, Judge Ecer, the Albanian *ad hoc* judge, was a Czech national, and while a judge of demonstrated ability probably had little knowledge of Albanian local conditions.

32. RULES INT'L CT. JUST. art. 7.

33. *Id.* arts. 26, 27.

34. *Id.* art. 26.

35. P.C.I.J., Ser. B, No. 12 (1925). STAT. INT'L CT. JUST. art. 29 requires formation of the Summary Chamber.

36. See note 15 *supra* for a hearing of private parties by the Summary Chamber.

37. STAT. INT'L CT. JUST. art. 42.

38. P.C.I.J., Ser. E, No. 1, at 265; P.C.I.J. Ser. E, No. 3, at 204.

39. A degree of difficulty has been experienced by the Court because of the use of agents who do not take up residence at the Hague. In the case of the *Electricity Company of Sofia and Bulgaria*, P.C.I.J. Ser. E, No. 16, at 149, the Bulgarian agent was unable to collaborate with his French counsel because of circumstances of *force majeure* and failed to file his rejoinder. The Court took the position that the agent should select some counsel whose collaboration could be effectively secured and that

The Registrar is the chief administrative officer of the Court and handles all communications to and from it.⁴⁰ The Registrar is a combination Clerk of Court, Court Reporter and administrative manager.⁴¹ The Registrar is elected for a term of seven years by the Court and may be reelected.⁴² The Registrars have performed their duties efficiently.

The personnel who are to find facts upon which the decisions of the World Court are to be based seem to be prepared in training and experience at least as well as, if not better than, appointees to equivalent positions in national courts. The average age of the Court is low considering the experience of the judges and the dignity of their position. The eldest member of the Court at the time of his appointment, Judge Alvarez, who retired in 1955, is noted for the forthrightness of his opinions and his acute perception of the real task which the Court faces. The Court does appear to need additional judges, particularly from the Far East and Africa to provide not only legal skills but a knowledge of the customs and demands of the peoples they represent.⁴³ The Institute of International Law has recommended recently that if there must be an increase in the number of judges, the increase should not exceed a total of 18.⁴⁴ The writer is convinced that elections to the Court should be for life, that an optional retirement age should be set at 70, and that a judge of the Court should

the Bulgarian Government could not, of its own volition, prevent continuation of the proceedings instituted by Belgium. The Court was convoked for February 15th, 1940, to hear the case on the merits but did not meet because of the German invasion of the Netherlands. STAT. INT'L Cr. JUST. art. 42, ¶ 3 provides that agents, counsel and advocates shall enjoy the privileges and immunities necessary to the independent exercise of their functions. In 1946 the General Assembly recommended that agents, counsel and advocates should be accorded, during the period of their missions, including the time spent on journeys in connection with their missions, the privileges and immunities provided in Art. IV, §§ 11-13 of the Convention on Privileges and Immunities of the United Nations. See P.I.C.J., Ser. D, No. 1, at 85. For the text of the Convention see HILL, INTERNATIONAL OFFICIALS, IMMUNITIES AND PRIVILEGES 224 (1947).

40. RULES INT'L Cr. JUST. arts. 18-23.

41. The Registrar prepares the instructions for the Registry which are approved by the President subject to subsequent approval by the Court. RULES INT'L Cr. JUST. art. 18. A comprehensive discussion of the work of the Registry, including the Staff Regulations and Instructions, appears in I.C.J. YEARBOOK (1946-47) at 57.

42. STAT. INT'L Cr. JUST. art. 21, ¶ 2; RULES INT'L Cr. JUST. art. 14.

43. As additional States become parties to the statute there will be increased pressure for additional judges. In connection with the *Columbian-Peruvian Asylum* case, Judgment of November 20, 1950, [1950] I.C.J. Rep. 266, Columbian officials observed that the decision was made mainly by European judges unfamiliar with Latin American conditions. See LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE 84 (1951).

44. See Hudson, *The Thirty-Third Year of the World Court*, 49 AM. J. INT'L L. 1, 14 (1955).

be entitled to full pay upon retirement.⁴⁵ If the Court is expected to exert a positive influence in international affairs, the judges must be guaranteed a degree of independence in their positions which they do not now possess.

This is not to say that a judge should be expected to sever his ties with his State. The efficiency of the judge as a fact-finder depends in part upon the ties that he is able to maintain. It is important that the judges should feel free to press their inquiries and make their decisions without the threat of informal retaliation through economic or political pressures when their service upon the bench is completed. The writer is also convinced of the value of the *ad hoc* judge, who in some cases may be unduly persuasive,⁴⁶ but who nevertheless may bring new facts before the Court about the State which appoints him. Some precaution is probably necessary to insure that the *ad hoc* judge will be qualified professionally.⁴⁷ Perhaps, as a qualification, he should have professional legal experience for a stipulated period in the territory of the State which names him.⁴⁸

It should be observed, however, that substantial changes in the status of Court personnel cannot be made without changes in the statute. The General Assembly determines the salary of the judges and the Registrar and by its regulations can fix the conditions under which retirement pensions may be given.⁴⁹ But there is no way in which it can increase the term of office. The provisions for the appointment of *ad hoc* judges in contentious proceedings are inflexible, although the Court might set special conditions for them when used in advisory cases.⁵⁰

A judge of the World Court has access to the Carnegie Library in the Peace Palace at the Hague and, of course, to the services of the library of the Court. He also has access to the newspaper clip-

45. The Institute of International Law recommends that the judges be elected for fifteen years and not be eligible for reelection. The Institute suggests a compulsory retirement age of 75 in the event an age limit is established. Hudson, *op. cit. supra* at 14.

46. See HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1920-1942) 360 (1943).

47. The Institute of International Law recommends that "if the system of *ad hoc* judges cannot be abandoned" the appointment of such judges should be subject to guarantees to secure *ad hoc* judges with qualifications, that measure up to those of titular judges. The Institute is concerned primarily with the qualifications of the officials who appoint the *ad hoc* judges. See Hudson, *The Thirty-Third Year of the World Court*, 49 AM. INT'L L. 1, 14-15 (1955).

48. See HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1920-1942) 366-69 (1943).

49. STAT. INT'L CT. JUST. art. 32. For the pension plan for the Court see P.I.C.J., Ser. D, No. 1, at 91.

50. The use of *ad hoc* judges in advisory cases is within the discretion of the Court. STAT. INT'L CT. JUST. art. 68.

ping service performed by the Archivist of the Registry.⁵¹ In the normal course of events he is also called upon to serve on committees of international organizations formed for the study of problems related to his specialty or on arbitral commissions and in related judicial or quasi-judicial positions. A judge of the World Court, unlike the judges of many national courts, cannot retire into a cloister to emerge only for the hearing of cases and the reading of decisions.

The special environment in which a judge of the World Court must live and work has produced two problems, both of which are related to his effectiveness as a fact finder. What positions can he accept without compromising his position as a judge? Under what circumstances in relation to a particular case is he obliged to step aside because he knows too much about it?

The statute of the Court is not particularly helpful in answering either question. Article 17 of the statute sets forth certain grounds of disqualification that seem obvious as well as reasonable. No member of the Court may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a commission of inquiry, or in any other capacity.⁵² Any doubt on the point is settled by a decision of the Court. A judge is not disqualified simply because he is a national of a State which is a party before the Court.⁵³ Suppose he is extremely well informed about a case before it reaches the Court. Is he obliged to disqualify himself on this ground only? Is he obliged to disqualify himself if he has reached a tentative opinion as to the proper result? This seems to be a matter primarily for the judge's conscience. He is to inform the President of the Court if he feels that he should not take part in the decision of a case.⁵⁴ The President may raise the issue, and if the President and the member of the Court disagree, the matter is to be settled by a decision of the Court.⁵⁵ There is no provision for challenge of a judge by the agent of a party.

If emphasis is to be placed upon increasing the efficiency of the fact finding functions of the Court, a substantial change should be made in the result of disqualification of a judge. While it is important to preserve the integrity of the Court and to preserve the fiction that the decision maker receives the case without preconceived opinion as

51. I.C.J. YEARBOOK (1946-47) 81.

52. STAT. INT'L Ct. JUST. art. 17, ¶ 2.

53. *Id.* art. 31, ¶ 1.

54. *Id.* art. 24, ¶ 1.

55. *Id.* art. 24, ¶ 3.

to the proper outcome, the same standards should not be applied to a judge of the World Court that are applied to a judge of a national court. Many cases that come before national courts are veiled by a mantle of anonymity because they lack news interest and because the docket of the court is so crowded that the judge would not have time to concern himself with the facts even if he were so inclined. The case that comes before the World Court has probably been the plaything of the press for months before formal hearings. Certain cases, such as the *Corfu Channel Case*⁵⁶ and the *Anglo-Iranian Oil Co. Case*⁵⁷ are argued in the press by State propagandists before their counsel appear in Court.

While a disqualification rule should be retained, the disqualification should go only to the vote in the decision and should not prevent a judge from participating in the oral proceedings, questioning counsel and consulting with his colleagues while they consider the case. Thus, in the *Anglo-Iranian Oil Co. Case* Sir Benegal Rau disqualified himself because he had represented his State on the Security Council when the Council considered the United Kingdom complaint concerning Iranian failure to carry out interim measures of protection indicated by the Court.⁵⁸ In the *Nottebohm Case*⁵⁹ a judge had advised one of the parties prior to his election to the Court and was disqualified. He did not participate in the adjudication of the case. In both instances it would seem that the judge concerned should have been permitted to participate in the proceedings without a vote so that he could contribute such special information to the Court as he possessed.⁶⁰ The principle should apply with special force in advisory proceedings in which the decision of the Court is usually not binding in a legal sense. It should be possible to develop a principle of "qualified" disqualification, such as that suggested, by a narrow construction of the statute, limiting the word "decision" simply to the vote upon which the actual decision in the case is taken.

The statute states that a judge may not act as agent, counsel or advocate in any case⁶¹ and that he may not exercise any political or administrative function or engage in any other occupation of a professional nature.⁶² While it is especially important that the col-

56. Judgment of April 9, 1949 [1949] I.C.J. Rep. 4.

57. Judgment of July 22, 1952 [1952] I.C.J. Rep. 93.

58. I.C.J. YEARBOOK (1953-54) 96.

59. I.C.J. YEARBOOK (1954-55) 88.

60. Such disclosure should, of course, be subject to the professional obligation due a client.

61. STAT. INT'L CT. JUST. art. 17, ¶ 1.

62. *Id.* art. 16, ¶ 1.

lateral activities of a judge not detract from the reputation of the Court for integrity and fairness, it is equally important that the judge not be removed from the sources of information that international committees and other projects of an international character may provide. The present practice of the Court appears to be liberal except with respect to service upon arbitral tribunals or commissions. There is, for example, no incompatibility between the function of judge and acting as chairman of an *ad hoc* committee set up by the General Assembly with a view to finding a humanitarian solution to the problem of prisoners of war.⁶³ On the other hand, any function which compels a judge to follow the instructions of his government, regardless of his personal views, is political. This includes the position of delegate for a government to the International Labor Conference.⁶⁴ The principle applied by the Permanent Court to determine the incompatibility of the function of judge and service on an arbitral tribunal was, originally, whether the agreement upon which the arbitration was based provided for an appeal to the Court or settlement by the Court in case the arbitration failed.⁶⁵ At a later date this principle was abandoned upon the assumption that the judge could be disqualified if the case ultimately came before the Court.⁶⁶

The International Court of Justice has applied a principle more restrictive than that established originally by the Permanent Court. A judge may not accept the functions of arbitrator, chairman of a commission of conciliation or inquiry, or any similar function, if there is any provision to the effect that a decision taken by him, or one in which he has taken part, may be the subject of an application to the Court or if there is a possibility that the decision may be the subject of an application.⁶⁷

The judges of the World Court should be encouraged to participate actively in international affairs collateral to their duties upon the Court. In this activity the judge may develop "background" information that will enhance his ability to find facts while performing his judicial duties. Subject to the rule for disqualification mentioned in this Article, the judge may likewise contribute to the Court information derived from his participation in arbitral and conciliation proceedings.⁶⁸

63. I.C.J. YEARBOOK (1953-54) 96.

64. P.C.I.J., Ser. E, No. 7, at 278.

65. P.C.I.J., Ser. E, No. 3, at 178; P.C.I.J., Ser. E, No. 13, at 145.

66. P.C.I.J., Ser. E, No. 7, at 277.

67. I.C.J. YEARBOOK (1953-54) 96.

68. The members of the Court enjoy diplomatic immunities but only when engaged on the business of the Court. STAT. INT'L CT. JUST. art. 19. The judges of

The fact-finding potentialities of the use of the President's appointing power do not appear from the record to have been realized. Treaties sometimes provide for appointment by the President of the Court of arbitrators, umpires or members of conciliation commissions. Thus, the Treaty of Lausanne provided for appointment of the President of the Mixed Arbitral Tribunals by the President of the Court if the parties could not agree upon a selection. The President performed this function in 1924 by appointing a President for the Greco-Turkish and Romano-Turkish Tribunals.⁶⁹ Special requests are sometimes made by States or international organizations for appointments to fill special offices. In 1954 the President nominated a Chairman for a Special Advisory Board appointed by the Secretary-General of the United Nations.⁷⁰ Requests are also made by corporations to appoint arbitrators to settle contract disputes and these requests are usually granted.

Certain appointments, quite certainly, have no potential value to the Court as information sources.⁷¹ But in other instances, such as an appointment of members of a conciliation commission or arbitral board, the appointment could be conditioned upon reports by the member concerned or upon his willingness to testify or produce evidence before the Court if later called upon. The President is usually approached and his consent secured before the treaty provision or special request for appointment is made. The appointing practice does seem to be a bud from which increased efficiency in finding facts could quickly flower.

III.

ALLOCATION OF THE INTELLIGENCE TASK.

Judge Hudson, in his careful and distinguished treatment of the work of the Permanent Court of International Justice, states: "Issues of fact are seldom tried before the Court, and where a question of fact arises the Court must usually base its finding on statements made on behalf of the parties either in the documents of the written pro-

the Court have general diplomatic immunity in the Netherlands. This immunity would not exist in the State of which the judge was a national. There is thus a practical limitation upon the suggestions of the writer concerning disclosures of information obtained in collateral activities of the judges since a judge might breach the security regulations of his State by reason of his disclosure. As suggested in note 60 *supra*, the disclosures should also be subject to the judge's obligation of professional confidence.

69. P.C.I.J., Ser. E, No. 1, at 150.

70. I.C.J. YEARBOOK (1953-54) 44.

71. See I.C.J. YEARBOOK (1952-53) 44-45 for a number of appointments made by the President.

ceedings or in the course of oral proceedings".⁷² His remark applies with equal accuracy to the work of the International Court of Justice.

The exclusion of fact in the Anglo-American judicial duel has come to be taken for granted by American judges and lawyers. The burden is on the opponent to produce the facts and, if he can be kept from getting them in, so much the better for the client. The practice has been tolerated not only because of the lawyer's affection for tradition but because the judge does not have the time to set out upon extensive fact-finding inquiries of his own. The judge is an umpire at trial. The judge on appeal tends to accept the facts produced at trial. There is no reason why this situation should exist in cases brought before the World Court. The General List of the Court is not overcrowded and the judges, or at least most of them, are not imbued with Anglo-American legal traditions. Why are the parties allowed to perform the major fact-finding function before the World Court? Who makes the decisions which determine who finds the facts?

The statute of the Court sets forth the major outlines of the fact-finding missions which the Court can pursue. Since the statute is based upon State consent and State consent pervades the entire problem of the Court's jurisdiction, it is understandable that special deference should be shown to the statements made by State representatives and the facts produced by them. Nevertheless, in spite of the very real obstacle that State consent presents in fact-finding, this single factor cannot explain why the Court has not moved with greater freedom in finding facts within the confines that its statute establishes.

Two factors appear to account for the reticence of the Court, particularly in contentious cases, to make independent inquiries. The Court has been prone to regard executive-administrative findings-of-fact as conclusive because of the limitations set by the statute upon its own fact-finding activities. This predisposition has carried over into contentious litigation, the State being treated as an administrative fact-finder whose conclusions must be accepted at face value unless manifestly questionable. Likewise, in the history of the Permanent Court, there were efforts to use the Court as a fact-finding institution for the League and other international organizations. This resulted in resistance within the Court to any extension of judicial fact-finding activity.

72. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1920-1942)* 565 (1943).

A. *The Notion of Executive-Administrative Finality.*

In the Anglo-American and Civil Law judicial systems the theory of finality of administrative and legislative findings-of-fact has been firmly implanted. The theory may be based upon constitutional separation of powers, upon a need for efficiency in sifting voluminous facts or upon the inability of the Court to appraise remote events. It is understandable that judges trained in the Anglo-American and Civil Law systems should tend to apply these theories to the work of the World Court. There is also more justification for the application of theories of finality when the fact-finding ability of the Court is substantially curtailed. The Court has no processes to compel the production of evidence. It may request of public international organizations information relative to cases before it,⁷³ and may call upon the agents to produce any document or supply any explanation.⁷⁴ Relevant questions may be put to witnesses and experts.⁷⁵ But the Court must depend upon the consent of States to produce witnesses or permit the making of inquiries on the spot.⁷⁶ Requests for advisory opinions must be accompanied by all documents "likely to throw light" upon the question.⁷⁷

Lacking the necessary power to compel the production of the evidence it may need, the Court tends to rely heavily upon the evidence submitted without positive efforts to police the truth of the facts. In the case of *The Prince of Pless*,⁷⁸ Poland maintained that the German application was inadmissible so long as the Prince had failed to exhaust his administrative remedies in Poland. The Court found it unnecessary to pass upon the issue of exhaustion of remedies: "Since in any event it will certainly be an advantage to the Court, as regards the points which have to be established in the case, to be acquainted with the final decision of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince von Pless and now pending before that tribunal and . . . the Court must therefore arrange its procedure so as to insure that this will be possible."⁷⁹

In the case of *Jurisdiction of the European Commission of the Danube*⁸⁰ a special committee of inquiry appointed by the Technical Committee for Communications and Transit of the League had con-

73. STAT. INT'L CT. JUST. art. 34, ¶ 2.

74. *Id.* art. 49.

75. *Id.* art. 51.

76. *Id.* art. 44.

77. *Id.* art. 65, ¶ 2.

78. P.C.I.J., Ser. A/B, No. 52 (Order of Feb. 4, 1933).

79. *Prince of Pless*, *supra* note 78 at 16.

80. P.C.I.J., Ser. B, No. 14 (1927).

ducted an investigation of the case on the spot and had examined witnesses and records. The Romanian agent contested the findings of the special committee. The Court stated: "The facts having been already investigated by the Special Committee appointed by the League of Nations, and its report having been adopted by the competent body of the League, the Court does not think it proper to make new investigations and inquiries."⁸¹

Apparently the showing of an erroneous finding must be clear before the Court will initiate its own inquiry. In the case of *The Monastery of St. Naoum*⁸² the Conference of Ambassadors, upon recommendation by its delimitation commission, had set a boundary between Albania and Yugoslavia. The Yugoslav agent objected that the finding was based upon erroneous information or adopted without regard to certain essential facts. The Court was prepared to consider whether new facts had been produced or old facts overlooked. The Conference of Ambassadors had informed the Court that it had not been acquainted with the documents offered by the Yugoslavs to support their claim for revision until after its decision had been made. The Court stated its opinion, however, that "new documents do not in themselves amount to fresh facts".⁸³ The Yugoslavs also contended that the Conference had overlooked certain proposals made to the Conference of Ambassadors in 1913. The Court stated:

"It is however difficult to believe that the members of the Conference of Ambassadors were unacquainted with these documents, which are in no sense secret. The application of the London Protocol to determine the Serbo-Albanian frontier was proposed by the Conference of Ambassadors itself, and the Conference obviously did so with full knowledge of the facts, that is to say, after acquainting itself with the documents relating to the London Conference of 1913."⁸⁴

B. *Pressures to Make the Court an Administrative Fact-Finder.*

It was perhaps natural that the Council of the League, the executive body of that Organization charged with peace enforcement functions, should attempt to use the facilities of the Court as an aid in

81. Jurisdiction of European Commission of the Danube, *supra* note 80 at 46.

82. P.C.I.J., Ser. B, No. 9 (1924).

83. *The Monastery of St. Naoum*, *supra* note 82 at 22.

84. *Ibid.* After the decision of the Court, the Yugoslav Minister at Paris sent to the President of the Conference of Ambassadors a letter circulated by Count Berchtold in 1913 to certain ambassadors of Austria-Hungary. This letter convinced the Conference that it has been mistaken in its judgment which the Court had sustained. Based upon this letter, the Albanian and Yugoslav settled the boundary dispute by negotiation and the settlement was accepted by the Conference. P.C.I.J., Ser. E, No. 2, at 137.

accomplishing its mission. The details of the use by the Council of advisory opinions as a device for presenting contentious litigation to the Court are considered hereafter. But once the entering wedge was placed, the Council also sought advisory opinions relating to the difficulties of the Free City of Danzig. The Free City was a ward of the Council and was under the general supervision of a High Commissioner. In a series of cases, the first group involving Polish claims to certain functions within the City and access to port facilities and the second rising out of Nazi party activity within the City, the Council threw administrative problems into the lap of the Court that probably could and should have been solved by the Council and High Commissioner without judicial action.⁸⁵ There was also a tendency to try to thrust upon the Court some of the fact-finding problems of the Mixed Commission for the exchange of Greek and Turkish populations under the Convention of Lausanne. The Court dutifully complied with the requests for aid in the Danzig cases, although in *Danzig Legislative Decrees*, Judge Anzilotti remarked:

“All that can be said is that the reason why the Council asked for the Court’s opinion was because it desired to be informed as to the scope and effects of certain provisions of the Danzig Constitution and of certain acts of the Senate, in order to enable it to exercise the guarantees of the League of Nations. Now although it is the right and obligation of the Council to obtain any information which it considers useful or necessary, it is equally true that it must do this by appropriate methods, and must not seek to impose on the Court duties different from those for which it was created and organized.”⁸⁶

With respect to inquiries by the Mixed Commission, however, the Court assumed a different attitude. In *Exchange of Greek and Turkish Populations*⁸⁷ the Mixed Commission induced the Council of the League to seek the opinion of the Court on the questions:

“What meaning and scope should be attributed to the word ‘established’ in Article 2 of the Treaty of Lausanne . . . in regard to which discussions have arisen and arguments have been put forward which are contained in the documents communicated by the Mixed Commission? And what conditions must the persons who are described in Article 2 . . . under the name of ‘Greek

85. *The Polish Postal Services at Danzig*, P.C.I.J., Ser. B, No. 11 (1925); *Jurisdiction of the Courts of Danzig*, P.C.I.J., Ser. B, No. 15 (1928); *Anchorage in the Port of Danzig of Polish War Vessels*, P.C.I.J., Ser. B, No. 43 (1931); *Treatment of Polish Nationals in Danzig*, P.C.I.J., Ser. A/B, No. 44 (1932); *Danzig Legislative Decrees*, P.C.I.J., Ser. A/B, No. 65 (1935).

86. *Danzig Legislative Decrees*, P.C.I.J., Ser. A/B, No. 65, at 61 (1935).

87. P.C.I.J., Ser. B, No. 10 (1925).

inhabitants of Constantinople' fulfill in order that they may be considered as 'established' under the terms of the Convention and exempt from compulsory exchange."⁸⁸

The Court answered the first question but as to the second carefully qualified its answer. The Court was

"... neither called upon to prepare in advance solutions for all of the problems that may arise with regard to the application of Article 2 . . . and is not in possession of sufficient information to do so. . . . In the absence of sufficient materials in the discussions and arguments submitted to it, it must abstain from providing concrete solutions for the complex problems which may arise in the application of Article 2 to persons who, though belonging to one family, do not individually satisfy the conditions laid down in that article. The power conferred upon the Mixed Commission by Article 12 enables that body, within the limits fixed by the clauses of the Convention, to find an equitable solution for any disputed points."⁸⁹

The preparedness of the Court to accept administrative findings of fact, reinforced to a degree by an adverse reaction of the Court to efforts to press it into the role of administrative fact-finder in the years preceding World War II, has caused the Court to slip into a position in which it is loath to take advantage of the limited avenues of independent inquiry which its statute permits.

The ready acceptance by the Court of conclusions of fact by State parties has two manifest disadvantages. The adequacy and honesty of State fact-finding processes are presumed in a period in which the conscious use of techniques for distorting facts is an accepted and anticipated practice in the execution of State policies.⁹⁰ Also the tedious processes of State administrative action delay in many cases the presentation of facts to the Court until long after the events which give rise to the controversy. Thus, in the case of *Serbian Loans Issued in France*⁹¹ the French bondholders spent six years trying to interest the

88. The Exchange of Greek and Turkish Populations, *supra* note 87 at 7.

89. The Exchange of Greek and Turkish Populations, *supra* note 87 at 23. In the *Ambatielos Case*, Judgment of May 19, 1953, [1953] I.C.J. Rep. 10, 16 the Court refused to pass judgment upon any question of law or fact falling within "the merits of the difference" or "the validity of the claim" since that would encroach upon the jurisdiction of the arbitral commission.

90. Consider in this connection the British allegation in the *Corfu Channel Case* that Albania had secured the Hodgson Report by espionage and had edited the report before photographing it for evidence. 2 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 255-56 (I.C.J. 1948). For a comment upon apparent Yugoslav lack of frankness in the same case see the dissenting opinion of Judge Azevedo. *Corfu Channel Case*, Judgment of April 9, 1949 [1949] I.C.J. Rep. 4, at 89.

91. P.C.I.J., Ser. A, No. 20 (1929). The proceedings of the Court tend to produce decisions more rapidly than those of arbitral tribunals. Also there is usually less delay in submitting cases to the Court than to arbitration.

French Government in their case. The case was submitted to the Court three years after France decided that the bondholders should be protected. The judgment of the Court was rendered one year later. In the meantime there had been speculation in the Serbian bonds and the original subscribers had taken their losses long before the decision of the Court. The Court could not concern itself with this matter.⁹²

C. *Allocation of the Intelligence Task in Contentious Cases.*

Upon the assumption that the Court might be prepared in some contentious cases to make independent inquiries into facts, what opportunities for independent inquiry are open to the Court? At the present time, the Court seems to take it for granted that if the parties are in agreement on the facts, the facts agreed upon will be taken as the basis of the decision. In this situation the State parties determine the allocation of intelligence tasks.

The likelihood of a dispute as to facts is fairly remote. This is not because the parties are anxious to quickly reach a peaceful solution but simply because neither party has enough facts to question the facts submitted by the other. Records may be lost, the events in question may have occurred within the territory of one of the parties, or the case might be pitched on events long passed. When the facts do get into dispute in the usual proceeding on the merits it is because one of the parties by espionage or other informal practices has succeeded in penetrating the barriers to the flow of information established by the other.

In the *Oscar Chinn Case*⁹³ the British were unable to dispute the Belgian allegations of fact concerning the de facto monopoly alleged by the British because the evidence the British needed was in the Belgian Congo. The British had no access to the facts and the Court was not prepared to get the facts for them. In the *Nottebohm Case*⁹⁴ Guatemala could not make an issue of fact concerning the alleged fraud of Nottebohm in obtaining Liechtenstein nationality because it could not have access to the necessary records in Liechtenstein. In the *Corfu Channel Case* the British took the necessary evidence to raise an issue of fact with Albania by sweeping mines in the Corfu Channel over Albania's protest. The British case for Yugoslav participation in the mining was built on the testimony of a Yugoslav officer who left Yugoslavia after the mining incident and who did not come to

92. Serbian Loans Issued in France, *supra* note 91 at 39.

93. P.C.I.J., Ser. A/B, No. 63 (1934).

94. (Second Phase) Judgment of April 6, 1955, [1955] I.C.J. Rep. 4.

the attention of the British until after their case had left the Security Council. If the Court is confronted with a dispute of fact, the dispute tends to be based upon information obtained informally so that the Court is likely to have difficulty in any investigation it undertakes.

If the facts are not disputed by the parties, there are several situations in contentious proceedings in which the Court *might* see fit to make independent inquiries but has not yet done so to any appreciable extent. In a number of contentious cases the Court must hear a preliminary objection to its jurisdiction before proceeding to the merits. The Court determines its own jurisdiction but clearly cannot do so unless some of the facts of the case are considered. The Court has taken a pragmatic approach to the problem by holding that if an excursion into facts is necessary on the issue of jurisdiction, the facts will be considered *de novo* on the merits.⁹⁵ This is painless dentistry. If a State appears to raise the issue of jurisdiction and is not cooperative in producing facts, the Court may take the position that it is free to investigate for the limited purpose of determining its jurisdiction. No institution other than the Court can determine jurisdiction and the question of jurisdiction must be answered.⁹⁶

The Court may request information from public international organizations relative to cases before it.⁹⁷ This may be done at the initiative of the Court or at the request of one of the parties.⁹⁸ The privilege to request information applies to advisory as well as contentious proceedings and would seem to apply to proceedings upon preliminary objections as well as to proceedings on the merits.

A State not originally a party to contentious litigation may intervene. This may inject new facts and create a dispute. A State may intervene as a matter of right if a convention to which it is a party is being construed.⁹⁹ It may intervene with Court consent if it has a legal interest which might be affected adversely by the decision.¹⁰⁰

95. German interests in Polish Upper Silesia (The Chorzow and Rural Estates case) (Jurisdiction) P.C.I.J., Ser. A, No. 6, at 15-16 (1925). If it would be impractical to consider the jurisdictional issue without a full consideration of the facts on the merits, the Court will join the jurisdictional question and the issue on the merits. *E.g.*, Pajzs, Czaky, Esterhazy case (Preliminary Objection), P.C.I.J., Ser. A/B, No. 66 (Order of May 23, 1936). In the *Anglo-Iranian Oil Co.* case (Jurisdiction) Judgment of July 22, 1952, [1952] I.C.J. Rep. 93, 149, Judge Read considered that the Court had improperly decided the merits of the British treaty claim in ruling upon the jurisdictional issue. The treaty had been put in issue by the British in an effort to establish jurisdiction.

96. STAT. INT'L CT. JUST. art. 36, ¶ 6.

97. *Id.* art. 34, ¶ 2.

98. RULES INT'L CT. JUST. art. 57 (3).

99. STAT. INT'L CT. JUST. art. 63.

100. *Id.* art. 62.

There have been two formal interventions.¹⁰¹ Neither appear to have added significant facts to the proceedings. Informal interventions have been attempted. In the *Corfu Channel Case* Yugoslavia sought to impeach the testimony of a witness for the United Kingdom, Kovacic, by a communique and introduced evidence through the Albanian Agent. The Court received the evidence because it was anxious "for full light to be thrown on the facts alleged".¹⁰² The Court admitted the evidence with reservations and refused to express an opinion on its probative value. In the *Mosul Case*¹⁰³ an advisory opinion involving a boundary dispute between Turkey and Iraq, Turkey boycotted the proceeding but, in addition to answering questions from the Court in writing, requested a French publicist to submit an opinion on the issue directly to each member of the Court. The Court did not consider the opinion because it was not official and had not been examined by the Turkish Government.

A public international organization may offer information on its own initiative in a contentious proceeding.¹⁰⁴ The Registrar notifies a public international organization when its constitutional instrument or a treaty made under its auspices is being construed.¹⁰⁵ The Court reserves the right to require the information to be supplemented.¹⁰⁶ The organization does not become a party to the proceeding in a technical sense.

If the Court takes interim measures of protection, additional facts may emanate from three sources.¹⁰⁷ As a result of the interim measures the parties may reappraise their positions and the facts of the controversy and produce new facts when the proceeding on the merit commences. A dispute in which interim measures are necessary will probably be a matter of interest to the Security Council. It must be informed of interim measures ordered. The Security Council through its commissions of investigation may supervise the execution of interim measures and new facts may flow to the Court from the United Nations. The Court may also recommend the establishment of a Committee to supervise interim measures. This was done in the *Anglo-Iranian Oil Co. Case*. Iran, however, refused to comply with the order and the committee was never established. A requirement might be made that

101. The S.S. "Wimbledon," 11 P.C.I.J., Ser. A, No. 1 (1923) (Poland); *Haya de la Torre case*, Judgment of June 13, 1951, [1951] I.C.J. Rep. 71 (Cuba).

102. Judgment of April 9, 1949 [1949] I.C.J. Rep. 4, at 14.

103. P.C.I.J., Ser. B, No. 12 (1925).

104. STAT. INT'L Ct. JUST. art. 34, ¶ 2.

105. *Id.* art. 34, ¶ 3.

106. RULES INT'L Ct. JUST. art. 57 (4).

107. STAT. INT'L Ct. JUST. art. 41; RULES INT'L Ct. JUST. art. 61.

the Committee submit reports to the Court concerning the execution of the measures ordered. No requirement of this sort was made in the *Anglo-Iranian Oil Co. Case*.¹⁰⁸ Interim measures have been requested in seven cases and granted in three.¹⁰⁹ In no case in which interim measures have been granted have substantial additional facts been brought before the Court as a result.

During oral proceedings, which are always held in contentious cases,¹¹⁰ the judges of the Court may question agents and counsel.¹¹¹ The rules of Court provide that any member may question but must first make his intention known to the President who controls the hearing.¹¹² Agents and counsel, however, are at liberty to answer immediately or can delay their answer until a later date.¹¹³ The right of agents and counsel to delay their answers, which they usually do, has deprived questioning by the Court of much of its value as a device to wring admissions of fact. The authority of a member of the Court to question does not extend to authority to request the production of documents.¹¹⁴ The question must likewise be relevant to the terms of the dispute before the Court.¹¹⁵

The necessity of simultaneous translation in World Court proceedings has meant that the Court waits until counsel completes his statement and then presents its questions as a group. Sometimes the President of the Court collects the questions and presents them. Sir Frank Soskice, British Solicitor General and examining counsel in the *Corfu Channel Case*, has commented that the delay in putting questions deprives the proceeding of the conversational interplay between bench and bar to which English lawyers are accustomed.¹¹⁶

Requests for interpretation or revision of a judgment may produce new facts. A judgment of the Court is final and without appeal.

108. In this connection consider the previous recommendations in this article for utilization of the appointing power as a technique for obtaining information. The board contemplated was to be composed of two members named by each of the States and a fifth member who was to be a national of a third State and either selected by the parties or designated by the President of the Court.

109. In addition to the measures granted in the *Anglo-Iranian Oil Case*, interim measures were granted in the *Case of Denunciation of the Treaty of November 2, 1865, between China and Belgium*, P.C.I.J., Ser. A, No. 8 (Orders of Jan. 8, Feb. 15 and June 18, 1927) and in *Electricity Company of Sofia and Bulgaria*, P.C.I.J., Ser. A, No. 13, at 21 (1921).

110. STAT. INT'L CT. JUST. art. 43, ¶ 1. Oral proceedings are optional in advisory cases but usually are held.

111. STAT. INT'L CT. JUST. art. 48. The statute does not state that any member of the Court may question but this authority is easily implied from the provisions.

112. RULES INT'L CT. JUST. art. 52 (1-2).

113. *Id.* art. 52 (3).

114. P.C.I.J., Ser. E, No. 13, at 150, 151.

115. P.C.I.J., Ser. E, No. 2, at 189.

116. Soskice, *Some Practical Considerations Affecting the Administration of International Law*, 37 TRANS. GROT. SOC. 127, 128 (1952).

But if it is found difficult to apply the decision to the facts existing at the time it is rendered, the Court may be requested to construe the judgment.¹¹⁷ The Court has stated that it will not examine facts other than those considered in its judgment and will not consider supervening facts when the judgment is interpreted.¹¹⁸ The Court, however, can not interpret in the abstract its own judgment any more than a Court can interpret a statute of a legislature without considering the facts to which it is being applied. In the *Case of Interpretation of Judgments Nos. 7 and 8 (The Chorzow Factory)*,¹¹⁹ the Court agreed to interpret a passage in Judgment No. 7: "If Poland wishes to dispute the validity of this entry, it can, in any case, only be annulled in pursuance of a decision given by the competent tribunal." Poland had contended that the land-book entry was invalid, and, after the judgment, commenced a proceeding before the Tribunal of Katowice to annul it. The Court was required to interpret the passage in Judgment No. 7 in the light of the supervening act by Poland in commencing annulment proceedings before its own tribunal. The supervening act provoked the request for interpretation.

How far the Court will consider new facts in the guise of interpretation is presently an open question. Clearly the Court will not entertain a new line of factual argument not originally submitted. Thus in the *Columbian-Peruvian Asylum Case*¹²⁰ Columbia presented an abstract question whether Columbia was "competent, as the country to qualify the offense for the purpose of said asylum." The Court answered the question in the abstract: Columbia did not have a right to qualify the nature of the offense by a unilateral and definitive decision binding on Peru. But the Court held that there was no urgency justifying the asylum, although Mr. de la Torre, the refugee in question, was not a common criminal as contended by Peru. While this decision disposed of an abstract question presented by Columbia, it did not dispose of Mr. de la Torre who was still in the Columbian embassy at Lima. On the day the judgment was rendered, Columbia requested an interpretation. The Court refused to give this interpretation, noting that it had not passed on the issue whether Columbia's qualification was in fact correct. The purpose of the request must

117. STAT. INT'L CT. JUST. art. 60.

118. *Interpretation of Judgments Nos. 7 and 8 (The Chorzow Factory)*, P.C.I.J., Ser. A, No. 13, at 21 (1921).

119. *Id.* at 123.

120. Judgment of November 20, 1950 [1950] I.C.J. Rep. 266.

be to obtain an interpretation of the judgment and not to answer a question not yet decided.¹²¹

If one of the parties can produce a new fact which has been discovered after the judgment has been rendered, it may be possible to revise the judgment.¹²² It is unlikely that revision will become a very significant part of the jurisprudence of the Court because of the conditions imposed in the statute. There can be no revision more than ten years after the date of judgment. The application for revision must be made within six months after discovery of the fact. The fact must be a decisive factor. It must have been unknown to the Court at the time of the decision and also unknown at that time to the party claiming revision. The party cannot claim revision if its ignorance was due to negligence. There have been no cases of revision by the Court and there are unlikely to be any unless the statute is substantially modified.¹²³

D. Allocation of the Intelligence Task in Advisory Cases.

In contrast to the restricted rule of the Court in allocating fact-finding missions in contentious cases, in advisory cases the ultimate decision as to who finds what facts and where the facts are to be found rests with the Court. There are several reasons for this. The most important reason is that the statute of the Court places no substantial limits upon its activity in advisory cases.¹²⁴ Also, while advisory decisions may be binding in a moral sense and are usually accepted by the organizations or States concerned, the advisory decision is binding in a legal sense only when the parties have agreed by treaty or convention that the advisory opinion is to bind.¹²⁵ States have little to lose and much to gain by participating in advisory proceedings. The Security Council and the General Assembly may request advisory opinions. Likewise other organs of the United Nations and the specialized agencies may make the requests when authorized by the General Assembly.¹²⁶ A State cannot request an advisory opinion directly but may be able to persuade the General Assembly or some other organization authorized to seek advisory opinions to make the request

121. Request for Interpretation of the Judgment of November 20, 1950, [1950] I.C.J. Rep. 395.

122. STAT. INT'L CT. JUST. art. 61.

123. See note 84 *supra*, with reference to production of a document by the Yugoslavs that might have been used for revision if presented to the Court.

124. STAT. INT'L CT. JUST. art. 68.

125. In some instances international organizations have agreed that advisory opinions will be binding upon them. See I.C.J. YEARBOOK (1955-56) 39.

126. U.N. CHARTER art. 96.

for it. When the General Assembly requests an advisory opinion, the fact gathering resources of the United Nations are at the disposition of the Court.¹²⁷ The Secretary-General is instructed to furnish the Court with the necessary documents and provide it with other necessary assistance. He has invariably done this.

While the predisposition of the Court to regard administrative findings and State submissions as conclusive weighs as heavily in advisory proceedings as in contentious litigation, the predisposition is not supplemented by restrictions in the statute or cultivated by State resistance to independent inquiry by the Court. The Court has exhibited initiative in advisory proceedings that has been lacking in much of the contentious litigation. It has, for example, agreed to allow the International Federation of Trade Unions to produce witnesses and make statements,¹²⁸ it has received statements from political parties in the City of Danzig,¹²⁹ and has received a decision of the High Court of Danzig after the proceedings in the case were closed, the decision being received from an official of the Free City other than its court agent.¹³⁰ Usually several international organizations and three or more States are heard in each advisory proceeding. It should also be observed that the major contributions of the International Court of Justice to the doctrine of international law have been made in advisory cases.¹³¹

The advisory proceeding is the ideal vehicle for fact-finding activity by the Court. The Court cannot volunteer opinions. An international organization qualified to do so must request them.¹³² But is it possible that factually static contentious litigation may be short circuited into ductile advisory proceedings in which the Court might be prepared to make independent findings? The General Assembly is gradually assuming the executive functions of the Security Council; and is not blocked by a veto. To what extent can the General Assembly put be-

127. The General Assembly has requested all advisory opinions except one which was requested by UNESCO.

128. Competence of the International Labor Organization to Regulate, Incidentally, the Personal Work of Employers, P.C.I.J., Ser. B, No. 13 (1936). The witnesses ultimately were not produced. See P.C.I.J., Ser. E, No. 13 at 213.

129. P.C.I.J., Ser. E, No. 12 at 199.

130. P.C.I.J., Ser. E, No. 12 at 196. The Court said that it accepted the decision as information and not as evidence.

131. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of April 11, 1949, [1949] I.C.J. Rep. 174 (status of the United Nations to protect its agents); Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion of July 13, 1954, [1954] I.C.J. Rep. 47 (implied power of the United Nations to establish administrative tribunal).

132. U.N. CHARTER art. 96.

fore the Court State disputes in the guise of advisory requests? This is one of the sensitive issues before the Court today.

The present position of the Court appears to be as follows: The Court is entitled to withhold an advisory opinion and will do so if its opinion requires a decision directly upon the merits of a State dispute and one or more of the States concerned do not participate in the proceeding. This may also be the case when the States participate in the proceeding, but a request for an opinion should not in principle be refused.¹³³ When the opinion relates to legal grounds actually pending between States, the opinion has no binding force. However, no State, whether a member of the United Nations or not, can prevent the giving of an advisory opinion which the United Nations deems desirable for its guidance.¹³⁴ The Court is not concerned with the political motive of the General Assembly in submitting a request for an opinion.¹³⁵ The Court is the principal judicial organ of the United Nations and will function accordingly. The rules provide that if the request for an advisory opinion relates to legal questions actually pending between States the provisions of the statute relating to *ad hoc* judges shall apply.¹³⁶ In applying the provisions of the statute relating to contentious proceedings to advisory proceedings the Court has stated that it will "above all consider whether the advisory opinion relates to a legal question actually pending between two or more States."¹³⁷

Since 1946, the General Assembly, which has requested all except one of the advisory opinions, has presented its questions in abstract form. In at least one instance the question was so abstract that the Court could not answer it directly. This tactic of the General Assembly has not prevented States from appearing and attacking the jurisdiction of the Court.¹³⁸

The judges likewise must consider the experience of the Permanent Court in "advisory arbitration."¹³⁹ The League Covenant provided that the Court could give an advisory opinion upon any *dispute*

133. Reservations to the Convention on Genocide, Advisory Opinion of May 28, 1951, [1951] I.C.J. Rep. 15.

134. Interpretation of Peace Treaties, Advisory Opinion of March 30, 1950, [1950] I.C.J. Rep. 65.

135. Admission of a State to the United Nations (Charter Art. 4), Advisory Opinion of May 28, 1948, [1948] I.C.J. Rep. 57.

136. RULES INT'L. Cr. JUST. art. 83.

137. RULES INT'L. Cr. JUST. art. 82 (1).

138. See Interpretation of Peace Treaties, Advisory Opinion of March 30, 1950, [1950] I.C.J. Rep. 65; Admission of a State to the United Nations (Charter Art. 4), Advisory Opinion of May 28, 1948, [1948] I.C.J. Rep. 57.

139. See the individual opinion of Judge Azevedo in Admission of a State to the United Nations, note 138 *supra*, at 73.

or question referred to it by the Council or Assembly. As the practice in advisory cases developed, the Council of the League, the executive body, made all requests for advisory opinions. The second request by the Council for an opinion was refused in *The Status of Eastern Carelia*.¹⁴⁰ The case involved Russia's obligations under the Treaty of Dorpat relative to certain communes under Finnish protection which had been attached to Eastern Carelia. Russia refused to participate in the proceeding. The Court refused to render an opinion on the ground that Russia had not consented to a decision by the Court. The Court noted that it would be at a disadvantage in finding facts if Russia did not participate.¹⁴¹

In subsequent cases the Court gave advisory opinions involving State disputes when the merits were not directly in issue. These opinions did, however, interpret treaty obligations or international customary legal obligations in such a way that the decisions conditioned settlements ultimately made by the parties. In the *Mosul Case*, in which Turkey refused to participate directly, the Court took pains to point out that its opinion related directly to the question addressed by the Council and that the merits of the dispute before the Council were in no way prejudged. The practice of advisory arbitration reached its high point in the case of *Customs Regime Between Germany and Austria*¹⁴² in which political motives were imputed to the Court. Thereafter the practice was continued but with greater caution.

The statute of the International Court of Justice limits the advisory jurisdiction of the Court to "legal" questions.¹⁴³ This limitation does not appear to confine the Court solely to abstract questions of law, but the change in the statute, coupled with resistance from within the Court, may mean that the practice of advisory arbitration will never be as flexible or as common as under the League.¹⁴⁴

IV.

SURVEILLANCE PRACTICES.

The Court may have no reasonable opportunity to find facts because the decision as to who will find the facts and where the facts will be sought rests elsewhere. If the Court does have an opportunity

140. P.C.I.J., Ser. B, No. 5 (1923). The first request was in *Nationality Decrees in Tunis and Morocco*, P.C.I.J., Ser. B, No. 4 (1923).

141. *Status of Eastern Carelia*, note 140 *supra*, at 28.

142. P.C.I.J., Ser. A/B, No. 41 (1931).

143. STAT. INT'L CT. JUST. art. 65, ¶ 1.

144. See the separate opinion of Judge Azevedo in *Interpretation of Peace Treaties*, Advisory Opinion of March 30, 1950, [1950] I.C.J. Rep. 65, 81.

to find facts the inertia produced by the predispositions of the judges may prevent it from taking advantage of the opportunity. But upon the assumption that the Court will decide to make independent inquiries, how does the Court make them?

The rest of this article deals with four major problems produced by surveillance practices: procuring and use of testimony by witnesses; use of expert inquiries; rules of evidence; and State security restrictions. No effort is made to discuss rules of evidence exhaustively since several excellent treatments of this subject are now in print.¹⁴⁵

There have been few contentious cases before the Court in which the parties have disputed the facts. Of these, the *Corfu Channel Case* sheds more light upon the difficulties of independent inquiry by the Court than any other. The case is a judicial landmark and figures prominently in the subsequent discussion.¹⁴⁶

145. SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* (1939); WITENBERG, *La Theorie des Preuves devant les Jurisdictions Internationales*, 56 *HAGUE RECUEIL* 5 (1936).

146. In view of numerous references to this case in the subsequent materials the facts of the case are stated briefly here. On October 22, 1946, two British destroyers, H.M.S. "Saumarez" and H.M.S. "Volage" struck mines while passing through the fairway of the Corfu Channel. These vessels were part of a squadron passing through the Channel subject to secret British orders X.C.U. Upon receipt of the report of the mining, the Central International Mine Clearance Board recommended that the channel be reswept at a favorable opportunity (the channel having been swept prior to October 1946), but stated that the sweeping of the channel remained an issue outside its scope. The British nevertheless swept the channel on the 12th and 13th of November, 1946 (Operation Retail). A member of the Mediterranean Mine Clearance Board, Commander Mestre, attended the sweeping as an observer. Two German G-Y mines were recovered and taken to Malta for inspection. Diplomatic negotiations with Albania having failed, the British took the case before the Security Council under Article 35 of the Charter. Albania accepted an invitation to attend the Security Council proceedings upon condition of her acceptance, for the purposes of the dispute, of the obligations of a member of the United Nations. The Security Council appointed a subcommittee to investigate the facts, and the report of this committee was considered by the Council. Ultimately, a finding by the Council adverse to Albania was blocked by the veto, but a British resolution referred the case to the World Court. The British brought the case before the Court by application, and Albania raised a preliminary question of jurisdiction on the ground that the case should have been submitted by special agreement. The Court decided that it was unnecessary to pass upon this issue because Albania had voluntarily accepted its jurisdiction by a letter of July 2, 1947. *Corfu Channel Case (Preliminary Objection)*, Judgment of March 25, 1948, [1947-48] I.C.J. Rep. 15.

Immediately after this decision the case was submitted by special agreement. The claim of the United Kingdom in this agreement was Albanian responsibility for the explosions and liability for the resulting damages. The British case was that the mines were laid by Yugoslavia with Albanian connivance or that Albania knew the mines had been laid and failed to give notice as required by international law. Albania counterclaimed that the United Kingdom had violated her sovereignty on October 22, 1946, not having been in innocent passage, and had again violated her sovereignty in Operation Retail on the 12th and 13th of November 1946. After hearing witnesses and directing an expert inquiry on the spot, the Court gave judgment for the British on their claim on the ground that Albania knew or should have known of the mining and failed to give warning; the court gave judgment for Albania on that part of her counterclaim pertaining to Operation Retail. The Court determined the indemnity in a separate proceeding in which Albania refused to participate. A second committee of experts was formed to aid the Court in determining the indemnity due. The indemnity

A. *Testimony by Witnesses.*

Witnesses have testified before the Court in *German Interests in Upper Silesia*¹⁴⁷ and the *Corfu Channel Case*. In the case of *Greco-Bulgarian Communities*¹⁴⁸ the Court may have questioned the Acting President of the Mixed Commission.¹⁴⁹ This officer was present as an expert and not as a general witness. In its examination of the canals and locks in *Diversion of the Water from the Meuse*¹⁵⁰ the Court heard explanations on the spot given by representatives who had been designated by the parties for the purpose.¹⁵¹ The Committee of Experts which conducted an investigation on the spot in the *Corfu Channel Case* appears to have questioned the members of its escort and perhaps some natives of the locality, but this questioning appears to have been informal in nature.¹⁵² In other cases in which counsel have suggested that witnesses be called, the witnesses have not in fact been heard.¹⁵³ Because of the limited opportunities of the Court to receive the testimony of witnesses, only rudimentary techniques for handling the testimony of witnesses have been developed. The judges have tended to draw heavily upon the Anglo-American experience in handling witnesses, although in other matters of evidence the Court seems to have been influenced by the Civil Law.

Unless the parties produce witnesses voluntarily, the Court must apply to the government of the State upon the territory of which the subpoena is to be served to have the witness produced.¹⁵⁴ Many States appear to lack any law requiring compulsory production of witnesses in international judicial proceedings.¹⁵⁵

was set at £843,947 in favor of the United Kingdom. The decision was considered a sufficient award for Albania on her counterclaim. *Corfu Channel Case*, Judgment of December 15, 1949, [1949] I.C.J. Rep. 244.

147. P.C.I.J., Ser. A, No. 7 (1926).

148. P.C.I.J., Ser. B, No. 17 (1930).

149. The writer does not have access to the necessary records to determine whether this officer was questioned or not.

150. P.C.I.J., Ser. A/B, No. 70 (1937).

151. While minutes were made of the proceeding, there is no indication that the representatives were subject to cross-examination or extensive interrogation.

152. Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 154, 158, 161, 166. It is unlikely that either the Albanians or the Yugoslavs would have permitted intensive examination of any witnesses other than those selected for the purpose because of the possibility of divulgence of information not related directly to the investigation.

153. *Legal Status of Eastern Greenland*, P.C.I.J., Ser. A/B, No. 53, at 25 (1933); P.C.I.J., Ser. C, No. 67, at 4123, 4126; *Personal Work of Employers Case*, P.C.I.J., Ser. B, No. 13 (1926); P.C.I.J., Ser. E, No. 3, at 213; *Pajzs, Czaky, Esterhazy Case*, P.C.I.J., Ser. A/B, No. 68 (1936); P.C.I.J., Ser. E, No. 13, at 150.

154. STAT. INT'L Cr. JUST. art. 44, ¶ 1.

155. See Anderson, *Production of Evidence by Subpoena before International Tribunals*, 27 AM. J. INT'L L. 498 (1933); Jessup, *National Sanctions for International Tribunals*, 20 A.B.A.J. 55 (1934); HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1920-1942)* 569 (1943).

Within sufficient time prior to the commencement of the oral proceedings each party is required to name its witnesses, designate their place of residence and indicate in general the points towards which the testimony of the witnesses will be directed.¹⁵⁶ If the Court requests the parties to call witnesses or experts¹⁵⁷ the Court must bear the expense of producing them.¹⁵⁸ If the witness is not called by the Court, each party must bear the expense of its own witnesses.

In *German Interests in Upper Silesia*¹⁵⁹ an issue of fact was presented whether it was necessary for certain mining interests to control the super-jacent land in order to prevent subsidence of the soil. The Court, by order, called upon the parties to present at a public hearing "by whatever means they thought fit" evidence relating to the points reserved, subject to the right of the Court to make good any insufficiency in the evidence by the means provided by its statute.¹⁶⁰

Germany produced four expert witnesses and Poland produced one. At the hearing the witnesses were sworn and were examined directly by the producing party and then cross-examined by the opposing party. After examination the witnesses were questioned by some of the judges.

The witnesses answered in Polish or German, neither of which were official languages of the Court. Each party was responsible for translating the testimony of its witnesses into both official languages of the Court.¹⁶¹ The French version of the testimony was regarded as authentic in case of conflict. A record of the French translation was sent to the agent of the parties for examination by the witnesses. Whether the witnesses could actually read the translation does not appear. They were, however, allowed to submit further depositions if they felt that their testimony would be clarified by additional observations. The record was read to the witnesses for signature and approval at a public meeting of the Court. One of the German witnesses was not present at this meeting, having authorized the German agent to sign his testimony by proxy. The Court disregarded the testimony because it had not been read to the witness or signed by him.¹⁶²

156. RULES INT'L Cr. JUST. art. 49.

157. *Id.* art. 54.

158. *Id.* art. 55.

159. P.C.I.J., Ser. A, No. 7 (1926).

160. *Id.* at 96.

161. See P.C.I.J., Ser. C, No. 11, at 25-36; Ser. E, No. 2, at 110. The proceeding is discussed in HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1920-1942) 570 (1943); SANDIFER, *EVIDENCE BEFORE INTERNATIONAL TRIBUNALS* 222 (1939).

162. See P.C.I.J., Ser. C, No. 11, at 25-36.

In the *Corfu Channel Case* it was clear well in advance of the proceeding that there would be a hotly contested issue of fact and that both parties would produce witnesses and experts. The Special Agreement between the United Kingdom and Albania provided that the Court should make such orders with regard to procedure in conformity with the statute and the rules of Court as it deemed fit after having consulted the agents of the parties.

Sir Eric Beckett, the British agent, and Mr. Kahreman Ylli, the Albanian agent, submitted to the Registrar, prior to the oral proceedings, the names of the persons who would be present at the Hague during the course of the hearings and who would be available for call as witnesses by the Court or by the parties depending upon the course of debate.¹⁶³ Affidavits had been filed by the British which set forth the testimony, in general, that their witnesses would give if called. After two British requests, the Albanian agent also submitted a statement of the substance of the testimony his witnesses would offer.¹⁶⁴

The general plan of procedure was arranged at a meeting between the President of the Court and the agents on November 8, 1948, a day prior to commencement of the oral proceedings. In general, the plan was that two British counsel would make opening statements followed by an answer by counsel for Albania. Then the witnesses were to be examined. The British were then to make their reply approximately twenty-four hours after the last of the witnesses was heard and the Albanian counsel would then make their rejoinder.¹⁶⁵ As soon as the first part of the oral arguments had been completed the President ordered the agents to inform the Registrar of the particulars of the witnesses whom they proposed to call.

The hearing of witnesses commenced on November 22, 1948, and lasted until December 14, 1948. Except for those witnesses who were

163. 5 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 183, 189, 195, 217 (I.C.J. 1948). The British witnesses designated and ultimately called were Lieut. Comm. Karel Kovacic, formerly of the Yugoslav Navy; Captain W. H. Selby, Captain of H.M.S. "Saumarez"; Commander R. T. Paul, Captain of H.M.S. "Volage"; Commander Q. P. Whitford; Commander E. R. D. Sworder; Lieut. Comm. P. K. Lankester; and Commander Paul Mestre of the French Navy. The Albanian witnesses were Captain Ali Shtino, Harbor-master at Saranda, Albania; Captain Aquile Polena, Coast Defense Commander at Saranda; M. Xhavit Muco, Vice President of the Executive Council at Saranda. As experts the Albanians offered Rear Admiral Raymond Moullec of the French Navy and Captain Branimir Ormanov, Chief of Staff of the Bulgarian Black Sea Fleet. Albania also named M. Mikhailo Stojakovic, Yugoslav Charge d'Affaires at the Hague, but he was not called. See 3 *id.* at 250.

164. 3 *id.* at 246; 5 *id.* at 196, 201.

165. 5 *id.* at 200.

also appearing as experts, the witnesses were excluded from the hearing until they were called. The witness was allowed to hear the remainder of the testimony after he had testified.¹⁶⁶ Before testifying, the witnesses were required to make their declarations as required by the rules.¹⁶⁷

The technique of simultaneous translation was used. In accordance with the rules, statements made in one official language had to be translated to the other official language.¹⁶⁸ The requirement was made for both questions and answers. This meant that when an English speaking counsel was examining an Albanian witness, the question had to be translated into French and Albanian and the answer into French and English. This not only delayed the proceedings but spoiled the effect of cross-examination.¹⁶⁹

Captain Ormanov, the Chief of Staff of the Bulgarian Black Sea Fleet, an Albanian expert witness, complicated matters by answering sometimes in English and sometimes in Russian.¹⁷⁰ The interpreter's difficulty with technical naval terms sometimes delayed and confused the translation.¹⁷¹ The translation was under the general supervision of the Court.¹⁷²

The British witnesses were examined first. The interrogation of witnesses was by counsel for the parties; general control over the examination was exercised by the President of the Court.¹⁷³ Counsel for the parties determined the order in which witnesses were called.¹⁷⁴

The examination was conducted in the Anglo-American fashion. The producing party examined the witness directly. The opposing party then cross-examined. The witness was then questioned by the President and members of the Court. The producing party then sub-

166. 5 *id.* at 220. There appears to have been no effort to exclude witnesses during the opening arguments of counsel in which the general nature of the testimony to be offered by the witnesses was discussed.

167. RULES INT'L Ct. JUST. art. 53. The witness declares: "I solemnly declare upon my honor and conscience that I will speak the truth, the whole truth and nothing but the truth." The expert declares: "I solemnly declare upon my honor and conscience that my statement will be in accord with my sincere belief." Neither statement is an oath in a technical sense.

168. RULES INT'L Ct. JUST. art. 58 (1).

169. Soskice, *Administration of International Law*, 37 TRANS. GROU. SOC. 127, 128 (1951).

170. 4 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 317 (I.C.J. 1948).

171. 3 *id.* at 568.

172. RULES INT'L Ct. JUST. art. 58 (2).

173. *Id.* art. 53 (1).

174. 3 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 173 (I.C.J. 1948). The United Kingdom called Commander Sworder as the first expert witness. The President then suggested that Commander Whitford be called as the second expert witness but counsel preferred to call Commander Kovacic. Albania called its general witnesses first and then its expert witnesses.

mitted the witness to re-direct examination and the opposing party, if it so desired, could then subject the witness to re-cross-examination. On cross-examination the opposing counsel was allowed to put new questions to the witness and the producing counsel could put new questions and add technical explanations on re-direct examination. In the course of his ruling upon this matter the President made the following observation:

“Our procedure is very liberal. There is no limit to the number of questions that may be put. The Court has one wish, and that is that as much light as possible should be cast upon the matter discussed by the Court, and secondly the Court wishes to give the Parties every opportunity to defend their point of view . . .”¹⁷⁵

The British examination was conducted by Sir Frank Soskice, Solicitor General. The examination for Albania was conducted by M. Joe Nordmann and M. Pierre Cot of the French bar. The French counsel, being accustomed to the French practice of examination by the presiding judge, had initially some difficulty with the system of examination selected by the Court but quickly warmed to their task. In every instance counsel appeared to prefer a detailed examination of the witness rather than putting a general question to the witness as had been suggested by the President.¹⁷⁶

The Court was required to rule infrequently on the conduct of the examination. Most of the difficulty centered upon the testimony of Commander Kovacic who testified concerning the British contention that Yugoslav minelayers had placed the mines in the Corfu Channel with the connivance of Albania. Prior to the hearings, an effort had been made to impeach the testimony by means of a Yugoslav communique.¹⁷⁷ During his cross-examination of Commander Kovacic, M. Cot produced a photostat of an identification paper and attempted to use it in his examination. Sir Frank objected to the use of the paper, his objection being based upon the best evidence rule.¹⁷⁸ The Court ruled that no question could be put to the witness based upon the document unless it was presented in complete and original form. The Court also ruled that no question could be put based on a docu-

175. *Id.* at 428.

176. See, for example, the detailed questioning of Commander Paul, the Captain of “Volage” by Sir Frank Soskice and the equally detailed direct examination of Captain Shtino by M. Cot. 4 *id.* at 9-25, 201-13.

177. 3 *id.* at 251.

178. 3 *id.* at 538-39.

ment which had not been filed with the Registry.¹⁷⁹ Subsequently the Court ruled that the document not only must be filed with the Registry but must have been distributed to the opposing party.¹⁸⁰

In the course of his examination M. Cot also produced a calculation concerning the angle of the sun at Sibenik in Yugoslavia on the date that Commander Kovacic had testified he had seen sun glinting from mines on the decks of two Yugoslav minelayers. The British desired that the accuracy of this calculation be checked by experts before Commander Kovacic was questioned from it.¹⁸¹ The calculation together with certain other technical questions was submitted to a group of experts provided by both parties.¹⁸² The experts met in another room while the examination of Commander Kovacic was proceeding and reached a conclusion concerning the angle of the sun before completion of the re-cross-examination by M. Cot. This conclusion appears to have been made known to counsel but M. Cot does not appear to have used this conclusion in his examination. After the Court adjourned for the day, Sir Frank apparently discussed the conclusion of the experts with Kovacic and requested the Court to permit him to return Kovacic to the stand on the following day to put further questions to him relating to the time he recalled making his observation.¹⁸³ M. Cot agreed to recall of the witness. The witness was examined by Sir Frank, then cross-examined by M. Cot and questioned by Judge *Ad Hoc* Ecer. After Judge Ecer's questions, M. Cot put further questions.¹⁸⁴ The report of the experts was filed after adjournment on the date that Commander Kovacic was recalled.¹⁸⁵

In accordance with the Rules a shorthand transcript was made of the testimony of each witness.¹⁸⁶ This transcript was made available to the witness as soon as possible after his evidence was given. The witness read the transcript and made necessary corrections. The transcript was returned to the Registrar and the Registrar reported to the Court any corrections made. When the transcript was approved by the witness, he signed a certificate in the presence of the Registrar and this was attached to the manuscript which was sealed and filed in the

179. 3 *id.* at 544-45.

180. 3 *id.* at 555.

181. 3 *id.* at 564.

182. 3 *id.* at 608, 616-20; 5 *id.* at 123. The experts were Commander Sworder, Lt. Commander Lankester, Lt. Godsall, Admiral Moullec and Captain Ormanov.

183. 3 *id.* at 665.

184. 3 *id.* at 665-79.

185. 3 *id.* at 679. This report also related to questions put by Judge Ecer to Lt. Commander Lankester. The questions were reduced to writing and submitted to the committee upon the recommendation of M. Cot. 4 *id.* at 59; 5 *id.* at 126.

186. RULES INT'L Ct. JUST. art. 60 (1), (2).

Registry. If a witness testified in one of the official languages of the Court, the certified copy was the transcript of the language in which he spoke. If the witness testified in other than an official language, the translation into an official language arranged by the party concerned under the supervision of the Court was the official text.¹⁸⁷

The World Court cannot punish for contempt. It cannot punish a witness for perjury. There is no immunity for a witness who gives testimony inimical to the interests of the State of which he is a national.¹⁸⁸ Because of the absence of power of the Court to deal with a recalcitrant or perjured witness and because of the absence of immunity of the witness to legal action as a result of his testimony, the Court makes no effort to compel a witness to testify. In the *Corfu Channel Case* a reasonable ground for refusal to testify was respected by the Court. Thus, Commander Kovacic refused to disclose the name of the Yugoslav who told him that Sub-Lieutenant Drago Blazevic had said that the Yugoslav minelayers placed mines in the Corfu Channel. The question was withdrawn by M. Cot.¹⁸⁹ Commander Paul refused to answer a question by the President of the Court concerning the British secret Order X.C.U.¹⁹⁰ Commander Lankester likewise refused to answer a question by M. Cot concerning the same order.¹⁹¹ Commander Whitford refused to testify concerning his special orders when being cross-examined by M. Cot.¹⁹²

As a result of the *Corfu Channel Case* the Court appears to have developed rudimentary but sound techniques for hearing testimony by witnesses. The efficiency of examination of witnesses and the care in recording testimony is in marked contrast to the first efforts in *German Interests in Upper Silesia*. It is likely that the Court will not resort to the taking of depositions. This common practice in arbitral proceedings would deprive the Court of an opportunity to observe the demeanor of the witness and to put its own questions. Likewise, while it appears that the Court is committed to the Anglo-American

187. 5 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 221 (I.C.J. 1948).

188. The witness has in the Netherlands the immunity necessary for the fulfillment of his mission. I.C.J., Ser. D, No. 1, at 89. In 1946 the General Assembly recommended that witnesses, experts and persons performing missions by order of the Court should be accorded, during the period of their mission, including the time spent on journeys in connection with their mission, the privileges and immunities provided in Art. VI, § 22 of Convention on Privileges and Immunities of the United Nations. I.C.J., Ser. D, No. 1, at 85.

189. 3 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 633-35 (I.C.J. 1948).

190. 4 *id.* at 27-28.

191. 4 *id.* at 77-78.

192. 4 *id.* at 185-86.

type of examination, the practices of the Court in guiding the examination of witnesses are likely to be flexible. The flexibility of the Court's procedures are well illustrated by the examination of Commander Kovacic. The features which would enhance the effectiveness of the use of testimony will require changes in the statute or the conclusion of a special convention. The Court needs the authority to compel the production of witnesses or at least the States should undertake to enact national laws for the production of needed witnesses and documents. It is also desirable that a witness be given immunity for testimony offered before the Court. Immunity should extend to criminal prosecution if general immunity cannot be granted.

B. *Special and Expert Inquiries.*

The Court may make a special inquiry into facts, including investigations on the spot, in two ways. Members of the Court may be commissioned to make the inquiry. Technical experts may be commissioned to investigate matters of a type for which their training makes them particularly suitable.

The Court has power to create Special Chambers.¹⁹³ In contentious proceedings the use of Chambers requires the consent of the parties. In advisory proceedings, however, the Court could use Chambers as it saw fit.¹⁹⁴ If Chambers were formed for the purpose of investigation, the Chamber could not only investigate but also could decide the case.¹⁹⁵ The regular use of Chambers for this purpose would, in effect, create a supplementary court system. Appeals could not be taken to the World Court, however, without a change in the statute.¹⁹⁶ On one occasion, the Court as a whole conducted an investigation on the spot. In *Diversion of Waters from the Meuse*¹⁹⁷ the Belgian agent suggested that the Court visit the installations, canals and waterways to which the dispute related. The Netherlands agent agreed. An itinerary was proposed by the parties and adopted by the Court. The Court carried out the inspection in three days, heard

193. STAT. INT'L CT. JUST. arts. 26-29. The Chamber may exercise its functions elsewhere than at the Hague.

194. A literal construction of the existing rules appears to preclude the use of Chambers having been used as of this date and the Summary Chamber having been ever, makes its own rules and nothing in its statute seems to preclude the use of Chambers in advisory opinions.

195. STAT. INT'L CT. JUST. art. 27.

196. It is probable that any use of Chambers as investigating-deciding bodies will occur in advisory proceedings rather than in contentious litigation, no special Chambers having been used as of this date and the Summary Chamber having been used only once in formal proceedings. See note 35 *supra*.

197. P.C.I.J., Ser. A/B, No. 70 (1937).

explanations by representatives designated by the parties and witnessed practical demonstrations of the locks and connected installations. The *Meuse* case is a weak precedent for expansion of investigating functions by Chambers of the Court or by groups of judges and there is no suggestion at this time that the Court contemplates the further use of such techniques.¹⁹⁸

A commission of experts created under article 50 of the statute was used once by the Permanent Court¹⁹⁹ and sought by parties on other occasions.²⁰⁰ The International Court of Justice has used expert commissions twice. An expert commission was used in finding facts on the merits in the *Corfu Channel Case* and a second commission was formed to aid in setting the indemnity due the United Kingdom.²⁰¹

After the decision in *German Interests in Upper Silesia* in favor of Germany, the Germans failed to agree with the Poles concerning the value of the Chorzow Factory property. Having obtained an interpretation of two of the previous judgments of the Court in the *Chorzow* litigation, Germany instituted an action to determine whether indemnity was due and, if so, its amount. The Court determined that indemnity was due but the parties failed to present adequate data bearing upon the amount.²⁰² The Court established a Commission of Inquiry and reserved the fixing of an amount until the report of this commission could be received.²⁰³

The President of the Court was directed to appoint three experts. Each of the parties was authorized to appoint one assessor who was to participate in the investigation in an advisory capacity. The experts were to elect one of their number as chairman. The Registrar was made responsible for secretarial assistance and for liaison between the

198. The Second Committee on Revision of Rules of the Permanent Court reported in 1935 that it was unlikely that a Court of fifteen judges would attempt to hear witnesses as in the case of *German Interests in Upper Silesia* but would delegate a judge or nominate a commission to take the testimony. P.C.I.J., Ser. D, No. 2 (3d add.) at 770. In *Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., Ser. A/B, No. 46 (1932), the special agreement by which the case was submitted contemplated the use of members of the Court as a commission to investigate on the spot. The appointment of such a commission was requested by one of the parties but was never used.

199. The Factory at Chorzow (Claim for Indemnity — Merits), P.C.I.J., Ser. A, No. 17 (1928).

200. See *Free Zones of Upper Savoy and District of Gex*, P.C.I.J., Ser. A/B, No. 46 (1932); *The Oscar Chinn Case*, P.C.I.J., Ser. A/B, No. 63 (1934). In the *Chinn* case at page 146, Judge van Eysinga noted "Indeed there has never been a case before the Court in which the facts have been disputed to the same extent."

201. Judgment of December 15, 1949, [1949] I.C.J. Rep. 244.

202. The Factory at Chorzow (Claim for Indemnity — Merits) P.C.I.J., Ser. A, No. 17 (1928).

203. *Id.* at 99.

commission and the Court. The commission was authorized to ask for any document, explanation or facilities it might consider useful in carrying out its task. It might ask for authorization to inspect the factories involved in the dispute. A decision to make the requests was to be taken by a majority of the experts. The decision was to be transmitted to the Registrar who would obtain the information or authority needed or obtain the aid of the President.²⁰⁴ The fees of the experts were determined by the President. The experts were paid by the Court and each party paid its own assessor. Other fees and expenses were advanced by the Court and refunded by the parties.

Three technical questions were set forth in the order of the Court.²⁰⁵ The report was to contain the reasoned opinion of each member of the commission with respect to each question. The investigation was to conform to the principles established by the decision of the Court and the Registrar was to furnish the commission with the full record of the proceeding and certain other proceedings related to the Chorzow Factory. Each expert was required to swear that he would "abstain from divulging or turning to my own use any secrets of an economic or technical nature which may come to my knowledge in the performance of this task."

It was contemplated that the report should be communicated to the members of the Court and to the agents of the parties. A public sitting would then be held at which the report would be discussed and the experts questioned by the Court and agents. Fortunately for international tranquility, and unfortunately for the experience of the Court, no report was submitted. The experts held five meetings at the Hague, assisted by assessors and a liaison officer. They decided to make an inspection of the factories at Chorzow in Upper Silesia and of certain factories in Germany. Before an inspection could be made, the parties settled their dispute and the inquiry was terminated.²⁰⁶

Before conclusion of the oral arguments in the *Corfu Channel Case*, the President informed the agents that the Court was considering an appointment of experts under article 57 of the rules.²⁰⁷ The British agent suggested delay of the decision until the oral arguments were

204. The Register had general duty to reply to enquiries under Art. 24 of the Rules. The President's authority to obtain the information was contained in STAT. PER. CT. INT'L JUST. art. 49.

205. The order may be found in *The Factory at Chorzow (Claim for Indemnity — Merits)* P.C.I.J., Ser. A, No. 17, at 99 (1928).

206. P.C.I.J., Ser. E, No. 5, at 200.

207. The Registrar made enquiries to make up a list of experts before the oral proceedings commenced. 4 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 170 (I.C.J. 1948).

completed.²⁰⁸ By that time the Court could determine the technical questions involved and the basic factual dispute. The Court apparently reached its decision to appoint experts during or after the testimony of Admiral Moullec which, in conjunction with Yugoslav documents, cast doubt upon some of the testimony of Commander Kovacic.

By the Court Order of December 17, 1948, Commodore J. Bull of Norway, Commodore S. A. Forshell of Sweden and Lieut. Commander S. J. W. Elfferich of the Netherlands were appointed as experts to give the Court "a precise and concrete opinion" upon the questions presented and the reasons for their findings. In its general administrative details the order was similar to the one issued in the *Chorzow Case*.²⁰⁹ The questions presented to the experts, however, went to the critical issues of the case. The experts were to examine specified evidence to render an opinion as to what conclusions could be drawn concerning the type mine that injured the vessels, whether the mines were laid methodically, the purpose for which they were laid and when they were laid. The experts were also to give an opinion whether from the evidence Commander Kovacic could have seen G.Y. mines being loaded upon the Yugoslav minelayers in Panikovac Cove, how many G.Y. mines such a minelayer could carry and how long it would take to load them with the facilities available. The experts were requested to state an opinion on the main issue, the means employed to lay the minefield and whether the field could be laid without Albanian authorities being aware of it.²¹⁰

The experts elected Commodore Bull as chairman, considered the evidence and submitted their unanimous report on January 8, 1949.²¹¹ The experts concluded that the vessels had been damaged by German G.Y. mines such as those recovered in "Operation Retail," that the field was laid methodically with an offensive-defensive object (to stop ships from passing through the channel and prevent their entry into Saranda Bay) and that the mines recovered had been in the water a short time, but that no precise date could be established for the laying of the field. The experts stated a number of possible alternatives concerning the observations of Commander Kovacic but were unable to give a definite answer. Likewise no definite answer could be given to the question whether the Albanian authorities should

208. 5 *id.* at 210.

209. Corfu Channel Case, Order of December 17, 1948, [1947-48] I.C.J. Rep. 124.

210. The questions are paraphrased from the order. The questions were presented in great detail with a brief description of the evidence to be considered.

211. Corfu Channel Case, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 142.

have known that the mines were laid, experiments relating to sight and sound having been conducted at a Netherlands naval base. Copies of the report were sent to the British and Albanian agents. The Albanian copy was shown to the Yugoslavs. The Yugoslav Charge d'Affaires at the Hague then brought certain inaccuracies in the report to the attention of the President and suggested that the experts make an investigation on the spot.²¹² The Albanians likewise agreed to cooperate in an investigation at Saranda.²¹³

When oral proceedings of the Court were resumed on January 17, 1949, the Court decided to send the experts to Sibenik in Yugoslavia and Saranda in Albania to make the necessary investigations. The Registrar was instructed to make preparations for the inspection and to insure that the experts had the facilities for the prompt accomplishment of their mission. The parties were entitled to file written observations within one week following submission of the expert's report.²¹⁴ Commodore Bull was unable to make the inspection because of health and the parties secured the consent of the Court to their appointment of experts to accompany the mission. Commander Sworder was appointed by the United Kingdom and Captain Ormanov by Albania.²¹⁵ M. Garnier-Coignet, Deputy-Registrar, was appointed to maintain liaison with the Court and to be responsible for relations with authorities in Albania, Yugoslavia and the countries through which the mission passed. A member of the Court's internal services was assigned as courier.

The commission travelled by chartered plane and inspected the Sibenik area on January 24 and 25, and the Saranda area on January 28 and 29, 1949. The Albanian and Yugoslav authorities were cooperative and placed the necessary vessels and personnel at the disposal of the experts for the conduct of the tests.²¹⁶ The character-

212. 5 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 253-54 (I.C.J. 1948).

213. *Id.* at 252.

214. Corfu Channel Case, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 151.

215. 5 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 259 (I.C.J. 1949).

216. There is a slight suggestion in the report of the experts that the Albanian authorities were not frank in their statements concerning the watch kept on the coastal areas. Corfu Channel Case, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 159. Commander Sworder, the British expert who accompanied the mission, states that "Captain Polena first said there were no buildings on Denta Point, and then, when the experts insisted on trying to find the buildings, which they had observed from the sea, Captain Polena led them to the wrong hill. Further efforts were made to prevent the discovery of the post on the tower of the San Giorgio Monastery . . . [T]he door, in fact, was forced open by Lieutenant Commander Elfferich. The Albanian authorities refused to allow the lookout party under Commander Forshell to make observations from the tower of the Monastery." 5 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 96 (I.C.J. 1948).

istics of the quay at Sibenik and the facilities for storage of mines were examined. Sight tests were made from a launch in Panikovac Cove, the minelayer *M-2*, one of the vessels alleged to have laid the mines, being moored at the time at the quay. The *M-2* was inspected by the experts and other features of Commander Kovacic's testimony were checked. At Saranda, observations were made at night from the San Giorgio Monastery of a ship completely blacked out and running the course used to lay the mines in 1946. Both noise and sight tests were made, although no mines actually were laid. Other possible observation points in the Saranda area were examined.

In their report filed on February 8, 1949, the experts stated that it is "indisputable that if a normal lookout was kept at Cape Kiephali, Denta Point and San Giorgio Monastery, and if the lookouts were equipped with binoculars as has been stated, under normal weather conditions for this area, the mine laying operations must have been noticed by the coast guards".²¹⁷ Copies of the report were furnished the parties and they filed brief observations upon it. Questions were put to the experts in writing by three members of the Court and answered by the experts on February 12, 1949.²¹⁸

In its opinion on the merits the Court stated:

"The Court cannot fail to give great weight to the opinion of the Experts who examined the locality in a manner giving every guarantee of correct and impartial information. . . .

"From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosion on October 22nd, 1946, could not have been accomplished without the knowledge of the Albanian Government."²¹⁹

In the proceedings to establish the reparations due the United Kingdom, Albania failed to appear and was held in default.²²⁰ The Court referred the data furnished by the United Kingdom to two experts, Rear Admiral J. B. Berch of the Netherlands Navy and Mr. G. de Rooy, Director of Naval Construction, Netherlands Navy. The order was in the same general form as that used for the earlier commission. No specific questions were put to the experts and the order did not state what the experts were to report. Despite the inadequacy

217. Corfu Channel Case, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 161.

218. *Id.* at 163, 165.

219. *Id.* at 22.

220. Corfu Channel Case, Order of November 19, 1949, [1949] I.C.J. Rep. 237.

of the order, the experts understood their task and filed a comprehensive report on December 1, 1949.²²¹ The experts apparently worked almost entirely from the data submitted by the British and information placed at their disposal by the Royal Netherlands Navy. Blueprints of a destroyer of the "Saumarez" class were available and the experts had previously supervised the repair of damage similar to that sustained by "Volage." The experts do not appear to have questioned British personnel or to have examined the vessels or stores. It was indicated in the report that the figures determined were an approximation as some of the equipment injured was secret and other equipment had to be dismantled before the extent of damage could be determined. The experts were examined by the Court at a special sitting.

There is no reason to suppose that the technique of expert inquiries will cease to be used with the *Corfu Channel Case*. The value of the information obtained from the experts was greater than that of any evidence contributed by witnesses before the Court. The major question is not whether the Court will be prepared to use an expert inquiry on the spot in an appropriate case but whether the States concerned will cooperate in allowing the experts access to information. This is a factor difficult to appraise, but the national official does not live who will refuse to trade information for values deemed of greater advantage to his State. Albania was willing to go before the Court because of her loss of moral prestige in proceedings before the Security Council. She was prepared to receive investigators in an effort to regain her position of respect in the Community of States.

C. *Attitude of the Court Concerning Rules of Evidence.*

Rules of evidence familiar in the Anglo-American legal system have been rejected outright by the Court or, when received, modified substantially before being applied. The World Court has no jury to protect and the judges are confident of their own abilities to weigh facts. Significant State interests being at stake in many of the cases which the Court considers, the Court is not prepared to turn a case on a technical rule of evidence or procedure.²²² As Judge Van Eysinga put the matter in the *Oscar Chinn Case*: ". . . [T]he Court is not tied

221. *Corfu Channel Case*, Judgment of December 15, 1949, [1949] I.C.J. Rep. 244, at 258.

222. *Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., Ser. A/B, No. 46, at 155 (1932).

to any system of taking evidence, . . . its task is to cooperate in the objective ascertainment of the truth."²²³

The Court seems to have reworked the rules of evidence which it does apply with three objects in mind: (1) to bridge the gap left by the non-production of evidence, (2) to enable the Court to weigh the evidence submitted, and (3) to allow the opposing party to meet the evidence introduced. Evidence is seldom excluded by the Court.

(1.) *Unreasonable Searches and Seizures.*

The Court appears to accept evidence no matter how it was obtained by the party which produces it. In the *Corfu Channel Case* evidence was admitted which had been obtained by espionage.²²⁴ Part of the key evidence in the British case had been obtained by the international equivalent of an "unreasonable search and seizure." After the mining incident of October 22, 1946, the British swept the Corfu channel in "Operation Retail" (November 1946) over the protest of Albania. Twenty-two mines were cut and two mines, which proved to be German mines of the G.Y. type, were recovered and taken to Malta. The mines appeared to have been laid a short time before the incident of 22 October. The Court admitted evidence obtained from examination of the mines and related technical details. In answer to Albania's counterclaim that the United Kingdom had violated her sovereignty in "Operation Retail," the British argued that they were securing evidence for the Court which might have been lost if the mines had been removed by Albania or had been equipped with automatic flooding devices. The British also argued that self help justified their action. Both arguments were rejected by the Court and the United Kingdom was held liable on the counterclaim. The evidence obtained, however, formed part of the basis for the decision of the Court that Albania was liable to the United Kingdom on the British claim.

An exclusion of evidence by the Court based upon the way in which it was secured would be unrealistic in view of the known barriers established by States to the flow of information. The Court is not faced with the problem of intermittent police abuses of individuals which national constitutional guarantees are designed to minimize. The Court must get its evidence when and by whatever means it can obtain it.

223. The Oscar Chinn Case, P.C.I.J., Ser. A/B, No. 63, at 146 (1934).

224. 3 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 204 (I.C.J. 1948). The document was annexed as annex 11 to the Albanian counter memorial.

(2.) *Time Limits Upon Submission of Evidence.*

Evidence can be submitted at any time with Court consent. The Court will not consent if the opposing party will have no opportunity to comment upon it or offer rebutting evidence.²²⁵ As a general proposition, no further documents may be submitted by a party after the close of written proceedings without consent by the other party. If the other party does not object it is presumed to consent.²²⁶ If the other party does object, the Court, after a hearing, determines whether the evidence will be admitted or excluded. If the evidence is admitted, the objecting party must have an opportunity to comment upon it and submit documents in support of its contentions.²²⁷

If an agent or counsel refers to a document in his oral statement, he is ordinarily expected to produce it.²²⁸ Production is also required if the document is to be used in the examination of witnesses.²²⁹

Comment upon unproduced documents has created difficulty. In the *Mavrommatis Case*²³⁰ the Greek counsel was permitted to read an extract from Hansard's Parliamentary Debates over objection by the British counsel, the Court reserving its decision as to the importance to be attached to the material.²³¹ In the *Peter Pazmany University Case*²³² the Czech agent, before the opening of the hearings, announced he intended to produce additional documents, of which he furnished a list. He filed all of the documents except one and read most of them during the hearings. The Hungarian agent then objected to admission of the documents as evidence. The Court admitted all of the documents except the document which had not been produced. Whether the single document had been read during the hearings does not appear from the opinion.²³³ In the *Corfu Channel Case* the British

225. The Court appears to have construed Articles 52, 45 and 48 of the Statute as giving it full latitude to admit or exclude documents after the time set.

226. RULES INT'L CR. JUST. art. 48 (1).

227. *Id.* art. 48 (2). See *Nottebohm Case (Second Phase)*, Judgment of April 6, 1955, [1955] I.C.J. Rep. 4, at 6. The principle has been pursued to such an extent that the Court has withdrawn its request for a document when both parties objected to its production. *Pajzs, Czaky v. Esterhazy Case*, P.C.I.J., Ser. A/B, No. 68 (1936); P.C.I.J., Ser. E, No. 12, at 195.

228. *Pajzs, Czaky, Esterhazy Case*. See note 227 *supra*.

229. 3 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 555-56 (I.C.J. 1948).

230. P.C.I.J., Ser. A, No. 5 (1925).

231. P.C.I.J., Ser. E, No. 1, at 268.

232. P.C.I.J., Ser. A/B, No. 61 (1933).

233. The documents were accepted with "the usual reservations respecting the value which the Court might decide to attach to them." *Peter Pazmany University Case*, P.C.I.J., Ser. A/B, No. 61, at 215 (1933).

counsel objected to documents offered by Albania in the course of the oral hearings. A special hearing was held to determine whether the documents should be admitted. During the hearing, the Albanian counsel, in violation of the President's instructions, gave a resume of the documents which he wished to introduce. The British agent contended that the resume was inaccurate and gave his own resume. The President reprimanded both representatives in open court.²³⁴ The Court subsequently admitted the documents. There was little else that could be done.

It has been customary in contentious proceedings for the President to announce before closing that the Court reserves the right to request the parties to furnish additional explanations or information. During its twenty-second session the Permanent Court requested an agent to submit a document. The hearing was concluded before the document was submitted. The questions then arose whether the Court could maintain the request since it could use information only after it had been communicated to the interested parties and would have to hold a hearing if a party objected. The President stated the Court would accept the document without committing himself to the procedure to be followed.²³⁵

The advisory proceedings present no problem as to time limitations in filing evidence, all material produced being for the information of the Court and the decision having no binding effect.

(3.) *Burden of Proof.*

The burden of proof rule applied by the Court is the simple formula of the Civil Law. The burden of proof rests upon the party which asserts the affirmative of a proposition which if not substantiated will result in a decision adverse to his contention.²³⁶ A distinction between the burden of the risk of non-persuasion and the burden of going forward with the evidence has not been accepted by the Court.²³⁷

234. 4 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 305-16 (I.C.J. 1948).

235. P.C.I.J., Ser. E, No. 8, at 268. The case cannot be identified from the record. In a few cases agents have attempted to submit documents in an apparent effort to frustrate a reply by their opponents. See P.I.C.I.J., Ser. E, No. 6, at 297, 298. The rules make no detailed provisions for the time limits for submissions of evidence in interventions, revisions and appeals to the Court. RULES INT'L CT. JUST. arts. 64, 65, 67, 78.

236. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 92 (1939). Judge Hudson notes: "on several occasions the Court has referred to the burden of proof as falling on a particular, but without distinguishing it from the burden of going forward with the proof." HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE (1920-1942) 565 (1943).

237. See 5 WIGMORE, EVIDENCE 434, 440-56.

The procedures of the Court are flexible and there is no jury. In some instances it is difficult to determine which State is plaintiff and which defendant. The Court also may make independent findings of fact. In the *Corfu Channel Case* the United Kingdom admitted it bore the burden of proof of Albanian complicity but argued that the burden would be discharged by satisfying the Court of Albanian complicity with reasonable certainty. The British further argued that the burden of going forward with the evidence was shifted to Albania because Albania had exclusive control of its territorial waters and adjacent land and knowledge of the events preceding the mining was likely to be confined to her government.²³⁸ Albania appeared to admit the burden of proof on her counter-claim but argued that the British bore the burden of proof on their defenses of innocent passage, securing evidence for the Court and self help.²³⁹ The British answered that, assuming the Albanian contention was true, once the British established the principle of their exception, the burden would shift to Albania to show that the British had exceeded their rights. The Court rejected the British argument that exclusive control and special knowledge by Albania shifted the burden of going forward with the evidence on the issue of complicity.²⁴⁰ The Court ruled in favor of Albania on that part of its counterclaim pertaining to "Operation Retail" and thus did not pass upon the issue whether, if the British could have proved their exception, the burden of going forward with the evidence on the issue of unreasonable exercise of the British rights would have shifted.

In the *Minquiers and Erechos Case*²⁴¹ the special agreement between France and the United Kingdom stated their intent as to the presentation of pleadings without prejudice to any question as to the burden of proof. The Court, considering the positions of the parties, both claiming sovereignty over the same territory, and the question of title that was in issue, decided that each party must prove its own title and the facts upon which it relied.

The International Court of Justice has had little occasion to discuss questions of burden of proof.²⁴² The Permanent Court likewise

238. 3 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 220, 250 (I.C.J. 1948).

239. 3 *id.* at 405, 406.

240. *Corfu Channel Case*, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 18.

241. Judgment of November 17, 1953, [1953] I.C.J. Rep. 47, at 52.

242. See *Columbian — Peruvian Asylum Case*, Judgment of November 20, 1950, [1950] I.C.J. Rep. 266, at 276; *Nottebohm Case (Second Phase)*, Judgment of April 6, 1955, [1955] I.C.J. Rep. 4, at 30.

considered burden of proof in only a few cases.²⁴³ There is no indication from the cases decided that the Court is likely to import the common law complexities of burden of proof nor does there seem any justification for doing so.

(4.) *Judicial Notice.*

The judges of the Court often bring to a case facts that have not, strictly speaking, been introduced in evidence. In the nature of the work of the judges of the Court and in view of the kind of case with which the Court deals, the judge cannot be a stranger to a case in the sense that a judge of a national court may hear a case for the first time when it is argued before him. By its statute the Court is not restricted to the evidence produced by the parties. Informal contributions by the judges are inevitable and desirable. Thus, while the Court has had occasion to take judicial notice of certain facts, judicial notice has been used more often to describe the things that the Court will not consider without proof. For example, the Court has stated that it will not take notice of a municipal law but will obtain knowledge of it with the aid of the parties or by inquiries by the Court.²⁴⁴ On the other hand, the Court will take notice of treaties and administrative acts relating to them.²⁴⁵ The Court will also take notice of historical events²⁴⁶ and publicized contemporary political situations.²⁴⁷

(5.) *Circumstantial Evidence — Adverse Presumptions.*

The Court has dealt with circumstantial evidence in a number of cases.²⁴⁸ In the *Corfu Channel Case* the Court based its decision on the British claim upon circumstantial evidence and thus found it necessary to discuss the matter in detail. The Court rejected the British argument that exclusive control by Albania over the Corfu Channel area and exclusive knowledge of the events preceding the mining

243. See *Eastern Greenland Case*, P.C.I.J., Ser. A/B, No. 53, at 49 (1933); *Mavrommatis Concessions Case*, P.C.I.J., Ser. A, No. 5, at 30 (1925).

244. *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, P.C.I.J., Ser. A, No. 21, at 124 (1929); See *Danzig Legislative Decrees*, P.C.I.J., Ser. A/B, No. 65, at 61 (1935).

245. *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, P.C.I.J., Ser. A, No. 23, at 19 (1929).

246. *Anchorage in the Port of Danzig by Polish War Vessels*, P.C.I.J., Ser. A/B, No. 43, at 144 (1931).

247. *German interests in Upper Silesia*, P.C.I.J., Ser. A, No. 7, at 73 (1926); See *Customs Regime Between Germany and Austria*, P.C.I.J., Ser. A/B, No. 41, at 70 (1921).

248. *E.g.*, *The Oscar Chinn Case*, Ser. A/B, No. 63 (1934). Had the *Borchgrave* case not been withdrawn the Court would have faced a state protection issue based upon circumstantial evidence. See P.C.I.J., Ser. A/B, No. 72 (1937).

would shift the burden of going forward with the evidence on the issue of complicity to Albania. The Court stated, however, that Albania's position precluded the British from furnishing direct proof of facts giving rise to responsibility so that the British should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. "This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."²⁴⁹ The Court considered proof of Albanian knowledge of the mining could be drawn from inferences of fact provided they leave no room for reasonable doubt. From the attitude of Albania before and after the mining incident in conjunction with the information furnished by its experts, the Court concluded that Albania must have had knowledge of the mining.²⁵⁰

The World Court appears unwilling to draw inferences from the non-production of documents, although the statute indicates that the Court may take formal notice of a refusal to produce.²⁵¹ In the *Corfu Channel Case* the Court was urged to infer from the refusal of the British to produce Order X.C.U., which related to the passage of the Corfu Strait on 22 October 1946, that the order contained instructions to reconnoiter the Albanian Coast. The Court refused to draw conclusions differing from those to which the actual events gave rise.²⁵² The use of adverse presumptions might provide an effective sanction for the production of documents.²⁵³

D. Security Considerations.

A disclosure of facts is a major object of judicial proceedings. A State which commences a case before the Court must assume that assertion of its claim will entail a disclosure of information which it might prefer to restrict. The assertion of State policy in judicial proceedings is accompanied by a security loss. Likewise, a State which accepts the jurisdiction of the Court must anticipate a security loss in making its defense or asserting a counterclaim. In the *Corfu Channel*

249. Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 18.

250. For a different view concerning the required weight of circumstantial evidence see the dissenting opinion of Judge Badawi. *Id.* at 59, 60.

251. STAT. INT'L CR. JUST. art. 49.

252. Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 32.

253. There is also a possibility that the Court may draw favorable inferences from documents not produced. In this connection consider the efforts of Sir Frank Soskice to dispel from the minds of the judges an inference by M. Cot concerning what he could have done with some documents if they could have been used in evidence. 3 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 561 (I.C.J. 1948).

Case the Albanian agent produced a secret report by General Hodgson, who was at one time chief of the British Military Mission in Albania, the report apparently having been obtained by espionage. The report was submitted to the Court as a photograph of an edited document. In order to prove that the document had been edited, the British found it necessary to introduce a photograph of the un-edited document which at the time was still classified as secret.²⁵⁴ In the Albanian counterclaim it was contended that the British vessels were not in innocent passage at the time of the mine incident on October 22, 1946. In support of this claim they relied upon a report of the Captain of the "Volage," one of the damaged vessels, in which it was stated that the Albanian defenses had been studied at close range and that the information was included with reference to X.C.U. The Court requested the British agent to produce this document but he refused to do so on the ground of naval secrecy even though the Albanian agent offered to produce all relevant Albanian orders and instructions "even the most secret" in exchange for the production of Order X.C.U.²⁵⁵

The pressure to disclose information may be exerted against a State not technically a party to the proceeding. In the *Corfu Channel Case* the British introduced the testimony of Commander Kovacic, a former Yugoslav navy officer, who had been in charge of signal repairs at the Yugoslav naval shipyard at Sibenik before the mining incident of 22 October 1946. Commander Kovacic's testimony indicated that the Yugoslav minelayers, *Mljet* and *Meljine*, had been loaded with G.Y. mines at the base shortly before 22 October 1946 and had put to sea, returning a short time later unladen. He offered hearsay evidence that the mines had been laid in the Corfu Channel.²⁵⁶ The testimony supported the British contention that the mines had been laid with Albanian connivance. In an effort to counteract this testimony the Albanians secured from the Yugoslavs certain documents, among which was the register of the shipyard at Sibenik. Originally a photostat of one page had been submitted, but the British objected

254. 2 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 255; 3 *id.* at 204.

255. *Corfu Channel Case*, Judgment of April 9, 1949, [1949] I.C.J. Rep. 4, at 31, 32; 3 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 291 (I.C.J. 1948); 3 *id.* at 185, 291; 4 *id.* at 270, 598; 5 *id.* at 255. The British also refused to produce the operational orders governing "Operation Retail" although Admiralty orders governing this operation were submitted, in some cases being paraphrased to secure the Naval cipher. The Albanians produced none of their official documents, if such existed, relating to investigations of the mining incident or their response to "Operation Retail."

256. 3 CORFU CHANNEL CASE — PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 525-679 (I.C.J. 1948).

to this and the entire register, although secret, was deposited with the Court.²⁵⁷ The British then requested permission to examine the register. The conditions set by the Yugoslavs and Albanians and agreed to by the British and the Court were that the British representatives were to look at the pages of the register other than the page in question only in the presence of a representative of the Yugoslav Government and, in looking at the other pages, the British could not examine them in detail but could leaf through them rapidly to determine if they were in the right order and to see, superficially, whether pages had been cut out or inserted.²⁵⁸ The Yugoslav Government also received the expert commission sent by the Court to investigate certain facilities at Sibenik. The only major restriction imposed upon the mission was the Yugoslav refusal to allow them to inspect the repair shops at Mandalina on grounds of naval secrecy.²⁵⁹

To a limited degree the Court can control the disclosure to the public of classified information which it collects in the course of its proceedings. The Court can close its hearings to the public.²⁶⁰ It may exclude its own officers from hearings and exclude witnesses from the proceedings when not testifying.²⁶¹ The proceedings need not be reported to the press.²⁶² The Court swears its experts and commissioners of investigation to secrecy.²⁶³ The deliberations of the Court are private and remain secret.²⁶⁴ But many leaks are possible. The parties are entitled to be represented by agents and counsel.²⁶⁵ A certified copy of every document produced by one party must be communicated to the other party.²⁶⁶ A State may intervene in the proceeding.²⁶⁷ The Court must state the ground for its decision in its opinion.²⁶⁸

The "built-in leaks" to which the Court is subject creates two difficulties: (1) The responsibility of the Court in handling secret information which it obtains and (2) the resistance of States to jurisdiction because of the possibility of security losses.

257. 4 *id.* at 313.

258. 4 *id.* at 357, 366; 5 *id.* at 238.

259. 5 *id.* at 264.

260. STAT. INT'L CT. JUST. art. 46.

261. *Id.* art. 45.

262. The Registrar is the liaison officer with the press. Representatives of the press are excluded in closed hearings.

263. An oath was administered in the Chorzow and in the Corfu cases.

264. STAT. INT'L CT. JUST. art. 54, ¶ 3.

265. *Id.* art. 42, ¶¶ 1, 2.

266. *Id.* art. 43, ¶ 4.

267. *Id.* art. 62.

268. *Id.* art. 56.

The Court has attempted to solve the question of responsibility in handling secret information by denying responsibility in part. In 1926, President Huber proposed a new rule of Court placing the responsibility on the party which introduced the secret information and allowing the opposing party to demand a private hearing.²⁶⁹ The proposal met with much opposition from the Court on the ground that it was superfluous and perhaps dangerous since the parties acting together might produce any information they saw fit. The consensus of the Court appeared to be that the State producing the information was responsible in principle and that the Court could exclude evidence which it could not properly take into account and make public.²⁷⁰

Resistance to the jurisdiction of the Court or obstruction of its fact gathering processes on security grounds is a more serious matter. The principal difficulty encountered by the Permanent Court was in obtaining preparatory materials used for the Versailles Conference.²⁷¹ In his dissenting opinion in the *Oscar Chinn Case*, Judge Van Eysinga noted:

“The undersigned cannot refrain in this connection from expressing his regret that the Court should frequently be called upon to give decisions in regard to collective conventions concluded after the Great War without having at its disposal the records of the meetings at which these conventions were elaborated, these records being kept secret. The resulting lack of information has more than once made itself felt in the present case.”²⁷²

The security restrictions proved an embarrassment even in those cases in which one of the parties offered to produce the necessary materials. In *The Jurisdiction of the European Commission of the Danube*²⁷³ the agent of one of the States cited certain records of the preparation of the Versailles treaty. Counsel for another State objected to the use of the records in evidence because they were secret. One of the States interested in the proceeding offered to supply the records in question. The Registrar was directed to obtain from the French Minister of Foreign Affairs a verification of the citations and

269. P.C.I.J., Ser. D, No. 2 (add.) at 124-25, 251.

270. See SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 89-91 (1939).

271. See The S.S. “Wimbledon,” P.C.I.J., Ser. A, No. 1 (1923); P.C.I.J., Ser. E, No. 4, at 288; Advisory Opinions 2 and 3 on Competence of International Labor Organization, P.C.I.J., Ser. B, No. 23 (1922); P.C.I.J., Ser. E, No. 4, at 288. For other difficulties of the Permanent Court with security issues see the *Diversion of Water From the Meuse*, P.C.I.J., Ser. A/B, No. 70 (1937); *The Monastery of St. Naoum*, P.C.I.J., Ser. B, No. 9 (1924); P.C.I.J., Ser. E, No. 6, at 296.

272. *The Oscar Chinn Case*, P.C.I.J., Ser. A/B, No. 63, at 136 (1934).

273. P.C.I.J., Ser. B, No. 14 (1927); P.C.I.J., Ser. E, No. 4, at 288.

obtain his views on the offer made by the interested government. The Court reversed its decision on the matter of admitting the records in evidence pending an answer to its inquiry but delivered its opinion before the answer was received. Subsequently the President of the Conference of Ambassadors expressed his appreciation of the Court's refusal to take the secret documents into consideration without the unanimous consent of all States concerned.

While the Permanent Court did not renounce its authority to request the production of documents, secret or not, in some cases secret documents were excluded upon grounds that avoided the secrecy issue.²⁷⁴ In the case of *International Commission of the Oder*²⁷⁵ the Polish agent referred to preparatory work done by the Commission on Ports, Waterways and Railways of the Versailles Conference. The evidence was excluded on the ground that the Polish agent did not intend to make use of these records in his defense and the records could not be used in any event since three of the parties in the case, Germany, Denmark and Sweden, had not participated in the preparatory work and the materials could not be used to determine for them the meaning of the treaty.

Since the *Corfu Channel Case*, few advisory opinions or contentious proceedings presented to the Court have involved serious security issues.²⁷⁶ In those cases in which security issues might have been involved, the defendant State has not accepted the jurisdiction of the Court.²⁷⁷ Security considerations will probably be the catalysts determining which cases are received by the Court and which are not. The British decision to refuse the jurisdiction of the Court in matters involving the national security of the United Kingdom, while perhaps precipitated by the threat of judicial action concerning the tests of hydrogen bombs, is prophetic of the future.²⁷⁸

274. See *Diversion of Waters from the Meuse*, P.C.I.J., Ser. A/B, No. 70 (1937); P.C.I.J., Ser. E, No. 4, at 288.

275. P.C.I.J., Ser. A, No. 23, at 41 (1929).

276. See *Interpretation of Peace Treaties*, Advisory Opinion of March 30, 1950, [1950] I.C.J. Rep. 65, at 95 in which Judge Winiarski makes the point the Court has insufficient facts to decide the case, Bulgaria, Romania and Hungary not participating in the proceeding.

277. See *Case of Treatment in Hungary of Aircraft of United States of America*, Order of July 12, 1954, [1954] I.C.J. Rep. 99; *Aerial Incident of March 10, 1953*, Order of March 14, 1956, [1956] I.C.J. Rep. 6; *Aerial Incident of October 7, 1952*, Order of March 14, 1956, [1956] I.C.J. Rep. 9.

278. *Richmond Times Dispatch*, Aug. 22, 1957, p. 1, col. 1.

V.

CONCLUSION.

As an *occasional* court, one to which the cases of secondary importance will be referred for settlement, the World Court has fact-finding facilities as good as it needs. It is true that the facts in its decisions show alarming gaps. In the *Peter Pazmany University Case*²⁷⁹ the Court did not have most of the documents of the written proceedings of the arbitral tribunal which made the decision being reviewed. In the *Lotus Case*²⁸⁰ the Court did not have the Turkish judicial decision that gave rise to the dispute. In the case of *Minority Schools in Albania*²⁸¹ the decision was rendered based upon many assumptions concerning the Albanian education situation. But if the Court *can* be developed into a more vital force as part of the United Nations structure, which is a major assumption, attention to its fact-finding resources should receive a high priority. In particular, it may be hoped that the advisory jurisdiction of the Court can be expanded, since the advisory proceeding is the ideal fact-finding vehicle under the present statute of the Court.

279. P.C.I.J., Ser. A/B, No. 61, at 217, 240 (1933).

280. P.C.I.J., Ser. A, No. 10, at 11 (1927); P.C.I.J., Ser. E, No. 4, at 289.

281. P.C.I.J., Ser. A/B, No. 64, at 11, 12, 14, 16 (1935).