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WIDENING THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE WITHOUT AMENDING ITS STATUTE*

*Stephen M. Schwebel***

In a world full of international legal disputes, the principal judicial organ of the international community, the International Court of Justice, has paradoxically few disputes on its docket. Currently, it has three; it rarely has more than four; at times in recent years, it has had none.

Actually, three contentious cases before the Court at one time is not inconsiderable, for contentious cases are massively briefed and lengthily argued by the State Parties. The extent of time needed for the exchange of pleadings and for oral argument is largely responsive to the needs of the State Parties, and the methods of deliberation and drafting of a court of fifteen judges representative of the whole of the world's international legal community cannot be other than deliberate. But, like other human institutions, the Court is responsive to demands made upon it. Should more cases be submitted to it, it is doubtless that the Court would rise to the challenge of dealing with them.

In any event, viewed over the years, the Court has not been overworked. On the contrary, the general and accurate opinion is that the Court has been under-used, that its significant contributions to the settlement of international disputes and to the clarification and development of international law would be more significant if it had more business. Thus interested States and scholars and learned societies have given thought to ways of increasing recourse to the Court.

In that commendable endeavor, it is fair to say that Washington is currently the center of the world. It was the United States which in 1970 took the lead in causing the United Nations General Assembly to review the role of the International Court of Justice. It is in the Senate and House of Representatives of the United States that proposals are recurrently made and adopted. These proposals are designed to stimulate wider recourse to

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the Court. In 1971, the American Society of International Law established a distinguished Panel on the International Court of Justice, under the leadership of Judge Philip C. Jessup and Edvard Hambro, and canvassed a large number of ideas for invigorating the utility of the Court. This panel also published two excellent volumes, under the editorship of Professor Leo Gross, on *The Future of the International Court of Justice*.¹ These volumes examine in depth and detail a remarkable variety of possibilities for strengthening recourse to the Court. The Society's *American Journal of International Law* publishes valuable articles on such possibilities. Moreover, the American Bar Association, that mighty organization of American lawyers whose headquarters is in Chicago, has recently shown a marked and constructive interest in enhancing recourse to the International Court of Justice. The ABA has recommended that the United States support expansion of the advisory jurisdiction of the Court to include questions of international law referred to it by national Courts.

It should be added that the United States Government in 1979 brought to the Court the contentious and momentous case concerning *United States Diplomatic and Consular Staff in Tehran*.² It has joined Canada in submitting to a Chamber of the Court the important, current *Gulf of Maine*³ maritime boundary case; and it took the lead in bringing about the submission to the Court of one of its last advisory proceedings: that in the *Who* case.⁴

It is of cardinal importance that the United States continue to bring to the Court legal disputes with other States—and the United States does not lack for such disputes—and that it remain alert to the possibilities of invocation of the Court's advisory jurisdiction by international organizations. At the same time, the United States will not be in the position of doing all that it can and should to promote international adjudication until it removes the self-judging provision from the terms of its acceptance of the Court's compulsory jurisdiction. It is a mark of the recession of the World Court's status that the percentage of States which subscribe to its general compulsory jurisdiction under the "optional clause" of article 36, paragraph 2 of its Statute is so much less today than it was before World War II. In 1938, out of fifty-four members of the League of Nations, thirty-eight were bound by adherences under the optional clause. In 1983, just

1. L. GROSS, *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* (1976).

2. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1979 I.C.J. 7 (Order of Dec. 15).

3. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (U.S. v. Can.), 1982 I.C.J. 560 (Order of Nov. 5).

4. *Interpretation of the Agreements Between the World Health Organization and Egypt*, (W.H.O. v. Egypt), 1980 I.C.J. 349 (Advisory Opinion of Dec. 20).

forty-seven out of one hundred fifty-eight members of the United Nations are so bound by the optional clause, and a half dozen of those have reserved to themselves, by self-judging provisions, the decision as to whether or not they are bound.

It is thought that the fundamental reason why States are reluctant to submit cases to the Court is a lack of a sufficient sense of international community. States wish to keep the levers of power in their hands. They wish to handle or mishandle international disputes as they please. Their diplomats and politicians are reluctant to surrender to any binding international judicial authority, what they believe to be their capacity to settle disputes on their terms. Additional reasons are advanced, some of which are not wholly consistent. It is said that States are unwilling to go to the Court because they believe that the Court is unpredictable and that they are unwilling to go because the law *is* predictable (that is, in the view of some, the law is unduly reflective of the interests of the older States whose practice formed so much of customary international law). Too often the State that believes that its legal case is strong is willing to go to the Court while the State that believes its case is weak is not.

I do not propose to go further into the several such considerations which cut against resorting to the Court, not only because they are inherently elusive but also because they have been analyzed elsewhere (as in the Society's book to which I have referred). Rather I shall talk about two possible ways of increasing the use of the Court's authority to render advisory opinions. But before doing so, I wish to note two encouraging trends: first, the Court during the last few years has had three cases brought to it by relatively new States of Africa and the Mediterranean; and second, two cases, for the first time in the Court's history, have been submitted to Chambers of the Court rather than to the full Court. While, in principle, recourse to the full Court may be preferable, it is understandable and desirable that States submit international legal disputes to chambers of some judges of the Court in some cases. The launching of recourse to chambers of the Court could prove to be a departure of much promise, for it at once offers States many of the advantages of arbitration together with the advantages of a permanent Court—a Court of experienced judges, acting in accordance with established rules, serviced by an efficient secretariat, with the expenses of the Court being met by the United Nations.

Article 96 of the United Nations Charter provides:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

It is a reflection of the intensely political character of the Security Council and the General Assembly that they have resorted to the Court under paragraph one of article 96 only fourteen times between 1946 and 1983 and that, for their part, the numerous specialized agencies of the United Nations have had recourse to the Court only three times in all. In contrast, the Council of the League of Nations has made requests to the Permanent Court of International Justice which, in about half that period, resulted in twenty-seven advisory opinions. At the same time, it is worth noting that the League Council put to the Court some requests for advisory opinions that were initially stimulated and sought outside the Council, in addition to those it sought on behalf of the International Labor Organization (ILO).

In 1922, at the outset of the Court's life, Great Britain and France induced the League Council to seek the opinion that led to advisory proceedings over the bilateral differences between them with regard to the *Nationality Decrees issued in Tunis and Morocco*. The Soviet Union, in contrast to both Britain and France, "absolutely repudiated the claim of the so-called League of Nations to intervene in the question of the internal situation of Carelia" and "categorically" refused to take any part in the examination of the *Eastern Carelia* question by the Court.⁵ The Court accordingly gave an opinion in the *Nationality Decrees* case but declined to do so in the *Eastern Carelia* case.

The Court also gave advisory opinions to international organizations other than the League (as Judge Manley O. Hudson pointed out when the revised Statute was being drafted in Washington in preparation for the San Francisco Conference); to the Danube River Commission and the Greek-Bulgarian Exchange of Populations Commission, as well as the ILO. Requests for these opinions were transmitted to the Court by the League Council.

These precedents suggest that the General Assembly or Security Council could transmit requests for advisory opinions whether made by States or by international organizations which are not Specialized Agencies of the United Nations (whether universal or regional). The San Francisco Conference on International Organization reviewed a British proposal to accord States the direct right to seek advisory opinions. This proposal, however, was rejected. From this, it could be argued that States should not

5. Status of Eastern Carelia, 1923 P.C.I.J., ser. B, No. 5, at 13 (Judgment of Nov. 3).

be permitted to seek advisory opinions indirectly even if passed upon and submitted to the Court by the General Assembly or by a committee of it, or by the Security Council.⁶ Nevertheless, there appears to be no impediment to their transmitting a request to the Court from an international organization, if such a request is made.

It has been suggested in various quarters that the General Assembly should establish a committee that would be charged with passing on to the Court requests by such international organizations that are not specialized agencies.⁷ Such a committee would be analogous to the Committee on Applications for Review of Administrative Tribunal Judgments. This committee has submitted a few requests to the Court, and the Court has responded with advisory opinions.

A much more far-reaching proposal would empower such a committee to transmit to the Court questions formulated by the highest or appellate national courts of States that wish to enter into the requisite arrangements.⁸ This so-called "reference procedure" or "preliminary opinion procedure" would permit specified national courts to put to the Court, through the medium of a General Assembly committee, questions of international law. Like the procedure under the Treaty of Rome the case *as a whole* would be decided by the national Court. The national court would either give binding force to the Court's opinion on the question, or treat it as advisory. Proposals differ in this regard.

A like idea was put forward by Lauterpacht as long ago as 1929.⁹ It has most recently been supported by the American Bar Association.¹⁰ The Department of State has expressed support in principle for the idea,¹¹ and the United States House of Representatives has called for its examination.¹²

6. Doc. 235, II/2/A, 13 U.N.C.I.O. Docs. 611 (1945).

7. See L. GROSS, *THE INTERNATIONAL COURT OF JUSTICE: CONSIDERATION OF REQUIREMENTS FOR ENHANCING ITS ROLE IN THE INTERNATIONAL LEGAL ORDER*, reprinted in 1 L. GROSS, *supra* note 1, at 22; P. SZASZ, *ENHANCING THE ADVISORY COMPETENCE OF THE WORLD COURT*, reprinted in 2 L. GROSS, *supra* note 1, at 499.

8. *Id.* See also L. CAFLISCH, *REFERENCE PROCEDURES AND THE INTERNATIONAL COURT OF JUSTICE*, reprinted in 2 L. GROSS, *supra* note 1, at 572.

9. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, BRIT. Y.B. INT'L L. 94-95 (1929).

10. See Sohn, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124 (1983).

11. DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 650 (1976).

12. On December 17, 1982, the House of Representatives adopted H.R. Con. Res. 86, as revised, urging the President to consider the feasibility of pursuing, through the United Nations, expansion of the advisory jurisdiction of the International Court of Justice, and in particular to "explore the appropriateness of the establishment of a special committee, under United Nations auspices, authorized to seek an advisory opinion of the International Court

Whether such a procedure could be validly established without amendment of the Statute of the Court is a question on which opinions differ. The precedents cited are capable of more than one interpretation, as are the terms of the United Nations Charter and Statute. The Department of State has declared that appropriate implementation of such a procedure would require amendment of the Court's Statute.¹³ But scholars of the highest reputation have concluded that amendment is not required.¹⁴ Nor is there agreement on the merits of the proposal. Only a few States outside the United States have endorsed it, though it has not attracted opposition. And, in the best American tradition of governmental division of views, the United States Department of Justice has indicated its opposition to the plan.¹⁵ Its supporters maintain that such a procedure not only would increase resort to the Court, but also would promote uniformity in rulings by national courts on questions of international law that arise in the ordinary course of human affairs.

Another step could be more easily taken: authorizing the Secretary-General of the United Nations to seek advisory opinions of the Court. The Secretary-General is the chief executive officer of the Secretariat. The Secretariat is, by the terms of the Charter, an "organ" of the United Nations. In fact, it is the only principal organ apart from the Court itself that is not authorized to seek advisory opinions. The Secretary-General himself has evinced no doubt about the capacity of the General Assembly to authorize the Secretariat to request advisory opinions, nor is any State Member recorded as objecting to the exercise of that capacity. The Secretary-General could be so authorized only with respect to legal questions arising within the scope of the Secretariat's (and the Secretary-General's) activities. A review of such questions demonstrates that there are a multiplicity of legal questions on which the Secretary-General might have sought, and in some instances might still seek, the Court's advice. Yet the activities of the Secretariat and Secretary-General do not equate with the work of the Organization and affording the Secretary-General the authority to request advisory opinions would not be tantamount to empowering him to seek an opinion "on any legal question."

Thus the issue is not whether there are questions which the Secretary-

of Justice, upon request by a national court or tribunal which is duly authorized by national legislation to make such a request, regarding any question of international law of which such court or tribunal has jurisdiction." See H.R. Con. Res. 86, 97th Cong., 2d Sess. (1982).

13. DIGEST, *supra* note 11, at 652.

14. See C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 161 (1964); see generally, L. GROSS, *supra* note 8; Sohn, *supra* note 10.

15. Goldklang, *House Approves Proposal Permitting ICJ to Advise Domestic Courts*, 77 AM. J. INT'L L. 338 (1983).

General could be authorized to put to the Court, or whether the General Assembly has the capacity to endow the Secretary-General with the authority to request advisory opinions. Rather, the issue is whether the General Assembly wishes to exercise its capacity in this way. Some believe that, since the Secretariat is not composed of States, and since the Secretary-General is responsible only to the Organization, members of the General Assembly might be reluctant to accord such authority to the Secretary-General. But it may be pointed out that under article 99 of the Charter, the Secretary-General has the authority to bring to the attention of the Security Council any matter that, in his opinion, may threaten international peace and security. If the Secretary-General can be endowed with that politically delicate right, why should it be thought that the General Assembly would be unwilling to entrust him with the less sensitive authority to seek advisory opinions of the Court? In almost forty years, no Secretary-General has used article 99 slightly or excessively. On the contrary, it has been used with extreme caution. Nevertheless it is believed that if the Secretary-General were to be authorized to request advisory opinions, he would be persuaded by States to seek opinions in politicized cases which might be better left aside. It is also believed, however, that any risks of this order are worth taking.

Statesmen and international lawyers of the distinction of Philip Jessup and C. Wilfred Jenks have supported authorizing the Secretary-General to request advisory opinions of the Court.¹⁶ The possibility has been positively referred to by a few States and scholars but not put to the General Assembly. Perhaps the time is approaching when the current Secretary-General, an international lawyer of attainments, may find it appropriate to explore the ground in the General Assembly. Should such explorations prove fruitful, it may be anticipated that an authorized Secretary-General would, over the years, request the Court to deliver a series of opinions that would contribute both to the solution of United Nations legal problems and to the progressive development of international law.

16. Jessup, *To Form a More Perfect United Nations*, 9 COLUM. J. TRANSNAT'L L. 177, 187 (1970); see C. JENKS, *supra* note 14, at 195.

