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## The International Court of Justice at its Present Stage of Development

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# Articles

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Hermann Mosler\*

The International Court of  
Justice at its Present Stage of  
Development

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## I.

The object of this study is not to give an outline on the role and function of the International Court of Justice in general but to evaluate its present situation. This is quite a different subject although for this purpose it will be indispensable to compare achievement reached by the Court with the role assigned to it at the time of its foundation as part of the basic structure of the United Nations, the legal organization of the international community. Reminding at the very beginning, of deficiencies actually existing, I do not want to intimate that the problems with which judicial settlement of international disputes is confronted are due to the Court, either entirely or in its major part. The principal difficulty stems from the fact that adjudication of disputes by courts is today, for various reasons, less popular in the international society than other means of settling conflicting interests.

“The International Court of Justice shall be the principal judicial organ of the United Nations.” This is the wording of Article 92 of the Charter. The Court is the only judicial institution to which all the States in the world have access. Its function is not restricted to the members of the United Nations. The Charter constitutes it as the general Court of the international community as a whole, non-member States being admitted to submit their disputes to the Court either through becoming a party to its Statute (which forms an integral part of the Charter) on conditions determined by the General Assembly upon the recommendation of the Security Council,<sup>1</sup> or by making particular or general declarations of

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1. General Assembly resolutions concerning Switzerland (December 11, 1946); Lichtenstein (December 1, 1949); San Marino (December 9, 1953); and Japan until her admission to the U.N. (December 9, 1953). See (1947-48), I.C.J. Yearbook at 30; (1949-50), I.C.J. Yearbook at 161; (1953-54), I.C.J. Yearbook at 204

accepting the jurisdiction of the Court under a resolution of the Security Council as early as 1946.<sup>2</sup>

On the other hand, the Statute of the Court hardly reflects the organizational element which has become a significant feature of modern international society. The Court's contentious jurisdiction is limited to legal disputes between States. Its power to give advisory opinions on legal questions is subject to a request made in accordance with the relevant provisions of the United Nations Charter.<sup>3</sup> The individual person whose fundamental rights are now guaranteed by many international conventions,<sup>4</sup> is totally ignored by the Statute.

The provisions of the Charter and the Statute conferring jurisdiction on the Court, thus, did not follow the development and trends of modern international life and international law, the Court's basic structure being framed in the initial period of the League of Nations.<sup>5</sup>

As the general court of the community of nations the Court applies universally binding international law. The sources of that law are mentioned in the well-known Article 38 of its Statute. The Court is obliged to apply international conventions, international custom as evidence of a general practice accepted as law, and the general principles of law.

Furthermore, as the principal judicial organ of the United Nations the Court applies, should the occasion arise, the Charter and the special law given by the organs of the United Nations in accordance with the provisions of the Charter. The Court is thus pushed on the way to develop the relationships between general international law and the principles and rules of the Charter. The evolution of the latter proceeds faster than the law-making process of general international law, the criteria of which are much stricter. The Court is therefore in a better position to contribute to developing international law than any other court or arbitrator in the world.

States are of course free to take advantage of the Court's services

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2. Res. 9 (1946) of The Security Council Concerning Admission of States not Parties to the Statute of the Court, Oct. 15, 1946 in *I.C.J. Acts & Documents Concerning the Organization of the Court, No. 4: Charter of the United Nations, Statute and Rules of Court and other Documents, 1978*, at 174-185

3. Art. 65; *cf.* (1977-78), *I.C.J. Yearbook* at 38-40

4. U.N. Doc. St/HR/I/Rev. 1

5. For a recent discussion on access to the Court for legal entities other than States and for individual persons see D. A. Ijalaye, *The Extension of Corporate Personality in International Law* (1978), at 256-268

or to opt for other possibilities to settle their disputes peaceably. The actual importance which the Court can possibly have in international life therefore depends upon the extent to which States can be convinced that recourse to this institution best serves their interests.

In recent years it became usual to speak of the Court as a sick institution, of a patient who needed some help to recover. The medicaments prescribed have been multiple, relating both to efforts made from inside of the Court and from outside. A recent book on the Court, written by authors teaching at universities in the United States, has the subtitle "An Analysis of a Failure".<sup>6</sup> A contribution to the *Polish Yearbook of International Law*<sup>7</sup> doubts that the détente in international relations will increase very much the role of international courts. The writer identifies the Hague Court with the western concept of international courts modelled on international adjudication which has, according to him, completely failed during both world wars. Effectiveness of judicial settlement seems to him as having a chance only if disputes have no great political significance and if the legal elements are preponderant. The most striking and most serious warning comes from a member of the Court itself, my friend and predecessor in office, the late Swedish judge, Sture Petré. In a contribution called "Some Thoughts on the Future of the International Court of Justice,"<sup>8</sup> he wrote: "The Court's time as a judicial organ thus seems to be running out, unless the recent remodelling of its Chambers *ad hoc* proves to have opened a road back to the Court's former position in the life of the international community."<sup>9</sup>

Although opinion of this kind, ranging from personal disappointment to complete rejection of judicial settlement on the basis of general international law, dominates the public scene, it should not be forgotten that such views are, to a certain extent, balanced by others. Thus, for example, Professor Jennings of Cambridge started a report on the Court by insisting that he did not consider his task as devising some rescue operation for an institution that had failed.

Far from being a failure the Court has in a very difficult period exercised a profound influence upon the development of

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6. J. K. Gamble and D. A. Fisher, *The International Court of Justice*, 1976

7. R. Bierzanek, *Some Remarks on the Function of International Courts in the Contemporary World* (1975), 7 *Polish Yearbook of Intl. L.* 121 at 148-149

8. (1975), 6 *Netherlands Yearbook of Intl. L.* 59 at 75

9. Art. 7, para. 3 of the 1972 Rules; Art. 17 of the 1978 Rules (See *infra* note 35)

international law and it has disposed of some important disputes. It is right to be concerned at the relative lack of business for the Court but it is also easy to exaggerate its importance.<sup>10</sup>

On the occasion of the fifty-year existence of the Court, including its predecessor, the Permanent Court of International Justice, the American Society of International Law set up a panel consisting of internationally respected and very experienced personalities to analyze the present situation and the possible development of the Court. A publication of two volumes called *The Future of the International Court of Justice* was the result of this effort. The work strongly advocates enhancing the role of the Court.<sup>11</sup>

A Court which is to such an extent the target of world-wide discussion is evidently an institution to which a task of primary importance for the international community has been entrusted. Let us therefore look at the expectations of the founders of the United Nations who revived in San Francisco, 34 years ago, the Permanent Court of International Justice of the League of Nations in a slightly different form, but without changing its idea in principle. The Committee charged with that question formulated its proposals and intentions in the following terms:

[The First Committee] ventures to foresee a significant role for the new Court in the international relations of the future. The judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means. . . . It is confidently anticipated that the jurisdiction of this tribunal will be extended as time goes on, and past experience warrants the expectation that its exercise of this jurisdiction will commend a general support.

And then it went on with these pathetic words:

In establishing the International Court of Justice, the United Nations hold before a war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.<sup>12</sup>

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10. R. Y. Jennings, "Report: Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirements which Flow from its Functions as the Central Judicial Body of the International Community?" in *Judicial Settlement of International Disputes, an International Symposium* held at the Max Planck Institute for Comparative Public Law and International Law, Berlin, 1974

11. Leo Gross, ed., *The Future of the International Court of Justice* (Vols. I & II, 1976) at X and 862

12. (1945), UNCIO 393 (Doc. 913 IV/1/74 (1), June 12, 1945)

The hopes here expressed were certainly those of the vast majority of the 51 States constituting the original membership of the United Nations. It is well known that there have been strong tendencies in favour of making the jurisdiction of the Court compulsory for all member States. The effect would have been that being a member of the United Nations or becoming admitted to it later would have automatically included the general submission under the Court's jurisdiction as well as the obligation to appear as defendant before the Court if any other member should lodge unilaterally a complaint concerning a legal dispute. But other countries, especially the great powers, were reluctant to go so far. The result was the same as the compromise made after the First World War, when the Statute of the Permanent Court was made in the League of Nations. The so-called optional or facultative clause was again embodied in the new Statute.<sup>13</sup> While all members of the United Nations are entitled to make use of the Court as one of the principal organs of the organization, the faculty to do so or to bypass the Court depends on the sovereign decision of each State. The optional clause is only a technical device to facilitate the submission under the Court's jurisdiction. It can substitute arbitration treaties, special compromissory clauses in other treaties, on condition that a State is prepared to submit, on the basis of reciprocity, all legal disputes with any other State which acts likewise.<sup>14</sup>

Does the emphatic statement of the Committee Report in San Francisco correspond to the legal position actually attributed to the Court in the framework of the organization of the international society? I think that the analysis of the role shows that the expectation was exaggerated. It is true that the 2nd General Assembly passed a resolution on the "Need for greater use by the United Nations and its organs of the International Court of Justice" in which it was underlined

. . . that it is also of paramount importance that the Court should be utilised to the greatest practicable extent in the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation.

It concluded by recommending that the States should submit, "as a general rule", their legal disputes to the International Court of

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13. Art. 36, para. 2

14. For the history of the optional clause see Max Huber, *Denkwürdigkeiten* (1974), at 170-172

Justice.<sup>15</sup>

This resolution taken in the early years of the United Nations proves that from the very beginning the idea was that the Court should, in deciding legal disputes between States and in giving advisory opinions to the United Nations and other organizations authorized by the General Assembly to request such opinions, promote the progress of development of international law.

On the other hand, one could not realistically think of the Court acting as a sort of legislator. Either party to a dispute is entitled to obtain a judgement on the basis of existing law unless the Court has been authorized by them to go beyond established law and may break new ground (cf. Art. 38, para. 2, of the Statute). Certainly, international law is changing, and many of the old norms which emerged in the age of European domination of the world, are no longer the same as they were in the 19th century. The most famous example is the legal concept of property and the extent to which it is protected by general international law. Insofar as the Court is able to state that a change in customary law or in the general principles of law has taken place, or that a new rule has arisen or an old one disappeared, it applies existing law.<sup>16</sup> The Court has to take account of the evolution of the law, but it has always to apply the sources of law as they are prescribed to him in Article 38 of its Statute.

Even when we take into account the restrictions of developing the law inherent in the very concept of a court, the role of the Hague institution in this respect is considerable.

The Court's outstanding task is the preservation of the unity of international law. Since the Court is the only judicial institution of general international law without any limitation with regard to groups of States or to special treaty law, it has to apply international law as a single coherent body of norms applicable to any legal relations between the States constituting the international society.

No one could expect, not even in 1945 when the whole world was decided against waging another war, that any court could preserve world peace if vital conflicts of nations should arise again. But the idea was to dissociate international disputes from their dangerous political implications by settling them, on the basis of objective legal norms, by independent and impartial judges.

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15. For text and comment see H. Steinberger, "The International Court of Justice," in *Judicial Settlement*, *supra*, note 10 at 201

16. See *Fisheries Jurisdiction (U.K. v. Iceland)*, *Merits, Judgments* (1974), I.C.J. Rep. at 23-24

On the other hand, one cannot overlook that under the United Nations Charter judicial settlement is only one of the long list of means of settling disputes enumerated in Article 33 of the Charter. That provision speaks of negotiation, inquiry, mediation and conciliation before it comes to arbitration and judicial settlement. It finishes by mentioning "other peaceful means of the parties' own choice". Article 36 of the Charter puts a little stronger accent on the International Court of Justice: the Security Council should take into consideration that legal disputes should, "as a general rule" be referred to the Court. One must conclude from these terms that submission of disputes to the Court is considered to be the normal way of solving legal questions. The practice of the Council did not correspond, however, with this demand. Only once, in the *Corfu Channel* case, in 1947, the Council made a recommendation in accordance with Article 36, paragraph 3. Later proposals submitted to it by different States on different occasions, in 1947, 1957 and 1960, were rejected.<sup>17</sup> When the General Assembly made probably the most important declaration which it has ever proclaimed, relating to principles of international law concerning friendly relations and co-operation among States, it did not emphasize the role of the Court but only repeated the wording of Article 33 of the Charter.<sup>18</sup>

The discussions in the United Nations which took place in the first years of this decade on the occasion of the fiftieth birthday of the institution revealed a lot of diverging views. While most of the participating delegations, not only the so-called group of western and other powers, made proposals to enhance the role of the Court, there were also opinions expressed which were reluctant and in some cases even unfriendly.<sup>19</sup>

In any political system, national or international, courts can only play an effective role if they have the opportunity to exercise their jurisdiction in a considerable number of cases brought before them during a certain period of time. Frequent use has never been made of the Court, but it was used more often during the first two decades. A comparison with the Permanent Court of International Justice shows, however, that the balance is in favour of the latter.<sup>20</sup>

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17. *Supra*, note 15 at 209

18. (1970), 9 Int'l Legal Materials 1295

19. *Supra*, note 15 at 231

20. See "Judgments of the International Court of Justice, Part XVI" in Kr. Marek, ed., *A Digest of the International Court 1959-1975*, Vol. II (1978), at 674



Furthermore, it must be observed that the political implications of the cases in the League of Nations' period were of higher importance than the average case after World War II.

The present Court has been active in 44 contentious cases and 15 requests for advisory opinions. It is an alarming fact that in recent years three governments against which proceedings have been instituted decided unilaterally that the Court lacked jurisdiction, although Article 36, paragraph 6, confirms that the decision on the jurisdictional question belongs to the Court itself.<sup>21</sup> To be sure, these judgments are not without importance; they were, it is true, not able to solve the actual disputes but the reasons will be considered as dicta on questions of international law; they may even be contributions to its progressive development in the limits I have already tried to draw. When we compare them with the great many instruments which confer jurisdiction on the Court, the lack of proportion strikes the eye.

A hundred and fifty one member States of the United Nations and three non-members are parties to the Statute. The number of States recognizing the obligatory jurisdiction of the Court according to the optional clause runs actually up to forty five.<sup>22</sup> They consist of States of all five continents, Western and African States prevailing. One must, of course, take account of the many important reservations restricting the scope of such declarations. One of the most famous is that of Canada, of April 7, 1970, excluding from the jurisdiction of the Court, besides the usual reservation regarding questions of national jurisdiction, also disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.<sup>23</sup> This reservation is not quoted here in order to blame the Canadian Government but to show that there exists, apart from well-known restrictions of the declarations under Article 36, paragraph 2, of the Statute, another type of reservation relating to vital interests of the declaring State. In the view of the Canadian Government, international law regarding the matters excluded from the Court's jurisdiction was not

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21. See D. G. Partan, *Increasing the Effectiveness of the International Court of Justice* (1977), 18 *Harvard Int'l. L.J.* at 562-563

22. (1977-78), *I.L.C. Yearbook* at 48

23. See text in (1975-76), *I.L.C. Yearbook* at 54

sufficiently developed. As the Government pointed out in a note to the United States Government of April 16, 1970, it was not prepared to await the gradual development of international law, neither by other States through their practice nor through the possible development of rules of law through multilateral treaties.<sup>24</sup> This is an impressive example of the option left to the States by the Statute to limit their recognition of the Court's jurisdiction. The number of declarations does therefore not reflect their actual scope. To get the whole picture, one must study them in detail.

A great many treaties, bilateral and multilateral, contain clauses relating to the jurisdiction of the Court in contentious proceedings. Such clauses generally provide that disputes concerning the application or interpretation of the instrument may be referred to the Court for decision. Surveys of treaties in force with clauses of this kind are published in each edition of the Yearbook. In the last twelve months, five multilateral treaties include such provisions.<sup>25</sup>

Looking at these long lists one could think that the Court must be overloaded with work. But it is an old experience in international relations that the number of conciliation procedures, compromissory clauses and provisions made for binding interpretation of international instruments by a pre-established authority, including a court, gives no indication of the number of disputes actually submitted to such institutions.<sup>26</sup> There are specialized permanent tribunals set up in international instruments which never came to life. One does not, therefore, need to increase the number of international instruments but to use the existing ones.

The obvious tendency of States to settle their differences by non-judicial means is not an indication that their relations are bad. A judicial decision which leaves one party the winner and the other the loser may create a situation which does not correspond to the needs of the litigant States for compromise and co-operation. The effective role of the judiciary is a criterion of a society which has reached a high degree of integration. The present situation of the international community which is half way between the anarchy of sovereign States and organized co-operation, prevents the effective-

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24. (1970), Int'l. Legal Materials at 607 to 611

25. *Report of International Court of Justice to U.N. General Assembly*, Aug. 18, 1978

26. See the statistical information on treaties including compromissory clauses in L. B. Sohn, *Settlement of Disputes Relating to the Interpretation and Application of Treaties* (1976, II), 150 *Recueil des Cours* 259

ness of courts being compared with that of the national judiciary applying an elaborate system of norms and acting on the authority of a State to which the parties are subjected. As long as no such hierarchy exists between the Court and the parties, international judicial decisions shall derive their authority from the sovereign will of both parties.

Judicial settlement should play an increasing role, corresponding to the increasing integration of the international society. If circumstances are favourable, courts may even stimulate the process of integration. In the European Community the Court of Justice in Luxembourg made, in recent years, effective contributions to developing a closer union of the States concerned. This court however, can act on the basis of treaties which leaves the door open for a closer economic and political union. Thus far, the Court could be sure that its jurisprudence met the approval of the majority of the population of the nations; the governments did not, at least, oppose it.

The International Court is to a lesser degree in a similar situation. Since the consensus of the nations does not support it to the same extent, and since many governments are not favourable to judicial settlement either generally or, at least to judgments on major issues, its methods to develop the law must be much more cautious. Its role as an integrating factor cannot be the same.

The Court's success in the future depends on the increasing efficacy of the purposes and principles of the United Nations; it cannot be more efficient than the United Nations in each stage of their development. It is therefore incorrect and misleading to stress an alleged crisis of the Court without analyzing, at the same time, the current views in the United Nations family with regard to the settlement of disputes.

As long as diplomatic channels, negotiations, pressure exercised in international organs by majority vote and other means of defending States' interests are preferred to submission to courts, no one can expect that recourse to the I.L.C. will be considered as the natural way to settle disputed matters.

## II.

To improve the situation many proposals have been made. They can be summarized as follows:

- a) The establishment of chambers for cases concerning States belonging to the same region.

The constitution of chambers for particular categories of cases.

The constitution of a system of functional and a regional hierarchy of cases.

Institution of appeal procedures against decisions of other international bodies.

Forming of itinerant chambers of the Court.

- b) The taking into consideration at the time of each election, of whether candidates are nationals of States which have recognized the compulsory jurisdiction according to the Optional Clause.

Enlarging or modification of the composition of the Court so that it would reflect the structure of the international community.

Better preparation of the lists of candidates by the national groups of the Court of Arbitration and extension this procedure to the appointment of national judges *ad hoc*.

- c) More frequent recourse of the Security Council to recommendations to refer cases to the Court, according to Article 36, paragraph 3 of the Charter.

More frequent use of the right to request advisory opinion and more appropriate procedures to prepare the questions to be submitted.<sup>27</sup>

The Statute being an integral part of the Charter, it can be amended only by the same complicated procedure as the Charter itself.<sup>28</sup> Since it is unlikely that changes will be made in the foreseeable future, such proposals should be discussed in the first place which can be realized without amending the constitutional texts.

1. The Court disposes, within the limits of the Statute and the Charter, of the power to enact and to amend its Rules of procedure. Although procedural matters do not touch the core of the problems with which the Court is confronted, the revision of the Rules may nevertheless open doors which seem to be difficult to pass.

As early as 1967 the Court decided to undertake a comprehensive revision of its Rules adopted in 1946. The work then started in a committee set up for the purpose of elaborating proposals for

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27. See H. Golsong, *The Role & Functioning of the International Court of Justice: Proposals Recently Made on the Subject* (1971), 31 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 673

28. Art 69 of the Statute; Art 108 of the Charter

submission to the plenary court. After four years of preparation the Court enacted a partial revision limited to certain articles of the Rules. Their key points were the following:

- a) express permission given to the parties to influence the composition of *ad hoc* chambers;
- b) elimination of the right to exchange a second round of written pleadings;
- c) acceleration of advisory proceedings, especially by providing oral hearings only in urged requests; and the express authorization for the joinder of preliminary objections to the merits.<sup>29</sup>

Several cases and requests for advisory opinions interrupted the continuation of the revision until 1976 when the Court charged the Committee in a new composition to complete the rest of the total revision of the Rules. The new text was adopted by the Court on April 14, 1978; it was enacted on July 1, 1978.<sup>30</sup> The changes of 1972 were incorporated almost unaltered. The modifications and additions made with regard to that part of the Rules of 1946 which had not been affected in 1972, endeavour to make the procedure as flexible and expeditious as possible and to facilitate recourse to Chambers and the use of advisory opinions. The new Rules follow a somewhat different arrangement for the various sections of the Rules.<sup>31</sup> Although the partial revision of 1972 may be considered to be more important than most of the amendments made in 1978, attention should be given to the new provisions on the joinder of proceedings (Article 47), the indication not only of the number but also of the names of the judges constituting the majority (Article 95), the possibility of sitting elsewhere than at The Hague for part of the proceedings (Article 55), and the possibility of special reference to the Court which replaces the old article on "appeals to the Court" (Article 87).

2. The hopes were set highest upon the offer made to potential parties to exercise influence on the formation and composition of a

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29. E. Jimenez de Aréchaga, *The Amendments to the Rules of Procedure of the International Court of Justice* (1973), 67 Am. J. of Int'l L 1 at 21

30. For text see I.C.J. *Acts & Documents Concerning the Organization of the Court, No. 4: Charter of the United Nations, Statute and Rules of Court and other Documents* (1978), at 92-161

31. See the explanation in (1977-78), I.C.J. Yearbook at III, and the Analytical Table comparing the 1978 Rules with the text of the 1947 Rules as revised in 1972; *id.* at 113-119

chamber *ad hoc*. The idea was obviously to combine the advantages of a permanent court with that of an arbitral Tribunal. Recourse to this kind of chamber would prove more attractive to potential litigants if the election of their members were to be based on a consensus between the Court and the parties.<sup>32</sup> Judge Petré, in the passage of his article quoted earlier, went so far as to think that the use of this new possibility was the condition of a promising future of the Court.<sup>33</sup>

Up to this moment, these expectations have not yet been answered by potential litigants. But the delay elapsed since 1972 may be too short to allow a definite judgement.

According to the Statute, the Court shall sit, as a rule, in its full composition. It provides, however, for three kinds of chambers: the chamber of summary procedure, chambers for dealing with particular categories of cases, the examples of which are labour cases and cases relating to transit and communications, and chambers for dealing with a particular case.<sup>34</sup> The latter is the type of chamber to which the partial revision of the Rules of 1972 intends to facilitate access.<sup>35</sup>

The present rule repeats that of 1972 in a somewhat different arrangement of paragraphs and wording. It provides for a consultation of the President with the parties which have agreed upon asking for the formation of a chamber *ad hoc*, not only on the number of judges but also on the composition of the chamber. The parties can discuss with him the names of the judges they desire to become members of the chamber. The result of this consultation shall be reported by the President to the plenary Court. The Statute subjects only the *number* of the judges to the approval of the parties. On the other hand it does not limit the scope of the President's consultation with the parties. This lacuna is completed by the new Rule: the consultation may be extended to the *names* of the judges.

The Court cannot, however, be dispensed from the provision of the Statute prescribing that it must proceed by secret ballot to elections of the members of *all* chambers, including *ad hoc* chambers. It has thus the ultimate control over the composition of any chamber. The result of the secret voting may therefore differ from the wishes submitted by the parties to the President and

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32. *Supra*, note 29 at 2

33. *Supra*, note 8 at 75

34. Arts 25 to 29 of the Statute

35. Art. 26, para. 2 of the Statute; Art. 17 of the 1978 Rules

communicated by him to the Plenary Court. I agree with Judge Jiménez de Aréchaga when he wrote, in 1973, that it would be difficult to conceive that in normal circumstances those members who have been suggested by the parties would not be elected.<sup>36</sup> Judge Petrán said the same in unequivocal terms:

It goes without saying, however, that should the Court elect other judges than those suggested by the parties, the latter could be expected to withdraw the dispute from the Court and set up an arbitral tribunal of their own, as already happens in so many cases.

The General Assembly of the United Nations expressly noted, in its resolution of November 22, 1974 on the review of the role of the Court, that the Rules had been amended with a view to facilitating recourse to it for the judicial settlement of disputes, *inter alia*, by allowing for greater influence by the parties on the composition of chambers *ad hoc*.<sup>37</sup>

3. What would be the advantages for the parties to resort to an *ad hoc* chamber instead of bringing the case either before the whole Court or before an arbitral tribunal set up by the potential litigants themselves? As distinct from an arbitral tribunal, the chamber would be part of the International Court of Justice. The International Court of Justice would be constituted as a chamber exercising, in regard to the concrete case submitted to it, the jurisdiction of the Court itself.

The judgment is a judgment of the Court, having the same effect as another decision of the Court. It has to be reported to the Security Council in order to enable the Council to exercise its function under Article 94, paragraph 2, of the Charter, which reads as follows:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other Party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Futhermore, the procedural rules to be applied are the Rules of Court. The expenses of the proceedings are borne by the budget of the International Court of Justice fixed by the United Nations; the litigants contribute to it in their capacity as members of the Statute.

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36. *Supra*, note 29 at 3

37. *Supra*, note 6 at 64

The services of the Court's Registry are at the disposal of the Chamber.

The differences from the normal recourse to the Plenary Court are obvious; the bench does not consist of 15 judges plus, as the case may be, one or two judges *ad hoc* appointed by the parties, but of a group of judges selected from the whole Court.

Potential parties may feel that their interests are in good hands if they are entrusted to some of the judges. From an idealistic point of view it is certainly desirable that the whole Court, whoever may be elected to it, enjoys the entire confidence of all member States of the Statute. Recourse to a chamber of this kind may therefore be considered as a necessary evil; if opposing parties are convinced that a satisfying judicial settlement could be better reached by a certain group of judges it seems to me preferable to form a chamber *ad hoc* composed practically with the approval of the parties than to leave it to the litigants to look for another way of settlement outside the Court. On the whole the Court's function as the principal judicial institution of the world community will be strengthened.

In the discussions on the role of the Court which took place in the early 70s, the fact that the composition of the Court changes every three years was criticized, to the effect that often a judge who participated in the first phase of a case, for instance the dispute on jurisdiction or on provisional measures of protection, was no longer a member of the Court in further phases of the same case and did not decide on the merits. It is true that certain inconsistencies in the jurisprudence of the Court relating to consecutive phases of the same case have not been avoided in the past.<sup>38</sup> The obligation and the right of the judges to finish a case does not go beyond the end of the phase in which he took part in the oral hearings. Although this principle has been maintained in the revised Rules of 1978,<sup>39</sup> it does not apply to chambers *ad hoc*. Members of such a chamber shall continue to sit in all phases of the case, whatever the stage it has reached when their term of election ends.<sup>40</sup> The parties can therefore be sure that the same judges who have been appointed as members of the chamber, continue to act in all phases of the case, whatever stage it has reached at the end of their time in office. This seems to

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38. See R. Bernhardt, *Homogeneity, Continuity and Dissonances in the Case Law of the International Court of Justice* (1973), 33 *Zeitschrift Für Ausländisches Öffentliches Recht und Völkerrecht* 1

39. Rules of Court, Art. 33

40. *Id.*, Art. 17, para. 4



me an important difference.

Another provision of the new Rules applies equally to the Plenary Court as to chambers, but will probably be more relevant to the latter. The Court may, if it considers it desirable, decide, pursuant to Article 22, paragraph 1, of the Statute, that all or part of the further proceedings in a case shall be held at a place other than the seat of the Court. Before so deciding, it shall ascertain the views of the parties.<sup>41</sup>

As mentioned before, proposals have been made to create itinerant chambers which could go to the regions to which the parties belong. The desire has been expressed that the Court should come nearer to the parties. A chamber *ad hoc* which is more flexible than the whole Court and the transfer of which in other parts of the world is less expensive, could sit, if it is feasible, elsewhere than in The Hague.

In this connection, it should not be forgotten that the summary chambers for urgent cases can also exercise their functions, according to the same provision, elsewhere than at The Hague. Since this chamber is elected annually by the Court, its composition cannot be influenced by the parties.

There seems to be no obstacle in the Statute to the Court forming chambers for certain regions of the world. The present Rules do not provide for that. Although it is, in my opinion, legally possible to amend the Rules to this effect, objections could on the other hand, be raised against this innovation. The main doubt expressed is that regional chambers could endanger, as could equally regional courts, the unity of general international law, particularly in a period of its speedy development.<sup>42</sup>

4. In my view, the attempt should be made to test how the revised provisions on chambers work. The risk run by potential parties asking for a chamber *ad hoc* is not great because the case remains in their hands until the chamber is constituted by joint action of both parties and the Court. If, however, this attitude of States should become a custom it might change the character of the Court. At the present stage, this foresight is certainly theoretical, but one should already reflect at the beginning on consequences which may later arise. It may occur that the same legal question is interpreted in a

41. *Id.*, Art. 55

42. H. Mosler & R. Bernhardt, *Report on International Symposium on Judicial Settlement of International Disputes, Heidelberg, 1972* (1972), 32 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 543 at 552

different manner by the Plenary Court and a chamber. The same may happen between two or more chambers. In national courts subdivided into several chambers or senates the unity of the jurisprudence is usually preserved by a decision of the plenary court or a so-called great chamber or great senate to which the chamber or senate which intends to differ from a previous judgment of another chamber or senate or from the plenary court, must refer either the whole case or at least the dispute or legal question. Such a solution would be even more desirable for an international court. Provision is made for recourse of the chamber to the Plenary Court in the Rules of the European Court of Human Rights at Strasbourg. Where a case pending before a chamber raises a serious question affecting the interpretation of the Convention, the chamber must relinquish jurisdiction in favour of the Plenary Court if the resolution of such question might have a result inconsistent with a judgment previously delivered by another chamber or by the Plenary Court. The Plenary Court may either retain jurisdiction over the whole case or may, after deciding on the question of interpretation, order that the case be referred back to the chamber.<sup>43</sup>

Transferring this idea to the International Court of Justice can be left to the time when the problem arises in practice. I do not see any obstacle in the Statute of the Court that could prevent the Court itself providing for remedies by amending its Rules.<sup>44</sup>

To conclude the discussion on chambers *ad hoc* I should like to mention that it was also suggested that each of the parties could agree on appointing a judge *ad hoc* and ask the Court to appoint a third one. This procedure would bring the chamber *ad hoc* very near to arbitration, enjoying the advantages of having the authority of the Court and the gratuitous services of the Registry. But this would be rather far away from the original idea of having a world court.<sup>45</sup>

5. The efforts made in the revised rule, to speed up the proceedings are useful and shall evidently be an answer to the criticism made of their length. The Court now offers all that which is within its power to accelerate the written as well as the oral

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43. Rule 48 of the Rules of Court in *European Convention on Human Rights, Collected Texts* (Strasbourg: Council of Europe, 1977) at 415

44. For a discussion of the question see T. O. Elias, "Report to International Colloquay at Heidelberg," in *Judicial Settlement, supra*, note 10 at 29 and Hermann Mosler, *The International Society as a Legal Community* (974 IV), 140 *Recueil des Cours* 303

45. See, *supra*, note 42 at 552

proceedings. In fact, however, the Court is to a large extent in the hands of the parties. If the parties do not want to obtain the judgment within a short time, or at least within a reasonable delay, the Court can hardly stop them abstaining from a second round of written pleadings or from asking for long delays. It has the power to reject such demands and certainly must do so if it gets the impression that the proceedings before the Court are abused for political purposes. It must not serve as a storehouse for disputes, the judicial solution of which is not earnestly wanted.

6. One of the major points of interest is the replacement of the old Rule called "Appeals to the Court", by the new Rule 87 called "Special Reference to the Court". The former Rule 72 read as follows: "When an appeal is made to the Court against a decision given by some other tribunal, the proceedings before the Court shall be governed by the provisions of the Statute and of these Rules." Put in less enigmatic terms, the Rule prescribed that the provisions on contentious proceedings should be followed. Since the Court had no jurisdiction to entertain an appeal *stricto sensu* from any other tribunal, the Article was never applied. When an appeal was made against a decision of the Council of the International Civil Aviation Organization, it was lodged under the Chicago Convention of 1944 on international civil aviation.<sup>46</sup> This was a convention within the meaning of Article 36 of the Statute, which provides that the Court may have jurisdiction on the basis of any treaty in force. A special article on appeals was therefore held misleading by the Committee for the Revision of the Rules and subsequently by the Plenary Court.

The new article is meant to draw the attention of governments and international organizations to the possibility of providing in any treaty or convention for the referring of appeals against decisions of any international body, tribunal or other, to the International Court of Justice. In order to make it completely clear that this possibility is nothing more than making use of Article 36 of the Statute in particular situations, the new article refers expressly to treaties or conventions establishing jurisdiction of the Court; it adds that the Rules on contentious cases shall apply. Interpreted in such a way, the new article is an invitation to States who are parties to international treaties or conventions to act accordingly. It draws their attention on a point which has so far often been overlooked.

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46. (1972), I.C.J. Reports at 46-50

7. While in present circumstances there is little chance of extending the Court's jurisdiction over contentious cases, it may be less unrealistic to consider granting to it an extended advisory jurisdiction. Some efforts to improve the proceedings are also made in the revised Rules on advisory opinions. (Arts. 102-109, particularly Arts. 105 and 106).

The Court may only answer legal questions (Art. 65 of the Statute). The questions formulated by the General Assembly in the *Western Sahara* dispute were partly on the borderline between law and historical research. It may occur that questions will be put before the Court which have either a political character or a mixed character of legal and political implications. To embark on the analysis of such problems may lead the Court to an embarrassing situation. Although I think the Court should play a greater role in delivering advisory opinions, I am strongly against requests which can endanger the Court rather than enhance its role. Suggestions made to let requests pass through a new committee of the General Assembly of the United Nations are in my view to be welcomed.<sup>47</sup>

Another possibility would be to authorize the Secretary General, according to Article 96 of the Charter, to submit requests for advisory opinions either on his own responsibility or upon instructions of the General Assembly.<sup>48</sup> The Secretary-General whose legal service is well-informed of the problems appropriate for an answer by the Court, is best equipped to put the right questions in the right form. He could avoid a danger implied in the institution of advisory opinion itself. Legal questions submitted to the Court may be connected with legal interests of States which in advisory opinions do not have the position of a party which they would have in a contentious case. Advisory opinions can therefore be used to deviate the right of States not to submit to the jurisdiction of the Court.

8. The tendency of many proposals and of some provisions of the revised Rules is to combine submission to the Judgment of the Court with the liberty left to the parties to settle their disputes finally by negotiation or other means of their choice. This effect can be reached, to a certain extent, through instituting contentious

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47. See *supra*, note 27 at 682

48. The Secretary-General, in his address at The Hague on April 4, 1978, referred to this suggestion made recently by several states. See (1977-78), I.C.J. Yearbook at 124

proceedings before the Court on the basis of a compromise between the parties asking the Court to settle the dispute not in its entirety but only part of it which the parties want to have decided. The model cases of this kind are the special agreements in accordance with which the Federal Republic of Germany, Denmark and the Netherlands submitted their dispute over the demarcation of their shares of the continental shelf in the North Sea to the Court. This attitude has been received with widespread approval.<sup>49</sup> The three parties requested the Court to hand down a binding judgment on the issue of which principles and rules were applicable to delimit the rights of the parties to the continental shelf in the North Sea. They reserved, however, the delimitation of the boundaries for a future treaty and did not oblige themselves to draw them up in accordance with the decision of the Court.<sup>50</sup> They thus had an opportunity to negotiate on the definite boundaries and to delimit them according to their respective needs. The Court defined the principles and rules according to which the delimitation should be made but was not asked to distribute the shares to the parties. This flexible system made it easier for the Federal Republic of Germany and Denmark to take account, in their agreement on the boundaries, of Danish wishes in the respective area.<sup>51</sup>

This precedent has been followed for the first time by Libya and Tunisia in their special agreement for the submission of the question of the continental shelf between the two countries to the International Court of Justice, notified to the Court on November 25, 1978. The distribution of matters submitted to the Court and decisions reserved to the parties differs in certain respects from the *North Sea Continental Shelf* cases. The principal idea is however the same. While the Court is asked to render its judgment on the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining to each of the litigants, the delimitation shall be fixed by the two countries themselves.<sup>52</sup>

These two cases may initiate a new and, in my view, promising

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49. H. Mosler, "Problems and Tasks of International Judicial and Arbitral Settlement of Disputes Fifty Years After the Founding of the World Court" in *Judicial Settlement, supra*, note 10 at 6

50. (1969), I.C.J. Rep. at 6

51. Text of Agreement in (1971), 10 Int'l Legal Materials at 603

52. Arts. 1 & 2 of the Special Agreement of June 10, 1977, notified to the Court on December 1, 1978 (I.C.J. Doc. 1978, General List No. 63)

tendency to submit cases to the Court. Experience has shown that proceedings instituted by unilateral application have often prevented the Court from deciding on the merits. In several instances defendant parties refusing to take any step in the proceedings referred to the vital national interests involved in the case.<sup>53</sup> Similar cases, which are certainly detrimental to the Court's authority, are likely to occur in the future. For the time being special agreements seem to be the better way to seize the Court than applications directed against an unwilling respondent. There may be disputes of a legal character in regard to which the States concerned do not want to run the risk of an unfavourable binding judgment, but which they cannot submit to the Court as a request for an advisory opinion, this procedure being reserved to organs of international organizations. The parties may be interested in obtaining, in the operative part of a binding judgment, definitions of the principles and rules of international law applicable to their case. They may also be interested, as occurred in the *North Sea Continental Shelf* cases, of the factors to be taken into account in applying such principles and rules. Final settlement itself would later be made by an agreement between the parties achieved on the basis of those principles, rules and factors.

### III.

Among the proposals made in the Sixth Committee for a better composition of the Court, new countries wished to ensure the representation of African, Latin American and Asiatic legal cultures. The number of judges has remained the same since the time of the Permanent Court, but the distribution from the different parts of the world has changed to a considerable extent. The International Court of Justice had up to 1963 only one African and two Asians among its members. From the later triennial elections of 5 judges, it can be seen that, without any amendment to the Statute, the Court has been gradually developing as a more representative organ. It must not be forgotten that, not by any binding rules but in continuous practice, a national of each of the permanent members of the Security Council is elected. The number was 5 so long as China, then represented by the Republic of China in Taiwan, had its own

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53. The last example is the Turkish observations in the jurisdictional phase of the *Aegean Sea Continental Shelf* Case referred to in the Court's Judgment of December 18, 1978. See (1978), I.C.J. Rep. at 13

national on the bench. For a long time there have been only four judges coming from the United States, the Soviet Union, France and Great Britain. The People's Republic of China, since their government is representing the member-State China, has not yet availed herself of the opportunity of nominating a candidate. The present composition, as it resulted from the last elections, is five judges coming from the western States group, namely from the three permanent members of the Security Council belonging to that Group and from Italy and Germany. Three members come from Africa, two from Latin America, three from Asia — from the Middle East, India and Japan — and two from socialist countries. These changes are due to a redistribution within the Court. So far an increase in its members has been avoided, although proposals in that direction have been made.<sup>54</sup> In my view, it would not be wise to follow the examples of the Security Council and the Economic and Social Council in order to achieve a more balanced representation by increasing the number of judges. It could only be recommended on the condition that the Court would be overloaded with business attributed to a number of chambers. On that supposition the situation of the Court would be similar to the actual work of European Court of Human Rights, presently consisting of 21 judges from 21 countries. The Plenary Court acts as a judicial body only upon reference to it of a case by a chamber. One cannot expect that an analogous problem will come up in The Hague in the foreseeable future.

A very numerous bench makes the deliberations necessarily longer and more complicated. According to my experience from another court, it is a heavy task for a President to direct the deliberations of a large body of judges and for the Drafting Committee to prepare the judgment supported by a substantial majority and not weakened by too many dissenting or separate opinions. An increased number of judges of the International Court of Justice would also increase the problems arising from the divergences of the judges' legal and regional or national background. An enlarged composition of the Court could never reflect all regions, legal cultures and social tendencies which are found in the more than 150 parties to the Statute.

What the Court really needs is the opportunity of developing continuously its jurisprudence in many cases of various kinds. This

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54. For a discussion of the whole question see T. O. Elias, *supra*, note 44 at 22-24

is on the condition that there is co-operation, guided by an *esprit de corps*, which is internationally-minded and anxious to promote a progressive evolution of law on the basis of recognized methods of interpretation. The real crisis of the institution is not actually having this chance. This crisis is due to the unsatisfactory state of the international community.