

THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN INTER-STATE RELATIONS TODAY

BY

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Three years ago almost exactly to the day I gave a lecture in the University of Minnesota on the same topic as has been chosen for today's talk (1). In that lecture, delivered under the immediate impact of the judgment of the International Court of Justice of 26 November 1984 in the phase of jurisdiction and admissibility of the *Military and Paramilitary Activities in and against Nicaragua* case, I suggested that the history of the Permanent Court of International Justice and of the present International Court of Justice taken together fell into four clearly defined periods. The first, the formative period, ran until the year 1931 when it came to a brutal finish with the controversial advisory opinion in the so-called *Customs Union* case (P.C.I.J., Ser. A/B, No. 41, 1931). That was widely regarded as an attempt by the Permanent Court to involve itself in a political matter and to have been motivated by political reasons. But as the general international situation then began its steady deterioration leading to the outbreak of the Second World War in 1939, it is not easy even after this lapse of time to be sure that mistrust with regard to the purely legal approach of the Permanent Court was the only reason for the marked decline in the work of the Court in the second decade of its existence. Nevertheless, it is a fact that after that date no major case, no case going beyond some routine and relatively minor dispute between States, came before either the contentious or the advisory jurisdiction of the Court. The outbreak of the War effectively put an end to the work of the Permanent Court, although in retrospect one cannot fail to be struck by the lack of realism displayed in the Court's last pronouncements in the *Electricity Company of Sofia* (Belgium v. Bulgaria) case, to the effect that the existence of the state of war in Europe did not constitute a sufficient degree of *force majeure* to interfere with the Court's procedures: a hearing was actually fixed for 16 May 1940, by which date the Nazi invasion of Belgium and the Netherlands had taken place and the real *Blitzkrieg* on the Western Front was in full swing (P.C.I.J., Ser. A/B, No. 80, 1940).

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(1) 'The Changing Role of the International Court' in 20 *Israel Law Review* 182 (1985).

The third period ran from the establishment of the present Court in 1945 to the final judgment of 18 July 1966 in the second phase of the *South West Africa* cases — a period already as long as the whole working life of the Permanent Court. This period is marked by several things. Firstly, the composition of the Court, from the point of view of the representation on it of the main forms of civilization and the principal legal systems of the world, underwent a noticeable change. This was mainly at the expense of the Latin American representation and following the split of the European representation between judges from Western Europe (including for this purpose the United States of America and the so-called Old Commonwealth) and judges from the Eastern European (Socialist) States. Secondly, the advisory competence, which in the days of the League of Nations and the Permanent Court had been employed by the Council of the League acting on the basis of the rule of unanimity of its members, became an instrument of the General Assembly of the United Nations operating on the basis of a majority vote, with the result that an advisory opinion could be requested notwithstanding the existence of politically significant opposition which the Court, in the exercise of its discretion, disregarded. It did so largely on account of its status as a principal organ of the United Nations under Article 7 of the Charter. Thirdly, there was an obvious disinclination of States to make use of the contentious jurisdiction in general, and the so-called compulsory jurisdiction in particular, symbolized by the steady decrease in the percentage of States parties to the Statute making declarations under Article 36, paragraph 2, of the Statute, accepting the compulsory jurisdiction of the Court, and the far-reaching reservations attached by other States which did make declarations. That was coupled with difficulties which soon came into the open of enforcing the decisions of the Court through the Security Council against an unwilling State, especially if it was a permanent member of the Security Council or enjoyed the backing of one, notwithstanding the formal provisions of Article 94 of the Charter. This period coincided with the high level of international tension in the aftermath of the War and going under the name of the Cold War.

The fourth period began immediately after the 1966 judgment in the *South West Africa* cases. It is distinguished by a substantial falling off in all the business of the Court, both contentious and advisory, if the standing of the Court is to be measured in statistical terms only, although the complexity and the multiplicity of issues arising in a single case as well as their novelty have changed the character of the general work-load of the present Court and of its members. But above all a major reconstruction in the composition of the Court was carried through in this period. Painfully accomplished, it is now accepted, through a series of political understandings in the electoral organs, that the geographical distribution of seats on the Court, from the point of view of the accepted geographical regions in the United Nations, should correspond to the geographical

distribution of the seats on the Security Council — also composed of 15 members. The five permanent members of the Security Council can always have a judge of their nationality on the Court if they so wish, leaving the remaining ten seats for distribution amongst the rest of the world. This diplomatic understanding has the effect that while the permanent members of the Security Council are in fact able to ensure *their* presence on the Court, through their ability to control the necessary majority of eight votes in the Security Council to the length of forcing a deadlock with the General Assembly if needs be (as in 1956), in the event of contested elections for the other seats, the Security Council will in the end accept the arbitrament of the General Assembly, as occurred in the elections of 11 November 1987. This diplomatic understanding prevents the occurrence in the Court of the kind of situation that now exists in the International Law Commission as regards the presence of a permanent member of the Security Council. On the other hand, it can lead to the non-re-election of a distinguished sitting judge as indeed also occurred on 11 November 1987.

Here I must state my belief that for a permanent international court with a universal mission of the standing of the International Court of Justice, it is essential to ensure proper Big Power representation among its members. But it is another question whether today permanent membership in the Security Council, itself reflecting a transient and abnormal political situation existing in 1945, is necessarily the only or the most appropriate criterion to meet this desideratum.

In that Minnesota lecture I stated that the fourth period was still continuing. Looking back today it seems that with the 1984 judgment in the *Nicaragua* case, coupled with the successful use for the first time in that year of an *ad hoc* Chamber in the *Gulf of Maine* case, that fourth period has come to an end and we are now at the start of a new, fifth period. I would like to share with you some of my thoughts which have led me to this conclusion.

If we take the years 1984 to 1986 together, three notable events in relation to the Court have occurred. Two have been mentioned, and more will be said about them. The third is the correction of one major imbalance in the composition of the Court through the election in 1984 of a candidate nominated by the national group of the People's Republic of China. There had been no member of the Court of Chinese nationality since February 1967, when the term of office of Judge Wellington Koo came to an end. Judge Ni, well known as the head of his country's delegation to the Third United Nations Conference on the Law of the Sea, took his seat on 6 February 1985, delivering his first individual opinion in the merits phase of the *Nicaragua* case in 1986.

The diplomatic understanding that the composition of the Court should mirror that of the Security Council, with the division of responsibility

for ensuring this between the Security Council and the General Assembly, is not entirely satisfactory. It has led to the over-representation of the Western European Group. Western Europe is the only geographical region of the world with two permanent members of the Security Council. The principal under-represented region, as far as the Court is concerned, is today the American Continent south of the U.S.-Mexican border. That region was once composed almost entirely of Spanish speaking States (except Portuguese speaking Brazil), but not now, when the Caribbean sub-region is mostly composed of English speaking States which gained their independence through the process of decolonization. Their determined effort to secure one seat on the Court met with success on 11 November 1987 with the election of Dr. Mohamed Shahabuddeen of Guyana. This has left Latin America even more under-represented, while the vast « new » region of the independent States of the Pacific Ocean is not represented at all. It is beginning to look as if the question of the geographical composition of the Court will become one of the tough political issues in future elections.

As mentioned, another major departure of the years 1984 to 1986 was the sudden invocation of what was a major innovation introduced into the Statute in 1945, the Chamber formed for dealing with a particular case envisaged in Article 26, paragraph 2, of the Statute of the Court. Although the matter is one of controversy, Article 17 of the revised Rules of Court of 1978 suggests that an *ad hoc* Chamber of this kind will be composed more or less according to the wishes of the parties. The first invocation of this procedure in the *Gulf of Maine* case occurred in circumstances which were somewhat unusual and provoked a bitter division within the Court itself. (The reasons for that development are, however, at least in part fortuitous, and follow from the lamented deaths in 1981 of Judges Baxter and Sir Humphrey Waldoock, as well as of Professor Max Sørensen whom (I understand) the parties wished to see on the Chambers, and this was to affect the parties' initial agreement, between themselves and with the then President, Waldoock, as to composition of the Chamber, although there were other reasons for anger displayed by some members of the Court in their opinions appended to the Order of 20 January 1982 constituting that Chamber.) The proceedings were watched with interest, and from the point of view of its contribution to the settlement of the dispute, the experiment may be regarded as a success. This was a bilateral matter between the States concerned. More interesting was the second Chamber to be established, that formed to deal with the frontier dispute between Burkina Faso and Mali. That was a smouldering dispute in which armed force or the threat of armed force had been used by both parties, and the Organization of African Unity had been involved in the process of restoring peace and assisting the parties to reach a pacific settlement of the dispute. Indeed, even while the proceedings were in progress a further outbreak of violence occurred, necessitating renewed intervention by the appropriate regional

organization, consolidated by the Order of 10 January 1986 by the Chamber, indicating interim measures of protection. That calmed the situation and enabled the proceedings to be conducted with the necessary degree of serenity. An interesting thing about this case is that after the judgment was delivered on 22 December 1986, both Governments addressed messages to the President of the Chamber thanking the Chamber for its contribution to the settlement of the dispute and accepting the judgment. This is apparently the first occasion on which messages of this kind have been addressed to the Court or a Chamber.

Since then the Court has been requested to establish two more *ad hoc* Chambers, one to deal with a long-standing dispute (which has led to violence in the past) involving land and maritime frontier delimitations between El Salvador and Honduras in the Gulf of Fonseca area — a case about that, but between different parties, came before the short-lived Central American Court of Justice in 1917 (2); and early in 1987, in a further procedural and diplomatic development, since hitherto all these cases had been commenced by the notification of a special agreement, the United States filed an application introducing proceedings against Italy in a case of diplomatic protection of its nationals, the *ELSI* case and it was agreed this case should be determined by an *ad hoc* Chamber.

With these two cases still pending, it would be premature to embark upon any assessment of the implications of these developments save in one respect. Seven countries have been involved in these four cases. Of these three, Burkina Faso, Canada and Mali, have never been in the International Court before, while El Salvador attempted unsuccessfully to intervene in a pending case. It is therefore still an open question whether the facility of recourse to *Ad hoc* Chambers has enabled States which otherwise would not have submitted a case to the Court to have had recourse to the Court. Probably more interesting is the fact that three of the four cases concerned the territorial domain of the States concerned. This is always a delicate matter, and it is likely that the parties' ability to influence the composition of the panel may well have been a factor leading them to adopt this course of action in preference to other available procedures. One thing, however, is clear. The Chambers are themselves an integral part of the Court. They are governed fully by the Statute and the Rules of Court, and they must be regarded as subject to the Court's own doctrines as to the nature of the judicial task within the framework of the combined Charter and Statute, and the Court's general duty to safeguard the integrity of the judicial function. The Chambers, therefore, and the States invoking that procedure do not have that complete autonomy as regards control over the procedure and the proceedings, including the law to be applied,

(2) *El Salvador v/ Nicaragua*, 9 March 1917, 11 *American Journal of International Law* 674 (1917).

as is characteristic of international inter-state arbitration proceedings. If, as it is sometimes put, the Chambers are a bridge between the full Court and arbitration, they are on the Court end of the bridge.

In this connection, it is impossible to ignore two other possibly related developments. One is the appointment of members of the Court, or past members, to act as arbitrators in cases which for any reason the parties do not wish to bring before the Court. As is well known this practice was started in the Permanent Court, and two of its members, Judges Huber and Guerrero (the latter when he was Vice-President of the Permanent Court), had undertaken these duties. But in recent years this process has been carried much further, for if Judges Huber and Guerrero had acted as arbitrators sole, in the *Guinea/Guinea-Bissau Maritime Delimitation* case of 1985, not only were all the arbitrators serving members of the Court, but the seat of the arbitration, originally fixed at Geneva, was moved to The Hague, and the Rules of Court were adopted as the rules of procedure for the arbitration. Of course, in all such cases the duties of the persons concerned as members of the Court take precedence over their duties as arbitrators, and so far as is known there have been no serious conflicts. But circumstances can be envisaged, for instance a sudden request for an urgent advisory opinion or for the indication of interim measures of protection in the Court, which could interfere with the orderly progress of arbitration proceedings, just as the Nicaraguan request in its case against the United States interfered with the hearings in the *Gulf of Maine* case (to take a recent illustration). But the Court has shown a welcome degree of flexibility in enabling its members to fulfil other functions relating to the application of the law, and no doubt practical solutions will be found for this type of situation causing the least possible inconvenience to all concerned without impairment of the performance of the judicial functions for which the individuals were elected to the Court.

A second related development is the marked tendency for litigating States to choose persons not of their nationality to serve as judge *ad hoc*. This too is not new. The first instance was the appointment by Albania in 1948 of non-nationals in the *Corfu Channel* case, followed in 1959 by Bulgaria in the *Aerial Incident of 27 July 1955* case. More striking was the *Arbitral Award of the King of Spain* case in 1960, where both parties appointed non-nationals, one not even from the regional group to which the appointing State belonged. This attitude has been carried much further in the three cases involving the delimitation of the continental shelf of Libya, before the Court between 1981 and 1985. But this becomes even more striking when we see the same phenomenon occurring in the *ad hoc* Chambers. Article 35, paragraph 1, of the revised Rules of Court of 1978 is deliberately framed to encourage this, and it certainly enhances the general standing of the international magistrature. (This is illustrated by the way in which a non-national judge *ad hoc* in 1985, in what is believed

to be first instance of this, not only did not uphold the case of the appointing State but actually appended an individual opinion to the judgment, and this was repeated the next year in the Chamber deciding the *Burkina Faso/Mali* case.) While on the whole this is a welcome development in State practice, it is possible that not all the problems which it is setting have been properly faced. For example, on one occasion there were three judges of French nationality in the Court, an elected member, a previous member completing unfinished judicial business in accordance with Article 13, paragraph 3, of the Statute, and a judge *ad hoc* of French nationality appointed for another case. While Article 3, paragraph 1, of the Statute makes it clear that no two of the 15 members of the Court may be nationals of the same State, and therefore on its face does not apply to judges *ad hoc* or judges completing unfinished business on which they started before their terms of office came to an end, the presence of several nationals of the same State in the Peace Palace at the same time leaves me with some perhaps undefinable feeling of unease.

The third major event of the period 1984 to 1986 is the series of judgments and other decisions in the case brought by Nicaragua against the United States of America, leading to the judgment on the merits of 27 June 1986 (the compensation phase of this case is pending), followed by the introduction by applications filed on 28 July 1986 of proceedings against two of Nicaragua's neighbours, Costa Rica and Honduras (but not against the third, probably the most directly concerned, El Salvador, which had unsuccessfully attempted to intervene in the jurisdictional phase of the case against the United States, and had later been suggested by the Court to intervene in the merits phase of that case). Although critical of several major aspects of the 1984 judgment on jurisdiction and admissibility, I do not intend here to dwell upon that, but to try and portray the new turn that the case as a whole may have given to the Court's conception of its role in the pacific settlement of disputes within the framework of the Charter of the United Nations and the annexed Statute. It is this, in combination with the reconstruction of the composition of the Court and the increased employment of *ad hoc* Chambers, which brings the fourth period in the history of the universal Court to an end and propels it into a fifth period now starting.

The judgments and orders in the *Nicaragua* case have already fuelled more controversy than any other judicial pronouncement of the present Court. Some of this controversy is a reflection of partisan domestic controversy within the United States over the whole of the Administration's policy in Central America, and little of that is really concerned with the international implications of the Court's pronouncements. On the other hand, there is serious non-partisan controversy over what the Court has done, both inside the United States and elsewhere, as well as over the attitude adopted by the Administration towards the Nicaraguan case

itself, and towards the Court more generally. There are some who are inclined to see in the submission of the *ELSI* case to the Chamber of the Court an attempt to mollify some of the domestic criticism of the Administration's attitude towards the *Nicaragua* case.

In approaching the *Nicaragua* case two separate factors have to be distinguished. One is the skilful diplomatic use made by Nicaragua of potentialities open to it under the Charter, which itself nowhere countenances what is sometimes called the *electa una via non datur recursus ad alteram* approach to dispute settlement, meaning that once a given route is chosen, all other routes to the same end are excluded (although any assumption that the applicant State here was aiming at a final and binding settlement of its dispute with the respondent State may not accord with reality). The other factor is the manner in which the Court faced up to this unusual invocation of its procedures. When Nicaragua brought its complaint before the Security Council in April 1984, it should have anticipated that its proposed resolution would not be adopted because of the negative vote of that permanent member of the Security Council against which the legal proceedings would subsequently be instituted. The diplomatic and legal skill displayed by its representatives on that occasion must be recognized. In fact Nicaragua had nothing to lose by going to the Court. Its responsible authorities should have been fully aware of the weaknesses of the jurisdictional basis of their application instituting proceedings, and had the Court declined to entertain the case on those grounds the whole thing could have been passed off as a legal technicality.

The gnawing question which arises is whether the Court should have allowed itself to perform the role mapped out for it by those who planned Nicaragua's political and legal strategy. That was the underlying issue raised in the jurisdictional phase of the case, although, in the guise of arguments about «jurisdiction», «admissibility» and «justiciability» the true purport of what was involved remains concealed.

Having said that, I do not purport to embark on any superficial or detailed critique of the Court's decisions, but rather to indicate why they initiate a new conception of the nature of the judicial function and of the role of the International Court of Justice in the schematics of the pacific settlement of international disputes, and the possible impact of these developments on the future use of the Court by States.

Two factors in particular of the Court's handling of this case call for notice. The first is found in the consequences drawn by the Court from its application of the multilateral treaty reservation contained in the United States declaration of 14 August 1946 under Article 36, paragraph 2, of the Statute. By that reservation the United States excluded «disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to the jurisdiction». In its 1984

judgment the Court left open the question whether this reservation was applicable, but in the 1986 judgment the Court concluded that the effect of this reservation was to prevent the Court from entertaining claims based upon two multilateral treaties invoked specifically by Nicaragua, the Charter of the United Nations and the Charter of the Organization of American States. But this reservation did not preclude the Court from examining possible violations of other multilateral treaties not invoked by Nicaragua or other sources of international law listed in Article 38 of the Statute. The second factor, partly the consequence of the first but partly, and more importantly, independent of it, is the readiness of the Court to deal with a dispute which one party patently did not regard as a «legal dispute» (with which alone Article 36, paragraph 2, of the Statute deals), and in which the on-going use of armed force was present, that broader dispute or situation itself being within the competence and on the agenda of the Security Council and other regional organizations and bodies. These call for separate treatment.

With regard to the first factor, the Court made it clear that a rule of international law can exist simultaneously as a rule of treaty-law and as a rule of customary law, with the same or close identity of content as regards substance, although not of course as regards any procedural attributes or requirements which the treaty might impose. In itself, the symbiotic existence of a rule as one of treaty-law and as one of customary law is nothing new. Leaving aside judicial precedents, of which the judgment of 20 February 1969 in the *North Sea Continental Shelf* cases is certainly the most important, the existence of this phenomenon is twice recognized in the Vienna Convention on the Law of Treaties of 1969, in articles 38 and 43, as well as in the preamble in a more programmatic manner. This means that the concept has diplomatic and political approval and is thus part of customary international law itself, that the necessary *opinio juris* is established. That the Court should examine its jurisdiction by reference to the rules of law it is requested to apply, in terms of Article 38 of the Statute, is also in itself nothing new. The Court has posed this question several times in cases instituted by notification of a special agreement, asking whether the terms of the special agreement were compatible with the functions, mission or duty of the Court as specified in Article 38 (the expression «functions, mission or duty» is used deliberately, because the French version of this addition made to the Statute in 1945 uses *mission* and the Russian version *obyazan* (the Spanish retains *función*) — a possible cause for ideological and juridical confusion about the role of the Court). Indeed, a recent instance of this can be seen in the *Tunisia/Libya Continental Shelf* case in paragraph 71 of the 1982 judgment. But this is the first occasion on which the Court has interconnected questions of jurisdiction with the applicable law under Article 38 in a case brought under Article 36, paragraph 2, of the Statute against the will of the respondent

State. Whatever the rights and wrongs of this aspect of the Court's decision, it is doubtful whether declarations accepting the compulsory jurisdiction have been drawn up with any deep consideration being given to all the ramifications of the law to be applied, or to the dynamic element in Article 38 of the Statute of the Court. In its 1984 judgment the Court stated that

it cannot dismiss the claims of Nicaragua under principles of customary and general international law simply because such principles have been enshrined in the texts relied upon by Nicaragua. ... Principles ... continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated (paragraph 73).

In paragraph 174 of its 1986 judgment the Court developed and refined those remarks in the light of the subsequent proceedings, but this does not affect the fundamentals of the matter.

Given the unprecedented broadening of the scope of modern international law in comparison with what existed even as late as 1939, given the obscurity and even confusion which exists over how rules of customary international law are to be ascertained or how they develop, given the large quantity of written texts which formally are not normative, such as resolutions of the General Assembly of the United Nations (whatever their denomination) or the final acts of diplomatic conferences — some of the statements made by the Court in these judgments, and some of the concrete applications of its doctrine, are bound to excite policy-makers and their legal advisers, especially of countries with manifold and complicated foreign policy interests. For in one sense the very existence of this conception must increase the range of unpredictability which attends any idea of a reference to the Court; and the question which it poses is whether that range of unpredictability is more than contemporary diplomacy can accept. If this case remains an isolated phenomenon in the annals of international jurisprudence, probably no long-term harm will be done to the cause of international judicial settlement of international disputes. But the precedent remains, to disturb that calmness of thought which is needed whenever the affairs of the Court are under consideration, or whenever a government is seriously examining the potentialities of recourse to the Court for the settlement of some outstanding dispute of direct concern to it.

The factor of the willingness of the Court to examine and decide on issues hitherto believed to be within the exclusive competence of a political organ such as the General Assembly or the Security Council now calls for an observation.

It is of course a truism to say that the distinction between legal and non-legal or between justiciable and non-justiciable disputes is not really one which the *law* can make, although it is often one which *courts* may be

called upon to make (to some extent the idea is the invention of the Supreme Court of the United States, interpreting the Constitution). In 1965 I wrote :

The experience of the International Court of Justice, even more than that of its predecessor, suggests, as the doctrinal writers have been insistent in maintaining, that there is no dispute which is inherently not susceptible to legal treatment if it is agreed to depoliticize it and submit it to the Court. The Court has demonstrated that the distinction between legal and political disputes, or between justiciable and non-justiciable disputes ... has no validity as an abstract proposition of law, despite its real importance as a matter of practical politics (*The Law and Practice of the International Court* at 94).

The critical words in that passage are « if it is agreed to depoliticize it and submit it to the Court » (3). Furthermore, whatever the conception of the draftsmen of the Charter, any idea that the Security Council has sole and exclusive competence in the matter of dispute settlement, even in face of the threat or use of force, has long been superseded in practice, where these functions are now also shared with the General Assembly. But until now it has been widely assumed that a distinction could and should be made and maintained between the political treatment of a situation or dispute by the political organs competent in the matter, whatever they might be, and the legal treatment of a situation or a dispute, or the isolation of some of its elements for legal treatment, whether by the Court or by some other organ, when the consent of all concerned would be the cardinal constituent of the legal treatment. The corollary was the equally widely held belief that the Court should not concern itself with disputes in which the use or threat of force was present, unless specifically requested to do so with the consent of the interested parties.

In the exercise of its advisory competence, the Court has for a long time been developing the doctrine that, as a principal organ of the United Nations, it is under the duty to play its part in the activities of the United Nations. It has used this argument to reject contentions that it should exercise its discretion under the Charter and the Statute and refrain from giving an advisory opinion which had been requested of it over political opposition. Although the *Nicaragua* judgments do not make specific references to this jurisprudence, the Court's action can be seen as an extension of the underlying principle into the contentious jurisdiction being, moreover, a factor stronger than the refusal of an unwilling respondent to recognize the jurisdiction and the competence of the Court in the case. But unlike many of the publicists, who would make the justiciability flow from the agreement of all parties to treat it as such, in this case the Court has done

(3) Unfortunately these critical words were omitted from the quotation in H. HOHMAN and P. J. I. M. DE WAART, « Compulsory Jurisdiction and the Use of Force as Legal Issues : the Epoch-Making Judgment of the International Court of Justice in *Nicaragua v. United States of America* » in 34 *Netherlands International Law Review* 162 (1987). That omission distorts the sense of the passage.

so on the basis of *ex parte* action by the applicant State with patently political objectives and as part of a more broadly conceived campaign of political action directed not only towards an international constituency but also towards factions within the domestic internal political system of the respondent State themselves opposed to the Administration's policy and sympathetic towards the position of the applicant State. Nicaragua's subsequent proceedings against Costa Rica and Honduras, only to be discontinued or put on ice as the international situation evolved during the latter half of 1987, something probably not foreseen at the time by the Court, must throw doubts on the genuineness of Nicaragua's desire for the depoliticization of its dispute with the United States : and in its turn this must lead to the difficult question, which I prefer to leave unanswered, whether the Court was not too generous in allowing itself to be used in that way in this case.

However, as in the case of the relationship between jurisdiction and the applicable law, so in the case of justiciability, the precedent of *Nicaragua* remains on the books, and even if it lies dormant it will be there to haunt, if not to taunt, and to tempt, policy makers and their legal advisers.

Such are the fundamental reasons why the years 1984 to 1986 can be seen as constituting a turning-point in the history of the International Court and as opening new vistas, the end of which is not in sight. This turn of events must cause concern, however, since they are probably far in advance of what international thinking is prepared to accept in the realm of practical politics, and they may therefore do more harm than good to what is still a delicate and sensitive organ operating among the established organs for the pacific settlement of international disputes.

In this connection there is another feature to be noticed. For some time now there have been signs that purely unilateral recourse to the Court, whether on the basis of the compulsory jurisdiction or on the basis of a compromissory clause in a treaty permitting unilateral recourse to the Court, is unlikely to be successful as a dispute resolving move. The suggestion, for instance in the Manila Declaration on the Peaceful Settlement of International Disputes annexed to General Assembly resolution 37/10 of 15 November 1982, that recourse to judicial settlement of legal disputes, particularly referral to the Court « should not be considered an unfriendly act between States » does not reflect an universally held view among States, laudable although the concept is. The *Nicaragua* decisions are seen as likely to increase the unwillingness of States to encourage unilateral recourse to the Court (save where by agreement this *form* of seising the Court is employed), and to accept obligations having that effect. There is no perceptible trend which within a reasonable space of time will lead to any marked increase in the percentage of States parties to the Statute which have accepted the compulsory jurisdiction. As for the advisory competence, this has been strained to the utmost through the use made

of it by the numerical majority in organs empowered to request an advisory opinion, with sometimes questionable results, and further instances of this, unless restrained by the Court, may only serve to increase the resistance of States to the use of the international judicial processes, save with the clear consent of all interested States.

I want to mention another aspect altogether, by making some reference to the type of cases which have been brought before the Court for, in contrast to what I have said up to now, they demonstrate a willingness on the part of States to agree to refer to the Court complicated issues of fact and of law and the readiness of the Court to face up to them. In my 1965 book I could write :

The substantive work of the Court is far from being confined to mere questions of treaty interpretation, which many people consider to have been the most prominent feature of the work of the Permanent Court. A great number of completely novel problems have come before it, covering vast areas of international legal and social relations previously untouched by the international judge (p. 16).

This has a dimension in space as well as in matter.

In space, what is noticeable is the virtually complete universalization of the dispute settlement work of the Court. There have come before it disputes between States of Western Europe, North America, Asia, Africa, Arab States, disputes with Eastern European (Socialist) States, and disputes between Latin American States. There have been transcontinental disputes embracing half the world. The cases before the present Court have related to vast areas of our planet. The Court has become truly planetary.

In matter too the Court has had to deal with cases involving the lives and the well-being of huge numbers of men and women, in many walks of life and in many parts of the world. A great deal of this aspect of the Court's work has been concerned with the law of the sea and maritime matters, and there can be little doubt that the reconstruction of the law of the sea embodied in the United Nations Convention on the Law of the Sea of 10 December 1982 would not have been possible without the important clarifications made by the International Court, especially since the judgment of 18 February 1951 in the *Anglo-Norwegian Fisheries* case. The Court has also had, and still has, important disputes relating to land frontiers and territorial sovereignty over disputed areas, often accompanied by the threat or use of force. Or to move on : Who amongst my generation when we were students ever imagined that we would have to advise our clients on questions of atomic energy or atomic power or of risks of radiation or other ecological disasters? Yet cases involving nuclear tests in the high atmosphere have been brought before the Court. Who amongst us had ever heard of the continental shelf, or knew about its vast and untapped resources? The list could be prolonged, and it is surely only a matter of time before the Court will be confronted with questions about the legal

regime of outer space. With this, the Court has shown that given the necessary co-operation of the parties, it can deal with new topics such as these. On the other hand, if the parties are not willing for the Court to deal with the case, both parties, either the Court is unable to deal with the case at all (sometimes a wise course if it thinks that a formal crystallization of the law through a judicial decision could be premature), or its decisions will not be acceptable to those to whom they are addressed.

It would not be right to conclude this talk without referring to the important article of Mr M. Gorbachev, General Secretary of the Communist Party of the Soviet Union, published in *Pravda* and other Soviet newspapers on 17 September 1987 on the eve of the opening of the 42nd session of the General Assembly, and since circulated as an official document of the General Assembly and the Security Council (A/42/574, S/19143). In the course of that article the General Secretary wrote :

Nor must we forget the possibilities of the International Court of Justice. The General Assembly and the Security Council could address themselves to it more frequently for advisory opinions on disputed international law issues. Its binding jurisdiction [possibly a mistranslation for « compulsory jurisdiction » — Sh.R.] must be acknowledged by all on mutually agreed terms. The first step in this direction, in the light of their special responsibility, needs to be taken by the permanent members of the Security Council.

This certainly represents a new approach towards the Court on the part of the Soviet authorities. Yet at the same time, it should be remembered that there is nothing new under the sun. The Soviet Union took an active part at Dumbarton Oaks (1944), at the Washington Committee of Jurists (1945) and above all at the San Francisco Conference (1945), in establishing the International Court of Justice and in its integration in the United Nations as one of the principal organs of the new international organization, employing the services of its most eminent jurists for this. An attitude of reserve towards the invocation of international arbitration and judicial procedures in matters of direct concern to the Soviet State and its conceptions of government is traceable to Lenin himself, at a time when the new Soviet Union was virtually isolated from the main stream of world affairs. Disappointment at the use, or misuse, of the Court in the « Cold War » cases in the 1950s found expression in an important article by the well-known Soviet jurist E. A. Korovin entitled « The International Court in the Service of Anglo-American Imperialism » (4), again when the Soviet Union was in a minority position in the United Nations. While it remains to be seen what practical effect will be given to Mr. Gorbachev's statement — and many possibilities are open to Soviet policy makers — one thing is clear. The statement demonstrates a new confidence in the Court for the foreign policy goals of the Soviet Union. There can be little doubt

(4) *Sovetskoye Gosudarstvo i Pravo*, May 1950, p. 57.

that the accumulation of events relating to the Court, culminating in the spectacular happenings of the years 1984 to 1986, has been a major factor leading to this new formulation of the Soviet attitude towards the Court.

In the polarized world of today, to dispel the suspicions of one part of it is to increase the suspicions of another part of it. With all the material and spatial expansion in the scope of the Court's activities, the Court does not yet enjoy universal confidence, and it is doubtful if what has occurred in recent years has brought the Court any nearer to that goal, or that we will not see a prominent jurist from the Western world publish an article on the International Court in the service of Soviet foreign policy. But no one would be more pleased than I to be proved wrong.

A fitting conclusion to this address is provided by the remarks of the President of the Court, Judge Nagendra Singh, on 17 November last, at the formal inauguration of the Chamber formed for the *ELSI* case between the United States and Italy. The President said :

It is gratifying to be able to point to such diversity [a reference to the remarkable diversity in the nature of the cases that have been brought before the Court — Sh.R.] at a moment when the role of the Court as an instrument for the peaceful resolution of disputes is becoming clearer and when a serious reassessment of the potential of the United Nations and its principal judicial organ is under way (C 3/CR 87/1, p. 12).

That a serious reassessment is under way cannot be gainsaid. Where it will lead cannot yet be foreseen. But the hope may be expressed that it will be conducted in an atmosphere freed from high emotional content such as has characterized much of the recent commentaries on different aspects of the work of the Court and on the attitudes of this or that government towards the judicial function in international affairs, as well as from euphoria generated by recent statements of responsible statesmen.

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