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REVIEW OF THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE

Report of the Secretary-General

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INTRODUCTION

1. On 15 December 1970, the General Assembly adopted unanimously resolution 2723 (XXV). Operative paragraphs 1, 3 and 4 of the resolution read as follows:

> "The General Assembly
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> .....
>
> "1. Invites Member States and States parties to the Statute of the International Court of Justice to submit to the Secretary-General, by 1 July 1971, views and suggestions concerning the role of the Court on the basis of the questionnaire to be prepared by the Secretary-General;
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> .....
>
> "3. Invites the Court to state its views, should it so desire;
>
> "4. Requests the Secretary-General to prepare a comprehensive report in the light of the opinions expressed by States and the Court, should the Court so desire;
>
> ....."

2. Pursuant to paragraph 1 of the resolution, the Secretary-General prepared a questionnaire and sent it under cover of a circular letter to Member States and States parties to the Statute of the International Court of Justice. As of 10 September 1971, the Secretary-General had received replies from the following 26 Governments: Argentina, Austria, Belgium, Canada, Cuba,[1/] Cyprus, Czechoslovakia, Denmark,[2/] Finland, France, Guatemala, Iraq, Italy, Japan, Laos, Madagascar, Mexico,[3/] Netherlands, Norway, Poland, Sweden, Switzerland, Ukrainian SSR, Union of Soviet Socialist Republics, United States of America, Yugoslavia.

1/ In its reply, the Cuban Government also refers to the relevant statement made by its representative in the Sixth Committee during the twenty-fifth session of the General Assembly (see A/C.6/SR.1217).

2/ In its reply, the Danish Government also refers to the relevant statement made by its representative in the Sixth Committee during the twenty-fifth session of the General Assembly (see A/C.6/SR.1210).

3/ The Mexican Government indicated that its observations are of a preliminary character and that it "retains complete freedom of action to state its position as it deems fit should the matter come up again for discussion in the General Assembly".

3. The Secretary-General also received from the President of the International Court of Justice a letter sent with reference to operative paragraph 3 of General Assembly resolution 2723 (XXV).

4. Pursuant to operative paragraph 4 of the same resolution, the Secretary-General submits herewith the report requested by the General Assembly. This report is divided into three sections as follows: section A contains the text of the questionnaire prepared by the Secretary-General pursuant to operative paragraph 1 of resolution 2723 (XXV). Section B reproduces the views expressed in their replies by Member States and States parties to the Statute of the Court. The views expressed are broken down according to headings I to V of the questionnaire; subheadings have been added for the sake of clarity. Under each heading or subheading, the order of presentation which has been followed is that of the dates of submission of the replies. Any reply which might still be forthcoming will be published as an addendum to this report. Lastly, section C reproduces the text of the letter received from the President of the Court as indicated in paragraph 3 above.

A. TEXT OF THE QUESTIONNAIRE PREPARED BY THE SECRETARY-GENERAL PURSUANT TO OPERATIVE PARAGRAPH 1 OF GENERAL ASSEMBLY RESOLUTION 2723 (XXV)

5. The questionnaire prepared by the Secretary-General pursuant to operative paragraph 1 of General Assembly resolution 2723 (XXV) read as follows:

"You may wish to comment on the following main points which were made in the General Assembly during the discussion of the item 'Review of the Role of the International Court of Justice':

I. The role of the International Court of Justice within the framework of the United Nations

Questions were raised such as the attitude of States towards the Court, the meaning and place of judicial settlement among the peaceful means of settlement of disputes, the law applied by the Court.

II. Organization of the Court

Questions were raised such as the composition of the Court and its representative character, the recourse to the chamber of summary procedure, the creation of regional panels of judges and other steps the Court or parties might take.

III. Jurisdiction of the Court

(a) Contentious cases

Questions were raised such as the compulsory jurisdiction of the Court, the possibility of enabling intergovernmental organizations to be parties in cases before the Court and the possibility of including in future treaties provisions giving the Court jurisdiction over disputes under the treaties.

(b) Advisory jurisdiction

Questions were raised such as the possibility of making the advisory procedure available to more intergovernmental organizations, including regional organizations, and permitting States to have the option of seeking an advisory opinion.

IV. Procedures and methods of work of the Court

Questions were raised such as the flexibility in the rules of the Court, the length of the procedure and the cost of litigation.

V. Future action on the item by the General Assembly

Questions were raised such as how should the General Assembly proceed with the consideration of the item, how to implement measures aiming at enhancing the effectiveness of the Court, should such measures be deemed desirable."

B. VIEWS EXPRESSED BY MEMBER STATES AND STATES PARTIES TO THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE IN THEIR REPLIES TO THE QUESTIONNAIRE PREPARED BY THE SECRETARY-GENERAL

I. THE ROLE OF THE COURT WITHIN THE FRAMEWORK OF THE UNITED NATIONS

1. The place of the Court and of the judicial settlement of disputes in the system established by the Charter of the United Nations

Poland

6. "The Polish People's Republic recognizes the important role accorded by the United Nations Charter to the International Court of Justice as the judicial organ of the United Nations."

Cyprus

7. "Unlike its predecessor, the Permanent Court of International Justice, the International Court of Justice was created as an organ of the United Nations and it is its principal judicial organ.[4/] It is constituted in virtue of its Statute, based on the Statute of the Permanent Court of International Justice but forming an integral part of the Charter.[5/] The International Court of Justice is in all but name and form the direct continuation of the Permanent Court of International Justice. The Statute and the Rules are practically identical and the new Court has taken over not only the premises but also the archives of the old Court."

4/ Articles 7 (1) and 92 of the Charter. For legal literature on the subject, see O'Connell, International Law, vol. II, p. 1159, note 18; Oppenheim-Lauterpacht, International Law, 7th ed., vol. II, p. 42. The Permanent Court of International Justice was established under article 14 of the Covenant of the League of Nations and was officially dissolved as from 1 April 1946 when the International Court of Justice started to function; see Hambro, The jurisdiction of the International Court of Justice, in Recueil des Cours 1950 (1), vol. 76, p. 133 and see also resolution of the XXI Assembly of the League of Nations dated 19 April 1946. For the reasons which led to the creation of the new Court rather than the continuation of the old one, see Rousseau, Droit international public, pp. 523 et seq.

5/ Article 92 of the Charter. The Statute of the Permanent Court of International Justice was a separate document; the new Statute however follows the provisions of the old one.

Norway

8. "Judicial settlement is an important means of settling disputes between States which could well be made more use of than has recently been the case. The International Court of Justice, being the principal judicial organ of the United Nations, ought to play an essential role in the peaceful settlement of legal disputes. Norway has, for its part, always taken a positive attitude towards the Court, as can be seen from the fact that Norway accepted, unconditionally, the compulsory jurisdiction of the Permanent Court of International Justice in 1921 and has renewed and kept in force this acceptance ever since."

Denmark

9. "... the International Court of Justice, described in Article 92 of the Charter as the principal judicial organ of the United Nations, must be regarded as an essential element in the system of pacific settlement of disputes in accordance with Chapter VI of the Charter, and... it is a vital task to strengthen the natural role of the Court in international relations."

Guatemala

10. "According to Article 92 of the Charter, the Court is the principal judicial organ of the United Nations. It exercises its functions in accordance with its Statute, which forms an integral part of the Charter. It would be desirable for States to have recourse to the Court whenever necessary. Guatemala was a party in one of the cases submitted to the Court, namely that brought by the Principality of Liechtenstein. This case was duly decided by the Court. In another case, concerning the century-old dispute between Guatemala and the British Government over the territory of Belize, Guatemala agreed to bring the case before the Court so that it might decide the dispute in accordance with the ex aequo et bono procedure, as provided in article 38, paragraph 2 of the Statute of the Court; however, the British Government did not see fit to accept that procedure. Article 33 of the United Nations Charter states that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall seek a solution by one of a number of peaceful means listed in the Article, inter alia, judicial settlement. In view of the way in which this Article is worded, we feel that it is for the parties to choose which of these means to use, and hence whether or not to resort to judicial settlement."

United States of America

11. "The United States firmly believes that a strong and active international Court is a central and indispensable element of an international legal order. Prevention of the use or threat of force to settle international disputes is essential to the maintenance of international peace and security, and is most effectively assured by the development of an international legal order and resort to a strong and respected Court."

Argentina

12. /The Government of the Argentine Republic/ "is of the opinion that the judicial settlement of conflicts between States is an appropriate and mature means of resolving problems which affect good relations between countries. Without depreciating arbitration, good offices or any other peaceful means of solving disputes between countries, it wishes to reaffirm its respect for judicial settlement as a means of solving such disputes."

Italy

13. In the view of the Italian Government, "the peaceful settlement of international disputes is an indispensable condition for the rule of law in international relations. Judicial settlement, notably before the International Court of Justice, is the most important among the means of settlement listed in Article 33, paragraph 1 of the United Nations Charter. Therefore, as rightly stressed in Article 36, paragraph 3 of the Charter, legal disputes should, as a rule, be referred by the parties to the International Court of Justice. Recommendations to that effect should be made by the Security Council and the General Assembly."

Mexico

14. "Whatever changes in the organization of the Court or amendments to its Statute, in the light of experience, it may be deemed advisable to introduce, the Mexican Government takes the view that the Court should in any event retain the basic characteristics appropriate to it as the principal judicial organ of the United Nations under the terms of Article 92 of the Charter. Merely by bestowing

upon it this high status - a status not enjoyed by its predecessor, the former Permanent Court of International Justice - the authors of the Charter gave an unmistakable indication of high esteem in which they held judicial settlement between States. Moreover, they reaffirmed that view in Article 36 of the Charter, which provides that 'legal disputes should as a general rule be referred by the parties to the International Court of Justice'. This is a view which we fully share and which, furthermore, is perfectly consistent with the freedom of Member States - recognized in Article 33 - to choose the peaceful means of solving a dispute which they deem most appropriate in the circumstances of the particular case. This view may be summarized as a conviction that, other things being equal and circumstances permitting, the solution obtained through the application of law is normally that which is most likely to be respected and to endure."

Switzerland

15. "The starting point for any comments on the role of the International Court of Justice must necessarily be the distinction between differences involving a controversial application of existing law and those involving a controversial change in existing law. Essentially, any difference of the first type is an appropriate subject for judicial settlement and may therefore be termed justiciable. However, even a difference of the second type may be amenable to judicial settlement in certain respects, since it may be desirable to establish the legal position - which one of the parties is seeking to change - by means of a judicial decision. Thus, in the judgement which it gave in 1960 in the Case concerning the Right to Passage over Indian Territory, the Court defined the rights and obligations of the parties resulting from a situation which was the subject of a political dispute between those parties, and at the time when the Court rendered judgement, the situation was already being transformed by political events."

Japan

16. "By virtue of the provisions of Articles 2 and 33 of the Charter, States Members of the United Nations are committed to the principle of settling international disputes by peaceful means, including judicial settlement. The

International Court of Justice as the principal judicial organ of the United Nations represents the institutional means of assuring the realization of this principle in relation to international disputes of legal character. The Court, therefore, occupies a place of vital importance in the community of nations for the maintenance of international peace and security. Japan has always been second to none as a staunch supporter of the Court and has consistently co-operated with other Member States in strengthening its role within the framework of the United Nations."

Sweden

17. "The Swedish Government deems it a matter of utter importance that the International Court of Justice can carry out the functions entrusted to it by the Charter of the United Nations. It may in this connexion be recalled that the Security Council, according to paragraph 3 of Article 36 of the Charter, in making recommendations for the pacific settlement of disputes should take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court. A settlement by the International Court of Justice offers a guarantee that the legitimate claim of one party is not left at the mercy of the other party and, in addition, contributes to the elimination of future international friction between the parties by the tribuanl's binding and final judgement. The political, economic or military strength of the respective party becomes irrelevant in a judicial proceeding. This may not be true of some other peaceful means of settling disputes such as negotiations."

Canada

18. "Although it is appreciated that judicial settlement through the International Court of Justice represents only one among many valuable means, referred to in Article 33 of the Charter, of peacefully resolving the problems arising from increasingly complex international relations, Canada wishes to reaffirm its confidence in the Court as the principal judicial organ of the United Nations, and to urge all States to continue to explore the possibility of prospects for its greater use. It would appear that the quantity and quality of recognized

international law is developing rapidly not only through articulations of that law by the International Court, but also through vastly expanded bilateral and multilateral agreements and treaties. The existence of this readily discernable and dynamic body of law should make recourse to the Court an increasingly attractive method of peacefully regulating international relations, particularly differences concerning interpretations of treaties."

Cuba

19. "... Article 33 of the United Nations Charter specifies the various means by which disputes may be solved peacefully, which include judicial settlement. States are free to choose any of the means listed in that Article."

Madagascar

20. "In view of the objectivity and value of legal decisions, judicial settlement should be regarded as the normal procedure for resolving major differences which could not have been settled by political methods, namely direct and friendly agreement, conciliation, mediation or arbitration."

Ukrainian SSR

21. "Supporting as it does the consistent implementation of one of the most important principles of international law, namely that States should settle their international disputes by peaceful means, the Ukrainian SSR has always attached great significance to enhancing the effective uses of peaceful means of settling disputes as set forth in Article 33 of the United Nations Charter, and, in that connexion, enhancing the effectiveness of the International Court of Justice. Chapter VI of the Charter, notably Article 33, which lists in detail means for the pacific settlement of international disputes does not express a preference for any particular means. Thus it follows that sovereign States themselves have the right to choose the methods and means of reaching a pacific settlement of any differences or disputes existing between them.... Under Article 92 of the Charter, the Court is the principal judicial organ of the United Nations. However, this in no way prevents States from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future (Article 95 of the Charter)."

Czechoslovakia

22. "The Czechoslovak Socialist Republic has always supported the implementation of the provision of the United Nations Charter which lays down that all Member States should solve their international disputes by peaceful means so that neither the international peace and security nor justice were endangered. Possible ways of peaceful settlement of disputes are listed in Article 33 of the United Nations Charter. Court proceeding is one of such means. It was for this purpose that, pursuant to Chapter XIV of the Charter, the International Court of Justice has been established as the principal judicial organ of the United Nations. It follows from its character that the entire activity of the Court is closely connected with the activity of the United Nations and must, therefore, be in conformity with the United Nations Charter. The United Nations Organization is formed by a whole system of organs whose specific competence is determined by appropriate provisions of the United Nations Charter and whose procedures of activity are fixed. The International Court of Justice is one of such organs."

Union of Soviet Socialist Republics

23. "As is well known, the Soviet Union takes a consistent position in favour of settling disputes between States exclusively by peaceful means, without the use of force. Accordingly, the USSR attaches great importance to the peaceful means of settlement of disputes provided for in the United Nations Charter, one of which is the consideration of disputes between States by the International Court of Justice."

Iraq

24. "In prohibiting the use of force in contravention of the United Nations Charter, the Charter emphasizes, by the same token, the absolute necessity of seeking peaceful solutions to international disputes. If, however, such solutions could not be reached by means other than judicial settlement, then the latter must be used, since leaving a dispute unresolved would be tantamount to favouring the status quo and the States which benefit from it. This very deficiency, which characterizes so many of the international disputes on the world scene at present, makes an institution like the International Court of Justice indispensable and makes it imperative to remove the obstacles which impede its use."

/...

Yugoslavia

25. "In the present-day conditions, when the struggle for peaceful and active coexistence, that is, pacific settlement of disputes in conformity with the principles of the Charter, constitutes one of the primary avenues for transcending difficulties and solving problems facing the international community, efforts for improving the work of the Court are of particular significance. The International Court of Justice, although restricted in possibilities for judicial resolving of legal issues, undoubtedly, has an important place in the field of peaceful settlement of disputes."

2. The role played by the Court

(a) The influence exerted by the judgements and advisory opinions of the Court

Poland

26. "The judgements of the Court carry authority in the world even though they are scarce and do not always correspond to the legal conscience of contemporary international community. The judgements of the Court have been instrumental in laying down and developing the international law, as evidenced in the work on codification carried out under the auspices of the United Nations."

Italy

27. In the opinion of the Italian Government, "the advisory competence of the International Court of Justice is not less vital than the contentious one. The Court's advisory opinions serve the essential purpose of ensuring the rule of law in the activities of international organizations and of the Member States thereof."

Ukrainian SSR

28. "As is well known, in deciding a number of cases and giving certain advisory opinions, the Court has not shown itself equal to the responsible tasks entrusted to it and it has been justly criticized for this. However, the Court has also handed down judgements and advisory opinions which can be regarded as positive from the standpoint of international law."

Iraq

29. "The work accomplished by the Court is on the whole remarkable."

(b) The insufficient extent of the role played by the Court

Cyprus

30. "... though the new Court was expected to play a significant role in the international relations of the future and the judicial process to have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means, nevertheless such expectations have not materialized.[6/] The jurisdiction of the Court remained optional.[7/] In spite of the resolution of the General Assembly,[8/] the compulsory jurisdiction of the Court under Article 36, paragraph 2, was accepted by only 46 States out of the 130 parties to the Statute (including, apart from the 127 Members of the United Nations, Switzerland, San Marino and Lichtenstein) as compared with the ratio in 1938 of 38 to 54 in the League. The Court has declared 13 advisory opinions and one request is pending[9/] and during the period 1946-1970 the Court was seized of 39 contentious cases and gave 31 judgements of which 14 were on merits, two were designated 'Second Phase' and one was an interpretative judgement.[10/] As emphasized by the Legal Counsel of the United Nations, 'the past 25 years have witnessed a disappointing lack of progress and it is difficult to envisage any sudden change

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6/ See Rousseau, op cit., p. 527: Julius Stone, The International Court and the world crisis, p. 31 et seq.

7/ See Article 36, paragraph 1, of the Statute although as observed by O'Connell, op cit., p. 1164 "the ideal goal of every international lawyer is a state of affairs when the International Court will have compulsory jurisdiction in every dispute of a legal character between States".

8/ Resolution 171 (II) of 14 November 1947, as to which see Hambro, op cit., pp. 137-138.

9/ As of 10 September 1971, date of submission of this report, the Court had rendered 14 advisory opinions and no request was pending.

10/ Leo Gross, The International Court of Justice: Consideration of requirements for enhancing its role in the international legal order, in American Journal of international law (1971), vol. 65, p. 262.

in the preference of States for keeping a dispute close, rather than entrusting it to some form of third party settlement which might not come wholly in their favour'.[11]"

Norway

31. "... Norway shares the anxieties which have been expressed about the failure of States to use the Court and about the alleged deficiencies in the organization and working methods of the Court."

Argentina

32. "The Government of the Argentine Republic, which has a tradition of settling international disputes by peaceful means, shares the concern felt by a number of countries at the attitude of some States towards the Court. This is why it co-sponsored initiatives such as that contained in document A/C.6/L.800/Rev.1,[12] which proposed the establishment of an Ad Hoc Committee to study obstacles to the satisfactory functioning of the Court, ways of removing them and means of enhancing the effectiveness of the Court."

Italy

33. The Italian Government "have noted with concern, especially in the course of the six sessions (1964-1970) of the Special Committee on the Principles of International Law concerning Friendly Relations and Co-operation among States that the International Court of Justice - and judicial settlement in general - were viewed with little favour by a number of Member States."

Finland

34. "The initiative taken by some of the Member States of the United Nations, including Finland, on raising the question of the review of the role of the International Court of Justice at the twenty-fifth session of the General Assembly

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11/ Stavropoulos, The United Nations and the development of international law 1945-1970, in United Nations Monthly Chronicle, pp. 78-84 (June 1970) cited by Gross, op. cit., p. 259.

12/ See Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 96, document A/8238, para. 7.

reflect the concern of the initiators for the attitude of several States toward the International Court of Justice that reveals some kind of confidence crisis which has weakened essentially the significance of the institution intended to be one of the principal organs of the United Nations. The system intended for the peaceful settlement of disputes has thus become both complex and inadequate in its essentials."

Japan

35. "Although the Court has made some valuable contributions during the last quarter of a century of its existence to the maintenance of the legal order of the international community, the Government of Japan shares with other Member Governments the sense that the Court has not been able to live up to the original expectations as the highest tribunal applying international law. The paucity of cases which have come before the Court, despite the fact that there is no lack of legal disputes in the world, is often pointed out as a symptom of the gap between the actual role of the Court and its full potentiality. It was against this background that 12 Member States, including Japan, requested the inclusion in the agenda of the twenty-fifth session of the General Assembly of the item 'Review of the role of the International Court of Justice'."

Sweden

36. "The Swedish Government finds it regrettable that in recent years Member States of the United Nations have made so little use of the services which the International Court of Justice could render in its field of competence."

Czechoslovakia

37. "... the International Court of Justice is not being used by States to a sufficient extent."

France

38. "The French Government feels bound to point out that the compulsory jurisdiction of the International Court of Justice is not yet as broadly developed nor recourse to international judgement as frequent as might have been desired.

In this connexion, the small number of States which have accepted the compulsory jurisdiction of the Court and the reluctance to include clauses relating to the Court's jurisdiction in contentious cases in recent conventions are revealing. France has, in the past, been a party to the proceedings in several contentious cases before the Court and has used other procedures for settling disputes by legal means or by arbitration, but it must be acknowledged that not all States have taken the same attitude."

Austria

39. "In Austria's view, it is only to a limited extent that the International Court of Justice is playing the role it should be playing under Article 92 of the United Nations Charter as the 'principal judicial organ of the United Nations'."

Belgium

40. "... /some/ aspects of the organization and functioning of the Court... are of vital importance in ensuring that it fulfils the role appropriate to it as the principal judicial organ of the international community.

41. "It is a fact that the results produced by the Court no longer correspond to the hopes - exaggerated hopes perhaps - to which its establishment once gave rise. In considering this matter, cause should not be confused with what is merely effect. Thus, the slowing down of the machinery established by the provisions relating to compulsory jurisdiction is no more than the result of a situation whose causes lie in the general decline, throughout the world, in the settlement of disputes by legal means. This decline is not peculiar to the Court, but it naturally affects the Court more directly and, above all, more conspicuously, since the Court was conceived in the past as a universal tribunal and its decisions still have a definite impact."

3. Factors relevant to the present situation of the Court

(a) The international climate and the disinclination of States to resort to the Court

Cyprus

42. "... the adoption of the compulsory jurisdiction of the Court, as other machinery in the United Nations, and the recourse to the Court in general are subject to political manipulation as instruments of a State's foreign policy. In this way, the attitude of the Soviet bloc, of the Afro-Asian States and of the Western States towards the Court may be explained."

Denmark

43. "... the crux of the matter is the willingness of Governments to accept the compulsory jurisdiction of the Court under Article 36 of the Statute. The international trend has moved away from general acceptance of the concept of judicial settlement of international disputes, a tendency clearly demonstrated by the fact that only about one third of the States Members of the United Nations have accepted the compulsory jurisdiction and some of those very restrictively."

United States of America

44. "The present reluctance of States to use the International Court of Justice may suggest a certain lack of confidence in the institution. Some States have expressed concern about the competence and objectivity of the Court and the representative character of the law applied by it. Concern has also been expressed that some States have injected political considerations into the process of nominating and electing the members of the Court.

45. "Unfamiliarity with the forum may lie behind the reluctance to use the Court, as may the assumption of some States that going to the Court is in some way an unfriendly act. A United Nations General Assembly affirmation that use of the Court is an act of statesmanship implying dedication to high standards of international co-operation might mitigate this latter concern. In addition, some States feel that resort to the Court necessarily involves a long and expensive undertaking even though the cost of the Court itself is borne by the United Nations.

46. "Perhaps more fundamentally there exists a basic disinclination to submit disputes to third party adjudication. Cases of secondary importance to the vital interest of States are often considered not worth the expenditure of time and money, and cases which do affect those vital interests are regarded as too important to entrust to any third party."

Finland

47. "In the opinion of the Government of Finland, the basic reason for the lack of confidence /of States in the Court/ is not the obsoleteness of the Statute of the Court any more than it is the impracticability of its procedural order. Although the Statute of the International Court of Justice is based on the Statute of the earlier Permanent Court of International Justice, it can hardly be regarded as unsatisfactory in general. The Finnish Government considers the reasons for the confidence crisis to be chiefly political and ideological."

Switzerland

48. "The only major obstacle to the judicial settlement of justiciable disputes is the will of either or both parties to have recourse to it. All other apparent obstacles to the judicial settlement of disputes are merely technical problems which can always be solved by appropriate institutional reform."

Japan

49. "There is a good deal of reason in the argument that the inactivity of the Court should be ascribed not to its institutional defects but to the prevailing international climate resulting from the very nature of the international community. Yet, it is also true that the climate itself may change if steps sre taken to alleviate the misgivings of Member States against the Court and if institutional reforms succeed in increasing the confidence of States in the role of the Court."

Madagascar

50. "In the opinion of the Malagasy Government, the attitude of States towards the Court continues to be dictated by their attachment to the principle of national sovereignty."

France

51. "The question may be asked why the procedures for the judicial settlement of disputes are not more widely used. Possibly some States continue to hold the old view according to which recourse to an international court constituted an unfriendly act. Other States will cite national sovereignty as a reason for rejecting the possibility of a judicial settlement, even though they are invited to defer to such settlement in exercise of their sovereignty. Some States will refer to problems relating to the composition of the Court. Yet experience shows that such States do not have recourse to judicial settlement even when justice is organized on a regional basis, and that they have not even investigated the possibilities which may be offered by the Statute of the Court when it provides that, for a particular case, a chamber may be formed which could if necessary sit elsewhere than at The Hague.

52. "Other States - and this no doubt represents a more serious obstacle - will challenge the law applied by the Court. If that law is based on new theories which in their view do not correspond to the rules of international law, States which now accept the jurisdiction of the Court will turn away from it. On the other hand, other States will reject a system they regard as based on "traditional" law which does not correspond to their concepts. However, the criticisms which they may make in that regard do not in themselves explain their lack of enthusiasm for judicial settlement since, as has been stated, they could pursue a judicial settlement through jurists applying rules which they recognize, yet fail to do so. It therefore appears that the real reason for the rejection of compulsory jurisdiction lies in the structure of international relations itself. Except in a few instances, the feeling of solidarity between States is not sufficiently well developed for them to regard recourse to international justice as one of the surest means of maintaining their good relations. New texts and different machinery will not induce States which did not intend to resort to international justice to do so."

Austria

53. "In Austria's view, the present situation is mainly due to the heterogeneity of political systems, the divergence of the legal ideas underlying the various

legal systems and the consequent reluctance on the part of Governments to settle their disputes on a legal basis. There is not much that can be done about this situation by reforming statutes or rules of procedure."

(b) The law applied by the Court

Cyprus

54. "Another reason for mistrust to the Court relates to the law that the Court is likely to apply. Under Article 38 of the Statute the Court in deciding disputes submitted to it shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilian nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In paragraph 2, it is provided that this provision 'shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto'.

55. "In the absence of a legislator in a homogenous society, international law is bound to remain vague and uncertain unless its principles are accepted by the States forming the family of nations. The number of international conventions establishing rules expressly recognized by the contesting States in spite of recent codification of various branches of the international law such as the codification of the law of the sea, the law of diplomatic and consular relations and the law of treaties, continues to be very restricted but this matter should receive the most serious consideration. The International Law Commission may hold more frequent and regular sessions so that more rapid progress be achieved. Regarding sub-paragraph (b) of paragraph 1 of Article 38 of the Statute, which provides that one of the sources of the law is 'international custom as evidence of a general practice accepted by law', its wording, as pointed out by Kelsen,[13/]

13/ Kelsen, The Law of the United Nations, p. 533.

is unsatisfactory. It is not possible to apply a custom, since 'custom' is a habitual or usual course of action which cannot be applied to a case but only the legal norm evidenced by the custom. If, on the other hand, what is meant is the 'customary international law' then, in spite of the various difficulties especially those relating to the proof of its recognition by the various States,[14/] the Court may contribute substantially to the development of international law (as it was made in the Corfu Channel Case and the Fisheries Case).

56. "The same considerations apply to the interpretation of sub-paragraph (c) of paragraph 1 of Article 38 of the Statute in connexion with 'the general principles of law recognized by civilized nations'. This would presuppose a bridging between the various legal systems, especially those of the western countries with the legal systems of the non-western countries, in an effort to find the general principles underlying such systems so as to establish a common basis for a 'world law'.

57. "Professor Röling supports as a preliminary for such an effort (a) 'to annul' the former law of domination as expressed in the colonial system and the 'unequal treaties'; (b) the expansion of international law by introducing new chapters of 'social protective law' and 'welfare law' but he emphasizes that this may be 'almost a superhuman task'.[15/]

58. "Finally among the sources of the law the Court would administer, it may be included the law making resolutions and declarations of the General Assembly and the Security Council."[16/]

Guatemala

59. "Article 38 of the Statute of the Court specifies the law which it shall apply. Various objections have been raised to this Article, particularly to the

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14/ As to which see Jenks, The prospects of international adjudication, pp. 237 et seq.; idem, The Common Law of Mankind.

15/ Röling, International law in an expanded world, pp. 121 and 122.

16/ Gross, op. cit., p. 319.

expression 'civilized nations' in paragraph 1 (c). In our opinion, this Article should be amended in order to meet the objections which have been raised and to permit the Court to function more satisfactorily. In amending that Article, due regard should be paid to the development of law which has occurred since the United Nations Charter was signed, to the Vienna Convention on the Law of Treaties and to other relevant international instruments."

United States of America

60. "Uncertainty regarding the law to be applied by the Court only increases hesitancy to litigate."

Argentina

61. "Regarding the law applied by the Court, it is the understanding of the Argentine Government that the Court applies positive international law as specified in Article 38 of its Statute."

Finland

62. "... the fact that international law as a judicial system is still underdeveloped and deficient in many respects causes many States to adopt an attitude of reserve in bringing cases to the International Court of Justice, particularly on issues involving recognition of its jurisdiction as compulsory".

Mexico

63. "On the question of the law which the Court should apply, the Mexican Ministry of Foreign Affairs on the whole considers Article 38 of the Statute of the Court satisfactory as it now stands; it is the ultimate definition of the sources of international law in their most widely recognized gradation. It is also entirely appropriate, in our opinion, that the Court may not refrain from applying existing law only and decide a case ex aequo et bono unless the parties agree thereto, and that in all other instances it must adhere to pre-existing written and customary law. Finally - this is no more than a secondary problem of drafting - we agree with those who favour the deletion of the qualifying phrase 'by civilized nations' in paragraph 1 (c) on the grounds that it is a verbal

relic of the old colonialism. 'By the international community' or some similar expression could be used in its place. This is merely to improve the wording - highly desirable in the case of legal texts - since we are sure that the honourable judges of the Court would not interpret the above-mentioned phrase in the existing text in any way which was discriminatory or offensive to a State Member of the United Nations."

Madagascar

64. "The authority of the Court... would be further enhanced in so far as the law which the Court applies is clarified in line with the present tendency to codify international rules and customs. In the current state of uncertainty in this field, the trust which States place in the international judges will lead to greater confidence in the validity of the legal principles which the Court works out and applies to concrete situations."

Iraq

65. ".... there is no doubt that the accession to independence of many new States and the evolution of new political, economic and social systems in various countries have introduced new forms of civilizations and new legal systems which sre atill inadequately represented on the International Court of Justice. Although, admittedly, some effort has been made to remedy this state of affairs, as is apparent from the United Nations significant work in the codification of international law, yet this effort falls short of being an effective remedy. The inadequate representation of the new forms of civilization and legal systems has created a situation whereby the International Court of Justice applies a system of law the applicability of which is disputed by many States because they have not participated in the formulation of that system. There should be a greater realization, therefore, that new bodies of law are emerging, a fact that necessitates a fresh look at the very sources of the law itself and their relative priority."

Austria

66. "The law applied by the International Court of Justice could be enlarged by revising Article 38 of the Statute to include binding directions issued by

international organizations (such as regulations, rules, and decisions of the Security Council). Non-binding resolutions and declarations by international organizations should be included in Article 38, paragraph 1(d) as 'subsidiary means for the determination of rules of law'."

Yugoslavia

67. "The role of the Court in regulating basic tasks of the United Nations, essentially depends upon the codification and modernization of international law; hence the Court can also serve as a factor in progressive interpretation of international law in the same way as its codification must reflect signs of progressive development.

68. "Having in mind the results achieved in the field of the codification and progressive development of international law, the Yugoslav Government considers that they enable the Court to apply new law, to more resolutely utilize new legal conceptions that have emerged and have been asserted after the Second World War."

4. The general approach to the question of the enhancement of the role of the Court

Poland

69. "The Government of the Polish People's Republic has always supported any constructive initiative aimed at more effective implementation of the principle of the peaceful settlement of international disputes. Presently /it/ joins with the efforts undertaken with a view to enhancing the effectiveness of the International Court of Justice. It is the considered opinion of the Government of the Polish People's Republic that these efforts should be aimed at using the possibilities existing under the present Statute rather than at introducing changes in it since any change on the Statute would amount to the revision of the United Nations Charter."

Cyprus

70. "... the sooner it is realized that the adjudication by the Court consists in an objective, detached and impartial consideration of an international dispute in accordance with the law and it may be resorted to as a better alternative to other means of solution of international differences the better for the building up of confidence in the Court. It will also contribute to the enhancement of the role of the Court in the international legal order if the recognition of the compulsory jurisdiction of the Court under Article 36, paragraph 2 of the Statute is depoliticized and extended and the reservations for its adoption not only are restricted to the possible minimum 17/ but also are subjected to certain conditions.18/

17/ See the Declaration of the United States of 14 August 1946; the "Connally amendment", in the words of Gross, op. cit., p. 271, "struck a most damaging blow at the Court"; see also Kelsen, op. cit., p. 785, and pp. 525 et seq., and 528 et seq., regarding other reservations by other States. See Waldcek, The decline of the optional clause, in 32 British Yearbook of International Law (1955-56), 244-248. See also the proposal of Lauterpacht to give to the States the right of contracting out the optional clause which should be the governing principle; see also Hambre, op. cit., pp. 183 et seq.

18/ See Gross, op. cit., pp. 313 et seq.

Laos

71. "All States Members of the United Nations should be required to submit to the jurisdiction and decisions of the Court."

Norway

72. /The Norwegian Government/ "would be ready to support all measures which could make the Court's work more efficient, increase the standing and authority of the Court and thereby encourage States to have more frequent recourse to the Court. Whereas some reforms of the Court might necessitate changes in the Statute of the Court, it is the opinion of the Norwegian Government that there exist ample opportunities for improvement of the work of the Court without such changes. In this connexion the Norwegian Government would express the hope that the revision of the Rules of Court which the Court embarked upon in 1967 will soon be completed and that the new Rules will correspond better to present day needs providing for more expeditious forms of procedure and rendering the participation of the parties less onerous."

Denmark

73. "Unless the trend /to move away from general acceptance of the concept of judicial settlement of international disputes/ can be reversed, practical reform of the Court's rules and practices might have no real impact on the present situation."

United States of America

74. "... the attitude of States toward use of the Court must be changed. It is the opinion of the United States that many and perhaps most of the institutional and procedural deficiencies of the International Court of Justice can be overcome and respect for and use of the Court greatly enhanced. The indispensable step in effecting these changes, however, is recognition and acceptance by States of the value to themselves and to the world as a whole of a responsible legal order and of a viable international judiciary at its core. In that context, the United States strongly favours this review by the General Assembly of the role of the International Court of Justice. Although revisions which might require amendment

of the Statute of the Court should not be excluded from this review, the strongest possible effort should be made to revitalize the Court within the present provisions of the Statute. The United States believes that such an effort could include examination of the issues outlined in Sections II through IV below."

Italy

75. "Until an adequate study of the matter has been carried out by the United Nations, it seems premature to put forward detailed views and proposals concerning the specific points covered by sections II-IV of the Questionnaire. In general, it is felt that sections II-IV rightly touch upon the most crucial aspects of the International Court of Justice's structure and functions. The items covered therein should all be included, therefore, within the scope of the proposed review of the role of the Court....

76. "A review of the role of the International Court seems ... highly desirable. It should be possible, by such a review, to make an accurate study of the causes of the Court's lack of popularity and to explore ways and means to secure greater support for the Court and its utilization in the interest of all countries."

Finland

77. "The Government of Finland, recalling that Finland accepted already in 1958 the optional clause concerning the jurisdiction of the International Court of Justice, does not see the issue in question primarily as one related to the position, composition and amendment of the Statute of the International Court of Justice but considers it important to study proposals and implement measures through which the confidence of States in the International Court of Justice can be increased. One such measure was perhaps the decision of the Security Council on Finland's initiative concerning the request for an opinion on the legal significance of resolutions relating to Namibia. The Finnish Government is ready to consider all proposals aimed at the enhancement of the effectiveness of the institution, even if their implementation should require minor amendments of its Statute."

Japan

78. "The Government of Japan considers that the debate of the Sixth Committee on the item /during the twenty-fifth session of the General Assembly/ [19] was highly useful because it provided Member Governments with an opportunity not only to remind themselves of the important role the Court is expected to play but also to explore ways and means to make the Court a more effective institution commensurate with its place in the Charter. In the course of the debate, various views were expressed on possible remedies to be taken in order to enhance the effectiveness of the Court. These views could be broadly divided into two groups: one focused attention on the Court's relationship with the international community and suggested measures to strengthen such relationship; the other dealt with the more technical and institutional aspect of the matter and pointed out certain steps to expand the activities of the Court. A typical example of the former is to encourage a wider acceptance by Member States of the Court's compulsory jurisdiction while the latter is represented in various proposals to widen the scope of the functions of the Court, including the use of its advisory opinions. Both approaches have their own merits as well as shortcomings. Many of the suggestions advanced seem to have constructive elements in them though some of them may not have immediate remedial effects while some others may be found to be difficult to implement.... It is essential that the United Nations should leave no stone unturned in trying to bring the Court even closer to the place it deserves as the highest tribunal of the community of nations."

Sweden

79. "The General Assembly ought ... to seek means of giving the principal judicial organ of the United Nations the rightful place that the Charter assigns to it and to explore all ways likely to enhance the effectiveness of the Court.

80. In noting the fact that the General Assembly, in its resolution 171 (II), stressed the need for the organs of the United Nations and the specialized agencies

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19/ See Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 96, document A/8238.

to refer important points of law to the International Court of Justice for advisory opinion and also recommended as a general rule that States should submit their legal disputes to the International Court of Justice, the Swedish Government is also aware of the several suggestions related to the function of the Court that have been made in the past and, most recently, in the course of the debate in the Sixth Committee at the twenty-fifth session of the General Assembly of the United Nations.

81. "Many of these suggestions would entail for their realization amendments to the United Nations Charter and/or to the Statute of the International Court of Justice. The Swedish Government, while sensible of the fact that it may meet with considerable difficulties to bring about amendments to the Charter of the United Nations and to the Statute of the International Court of Justice, deems it appropriate that suggestions to this effect should not be a priori left outside the scope of the present review of the role of the Court. However, should it be impossible to enhance the usefulness of the Court by amending the Charter of the United Nations or the Statute of the Court, it would remain for the General Assembly and the Court itself to find other ways and means of inducing States to submit their disputes of legal character to the International Court of Justice. In passing, it should be borne in mind that the question of a revision of the United Nations Charter - which might also touch upon the provisions relating to the International Court of Justice - is listed on the agenda of the General Assembly (resolution 2697 (XXV))."

Canada

82. "The Canadian Government considers ... that there is an urgent need for consultation within the United Nations on means of enhancing the effectiveness of the International Court of Justice. The Canadian authorities have given considerable thought to the broad basic problems affecting the Court, including the attitude of States towards the Court, the reasons for such attitudes, the meaning and place of judicial settlement among the various peaceful means of settlement of disputes and the law applied by the Court. These are questions of great complexity and require thorough and continued consultation among all members of the international community. Thus, while the Canadian Government supports continued examination of

the basic questions, it is of the opinion that in the short term there would be practical advantage in avoiding such questions, considering instead the implementation of certain proposals to improve the procedure of the Court without amending its Statute. The suggestions /presented by Canada/ do not therefore constitute dramatic new reforms, but rather represent specific proposals for more comprehensive implementation of the articles of the Court's existing Statute."

Cuba

83. The Cuban Government refers to "its objections to any amendments to the present Statute of the Court".

Madagascar

84. "Judicial settlement could only be fully effective if the States accepting the jurisdiction of the Court were to consider treating its decisions as res judicata. It might be suggested that, as a first step, the General Assembly of the United Nations should invite States to authorize their courts to apply, where appropriate, the decisions of the Court, where their constitution or the rules of their legal system do not so provide."

Ukrainian SSR

85. "The Ukrainian SSR ... does not favour the idea of reviewing and strengthening the role of the Court, for which purpose it is proposed that the Court's procedure and functions should be amended. Such endeavours are in essence aimed at revising the basic provisions of the Statute of the Court. This position was expanded by the representative of the Ukrainian SSR at the twenty-fifth session of the United Nations General Assembly and was reflected in the draft resolution on the question (A/C.6/L.802),[20] which the Ukraine sponsored together with the delegation of Czechoslovakia.... The Ukrainian SSR believes that the effectiveness of the Court can be enhanced not by strengthening its role, broadening its competence and making States subject to its compulsory jurisdiction, which could be prejudicial to the national sovereignty of States but by strict observance of the provisions of the United Nations Charter and the Statute of the Court."

20/ Ibid., para. 9.

Czechoslovakia

86. "Czechoslovakia's measure for judging the role of the International Court of Justice is to what extent the activity of the Court is in conformity with the United Nations Charter, how it corresponds to the fundamental task of the United Nations to maintain international peace and security and to what extent the Court observes the principles of the Charter and the universally recognized norms of international law... A way.... for achieving higher effectiveness of the International Court of Justice is to bring the activity of the Court strictly in harmony with the provisions of the United Nations Charter and with the Statute of the Court which forms an integral part of the Charter. This is however a matter which should be solved by the Court itself and these aims cannot be achieved by a revision of the Court's Statute or by a revision of the United Nations Charter. Any effort aimed at a revision of the Court's Statute and, in connexion with that, at a revision of the United Nations Charter of which the Statute is an integral part would not correspond to the interests of strengthening the world peace and promoting the role of the United Nations. Therefore, also the question of examining the activity and the role of the International Court of Justice should be the subject of consideration within the Court itself. The fact that the Court is presently studying its rules of procedures proves that it is searching for the ways of harmonizing its activity with the tasks laid upon it. It is therefore necessary to enable the Court to bring its work in this respect to an end."

France

87. "The situation does not appear to be such as to make consideration of it a matter of urgency. In particular, it does not appear that if a problem does exist, the solution to it should be sought in a revision of the texts governing the Court or in an expansion of the Court's jurisdiction not corresponding to the needs of all sovereign States. The problem is not that the legal rules embodied in the Statute of the Court should be made more satisfactory for States but rather that States should feel the need and show the effective desire to resolve their differences by means of judicial settlement and should make use of the possibilities offered for that purpose by the existing texts. Unless States take such action,

it will serve no purpose to revise the Statute of the Court or to enlarge its jurisdiction.

Union of Soviet Socialist Republics

88. "The role of the Court as an organ for the peaceful settlement of disputes depends primarily on the extent to which its decisions conform to the fundamental task of the United Nations, the maintenance of international peace and security. The authority of the Court is also determined by the extent to which its activities promote compliance with the provisions of the United Nations Charter and with the universally recognized principles and rules of contemporary international law. Only by following this course will the Court be able to justify the hopes placed in it and contribute to the development of co-operation between States with different social systems.

89. "It is this course of action and not the revision of the provisions of the United Nations Charter and of the Statute of the International Court of Justice that can enable the Court to function better. Thus, the success of the Court's activities and its authority depend primarily on the Court itself. It is to be noted that the Court is at present engaged in revising its Rules and it should be permitted to complete its work."

Iraq

90. "It is to be observed... that the effective functioning of the International Court of Justice - as indeed of any other institution - depends, to a large extent, on how far its mechanism corresponds to the realities of the order of which it forms part. This question is of the utmost importance since the International Court of Justice is the principal judicial organ of the United Nations ... the Court is not sufficiently keeping pace with the developments of the international community. Thus every effort should be made to improve the functioning of the Court."

Austria

91. "It would be welcome if ways and means could be found to strengthen the part taken by the Court in the peaceful settlement of disputes. The significance attributed by Austria to the strengthening of the Court's role is emphasized by the fact that Austria recently made a declaration under Article 36, paragraph 2 of the Statute recognizing the jurisdiction of the Court as compulsory."

Yugoslavia

92. "During the twenty-fifth session of the General Assembly of the United Nations Yugoslavia has voted in favour of resolution 2723 (XXV) entitled 'Review of the Role of the International Court of Justice'. The Yugoslav Government deems useful the action initiated by a group of countries to study and examine this problem. In spite of the sensitivity of this problem and the differences reflected in the debate during the twenty-fifth session of the General Assembly, the Yugoslav Government is of the opinion that it is possible, without risking changes of the Statute of the International Court of Justice, to improve the Court procedure and to find solutions enhancing the role and prestige of the International Court of Justice.

93. "One of the main preconditions to a successful examination of this problem is the readiness of States to address themselves and to utilize the services of the International Court of Justice, which in many aspects depends upon the law applied by the Court, methods of work, speedy dispatch of business and its structure, more specifically, its representation of legal systems and regions. In the opinion of the Yugoslav Government these constitute two closely linked elements which must be borne in mind when exerting efforts toward achieving greater effectiveness and securing wider recourse to the Court in international relations."

II. ORGANIZATION OF THE COURT

1. The composition of the Court

Poland

94. "The present composition of the Court does not yet fully correspond to the criteria given in Article 9 of the Statute of the Court. It must, however, be recalled at this point that in the light of the Court's procedure, which requires only simple majority of votes for taking decision, any selection of judges based on the criterion of representation of a group of States, or on their form of civilization or law system, as a sole factor, cannot be entirely satisfactory. They must be also selected as individual persons enjoying full confidence of all States. It should be borne in mind, furthermore, that Article 9 of the Statute was introduced by the Committee of Jurists in 1920 only as an indispensable compromise."

Cyprus

95. "The composition of the Court is of great significance as far as the confidence in the Court, its impartiality and objectivity are concerned and especially in the light of the changing international relations.

96. "There has been on the whole satisfaction with its present composition[21] although certain suggestions were made for the increase of its members and the qualifications of the judges. Proposals were also made that they should represent not only 'the principal legal systems of the world' but its 'special systems' as well, whilst others support the view that it would have been preferable to speak to legal cultures."[22]

Laos

97. "It is necessary ... to seek a criterion whereby seats would to some extent be allocated on a geographical basis."

21/ Disappoijntment was felt, however, by the world's public opinion as a result of the judgement in the South West Africa case.

22/ See Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 96, document A/8238, para. 37.

United States of America

98. "... States must feel that the relevant tenets of their particular legal systems will be understood and objectively considered by the Court. Broad and balanced representation in accordance with Article 9 has been sought by means of informal allocation of seats among the different basic legal systems of the world. The composition of the Court has changed over the years to reflect the change in character of the General Assembly membership. It now has approximately the same geographical composition as the Security Council, a distribution of seats which was agreed upon in the 1960's after the General Assembly had acquired approximately its present size and configuration.

99. "A number of States, however, have advocated that the number of judges be increased in an attempt to broaden the present composition of the Court. Although in the future it may be appropriate to expand the size of the Court, the United States strongly feels such a move would be inappropriate at this time. There is at present no evidence that expansion of the number of seats would lead to greater use of the Court, and absent such a result, expansion would only intensify criticism that the Court is too large and too expansive.

100. "It has been suggested that, rather than expanding the Court in order to broaden its representative character, the Court might decide cases by a two-thirds rather than simple majority, thereby ensuring that the views of all legal systems be fully taken into account in the Court's deliberations. A judgment based on less than a two-thirds majority might be delivered in declaratory form, on the basis of which the parties would negotiate a settlement. This alternative might be studied further."

Argentina

101. "During the debate on this item in the Sixth Committee, many representatives of countries whose disinclination to resort to the Court is well-known questioned its composition. In view of the fact that the Court, since its establishment, has consisted of 42 judges - 17 from Europe, 14 from the the Americas, eight from Asia and Australia and only three from Africa - it would be advisable to consider the possibility of making the composition more equitable by increasing the number of judges."

Finland

102. "The composition of the International Court of Justice, the number and competence of its judges are in the opinion of the Government of Finland, satisfactory. Furthermore, it can be noticed that in recent appointments to the Court, special attention has been paid to equal distribution of its members both geographically and in accordance with different legal systems. If the number of judges at the International Court of Justice is to be increased for the further development of this distribution, /this/ would obviously mean in practice raising the number of members to at least 25."

Mexico

103. "In view of the very regrettable lack of contentious cases pending before the Court at the moment, we do not at the present time consider it necessary to increase the number of members. This does not mean, however, that we reject a priori the prudent expansion in membership which might some day be dictated by circumstances. There should not, in any event, be an excessive number of judges, since that would render even more difficult the deliberations of a body in which the greatest possible degree of unanimity is highly desirable. It was on these considerations that the Institute of International Law based its examination of the question; the Institute recommended that there should be a maximum of eighteen judges, and then only if the large volumes of cases submitted to the Court made such an increase necessary.

104. "The large number of States which are now Members of the United Nations is not a factor which should necessarily be reflected in the composition of the Court. Even with its current membership, it is quite possible for the principal legal systems of the world to be represented in the Court, provided that, in electing its members, due regard is paid to equitable distribution, both as regards the geographical factor and the legal thinking derived from the various cultures."

Switzerland

105. "An increase in the number of judges at the Court has been one of the most frequently discussed proposals for reform. The main argument which may be adduced to support this change is the considerable increase in the number of States

comprising the international community which has occurred since the Court was established. The most serious objection to an increase in the number of judges, on the other hand, is the fear that it would be difficult for a Court with too many judges to function properly. The present composition of the Court appears to ensure fairly satisfactory representation of the various regions and various legal systems of the world. There therefore seems to be no compelling reason to introduce a reform which might jeopardize the satisfactory functioning of the Court. Accordingly, the Swiss Government is opposed to an increase in the number of judges."

Sweden

106. "... the Swedish Government believes that an increase of the number of judges will neither be necessary nor justified; it may not only entail additional expenses for the United Nations but will make the Court's own handling of a case or an advisory opinion more cumbersome."

Canada

107. "Canada is pleased to observe that the Court now appears to be widely representative of the principal legal systems of the world." It refers to "the standards of balanced representative character and impartiality which now exist."

Cuba

108. "... in order to remedy the difficulties of the Court, its composition should be improved so that all currents of modern legal thinking are equitably represented."

Madagascar

109. "In the view of the Malagasy Government, the composition of the Court should be revised: the number of judges should be increased in proportion to the projected expansion of the Court's role ... and the ensuing increase in the number of cases."

Iraq

110. "The representative character of the Court is very much interrelated to the problem of the law to be applied. Consequently, a fuller and more adequate

reflection of the new forms of civilization and legal systems in connexion with the law to be applied by the Court would, of necessity pave the way for more adequate representation in the person of the judges to be elected to the bench of the Court."

Austria

111. "The idea of increasing the membership of the Court is not viewed very favourably by Austria, as such a step might reduce the Court's efficiency."

Yugoslavia

112. "The International Court of Justice should be composed so as to represent not only all legal systems, that is, legal cultures of the world, but also regions to which Member States of the United Nations belong."

2. The mode of designation of judges and the length of their mandate

Cyprus

113. "Regarding the process of the nomination of candidates, various proposals were made[23/] but it seems ... that the proposal of the late Professor Lauterpacht for the creation of a preparatory and explanatory body merits consideration. In this respect it should be emphasized that depoliticizing the elections would tend to strengthen the confidence in the Court.

114. "With regard to the term of office of the judges probably a fixed period instead of partial renewal would tend to securing more stabliity and cortinuity in the litigation."

Laos

115. "Account should be taken (a) firstly, of the qualifications and competence of the candidates for the office of judge...".

United States of America

116. "Respect for the competence and objectivity of the judges is essential to fundamental confidence in the Court. To elicit that respect, Article 2 of the

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23/ See Gross, op.cit., pp. 286 et seq..

Court Statute requires 'independent judges elected regardless of their nationality from among persons of high moral character', persons who possess the qualifications for highest judicial office and who have recognized competence in international law. In addition, Article 9 contemplates that the Court should be representative of the main forms of civilization and of the principal legal systems of the world. Although many highly qualified jurists have been elected to the Court, the nomination and election procedures have been subject to intensive political pressures which have caused some States to raise questions concerning the independence and objectivity of the Court. The critical element in ensuring the nomination and election of outstanding and independent jurists is the strong determination of States to do so, rather than the particular procedures followed. Presently, prescribed procedures are satisfactory; therefore, efforts need to be directed toward ensuring bona fide application of those procedures rather than substitution of an entirely new system. Within the scope of present procedures a number of constructive steps can be taken to encourage election of independent judges. In accordance with Article 6 of the Statute, before making nominations, national groups should conduct extensive consultations with national and regional bar associations, universities, judicial authorities, legal scholars and other concerned groups in order to obtain recommendations regarding nominations. Similar consultations among national groups might be undertaken on the regional level to encourage support for the most outstanding national candidates. States should also seek to isolate the election of jurists to the Court as far as possible from other pressures of political accommodation.

117. "In the context of efforts to increase the independence and representative character of the Court the term of office of the judges should be examined. It is the opinion of the United States that the present nine-year term is the minimum length needed to encourage independence of the judges. The age of some judges, however, has been raised as a reason for lack of confidence in the adaptabliity of the Court to the new requirements of a changing international legal system. The United States believes, therefore, that a mandatory retirement age of 72 should be adopted and that national groups should seek to nominate only candidates who could complete their terms of office before reaching that age."

Switzerland

118. "During debates in the United Nations it has been suggested that the term of office of the judges should be reduced, no doubt in order to enable the various regions of the world to be represented more equitably, by means of rotation. This point is mentioned in paragraph 55 of the Sixth Committee's report.[24/] Although we understand the considerations underlying such a suggestion, it may nevertheless be useful to draw attention to the advantages the Court may derive from long service by jurists of great authority. In this connexion, we need only refer to the valuable contribution to the Permanent Court of International Justice made by the great jurist Anzilotti, who sat in the Court throughout the eighteen years of its real existence. Apart from such contributions of outstanding value, a relatively long term of office and limited, progressive rotations make it possible to strengthen the independence of the judges and to maintain within the Court a continuity which ensures stability of judicial practice. There is no need to amend the Statute in this respect; the wish might merely be expressed, in a simple General Assembly resolution, that the term of office of certain judges should in some cases be extended by re-election.

119. "On the other hand, if it was felt that a further step should be taken to ensure continuity within the Court, this could be achieved by taking up the proposal adopted in 1954 by the Institute of International Law at its session in Aix-en-Provence:

> 'With a view to reinforcing the independence of the judges, it is suggested that members of the Court should be elected for 15 years and should not be re-eligible. In this event an age-limit should be laid down; it might be fixed at 75 years.
>
> Provisions should also be made whereby, contrary to the present text of article 51 of the Statute, new members of the Court would be elected for terms of 15 years, subject to the age-limit, irrespective of the terms for which their predecessors held office.' 25/

The existing text of Article 15 of the Statute, which provides that "a member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term", results in an excessively

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24/ Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 96, document A/8238.

25/ Annuaire de l'Institut de Droit International 45 II, p. 290.

rapid turnover if the person appointed as a replacement is not re-elected after his partial term of office has expired. The adoption of the provision proposed by the Institute of International Law would eliminate this disadvantage. Another effect would be that, in the event of special elections after a seat became vacant prematurely, that seat would be filled on a permanently staggered basis, to the regular partial rotation of the members of the Court. Any disadvantage that might result from such a procedure, because of the need to organize additional elections, would be offset by the advantage of a certain staggering of the rotation process. Regular replacement of a fraction of the total membership, which would no longer necessarily be one third, would occur at intervals of five years, thereby ensuring greater continuity. If it was felt that a term of office of fifteen years was too long, a compromise period of twelve years might be agreed on, with the result that the interval for regular rotation would be fixed at four years.

120. "With a view to strengthening the independence of the judges and depoliticising the elections, it would be desirable either to elect judges for life, as is the case in many States (possibly with an age-limit), or to appoint them for a relatively long fixed period without the possibility of re-election. If there is no desire to amend the Statute in this way at the present time, the General Assembly and the Security Council might set guidelines for themselves along these lines by adopting a resolution.

121. "Irrespective of the foregoing observations, it might be advisable to conduct the elections held at the time of rotation of one third of the seats on the basis of a vote for each individual seat rather than a simultaneous vote for all the seats to be filled. The Institute of International Law made this proposal also in its abovementioned 1954 resolution, taking up in this connexion an idea expressed by Max Huber, which was itself prompted by the electoral system of the Swiss Federal Council. In this respect, the former President of the Permanent Court noted in his report to the Institute:

> 'Since the adoption of the Swiss Federal Constitution of 1848, the Federal Assembly - which for this purpose is composed, of both the Chambers - has elected the Federal Council, which is composed of seven members, for a period of four years with the possibility of re-election, by appointing one member of the Council after the other, following the order of seniority of service of the outgoing members. No canton may be represented by more than one member.

'Thus, although three seats are from the outset, in accordance with a political tradition, reserved for three of the principal cantons, it has proved possible to take successive account of, firstly, the three different linguistic regions, secondly, the two main religious faiths practised in the country, and lastly, the main political parties themselves and, at present time all of these factors simultaneously.' 26/

"By amending the electoral process in this manner, it would be possible to prevent a recurrence of the situation which arose at the 1963 election, when a candidate obtained a majority in a simultaneous vote, first in the Security Council and then in the General Assembly, but could not be elected because the Council, in a subsequent vote, was obliged to reduce the number of candidates elected by it to the number of vacant seats."

122. Furthermore, it might be advisable to conduct the elections to the Court independently of the other business of the General Assembly; for example, they could be held on the first day of the session or even on the eve of the official opening of the session. A reform on these lines, which was also suggested during the deliberations of the Institute of International Law, would enable the elections to be held in a calmer atmosphere, unaffected by the political preoccupations and manoeuvres which are customary at the time of elections to other organs of the United Nations."

Sweden

123. "Article 2 of the Statute sets out the qualifications which a judge of the Court should possess. The members of the Court are elected for nine years. With such a long term of office, and with the possibility of re-election, the ensuing result has been that the average age of the members of the Court tends to be very high. The Swedish Government wishes to draw attention to this fact and ventures to suggest whether it would not be advisable to introduce some sort of age limit to be applied to the members of the Court, by fixing, say, the age of 75 as a generally applicable retiring age."

Canada

124. "It may be that eventually some consideration should be given to suggestions which bear on the method of electing judges and on the length of their mandate,

26/ Ibid., 45 I, p. 421.

but any proposals in this regard should only be considered if they will clearly maintain or enhance the standards of balanced representative character and impartiality which now exist."

Madagascar

125. "In order to make the Court more representative, it would be advisable to consider electing the judges only for a non-renewable term of office. More rapid rotation of the judges would not only permit more equitable national representation, but would also constitute an additional guarantee of independence."

Yugoslavia

126. "... it is vital to constantly bear in mind the fact that judges must possess the highest professional qualifications and moral characteristics. As regards the duration of mandate, the possibility for shortening the terms should be explored. This would enable the Court to renew itself more often, and at the same time provide a possibility for re-election."

3. Recourse to chambers, as provided in Articles 26 to 29 of the Statute

Poland

127. "The present organization of the Court although certainly not perfect should be considered flexible enough to implement the necessary improvementes. Particular attention should be focused on the Statute's provision on the possibility of forming chambers for dealing with particular categories of cases as well as the possibility of creating chambers of summary procedure (Articles 26-29)."

Cyprus

128. "The length of the proceedings with the great costs and delays involved before the full Court has been a matter of concern to the Court itself and to the various Governments and has actually barred many recourses to it. A former Legal Adviser of the British Foreign Office, the late Sir Cecil Hurst, submitted some years ago that international courts of a less formal, cheaper and more expeditious character could be created to deal with international law suits of not great importance. There must be many disputes on such matters which could be dealt with more rapidly and would not necessarily need to be tried by a Court consisting of fifteen judges. Already the Statute contemplates such an eventuality. Under its Article 26, paragraph 1 'The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases....'. Furthermore under the ensuing paragraphs the Court may at any time form a chamber for dealing with a particular case and at the request of the parties may hear and determine cases in chambers.

129. "It has also been suggested that the Court may make its services available on a decentralized basis on the pattern of the English system of the judges on circuit."

United States of America

130. "The United States supports the establishment and wide use of ad hoc chambers of the Court for legal problems requiring expertise in technical areas, and for peculiarly regional problems, for whose solution all parties would

prefer to address a regionally oriented bench. The Court has adequate authority to create such chambers under the present Statute; liberal exercise of that authority could make the forum of the International Court of Justice considerably more flexible and mobile, and its use less costly and less formal.

131. "To encourage use of such chambers, States might write into future treaties provisions referring disputes to a special chamber rather than to the full Court, if appropriate. The prospect that different chambers might arrive at different conclusions on similar issues could be dealt with by providing for appeal to the full Court but such appeal should be limited to cases of conflicts between chambers.

132. "The United States favors greater use, whenever appropriate, of the Court's chamber of summary procedure created pursuant to Article 29 of the Statute. Although not all cases can or should be handled in this forum, the length of time necessary for litigation in some cases in the past has been cited as discouraging use of the Court."

Argentina

133. "... the Argentine Government considers that recourse to the chamber of summary procedure might constitute a means of speeding up the administration of justice by the Court, with the result that the expenditure now incurred by the parties as a result of the lengthy nature of proceedings would be reduced."

Finland

134. "If the number of judges is to be increased ... to ... 25 the handling of business in plenary sessions would apparently become exceptional and be replaced by deliberation by chambers. The possibility of having issues dealt with by chambers which are composed of judges accepted by the parties concerned and representing a certain geographical area or legal system has in fact, been regarded as one way of increasing the working scope of the International Court of Justice; chambers may be formed for the above-mentioned purpose also without the need to increase the number of judges or amend the Statute. According to Article 31 of the Statute, the parties have the right to appoint their own ad hoc members also when cases are heard and determined by the chambers."

Switzerland

135. "The role of /the/ chamber /of summary procedure/, which is already provided for in Article 29, was also mentioned in the course of the deliberations. Recourse to this chamber is obviously dependent on a decision by the parties. As experience shows, however, this institution does not appear to be destined for a great future - a fact for which there is a ready explanation: if a State submits a case to the Court, it does so because, by definition, it considers the case to be important. It will therefore wish the case to be given detailed consideration in accordance with the normal procedure before the full Court, and only infrequently will it evince any interest in the speedy despatch of business by summary procedure in accordance with Article 29. It therefore seems that the present procedure is sufficient to meet any need for rapidity that might exceptionally become apparent, and that there is, consequently, no need to envisage any reform. A General Assembly resolution might, however, draw the attention of States to the possibilities offered by this institution."

Sweden

136. "No State has ever made use of the possibility of having a dispute adjudicated on by the annually formed chamber of summary procedure (Article 29 of the Statute), nor by a special chamber as provided for in Article 26 of the Statute. By virtue of Article 26, paragraph 2 of the Statute, it is in the hands of the parties to a dispute to request that a special chamber be formed for dealing with their case. In determining the number of judges constituting the chamber, the Court shall have the approval of the parties. On the other hand, the parties are without any influence when it comes to the election of the individual judges of such a chamber. The President of the special chamber as well as its members shall, according to Article 24, paragraph 2 of the Rules of Court, be elected by the Court, by secret ballot, and by an absolute majority of votes. The Swedish Government is of the view that the use of a special chamber could in certain circumstances be of great advantage to the parties.

137. "The Swedish Government believes that the procedure envisaged in paragraph 2 of Article 26 of the Statute would prove more attractive to potential litigants if the Rules of Court were modified to the effect that also the election of the individual members of a chamber should be based on a consensus between the Court

and the parties. In this way the parties will have the opportunity of submitting their case to a chamber of their choice, thereby avoiding ab initio also the delicate question of disqualification of a particular chamber member on account of incompatibility (Articles 17 and 24 of the Statute). In this way, that is with the consent of the parties, a special chamber could be constituted either as a regional chamber or as a chamber composed of judges possessing expert knowledge of the particular subject to be dealt with. Chambers thus constituted could, with the consent of the parties and for their convenience, sit and exercise their functions elsewhere than at The Hague; such an arrangement might also lead to a reduction of the costs of litigation for the parties."

Canada

138. "There are certain suggestions which the Canadian Government believes would be worthwhile considering with a view to expediting the decision-making process within the Court. For example, the Court does not seem to have made full use of the terms of Article 29, which provides for a summary procedure, or of the provisions of Article 30, which allows for the admission of oral evidence. Consideration might also be given to a means of reducing voluntarily the massive volume of written submissions which are placed before the Court in the process of hearing a single case.

139. "It may also be worthwhile giving consideration to fuller utilization of Article 26 of the Statute. A variety of situations can be imagined where the effectiveness of the Court could be enhanced through the creation and use of functional and regionally oriented chambers of the Court. Under this article of the Statute functional courts may be created to hear specific cases relating to certain types of problems - the examples given in Article 26, paragraph 1 refer to labour and transit and communications cases, but this clearly need not be taken as an exhaustive list. For instance, consideration could be given to the feasibility of including in treaties concerning the environment, the seabed and unlawful interference with international civil aviation, provisions allowing reference to specially constituted chambers of the Court, or to using individual judges, either within or outside the context of the Court, on ad hoc panels of arbitration...

140. "Under Articles 27 and 28, with the consent of the parties, chambers may sit and exercise their functions elsewhere than at The Hague. This presents a possibility which, when combined with the creation of chambers composed to hear cases of regional significance, or when used to permit the carrying out of expert surveys or technical studies by appointed bodies, could greatly assist in strengthening the usefulness and availability of the Court."

Madagascar

141. "Summary procedure offers many important advantages which the Court itself should bring to the attention of States... the attention /of the Court/ should be drawn to the possibilities afforded by Articles 26-28 of its Statute, by strengthening the system of small, specialized chambers sitting elsewhere than at The Hague."

France

142. "The French Government... has noted that one of the criticisms levelled against the current functioning of the Court relates to the ponderous nature of its procedures. Without commenting on the justification for such criticism, it may be observed that the Statute itself provides a solution for States which might wish to have recourse to it. In this connexion, reference should be made to Article 29, and, again, to Articles 26 and 28, which contain all the elements needed to streamline and speed up procedures, and to bring justice closer to those subject to it if they so wish."

Iraq

143. "More use should be made of the five-judge chamber of summary procedure which the Court elects annually in accordance with Article 29 of the Statute. In this connexion, no criticism can legitimately be directed against the Court itself. For, while the parties to an international dispute have always been free to elect to use this procedure, yet they have not done so in the life of the International Court of Justice."

4. Creation of regional chambers or courts

Argentina

144. "The creation of regional chambers is a matter which deserves close study since it could afford a very useful means of promoting a greater readiness on the part of States to submit their disputes to the jurisdiction of the Court."

Mexico

145. "... since the intended purpose of the Statute of the Court (Article 9) appears to have been the living interpenetration of the major legal systems within this high tribunal so as to promote the development of an international law... having truly universal scope, there is bound to be some doubt as to whether the suggestion to create so-called regional chambers would be entirely compatible with this larger purpose. The possibility of regional organizations setting up judicial bodies of their own to secure the peaceful settlement of local disputes is one thing, but to transfer this to the world Court would be quite another. Were this to be done, might not the regional chambers act as watertight compartments promulgating or applying an international law that would differ from one region to the next? Judging from Articles 28 and 29 of the Statute of the Court, the chambers which can now be formed are not set up on the basis of regional considerations but rather to expedite proceedings or consider certain highly technical cases, the unity of international law being preserved throughout. Thus in one direction we have specialization by subject-matter while in another very different one, fraught with implications, we have specialization by region."

Switzerland

146. "The creation of regional chambers is one of the ideas that has come up most often in discussions concerning the reorganization of the Court. The purpose of such an innovation would clearly be to allow for the more effective expression in international judicial practice of the legal systems which have developed in various civilizations and cultures. The idea has, however, encountered objections. The fear has been expressed, for example, that it might lead to the fragmentation

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of international law, whereas the latter should be seen strictly as a single juridical order having universal scope. In his report to the Institute of International Law at its 1954 session, Max Huber took up this question in a rather different context, referring to the section of Article 9 of the Statute on representation of legal systems within the Court. His thoughts on the subject are nevertheless worth recalling here since the 'legal systems' idea expressed in Article 9 is clearly the same as the one underlying the proposal to create regional chambers. Max Huber finds that the idea 'is based on a mistaken notion or a misapprehension', inasmuch as the concept of diversity of legal systems can only relate to national law. 'Conceptions of national law', he goes on, 'particularly in civil and procedural law, may be important in situations involving reference to Article 38 (the general principles of law recognized by civilized nations)'. However, 'the Court must adjudicate according to international law, which is the same for all parties'.27/

147. "Today, however, more than fifteen years after Max Huber made the above comments, it no longer seems possible to keep the notion of regional systems confined to the plane of national law. For one thing, international law possesses certain features of legal regionalism which are very old and well established, although limited in scope to selected areas. We have in mind in this connexion historical systems which have particular rules of positive law based on regional custom or practice in various specific matters. On the other hand, there are phenomena of a regional nature dating from fairly recent years which are characterized not so much by peculiar features in the area of positive law as by a general concept, a different approach to public international law as a whole. In the first category, that of historical systems, one thinks immediately of the Latin American system, which is probably the best known and the most individual. It is the prime example of a system having particular institutions for specific matters such as the practice of asylum and uti possidetis juris. It is also fitting to recall the traditions of Islamic law or the great Asian civilizations, which likewise certainly contain various noteworthy special

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27/ Annuaire de L'Institut de Droit International, 45 I, p. 414.

institutions. In practice, it might happen that in a case involving legal institutions peculiar to a given system, either party or both might have qualms, whether rightly or wrongly, about seeing the case judged by persons unfamiliar with the inner nature of the system. Such misgivings could arise in a matter like the Asylum case, although in that particular instance the two Latin American countries concerned willingly applied to the International Court of Justice in view of its current membership based on universal representation. The second category, involving what we have called 'concept' rather than system, is primarily the consequence of the decolonization movement which restored sovereignty to a large number of African and Asian nations. Some of these nations are expressing distrust of traditional international law as developed in Europe and the Americas. This attitude of distrust must be regarded as a fact and serious thought must be given to its implications. Here again it could happen that some of these States might hesitate to submit a dispute between them to a Court whose judges represented the more traditional approach to international law.

148. "It would indeed be useful therefore to create, among the States parties to the Statute of the Court, groups which would ideally include the various States sharing a particular concept of public international law. Judges who are nationals of States in a given group would form the regional chamber or nucleus of the regional chamber having jurisdiction for the group in question. Two categories of regional groups could be established on the basis of two separate criteria, one involving continental affinity and the other adherence to a particular system of law, such as the Latin American system or the Anglo-American system. With this kind of classification, most States would be eligible for membership in a geographical group and a 'system' group. As a matter of principle, each State would be free to decide whether or not to join a system group. Although a State may adhere to a certain system or concept of international law as a result of its history and traditions, or conversely its more recent policy decisions, it need not belong to the group corresponding to that system or concept for the purposes of its participation in the Court, but it could opt to enter the geographical group in which it naturally fits. To give an example, States applying the Anglo-American system could choose between the

group representing that system and the group for their particular continent. A dispute between two States belonging to the same group could be referred to the group's regional chamber. The chamber would be composed, as indicated above, of judges from the group's States, plus the President of the Court (if he is not already a member) who would serve as president of the chamber, and such additional members - the Vice-President or judges of the Court according to seniority - as would be required to achieve a quorum of five judges, to whose number judges ad hoc would be added where appropriate. In the case of a dispute between two States belonging to different groups, the regional chamber would be a joint body of judges from the States belonging to the two groups expanded in the same way as above to provide for the presidency and to secure the minimum number of five, to which judges ad hoc would be added.

149. "The applicant State would declare its desire to have the case brought before the competent regional chamber upon filing the application instituting proceedings. Failing prior accord between the parties on the basis of a special agreement or in some other manner, the respondent would have the right to reject the jurisdiction of the regional chamber, in which case the matter would automatically be transferred to the full Court. Any procedural decisions required between the filing of the application and the defendant's announcement of his decision concerning the regional Court would take the form of orders issued on the sole authority of the President of the Court.

150. "To avoid the danger of fragmenting international law - the major objection to regional chambers - consideration might be given to introducing a right to appeal judgements of chambers to the full Court, thus safeguarding the integrity of international judicial practice. On the other hand, an appeal procedure might reintroduce the very difficulty which was to have been overcome by creating regional chambers, namely the reluctance of some States to see their affairs decided by judges who do not belong to their group. To reconcile these opposing but equally valid considerations, an appeal case before the full Court should be limited to questions of law, the facts being taken to be established, with the understanding that to safeguard regional legal institutions the existence and substance of a regional custom would be taken to be a point of fact for the purposes of the appeal. It is not entirely clear from Article 26 of the Statute

whether an amendment of the Article would be required to cover regional chambers of the kind in question. The Article authorizes the Court to form chambers 'for dealing with particular categories of cases', which implies a distinction based on the nature of the dispute rather than the identity of the parties. At the same time, it does not appear that the letter of the Article would be violated if it were broadly interpreted to mean that disputes which States wished to settle through a regional chamber constituted a particular category. It does appear impossible, however, to introduce a right of appeal against decisions of the regional chambers without amending the Statute."

Canada

151. "The creation of regional courts with similar jurisdiction as the International Court and with a limited right of appeal, made up of judges with experience in local practices and familiar with problems of the particular region, may also serve to enhance the attractiveness and usefulness of the Court in settling disagreements between States in a particular region. This would be especially true if problems unique to that region were involved."

Madagascar

152. "The creation of permanent regional chambers, which would be costly to maintain and would have a fairly low level of activity, would not be justified unless States agreed to end the unprofitable practice of setting up increasing numbers of specialized international or interregional tribunals (European Court of Human Rights, European Court of Justice, proposed sea-bed tribunals, etc.)."

France

153. "The creation of regional chambers of judges does not seem... likely to be productive in terms of extending recourse to the system of international justice. In point of fact, it could not make up for any lack of will on the part of States in this regard. As has been said before, if States prefer to submit their disputes to judges of a given legal system, they can do so at any time by resorting to arbitration under treaties they have signed for the purpose, if necessary choosing their arbitrators from among members of the Court. Since this is not the practice of States, it may be concluded that they do not feel a need for such arrangements.

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154. "In addition, the work of regional chambers might lead to a fragmentation of international law, which would seem out of keeping with past efforts undertaken in this sphere in the United Nations.

155. "Finally, regional chambers would not provide a means of satisfactorily settling disputes arising between States adhering to different legal systems."

Iraq

156. "It is undoubtedly possible under the Statute to crate a regional chamber of judges to deal with 'particular categories of cases" as authorized by Article 26 (1) of the Statute, the 'category' here being a geographical one."

Austria

157. "The creation of regional chambers to decide disputes between parties belonging to the region concerned is regarded as an interesting suggestion by Austria. But in examining this aspect of the question, due regard must be paid to considerations which emphasize that such an organizational change might give additional impetus to existing tendencies towards the fragmentation of jurisdiction and the regionalization of international law. Moreover it is doubtful whether the parties to a given dispute would be more willing to subject themselves to a Court consisting of judges from their own region. Nevertheless, Austria believes that the idea of introducing regional chambers with a view to fostering increased recourse to the Court for the peaceful settlement of disputes should be seriously examined."

Belgium

158. "Belgium is opposed /to regional courts/. The major effort of international codification is directed at enhancing the unity of international law to the greatest extent possible, whereas the creation of regional courts would foster its fragmentation.

159. "There is, however, one area in which Belgium feels that this general misgiving may not fully apply. If certain regions of the world were to form a real consensus for the settlement of selected issues outside the ambit of general international law and its universally applicable principles but in a technically useful way,

one could conceive of a regional court being set up for the purpose. For example, one could visualize a court having the function of considering questions relating to African rivers: it would have a regional base but its jurisdiction would be limited to technical issues whose settlement would not affect general international law. In an attempt to maintain a certain unity, provision would be made in the statutes of the new courts for the possibility of appeal to the International Court of Justice."

5. Other comments

(a) Granting of preferential rights, in the allocation of seats, to States accepting the compulsory jurisdiction of the Court

Cyprus

160. "... (Cyprus recalled that) ... a proposal was made that in the election of a judge the possibility of taking into consideration the acceptance by his country of the compulsory jurisdiction of the Court should be examined"[28/].

Switzerland

161. "Among the reforms which could ensure more frequent recourse to the Court's jurisdiction, one which immediately springs to mind would be to grant a degree of priority in the allocation of seats to States accepting its compulsory jurisdiction, which are the normal users of the Court. In his report to the Institute of International Law, Max Huber noted that a criterion for allocation based on such considerations would seem "the fairest and most reasonable".[29/] He considered, however, that the reform stood little chance of being adopted and therefore refrained from recommending it.

162. "Moreover, in addition to the political impediments it would encounter, the reform, the justification for which at first seems obvious, proves on reflexion to be impracticable. In the first place, it would imply the introduction of a distinct privilege in favour of the five major Powers, whereas hitherto the invariable inclusion in the Court of judges who are nationals of those countries has been no more than a simple, although universally recognized, fact. The proposed reform has, moreover, even greater defects and gives rise to one main objection. The

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28/ Made by the representative of Japan in the Sixth Committee during the eighteenth session of the General Assembly in the course of the consideration of the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations (Official Records of the General Assembly, Eighteenth Session, Sixth Committee, 821st mtg., para. 6).

29/ Annuaire de l'Institut de Droit International, 45 I, p. 429.

introduction of priority allocation to States subject to the Court's compulsory jurisdiction, and the consequent formal recognition of the privilege of the major Powers, would be inconsistent with the principle that judges do not represent their State of origin but are independent persons chosen on their own merits. Consequently, if a person fulfils these personal requirements and is recognized as worthy to sit on the Court, the fact that his State of origin has not accepted its compulsory jurisdiction is of little consequence and should not impede his election. It may also be noted incidentally that the proposed reform would be irreconciliable with the system prevailing in the Court, especially since there is nothing, at present, to prevent the election even of persons whose State of origin is not a party to the Statute. Article 2 of the Statute stipulates, indeed, that judges shall be elected regardless of their nationality.

163. "Moreover, for purposes of application of the proposed rule, it would be very difficult to determine which States should be regarded as accepting the Court's compulsory jurisdiction. It would be unwarranted, in this connexion, to take into consideration only States which accept that jurisdiction unreservedly, for many of the reservations entered to the declarations made under Article 36, paragraph 2, are limited in scope or in any event do not seriously jeopardize the principle of compulsory jurisdiction. States which have deposited declarations with only minor reservations should therefore also enjoy preferential representation, but prior establishment of an objective criterion laying down the dividing line between reservations which are significant and those which are not is impossible.

164. "Finally, in matters relating to the Court's advisory opinions the distinction between States which accept its compulsory jurisdiction and those which do not loses its significance and in this field there would be no reason for granting a privileged position to States in the first category.

165. "Similarly, it should not be forgotten that in the matter of jurisdiction in contentious cases, some of the cases pleaded before the Court are brought before it as the result of a special agreement between States not accepting its compulsory jurisdiction. The same arguments which could be adduced by States accepting that jurisdiction in order to claim priority in the allocation of seats then apply in reverse and States pleading on the basis of a special agreement could complain of having to bring their case to a Court whose composition does not include judges who are nationals of States not subject to its compulsory jurisdiction.

166. "Therefore, no matter how attractive the idea of granting a privileged position in seat allocation to States which have accepted the Court's compulsory jurisdiction, it must ultimately be rejected."

(b) Identical composition of the Court in different phases of the same case

Switzerland

167. "Under the prevailing system, the Court may, as the result of a periodic election, be differently constituted when adjudicating on successive phases - preliminary objections and merits, for example - of the same case. In order, however, to ensure greater continuity in judicial decisions and to obviate the danger that, in the election of new judges, States may be tempted to base their choice on considerations relating to a specific case, it would be advisable that, so far as possible, the Court should be reconstituted with its former membership when called upon to adjudicate in a new phase of a case it has already considered.

168. "It has been admitted in established judicial decisions of both Courts that proceedings in respect of preliminary objections and those in respect of merits do not constitute a single case within the meaning of Article 13, paragraph 3 /of the Statute/. Such was the decision of the Permanent Court in the Mavrommatis case and the case concerning certain German Interests in Polish Upper Silesia, and of the International Court of Justice in the Nottebohm Case, the Case concerning Right of Passage over Indian Territory, the South West Africa Case and the Case concerning the Barcelona Traction, Light and Power Company, Limited. Article 13, paragraph 3, has, therefore, been applied only in instances in which two successive phases of the same case are both concerned with the merits, as happened in the Case of the Free Zones of Upper Savoy and the District of Gex.

169. "The validity of this procedure is questionable. The link between preliminary questions and questions of merit becomes particularly apparent when the objections, or some of them, are joined to the merits; in the Case concerning the Barcelona Traction, Light and Power Company, Limited, for example, the Court itself was led to emphasize the link. Nevertheless, even in cases in which the preliminary objections are dealt with and dismissed in an initial decision, a logical connexion between them and the questions of merit may subsist, thus making it particularly desirable that the original composition of the Court should be maintained.

170. "The Case of the Free Zones of Upper Savoy and the District of Gex provides an illustration of the practical problems posed by reconstitution of the Court which adjudicated in an earlier phase. As is known, when it met in the second phase of this case, the Court endeavoured to ensure that, so far as possible, it should be reconstituted with the same membership as when it made its first order of 19 August 1929 in the case. At the hearing of 23 October 1930, President Anzilotti explained that, to comply with the provisions of Article 13, paragraph 3, of the Statute, the composition of the Court should have been the same as in 1929; circumstances, however, had rendered this impossible, the number of judges available of those who had taken part in the session of 1929 having fallen below the quorum required by Article 25 of the Statute in order to render the proceedings of the Court valid. Accordingly, the Court was reconstituted in conformity with the principles of that Article by summoning all the regular judges available and also - in the order laid down in the list - the number of deputy-judges whose presence was necessary to make up the number of eleven laid down by the Statute.[30/] Furthermore, according to decisions taken on 22 November and 4 December 1930, the Court decided that, should the case of the free zones be referred to it again, it would remain as then constituted[31/] although it was to be largely reconstituted at the end of 1930 following the non-re-election of several of the judges appointed in 1921. The same situation could recur now. As there is no provision in the new Statute for deputy-judges, it might be possible, in order to obtain a quorum and when a sufficient number of outgoing judges can no longer be assembled, to call upon newly-elected judges, in order of seniority, on the understanding that two judges of the same nationality may not sit simultaneously.

171. "This proposed reform does not seem to require an amendment of the Statute. Article 13, paragraph 3 of the Statute, which is identical with the provision of the same number in the former Statute, provides that judges who are not re-elected shall finish any cases which they may have begun. It seems, therefore that the only point at issue is interpretation of this text, and that nothing in the terms used prejudges it."

30/ PCIJ, Series A/B, No. 46, p. 106.

31/ Ibid., p. 215.

Sweden

172. "Paragraph 3 of Article 13 of the Statute provides that the members of the Court shall, though replaced, continue to sit in any cases which they may have begun until it is finished. An identical provision applies to the members of a chamber (paragraph 3 of Article 24 of the Rules of Court). It is understood that for the purpose of these provisions, in the Court's interpretation, a judge is not deemed to have begun a case until the oral proceedings are due to take place. Furthermore, a judge is also considered to have finished to sit on a case in the event that, after oral proceedings having taken place, the Court (chamber) gives a decision on a question of preliminary objections and the proceedings on the merits of the case are suspended. The effect of this interpretation is that the composition of the Court or the chamber at the beginning of the written proceedings will in most cases differ from the composition which the Court or the chamber will have from the start of the final oral proceedings and until judgment is delivered. There can be no doubt that such a situation is another element which may deter States from bringing a case before the Court. It is also bound to lead to further protraction of the proceedings and added costs. The Swedish Government submits that a change of the present practice of the Court in this respect would be well received by the Court's prospective clients. In other words, a member of the Court - or chamber as the case may be - should be entitled to serve on the bench through the whole of the written and the oral procedures that is from the institution of the written proceedings until the case is finally disposed of. The additional expense incurred by such an arrangement seems to be fully justified if it can contribute to a more frequent use of the Court."

(c) The question of judges ad hoc

Cyprus

173. "Regarding judges ad hoc appointed under Article 31 of the Statute, there exists a divergence of views, some supporting them as satisfying diplomatic susceptibilities and others being against them as contrary to the idea of justice. If they were allowed to die a natural death, it would be more consistent with the standing and the decorum of a Court administering justice in accordance with the law".

Switzerland

174. "The institution of judges ad hoc is based on the tradition of the former Permanent Court of International Justice. It is now entrenched by fifty years' practice and despite the criticisms sometimes levelled against it, it seems difficult to change it in any way. In fact, it is certainly useful that the Court should be able, in its deliberations, to benefit by the opinions of a person more familiar with the views of one of the parties that the regular judges might be. Conversely, it is certainly not desirable that this person's opinion should constitute merely the expression of one party's approach and his dissenting opinion, if any, purely and simply a repetition of that State's chain of argument. Furthermore, the dissenting vote of the judge ad hoc chosen by the State which loses the case, when it is a constant phenomenon, as has been the case thus far, constitutes an insurmountable obstacle to unanimity, although the latter is certainly a desirable ideal and would tend to strengthen the authority of the Court's decisions.

175. "Two small changes in existing practice would bring about an improvement in this connexion. In so far as the deliberations are concerned, there would be some justification, in order to take account of the very special situation of this sort of judex in causa sua, in affording judges ad hoc the possibility of abstaining in the Court's final vote, without imposing any obligation on them in this regard or restricting their rights, which would remain exactly the same as those of regular judges. In the interest of equality, the same possibility should be afforded to a regular judge when the State of which he is a national is a party to the case. A judge ad hoc or national judge who happens to be the sole dissenter in an otherwise unanimous Court could, by his abstention, both preserve unanimity and yet indirectly indicate his disagreement. In this way, it would be possible to reconcile the desirability of strengthening the judicial authority of the judgement with regard for the prestige of the State which loses the case. Such a change in practice would certainly not necessitate an amendment to the Statute and perhaps not even to the Rules. A General Assembly resolution could express the will of States that the new practice be introduced. In the matter of dissenting opinions of judges ad hoc, the drawbacks of existing practice could be reduced, firstly by the practice of abstaining, since this would obviously mean foregoing the right to draft an individual opinion and, secondly, by stricter observance of the rule that an individual opinion

must be limited to the subject of the judgement and not touch on questions the Court itself has not examined. This, however, is a matter which applies to all dissenting opinions, not only those of judges ad hoc; it will, therefore, be discussed in its proper time and place.32/

176. "It has sometimes been suggested that, in order to ensure selection of high calibre judges ad hoc, only persons who have already been candidates in Court elections, including former judges themselves, should be chosen for this office. This suggestion, which at first seems very attractive, nevertheless gives rise to serious doubts because it might cause States in every case to submit candidates for the Court so as to have a judge ad hoc of their choice at their disposal when necessary. This would increase the number of candidatures, thus complicating the election procedure and rendering selection of the best qualified persons more difficult.

177. "Various encouraging moves along the lines of the above-mentioned reform can, however, be detected in the practice of States which have pleaded before the Court in recent years. Very often, States have in fact chosen their judge ad hoc from among persons who have been candidates for the Court, and it is interesting to note that they have often chosen persons who were not their nationals. Mention should also be made, in this connexion, of the choice of Mr. Armand-Ugon, a former member of the Court, as a judge ad hoc for Spain in the Case concerning the Barcelona Traction, Light and Power Company, Limited. Lastly, by waiving their right to choose judges ad hoc in the Case concerning the Temple of Preah Vihear, Cambodia and Thailand set an example which should be followed. These praiseworthy attitudes, which States have adopted in all freedom and of their own accord, show that there is no harm in maintaining the existing system, whereas there would be considerable harm in trying to modify it by introducing a mandatory rule...

178. "The proposal, which will be discussed later, to allow international organizations access to the Court's jurisdiction in contentious matters, poses the question of the choice of a judge ad hoc by the organization concerned. This question will be discussed later in connexion with the correlative problem."33/

32/ See paras. 350-352 below.

33/ See para. 214 below.

Madagascar

179. "The need for independence /of judges/ would imply suppression of judges ad hoc. Such a measure should however, be examined with care in an endeavour to ensure that it does not become a further cause of disaffection."

(d) Assessors in the advisory opinion procedure

Switzerland

180. "In the case of requests for advisory opinions concerning interpretation of an international organization's statute, it might be advisable to supplement the Court by a member ad hoc without the right to vote, chosen by the organization. This could be done by means of assessors as provided for in Article 30 of the Statute."

III. Jurisdiction of the Court

1. General comments

Cuba

181. "The jurisdiction /of the Court/ should remain that established in the existing provision ... the proposals to the effect that the Court's competence should be enlarged /are considered/ unacceptable."

2. Contentious cases

(a) The question of the compulsory jurisdiction of the Court

Poland

182. "The Government of the Polish People's Republic believes that in accordance with Article 33 of the United Nations Charter the States parties to disputes should not be restricted in their seeking the most suitable means of peaceful settlement of a given dispute. Moreover, experience gathered so far provides no grounds for general acknowledgement in abstracto of judicial procedures in international relations as the most effective and convenient for the parties.

183. "The practice of accepting the compulsory jurisdiction of the Court with reservations makes the acceptance only apparent. The experience indicates that the efforts aimed at enhancing the effectiveness of this judicial organ should be primarily directed at overcoming distrust and encouraging States to bring disputes before the Court, and this could be done by making improvements within the present framework of the Statute."

Laos

184. "The jurisdiction of the Court should be ... made compulsory."

Guatemala

185. "States should be invited to make more frequent use of the services of the Court and more States should be encouraged to accept its compulsory jurisdiction."

Italy

186. "... the Italian Government refer to the initiatives taken by the delegation of Italy before the ... Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.[34/] Those proposals, as shown in the Committee's report for 1970 and in the reports covering the previous sessions, were aimed at

- promoting a wider acceptance of the Court's jurisdiction within the framework of the 'optional clause' of Article 36, paragraph 2 of the Court's Statute;

..."

Switzerland

187. "The present list of matters which may be encompassed by an acceptance of compulsory jurisdiction, contained in Article 36, paragraph 2 seems somewhat arbitrary or, in any case, appears not to correspond to categories recognized in modern international law. In fact, the Court is competent to examine any request whatsoever from a State claiming to have a subjective right based on international law. The wording of Article 36 might therefore be revised so as to make it wider in scope.

188. "We cannot conclude our comments on Article 36 without noting with regret that only one third of the States parties to the Statute have accepted the compulsory jurisdiction of the Court, and that a great number of these declarations of acceptance are encumbered with serious reservations. The Swiss Government would like the General Assembly, by means of a solemn resolution, to invite States to accept the compulsory jurisdiction of the Court and to invite those which have already done so or will do so to abandon restrictive reservations, or if they consider them essential, to define them in precise and limitative terms."

Netherlands

189. "... further efforts should be made to promote the willingness /of States to make use of the International Court of Justice/ by having wider recourse to (1) unilateral declarations of acceptance of the Court's jurisdiction under Article 36, paragraph 2 of the Statute of the Court ..."

34/ See Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item 87, document A/6230, para. 159.

Sweden

190. "... as a first step in enhancing the effectiveness of the Court, the Swedish Government would like the General Assembly not only to reiterate its resolution 171 (II) but to give added emphasis to its recommendation therein to States to accept the jurisdiction of the Court. Up till now only 47 States have declared their acceptance of the compulsory jurisdiction of the International Court of Justice under paragraph 2 of Article 36 of its Statute ... States which may be reluctant to accept the general obligation of compulsory jurisdiction by a declaration in accordance with paragraph 2 of Article 36 of the Statute - even if their acceptance is limited by reservations accompanying the declaration could be recommended by the General Assembly to conclude bilateral agreements with other States whereby the two contracting States agree to submit to the International Court of Justice future disputes of a legal nature which they have not been able to solve through negotiations."

Canada

191. "The Canadian Government is aware of the difficulties concerning acceptance of the compulsory jurisdiction of the Court, in particular the legal complexities raised by the many reservations which have been made by States in depositing declarations under the optional clause (Article 36, paragraph 2) of the Court's Statute. A possible approach might be to revise this section of the Statute at some further date to require States to list those instances in which they will not accept the jurisdiction of the Court, rather than those in which they are prepared to do so, but in the immediate future particular attention should be given by all States to increasing the instances of acceptance of the jurisdiction of the Court in appropriate cases. To that end, governments might be asked by the United Nations Secretary-General to reconsider existing declarations made under Article 36 of the Statute, with a view to clarifying their meaning and effective time limit. It may also be possible for groups of like-minded States to consult among themselves in an effort to reach agreement on co-ordinated declarations wherein they would list those instances in which they could accept the jurisdiction of the Court to adjudicate on problems arising from their mutual interrelations. This might be a particularly useful approach in the interpretation of regional or other limited multilateral treaties.

Madagascar

192. "In the present state of world organization, it would be difficult to make a categorical statement concerning the compulsory jurisdiction of the Court. The elimination of the margin of freedom provided by Articles 33 and 95 of the United Nations Charter forms part of the difficult question of a revision of the Statute of the Court, and hence of the Charter itself."

Cuba

193. "... optional acceptance of the jurisdiction of the International Court of Justice by States is in accordance with the principle of their sovereign equality."

Czechoslovakia

194. "Chapter XIV of the United Nations Charter provides that the Court is the principal judicial organ of the United Nations Organization with jurisdiction in those cases which are brought before it by States-Parties, and therefore not with obligatory jurisdiction. To recognize an obligatory jurisdiction of the International Court of Justice would amount to transforming it into a supra-state organ, with which the Czechoslovak Socialist Republic cannot agree."

France

195. "... The French Government considers that more general acceptance of the compulsory jurisdiction of the Court ... can only come about after a change in the position of States regarding the judicial settlement of disputes."

Iraq

196. "One reason behind the reluctance of States Members of the United Nations to accept the compulsory jurisdiction of the Court is the composition of the Court itself and its representative character..."

Austria

197. "Efforts to induce governments to recognize the Court's jurisdiction as compulsory should be continued - if necessary by means of resolutions of the General Assembly."

Yugoslavia

198. "The fact that the jurisdiction of the International Court of Justice is not compulsory but facultative, constitutes one of the main obstacles in the work of the Court. The Yugoslav Government feels that in the contemporary conditions it would not be realistic to expect a larger number of countries to accept the compulsory jurisdiction of the Court. The recourse to the Court should remain within the sphere of free decision-making of the States. There is no doubt, however, that this question cannot be viewed isolated from the state of international relations as a whole. The acceptance of the compulsory jurisdiction, in essence, depends upon the further democratization of the international community.

199. "The Yugoslav Government, however, is of the opinion that this should not limit the efforts for enhancing the effectiveness of the Court, because there also exist other important aspects upon the solution of which depend the functioning and the role of the International Court of Justice in international relations."

(b) Access to the Court

Cyprus

200. "Paragraph 1 of Article 34 of the Statute follows the classical theory, prevailing in the nineteenth century, that only States could initiate proceedings and be parties before the Court in the exercise of its contentious jurisdiction as the only subjects of international law. But with the expansion of the concept of subjects of international law, including now not only the various international organizations but also the individuals, it would be anachronistic to have only the States as members of the contentious litigation before the Court.

201. "Article 34, paragraph 1 may be expanded so as to include not only the United Nations, which, as decided by the Court in advisory opinion on the Reparation for injuries suffered in the service of the United Nations is at present the supreme type of international organization[35] but also the other international

35/ I.C.J. Reports 1949, p. 179; see also Hambro, op. cit., p. 159.

organizations and eventually to individuals;[36] in that connexion, consideration may be given to what Jenks calls the evocation procedure.[37]"

Laos

202. "The jurisdiction of the Court should be expanded."

Denmark

203. "... it could be considered to allow international organizations to be parties to cases before the Court ..."

Guatemala

204. "In our opinion, governmental organizations should be given the opportunity to be parties to certain cases before the Court."

United States of America

205. "The provisions of the Statute of the Court relating to the right to bring contentious cases to the Court have remained unchanged since 1920 when they were embodied in the Statute of the Permanent Court of International Justice. Since that time, however, there has been tremendous growth in the number and importance of international organizations, with concomitant developments in international law, including the increasing frequency with which international organizations have become parties to bilateral and multilateral treaties and agreements.

206. "The United States believes that in cases arising under Article 36, paragraph 1 of the Court's Statute, international organizations should be permitted to appear before the Court as plaintiffs or defendants. The agreement of both the

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36/ In this respect the provisions of articles 25 and 48 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Optional Protocol to the United Nations International Covenant on Civil and Political Rights of 16 December 1966 should be borne in mind. The only international court of general jurisdiction to which access was given to individuals was the Central American Court of Justice (1908 to 1918); see Stone, op. cit., p. 53; Hambro, op. cit., p. 163.

37/ See Gross, op. cit., p. 303 and Articles 169, 170 and 177 of the Rome Treaty of March 1957; see also Campbell and Thompson, Common Market Law, pp. 280, 281 and 283.

international organization and the States concerned would, by the terms of Article 36, paragraph 1, be necessary in each instance. An intermediate approach not requiring amendment of the Statute might be developed along the lines of the procedures followed in the United Nations Convention on Privileges and Immunities; States might agree that they will regard themselves as bound by advisory opinions sought by international organizations."

Argentina

207. "The Argentine Government is of the opinion that it would in principle be useful to study in detail the possibility of allowing intergovernmental organizations to be parties to cases brought before the Court, provided that the legal and procedural status of such organizations in the proceedings were clearly defined."

Finland

208. "The reasons why States have refrained from accepting the optional clause concerning the recognition of the International Court of Justice's jurisdiction as compulsory obviously cannot be removed easily and quickly. There is, therefore, reason to consider especially the possibilities of increasing the competence of the International Court of Justice so that intergovernmental organizations may also have access to the Court as parties to an issue. The granting of such a possibility for the organizations mentioned may have proved in practice necessary."

Mexico

209. "The fact that regional organizations, or intergovernmental organizations in general, possess juridical personality is a strong argument in favour of enabling them to be parties in cases before the Court and, hence, of revising Article 34 of the Court's Statute, which provides that "only States", taken individually, may be parties in such cases. Some thought must be given, on the other hand, to the possible practical consequences of allowing all intergovernmental organizations access to the Court indiscriminately, seeing that some of them represent substantial political interests which it might prove impossible to ignore in a strictly juridical controversy. Certain qualifications could perhaps be introduced regarding the right of such bodies to have access to the Court, though all this will of course have to be studied in great detail."

Switzerland

210. "As it has developed since the end of the Second World War, international practice has shown that there may arise between States and international organizations disputes which lend themselves to judicial settlement. These organizations are called upon to conclude with States members or non-members, treaties such as headquarters agreements or conventions on privileges or immunities, that may give rise to disagreements as to interpretation. Disputes may also arise between States and organizations concerning matters not related to non-treaties. In the advisory opinion on reparation for injuries suffered while in the service of the United Nations which it gave in 1949, the Court recognized 'that, in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State', the Organization 'has the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due in respect of the damage' caused both to the United Nations and to the victim or to persons entitled through him, regardless of whether or not the State involved is a member of the Organization.[38/] At the same time, operations of the Organization such as that carried out by the United Nations Emergency Force in the Congo were shown to be liable to cause damage to private persons, on behalf of whom the States of which the victims were nationals - whether members of the Organization or not - were entitled to claim reparation. The United Nations, therefore, and very likely the specialized agencies and other international organizations as well, may have to claim reparation in respect of damage caused by a State or, conversely, to answer for damage caused to a State. Contrary to past experience, it may in either case prove impossible to settle the dispute through negotiation. In addition to cases which involve what could be termed the external relations of the Organization, disputes may arise between States Members and the Organization in respect of its internal operation. It would be extremely useful if provision were made for these various matters to be settled by the International Court of Justice.

211. "This solution is open to the general objection that the Court, as an organ of the United Nations, cannot be called upon to adjudicate a dispute involving the Organization itself. Although it has a certain validity in theoretical terms, this

38/ Reports of Judgments, Advisory Opinions and Orders, 1949, p. 187.

objection is not as serious as might at first appear. In domestic affairs, courts are similarly called upon to settle disputes between private persons and the State itself, and this is possibly one of the most important tasks they perform. It is true, however, that a national court deals with cases involving the State of which it is a judicial organ and a litigant who is subject to the sovereignty of that State, whereas the International Court of Justice would be expected to deal with disputes between the Organization of which it is an organ and sovereign States that are in no way answerable to the Organization. It is obvious, therefore, that the Court could only be given jurisdiction over such matters if the States themselves agreed to this procedure. On the other hand, if the States see fit to submit their disputes with the Organization to the International Court of Justice, there seems to be no reason why they should be prevented from doing so, merely for a question of principle.

212. "It remains to be seen how, from the technical point of view, contentious proceedings in respect of international organizations can be introduced. As Max Huber pointed out in his report to the Institute of International Law, organizations composed of States and the kind of relations they are concerned with - relations both between the various members and relations with the organization itself - are far too varied and unpredictable to fit into an easy formula that places States and organizations composed of States purely and simply on the same footing.[39/] A general declaration by the organizations accepting the Court's jurisdiction similar to that referred to in Article 36, paragraph 2, of the Statute, can thus hardly be envisaged, both because of the particular nature of the disputes involving organizations and because of the problems of reciprocity that would arise. It would therefore seem more feasible for international organizations, in their statutes, to declare that they accept the Court's jurisdiction in respect of States members or, in the case of disputes involving general international law, in respect of States parties to the Statute of the Court, subject to reciprocity. In the case of existing organizations, the declaration of acceptance of the Court's jurisdiction could be embodied in a resolution of the appropriate body, which would also define the limits and

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39/ Annuaire de l'Institut de Droit international, 45 I, p. 431.

conditions of that acceptance. For the time being, it would suffice to amend Article 34 of the Statute of the Court in such a way as to allow for this kind of explicit acceptance of the Court's jurisdiction. It would then be necessary to consider to what extent and in what way the organizations' access to contentious proceedings before the Court should be dependent upon United Nations authorization (see the remarks of Mr. Max Huber and Mr. Henri Rolin on the subject and the latter's proposal to amend Article 34 of the Statute).40/

213. "As matters now stand legally, the organizations' inability to bring contentious cases before the Court has been mitigated by the institution of the binding advisory opinion, which is provided for in Article 11 of the Statute of the United Nations Administrative Tribunal, section 30 of the Convention on the Privileges and Immunities of the United Nations, adopted in General Assembly resolution 22 (I) of 13 February 1946, and Section 21 (b) of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, adopted in General Assembly resolution 169 (II) of 31 October 1947. A number of writers have criticized this system because its effect is to set up, in disguised form, a contentious procedure that circumvents Article 34, paragraph 1, of the Statute and to endow advisory opinions with effects which are, in the view of these writers incompatible with the nature of such opinions. The advisory opinion which the Court gave in 1956 in the case of the Judgements of the Administrative Tribunal of the International Labour Organisation and the individual opinions attached thereto, for example, give some idea of the difficulties that this type of procedure invariably involves. There is reason to believe that, even in this limited field where an expedient has been found to make up for the absence of any contentious procedure for international organizations, the present solution is not entirely satisfactory and could be improved by the pure and simple introduction of a form of contentious procedure.

214. "If organizations were allowed to be parties to contentious cases before the Court, there would be every reason to grant them the right to chose a judge ad hoc. This should be the automatic outcome of such a step and should not require an amendment to Article 31 of the Statute, which is based on the concept of the 'party'."

40/ Ibid., pp. 431, 545-546.

Sweden

215. "The Swedish Government would ... welcome modifications of /the Charter of the United Nations and the Statute of the Court/ to the effect that the competence of the Court is extended to admit the United Nations and specially authorized international intergovernmental organizations to appear as parties before the Court in clearly defined cases (such as interpretation or application of treaties concluded between such organizations or between an organization and a State), it being understood that the provisions of paragraphs 2 and 3 of Article 36 of the Statute of the Court shall apply mutatis mutandis to such a litigation."

Canada

216. "Canada would ... look with favour on suggestions for promoting use of the Court by permitting United Nations bodies and other intergovernmental organizations to refer contentious cases to it on conditions set by the General Assembly."

Madagascar

217. "Allowing international or intergovernmental organizations to appear as parties before the Court would open up a new area of competence in matters which the Court is perfectly capable of dealing with, which it has already taken up in an advisory capacity and which, by dint of a certain amount of juridical acrobatics, it has even managed to settle - as, for example, in the case of the Judgments of the Administrative Tribunal of the International Labour Organisation.

218. "It would still be necessary to define the status of the respondent which might be a State, another international organization, or even, as has happened in respect of international civil servants, a private person.

219. "In the last two cases, the possible suppression of the ad hoc judge should be considered."

France

220. "It would seem that allowing international organizations to be parties to contentious cases before the Court would raise serious problems of principle and procedure. It would, indeed, be difficult to grant this right to all international

organizations or to some of them without granting it also to the United Nations itself; at the same time, it is impossible to assess exactly the possible consequences of such a measure for the Organization.

221. "Furthermore, even if the United Nations could conceivably be subjected to the jurisdiction of one of its organs, would this not in fact upset the entire political equilibrium of the Organization? Moreover, a constitutional problem would arise in determining which organ would be competent to appear as a party to a case before the Court.

222. "The very fact that these questions arise indicates that it would be inadvisable to embark unnecessarily upon a course whose outcome is uncertain and possibly dangerous, since the States members themselves have provided international organizations with adequate means of resolving the disputes to which the operation of those organizations may give rise. The French Government has already made known its position regarding steps that might entail amendment of the United Nations Charter."

Iraq

223. "The Statute of the Court should be amended to grant international and regional organizations access to the Court, since these entities, like States, possess international personality."

Austria

224. "Austria does not object to the extension of the Court's jurisdiction to international organizations, although this would require a revision of Article 34, paragraph 1 of the Statute. In order to avoid differences on the question as to which organizations should be brought under the Statute of the Court, one might consider limiting their number to the United Nations and specialized agencies and the International Atomic Energy Agency, since it is obviously difficult, especially in the case of regional organizations, to draw a clear line which excludes organizations based on political and military pacts. An international organization having party status should also have the possibility to recognize the Court's jurisdiction as compulsory, under Article 36, paragraph 2.

(c) Disputes relating to the interpretation or application of treaties

Cyprus

225. "... the tendency of providing in various international treaties that any disputes thereunder and especially those relating to the interpretation of the treaty may be referred to the International Court for determination should be encouraged."[41]

Guatemala

226. "In accordance with Article 37 of the Statute of the Court, it should be recommended that treaties concluded by Members of the United Nations and international organizations should include clauses giving the Court jurisdiction with regard to the interpretation and application of such treaties, with a view to settling any disputes which might arise from them."

United States of America

227. "The United States fully supports the inclusion in multilateral and bilateral agreements of clauses providing for submission to the Court of any disputes relating to the interpretation or application of those treaties."

Argentina

228. "Regarding the possible inclusion in future treaties of clauses giving the Court jurisdiction for the settlement of disputes arising from such treaties, there is nothing in the present provisions to prevent such a course, and it has been followed, for instance in the Pact of Bogota."

41/ As to the right of a State party to a multilateral treaty to have recourse to the Court for its interpretation, even in the absence of any provision to this effect in the treaty or any violation of the treaty see Kelsen, op. cit., pp. 529 et seq. As to such conventional jurisdiction, see Oppenheim-Lauterpacht, op. cit., pp. 58 et seq. See also Article 36, paragraph 1 of the Statute; see also Hambro, op. cit., pp. 173 et seq.

Italy

229. [The Italian Government advocates]

"...

- the inclusion, in multilateral treaties, of provisions giving the Court jurisdiction over disputes arising in the interpretation and application of the treaties."

Finland

230. "In important international conventions concluded in the last decade provisions have been incorporated or added which refer to submitting disputes arising from the enforcement of the convention to the International Court of Justice for settlement. Although these clauses have generally been optional, the Government of Finland is of the opinion that the practice is worth continuing as it is obviously easier in a particular case for the States to accept the jurisdiction of the International Court of Justice than to give the exposition referred to in Article 36 of the Statute concerning the said jurisdiction in general."

Mexico

231. "The possibility of including in future treaties the so-called compromise clause, by which the parties would give jurisdiction to the Court for the settlement of disputes arising in the application of the treaty would not be ... an innovation in the present legal situation. It is always easier to carry out specific commitment than a general commitment, and in that way States could undoubtedly be encouraged to have recourse to the Court more frequently."

Netherlands

232. [The Netherlands Government advocates] "wider recourse to ... (2) clauses in multilateral or bilateral treaties referring to the Court all disputes concerning interpretation and application of the treaty concerned; ..."

Sweden

233. "Wider use of the International Court of Justice could be made if States were willing to insert in bilateral or multilateral conventions and treaties clauses

to the effect that disputes arising from the interpretation or application of such conventions and treaties be submitted to the International Court of Justice."

Canada

234. "Employing the Court more frequently to both arbitrate and adjudicate in matters arising out of treaties might ... have the desirable effect of minimizing or eroding the distinction between advisory and contentious proceedings, and thus helping to remove the unfounded implication that sometimes arises that recourse to the Court is per se an unfriendly act. As a start in this direction, it may be worth considering the possibility of States parties to a particular treaty agreeing among themselves at the time the treaty is signed or ratified that following the conclusion of discussion on matters of substance involved when differences arise, they will submit questions of interpretation to the Court."

Madagascar

235. "It might perhaps be more effective for the present to promote the implementation of General Assembly resolutions inviting States to accept the optional clause regarding compulsory jurisdiction in international agreements and treaties."

Iraq

236. "A very welcome development would, indeed, be to strengthen the trend of including in future treaties provisions giving the Court jurisdiction over disputes under the treaties."

Yugoslavia

237. "The Yugoslav Government holds the view that efforts should continue to be exerted towards having international multilateral treaties make provision for compulsory jurisdiction of the Court in disputes which may arise in the course of the execution of those treaties."

(d) Declaratory judgements

Switzerland

238. "The judicial practice of the Court has on several occasions raised the question of knowing to what extent the Court could pronounce purely declaratory judgements in contentious cases. The question was broached, for instance, in the judgement of the Permanent Court of International Justice in the Case concerning Certain German Interests in Polish Upper Silesia[42] and on the Interpretation of the Statute of the Memel Territory,[43] in the judgements of the International Court of Justice in the Corfu Channel Case[44] and in the Case concerning the Northern Cameroons.[45]

239. "In the Case concerning Certain German Interests in Polish Upper Silesia, the Court declared that the abstract character of a question placed before it did not prevent the Court from adjudicating, since Article 14 of the Covenant of the League of Nations empowered the Court to 'hear and determine any dispute of an international character which the Parties thereto submit to it'. The Court added that the abstract interpretation of a treaty was one of the most important functions which it could fulfil.[46]

240. "In the case of the Interpretation of the Statute of the Memel Territory, the Court, without refusing to examine the merits, did, however, draw attention to the inconvenience resulting from the fact that the questions submitted to it had been 'formulated as questions purely in abstracto, without any reference to the facts of the dispute which had arisen'.[47]

241. "In the Corfu Channel Case, the Court decided that by reason of certain acts of the British Navy in Albanian waters, the United Kingdom had 'violated the sovereignty of the People's Republic of Albania, and that the declaration by the Court constituted in itself appropriate satisfaction'.[48]

42/ P.C.I.J., series A, No. 7.
43/ P.C.I.J., series A/B, No. 49.
44/ I.C.J. Reports 1949, p. 4.
45/ I.C.J. Reports 1963, p. 15.
46/ P.C.I.J., series A, No. 7, pp. 18-19.
47/ P.C.I.J., series A/B, No. 49, p. 21.
48/ I.C.J. Reports 1949, p. 36.

242. "In the Case concerning the Northern Cameroons, the court first noted that there existed a dispute 'in the sense recognized by the jurisprudence of the Court and of its predecessor', between the Republic of Cameroon and the United Kingdom.[49] On continuing its review, however, the Court concluded that as the dispute concerned a past fact for which no reparation was claimed, it would 'be impossible for the Court to render a judgment capable of effective application' even if it held that the applicant's contentions were sound on the merits.[50] In support of this conclusion, the Court noted

> 'the function of the Court is to state the law, but it may pronounce judgement only in connexion with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgement must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainties from their legal relations.' [51]

Following these considerations, the Court observed that 'if in a declaratory judgement it expounds a rule of customary law or interprets a treaty which remains in force, its judgement has a continuing applicability', which was not the case in the special circumstances of the Case concerning the Northern Cameroons.[52]

243. "The latter judgement is the most recent interpretation of the rules which presently govern the activities of the Court on the matter and there is no point in disputing that interpretation here. Without wishing to criticize the judgement of 2 December 1963 or comment on the very delicate, preliminary questions raised by Cameroon's claim, it must be noted that current practice assigns rather strict limits to the Court's power to pronounce declaratory judgements. (This applies to the Court's power and not to its competence in the matter; what is in question here is not the competence of the Court but the conditions under which its judicial function is exercised: see for instance, in addition to the judgement, the declaration of Judge Koretsky or the separate opinion of Sir Gerald Fitzmaurice.)[53]

49/ I.C.J. Reports 1963, p. 27.

50/ Ibid., p. 33.

51/ Ibid., pp. 33-34.

52/ Ibid., p. 37.

53/ Ibid., pp. 39-40 and 100-101.

The fact may be deplored, for it would certainly be regrettable if the Court's jurisdiction in contentious cases was reduced to cases where a State claims concrete reparation for an internationally wrongful act of which it considers it has been the victim. Relations among States in the matter of wrongful acts cannot be brought down to the level of simple material reparations, unlike relations between individuals, which are regulated by municipal law. The interest of the State which has been injured by a wrongful act is not necessarily restricted to a claim for compensation. Its interest may simply be to see the law proclaimed and recalled, and a declaration by the Court to that effect may, as was said in the Corfu Channel Case, constitute in itself adequate reparation.

244. "As Judge Morelli noted in his separate opinion on the Case concerning the Northern Cameroons, once the existence of a dispute has been established, there is perhaps no point in trying to find out whether one of the parties has an interest in a judicial settlement of the dispute:

> 'In any case each party has an interest in the settlement of the dispute. The interest in securing a decision on the merits is in re ipsa, because it is a necessary consequence of the very existence of a dispute.' 54/

Judge Morelli further notes:

> 'In reality there is no reason to make a distinction between past and future courses of conduct as the possible subject of a dispute. There is a dispute not only in the case of a claim, where one of the parties demands that its interest should be achieved, possibly through a certain course of conduct by the other party, but also in the case of a protest, where one of the parties asserts that its interest should have been achieved through a course of conduct by the other party contrary to that in fact adopted. There is no substantive difference between the claim and the protest. A protest is really only a claim with relation to the past." 55/

245. "There is no question here of opposing the opinion of Judge Morelli to the interpretation the Court gave of the rules by which it is bound, which has force of res judicata. However, these considerations in any case deserve attention de lege ferenda. In view of the real interest which States may have in obtaining a judicial settlement of disputes relating to past facts and a statement of the law

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54/ Ibid., p. 133.

55/ Ibid., p. 140.

concerning such facts, the Court's jurisdiction by means of declaratory judgements in contentious cases should be encouraged and facilitated; therefore those obstacles which, according to the judgement in the Case concerning the Northern Cameroons, now impede that type of activity should be removed.

246. "It has been said that an essential feature of a judgement in a contentious case is the fact that the judgement has effects in the future (see the separate opinion of Sir Gerald Fitzmaurice in the Case concerning the Northern Cameroons). 56/ This theory, however, raises the objection expressed by Judge Morelli in his separate opinion on the same case, which he bases on

> 'the objective limitations on res judicata arising from Article 59 of the Court's Statute, according to which the decision has no binding force except "in respect of that particular case" in which the decision is given.'

As Judge Morelli remarks,

> 'The judgement concerning a past course of conduct would not have the force of res judicata in respect of future courses of conduct, which would necessarily be different from the course of conduct forming the subject of the decision although more or less similar to it. In connexion with future courses of conduct the decision would be of value only in respect of the reasons given for it: its value would hence be analogous to that attaching to an advisory opinion.' 57/

247. "It would be useful to specify that the Court's jurisdiction in contentious cases will in future extend to disputes whose settlement calls for a purely declaratory judgement, with no reference to possible practical consequences of the judgement in the future. A review must be made of the means whereby this reform can be achieved. A modification of the Statute does not appear to be absolutely essential, as none of its provisions explicitly seems to exclude such jurisdiction. On the contrary, Article 36, paragraph (c) of the Statute provides that the Court may be called upon to settle disputes concerning 'the existence of any fact which, if established, would constitute a breach of an international obligation'. It is true that this rule relates to the recognition of the compulsory jurisdiction of the Court, and not to its competence, but it is clear that compulsory jurisdiction can exist only within the limits of competence; the

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56/ Ibid., principally p. 98 including foot-note 2, and p. 110.

57/ Ibid., p. 139.

provision quoted therefore indirectly provides a rule for competence and an indication of the way in which the judicial function of the Court should be exercised. The question might therefore be asked, whether a resolution by the General Assembly of the United Nations would not in itself be adequate encouragement for the Court to deliver declaratory judgements in contentious cases.

(e) Other comments

Cyprus

248. "With regard to the question of the assumption of regional specialized functions by the International Court, it may assume the kind of regional specialized functions assigned to the European Courts and may deal with questions referred to it for its opinion by regional courts performing specialized functions.
249. "Consideration may also be given to the possibility of assigning to the International Court appellate functions in cases tried by various arbitral tribunals."

Netherlands

250. "The peaceful settlement of disputes between States may be achieved by any of the means stated in Article 33 of the Charter of the United Nations. In most cases, a settlement is reached by a combination of some of these means: the parties first try to solve their dispute by negotiation; if they fail, they then agree to seek a solution through a binding advice or adjudication by an impartial third person or body.
251. "The Netherlands Government suggests that - in the light of experience gained in the past 25 years - the possibilities be studied of promoting the role of the International Court of Justice by having recourse to a combination of these two elements of peaceful settlement of inter-State disputes: negotiations between the parties to the dispute and adjudication by an impartial third body on certain specified elements of the case concerned. Thus the Court's decision would amount to a 'settlement in part' of the dispute only, which would provide an additional basis for continuing the negotiations.

The following expedients might be resorted to:

(a) The parties to the dispute could agree to submit to the Court certain specific legal questions relevant to the solution of the dispute;58/

(b) The parties to the dispute could agree to request the Court to give guidelines for the conduct of further negotiations;59/

(c) The parties to the dispute could agree to request the Court to establish the facts relating to the dispute.60/

252. "In such cases, the Court would clear the way for a final solution by the parties themselves. Though not adjudicating finally on the dispute, the Court would exercise a judicial function because it has to base its judgment on specific notions of existing law (- even when invited to engage in 'fact-finding' as referred to under paragraph (c) above, the Court would have to make a clear choice of criteria for establishing what are the relevant facts).

253. "The Court's role in the development of the law amongst nations would not merely become more important by virtue of the number of clearly circumscribed 'part issues' submitted to it. The Court's contribution might also become greater in substance, as the Court may more readily cross the borderline between a decision stricto jure and one ex aequo et bono, being conscious of the fact that in cases of adjudication 'in part' the final solution of the underlying dispute will always lie with the parties.

58/ A case in point is the issue as originally submitted by the parties in the North Sea Continental Shelf Cases, who asked the Court to choose between two different approaches for the delimitation, considered by the respective parties as being part of positive law.

Another case in point would be a case where the question as to whether a certain treaty is valid is relevant to the solution of a dispute. The procedure of article 66 of the Vienna Convention on the Law of Treaties may then be followed to submit this specific legal question to the Court.

59/ This point is well illustrated by the ultimate judgement of the Court in the North Sea Continental Shelf Cases: the Court did not make a choice between the submissions advanced by either side, but requested the parties to negotiate in good faith the disputed delimitation in the North Sea continental shelf, having regard to a number of "factors" indicated by the Court.

60/ Reference may be made to the excellent studies of the Secretary-General of the United Nations on the subject published in 1965 and 1966: see Official Records of the General Assembly, Twentieth Session, Annexes, agenda items 90 and 94, document A/5694 and Ibid., Twenty-first Session, Annexes, agenda item 87, document A/6228. For the Netherlands comments see Ibid., Eighteenth Session, Annexes, agenda item 71, document A/5470 and Add.1 and 2, p. 15 et seq.

254. "As in any case of judicial settlement, the crucial point in the case of 'adjudication in part' is the willingness of States to make use of the International Court of Justice by giving it effective judicial power. In the opinion of the Netherlands Government, further efforts should be made to promote this willingness by having wider recourse to: ... (3) special agreement between the parties to a dispute to the effect that they will submit the dispute to the Court for adjudication either 'in full' or 'in part'. Intergovernmental organizations might be encouraged to promote the conclusion of such special agreements by bringing to bear on the parties to a dispute such influence as they may be able to exercise."

Sweden

255. "... it would be welcome if the General Assembly or the Security Council, when recommending procedures or methods of adjustment of a legal dispute brought before it, advise the parties to refer the dispute to the International Court of Justice."

Madagascar

256. "The Malagasy Government wishes to propose that the Court be assigned an appeal and review role with regard to other international tribunals (at least those within the United Nations). On that assumption, the above-mentioned comment[61/] regarding judges ad hoc would have to be reconsidered."

Belgium

"Methods of conciliation:

257. With regard to the settlement of international disputes, Governments now show a tendency to prefer the flexibility of conciliation to the rigidity of judicial settlement. The question might be asked whether it would be possible to confer on the Court a conciliation role which did not extend beyond the framework of the present Statute, while preserving the Court's essential judicial character.

258. "Article 26 of the Statute gives the Court great freedom to form within it one or more chambers for the purpose of dealing either with certain categories of

61/ See para. 179 above.

cases, or with a particular case (Article 26, paragraphs 1 and 2). The Court might conceivably form a chamber to which it would assign a conciliation role to be fulfilled with the prior agreement of the parties, in which case the latter would for this purpose either comply unconditionally with the decision of the ad hoc chamber, or declare, in the absence of conciliation before the chamber, that they accept judicial settlement by the full Court.

259. "However, two questions arise in this connexion. Under Article 36 of the Statute, the Court's function is to settle disputes in accordance with international law. If it is obvious that a conciliation chamber could not act contra legem, could it not conceivably act infra legem, and even where the law clearly does not exist, could it not for the purposes of conciliation act ultra legem? Furthermore, there is a danger that the members of the Court might become involved in the political bargaining that is often inevitable in attempts at conciliation. In any case, the full Court should retain ultimate control over the exercise of the conciliation function, and should to that end be accorded a power of evocation.

Role of experts - fact-finding

260. "For some time it has been recommended that one means of reactivating the International Court of Justice should be the development of a new function, namely, that of fact-finding. In order to appreciate the latter's importance, account must be taken above all of the nature of the cases which States seem to be prepared to submit to the Court. Few of them have involved fact-finding, but such cases have nevertheless been sufficient in number to merit attention.

1. The International Court of Justice has complete freedom to appoint experts. It made extensive use of this facility in the Corfu Channel case.

2. It is sufficient to compare the questions of fact so important in this case with the questions of law which formed the substance of all the other cases to realize the limited role played by fact-finding: even if a fact-finding committee had existed, there would have been no work for it.

261. "The determination of questions of fact is a proper function of a commission of enquiry. Such a body played a vital role in the Red Crusader case. If, as Belgium suggested in a letter of 15 September 1970 addressed to the President of

the Court, the latter formed within it a conciliation chamber - as it is empowered to do - that chamber would obviously be called upon to establish a fact-finding procedure, which would precede any contentious proceedings. The fact-finding function would thus continue to be linked with the Court without giving rise to the distrust at present associated with the exercise of the Court's jurisdiction in contentious cases.

262. "Belgium sees no value - in so far as the aim is to improve the Court and not to isolate it still further - in the establishment of a completely independent fact-finding committee."

3. Advisory jurisdiction

Poland

263. "Advisory opinions of the Court can, under existing arrangements, be sought by numerous international organizations. In practice, however, this takes place quite infrequently. In this situation, the Government of the Polish People's Republic believes that the possibility of making the advisory procedure available to regional organizations or individual States is hardly justified. Such a measure would require revision of the United Nations Charter and of the Court's Statute, and the Government of the Polish People's Republic objects to such a revision."

Cyprus

264. "Under the Charter, the General Assembly and the Securtiy Council may request advisory opinions on any legal question (Article 96, paragraph 1); other organs of the United Nations and specialized agencies if so authorized by the General Assembly (Article 96, paragraph 2) may request such opinions with regard to legal questions arising within the scope of their activities.62/

62/ See also Article 65, paragraph 1 of the Statute. Six organs of the United Nations (including the Assembly and Council) and 13 agencies are at present authorized to request such opinions. For a list of such organs and agencies see Oppenheim-Lauterpacht, op. cit., p. 56, note 1; O'Connell, op. cit., p. 1198, note 31; see also Kelsen, op. cit., p. 545 et seq.

265. "States themselves may not seek an advisory opinion, though they may request a judgment on an abstract question of law.[63/] There would be, however, some advantage if such a procedure was made available to States, and this may be achieved without any amendment of the Charter or the Statute if the General Assembly may be accepted as a channel for the transmission of such request.[64/]

266. "Irrespective of the interpretation of Articles 96 of the Charter and 65, paragraph 1 of the Statute,[65/] we are inclined to the view that the circle of persons who may invoke the advisory jurisdiction of the Court may be expanded so as to include more intergovernmental organizations including regional organizations[66/] especially those established for the settlement of local disputes which may have a legal character.

267. "A question arises whether individuals may invoke the advisory jurisdiction of the Court. It has been pointed out that the power of the Court to receive information from international organizations is an oblique way of gaining access to individuals and in this respect the advisory opinion concerning the Judgments of the Administrative Tribunal of the ILO may be referred to.[67/] It seems that for the sake of assuring equality of the parties and a sound administration of justice it would be desirable to open access of the Court to individuals.

268. "Finally it may be considered desirable to have this jurisdiction of the Court open to arbitral tribunals or permanent international tribunals established under treaties."

Laos

269. "The advisory procedure may be a means for the peaceful settlement of disputes; the functions of the Court should also be broadened in this respect."

63/ Interpretaiton of Peace Treaties, I.C.J. Reports 1950, p. 65. In the Eastern Carelia case when the Court was asked for an advisory opinion it stated that "answering the question /put to it/ would be substantially equivalent to deciding the dispute between the parties" and accordingly, one of the parties refusing to appear, the Court declined to give any opinion: see Oppenheim-Lauterpacht, op. cit., p. 66 et seq.; also Encyclopédie Dalloz, Droit international, vol. I - Cour internationale de Justice No. 54, p. 589.

64/ See Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 96, document A/8238, para. 52.

65/ As to which see Kelsen, op. cit., p. 545.

66/ See Articles 47, 52 and 68 of the Charter.

67/ O'Connell, op. cit., p. 1198 and also ibid. note 40; Gross, op. cit., p. 322.

Denmark

270. ... "it could be considered... to widen the Court's capacity to give advisory opinions for instance by permitting States to have the option of seeking an advisory opinion."

Guatemala

271. "We believe that the necessary measures should be taken to enable States, in certain cases, to request advisory opinions of the Court on international legal questions which concern them, and also to enable the greatest number of United Nations bodies and governmental organizations, including regional organizations, to request advisory opinions of the Court within the scope of their activities."

United States of America

272. "Access to the advisory jurisdiction of the Court should be expanded concomitantly with access in contentious cases. Although at the present time the United Nations and its specialized agencies have the capacity to seek advisory opinions, there is a growing number of other international organizations, including regional organizations, whose activities are increasingly important to international law and yet who cannot obtain an advisory opinion from the International Court of Justice. Although the more important question is perhaps how to convince international organizations to request advisory opinions once they have that option, the essential first step is still to make that exercise possible.

273. "Accordingly, the United States favors making the advisory procedure available to more intergovernmental organizations, including regional organizations. A procedure not requiring amendment of the Statute could at the present time be established by the General Assembly through creation of a new special committee similar to the committee used for review of decisions of the Administrative Tribunal of the United Nations. The new special committee could be given authority to request from the Court an advisory opinion on behalf of other international organizations.

274. "In addition, the new committee could be given authority to seek an advisory opinion on behalf of two or more States who voluntarily agree to submit to the

advisory jurisdiction of the Court with respect to a dispute between them. This would in effect permit States which would be reluctant to submit a dispute to the binding decision of a contentious case to obtain from the Court an authoritative statement of the relative principles of international law."

Argentina

275. "The Argentine Government will certainly support proposals to enable more intergovernmental organizations, including regional organizations, to have access to the advisory procedure, and to provide States with the opportunity to request advisory opinions of the Court."

Italy

276. "The Government of Italy are inclined to favour the possibility of making the advisory procedure available to a greater number of international organizations, whether universal or regional".

Finland

277. "There is... reason, in the opinion of the Government of Finland, to broaden the field of parties entitled to seek advisory opinions from the International Court of Justice. To this end, consideration should be given to whether the right to request an advisory opinion can be accorded to States and organizations and institutes other than those which under the Charter of the United Nations or in accordance with its provisions are entitled to request a decision from the International Court of Justice."

Mexico

278. "Although the exercise of advisory functions is not in itself a jurisdictional act, the possibility of amending Article 96 of the Charter to enable both States and intergovernmental organizations to apply to the Court for advisory opinions should be explored.

279. "Without adopting any position in this respect, the Mexican Ministry of Foreign Affairs merely wishes at present to draw attention to the fact that such an amendment could indeed constitute a fundamental change in the very concept of the Court. Hitherto, in accordance with the texts in force, the primary and principal

duty of the Court has in fact been the jurisdictional function properly speaking, that is to say, the judgment of contentious cases, while its advisory function although very important, has been its secondary and supplementary duty. In the latter case, the Court at present acts exclusively as the legal adviser of the United Nations - or rather, of its most important organs (the General Assembly and the Security Council) - and in exceptional cases, of other organs and agencies with the authorization of the Assembly itself. If the suggested amendment were adopted, however, the supplementary function could become the major one and vice versa, the Court becoming the legal adviser of the whole world. We do not exclude the possibility that all this may become necessary and profitable, but the matter should still be weighed carefully before a step of such magnitude is taken."

Switzerland

"Access by States to the advisory procedure and restriction of the advisory procedure to non-contentious cases

280. "It may certainly be useful for States, in certain circumstances, to obtain the Court's views on the extent of their rights and obligations, even in the absence of a dispute. This fact gave rise to the idea that States should henceforth have access to the advisory procedure. This proposal is one of those most frequently put forward during the discussions on the review of the Court's role.

281. "While the value of this suggestion is evident, its inherent disadvantages are equally obvious. In the opinion of the Swiss Government, the principal, and in its view over-riding, drawback of an extension of the advisory procedure to requests submitted by States would be to compel the Court, where necessary, to deliver an opinion twice in succession on the same question, first in advisory proceedings and then in contentious proceedings. It might then run the risk of finding itself morally bound by an opinion which it had given previously in abstract terms, possibly without possessing the specific data which are provided in an actual case, or of giving a different decision in the light of the circumstances of the case and after a fresh examination, with a result that might be prejudicial to its prestige and authority.

282. "It is true that this drawback can be minimized if advisory opinions are henceforth excluded in the case of current disputes; this point will be incorporated

below in a secondary proposal. However, while this precaution reduces the risk, it does not eliminate it entirely. A State will not generally refer to the Court its doubts concerning a legal problem unless the question raised is of specific interest to that State and, consequently, unless it has a more or less direct connexion with an actual or latent dispute. There is hence a considerable risk that this dispute will subsequently be brought before the Court. But even if care is taken to incorporate in the proposed reform all the reservations and restrictions that might serve to reduce the disadvantages, it is nonetheless an indisputable truth that there is no object in inducing the Court to take a position on a legal question, with all the solemnity inherent in its decisions, before those questions arise in practice. For these reasons, the Swiss Government is opposed to the idea of giving States access to the advisory procedure.

283. "If the reform envisaged were nevertheless adopted, the Swiss Government would make a secondary proposal that, in order to reduce the disadvantages mentioned, advisory opinions should henceforth be excluded in the case of current disputes, including requests for opinions submitted by international organizations.

284. "With regard to requests from States, it would be incompatible with the authority of the Court if those States were to apply to it, via the roundabout way of an advisory opinion, for the settlement of a dispute while remaining free to take whatever action they wished on the decision.

285. "With regard to requests from international organizations, which are at present the only ones that can be submitted to the Court, it is known that they can be made in respect of what we have termed current disputes. This was also true in the case of the former Court, in which there are a number of precedents for advisory opinions being given in contentious cases. This particular form of advisory jurisdiction inevitably raises all kinds of practical problems which are reflected in the work undertaken at various times by the Permanent Court of International Justice in connexion with the formulation and revision of its Rules of Court. In addition to the basic difficulty resulting from the fact that a dispute submitted first of all for an advisory opinion may be brought before the Court again under the contentious procedure,[68/] the example may be given of the

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68/ See P.C.I.J. Series D, No. 2, pp. 390-392, 398: memorandum by Judge Moore, 1922.

problem of the introduction of judges ad hoc into the procedure for advisory opinions dealing with current disputes,[69] as well as the question of disputes involving the interests of a third State.[70]

286. "These technical difficulties would be avoided if the advisory procedure, once it was made accessible to States, could no longer apply to current disputes. Two means could then be envisaged for carrying out this reform, if it is considered necessary. The Court should either refuse to give a resulting on a request for an advisory opinion, as soon as it becomes clear that a current dispute is involved: or it should give its ruling only in cases where the States concerned agreed in advance to comply with the Court's opinion. This latter procedure was employed by the Council of the League of Nations in 1923 when it applied to the Permanent Court for an advisory opinion in the case of the Nationality Decrees issued in Tunis and Morocco. In that case, the Governments of the United Kingdom and France had informed the Council, which in turn informed the Court, that they had undertaken to refer the case in question either to arbitration or to judicial settlement under conditions to be agreed between them if the Court decided that the case was not a 'matter of domestic jurisdiction', which was precisely the object of the request for an advisory opinion.[71] There is, in fact, no longer a big difference between a request for an advisory opinion made in such circumstances and a special agreement for the institution of contentious proceedings. Nevertheless, this procedure could be useful in certain circumstances and the United Nations and States should not be precluded from exercising this option.

287. "If an undertaking were given to accept in advance the Court's opinion, certain practical measures should be taken. When the request is made by two or more States which refer from the outset to a current dispute, the request should be accompanied by a prior declaration accepting the opinion. However, the problem is more complex in the case where other States might intervene pursuant

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69/ Ibid., Add.1, pp. 253 and 267: propcsitions de MM. Huber et Anzilotti (French only) in 1924 and 1925; Add.3, pp. 785 et seq.: discussion of 1933 (French only).

70/ Ibid., Add.3, p. 796: Negulesco report.

71/ P.C.I.J. Series B, No. 4., p. 8.

to Article 66 in advisory proceedings instituted by a single State. The intervention should then depend on acceptance of the opinion by all the parties; failing which the request for an advisory opinion would itself no longer be admissible, since it would have become clear that, it would result in a case which was to all intents and purposes contentious being submitted to the Court, while at the same time the right to contest the Court's opinion would be retained.

288. "Although the Swiss Government is accordingly not in favour of the proposed reform and has not formulated any proposal in this respect - other than a purely secondary proposal - it would nevertheless be prepared to recognize, if a majority of States agreed, that there is a limited case where the admission of States to the advisory procedure could meet a particular need, and would not give rise to the objections of principle set forth above. It has been noted, that under the present system, a certain inequality exists between States and international organizations, since the latter can request opinions on questions which concern Member States, whereas the former cannot, in the same circumstances, request the Court to give an opinion on these questions. Consequently, in cases where an organization is entitled to apply to the Court for an advisory opinion in a question touching upon the rights and obligations of Member States, it would be equitable to recognize that Member States should have the same entitlement.

Access of a greater number of international organizations to the advisory procedure

289. "It would certainly be desirable to increase the number of organizations entitled to request the Court to give an advisory opinion and even to enable regional organizations to submit such requests."

Netherlands

290. "... international organizations confronted with complex problems might be empowered (or might more readily use their existing powers) to ask for 'judicial settlement in part' by submitting a request for an 'advisory opinion'. Some precedents have been set by the General Assembly and the Security Council of the United Nations: e.g. questions concerning the interpretation of peace treaties; the international status of Namibia (South West Africa) and several procedural matters relating to the question of Namibia (South West Africa)."

Sweden

291. "With regard to possible amendments to the Charter of the United Nations and to the Statute of the Court... some specially authorized international organizations outside the United Nations family might also be given the right to ask the Court for an advisory opinion. The Swedish Government would also deem it worthwhile to examine the question whether the Court should be authorized to give an advisory opinion at the request of the supreme national court of a State party to the Statute before its giving judgment on a question of international law, provided, of course, that the national court accepts in advance the ruling of the International Court of Justice as binding. Similarly, and with the same proviso, the Government of a State party to the Statute could very well be allowed to ask the International Court of Justice for an advisory opinion for the purpose of applying or interpreting an international instrument which the Government in question, through ratification or accession, is bound to observe in the domestic field."

Canada

292. "Consideration could be given to extending the number of United Nations bodies which can request advisory opinions from the Court under the terms of the Charter (Article 96, paragraph 1), and the Statute (article 65). An interesting suggestion which may be worthy of examination is that the General Assembly or some subsidiary body delegated by the General Assembly might act as a channel for States and other international organizations which desire the assistance of the Court. Canada, while not necessarily endorsing this suggestion at this time would be interested in the results or its further consideration."

Madagascar

293. "Authorization to request advisory opinions might appropriately be extended to regional organizations and States, provided that such requests are made only for the interpretation of a general rule of international law, or when such a rule is called in question. It is essential to ensure that the Court is not placed in a position where it may prejudice the outcome of certain cases.

294. "It might be desirable to take the additional step of empowering the Court to render declaratory judgements granting judicial recognition to the existence or non-existence of a right in the event of 'potential litigation'."

France

295. "The French Government believes that it would be unnecessary and inadvisable to authorize more institutions to request advisory opinions from the Court or to grant this possibility to States.

296. "As far as international organizations are concerned, it must be acknowledged that the practice followed since the Second World War appears to indicate that this procedure does not enjoy very great favour. The Permanent Court of International Justice received 27 requests for advisory opinions between 1922 and 1935 (the last year in which a request was submitted), although only the Assembly and the Council, the latter being empowered to act on behalf of the International Labour Office, were competent to make such requests. Within the United Nations system, four principal organs, two subsidiary organs of the General Assembly, twelve specialized agencies and the International Atomic Energy Agency, i.e. nineteen organizations in all, are at present authorized to request opinions. Thus far, however, the General Assembly has requested opinions on two occasions and the Security Council on one, and only two specialized agencies have ever submitted requests. Whatever the reasons for this reluctance to use the advisory procedure, it is doubtful whether an increase in the number of organizations authorized to request opinions would lead to an effective increase in the Court's activities in this area.

297. "Moreover, if, as would appear from some of their statements, those delegations to the United Nations which have suggested that States might request advisory opinions from the Court, have in mind the submission to the Court, by mutual consent between the parties, of questions such as those which have been submitted to it, as the result of a special agreement with regard to the continental shelf, experience shows that problems of this nature can be solved by means of the contentious procedure as organized at present. It is for States to use this method, if they see fit; this would not necessitate the amendment of existing rules.

298. "On the other hand, by empowering States on their own initiative to seek an advisory opinion from the Court, one would undoubtedly be failing to take into

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account the danger of a proliferation of attempts to circumvent the fundamental principle that no State may be subjected to international justice without its consent. It is, in fact, very unlikely that States would ask the Court to give a decision on a point of law if they did not intend to invoke its opinion, with the moral, if not juridical, authority which that opinion may have vis-à-vis other States. Even if advisory opinions do not create a juridical obligation, experience confirms that they are used as means of exerting pressure against States, and it is inadmissible that one State should subject another to such pressure without its prior consent."

Iraq

299. "The Statute of the Court should be amended so as to enable intergovernmental organizations, including regional organizations, and States to seek the advisory opinion of the Court through direct access. Admittedly, short of an amendment, States can submit a case to the Court in such a way as to elicit from it a legal view which, while not disposing of the entire dispute, would give guidance to the parties as to the applicable rule of law. This possibility, however, is not open to intergovernmental and regional organizations. Amendment of the Statute in this respect would, therefore, greatly enhance the role of the Court. The possibility of authorizing the Secretary-General of the United Nations to request the advisory opinion of the Court in certain cases is worth considering."

Austria

300. "In view of the fact that in certain United Nations bodies disputes are frequent which might be avoided by clarifying the legal aspects in the first place, it might be useful to consider the advisability of enabling more United Nations bodies and other organizations to request advisory opinions from the Court.

301. "An increase in the scope of the Court's advisory activities could foster the further evolution of universal international law. On the other hand, there is a danger that in some cases a party might ask for opinions in order to evade its obligation to litigate and in order to delay proceedings. In case of a concrete dispute, therefore, a request for an advisory opinion should be subject to the consent of all the parties....

302. ... "supreme courts and other government institutions in the various countries should be generally permitted to request opinions on questions of international law."

Yugoslavia

303. "The Yugoslav Government feels that the institution of seeking consultative opinion from the Court has not been sufficiently utilized. To this, no doubt, have also contributed some decisions passed by the Court in the past, decisions reflecting the differences between the spirit of the international community and the law applied by the Court. However, the consultative opinion rendered by the Court on the illegality of the presence of South Africa in Namibia, is an encouraging indicator of the changes in the Court procedures and of the adaptation of the Court to the contemporary trends in the world. It is to be expected that this decision will exercise a stimulative effect in the direction of greater use and requesting of consultative opinions of the International Court of Justice.

304. "The Yugoslav Government believes that it would be necessary to explore the possibility of having international organizations of intergovernmental character, including regional organizations, regardless of whether or not they are linked to the United Nations by a treaty, if their members are Member States of the United Nations, acquire the right to initiate proceedings in the Court with a view to receiving consultative opinion of the Court.

Belgium

305. "A member of the International Court of Justice, Judge M. Lachs, recently suggested that the Statute should be amended to empower States which were parties to a dispute to ask the Court for an advisory opinion.[72/] Although this proposal would undoubtedly entail an amendment of the Statute, its advantages are such that it is to be hoped that it might be adopted. Nevertheless, such requests for advisory opinions should be formulated in terms which would not prejudge the respective rights of the parties."

72/ Center for International Studies - Problems of the World Court, No. 4, page 19.

IV. PROCEDURES AND METHODS OF WORK OF THE COURT

1. General comments

Cyprus

306. "Proposals for facilitating the recourse to the Court either to its contentious or its advisory jurisdiction imply procedural amendments so as to avoid the rigidity of certain rules, to relieve the proceedings from being cumbersome and costly and to secure the speedy determination of the matter before the Court.

307. "In this respect it would be useful if the particular categories of cases in which it would be appropriate to resort to the procedures provided by Articles 26 and 29 of the Statute were expanded and more accurately defined. Also the possibility of making more often use of Articles 28, 29 and 30 (2) and 50 may be explored."

Laos

308. "The Royal Government of Laos hopes that /the procedures and methods of work of the Court/ will be made less formalistic and cumbersome."

Denmark

309. "... it would be helpful to reduce the cost and length of cases referred to the Court, which might find ways of encouraging parties to be more expeditious."

Finland

310. "Revisions pertaining to the procedural order and work of the International Court of Justice should, in the view of the Government of Finland, be prepared and implemented primarily by the Court itself by amending its Rules as occasion requires. Special attention should then be paid to, among other things, speeding up proceedings of the Court, although the slowness of procedure is generally due in practice to the parties concerned."

Mexico

311. "We have no special comments to make on this item of the questionnaire, apart from the general observation that Article 29 of the present Statute of the Court provides for simplification of the procedure at the request of the parties."

Canada

312. "Recognizing that the Rules of the Court are primarily the responsibility of the Court itself, Canada is encouraged that these are currently under review by the Court. Nonetheless, the Canadian Government believes that it would be beneficial for Member States to make suggestions concerning the flexibility of these rules, and anticipates that the results of the current revision will considerably rationalize the methods of work to reduce especially the length and cost of proceedings. Here again it is evident that potentially advantageous changes in procedure could be effected without amending the Statute of the Court."

Madagascar

313. "The suggestions in document A/8238[75/], (especially those in paragraphs 47 and 48) should be retained since their adoption would bring about a considerable improvement in the functioning of the Court. However, a thorough examination of those proposals cannot be undertaken as matters now stand. It is for the Court itself to amend its procedures, and it would be advisable to wait until it has completed its work in this connexion. Any amendment of the Statute of the Court is connected with a revision of the Charter of the United Nations. Unless the Charter is revised, work on the Statute would be purely academic. The length of the procedure and cost of litigation would undoubtedly be reduced to the extent to which the recommended reforms were applied."

75/ See Official records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 96.

France

314. "The French Government is of the view that, legally speaking, the review of the procedures and methods of work of the Court falls exclusively within the competence of the Court itself by virtue of the texts applicable to it. Moreover, this view is consonant with established practice where international legal and arbitral institutions are concerned."

Iraq

315. "The procedure of the Court leaves much to be desired. In this respect, the Court's study of revision of its Rules is a welcome step. The apparent lack of flexibility of these Rules, the length of the procedure, and the high, if not prohibitive, costs of litigation go a long way in explaining the 'clean docket' of the Court. Resort to the chamber of summary procedure and regional chambers could minimize the effects of these shortcomings."

Austria

316. "Simplifying and speeding up proceedings could be one way to stimulate recourse to the Court. The defects which have emerged in this respect in the proceedings conducted so far have been due partly to the governments and partly to the Court itself."

Yugoslavia

317. "Expeditiousness is a vital condition to the effective functioning of the Court, upon which depends the extent to which the States will approach the Court. For the purpose of achieving a more rapid settlement of disputes, it would be necessary to pay greater attention to the utilization of the chamber composed of five judges, in conformity with Article 29 of the Statute.

318. "In seeking a solution for simplifying and expediting court procedures, the Yugoslav Government supports, in particular, the efforts made on the part of the Court itself toward revising its own Rules. A modern method of work of the Court could go a long way towards meeting the needs of the contemporary international life and legal communication."

Belgium

319. "Those aspects of the procedure which are specifically covered in the Rule of the Court are only of secondary importance and in any case the Court is the best judge of the way in which its Rules should be used. The long time-limits, which have wrongly been attributed to the Court, are actually due to Governments which have persisted in requesting extensions. The obstacles which give rise to these objections cannot be overcome by attempting to alter the number or order of deposit of documents comprising the written proceedings, reports between the written and oral proceedings, and so on.

320. "The choice of interim measures of protection and especially the handling of preliminary objections present problems, which should be left in the hands of the Court. Finally, it does not seem advisable to pass judgement on the development of the Court's advisory procedures. The revival of the Court's advisory activities depends directly on the attitude of States Members of the United Nations to judicial settlement."

2. The desirability of deciding expeditiously on preliminary issues and questions relating to jurisdiction

Cyprus

321. "The time spent for deciding questions relating to jurisdiction and other preliminary issues... may be curtailed to the minimum possible."

United States of America

322. "The Court should adopt the principle of deciding expeditiously and at the outset of litigation all questions relating to jurisdiction and any other preliminary issues that may be raised. It may not always be possible to dispose definitively of all 'procedural' issues early in the course of litigation if they are intimately related to questions of substance. However, the practice of reserving decision on preliminary objections by joining them to the merits of a dispute has in certain cases led to unnecessarily long and expensive litigation, and should be avoided wherever possible."

Switzerland

323. "The view has been expressed that it would be useful for the Court to decide expeditiously on all questions relating to jurisdiction and other preliminary issues which might be raised by the parties, since the practice of reserving decisions on such questions pending consideration of the merits of the case has many drawbacks,...[74/] Joining to the merits a preliminary objection initially pleaded separately does, it is true, result in the parties pleading the same point twice. Although this obviously involves a more complicated procedure, the over-all duration of the proceedings, from the time of the application until the time the final judgement is delivered, may not necessarily be extended. The ideal solution is, no doubt, for objections to be ruled upon rapidly during a preliminary stage of the proceedings, but, as a study of the Court's practice shows, extremely delicate and important legal questions that are the main issue in a case are sometimes raised in the form of preliminary objections and it is frequently quite impossible to rule upon them without examining the merits.

324. "It would, therefore, seem advisable to allow the Court the option to choose either to dispose of preliminary objections forthwith or to join them to the merits without a hearing. As the Court pointed out in its judgement on the preliminary objections in the Barcelona Traction, Light and Power Company, Limited, the objection may be 'so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits..., or without prejuding the merits ...'.[75/] The joinder of preliminary objections to the merits will thus reflect 'the interests of the good administration of justice', which are the decisive factor for the Court in the matter. The third preliminary objection filed by Spain in the case concerning the Barcelona Traction, Power and Light Company, Limited was a typical example of the kind of issue that cannot be decided until the merits of the case have been examined, as the Court's judgement clearly illustrates, since it raised the question of the very substance of the rights of those persons whose interests Belgium claimed to be protecting.[76/]

74/ Ibid., document A/8238, para. 48.

75/ I.C.J. Reports 1964, p. 43.

76/ Ibid., pp. 44-45.

As was later pointed out, of course, the conclusion adopted by the Court in its judgement on the merits of the case, in 1970, 'seems to be derived exclusively from legal considerations regarding the distinct personality of companies in municipal private law, all of which considerations might have been put forward in 1964'.[77] Even so, the choice of the decisive argument may require an over-all view of the case that can only be gained from a hearing of the merits. The joinder of the objection to the merits cannot, therefore, be expected to restrict the Court in the choice of the reasons for its decision.

325. "To avoid the parties having to plead the same objection twice, therefore, it would be reasonable if, in future, the Court could join one or more preliminary objections to the merits, without being requested to do so and without hearing the parties involved, whenever it considers that at least one of the objections cannot be appreciated before the merits have been argued. Although in a case such as that concerning the Barcelona Traction Company, the Court would, in any event, not have been in a position to take up the option, which certain parties would have offered it, of deciding on the objections forthwith, a rule such as that proposed above would have allowed the procedure to be shortened by avoiding having the same points argued twice.

326. "The joinder of preliminary objections to the merits without a hearing would only be feasible in the case of objections relating to receivability, and not in the case of objections relating to jurisdiction, since a State could hardly be expected to explain its position in respect of the merits until it has been established that it accepts the jurisdiction of the court. This matter, however, requires a more detailed examination which will be made below. Moreover, the new rule would only offer the Court an option; it would not impose any obligation upon it. Here, too, the Court would be guided solely by the interests of the good administration of justice and the concern of the parties to keep the procedure as simple and expeditious as possible. If, for example, out of a number of preliminary objections there is one that can be ruled upon without reference to the merits, the Court could, depending on the circumstances, decide to give it a preliminary hearing. In other circumstances, however, it might decide to join to the merits

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77/ Dissenting opinion of Judge Riphagen, I.C.J. Reports 1970, p. 356.

certain objections which could be dealt with forthwith if other objections could not be dealt with without examination of the merits and if such a procedure appeared to be more economical on the whole. The reform proposed here would not require an amendment to the Statute of the Court but only to article 62 of the Rules of Court.

327. "/As regards objections relating to jurisdiction/, a State cannot, strictly speaking, be called upon to argue the merits of a case before the Court until the latter has established its jurisdiction. The general rule deriving from this must therefore be that objections relating to jurisdiction should invariably be ruled upon before an examination of the merits. Reference may be made here to the remarks addressed by Mr. Henri Rolin to the Institute of International Law in 1952 when it was considering amendments to the Statute:

> 'Another difficulty seemed to me to arise from the lack of suitable provisions governing preliminary objections. The Statute does not make explicit provision for preliminary objections, the only reference to them being in article 53, according to which, even when the Court pronounces on a case by default, it must, before deciding in favour of the claim, satisfy itself that it has jurisdiction. It can be assumed, therefore, that this applies a fortieri when the case is defended.
>
> 'On the other hand, the Rules leave it to the Court's entire discretion to decide whether to join objections, including presumably those relating to jurisdiction, to the merits. I have the gravest doubts as to the advisability of interpreting the rule in this sense, as one of its effects would be to oblige a State to explain its position in respect of the merits of a case which it considers to fall exclusively within its own jurisdiction. It does not seem to me that such a situation is likely to be easily understood and accepted by public opinion. I fear that it may cause the Court serious difficulties and I would not be surprised if it even prevented States from accepting the idea of compulsory jurisdiction.' 78/

328. "In practice, nonetheless, a rule providing for the preliminary examination of questions of jurisdiction however useful it might be would be difficult to apply and the Court, in fact, currently reserves its right to join to the merits even an objection relating to jurisdiction. There are many reasons for this practice. There is, for example, the difficulty which is frequently encountered of establishing a logical distinction between objections relating to jurisdiction proper and other preliminary objections relating to receivability. In most cases,

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78/ Annuaire de l'Institut de Droit International, 45 I, pp. 487-488.

/...

however, this difficulty could be overcome by applying the criterion referred to by Sir Gerald Fitzmaurice in his separate opinion on the case concerning the Northern Cameroons:

> '... but the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction. If it is founded on considerations lying outside the ambit of any jurisdictional clause, and not involving the interpretation or application of such a provision, then it will normally be an objection to the receivability of the claim.' 79/

329. "A rather more serious difficulty is posed by the form in which certain States have added reservations to declarations made under article 36, paragraph 2, of the Statute. These reservations very often do no more than place on a formal, procedural footing certain elements that are essential to and inherent in the material existence of a subjective right based on international legal order. Consequently, these reservations add nothing to the elements of the litigation that the Court would in any case have to examine when deciding on the material justification of the claim.

330. "An example of this kind of reservation occurred in one of the preliminary objections filed by India that was joined to the merits in the case concerning Right of Passage over Indian Territory. In this objection, India invoked the reservation which it had made regarding its acceptance of compulsory jurisdiction in respect of all questions which, by international law, fell exclusively within its own jurisdiction. Clearly, a reservation of this nature and the objection deriving from it merely reaffirm the requirement that, to be valid, a claim must be based on a genuine point of international law. Where that is the case and where, therefore, the applicant has a subjective right in respect of the respondent, then automatically the question in dispute can no longer be held to fall exclusively within the jurisdiction of the respondent. Without the position of respondent being in any way affected, therefore, an objection of this kind can either be rejected or joined to the merits, since in both cases the respondent will have

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79/ I.C.J. Reports 1963, pp. 102-103.

every opportunity to put forward the relevant material arguments during the examination of the merits. Although, in the case concerning Right of Passage over Indian Territory, the Court decided to join the objection to the merits, Judge Klaestad's dissenting opinion in favour of its rejection deserves serious consideration.80/

331. "Finally, practical consideration may make it impossible to take up other objections as preliminary issues, even though they are not a mere repetition of the material facts of the case. An example of this was the second objection filed by India in the same case, concerning Right of Passage over Indian Territory, which was joined to the merits. This objection raised the question of whether the dispute had originated after a certain crucial date which had been fixed as a time limit in the declaration recognizing compulsory jurisdiction. It is obvious that a decision on such an objection presupposes an examination of the facts of the dispute and, in most cases of this kind, it will be impossible to meet the theoretical requirement of determining jurisdiction before hearing the merits. A solution can be found, however, since any decision regarding the very existence of compulsory jurisdiction, however limited, will normally derive from a recognition of the existence and validity of a declaration under Article 36, paragraph 2, of the Statute, or of the clause of a Treaty. A decision on this point, therefore, does not require a hearing on the merits. On the other hand, once it has been established that compulsory jurisdiction exists but where its limits have to be defined in terms of time or in relation to the questions in dispute, a hearing on the merits will often be essential. However, in such cases, a State which, to a degree yet to be determined, has accepted compulsory jurisdiction can be assumed not to have the same reasons as a State which has accepted no such jurisdiction for evading an examination of the merits until the question of jurisdiction has been decided.

332. "Thus, the rule should be that, in the absence of any imperative reason to the contrary, an objection relating to the existence of compulsory jurisdiction should be ruled upon as a preliminary matter, whereas an objection regarding the extent of a compulsory jurisdiction that has already been established can more conveniently be joined to the merits of the case. The adoption of such a rule would not necessarily require an amendment to the Statute, but could take the form of a recommendation in a resolution."

80/ I.C.J. Reports, 1957, p. 165.

Sweden

333. "... it is essential, and even indispensable, that all questions relating to jurisdiction and other preliminary issues are decided at the earliest possible stage of the proceedings.

Canada

334. "Canada... believes that there would be merit in considering proposals that could have the effect of expediting the rendering of the Court's decisions on preliminary objections. It would also assist the cause of expedition if, wherever possible, procedural and jurisdictional questions could be decided before considering the merits of contentious cases."

Austria

335. "Particularly detrimental to the Court's authority has been the practice hitherto followed in dealing with objections to the Court's competence. Frequently, such objections have been left to be dealt with in the final judgement. In this way, it has been possible for proceedings to end by a dismissal of the action for want of jurisdiction after years of deliberation on the subject matter of the dispute."

3. Other suggestions for expediting and simplifying procedure

Cyprus

336. "... the time taken for issuing a reserved judgement may be curtailed to the minimum possible".[81/]

United States of America

337. "Although in special cases extensions of time limits set by the Court may be essential to provide a fair opportunity for preparation, too liberal acceptance by the Court of requests for such extensions can slow litigation to the point of becoming an excessive burden on the parties. The Court should, as it did in the Namibia advisory opinion, apply more stringent standards in deciding whether to grant or deny a request for extension of time.

338. "Similarly, the Court in certain cases should seek to accelerate both written and oral phases of the proceedings in contentious cases. The requirements of Article 43 of the Statute call for a two-part procedure, written and oral, and specify that the written phase is to include a memorial, a counter-memorial and, if necessary, a reply. To this is added the apparent requirement of the Court's Rules that a reply and a rejoinder be made in cases submitted by special agreement. This rigidity could be removed by eleiminating the requirements additional to the Statute and leaving to the Court's discretion in each case whether replies need be filed.

339. "In contentious cases where the written pleadings appear adequate, the Court might wish to suggest that the parties agree to dispense with an oral phase, on the understanding that if any party to litigation requests a hearing it would be granted without prejudice. In addition, the Court might wish, after reading the written documents, to specify the questions that should be addressed in the oral phase. By directing the focus of the oral arguments in this way the Court would reduce duplication of coverage, increase attention paid to issues the Court finds most significant, and minimize the likelihood that the parties will

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81/ In the South West Africa case (Second Phase), the hearing was concluded on 29 November 1965 and the judgement delivered on 18 July 1966. In the case concerning the Barcelona Traction Light and Power Co., Limited (Second Phase) the hearing was concluded on 27 July 1969 and the judgement was delivered on 5 February 1970.

be unprepared to answer questions the Court addresses to them during those proceedings. Finally, increased use of summary procedures, either in chamber or by the full Court, as discussed above, would enable the Court to shorten the length of litigation."

Switzerland

340. "The procedure followed by the Court has on occasion been criticized as being too slow. By and large, the criticism is unfair, since the pace of the proceedings depends almost entirely on the parties themselves and the famous delays that occurred in certain recent cases are due to the fact that the parties requested extensions of time-limits. No changes in the rules now in force are therefore called for, except that the Court could perhaps consider applying them more strictly in future, for example by refusing to extend more than once the time-limits fixed for the completion of steps in the proceedings.

341. "With a view to expediting or simplifying procedure, the suggestion has sometimes been made that the Court should inform the parties in advance of the points on which it would like to hear oral statements and that it should restrict speeches to those aspects of the case. The Swiss Government is of the opinion that, however justified in theory, this proposal is not practicable. As the Court has pointed out itself, it cannot decide a point that has not yet been fully argued by the Parties.[82/] It follows from this undeniable principle that the Court cannot make a general and definitive ruling restricting oral statements in advance. On the other hand, there would be no objection in principle to it provisionally limiting oral statements either to the first points of fact and law that arise in the logical sequence of the arguements adduced in support of a case or, conversely, to the first of a series of objections each of which, if found to be justified, would suffice to bring about rejection of the claim. If the examination of one of these initial points were already to demonstrate that the applicant's argument was unfounded or that an objection

82/ Ambatielos case (jurisdiction), I.C.J. Reports 1952, p. 45.

of the respondent should be upheld and that the claim should therefore be rejected, the Court would then be in a position to deliver its judgement after hearing partial oral statements. If, however, the initial points were decided in favour of the applicant but other objections of the respondent still stand at a later stage of the proceedings, the Court would then have to request oral statements on aspects of the case that had originally been set aside as subsidiary or hypothetical issues. The oral proceedings, and even the deliberations of the Court, would thus be divided into two or more phases, so that ultimately consideration of the case as a whole might become more complicated and slower. These factors therefore seem to militate against the suggestion made.

342. "It would, however, be advisable for the Court to limit the length of oral statements and the number of speakers (advocates, counsels) and adopt strict rules on the subject. The exaggerations committed by certain parties have probably discouraged a number of States from bringing their cases before the Court."

Sweden

343. "The Swedish Government deems the primary task of the International Court of Justice to be that of adjudication. Any simplification of the conduct of the procedure is likely to have a positive bearing on the readiness of States to bring a case before the Court. Consequently it would be most welcome if the Court would endeavour, to the extent possible to show restraint in granting requests for extensions of time-limits and consider how both the written and oral proceedings can be speeded up."

Canada

344. "Among /the/ areas of practice which might be discussed is the possibility of streamlining present pretrial court procedures through the use of depositions and of written stipulations by the parties. Perhaps limitations on length and imposition of time limits could be instituted to improve the nature of written proceedings before the Court and to enhance the usefulness of certain

oral procedures which now tend to repeat what has already been submitted in written form. Current procedures have been criticized in this regard as being overly lengthy, formal, repetitive and rigi[illegible] "

Madagascar

345. "States should also be allowed to opt for written proceedings only."

4. The question of costs

United States of America

346. "The cost of litigation to parties before the Court has often been cited as an impediment to more frequent use of the Court. Although the basic costs of the Court are borne by the international community and recourse to the Court is therefore less costly than, for example, the establishment of arbitral tribunals, there is room for reducing the costs of litigation even further. Shortening the length of litigation and settling cases more expeditiously may reduce the costs somewhat. Moreover, in order to assure that any State wishing to use the Court may obtain competent counsel, the General Assembly might wish to consider permitting States which have incurred or have agreed to incur the costs of litigation and cannot meet them entirely from their own resources, to seek assistance from the regular United Nations budget pursuant to a decision in each case by the General Assembly."

Finland

347. "As regards the costs of the procedural system, which have also been regarded as immoderately high, it is as well to point out that the costs of the maintenance of the International Court of Justice are met from United Nations funds and that it depends on the parties concerned in the case to decide the costs they consider to be necessary for the presentation and proceedings of the case before the Court."

Mexico

348. "As regards the cost of litigation, it should be borne in mind that judicial proceedings, expensive though they may be, are in fact less costly than arbitration, since the salaries of the judges and administrative personnel of the Court are paid out of the United Nations budget."

Switzerland

349. "It is not true that the proceedings of the Court are unduly costly. A comparison with arbitration procedure would most likely be favourable to the Court, since its costs are covered by its own budget and the parties are responsible only for their own expenses. It is the responsibility of the latter, therefore, to keep their costs within reasonable bounds. As stated above, however,[83/] stricter limits could perhaps be imposed on oral statements before the Court."

Sweden

350. "It is an undisputed fact that the costs of litigation before the International Court of Justice are very high and are likely to have an inhibitory effect on smaller States, and particularly on the smaller developing States, to bring a case before the Court. Means should therefore be sought to reduce the financial burden that a procedure before the International Court of Justice entails for these States. The Swedish Government would like to broach the idea of creating a special fund, within the framework of the United Nations, by which a part of the litigation costs could be met in appropriate cases. This suggestion appears to be in line with the idea underlying the final provisions of the Annex to the Vienna Convention on the Law of Treaties, whereby the expenses of the Conciliation Commission shall be borne by the United Nations (see also General Assembly resolution 2534 (XXIV)."

83/ See para. 342 above.

5. Other comments

(a) The question of individual and dissenting opinions

Switzerland

351. "The practice of separate and dissenting opinions has sometimes been criticized, certain authors claiming that the Court's judgements would carry more weight if only the opinion of the majority were published. Such criticisms do not, in general, appear to be justified. Over the 50 years during which the two Courts have existed, separate and dissenting opinions have undoubtedly made a considerable contribution to their volume of judicial precedents and to the development of international law. It should suffice to remember the separate or dissenting opinions of Anzilotti or Sir Hersch Lauterpacht, to cite only great judges of the past.

352. "Quite apart from the special significance of some separate and dissenting opinions, they frequently serve to clarify the sense of a judgement or, by showing where there was divergence and where convergence of opinion, to indicate which parts of the reasoning are more or less substantiated. By contrast, a judgement which contained no indication of minority votes would give a false impression of unanimity where more had existed, while a judgement showing the result of voting but containing no separate opinions would leave the reader unaware of the sense and scope of the opposing views. Finally, by adding to judicial precedent the refinements and clarifications which at the national level are provided by a whole series of judgements on the same subject, separate opinions go some way - as regards the development of international law - towards making up for the small number of cases covered by international judicial practice.

353. "While separate and dissenting opinions are thus an institution which has shown its worth and which should therefore be retained, it might nevertheless be useful to ensure that it is not abused. Since Article 57 of the Statute leaves this matter entirely to the discretion of the judges, a written rule should be introduced specifying the limits that have always been accepted in theory but too often disregarded in practice. Separate or dissenting opinions must bear

on the issue on which the Court has passed judgement, giving the reasons why a judge was unable to vote for the conclusion of the Court or the different reasons which led him to the same conclusion. It must, however, be clearly understood that judges are not entitled, in their opinions, to deal with matters that the Court has not taken up. Specifically, they should not examine the merits of a case in a dissenting opinion attached to a judgement in which the Court has declared that it has no jurisdiction or ruled that the claim is not admissible. Reference may here be made to the statement by Sir Percy Spender, President of the Court in 1966, following its judgement on the South West Africa case (Second Phase)."84/

Canada

354. "In view of the responsibility which rests with the Court to articulate international law, consideration might be given as to the role and usefulness of dissenting opinions to judgements of the Court, and to the form which judgements should take. Canada welcomes the flexibility shown by the Court in providing 'guidelines' rather than a final decision in the North Sea Continental Shelf Cases, and believes there may be some advantage in more frequently employing this type of approach in the future."

(b) Interim measures of protection

Switzerland

355. "The Court currently considers that it is entitled to indicate interim measures before deciding the question of its jurisdiction. It did so, for example, in the Anglo-Iranian Oil Company case, in which it subsequently decided that it did not have jurisdiction. This system cannot fail to give rise to certain misgivings. If the Court supposedly does not have jurisdiction, a State

84/ I.C.J. Reports 1966, pp. 51-57.

can not strictly be expected to carry out the interim measures indicated by the Court. This would lead to a situation in which the order concerning interim measures would have no more value than a recommendation, as Mr. Henri Rolin suggested in his remarks to the Institute of International Law.[85/] In order to avoid this difficulty, the jurisdiction to decree interim measures of protection might be considered as the expression of a preliminary or incidental jurisdiction, as suggested by Sir Gerald Fitzmaurice, in his separate opinion on the case concerning the Northern Cameroons.[86/] The second alternative is undoubtedly the most satisfactory, since it guarantees the compulsory nature of the order concerning interim measures and thereby safeguards the Court's authority. This does not necessarily mean that the existence of jurisdiction can be proved on a first examination. We have here the same distinction as that outlined above between examination of the actual existence of jurisdiction and examination of its scope. It would seem that interim measures cannot be reasonably decreed until after a decision affirming the existence of some form of jurisdiction but before the examination of the limits of such jurisdiction."

(c) The advisory opinion procedure

Austria

356. "In the interests of efficiency, it would not seem useful to conduct the advisory opinion procedure in the form of quasi-litigious proceedings in accordance with Article 66 /of the Statute/."

85/ Annuaire de l'Institut de Droit International, 45 I, p. 487.

86/ I.C.J. Reports 1963, p. 103.

V FUTURE ACTION ON THE ITEM BY THE GENERAL ASSEMBLY

Cyprus

357. "The future action on the item of reviewing the role of the Court falls into two categories: those which involve a change in the Statute and those which do not. Changes in the Statute are equivalent to amendments of the Charter (Article 69 of the Statute) and require 'a vote of two-thirds of the members of the General Assembly' including all the permanent members of the Security Council (Article 108 of the Charter). The initiative may come from Members or from the Court (Article 70 of the Statute).

358. "It may, however, be possible to evolve some changes with respect to the access to the Court or procedural matters which will not require formal amendments. Thus viewing the provision of Article 36, paragraph 1 of the Statute, some innovations in procedure and remedies may be brought about by additional or supplementary instruments giving jurisdiction in respect of matters provided for in treaties.[87/] Also international organizations other than specialized agencies might be authorized to request advisory opinions.[88/] The Court may also deal with requests for advisory opinions under Article 26, paragraph 2 of the Statute or for matters for summary proceedings under Article 29 thereof."

Laos

359. "The Statute of the Court should be revised on the principle of compulsory adherence whereby all States Members of the United Nations would undertake in advance to comply with the decisions of the Court and to enforce them in the same way as decisions of their national courts."

87/ See Gross, op. cit., p. 276. See ibid., examples in some agreements between States.

88/ In this respect the provisions of Article 96, paragraph 2 of the Charter providing for "other organs of the United Nations and specialized agencies" may be compared with the provisions of Article 65, paragraph 1 of the Statute in which provision is made for "the request of whatever body which may be authorized by or in accordance with the Charter of the United Nations to make such request". It may be argued, however, that the Court may be guided by its Statute rather than by the Charter (Gross, op. cit., p. 277). As a matter of fact such an authorization was granted to the International Atomic Energy Agency which is not a specialized agency.

Norway

360. "The Norwegian Government feels it would be premature to make any detailed suggestions regarding the improvement of the court's work before the revision /of the Rules of Court/ has been completed or at least before the Court has made its views on a possible revision of its organization and functioning known to the General Assembly of the United Nations, as it has been invited to do."

Denmark

361. ... "an ad hoc committee should be established to study means of increasing the effectiveness of the Court".

Guatemala

362. "The General Assembly should establish a special committee composed of representatives of Member States, along the lines suggested at the last session of the General Assembly, to study effective measures to promote more frequent use of the services of the Court both by States and by organs of the United Nations and intergovernmental organizations, including regional organizations."

United States of America

363. "The United States believes that a detailed study of the International Court of Justice and the attitude of States toward the Court is urgently required. While the need for peaceful settlement of international disputes remains urgent, use of the Court has diminished to the point that at times there are no cases at all on its docket. The reasons for this paradox must be studied in depth if the basic objectives of the United Nations Charter are ever to be fulfilled. To this end the United States would favor the establishment by the General Assembly of an ad hoc committee to study the results of the Secretary-General's questionnaire on the review of the role of the Court, and to propose measures designed to enhance the effectiveness of the Court and to encourage its significantly greater use.

364. "Should the General Assembly consider those measures desirable, it might, with the advice and comments of the members of the Court, seek to implement them in two ways. Measures which concern the procedures and methods of work of the Court should be conveyed to the Court for its consideration as the Court reviews its own procedures. Other measures deemed bound by the General Assembly should be implemented wherever possible by action of the Assembly or contained in recommendations for further action by States."

Argentina

365. "The General Assembly should continue to give special attention to the subject which concerns the enhancement of the effectiveness of the principal judicial organ of the United Nations. The Sixth Committee did not support the establishment of an ad hoc committee to study obstacles to the satisfactory functioning of the Court. However, after an analysis of the various replies to this questionnaire, it may prove appropriate to set up a standing or fixed-term committee to accomplish the aims that led the General Assembly to adopt resolution 2723 (XXV)."

Italy

366. "Future action on the item by the United Nations should be the creation of an ad hoc committee of the General Assembly, composed of experts and entrusted with the task of studying the role of the Court and reporting thereon to the General Assembly. The ad hoc body's mandate should be conceived with a certain elasticity for the study to be, without committing Member States to any given solutions, sufficiently comprehensive. The ad hoc body should also be offered an opportunity to benefit from the opinion of the Court itself."

Finland

367. "The Government of Finland considers that the material now collected, the remarks and proposals that may be introduced by the International Court of Justice give a basis to draw up an over-all programme for the improvement of the work of the Court. This programme should present in different groups the measures in which the International Court of Justice may itself decide and those which require the decision of the General Assembly upon the recommendation of the Security Council as well as other recommendations and standpoints of a general nature to which attention has been given and which may be important for the status and role of the International Court of Justice in the future. For drafting this programme and the exploratory work needed for this, a special committee should be appointed by the General Assembly, as was proposed by several States at the Twenty-fifth session of the General Assembly. The composition of the committee should be representative and its task should be defined accurately."

Mexico

368. "During the twenty-fifth session, Mexico was among the twenty-two delegations that proposed the establishment of an ad hoc committee to study the subject. This idea may come up again at the next session of the General Assembly. Mexico does not have any preconceived ideas; it will, however, sponsor or support any proposal that it believes will produce the best solution to the crisis at present facing the International Court of Justice. To this end and in this spirit, the Mexican delegation will take part in any further debate on this subject."

Switzerland

369. "Some of the proposed reforms require a revision of the Statute, some involve an amendment of the Rules of Court and some could be carried out through Assembly resolutions."

370. "The Swiss proposals requiring revision of the Statute concern the following points: duration of the term of office of judges; method of election; establishment of regional chambers (at least for the submission of an appeal and possibly even for the entire proceedings); re-drafting of Article 36; exclusion of current disputes from the advisory procedure if this procedure is opened to States; increase in the number of organizations authorized to request advisory opinions. The Rules would have to be revised in order to permit the Court to join preliminary objections to the merits without debate (Article 62), and possibly in order to give ad hoc judges and permanent judges of the nationality of a party in the case of the right to abstain (Article 30) and to limit the right to emit dissenting and separate opinions on the points covered by the judgement. Finally, the following points could be the subject of resolutions: timing of elections; participation of assessors in the advisory procedure; identical composition of the Court in different phases of the same case; declaratory judgements; acceleration of procedure; treatment of preliminary objections and requests for interim measures and (possibly) the question of the right to abstain and dissenting opinions.

371. "Amendments to the Statute are a matter within the competence of the General Assembly, acting with the participation of States which are Parties to the Statute but are not Members of the United Nations. The revision of the Statute, which

is itself an integral part of the United Nations Charter, obviously poses a delicate problem and for the time being preference could be given to the reforms that can be effected by amending the Rules or by adopting resolutions.

372. "The revision of the Rules falls within the exclusive competence of the Court, which may be interested in the suggestions made on this subject by the Parties to the Statute and in the ideas which meet with the approval of the majority of these Parties. As far as the Assembly is concerned, there is no difference between the proposals involving a revision of the Rules and the third group of suggestions mentioned above, since all can be dealt with in resolutions."

373. "Such resolutions, addressed by one United Nations body to another which is not subordinate to it (in this case the Assembly and the Court), are an accepted United Nations practice and there are many examples of this practice in relations between the General Assembly and the Security Council, although it is understood that the resolutions are no more than recommendations involving no binding obligation."

374. "In any case, States which are Parties to the Statute but are not Members of the United Nations should have the option of participating in the task of reforming the Court. This point has never been questioned and was expressly established in resolution 2520 (XXIV), adopted by the General Assembly on 4 December 1969. This text applies to any future work on the revision of the Statute.

375. "A question does, however, arise with regard to the time when States which are Parties to the Statute but are not Members of the United Nations should be called upon to participate in the work and with regard to the matters in which they should be involved. If Article 69 of the Statute and resolution 2520 (XXIV) are followed to the letter, such States are required to participate only in the adoption of amendments to the Statute. However, the spirit of the Statute requires that we go one step further. Until now the work of the Sixth Committee and the Assembly on the item entitled 'Review of the role of the International Court of Justice' has proceeded without the participation of the States which are Parties to the Statute but are not Members of the United Nations. This procedure was then perfectly normal. However, it would seem that the adoption of resolution 2723 (XXV) and the circulation of the Secretary-General's questionnaire changed the situation for the future. As has been shown, the proposed reform of the Court closely

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combines proposals for amendments to the Statute and other suggestions that can be carried out only by Assembly resolutions proposing an amendment to the Rules or expressing other views. The proposals in the second category are also the easiest to implement and therefore the most important at this time. There would thus be no justification for allowing States which are Parties to the Statute but are not Members of the United Nations to participate only in the discussion and voting on amendments to the Statute and not permitting them to take part in the debate on the other aspects of the proposed reform. In both cases, the international community concerned is the group of Parties to the Statute of the Court and each State in this group has an equal right to participate in the discussion of all problems concerning the community. The Swiss Government therefore suggests that the States which are Parties to the Statute of the Court but are not Members of the United Nations should, in future, participate in all the work of the United Nations on the role of the International Court of Justice, without awaiting the start of the actual discussion of amendments to the Statute.

376. "With regard to the practical organization of work, the General Assembly should establish a committee with fifteen to twenty members, which would make a detailed examination of the various proposals for revision.

377. "A committee thus constituted would be sufficiently large to appoint three or four special sub-committees which would each examine groups of problems connected with the proposed revisions; for example, the divisions used in the Secretary-General's questionnaire of 5 March 1971 could be followed."

Japan

378. "... Japan joined twenty-one other Member States in submitting at the last session of the General Assembly the proposal to establish an ad hoc committee 'to examine ways and means of enhancing the effectiveness of the International Court of Justice'. The deliberations of the Sixth Committee last year, though useful, made it all the more necessary to study the matter in depth and to examine in detail the various suggestions and proposals, which merit serious consideration. The Government of Japan therefore believes that it would be appropriate for the General Assembly at its forthcoming session to establish an ad hoc committee which may undertake a thorough-going review of the subject with expert knowledge, without prejudice to any future action to be taken by the Assembly itself."

Sweden

379. "A comprehensive review of the role of the International Court of Justice will be a complex and lengthy process if it purports to bring about more far-reaching amendments to the Charter of the United Nations and to the Statute of the Court. Should at some future date the General Assembly decide to create an International Court of Criminal Jurisdiction, such a step can be expected to have a bearing on the role of the International Court of Justice. For this reason, it might be advisable to postpone any more comprehensive study of the role of the International Court of Justice until the fate of the proposed International Court of Criminal Jurisdiction is finally decided."

Canada

380. "Canada is concerned that an effective and co-ordinated stand be taken within the United Nations to affirm that recourse to the Court does not imply per se an unfriendly act, but is rather an expedient means of peaceful settlement and regulation of disputes. It may be that members would wish to consider the elaboration of a resolution of the United Nations General Assembly, in which an unequivocable declaration that recourse to the Court is not an unfriendly act, could be combined with a plea to States to make greater use of the Court.

381. "In this connection, the Canadian Government is aware that for many States, proceedings before the International Court of Justice are rendered virtually impossible because of their very high cost in terms of both expertise and finances. Canada would therefore urge that consideration be given within the United Nations to the possibility of establishing a multilateral legal aid system. This legal assistance scheme would be complimentary to existing United Nations and bilateral technical assistance in the teaching, development and dissemination of international law, and would provide a pool of human as well as financial resources upon which less wealthy States could draw in order to assist in preparing, arguing and financing cases before the Court.

382. "In the Sixth Committee at the twenty-fifth session of the General Assembly, the Canadian representative joined in urging delegations to give serious consideration to the establishment of an ad hoc committee to study carefully suggestions to increase the usefulness of the International Court of Justice. Canada continues to believe that such an ad hoc committee, made up of individuals

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who are widely respected and have demonstrated particular interest in promoting the effectiveness of the Court, could provide a practical forum for consideration of those measures which would make greater use of the provisions of the present Statute in enhancing the effectiveness of the Court."

Cuba

383. "... in the last instance, it is the Court which should adopt measures to enhance its effectiveness

Madagascar

384. "The Malagasy Government believes that the procedure hitherto adopted for consideration of the question by the General Assembly is worth maintaining. It is clear that measures designed to enhance the effectiveness of the Court will necessitate revision of the Charter of the United Nations. Institutions, however perfect they may be, will only be of value in so far as the States which are to use them display goodwill, confidence and belief in the virtue of judicial settlement. The general growing awareness, now apparent, of the need to find the right ways and means to improve this somewhat neglected method for the peaceful settlement of disputes might lead States to reconsider their position on questions such as national sovereignty. A confrontation of ideas within the United Nations will yield long-term positive results."

Ukrainian SSR

385. "The Ukrainian SSR considers that continuing the discussion in the United Nations General Assembly on the role of the International Court of Justice is inappropriate and unwarranted, as responsibility for improving the work of the Court belongs to the Court itself which since 1967 has been reviewing its Rules with a view to eliminating difficulties which impede the effectiveness of its proceedings."

Czechoslovakia

386. "... the appropriate Czechoslovak organs arrived at the conclusion that

- the organ which is competent to examine the activity and the role of the International Court of Justice and to draw appropriate conclusions so that the activity of the Court would fully correspond to the provisions of the United Nations Charter, under which the Court has been established and which gave it the character of the principal judicial organ of the United Nations, as well as to the provisions of the Court's Statute which lays down its organization, competence and procedure, is the International Court of Justice itself,

- there do not exist any serious reasons that the General Assembly of the United Nations should consider the question of examining the role of the International Court of Justice, or the question of a revision of the Court's Statute and a revision of the United Nations Charter."

France

387. "The Government of the French Republic believes that consideration of the report which the Secretary-General will prepare pursuant to resolution 2723 (XXV) in the light of the opinions expressed by States and, possibly, by the Court should lead the General Assembly to decide that no new measure is either necessary or desirable at the present time. However, it might perhaps deem it useful to draw the attention of States to the opportunities offered to them under the Statute for the peaceful settlement of their disputes."

Union of Soviet Socialist Republics

388. "... the Soviet Union feels that there is not sufficient reason at present to believe that a review by the United Nations General Assembly of the role of the International Court of Justice could lead to an improvement in the functioning of the Court."

Iraq

389. "Under the Charter, the General Assembly could request the International Court of Justice to give advisory opinions on legal questions. Surely, the Statute of the International Court of Justice is pre-emiently such a question. Consequently, the General Assembly could, if it so decides, request an advisory opinion from the Court on the question of the latter's Statute and Rules."

Austria

390. "It might be advisable to set up a committee of the General Assembly to examine incoming proposals and suggestions and to lay before the General Assembly for adoption suggestions to the International Court, recommendations to the governments and proposals on a revision of the Statute."

Yugoslavia

391. "The Yugoslav Government is of the opinion that the eventual future action of the General Assembly to review the role of the Court should be preceded by a detailed, comprehensive and in-depth study of the entire problem. Furthermore, the Court itself has a special role and specific importance in finding the best solutions for greater effectiveness....

392. "The Yugoslav Government is of the opinion that, on the basis of a comprehensive report to be prepared by the Secretary-General for the twenty-sixth session of the General Assembly and proposals of the Court itself, it will be necessary to establish forms for continuing engagement of the United Nations in the review of this problem."

C. TEXT OF THE LETTER ADDRESSED BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE TO THE SECRETARY-GENERAL WITH REFERENCE TO OPERATIVE PARAGRAPH 3 OF GENERAL ASSEMBLY RESOLUTION 2723 (XXV)

393. On 18 June 1971, the President of the Court addressed to the Secretary-General the following letter:

"Allow me to refer to paragraph 3 of General Assembly resolution 2723 (XXV), by which the Assembly invited the International Court of Justice, should it so desire, to state its views on the question of the role of the Court, in connexion with the consideration by the Assembly at its twenty-sixth session of an item entitled 'Review of the Role of the International Court of Justice'.

The Court has considered the Assembly's invitation and has taken note of the discussions in the Sixth Committee and the questionnaire addressed to Member States and States parties to the Court's Statute in pursuance of paragraph 1 of resolution 2723 (XXV), which have traced a framework of reference for the review envisaged. The Court is most appreciative of the General Assembly's invitation affording it the opportunity of making its views known and of thus, to the extent of its competence, assisting the Assembly in the preparation of the item. While the Court is fully mindful of the responsibilities entrusted to it by the Charter and its Statute, it does not consider that it could at this stage usefully state its views on the questions involved.

The reference to the Court of contentious cases and requests for advisory opinions remains a matter for States and for the authorized organs of the United Nations and specialized agencies. In 1970 you yourself recalled, as did also the President of the General Assembly, that the problems of the United Nations are above all the problems of States. This is no less true of the role and future of the Court.

However, if the General Assembly were to consider that the Court could usefully be asked for particular observations on legal questions, the Court would be prepared to meet such requests.

It may be of interest to recall that the Court, for its part, exercising powers conferred upon it by Article 30 of its Statute, commenced in 1967 a revision of its Rules. On the proposal of a committee appointed for the purpose, the Court has adopted in first reading revised Rules on matters concerning the internal functioning of the Court and the procedure applicable in contentious cases."
