

RECOMMENDATIONS ON THE ENHANCEMENT OF THE ROLE
AND EFFECTIVENESS OF THE INTERNATIONAL COURT OF
JUSTICE AND STATE PRACTICE: THE GAP BETWEEN
RECOMMENDATION AND PRACTICE (1971–2006)

by BIMAL N. PATEL*

I. INTRODUCTION

The central inquiry of this work is to examine the practice of states, between 1971-2006, against their own recommendations to increase the role and effectiveness of the International Court of Justice in the peaceful settlement of international disputes through adjudication and international legal order. The UN Secretary-General invited member and non-member States of the UN to give their recommendations or suggestions. Thirty states provided their recommendations and comments which were compiled and released in the form of the UN Secretary-General report in 1971. This paper uses this report as a main reference tool.

Let's go back into the history of international relations and law in 1971 to put into perspective the entire debate. As we all know, the Cold War was very much actively felt in global affairs and the Court was mainly resorted to by the Western European states. As of 1971, 15 states from Western Europe and other regions (Western Europe and Other Group countries including the USA, Australia and New Zealand), five states from Africa, six states from Asia, seven states from Latin America and five states from Eastern Europe had been parties to the Court either as an applicant or a respondent. The Court had dealt with 37 cases and 13 advisory opinions as of July 1971. The Court also witnessed some of the classic conflict of east-west tensions, especially the Aerial Incident cases, in which almost consistently, the respondent would successfully challenge the jurisdiction of the Court. Furthermore, decolonization was going at full speed. There were 147 independent states, all full-fledged members of the UN. Boundary disputes between the newly decolonised states were surfacing with more frequency and intensity and which remains the classic area of adjudication for the Court.

As far as the Court was concerned, before this, its docket was almost empty. Between 31 July 1935 and 1 August 1970, the Court had only one advisory opinion (*Legal Consequences*

* Currently serving the Organisation for the Prohibition of Chemical Weapons (OPCW), the Hague, the Netherlands. Author/editor of *The World Court Reference Guide* (foreword by Shabtai Rosenne) and *India and International Law*. Honorary Coordinator (Europe) of the Indian Society of International Law and visiting Professor/Guest Lecturer at various universities in Asia, Europe and Pacific. The author is grateful to Mr Schithaart, Staff Member of the Registry of the International Court of Justice, who during the preparation of *The World Court Reference Guide* by the author, helped him in locating the 1971 Report which gave critical inspiration to analysing the state practice. The author would also like to thank Professor Shabtai Rosenne for his interesting insights into how the entire debate on the reform of the Court began in the aftermath of the famous *South-West Africa* case. Ms Urmi Chanda, MIT School of Government, Pune (India) is thanked for her kind proof-reading. Views and opinions are expressed in the personal capacity of the author.

for *States of the Continued Presence of South Africa in Namibia*) pending in its docket which it delivered during that year.

This is what, in a nutshell, was the then existing international relations as far as its impact on the Court was concerned. It is against this background that the UN carried out its exercise. The overall central theme of the exercise was to restore the confidence in the Court (especially after the famous judgment in the *South-West Africa* case¹) and to enhance its role in maintaining international legal order and settlement of state disputes thereby contributing to peace and stability in the world. Since the ICJ is a neutral organ compared to other organs, the international community had great faith that the Court itself can play a key role.

The UN found it appropriate to obtain recommendations from the states in the following areas hoping that the recommendations in these areas will have the greatest influence in enhancing the role of the Court. Thirty states provided their recommendations or comments, *inter alia*, three from Asia (Iraq, Japan and Laos), three from Africa (Ivory Coast, Madagascar and Senegal), five from Eastern Europe (Czechoslovakia, Poland, Ukraine SSR, USSR and Yugoslavia), 15 from Western Europe (Austria, Belgium, Canada, Cyprus, Denmark, Finland, France, Italy, Netherlands, New Zealand, Norway, Sweden, Switzerland, Turkey, UK, USA) and other countries and four from Latin America (Argentina, Cuba, Guatemala and Mexico).

This paper seeks to analyse the recommendations made and how they have been put into practice in the last 35 years. In order to achieve this, it first describes the existing situation in each of the areas of recommendation, captures the essence of the recommendations and looks at how states have actually put the recommendations into practice. This paper will identify whether states have adhered to or departed from (significantly or marginally) their recommendations and whether the current demand of the Court is due to the faithful implementation of their words in action or due to other explainable or non-explainable factors.

As of 31 July 1972, 132 states were members of the UN and three states (non-members of the UN) were parties to the Statute of the Court (Liechtenstein, San Marino and Switzerland) under article 93(2). As of 31 July 1995, 185 states were members of the UN and two states (non-members of the UN) were parties to the Statute of the Court (Nauru and Switzerland) under article 93(2). Furthermore, as of this date, there were three cases and one advisory opinion (*Appeal relating to the jurisdiction of the ICAO Council* (India *v.* Pakistan), *Fisheries Jurisdiction* (UK *v.* Iceland, Federal Republic of Germany *v.* Iceland) and an advisory opinion concerning the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*. The Secretary-General report focused on the role of the Court within the framework of the UN, the Organization of the Court, the Jurisdiction of the Court, the Procedures and Methods of Work of the Court and future action on this subject by the General Assembly.

II. THE ROLE OF THE COURT WITHIN THE FRAMEWORK OF THE UN

Ten states (Ukraine, Cyprus, Argentina, Finland, Japan, Sweden, Czechoslovakia, Austria, Belgium and UK) provided comments. The major concerns were that the Court had not shown itself equal to the tasks entrusted to it and had been justly criticised (Ukraine), a crisis in confidence had weakened the significance of the institution (Finland), the Court

¹ Dugard John, "1966 and All That: The South West Africa Judgment Revisited in the East Timor Case" (1996) 8 *African Journal of International and Comparative Law* 549-563; Gaglione, Anthony, *Anti-Colonialism and the South West Africa case: A Study in Majoritarianism at the United Nations* (1971); Lejeune, Anthony ed., *The Case for South West Africa* (London: Stacey, 1971); Friedman, W.G., "The Jurisprudential Implications of the South West Africa Case" (1967) 6 *Columbia Journal of Transnational Law* 1-16.

had not been able to live up to the original expectations as the highest tribunal applying international law (Japan), the member States had made little use of the services (Sweden) or not used to a sufficient extent (Czechoslovakia) and the results produced by the Court no longer corresponded to what was hoped (Belgium).

Concerns were also raised regarding the Court's competence, its objectivity, the representative character of the law applied by it, political considerations taken into account in the nomination and election process of the judges and that it was a long and expensive undertaking (USA). Resorting to the Court was also perceived as an unfriendly act (France). The frustrations expressed by some states were so intense that it was considered that there was not much that could be done by reforming the Statutes or rules of procedure (France). It should be noted, as will be explained below, that the changes in the rules of procedure and the issuance of *practice directions* by the Court have been able to mitigate some of these concerns. Japan rightly struck to the core of the recommendations by suggesting that the climate itself may change if steps were taken to alleviate the misgivings of member States against the Court and if institutional reforms succeeded in increasing confidence in it. It should be noted that Japan had never been a party to a case at the Court and its participation in the advisory opinion proceedings is relatively limited (Japan submitted written statements in three opinions and oral statements in two opinions).² Japan, however, has had valuable experience on the bench of the Court. Since 1976, the Court always had a member from Japan on its bench. Japan had actively participated in the UN Sixth Committee debates and called upon the international community to make use of the services provided by the Court to resolve their disputes. In the view of the USA, a General Assembly reaffirmation of the use of the Court as an act of statesmanship (implying dedication to high standards of international cooperation) might mitigate this concern. While an attempt has been made below to analyse the actions of the General Assembly in pursuant to the call of member States in this regard, it is worth mentioning that several resolutions which have been passed by member States in the General Assembly on this subject are of *routine nature*.

III. LAWS APPLIED BY THE COURT

Several states made observations regarding the laws applied by the Court. There were suggestions to include the law making resolutions and declarations of the General Assembly and the Security Council in the sources of the law (Cyprus), remove uncertainty regarding the law to be applied (USA), remove the term *laws of civilised nations* from article 38(1) of the Statute (Mexico, Guatemala), work for a system of application of law in which all states of the world have participated (Iraq) and include binding decisions issued by the international organisation (such as regulations, rules and decisions of the Security Council) and non-binding resolutions.³ The analysis of the sources of laws referred to between 1971-2000 suggest that the Court has increasingly referred to the resolutions and declarations of the General Assembly and the Security Council and the regulations, rules and decisions issued by the IO. By doing so, the Court has clarified or given more legal characterisation to these sources. In respect of the reference to the *laws of civilised nations*, as it appears in Article 38 (1)(c), Mexico recommended that it should be referred to instead as *laws applied by the international community*. It should be noted that no judgement issued since 1971 explicitly refers to the term the *laws applied by civilised nations*. This shows that the Court has shown sensitivity to this term. While Iraq rightly mentioned that the laws applied by the

² Written statements in the Certain Expenses, Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons; oral statements in Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality of the Threat or Use of Nuclear Weapons.

³ The author has attempted to put in a systematic order all sources of law which the Permanent Court of International Justice and the International Court of Justice has referred to in its judgements, orders and advisory opinions since 1922 in his *The World Court Reference Guide (1922-2000)*.

Court is not the one in which many states participated in its formulation, the track record of Iraq in the debates of the Sixth Committee shows that it has not made any systematic attempt to address this recommendation.

IV. ENHANCEMENT OF THE ROLE OF THE COURT

Not less than sixteen states (Cyprus, Laos, Norway, Denmark, USA, Italy, Finland, Japan, Cuba, Madagascar, Ukraine, Czechoslovakia, France, New Zealand, USSR, Iraq and Yugoslavia) had forwarded recommendations on the general approach to the question of enhancing the role of the Court. Recommendations were made regarding the depoliticization and extension of compulsory jurisdiction (Cyprus), the submission of all states to the jurisdiction of the Court (Laos), the revision of rules and emphasis on the general acceptance of the concept of judicial settlement of international disputes (Denmark), the review of the role of the ICJ by the General Assembly (USA), the conducting of an accurate study of the Court's lack of popularity (Italy), the amending of the Statute, if required, after studying proposals and measures (Finland), the encouragement of national Courts to apply ICJ decisions where appropriate (Madagascar), the bringing of the Court's activity into harmony with the provisions of the charter and the Statute of the Court (Ukraine, USSR and Czechoslovakia) and the keeping pace by the Court with the developments of the international community (Iraq).

What has been the state practice? Cyprus which recommended the extension of the compulsory jurisdiction and more restrictions on reservations, accepted the compulsory jurisdiction of the Court for the first time effective 29 April 1988 and replaced it subsequently. However, its acceptance was subject to various reservations. Laos which called upon states to be required to submit to the jurisdiction of the Court is yet to make its acceptance of compulsory jurisdiction under article 36(2). In addition to the review of the role of the Court by the General Assembly, the USA called for the strongest possible efforts to revitalise the Court within the present provisions of the Statute. It should be noted that the USA withdrew its acceptance of compulsory jurisdiction which it made for the first time on 26 August 1946. Furthermore, prior to 1971, the USA appeared as applicant in seven cases and respondent in one case respectively. After 1971, it appeared only twice as applicant, eight times as respondent and once by bringing a case together with Canada through special agreement. This paper does not examine how many inter-state disputes the USA has resolved through other means but as far as using the Court has been concerned, the post-1971 record shows a declining trend. Italy's track record of making an accurate study of the causes of the lack of the Court's popularity is nowhere near to living up to its recommendation. Japan, who has otherwise ardently supported measures to enhance the effectiveness of the Court, has taken no initiative exclusively at the international level to mobilise the world community to examine its recommendations. New Zealand, showing its commitment to enhance the role of the Court, mentioned that it is reviewing the terms of its declaration of 8 April 1940. It revised its declaration, however, by attaching several reservations and this can be considered a less rigorous acceptance of the compulsory jurisdiction than in 1940.⁴ One can hardly fail to see that the revised declaration of 1977 contains

⁴ The New Zealand declaration of 8 April 1940: The declaration applies to all disputes other than: (i) disputes in regard to which the parties to the disputes have agreed or shall agree to have recourse to some other method of peaceful settlement; (ii) disputes with the government of any other Member of the League which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; (iii) disputes with regard to questions which by international law fall exclusively within the jurisdiction of New Zealand; and (iv) disputes arising out of events occurring at a time when His Majesty's Government in New Zealand were involved in hostilities. The 22 April 1977 declaration accepted the jurisdiction of the Court over all disputes other than: (1) disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement; (2) disputes in respect of

more substantive reservations than the one in 1940.⁵ The then USSR recommended that the Court should be permitted to complete its work on the revision of the rules of procedure. If the Court's activities are to promote compliance among member States with the provisions of the charter and with universally recognised principles and rules of contemporary international law, then this revision can enable the Court to function better. In its view, it is this course of action, and not the revision of the provision of the charter and of the Statute, which will promote the role of the Court. It is an undeniable fact that the revision of the rules of procedure and the issuance of the practice directions have significantly enabled the Court to function more efficiently and the judgements pronounced by the Court in the last decade, especially, have greatly encouraged states to repose their faith in this judicial body. Yugoslavia presented a range of measures—the law applied by the Court, methods of work, speedy dispatch of business and its structure, representation of legal systems and regions in the composition—which would through their integrated effects enhance the role of the Court.

V. EFFICIENCY OF THE COURT

Has the Court achieved speedier dispatch of business in real terms? No. The analysis of the case duration pre-1971 and post-1971 shows the following: Out of 37 cases where judgement was pronounced before 1971 (cut off, *Appeal Relating to the Jurisdiction of the ICAO Council—India v. Pakistan*), 15 cases took more than one year, nine cases took more than two years and one case each lasted for more than three, four, five and seven years. The longest duration was in the case concerning *Barcelona Traction* (Barcelona Traction, Light and Power Company Ltd. (New Application, 1962) (*Belgium v. Spain*), from 19 June 1962 to 5 February 1970).

In the 30 cases post-1971 (with a cut-off date of 31 December 2000), five cases lasted more than one year, four cases lasted more than two years, five cases lasted more than three years, four cases lasted more than four years, and one case each lasted for more than five, six and seven years. This case duration analysis excludes the three longest staying cases in the Court's history, *Lockerbie* (Libya v. UK, Libya v. USA), *Maritime Delimitation and Territorial Questions* (Qatar v. Bahrain) and *Nagymaros-Gabcikavos* (Hungary/Slovakia), all of which have lasted more than 10 years.

In the area of advisory opinions in the pre-1971 phase (cut-off, Namibia), 13 opinions lasted an average of five and a half months while in the post-1971 phase (cut-off, *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), 10 opinions lasted an average of 15 months, nearly three times longer than the pre-1971 phase. Although this excludes an analysis of the duration of each of the phases of a case, it can be safely assumed that the pre-1971 cases took relatively less time than the post-1971 phase. Therefore, the conclusion that the Court is able to attract more clients because of its increased efficiency is subject to correction. Equally doubtful is the real effect of the revision of the rules of procedure and the issuance of the practice directions in achieving time efficiency. Thus, most if not all of the recommendations to enhance the role of the Court have had no real impact.

which any other party to the dispute has accepted the compulsory jurisdiction of the ICJ in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court; (iii) disputes arising out of, or concerning, the jurisdiction or rights claimed or exercised by New Zealand in respect of the exploration, exploitation, conservation or management of the living resources in marine areas beyond and adjacent to the territorial sea of New Zealand but within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

⁵ It is important to point out that in the time period between the recommendations made in 1971 and the new declaration of 1977, New Zealand was an applicant in the *Nuclear Tests* case against France in 1973.

VI. ORGANISATION OF THE COURT (COMPOSITION, LENGTH OF SERVICE AND AGE OF THE MEMBERS)

Another major area of analysis concerns the Organisation of the Court. Member States made recommendations on the composition of the Court, mode of designation and length of their mandate, recourse to chambers, granting of preferential rights in the allocation of seats, identical composition in different phases of the same case, question of judge *ad hoc* and role of the assessors in the advisory opinion procedure. Seventeen states (Poland, Cyprus, Laos, USA, New Zealand, Argentina, Turkey, Senegal, Finland, Mexico, Switzerland, Sweden, Canada, Cuba, Madagascar, Iraq and Austria) made comments on the issue of the composition of the Court.

Out of those states which made comments and suggestions in this area, two nationals from Poland (Lachs 1967-1993 and Winiarski 1946-1967), one from New Zealand (since 2006), two from Argentina (Quintana 1955-1964 and Ruda 1973-1991), two from Senegal (Forster 1964-1982 and Mbaye 1982-1991), four from Mexico (Fabela 1946-1952, Córdova 1955-1964, Padilla Nervo 1964-1973 and Sépulveda since 2006), one from Sweden (Petren 1967-1976) and one from Madagascar (since 1991) have served on the Court since its inception.⁶ Since the nationals of the five permanent members of the Security Council (with the exception of China) have served the Court since its inception without any break, their details have been excluded.

The recommendations included that the members should be elected as individual persons enjoying the full confidence of all states (Poland), the number of members should be increased and the judges should not only represent the principal legal systems but also special systems as well as speak to legal cultures (Cyprus), the geographical basis should be increased (Laos), the size of the Court may be expanded in the future, but that it would be inappropriate at this time (USA), the question of the size or composition should not be excluded from any thorough ongoing review (New Zealand), the composition of the Court be made more equitable by increasing the number of judges (Argentina), new seats be allocated to judges from developing countries and to make the Court more representative by reconsidering the re-election principle and allowing a single term (Turkey), the number of African judges to be raised to five even if this would mean an increase in the number of members of the Court (Senegal), if the number of judges is to be increased for the further development of the distribution then in practice raising the numbers to at least 25 (Finland), prudent expansion to a maximum of 18 judges is to be done only if the large volume of cases submitted to the Court made such an increase necessary (Mexico), the composition should be improved (Cuba), the number of judges should be increased in proportion to the projected expansion of the Court's role (Madagascar), more adequate representation is needed (Iraq) and the composition is not viewed very favourably (Austria). New Zealand, Switzerland, Canada, Sweden were more or less of the opinion that the composition of the Court was fine and that no real changes were needed. Since 1971, only nationals of two out of 17 states which made various recommendations regarding the composition to the Court were elected as a member of the Court (New Zealand in 2005 and Madagascar in 1991).

As of 31 July 1972, the composition of the Court consisted of nationals of the following members; three from Africa (Dahomey/Benin, Nigeria and Senegal), three from Asia (Pakistan, Lebanon, the Philippines), two from Eastern/Central Europe (USSR and Poland), two from Latin America and Caribbean (Mexico and Uruguay), five from West Europe, North America and Oceania (Sweden, USA, UK France, Spain). In 31 July 1995 it composed of members from Algeria, USA, Japan, France, Guyana, Venezuela, Sri Lanka, Madagascar, Hungary, China, Germany, Sierra Leone, the Russian Federation, Italy and

⁶ It should be noted that no national of Austria, Canada, Cuba, Cyprus, Finland, Iraq, Switzerland and Turkey, has yet been elected as a member of the Court.

UK. As of 31 March 2006, the composition is as follows: three from Africa (Madagascar, Morocco and Sierra Leone), three from Asia (China, Japan and Jordan), two from Eastern/Central Europe (Russia and Slovakia), five from West Europe, North America and Oceania (France, Germany, UK, USA and New Zealand) and two from Latin America and Caribbean (Mexico and Venezuela). This means there has not been any change in the unwritten quota for any region's representation in the Court.

Out of 17 states which made comments on the composition of the Court, nine states (Cyprus, USA, New Zealand, Argentina, Senegal, Mexico, Switzerland, Canada and Sweden) appeared as applicant or respondent in cases before the Court. New Zealand, Senegal, Mexico and Canada appeared as parties in the post-1971 period.

A. *Age, Composition and Duration of Judges*

Although the issue of composition of the Court is one of the most interesting and important issues, there has not been any discussion during the 60th anniversary regarding the adjustment or increasing the number of members of the Court. Nor has there been discussion on the age and duration of service of the Judges.

B. *Background of Judges and Previous Roles in the Court*

This is partially due to the fact that the Court has more or less balanced geographical representation now, even though there are more members from the WEOG than other groups: two from Latin America, five from WEOG and USA, three from Asia, three from Africa, two from Eastern/Central Europe. This issue can be considered closed and is unlikely to be opened in the future unless there is a drastic imbalance. As far as the background of the members are concerned, the current Bench background is inclined towards diplomatic services (Mexico, Jordan, Japan, Algeria, Madagascar, Sierra Leone, the Russian Federation, and Slovakia) and all the WEOG members are drawn from legal advisory and judiciary services (except President Higgins who has most of her career in the academic world). Judges from China and Venezuela have backgrounds in the judiciary as well as legal advisory services. It is interesting that seven out of fifteen of the members have served at the Court in various capacities; Judge Sepulveda has served as agent in the *Avena* case, (Mexico *v.* USA), Judge Bennouna has served as Judge *ad hoc*—in the *Boundary Dispute*, (Benin/Niger), Judge Ranjeva has served as Counsel in the *Frontier Dispute* case, (Burkina Faso/Mali), Judge Tomka has served as agent in *Gabcikovo-Nagymaros*, (Hungary/Slovakia), Judge Simma has served as Counsel in *Land and Maritime boundary between Cameroon and Nigeria; Equatorial Guinea intervening*, (Cameroon *v.* Nigeria); as co-agent in *LaGrand*, (Germany *v.* USA); and as counsel in the case concerning *Certain Property*, (Liechtenstein *v.* Germany), Judge Abraham has served as counsel in *Legality of Use of Force*, (Serbia and Montenegro *v.* France) and *Certain Criminal Proceedings*, (Republic of Congo *v.* France), President Higgins has served as counsel in *Territorial Dispute*, (Libya/Chad); *East Timor*, (Portugal *v.* Australia); *Lockerbie*, (Libya *v.* UK) and *Gabcikovo-Nagymaros*, (Hungary/Slovakia). Only Judges Buergenthal, Parra-Aranguren, Al-Khasawneh, Owada, Koroma, Shi, Skotnikov, Keith from the current Bench have no past direct experience with the Court.

C. *Duration and Election of Judges*

The records indicate that since 1971, out of 63 judges, only five judges have been elected to serve a third term in the office (Judges Bedjaoui, Guillaume, Lachs, Oda and Schwebel), while 24 judges have been elected to serve a second term (Judges Ago, Ammoun, Bedjoui,

Buerghenthal, Elias, Fitzmaurice, Forster, Gros, Guillaume, Herczegh, Higgins, Jennings, Koroma, Lachs, Morozov, Oda, Parra-Aranguren, Ruda, Schwebel, Shi, Nagendra Singh, Tarassov, Vereshchetin and Zafrulla Khan).

D. *Ages of Judges*⁷

The average age of a Judge since 1971 has been 60 years, while the average age of a judge who has been elected for a second and third term in the office has been 67 and 69 respectively. Out of the 63 judges, six judges (including one current) have served beyond the age of 80, 22 judges (including two currently serving) have served beyond the age of 75, 36 judges (including four currently serving) have served beyond the age of 70, 21 judges (including seven currently serving) have served between the age of 60-70 years and six (including four currently serving) are below the age of 60. Out of 63 judges, 13 judges (including one currently serving) have served 15 or more than 15 years (including two who served more than 25 years).

E. *Term of Office*

Since 1971, one judge from Africa has been elected to serve for a third term while four judges from this region have been elected to serve for a second term. From Asia and Eastern Europe, these numbers are one and five respectively for both. None of the judges from the Latin American Group has served a third term and only two have served for two terms. Two judges from WEOG have served three terms and eight have served two terms. In total, there have been 12 judges from Africa, 13 from Asia, seven from Eastern Europe, nine from Latin America and 22 from WEOG. Four judges from Asia have served beyond the age of 80. Three each from Africa, Eastern Europe and Latin America, six from Asia and seven from WEOG have served beyond the age of 75. Five each from Africa and Eastern Europe, nine from Asia, four from Latin America and 13 from WEOG have served beyond the age of 70. These figures include the members of the current Bench.

From Africa, the total term of office of judges from Algeria, Benin, Egypt, Madagascar, Senegal and Sierra Leone has been 19, 9, 7, 15, 27 and 27 years respectively. Judges from Asia, India, Japan, Jordan, Lebanon, Pakistan, Philippines, Sri Lanka and Syria have served for 17, 30, 6, 11, 16, 9, 9 and 8 years respectively. Judges from Eastern Europe, Hungary, Poland and Slovakia have served for 10, 26 and 3 years respectively. Judges from Latin America, Argentina, Brazil, Guyana, Mexico, Uruguay and Venezuela have served for 18, 18, 9, 9, 9 and 14 years respectively. Judges from WEOG, Germany, Italy, Netherlands, Norway, Spain, and Sweden have served for 21, 18, 9, 9, 9, 9 years respectively. The duration of service for permanent members of the Security Council is not counted since they have been represented on the Court since 1971 without any interruption. The exception is China which has been represented on the Court since 1985 without interruption.

Out of five Permanent members of the Security Council, the records show that 11 judges (USA – 2, France – 2, China – 1, Russia (USSR) – 3, UK – 3) have been elected for a second term while two judges have been elected for a third term in office.

It should be noted that Mexico, Madagascar, France, UK, New Zealand, USA, Japan and Russia gave general comments on the 1971 Report and the USA, UK, Mexico, Madagascar and New Zealand made specific comments on the organisation and composition of the Court.

⁷ The age is calculated from the year of birth to the year of the first/second/third term or to the year of expiration/current service/or death in the case of a few members.

VII. EXPANDING THE SCOPE OF JURISDICTION

The expansion of the jurisdiction of the Court especially giving *locus standi* to intergovernmental organisations is one of the most important desires expressed by academicians, some member States, the UN Secretary-Generals as well as the presidents of the International Court of Justice.

However, as far as the resolutions of the General Assembly are concerned, the message is clear; namely, the *status quo* should remain and those agencies which are entitled by their Statutes or charters may seek the advisory opinion of the Court. Thus, expanding the jurisdiction of the Court to include intergovernmental organisations is likely to remain a distant dream.

While the general attitude of the member States can be measured through the resolutions, it should also be borne in mind that relationship agreements between the UN and several international organisations or between international organisations exclude the possibility of referring their inter-organisational legal problems arising out of the interpretation or application of those agreements to the Court. As far as internal problems of international organisations are concerned, these are being dealt with by their internal rules and procedures. However, the intergovernmental organisations have the possibility of seeking the advisory opinion of the Court, save legal disputes arising between two international organisations. The advisory opinion given by the Court are declared by the Court as binding to the extent that the Security Council can be informed of the possibility for the execution of the advisory opinion.

Thus, the recommendation made in 1971 to expand the jurisdiction to include international organisations is not feasible and not necessary. One should keep in mind that this particular recommendation was part of a general package of recommendations which was made in 1971 when the Court's docket was empty. In view of the current heavy workload of the Court, it is even more doubtful whether there is any more support to realise this recommendation.

A. *Appeal to Use the Court*

More and more use of the Court has been called upon by member States in their report. Several resolutions of the General Assembly and calls by the Secretary-General evidence this appeal. The Outcome Document of 2005 of the World Leaders meeting at the UN General Assembly also makes reference in this respect. How has the debate and state practice evolved in this area? It would be useful to identify and examine the quality of calls during the period under reference.

Back in 1974 (UNGAR 3232 (XXIX) of 12 November 1974), the General Assembly took note of the amendment to the rules of procedures with a view to facilitating recourse to it for the judicial settlement of disputes by, *inter alia*, simplifying the procedure, reducing the likelihood of undue delays and costs and allowing greater influence of parties on the composition of *ad hoc* chambers. Regarding submission of disputes to the Court, the resolution only went to the extent of recalling the opportunities afforded by the power of the Court under article 38 (2), to decide a case *ex aequo et bono* if the parties agree thereto. On the issue of the acceptance of compulsory jurisdiction and removal of reservations, the resolution had even lighter language, "recognising the desirability that states study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with article 36".

The resolution merely drew the attention of states to the advantage (which were not mentioned in the resolution) of inserting in treaties (no mention of whether bilateral or multilateral), in cases considered possible and appropriate, clauses providing for the submission to the Court of disputes which may arise from the interpretation or application of such

treaties. As seen above, bilateral treaties have made lesser and lesser reference to the Court's jurisdiction over the disputes that could arise in the interpretation or application of the same.

Regarding the referral of the disputes to the Chambers of the Court, the resolution drew attention to the possibility of making use of chambers, including those which would deal with particular categories of cases.

It is noticed that the resolution was conspicuously absent in terms of expanding the jurisdiction to additional international organisations as the resolution expressly specified that the UN organs and specialised agencies should from time to time, review legal questions within the competence of the ICJ that have arisen or will arise during their activities and study the advisability of referring them to the Court for an advisory opinion, provided that they are duly authorised to do.

This cursory remark on the jurisdiction issue is noticeable because the General Assembly could have said much more in this regard. Even if it could not have made a strong recommendation, at the very least, it could have covered various elements of jurisdiction. For example, it could have called upon the states to reconsider existing declarations with a view to clarifying their meaning and effective time limits (as suggested by Canada) or to conclude bilateral agreements with other states agreeing to submit future disputes of a legal nature which they have not been able to solve through negotiations (as suggested by Sweden).

The resolution reaffirmed that recourse to judicial settlement of a legal dispute, particularly referral to the Court, is not to be considered an unfriendly act between states. This particular reaffirmation derives inspiration from the French recommendations.

In sum, the resolution had covered the crux of almost all recommendations made by the member States in the Report but failed to incorporate the substantial comments which could have truly enhanced the role of the Court in international affairs. The resolution neither provided any subsequent follow-up nor established any committee to study and monitor the implementation of the recommendations. This evidences a lack of serious commitment on the part of the General Assembly and the member States.

In this regard, the Manila declaration⁸ was an important declaration of 1982. It called upon the states to seek recourse to judicial settlement of legal disputes with particular referral to the ICJ. It consolidated the previous call of the General Assembly that recourse to the ICJ should not be considered an unfriendly act between states. The declaration also wholeheartedly welcomed the suggestion made by the Secretary-General that in order to reinforce the Court and make it more efficient, states which have not yet done so need to consider recognising compulsory jurisdiction and that the recourse to the advisory powers by duly authorised UN organs and specialised agencies should be increased.

After the end of the Cold War, while discussing the UN Secretary-General Agenda for Peace,⁹ the member States underlined the use of the ICJ in the peaceful settlement of disputes. However, the recommendations were far from emphatic in nature. For example, it encouraged states to consider making greater use of the Court, recommended that states consider the possibility of accepting the jurisdiction of the Court, including through the dispute settlement clauses of multilateral treaties,¹⁰ noted that the use of chambers is a means of providing increased use of the Court, requested the states, if possible on a regular basis, to make contributions to the ICJ Trust Fund and invited the Secretary-General to report periodically on both the financial status and utilisation of the Fund, recalled that the General Assembly or the Security Council may request the ICJ to give an advisory opinion to other organs on legal questions arising within the scope of their activities and decided to keep the matter under examination including those related to the use of the advisory competence of the Court. However, it should be noted that there has not been any change in the advisory

⁸ UN General Assembly resolution A/RES/37/10 of 15 November 1982.

⁹ Resolution adopted without reference to a main committee, 47/120.

¹⁰ It has been observed that there has not been any recommendation on the removal of the reservation/condition, nor any recommendation to encourage insertion of the ICJ clause in the bilateral treaties.

competence of the Court and the author firmly believes that there will be no change in the near future.

Against these important milestones in the history of the UN, it is to be noted that the World Summit Outcome Document of 2005 had a very sparse reference to the Court's role in international affairs especially regarding the peaceful settlement of international disputes. Under the heading of pacific settlement of disputes (para. 73), the member States emphasised the obligation of states to settle their disputes by peaceful means in accordance with chapter VI of the Charter, including when appropriate by the use of the ICJ. Furthermore, under the *Rule of Law* heading, paragraph 134(f), the member States recognised the important role of the ICJ, the principal judicial organ of the UN, in adjudicating disputes among states and the value of its work, and called upon states that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work, including by supporting the Secretary-General Trust Fund to assist states in the settlement of disputes through the ICJ on a volunteer basis. It is pertinent to reinforce the fact that the resources to the Trust Fund has been depleting ever since it has been created and the voluntary contributions in the last two years, especially, has been meagre.¹¹

B. *Attitude Towards the Court*

In this section, an attempt is made to analyze the latest comments of some member States on the Court's role in contemporary world affairs. President Putin, while visiting the Court on 2 November 2005 stressed most particularly that the ICJ, its judgments and advisory opinions, "play an extremely important role in the strengthening and development of international legal principles and norms; they provide a clear understanding of the rights and obligations of states and thereby have a positive influence on the process of universalisation of law". He continued saying that "the very fact of the existence of the ICJ within the UN system is an extremely important factor in the stability and legitimacy of the organization, including in the context of the development of comprehensive strategies to counter the novel threats and challenges confronting humanity...the Court makes an enormous contribution to the prevention of international conflicts and to the peaceful settlement of existing disputes, thus promoting the cause of international justice. And this has become possible thanks to the independence of the Court and to its particular status and unique composition".¹² These words by the Russian President have significantly highlighted the role of the Court in the international legal order as well as in the peaceful settlement of international disputes and prevention of conflicts. President Putin mentioned that the Court makes an enormous contribution to the prevention of international conflicts and to the peaceful settlement of existing disputes, thus promoting the cause of international justice. And this has become possible thanks to the independence of the Court and to its particular status and unique composition.

It is worth examining the statements made by the delegations at the 60th anniversary of the Court which give some indication on how the role of the Court is perceived by some.¹³

USA believed that a strong and active international Court is a central and indispensable element of an international legal order. It is well known that it withdrew its acceptance of compulsory jurisdiction in the wake of the judgment in the *Military and Paramilitary Activities* case (Nicaragua v. USA). According to China "the Court has facilitated the

¹¹ See further analysis on the UN Secretary-General Trust Fund below.

¹² Speech by President Putin during his visit to the Court on 2 November 2005. See http://www.icj-cij.org/icjwww/ipresscom/ipress2005/ipresscom2005-22_20051102.htm.

¹³ GA/A/60/PV.39 dated 27 October 2005.

development of international law” through judgments in contentious cases and by delivering advisory opinions.¹⁴

The Republic of Korea had to say that the *Wall* advisory opinion has generated “an unusual amount of media attention”. This suggests that only when the Court delivers a judgment on a legal question or dispute which is politically topical, does it experience media attention. South Korea reiterated its desire that the proposals “to expand the advisory role of the ICJ” be further considered.

Egypt expressed its belief that “the assembly should use the Court’s advisory opinions to strengthen the capacity to perform its duty in the most perfect manner possible by referring contentious issues to the Court and requesting advisory opinions from it, so that such opinions can be applied, despite the fact that we know that these opinions are advisory in nature and are open to interpretation of binding legal principles that are upheld by international law”. This suggests that there is a call by the member States of the UN to expand the scope of advisory opinions and the types of issues that can be referred to the Court. While the Court’s role and importance in the settlement of international disputes is underlined, the question has arisen time and again on the implementation of the Court’s judgments or advisory opinions.

During the *Military and Paramilitary Activities in and against Nicaragua* case, it was observed that the General Assembly had to repeatedly pass resolutions that compliance with the Court’s judgment was essential. As late as 2005, Member States continue to have suspicions regarding the implementation of advisory opinions. For example, Syria had to say that “in spite of the Court’s advisory opinion that stresses the need that the United Nations, including the Security Council, should take measures to end the illegal status resulting from the construction of the wall, it is unfortunate that the Security Council did not exercise its role owing to the practice of selectivity on the part of some of its members and their protection of violations of international law when it serves their politics and interests”.

Malaysia appreciated the “important contribution of the ICJ to the peaceful settlement of disputes between states and the development of international law. The Court plays an important role in resolving disputes and giving advisory opinions... [its] role should not be underestimated in the common endeavour to promote peace among nations... [it] provides a more prudent and civilised alternative to violence and the use of force. Judicial decisions as such are not a source of law, but the dicta by the Court are unanimously considered as the best formulation of the content of international law in force”. Some of these statements are in stark contrast to what the prevailing situation was in 1971 and this clearly shows that member States are placing more trust in the Court and the Court’s judgments are increasingly being seen as the most authoritative formulation of the content of international law in force. It should be noted however, that the Court is still not the first platform to resolve the disputes and it will unlikely to be in the future. In the words of Malaysia “the Court is the most appropriate forum for a peaceful and final resolution of disputes when all efforts in diplomacy have been exhausted”.

C. Positions of Member States

It is difficult to ascertain the views of member States before 1997 because the speeches of the visiting heads of states or governments are neither reproduced in the yearbooks nor on the web-site. In this regard, the contemporary ICJ web-site enables the researchers to read the speeches posted on the web-site and to analyse the contemporary attitude of member States towards the Court. On the other hand, the UN Legal Counsel in 1971 had to say that the past 25 years have witnessed a disappointing lack of progress and it is difficult to

¹⁴ It should be noted that China did not give any comments on the report nor did the Chinese head of state or prime minister ever visit the Court.

envisage any sudden change 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. It would have been very useful if the latest opinion of the Counsel was to be available in the public documents to see what his contemporary perception is.

D. *ICJ as a Dispute Resolution Forum in Bilateral Treaties*

Bilateral or multilateral treaties among states can be one of the important indicators of whether member States are increasingly or decreasingly willing to rely on the Court in so far as the disputes arising from the interpretation or application of these treaties are concerned. This is one of the strong indicators of actual state practice. As of 31 October 2006, out of 192 states party to the Statute, 67 have accepted compulsory jurisdiction and approximately 300 treaties make reference to the Court in the settlement of disputes arising from their application and interpretation. Between 1946 to 1971, treaties concluded between 54 states made reference to the Court's jurisdiction over the disputes, while between 1971 to 1995, only 24 states had such reference in their bilateral treaties. Since 1995, there has not been any bilateral treaty which has given jurisdiction to the Court. This amply shows that bilateral treaties which have come into force after 1971 have made less reference to the Court's jurisdiction.¹⁵ This also sharply contrasts with some member States' suggestion that more treaties should have reference to the jurisdiction of the ICJ in their dispute settlement clause.

VIII. UN SECRETARY-GENERAL TRUST FUND

In order to assist member States, who are unable to do so financially, to resort to the Court, the member States established the UN Secretary-General Trust Fund. The statutory purpose of the trust fund¹⁶ is to encourage the peaceful settlement of disputes by providing financial assistance to states as an incentive to submit their disputes to the ICJ. The financial assistance is granted on the condition that it is used by the receiving state to defray expenses incurred in connection with the submission of a dispute and the costs of implementing a judgment.

¹⁵ Between 1946 and 1971, bilateral treaties between 54 states in total had reference to the ICJ jurisdiction. These were, Afghanistan (3), Algeria (1), Australia (3), Austria (4), Belgium (19), Brazil (1), Canada (2), China (3), Costa Rica (1), Denmark (8), Ecuador (1), Egypt (2), Ethiopia (2), Finland (1), France (13), Germany (7), Greece (6), Guatemala (1), Guinea (3), Honduras (1), Iceland (3), India (9), Indonesia (2), Iran (5), Ireland (1), Israel (2), Italy (11), Japan (8), Jordan (2), Kuwait (1), Lebanon (10), Liberia (5), Libya (1), Luxembourg (9), Mexico (3), Myanmar (2), Netherlands (21), Norway (7), Pakistan (16), Paraguay (1), Philippines (11), Portugal (2), Republic of Korea (2), Saudi Arabia (1), Serbia and Montenegro (3), Spain (3), Sri Lanka (3), Sweden (9), Switzerland (5), Thailand (3), Togo (1), Turkey (2), UK (19), USA (39) and Viet Nam (1). The trend between 1971 and 1995 is more interesting as the number of states which were parties to bilateral treaties and have given the jurisdiction to the Court over those treaties substantially declined and those states which accepted the jurisdiction in their bilateral treaties between 1946-1971 had no such clause. During this period Argentina (2), Australia (1), Belgium (2), Benin (1), El Salvador (1), Ghana (1), Greece (1), Guinea-Bissau (1), Honduras (1), Italy (2), Japan (1), Luxembourg (1), Netherlands (1), Philippines (2), Russian Federation (1), Saudi Arabia (1), Senegal (1), Spain (2), Sudan (1), Switzerland (3), Turkey (1), UK (1), Uruguay (2) and ILO (1) accorded jurisdiction to the Court. The stark contrast between these two periods is seen in the case of Belgium, Denmark, France, India, Italy, Japan, Lebanon, Luxembourg, Netherlands, Pakistan, the Philippines, Sweden, UK and USA. The number of bilateral treaties to which these states were parties and which came into force between 1971-1995, had substantially reduced reference to the Court's jurisdiction. For example, not a single bilateral treaty to which USA was a party in this period had reference to the Court's jurisdiction. Contrast this with the 39 such treaties prior to 1971.

¹⁶ Since its creation, 35 States have contributed a total of approximately USD \$1.76 million to the Fund. These States are Austria, Chad, China, Cyprus, Czechoslovakia, Denmark, Dominica, Fiji, Finland, France, Germany, Greece, Hungary, Indonesia, Iran, Japan, Luxembourg, Maldives, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Oman, Senegal, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Togo, UK, Venezuela and Zambia.

Since its creation in 1989, six states have benefited. The total accumulated contribution made by 35 states as of 2005 was USD \$2,350,778 (USD \$583,705 between 1989 and 1992 and USD \$1,763,073 between 1992 and 2005). As of 30 June 2005, the Fund balance was USD \$2,008,766.47 excluding the payments already made to the six beneficiary states. The fact remains that since its creation the fund has been receiving less and less contribution every year, the highest contribution was made in 1992 (USD \$206,282) and the lowest in 2005 (only USD \$5000). Please see the attached Annex 1.

The Fund has benefited from the contributions of 35 states in total, 16 states from WEOG (Austria, Cyprus, Denmark, Finland, France, Germany, Greece, Luxembourg, Malta, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland and UK), five from Africa (Chad, Morocco, Senegal, Togo and Zambia), nine from Asia (China, Fiji, Indonesia, Iran, Japan, Maldives, Oman, Singapore and Sri Lanka), three from Latin America (Dominica, Mexico and Venezuela) and two from East Europe (Czechoslovakia (in 1990 and 1991) and Hungary). Voluntary contributions may be made by states, intergovernmental organisations, national institutions, NGOs as well as natural and juridical persons but the fact remains that except for states, no other legal or natural person has made any contribution to the UN Secretary-General Trust Fund.

It is interesting to note that the Presidents of the Court have not made any strong appeal to member States to contribute to the ICJ Trust Fund. In the latest statement to the AALCO where the President of the Court made an interesting reference to it being "an African year", the President could have mentioned how the ICJ Trust Fund has helped some African states. While it is the Secretary-General Fund, it is equally important that the Court also regularly recognises the importance of the Fund and invites member States to contribute to the Fund, especially, when the Court is being resorted to by developing countries.

The Secretary-General reported in his 2004 report (A/59/372 dated 21 September 2004) that despite numerous appeals, the Fund has had a decreasing level of contributions since its inception. On one hand, there is more demand from countries needing assistance, while contributions have dropped. The Secretary-General appealed for substantial and regular contributions from all states and other relevant entities.

Despite a strong resurgence of cases in the Court by developing countries, especially African countries, the continuous depletion of resources and decreasing scale of contributions indicate that member States are not manifesting in their state practice a true sense of commitment towards the Court.

IX. PROCEDURES AND METHODS TO ENHANCE EFFECTIVENESS

The calls for reducing the time period between the various phases of litigation and the cost of litigation, with a view to increasing the efficiency in the administration of justice and making the platform more attractive, are abound. Indeed, the Court has responded in a variety of ingenious ways to mitigate these concerns.

The Court has modernised the organisation of its registry, reviewed and adapted its internal working methods, promulgated practice directions for the parties and even modified its rules when necessary. The working methods of the Court are subjected to permanent re-examination in an effort to avoid delays in the Court's proceedings. This constant quest to meet the expectations of parties before the Court is necessary in view of the considerable number of cases on its docket. Indeed, the Court has amended the rules of procedure twice, in 1972 and 1978. Furthermore, it has come up with a novel idea of Practice Directions in 2000 which undoubtedly contributes to its internal functioning and efficiency. The practice directions which have been issued accelerate contentious proceedings.

The Court has requested the parties to a case to reduce the number and length of their written pleadings and annexed documents, fixed standard time limits for the submission of documents in incidental proceedings and laid down strict rules on the filing of new documents

after the closure of written pleadings. The fact remains that even after 60 years, no use has been made of the facility of chamber of summary procedure. However, after the debate, this principal innovation was introduced in 1972 in the composition of the summary procedure chamber, where both the President and Vice-President would be *ex officio* members of this chamber. In view of the current workload, it is imperative that this facility of chamber of summary procedure is utilised.

While all of these changes and improvements contribute to the efficiency of administration of justice, one particular appeal by the Court to the member States needs special attention. Former President Shi, in the context of increasing overall efficiency of the Court remarked at the General Assembly that “many cases have been rendered more complex as a result of preliminary objections by respondents to jurisdiction or admissibility and counter-claims and applications for permission to intervene” which have to be dealt with as a matter of urgency.¹⁷ The author feels that this remark may send a message to parties that they should avoid bringing these issues which are an essential part of the administration of justice. In fact, once the Court has delivered judgment on preliminary objections, its reputation is further reinforced and states will have less reason to deny the judgment on its merits. On the contrary, if the Court makes these kinds of remarks, in future the parties may altogether choose not to resort to the Court.

An increase in staffing resources has been found to be one of the most important and useful means to increase the efficiency of the Court. The Court requested conversion of five law clerks posts into established posts to assist with research into its 15 members. Such conversion undoubtedly helps the members to focus on more substantive issues of law, while other legal procedure related issues can be researched by the law clerks, saving their time and energy. To further enhance efficiency, the current President Higgins, drawing a parallel from practice observed in various other international tribunals, requested another nine law clerk posts so that each member of the Court can have one dedicated law clerk.¹⁸

It is essential to note that despite its limited size and resources, the Court has established work procedures and methods that have allowed it to accomplish its work efficiently and in a timely manner. It can be concluded that the lack of increased resources needed to enhance the expeditious administration of justice by the Court is another sound indication of the lack of willingness of member States to contribute in this regard and thus, another indicator of their real commitment towards the Court.

X. OUTREACH PROGRAMME OF THE COURT AND ITS EFFECT ON THE INCREASED USE OF THE COURT

The Court's existence and popularity has tremendously increased due to its outreach activities, especially, through electronic media like its website.

Since 2000, one of the most noteworthy achievements is that the Court has kept pace with technological developments in order to improve the overall internal functioning of the registry. Its EDMs provides immediate access to case files and archive documentation. In particular, its ZyImage document retrieval software, provides an updated bilingual database and enables users to quickly access and consult a wide range of legal and Court-related materials.

The Court's public awareness efforts which aim to help foster better understanding about the Court's work have been highlighted by member States. Since there had not been intensive public awareness efforts by the Court in 1971 and with the atmosphere of the Cold War,

¹⁷ Speech of President Shi to the UN General Assembly on 31 October 2003. See http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Shi_GA58_20031031.PDF.

¹⁸ Speech of President Higgins to the UN General Assembly on 26 October 2006. See http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeechpresident_higgins_20061026.htm.

there was not much appreciation of the Court and its work. But now the situation has changed. Its excellent web-site and media efforts together with the increased number of cases are giving it more popularity. To an extent, the recommendations by member States to increase the Court's public awareness are paying off; by giving more resources to the Court, member States are fulfilling one of the more important pledges towards the Court and its role in the contemporary world.

One of the most important factors is the overall increase in the finances of the Court. The expenditure of the Court in 1970-71 was USD \$1.453 million, in 1996-97, USD \$19.87 million and in 2004-2005, USD \$35 million¹⁹; a 33 time increase in its expenditure. It is still less than 1% of the overall budget of the UN but it must be noted that its expenditures have significantly increased. This clearly shows that the increased number of cases draw significantly on the Court's resources.

XI. SUPREME COURT OF THE WORLD

The International Court of Justice is the only international Court which has general jurisdiction. However, we have witnessed an increased number of international Courts and tribunals with specific jurisdiction and mandate. The pronouncement of justice made by the other Courts and tribunals may create conflicts.

It is perfectly possible that all these Courts would jealously guard their supreme role in world affairs. Various statements by the Presidents of the ICJ strongly indicate that the ICJ ought to enjoy the role of the Supreme Court of the world.

Former President Guillaume in his 2002 speech to the Sixth Committee, on 30 October 2002, did not mention anything special about the increased role of the Court, but had to say "new branches of international law have sprung up and there has been a proliferation of specialised international Courts. These developments correspond to those in society as a whole and in international relations. In this new scenario the ICJ, principal judicial organ of the UN, retains an essential role. It alone can address all areas of the law and accord them their proper place within an overall scheme." This statement appears to put the Court in a supreme role but the author believes that the *ad hoc* tribunals and courts do justice to the subjects and the Court cannot necessarily have sole supremacy in this respect. The courts and tribunals are created to deliver particular mandates which in their own way contribute to the consolidation of international legal jurisprudence and to also settle disputes. These courts which have more facts and more cases are better placed than the ICJ to understand the reality on the ground as the ICJ is not called upon until two states or an authorised international organisation or a UN organ seeks recourse.

Without referring to the essential role of other courts and tribunals, former President Shi had to say in October 2005 to the General Assembly that "it has thus become clear to the international community that the ICJ, as the principal judicial organ of the UN, has a crucial and primary role in the peaceful settlement of international disputes and the promotion and application of international law". He goes on saying that "it is important, in this regard, to remember that the Court is the only international judicial body to possess general jurisdiction, which enables it to deal with any issue relating to international law and to take into account developments in international law across the entire spectrum of international relations. The Court is thus ideally equipped to settle quickly and durably, at minimal costs, any type of legal dispute, whatever its nature and the type of solution pursued, and no matter what the status of the relationship between the litigant parties is".

No one denies the important role of the ICJ. However, in the wake of an increasing workload and changes in areas of international law where other tribunals have subject jurisdiction, the Court ought to recognise their important role in the peaceful settlement of

¹⁹ The overall budget of the UN was USD \$3.5 billion for the same period.

international disputes and the maintenance of international peace and security. The ultimate aim of these Courts and tribunals is the same; peaceful settlement of international disputes and the maintenance of international peace and security. Their judgments are also final and binding. If the litigating parties remain unsatisfied with the judgments of the other Courts and tribunals, they will be inclined to come to the ICJ since it has general jurisdiction. The Court ought to recognise the important contributions which these Courts and tribunals are making in the codification and progressive development of international law. These Courts and tribunals were created mainly because member States wanted to have a separate judicial body to deal with particular disputes. Hence, it is reasonable that the importance of their role should be recognised.

In this regard, it is instructive to note what other international Courts and tribunals also have to say about the ICJ.

Addressing the General Assembly on 9 December 2002, the President of the International Tribunal for the Law of Sea clarified that, “it is sometimes stated that the multiplication of international tribunals may pose a real risk to the unity of international law. Whatever the merits of this proposition—and it is certainly not generally accepted—the Tribunal for its part has not shown any disinclination to be guided by the decisions of the ICJ. In fact, even in this short period of six years, decisions of the ICJ have been cited both in judgments of the Tribunal and in the separate and dissenting opinions of members of the Tribunal. The truth must lie in the words of a former President of the International Court of Justice: It is inevitable that other international tribunals will apply the law whose content has been influenced by the Court (i.e., the ICJ), and that the Court will apply the law as it may be influenced by other international tribunals”.²⁰ However, there is a marked change recently in this regard. President Higgins’ remarks at various forums about this increasing competition between the international Courts and tribunals are soothing.²¹

While individuals have a relatively wide range of judicial platforms (criminal, human rights tribunals, and other areas of concern) and should be content that these Courts and tribunals aim to bring justice to the cause of their direct concerns, the usefulness of *ad hoc* chambers or tribunals or courts must not be underestimated. It is perhaps a sweeping general statement but it would not be a good solution that the ICJ remains the Court for classical interstate disputes and the other international courts and tribunals for other subject matters.

The lack of a firm positive and proactive attitude, watered-down language of the UN resolutions and a lack of resources (which together give a clear indication of member States’ willingness to enhance the Court’s role) is compounded by the fact that there are many new existing courts and tribunals. They all need funds. Continuous growth and consolidation of jurisprudence will undoubtedly affect the long-term utility of the ICJ and perhaps, it will continue to handle the classical areas of international law.

XII. UNANIMITY OF VOTING RECORDS AND ITS EFFECT ON THE ENHANCEMENT OF THE ROLE OF THE COURT

The Court voted unanimously on 8 occasions between 1946 and 1971 while between 1972 and 2000, it voted unanimously 33 times. These include unanimous decisions on operative and sub-operative paragraphs. Most of the unanimous voting patterns however have been

²⁰ Address by the President of the International Court of Justice, Judge Stephen Schwebel, to the General Assembly of the United Nations, 27 October 1998.

²¹ Speech of President Higgins at 10th anniversary of the International Tribunal for the Law of the Sea on 29 September 2006. See http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeech_president_higgins_itlos_20061029.htm; Speech by President Higgins at the Security Council’s Thematic Debate on “Strengthening International Law” on 22 June 2006. See http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeechpresident_higgins_20060622.htm.

observed during the preliminary objections phase. Unanimity can send important messages in general and consolidate codification of international law in particular. It could also create positive effects by encouraging member States to approach the Court.

XIII. CONCLUDING REMARKS

How is the current state of affairs relating to state practice important now? Does this state of affairs create any cause for concern? What are the challenges to the Court and how is it likely to be overcome?

The concluding remarks can be summarized as follows:

Firstly, there is a significant gap between the recommendations made and state practice since 1971. Thus, States, especially those states which have made high sounding recommendations, have clearly failed to adhere to their own recommendations. An overview of the report gives an impression that the states have made quite fancy suggestions or a shopping-list. Yet, they have neither adhered to nor made concerted efforts to make any headway on their suggestions, at least, in so far as the public records of the Sixth Committee are concerned.

Secondly, the issue of expanding the jurisdiction of the Court to include international organizations is unnecessary. It should be noted that international organizations were not invited to comment on making recommendations to enhance the role and effectiveness of the Court. The main reasons for this are: Firstly, there was no unanimity among the member States on this issue. Secondly, the inter-organizational relationship agreements clearly prohibit recourse to the Court on issues concerning the interpretation and application of agreements. Thirdly, no international organization has brought any case (excluding advisory opinions) to the attention of the General Assembly or the ECOSOC. Fourthly, international organizations have not joined the call as can be seen from the statements of their executive heads to the General Assembly, Security Council or ECOSOC. Additionally, the International Law Commission is already addressing the issue of responsibility of international organizations. Last but not least, the 1970s debate revolved around enlarging the scope of advisory opinions to international organizations because the Court's docket was empty at that time. It is perfectly logical that, now the Court itself nor the states may not be enthusiastic anymore, due to the sheer workload of the Court.

The third concluding remark is that member States have realized that the issue of composition, age and duration of service of the members of the Court is not important anymore as far as its impact on the enhancement of the role and effectiveness of the Court is concerned. The statistical analysis is proof of this conclusion.

Fourthly, the unanimity of voting records, especially since 1971 in the preliminary objection phase, has made its own contribution to the overall effectiveness of the judgements of the Court, not only in resolving the disputes but also in clarifying legal norms and principles.

Fifthly, the efficiency of the Court in dispatching cases is not proven. In fact, as the analysis clearly shows, the Court has taken significantly more time in delivering judgments and advisory opinions since 1971.

Sixth, there is a clear absence of strong political will on the part of the leadership either of the UN Secretary-General, the President of the Court and the General Assembly to appeal to member States to make increasing use of the Court. There is no direct cause and effect between any resolution of the General Assembly or statements of the Secretary-General or President of the Court and an increase in the number of cases and parties to the Court.

Seventh, the lack of provision of ICJ dispute settlement mechanisms in bilateral treaties, especially since 1971, makes it abundantly clear that states have become more wary of the role of the ICJ in their bilateral affairs.

Eighth, the outreach campaign of the Court together with its judgements and opinions on politically-charged cases since 1991 has brought the Court closer to its role and to the attention of the civil society at large.

Last but not least, the emergence of international and regional Courts and tribunals has clearly caused a concern regarding the traditional problem of institutional rivalry and potential fragmentation of international law. Regarding the Court's contribution to the general development of international law, the author sees a clear contribution emerging from the international and regional courts and tribunals and these should be seen to complement the well-developed jurisprudence of the Court in general and should not be seen as competition with its jurisprudence. Undoubtedly, the contribution of these courts and tribunals in specific areas are much more valuable and unless there is an appellate role given to the ICJ, the international community has to accept their jurisprudence as the guiding sources for the codification and progressive development of international law.

It is evident that states which made recommendations to enhance the role and efficiency of the Court in the then prevailing climate have not engaged in strong efforts to live up to their own recommendations. On the contrary, there is some deviation from the recommendations in the cases of some states. Interestingly though, despite these recommendations not being worked upon, there is a renewed trust in the Court, more cases are being filed every year and the overall perception has changed in favour of the Court. But this may create an unpredictable feeling: is it not possible that a sudden change in international affairs may reverse this favourable perception as there has not been a systematic attempt on the part of the States to enhance the role and efficiency of the Court?

XIV. CHALLENGES

Although there is significant gap between the recommendations made and state practice, this state of affairs does not cause any significant concern. Are there any trends or developments? None of the States which had earlier expressed serious concerns are making any statements that lead us to believe that these concerns remain. Statements made by them during the 60th anniversary of the UN and during the debate following the speech of President Higgins to the Sixth Committee and Security Council in 2006 clearly show their full confidence in the impartiality and effectiveness of the Court.

A. Acceptance of Compulsory Jurisdiction

Despite the increasing number of cases and apparent deposition of full faith, the fact remains that only 67 States have accepted the compulsory jurisdiction of the Court. As the Dutch Foreign Minister Mr Bot said on the occasion of the 60th anniversary of the Court, "there is much room for improvement when it comes to acceptance of the Court's jurisdiction". Except for the United Kingdom, no other Permanent members of the Security Council have accepted compulsory jurisdiction. As seen above, France and USA have withdrawn their acceptance after losing their cases. Despite the categorically positive statement of President Putin and support for the role of the Court in the peaceful settlement of disputes and international relations in general, the Russian Federation has not accepted compulsory jurisdiction. China, like the other 3 permanent members, has never been a party to the Court and is yet to accept compulsory jurisdiction. It is imperative that these five permanent members set

an example for the world by accepting the compulsory jurisdiction of the Court. In this regard, it is instructive that none of the Presidents²² of the Court since 1991 have expressly appealed to these states in their speeches at the General Assembly or the Security Council.

B. *Conflicting Jurisprudence and Fragmentation of International Law*

Another challenge is the possible conflict of jurisprudence between various international Courts and tribunals and the ICJ. The issue is already addressed by the ILC. However, it should be noted that the growth in the number of new courts and tribunals has not posed any significant concern regarding the lack of consistency in the enunciation of legal norms and the attendant risk of fragmentation. The author fully agrees with President Higgins' remark that "the potential for fragmentation should not be exaggerated".²³ Nevertheless, the idea of an annual meeting of the President and Judges of the Courts and Tribunals is worth considering, during which the issue of fragmentation, among others, can be discussed. Perhaps, the Courts should establish a tradition of meeting together to address the issue. This will be in line with the regular meeting of the senior management group of the UN which comes together to discuss inter-organizational issues which directly affect the delivery of their mandate.

C. *Attitude of the Security Council Towards the Court*

Another important challenge the Court faces is the attitude of the Security Council towards the Court. It has been a matter of ritual reiteration that the Council should refer cases, where legal claims are stake, to the Court. There has hardly been any instance where the Council has done so. Thus, President Higgins, during the debate, suggested to the Council that it strongly indicates to the parties that they are expected to have recourse to the Court under articles 33 and 36(2) of the Charter. Citing the failure of the Council to make use of these provisions of the Charter, President Higgins has suggested that this tool needs to be given life and made a central policy of the Security Council. It is yet to be seen whether the Council takes this recommendation seriously or not.

D. *UN Secretary-General Trust Fund*

As seen above, more and more African and Asian states have resorted to the Court in the last decade. Some of these states needed to use the Trust Fund to go to the Court and it is likely that the trend will continue. However, the sources of the Fund have been depleting since its inception. Thus, it is imperative that states contribute more resources to the Fund so that needy member States can avail themselves of the funds to resolve their disputes. The new UN Secretary-General should take this to heart and he and the President of the Court should make a special appeal to member States to contribute funds.

E. *Compliance with the Judgments*

The Court has an impressive record of compliance with its judgments by the parties. As President Higgins noted during her speech to the Security Council on Thematic Debate,

²² Since 1991, the president of the Court has invariably been from one of the five Permanent members of the Council except between 1995-1997, when Judge Bedjaoui of Algeria was the President.

²³ President Higgins speech on 10th anniversary of the ITLOS, *supra* note 21.

“no more than a handful (of cases) have presented problems of compliance. And of this handful, the problems of compliance have mostly turned out to be temporary”. The level of compliance with the court’s judgment is one of the strong factors which have motivated states to come to the Court to resolve their disputes.

XV. OTHER CHALLENGES

The issue of age, composition and duration of service of judges is one that no longer needs to be addressed. However, there are still a few challenges. Firstly, the Court is facing challenges that are posed by the substantive law of the current issues. An increasing number of cases require continuous innovative amendments to the rules of procedure of the Court. The Court continues to effectively respond to the challenges and has amended the rules of procedure twice in the last six years and has kept amending the Practice Directions. The Court should encourage the use of the facility of summary of chambers of procedure. The issue of adequate human resources is equally challenging, as the Court must have necessary assistance to provide the judges high quality and timely research. One should not underestimate that the lack of human resources has a direct and critical effect on the efficiency of the Court as well as the quality of its judgements. Urgent attention by the General Assembly can help to overcome this challenge.

ANNEX—1

UN Secretary-General Trust Fund for the ICJ

No.	State	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	Total
1	Austria			✓	10,000.00	10,000.00	13,400.00	13,400.00											46,800.00
2	Chad		✓																0.00
3	China		✓																0.00
4	Cyprus	✓			2,000.00														2,000.00
5	Czechoslovakia		✓																0.00
6	Denmark		✓																0.00
7	Dominica		✓			3,685.00			3,683.57										7,368.57
8	Fiji		✓																0.00
9	Finland		✓		22,119.00	19,979.68	20,936.74	26,953.55	25,196.84	22,113.18	22,632.27	20,232.43	16,480.79	17,088.94	20,156.87	12,056.00	12,960.83		258,907.12
10	France		✓		56,603.77	51,282.05	53,097.34	61,224.49											222,207.65
11	Germany		✓																0.00
12	Greece		✓																0.00
13	Hungary		✓																2,000.00
14	Indonesia		✓																0.00
15	Iran					20,000.00													20,000.00
16	Japan			✓		25,000.00	25,000.00	25,000.00	25,000.00	25,000.00	24,000.00	24,000.00	24,000.00	24,000.00				221,000.00	
17	Luxembourg				2,959.42	5,711.45	3,138.49	3,553.34	3,163.56	2,799.36	2,653.45								23,979.07
18	Maldives		✓																0.00
19	Malta		✓																0.00
20	Mexico		✓		5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	5,000.00	4,855.50		10,000.00	5,000.00	69,855.50
21	Morocco			✓	3,784.47														3,784.47
22	Netherlands			✓															0.00
23	New Zealand		✓																0.00
24	Norway		✓													12,584.00	10,000.00		22,584.00
25	Oman		✓																0.00
26	Senegal		✓																0.00
27	Singapore				5,000.00														5,000.00
28	Spain			✓	19,196.43	16,714.50		15,617.31	15,415.56										66,943.80
29	Sri Lanka			✓	1,000.00														1,000.00
30	Sweden			✓	69,084.63		53,368.91												122,453.54
31	Switzerland		✓																0.00
32	Togo		✓																0.00
33	UK		✓		7,535.00		20,000.00				25,000.00		33,121.65						85,656.65
34	Venezuela		✓					444.85		1,383.40									1,828.25
35	Zambia		✓		206282.72	157372.68	193941.48	151193.54	77459.53	56295.94	79285.72	49232.43	78602.44	46088.94	25012.37	24640	32960.83	5000	1767073.62

*all amounts in US dollars; ** A/57/373, p. 3 reports receipt of 46,114.44 instead of 46,088.94 dollars; ***As of 30 June 2005 the fund balance was 2,008,766.47 dollars; ****In addition 583,705 dollar contribution from 1989 to 1992.

ANNEX—2

Unanimous voting records of the ICJ between 1972 and 2000

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- (1) Nuclear Tests (Australia *v.* France), Application to Intervene, Order of 20 December 1974.
 - (2) Nuclear Tests (New Zealand *v.* France), Application to Intervene, Order of 20 December 1974.
 - (3) Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgement, I.C.J. Reports 1981.
 - (4) United States Diplomatic and Consular Staff in Tehran, Order of 15 December 1979, I.C.J. Reports 1979.
 - (5) United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3.
 - (6) Frontier Dispute, Constitution of Chamber, Order of 3 April 1985, p. 6.
 - (7) Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986, p. 3.
 - (8) Frontier Dispute (Burkina Faso/Mali), Judgement, I.C.J. Reports 1986, p. 554.
 - (9) Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, p. 169.
 - (10) Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 1984, p. 392.
 - (11) Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgement, I.C.J. Reports 1986, p.14.
 - (12) Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia *v.* Libyan Arab Jamahiriya), I.C.J. Reports 1985, p. 192.
 - (13) Border and Transborder Armed Actions (Nicaragua *v.* Honduras), Jurisdiction and Admissibility, Judgement, I.C.J. Reports 1988, p. 69.
 - (14) Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Constitution of Chamber, Order of 8 May 1987, I.C.J. Reports 1987, p. 10.
 - (15) Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Constitution of Chamber, Order of 13 December 1989, I.C.J. Reports 1989, p. 162.
 - (16) Land, Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990, p. 92.
 - (17) Land, Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening), Judgment of 11 September 1992, I.C.J. Reports 1992, p. 351.
 - (18) Elettronica Sicula S.p.A (ELSI), Constitution of the Chamber, Order of 2 March 1987, I.C.J. Reports 1987, p. 3.
 - (19) Elettronica Sicula S.p.A (ELSI), Judgement, I.C.J. Reports 1989, p. 15.
 - (20) Certain Phosphate Lands in Nauru (Nauru *v.* Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240.
 - (21) Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991, p. 53.
 - (22) Passage through the Great Belt (Finland *v.* Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 12.
 - (23) Oil Platforms (Islamic Republic of Iran *v.* United States of America), Counter-Claim, I.C.J. Reports 1998, p. 190.
 - (24) Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 3.
 - (25) Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996, p. 13.
 - (26) Land and Maritime Boundary between Cameroon and Nigeria, Application to Intervene, Order of 21 October 1999, I.C.J. Reports 1999, p. 1029.
 - (27) Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I. C. J. Reports 1999, p. 1045.
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ANNEX—2 [Continued]

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- (28) Vienna Convention on Consular Relations (Paraguay *v.* United States of America), I. C. J. Reports 1998, p. 248.
 - (29) Request for Interpretation of the Judgment of 11 June 1998 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, (Nigeria *v.* Cameroon), Judgment, I. C. J. Reports 1999, p. 31.
 - (30) LaGrand (German *v.* United States of America), Provisional Measures, Order of 3 March 1999, I. C. J. Reports 1999, p. 9.
 - (31) Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Provisional Measures, Order of 1 July 2000, I. C. J. Reports 2000, p. 111.
 - (32) Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo *v.* Belgium), Provisional Measures, Order of 8 December 2000, I. C. J. Reports 2000, p. 182.
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Unanimous voting records of the ICJ between 1946 and 1971

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- (1) Corfu Channel case, Judgment of April 9th, 1949, I.C.J. Reports 1949, p. 4.
 - (2) Case concerning rights of nations of the United States of America in Morocco, Judgement of August 27th, 1952: I.C.J. Reports 1952, p. 176.
 - (3) Haya de la Torre Case, Judgment of June 13th, 1951: I.C.J. Reports, p. 71.
 - (4) The Minquiers and Ecrehos case, Judgement of November 17th, 1953: I.C.J. Reports 1953, p. 47.
 - (5) Nottebohm case (Preliminary Objection), Judgement of November 18th, 1953: I.C.J. Reports 1953, p. 111.
 - (6) Case of the monetary gold removed from Rome in 1943, (Preliminary Question), Judgement of June 15th, 1954: I.C.J. Reports 1954, p. 19.
 - (7) Interhandel (Switzerland *v.* United States), Judgment of March 21st, 1959, I.C.J. Reports 1959, p. 6.
 - (8) Temple of Preah Vihear (Cambodia *v.* Thailand), I.C.J. Reports 1961, p. 17.
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