THE "WORLD COURT": COPING WITH POLITICAL REALISM AND THE SOVEREIGN TRIBE IN INTERNATIONAL ADJUDICATION

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I. INTRODUCTION

> As long as international law and the jurisdiction of international tribunals are based on consent, it is of the utmost importance that the effectiveness of the World Court should be improved and its jurisdiction extended. It is in this way that it can be expected that resort to international justice will be increased — ultimately to the point where the rule of international law becomes the normal pattern for the disposition of justiciable disputes between nations.
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> John E. Read[1]

> A federal district judge will say to me, "I'll gladly exchange my docket for yours", Harvard friends are more outspoken: "Have you sat on a case yet?" or "I hope you're not being overworked". The answer to both questions is no.
>
> Richard R. Baxter[2]

Created in the roseate wake of supranationalism that spawned the *United Nations Charter*, the post-war International Court of Justice at The Hague has suffered through several cycles of critical appraisal. The International Court of Justice (World Court) was designed to facilitate and enhance the commitment of sovereign nations to a system of international law and peaceful dispute settlement. However, in the years since the optimistic pronouncements of Canadian jurist John Read, the Court has been labelled "tragically underworked".[3]

Rising from the ashes of the League of Nations' Permanent Court of International Justice, the World Court has considered more than sixty-eight major cases since 1947. However, the Court's full bench of fifteen

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[1] Read, *The World Court and the Years to Come*, 2 CAN. Y.B. INT'L L. 164, at 171 (1964).

[2] Baxter, *Two Cheers for International Adjudication*, 65 A.B.A.J. 1185 (1979).

[3] Calamai, *Canada makes her debut before the World Court*, The National, 4 Apr. 1984, at 18, col. 2.

judges has delivered only twenty-one judgments on the merits and eighteen advisory opinions since its inception. The remainder of the cases were either disposed of by rulings on interlocutory points or discontinued by the nation-state parties themselves.[4] Since 1974, the number of cases considered annually by the Court has declined precipitously. It is the object of this article to examine the factors that have discouraged nations from bringing an international dispute to the World Court and to consider the internal reform of Court rules and procedure that took place in the 1970's. These reforms provide evidence that the Court itself had recognized its declining efficacy and had attempted to make its forum more attractive to sovereign litigants. While any assessment of the past and future role of the World Court must be based on legal and systemic analysis, a major thesis of this article recognizes the sometimes overriding importance of political realism on the part of national governments. Decisions to sue and/or to respond to a suit at the international level of adjudication are often the result of calculated policy, beyond the Court's control.

While the World Court languishes in relative disuse, activity in the Permanent Court of Arbitration[5] flourishes. The more flexible arbitration tribunals, originally created to deal with particular disputes, are currently occupied with the settling of disputes over the claims and counter-claims arising between Iran and the United States in the aftermath of the Iranian revolution and the hostage-taking incident of 1979. Apart from any ability to handle more effectively numerous and particularized aspects of a dispute, the popularity of the arbitral process must be recognized in any analysis of the role of the World Court. Questions interstitially woven throughout this article are based on the hypothesis that the arbitration tribunal route is a popular one largely because it affords disputants more control over the ultimate outcome. Thus, the inference may be drawn that the World Court suffers from a fundamental lack of faith on the part of signatories that have nominally (and in many cases only partially) submitted themselves to the Court's jurisdiction. The discussion of the question of jurisdiction will emphasize the sad fact that few Member Nations are willing to place their confidence in the Court proper. The recent furore over the United States' denial of jurisdiction in suits brought by Central American countries has become the most timely and perhaps the most devastating indictment of the failure of the World Court. In addressing this failure, reformers both inside and outside the Court have encountered the seemingly impen-

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[4] For a closer analysis of these statistics (in the context of the thesis of this article), *see J. Gamble & D. Fischer, The International Court of Justice* 119-25 (1976).

[5] The permanent Court of Arbitration was established by the International Conventions on the Pacific Settlement of International Disputes, 187 C.T.S. 410 (1899); International Covention on the Pacific Settlement of International Disputes, 205 C.T.S. 233 (1907).

etrable wall of "tribalism" in international law. As yet, nations seem unwilling to give up their sovereignty in the interests of peaceful dispute settlement when the process seems weighted against them.

This article will also focus on an innovation in the Court's procedures: the *ad hoc* chambers. Liberalized in 1978 as part of a reform process, the new Rules of Court[6] now allow litigants to select a panel of judges from among the full fifteen-member Court.[7] The *ad hoc* chambers were established in order to mirror the flexibility of the arbitration process while retaining the prestige and aegis of the World Court itself.[8] This new procedure raises the question of whether the device will improve the incidence of dispute resolution and thereby give the Court a new *raison d'être* or whether it will undermine the authority of the full Court. As the Court appoints the chambers' panel, yet allows the president to confer with the parties on their selection, the new procedure may also demonstrate the role of policy at the Court. In effect, under the chambers procedure governments can avoid judges from countries or regimes perceived to be inimical to their national interests. This may be an important factor in promoting the active participation of both Third World signatories and major Western countries before the Court.

The conflict between national policy and submission to international jurisdiction is the primary focus of this article. The twin problems of the non-appearing respondent and non-recognition of the Court's judgment provided the impetus for past schemes aimed at enhancing the role of the Court. The problems, however, have not disappeared. The decision by the United States government in April, 1984 not to recognize any judgment in Nicaragua's suit over the alleged mining of her harbours is only the most recent reminder of these problems.[9] The fact that this denial of jurisdiction comes from the Court's major Western proponent carries a new, frightening message for the future prospects of the Court.

The *Statute of the International Court of Justice*[10] is itself partly responsible for the Court's problems. Articles 36 and 37, read together, provide that jurisdiction adheres upon the agreement of both parties.

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[6] The original Rules of Court, adopted May 6, 1946, ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT 54 (2d ed. 1947) [*hereafter* I.C.J.R.C. (1946)] were amended May 10, 1972, ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, NO. 2, at 3 (1972), and *No.3.* 93 (1977) [*hereafter* I.C.R.J.C. (1972)]. Revised Rules of Court were later adopted on April 14, 1978, ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, NO. 4, at 93 (1978) [*hereafter* I.C.J.R.C. (1978)].

[7] I.C.J.R.C. (1978), arts. 5-18.

[8] *Supra* note 3.

[9] *See* notes 155-63 and accompanying text *infra.*

[10] 15 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 355 (1945). The Statute is annexed to the *Charter* of the United Nations by virtue of Article 92. The Statute is reprinted in DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 59 (S. Rosenne ed. 1974).

The practical effect of these provisions, combined with the provisions of Article 53 concerning the non-appearing respondent, is that no state can be brought before the Court without its consent. In many cases, states have simply refused to appear. For example, in 1970 Canada formally withdrew jurisdiction from the Court on all matters concerning Arctic marine pollution.[11] The Canadian government blatantly refused to take the adjudicative risk of submitting to a ruling potentially adverse to the perceived national interest. Throughout the 1960's and 1970's other cases have followed this pattern. In 1973 India refused to respond to Pakistan's suit over Pakistani prisoners of war.[12] In 1974 both New Zealand and Australia won a preliminary judgment against France over the latter's nuclear test program in the South Pacific.[13] France refused to participate in the case. As well, to this date neither the Soviet Union nor its satellites have ever accepted the Court's jurisdiction.

The consensual nature of the Court also confers no power to enforce its judgments or interim orders, even if both parties do appear. Therefore, where the Court has issued orders they have generally been ignored. In the *South West Africa* case no orders were observed.[14] In the *Trial of the Pakistani Prisoners of War*[15] the Court was unable to achieve any result before discontinuance. The 1974 judgments in the *Fisheries Jurisdiction* cases[16] were blatantly ignored by Iceland. Judgments that same year ruling against France's nuclear test program[17] were also ignored as France continued to pursue policies of immediate national interest. Finally, the provisional measures designed to achieve the release of American hostages in Tehran in 1979[18] failed to impress the Iranian government. Thus, there is ample historical precedent to support the thesis that the World Court has failed to acquire the "teeth" necessary to surmount narrow tribal aims in favour of a workable supranational legal order.

In the last two decades the wide-ranging effect that other supra-

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[11] *See* J.-G. CASTEL, INTERNATIONAL LAW 798-800 (3d ed. 1976); Beesley & Bourne, *Canadian Practice in International Law during 1970 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs*, 9 CAN. Y.B. INT'L L. 276 (1971); *see* CANADA AND THE 1970 RESERVATION ON JURISDICTION *infra*.

[12] Trial of Pakistani Prisoners of War (Pak. v. India), [1971] I.C.J. 328 (Interim Protection Order of 13 Jul.), [1971] I.C.J. 347 (Order of 15 Dec.).

[13] Nuclear Tests (Austl. v. Fr.), [1974] I.C.J. 253 (Judgment of 20 Dec.); Nuclear Tests (N.Z. v. Fr.), [1974] I.C.J. 457 (Judgment of 20 Dec.).

[14] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 3, 6, 9 (Orders 1, 2, 3, of 26 Jan.), [1971] I.C.J. 12 (Order of 29 Jan.).

[15] *Supra* note 12.

[16] Fisheries Jurisdiction (U.K. v. Ice.), [1974] I.C.J. 3 (Judgment of 25 Jul.); Fisheries Jurisdiction (W. Germ. v. Ice.), [1974] I.C.J. 175 (Judgment of 25 Jul.).

[17] *Supra* note 13.

[18] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), [1980] I.C.J. 3 (Judgment of 24 May).

national adjudicative bodies have had on international jurisprudence has highlighted the failure of the World Court. For the most part, these adjudicative bodies are well-established regional tribunals founded on a strong base of political consensus among the contracting parties. Two European courts in particular — the Court of the European Communities and the European Court of Human Rights — have acquired a degree of supranational power that eludes the more consensually fragile World Court. The dramatic developments brought about by these regional tribunals are a direct result of the wide jurisdiction initially conferred upon them — jurisdiction that many signatories may now regret, given the unforeseeable political consequences many decisions have produced.[19] On the international plane, the European Court of Human Rights deals with questions concerning the rights of individuals: questions that only a few decades ago were considered the exclusive province of domestic courts applying domestic law. This geographically limited body has since spawned the Inter-American Court of Human Rights.[20] The Court of the European Communities considers questions of treaty interpretation and relations between states. It has significantly added to the corpus of international law by determining the constraints on sovereignty imposed by the self-executing character of the Treaty of Rome.[21]

The historical background leading to the establishment of the Court of the European Communities is germane to this article insofar as it emphasizes a common attitude among member European states. As Chancellor Adenauer remarked in a 1953 statement to the Bundestag, "We must free ourselves from thinking in terms of national statehood."[22] The Court grew out of the establishment of the European Coal and Steel Community Treaty (ECSC) in 1951, and the European Economic Community (EEC) and European Atomic Energy Community (Euratom) in 1957. After the constitution of an umbrella Council of Ministers for these three groups in 1967, the Court acquired the sole power to decide whether the acts of this Council or the ECSC/EEC/Euratom Executives should be upheld. Thus, the Court of the European Communities was founded on a shared commitment to economic integration.

The Court of the European Communities is composed of seven judges, with no nationality requirements. Unlike the World Court, only one opinion is rendered in each case, thus eliminating any question of the possible partiality of judges. In terms of access to the Court, entities other than national governments can invoke the Court's jurisdiction. Enforcement of judgments is a political matter for the Member

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[19] *See* F. GRIEVES, SUPRANATIONALISM AND INTERNATIONAL ADJUDICATION 175 (1969).

[20] *See supra* note 2, at 1186.

[21] *Id.*

[22] Address to the Bundestag, March 19, 1953. Cited in *supra* note 19, at 124.

States; however, decisions are directly binding where enterprises and individuals are concerned. In the last ten years, decisions of this Court have departed from the provisions of their underlying documents in order to further the fundamental objectives of the three treaties.[23] In this way, the Court has become a more creative adjudicative body. Drawing on the clear supranational intentions of the treaties, the Court has apparently acquired the prestige needed to prevent any litigant from disrupting the consensus and obstructing the Court's rulings.

However, the degree of real power given to the European Court of Human Rights and the Court of the European Communities has been controlled by the participant states, although both Courts have taken an expansive view of their jurisdiction.[24] Before embarking on a deeper study of the World Court, it may be concluded from the foregoing discussion that regional, technical or specialized tribunals exhibit greater efficacy because their Member States have a greater sense that disposition will occur with less regard for the vagaries of world politics. The importance of political calculus at the World Court and the search to overcome this underlying fact occupy the balance of this article.

II. THE FORUM INTRODUCED: A BRIEF OUTLINE OF THE WORLD COURT

The World Court was established by Articles 92-96 of the *United Nations Charter* and first convened in 1946. At that time, the Permanent Court of International Justice, the judicial organ of the League of Nations, was dissolved.[25] The Court is governed by the *Statute of the International Court of Justice* which is not incorporated into the *United Nations Charter* but simply annexed to it. Nonetheless, it reflects and elaborates general principles laid down in Chapter XIV of the *United Nations Charter.* All members of the United Nations are *ipso facto* parties to the Statute, although non-members of the United Nations may also adhere to the Statute.

The Court has drawn up its own general Rules[26] to supplement the Statute on procedural matters. The revisions of these Rules, which are within the Court's sole competence, are indications of an internal response to the perceived failure of the Court. Before 1967 the Court operated under a revised version of the 1936 Rules of the Permanent

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[23] *Supra* note 2, at 1186.

[24] *Supra* note 19, at 22. Since the *Lawless* case, VIII EUROPEAN Y.B. 409 (Council of Europe 1960) individuals can appear as parties before the European Court of Human Rights.

[25] *See* DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE, *supra* note 10, at 489.

[26] *Supra* note 6.

Court of International Justice.[27] In 1967 a thorough revision was begun, aimed at simplifying Court procedure and creating a greater degree of flexibility for the parties. This revision coincided with a period of underuse of the Court by Member States.[28] It was also a period during which the number of state instruments conferring jurisdiction on the Court grew slowly. This situation prompted an official call by the Secretary-General in 1970 for a study "of the obstacles to the satisfactory functioning of the International Court of Justice and ways and means of removing them", including "additional possibilities for use of the Court that have not yet been adequately explored".[29] Partially amended rules came into force in September, 1972.[30] Then, in 1974 the United Nations General Assembly adopted a telling and important resolution.[31] This resolution produced new, more effective rules such as those facilitating resort to *ad hoc* chambers. The Rules of Court were more fully amended in 1978.[32] However, the excitement generated by increased Court activity between 1974 and 1978 has been followed by a return to general symptoms of under-utilization in the 1980's.

The full fifteen-member Court is elected by the United Nations Security Council and General Assembly without regard to nationality. Part of the criteria for electors is that the Court should be representative of the "main forms of civilization and of the principle legal systems of the world".[33] In practice, this provision is implemented by distributing three seats to Africa, two to Latin America, three to Asia, two to Eastern Europe and five to Western Europe and other states. Judges serve nine-year terms and are eligible for re-election. Contrary to the thesis of this article, the Statute[34] clearly indicates that judges are not governmental representatives. Theoretically, the Court acts only on the basis of the law, "independent of all outside influence".[35] Article 18 of the Statute provides for dismissal procedures if, in the unanimous opinion of the Court, any judge violates this rule. However, this procedure has never been invoked.

The composition of the Court varies from case to case but no two members may be nationals of the same state. When a case is submitted

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[27] Published in Series D, No. 1 (4th ed. 1940) of the Permanent Court of International Justice official publications.

[28] *See* note 4 and accompanying text *supra.*

[29] U.N. Doc. A/8382 and Add. 1-4. Cited in THE INTERNATIONAL COURT OF JUSTICE 20 (1976)

[30] I.C.J.R.C. (1972). *See* note 6 *supra.*

[31] G.A. Res. 3232 (XXIX), U.N. GAOR Supp. (No. 31) at 141, U.N. Doc. A/9846 (1974).

[32] I.C.J.R.C. (1978). *See* note 6 *supra.*

[33] *Statute of the International Court of Justice,* art. 9, 15 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 355 (1945).

[34] Arts. 2,16,17,18.

[35] For a commentary on this point *see* THE INTERNATIONAL COURT OF JUSTICE 22 (1976).

to the Court, judges must withdraw from participating if they have previously taken part in the case or have a special reason to withdraw, such as a family relationship with a party. While the right of Members to sit has been challenged by a government, no such challenge has been successful.[36] Furthermore, a judge is not disqualified from sitting on a case because he is of the same nationality as one of the parties. In fact, where a party has no judge of the same nationality on the bench, it may choose a person of that nationality to sit as an *ad hoc* judge. Since 1966, there have been few occasions when the position of the national or *ad hoc* judge of one of the parties disagreed with the position of his country of origin.[37]

It follows from the foregoing discussion that the composition of the Court may vary from seventeen or more judges (if there are *ad hoc* judges) to a quorum of nine judges. The composition may also change for various aspects of a particular case, for example, for interim orders of protection, preliminary objections and consideration of the merits. The Statute and the amended 1972 and 1978 Rules provide for still other possibilities. Secretly elected assessors may attend the Court's deliberations in cases of a technical nature. As well, the Rules allow for a five-member Chamber of Summary Procedure to be constituted annually.[38] Articles 26-28 of the Statute allow for the establishment of *ad hoc* chambers of three or more judges to deal with a given category of cases, such as labour or communications. A judgment by the chambers is considered a judgment by the Court. As mentioned above, use of the new chambers procedures has been encouraged since the early 1970's as an alternative for reluctant states seeking quicker or less politically risky dispute resolution.

Article 34(1) of the Statute provides that only states may be parties in cases before the Court,[39] although the Court also has the power to

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[36] For example, a challenge failed in South West Africa (Ethiopia, Liberia v. S. Afr.), [1966] I.C.J. 4 (Judgment of 18 Jul.).

[37] In Barcelona Traction, Light and Power Co. (Belg. v. Spain), [1958] I.C.J. 49 (Order of 18 Oct.); [1970] I.C.J. 4 (Judgment of 5 Feb.). The Spanish *ad hoc* judge dissented on all points in the case on preliminary objections.

[38] I.C.J.R.C. (1978), art. 15.

[39] States include:

(1) Member States of the United Nations. Article 35(1) of the Statute provides that the Court shall be open to states that are parties to the Statute. Article 93(1) of the *United Nations Charter* provides that all Member States of the United Nations are *ipso facto* parties to the Statute.

(2) Other State Parties to the Statute. Article 93(2) of the *United Nations Charter* provides that states which are not members of the United Nations may become parties to the Statute on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

(3) States not Parties to the Statute. Article 35(2) of the Statute provides that subject to any special provisions contained in any treaties in force, the Security Council shall determine the conditions under which the

issue advisory opinions to organs of the United Nations.[40] This jurisdiction *ratione personae* is not, however, in itself enough. Article 36(1) of the Statute provides that the Court has jurisdiction over all cases referred to the Court by parties. However, there are several categories of cases. The first possibility is bilateral agreement by the parties to submit a pre-existing dispute to the Court by special agreement (*compromis*). A second possibility exists where only one of the disputing states initially recognizes the Court's jurisdiction and the other subsequently does so (a rare situation known as *forum prorogatum*). Often a state will bring suit and invite the other party to recognize the Court's jurisdiction despite past arrangements to the contrary. These suggestions have always been met with a negative response. A more credible jurisdictional possibility contemplated by Article 36 is the inclusion in international agreements of compromissory clauses which provide for the reference of enumerated potential disputes to the Court. Often, however, resort to the Court through compromissory clauses occurs only after mediation or arbitration have failed. There are 300 to 400 compromissory clauses still in force, including sixty bilateral agreements.[41]

A final method of conferring jurisdiction on the Court in contentious cases is set out in Article 36(2)-(5) of the Statute.[42] A state may choose to recognize the compulsory jurisdiction of the Court in all legal disputes when any other state accepts the same obligation. This acceptance of compulsory jurisdiction is accomplished by formal declaration. To date

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Court may be open to other states. Under no circumstances can these conditions place a state in a position of inequality before the Court.

[40] Art. 65.

[41] *See supra* note 35, at 25.

[42] Specifically, the provisions are as follows:

36. (2) The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

(3) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several of certain states, or for a certain time.

(4) Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

(5) Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

some forty-five nations have filed acceptances. However, this is a much smaller number than the framers of the Court had envisaged in 1946. In the 1960's many of the newer Third World countries were reluctant to resort to compulsory jurisdiction. Since 1966 nine states that had previously recognized the Court's compulsory jurisdiction have withdrawn their acceptances, many after having been made respondents in proceedings before the Court.[43] More than any other facet of Court jurisdiction, the study of sovereign states' acceptance of compulsory jurisdiction illustrates the inherent tenuousness of a fundamental principle of international law: parties must consent to the adjudicative exercise of jurisdiction. Many of the nations filing acceptances have further complicated the issue by annexing reservations or imposing time limitations on their acceptances: such reservations necessarily weaken the effect of compulsory jurisdiction. The most common reservations relate to other means of pacific settlement or to matters of domestic jurisdiction, both of which are allowed under Article 95 of the Statute and under Article 2(7) of the *United Nations Charter*.[44] The United States' acceptance of jurisdiction includes the famous Connally Amendment[45] concerning matters of domestic jurisdiction. Even after various statesmen and jurists came to view this type of reservation as contrary to the Statute and therefore void, few nations with such a reservation agreed to withdraw it.[46] As to reservations relating to other means of settlement, it must be noted in fairness that the World Court was not created in order to settle all international disputes but was merely intended as an *alternative* to direct and friendly settlement. Therefore, it may be argued that declining case loads at the Court do not necessarily represent a rejection of international adjudication because disputes may also be settled through mediation, bilateral arbitration or other less costly processes. According to this argument (which ignores the *political* calculus of decision-making), the rationale for settling out of court in domestic legal systems is also applicable to the settlement of international claims.

Parties who have submitted to the Court's jurisdiction agree to comply with any interim orders or judgments on the merits issued by the Court. While failure to do so may technically prompt referral of the matter to the Security Council, in practice, judgments cannot be enforced against renegade Member States. Judgments are delivered in public, for maximum publicity. However, the Rules allow dissenting and separate opinions[47] that may detract from the appearance of authority

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[43] *Supra* note 35, at 36.

[44] *Supra* note 2, at 1187

[45] Contained in the United States' Declaration accepting compulsory jurisdiction, 1 U.N.T.S. 9 (1946). *See* notes 143-45 and accompanying text *infra*.

[46] *See* T. ELIAS, THE INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS 134-40 (1983).

[47] I.C.J.R.C. (1978), art. 95 (2).

and cohesion. Failure to implement a judgment frequently occurs where the establishment of the Court's jurisdiction has been questioned.[48]

Finally, Article 38 of the Statute provides for the application of international law to cases before the Court. This law includes international conventions and custom as well as judicial decisions and teachings of "highly qualified publicists" of Member Nations. While *stare decisis* as it exists in the common law has no place in international law, the Court may apply an international custom to which it has previously adhered and thus further the development of international law.[49] For example, parties may rely on an approximation of precedent in boundary and territorial water delimitation cases already ruled on by the Court.[50] The Court may "decide a case *ex aequo et bono* [that is, according to equitable principles], if the parties agree thereto".[51]

The foregoing background is relevant to a more specific analysis of why nations have yet to embrace fully the Court as an ideal instrument of international adjudication. The key conflict between jurisdiction and national policy will be highlighted in the following sections.

III. CYCLES OF CRITICISM AND INTERNAL REFORM: THE SEARCH FOR PRESTIGE AND EFFICACY, 1966-1985

As noted above, the frequency of resort to the Court in contentious cases decreased in the 1960's but revived briefly in the mid-1970's. Thereafter, the Court faded precipitously in terms of both the number of cases on the docket and international prestige. Only recently, in the wake of the decision in the *Gulf of Maine*[52] case and the tempest generated by Nicaragua's suit against the United States, has the Court attracted much public interest in North America. Yet the criticisms produced by the failures of a decade ago have returned to haunt the Court with sometimes equal validity. Only the *ad hoc* chambers procedure seems to offer the institution a glimmer of hope for the future. Accordingly, this section will canvas the dialectic of Court reform into the 1980's and suggest that many of the criticisms of the past apply today. References to the specifics of major cases before the Court in the past will be kept to a minimum.

A précis of the problems that the Court continues to face includes an understandable preference among nations "for regional organizations

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[48] *See, e.g.*, the aftermath following Corfu Channel (Preliminary Objection), [1947-48] I.C.J. 15 (Judgment of 25 Mar. 1948).

[49] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 731 (3d ed. 1979).

[50] *See* discussion of the *Gulf of Maine* case *infra.*

[51] *Statute of the International Court of Justice*, art. 38(2).

[52] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), [1984] I.C.J. 246 (Judgment of 12 Oct.).

. . . for negotiation rather than arbitration, and for treating disputes as [essentially] political rather than legal".[53] These elements could be subsumed under the heading of "political realism". Governments have always regarded "hauling another state before the Court"[54] as an unfriendly act, despite the Court's assurances to the contrary.[55] As well, disputes of a technical nature have traditionally been seen as better suited to the formats of other tribunals. The preference for arbitration over the less flexible practice of the Court has already been noted.[56] In the area of representation there may also be lingering distrust on the part of Third World countries against a perceived "colonial" bent in the Court's composition.[57] In addition, given the current state of East-West tension, the palpable distrust of the Court by communist Member States is a recurrent factor. For its own part, the United States has always been reluctant to submit a dispute involving its national interest to a Soviet, Syrian or Polish judge. Finally, the protracted and expensive character of cases conducted before the full Court has discouraged potential litigants.

A. *The Ongoing "Crisis of Confidence"*

Analysis of the reasons for which nations have been disinclined to submit disputes to the World Court began in the mid-1960's. At that time stagnation was primarily attributed to the popularity of the arbitration process. However, distinction between solvable legal controversies and more nebulous political controversies was also made as, even in 1963, it was considered unlikely that the use of the Court could be enhanced given national fears of an untoward decision by the Court.[58] Renouncing sovereignty in the face of perceived bias or taking the risk of becoming subject to bias continues to be an almost insurmountable obstacle to a more active Court. This unwillingness to subordinate national interest is not, however, unique to the World Court. For example, at the 1958 Law of the Sea Conference, parties freed from the supposed composition partiality and compulsory jurisdiction of the Court were also opposed to referring disputes to more flexible (as far as national input is concerned) arbitral tribunals.[59] The ingrained attitude that resort to third-party juristic appraisals of another state's political acts is *hostile* rather than normal seems as strong in 1985 as it was in the 1960's.

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[53] J.-G. CASTEL, *supra* note 11, at 1249.

[54] *Supra* note 49, at 731.

[55] *See* G.A. Res. 3232 (XXIX), art.6, U.N. GAOR Supp. (No. 31) at 141, U.N. Doc. A/9846 (1974).

[56] *See* INTRODUCTION *supra.*

[57] *See* Verzijl, *The Present Stagnation of Interstate Adjudication: Causes and Possible Remedies,* II INTERNATIONAL RELATIONS No. 8, at 481 (Oct. 1963).

[58] *Id.* at 481.

[59] *Id.* at 481-82.

Early suggestions for beneficial reform were primarily born in the "hotbed" period of new Third World nationhood. Accordingly, the problem of partiality in the composition of the Court was met with calls either to alter the balance of representation (which may have further usurped the Court's role by challenging the supposed "vested rights" of "capitalist" or "colonial" Member States) or to expand the Court to accomodate more Third World judges.[60] If these suggested reforms persist at all today, they have been shunted aside by practical arguments which contend that the root problem is the basic non-acceptance of supranationalism.[61] Even if the Court were altered to the extent that it lost its judicial nature, many other pretexts would still exist for states to avoid the bitter pill of acceptance of compulsory jurisdiction.

Another proposed reform that began germinating two decades ago is the possible broadening of the categories of parties able to appear before the Court.[62] If organizations other than sovereign states were given the standing to sue or be sued, according to this argument the United Nations would provide more work for the Court in the area of advisory opinions if not contentious cases. This idea of binding the United Nations to the rule of law was never attractive to its politicized Members and the proposal was quickly abandoned.

As early as 1969 commentators in the West began analyzing recourse to the World Court in terms of extra-legal political motives. Merrills identified five obstacles to judicial settlement in international law: national interest, calculation of the risk of loss, attitudes reflecting cultural, historical or doctrinal divisions, the availability of exploitable extra-judicial power and the calculation of the benefits of publicity.[63] While this categorization is not exhaustive, it perhaps serves to introduce the limited value of any distinction between "legal" and "political" disputes.[64]

States that have no objection to judicial settlement in principle (for example, Canada) may nevertheless be unwilling to accept the compulsory jurisdiction of the Court without reservation simply because such acceptance could deprive the state of the power to shelter future, unforeseen questions from this relatively "messy" form of settlement.[65] Accepting the so-called "optional clause" of Article 36(3) of the Statute, which enables a unilaterally adhering state to sue and be sued by other Members, could force a state to appear before the Court, with little

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[60] *See, e.g.*, Anand, *Attitude of the "New" Asian-African Countries Toward the International Court of Justice*, 4 INT'L STUD. 119 (1962); *supra* note 57, at 489.

[61] *See, e.g.*, *supra* note 2, at 1188; *supra* note 19, at 172.

[62] *See, e.g.*, *supra* note 4, at 17-18.

[63] Merrills, *The Justiciability of International Disputes*, 47 CAN. B. REV. 241, at 241-69 (1969).

[64] *See* SUMMARY OF FACTORS IN PRE-LITIGATION DECISION-MAKING: THE POLITICS IN NICARAGUA'S SUIT AGAINST THE UNITED STATES *infra*.

[65] *Supra* note 63, at 268.

expectation of a favourable result, *despite* both political realities that provide *de facto* power over the subject matter in dispute and a desire to avoid judicial publicity.[66] These possibilities illustrate why so few nations have accepted the optional clause or compulsory jurisdiction and have limited, qualified and hedged their acceptances of jurisdiction with reservations. In 1970 Canada made this politically calculated decision and the United States has yet to repeal the notorious Connally Amendment. Indeed, the American withdrawal of jurisdiction from the Court on the Nicaragua matter is an excellent example of the way in which reservations on jurisdiction are used: the United States withdrew only when the possibility of an unsatisfactory result became apparent.

The official reaction of Members to this attitude was evinced in several bursts of reform at the beginning and the end of the 1970's. In 1970 Canada, the United States and ten other Members[67] succeeded in placing a review of the role of the Court on the agenda of the Twenty-Fifth Session of the General Assembly. By 1971, Member Nations had responded to a questionnaire circulated by the United Nations Secretary-General eliciting suggestions for reform of the Court's organization, jurisdiction and procedure. On the basis of twenty-six timely responses from Member Nations and one response from a non-Member party to the Statute (Switzerland), the results were published.[68] This survey coincided with the internal efforts of the Court to revise its Rules.

The reform suggestions covered the spectrum of changes outlined above. With respect to the composition of the Court some Members emphasized the need to de-politicize the election process[69] while others, such as Senegal, indicated their concern with Third World representation on the Court. As a means of ensuring a greater commitment to the Court, some Members suggested that preferential treatment in the election of judges be granted to states accepting compulsory jurisdiction.[70] Further, under Article 13(3) of the Statute, it was suggested that there be continuity of composition throughout the successive phases of adjudication of a case.[71]

With respect to procedure, the questionnaire lent additional weight to a general call for the greater use of *ad hoc* chambers to expedite cases and reduce costs. There were also suggestions that an appeal to

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[66] *Id.*

[67] U.N. Doc. A/8042 (1970). The ten states were Argentina, Finland, Italy, Japan, Liberia, Mexico, Uruguay, Australia, Ivory Coast, United Kingdom.

[68] Review of the Role of the International Court of Justice, Report of the Secretary-General, U.N. Doc. A/8382 at 4 (1971). *See* Gross, *Review of the Role of the International Court of Justice*, 66 AM. J. INT'L L. 479, at 479- 82 (1972).

[69] Cyprus, United States, Switzerland and Sweden. U.N. Doc. A/8382, paras. 113, 116, 120-23.

[70] U.N. Doc. A/8382, para. 160.

[71] Switzerland and Sweden in U.N. Doc. A/8382, paras. 167-72 and Israel in U.N. Doc. A/8382, para. 160.

the full Court be provided to prevent fragmentation of the law;[72] however, the beginnings of a chamber-centred response to the problems of declining recourse to the Court also date from this period. In the United States, Secretary of State William Rogers publicly suggested that greater use be made of the chambers and that regional chambers be established to meet outside The Hague.[73] This latter twist was based on the public relations argument that the Court should be brought into closer and more intimate contact with important segments of its international constituency. Politicians and jurists in America found that Article 26(2) of the Statute provided strong authorization for the formation of regional chambers to deal with defined categories of cases.[74] The increased use of chambers was also officially advocated by Finland, the Netherlands, France, Syria, Greece, Kenya, the United Kingdom, Mexico, Norway and Canada. On the other hand, Canadian commentators[75] suggested that Articles 27 and 60 (making the judgment of a chamber final) be amended to allow for an appeal to the full Court. In general, however, most of the suggested reforms of the chambers procedure could be accomplished by revision of the Rules under Articles 26-30, precluding any need to amend the Statute. The Court could (and later did) amend these Rules without exceeding its powers.

Another suggestion from many governments was that access to the jurisdiction of the Court be opened to international organizations. The United Kingdom went so far as to suggest that corporations and individuals be given standing or the right to intervene in certain cases. As well, this period saw the origin of the argument that the World Court be made into an international appellate court for decisions from other international tribunals such as the Court of the European Communities.[76] All of these proposals were structural rather than remedial in nature.[77]

Most of these suggestions were rejected by the majority of Member States that did not wish to amend the Statute. In reality though, international conditions at that time failed to provide the impetus needed to surmount the barriers to efficacy. The Connally Amendment, when read with Article 36(2), had been a notable hinderance. Article 36(2) provides for reciprocity of reservations between parties; therefore, any

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[72] Gross, *supra* note 69, at 486.

[73] Address by Secretary of State William P. Rogers, American Society of International Law Annual Dinner, 25 Apr. 1970 (*reprinted in* 64 AM. SOC'Y INT'L L. PROC. 285 (1970)).

[74] *See, e.g.*, Address by Senator Jacob Javits to Committee VI on the International Court of Justice, 29 Oct. 1970.

[75] *Supra* note 1, at 170.

[76] United Kingdom, U.N. Doc. A/8382/Add.1, paras. 14-15.

[77] *See*, Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Rôle in the International Legal Order*, 65 AM. J. INT'L L. 253, at 268 (1971).

state against which the United States institutes proceedings may itself invoke the Connally Amendment.[78] Increasingly throughout the 1970's, the optional clause was not used as a minor modification to declarations of firm commitment but as an operative instrument of sovereignty disguised as a reservation.

Early suggestions that the emphasis of compulsory jurisdiction be changed from a "contracting in" to a "contracting out" format have also been ignored.[79] This idea may still have vitality if the politically impractical nature of compulsory jurisdiction is recognized and if the importance of the psychological effect of "contracting-out" is emphasized. While Members attempting to contract out would still resort to reservations, the reversal of the onus might enhance the general prestige of adjudicative dispute settlement.[80]

B. *Coping with Tribal Interests and the Short-Term Gain*

Governmental preference for the pursuit of immediate national interests is the central problem with respect to acceptance of jurisdiction and frequency of invocation of the Court. This is especially true when international adjudication is regarded as a regularized "pie-in-the-sky" system. Despite the salutary effects of procedural changes and the potential expansion of international law should individuals, corporations and international organizations be given standing before the Court, the paramountcy of political solutions in inter-state legal disputes will continue to hinder the *raison d'être* of the Court.[81]

The decision to refer a matter to the Court is almost always made on a short-run calculation of the likelihood of victory. It can therefore be argued that increasing the emphasis on short-term political factors rather than on the long-term benefits of third-party adjudication may have a greater impact on increasing the number of contentious cases brought before the Court.[82] However, before this argument is examined, it must be stressed that the issue does not involve problems of procedure but the more intractable problems of "tribalism" and a decentralized international system.[83]

The twenty-year pattern of repudiation of the Court can frequently be explained by fears of partiality. Communist states, for example, not

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[78] *See, e.g.*, Aerial Incident of 27 July 1955 (Isr. v. Bulg.), [1959] I.C.J. 127 (Judgment of 27 Jul.). *See* Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L 357 (1962).

[79] *See* S. ROSENNE, 1 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 419 (1965).

[80] *Id.*

[81] *See* Rovine, *The National Interest and the World Court*, in I THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 313-35 (L. Gross ed. 1976).

[82] *Id.* at 314; Rogers, *supra* note 73, at 286.

[83] *Supra* note 81, at 315.

only distrust non-communist judges but also carry an historical dislike of third-party adjudication in general.[84] This attitude may stem in part from the disorienting application of non-Marxist juridical norms.

Emerging Third World nations have also been characterized as uncomfortable with a "colonial" Court applying a system of law that is sometimes unintelligible to their evolving legal norms.[85] These nations have viewed the Court's inability to legislate openly and the Court's support of (colonial) treaties to be indications of the Court's resistance to economic and social change. For example, the single vote majority decision in the *South West Africa* case,[86] which saw the defeat of Ethiopia's and Liberia's challenge to South African apartheid policies, initiated *procedural* reform at the Court. However, the criticism that the Court was too dominated by Western legal ways of *thinking* went unanswered.[87]

Yet the view that new, predominantly Third World states are uniformly hostile or skeptical toward the World Court is erroneous. In fact, the only generalization that can be made is that Third World states are more favourable toward the Court than communist states.[88] However, there is no indication that any of these states reject traditional international law. Once again, it is the political calculus of new states in a forum of older states that is the central issue, not cultural issues or factors based on legal developments. For example, many new states ruled by revolutionary or military governments do not view adjudication as the best way to settle disputes as these states have had disappointing experiences with international tribunals in the past.[89] New states can preserve their freedom of action by turning to other methods of settlement that offer a less costly, shorter route to a compromise solution. On the one hand, the political organ of the United Nations General Assembly offers new states influential voting power and the ease of ignoring adverse resolutions as "big-power" manoeuvering. On the other hand, regional non-judicial negotiations allow for quick face-saving settlements free from accusations of outside pressures. Conversely, any support new states may show for the Court may derive from their weaker bargaining position with larger states. Indeed, it was mainly the new states that advocated conferring compulsory jurisdiction on the Court in the 1970's.[90] In all cases in which new states have been a party,[91] the ordinary course of

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[84] For the communist view, *see* O. LISSITZYN, INTERNATIONAL LAW TODAY AND TOMORROW (1965).

[85] *E.g.*, J. BRIERLY, THE LAW OF NATIONS vii (6th ed. 1963).

[86] *Supra* note 36.

[87] McWhinney, Book Review, 13 CAN. Y.B. INT'L L. 453 (1975).

[88] *See* Shihata, *The Attitude of New States Toward the International Court of Justice*, 19 INT'L ORGANIZATION 215-22 (1965).

[89] *Id.* at 217.

[90] *See id.* at 219.

[91] Examples of cases initiated by new states include: Aerial Incident of 27 July 1955 (Isr. v. Bulg.), *supra* note 78; The Temple of Preah Vihear (Cambodia v. Thailand),

international disputes was followed. However, this latter observation also underlines the fact that since 1973 new states have been conspicuously absent from the Court in contentious cases. Only recently has this trend changed.[92] The last time that a new state was a respondent was the anomalous case of America's suit against Iran in 1979, where the renegade revolutionary state neither appeared before the Court nor submitted to the Court's interim orders. Thus, there is evidence to support the contention that motives of new states in resorting to or avoiding the Court are political and founded on case-by-case considerations rather than on blanket alienation from the legal practice of the institution. In this light, the recent perception of political norms inimical to their interests will only bolster objections by new states to the nature of the law developed by the Court.

A common reason for submission of disputes to the Court is simply that the parties can find no acceptable alternative. Domestic considerations affecting the prestige of a nation may obviate political settlement. The Court may also be seen as an appropriate forum for the settlement of non-political disputes where the party is willing to risk an adverse decision.[93] Furthermore, the face-saving value of the Court has been noted as a short-term advantage[94] as, on occasion, the national interest may be served by losing a case; in these circumstances, the Court and not the national government will bear the domestic or international "political heat". Defendant-respondents may also use the Court as a forum in which to defend unpopular policies.[95] In such instances, even the risk of an unfavourable decision may be outweighed by the advantages of a forum that would limit political debate. Finally, the possibilities for delay may be an attraction to parties that view deferment as a way to calm or to ignore a contentious dispute. The *Barcelona Traction, Light and Power Company* case,[96] initiated in 1958 and terminated in 1970, is a good illustration of the snail's-pace adjudication at the Court. Thus, the probability of delay may not always be a negative factor in a state's realistic assessment of whether to use the Court. Threats to resort to the Court, with its attendant formalism and publicity, may also be used as a spur to alternative negotiations. Even if parties wish to resolve a dispute through diplomatic channels, the Court may be an ideal vehicle for legal advice rather than a final determination. The decision in the 1969 *North Sea Continental Shelf* case allowed for this possibility.[97]

[1962] I.C.J. 4 (Judgment of 15 Jun.); South West Africa, *supra* note 36; The North Cameroons (Cameroon v. S. Afr.), [1963] I.C.J. 15 (Judgment of 2 Dec.); Trial of Pakistani Prisoners of War, *supra* note 12.

92 *See, e.g.*, notes 155-64 and accompanying text *infra.*

93 *Supra* note 81, at 322.

94 *Id.* at 323.

95 *E.g.*, *supra* note 36.

96 *Supra* note 37.

97 (W. Germ. v. Den., Neth.), [1969] I.C.J. 4 (Judgment of 20 Feb.).

Finally, it may serve short-term national interests to use the Court as a forum in which to demonstrate a commitment to the rule of law and to disclose the attitude of an opponent state. In the 1979 *United States Diplomatic and Consular Staff in Tehran* case,[98] America was fully aware that Iran would not appear. The American motive in bringing the suit was perhaps to make Iran look suspect in the eyes of world opinion. While this may not have been a generally contemplated function of the Court, such use may positively influence the decisions of sovereign states to use the Court. The power of this function was very recently demonstrated in speculation over Nicaragua's motives in commencing its action against the United States. Facing the possibility of being struck with the same sword used on Iran in 1979, the United States decided not to risk an adverse decision, thereby presenting Nicaragua with an immediate and certain propaganda victory.

Thus it can be seen that nebulous allusions to an ideal world legal order may carry little weight in schemes aimed at enhancing the future role of the Court. Given the current of political realism in decision-making, the practical effect of utilitarian arguments may be more impressive.

C. *Into the 1980's: The Court as an Agent for Change in International Law*

It has usually been accepted that the mandate of the World Court is the peaceful settlement of international disputes. While this view is certainly arguable, the Court's record following the *South West Africa* case[99] is far from inspiring. While Articles 33(1) and 36(3)[100] of the *United Nations Charter* clearly envision the role of peaceful settlement, the reliable yardstick of frequent and successful use certainly indicates failure in this area. A brief survey of judgments supports this observation.

Between 1967 and 1984, only nine contentious cases have been brought to the Court: (1) the *North Sea Continental Shelf* case,[101] (2) India's application against Pakistan concerning an *Appeal Relating to the Jurisdiction of the ICAO Council*,[102] (3) the *Fisheries Jurisdiction*

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[98] *Supra* note 18.

[99] *Supra* note 36.

[100] These Articles provide (in part) that:

33.(1) . . . any dispute, the continuance of which is likely to endanger the maintenance of international security, shall [be subject] first of all . . . [to] negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement and resort to agencies or arrangements . . .;

36.(3) . . . legal disputes should as a general rule be referred by parties to the International Court of Justice.

[101] *Supra* note 97.

[102] (India v. Pak.),[1972] I.C.J. 46 (Judgment of 18 Aug.).

case,[103] (4) Pakistan's 1973 application (withdrawn the same year) against India concerning the *Trial of Pakistani Prisoners of War*,[104] (5) the *Nuclear Tests* cases,[105] (6) the *Aegean Sea Continental Shelf* case,[106] (7) the *United States Diplomatic and Consular Staff in Tehran* case,[107] (8) the *Continental Shelf* case[108] and (9) the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*,[109] involving the first use of the new chambers procedure under the 1978 Rules of Court.

In five of these nine cases, the respondent governments declined to appear, having decided that the Court lacked jurisdiction. Of these five cases, three were decided by the Court,[110] one was dismissed[111] and one was withdrawn by the applicant.[112] Of the remaining cases, three have confirmed the ideal of the Court as a major contributor to peaceful settlements. However, the *North Sea Continental Shelf* case and the *ICAO Council* case were both decided over a decade ago. They provide shining examples of the Court's intended effect on international law achieved by the full participation of the parties in every step of the case. Indeed, in the *North Sea Continental Shelf* case the judgment led to discussions which formed the basis of a treaty between the parties that fully settled the dispute. Only recently, with the decision in the *Gulf of Maine* case, have hopes for such satisfactory results been rekindled.

The analysis presented above fails to consider the subjective indicia of the Court's efficacy; namely, (1) the impetus given to peaceful settlement by the mere availability and threat of litigation, (2) the invocation of the Court by the applicant under pre-existing treaties or special agreements or (3) "optional" jurisdiction under Article 36(2). Thus, the assessment of underuse, and even failure, remains. It has been suggested that one of the major reasons for this failure is that traditional international law, as applied by the Court, is unresponsive to the interests and needs of Member Nations.[113] The irony of this criticism is that in order to develop law to meet the needs of the international community, the Court must be used more frequently. As political realism operates to discourage recourse to tradition-bound international law, can the Court

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[103] *Supra* note 16.
[104] *Supra* note 12.
[105] *Supra* note 13.
[106] (Greece v. Turkey), [1978] I.C.J. 3 (Judgment of 19 Dec.).
[107] *Supra* note 18.
[108] (Libya v. Tunisia), [1981] I.C.J. 3 (Judgment of 14 Apr.).
[109] *Supra* note 52.
[110] *Fisheries Jurisdiction*, *Aegean Sea Continental Shelf* and *United States Diplomatic and Consular Staff in Tehran* cases.
[111] *Nuclear Tests* cases.
[112] *Trial of Pakistani Prisoners of War* case.
[113] Partan, *Introduction: Increasing the Effectiveness of the International Court*, 18 HARV. INT'L L.J. 559 (1977).

find alternative sources of judicial custom in order to meet the demand for change?[114]

As early as 1947 the Court was identified as a force in the development of international law as well as effecting the peaceful settlement of disputes.[115] Yet in the past the Court has resisted the temptation to break from the traditional view of what constitutes the source of customary international law. In the *North Sea Continental Shelf* case[116] and the *Fisheries Jurisdiction* cases,[117] the Court insisted on following "existing law". Implicitly, contemporaneous state practice was dismissed as narrow, nationalist and political.[118] The *Nuclear Tests* cases have long constituted a detailed illustration of the Court's lost opportunity to be an arbiter of change. The essential question of whether states have a right under customary international law to be free from the radiation generated by nuclear weapons tests was not only groundbreaking but also represented a *cause célèbre*. However, the Court simply dismissed the case after the respondent denied (in a statement unconnected with the suit) any intention to continue its test program.[119]

These cases illustrate that the Court may not have an adequate "theory" to accomodate change in customary international law. Disputes based on such law will therefore be steered away from the Court, depriving it of new opportunities to develop theories adequate to accomodate change.[120] If the Court is to redefine customary law concepts, Article 38 of the Statute of the Court must be expanded.[121] In listing the sources of law that the Court may apply, Article 38 does not include resolutions and declarations of international organizations. Therefore, the Court is precluded from reflecting on the contemporary state of international law. It is, of course, up to governments in the General Assembly to effect this change. Thus, the underlying political support of governments is a pre-condition to any attempt by the Court to advance a theory of change in customary law.[122]

It is also significant that arguments advocating that the Court embark on a departure from the vicious circle of restrictive customary law include suggestions that the Court's advisory jurisdiction be expanded. While

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[114] This question forms the basis of Partan's hypothesis and analysis. *Id.* at 567-75.

[115] *See* G.A. Res. 171 (II), U.N. Doc. A/519, at 103 (1947).

[116] The Court held against the principle of equidistance in boundary delimitation.

[117] In the dispute between Iceland and the United Kingdom, the Court upheld the traditional rights of foreign fishermen.

[118] *See supra* note 113, at 569.

[119] For a detailed analysis of this missed opportunity, *see* Dugard, *The Nuclear Test Cases and the South West Africa Cases: Some Realism About the International Judicial Decision*, 16 VA. J. INT'L L. 463 (1976).

[120] *Supra* note 113, at 571.

[121] This suggestion was made by Mexico during the 1974 debates on the role of the Court, 29 U.N. GAOR Sixth Comm., U.N. Doc. A/C.6/Sr. 1470 (1974).

[122] *Supra* note 113, at 571.

such an expansion would require either an amendment to the *United Nations Charter* or the creation of a standing General Assembly committee to request opinions on the application of bodies not recognized by the Court,[123] the added casework would likely do little to remedy the problem. As these advisory opinions would not deal with the functions and powers of states, they would seldom raise the broader issue of customary international law. This has also been true of *past* requests by states for advisory opinions.[124]

The complicating factor in any attempt by the Court to circumvent customary law and to display a certain theoretical vitality is the idea of consent. Many states still claim that consent is the true basis of all customary law. While the notion that a state is not bound by any rule of customary law without prior consent may be criticized, many nations continue to emphasize sovereignty in the general scheme of international order. Therefore, it may be persuasively argued that the Court's hands were tied in the *Fisheries Jurisdiction, North Sea Continental Shelf* and *Nuclear Tests* cases. The Court's cautious approach in avoiding debates on whether a rule advocated by one or other of the parties had become a custom of international law may have been influenced by the Damoclean sword of consent that all parties hold over the continued business of the Court.

On the other hand, the Court's method of avoiding the thorny questions of change and customary law has been particularly irksome. In both the *Nuclear Tests* cases and the earlier *South West Africa* cases, this avoidance was couched in procedural technicalities.[125] It is noteworthy that in both cases there was considerable disagreement on the merits which was not reflected in the majority opinions. In the latter case, the crucial point of law was whether a norm of non-discrimination in the political organs of the United Nations had been sufficient to generate a legal custom. While two judges were prepared to find this as a fact,[126] others either found that apartheid violated a "standard"[127] or labelled the practice "unreasonable"[128] or simply avoided the issue.[129]

In the *Nuclear Tests* cases the majority asserted that nuclear test laws "belong to a highly political domain where the norms of legality or illegality are still at the gestation stage".[130] They did not, however, consider arguments of custom on atmospheric fall-out from nuclear tests. The joint dissenting opinion, however, maintained that the issue was

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[123] *Id.* at 572-73.

[124] *See* Szasz, *Enhancing the Advisory Competence of the World Court*, in II THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 499, at 522 (L. Gross ed. 1976).

[125] *See supra* note 119, at 482.

[126] *Supra* note 36, at 291-94 (Tanaka J.); *id.* at 464, 469 (Nervo J.).

[127] *Id.* at 433 (Jessup J.).

[128] *Id.* at 169-70 (Van Wyk J.).

[129] *Id.* at 237 (Koretsky J.).

[130] Nuclear Tests (Austl. v. Fr.), *supra* note 13, at 303 (Petren J.).

not "new" and was therefore liable to judicial legislation should the Court accede to the claim.[131] Only by tying the claim to "long established rights such as territorial sovereignty and freedom of the high seas"[132] could dissenters argue the result they desired. As yet, the Court has not broken the strictures of customary international law that, at best, require advocates of change to manipulate old tools rather than articulate new ones more attractive to realist litigants in the present decade.

IV. JURISDICTIONAL ISSUES

A. *Preliminary Objections and Article 53 Issues*

In 1958, Sir Hersch Lauterpacht emphasized that "[t]he prominence of jurisdictional issues before the Court is illustrated by the fact that, with few exceptions, in all cases in which a defendant State has been brought before the Court by unilateral application it has pleaded to the jurisdiction of the Court."[133] This observation remains valid in light of subsequent Court practice. In addition to purely jurisdictional objections, there are objections based on the inadmissibility of the claim. These too may result in the Court finding that it lacks jurisdiction. There are also situations where despite the formal consent of the parties to submit a dispute, the Court has found it lacked jurisdiction because of the requirement of strict proof of jurisdiction.[134] The preoccupation of the Court in determining jurisdiction, coupled with the principle of consent, have become the chief stumbling blocks to efficacious dispute resolution in contentious cases. Since the *Corfu Channel* case in 1947[135] the Court itself has been sensitive to the critical nature of its ruling on this preliminary matter. It has, in fact, become a political consideration.[136]

When a respondent state denies the competence of the Court to hear an application, it is usually serving notice that it will not accept an adverse decision. Once a preliminary objection is filed (for example, as to the Court's competence or the admissibility of the claim on grounds other than its ultimate merits), the Rules require the suspension of proceedings on the merits. However, the Court's notorious approach

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[131] *Id.* at 364.

[132] *Id.* at 370.

[133] H. LAUTERPACHT, THE DEVELOPMENTS OF INTERNATION LAW BY THE INTERNATIONAL COURT 94 (1958).

[134] *E.g.*, Case of the Monetary Gold Removed from Rome in 1943, [1954] I.C.J. 19 (Prelimination Question Jun. 15).

[135] *Supra* note 50.

[136] Rosenne, *The 1972 Revision of the Rules of the International Court of Justice*, 8 ISR. L. REV. 197, at 236 (1973).

in the *Nuclear Tests* cases has muddied the treatment of this rule. In that case, the Court appeared to rule on the legal effect of statements made by the French government in its consideration of preliminary objections to jurisdiction. Dissenting judges found this to be a judgment on the merits[137] without any prior finding of jurisdiction. This practice prompted outrage on the part of governments and commentators who had expected a narrower, proper scope to the preliminary hearings.

In the last two decades a more particular problem rooted in jurisdiction has come to the fore, the non-appearing respondent. In such cases, Article 53 of the Statute seems clear. It allows the appearing party to call upon the Court to decide in its favour provided that: (1) the Court is satisfied that it has jurisdiction and (2) the claim is well founded in fact and law. However, in discharging its duty under Article 53, the Court will consider all the possible legal issues in the respondent's defence.[138] The uncertainty of such examination may persuade an applicant not to bring its case before the Court. This approach may also support the respondent's belief that the Court may be able to canvass the legal issues in its defence more thoroughly than the respondent itself.[139] Thus, there is really no reason for the respondent to appear. The dilemma stemming from the respondent's refusal to recognize jurisdiction has the potential to further limit utilization of the Court in contentious cases.

In the *Case Concerning the United States Diplomatic and Consular Staff in Tehran* the United States invoked the Court's jurisdiction under three treaties.[140] Furthermore, the United States sought provisional measures (including the immediate release of the hostages) under Article 41 of the Statute. The revolutionary government of Iran was not represented at the Court nor did it file a Counter-Memorial to the suit. On the issue of Article 53 determination of jurisdiction, there was a thorough consideration of all the circumstances of the case and possible preliminary objections. However, unlike preceding cases, the Court seemed to be careful not to exercise too much judicial initiative in employing this *propio motu* power. Two letters sent to the Court by Iran alleging that the dispute was only a marginal component of a larger problem in United States-Iran relations spanning twenty-five years were virtually ignored by the Court in discharging its duty under Article 53.[141] To consider the letters and the issues they raised would have, in effect, substituted the Court for the non-appearing respondent. Therefore, this case represented a positive step in the battle to discourage respondents from completely ignoring the Court's jurisdiction.

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[137] Nuclear Tests (Austl. v. Fr.), *supra* note 13, at 364-68.
[138] *See, e.g.*, Aegean Sea Continental Shelf case, *supra* note 106.
[139] *Supra* note 46, at 60.
[140] [1979] I.C.J. 7-8 (Pleadings, Oral Arguments, Documents).
[141] *See supra* note 46, at 66.

B. *The United States and Compulsory Jurisdiction: Failed Leadership?*

The qualification of acceptance of jurisdiction under the "optional clause" may be the single most important reason for both the underutilization of the Court and its disappointing record of dispute resolution.[142] The reservations to compulsory jurisdiction will inevitably become sources of controversy when states rely on either their own declaration or that of another nation.

It is perhaps true that the problem of reservations to jurisdiction is inevitable in an international system predicated on consent. Also, underutilization of the Court may have much to do with the reluctance of even a fraction of the parties concluding bilateral and multilateral treaties to include provisions for reference of disputes to the World Court. The gaping jurisdictional hole could have been partially closed in 1946 if the United States had led by example and accepted compulsory jurisdiction without reservation of "domestic jurisdiction . . . *as determined by the United States of America*".[143] As a principle founder of the United Nations and a global superpower, any overt commitment to supranational principle and practice by the United States would have undoubtedly bolstered the prestige and functions of the World Court. For this reason the Connally Amendment has long been an unhappy reminder of political realism.

Strong opposition to the Connally Amendment has existed in the United States since 1950 when a Senate Committee on Foreign Relations considered the elimination of the reservation.[144] Indeed, in 1946 the American Bar Association publicly opposed the reservation and later issued a statement, prophetic in light of the 1984 withdrawal of jurisdiction in the Nicaragua harbour mining case:

> The committee [Special Committee on International Law Planning of the American Bar Association] believes that the withdrawal of the United States reservation to the jurisdiction of the International Court, to the extent that it allows the United States unilaterally to determine which disputes lie essentially within its own jurisdiction, would be a most salutary step. It would be a demonstration of faith in the rule of law, and a persuasive example to others. We believe it would materially strengthen the position of the United States in the world community . . . .[145]

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[142] Even with these sweeping reservations, only one-third of the Member States of the United Nations General Assembly had subscribed to the Court's jurisdiction at the beginning of the 1980's. *See supra* note 2, at 1188.

[143] 1 U.N.T.S. 9 (1946). *See* Briggs, *The United States and the International Court of Justice: A Re-Examination*, 53 AM. J. INT'L L. 301 (1959) (emphasis added).

[144] The Committee studied the proposal in 1950 and in 1956 but no action was taken. *See* Humphrey, *The United States, the World Court and the Connally Amendment*, 11 VA. J. INT'L L. 310, at 312 (1971).

[145] REPORT OF THE SPECIAL COMMITTEE ON INTERNATIONAL LAW PLANNING OF THE AMERICAN BAR ASSOCIATION (1958).

The redundancy of "domestic jurisdiction" reservations is clear from a reading of Article 36(2) of the Statute. Matters not listed within the categories of international disputes are excluded from the Court's jurisdiction. However, the psycho-political effect of the Connally Amendment on other states perhaps justifies advocacy of the withdrawal of the declaration. In practical terms, as an opponent of the United States can also avail itself of this self-judging reservation, the United States will be prevented from bringing any state to the Court against its will. These arguments point to the significant fact that self-judging reservations not only represent missed opportunity for long-term normalization of international adjudication but also rebound detrimentally to the national interest.

C. *Canada and the 1970 Reservation on Jurisdiction*

On April 7, 1970, the Canadian government placed a reservation on the Court's jurisdiction in all matters relating to "undeveloped" areas of the law of the sea, thus acting to protect perceived vital interests.[146] On the same date, Prime Minister Trudeau made the following remarks in the House of Commons concerning the reservation:

> I wish now to table a copy of a letter which Canada's Ambassador to the United Nations has delivered to the Secretary General submitting a new reservation to Canada's acceptance of the compulsory jurisdiction of the International Court of Justice. This reservation is intended to guard against any possible litigation of certain features of these two bills.
>
> Canada strongly supports the rule of law in international affairs. Canada has made known to other states that it is prepared to participate actively in multilateral efforts to develop agreed rules on the protection of the environment and the conservation of the living resources of the sea.
>
> Canada is not prepared however to engage in litigation with other states concerning vital issues where the law is either inadequate or non-existent and thus does not provide a firm basis for judicial decision. We have therefore submitted this new reservation to Canada's acceptance of the compulsory jurisdiction of the International Court relating to those areas of the law of the sea which are undeveloped or inadequate.
>
> It is well known that there is little or no environmental law on the international plane and that the law now in existence favours the interests of the shipping states and the shipping owners engaged in the large scale carriage of oil and other potential pollutants. There is an urgent need for the development of international law establishing that coastal states are entitled, on the basis of fundamental principle of self-defence, to protect their marine environment and the living resources of the sea adjacent to their coasts.
>
> In spite of this new reservation, Canada's acceptance of the compulsory jurisdiction of the court remains much broader than that of most other members of the United Nations, and it is the hope of the government that

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[146] Letter from Canadian Ambassador to the United Nations to the Secretary-General, 7 Apr. 1970.

> it will prove possible to reach agreement with other states on the vital need to develop the law to protect the marine environment and its living resources so as to make it possible for Canada again to broaden its acceptance of the court's jurisdiction.[147]

The impetus for the imposition of this reservation came with the adoption of the *Arctic Water Pollution Prevention Act*.[148] The Act proclaimed Canada's right to exercise jurisdiction over the high seas immediately outside her territorial waters for the purpose of pollution control. Although the Act conceded that this was not a claim for an extension of territorial waters, the rights claimed in the interest of environmental protection of Canadian waters and coasts were novel at law. While the Prime Minister and government officials were accused of disguising an assertion of sovereignty, the Act was defended as merely a functional approach to controlling and preserving environmental conditions.[149] The unique nature and particular vulnerability of the Arctic environment was cited as the prime reason for this extension of a limited or hybrid form of jurisdiction.

Canadian legislation in this area involved new theory and principle. As the Prime Minister's remarks in the House of Commons and a Canadian note to the United States government made clear,[150] not only was environmental law outside the contemplation of customary international law but customary law goes so far as to protect those shipping states that pollute coastal waters. Canada removed the matter from the compulsory jurisdiction of the Court because the Court was necessarily unable to legislate judicially.[151] Traditional international law was unable to serve the national interest and peculiar needs of Canada in this matter; therefore, recourse to a court system that was more responsive to custom than to change was logically obviated. While this thesis was discussed earlier,[152] Canada's 1970 reservation serves to underline the fact that disaffection with the Court's real inability to work around customary law and act as an arbiter of change is not confined to Third World nations.

In political terms, while Canada took the risk of appearing to ignore international law, its action in 1970 may have provided the government with a strong negotiating lever in alternative methods of dispute resolution. Rejecting the Court's jurisdiction over an identifiable subject

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[147] H.C. DEB., 28th Parl., 2d sess., at 5623-24 (8 Apr. 1970) (*reprinted in* Macdonald, *The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice*, 8 CAN. Y.B. INT'L L. 3, at 3-4 (1970)).

[148] R.S.C. 1970, 1st Supp., c.2.

[149] *See* J.-G. CASTEL, *supra* note 11, at 800.

[150] Note from the Canadian government to the United States government, April 16, 1970. *See id.* at 800-05.

[151] *See* Henkin, *Arctic Anti-Pollution: Does Canada Make-or Break-International Law?*, 65 AM. J. INT'L 131, at 132 (1971).

[152] *Supra* note 115 and accompanying text.

matter is tantamount to an impressive declaration that the state is willing to resort to unilateral measures to protect that interest.[153]

V. SUMMARY OF FACTORS IN PRE-LITIGATION DECISION-MAKING: THE POLITICS IN NICARAGUA'S SUIT AGAINST THE UNITED STATES

The preceding analysis has canvassed a number of factors directly relevant to the manner in which governments decide whether or not to resort to the World Court and how respondent states react to being sued.[154] In addition to the prominent role of political realism and the influence of legal and economic considerations, the characterization of the dispute as either "legal" or "political" may determine whether or not a respondent state will object to the Court's jurisdiction. The effect of such a characterization is well illustrated by the most recent application to the Court.[155] In April 1983 it was confirmed that officials from the United States Central Intelligence Agency had directed mine-laying operations in Nicaraguan waters. On April 9, 1984 Nicaragua filed an application for provisional measures directed at ordering the United States to cease supporting and directing covert operations that violated Nicaraguan territorial sovereignty.

In terms of political realism, Nicaragua's action may have been premised on tactical rather than legal hopes. The applicant perhaps viewed the Court as an opportunity to focus adverse publicity on a larger nation. Certainly the forum would bring an artificial equalization of power. The request for provisional measures may have been prompted by a psycho-political motive as the interim orders issued by the Court on six previous occasions had never been observed by the states they were intended to bind.[156]

From the beginning of the controversy, the Americans may have realized the extra-judicial harm that could be done: they had immediately labelled the action of Nicaragua as an attempt to create a "propaganda forum".[157] Even before Nicaragua's invocation was filed the United States had announced its intention to refuse to appear before the Court or to recognize any rulings on Central American issues for a two-year

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[153] *See* Gotleib & Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law*, 67 AM. J. INT'L 229, at 246-47 (1973).

[154] For a detailed discussion of these questions *see* Fischer, *Decisions to Use the International Court of Justice*, 26 INT'L STUD. Q. 251 (1982).

[155] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), [1984] I.C.J. 246 (Judgment of 12 Oct.).

[156] A recent example is provided in the United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), [1979] I.C.J. 7 (Interim Order of 15 Dec. 1979). Iran ignored this Interim Order.

[157] *U.S. challenges World Court jurisdiction on Central America*, The Globe and Mail (Toronto), 10 Apr. 1984, at 15, col. 2.

moratorium period. The issues raised by the United States' decision to reserve jurisdiction in Central American matters are complex. A preliminary question is whether the United States could effectively withdraw the case once it was on the docket without first giving the required six months notice of its intentions.[158]

Early public reaction to the case illustrated the dangers of rejecting the Court's jurisdiction; the American action appeared to be an admission that their case was weak on its merits. As an adverse decision would undoubtedly have resulted in the United States' ignoring the judgment the initial assessment of the overall political balance may well have indicated that a preliminary slap on the wrists for withdrawing jurisdiction was preferable to the more serious consequences of ignoring a judgment.[159]

However, it was the United States' traditional commitment to peaceful adjudication and its leadership within the political organs of the United Nations that was the principal source of public shock and confusion. Before the controversy was even days old, United States State Department spokesmen acknowledged that this was the first time since the Court had been constituted that the United States had moved to block peaceful adjudication.[160] The United States is a large, linchpin power and its withdrawal of jurisdiction represented a severe blow to the prestige of international adjudication and the role of the World Court in particular. Given that the Court has the power to determine its own jurisdiction under Article 36(6) of the Statute, refusal to take jurisdiction in this case would have marked the body as a decided failure and future resort to the Court by lesser states would have declined even more precipitously. In fact, the Court did assume jurisdiction and heard the case against the wishes of the United States.

In arguing its preliminary objection to jurisdiction before the Court, the United States chose to question the technical validity of Nicaragua's declaration of acceptance of the Court's jurisdiction and to argue that the matter was not exclusively legal, but political, thus taking it out of the Court's hands.[161] However, the Court, perhaps mindful of its tenuous hold on credibility, ultimately rejected American arguments and made provisional orders conforming with the Nicaraguan request. It was noteworthy that the United States participated fully in the proceedings. This decision represented an about-face from the intentions announced weeks before. Thus, not only had the Court's prestige been salvaged but the less powerful Nicaragua was seen to be winning the

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[158] *Statute of the International Court of Justice.* art. 61(4).

[159] Ward, *Veto in the World Court,* Toronto Star, 22 Apr. 1984, at F4, cols. 2-3.

[160] *Supra* note 157, at 15, col. 3.

[161] Smith, *U.S., Nicaragua clash, on court's jurisdiction,* The Globe & Mail (Toronto), 24 Apr. 1984, at 15, cols. 1-5.

battle to force the United States into court. If Nicaragua's application was aimed at directly influencing American domestic leadership, the tactic had temporarily succeeded. Even before the Court ruled on the matter of interim orders, political opponents of the Reagan Administration had labelled American actions in Nicaragua as "legally indefensible"[162] and promised to turn the issue into a partisan battle over Administration requests for increased covert aid to Central American allies.

On January 18, 1985 the United States announced that it would not participate in further Court proceedings in the action brought by Nicaragua. In labelling the Court's decision to take jurisdiction "clearly erroneous", the United States State Department spokesman Alan Romberg reiterated the American view that the case was a "misuse of the Court for political and propaganda purposes".[163] The American government was clearly prepared to stand firm on the conviction that the "broad political, economic, social and security problems of Central America" could only be solved by "political and diplomatic means — not through a judicial tribunal".[164] To underline this conviction, the announcement on January 18 alluded to an intent on the part of the American government to fall back on the Connally Amendment. Supplementing this argument, the Reagan Administration also noted that participation in further Court proceedings would compromise American intelligence sources — a bellweather concern that only serves to underline the ruling hand of political realism in national decision-making with respect to the Court.

VI. THE MOVE TO ARBITRAL FLEXIBILITY: WILL GOING TO CHAMBERS GIVE THE COURT A NEW LEASE ON LIFE?

A. *The Impetus for Chambers*

During the mid-1960's the Court itself sought to remedy its declining case load and increasingly cumbersome proceedings by embarking on a revision of the Rules of Court. The aim was simple. By building in the sort of control and procedural flexibility that tribal states had come to trust (for example, *ad hoc* particularized arbitration tribunals), it was hoped that peaceful dispute settlement at the Court would increase in volume and efficiency. This improvement, in turn, would ensure the prominence of the Court in the future development of international law.

The idea of a special chamber of the Court as an alternative to

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[162] *Supra* note 159, at 15, col. 4.

[163] *See U.S. turns its back on World Court in Managua case*, The Globe and Mail (Toronto), 19 Jan. 1985, at 1, col. 5.

[164] *See id.*

ad hoc arbitration drew prominent re-evaluation as the Court prepared for procedural reform in 1967-68.[165] It was hoped that the time and expense of adjudication could be reduced where the opposing parties agreed to resort to a chamber of the Court. Before the first revision of the Rules in 1972, Article 26(2) of the Statute had provided for the formation of these *ad hoc* chambers: their constitution would be determined by the Court with the approval of the parties. However, the parties before the Court in this period never chose to invoke Article 26(2). Similarly, the annual five-judge Chamber for Summary Procedure[166] had never been used. At this time, reluctance to resort to special chambers was perhaps understandable. Chambers were elected by an absolute majority of the full Court, by secret ballot; therefore, governments preferred to opt for the entire bench rather than risk buying "a pig in a poke".[167] However, the application of the "national judge" principle[168] in constituting a chamber did allow the composition of a tribunal to closely resemble that of an arbitral tribunal, consisting of a World Court judge as arbiter and a national judge of each party.

In 1974, Resolution 3232 (XXIX)[169] was adopted by the United Nations General Assembly. It contained an unequivocal appeal for greater use of the chambers procedure set out in Articles 26 and 29 of the Statute. Couched in the language of an advertisement, the Resolution explicitly outlined the objectives of the new chambers rules: reduction in undue delay, simplified procedure, lower costs and most importantly, greater influence of the parties on chamber composition. The encouragement given by the United Nations to the use of the chambers for specific categories of cases helped to establish the *ad hoc* bodies that resembled regional, technical or specialized arbitration tribunals.

In 1978, the second revision of the Rules further clarified the leeway given to the parties in composing a chamber. While the president and the Court are not obliged to honour the requests from the parties on composition, the president must nevertheless seek the views of the parties and communicate them to the full Court.[170] This procedure greatly reduces the possibility that a recommendation by the parties will be ignored.[171] The risk is virtually eliminated if the parties tie their acceptance of the chamber's jurisdiction to an agreed, specified composition. Additionally, the parties can appoint judges *ad hoc* if one of their nationals is not in the chamber. Therefore, the parties have the freedom to appoint two outsiders to sit as members of the chamber.

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[165] *Supra* note 46, at 34.

[166] Provided for by Article 29 of the Statute.

[167] *See* Hyde, *A Special Chamber of the International Court of Justice - An Alternative to Ad Hoc Arbitration*, 62 AM. J. INT'L 439, at 440 (1963).

[168] *See* note 37 and accompanying text *supra*.

[169] *Supra* note 31.

[170] I.C.J.R.C. (1978), art. 17(2).

[171] *Supra* note 2, at 1189.

The result of the 1978 Rules seems to be that parties can secure a chamber of the World Court as if it were a panel of arbitrators.[172] The latitude afforded parties to wend their way through the minefield of judicial personalities is perhaps indicative of a tacit acknowledgment of the politics of the Court.

Ideally, the evolution of these new chambers procedures should appeal to parties desiring an emphasis on common regional association, common background in a particular legal system or, perhaps most likely, concentrated expertise in a particular area of law. These new accommodations may come into conflict with the vested interest of state bureaucrats who are wary of specialized supranational tribunals usurping their role in dispute settlement.

B. *The Gulf of Maine Case*

The boundary dispute between Canada and the United States over the Gulf of Maine first arose out of deliberations at the United Nations Law of the Sea Conference. In 1976 and 1977 both nations had extended their fisheries jurisdiction to 200 miles on the Atlantic and Pacific coasts. As a result, several regions, including the Straits of Juan de Fuca, the Beaufort Sea, the Dixon entrance between British Columbia and the Alaska panhandle, and the Gulf of Maine produced overlapping and conflicting claims. At stake in the dispute over the Gulf of Maine was more than $100,000,000 in fish harvest (fuelling the local economy of both disputants) and, potentially, the more significant oil and gas reserves under the sea.[173]

On March 29, 1979, the parties signed a Treaty[174] agreeing to submit their dispute over the Gulf of Maine to binding settlement. This was the first use of third-party settlement in off-shore matters between Canada and the United States since 1910.[175] It was also to be the first invocation of a chamber of the World Court under the 1978 Rules of Court.

As originally drafted, Article 1 of the Treaty required the parties to notify the World Court of their intent (expressed in a Special

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[172] *Id.*

[173] Koling, *U.S-Canadian boundary dispute reaches Hague Tribunal*, The Globe and Mail (Toronto), 2 Apr. 1984, at 9.

[174] *Treaty Between the Government of the United States and the Government of Canada to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 20 INT'L LEGAL MAT. 1377 (1981). For an elaboration on the Treaty, *see* Nied, *International Adjudication: Settlement of the United States and Canada Maritime Boundary Dispute*, 23 HARV. INT'L L.J. 138, at 139-40 (1982).

[175] *See* McRae, *Adjudication of the Maritime Boundary in the Gulf of Maine*, 17 CAN. Y.B. INT'L L. 292 (1979).

Agreement[176] annexed to the Treaty) to submit the dispute to a special chamber of the Court. In the event that the chamber was not constituted within six months of the effective date of the Treaty, alternative provisions for arbitration could be triggered by either party.

The Special Agreement provided that, along with the sanctioned use of technical experts and time limits for Memorials and Counter-Memorials to the Court, the chamber would be constituted according to Articles 26(2) and 31 of the Statute. The 1978 Rules allow parties to suggest the size of the chamber panel and both parties in this case agreed to a five member composition. The Court would choose three of the judges from among the fifteen members of the full bench and each party would choose one non-national judge who was not a member of the Court.[177] However, the Agreement was initially tied to ratification of an east coast fisheries resources agreement which subsequently failed to pass through the United States Senate. When an amended Agreement that was not tied to any fisheries agreement was presented in 1981, the Senate had deleted the non-national judge provision. Therefore, the final form of the Agreement left the appointment of all five judges to the Court.[178] In any event, the non-national judge provision violated Article 31(4) of the Court's Statute which states that the Court elects all members of the chamber. Despite the intention to give parties more control in the selection process, the power of a party to elect a chamber judge arises only when none of the panel members are of the party's nationality.

After receiving a request for the establishment of a chamber, the Court consulted the parties and issued an Order on January 20, 1982, constituting the chamber.[179] The five judges elected were Judge Gros (France), Judge Ruda (Argentina), Judge Mosler (West Germany), Judge Schwebel (United States) and Judge Ago (Italy). Judge Ago was to act as the President of the chamber. In accordance with Article 31(4) of the Statute, Canada was allowed to choose an *ad hoc* judge and, as a result, Judge Ruda stepped down so that Canadian Professor Maxwell Cohen could join the panel.[180]

It is significant that the Order of January 20 made no mention of why these particular judges were selected. A cynical Judge Oda, in a five line declaration, remarked that "the Court, for reasons best known to itself, has approved the composition of the Chamber entirely

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[176] *Agreement Between the Government of the United States of America and the Government of Canada to Submit to a Court of Arbitration the Delimitation of the Maritime Boundary in the Gulf of Maine Area, 29 March 1979*, 20 INT'L LEGAL MAT. 1380 (1981).

[177] *Supra* note 175, at 294-96.

[178] *Supra* note 174, at 140.

[179] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), [1982] I.C.J. 3 (Order of 20 Jan.). *See also* note 52 *supra*.

[180] *Supra* note 179, at 8.

in accordance with the latest wishes of the Parties".[181] Those wishes magically manifested themselves in the selection of an American, a Canadian (*ad hoc*) and three Europeans. The Court, voting in secret, seemed to have taken account of political realities and the fears of the parties in excluding judges from communist or Third World states. Indeed, Judges Morozov (Soviet Union) and El-Khani (Syria) dissented from the order.[182] Interestingly, Judge Morozov pointedly referred to Article 26(2) of the Statute which implicity limits the parties to input on the *size* of the panel only. He bridled at the parties having formally decided and proposed the names of the judges to be elected by secret ballot.[183] Further, he suggested that the parties "even present[ed] these proposals to the Court in the form of some kind of 'ultimatum'".[184] The Syrian judge reiterated Morozov's observation and openly challenged the "regionalization" of the chamber as violative of Article 9 of the Statute which assures representation of "the main forms of civilization and the principle legal systems of the world" in the context of the full Court.[185] In essence, this was an invocation of one of the Court's most basic tenets.

Thus, the composition of the chamber in the *Gulf of Maine* case can be seen as a "show-down" between the traditional universality of the Court and the tacit acknowledgment of political realism under the new Rules. In fact, the drafters of Article 26(1) of the Rules, which allows the Court to consult with the parties, intended that the parties exercise decisive control over the selection of judges.[186] To hold otherwise would have defeated the primary objective of encouraging states to use the Court: submission to the Court's jurisdiction is primarily determined by a state's assessment of the degree of control over the selection of judges.[187] Nonetheless, Judge El-Khani's comments on the Western bias of the chamber[188] may have validity in cases involving broad classes of disputes that might arise in, for example, a Third World context. Should regionalization of chamber composition continue, the Court may be split if each chamber applies its "regional" view of international law to similar problems.[189] Thus, there is indeed an argument to be made that accessions to political realism, as an enticement to parties to the arbitral process, may ultimately undermine the World Court.

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[181] *Id.* at 10.

[182] *Id.* at 11-13.

[183] *Id.* at 11. I.C.J.R.C. (1978), art. 18 (1) provides that members are to be elected by secret ballot.

[184] *Supra* note 179, at 11.

[185] *Id.* at 13 (El-Khani J.) (dissenting opinion).

[186] *See* de Arechaga, *The Amendments to the Rules of Procedure of the International Court of Justice*, 67 AM. J. INT'L 1, at 2 (1973); *supra* note 179, at 142.

[187] *Supra* note 174, at 142.

[188] *Supra* note 179, at 11.

[189] *Supra* note 174, at 140.

The use of the chambers process and the attendant modification of the Rules in order to accommodate tribal fears may well be the answer to the vexing problem of decreasing resort to the Court, despite its invocation only once in ten years. But at what price? The possibility exists that this new procedure may undercut the prestige and authority of the Court and militate against a cohesive body of international law. Incorporating what is essentially a policy variable into the functioning of the Court may as easily produce adverse results as beneficial ones.

For these reasons it is likely that the scope of the 1978 Rules, especially as they apply to chambers procedures, will be further narrowed. Thus, the Court's Order on the composition of the chamber in the *Gulf of Maine* case is not likely to serve as a guide for the future.

VII. CONCLUSION

In studying the impact of the World Court on the international legal order over a span of almost four decades, two related conclusions figure prominently. First, the Court is at best viewed as a marginal institution by states not yet prepared to relinquish absolute sovereignty, even in exchange for the long-term benefits of a more reliable and authoritative organ of peaceful dispute resolution. Second, and perhaps because of the above, the Court has not added as much to the corpus of international law as originally hoped in 1946. Furthermore, there are few indications that this situation will change in the 1980's and beyond.

As the basis of international law may still be said to turn on consent, the challenge for the Court has been to engender enough faith in its forum to woo politically jaded national leaders and bureaucrats into invoking its jurisdiction. Procedural changes, while performing the general good of cost reduction and efficiency or the more selfish good of narrowing the differentiation between the Court and "rival" arbitral arrangements, have not effected a change of attitude toward international adjudication of disputes in general. As noted above, the innovation of *ad hoc* chambers may even prove to be counter-productive in achieving this fundamental goal.

Yet the failure of the World Court could hardly be called abject in light of the breadth of the idea that it represents. In the first place, even the founding mandate of the Court places it well down the list of peaceful alternatives to conflict resolution between states. The rationale of settling out of court (provided by domestic law) and the social and economic utility of such a course of action may provide a caveat to any thorough analysis of the reasons for the meagre docket of the Court. As well, unlike other international tribunals, the World Court faces the almost impossible task of forging a working consensus from Member States of startling regional, jurisprudential and especially political diversity. While political realism is the order of the day, the

express nature of this adjudicative body rejects its validity. The Court, aside from the fatal problems of enforceability and non-compliance with judgments that are inherent to international law in general, has stood on customary law and refused to even consider contemporary state practice. Until some way is found to reconcile these elements and work toward a fundamental transformation of what sovereign tribes view as their "national interest", the Court will remain a marginal institution.