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Is A Compulsory Adjudication of International Legal Disputes Possible?

Wienczyslaw J. Wagner*

General Observations

After the withdrawal of the Church from any direct influence on secular affairs, and the decline of the power of the German Empire, a type of State, in principle completely independent of any outer factors, was born. Lawyers, philosophers and statesmen created, from the 16th century on, the theory of omnipotence of the power of the State. Bodinus was one of its first and most famous promoters in the internal life of the State,¹ and Vattel, two centuries later, its chief theorist in the field of international relations.² The notion of State-sovereignty, or of the fullest independent power, was the source of theories which sanctioned the anarchy in international life. One of its most important implications was that every State was permitted to be a judge in its own causes. The ideas of Grotius about the *bellum justum* and *bellum injustum*³ were discarded, and the States were considered entitled to decide, without any restrictions, in which manner they were to defend their interests, including the possibility of having recourse to war. No outer factors, States or organizations of nations, could impose on a State their will or decision.

In the last fifty years, an evolution of ideas is observable in the field of the development of international relations as well as in the domain of theoretical considerations. One of the most important results of the new trend is the creation of the illegal war concept, developed under the League of Nations and various other international arrangements, adhered to by a larger or smaller number of States (or remaining only in a projected state), such as different pacts of non-aggression, the Pact Briand-Kellogg, the Declaration on the Definition of the Aggressor, etc. This was the concept that served as a jurisdictional prerequisite in the prosecution and conviction of the authors of the last World War (with all the imperfections of the Nuremberg Tribunal).

The Charter of the United Nations made some further steps towards the elimination of war as a means of settling international disputes. The extension of its principles to States which are not members of the United Nations⁴ is of revolutionary character.

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* Teaching fellow, Northwestern University Law School.
1. Bodin, De Republica (1576).
2. Vattel, Droit des Gens (1758).
4. Art. 2 §6 of the U.N. Charter: "The Organization shall ensure that States which are not Members of the United Nations act in accordance with these Prin-
However, it is not sufficient to forbid States to have recourse to war. The necessary corollary of such prohibition must be the assurance that every State can get justice by peaceful proceedings.

Not all disputes may be adjudicated by a judicial body. Some of them cannot be settled by a mere application of law; they have a "political" character, and they should be dealt with by a political organ. Only if their character is "legal" are they suitable for a court's decision.

Most cases involve both political and legal elements. If both parties rely, in their assertions, on international law, the dispute is clearly a legal or justiciable one. If one of them challenges some rule of law as unjust and seeks to protect its interests which find no support in the positive legal system, the dispute has a purely political character. Thus, in most cases, the classification of a dispute will depend on the qualification given it by the parties. In many cases, however, it will be difficult to characterize the dispute. The reason for the great number of political disputes is the fact that the international community has no proper legislative power at its disposal, and can bring about peaceful changes in the existing status quo only in rare instances. An analogy, though distant, may be drawn between the international legal order and domestic ones which are vested with legislative powers but still present occasions for "political" disputes—disputes which should be settled by political rather than judicial bodies. In municipal, as in international law, the problem of determining in what category a dispute should be classified may present much difficulty. The discussion of these problems is beyond the scope of the present article which will deal only with the settlement of legal disputes.

A theory has been advanced by some scholars that thousands of years ago, relations between men were based exclusively on force. In the state of "bellum omnium contra omnes," a man who saw that his neighbor succeeded in killing a deer or was in possession of any other thing which he envied, could take a club, beat him on the head, and take what he coveted for himself. If we believe in this theory, we must admit that until very recently, the relations between
States were pretty similar to those between the human beings at their primitive stage of development. Gradually, groups of individuals came to be created, based, in most cases, on kinship and imposed control on the conduct of their members. For centuries, the legal systems of the States have prevented individuals from being judges in their own causes and from administering justice for themselves. But at the same time, the legal system of a State offers to all persons under its jurisdiction the possibility of having their rights adjudicated by tribunals and of the execution of the judicial decisions. The fundamental basis of every municipal legal system is that the adjudication of a case by a competent court is not dependent upon the consent of the defendant.

The situation is still very different in the field of international controversies. It is interesting to consider the question how far the necessity of compulsory adjudication of international disputes has, up to now, been recognized in the life of nations and what are the prospects for the future.

Types of International Disputes

As mentioned above, disputes between States are not always legal in nature. Some of them have a political character and are not cognizable by purely judicial or quasi-judicial international bodies. But disputes between States are not the only category of litigation which exceed the borders of one country or which involve nationals of more than one State. The only subjects of the traditional international law are groups of persons, usually organized into States, but sometimes not possessing the full characteristics of a State, like Dominions, or possessing the nationality of different States, like the Catholic Church. Associations of States, like the League of Nations or the United Nations, are clearly also subjects of international law. But individuals, as such, are still not recognized by positive international law as subjects of the law of nations, in spite of the fact that outstanding scholars in international law, such as Professor Philip C. Jessup in the United States and Professor Georges Scelle in France advance radical changes in the "classical" system of the law of nations. Thus, as a rule, indi-

8. See MAINE, EARLY HISTORY OF INSTITUTIONS, 64 (7th ed. 1897).
9. Of course, any analogy between relations among individuals and among States must be drawn very carefully: LISSITZYN, THE INTERNATIONAL COURT OF JUSTICE 106 ss (1951). See also Borchard, The Place of Law and Courts in International Relations, 37 Am. J. Int'l L. 46, 48 (1943): "Much Harm has been done . . . by those who would endow international law with the machinery of municipal law." It may help, however, to realize the anarchy existing in international relations.
11. SCELLE, TRAITE ELEMENTAIRE DE DROIT INTERNATIONAL PUBLIC (1944)
Individuals have no standing before international judicial bodies, and their claims are presented by their governments, the case proceeding on the fiction that the State itself has suffered the legal wrong. If, however, a government does not wish, for any reason, to maintain the suit, the individual has no possibility of recourse to any international means of settlement.

In the internal system of the United States, the federal courts are not only used for litigation between States, but by virtue of their diversity jurisdiction, federal courts may adjudicate claims between the residents or nationals of different States, with exceptions provided by the law. The reason for the creation of federal diversity jurisdiction is the possibility of bias which may exist in the courts of a State against the citizens of another.

It is unnecessary to emphasize that such bias is much more likely to occur in international life, against nationals of a foreign country. Nevertheless, individuals of different nationality may sue each other only before a State court which performs, in such a case, the functions of an international court, according to Professor Scelle's theory of "functional double."

Some exceptions have been made. Thus, as an incident to certain capitulations, special international "mixed" tribunals were established in Egypt in 1876. Their system was well developed and consisted of courts of first instance and courts of appeals; the judges were Egyptians and foreigners. The courts had jurisdiction over cases involving interests of Egyptian and foreign nationals.

Other mixed tribunals or commissions have sometimes been created to adjudge disputes between individuals, nationals of different States. They are usually established at the end of hostilities in order to adjust situations between nationals of the belligerent countries. Such tribunals were called into being by the Peace Treaties after World War I. Their powers were considerable and their jurisdiction compulsory. In some cases, they could review decrees of the State courts and they were empowered to base their decisions on equitable grounds.

Another type international dispute is that between an individual and a foreign State. According to positive international law, the individual cannot sue a State before an international tribunal, and in order to bring a suit against a foreign government in a court of the plaintiff's nationality, the consent of the prospective defendant is necessary.

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12. *Id.* at 525.
14. Exceptions to this rule are based on the implied consent of the State, *e.g.*
Still another distinction may be drawn between international disputes. Some of them reach international methods of settlement without having been dealt with by the municipal courts of any State. Others, involving suits to which individuals are parties, are decided by the State courts, and a party to the dispute seeks protection of its rights, allegedly infringed and not recognized by those courts, before a competent international body. Such situations involve the power of review of domestic judgments by international judicial proceedings.

Pre-judicial Methods of Settlement of International Disputes

Of course, settlement of international disputes can be effected by resort to methods other than war or international litigation. As a matter of fact, judicial proceedings *stricto sensu* are quite new in international life. As Professor Brierly observed, one of the methods of dispute adjustment between individuals, as well as States, is to induce them to agree on some terms of settlement, taking advantage of the friendly help of third parties.\(^\text{15}\) This was the traditional way of dealing with international disputes, if the parties did not deem it proper or wise to wage a war.

If a disagreement arose between the parties, usually they tried first to settle the matter by direct negotiations. If no successful result could be achieved, third parties could act. By offering their good offices, they attempted to persuade the litigants that they should not be discouraged, that the matter could be settled and that they should reopen the negotiations. By exerting pressure on both parties or on the party which took the more intransigent position, renewed parleys—and possibly more successful ones—could be brought about.

By mediation, a third party or parties assumed a more active role. They participated in the negotiations and tried to reconcile the litigants. The traditional rules of good offices, mediation and other pre-judicial means of settlement of international disputes have been codified\(^\text{16}\) in the Convention for the Pacific Settlement of International Disputes\(^\text{17}\) at The Hague, in 1899 and 1907.\(^\text{18}\)

The Convention also provided for the creation of special Commissions of Inquiry with the purpose of finding the facts giving rise
to the dispute.\textsuperscript{19} In cases where international tension arose out of a different view in respect to some factual situation, this procedure gave satisfactory results.\textsuperscript{20}

In all the aforementioned proceedings, the litigants themselves are supposed to reach the terms of settlement of the dispute. If a third party or some special body endeavors to suggest the terms, without any obligation on the part of the litigants to accept these suggestions, they make recourse to the procedure of conciliation. This way of dealing with international disputes has been resorted to, not only after litigation arises, but, per the terms of many multilateral agreements made in the last 50 years, even before a dispute actually arises. The system of conciliation has tended, in some cases, to have a quasi-permanent character, and is characterized by recourse to international lawyers, as contrasted with mediation, where, for the most part, statesmen and politicians are resorted to.

Article 15 of the Covenant of the League of Nations, authorizing the Council to "endeavour to effect a settlement of the dispute," and if the attempt fails, to make recommendations to the parties in dispute, established a kind of conciliation which guaranteed the League's backing to the litigant who complied with a unanimous recommendation of the Council.

Under the U. N. Charter, similar powers of recommendation have been granted to the Security Council. The Security Council's powers, like those of the Council of the League, relate particularly to disputes which may endanger international peace. According to Article 33 of the Charter, the parties to such a dispute may be called upon by the Council to settle their dispute by peaceful means. Irrespective of the steps taken by the parties, the Council may, "at any stage of a dispute . . . recommend appropriate procedures or methods of adjustment" (Article 36).\textsuperscript{21} If the parties fail in their attempts, the Council may "recommend such terms of settlement as it may consider appropriate" (Article 37).

The Council's powers of conciliation are not limited to the disputes which are dangerous to international peace. It may also make recommendations to the parties to any dispute, on the condition, however, that all the parties so request (Article 38).

If the Council faces a "threat to the peace, breach of the peace, or act of aggression," its powers exceed those of making recommenda-
tions in that it can take decisions in order to “maintain or restore international peace and security” (Article 39).

All the aforementioned means of settling disputes cannot strictly be considered judicial since they don’t lead to a judgment or decision possessing a binding character for both parties and issued by a body having the features of a court.

A very old expedient, endowed with judicial character, is arbitration. However, it may be considered only as a quasi-judicial proceeding, as the arbitrary tribunal is convened *ad hoc* in order to deal with some particular dispute submitted to it by the agreement of the litigants (*compromis*). It lasts only long enough to make an award. The arbitrators, as a rule, are chosen by the parties to the dispute, and, frequently, they select an umpire. As do judges, the arbitrators are supposed to base their decisions on the principles of international law, although they have often invoked justice rather than legal considerations. The most important differences between an arbitral and a judicial tribunal relate to their temporary or permanent character and the system of appointment of judges; but for a long period of time, the borderline was not clearly drawn, and a proposal, advanced at The Hague, suggesting the creation of a body possessing the characteristics of an international court, called it the *Court* of Arbitral Justice.

The difficulties in reaching an agreement establishing the arbitral tribunal are often very serious. The selection of the judges and the scope of their award are the most disputed issues. The Hague Convention, in its Part IV, Chapter II, endeavored to overcome those difficulties by providing for an “obligatory *compromis*” where these two problems might be settled by third parties (Articles 45, 55).

In past centuries, the arbitral procedure was resorted to only by special agreements concluded, each time, after a dispute arose. In the last decades, however, many treaties provided for submission to arbitration disputes which might arise between the contracting parties in the future; thus, a kind of an “obligatory arbitration” was created. One of the first treaties so providing was the Franco-British Treaty of Arbitration of 1903. By its terms, the parties agreed to submit to the Permanent Court of Arbitration of

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23. BRIEFLY, op. cit. supra note 15 at 252.
24. For the difficulties in distinguishing the judicial and arbitral procedures, see Garner-Coignet, *Procédure Judiciaire et Procédure Arbitrale*, 6 Rev. Dr. Int. 123 (1930).
25. See infra.
26. 32 NOUVEAU RECUEIL DES TRAITÉS (Martens-Stoerk) 479 (2nd series).
The Hague\textsuperscript{27} their “differences of a legal nature or relating to the interpretation of treaties” if they did not affect “the vital interests, the independence, or the honour of the two states,” and did not concern “the interests of third parties.” Similar provisions have been accepted by subsequent treaties.

The possibility of treating most disputes as involving “the vital interests” of a party practically annihilated the obligation to resort to arbitration. Besides, in every case of a dispute, a special agreement was to be entered into, defining the details of the arbitration.

Treaties which submit, \textit{a priori}, all the future disputes of the contracting parties to arbitration may be called General Obligatory Arbitration Treaties.\textsuperscript{28} Irrespective of such treaties, a number of obligatory arbitration agreements relating to some particular matters (commercial, navigation, etc.) have been concluded.

The concept of obligatory arbitration, with all its imperfections, constitutes progress in the field of settlement of international disputes. At The Hague Peace Conference, a multilateral compulsory arbitration convention was suggested in respect to specified matters, but all efforts along these lines failed because of the opposition of certain large powers. In the Convention for the Pacific Settlement of International Disputes, however, it was emphasized that the contracting parties recognize compulsory arbitration as an adequate means for dealing with international disputes, and expressed, in Article 40, the intention to extend “compulsory arbitration to all cases which they may consider it possible to submit to it.”

\textbf{First Efforts to Create an International Court}

The first serious proposal to establish an international court was advanced during the sessions of the Second Peace Conference in The Hague in 1907. The idea’s promoter was the United States, and its suggestions met with understanding and support of certain other powers; among them, France and Great Britain. The court, of a permanent character, was to have jurisdiction in disputes between the States parties to the Convention establishing the court. In case of a deadlock in reaching an agreement settling the terms of submission of a particular dispute to the court, special pro-

\textsuperscript{27} The name of the Court is misleading. The Court is not permanent; there is only a permanent panel of arbitrators at the disposal of the litigants. The Court has been established by The Hague Convention for the Pacific Settlement of International Disputes.

\textsuperscript{28} Prof. M. O. Hudson draws a distinction between the notions of “obligatory” and “compulsory”; an “obligatory arbitration” agreement requires a further agreement, after a dispute arises, on the “compromise,” and thus is actually a promise to agree; a “compulsory jurisdiction” may exist only where the party to a suit may bring unilaterally its case directly before an established court. \textit{Hudson, International Tribunals} 75 (1944).
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Procedures were envisaged according to which, the court itself was enabled to work out the *compromis*. The judges of the court were to be long-term appointees, selected on the basis of international law expertise.

The delicate problem of appointment of the judges destroyed the whole idea. The small powers, moved by an exaggerated sentiment of the "equality" of States, insisted upon having a competence equal to that of the great powers in the appointment of judges. Different suggestions were advanced in order to find a solution acceptable by all States, but no agreement could be reached.

Another project, involving the establishment of an International Prize Court, also came closer to fruition. The need for an international body adjudicating claims relating to prizes was felt for a long time, since it had been observed that, in many instances, the admiralty courts of different States did not exercise their functions in a purely objective way. The project, submitted by Great Britain and Germany, won general approval. It was revolutionary, as it recognized three principles which would make the proposed tribunal a true international judicial body similar to those of municipal legal systems; 1) its jurisdiction was to be compulsory; 2) it was to be open not only to the governments, but also to individuals; and 3) it was to have power of review of the judgments rendered by municipal tribunals.

An agreement on the problem of appointment of judges was reached. The idea of a complete equality between the States was abandoned, and it was agreed that the eight maritime powers would have the privilege of appointing one judge each to sit for a period of six years. The remaining seven judges were to be appointed by other States and were to sit for shorter periods, ranging from two to four years. A provision was enacted, later incorporated in the Statute of the Permanent Court of International Justice, which established the possibility of appointing judges *ad hoc* by States, parties to a dispute, having no judges of their nationality on the Court.

This daring project was adopted by the Conference and constituted the Twelfth The Hague Convention of October 18, 1907. Unfortunately, it was agreed that the Convention would be ratified only after the codification of the rules of sea warfare. Another conference was later convened in London and resulted, after min-

30. In order to meet the United States' objection that constitutional difficulty would arise in permitting appeals from the Supreme Court, it was agreed that where such difficulty exists, no appeals, but original questions will be submitted to the international court. See *Finch, Appellate Jurisdiction in International Cases*, 43 AM. J. INT'L L. 88, 89-90 (1949); *Hudson, International Tribunals* 82-3 (1944).
ute discussion, in the promulgation of the London Declaration of February 26, 1909, settling the most important problems in this branch of law. The touchiest issue was the question of food contraband—a very delicate matter for Great Britain. The provisions of the Declaration, dealing with this problem, seemed, to Parliament, dangerous to British interests, and the ratification there was denied. This blow, struck by the foremost maritime power of Europe, proved to be fatal, and neither the Declaration nor the Projected Court ever came into effect.

The only international court which came into being before the first World War was the Central American Court of Justice, promoted by the United States and limited in its jurisdiction to five Central American States. It was created by the Treaty of December 20, 1907, signed by Costa Rica, Guatemala, Honduras, Nicaragua and Salvador.

Among five small countries, it was a relatively easy matter to agree on the question of appointment of judges, and each country appointed one of the five judges of the Court. Its jurisdiction was compulsory for disputes arising between the signatory States and could be extended to those with third States if they were willing to submit to it. It could render judgments in default of a party. The Court was open to individuals as well as States and a provision of the Treaty constituting the Court further empowered it to adjudicate disputes created by differences of opinion of public organs of the signatory States. This gave to the Court, in some cases, the competence of a Supreme Court of the signatory States. It was hoped that by this device, internal security and balance of power in the five States could be maintained under international supervision. The Court was established for a period of ten years.

The Court successfully dealt with some difficult cases in the first years of its existence, but, unfortunately, lacking any possibility of enforcing its judgments, it could not force Nicaragua to comply with its decree involving the validity of treaties between Nicaragua and the United States. Nicaragua's non-compliance was one of the main reasons for the termination of the Court's existence after the ten years elapsed.

The International Court in the Systems of the League of Nations and the United Nations

Provided for by Article 14 of the Covenant of the League of Nations, the Permanent Court of International Justice—the first
really international court—was established in 1920. The difficult question of appointment of judges was resolved by providing for a double election of judges by the Council and the General Assembly of the League of Nations, from among the foremost legal scholars of the world. Each of the fifteen judges was to be a national of a different State and the composition of the Court could be supplemented by judges ad hoc. Slight amendments to the Court's Statute were made in 1929. The International Court of Justice, set up by the United Nations, is but a continuation of the Permanent Court, and its Statute is that of the Permanent Court with a few minor changes, the majority of which adjust the Court to the United Nations framework.

In accordance with the traditional system of international law, the Court adjudicates only disputes between States. However, a claim of an individual, if presented by his government, acquires such a character, and the Court has jurisdiction.32

The Court has the characteristics of a judicial body, as its composition (with the exception of the judges ad hoc) is independent of the parties to the disputes it adjudicates, and as it is not set up to deal with a particular case, but is permanent. But the Statute of the Court follows the traditional principles of international law in that its jurisdiction is not compulsory. The consent to submission by the parties to a dispute is required.33

The Committee of Jurists who drafted the Statute of the Permanent Court intended to confer compulsory jurisdiction on the Court in some specified types of cases. Unfortunately, the Council and the Assembly of the League of Nations would not accept such a progressive rule.34

Similar suggestions were made and supported by delegates of many States, in particular those of some small powers, early in the U. N.'s development.35 Unfortunately, once again they were opposed by other powers, in particular by the United States and the Soviet Union,36 and were rejected.37 The opposition of the U.S.S.R.

32. E.g. the Mavrommatis cases, judgments No. 2, 5, 10.
33. Art. 36 ¶1 of the Court's Statute: "The jurisdiction of the Court comprises all cases which the parties refer to it ... ."
34. See, e.g., Goodrich and Hambro, Charter of the United Nations, Commentary and Documents 239 (1946).
35. "The Committee also studied the problem of compulsory jurisdiction. A majority of members appeared to be desirous that such jurisdiction should be established by a clause inserted in the revised Statute, so that, as the latter was to become an integral part of the U.N. Charter, compulsory jurisdiction would be an element of the future International Organization." I.C.J. Yearbook 1946-1947, p. 19.
36. Lissitzyn, op. cit. supra Note 9 at 61-2.
37. "Other amendments (to the Dumbarton Oaks proposals) were offered to distinguish between legal and political questions, and to require the submission of the former to judicial settlement. Most of these were answered by the decision ... not to give compulsory jurisdiction to the International Court of Justice" (U. S. Report to the President on the Results of the San Francisco Conference, June 26th, 1945. U. S. Dept. of State, Publ. 2349).
to compulsory or quasi-compulsory jurisdiction of the Court is understandable if we consider the basic foundations of the communistic ideology, according to which the fight between the "capitalists" and the "proletarians" will continue until the whole world is organized on a communistic basis, and any *modus vivendi* between the States governed by the "capitalists" on one side, and the "proletarians" on the other, can be only a temporary compromise.\(^{38}\) But the position of the United States does not seem to be justifiable. The fact that the United States delegates were concerned about the "advice and consent" of the Senate, explains their position at the Conference, but not that of the United States as a whole.

Thus, neither under the League of Nations nor the United Nations system, was the jurisdiction of the International Court made compulsory. Under the League of Nations Covenant, the member States agreed only in a general way that, "if there should arise between them any dispute likely to lead to a rupture," they would submit it either to arbitral or judicial proceedings or to inquiry by the Council (Article 12). The disputes considered as suitable for submission to arbitral or judicial settlement were enumerated, and were to be referred either to the Permanent Court or to "any tribunal agreed on by the parties" (Article 13).

The system of the Covenant was supplemented by subsequent conventions by which it was sought to make the resort to the Permanent Court or to the arbitral procedure as frequent as possible. The most famous were the Protocol of Geneva of 1924 (which, however, failed to be ratified), and the General Act of 1928, submitting to judicial settlement or arbitration disputes in which "respective rights" of the parties were contested, or, in other words, legal disputes. The General Act was revived, with some changes, by the General Assembly of the United Nations which recommended its adoption by the States in 1948. The new General Act entered into force on September 20, 1950, after having been ratified by two States: Belgium and Sweden.\(^{39}\)

In Article 2, Paragraph 3 of the U. N. Charter, the member States declared that they "shall settle their international disputes by peaceful means." In Article 33, Section 1, they agreed to seek

\(^{38}\) Lissitzyn, *op. cit. supra* note 9 at 63: "The Soviet position appears to derive from the Marxist theory that law is based on the will of the ruling classes. The interests and policies of the Soviet and the capitalist states are viewed as being so basically opposed that impartial adjudication of disputes of any importance between them is believed to be virtually impossible." Thus, the Soviet Union cannot agree to the compulsory jurisdiction of a court composed in majority of judges who share "capitalist" ideas.

the solution of "any dispute, the continuance of which is likely to endanger the maintenance of international peace and security," first of all, by resorting to the traditional procedures, judicial settlement included, or "other peaceful means of their own choice." Further, in accordance with Article 36, the Security Council, in making recommendations to the parties, will take into consideration "that legal disputes should, as a general rule, be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court." Thus, the Security Council is limited to a recommendation that the dispute be submitted to the Court—it cannot itself confer the jurisdiction of the case upon the Court. Thus far, the Security Council made the recommendation to refer a dispute to the Court in only one case, the Corfu Channel dispute between Great Britain and Albania.

Chapter XIV (Articles 92-96) of the U. N. Charter is devoted to the International Court of Justice, "the principal judicial organ of the United Nations" (Article 92). Evidently the establishment of other tribunals is contemplated. All members of the United Nations are ipso facto parties to the Statute of the International Court of Justice (Article 93, Paragraph 1), and other States may become parties to it (Article 92, Paragraph 2).

The above mentioned provision of Article 93 of the Charter is the only progress, however slight, made by the Charter as compared with the Covenant, in respect to the judicial settlement of international disputes. But, since the Charter has developed and favored more the political than the judicial methods of settlement of disputes, it is often considered a step backward. It is very well that all the member States of the United Nations may resort to the Court, in accordance with Article 93 of the Charter. They don't have any duty to do so, however, and, as as matter of fact, they do not resort to the Court often enough. Prior to 1949, only one contentious case—the above-mentioned Corfu Channel case—and two requests for advisory opinions were submitted to the International

40. From the last proviso of Art. 36, it might be inferred that the Security Council's recommendation depends on the acceptance of the optional clause by the parties; GOODRICH AND HAMBro, op. cit. supra Note 34 at 151.

41. The text of c. VIII, § A, ¶ 6 of the Dumbarton Oaks Proposals for the U.N. Charter could be interpreted as meaning that the Security Council itself may submit a justifiable dispute between two States to the Court. This wording had been re-drafted in San Francisco; see GOODRICH AND HAMBro, op. cit. supra Note 34 at 151. In spite of the re-drafting, in the Corfu Channel case, Great Britain contended that the recommendation of the Security Council had a compulsory character. As Albania subsequently gave its consent to be sued, the Court did not examine the British contention.

42. See note 21 supra and other observations of Mr. Delbez in his article, Kunz, Swing of the Pendulum, 44 AM. J. INT'L L. 135 (1950).
Court of Justice. The disuse of the Court became a matter of concern for the General Assembly of the United Nations, which, on November 14, 1947, recommended that the member States submit their legal disputes to the Court and to accept the optional clause provided for in Article 36 of the Court's Statute. In 1949, the business of the Court increased. Six cases were submitted (three contentious cases and three requests for advisory opinions), and in 1950, three cases were filed.

Both the system of the League of Nations and of the United Nations, as well as a few treaties, provided for the compulsory submission to the Court of certain disputes relating to some specified special problems. For example, the peace treaties after the first World War made the Permanent Court competent for the adjudication of disputes in cases concerning national minorities, transit, international mandates, navigation on some rivers, etc. By virtue of Article 37 of the Statute of the International Court of Justice, the provisions of other treaties (e.g., of alliance, commercial, transport and communication, etc.), concluded before 1945 and conferring jurisdiction on the Permanent Court, were considered applicable to the International Court of Justice. Many disputes, involving technical organs of the League were also submitted to the jurisdiction of the Court.

Under the United Nations system, some constitutions of the specialized agencies and some bilateral and multilateral conventions, including trusteeship agreements, provide for settlement of disputes by submitting them to the International Court.


44. The full text of the resolution is as follows:

The General Assembly,

Considering that, in virtue of Article 1 of the Charter, international disputes should be settled in conformity with the principles of justice and international law;

Considering that the International Court of Justice could settle or assist in settling such disputes if, by the full application of the provisions of the Charter and of the Statute of the Court, more frequent use were made of its services:

1. Draws the attention of the States which have not yet accepted the compulsory jurisdiction of the Court in accordance with Article 35, Paragraphs 2 and 5, of the Statute, to the desirability of the greatest possible number of States accepting this jurisdiction with as few reservations as possible;

2. Draws the attention of States Members to the advantage of inserting in conventions and treaties arbitration clauses providing, without prejudice to Article 95 of the Charter, for the submission of disputes which may arise from the interpretation or application of such conventions or treaties, preferably and as far as possible to the International Court of Justice;

3. Recommends as a general rule that States should submit their legal disputes to the International Court of Justice. (I.C.J. Yearbook 1947-1948, 20).

provisions are contained in some recent commercial treaties entered into by the United States and other countries.\textsuperscript{46}

\textbf{The Optional Clause: Quasi-Compulsory Adjudication of Disputes; the Reservations}

Progress in the history of the international judicial function was made by the inclusion, in the Court's statute, of the optional clause. Its application renders the jurisdiction of the International Court quasi-compulsory in some types of litigation not restricted to any special field of international intercourse.

The clause, embodied in Article 36, Paragraph 2 of the Court's Statute, reads as follows:

"The states parties to the present Statute may at any time declare that they recognize as compulsory \textit{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."

Article 36, Paragraph 3 supplements the foregoing provisions by stating that:

"The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time."

By virtue of the optional clause, many States may be obligated to submit a large number of potential disputes to the Court without ever having concluded specific agreements to that effect. Unfortunately, the declarations accepting the clause are too often qualified by conditions and reservations\textsuperscript{47} which may render the effect of the declaration practically nil. Thus, the British acceptance of 1929\textsuperscript{48} was subject to certain reservations, the most important of which restricted the application of the optional clause to disputes "with regard to situations of facts subsequent to the . . . declaration." This reduction in scope may be interpreted in various manners, and, as a bad example always finds followers, has been repeated by some other countries.\textsuperscript{49}

\textsuperscript{46} Lissitzyn, \textit{op. cit. supra} note 9 at 68.

\textsuperscript{47} For most common types of reservations, see Hudson, \textit{International Tribunals} 76-7 (1944).

\textsuperscript{48} Confirmed on Feb. 20, 1940; see I.C.J. \textit{Yearbook} 1949-1950, 176.

\textsuperscript{49} \textit{E.g.}, India, Feb. 28, 1940, or Iran, Oct. 2, 1930; see I.C.J. \textit{Yearbook} 1949-1950, 170.
The United States reservations were not less far reaching. President Truman declared, on August 14, 1946, that the United States accepted the optional clause, but excluded its application to:

"a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or
c. disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction . . . ."

The second of the three reservations is commonly called the "Connally Amendment," and the third, the "Vandenberg Amendment." Fortunately, another reservation suggested by Mr. John Foster Dulles was not adopted.

It is obvious that if all States made similar reservations, the value of the optional clause would wane. In practice, the quasi-compulsory jurisdiction of the Court would give way, in most cases, to the determination, by the States interested, of their willingness or unwillingness to submit the dispute to the International Court. This has been bluntly stated in respect to cases involving multilateral treaties (the Vandenberg Amendment, Paragraph 2).

As to the Connally Amendment, it may be observed that a great number of disputes involve some international and some domestic elements. Whether the disputed matter is "essentially" within the domestic jurisdiction of a State is often problematical. It is natural that the parties will tend to interpret any question involving their vital interests as a domestic matter; the Aaland Islands case, the Morocco Nationality Decrees case, or the recent Anglo-Iranian Oil Co. case furnish good examples of the approach of the interested parties to the domestic jurisdiction concept. If a party to a dispute reserves the right to pass upon the question by itself, who

50. The United States never acceded to the Permanent Court; a resolution, providing for the U.S. membership in the Court, failed to obtain the advice and consent of 2/3 of the Senate; 52 out of 88 votes were cast in its favor in 1935. HUDSON, INTERNATIONAL TRIBUNALS 155 (1944).
52. The proposal involved "disputes where the law necessary for decision is not found in existing treaties and conventions to which the United States is a party and where there has not been prior agreement by the United States as to applicable principles of international law"; LISZT, op. cit. supra Note 9 at 65 n. 46.
53. The debates in the Senate revealed that the Senators feared that the United States may be exposed "to the possibility of actually losing a case it might want to win . . . Senator Austin . . . attempted to allay his colleagues' fears by pointing out that the Court does not have power to compel execution of its judgments"; GILMORE, THE INTERNATIONAL COURT OF JUSTICE, 55 YALE L.J. 1049, 1053 n. 13 (1946).
may check the reasonableness of its determination? Similar problems arose in the Security Council when it was sought to determine whether some matters were substantive or procedural.

The Connally Amendment may be compared to the assumption of a State of the United States of the right to decide whether some litigation raised only state law questions, or involved federal law, to the exclusion of the federal courts. It has been much criticized, and the American Bar Association resolved that it should be withdrawn.54 Needless to add, the United States example has been followed by other countries, like France,55 Mexico56 and Pakistan.57

The threat to the quasi-compulsory jurisdiction of the Court made by the reservations is reinforced by the principle of mutuality, which enables not only the party which made the reservation, but the other party to a dispute as well to object to the jurisdiction of the Court on the ground that the problem is covered by the reservation.

An example of the difficult jurisdiction questions posed by a reserved optional clause is the recent Anglo-Iranian Oil Co. case. In May, 1951, the British Government addressed to the Registrar of the Court a written application to institute proceedings in the Anglo-Iranian Oil Co. dispute, by virtue of Article 40, Paragraph 1 of the Court's Statute.58 The jurisdiction of the Court was invoked by virtue of the fact59 that the Iranian Government unilaterally terminated the concession granted the Company (a British Corporation). The granting agreement of 1933 between the Iranian Government and the Company provided that if any litigation should arise between the parties, it would be adjudicated by arbitration. The Iranian Government refused to give effect to this provision, asserting that its nationalization program rested on Iranian sovereignty and could not be submitted to any arbitration.

Great Britain accepted the optional clause, with reservations. Iran accepted only Article 36, Paragraph 2(a) of the Court's Statute,60 restricting it to "situations or facts relating ... to the application of treaties or conventions accepted by Persia and sub-

54. 33 A.B.A.J. 249 (1947): "Resolved ... That ... the Association is of the opinion that the prestige and authority of the Court and the leadership of the United States in behalf of the peaceful settlement of international disputes require that a further step be taken, through withdrawal of the reservation put in the Declaration by virtue of the Connally Amendment. . . ."
56. Oct. 23, 1947; Id. at 172.
57. June 22, 1948; Id. at 173.
58. "Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar, . . ."
sequent to the ratification of this declaration.” Further reservations excluded the application of the optional clause to disputes concerning questions which, by international law, were within the exclusive jurisdiction of Iran. The Iranian declaration was made in 1930 and ratified in 1932.

According to the agreement of 1928 between Great Britain and Iran, and the most favored nation clause of other treaties concluded between the two countries, Iran was to treat the British nationals in conformity with the principles of international law. Further, the British contended that the concession agreement should be regarded as a “convention” covered by the Iranian declaration of acceptance of the optional clause.

In June, 1951, Great Britain requested the Court to order some provisional measures of protection of the Company’s interests. The request was granted in July, 1951, in accordance with Article 41 of the Court’s Statute.

The Government of Iran challenged the Court’s jurisdiction, asserting that the problem was essentially within the domestic jurisdiction of Iran. This argument was met by the British contention that the refusal to submit the dispute to an arbitration was a denial of justice, contrary to the customary law of nations. But even if by the agreement of 1928, Iran was to treat the British nationals in accordance with the principles of international law, it is not certain whether, by virtue of the Iranian declaration, ratified in 1932, the case would be submitted to the compulsory jurisdiction of the International Court, as the word “subsequent” used in the declaration seems to refer to “treaties and conventions” rather than to “situations or facts.” It is doubtful, too, whether the concession agreement, concluded between a State and a corporation, may be treated as a “convention” covered by the Iranian declaration. These problems will be decided when the Court passes on its jurisdiction to adjudicate the case. In the meantime, it is interesting to note that the Court issued a provisional order in spite of the fact that Iran denied its consent to submit the case to the Court.

61. A similar but less ambiguous reservation contained in the acceptance of the optional clause by France was examined by the Court in the Phosphates in Morocco case, Judgment of June 14, 1938 (P.C.I.J. Publications, Series A/B, No. 74, p. 21). The French declaration referred only to disputes involving situations or facts subsequent to the ratification of the declaration. The Court held that Italy could not maintain the suit as the ratification took place in April, 1931, and acts complained of related to a decision of the Dept. of Mines of January, 1925.

62. Fenwick, op. cit. supra note 60 at 723.

63. Article 41: “1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”

64. Fenwick, op cit. supra Note at 726.
Although by issuing the order, the Court did not assume jurisdiction, but only indicated that it considered its jurisdiction possible, it made it clear that the parties to the dispute will not be asked what was the scope of their consent to the Court's jurisdiction in their acceptance of the optional clause, and that the Court itself will interpret the declaration. The position taken by the Court should be greeted with approval.

While speaking of the quasi-compulsory jurisdiction of the Court rendered possible by the optional clause, it is worth noting that still another step towards granting the Court some features of a purely judicial institution, similar to those of municipal courts, are the interpleader rules, embodied in Articles 62 and 63 of the Statute. The Court itself decides whether or not to grant the request of a third party to intervene, without any expression of consent of the parties to the dispute. If the litigation involves the construction of a multilateral convention, any party to it may intervene ipso jure.

Advisory Opinions: Quasi-Compulsory Adjudication

Another device rendering possible an extension of the court's quasi-compulsory jurisdiction—the advisory opinion procedure—may result in a compulsory quasi-adjudication of disputes. Article 14 of the Covenant of the League of Nations empowered the Council and the Assembly to request advisory opinions from the Court. Provisions dealing with advisory opinions were inserted in the Court's Statute in 1929 at Chapter IV, Articles 65-68. Slight amendments were made in 1945 to Article 65, Paragraph 1:

"The court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

Article 96, Paragraph 1 of the U.N. Charter empowers the General Assembly and the Security Council to submit requests for

65. Judges Winiarski and Badawi Pasha dissented on the ground that the Court, in order to issue a provisional order, should find that its jurisdiction is reasonably probable, not only possible.
66. "1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request."
67. "1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene. . . ."
68. For comments, see SCHELLE, op. cit. supra Note 11 at 564-5.
69. In the Statute of the Permanent Court, the word "legal" was absent. The change of phraseology makes some commentators believe that the possibility of taking recourse to the advisory opinion procedure under the U.N. system had been narrowed.
advisory opinions. According to Article 96, Paragraph 2, other organs and specialized agencies of the United Nations may do so upon authorization of the General Assembly.

The advisory opinion has been resorted to often and has been almost as authoritative as a judgment—during the whole existence of the Permanent Court, the parties concerned always complied. Although formally, they were not bound to accept the Court's opinion,70 they were not prone to risk the general reprobation of the world's opinion. It is true, however, that after the Eastern Carelia case, the League of Nations was careful not to submit to the Court any request for advisory opinions if one of the parties involved expressly objected to it.

In the Eastern Carelia case,71 in accordance with its resolution of April 21, 1923, the Council of the League of Nations requested the Court to give its opinion as to the question of whether:

"... articles 10 and 11 of the Treaty of Peace between Finland and Russia, signed at Dorpat on Oct. 14th, 1920, and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein?"

As stated in the Court's reply of July 23, 1923,72 Mr. Tchitcherin, the Russian People's Commissary for Foreign Affairs, on June 11, 1923, dispatched, to the Court, a telegram stating that there were "reasons which render it quite impossible for the Russian Government to take any part in the discussion of the Carelia question before the Permanent Court."

The Court took the position that it could not assume jurisdiction over the case, pointing out that

"It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement. Such consent can be given once and for all in the form of an obligation freely undertaken, but it can, on the contrary, also be given in a special case apart from any existing obligation. The first alternative applies to the Members of the League who, having accepted the Covenant, are under the obligation resulting from the provisions of this pact dealing with the pacific settlement of international disputes. As concerns States not members of the League, the situation is quite different; they are not bound by the

70. This fact has been stressed by Finland in its memorandum to the Council of the League of Nations concerning the Eastern Carelia case in August, 1923 (4 L.N. Official Journal 1497-1501, 1923).
72. Although the Court declined to give an advisory opinion, its reply has been printed in the advisory opinions collection, and is called "advisory opinion Nr. 5."
Covenant. The submission, therefore, of a dispute between them and a member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent . . . The Court is aware of the fact that is it not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations . . . Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.”

By virtue of Article 65 of the Statute, the Court may give an advisory opinion; thus it is not obligated, but is endowed with the power to do so. However, the Court did not decline to give an opinion while holding it had the power to do so. It held that it had no competence to deal with the case.73

By its approach to the question of consent, the Court made it clear that it was not disposed to undermine the traditional rules of international law. It seems, however, that it might have rendered an opinion,74 without any direct derogation to the principle of consent, since the advisory opinion is not a judgment, has no res judicata effect and does not preclude any further litigation, although in most cases, the result of further litigation would be predetermined. Thus can there be quasi-compulsory effect, similar to that arising from the optional clause, on the penumbra of the advisory opinion.75

In spite of the assertion of the Court that it cannot “depart from the essential rules guiding their activity as a Court,” the very concept of the advisory opinion is contrary to the character of the Court as a purely judicial organ in all cases. The function of a judicial tribunal is merely to render judgments, while by answering the requests to give advisory opinions, the Court “sets aside its competence as a judicial organ,”76 and the judges act as jurisconsults.77 It has been asserted that the prestige of the Court would

73. Only eleven judges sat in the case. Four judges dissented leaving seven in the majority.

74. This power of the Court was well understood by the U.S. Senate, which adopted the following reservation, among others, in case the U.S. adhere to the Permanent Court: “Nor shall (the Court) without the consent of the United States entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.”

75. The role of an advisory opinion is still more similar to that of a judicial opinion if the parties agree in advance that they will comply with it; for examples, see Liszrzyzn, op. cit. supra note 9 at 88, n. 89.

76. SCHELLE, op. cit. supra note 11 at 566.

77. “That a Court should be asked for an opinion on theoretical questions may seem strange. But it must not be forgotten that the International Court of Justice has a double character: that of tribunal, and that of counsellor. And it is quite fitting for an advisory body to give an answer in abstracto which may eventually be applied to several de facto situations . . . “, individual opinion by Judge Azevedo in the Admission to Membership in the U.N. case, I.C.J. Reports, 1948, p. 74.
not increase if its advisory opinions were bluntly disregarded by a party which did not consent to its jurisdiction. On the other hand, it may be argued that it is more advisable clearly to put the blame on the party which does not act in accordance with international law, than to decline to deal with the problem and enable the State concerned to assert that no rule of international law had been violated.\textsuperscript{78} Of course, this argument is valid also in respect to the parties' consent to the rendering, by the Court, of judgments as well as advisory opinions, but the Court was by no means empowered to change the traditional rules of international law relating to judgments. It was offered the possibility, however, to promote the development of the Law of Nations by establishing a new kind of a quasi-compulsory jurisdiction; it did not take advantage of this opportunity.\textsuperscript{79}

The International Court of Justice has been more daring than the Permanent Court of International Justice. A hint of the new trend may be found in the fact that it assumed the competence to give an advisory opinion in the \textit{Conditions of Admission of a State to Membership in the United Nations} case,\textsuperscript{80} without inquiring whether the consent of the U.S.S.R. had been secured.\textsuperscript{81} Although the request for an advisory opinion was couched in general terms and involved the interpretation of the Charter, it was clear that it referred to the concrete fact that Soviet Russia vetoed the recommendation of the Security Council for admission of some States to the United Nations.\textsuperscript{82}

This reversal of attitude by the Court toward its duties regarding advisory opinions was clearly revealed in the \textit{Interpretation of Peace Treaties} case.\textsuperscript{83} Involved here were violations of treaties by the governments of Bulgaria, Hungary and Rumania in not appointing members to the treaty commissions, provided for to deal with disputes concerning the interpretation and execution of the treaties. The merits of the disputes involved constant vio-

\textsuperscript{78} See also infra.

\textsuperscript{79} For the opinion that the Court was right in declining its jurisdiction in the \textit{Eastern Carelia} case, see \textit{e.g.} Gilmore, \textit{International Court of Justice}, 55 \textit{Yale L.J.} 1049, 1059 (1946); for criticism, see \textit{e.g.} Hudson, \textit{The Twenty-ninth Year of the World Court}, 45 \textit{Am. J. Int'l L.} 1, 6 (1951).

\textsuperscript{80} I.C.J. Reports, 1948, p. 57.

\textsuperscript{81} The \textit{Admission to Membership} case may be distinguished from the \textit{Eastern Carelia} case on several grounds (in the latter, Soviet Russia was not a member of the League of Nations; in the former, it was a member of the United Nations; in the latter, the question referred to the interpretation of the Charter without any reference to the U.S.S.R.'s contention; in the former, Soviet Russia's position was clearly challenged, etc.) but the question of consent was involved in both cases.

\textsuperscript{82} "In the period from 1922 to 1935, twenty-eight requests for advisory opinions were made to the Court by the Council of the League of Nations. None of them related to an abstract question"; HUDSON, \textit{INTERNATIONAL TRIBUNALS} 81 (1944).

\textsuperscript{83} I.C.J. Reports, 1950, p. 65 and 221.
lations, on the part of the three States, of the human rights of their inhabitants by ruthless persecution and extermination of any opposition, in disregard of the peace treaties.

Arguments were advanced that the Court should decline to take jurisdiction of the case because the three States were neither members of the United Nations system nor of the International Court, and that they opposed the Court's advisory procedure. It was contended by some States submitting statements to the Court that the Court could not "... give the Advisory Opinion requested without violating the well established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent."

To these contentions the Court properly answered that:
"This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions. The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character; as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take...."

The Court tried to distinguish the Eastern Carelia case and held that the circumstances of that case were "profoundly different" because there:
"... the question... was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and... at the same time it raised a question of fact which could not be elucidated without hearing both parties. As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes... It follows that the legal position of the parties to these

84. Of course, similar disregard of human rights is a practice of the governments of other "Iron Curtain" countries, too. However, as these States were on the side of the Allied Powers during the War, no peace treaties or other conventions requiring their respect of human rights have been concluded with them, and the United Nations did not intervene in their "domestic matters," although it seems that it might have done so by virtue of the Charter provisions about the human rights.
disputes cannot be in any way compromised by the answers that the Court may give to the Questions put to it.”

The terse distinguishing of the Eastern Carelia case, right after the Court held that it could deliver advisory opinions even where a dispute on the same point was pending between States, is surprising. The distinction made by the Court is based on narrow grounds and seems without much merit. It is difficult, if not impossible, to find, in the very few existing judicial opinions of international courts, two cases quite identical. The basic problem in the instant cases was the same—the interpretation and implementation of an international treaty. The question whether the treaty provisions involved substantive or procedural matters is secondary. Actually, in both cases, the Court faced a plain violation of an international treaty.

One of the differences between the Permanent Court and the International Court of Justice is the fact that the latter “... has been raised to the status of a principal organ and thus more closely geared into the mechanism of the United Nations Organization ...” and therefore it “... must do its utmost to co-operate with the other organs with a view to attaining the aims and principles that have been set forth. ...” This difference, however, should not affect the duties of the Court. Therefore, if the Court were to follow its attitude taken in the Eastern Carelia case, it should have declined to give an advisory opinion, and if we agree with this attitude, we should also agree with the separate opinion by Judge Azevedo in the Peace Treaties case. The contention of Judge Azevedo and of Judges Winiarski, Zoricic and Krylow, in their dissents, that both cases should not have been distinguished, seems to be well founded. The inference should

86. Separate Opinion by Judge Azevedo, Interpretation of Peace Treaties case, I.C.J. Reports, 1950, p. 79, 82.
87. “But there are certain limits which a judicial court may not overstep, even in the exercise of an advisory function assigned to it as a subsidiary activity. For instance, the absence of consent without doubt constitutes a non possimus which the Court will be obliged to declare. ... The recognition that there is no clause restricting the power or duty of giving advisory opinions is not sufficient ground for concluding that the consent of the States directly concerned is not required.” Id. at 82-3.
88. Id. at 89, 102-4.
89. “The precedent of Eastern Carelia constitutes ... a convincing proof that the consent of the States is necessary, not only in regard to contentious cases, but also in advisory cases....” Id. at 98, 103.
90. Judge Krylow distinguished advisory opinions which do and do not deal with a legal question actually pending between the States (Id. at 105, 106), and likened the Eastern Carelia case to the Interpretation of Peace Treaties case.
91. “The analogy with the case of Eastern Carelia is thus very striking, for there again the issue was not the merits of the dispute, but a preliminary question which, while necessarily affecting the examination of the case and the final settlement, did not, strictly speaking, ... prejudge the substance of the dispute.”
be, however, not that the Court should decline to give the advisory opinion, but that it should overrule its position taken in the Eastern Carelia case. It seems that the Court is not prone expressly to overrule its holdings.92 As Professor Lissitzyn observed, the Court "... has never admitted that any two of its judgments or opinions have been inconsistent... Where there is danger that the Court will be accused of inconsistency, it takes pains to 'distinguish' its previous action in a manner very reminiscent of the traditional technique of getting around precedents used by the Anglo-American common law courts and lawyers."93

It is hardly necessary to add that neither Bulgaria, Hungary nor Rumania changed their attitude after the advisory opinion was delivered.94 As this fact could have been easily foreseen, some commentators expressed the opinion that it would have been better, for the prestige of the Court, to decline to take jurisdiction, just as in the Eastern Carelia case.95 This point, however, should not be controlling. No court should take into consideration the question whether its holdings will be complied with or not, and it cannot decline to pass upon a case if it presumes that its judgment (or advisory opinion) will not be respected by the parties involved. There is no connection between the pure function of passing upon a case and the execution of the decree. The last function belongs to the executive, and not to the judicial power. Therefore, the prestige of the Court cannot be diminished by the fact that its opinion is disregarded by a party. It is only the lack of any power of execution of the international community which is responsible for the persisting anarchy in international relations,96 and this power should enforce the decisions of its political as well as judicial organs.97 It is clear, however, that as long as no power of execution exists, the opinions of the Court may be disregarded. The recent controversy over the status of South-West Africa is a

92. In spite of the fact, that from a strictly formal point of view, the Permanent Court was another court.
93. Lissitzyn, op. cit. supra Note 9 at 19.
94. After the advisory opinion had been given, Rumania still contended that the Court, assuming its jurisdiction, acted in violation of international law because it "has taken upon itself the right to express an opinion on a question concerning Romania, without Romanian Government's consent." Similar statements were made by Bulgaria and Hungary. Hudson, The Twenty-ninth Year of the World Court, 45 Am. J. Int'l L. 1, 10 (1951).
95. E.g. Lissitzyn, op. cit. supra Note 9 at 93.
96. For an unpersuasive criticism of the idea of the world's community power of execution, see Borchard, The Place of Law and Courts in International Relations, 37 Am. J. Int'l L. 46 (1943).
good example in respect to advisory opinions, as the Corfu Channel case is in respect to judgments.

Giving effect to the resolution of the General Assembly of Dec. 6, 1949, the Court gave an advisory opinion on July 11, 1950, holding that the Union of South Africa, acting alone, "has not the competence to . . . modify the international status of the Territory (of South-West Africa)," and that the Territory continues to be "under the international mandate assumed by the Union."

The Union of South Africa, which had declined to give any effect to the repetitious resolutions of the General Assembly of the United Nations, made it clear that it did not consider itself bound by the advisory opinion which, as the Union contended, might constitute an intervention in its internal affairs. The Union's consistent disregard of any recommendations or opinions of international organs in the South-West Africa case and on other occasions, raises one of the serious problems before the U.N.—how to deal with one of its members which shows a considerable amount of bad faith in its approach to the questions of international life.

The adjudication of international disputes is in principle still not compulsory, although progress has been made, and a quasi-compulsory jurisdiction of the International Court has been made possible. By virtue of Article 36, Paragraph 6 of the Statute, the Court itself is the judge of the scope of its jurisdiction. It should exercise its power not in the light of the static, stiff and obsolete principles, but in conformity with the necessities of the development of international law and relations.

The optional clause's effect is sometimes called "voluntary compulsory jurisdiction." This term stresses the necessity of prior consent to the Court's jurisdiction in respect to disputes which may arise in the future, and, in a great majority of cases, the States which agree to a judicial settlement, carry out the decisions of the Court. In Article 94, Paragraph 1 of the Charter, the member States undertook "to comply with the decision of the International Court of Justice in any case to which [it is] a party." This provision does not confer any new duties upon the members of the United Nations, but is merely declaratory of the old rule of law, municipal or international, which is binding upon members

98. Although strictly legally advisory opinions are not binding, non-compliance with them shows a disregard of the principles of international law, stated by the Court.
101. In particular, in the case of discrimination against the Indians in the Union.
102. "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."
and non-members of the United Nations. However, as was stated above, so long as there is no power of execution in international life, international law may be disregarded. As proof that it is, witness the Corfu Channel case. There, Albania, which consented to submit the dispute to the Court, declined to give effect to the Court's judgment of Dec. 15, 1949, fixing the amount of the damages to be paid to Great Britain\textsuperscript{103} and challenged the competence of the Court to rule on damages.\textsuperscript{104} Article 94, Paragraph 2 of the Charter empowers the Security Council not only to make recommendations, but also to take decisions "upon measures to be taken to give effect to the judgment" when a party to the dispute takes recourse to the Council. However, this provision, juxtaposed with Article 94, Paragraph 1, seems to be applicable only to the members of the United Nations. The extension of the principles of the Charter to non-members of the U. N., provided for by Article 2, Paragraph 6, is applicable only to cases where the "maintenance of international peace and security" is involved. Albania's non-compliance did not endanger the international peace and therefore, Great Britain did not take recourse to the Security Council. Besides, even if Article 94, Paragraph 2 were construed to be applicable to non-members of the U. N., and if the Council could agree to make a recommendation or to take a decision (assuming that the U. S. S. R., the sponsor of the Albanian Government, did not use the veto), it was clear that any measure short of the use of force would have no effect. Thus, the only consequence of its non-compliance was that the Albanian Government was recorded in the history of the International judiciary as the first ever to disregard a judgment of The Hague Court.

New Proposals and Developments

No one considers satisfactory the existing state of things in the field of international adjudication of disputes. Therefore, it is quite natural that new proposals to improve the situation are continuously advanced. Some call for gradual change; others for a radical and immediate transformation of the whole structure.

\textsuperscript{103} I.C.J. Reports, 1949, p. 244. In the previous judgment of April 9, 1949 (I.C.J. Reports, 1949, p. 4), the Court held that Albania was liable to the United Kingdom for the explosions which occurred in Albanian waters and which resulted in damages and loss of human lives. The amount of compensation was not fixed because evidence with regard thereto was not produced and because Albania did not state what sums it contested.

\textsuperscript{104} The Albanian contention was based on the fact that Albania consented only to the submission to the Court of the question of its liability, without right to fix the amount of the compensation (I.C.J. Reports, 1949, p. 246); and the Court rejected it in just a few words: "The Court may confine itself to stating that . . . (its) jurisdiction was established by its Judgment of April 9th, 1949" (Id. at 248).
of the world. Some proposals relate to the universal judiciary; others are restricted to certain regions—for example, the proposed Inter-American Court of International Justice, competent not only to adjudicate contentious cases, but also to deliver advisory opinions.\textsuperscript{105} It is worth noting just a few of these proposals.

The Petition to the General Assembly of the United Nations by A. Cranston and others\textsuperscript{106} is an example of the "evolutionary" approach. It suggests some amendments to the U. N. Charter, in accordance with which, the International Court would be vested with final authority, at least in interpreting the Charter. Further, the Security Council would have the power to require\textsuperscript{107} the submission of disputes "of so serious a character as to endanger peace," to either "the International Court of Justice or an arbitral tribunal, dependent upon the nature of the dispute."\textsuperscript{108}

Another interesting proposal to broaden the scope of the compulsory jurisdiction of the Court was advanced by Ecuador. According to its suggestions, any problem dealt with by any organ of the U. N., in respect to which there are doubts as to its international or domestic character, should be referred to the International Court of Justice in order to determine the problem’s nature.\textsuperscript{109}

On the other hand, in some proposals completely to reorganize the international community, propositions were advanced that only a federation of all the States is able to assure a better future for humanity. The idea of international federalism is becoming more and more popular, and it is impossible to enumerate all the proposals that tens of federalists’ associations and scores of authors advance. Typical is the Draft of a World Constitution, prepared by the Committee to Frame a World Constitution of Chicago.\textsuperscript{110}

According to the Draft Constitution, the future World Commonwealth would be headed by a World Government, complete with the three usual branches of power. "The supreme judiciary power of the World Republic shall be vested in a Grand Tribunal of sixty Justices" declares Article 16 of the Draft Constitution. The Tribunal shall be composed of five Benches, adjudging cases in accordance with the character of the issues raised (Article 18). The distribution of cases among the Benches shall be made by the

\begin{footnotes}
\item[105.] HUDSON, INTERNATIONAL TRIBUNALS 81 (1944).
\item[106.] See SOHN, CASES AND OTHER MATERIALS OF WORLD LAW 338 ss. (1950).
\item[107.] See supra, p. ....
\item[108.] This distinction is not correct. There is no difference in the nature of disputes adjudicated either by an arbitral or by a judicial tribunal. The disputes which are dangerous for the international peace are usually political, and a court of law (arbitral or judicial) has no jurisdiction to settle them.
\item[109.] Delbez, op. cit. supra note 21 at 18.
\item[110.] 1 COMMON CAUSE 329 (1948).
\end{footnotes}
Supreme Court (Article 20), composed of seven members—one representing each Bench, with the President of the World Republic as the Chief Justice of the Grand Tribunal, and the Chairman of the World Council as the Vice-Chairman (Article 19); the Supreme Court shall be empowered to review the decisions of the Benches (Article 21). Lower Federal Courts are also provided for (Article 22). The jurisdiction of the Federal Tribunals would be compulsory, and in particular, would extend to any questions affecting federal (in other words, international) law (Article 18).

Not all the proposals are as detailed as the one summarized above. For example, the Sept. 10, 1948 Declaration of the Congress of the World Movement for a World Federal Government, presents no detailed draft of a World Constitution, but only promotes the idea of drafting and adopting one which should "provide for a legislature empowered to enact world law, which is to be carried out and administered by an Executive Agency," and applied and interpreted by a Judiciary.\(^\text{111}\)

The transformation of the world structure from the system of "sovereign" States into a federal union should undoubtedly be encouraged, but all these proposals, more or less realistic, certainly will not be realized in the near future.

Other suggestions were advanced to confer upon an international tribunal not only original, but also appellate jurisdiction, in respect either to municipal courts or to arbitral awards in international cases (in particular, where the *excès de pouvoir*, transgression of the power of an international arbitral tribunal, is asserted). By some agreements in the past, the decrees of mixed arbitral tribunals were subjected to the review of the Permanent Court.\(^\text{112}\) In rare instances, special agreements permitted the re-litigation, before an international body, of a dispute first passed upon by municipal courts. Thus, a U. S.-British tribunal took cognizance of certain prize cases decided previously by the Supreme Court of the United States.\(^\text{113}\) A direct, general power of review over the judgments of municipal courts in all cases involving international law does not seem possible so long as the States stick to the obsolete concept of "sovereignty."\(^\text{114}\)

Proposals to establish special international courts have been repeatedly advanced since the first international criminal tribunal

\(^{111}\) 2 Common Cause 122 (1948).

\(^{112}\) Hudson, International Tribunals 82 (1944).

\(^{113}\) Hudson, International Tribunals 82 (1944).

\(^{114}\) "(S)tates do not permit appeals from their courts to an international jurisdiction for the reason that such procedure would be incompatible with state-sovereignty." Finch, Appellate Jurisdiction in International Cases, 43 Am. J. Int'l L. 88, 90 (1949).
sat in 1474, to judge Pierre de Hagenbach.\textsuperscript{115} Suggestions to call into being such a court having a permanent character, have been numerous, and have increased since the Nuremberg Trial.\textsuperscript{116} Other proposals refer to an international loans tribunal, an international commercial tribunal, etc.\textsuperscript{117}

From among the proposals of legal scholars, that of Professor Hans Kelsen deserves special mention because of the great authority of the writer and the persuasiveness of his reasoning.\textsuperscript{118} Professor Kelsen would vest the international judiciary with not only the power to adjudicate legal disputes, but also provide necessary measures of enforcement.\textsuperscript{119} At the end of the second World War, when his work was written, he advocated the concluding of an international treaty, entered into "by as many States as possible—victors as well as vanquished—establishing an international court endowed with compulsory jurisdiction."\textsuperscript{120} The U.N. Charter rejected the idea of compulsory jurisdiction, but Professor Kelsen's proposal will remain timely until further progress in the field of the international adjudication of disputes is made. The competence of Kelsen's Court is described in Article 31 of the proposed Covenant, establishing a "Permanent League for the maintenance of Peace":\textsuperscript{121}

"1. If there should arise between Members of the League any dispute, any party to the dispute may submit the matter to the Court.

2. The Court is competent to decide any dispute between Members of the League submitted by one of the parties to the dispute."\textsuperscript{122}


\textsuperscript{116} HUDSON, INTERNATIONAL TRIBUNALS 181 (1944); and Sottile, \textit{op. cit. supra} Note 115.

\textsuperscript{117} HUDSON, INTERNATIONAL TRIBUNALS 204, 213 (1944).

\textsuperscript{118} KELSEN \textit{Peace Through Law} (1944); some parts of the booklet have been published as articles; see \textit{e.g.} Kelsen, \textit{Compulsory Adjudication of International Disputes}, 37 Am. J. Int'l L. 397 (1943).

\textsuperscript{119} The author's distinction between political and legal disputes rests in "the way the parties to the conflict justify their respective attitudes," not in the matter of the conflict, seems in most cases proper, but the endowing of international courts with the power of compulsory settlement of both kinds of disputes without qualifications seems to be too far going, for the time being ("A positive legal order can always be applied to any conflict whatever," KELSEN, \textit{op. cit. supra} note 118 at 29).

It is interesting to note, that in the Bogota Pact of 1948, the American States agreed to submit to a compulsory jurisdiction of the International Court of Justice all disputes, legal and political. (The latter ones to be judged \textit{ex aequo et bono}, if other means of settlement fail; it is fortunate that such an agreement could be reached, but it seems certain that it could not be adopted by the whole international community, at least not in the near future.

\textsuperscript{120} KELSEN, \textit{op. cit. supra} note 118 at 20.

\textsuperscript{121} The scope of action of the proposed League was narrower than that of the U.N.O., created one year after the publication of the proposal; its chief purpose was to maintain the peace.

\textsuperscript{122} KELSEN, \textit{op. cit. supra} note 118 at 137.
Most proposals will forever remain only on paper, but some of them may be or even are being realized. Thus, interesting recommendations were adopted at the meeting of the International Council of the European Movement in Brussels, in February, 1949. The establishment of a European Court of Human Rights was suggested, the object of which would be the judicial protection of certain "rights of man" to be agreed upon by the members of the Council of Europe. The Court was to have the power to review municipal court judgments, provided that local remedies had been exhausted. Individuals were to be entitled to appear before the court if they submitted a petition to the European Human Rights Commission, and if the conciliation of the Commission failed.

The work of the European Movement served as a basis for discussion for the conclusion of a Convention between the members of the Council of Europe. The Convention was signed at Rome on Nov. 4th, 1950, and bears the title, "Convention for the Protection of Human Rights and Fundamental Freedoms." The first section of the Convention, referring to the Universal Declaration of Human Rights of the United Nations of Dec. 10th, 1948, determines, in 17 articles, the extent of human rights which are to be collectively enforced. The next sections establish a European Commission of Human Rights and a European Court of Human Rights.

Many suggestions contained in the Brussels recommendations have been embodied in the Convention. Unfortunately, some important, progressive proposals have been changed. Thus, according to Article 48 of the Convention, only the European Commission of Human Rights and the contracting States may be parties before the Court. Compulsory jurisdiction of the Court has not been accepted automatically by the parties. Article 46 of the Convention contains an optional clause, according to which "Any of the High Contracting Parties may at any time declare that it recognizes as compulsory ipso facto and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention." Some other provisions of the Convention are also similar to the rules governing the functioning of the International Court of Justice.

The Convention has been signed by the representatives of thirteen countries, members of the Council of Europe.

125. Article 20: "The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State."
Prospects for the Future

As described above, the need for compulsory adjudication of international disputes has been felt for a long time. Even before the first World War, one international court, limited to a few Central American States, was established, and the decision to create an International Prize Court was made by a large number of States and was nearly realized. Suggestions to provide for compulsory adjudication of disputes, advanced during the formulating discussions surrounding the League of Nations and the U.N., met with broad approval, but failed to be accepted.

It is impossible, at the present stage of the development of international relations, to settle all disputes judicially. The most dangerous disputes are "political," and cannot be settled by mere application of the rules of international law. It is true that the International Court of Justice may adjudicate cases *ex aequo et bono*, irrespective of the whole system of the Law of Nations, but it may do so only on a consensual basis. There has not been, by any means, a path beaten to the Court's door.

By the creation of the League of Nations and of the United Nations, the States pledged their belief in international peaceful co-operation. They determined "... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,"126 and to adjust international disputes which might lead to a breach of the peace "... in conformity with the principles of justice and international law."127

In order to give content to these laudable intentions, implementation, in the form of compulsory adjudication, would seem necessary. It is illogical to assure willingness to abide by the law and at the same time to insist upon being judge in one's own cause.

The first step should be the acceptance of the optional clause by the members of the U.N., without any reservations. As Professor Lauterpacht properly points out:

"... it must become axiomatic that at a time when nearly forty States128 have agreed to take the risks ... and to assume the obligations of compulsory jurisdiction of the Court, there is no convincing justification for the remaining thirty States to withhold from it such jurisdiction. By the same token, at a time when ten States have accepted the compulsory jurisdiction of the Court without reservations there can be little justification for the others to qualify their acceptance by reserva-

\[\text{126. PREAMBLE, U.N. CHARTER.}\]
\[\text{127. U.N. CHARTER Article 1, Paragraph 1.}\]
\[\text{128. Between 1921 and 1940, the optional clause was accepted by 45 States. HUDSON, INTERNATIONAL TRIBUNALS 76, 139 (1944).}\]
COMPULSORY ADJUDICATION

It is difficult to disagree with these propositions. It is sure, however, that Soviet Russia will never accept the optional clause. As aforementioned, communism rests on principles so different from those of the democratic world, that to anyone who is acquainted, although only in general outlines, with the theories of Marxism, it is doubtful whether long-range co-operation between the two worlds can be brought about. It would seem ideologically impossible for Soviet Russia (and the governments of some other countries sponsored by her) to accept any kind of compulsory jurisdiction of any international court. But other countries, believing in the democratic organization of internal and international life, have no excuse.

Disregarding the non-unanimity problems posed by Russia's defection, the next step should be the amendment of the Charter and the submission of all legal disputes to compulsory adjudication.

Of course, it may be argued that even if the United Nations adopted the general principle of compulsory jurisdiction, it still would not constitute any departure from the traditional approach since the States are free to join international organizations or not, and if they do join them, they express their consent to the whole system, including the jurisdiction of an international court. However, such a voluntary acceptance of compulsory jurisdiction would undeniably constitute great progress. The rules of international law are usually created out of the consent of the States and then become mandatory. Customary law, which is the source of the most stable principles of international law, was or is being created by the consent of the States to follow some standard of conduct. Once a principle of law is established, no State can disregard it without becoming a violator of the Law of Nations. For example, it would be ridiculous to assert today that State X consented to the principle of freedom of the open seas.

Once the principle of compulsory adjudication of international legal disputes is accepted by the great majority of States, it will tend to become a settled principle of international law, free of the consensual prerequisite, though still needing, for its implementation, the existence of an executive power in the international com-

129. Lauterpacht, Foreword to the International Court of Justice by Lissitzyn (1951).
130. See supra.
munity. Recently, the International Court of Justice declared that non-member States of the United Nations cannot disregard the international community’s constitutional law, embodied in the Charter.\textsuperscript{132} The principles of the Charter must be respected by non-members at least in cases where international peace is at stake.\textsuperscript{133} The next step should be the declaration of still other principles of the United Nations as binding upon all the States of the world. Since the natural tendency of an international organization, based on principles of peaceful co-operation, is to become universal, this \textit{Ex Parte} aspect will become progressively less important. Just as there is greater participation in the U.N. than there was in the League, possibly a third organization will proclaim membership a duty rather than a right. It may be remembered that as early as in San Francisco, suggestions were advanced to bar withdrawals from U.N. membership.

The ideal of every international lawyer who believes in the monistic theory of the Law of Nations, is the establishment of a system of international courts, not only having compulsory jurisdiction of cases which may not be adjudicated by state courts, but also empowered to review the decrees of municipal courts in cases involving the Law of Nations and, possibly, the competence to judge diversity of citizenship cases. It is rather apparent that this ideal is possible of fulfillment only upon abandonment of the sovereignty thereby for a world organized on a federal basis.

\textsuperscript{133} Article 2, Paragraph 6 of the Charter.