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THE INTERNATIONAL COURT OF JUSTICE

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SUMMARY

The International Court of Justice, the principal judicial organ of the United Nations, is a standing tribunal to which States may bring their disputes, and which is empowered to give advisory opinions to United Nations organs and specialized agencies. Its jurisdiction derives from the consent of the States parties to the case, which may be given either directly in respect of a specific dispute, or in advance in respect of a defined class or category of disputes; the Statute of the Court also provides for acceptance of a general 'compulsory' jurisdiction by simple declaration, which may however be subject to reservations. Decisions of the Court, given after an extensive written and oral procedure, are binding on the parties in respect of the case, but not otherwise.

I. INTRODUCTION

The International Court of Justice is often referred to in non-technical contexts as the 'World Court', but this is perhaps misleading. Such an appellation may suggest the international equivalent of a national supreme court, a body of worldwide jurisdiction, empowered to pass judgment on the legal rights and duties of all States from a position of superiority and supervision. No such tribunal however exists. The International Court can better be seen as a standing mechanism available for the peaceful settlement of disputes between States, to the extent that they wish to make use of it. No dispute can be the subject of a decision of the Court unless the States parties to it have consented to the Court's jurisdiction over that specific dispute, or over a class of disputes of which that dispute is one. Access to the Court is enjoyed by all members of the United Nations, but its 'compulsory jurisdiction' (also a somewhat misleading term) is accepted by only a fairly small number of States, and for the most part with reservations that limit effective jurisdiction to certain classes of dispute.

The Court is defined in the United Nations Charter (Article 92) as the 'principal judicial organ' of the Organization, but here also the term 'judicial' serves to distinguish the role of the Court from that of the political organs, the General Assembly and Security Council. It does not signify that the Court enjoys, within the Organization, any position resembling that of the supreme court or constitutional court of a State. It has, for example, no overriding power to interpret the Charter, and the question whether it is entitled to examine the legality of a decision adopted by one of the other principal organs is controversial.[1]

Despite these limitations, the Court has, as we shall see, an important role to play in the settlement of disputes, and thus the maintenance of international peace, and in the development of international law. Its function is defined by its Statute (Article 38) as being 'to decide, in accordance with international law, such disputes as are submitted to it'. It is further empowered to give advisory opinions on legal questions at the request of the Security Council or the General Assembly; subject to certain limitations (to be examined below), such opinions may also be requested by other organs and agencies authorized by the General Assembly.

II. HISTORY

The present Court was established by the United Nations Charter, and came into existence with the election of the first members in February 1946. It was however created as the successor to the Permanent Court of International Justice, established pursuant to Article 14 of the Covenant of the League of Nations in 1921, and was modelled closely on that body.

The move towards the creation of a standing international judicial body came as the culmination of the trend, throughout the nineteenth and early twentieth centuries, to make increasing use of arbitration as a means of settling international disputes. (The development of arbitration, its operation, and its advantages and disadvantages, are dealt with in the preceding chapter.) Two practical problems however stood in the way of implementing proposals for the establishment of such a permanent body. When a dispute was taken to arbitration, the arbitrators were appointed by the States parties to the dispute (or by a third party nominated by them), and the expenses of the arbitration were borne by the parties. If a standing tribunal were set up to try *future* disputes, how were its judges to be appointed, and how should it be financed? The Permanent Court of Arbitration, created in 1899, had gone some way to meet the difficulty, by establishing a large panel of potential arbitrators from whom

[1] The question has been debated before the Court in the cases of the *Aerial Incident at Lockerbie (Libya* v *United Kingdom, Libya* v *United States)*, but at the time of writing the Court has not yet ruled on the point.

States could choose for a particular dispute, and by setting up a small standing secretariat, but this did not amount to a true court. With the creation of the League of Nations, it became possible to set up a system of election of members of the new Court by the League Council and Assembly, and for the expenses of the Court to be met out of the budget of the League.

It was originally hoped that the new Court would have a status approximating to that of a 'World Court' as described above, and in particular that it would have universal compulsory jurisdiction, at least over members of the League. This proved over-optimistic; as explained further below, the Court's jurisdiction had to be consensual, and it was too much to expect States to give a new and untried body a blank cheque to this extent. Jurisdiction could be conferred ad hoc by agreement, or accepted by treaty in advance for defined categories of disputes; and the 'optional clause' of Article 36(2) of the PCIJ Statute, whose operation is explained below, went as far as was possible for the time in the direction of compulsory jurisdiction.

The history of the Permanent Court during the inter-war period was generally a satisfactory one; it gave a number of judgments and advisory opinions, some on matters of acute political or legal delicacy, and its operation inspired increasing confidence. The fact of its existence was also a force for peaceful settlement, since the possibility that a dispute might be brought before it, with the attendant publicity, was an inducement to reach a negotiated settlement. However, although not formally an organ of the League, its fortunes were bound up with those of the League; and the paralysis of the League caused by the outbreak of the Second World War already impeded the Court's work even before the German invasion of the Netherlands, where the Court had its seat, brought it completely to a halt.

The Allies' plans for a new post-war international organization included provision for a judicial body; the possibility of keeping the Permanent Court in being was considered, but it was thought better to let it disappear with the League of Nations, and set up a new Court to continue its work. However, the new International Court of Justice was not only to take over the premises and archives of the pre-war Court, but also, so far as possible, to inherit its jurisdiction. Numerous treaties had been concluded providing for settlement of disputes by the Permanent Court; the Statute of the new Court provided that, as between parties to that Statute, such treaties should be read as referring to the new Court.[2]

[2] Similarly, pre-war 'optional clause' jurisdiction was preserved, so far as possible: see note 18 below. These provisions of the Statute did not specifically regulate the position of States parties to the Statute of the Permanent Court who did not become members of the United Nations, and thus parties to the Statute of the new Court, until many years after the Permanent Court had ceased to exist. For the handling of lacunas of this kind, see *Temple of Preah Vihear, Preliminary Objections, ICJ Reports 1961*, p 17; *Barcelona Traction Light and Power Company Preliminary Objections, ICJ Reports 1964*, p 6.

III. STRUCTURE AND COMPOSITION

The Court consists of fifteen judges, elected by the Security Council and the General Assembly for terms of nine years; the elections are staggered so that five judges complete their terms of office every three years. A judge may be re-elected (and this has frequently occurred), but the system thus ensures that a regular renewal of the bench is possible, while at the same time preserving continuity. Judges are elected as individuals, not as representatives of their countries, and are required to make a solemn declaration in open court of impartiality in the exercise of their functions. They may not engage in any other occupation during their period of office.

No two members of the Court may be of the same nationality.[3] The Statute (Article 9) directs that the election be such as to ensure the representation of 'the main forms of civilization and of the principal legal systems of the world'. There is no official allocation of seats on this (or any other) basis, but it is a long-standing convention that the candidate of each of the permanent members of the Security Council will always be elected, and the other seats are unofficially distributed between various regions of the world.

The salaries of the judges, and the other expenses of the Court, are borne by the United Nations, as part of the regular budget. The seat of the Court is at The Hague, in the Peace Palace, where the Court occupies premises under an agreement between the United Nations and the Carnegie Foundation, the owner of the building. The President of the Court (elected triennially by his colleagues) is to 'direct the work and supervise the administration of the Court' (Rules, Article 12). The day-to-day administration of the Court is the responsibility of the Registry, headed by a Registrar, elected by the Court for a seven-year term.

Cases are heard by the full Court unless the parties to a case agree that it shall be heard by a chamber (see below). A judge is not required to withdraw if a case is brought by the State of which he is a national; on the contrary, he is bound to sit in all cases before the full Court, unless there are special reasons, other than the mere fact of nationality, why it would be inappropriate for him to sit. (If however the President of the Court is a national of one of the parties to a case, he does not preside in the case, but hands over the presidency to the Vice-President or senior judge.) The disqualification or withdrawal of a judge is dealt with by Articles 17 and 24 of the Statute: the commonest reason for exclusion is that the judge has, prior to his election, already been involved in the case, for example, as having advised one of the parties.

The possible presence on the bench of a judge of the nationality of one of the parties was seen, when the Statute was drafted, as suggestive of inequality, despite the fact that members of the Court are required to act impartially. This view is defended on the ground that the presence of a 'national judge', even one bound to decide impartially, is still valuable for ensuring justice for the State of which he is a national,

[3] But a judge ad hoc (see below) may have the same nationality as an elected member of the Court.

since he can ensure that the case presented by his country is fully understood. Rather than requiring withdrawal of the judge in such circumstances, the Statute therefore enables the other party to a case of this kind to nominate a person to sit as judge solely for that case, with the title of judge ad hoc.[4] The Statute also provides, consistently with the idea of the benefit of a 'national judge', that in a case where neither party has a judge of its nationality on the Bench, and thus there is no inequality between the parties, each party may choose a judge ad hoc. In such cases, the parties however quite often agree that neither of them will exercise their right to a judge ad hoc.

Elected members of the Court not infrequently vote against the State of their nationality, but to date judges ad hoc have nearly always voted in favour of the State that appointed them;[5] and it is perhaps too much to expect that they should do otherwise.

In addition to certain standing chambers (in practice virtually never used),[6] a chamber may be formed by the Court to deal with a specific case, if the parties so request. The number of judges to constitute such a chamber is determined by the parties, but the individual judges to be members of it are elected by the Court, and the composition of the chamber is thus, theoretically, outside the control of the parties. In practice however it has become accepted that if the parties indicate that certain names would be acceptable, the Court is virtually certain to elect them, if only because the creation of a chamber composed otherwise than as desired by the parties would be likely to result in the case being withdrawn and referred to some other method of settlement.[7]

Reference of a case to a special chamber of the Court, a procedure long neglected, has become more popular over the last twenty years.[8] To some extent the use of chambers makes for greater flexibility and thus tends toward speedier settlement of cases; but simultaneous operation of two chambers is only possible if no member of one chamber is also a member of the other. In tribunals where the chambers are established by the tribunal itself, as sub-units (eg, the International Criminal Tribunal for the Former Yugoslavia), this can be arranged; but where the membership of chambers is in effect left to the parties to determine, experience shows that

[4] There is however no requirement that the judge ad hoc be of the nationality of the party appointing him, and this is frequently not the case.

[5] The principal exception has been the vote of Judge ad hoc Suzanne Bastid (incidentally the first woman to sit as a judge), appointed by Tunisia, against the request of that State for revision of the Judgment in the *Continental Shelf* case (Tunisia/Libya).

[6] The experience with special chambers suggests that the reason for the neglect of the standing chambers is probably that their composition is determined in advance by the Court, and the parties have no say in it.

[7] The first request for a special chamber, by the United States and Canada in the *Gulf of Maine* case, was made pursuant to a treaty which provided explicitly that the case would be transferred to arbitration if the Chamber was not formed as the parties wished. Subsequent approaches to the Court have been more tactful.

[8] The following cases have been decided by chambers: *Gulf of Maine* (1984); *Frontier Dispute (Burkina Faso/Mali)* (1986); *Eletronica Sicula* (1989); *Land, Island and Maritime Frontier Dispute* (1992). Chambers have been established to hear the following further cases: *Application for Revision of the Judgment of 11 September 1992 in the Land, Island and Maritime Frontier Dispute* (2002); *Frontier Dispute (Benin/Niger)* (2002).

overlapping membership is frequent. The use of chambers has thus not appreciably accelerated the procedure of the International Court.

IV. PROCEDURE

The procedure before the Court is regulated primarily by its Statute. Under Article 30 of the Statute the Court has power to make rules 'for carrying out its functions', including rules of procedure. The Rules of Court adopted in 1946 were modelled closely on those drawn up by the Permanent Court; they were revised in part in 1972, and more radically in 1978. Further revisions of detail have been effected in more recent years. The Court has recently found it useful to regulate detailed matters of procedure in a more informal way, by issuing 'Practice Directions' interpreting and implementing the Statute and Rules. The hierarchy of norms is of course that Practice Directions cannot be inconsistent with the Rules or the Statute, and the Rules cannot depart from the Statute.[9] Generally, the extent to which the broad lines of the procedure laid down in the Statute of the Permanent Court, and in the Rules adopted by that body, have been maintained, is a tribute to the work of the jurists of the inter-war period. The official languages of the Court are French and English.

The proceedings in contentious cases are set in motion in one of two ways. If the parties have concluded an agreement (*compromis* or Special Agreement) to bring the dispute before the Court, the case begins with the notification of this to the Court. If not, one State may file an application instituting proceedings against another State, and the Registrar communicates this to that State. In either event, all other States entitled to appear before the Court are notified of the institution of proceedings. The procedure thereafter represents something of a blend of the continental system of extensive written pleadings, and the Anglo-American common law system in which the hearing, the 'day in court', is the essential element. In a first stage, the parties exchange written pleadings (Memorial by the applicant, Counter-Memorial by the respondent; in some cases followed by a Reply (applicant) and a Rejoinder (respondent), but these additional pleadings are now exceptional). There then follows a hearing, usually taking up several days or even weeks, at which the parties address their arguments to the Court in the same order: a presentation by the applicant, followed by a presentation by the respondent, and a much briefer 'second round' devoted to refutation of the opponent's contentions. When the case is brought by special agreement, rather than by a unilateral application filed by one State against another, neither party is, strictly speaking, in the position of applicant or respondent;

[9] For an example of a challenge to a provision in the Rules on the ground that it was inconsistent with the Statute, see the dissenting opinion of Judge Shahabuddeen in the *Land, Island and Maritime Frontier Dispute, (El Salvador/Honduras), Application to Intervene, Order of 28 February 1990, ICJ Reports 1990*, p 18ff.

the order of speaking is determined by the Court, taking into account the views of the parties.[10] The hearing is open to the public; the Court has power to hold a closed hearing (Statute, Article 46), but has done so only on one occasion. The written pleadings are normally made available to the public at the time of the opening of the oral proceedings (Rules, Article 53(2)).

Evidence is normally submitted in the form of documents, though it may of course take other forms (eg, photographs, physical objects); witnesses may give written evidence, or appear at the hearing to give their evidence orally, in which case they may be cross-examined by the other party. The procedure in this respect is modelled broadly on Anglo-American practice. Hearsay evidence does not carry weight;[11] and in the case of *Military and Paramilitary Activities in and against Nicaragua* the Court expressed some reservations as to the value of evidence of government ministers and other representatives of a State, who could be taken to have some personal interest in the success of their government's case.[12]

The burden of proof of fact, in accordance with general procedural principles, rests upon the party alleging the fact. In accordance with the principle *iura novit curia*, the parties are not required to prove the existence of the rules of international law that they invoke; the Court is deemed to know such rules. An exception to this is where a party relies on a customary rule which is not one of general law (local or special custom): in this case, the party must 'prove that this custom is established in such a manner that it has been binding on the other Party'.[13] In practice, particularly where the existence of a particular rule of general law is controversial, States will devote much argument to demonstrating that it does, or does not, exist, citing the facts of State practice in support.

The sources of international law to be applied by the Court, enumerated in Article 38 of the Statute have been discussed in Chapter 4 above: international treaties and conventions; international custom; general principles of law; and the subsidiary sources, ie, decisions of tribunals[14] and opinions of jurists.

The decision of the Court is adopted by majority vote, the President of the Court having a casting vote in the event of a tie. Every judge has the right to append to the decision an individual statement of his views, entitled 'separate opinion' if he agrees with the decision, or 'dissenting opinion' if he does not. Until 1978, the way in which a judge had voted would not become public unless he chose to attach such an opinion; but the revised Rules of Court adopted in that year provided that in future the decision would indicate not only the numbers of the votes on each side, but also the names of the judges.

[10] The order of speaking is different in proceedings on preliminary objections or requests for the indication of provisional measures; these proceedings are explained below.

[11] Cf *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p 4 at pp 16–17; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *USA), Merits, Judgment, ICJ Reports 1986*, p 42, para 68.

[12] Ibid, para 70.

[13] *Asylum, Judgment, ICJ Reports 1950*, p 266 at p 276.

[14] For the treatment by the Court of its own decisions, see Section VII below.