THE PROBLEM OF JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

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To a certain extent, the rule of law in the domain of domestic jurisdiction has already been attained in most States. This is not so in the conduct of States in the community of nations. The function of law is to regulate the conduct of men by reference to rules whose formal — as distinguished from their historical — source of validity lies, in the last resort, in a precept imposed from outside. Within the community of nations this essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which reduces the binding force of international law upon the individual member of the international community.[1] Thus, it has always been the aspirations of statesmen to have a world community governed by a rule of law. A law among nations may be realistically observed as a process of authoritative decisions transcending state lines by which the peoples of the world seek to clarify their common interests in order to prevent unauthorized coercion and optimum order in world society.[2]

One means devised by statesmen in attaining a world community under a rule of law is the establishment of judicial tribunals to settle disputes among States. Indeed one of the major purposes of law at any level is to deal with disputes, either to prevent them altogether or to settle them.[3]

In the international community, disputes are either political or legal. Recently, a third category has appeared, the technical disputes. Each type of dispute has to be handled or settled by a specialized agency which can effectively settle the controversy. Disputes may also be classified as justiciable or non-justiciable. This distinction became an accepted part of positivist legal thinking and has been enshrined in the provisions of a number of arbitration treaties.

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[1] LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 3 (1973).

[2] MCDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER vii (1961).

[3] VON GLAHN, LAW AMONG NATIONS 455 (1965).

Non-justiciable disputes usually involve non-legal or political issues and generally affect the vital national interests. Involved are economic or political interests of a nation. Strictly speaking, legal rules cannot settle them.

Justiciable issues, on the other hand, are those where not only is there a question of law involved but the law is relevant to the disputes and can be utilized to settle it.

There is difficulty, however, in determining what is political and what is legal. In practice, non-justiciable disputes are settled peacefully by negotiation, mediation or action of any of the international agencies.

At any rate, all members of the United Nations have agreed under the Charter, to refrain in their international relations from the use of force or threat against the territorial integrity or political independence of a State or in any manner inconsistent with the purposes of the United Nations.[4] The preamble of the United Nations Charter prohibits the use of force except on a collective basis or in self-defense under certain conditions. The most important methods of settling disputes through peaceful means are through diplomatic negotiations, tender of good offices, mediation, conciliation, arbitration, inquiry, regional arrangements and adjudication by judicial tribunals.

Expectations from the International Court of Justice

To most people interested in having a world community under a rule of law, the existence of judicial tribunals, such as those that operate in the internal affairs of the nation, are the most effective means of settling disputes. The International Court of Justice was precisely established as the judicial organ of the United Nations. At least, the founding members of the United Nations envisioned the International Court of Justice as a true international court to settle legal disputes among States. As envisioned by the founding members, the United Nations had been established to bring about by peaceful means and in conformity with the principle of justice and international law the adjustment or settlement of international disputes or situations which might lead to the bread of the peace. The importance of the place occupied by the Court in the United Nations is emphasized by the other provisions contained in the Charter on the Court as the principal judicial organization.[5]

In making recommendations for settlement of disputes, the Security Council shall take into consideration that legal disputes

[4] U.N. Charter, art. II, par. 4.
[5] U.N. Charter, art. 92.

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.[6] In presenting the Statute of the Court to the Fourth Commission at the UN Conference on International Organizations, the rapporteur said that the committee "ventures to forsee a significant role for the new court in the international relations of the future." The judicial process will have a central place in the plans of the UN for the settlement of international disputes.[7]

The peoples of the world, therefore, had looked forward to the International Court of Justice as an ultimate tribunal in which all legal disputes will be settled. Contrary to these expectations, however, the Court had turned out to be the least used among the organs of the United Nations. Instead of submitting their disputes to this court, most states have resorted to all available means to avoid its jurisdiction.

It is univeral knowledge that the Court has not lived up to the expectations expressed at its creation. On the other hand, it is also known that the governments in and out of the United Nations have been responsible that the Court has not lived up to those expectations.[8]

Cases of Minor Importance — Lack of Business of the Court

Most cases brought to the Court are of minor importance and significance. All too often, disputes that arise especially when they involve the application of customary law or the meaning of a treaty provision really represent political disagreements rather than true legal disputes and one of the States, and possibly both, does not really desire a settlement through the medium of an outside agency, much less a judicial tribunal. One main reason for this attitude of States is the inherent defect of the provision on jurisdiction of the Court.

It is true that the International Court of Justice and its predecessor, the Permanent Court of International Justice, have contributed to the advancement of the peaceful settlement of disputes through adjudication. But in spite of its status, its stature, importance and the fact that the most highly qualified jurists have sat on said tribunal, most nations have not availed of its services as the statistics of the Court show.

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[6] Art. 36.
[7] Doc. 913, 13 U.N.C.I.O.
[8] Gross, *The International Court of Justice: Considerations of Requirements for Enhancing Its Role in the International Legal Order*, 65 AM. J. INT'L. L. 253 (1971).

The stagnation of the functioning of the Court prompted some members of the United Nations to include in the agenda of the General Assembly during its 25th session the item urging a review of the role of the International Court of Justice. The members noted the lack of business currently before the Court. This situation, indeed, is not commensurate with either the distinction of the judges or the needs of the international community. A study was therefore proposed, to identify the obstacles to the satisfactory functioning of the International Court of Justice, and ways and means of removing them.[9]

Since its operation in 1946 up to 1976, only about 47 cases had been brought to the International Court of Justice. Of this number, only about 27 were heard and decided on the merits. This means that the Court had an average of less than one case a year decided on the merits.[10]

The other cases were removed from the docket of the Court, either for lack of jurisdiction or the case became academic due to amicable settlement or for other causes.[11]

The International Court of Justice rendered about seventeen advisory opinions as of the year 1976.

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[9] Members proposing said item were the United States, Argentina, Canada, Finland, Italy, Japan, Liberia, Mexico, Uruguay, Australia, Ivory Coast, United Kingdom, Doc. A/8042, August 14, 1970.

[10] The Corfu Channel Case, (United Kingdom v. Albania), (1949) I.C.J. REP. 4; The Asylum Judgment, (Columbia v. Peru), (1950) I.C.J. REP. 266; Haya dela Torre, (Colombo v. Peri), (1951) I.C.J. REP. 71; The Fisheries Judgment, (United Kingdom v. Norway), (1951) I.C.J. REP. 15-16; Anglo-Iranian Oil Co. Judgment, (1952) I.C.J. REP. 93; Rights of National of USA in Morocco, (France v. USA), (1952) I.C.J. REP. 176; Ambatielos, (1953) I.C.J. REP. 10; Miniquiers and Ecrehos Judgment, (France v. United Kingdom), (1953) I.C.J. REP. 47; The Monetary Gold Removed from Rome in 1943, (Italy v. France, UK, Russia), (1954) I.C.J. REP. 19; The Nottebohm Judgment, (Liechtenstein v. Guatemala), Second Phase, (1955) I.C.J. REP. 4; Certain Norwegian Loans Judgment, (France v. Norway), (1957) I.C.J. REP. 9; Right of Passage Over Indian Territory, (Portugal v. India), (1957) I.C.J. REP. 125; Application of the Convention of 1902 Governing the Guardianship of Infants, (Netherlands v. Sweden), (1958) I.C.J. REP. 55; Interhandel, Judgment, (1959) I.C.J. REP. 6; The Aerial Incident of 27 July '55, (Israel v. Bulgaria), (1959) I.C.J. REP. 127; Sovereignty Over Certain Frontier Land, (Belgium v. Netherlands), (1959) I.C.J. REP. 209; Right of Passage Over Indian Territory, (1960) I.C.J. REP. 6; Temple of Preah-Vihear, (Cambodia v. Thailand), (1961) I.C.J. REP. 17; Judgment on the Merits, (1962) I.C.J. REP. 6; The Northern Cameroons Judgment, (Cameroon v. U.K.), (1963) I.C.J. REP. 15; The Southwest Africa Judgment, (Ethiopia v. Southh Africa), (1966) I.C.J. REP. 6; North Sea Continental Shelf Judgment, (Federal Republic of Germany v. Denmark and Netherlands), (1969) I.C.J. REP. 3; The Barcelona Traction, Light & Power Co. Ltd., (Belgium v. Spain) Judgment, (1970) I.C.J. REP. 3; The Appeal Relating to the Jurisdiction of ICAO Council, (India v. Pakistan), (1972), I.C.J. REP. 46; The Fisheries Jurisdiction, (Federal Republic of Germany v. Iceland), (1973) I.C.J. REP. 49; The Fisheries Jurisdiction (United Kingdom v. Iceland) for the Jurisdiction of the Court, (1973) I.C.J. REP. 3; The Fisheries Jurisdiction, (United Kingdom v. Iceland) Judgment, (1974) I.C.J. REP. 3 & 175; The Nuclear Tests, (Australia v. France), (1974) I.C.J. REP. 253; The Nuclear Tests (New Zealand v. France) Judgment, (1974) I.C.J. REP. 457.

As the successor of the Permanent Court of International Justice, the International Court of Justice has the function of deciding in accordance with international law such disputes as are submitted to it.[12]

Jurisdiction of the Court as to Parties

The jurisdiction of the Court in respect to contentious cases raises 3 issues: (1) on the jurisdiction regarding the parties; (2) on the subject matter, and (3) in the time limits. Jurisdiction in this respect is defined by Article 93 of the Charter of the United Nations and by Articles 34 to 37 of the Statute of the Court. Only States may be parties in cases before the Court. These States fall under 3 categories: (1) States members of the United Nations; (2) the States not members of the United Nations but parties to the Statutes on conditions embodied by the General Assembly upon recommendation of the Security Council. Said States must accept the provisions of the Statute of the International Court of Justice and all obligations of a member of the United Nations under Article 94 of the Charter and the undertaking to contribute to the expenses of the Court such equitable amount as the General Assembly shall assess from time to time after consultation with the Swiss Government.[13] As of 1976, Liechtenstein, Switzerland and San Marino, which are not members of the United Nations, were admitted as parties to the Statute. (3) The Court is also open to States which are not parties to the Statute and not members of the United Nations in accordance with Article 35, paragraph 2 of the Statute. The conditions upon which the Court shall be opened to such States shall, subject to the special provisions contained in treaties enforced, be laid down by the Security Council.[14]

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[11] Jurisdiction of French Nationals and Protection in Egypt, Order of 29 March 1950; Electricite de Beyrouth Co., (France v. Lebanon), Order of 29 July; Treatment in Hungary of Aircraft & Crew of the U.S.A., (U.S.A. v. Hungary, U.S.A. v. U.S.S.R.), Order of 12 July 1954; Aerial Incident of 10 March 1953, (U.S.A. v. Czechoslovakia), Order of 14 March 1956; The Antarctica, (United Kingdom v. Argentina, United Kingdom v. Chile), 16 March 1956; Aerial Incident of 7 October 1952, (U.S. v. U.S.S.R.), Order of March 14, 1956; Aerial Incident of 27 July 1955, (U.S. v. Bulgaria), Order of 13 March 1960; Aerial Incident of 27 July 1955, (United Kingdom v. Bulgaria), Order of 3 August 1959; Aerial Incident of 4 September 1954, (U.S. v. U.S.S.R.), Order of 9 December 1958; Compagn des Port, Das Quais Et Des Entreports De Beyrouth and Societe Radio-Orient, (France v. Lebanon), Order of 31 August 1960; Aerial Incident of 7 November 1954, (U.S.A. v. U.S.S.R.), Order of 7 October 1959; Northern Cameroons, (Cameroon v. United Kingdom), Order of 2 December 1963; Trial of the Pakistani Prisoners of War, (Pakistan v. India), Order of 15 December 1973.

[12] Statute of I.C.J., art. 38, par. 1.

[13] Art. 93. See Resolution 9-1, 11 December 1946.

[14] See Resolution 9 of the Security Council adopted 15 October 1946.

Limited Jurisdiction

The jurisdiction of the Court is based mainly on the consent of the States to which it is opened. In most cases, the Court found that it could take no further steps after application in which it was admitted because the opposing parties did not accept its jurisdiction.[15] The form in which this consent is expressed determines the manner in which a case may be brought before the Court.

(a) *Special Agreement*

Under Article 36, paragraph 1 of the Statute, the jurisdiction of the Court comprises of cases which the parties refer to it. Such cases normally come before the Court by notification to the registry of a Special Agreement and concluded by the patries especially for this purpose.[16]

An example is the *Corfu Channel* case, where the parties made a special agreement after delivery of the judgment in the preliminary objection. The case concerning the arbitral award made by the King of Spain on 23 December 1906 was submitted by means of application but the parties had previously concluded the agreement on the procedure to be followed in submitting the dispute to the Court.

(b) *Cases under Treaties and Conventions*

Cases are normally brought before the Court by means of a written application instituting the proceedings. This is a unilateral act of a State indicating the subject of the dispute. There are a number of treaties and conventions which contain compromissory clauses conferring jurisdiction of the Court. One of the most comprehensive of these clauses is Article 31 of the Pact of Bogota and Article 1 of the European Convention for the Peaceful Settlement of Disputes which give the Court, *vis-a-vis* the parties, to the respective treaties, compulsory jurisdiction in respect to alleged disputes as defined in Article 36(2) of the Statute of the Court.

Compulsory Jurisdiction of the Court

The Statute provides that a State may recognize as compulsory in relation to any other State accepting the same obligation

[15] Treatment in Hungary of the Aircraft and Crew of the United States of America, (U.S. v. Hungary, U.S.A. v. U.S.S.R.).

[16] The following cases were among those submitted to the Court by means of special agreement: The Asylum—The Meniquiers and Ecrehos; Sovereignty Over Certain Frontier Land; North Sea Continental Shelf, (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands).

the jurisdiction of the Court in legal disputes under some conditions.[17] States parties to the Statute may at any time declare that they recognize as compulsory *ipso facto* and without any special agreement in relation to any other State accepting the same obligation the jurisdiction of the Court in all legal disputes concerning (1) the interpretation of the treaties, (2) any question of international law, (3) the existence of any act which if established would constitute a breach of international obligation, and (4) the nature or the extent of the reparation to be made for the breach of international obligation.

The declarations may be made unconditionally or on condition of reciprocity on the part of several States or certain situation or for certain time.[18]

The Optional Clause System

Reciprocity is an important feature of the optional clause system. The declaration may be unconditional or on condition of reciprocity on the part of several or certain States, or for a certain time. But the reciprocity relates to a condition that may be introduced in a declaration which makes the declaration operative only on some other States also accepting the compulsory jurisdiction. Article 36(2) of the Statute limits the obligation to any other State accepting the same obligation. This is understood to require not identical declarations from both the parties, but that both the Declarations should confer jurisdiction in respect of the dispute submitted for adjudication.[19]

The declaration is a unilateral act. The Court had ruled that by acceptance of the deposit of a Declaration by the Secretary General, the accepting State becomes a party to the system of Optional Clause in relation to the other declarant States with all the rights and obligations under Article 36 of the Statute. The contractual relation between the parties and the compulsory jurisdiction of the Court resulting therefrom are established *ipso facto* and without special agreement.[20]

It is the view of some writers that the Optional Clause comes into operation *vis-a-vis* any party to the Statute on the fulfill-

[17] Art. 36 of the Statute.

[18] As of July 1976 there were 45 states declaining declarations of acceptance of compulsory jurisdiction of the Court. The terms of the declaration by the States is found in Section 2, Chapter IV of 4 YRBK. INT'L. C.J. 51 (1975-1976).

[19] Anglo-Iranian Oil Company, (1952) I.C.J. REP. 93; Norwegian Loans Case, (1957) I.C.J. REP. 9; Waldock, *Decline of the Optional Clause*, 32 BRIT. YRBK. INT'L. L. 244 (1955-1956.

[20] See Right of Passage Case, (1957) I.C.J. REP. 125.

ment of the condition prescribed by it, of depositing a Declaration. Consent, therefore, is a precondition of international adjudication.

The rights and obligations of a Declarant as against each of the other Declarants are determinable by virtue of the condition of reciprocity which is part of the sytsem. The engagement of the parties is, therefore, a multilateral one, but its content is ascertainable on the bilateral basis.[21]

The parties to the case must have a right of access to the Court at the time of the institution of the proceedings. A State under the Optional Clause may exclude jurisdiction *vis-a-vis* a State whose declaration does not satisfy certain time qualifications such as not having filed within a certain time before the institution of the proceedings.[22]

The State may also prescribe time qualifications for a dispute to come within the scope of the declaration such as arising before or after a specified date. Declarations which have expired or have duly terminated on a certain date cannot confer jurisdiction after that date.

Reservations Limit the Court's Jurisdiction

A considerable number of declarations of States contain reservations which have cut down the jurisdiction of the Court. Some reservations are double edged in effect. If the declarant State invokes them, on the principle of reciprocity, the respondent State is entitled to claim benefit of the reservation.[23]

Among the typical reservations is the *ratione temporis*. This type of reservation has been deposited by the United Kingdom and the Commonwealth Countries which are terminable on notice to the United Nations Secretary General.

The second type of reservations excludes disputes which are essentially within the domestic jurisdiction of the declarant. A difficult variant of this type is the "automatic reservation" found in the Declaration of the United States which is now popularly known as the *Connally Amendment*. The difficulty of this type of reservation is that the matter of domestic jurisdiction is determined by the United States, and all other States which filed similar declarations. It is considered automatic because once the respondent State

[21] ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 317 (1957).
[22] See Declaration of the United Kingdom of 26 November 1958, (1958-1959) I.C.J. YRBK. 225.
[23] Anglo-Iranian Oil Case, (1952) I.C.J. REP. 103; Norwegian Loans Case, (1957) I.C.J. REP. 23.

determines that the matter lies within its "domestic jurisdiction", the Court has to act upon it without any other consideration. Some Judges of the Court of the Court considered that this reservation invalidated the Declaration itself. Judge Lauterpacht states that the reservation is repugnant to Article 36(6) of the Statute. The reservation also took away in reality whatever jurisdiction the declaration purported to confer upon the Court.[24]

The third type of reservation is also found in the United States Declaration which excludes disputes arising under multilateral treaties unless all parties to the treaty affected by the decision are also parties to the case before the Court or the United States especially agrees to the jurisdiction of the Court.

The last type of reservation excludes disputes in regard to which the parties agreed to have recourse to some other method of peace settlement. When Portugal filed the *Right to Passage* case immediately after depositing its Declaration, the United Kingdom, India and France adopted reservations to prevent surprise initiation of proceedings against them.

Some other declarations exclude disputes arising in times of war or hostilities in which the Declaration might be involved. Israel has excluded disputes with States which have not recognized or have refused to have normal diplomatic relations with her or disputes involving any title created or conferred by any government other than the government of Israel itself.

El Salvador has also excluded pecuniary claims against her and questions which cannot be submitted to arbitration, according to the Constitution of El Salvador.

The Philippines recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes as stated in the Statute of the Court. The Declaration, however, shall not apply to any dispute—

(a) In regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement; or

(b) Which the Republic of the Philippines considers to be essentially within its domestic jurisdiction; or

(c) In respect of which the other party has accepted the compulsory jurisdiction of the International Court of Justice only in

[24] See Waldock, *The Plea of Domestic Jurisdiction before International Tribunals*, 31 BRIT. YRBK. INT'L. L. 96, 131 (1954).

relation to or for the purposes of such dispute; or where the acceptance of the compulsory jurisdiction was deposited or ratified less than 12 months prior to the filing of the application bringing the dispute before the Court; or

(d) Arising under a multilateral treaty, unless (1) all parties to the treaty are also parties to the case before the Court, or (2) the Republic of the Philippines specially agrees to jurisdiction; or

(e) Arising out of or concerning jurisdiction or rights claimed or exercised by the Philippines—

(i) in respect of the natural resources, including living organisms belonging to sedentary species, of the sea-bed and subsoil of the continental shelf of the Philippines, or its analogue in an archipelago, as described in Proclamation No. 370 dated 20 March 1968 of the President of the Republic of the Philippines; or

(ii) in respect of the territory of the Republic of the Philippines, including its territorial seas and inland waters.[25]

The Need to Expand the Jurisdiction of the International Court of Justice

Writers have put forward the need to increase the use of the Court to settle disputes among States. Indeed, in order to build confidence in the Court, the States must withdraw their Declarations which limit the jurisdiction of the Court. Thus, one government proposed that the jurisdiction of the Court be made compulsory.[26] Canada, suggested the possibility of groups of like-minded States to agree on coordinated declarations wherein they would list those instances in which they could accept the jurisdiction of the Court to adjudicate on problems arising from their mutual interrelations.[27]

It was also suggested that the General Assembly declare unequivocally that recourses to the jurisdiction of the Court is not *per se* an unfriendly act but is prompted by the desire to advance the rule of law. It must be stated that in the current Third U.N. Conference on the Law of the Sea, many State delegations were not in favor of using the International Court of Justice for settlement and adjudication of disputes arising from the Law of the Sea. There is no great desire among the States to give the International Court of Justice sole jurisdiction over sea disputes. So far only

[25] For Declaration of all other States of 1976, see YRBK. INT'L. C.J. No. 30 (1975-1976).
[26] Laos in Doc. A/8382.
[27] Doc. A/8382.

three cases of relative importance have been decided by the International Court of Justice (*Anglo-Norwegian Fisheries Case*, the *North Sea Continental Shelf Cases* and the *Fisheries Jurisdiction Case*). Moreover, the International Court of Justice might be of little use in law of the sea cases where individuals and private entities are likely to be involved.

Thus, in the latest document produced by the Third U.N. Conference on the Law of the Sea, settlement of disputes relating to the interpretation or application of the proposed convention may be submitted to a Law of the Sea Tribunal, the International Court of Justice, an Arbitral Tribunal or a special arbitral tribunal.[28]

Access to the Court by International Organizations

The jurisdiction of the Court should also be open to international organizations generally or in specific instances.[29]

The United Kingdom proposed that private individuals and corporations be allowed to be parties before the Court or to intervene in certain cases.

Another suggestion is that the International Court should be conferred appellate jurisdiction from decisions of other International Tribunals.[30]

The International Court of Justice at the Crossroads

Indeed, there is a need to tap this great institution for the settlement of disputes. It seems necessary to establish a link between the traditional form of litigation, the national tribunals, and the international forum, the International Court of Justice, in cases involving international law. Such a link had already been established by the Court of Human Rights. The International Court of Justice, subject to amendments, could discharge its functions more effectively in the still expanding area of transnational activities.[31]

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[28] Art. 287, Informal Composite Negotiating Text A/Con/62/WP. 10.
[29] Proposed by Cypaus and 10 other States. See Doc. A/8382.
[30] Doc. A/8382.
[31] Gross, *op. cit., supra*, note 8.