THE INTERNATIONAL COURT OF JUSTICE— RETROSPECTIVE AND PROSPECTS*

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As a jurist, I am greatly honoured by the opportunity to be present at the meeting of such a distinguished organization as the Asian-African Legal Consultative Committee (AALCC) and I would like to express my sincere gratitude for its kind invitation which has enabled me to return to the Committee.

I have a particular reason for using the word “return”, as my association with the AALCC goes back to its 12th Session in January 1971 in Colombo, when the meeting took up the subject of the law of the sea for the first time, and when I participated as an alternate member for Japan. In fact, the AALCC met to discuss the law of the sea in Colombo in January 1971, several weeks before the UN Sea Bed Committee started its deliberations in March of that year on the general problems of the law of the sea. Thus, the AALCC may well claim to have taken the initiative in beginning discussions on the law of the sea well in advance of UNCLOS III which commenced in 1973 and terminated in 1982.

At its Colombo session in 1971, the AALCC set up a sub-committee on the law of the sea with a small working group of five members which included among others FRANK NJENGA of Kenya (now Secretary-General of the AALCC) and myself. I attended the meetings of the sub-committee and the working group, as well as the regular sessions of the Committee held in the

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five-year period between 1971 and 1975 in Colombo, Lagos, New Delhi, Tokyo and Tehran, and thus I took part in all the discussions on the law of the sea at the AALCC until I had to leave to take up my post at the International Court of Justice (ICJ) in 1976.

Furthermore, I was honoured to be invited from the ICJ to speak when the AALCC met for its 20th Session in Seoul in 1979 and its 23rd Session in Tokyo in 1983. You may now understand why I said at the beginning that I am delighted to *return* to the AALCC.

As far as I can recall, the attention of the AALCC was first focused upon the subject of the role and work of the ICJ at the Seoul session in 1979, where I had the honour of speaking on the opening day. In 1985, the AALCC prepared a very valuable report entitled "A Study on the Question of Possible Wider Use of the ICJ by Agreement of States Parties" and, since that time, the AALCC has collaborated with the United Nations (UN) in promoting means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the ICJ—the subject which has now been proposed as a programme under the UN Decade of International Law.

The AALCC has become particularly interested in the role which the ICJ can play in the settlement of disputes arising from matters of environmental law, and last year it produced a very valuable study on the enhanced utilization of the ICJ in matters relating to the protection and preservation of the environment. In view of such a growing interest in the ICJ by the AALCC, it is my particular pleasure and privilege to talk about the ICJ in its present situation and to consider what demands may be made upon it in future.

In June last year, Mr. BOUTROS-GHALI, the United Nations Secretary-General, stressed in his well-known report "Agenda for Peace—the Preventive Diplomacy, Peacemaking and Peace-keeping" (drafted pursuant to the statement adopted at the summit meeting of the Security Council in January 1992) that "[the ICJ] remains an under-used resource for the peaceful adjudication of disputes [and] a greater reliance on the Court would be an important contribution to United Nations peacemaking".

I recall that an appeal of a similar nature was made nearly 20 years ago by the UN General Assembly to promote the more frequent use of the ICJ: around 1970, attention had been drawn to the stagnation of the Court. At the 1970 annual session of the American Society of International Law, Mr. WILLIAM P. ROGERS, then Secretary of State of the United States, proposed the revival of the "neglected and moribund" Court in order to establish the rule of law in the international community.

After discussions over a period of several years, the UN General Assembly proceeded, in November 1974, to adopt Resolution 3232 (XXIX) on the "Review of the Role of the International Court of Justice", in which the General Assembly made an appeal to revitalize the Court and referred to six distinct suggestions aimed at bringing this about.

Nearly 20 years have passed since the UN General Assembly appealed to the world community, at a time when the Court was so inactive, to direct its attention to the important role that it might play in the years to come. What, then, has been happening at the ICJ during these past two decades?

In the 1974 resolution to which I have just referred, the UN General Assembly recognized, *first*,

“the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute”.

In 1974, 45 of 141 States Parties to the Statute had accepted the compulsory jurisdiction of the Court under Article 36, para. 2, of the Statute. Since then, the number of accepting States has not increased considerably, despite the increased number of States Parties to the Statute. Today the States Parties to the Statute of the Court number 181. However, only 56 of 181 States Parties to the Statute have accepted the compulsory jurisdiction of the Court, and of these 56, 15 are from Africa including Uganda, and seven are from Asia. The United Kingdom is the only permanent member of the Security Council to have maintained a declaration of acceptance.

If, moreover, we consider that most of the declarations of acceptance of that compulsory jurisdiction are accompanied by various reservations, it would seem that the objective of attaining full acceptance of the Court's jurisdiction with as few reservations as possible will not so easily be attained.

Second, in the 1974 resolution the General Assembly pointed out

“the advantage of inserting in treaties, in cases considered possible and appropriate, clauses providing for the submission to [the Court] of disputes which may arise from the interpretation or application of such treaties”.

Regarding the acceptance of the Court's jurisdiction through the insertion of a compromissory clause into treaties, there were already quite a few such treaties in 1974, most of which were bilateral. During the past 20 years the number of these treaties has increased by approximately 20, and these recent additions include some multilateral treaties such as the 1979 International Convention against the Taking of Hostages; the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the 1985 Vienna Convention for the Protection of the Ozone Layer; the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. It is also worth mentioning that the 1982 UN Convention on the Law of the Sea, which has not

yet come into force, incorporates a very comprehensive compromissory clause as an integral part of this 320-Article treaty.

Third, the General Assembly in 1974 “call[ed] upon States to keep under review the possibility of identifying cases in which use can be made of the International Court of Justice”. During its 40-year history the Court has rendered judgments in about 30 contentious cases, but the cases submitted to the Court by *compromis*, that is to say by special agreement between the Parties concerned, have remained very limited in number. Since 1974 the full Court has had only two cases of this kind: the case between Tunisia and Libya in 1982, and another between Libya and Malta in 1985—both cases were related to the delimitation of the continental shelf of these countries.

The submission of disputes by means of a *compromis*, or special agreement, is really the most ideal way in which to settle such disputes, and the judgments in these instances were fully complied with by the respective Parties—Tunisia, Libya, and Malta. I am pleased to note that these two recent cases, brought to the Court by special agreement, involved two African countries. A further case was recently submitted to the Court by means of a special agreement between Chad and Libya for the delimitation of the land borders between them. This territorial dispute originated from the time of the colonial period prior to the independence of the two States. The written proceedings have been completed and the next phase will be the oral proceedings which will commence June 1993. The judgment of the Court may well be handed down early next year.

In connection with the need to promote the more frequent use of the Court, particularly by the developing countries, the then United Nations Secretary-General, Mr. PÉREZ DE CUÉLLAR, put forward a new proposal to the General Assembly in November 1989, aimed at setting up a Trust Fund to assist developing States in the settlement of disputes through the International Court of Justice. The purpose of the proposed fund was to make available financial assistance to States for expenses, such as the hiring of counsel and the preparation of written documents for pleadings. This project has now come into operation, but the fund will only be available in connection with disputes submitted to the Court by means of a special agreement, or to assist with the execution of a judgment of the Court resulting from such a special agreement.

It is known that the recent *Chad/Libya* case is the first instance in which this funding procedure has been applied, and that an award was made to Chad for its pleadings before the Court. It is my hope that this measure will make it easier for the developing countries, which would otherwise have had to face great financial difficulties relating to the hiring of counsel and the preparation of documents, to refer their disputes to the Court.

Fourth, the UN General Assembly in 1974 “[drew] the attention of States to the possibility of making use of chambers as provided in Articles 26 and 29 of the Statute of the International Court of Justice and in the Rules of Court”.

When the General Assembly made this suggestion, the chamber procedure had never been used, in spite of its being provided for in the Statute and the Rules. Now, however, the procedure involving *ad hoc* Chambers formed for dealing with particular cases—one of three Chamber procedures for which provision is made—has been resorted to on four occasions.

The first of those Chamber cases was the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, brought in 1981 jointly by Canada and the United States. The 1984 Judgment settled, in a manner accepted by both Parties, the long-standing fisheries dispute between those two States in the Gulf of Maine area.

The *Frontier Disputes* case between Burkina Faso and Mali concerning their land boundary, was brought in 1983 likewise by special agreement and in 1986 it was settled by an *ad hoc* Chamber of the Court to the satisfaction of both Parties.

The *Elettronica Sicula S.p.A. (ELSI)* case, which the United States instituted against Italy in 1987 (evidently with that country's consent, since both Parties accepted referral to a Chamber), concerned the bankruptcy/confiscation of an American-owned company in Sicily. In July 1989 it was decided by a judgment in favour of the respondent.

The *Land, Island and Maritime Frontier Dispute* case between El Salvador and Honduras, in which Nicaragua was eventually permitted to intervene, was jointly referred to a Chamber of the Court in 1986. The judgment delivered by the Chamber in September 1992 settled the delimitation of the borders in six separate sectors of land, and also determined the legal situation of certain islands in the Gulf of Fonseca and of maritime spaces both inside and outside that Gulf.

The *ad hoc* Chamber procedure is, by its nature, based on the consent of the Parties in dispute. In three of the four cases mentioned above, the respective Parties jointly consented in advance, by special agreement, to refer their disputes to the Court, on the understanding that a Chamber would be constituted to hear them. In the fourth instance, the *ELSI* case, the dispute was unilaterally brought to the Court by the United States, but with the full understanding that Italy would accept the Court's jurisdiction and agree to the composition of a Chamber. Thus, the *ad hoc* Chamber procedure may be seen as one type of joint submission by special agreement between the States in dispute.

In fact, in all of these four cases the Parties complied with the judgments, and I must particularly mention that, in the case of El Salvador and Honduras, the Parties had repeated in advance that they would comply with the judgment whatever the outcome. On the day of the delivery of the judgment in September of last year, the Presidents of both those countries got together with the Presidents of other Central American countries to celebrate the removal of a source of conflict from their region.

Fifth, the UN General Assembly in 1974 also recommended that

“United Nations organs and specialized agencies should . . . study the advisability of referring [legal questions that have arisen or will arise during their activities] to the Court for an advisory opinion”.

Prior to that time the Court had delivered advisory opinions in 16 instances. Yet since 1974 the Court has been asked to give only six advisory opinions, including two responding to applications for review of judgments of the United Nations Administrative Tribunal which had dealt with the terms of appointment of individual United Nations staff members. The issues dealt with in the four other advisory opinions were brought to light by disputes of some political significance.

The *Western Sahara* case (1975) involved claims by Morocco and Mauritania to sovereignty over the former Spanish territory and the incidence of the principle of self-determination. The case concerning *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (1980) related to the proposed transfer of the WHO regional headquarters in Alexandria to another country at a time when there was tension between Egypt and other Arab nations in the region. In both these cases the Court delivered a balanced opinion.

The status of the office of the PLO observer mission at the UN in New York was at issue in the case concerning the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (1988), and the Court rendered an opinion to the effect that the United States should, under the Headquarters Agreement, engage in an arbitration procedure with the United Nations before taking any action to close the office.

In the case concerning the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (1989), the Court delivered its opinion, shortly before the collapse of the CEAUCESCU Government in Romania, disapproving of that government's actions in refusing to allow a former rapporteur of the UN Human Rights Committee to leave his country to present his report in person to a meeting in Geneva.

In the light of the significant role which the Court can play by giving advisory opinions aimed at the settlement of disputes, even when these are of a political nature, proposals relating to a more frequent use of this procedure have recently been advanced from different sources. For example, in a speech made during the general debate at the 1990 Session of the UN General Assembly, Mr. SHEVARDNADZE, the then Foreign Minister of the Soviet Union, suggested by implication that, in connection with the Iraqi invasion of Kuwait, the advisory opinion of the Court might properly be sought.

Finally, the General Assembly in its 1974 Resolution “reaffirm[ed] that recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States”.

It may, of course, be difficult to ascertain whether there has been any change in the attitude of States in this respect but the increasing incidence of joint referrals of disputes by African States either to the full Court or to an *ad hoc* Chamber of the Court may be interpreted as implying that States, particularly those in Africa, have been inclined to favour the judicial settlement of such disputes as have arisen between them.

This is an account of the ICJ's caseload during the past two decades since the UN General Assembly appealed in its resolution of 1974 for a "more frequent use of the Court". The Court, which was at that time described as inactive, is now extremely busy handling about ten contentious cases of an international nature, including:

- (1) the *Jan Mayen* case, concerning the maritime delimitation between Jan Mayen, a small Norwegian island, and the Danish territory of Greenland, the oral phase of which has just been completed;
- (2) the *Libya/Chad Territorial Dispute* case filed by a special agreement of the Parties in 1990 (in which, as previously mentioned, oral proceedings will begin in a few months' time);
- (3) the *East Timor* case between Portugal and Australia, which involves the present political situation of East Timor, as well as a maritime delimitation (already agreed upon between Australia and Indonesia) in the Timor Gap;
- (4) the *Qatar/Bahrain* case, which relates, *inter alia*, to the delimitation of a maritime boundary in the Gulf—this case is in a phase devoted to questions of jurisdiction and admissibility;
- (5) the *Guinea-Bissau/Senegal* case concerning the delimitation of a single maritime boundary between these two States off the western coast of Africa;
- (6) the *Nauru/Australia* case concerning the extent of Australia's responsibility for alleged breaches of what is seen as its legal obligation to rehabilitate certain phosphate lands that were mined out on Nauru during the period of UN trusteeship—in this case the Court has in a first phase, established its jurisdiction;
- (7) the *Iran/US* case concerning the Iranian civil aircraft which was shot down in 1988 by a US cruiser in the Gulf;
- (8) the cases (in effect one case) brought last spring by Libya against the US/UK concerning the extradition of the Libyan suspects alleged to be responsible for the bombing of the Pan Am flight in 1988 over Lockerbie in Scotland. The Court, in April last year, made an Order in that case, in which it rejected the application for preliminary measures sought by Libya pending the delivery of a judgment. The substance of the case has yet to be fully submitted to the Court;
- (9) the case brought in October 1992 by Hungary against the Czech and Slovak Federal Republic in respect of a dispute concerning some constructions on the Danube which divert that international river

constituting the border between the two countries—with the dissolution of the Czech and Slovak Republic, which had not formally accepted the Court's jurisdiction, this case does not appear to have any future in its present form;

- (10) the case instituted by Iran in November 1992 against the United States with respect to the destruction of Iranian oil platforms in 1987 and 1988 by the United States Navy.

At the moment there is no case on the docket of the Court being dealt with through the *ad hoc* Chamber procedure and no request for an advisory opinion.

I would like to make a few comments on what may lie in store for the Court in the light of the experience gained during those past 20 years and of various suggestions made recently with a view to promoting a more frequent use of the Court for the maintenance of world peace.

First, in connection with the contentious function of the Court one question has been raised, namely the question of whether the existing restriction allowing States, and only States, to bring a case can be lifted to allow wider access to the Court.

There have been some suggestions which, however, are not being given much attention today, that private individuals or corporations should be given access to the Court.

More importantly, some further suggestions have been made to the effect that certain international organizations, such as the United Nations or specialized agencies, might be empowered to be parties on the same footing as States before the Court in contentious cases. Such suggestions appear to have some grounding, in the light of the fact that certain international organizations have been given a legal status similar to that of sovereign States in the international community, as was particularly indicated in the advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (1948) and that it is now normal practice for the United Nations and the specialized agencies to conclude treaties and agreements with States, while various international organizations are allowed to be parties to some multilateral conventions.

More discussions may be required on the possibility that the UN and specialized agencies as well as other international organizations may be given access to the Court as parties in contentious cases.

Secondly, it is a fact that while over the past 20 years there have been only two instances (three, if I include a case now in process) of a joint submission to the full Court of a case based upon a *compromis* or special agreement, four disputes have been dealt with by *ad hoc* Chambers which were referred to the Court with the consent of both parties. This would seem to mean that it is far easier for the States in dispute to come to a Chamber of the Court rather than to the full Court.

The Parties seemed to consider that it is easier to use the Chamber procedure, presumably because of a belief that they have a choice in the composition of what is, generally, a five-member Chamber. Whether the

Judges of the Chamber may in fact be nominated from among the 15 judges of the Court by the Parties themselves remains open to question, given the provisions of the Statute and the Rules of Court, but it is known that in each of the past four Chamber cases, the composition of the Chamber met the wishes—though not perhaps the original wishes—of the parties.

This certainly makes the use of Chambers in some ways similar to recourse to *ad hoc* arbitration. In other words, the Chamber procedure may be used as a substitute for arbitration in the sense that the bench can be virtually chosen by the Parties in dispute. The Rules of Court provide that a judgment given by the Chamber is considered as rendered by the Court. However, frequent use of the Chamber procedure may, perhaps inevitably, bring about a dispersal of the jurisprudence which ought preferably to be kept coherent and uniform by being formulated through the rendering of a judgment by the full Court. In the light of the resulting sacrifice of the proper development of a uniform and coherent jurisprudence, the question remains as to whether the use of the Chamber procedure should or should not be recommended for the purpose of encouraging the joint submission of disputes between States.

In addition, the Chamber procedures were originally instituted with a view to the speedy dispatch of business and, with that aim in mind, the Court was expected to hear and determine some cases by summary procedure. In fact, however, the experience gained from the four *ad hoc* Chamber cases shows that neither the expeditious dispatch of business nor the summary procedure which were originally supposed to characterize Chamber proceedings have in fact been realized. In the *Gulf of Maine* case, a huge volume of documents was exchanged in the course of three rounds of written pleadings, and there were 26 sittings of oral argument. In the case between El Salvador and Honduras, the volume of written documents accumulated through three rounds of written pleadings (not counting the intervention procedure) was almost without precedent and the phase of oral arguments took as many as 50 sittings, extending over a period of two months. This experience as well as the moribund condition of the Chamber of Summary Procedure shows that the advantages foreseen have turned out to be illusory because, regardless of the number of judges, proceedings before the Court can be protracted and complex.

Third, in connection with the advisory function of the Court, one needs to consider whether this function should be confined to the mere giving of opinions to international organizations on their legal problems or whether the Court should play a much wider role in giving advice for the solution of inter-State disputes.

It is recalled that, during the period of the PCIJ, most advisory opinions were sought in order to obtain some guidelines on legal principles to promote the settlement of disputes among States which could not be submitted to the Court as contentious cases. There were even, during the inter-war period, some cases in which the actual Parties in dispute were willing to seek an advisory opinion of the Court through the Council of the League of Nations. In that

respect it may well be said that, at that time, the advisory function had to some extent overlapped with the contentious case function.

The practice of the ICJ has been different, and there are very few cases in which an advisory opinion has been sought in connection with an existing dispute between States. The question of whether this course of action, in other words the function aimed at the settlement of disputes, should in future be envisaged as a type of advisory function of the Court is one that requires careful consideration.

The former UN Secretary-General, Mr. PÉREZ DE CUÉLLAR, in his General Report on the Work of the Organization at the 1990 Session of the General Assembly, asked that the authority to request advisory opinions be extended to the office of the UN Secretary-General, considering that almost all situations bearing upon international peace and security require the strenuous exercise of his good offices. This appeal, if granted, may or may not require an amendment to the UN Charter, depending on the interpretation of its Article 26, as to whether the "other organs of the United Nations" which could, by permission of the General Assembly, be allowed to ask for an advisory opinion, do or do not include the Secretary-General. The Secretary-General's proposal to facilitate access to advisory opinions may, however, be noted with interest.

Fourth, if the Court is to become busier now that it is called upon to deal with an increasing number of contentious cases, either as a full Court or through the medium of *ad hoc* Chambers, as well as with requests for advisory opinions, one may well ask whether it can maintain its present internal judicial practice, which in fact inhibits it from hearing and deciding more than two cases per year.

In fact, under the present practice, every case takes a few years to be completed. The procedures of the Court are governed by the Rules of Court, last amended in 1978, and the 1976 Resolution Concerning the Internal Judicial Practice of the Court. Most contentious cases in the past have required two (or, sometimes, even three) exchanges of written pleadings. The phase of oral arguments has taken longer to complete. For instance, the *Tunisia/Libya* case in 1982 required 30 sittings of oral argument, the *Libya/Malta* case in 1985 32 sittings. After the hearings, several months are required for the Court to complete the text of the judgment, which now generally reaches 100 pages or more in print, and is accompanied by a number of separate or dissenting opinions.

If this procedure is to be followed it will be physically impossible to dispose of more than two or three cases per year. The Court faces a paradox, that is, whether it should handle more cases in response to requests from the international community, either in its contentious or advisory function, or whether it should maintain its very cautious procedures for applying international law as scrupulously as possible in each particular case.

I have just exposed four distinct problems which the ICJ faces today in

connection with the expectations of the world community for the more frequent use of the Court in promoting means and methods for the peaceful settlement of disputes between States, the subject for a programme under the UN Decade of International Law.

Three of the problems I have outlined hinge upon the desirability of enlarging the Court's jurisdiction or widening the doors of access to the Court. The fourth relates to its capacity to meet any increased demands that might result from such innovations, if not indeed to manage its workload under the status quo.

I have dealt with all four in the same context because it may well be precisely on account of the meticulous, but time-consuming, procedures followed by the Court that the world community had developed sufficient confidence in its decisions to consider entrusting it with a broader role.