Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement*

*Ram Prakash Anand**

I. Law and Peace

If peace without law is unthinkable, peace under law is much to be striven for and desired. In humanity's long struggle for peace, one of the oldest, most important and appropriate, approaches to peace has been the peaceful settlement of disputes on the basis of law. In all civilized societies, disputes between individuals are settled in courts under the rule of law. But the law of jungle still prevails as the ultimate mechanism to settle disputes between nations. If we want to avoid the blood-bath of continuous warfare we see all around in our international society, we should be prepared to resolve our disputes through impartial third-party settlement, if direct negotiations between parties fail. That is the only civilized way to settle disputes. Supremacy of law within nations ensures freedom of individuals. Supremacy of law in the community of nations, it is hoped, will free mankind from the dread of endemic violence and destruction that we see and hear everyday all over the world.

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II. International Law Deficient: "Pyramid without a Base"

But as regards institutions and procedures for adjustment of disputes, international law has been woefully deficient — a jungle law imperfectly ameliorated by a fragmentary and hesitant progress in the direction of a legal order. The precariousness of the present situation can be visualized from the fact that whereas it is difficult to establish arbitration courts — which in any case remain *ad hoc* and impermanent — and the Permanent Court of Arbitration has been little used, we have an ICJ, which is sitting "precariously at the peak of a pyramid which has no enduring base. To say that the institutions of which the pyramid consists are primitive and incomplete is to speak mildly."[1] Although, as we shall see, the jurisdiction of the World Court has been progressively extended and it has gained tremendous and well-deserved prestige and confidence by its excellent and conscientious work, it is unable to realize fully "the potentialities of its greatness", it is pointed out, because of the insecure foundations upon which its enterprise must rest.[2] It needs, it has been suggested, a more enduring base if it is to fulfil the hopes which it has inspired. For, as Edwin Dickinson put it,

> " ... building peace requires effort from top to bottom. Reflecting some aspects of the task, one is tempted to say from bottom to top. Clearly the overall objective must be something better coordinated and more nearly complete. Work on the foundations may be more arduous and less dramatic, but ultimately such work must be done and done well if confidence is to be cultivated and the good order extended."[3]

III. Proliferation of New International Tribunals

Although it has been done rather haphazardly and "without any overall plan", there has been a proliferation of several new international tribunals during the last 50 years. Besides, several *ad hoc* arbitration tribunals which have been set up, and the so-called "commercial arbitrations" held under established rules such as UNCITRAL or ICSID, or

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1 See, E. Dewitt Dickinson, *Law and Peace*, 1951, 113.

2 Dickinson, see above, 121.

3 Dickinson, see note 1, 121–122.

under municipal arbitration law, quite a number of other international judicial or quasi-judicial institutions have been established, such as the Iran-United States Claims Tribunal, and new mechanisms under the auspices of the WTO.

There are too many such institutions to be enumerated. At the regional level, Europe has its European Court of Justice, its Commission and the Court of Human Rights, and a European mechanism for conciliation and arbitration set up within the framework of the OSCE.

Several administrative tribunals have been established to deal with disputes arising between international organizations and their staff: the ILO Administrative Tribunal, the UN Administrative Tribunal, the World Bank Administrative Tribunal, and so on.

The horror of war in Yugoslavia and Rwanda have led the UN Security Council to create two International Tribunals for crimes committed in the former Yugoslavia and in Rwanda. A new Permanent International Criminal Court is now proposed to be established.[4]

Even more interesting for us today is the International Tribunal for the Law of Sea which has been established under the Montego Bay Convention concluded in 1982 as part of a comprehensive system for the settlement of disputes laid down in the Convention. The Convention came into force in November 1994. Although there is a considerable overlapping in the jurisdictions of the Hamburg Tribunal and the ICJ[5] the Law of the Sea Tribunal can deal with some important classes of disputes[6] that probably could not go before the ICJ.

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[4] See, G. Guillaume, "The Future of International Judicial Institutions", *ICLQ* 44 (1995), 848 et seq., (849). See also in this respect on the proposed court for Sierra Leone the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, Doc. S/2000/915 of 4 October 2000.

[5] C.A. Fleischauer, "The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg", *Max Planck UNYB* 1 (1997), 327 et seq.

[6] Disputes like the prompt release of vessels and crews under article 292 of the Convention on the Law of the Sea and in the matter of provisional measures under article 290 para. 5, and disputes concerning the international sea-bed area as provided in Part XI of the Convention. See Judge P. Chandrasekhara Rao, "The ITLOS and its Guidelines", *IJIL* 38 (1998), 371 et seq.

IV. No Structured Relationship, or System Between Different Kinds of Courts

But despite all this proliferation of Courts, there is no "structured relationship" or "hierarchy or system" between them. As Judge R.Y. Jennings, President of the ICJ, pointed out, "they have just appeared as need or desire or ambitions promoted yet another one".[7] As a result:

> "In this particular respect, contemporary international law is just a disordered medley. Suffice it to say that it is very difficult to try to make any sort of pattern, much less a structured relationship, of this mass of tribunals, whether important or petty. It is sometimes difficult to find out what is going on, much less to study it."[8]

This lack of "structured relationship" among different kinds of courts in the international system, where diverse organs exercising parts of the judicial system are not related to each other are, it is sometimes pointed out, a rather disturbing trend which may lead to conflicts of jurisdiction or contradiction in decisions increasing the indetermination rather than the determination of law.[9] Some well-meaning scholars and judges are concerned about "the dangers that international law as a whole will become fragmented and unmanageable."[10]

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7 R.Y. Jennings, "The Judiciary, International and National, and the Development of International Law", *ICLQ* 45 (1996), 1 et seq., (5).

8 Jennings, see above, 5.

9 H. Thirlway, "The Law and Procedure of the International Court of Justice 1960–1989", *BYIL* 69 (1998), 1 et seq. But cf. S. Rosenne who points out that "there is no evidence to support the view that multiplicity of international judicial institutions for the settlement of disputes seriously impairs the unity of jurisprudence (a difficult proposition at the best of times). The Convention requires ITLOS to perform tasks that are beyond the capacity of the International Court under its present Statute. If only for that reason the cautious observer will hesitate before crying redundant." S. Rosenne, "Establishing the ITLOS", *AJIL* 89 (1995), 806 et seq., (814); see also A. Yankov, "ITLOS: its place within the dispute settlement system of the UN Law of the Sea Convention", *IJIL* 37 (1997), 356 et seq.

10 Jennings, see note 7, 60.

V. Jurisdiction of International Courts

Besides the problems relating to the creation or establishment of different structures of peace and their relationship with each other, the most important issues relate to the jurisdiction of these courts. It is all too well-known that no state is under an obligation to submit its disputes to any third party settlement without its own consent. The ICJ has made it clear beyond any doubt that the jurisdiction of an international court "depends on the will of the parties" and that the jurisdiction exists in so far as the states have accepted it.[11]

Leaving aside *ad hoc* arbitration and other specialized international criminal tribunals on which jurisdiction is conferred by special agreements relating to their establishment, it may be mentioned that when the Permanent Court of International Justice was established in 1920 and again when its Statute was revised and the new ICJ was formed in 1945, general compulsory jurisdiction could not be conferred on the Court. The obligatory jurisdiction of the Court could be accepted either under treaties, bilateral or multilateral, or by unilateral declarations under the optional clause (Article 36 para. 2 of its Statute). The optional clause constituted an invitation to states to take courage and undertake this commitment even if only for a trial period and even if only for a limited range of disputes. But the unilateral form of these declarations and complete freedom assumed by states left them free to exclude wide matters from coming before the Court. This also made state practice under the optional clause dependent on international confidence in the Court. After 1920, as confidence in the Court grew, many states accepted its jurisdiction. In all 50 states accepted the statute.[12]

VI. Permanent Court of Justice largely a "European Court"

Although the Permanent Court of International Justice had proved its worth and was the subject of general and well-merited praise at the San Francisco Conference for its decisions and advisory opinions — between 1922 and 1940 the Court pronounced 29 judgements and gave 27

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11 See, R.P. Anand, quoting numerous cases in the World Court, *International Courts and Contemporary Conflicts*, 1974, 194 et seq.

12 H.J. Schlochauer, "Permanent Court of Justice", *EPIL* 1 (1980), 163 et seq.

advisory opinions — general compulsory jurisdiction could not be conferred on the new Court which replaced it.[13] The Permanent Court truly represented the international community of its time. It was largely a "European Court" with a majority of European judges (with the notable exception of post-revolutionary Russia) in addition to judges from the United States, some Latin American Republics, as well as from China and Japan. The Court also reflected in its pronouncements, it is said, "the legal outlook of the Eurocentric community, which was strongly imbued with nineteenth century positivism."[14]

VII. International Court of Justice

The situation had entirely changed when the Court started functioning in its new reincarnation as a part of the UN Organization under its new name, the International Court of Justice. Since it started functioning in the late 1940s, there was a general deterioration in the international situation. The division of the world into two main groups and the advent of the cold war led to a general weakening of the position of law in international relations. Not only was there a totally negative attitude of the Soviet Union and its allies towards the Court, but there was a general "decline of the optional clause" in the latter part of the 1940s and 1950s.[15] Several Western and other countries, led by the United States, accepted the optional clause jurisdiction with such wide and far-reaching reservations that it amounted to negation of the Court's jurisdiction.[16]

The same trend has continued to this day. Although 23 countries which had accepted the jurisdiction of the Permanent Court were deemed to have accepted the jurisdiction of the ICJ under Article 36 para. 5 of its Statute in 1945, not many more countries have come for-

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13 See for an interesting comparison between jurisdiction conferred on the PCIJ and the ICJ, P. Couvreur, in: A.S. Muller/ D. Raic/ J.M. Thuranszky (eds), *International Court of Justice: its Future Role After Fifty Years*, 1997, 96–97.

14 G. M. Abi-Saab, "The International Court of Justice as a World Court", in: V. Lowe/ M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, 1996, 4.

15 See C.H.M. Waldock, "The Decline of the Optional Clause", *BYIL* 32 (1955/56), 244 et seq.

16 See Anand, see note 11, 53 et seq.

ward to accept the jurisdiction of the new Court. In fact 17 countries which had accepted the jurisdiction of the PCIJ under its optional clause, let their declarations lapse or terminated them. In 2000, out of 189 members of the international judicial community around 56 states had accepted the jurisdiction of the Court under Article 36 para. 2 of its Statute. Only nine without reservations.

It is interesting to note that President Mikhail Gorbachev of the former Soviet Union called upon the permanent members of the Security Council to set an example by submitting to the ICJ. This aroused great interest and the Five held a number of meetings at legal advisers level with a view to drawing up a list of subjects which could be submitted to the Court in the event of a dispute. But no agreement could be reached.[17]

Compulsory jurisdiction of the Court may also be accepted through compromissory clauses in international treaties. But we find the same hesitation in accepting the Court's jurisdiction among most of the countries.

VIII. Jurisdiction of the Law of the Sea Tribunal

There is a similar lack of enthusiasm in accepting the jurisdiction of the only other permanent court which has been recently created, the International Tribunal for the Law of the Sea which should have a great potential in the settlement of disputes relating to the law of the sea. Since not all countries were equally enthusiastic about this new Tribunal, the 1982 Law of the Sea Convention identifies in Part XV other means of settling disputes and leaves it to states to choose between the Tribunal, the ICJ, and various forms of arbitration. In 2000, out of 134 states which have ratified the Law of the Sea Convention, 29 have made a choice of procedure under Section 2 of Part XV.[18] The rest are deemed to have accepted arbitration as the method of settlement of disputes.

Further, states are not obliged to submit to the Tribunal their disputes which they consider of vital national concern. Thus, practically all disputes arising out of the exercise of sovereign rights or jurisdiction by

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[17] See President of the ICJ Judge Bedjaoui, in his address to the General Assembly on 11 October 1995.

[18] For further details see, Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1999, United Nations 2000, 212 et seq.

a state in the EEZ concerning marine scientific research and fisheries are excluded from the compulsory procedures. Moreover, a state may declare in writing that it does not accept any compulsory procedure with regard to, *inter alia*, disputes concerning boundary delimitation, military activities and law enforcement activities in regard to marine scientific research and fisheries in the EEZ, as well as disputes in respect of which the Security Council is exercising its functions under the Charter.[19]

IX. International Court of Justice in Crisis from the very Beginning

From the very beginning the ICJ was portrayed as in crisis as a result of the lack or loss of confidence by one or the other part of the international community. None of the big powers put much faith in the Court and avoided it as far as possible. If the United States included the self-judging Connally reservation relating to domestic jurisdiction in its declaration under the optional clause which reduced the acceptance to a mere nullity, the United Kingdom revised its declaration four times within a few years, each time changing its reservations to suit its convenience.[20] France withdrew its declaration after the *Nuclear Test* Cases in 1974.

After 1960, with the acceleration of the decolonization process, as numerous Asian and African countries became independent, "the 'crisis of the Court' was perceived and analysed in terms of the distrust manifested by newly independent States towards the Court."[21] Several explanations were sought to be given for this supposed distrust on the part of the Asian-African states in the judicial process and their preference for the diplomatic procedures. Besides their cultural differences and national traditions, the lengthy and onerous character of the judicial procedure, under representation of the Asian-African states on the bench, and the dissatisfaction of the new states with large parts of classical international law which legitimized their subjugation and generally favoured the interests of the erstwhile colonial powers, were given as

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19 See Law of the Sea Convention, Part XV, Sections 2 and 3; see also Guillaume, see note 4, 855; S. Oda, "Dispute Settlement Prospects in the Law of the Sea", *ICLQ* 44 (1995), 863 et seq.

20 Anand, see note 11, 39.

21 Abi-Saab, see note 14, 5.

the reasons for the hostile attitude of the new states towards international adjudication.[22]

The strongest blow to the confidence in the Court, especially amongst the Asian-African states, came in 1966 when the Court, by the casting vote of the President[23], after nearly six years of proceedings costing millions of dollars, more than a dozen volumes of written proceedings, almost 300 hours of oral testimony, and more than 100 Court sessions, decided — or refused to decide — the *South-West Africa* Cases by declining to go into their merits on the basis of a matter of "antecedent character" which was not even argued by either of the parties. This most controversial decision — or lack of decision — frustrated and enraged politically conscious Africans, undermined the confidence of newly independent countries in the Court and its capacity to do justice and thrust the Court into an acute crisis.[24] The African states, in particular, adopted "the cynical view that the ICJ was a white man's Court, dispensing white man's justice."[25] It also evoked an extended and critical debate on the role of the Court in the General Assembly, leading to readjustment in the composition of the Court to make it more representative of the various parts of the international community.

There was a steep decline in the work of the Court. So steep was the decline that for some time — from 21 June 1971 to 30 August 1971 — there was not a single case pending before the Court.[26] For almost the next three years after 1971 it had little to do and "it was the subject of some humour about there being few cases and many judges."[27]

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22 See R.P. Anand, "Attitude of the 'new' Asian-African countries towards the International Court of Justice", in his *Studies in International Adjudication*, 1969, 53 et seq.; Abi-Saab, see note 14, 5.

23 The Court being equally divided 7 votes to 7. See *South-West Africa* Cases (Second Phase), ICJ Reports 1966, 6 et seq.

24 Anand, see note 22, 119.

25 A.O. Adede, "Judicial Settlement in Perspective", in: Muller/ Raic/ Thuranszky, see note 13, 51.

26 See R.P. Anand, "Role of International Adjudication", in: L. Gross, *The Future of the International Court of Justice*, 1976, 2.

27 See Judge Shahabuddeen, "The World Court at the Turn of the Century", in: Muller/ Raic/ Thuranszky, see note 13, 20.

X. Self-Assessment and Change on the Part of Court

One of the most important consequences of this crisis was a new self-assessment, a new self-awareness and change of attitude on the part of the Court itself. While earlier the Court was reserved in its relations with the UN, after this crisis the Court missed no opportunity to emphasize that it was part of the United Nations and its principal judicial organ, and put forward the law and principles of the Charter.[28] The Court also revised its rules of procedure twice to make itself more efficient.[29]

In 1971 the Court gave its Advisory Opinion in the *Namibia* Case[30] declaring illegal the continued occupation of Namibia by the Republic of South Africa following the termination of its mandate. The Court's stock further rose in the eyes of African countries when in 1975 it gave its Advisory Opinion in the *Western Sahara* Case.[31] In this case the Court had occasion to discuss further the principles of decolonization and self-determination and made an important pronouncement on the concept of occupation as a means of acquiring title to territory in Africa.

XI. International Court Regains Confidence

The Court was beginning to regain its confidence, especially the trust of the African countries. The confidence in the ICJ reached its high water mark after its final judgement on the merits on 27 June 1986 in the *Nicaragua* Case. Nicaragua appeared before the Court on the basis of its own and US declarations under the optional clause and charged that the United States was "using military force against Nicaragua and intervening in Nicaragua's internal affairs in violation of Nicaragua's sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law." The Court unanimously rejected United States objections and boldly held that it had jurisdiction to entertain the case on merits.[32] Over the

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28 Abi-Saab, see note 14, 6.

29 Guillaume, see note 4, 851.

30 ICJ Reports 1971, 16 et seq.

31 ICJ Reports 1975, 12 et seq.

32 ICJ Reports 1984, 415–419.

strongest objections of the United States, which withdrew from the case and cancelled its optional clause jurisdiction, the Court gave a decision on merits holding the United States responsible for its actions, as charged by Nicaragua.[33]

This was indeed a bold decision and the Court was well aware of the political risk it was taking in deciding the dispute against a Super Power and leader of the Western group of states even if it was "upholding the basic principles of contemporary international law and the Charter in the way it did in its judgement, and which it could not help doing as a court of law."[34]

This led to what was supposed to be a new crisis. Earlier it was said that the Third World had no confidence in the Court. But with this judgement, some people "started to contend that it is now the Western world that no longer has confidence in the Court, where it risks systematically being put into the minority."[35] France had already withdrawn its jurisdiction under the optional clause after the *Nuclear Test* Cases. The United Kingdom was the only permanent member of the Security Council which had accepted optional clause jurisdiction which itself was full of gaps and reservations. The Court had, therefore, decided the *Nicaragua* Case at a very high cost, it was feared.[36]

XII. Increase in Court's Work

But these fears proved to be short-lived and unnecessary panic. The Court had indeed given proof of its impartiality, objectivity and independence. Even if, therefore, it would suffer in the volume of its work in the short run, it was bound to increase its credibility.

Furthermore, with the collapse of communism, international tension between the Eastern and Western bloc decreased and cold war between them subsided. This new period was ushered in by a momentous event, the collapse of the Berlin Wall on one memorable day in 1989. "Other walls", as Judge Bedjaoui told the General Assembly in his address on

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33 ICJ Reports 1986, 14 et seq.

34 Abi-Saab, see note 14, 6.

35 Ibid.

36 See R. P. Anand, "The World Court on Trial", in: R.S. Pathak/ R.P. Dhokalia, *International Law in Transition: Essays in Memory of Judge Nagendra Singh*, 1992, 253 et seq.

11 October 1995, "erected in the minds of world's leaders and which previously constituted so many impediments to the Court's work", then began to fall.[37]

Charles de Visscher said, "general and prolonged political tensions are one of the gravest obstacles to regular recourse to international justice".[38] Although tension is not altogether gone, it is much less prominent and much less debilitating.

All these factors have led to a tremendous increase in the Court's work. In fact the Court was never so busy and has never had so many cases simultaneously in its docket. Even those who were sceptical yesterday are beginning to see the Court's potentiality. As President Mitterand of France, some ten years after France had withdrawn its declaration under the optional clause, said in 1984 in an address in the Great Hall of the Court:

> "[T]here can be no civil peace without judges, no peace in our international society without judges who are chosen at that level and represent the powerful moral and legal force of the Hall where all the peoples of the world gather."[39]

President Gorbachev of the Soviet Union in an article on "The Realities and the Guarantees of a Secure World", published in Pravda on 17 September 1987, said:

> "One should not forget the capacities of the International Court either. The General Assembly and the Security Council could approach it more often for consultative conclusions on international disputes. Its mandatory jurisdiction should be recognized by all on mutually agreed conditions. The permanent members of the Security Council, taking into account special responsibility, are to take the first step in that direction."[40]

The Court is now overloaded with judicial work. Judge Jennings, President of the Court, said to the General Assembly in his 1991 address:

> "Glancing at this list of cases, we can say one thing with assurance: this is indeed now a World Court, exhibiting in its daily work that quality of universality which is also a feature of the General Assem-

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37 See Address by President Bedjaoui to the General Assembly on 11 October 1995.

38 C. de Visscher, *Theory and Reality in Public International Law*, 1968, 369.

39 Quoted in Shahabuddeen, see note 27, 24.

40 Quoted in Adede, see note 25, 62.

bly. I think there is every reason to believe that this new buoyancy of the Hague Court, which has been developing now for some time, is set to continue. A reason for that belief is that there is perhaps now a greater understanding among Governments of the role that an international Court can and should play in their relations with one another."[41]

It may also be mentioned that a Legal Aid Fund was established by the Secretary-General of the United Nations in 1989 to help the poor countries pursue their cases before the Court. This is an excellent move and can help some countries seek justice at the international level which many a time is beyond their reach.

XIII. Chambers of the Court

The ICJ has also adapted itself to the new situation under its new rules revised in 1978. The Court offers access by states involved in a case to chambers of the Court consisting of a group of judges rather than the whole Court. "The number of judges to constitute such a chamber" is determined by the Court with the approval of the parties (Article 26 para. 2 of the Statute), and article 17 para. 2 of its revised rules states, "when the parties have agreed, the President shall ascertain their views regarding composition of the chamber, and shall report to the Court accordingly." According to Article 27 of the Statute, a judgement by a chamber "shall be considered as rendered by the Court."

The chambers of the Court, it has been pointed out, offer "an attractive half-way house between international arbitration and adjudication", because it gives the states a more attractive "forum by permitting them a voice in the choice of judges."[42] Proceedings before a chamber would be much less expensive than the establishment and funding of an arbitral tribunal.[43]

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41 *ICJ Yearbook* 1991–1992, 207. See also Judge Shahabuddeen, see note 27, 22 et seq.; K. Highet, "The Peace Palace Heats Up: the World Court in Business Again", *AJIL* 85 (1991), 646 et seq.

42 Jimenez de Arechaga, "The Amendments to the Rules of Procedure of the ICJ", *AJIL* 67 (1973), 1 et seq., (2).

43 See S.H. Schwebel, "Reflections on the Role of the International Court of Justice", *Wash. L .Rev.* 61 (1986), 1061 et seq.

But despite the attractiveness of the chamber procedure for its "speed and informality" as well as the opportunity it provides to the litigating parties to choose certain members,[44] the system of chambers has been strongly criticized on several grounds. Firstly, it is pointed out, it reduces "the ICJ to another Permanent Court of Arbitration, a mere list of judges or arbitrators from whom the parties pick and choose those they want to sit in their case." It diminishes the "institutional character of the Court and the stability and continuity of its composition." Moreover, as happened in the first chamber constituted in the *Gulf of Maine* Case where "the parties insisted on having a chamber composed exclusively of Western judges," this would endanger "the universal character of the Court".[45] Luckily, this pitfall was avoided in the other three cases referred to chambers so far.[46]

Fears have also been expressed that the chamber system may fractionalize the Court, disrupting the universal development of international law.[47]

Apart from these theoretical objections, Judge R.Y. Jennings has referred to some practical difficulties for the Court and the waste of resources that chamber procedure leads to. As he pointed out:

> "The members of the Chamber are also at the same time members of the full Court. If, therefore, a chamber has one of these major cases on hand, the members of the Court who are also members of the chamber can do little else until the case is disposed of. In other words, whilst the chamber is working full time over its case, the rest of the Court in effect has to mark time until the chamber case is over."[48]

At this time when the full Court has a long list of important cases pending, he said, it "would seem intolerable that those cases should be held up by a chamber case involving perhaps only three of the members

44 Jennings, see note 7, 38.

45 Abi-Saab, see note 14, 9; Jennings, see note 7, 38.

46 *Frontier Dispute* (Burkina Faso vs. Mali), ICJ Reports 1985, 6 et seq.; *Elettronica Sicula* (United States vs. Italy), ICJ Reports 1987, 3 et seq.; *Land, Island and Maritime Frontier Dispute* (El Salvador vs. Houduras), ICJ Reports 1987, 10 et seq.

47 See Anand, see note 36, 264.

48 Jennings, see note 7, 38–39.

of the Court, but involving also just as much work for the Registrar and staff as a full Court case."[49]

XIV. Encouraging Trend

As we have seen, there has been a lot of judicial activity during the last few years. Several new international tribunals have been created and we are sitting in the new building of the newest permanent court which has been established for the settlement of disputes under the Law of Sea Convention. Although extensive compulsory jurisdiction has not been conferred on this Tribunal for the Law of the Sea, nor for that matter even on the ICJ, the case load in the latter Court shows increasing interest of states in the judicial settlement of international disputes. There have of course been swings before in the work-load of the ICJ and certainly variations will occur in the future. But an awareness seems to be increasing of the need to recourse to judicial settlement as a useful procedure for resolving disputes in a civilized way, in much the same way as individuals do within a domestic system. States seem to be appreciating more and more the dictum of the PCIJ that, "judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the parties."[50]

XV. Limitations of the Judicial Process

It must be realized, however, that the judicial process has its own limitations. Law is not a panacea to solve all the problems of the international society. As the Court itself said in the *Northern Cameroon's* Case that even if it finds that it has jurisdiction,

> "the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case on the one hand, and on

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[49] Jennings, ibid.

[50] *Free Zones* Case, Order PCIJ Series A, No. 22 (1929), 13. See also Shahabuddeen, see note 27, 23.

> the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."[51]

It must be confessed that judicial procedure cannot, on the plane of mere fact, be a substitute for war. The judicial approach is limited by the fact that, given the fundamental nature of major disputes that arise in international relations and the clashes of political and economic interests, a judgement does not constitute a settlement. There is no doubt that the much-disputed line between legal and political questions is purely a subjective phenomenon of the minds and wills of the disputants. But the fact still remains that many issues will be as far from settlement after a judge has said all that a judge can properly say as they were before any such pronouncement. It must be admitted that by the very nature of international life, not all disputes can or will be submitted to the international courts. The problem is not that the courts cannot decide the disputes because of their inherent "political" nature, but rather that the states won't be prepared to submit disputes or to accept judicial decision in cases which involve their vital interests.[52] Professor David Forsythe correctly stated:

> "The ICJ remains marginal in international relations because of the 'up-stream' concern by States that their 'vital' interests not be entrusted to independent judges who will decide disputes with reference to legal rules. Even when the Court finds that the States have given their consent to ICJ jurisdiction, if the resulting judgement is bothersome enough, States from Albania to Iran, from Libya to the US will display defiance rather than compliance. That most States have complied with ICJ and PCIJ judgements means primarily that States gave their consent for World Court adjudication previously because the dispute was not seen as 'vital'".[53]

The assertion that if general compulsory jurisdiction could be established, the problem of war and illegal force would be solved, said Judge Jennings, rests:

> "upon an egregiously mistaken assumption that wars and other resorts to force are about what international lawyers would recognize

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[51] ICJ Reports, 1963, 15 et seq., (29).

[52] See J.L. Brierly, "Vital Interests and the Law", *BYIL* 21(1944), 51 et seq. See also L.B. Sohn, "Expulsion of Political Disputes from Judicial Settlement", *AJIL* 38 (1944), 694 et seq.

[53] D.P. Forsythe, "The International Court of Justice at Fifty", in: Muller/ Raic/ Thuranszky, see note 13, 397.

as legal 'disputes' which would answer to the adversarial procedure of a court of justice. Some uses of force, or resort to war have indeed had legal disputes at the core of the matter – notably disputes about boundaries or entitlement to territory, both land and sea – but many again have not. Neither of the World Wars have even remotely lent themselves to so simplistic an analysis."[54]

So long as the world remains as unorganized as at present, and the security and welfare of each state are left in fact to depend upon itself alone, world history can not be turned into a Court procedure. Similarly, when states demand a change in the law, which they challenge as obsolete, a decision according to law can hardly help in solving the dispute. Indeed, the authoritative declaration of legal rights and wrongs may even impede settlement by encouraging the rigidity of one side in the controversy which might have been settled by a political compromise.[55] To again quote Judge Jennings, who said about grave disputes which are neither simply legal nor simply political:

"[A] Court, in deciding the legal question in legal terms, might be prejudicing or indeed frustrating decisions of which it may not itself be in a position even to understand, other than perhaps marginally. The Court has no expertise or even experience in the political, military and strategic criteria that a political body would expect to apply to this kind of political decision."[56]

He added that sometimes it is better not to settle at all but to *manage* the dispute and referred to "the successful treaty regime for Antarctica which wholly depends upon an agreement *not* to settle the underlying disputes."[57]

It has been correctly pointed out that generally "States have mutual, vested interests in settling (or managing, or just continuing) disputes out of Court. It is because of States' perception of what is in their national interest, i.e. freedom of manoeuvre as compared to submission to a workable and effective rule of law – that the ICJ has averaged only about three cases per year over the last 50 years."[58]

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54 Jennings, see note 7, 53.

55 Anand, see note 11, 231 et seq.

56 Jennings, see note 7, 31.

57 Jennings, ibid., footnote. Emphasis in original. See a detailed discussion of this dichotomy of legal and political disputes, Anand, see note 11, 230–241.

58 Forsythe, see note 53, 401.

XVI. Wider Compulsory Jurisdiction Helpful

But though compulsory adjudication in comparatively ordinary, non-political, so-called "run of the mill" cases is not an effective substitute for war, that does not mean that it is not in itself a powerful constituent element of peace. While admitting that adjudication must be supplemented by approaches of a different order and that other more informal political methods of pacific settlement of international disputes must be provided, it is essential to increase the jurisdiction of the courts. Even by solving minor day to day disputes, they can help create a law habit among states and create an atmosphere of peace. By deciding these ordinary economic, business or even boundary disputes without much fanfare, they can render a most useful service, as courts do in the traditional field, because by far the greatest number of disputes relate to these matters which, if peacefully settled, can encourage smooth intercourse between states in the present inter-dependent world. It has been well said by an experienced judge:

> "After all, it is the habit of living under the law, and with habitual and normal recourse to the agencies of the law, that will make violence and aggression in defiance of the law more difficult. What we need is not just a crisis law but a law for normal existence."[59]

Basically the principal function of law "is to provide clear principles and rules for the routine ordering of a society by the rule of law".[60]

XVII. Conclusions

Institutions and procedures for the settlement of disputes under law are at once the hope and despair of all those who reflect seriously upon relations among nations. One of the basic functions of a civilized legal order is a system of courts with jurisdiction to decide every dispute that might arise. In the international society, besides *ad hoc* arbitration courts, we have a number of courts established during the last 50 years but without any regular plan or structured relationship. We have the ICJ which is truly a World Court without any regional restriction as to subject matter in its contentious jurisdiction. But it is restricted as to parties of cases which come before it. Under Article 34 para. 1 of its

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59 Jennings, see note 7, 54.

60 Ibid.

Statute, "only States may be parties in cases before the Court." Although, individuals can and do enjoy "rights" directly under modern international law, the Hague Court is increasingly cut off from a growing and very important part of the international law system. Neither multilateral corporations, nor NGOs, nor even the United Nations itself can appear before the Court as applicants or respondents. This is an anachronism created in 1922 which has not been rectified. There is a dilemma. According to a former President of the World Court, if Article 34 para. 1 of that Statute is modified, it "would probably produce a flow of cases with which the Court, with its present staff, organization, and resources, could not possibly cope."[61]

Another possible remedy is of course the creation of other kinds of international tribunals and courts which has been done with a lot of enthusiasm. Although the proliferation of new, specialized and permanent courts, like the Law of the Sea Tribunal, are welcome, they all have limited jurisdiction, limited sometimes by region, sometimes by subject matter, sometimes by both. But because of their rather haphazard and unplanned growth, there is a serious danger that international law may "become fragmented as each tribunal ... will tend to produce a specific variety of international law."[62]

In a developed system of courts, as we find in most states, there are legally defined relationships between courts, whether legally defined subordination or legally recognized independence. There is usually one court at the top of the hierarchy. It is suggested that "the ICJ, being the principal judicial organ of the United Nations, and moreover having a general jurisdiction over all questions of international law, would seem to apt to fill this role."[63] But we will have to solve the problems of Article 34 para. 1 of the Statute, and its relationship with the specialized tribunals.

Although far-reaching jurisdiction has not been conferred on the International Court, nor is it likely to solve important economic or political problems involving vital interests of states, it is still one of the most successful organs of the United Nations. It is too much to expect states to accept unqualified compulsory jurisdiction immediately. The maxim "calculate the limits of the possible" should be kept in mind. The busier the Court gets, the better it is for the world society because it can help promote a more peaceful and less lawless world. It can cer-

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61 Jennings, see note 7, 38–39.

62 Abi Saab, quoted by Jennings see note 7, 61.

63 Jennings, see note 7, 63.

tainly help reduce tension between states by sorting out intricate facts and clarifying complicated law in numerous disputes that arise between them. Let us remember that each day of peace is a time for the extension of law and every extension of law a reinforcement of peace.