

# THE INTERNATIONAL COURT OF JUSTICE: A PROPOSAL TO AMEND ITS STATUTE

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## I. INTRODUCTION

In this nuclear age the need for pacific settlement of disputes is more acute than ever.<sup>1</sup> Although negotiation, mediation, and diplomacy remain the principal modes of problem solving, the need for providing effective third-party adjudication as an alternative to war can hardly be overemphasized.

This article traces the evolution of the International Court of Justice (ICJ), critically examines certain provisions of its statute, and proposes some amendments.

## II. THE INTERNATIONAL COURT OF JUSTICE: HISTORICAL BACKGROUND

In 1840, after having observed the immense suffering that humanity had undergone when sovereigns, in the name of "national interests," resorted to war, William Ladd wrote an essay.<sup>2</sup> The essay advocated a peaceful route to the settlement of disputes and proposed what in his days must have seemed a far fetched idea—that a Court of Nations be established wherein disputes should be settled "without resort to arms".<sup>3</sup> The idea of settling disputes peacefully finally caught on with Czar Nicholas II of Russia who, in 1899, convened the "First Hague Peace Conference,"<sup>4</sup> which resulted in a "Convention for the Pacific

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1. The nuclear weapons in control of the superpowers are capable of destroying the planet Earth many times over. Yet the nuclear weapon stockpiling continues.

2. W. Ladd, *Essay on a Congress of Nations for the Adjustment of International Disputes Without Resort to Arms* (1840).

3. *The International Court of Justice: A Key to World Peace*, 14 GEO. WASH. L. REV. 480 (1945), citing Scott, *The Permanent Court of International Justice—Its Origin and Nature*, 15 GEO. L.J. 297, 301 (1927).

4. *The International Court of Justice: A Key to World Peace, Id.*, at 480 n.4.

Settlement of International Disputes”.<sup>5</sup> The Convention recommended that states try “good offices and mediation”<sup>6</sup> for resolving disputes. It further recommended that in situations where “*neither honor nor vital interests*”<sup>7</sup> were involved, the disputing states should set up a “Commission of Inquiry” to determine the facts. It then laid out a framework for arbitration and “organized a Permanent Court of Arbitration”.<sup>8</sup> In 1907, another Convention was concluded at the “Second Hague Peace Conference”. This Convention, in addition to reaffirming the peace provisions of the First Convention, enumerated the types of disputes the Permanent Court of Arbitration was competent to handle.<sup>9</sup> The jurisdiction of the Court was not obligatory; “every contracting nation had a veto power”.<sup>10</sup>

Notions of “honor” and “national interest” overcame the Hague peace process, and “peace-loving nations” plunged head long into the First World War. At the end of this tragic human drama, the League of Nations was formed.<sup>11</sup> With vivid memories of the destruction caused by war, the nations again agreed that “whenever any dispute shall arise. . . *which they recognize to be suitable for. . . arbitration or judicial settlement. . . they will submit to judicial settlement. . .*”<sup>12</sup>

Article 14 of the Covenant of the League of Nations provided for the establishment of a Permanent Court of International Justice (PCIJ).<sup>13</sup> Pursuant to that article, the Statute of the PCIJ was enacted.<sup>14</sup> Just as in the case of the Permanent Court of Arbitration, PCIJ’s jurisdiction was not made obligatory.<sup>15</sup> However, states could

5. See 2 Malloy, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS 2016 (G.P.O. 1910) [hereinafter cited as MALLOY].

6. *Id.*, art. 6 at 2021.

7. *Id.*, art. 9 at 2022.

8. *The International Court of Justice: A Key to World Peace*, *supra* note 3, at 481.

9. MALLOY, *supra* note 5, art. 53 at 2238.

10. *The International Court of Justice: A Key to World Peace*, *supra* note 3, at 481.

11. The Covenant of the League of Nations was presented at the Paris Peace Conference on February 14, 1919, and subsequently adopted on April 28, 1919. The League’s legal existence did not commence until January 10, 1920, when the Treaty of Versailles received the necessary ratifications and became a binding international agreement. M. BURTON, THE ASSEMBLY OF THE LEAGUE OF NATIONS 61 (1941).

12. *The International Court of Justice: A Key to World Peace*, *supra* note 3, at 481-2.

13. Article 14 states in part: “The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it.” LEAGUE OF NATIONS COVENANT, art. 14, para. 1.

14. The PCIJ statute is printed in 6 L.N.T.S. 379.

15. Article 36 of the *Statute of the Permanent Court of International Justice* (PCIJ) states the following:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.

The Members of the League of Nations and the States mentioned in the

conditionally or unconditionally accept the compulsory jurisdiction of the court.<sup>16</sup>

The Axis Powers<sup>17</sup> and the Allied Powers<sup>18</sup> did not deem their disputes suitable for arbitration or judicial settlement. Therefore, the world once again had to suffer war. The use of atomic bombs brought an end to war with the guilt of Hiroshima forever imprinted on the human conscience.<sup>19</sup> Once again, the community of nations started laying out the framework for peace.<sup>20</sup> Out of this effort emerged the International Court of Justice (ICJ).<sup>21</sup>

Chapter 7 of the Dumbarton Oaks Proposals declared that "[t]here should be an international court of justice which should constitute the principal judicial organ" of the proposed United Nations Organization, and that the "statute of the court . . . should be either (a) the statute of the permanent court of international justice, continued in force with such modifications as may be desirable or (b) a new statute in the preparation of which the statute of the permanent court of international justice should be used as a basis".<sup>22</sup> Option (a) prevailed and, with

Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

- (a) The interpretation of a Treaty;
- (b) Any question of International Law;
- (c) The existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

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

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. 6 L.N.T.S. 379 at 403.

See M.O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942* (1943) at 677.

16. *Id.* This option to accept compulsory jurisdiction with or without reservations has been retained in the Statute of the International Court of Justice. STAT. I.C.J. art. 36, para. 2.

17. The Axis Powers included chiefly: Germany, Italy, and Japan.

18. The Allied Powers included primarily Great Britain, France, the Union of Soviet Socialist Republics, China, and the United States.

19. In 1945, the United States dropped atomic bombs on the Japanese cities of Hiroshima (August 6) and Nagasaki (August 8).

20. The Atlantic Charter, an informal agreement entered into by Franklin D. Roosevelt and Winston Churchill while at sea, aboard the American cruiser *Augusta* on August 14, 1941, has been called the "birth of the United Nations". S. ARNE, *UNITED NATIONS PRIMER* 2 (1945). The United Nations formally came into being on October 24, 1945, by which date its Charter had been ratified by a sufficient number of signatory States. *Id.*

21. See generally U.N. CHARTER Chap. xiv, and STAT. I.C.J.

22. *The International Court of Justice: A Key to World Peace*, *supra* note 3, at 482-3.

minor modifications, the PCIJ's statute became the statute of the ICJ.<sup>23</sup>

At the time of its establishment, expectations were that the ICJ would play a pivotal role in the preservation of peace. Optimism abounded:

On the basis of the tenets proposed for the Charter and for the Statute, the First Committee ventures to foresee 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 United Nations for the settlement of international disputes by peaceful means. An adequate tribunal will exist for the exercise of the judicial function, and it will rank as a principal organ of the Organization. It is confidently anticipated that the jurisdiction of this tribunal will be extended as time goes on, and past experience warrants the expectation that its exercise of this jurisdiction will commend a general support.

A long road has been travelled in the effort to enthrone law as the guide for the conduct of states in their relations with one another. A new milepost is now to be created along that road. In establishing the International Court of Justice, the United Nations hold before a war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.<sup>24</sup>

There is little doubt that the court has not lived up to these early expectations. Reviewing the impact of the ICJ in terms of promoting pacific settlement of disputes, Mr. Stavropolus, Legal Counsel of the United Nations, correctly observed the following:

As regards the pacific settlement of disputes, it must be said that experience over the past 25 years has been generally very discouraging. This is not for want of machinery within the Charter itself. Besides the Security Council and the General Assembly, which offer a forum for political settlement, the International Court of Justice, established as one of the principal organs of the United Nations, provides a means of judicial settlement. States have not, however, shown in the great majority of cases the will to avail themselves of these means for a genuine resolution of their international disputes. . . . At the present the International Court of Justice does not have a single case before it, although this is not, as we all know, for lack of disputes. Nor can it be said that this reluctance has been

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23. It should be noted that, unlike the PCIJ which was separate and distinct from the League of Nations, the ICJ constitutes an "integral part" of the United Nations Charter. U.N. CHARTER, art. 92. *See also*, arts. 93-6.

24. Doc. 913, 13 U.N.C.I.O. Docs. 381, at 393.

accompanied by a compensating growth in recourse to the alternative means of settlement listed in Article 33 of the Charter, ranging from negotiation and arbitration to resort to regional agencies or peaceful means of the parties' own choosing. In this sphere, if no other, the past 25 years have witnessed a disappointing lack of progress and it is difficult to envisage any sudden change in the preference of States for keeping a dispute alive, rather than entrusting it to some form of third party settlement which might not come out wholly in their favor.<sup>25</sup>

A closer look at the ICJ's statute reveals that the early expectations associated with the Court were unwarranted. In the author's view, the lack of compulsory jurisdiction is one factor which accounts for the fact that more disputes have not been presented to the Court.<sup>26</sup> The law that the Court is supposed to apply has also discouraged states from approaching it.<sup>27</sup> This is especially true of the many states which have gained independence in the recent past.<sup>28</sup> They view much of "customary international law" as more or less the law created by a handful of colonial powers, designed to safeguard the interests of such powers at the expense of the new states.<sup>29</sup>

The following proposals to amend certain provisions of the ICJ's statute have been advanced with an eye toward making the ICJ live up to those high expectations that accompanied its creation.

### III. MAKING THE COURT'S JURISDICTION COMPULSORY

Article 36, paragraphs 2 and 3 of the ICJ's statute provide the following:

2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting

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25. Stavropoulos, *The United Nations and the Development of International Law 1945-1970*, 7 U.N. Monthly Chronicle 78-84 (June, 1970) at 80-1.

26. An argument can be made that even if the ICJ were vested with compulsory jurisdiction, the disputes referred to it might not have significantly increased because the stronger nations would have diplomatically (with military pressure) dissuaded weaker nations from resorting to the Court. Moreover, most of the disputes among states are political in nature and not readily susceptible to judicial resolution. Whatever merit such argument may once have had, it no longer is very persuasive given that weaker nations have started defying the stronger states even in the military context. Furthermore, where disputes are between nations of equal strength, pressure politics hardly comes into play, and, if applied, is rarely effective.

27. See discussion accompanying notes.

28. See note 56 *infra*.

29. REPORT OF THE 1966 SPECIAL COMMITTEE ON FRIENDLY RELATIONS Doc. A/6230, para. 219 at 102.

the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. The interpretation of a Treaty;
  - b. Any question of International Law;
  - c. The existence of any fact which, if established, would constitute a breach of an international obligation;
  - d. The nature or extent of the reparation to be made for the breach of an international obligation.<sup>30</sup>
3. The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.<sup>31</sup>

By virtue of article 36, paragraph 3, states, while accepting the compulsory jurisdiction of the Court under the Optional Clause (article 36, paragraph 2) may make certain reservations. In practice, many states which have filed declarations under the Optional Clause have done so by using reservations.<sup>32</sup> Some reservations are of such an arbitrary character that they make the acceptance of compulsory jurisdiction illusory.<sup>33</sup>

30. This article is basically the same as article 36, paragraph 2, of the PCIJ statute and provides member states with an option to accept the compulsory jurisdiction of the court.

31. STAT. I.C.J. art. 36, para. 2 & 3. The text of the statute has been reprinted in 39 AM. J. INT'L L. 215-29, supp. (1945).

32. An example of the latter exclusion is the Declaration of Israel which does not apply to "any dispute between the State of Israel and any other State . . . which does not recognize Israel or which refuses to establish or to maintain normal diplomatic relations with Israel. . . ." 1968-1969 I.C.J. YEARBOOK at 53. Frequent also are exclusions of disputes between members of the Commonwealth. *See* Declarations of India, 1968-1969 I.C.J. YEARBOOK at 52. For an example of the former exclusion, *cf.* the Canadian Declaration of April 7, 1970, para. 2(d), 1969-1970 I.C.J. YEARBOOK at 55 regarding: "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada."

33. The American Declaration provides the following:

"this declaration shall not apply to

(a) disputes the solutions of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

(c) disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction. 1969-1970 I.C.J. YEARBOOK at 80.

The Connally Amendment or Reservation has been severely criticized. As one commentator notes:

The United States, however, has precluded itself from playing an active role in the promotion of judicial settlement through the Court. The United States Declaration of August 14, 1946, struck a most damaging blow at the Court. It expresses a virtually total lack of confidence in the Court. To be sure, other states hedged with reservations their acceptance of the Court's compulsory jurisdiction, but they

The absence of compulsory jurisdiction has been characterized as a "fundamental defect in the organization of international society" which "should be subject to repeated examination".<sup>34</sup> Some jurists have proposed that instead of giving the states an option to accept the compulsory jurisdiction of the Court, the Court's compulsory jurisdiction should automatically extend over all states which ratify its statute with the states having an option to "contract-out" of the Court's compulsory jurisdiction.<sup>35</sup> Advocates of the contracting-out principle maintain the following:

[Many states that] may have hesitated to contract in might be glad to have the decision made for them, and they may be under no pressure to contract out. But even if they did, they would not be likely to contract out completely. It is more likely that the contracting-out would take the form of formulating reservations which, even at their worst, might still leave a residuum of usable compulsory jurisdiction.<sup>36</sup>

The drafting history of article 36, paragraph 2, indicates that it was the subject of intense debate at Geneva in 1920.<sup>37</sup> Even at that time, when concepts of state sovereignty loomed large, the "majority of the delegations desired to see compulsory jurisdiction conferred on the Court";<sup>38</sup> however, they could not prevail.

Again in 1945 the majority of the Committee of Jurists preferred compulsory jurisdiction for the Court.<sup>39</sup> Indeed, "one might say practically all the nations with the exception of the United States and Soviet Russia, with the United Kingdom and France determined to follow the lead of the United States, favored compulsory jurisdiction for the Court".<sup>40</sup> Unable to reach an agreement, the Committee of Jurists formed two subcommittees: one of them was entrusted with the task of

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had enough confidence in the objectivity and impartiality of the Court to let it decide whether these reservations were applicable in a given case. The United States expressed its total lack of confidence in the Court by claiming for itself the right to determine whether its reservations applied in a given case. Gross, *infra* note 34, at 271.

For a detailed discussion of the Connally reservation see Howard, *The Connally Amendment*, 2 JOURNAL OF JOHN BASSET SOCIETY OF INTERNATIONAL LAW 1 (1961).

34. Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AM. J. INT'L L. 253, 313-4 (1975) Jan.-July, quoting Judge Lauterpacht.

35. *Id.*, at 314.

36. *Id.*

37. Hudson, *The Twenty-Fourth Year of the World Court*, 40 AM. J. INT'L L. 1, 32 (1946).

38. *Id.*

39. *Id.* For an analysis of the debates concerning art. 36, para. 2, see Preuss, *The International Court and the Problem of Compulsory Jurisdiction*, 13 *Dep't of State Bull.*, No. 327, 471-8 (September 30, 1945).

40. *The International Court of Justice: A Key to World Peace*, *supra* note 3, at 493 n.81,

drafting a "compulsory" jurisdiction article, while the other was responsible for putting together an "optional" jurisdiction article.<sup>41</sup> Both the compulsory and the optional jurisdiction articles were submitted to the San Francisco Conference with the following explanation:

It does not seem doubtful that the majority of the Committee was in favor of compulsory jurisdiction, but it has been noted that, in spite of this predominant sentiment, it did not seem certain, nor even probable, that all the nations whose participation in the proposed international organization appears as necessary, were now in a position to accept the rule of the compulsory jurisdiction. . . .<sup>42</sup>

The proposed compulsory jurisdiction article read as follows:  
 "2. The members of the United Nations and states parties to the Statute recognize as among themselves the jurisdiction of the Court as compulsory *ipso facto* and without special agreement in all or any of the classes of legal disputes concerning. . . ." Then follow categories "a, b, c, [and] d" of article 36, as adopted, which have been quoted earlier in the paper.<sup>43</sup> This proposed article, despite the support of the majority of nations, was not adopted at the San Francisco Conference. This was largely due to the opposition of the superpowers.<sup>44</sup> The proposal of "contracting-out," which has been discussed earlier, was also presented, but was not adopted; preference was given to the old League system of "contracting-in".<sup>45</sup>

At this stage, it is worthwhile to examine why the major powers were opposed to accepting compulsory jurisdiction of the Court when the rest of world opinion strongly favored it. The main argument advanced against the compulsory jurisdiction draft proposal was that in adopting such a proposal, states would be relinquishing too much of their sovereignty. On closer examination, it appears that this argument was more of a "pretext," because, if by accepting compulsory jurisdiction state sovereignty were endangered, then surely the majority of the

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citing 14 *United Nations Conference on International Organization Documents* 146-61, 207, 418-34 (1946) [hereinafter cited as *Documents*].

41. *The International Court of Justice: A Key to World Peace*, *supra* note 3, at 493-4.

42. *Report of the United Nations Committee of Jurists to the United Nations Conference on International Organization at San Francisco*, *Documents*, *supra* note 40, at 667.

43. *Documents*, *supra* note 40, at 287.

44. See Hudson, *supra* note 37, at 32-3.

45. Gross, *supra* note 34, at 314.

46. As used herein, the term "weaker nations" means nations that do not have a strong military, and judged by objective criteria (*i.e.*, not including fighting spirit, feelings of pride, honor, and other intangible factors which may actually turn the course of events and make predictions based on objective criteria rather unsound) would most likely lose if involved in an armed conflict with the superpowers.

nations, *i.e.*, the weaker nations,<sup>46</sup> would not have supported compulsory jurisdiction. Their "sovereignty" was and is far more vulnerable and, as such, they guard it much more fiercely. The real reason behind the opposition to the compulsory jurisdiction proposal seemed to be the immense benefit that the major powers thought they would obtain by the adoption of the optional jurisdiction article. The major powers had almost all of the military and economic power of the world at their disposal. Hardly any nation could stand up to them.<sup>47</sup> They must have calculated that in any dispute with a weaker state, where the law favored them, they could diplomatically (with standby military force) persuade the weaker state to opt for compulsory jurisdiction of the Court;<sup>48</sup> later, by themselves accepting the Court's jurisdiction, they could get a favorable judicial settlement.<sup>49</sup> On the other hand, in situations wherein the law favored the weaker state, they could, by not accepting the Court's jurisdiction (or if they had earlier accepted the Court's compulsory jurisdiction, then by revoking such acceptance), stay out of Court, and thereby diplomatically (with the military and economic muscle backing them) arrive at a favorable settlement.<sup>50</sup> From the standpoint of the major powers, the optional jurisdiction clause presented an "all-win, no-lose" situation. It is no wonder that they argued strongly against accepting compulsory jurisdiction and "imposed on the predominant will of the majority of nations represented at San Francisco"<sup>51</sup> an "optional" jurisdiction article.<sup>52</sup>

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47. In the aftermath of the second world war, it would have indeed been difficult to imagine that the Vietnamese people could pose much challenge to the United States. Nor could one imagine that an Iranian government would support the taking over of the United States Embassy in Teheran, and defy the United States' veiled military threats.

48. If the dispute involved was such that the possibility of armed conflict existed, then in the immediate post-second world war era it is difficult to imagine any weaker state not submitting to the suggestion of settling the dispute through adjudication. From the weaker states' perspective, a defeat in court would be more acceptable, both in terms of human and economic suffering, than would a defeat in the battlefield.

49. After obtaining a favorable judicial settlement, the major power could then very easily withdraw its declaration accepting compulsory jurisdiction of the Court. Indeed, the parties concerned would not even have to accept the compulsory jurisdiction of the Court; they could just agree that the Court's jurisdiction is limited to deciding the particular dispute involved.

50. Arguably, even if the superpower had accepted the compulsory jurisdiction of the Court, it is safe to say that at the time the ICJ statute was enacted, hardly any of the weaker states would have opted to take the major power to Court in circumstances in which the major power had made it clear that it preferred to stay out of Court. Such was the clout that the major powers had. However, despite all this, the major powers did not want to take any chances: they wanted to make sure that no right existed even when they were confident that such right, if given, would rarely be exercised.

51. *The International Court of Justice: A Key to World Peace*, *supra* note 3, at 494.

52. The optional jurisdiction clause was adopted only after the delegations representing the major powers "stated that their governments might find it difficult or impossible to accept a provision for compulsory jurisdiction in the Statute, and that the fate of the Charter to which the Statute was to be annexed might thus be placed in jeopardy". Hudson, *supra* note 37, at 32-3. Some delegations, while accepting the optional jurisdiction clause, expressly stated that they voted for such a clause only to prevent stalemate. *Id.*

However, events have not turned out as envisaged by the world powers. The phenomenal growth of the communications system in the post-war period has increased interaction among states. The increased international trade reflects the interdependence of states.<sup>53</sup> Many nations have gained independence since the passage of the United Nations Charter.<sup>54</sup> Indeed, these nations politically dominate the United Nations today.<sup>55</sup> These nations, referred to at times as "The Group of 77,"<sup>56</sup> "The Third World Countries,"<sup>57</sup> "The Non-Aligned Countries,"<sup>58</sup> "The Developing Countries,"<sup>59</sup> etc., have started challenging the major powers. The first major challenge took place in 1956 when Egypt confronted France, Britain, and Israel over the Suez Canal.<sup>60</sup> Vietnam's struggle, first against France and later against the United States, is possibly the best example of the proposition that the military might of the superpowers will no longer go unchallenged by the Third World. The heroic struggle of the Afghanistani people against the Soviet Union's aggression demonstrates the developing nations' will to assert their rights.<sup>61</sup> The economic interdependence of states was

53. Nowhere is this interdependence more acutely reflected than in the attitude exhibited by United States allies during the Iranian hostage crisis. Because of reliance on oil imported from Iran, some United States allies—notably Japan—were understandably reacting to the entire crisis in a very mild manner.

54. In 1945, the United Nations Organization had 50 member states. Since then, as a result of the process of decolonialization and the successful outcome of many national liberation movements, the membership of the United Nations Organization has increased to 150.

55. The United States' influence in the United Nations has decreased considerably since the inception of the Organization. Some United States writers have suggested that one way of increasing the United States' influence in the world body is to provide economic and military assistance only to those nations which support the United States' viewpoint in the international forum. Suggestions have also been made that the United States should reduce its contribution to the United Nations' budget.

56. Although the number seventy-seven is used, the group is, in fact, comprised of far more states.

57. Because of deteriorating economic conditions in many of these countries, some commentators have started to further differentiate the Third World countries. In fact, some of the countries previously referred to as Third World countries are now referred to as Fourth World countries by some writers.

58. Just as the term "Group of 77" is misleading, the term "non-aligned countries" may also be misleading. It is common knowledge that some of the countries which take pride in classifying themselves as non-aligned are very much aligned to either the Soviet Union or the United States.

59. Much political debate surrounds the use of the phrases "less developed countries," "underdeveloped countries," "developing countries," etc. When used in this article, these phrases are intended to be politically neutral.

60. The Suez conflict made a hero out of Egyptian President Gemal Abdul Nasser. Interestingly enough, Nasser was a founding member of the non-aligned movement.

61. Afghanistan is considered by some as Russia's Vietnam. The Soviet invasion of Czechoslovakia evidenced the departure of the Soviet leadership from Lenin's concepts regarding self-determination. The invasion of Afghanistan established once and for all the imperialist nature of the Soviets. It also underscored the fact that the Soviets only pay lip service to the concepts of self-determination to appease certain Third World countries, and are second to none in deploying ruthless and inhuman tactics in their quest to subdue popular liberation movements.

highlighted in the recent "American hostages crisis". Although an American aircraft carrier was dispatched to the Persian Gulf, Iran refused to back down from her demands knowing that world dependence on the commodity "oil" would deter the United States from exercising the "military option". Indeed, some of the United States' allies, notably Japan, (because of its dependence on oil) remained quite indifferent to the crisis. Thus, even though the major powers possess military superiority, smaller nations realize that economic interdependence among states is so acute that the possibility of military action on the part of the major powers is remote.

In short, whatever benefit the major powers might have anticipated by adopting the "optional," as opposed to the "compulsory," jurisdictional clause, has not really materialized in the post-war period. It appears very likely that if the compulsory jurisdiction issue were seriously reconsidered by the world-body today, the major powers would be persuaded to accept it. This statement is made on the following bases: in 1945 the majority of states were inclined to accept the compulsory jurisdiction of the Court; the state sovereignty concept has been considerably diluted since the enactment of the Charter in that specialized agencies of the United Nations are, on a daily basis, handling matters which, under the classical view of sovereignty, would be labelled as "strictly within the domestic jurisdiction of the state;" and the weaker nations of the world are no longer persuaded by quiet diplomacy (backed by military force).

The deteriorating international peace situation evidenced by the Falkland Islands crisis underscores how nations are increasingly "resorting to arms" to settle disputes.<sup>62</sup> Indeed, the whole purpose behind the creation of the United Nations seems to be defeated. Perhaps by conferring compulsory jurisdiction on the Court, respect for the provisions of the Charter may increase. For example, article 2, paragraph 4, of the Charter<sup>63</sup> forbids states from using force, or the threat of force, in inter-state relations, except in the case of self-defense or collective enforcement measures under chapter VII of the Charter. With article 2, paragraph 4's prohibition on the use of force on the one hand and no compulsory jurisdiction of the Court on the other, the states can no longer choose between "adjudication or arbitration" and "war or other

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62. Perhaps one reason for this increased resort to arms is that a new generation, which has not personally witnessed the horrors of the second world war, has come to the helm of state.

63. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER, art. 2, para. 4.

forcible measures of redress";<sup>64</sup> their choice is instead limited to "adjudication or arbitration on the one hand or stalemate on the other".<sup>65</sup> If one state refuses to submit the dispute to arbitration, the only possible way of breaking the "stalemate" is to "resort to arms".<sup>66</sup> Thus, if states resort to force to break the "stalemate," they necessarily run afoul of article 2, paragraph 4, which ultimately has the effect of undermining the Charter.

The proposed draft regarding "compulsory" jurisdiction, which was rejected at the San Francisco Conference, and the "optional" jurisdiction article which has been adopted as article 36, paragraph 2 of the statute, both contain a list of four classes of disputes, (*i.e.*, paragraph 5, a, b, c and d), to which compulsory jurisdiction applies.<sup>67</sup> Some proposals have been made "to enlarge the listing to 30 specific subjects with respect to which states would have the option to accept compulsory jurisdiction".<sup>68</sup> As article 36, paragraph 2 stands, subparagraphs a, c, and d are but particularizations of subparagraph b which utilizes the phrase "any question of international law". In the author's view, a detailed listing of the kinds of disputes to which compulsory jurisdiction will apply will unnecessarily limit the scope of compulsory jurisdiction. Instead, it would be more advisable to eliminate subparagraphs a, c, and d, lest they be construed as limiting the scope of subparagraph b. Further, subparagraph b should be included in the main paragraph of article 36, paragraph 2, so that the compulsory jurisdiction of the Court would extend to "all legal disputes concerning any question of international law".

#### IV. PROPOSED AMENDMENTS TO THE ICJ'S STATUTE

##### A. *Proposed Amendment of Article 38 of the ICJ's Statute*

Because of the decolonialization process, the membership of the United Nations has vastly increased since its creation. The ICJ's statute, which is basically the same as that of the Permanent Court of International Justice, is premised on a notion of international community as it existed at the turn of the century. It was written at a time when colonial and imperial powers dominated the world. Today, the compulsory jurisdiction of the Court might not be acceptable to many countries which gained independence after the conclusion of the

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64. C.W. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 104 (1964).

65. Gross, *supra* note 34, at 257.

66. Given the politics in the Security Council, any action by the Security Council to solve the problem is extremely remote.

67. Gross, *supra* note 34, at 316.

68. *Id.*

second world war. This might be so despite the fact that the majority of nations at the time of the creation of the United Nations were in favor of accepting the compulsory jurisdiction of the Court. The reason for the new states' anticipated reluctance to accept compulsory jurisdiction is primarily grounded in the law that the Court is bound to apply.

Article 38 of the statute of the International Court of Justice provides the following:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.<sup>69</sup>

The new states' opposition to compulsory jurisdiction may well stem from the fear that if they accept compulsory jurisdiction of the Court "they would be subject to customary international law which they did not recognize and which they had played no part in forming".<sup>70</sup> They further fear the application of "outdated and unjust treaties by which the colonial Powers were guaranteed advantageous positions and economic, political and military privileges".<sup>71</sup> In short, the new states believe that article 38, paragraph 1, *i.e.*, the law that the ICJ must apply, is quite different from their notions of international law, and, understandably, they would not be very willing to submit to it by adopting the compulsory jurisdiction clause.

The performance of the Court has further deterred the new nations from utilizing it more often. Except for a few cases, such as the

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69. STAT. I.C.J. art. 38.

70. REPORT OF THE 1966 SPECIAL COMMITTEE ON FRIENDLY RELATIONS, DOC. A/6230, para. 219, at 102, *quoted in* Gross, *supra* n.34 at 254-5.

71. *Id.*

*Fisheries*, *Corfu Channel*, and *Nottebohm* cases, the Court has been extremely reluctant in contributing to the progressive development of international law.<sup>72</sup> This is true in spite of the fact that when the PCIJ was established, it was hoped that "it would not merely clear up dubious points but also, in the absence of an international legislature, contribute to the development of the law".<sup>73</sup> In underscoring the conservatism of the Court, Jenk observed the following:

Taken together these nineteen propositions may appear to verge upon the extreme positivist position that no state is bound by custom in the absence of proof of its own recognition of the alleged custom in deference to an *opinio juris sine necessitatis*. This position involves a frontal challenge to any possibility of the development of international law by means of international adjudication. If this is indeed the logic of these decisions of the International Court we are confronted with the most tragic paradox in the development of international law and international institutions. A court which holds that international law permits whatever it does not specifically prohibit, which will not presume the consent to a rule in the absence of proof of a sense of legal obligation, which accepts dissent from or repudiation of a custom as proof that it is inapplicable, which regards a divergence of views in a political assembly as evidence that there is no generally accepted rule of law, and which views with reserve as constituent elements of custom treaty obligations, the practice of international organizations, municipal judicial decisions and the views of publicists, thereby debars itself from playing a constructive part in the progressive crystallisation of custom into law. . . .<sup>74</sup>

Since the creation of the United Nations there have been many resolutions, declarations, conventions, etc., passed by the *Organization* and its specialized agencies, and through these developments has emerged what some have called "the United Nations law".<sup>75</sup> The new states have played a very significant role in the development of the United Nations law. The only way to make the ICJ more attractive to the great majority of nations is to include the United Nations law among the various sources of law to which the Court must look while adjudicating disputes.

Within article 38, paragraph 1, there are two sources of law:

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72. Gross, *supra* n.34 at 317. *Fisheries Case* (United Kingdom v. Norway), [1951] I.C.J.Rep. 116; *Corfu Channel Case* (United Kingdom v. Albania), [1949] I.C.J.Rep. 4; *Nottebohm Case* (Liechtenstein v. Guatemala), [1955] I.C.J.Rep. 4.

73. *Id.*

74. *Id.*, at 317-8 (quoting Jenk).

75. *See Id.*, at 318.

(1) primary sources of law, *i.e.* subparagraphs a, b and c; and (2) subsidiary sources of law, *i.e.* subparagraph d.<sup>76</sup> It would be in the interest of the Third World countries to include the United Nations law in the primary source category. This would bring them on a more equal footing *vis-à-vis* the major powers; for just as the major powers had the decisive role in shaping "customary international law," the "United Nations law" has been largely shaped by the Third World countries. In case the major powers are adamant about not granting the "United Nations law" "primary source of law" status, it can be included in the category of "subsidiary sources of law". The Court should look at the United Nations law as a means to "the determination of rules of law".<sup>77</sup>

In addition to including the "United Nations law" among the existing sources of law, a stylistic change in article 38, paragraph 1, subparagraph c should also be made. In its present form, subparagraph c refers to "the general principles of law recognized by civilized nations". The words "civilized nations" should be replaced by the words "the community of nations" so that subparagraph c stipulates "the general principles of law recognized by the community of nations". This stylistic change has been proposed because the words "civilized nations" somehow bring back into sharp focus the distinctions drawn by classical European legal writers between the so-called "civilized" and "uncivilized" nations.

### *B. Expanding the Court's Jurisdiction*

Article 34, paragraph 1, of the statute provides that: "1. Only states may be parties in cases before the court."<sup>78</sup> This limitation on the Court's jurisdiction reflects the turn-of-the-century Hague attitude toward international law: only states are the subjects of international law. This century has seen a rapid growth in international activity. The United Nations and many other public inter-governmental organizations have appeared on the international scene. The concern for individual rights is intense. Indeed, the Human Rights Committee, which was created pursuant to the International Covenant on Civil and Political Rights, entertains complaints filed by individuals against their respective governments. Few would doubt that today, not only states, but the United Nations, public inter-governmental agencies, and individuals, are also subjects of international law. To restrict access to the Court to states only is to ignore the development and progress made over the century in terms of international relations and law.

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76. STAT. I.C.J. art. 38, para. 1.

77. *Id.*

78. STAT. I.C.J. art. 34, para. 1.

Most of the specialized agencies of the United Nations are entitled to advisory opinions from the Court. Internally, they have decided to give these advisory opinions binding effect. The Court and the parties know that the proceedings, though artificial in form, will be binding in substance. By granting "standing" to international organizations to appear before the Court in contentious proceedings, one can get rid of these artificial procedures. Resolutions to this effect were passed by the Institute of International Law in 1954 and the International Law Association in 1956.<sup>79</sup>

The Preamble to the United Nations Charter, by utilizing the phrase "[w]e the *peoples* of the United Nations," has once and for all done away with the myth that individuals are not proper subjects of international law. In consideration of the aforementioned, it is proposed that the statute should be freed "from the vestiges of the Hague system"<sup>80</sup> and brought more in line with contemporary notions of international law. This can be accomplished by amending article 34, paragraph 1, so that not only states but also inter-governmental agencies and individuals (in proper circumstances) may have standing, in contentious cases, to appear before the Court. In this connection, one might consider amending article 38, paragraph 1(a) which states that the Court shall apply conventions "establishing rules expressly recognized by the contesting states". The word "states" in this clause could be replaced by "parties," thereby covering international organizations and individuals as well.

### C. *Enforcement of the Court's Decisions*

Enforcement of the Court's decisions has never posed much of a problem. In the history of the PCIJ there was no instance of a refusal to comply.<sup>81</sup> In the working of the ICJ, there has been only one case of non-compliance: "the failure of Albania to pay the damages awarded to the United Kingdom in the *Corfu Channel Case*".<sup>82</sup> In international arbitration, too, the incidences of non-compliance are rare; indeed, out of many hundred cases there are but few in which states have refused to give effect to an award.<sup>83</sup> Given this record, there does not seem to be much need to address the issue of enforcement of the Court's

79. 49 AM. J. INT'L L. 15 (1955); I.L.A., 47th Report, at viii (1956).

80. Gross, *supra* note 34, at 302.

81. Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1 (1960). (construing HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 596 (1943)).

82. Schachter, *supra* note 81 (citing I.C.J. PLEADINGS (1954), in the Monetary Gold Case (Italy v. France, United Kingdom, and United States)).

83. *Id.*, at 2.

decisions. However, if compulsory jurisdiction of the Court is accepted and if international organizations and individuals are granted access to the Court, an enforcement problem may develop in the future. Under the Charter, the Security Council is empowered to enforce the Court's decisions.<sup>84</sup> Given the politics in the Security Council, *i.e.*, the presence of the cold-war mentality, and the existence of veto, some alteration in enforcement mechanisms may be desirable. States could devise a provision stipulating that in instances in which, due to the exercise of the veto power, the Security Council is not in a position to enforce the Court's decision, then the issue of enforcement should be submitted to a vote both in the Security Council and the General Assembly. If three-fourths of the members of both the Security Council and the General Assembly are in favor of enforcing the Court's decision, then the Security Council should take all possible measures for enforcing it, notwithstanding the earlier veto. The development of cold war politics was not foreseen at the time the Charter was enacted and the veto power granted. Seeing how the veto power has reduced the effectiveness of the world organization, the states just might be willing to dilute it—at least in the limited context of enforcing Court decisions.

#### *D. The Procedure for Amending the Statute*

Under article 69 of the statute, any change in the statute is equivalent to an amendment of the United Nations Charter. It therefore requires "a vote of two-thirds of the members of the General Assembly".<sup>85</sup> Also, by virtue of article 108 of the Charter, the two-thirds majority vote for amendment by the General Assembly must be ratified by "two-thirds of the Members, including all the permanent members of the Security Council".<sup>86</sup> According to article 70 of the statute, the initiative for amending the statute may come from members of the United Nations or the Court itself.<sup>87</sup>

As discussed earlier, the major powers today will be more supportive about accepting the compulsory jurisdiction of the Court than they were in 1945. However, they will most likely oppose amending article 38 to include the "United Nations law" as one of the "primary" or

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84. "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." U.N. CHARTER, art. 94, para. 2.

85. U.N. CHARTER, art. 108.

86. Gross, *supra* note 34, at 275.

87. Article 70 provides the following: "The Court shall have power to propose such amendments to the present Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the provisions of Article 69." STAT. I.C.J. art. 70.

“subsidiary” sources of law that the Court must consult. If the world body seriously undertakes a review of the statute, it is possible that the major powers might resist compulsory jurisdiction as a negotiating tactic to perhaps get the “United Nations law” listed under the “subsidiary” sources of law rather than under the “primary”. The side which takes the initiative in suggesting that the statute be reviewed and perhaps amended, might feel some weakening in its negotiating posture. Consequently, it may take a long time for member states to take such initiative. In view of this, it is urged that the Court should itself take the initiative. Such a move cannot only be made in a relatively short time, but will also have the beneficial effect of preserving the parties’ relative bargaining power. To take such an initiative would not be a novel move for the Court. In fact, the Court has in the past made proposals for amending certain articles of its statute.<sup>88</sup>

#### V. CONCLUSION

The ICJ statute was dated at the time of its adoption. It is even more so now. Much rewriting is needed before it can be deemed to reflect present values of international law. The proposals advanced are but a few of the steps that can be taken to bring the statute closer to contemporary notions of international law, and to make the Court play a more constructive role in the areas of dispute settlement and maintenance of international peace.

The author has no doubt that all of these proposals will ultimately form the basic features of the “World Court”. The critical question is: When will this occur? Perhaps when states’ desire for “justice and peace” overcomes their obsession with “vital national interests and honor”. All that is hoped is that it does not come about as a result of the Third World War, for humanity has already suffered enough in the pursuit of “national interest”.

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88. For example, the Court has in the past proposed “amending Articles 22(1), 23(2) and 28 of its statute, which provide that the seat of the Court shall be at The Hague”, *id.*