The Future of International Adjudication

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* It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair . . .

— Charles Dickens, A Tale of Two Cities**

For those who survey the state of international law, these are "the best of times" and "the worst of times." As we enter into the United Nations' Decade of International Law, we recognize the value of the rule of law in the protection of international peace as a "spring of hope." As we simultaneously enter into a "winter of despair" arising from military conflict in the Persian Gulf area, we recognize the fragility of that law. In the political arena, the end of the Cold War and the easing of bipolarism have meant liberation from tyranny for many and the reduction of the risks of nuclear war for all. The absence of that same bipolarism, however, has fragmented the established order and led to other clashes that the major powers formerly might have controlled.

For students of the International Court of Justice and of international dispute resolution by third-party adjudication, these are also the "best of times" and the "worst of times." For those who view it as an "age of reason," the Court's caseload has skyrocketed. It currently has eight cases pending on its docket,† a substantial increase from the empty docket the Court

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† The present cases are Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.) (form and amount of reparation); Border and Transborder Armed Actions (Nicar. v. Hond.); Land, Island, and Maritime Frontier Dispute (El Sal./Hond.); Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.); Aerial Incident of 3 July 1988 (Iran v. U.S.); Certain Phosphate Lands in Nauru (Nauru v. Austl.); Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal); and Territorial Dispute (Libya/Chad). Letter from Bernard Noble, Deputy-Registrar, International
faced two decades ago. Even Libya has seen fit to bring several of its most troublesome controversies to the Court. For those who see it as the "age of darkness," however, the Court's role in the international legal community has substantially diminished. Major nations have refused to accept or have renounced their acceptance of the Court's compulsory jurisdiction, and the Court's work has largely been confined to a single subject matter, the delimitation of disputed boundaries.

I. THE STATE OF INTERNATIONAL ADJUDICATION

The idea of the adjudication of disputes between nations largely developed during the past century. In the nineteenth century and before, war was considered an ordinary, necessary, and proper way in which to resolve international disputes. It was simply "a continuation of political intercourse, carried on with other means." Two Hague Peace Conferences, in 1898 and 1907, led to the establishment of the Permanent Court of Arbitration, a framework institution for a series of part-time arbitral tribunals. The Permanent Court of International Justice (Permanent Court), established in 1921, complemented the Permanent Court of Arbitration by providing a full-time tribunal to deal with international disputes.

The statute that created the Permanent Court provided for two basic kinds of jurisdiction. One kind was based on treaties that referred specific cases or classes of cases between the treaty partners to the Court. The other was based on unilat-
eral declarations, under which individual states could declare their readiness to accept adjudication of cases submitted by other states.\textsuperscript{10} It was hoped that most nations would eventually submit these declarations, so that courts, rather than war, would eventually resolve international disputes.

Despite political reservations that prevented the United States from entering the League of Nations, the United States government seriously considered joining in the work of the Permanent Court, but the Senate's objections to international involvement kept the country out of this international institution, as well.\textsuperscript{11} Nevertheless, several distinguished Americans served among the Court's judges, including Frank Kellogg of St. Paul, the former Senator and Secretary of State who had been instrumental in formulating the Kellogg-Briand Pact.\textsuperscript{12} Thomas Franck and Jerome Lehrman have aptly summarized American attitudes toward the Court as following one of two themes: a "messianistic" belief in the ability of judicial institutions to solve all international problems or a "chauvinistic" belief in the superiority of political resolution of disputes.\textsuperscript{13} These two competing themes have plagued discussion of international adjudication throughout its history.

When the League of Nations passed into history at the end of World War II, the Permanent Court went with it.\textsuperscript{14} The Permanent Court was immediately replaced with a "new" International Court of Justice (International Court) under the auspices

\textit{Source of Jurisdiction, Especially in U.S. Practice}, in \textit{The International Court of Justice at a Crossroads} 58 (L. Damrosch ed. 1987).

\textsuperscript{10} This acceptance was subject to a condition of reciprocity. Statute of the Permanent Court of International Justice, \textit{supra} note 9, art. 36, 6 L.N.T.S. at 403; \textit{cf.} \textit{Stat. I.C.J.} art. 36(2). For a discussion of jurisdiction under the modern form of this clause, see Morrison, \textit{Potential Revisions to the Acceptance of the Compulsory Jurisdiction of the International Court of Justice by the United States of America}, in \textit{The United States and the Compulsory Jurisdiction of the International Court of Justice} 29 (A. Arend ed. 1986).

\textsuperscript{11} For a general history of the period, see M. Dunne, \textit{The United States and the World Court}, 1920-1935 (1988).

\textsuperscript{12} Other American judges included John Bassett Moore and Manley O. Hudson. S. Rosenne, \textit{Documents of the International Court of Justice} 431 (1979).

\textsuperscript{13} Franck & Lehrman, \textit{Messianism and Chauvinism in America's Commitment to Peace Through Law}, in \textit{The International Court of Justice at a Crossroads}, \textit{supra} note 9, at 3, 6-7.

\textsuperscript{14} For all practical purposes, the Permanent Court ceased regular functioning in 1939. S. Rosenne, \textit{The World Court: What It Is and How It Works} 15 (4th ed. 1989). It was formally dissolved in April of 1946, when the new International Court of Justice began to operate. \textit{Id.} at 27.
of the new United Nations. The new International Court possessed an organic statute that was almost a carbon copy of its predecessor's statute; it occupied the same courtrooms in the Hague, and it performed most of the same functions in the international order. Change was to be found, however, in the attitude of the United States. In the heady days of the 1940s, a majority of the world's nations accepted compulsory jurisdiction of the Court, including, grudgingly, the United States. Indeed, for nearly forty years, the United States continued to accept that compulsory jurisdiction — with a limitation, known as the Connally Reservation, which provided an exception for cases that were "within the domestic jurisdiction of the United States of America as determined by the United States." During that period, the United States became the one of the International Court's most frequent litigants.

During that same period, the number of nations in the world more than tripled, and consequently the number of United Nations members rose from 51 to 159. The International Court, however, experienced a crisis of confidence, as many of the newly independent nations initially shied from accepting its jurisdiction, primarily because of fears that the Court was too oriented in favor of the established order. Major powers also retreated from its use. In the late 1940s, a majority of the world's nations, including all of the major powers except the Soviet Union, accepted the International Court's compulsory jurisdiction. Today the proportion of states accepting the compulsory jurisdiction is much lower, less than one-third, and the only permanent member of the Security Council accepting compulsory jurisdiction is Great Britain. Indeed, at one time in the early 1970s — an era not noted for the absence of international disputes — the Court had abso-

15. Id. at 27.
17. See infra note 18 and accompanying text.
18. 61 Stat. 1218, 1218, T.I.A.S. No. 1598, at 1. The full text of the declaration is conveniently reproduced in The International Court of Justice at a Crossroads, supra note 9, annex C at 469.
19. The United States appeared as a formal party in seven cases. In addition, it filed seven additional applications against Soviet block states that were dismissed for want of jurisdiction. It also participated extensively in the advisory opinion work of the Court.
22. Id. at 91.
In the past two decades, the International Court has become, in fact, a specialized tribunal. Half of its work deals with only one subject-matter, the delimitation of disputed boundaries, primarily maritime boundaries. Its most frequent litigants, in addition to the United States, are now an unlikely pair of states, Libya and Nicaragua.

The United States has participated in four cases before the Court during the same two decades, including one border dispute, which settled the maritime boundary with Canada in the Atlantic. Two others, the Iranian hostages case and the Nic-

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23. From the delivery in 1975 of the advisory opinion in the case of the Western Sahara, 1975 I.C.J. 12, until the filing in 1976 of the case concerning the Aegean Sea Continental Shelf (Greece v. Turk.), 1976 I.C.J. 3, there was a period of 10 months when there were no cases pending before the Court. There were also no cases on the docket for nearly six months in 1970, from the decision of Barcelona Traction Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, until the initiation of the advisory opinion request on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 3.

24. Half of the eight cases presently pending are boundary disputes. They involve the boundaries between El Salvador and Honduras, between Greenland and Jan Mayen Island (represented by Denmark and Norway respectively), between Guinea-Bissau and Senegal, and between Libya and Chad. See Letter, supra note 1. Other cases during the past decade decided maritime boundaries between Libya and Tunisia, Continental Shelf (Tunisia/Libya), 1982 I.C.J. 18, between Libya and Malta, Continental Shelf (Libya/Malta), 1985 I.C.J. 13, and between the United States and Canada, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246. Earlier boundary disputes included the North Sea continental shelf cases, North Sea Continental Shelf (W. Ger./Den.; W. Ger./Neth.), 1969 I.C.J. 3.

25. Both Libya and Nicaragua have border problems with their neighbors. For example, since 1975, Libya has been involved in litigation with Tunisia, Continental Shelf (Tunisia/Libya), 1982 I.C.J. 18, and with Malta, Continental Shelf (Libya/Malta), 1985 I.C.J. 13. Recently, Libya has agreed to adjudication of its border dispute with Chad. Territorial Dispute (Libya/Chad) (case pending). Nicaragua has been involved in four suits. In addition to the well-known suit against the United States, Military and Paramilitary Activites in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 169 (provisional measures), 1984 I.C.J. 392 (jurisdiction and admissibility), 1986 I.C.J. 14 (merits), it has initiated suits against Costa Rica, Border and Transborder Armed Actions (Nicar. v. Costa Rica), 1987 I.C.J. 182, and Honduras, Border and Transborder Armed Actions (Nicar. v. Hond.) (case pending), and has recently intervened in a border dispute between El Salvador and Honduras, Land, Island and Maritime Frontier Dispute (El Sal./Hond.) (case pending).


aragua litigation, were instances of high political visibility. The fourth, less visible, case involved the resolution of an investment dispute with Italy. Actions of the United States were also the subject of one advisory opinion, relating to the status of the Palestine Liberation Organization's delegation to the United Nations in New York.

The Nicaragua litigation led the United States government first to oppose the International Court's exercise of jurisdiction on technical grounds and eventually to terminate totally its acceptance of the Court's compulsory jurisdiction. After forty years of accepting compulsory jurisdiction by declaration, the United States abandoned that approach. Although one can deduce certain technical reasons for that decision — scholars of all persuasions had long recognized the United States declaration accepting compulsory jurisdiction to be technically deficient — the real controversy was over whether political or judicial means should be used to resolve the most serious international disputes. The termination simply renewed the debate between the polar extremes of "messianism" and "chauvinism" that has colored American attitudes toward the Court since the 1920s. It reopened the question of whether a judicial system can resolve international disputes, or whether the international political process is a superior means for their solution. The United States wanted to exclude the "hottest" controversies from the Court in order to reserve them for the political and diplomatic processes. The specific rationales supporting this ac-

32. Because the Connally Reservation, see supra note 18 and accompanying text, could be reciprocally enforced against the United States, it permitted any other state to avoid a United States suit. See Aerial Incident of 27 July 1955 (U.S. v. Bulgaria), 1959 I.C.J. 146. Another reservation to the 1946 declaration, the so-called Vandenberg Reservation, relating to multilateral treaties, also had a technical flaw. As a result, the United States was unable to rely successfully upon it in the course of the Nicaragua litigation. See supra note 28.
tion will be discussed later.33

II. OTHER TRIBUNALS

The International Court is not the only tribunal adjudicating controversies between nations. In the modern world, it faces increasing competition from other international bodies, with an alphabet soup of names, like ICSID34 and GATT.35 Particularly within Europe, there are also effective regional tribunals that, through resolution of private disputes, have reduced the potential business that might come to the International Court.36 A thorough examination of the state of international adjudication must include these institutions. Their work has expanded, just as the workload of the International Court itself has remained fairly constant.

A leading example of an alternative system for the resolution of disputes between nations is the successful resolution of many international trade disputes under the auspices of the dispute-resolution panels of the General Agreement on Tariffs and Trade (GATT).37 Authors of the Statutes of the Interna-

33. The rationale of the United States government can be found in two statements of the Department of State relating to the Nicaragua case. See supra note 28. The first sets forth the government's rationale for its refusal to participate further in the case, including a lengthy statement on the proper role of the Court, as seen by the United States. U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the ICJ, 1985 DEP'T ST. BULL., Mar. 1985, at 64. The second articulates the formal termination of compulsory jurisdiction. U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction, 1986 DEP'T ST. BULL., Jan. 1986, at 67. Both are reprinted in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS, supra note 9, at 472-78.


36. The European Court of Justice in Luxembourg decides cases arising under the treaties establishing the European Communities. The European Court of Human Rights in Strasbourg decides cases arising under the European Convention on Human Rights. International resolution of claims by these tribunals prevents the underlying disputes from escalating to a dispute between nations.

37. The formal provisions of the GATT relating to disputes are contained in Article XXIII, which does not refer to the panels at all, but rather to actions by the Contracting Parties to the Agreement. General Agreement on
tional Court (and of its predecessor, the Permanent Court) apparently assumed that the Court (or possibly a specialized chamber of it) would resolve legal questions in trade disputes. That has never been the case; such disputes normally have been resolved in special mechanisms within GATT. GATT's work in this regard has been steadily increasing.

What are the characteristics of GATT adjudicative decision-making? First, the cases are all based upon a fixed body of written law, the General Agreement and its subordinate agreements. In each case the parties to the dispute have agreed to the basic text in question; the issues for the panel are the elaboration of that text and the appreciation of the facts of the case, and not of finding law from some general principles. Second, the process is technically not adjudication in the strict sense of the word. The governing body of GATT appoints each panel and the panel technically only makes a report or recommendation to the governing body. In the governing body, each state, including the defendant state, could theoretically impose a negative vote to prevent adoption of the panel report. This means that states recognize that they have an opportunity, both before and after the panel decision, to preclude an unacceptably negative result, although such a veto itself could carry a very heavy political price. Third, the process itself is relatively rapid, inexpensive, and private, when contrasted to International Court procedures.

A second example of effective international dispute resolution is in the International Centre for the Settlement of Investment Disputes (ICSID), which operates under the auspices of the World Bank. An intricate network of treaties supports this system and allows foreign investors and states to adjudicate


38. See Stat. I.C.J. art. 26(1). Article 26(1) of the Statute of the Court provides for specialized, subject-matter chambers. One of the subject matters specifically mentioned is "transit and communication," an element of international trade. Id.


40. See R. HUDEC, INTERNATIONAL TRADE DISPUTES, supra note 39, at 5-11.

41. Id. at 11-13.

42. See supra note 34.
disputes involving compensation for direct or indirect nationalization of investment properties.

What are the characteristics of the ICSID system? As with GATT, the parties specifically agree to the applicable standards in advance. The process is also relatively quick, inexpensive, and private, when contrasted to International Court proceedings. In addition, this system admits a new kind of party to the international process. In the ICSID, the foreign investor can make its claim directly. In contrast, in the International Court, the claim could be put forward only after the investor's government has “espoused” it, making it a matter of diplomatic controversy between the two states. In a very important way, this serves to depoliticize the claims, potentially to the advantage of all concerned.

The work of the two European courts, in Luxembourg and in Strasbourg, has likewise increased phenomenally during the same period. Although formally concentrating on claims brought by individuals against states (or sometimes those of pan-European institutions against states), these courts have managed to transform what would otherwise be the grist for disputes between nations into the mode of judicial resolution. The European courts find their authority and the applica-

44. See id. at 103-04.
45. Id.
46. In traditional approaches to international law, only a state could be the bearer of “rights.” An individual or company that was harmed by a foreign government had no direct international claim; only that individual’s or company’s government could have such a claim. The process of making that claim was called “espousal.” Once the claim was espoused, it became part of the diplomatic agenda between the disputing states.
47. The European Court of Justice in Luxembourg decides cases under the treaties that establish the Common Market. See C. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 120 (1987). Indeed, those treaties provide that it will have exclusive jurisdiction, thus cutting off resort to the International Court. Most of the cases before the European Court involve disputes between private parties and governments or between the European Community’s institutions and national governments, rather than government-to-government conflicts. The institutionalization of these conflicts, however, helps reduce the potential for conflicts between states.
48. The European Court of Human Rights in Strasbourg decides cases under the European Convention on Human Rights. See C. GRAY, supra note 47, at 149. Again, the conflicts presented to it involve individual claims, but the resolution of those claims through this process may reduce the occasion for disputes between governments about these same issues.
ble law in the European Community treaties\textsuperscript{49} and the European Convention on Human Rights,\textsuperscript{50} respectively.

Other international adjudication mechanisms have also flourished. There is a new final dispute resolution mechanism for trade disputes between the United States and Canada.\textsuperscript{51} An international tribunal is arbitrating the thousands of claims following from the Iranian Revolution.\textsuperscript{52} Even Egypt and Israel were able to resolve a territorial dispute through an authoritative international arbitration.\textsuperscript{53}

All of this activity demonstrates that nations are increasingly turning to forms of third-party dispute resolution. Why are nations, including the United States, eschewing the International Court? What are the prospects for third-party dispute resolution?

III. CHALLENGES TO THE INTERNATIONAL COURT

Some of the challenges to the use of the International Court as a dispute resolving body can be illustrated from the experience of the United States, especially from its decision to terminate its declaration accepting jurisdiction under the "optional clause."\textsuperscript{54} The purpose of this presentation is not to rehearse the wisdom or folly of particular decisions of the Court or of the United States government, but simply to illustrate the issues involved. Some of the challenges, however, come from outside of that particular controversy, but nevertheless require attention.

A. CHALLENGE 1: THE COURT EXCEEDS ITS PROPER ROLE

In 1984, faced with an impending suit from Nicaragua, the United States tried to limit its acceptance of the jurisdiction of the Court.\textsuperscript{55} After failing in that attempt, the United States withdrew its acceptance of the compulsory jurisdiction in 1985. Some of the rationale offered for that action focused on the

\textsuperscript{49} See C. Gray, supra note 47, at 120.

\textsuperscript{50} Id. at 149.


\textsuperscript{52} See C. Gray, supra note 47, at 181-85.


\textsuperscript{54} See supra note 10 and accompanying text.

\textsuperscript{55} See S. Rosenne, supra note 14, at 217-23. The United States was not the only state to act in this manner. For example, the United Kingdom once altered its declaration to avoid impending litigation.
then stinging defeat in the jurisdictional proceedings before the Court; others were more technical in nature. These rationales for excluding jurisdiction, which I call "challenges" to the Court, deserve reexamination at this time.

The first challenge is based on the fundamental position the United States government took in the Nicaragua litigation: diplomatic, rather than judicial, means should be employed to resolve the most serious political-military disputes. The unsuccessful United States position had several formulations. The United States claimed that the United Nations Charter granted the Security Council exclusive jurisdiction over such controversies. In the alternative, it argued that the particular kind of dispute was inherently incapable of adjudication because of the impossibility of presentation of evidence, the lack of timeliness in adjudication, the risk of revealing military secrets and the like.

When originally articulated, these issues were expressed in a Cold War context, in which many decisionmakers and commentators saw a need to confront Soviet supported measures that might upset an otherwise precarious balance of power. With the end of the Cold War and with that set of conceptions now behind us, is there still need or support for such a set of limitations on the authority of the Court?

Useful insights can be drawn from the development of dispute resolution in other areas, particularly in GATT. In the GATT context, dispute resolution mechanisms gradually have evolved; they were not created with simple intellectual rigor in a single statute. GATT dispute resolutions deal with a wide variety of issues, from the mundane to the essential. At least between the major industrialized countries, the conflicts of the

56. The United States has not been alone in this attitude. France withdrew its declaration in the 1970s. The Soviet Union, despite protestations in recent years about the desirability of adjudication of disputes, has never consented to the general jurisdiction of the Court and has never appeared as a party there. Indeed, among the "Big 5" Security Council members, only the United Kingdom continues to admit compulsory jurisdiction under the optional clause, and it does so in a form that permits it to revoke jurisdiction on a moment's notice, as it has done when confronting potential suits against it.


58. Id. at 432-36.

59. Id. at 429-31, 436-38. The United States also argued other grounds for refusing jurisdiction, such as the alleged failure of Nicaragua itself to file a proper declaration accepting jurisdiction, were also argued. They are not pertinent to this point.
future are likely to be economic and trade conflicts, not military ones. How has GATT dealt with the resolution of disputes?

In some respects, GATT's dispute resolution system is similar to that of the International Court. Each of the disputing parties presents its claims to a neutral panel, which renders a report based on "GATT law." There, however, the similarities end.

In legal terms, GATT's dispute resolution mechanism has been formally based in the assembly of members. In that body, each nation, including the "defendant state," has a vote and actions can be taken only with unanimous consent. Thus, each nation has the potential to block the creation of a panel, to insist upon a specific formulation of the "terms of reference," or to block the acceptance of the panel report. Given this extensive authority to block adjudication, it may seem surprising that the vast majority of legal controversies have successfully been resolved in accordance with legal norms.

I submit that the relative success of the GATT mechanism has been because of, not in spite of, its recognition of a political role in the process. When nations feel their vital national interests are at stake, they will seek ways to protect those interests, even if those ends are in technical violation of international norms. But when nations perceive that their longer-term goals can be accomplished only through acceptance of some adverse decisions, they will acquiesce in those decisions to achieve the greater goal.

What kinds of factors lead to that acceptance? First, under the GATT system nations have the power to avoid adjudication because a member country may refuse to agree to the constitution of a panel, to its membership, or to its terms of reference. This veto power is equivalent to the United States' much-maligned Connally reservation to the jurisdiction of the International Court. Far from being a cause for concern, this provision may have aided in the resolution of disputes under this procedure.

Recent efforts to reduce the ability of GATT members to veto dispute resolution processes indicate the importance of

60. See R. HUDEC, INTERNATIONAL TRADE DISPUTES, supra note 39, at 7.


62. See supra note 18 and accompanying text.
that veto in the evolution of the GATT system. During the recent Uruguay Round of multilateral trade negotiations, there were efforts to make the panel dispute resolution process more "automatic" and "judicial." These efforts were based in part on confidence built in the dispute resolution mechanisms through the GATT's active resolution of a large number of cases. Even if that confidence is not yet sufficient to support such full judicialization of the process, the mere fact of the proposals demonstrates how confidence can be built. In GATT, that confidence was built upon a series of actual cases, not upon the theoretical soundness of an artificial framework.

Some analogies can be drawn to the "political question" doctrine in domestic constitutional law. In the earliest days of the Republic, a relatively broad political question doctrine may have been essential to the functioning of the Supreme Court. The Supreme Court accepted the proposition that certain governmental actions, although guided by law, were unsupervised by courts. The Supreme Court could not have enjoined effectively the Southern States from conducting the Civil War; indeed, no one thought to ask it to do so. Yet, after the nation as a whole had come to accept the Court as an authoritative decisionmaker, the political question doctrine was narrowed until it is now virtually meaningless as a limitation on the Court's authority. It was the broad-scale acceptance of the Supreme Court as a legitimate decisionmaker by all parts of society that made this transformation possible. I submit that the international community has not yet reached this level of acceptance of the International Court as such an ultimate decisionmaker. The fiat of a statute will not achieve that transformation by itself. Rather, as was true in the case of the domestic political question doctrine, acceptance of the International Court as the


64. GATT panels had heard 111 cases by the end of 1989. More than half of these, 59 to be exact, were referred to panels in the 1980s alone. R. Hudec, The Judicialization of GATT Dispute Settlement (May 3, 1990) (paper delivered at conference entitled "Due Process and Transparency in Trade: International Rules and Domestic Procedures" and to be published in a conference volume by the Centre for Trade Policy and Law and the Faculty of Law of the University of Ottawa, Canada).

65. See Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849) (guarantee of "republican form of government" not justiciable).

ultimate decisionmaker must gradually be reached by the process of building confidence.

B. CHALLENGE 2: THE INTERNATIONAL COURT IS LEGISLATING

A second challenge to the International Court is that it is "legislating" by creating new norms of international law, rather than interpreting and applying existing law. Perhaps somewhat reminiscent of charges that the United States Supreme Court often "legislates," this challenge presents special problems in the field of international law.

International law is a peculiar system. There is no single, simple, authoritative legislature. New rules of law emerge either from customary law, reflecting the nearly universal practice of sovereign states, or from treaties or other specific agreements that states have signed and ratified. The Court, of course, interprets and applies both kinds of law in its decisions. It decides cases by a simple majority vote.\(^6\) When it decides (even if by a bare majority) that some rule has been accepted as a universal customary practice, that decision binds the parties.\(^7\)

International law today is in a state of rapid change. A host of new issues exist: control of the environment, of outer space, of the exploitation of the seabed, and so on. Half a century ago, these subjects were simply incomprehensible. In addition, the legal implications of other existing issues have clearly changed. For example, human rights receive vastly greater protection than was the case a half century ago. Insofar as these changes have been based on treaties or other explicit agreements, they reflect explicit state consent. Insofar as these changes are predicated upon other forms of legal development, such as newly emerging customary law or rules evolved from non-binding General Assembly declarations, there is no equivalent clear state consent and, thus, there is far less willingness to accept adverse judicial determinations because they smack of legislation by an extraordinarily small body.

Again, one can return to the specificity of the norms involved and the clarity of national consent. When those two factors are present, adjudication has been relatively successful as a dispute resolution mechanism. These may be factors that contribute to the success both of the ICSID and GATT systems. In both cases the law is fairly clear at the outset. In the ICSID ar-

\(^7\) Id. art. 59.
bitrations, for example, one need not resolve the controversies
surrounding the appropriate standards of compensation for na-
tionalization of property. The arbitrators merely have to apply
the standard that was explicitly accepted in the agreement.69
ICSID decisionmakers have the more limited task of applying
settled law to the facts. Because the range of that discretion is
more constrained, risks of unanticipated adverse consequences
are thus more limited. Likewise in GATT, the basic rules have
been accepted in the General Agreement itself or in the
subordinate Codes that are formally accepted as international
agreements. The panel members are applying the terms of ac-
cepted law.

The European Court of Human Rights's decisions provide
another example. There again, the tribunal is administering an
agreed text, rather than creating law from general principles.70

C. CHALLENGE 3: THE INTERNATIONAL COURT IS BIASED

Perhaps most fundamental of the challenges to the Inter-
national Court is the charge that it is biased. The challenge ex-
ists at two levels: One is specific, the other systemic.

The specific charges of bias are based upon specific inci-
dents that need not be examined here. Less-than-desired con-
duct occurs in all judicial systems. Indeed, one reason for
having a bench of fifteen judges, rather than a smaller tribunal,
is to minimize the effects of such conduct if it occurs.

The more troubling aspect of this challenge is systemic. It
is based upon the selection process for judges. Although the
governing Statute provides a complex process by which the Se-
curity Council and the General Assembly vote upon proposed
candidates, who are supposed to be "elected regardless of their
nationality from among persons of high moral character,"71
the real selection process is somewhat more complex. In fact, the
judges of the Court are selected, in effect, on the same system
of geographic representation that prevails throughout the
United Nations system.72 One judge normally comes from each
of the five permanent members of the Security Council.73 Two

69. Shihata, supra note 43, at 100.
70. European Convention for the Protection of Human Rights and Funda-
mental Freedoms, Nov. 4, 1950, art. 45, 213 U.N.T.S. 221, 246.
71. STAT. I.C.J. art. 2.
72. The Statute does provide that in the Court as a whole "the representa-
tion of the main forms of civilization and of the principal legal systems of the
world should be assured." Id. art. 9.
73. For many years after its recognition by the United Nations as the gov-
of the others come from Western Europe, one from Eastern Europe, one from the Arabic states, two from sub-Saharan Africa, two from Asia, and two from Latin America. In practice, caucuses of the General Assembly representatives from each of these areas determine which of the candidates will be chosen. Once these selections have been made, other nations, both inside and outside of the region, usually vote for the "group" nominee. The formal election process has been little more than a ratification of those regional choices, unless the relevant group of nations is unable to agree on a single candidate.

One can analyze probable voting patterns (or, at the very least, predispositions) of the judges. If one applies to the International Court an analysis similar to that which would be applied in looking at the United States Supreme Court, there are interesting results. Five or six judges (those from the United States, Britain, France, the Western European countries, and Japan) can be expected to support the traditional Western views of international law. Three judges (from the Soviet Union, China, and Eastern Europe) have normally supported more Socialist views of law. The balance of six or seven judges, largely from "Third World" countries, hold the "swing votes." Many of these judges, at least of the older generation, have strong connections to the traditional approaches to international law.

Further, most of these judges also had diplomatic experience in the legal missions of their countries to the United Nations. Indeed, service in United Nations bodies has become a virtual prerequisite to selection to the Court, especially because the effective selection process of judges from Third World countries takes place within the "groupings" of the General Assembly. With the "swing votes" increasingly likely to come from former diplomatic representatives of these countries to the General Assembly, one should at least question their probable orientation toward legal questions and the proper role of the General Assembly in the creation and formulation of inter-

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74. Seven of the ten judges from non-permanent members currently serving on the Court had significant experience in United Nations organizations. See 1987-88 I.C.J.Y.B. 17-43 (1988) (presenting the biographies of the judges).
national law.\textsuperscript{75}

Perhaps more troubling than the election process is the need of the judges to seek periodic reelection. The term of office is nine years.\textsuperscript{76} Most judges seek to serve two (or sometimes more) terms. Reelection requires a repetition of the same General Assembly and Security Council selection process. For those originally so selected, renewal of the relevant regional group’s endorsement will be a prerequisite to this selection. A judge may be tempted to follow the political line of the relevant electoral groups, rather than a more strict legal analysis, especially as the time for reelection occurs. Subtle pressures in this regard may be as invidious as overt ones.

The arguments for a protected tenure for judges is as compelling in the international scene as it is in the domestic one. The perils of an electoral system in which there are only 163 voters,\textsuperscript{77} who comprise the entire body of potential litigants, is even more disturbing. The fact that the General Assembly is the primary electoral body in point of fact may lead to greater deference to its decisions than international law warrants. A protected tenure could take the form of a limitation of service to a single term, perhaps a term somewhat longer than the current nine year period.

D. MISCELLANEOUS CHALLENGES

There have been other more specific challenges to the jurisdiction of the Court. Most of them have been fairly technical in nature. They have included concerns about the Court’s apparent opposition to a third state’s intervention in litigation (an opposition that appears to have mellowed in the past year\textsuperscript{78}) and the minimalist jurisdictional threshold it applies in imposing preliminary measures, the international equivalent of a temporary restraining order. These challenges can only be briefly mentioned in this Essay. Some are within the control of the Court itself; others would require an amendment of the Court’s Statute to remedy.


\textsuperscript{76} STAT. I.C.J. art. 13, para. 1.

\textsuperscript{77} In addition to the members of the General Assembly, four other small states have ratified the Statute of the Court, but not the United Nations Charter. They are entitled to vote in judicial elections. They are Liechtenstein, Nauru, San Marino, and Switzerland. 1987-88 I.C.J.Y.B. 49 (1988).

One of these is the provision of the Court's Statute that provides that "Only states may be parties to cases before the Court." This provision excludes claims brought (or against) both international organizations and individuals (or companies) that have international claims. The exclusion of international organizations represents an outdated jurisprudential approach of the 1920s. Despite Charles DeGaulle and Margaret Thatcher, the European Community has a presence (if not a personality) in international affairs that must be recognized, not ignored. General international organizations, like the United Nations itself, must also be taken into consideration. The international community has developed a series of legal fictions that alleviate, but do not cure this problem. An amendment to the Statute clearly is warranted.

The exclusion of individuals and corporations from the Court's jurisdiction is more problematic. Certainly one would not wish to have the Court become a tribunal of first instance with general jurisdiction for resolution of all of the world's ills. But equally, an insistence that a nation espouse a claim before it can be presented to this international tribunal has the effect of transforming a relatively private dispute into a potentially political one. Some alternative, perhaps modeled after one of the other international tribunals, should be sought. For example, the ability of ICSID arbitration panels and of the European Court on Human Rights to dispose of claims brought by individuals or groups without transforming them into state-to-state controversies is one of the keys to their success.

Finally, there is the question of cost. Obtaining a decision from the International Court is not only time-consuming but, due to its nature, expensive. Much of the procedure of the Court remains from a time of far greater formality and cere-

79. STAT. I.C.J. art. 34.
80. Various legal fictions have been used to deal with this problem. The most common is for the international organization to seek an advisory opinion, which the organization and the state concerned agree to treat as binding. See, e.g., Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73 (Advisory Opinion). Another approach is for two states to "appeal" a decision of the international organization by ordinary litigation between themselves. See, e.g., Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.), 1972 I.C.J. 46.
81. Shibata, supra note 43, at 102-06.
82. Although parties save the cost of paying judges and the expense of the registry and court facilities by using the Court, other direct and indirect costs can outstrip the savings. Compliance with Court formalities, including the filing of hundreds of copies of printed memorials (instead of typed briefs), attendance of agents at pre-hearing proceedings, etc., escalate costs. The fact
mony. Ways of simplifying procedure and reducing cost might be explored.

IV. THE FUTURE OF INTERNATIONAL ADJUDICATION

Where do the current problems with the International Court lead in terms of the future of the international dispute resolution and the role of the Court in it. The relative success of the “other” dispute resolution systems presents optimistic possibilities. Most nations are willing to resolve many of their disputes in peaceful ways, frequently including reference to binding third-party dispute settlement. Given the proper context, this approach can be quite successful. This adjudicating mechanism usually involves the application of relatively specific rules and the delimitation of the issues to avoid the questions of the greatest national sensitivity.

We can expect to see the growth of the alternative dispute resolution tribunals over time. The disputes of the future will increasingly be economic in nature. Such disputes will probably fit more readily into a GATT or GATT-type mold than into the International Court’s system, especially if the GATT model offers advantages of time, cost, and privacy. In the alternative, we can expect to see international disputes diverted to regional organizations, such as the European Court or the Canada-United States Arbitration Panels. And, if we believe the advocates of alternative dispute resolution, a strict adherence to formal mechanisms of adjudication is already obsolete.

What about the International Court itself? Are there ways to enhance its jurisdiction and authority? Whenever this question is posed, an inconclusive debate between Franck and Lehman’s “messianists” and their “chauvinists” normally ensues. This debate pits those who would accept the Court’s jurisdiction as an act of faith against those who would reject it as an act of faith. That dispute has remained unresolved for at least seventy years; it is likely to remain unresolved for seventy years more. It is the argument (to hearken back to the quotation from Dickens at the opening of this Essay) between those who see an “epoch of belief” and those who see an “epoch of incredulity.”

I submit that this argument is irrelevant in the modern
world. Adhering to the pragmatic school of jurisprudence,\textsuperscript{83} I suggest that we have been asking the wrong questions for seventy years. Asking whether we should (or should not) have absolute confidence in a World Court as an abstract proposition is a vain and futile question. Rather, we should ask how we can build confidence in an International Court, and test that confidence with reasonable degrees of risk. If the confidence is then well-founded, the acceptance of jurisdiction and of the Court's work can grow. If not, the risk will be limited by the manner of submission of the dispute to the Court.

The notion of "confidence-building measures" is not new. It was one of the cornerstones of the Helsinki Agreement that was a precursor to the thawing of the Cold War.\textsuperscript{84} It involved, not global leaps of faith, but very limited, tentative steps to test the reactions of others. A similar approach might be taken on the question of international jurisdiction.

Confidence is built, not on grand theories, but on actual practice. For that reason, it is necessary to identify some specific instances in which the Court can be given jurisdiction and can effectively respond to the challenges provided.

One suggestion is that a series of subject-matters be identified in which there would be agreement to take international disputes to the International Court. The idea is not new. It was once proposed in the course of negotiations for the original Permanent Court.\textsuperscript{85} It was rejected in favor of a broader "leap of faith" approach under the "optional clause." That idea has not gained the support necessary to make it universally effective. It is time to try a different approach.

The idea proposed above is similar to the one that Abraham Sofaer, the former Legal Adviser to the Department of State, proposed.\textsuperscript{86} His considerably more elaborate version would also call for the use of chambers, rather than providing access to the full Court, and would initially be available only to the five permanent members of the Security Council.\textsuperscript{87}


\textsuperscript{84} Part 2 of the Final Act of the Conference on Security and Cooperation in Europe (commonly known as the Helsinki Accords) is entitled "Document on confidence-building measures and certain aspects of security and disarmament." Conference on Security and Co-operation in Europe: Final Act, August 1, 1975, 14 I.L.M. 1292, 1297 (1975).

\textsuperscript{85} M. HUDSON, supra note 8, at 192-93 & n.40.

\textsuperscript{86} Sofaer, \textit{Adjudication in the International Court of Justice: Progress Through Realism}, 44 REC. A.B. CITY N.Y. 462 (1989).

\textsuperscript{87} Id. at 480.
additional limitations may have practical advantages in negotiation, but may not be necessary as a permanent solution of the issues presented.

In identifying matters for adjudication, it would be well to heed the lessons learned from other international adjudicative bodies. The interpretation and application of treaties, specific texts the parties agreed to, achieves more acceptance than the interpretation and application of more general norms of international law, especially norms of customary international law. Equally, it is important to avoid highly political questions in the early stages of this confidence building process.

Building upon the credibility or confidence created in this process, states may be willing to extend the list of submitted matters and to restrict the number of issues excluded from jurisdiction. The process will be long and difficult; confidence in institutions and procedures cannot be built overnight. It will require the cooperation of states in submitting disputes to the International Court, under whatever jurisdictional framework is available. Confidence cannot be built without experience, and experience cannot be achieved without the submission of cases. Perhaps one of the biggest flaws of the previous approach has been to save only the largest controversies for the International Court, rather than using smaller ones to build that confidence.

For international adjudication, this is neither the best of times nor the worst of times. It is neither a season of Light, nor a season of Darkness, but rather one of Twilight. Gradually building confidence in the institutions of international adjudication, that Twilight can become the Dawn, offering a future in which adjudication will resolve international conflict.