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Philip C. Jessup

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THE DEVELOPMENT OF A UNITED STATES APPROACH TOWARD THE INTERNATIONAL COURT OF JUSTICE

*Philip C. Jessup**

I. INTRODUCTION

Article 1 of the United Nations Charter states the purposes of that organization. Prominent among these purposes is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace." Some writers have sought to make a point from the order of the words—"justice" is mentioned before "international law." But the function of the International Court of Justice is "to decide in accordance with *international law* such disputes as are submitted to it."[1] I doubt if there is any actual or intended dichotomy between the two prescriptions. Nor would I agree with an exegesis which suggested that "situations" are to be "adjusted" on the basis of "justice," while "disputes" are to be "settled" on the basis of "international law."

The concept of a World Court with a bench of judges serving full time has been a favorite theme with American statesmen from the first years of the twentieth century. Recognizing that international arbitration is also a judicial process, George Kennan writes that

* Former Judge, International Court of Justice; former United States Representative, United Nations Security Council and General Assembly. A.B., 1919, Hamilton College; LL.B., 1924, Yale University; A.M., 1924, Ph.D., 1927, Columbia University.

The substance of this article is taken from a manuscript prepared by the author as Senior Visiting Research Fellow, Council on Foreign Relations, 1970-71. Acknowledgement is made here, *en masse*, to the assistance received from many persons in obtaining data and in editing the manuscript.

1. I.C.J. STAT. art. 38, para. 1 (emphasis added).

"Arbitration, then, was our first love and our first hope."[2] He makes the common mistake of asserting that really vital disputes could never be submitted to judicial decision. Yet the assertion is not erroneous within his frame of reference, which is diplomacy on the grand scale among the Great Powers. It is of no significance to Kennan that smaller powers may gain or lose large percentages of national territory by arbitral awards. It is true that just as often they have gained or lost by the imposed fiat of the Great Powers. Thus, Kennan might say also that Canada was forced by Great Britain to submit to artibration the Alaskan boundary dispute that Theodore Roosevelt considered vital enough to warrant its solution by the American army if necessary. Kennan concludes that Secretary of State Elihu Root had no "sympathy or understanding for the idea of dealing with political differences on their merits and by the processes of diplomacy, at least not where there was any possibility that legal procedures could be devised to replace the diplomatic method. . . ."[3] This is a hasty judgment that is a complete misunderstanding of Root and that ignores his handling of United States relations with Latin America, Japan and various European governments. It ignores also the modern use of the International Court as part of the political processes of the United Nations in seeking to defuse potentially explosive situations.

This article is not designed as a history of the International Court of Justice, nor as a legal analysis of the way in which the Court functions.[4] Rather, the purpose is to describe the attitude of the United States, *i.e.*, the Department of State, toward the actual use of the Court in a variety of situations, some of which involved important interests of the United States and others of which did not. The concentration in this article is on the jurisdiction of the Court to give advisory opinions, since it is in connection with proposals to request such opinions that all members of the United Nations have an opportunity to express their views and to exercise their influence for or against the use of the principal judicial organ of the United Nations. In most contentious cases, only the states parties to the dispute are involved, although note will be taken of certain situations in which the General Assembly or Security Council urged the parties to resort to the Court. Before dealing with the proposals to request advisory opinions, the attitude of the United States toward the use of the

2. Kennan, *Arbitration and Conciliation in American Diplomacy*, 26 ARBITRATION J. 1, 6 (1971).

3. *Id.* at 18.

4. *See generally* JESSUP, THE PRICE OF INTERNATIONAL JUSTICE 51-82 (1971); ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965).

International Court of Justice is indicated by United States domestic law and by a series of cases in which the United States sought to secure a decision from the Court.

II. United States Attitudes

The State Department has recently displayed a conviction that the United States should break loose from the shackles of the "Connally Amendment,"[5] by which the Senate emasculated acceptance of the jurisdiction of the Court. The "Connally Amendment" was proposed on the Senate floor in 1946 by Senator Connally of Texas at the instigation of John Foster Dulles, although the same proposal had already been rejected by the Senate Committee on Foreign Relations. The Amendment provides in essence that although the United States purports to submit to the jurisdiction of the Court to decide cases involving legal issues, the United States Government can block the Court's jurisdiction in any case in which another state brings a suit against it simply by saying that the United States *claims* that the issue is within its domestic jurisdiction. Such an assertion was intended to be unreviewable by the Court.[6]

The illustrative case was *Interhandel*,[7] a suit brought by Switzerland against the United States in 1957. Basically, the case concerned the seizure by the United States during World War II of assets of a company that the United States claimed was German and therefore "enemy," but that the Swiss contended was actually a Swiss enterprise and therefore "neutral." In its response to the Swiss application to the Court, the United States advanced a number of defensive pleas. The Court, by a vote of nine to six, upheld the United States argument that the Swiss Government should, in accordance with an established rule of international law, exhaust its remedies in the courts of the United States before resorting to an international forum. This conclusion terminated the International Court proceedings. Another of the defenses of the United States was based squarely on the Connally Amendment, and asserted that the Court had no jurisdiction *because the United States had determined* that the questions at issue were "essentially within the domestic jurisdiction" of the United States.[8] A supplementary plea argued that the questions were "*according to international law*, matters within the domestic

5. 61 Stat. 1218, at para. 2, clause b (1947), T.I.A.S. No. 1598.
6. It is unnecessary here to discuss the arguments on this point.
7. Interhandel Case, [1959] I.C.J. 6.
8. [1959] I.C.J. at 15.

jurisdiction of the United States."[9] The Court rejected this latter argument by fourteen votes to one, but held it unnecessary to pass upon the defense based on the Connally Amendment. Two judges, Sir Percey Spender of Australia and Sir Hersch Lauterpacht of England, held that the Connally Amendment invalidated entirely the purported acceptance of the jurisdiction of the Court and, consequently, that the Court had no jurisdiction.[10]

It is not controverted that any such reservation has a reciprocal effect, which means that if the United States files with the Court a suit against any other state, the defendant state can have the case thrown out merely by saying that on the basis of reciprocity, it invokes the United States Connally Amendment and "claims" that the matter at issue is solely within its domestic jurisdiction. On a recent unpublicized occasion, when the State Department suggested to Canada that a certain dispute be referred to the International Court, Canada refused and said that it would invoke the reciprocal feature of the Connally reservation if the United States applied to the Court. In 1970, Canada revised its acceptance of the Court's jurisdiction to exclude specifically any challenge to its claims to protective jurisdiction in the Arctic waters, thereby blocking the possibility that the United States might air its challenge before the International Court at The Hague.[11] Another illustration of this reciprocal effect is provided by the United States case against Bulgaria following the aerial incident in which an Israeli El Al passenger plane was shot down over Bulgaria, with the resulting death of six American nationals. The United States withdrew this case on May 30, 1960,[12] due to a realization that the suit could be blocked by Bulgarian invocation of the Connally Amendment, although an attempt had been made in the application to avoid that possibility.[13] Perhaps the United States

9. [1959] I.C.J. at 24 (emphasis added).

10. [1959] I.C.J. at 54, 95. The United States was at least nominally a defendant in the Case of the Monetary Gold Removed from Rome in 1943, [1954] I.C.J. 19. The case was brought by Italy in 1953 and France and Great Britain were also defendants. Despite its interesting title, the case was abortive and the United States took little interest in it, although it did not object to the jurisdiction of the Court. The Court in its judgment of June 15, 1954, held that it could not adjudicate upon the submissions of the Italian Government.

11. All pertinent documents are reproduced in 9 INT'L LEGAL MATERIALS 598 (1970).

12. Case Concerning the Aerial Incident of 27 July 1955, [1960], I.C.J. 146.

13. The British Government withdrew a similar complaint at about the same time since the Court had rejected the principal suit brought by Israel on the ground that there was not extant any valid Bulgarian acceptance of the compulsory jurisdiction of the Court.

could have induced the Court to reconsider the decision it rendered in the case brought by Israel, but the Bulgarian invocation of the Connally Amendment forced the Legal Adviser of the State Department to "eat crow," which he did honestly and openly in his letter to the Court of May 13, 1960. In the following extract from that letter, the "second preliminary objection of Bulgaria" refers to Bulgaria's invocation of the reciprocal application of the Connally Amendment, and "reservation (*b*)" refers to that part of the Connally Amendment that is here under discussion. The letter reads in part:

> In that part of the Written Observations which relates to the second preliminary objection of Bulgaria, a contention was advanced on behalf of the United States with respect to reservation (*b*) attached to the acceptance by the United States of the jurisdiction of the Court. That contention was to the effect that reservation (*b*) did not authorize or empower Bulgaria to make an arbitrary determination that a particular matter was essentially within its domestic jurisdiction. The necessary premise of the argument was that the Court must have jurisdiction for the limited purpose of deciding whether a determination under reservation (*b*) is arbitrary and without foundation. On the basis of further study and consideration of the history and background of reservation (*b*) and the position heretofore taken by the United States with respect to reservation (*b*) in litigation before the Court, it has been concluded that the premise of the argument is not valid and that the argument must therefore be withdrawn. As it was declared by the United States to this Court in the Interhandel Case (Switzerland *v.* United States), when the United States has made a determination under reservation (*b*) that a particular matter is essentially within its domestic jurisdiction, that determination is not subject to review or approval by any tribunal, and it operates to remove definitively from the jurisdiction of the Court the matter which it determines. A determination under reservation (*b*) that a matter is essentially domestic constitutes an absolute bar to jurisdiction irrespective of the propriety or arbitrariness of the determination. Although the United States has adhered to the policy of not making any arbitrary determination under reservation (*b*), the pursuit of that policy does not affect the legal scope of the reservation. Under the rule of reciprocity applied by the Court in the case concerning Certain Norwegian Loans (France *v.* Norway), Bulgaria is accorded the same rights and powers with respect to reservation (*b*) as the United States. Accordingly, the Government of the United States withdraws that part of its Written Observations and Submissions which relates to the second preliminary objection of Bulgaria.[14]

14. This letter, as well as the written observations, was signed by Mr. Eric H. Hager, Agent of the United States of America. Aerial Incident of 27 July 1955, I.C.J. Pleadings 677 (1960). The whole case is skillfully analyzed in Gross, *Bulgaria Invokes the Connally Amendment,* 56 AM. J. INT'L L. 357 (1962).

The United States submitted to the Court's jurisdiction in the *Case Concerning Rights of Nationals of the United States in Morocco*;[15] it found it advantageous to have the Court pass on that question. There were, however, other cases that the United States submitted to the Court despite an awareness that the Court would not have jurisdiction and could not adjudicate upon them. All of those cases concerned aerial incidents and were against the Soviet Union or its Eastern European allies. There is no doubt that the United States, the aggrieved party in each case, would have been glad to have the Court assess the responsibility of any of the Communist states that shot down American planes, but the actual applications to the Court must be considered as gestures designed to reveal this country's devotion to the ideal of judicial settlement of international disputes and to expose the undeviating refusal by our adversaries to accept any third-party settlement of disputes to which they were parties. The only instance revealing Russian enthusiasm for the Court was in 1962, when the Soviet Union supported the attempt by Cuba to have the Security Council request the Court for an advisory opinion on the nature of anti-Castro actions of the Organization of American States. Ambassador Adlai Stevenson, speaking for the United States, stated in the Security Council that "What we have here is not a legal dispute. What we have is a cold war political attack, through the Cuban communist regime, on the Organization of American States. . . . The International Court of Justice should not be brought into the cold war or into the jungle of communist propaganda."[16] Although the Soviet Union and its allies, as potential defendants before the Court in the various politically motivated cases brought by the United States, did not use precisely Stevenson's language, they might have echoed its sentiments, *mutatis mutandis*. The general drift of their communications to the Court was to the effect that American planes had violated their territorial airspace, that the American claims were quite unfounded and, therefore, that there was nothing for the Court to decide.

The first of these cases submitted by the United States to the Court was a double-header. On February 16, 1954, the United States filed with the Court two applications instituting proceedings against both Hungary and the Soviet Union on account of the "Treatment in Hungary of Aircraft and Crew of United States of America." The airplane had been forced down when it strayed off course and the

15. [1952] I.C.J. 178.

16. 17 U.N. SCOR, 993rd meeting 24 (1962); 17 U.N. SCOR, 994th meeting 7 (1962).

airmen had been seized by Soviet officials and tried by the Hungarians.[17] The attitude in the State Department is revealed by a memorandum of January 14, 1953, sent by Sam Klaus of the Office of the Legal Adviser to Charles Bevans of the same office. Klaus attached to his memorandum a detailed 81-page account. His general recommendation was that the United States should demand from the Hungarian Government full information and the return of the airmen. If the Hungarian Government should contest its liability, they should be asked to join in submitting the case to the International Court of Justice. If they refused that proposal, the United States should announce its determination to take up the matter in the United Nations, either in the Interim Committee of the General Assembly or in the Assembly itself. The United States would propose setting up a commission of jurists to investigate the incident, and the report of such a commission could be referred by the General Assembly to the International Court of Justice for an advisory opinion. Such a procedure, Klaus suggested, would give the United States a solid basis for its claim to damages and thereby permit the Americans to decide whether to seek satisfaction from Hungarian assets in the United States. Klaus anticipated that the Court, if seized of the case, might not assess damages but would at least propound general principles of law.

Apparently, further consideration of the case in the State Department led to the institution of the two cases in the Court, one against the Hungarian People's Republic[18] and the other against the Soviet Union.[19] It was alleged that the Hungarian Government acted "in concert" with the Soviet Government. The United States told the Court that it had invited both governments to submit to the Court's jurisdiction, but had not received "any responsive reply to the invitation."[20] It noted, however, that both governments were "qualified to submit to the jurisdiction of the Court."[21] The Hungarian Government tersely informed the Court that it was "unable to submit in this case to the jurisdiction of the International Court of Justice."[22] The Soviet Government's statement was more elaborate. It

17. Applications Instituting Proceedings, Treatment in Hungary of Aircraft and Crew of United States of America, I.C.J. Pleadings 8 (1954).

18. Treatment in Hungary of Aircraft and Crew of United States of America Case, [1954] I.C.J. 99.

19. Treatment in Hungary of Aircraft and Crew of United States of America Case, [1954] I.C.J. 103.

20. [1954] I.C.J. at 100; [1954] I.C.J. at 104.

21. [1954] I.C.J. at 100; [1954] I.C.J. at 104.

22. [1954] I.C.J. at 100.

"regards as unacceptable the proposal of the Government of the United States of America" that the Court "should examine the case concerning the American aircraft which violated the State frontier of the Hungarian People's Republic" and that "there exists no subject for consideration" by the Court.[23] Accordingly, the Soviet Government could "see no reason why this question should be examined by the International Court of Justice."[24] Since the Court lacked the consent of the defendants, it had no jurisdiction and was forced to remove the case from its list.

The next such case was a United States action against Czechoslovakia for "certain wrongful acts committed by MIG-type aircraft from Czechoslovakia within the United States zone of occupation in Germany on March 10, 1953."[25] The application to the Court was not filed until March 14, 1956.[26] The Czech Government informed the Court that, as it had already told the United States, the aerial incident in question "occurred above Czechoslovak air space . . . by American military aircraft." The United States' claims were "without point" and the application was "totally unfounded." The Czech Government, therefore, could "see no reason why this case should be considered by the International Court of Justice."[27] The Court struck the case from its list.

On the same day, March 14, 1956, the United States filed another application against the Soviet Union, complaining of certain allegedly wilful acts committed by fighter aircraft of the Soviet Government against a United States B-29 aircraft and its crew off Hokaido, Japan, on October 7, 1952.[28] The Soviet Government told the Court that it had already advised the United States that "since the American military aircraft violated the frontier of the U.S.S.R. and opened fire without any reason upon Soviet fighter aircraft, responsibility for the incident which occurred and for its consequences rests entirely upon the American side." The United States' claim being "totally unfounded," there was no reason for the Court to deal with it.[29] How the dockets could be uncrowded in a national court if a lawsuit could

23. [1954] I.C.J. at 105.

24. [1954] I.C.J. at 105.

25. Case Concerning the Aerial Incident of March 10th, 1953, [1954] I.C.J. 6.

26. An illustrative exchange of notes in complaint of the aerial incidents may be found in 29 DEP'T STATE BULL. 180 (1953).

27. [1954] I.C.J. at 7-8.

28. Case Concerning the Aerial Incident of October 7th, 1952, [1954] I.C.J. 9.

29. [1954] I.C.J. at 10-11.

be dismissed merely by the defendant's statement that the claim was "totally unfounded"!

The last of these cases was a United States application of December 9, 1958, against the Soviet Union, complaining of "certain willful acts committed by military aircraft of the Soviet Government on September 4, 1954, in the international airspace over the Sea of Japan against a United States Navy P2-V-type aircraft, commonly known as a Neptune type, and against its crew."[30] The Soviet response was the same: violation of its frontier and opening fire on Soviet fighters. But the Soviet note to the Court added a new element. It stated that according to article 36 of the Statute of the Court, disputes could be "transmitted" to the Court only by "common consent of both sides."[31] Since the Soviet Government did not consent, the United States "acted in disaccord with the Statute."[32] And, as usual, there were no questions in the case "which are of need to be considered" by the Court.[33] The United States quickly and correctly pointed out that it was "well settled that any government qualified to appear before this Court may file its application without prior special agreement."[34] However, since the Court had no jurisdiction over the dispute, it removed the case from its list.

This aerial incident case had a sort of dithyrambic prologue, with Henry Cabot Lodge as the leader and the members of the United Nations Security Council as the chorus.[35] The United States immediately submitted the aerial incident to the Security Council and Ambassador Lodge made his opening speech on September 10, 1954. He said that the United States had "long felt that the correct forum for the solution of such problems is the International Court of Justice, where such cases can be considered on their merits. The United States Government realizes that the judicial process followed by the Court offers the best means of resolving cases of this type."[36] But, Lodge explained, only four months before this date the United States had proposed to the Soviet Government that the Hungarian aerial incident

30. Application Instituting Proceedings, Aerial Incident of 4 September 1954, I.C.J. Pleadings 8 (1958).

31. Case Concerning the Aerial Incident of September 4th, 1954, [1958] I.C.J. 158, 160.

32. [1958] I.C.J. at 160.

33. [1958] I.C.J. at 160.

34. [1958] I.C.J. at 160.

35. This is not to suggest that Lodge was Dionysiac, but rather that he led the dialogue after the manner introduced by Thespis. *See* A.E. HAIGH, THE TRAGIC DRAMA OF THE GREEKS 27 (1896).

36. 9 U.N. SCOR, 679th meeting 7-8 (1954).

should be referred to the Court and this proposal had been "categorically refused by the Soviet Government."[37] So the case was brought before the Security Council. No action was taken; probably, none was expected.

In 1960, the Soviet Union tried to turn the tables on the United States. The Soviet Government submitted to the Security Council the case of a United States aircraft, an RB-47, on a mission over the Barents Sea. The Soviets alleged that the plane had violated its aerial frontier and was over Soviet territory when it was shot down. Kuznetsov, the Soviet Representative to the Security Council, indeed accused Ambassador Lodge of Thespianism when he said:

> May I ask Mr. Lodge whether he really thinks that his theatrical methods, to which the United States representatives have been resorting with increasing frequency in recent Security Council meetings, can convince anybody? He should have realized long ago that the Security Council is not a stage for that kind of performance, which is designed to produce a very cheap effect.[38]

Ambassador Lodge did reply rather theatrically:

> The difference between the United States and the Soviet Union is that we shoot their aircraft with cameras; they shoot ours with guns and rockets and kill or imprison our crews—even though not one man, woman or child in Russia has ever been injured by any of our aircraft. Not one.[39]

In addition, however, Ambassador Lodge introduced a resolution whereby the Security Council would have called upon the two parties to settle the dispute either by setting up a commission to investigate the facts or by referring the case to the International Court of Justice. The resolution received nine votes in favor, but one of the two negative votes was that of the Soviet Union, thereby constituting a veto.[40]

It is true that aircraft occasionally miscalculate their position or are forced by weather conditions to deviate from their flight path. The Soviet Union and its satellite states, however, do not seem to be inclined to give the aircraft of other countries the benefit of this doubt. In public contemplation these days, United States military or naval aircraft may be suspected of espionage, but the same suspicion generally does not attach to the Swedish Air Force. Therefore, it is noteworthy that in 1952 the Swedish Government protested to the Soviet Government against attacks upon two Swedish aircraft over the

37. 9 U.N. SCOR, 679th meeting 8 (1954).
38. 15 U.N. SCOR, 881st meeting 8 (1960).
39. 15 U.N. SCOR, 883rd meeting 34 (1960).
40. 15 U.N. SCOR, 883rd meeting 39 (1960).

Baltic Sea. The Soviet's reply to Sweden followed the stereotype of replies to the protests of the United States: Swedish aircraft had violated the Soviet frontier and in at least one case were alleged to have opened fire on Soviet fighter aircraft. Like the United States, the Swedish Government proposed that some international procedure be utilized to establish the facts and suggested that the International Court of Justice would be the most suitable forum for dealing with the dispute. The Soviet reply was a variation on its usual theme:

> As regards the Swedish Government's statement that it will insist upon an examination of the matter under discussion by the International Court of Justice or in accordance with some other suitable international procedure, the Ministry for Foreign Affairs considers it necessary to draw attention to the fact that the protection of the frontiers of the Soviet Union against any encroachment is the Soviet State's inalienable right and duty. The Ministry for Foreign Affairs of the Soviet Union cannot, therefore, see any reason for resorting to any international procedure for the examination of questions connected with encroachments on the Soviet Union's frontiers.[41]

III. Advisory Opinions

In general, the United States has favored proposals to refer disputes between states and questions of a constitutional character concerning the operations of the United Nations under the Charter to the International Court of Justice for advisory opinions. When such a proposal is made in connection with a political issue, it may be motivated by the hope that the parties will agree to submit to the Court and that the Court's decision will either end the dispute or contribute to its solution. Another motivation is the expectation that the dispute will not be aggravated while the matter is *sub judice* and that, in the meantime, other diplomatic procedures may lead to a solution. Both of these motivations have an historical antecedent in the policy of the Council of the League of Nations to resort frequently to the Permanent Court of International Justice for advisory opinions, particularly to secure authoritative interpretations of contested articles of the peace treaties concluded at the end of World War I. That is a useful service that the Court can render. Even if

41. This quotation from the Soviet note of July 16, 1952, is taken from *Attacks upon Two Swedish Aircraft over the Baltic in June 1952: Notes Exchanged Between Sweden and the Soviet Union, Press Releases, etc.*, II:2 Documents Published by the Royal Ministry for Foreign Affairs, New Series 32 (Stockholm 1952).

the Court's opinion does not lead to a settlement of the dispute, the accumulating jurisprudence of the Court contributes to the development of international law. This contribution is particularly notable in the important subject of the rules for the interpretation of treaties; furthermore, future potentialities in this area are enhanced by the fact that there now has been wide acceptance of the Vienna Convention on the Law of Treaties (1969), which was based on prolonged studies by the International Law Commission of the United Nations.[42]

The various proposals granting the International Court of Justice jurisdiction to deal with constitutional and operational activities of the United Nations under the Charter have often had far-reaching political overtones. Soon after the organization's founding, the first substantive debates took place in the second part of the first session, which was held in New York beginning on October 23, 1946. The problem of South Africa's treatment of racial minorities, which still occupies the attention of many of the organs of the United Nations, was raised at this session by India's complaint of the treatment of Indians in the Union of South Africa. This case had special characteristics since it involved certain agreements between India and South Africa. A prime question at that time, as subsequently it has been in problems affecting other countries, was whether the matter was "essentially within the domestic jurisdiction" of South Africa and, therefore, beyond the competence of the United Nations to "intervene" in light of the restrictive provisions of article 2, paragraph 7 of the Charter. The legal technicalities of the interpretation of this Charter provision will be omitted in this article, but it should be observed that the United States generally has been favorable to the competence of the General Assembly to discuss a matter without commitment to that organ's right to decide on remedial steps or enforcement action.

In this first case, Field Marshall Smuts spoke for South Africa. He said that, while South Africa did not admit the right of the United Nations to intervene in this matter, his country did not object to discussion of the problem. Smuts submitted a draft resolution under which the General Assembly would have asked the Court to decide whether the matter was essentially within the domestic jurisdiction of South Africa.

Colombia then submitted a draft resolution, which, had it been adopted, might well have clarified subsequent debates about the

42. The text of the Convention is reproduced in 63 AM. J. INT'L L. 875 (1969).

apartheid policies of South Africa. The Colombian draft posed the following questions:

> (a) Whether the Members of the United Nations, in accordance with the Preamble and Article 1, paragraph 3, of the Charter, are under obligation to amend immediately their internal legislation when it establishes racial discrimination incompatible with the text of the Charter?
> (b) Whether the Members of the United Nations are entitled in the future to enact internal legislation embodying racial discrimination?
> (c) Whether laws of racial discrimination constitute, or may be alleged by States to constitute, matters of internal jurisdiction on which the General Assembly is debarred from making recommendations to the State or States concerned, to the Security Council or to the Economic and Social Council?[43]

The United States supported the South African draft resolution, emphasizing the importance of South Africa's avowed willingness to "accept the opinion of an impartial tribunal." Such willingness was not so apparent in later situations involving the treatment of black Africans. The position of the United States was stated by Charles Fahy, Legal Adviser to the Department of State, who as Solicitor General had been an adviser to the United States delegation at the San Francisco Conference of 1945. He argued the position of the United States in both the committee and in the plenary session. Resort to the Court, Fahy said,

> is the best possible manner of removing the legal controversy from the contending winds of political adjudication, which would forever cloud the decision made and leave the innocent parties most directly concerned, the Indians in South Africa, the victims of the resistance which would follow an effort to ameliorate their condition by a decision made here in the form of political controversy, leaving unsolved the underlying question of legal obligation.[44]

The United States joined Great Britain and Sweden in proposing an amended text of the draft resolution calling for a submission of the question to the Court, and South Africa withdrew its draft in favor of this proposal. France and Mexico, however, submitted an alternative draft that merely expressed the conclusion that South Africa should act in conformity with its international obligations and requested the two governments to report to the next session of the General Assembly. This innocuous resolution was adopted in committee by a vote of 24 to 19, with 6 abstentions. When South Africa recommended the United States-British-Swedish draft in plenary session, this

43. U.N. Doc. A/C.1&6/13 (1946).
44. 1 U.N. GAOR 1012 (1946).

was rejected by a 32-15-7 vote, and the bromidic text was adopted.[45] The searching Colombian draft fell by the wayside.

It may be well to note here that the United States similarly supported a 1947 Security Council proposal by Belgium to submit to the Court for an advisory opinion the question of whether the Indonesian problem was, as the Dutch claimed, an essentially domestic question. In explanation, Ambassador Herschel Johnson said that the United States had "no doubts whatever concerning the Security Council's competence and authority to issue an order to cease hostilities—no doubts whatever. What concerns us is the question as to whether the Security Council has competence to impose a particular method of peaceful settlement in a case of this type."[46] Since other members of the Council had divergent views, the United States favored submission of the whole problem to the Court. The resolution was defeated by a vote of four to one, with six abstentions.[47]

Just as the South African question has continued to plague the United Nations, so has the intractable problem of the Middle East, which was referred to as "the question of Palestine" during the 1940's. It was one of my official assignments over a period of years and sometimes an agonizing task. Even during the past several years, there have been repeated discussions of the desirability of submitting to the International Court of Justice a request for an advisory opinion on various aspects of the problem—access to the Gulf of Aqaba through the Straits of Tiran; the right of passage through the Suez Canal; whether belligerent rights persist under an armistice; whether under international law today any title to territory can be acquired by conquest; the rights of the United Nations to its properties that have been occupied or used by the Israeli Government; and the status of Jerusalem. No one can assert with assurance whether earlier proposals for resort to the Court would have contributed to some solutions. I regret that the United States, which has always been so bemused by the Middle Eastern problem, has not been more assertive of its advocacy of a judicial settlement that it evinced in other cases.

In 1947, I was not in government service. That was the year in which the General Assembly, notified by Great Britain that it intended to relinquish its mandate over Palestine in 1948, adopted what was called the "Plan of Partition with Economic Union." In the course of the debate in a special subcommittee of the General Assembly, the Arab states proposed that the International Court of

45. 1 U.N. GAOR 1007-10, 1061 (1946).
46. 2 U.N. SCOR 2222 (1947).
47. 2 U.N. SCOR 2224 (1947).

Justice be asked for an advisory opinion on eight legal questions connected with this rather elaborate plan. Two of the crucial questions dealt with the competence of the United Nations to recommend or enforce any plan concerning the future government of Palestine, especially any plan that might be contrary to the wishes of the inhabitants of Palestine. It is not necessary to record all of the details of the questions posed but, at the request of France, a preliminary vote was taken on seven questions that the Arab states proposed to submit to the Court, including a question that read:

> Whether the United Nations is competent to recommend either of the two plans and recommendations of the majority or minority of the United Nations Special Committee on Palestine, or any other solution involving partition of the territory which is contrary to the wishes, or adopted without the consent of, the inhabitants of Palestine?[48]

The proposal to refer these questions to the Court was rejected by a vote of 25 to 18, with 11 abstentions. A vote then was taken on this final question:

> Whether the United Nations, or any of its Member States, is competent to enforce or recommend the enforcement of any proposal concerning the constitution and future government of Palestine, in particular, any plan of partition which is contrary to the wishes, or adopted without the consent of, the inhabitants of Palestine?[49]

This last proposal was defeated by a narrower margin of 21 to 20, with 13 abstentions. Eventually, on November 29, 1947, the plenary meeting of the General Assembly adopted, by a vote of 33 to 13, with 10 abstentions, a resolution incorporating the "Plan of Partition with Economic Union." Both the United States and the U.S.S.R. voted in favor of this plan.[50] I have not had access to the official records for this period and the statements made by the United States Representative do not reveal the background of the policy that induced the United States to vote against the adoption of all the proposals to refer the questions to the International Court for an advisory opinion.[51]

Nineteen forty-eight was a crucial and a bloody year in the history of Palestine; an account of it is not within the scope of this article. Suffice it to say that on May 22, 1948, the United States Consul General, Thomas Wasson, was killed by a sniper's bullet while

48. 2 U.N. GAOR, Ad Hoc Comm. on Palestine Question 203 (1947).
49. 2 U.N. GAOR, Ad Hoc Comm. on Palestine Question 203 (1947).
50. 2 U.N. GAOR 1424-25 (1947).
51. The 1947 annual Report by the President to Congress on U.S. activities in the United Nations devotes 15 pages to the Palestine issue, but does not reveal the reasons for this position of the United States.

returning from a meeting of the Truce Commission established by the Security Council and composed of those members of the Security Council that had career consular officers in Jerusalem.[52] On September 18, 1948, Count Bernadotte, the United Nations Mediator, was assassinated in Jerusalem two days after he submitted the comprehensive Bernadotte Plan for attaining peace in the area. Meanwhile, on May 14, 1948, the British mandate for Palestine expired and the Provisional Government of Israel proclaimed the independence of the State of Israel, which President Truman immediately recognized.

In the summer of 1948, the Security Council busily sought to secure compliance with cease-fires and truces. In July, 1948, just before the adoption of the most far-reaching Council resolution, Syria introduced a draft resolution to request the International Court of Justice to give an advisory opinion regarding the international legal status of Palestine upon the termination of the British mandate. The United States Government during this period was in favor of referring various questions to the Court, but the recognition of the State of Israel explains why I, as the United States Representative on the Security Council, was instructed not to support the Syrian proposal. After noting that the United States agreed with certain statements already made by the Canadian and French Representatives, I made the following uninspiring statement:

> I should merely like to emphasize our belief that the procedure suggested by the Syrian draft resolution follows a line different from that which the Security Council and the General Assembly are pursuing in regard to the Palestine question. It may be that a proposal made at the special session of the General Assembly to submit this whole question to the International Court of Justice would have been very pertinent at that time, but that proposal was not the one which the General Assembly acted upon and accepted. The General Assembly did adopt a resolution providing for the selection of a United Nations Mediator to promote a peaceful adjustment of the future situation of Palestine. This problem is one with which the General Assembly has dealt on a number of occasions.
>
> The function of the Security Council, in my opinion, is primarily one of seeing that peace is maintained, and to that end, of assisting in the general programme laid down by the General Assembly through the aid which we are currently giving to the United Nations Mediator.
>
> For these reasons the delegation of the United States is not prepared to support the draft resolution introduced by the representative of Syria.[53]

52. Members with such officers were Belgium, France, the United States and Syria. This formula for the composition of the Commission eliminated the Soviet Union just as had been done in setting up the Consular Commission in Indonesia. Syria declined to serve on the Palestine Truce Commission.

53. 3 U.N. SCOR, No. 98, 14-15 (1948).

Syria made one more effort, again without success, to secure from the International Court of Justice an advisory opinion on one aspect of the situation in Palestine, *i.e.*, the status of the Palestinian refugees, and their right to repatriation and return of their property. The proposal was made on December 10, 1952, in the General Assembly's Ad Hoc Political Committee. Once again, it may be said that if the position taken by the Arab states had been supported by an advisory opinion of the Court (of course the Court's opinion might have been to the contrary), the United States might have found in such a judicial pronouncement the basis for taking a firmer stand in the interests of those hapless people whose deplorable condition still constitutes one of the aggravating elements in the chaotic Middle East crisis--for a crisis it still remains. But, as stated in the *Report by the President to the Congress for the Year 1952:*

> The role of the United States in the Committee debate was different from that in previous years in that the United States, while supporting direct negotiations between the parties, [which the Arabs consistently opposed] did not take any active lead in the debate and did not sponsor a resolution.

When the Syrian proposal was voted on December 11, 1952, the United States was one of the 19 states that abstained, while 26 votes were negative and only 13 in favor. There was no roll-call and no statement was made on behalf of the United States.

It seems relevant to mention briefly another matter arising in the Middle East and connected with the use of the International Court, although it was a procedural question involving an interpretation of article 27 of the Charter, which provides that in certain situations a member of the Security Council that is also a party to a dispute considered by the Council "shall abstain from voting." The factual situation before the Council was Egypt's placing of restrictions in April, 1951, on passage of ships through the Suez Canal. Egypt relied on involved legal and technical arguments, but it was not a member of the Council and, therefore, could not itself introduce a resolution. Egypt did, in the course of the debates, suggest that the Council should ask the International Court for an advisory opinion on the question whether five members of the Council (including the United States), which were said to be parties to the dispute with Egypt, should abstain from voting. Assistant Secretary of State Hickerson telephoned Ambassador Gross, who was representing the United States on the Council, and told him to oppose any effort to have the matter sent to the Court. Hickerson said that if the proposal were formally introduced, however, the United States should abstain if it were certain that the proposal would not get the seven votes necessary for approval. When Egypt found that if such a resolution were introduced it could not possibly secure the votes necessary for

adoption, it dropped the proposal. It is a pity that the United States did not advocate submitting the substantive legal questions to the Court. Instead, the United States joined England and France in sponsoring a resolution which held that the Egyptian restrictions were not justified and should be removed.

Another matter that had its origin in the period of intense violence in Palestine during 1948 did, in fact, result in reference to the International Court of a request for an advisory opinion, which—when delivered—was of outstanding importance in the development of the international law applicable to international organizations. It has been noted that the United Nations Mediator, Count Bernadotte, was assassinated in Jerusalem on September 17, 1948. Ralph Bunche, personal representative of the Secretary-General of the United Nations, who was to succeed Count Bernadotte as Acting Mediator, immediately reported the matter to Moshe Shertok, Foreign Minister of the Provisional Government of Israel. Bunche asserted that the act was committed by "Jewish assailants" and that under the circumstances, the "provisional Government of Israel must assume full responsibility" for the act.[54] At a September 18 emergency meeting of the Security Council to consider the matter, I stated, as Representative of the United States, that the authorities concerned were now most sharply reminded of their responsibility to discharge their duty of controlling the lawless members of their own group. Trygve Lie, the Secretary-General of the United Nations, noted that there had now been seven U.N. representatives killed in the line of duty during the hostilities in the Middle East: "Their murder can only be interpreted as a direct act of attempted interference with the effort of the United Nations to settle the Palestine question."[55] The Secretary-General followed up by putting on the agenda of the third session of the General Assembly in Paris the question of the right of the United Nations to demand reparation for injuries to its agents. Trygve Lie himself had no doubt that the organization had that right, but it was a disputed legal point. The State Department instructed the United States delegation to vote in favor of a request to the Court for an advisory opinion on the subject. The delegation was told that it need not make a statement on the subject since the proposal was sure to be approved in plenary session. However, John Maktos, as U.S. Representative in the Assembly's Sixth (Legal) Committee, spoke several times in favor of the proposal. He said, "In the opinion of the

54. 3 U.N. SCOR, Supp. Oct. 1948, at 1, U.N. Doc. S/1004 (1948); *see* Wright, *Responsibility for Injuries to United Nations Officials,* 43 AM. J. INT'L L. 95 (1949).

55. 3 U.N. SCOR, No. 11, at 3 (1948).

United States Delegation, existing rules of international law permitted a State to be held responsible to the United Nations," but in view of divergencies of opinion among the delegations, "it would be advisable to ask the International Court of Justice for an advisory opinion on the question."[56] Maktos said that he "personally had no doubt but that the United Nations was entitled to present an international claim as a result of the violation of international law by a State."[57]

The Sixth Committee recommended to the General Assembly a resolution requesting the Court for an opinion. The Assembly unanimously adopted the resolution on December 3, 1948.[58] There was no roll-call, but the United States was in favor of the result. The Court gave its opinion on April 11, 1949, and held unanimously that the United Nations, as an organization, had the right to bring a claim against the responsible government with a view to obtaining the reparation due in respect of the damage caused to the United Nations.[59] By a vote of eleven to four, it likewise held that the United Nations could present a claim on behalf of the victim in respect of the damage caused to him. The juridical significance of the opinion lies in the Court's conclusion that the United Nations, while not a state, is an international person and, therefore, a subject of international law capable of possessing legal rights.

Following the Court's opinion, the Secretary-General submitted to the next session of the General Assembly in 1949, proposals regarding the appropriate action to be taken. On December 1, 1949, the General Assembly authorized him to bring claims against states alleged to be responsible for injuries to U.N. agents. Mr. Maktos, speaking for the United States, declared that his government accepted the Court's opinion, although it had earlier held an opposing view. Actually, the State Department's view had been set forth, not in the usual form of a written statement to the Court, but rather in a letter to the Registrar from Jack Tate, the Acting Legal Adviser. Relying on the traditional legal theory that an international claim is based on an injury to a state through an injury to one of its citizens, the Department took the position that the United Nations could not bring a claim on behalf of the heirs or beneficiaries of the injured individual. Tate said that if the individual or those entitled through him were stateless, however, there was no reason why the United Nations should not present the

56. 3 U.N. GAOR, 6th Comm. 566 (1948).
57. 3 U.N. GAOR, 6th Comm. 559 (1948).
58. 3 U.N. SCOR 690 (1948).
59. Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, [1949] I.C.J. 174.

claim.[60] It is noteworthy that throughout these various debates on the question of applicable legal principal, there was neither a direct nor indirect identification of the state alleged to be responsible for Count Bernadotte's death.

At the fifth session of the General Assembly in 1950, the Secretary-General reported on the action that he had taken; he was then forced to be specific. He reported that in connection with the death of Count Bernadotte, he had addressed to the Minister for Foreign Affairs of Israel a request for a formal apology, a continuation and intensification of the Israeli Government's efforts to apprehend and bring to justice the perpetrators of the crime, and the payment of 54,628 dollars as reparation for the monetary damage borne by the United Nations. No claim was made for Count Bernadotte's widow because she did not wish such a claim to be presented. In its reply, the Israeli Government admitted that it had been at fault in some respects and expressed "its most sincere regret that this dastardly assassination took place on Israeli territory." It expressed doubt that further steps would disclose the identity of the perpetrators, but emphasized that it did not consider the case closed and would act upon any new evidence. A check for the stipulated amount was enclosed.[61]

Although it is not a Palestinian case, the geographical nexus makes it appropriate to mention here a matter that Egypt brought before the Security Council in July, 1947. Egypt complained of the continued presence of British troops on Egyptian soil, contrary to the will of Egypt. Great Britain relied on a treaty of 1836, which authorized the stationing of the troops. Egypt, however, insisted that the treaty was no longer in effect and that the presence of the troops was a cause of friction and a threat to the peace. Brazil submitted a draft resolution recommending that the parties utilize peaceful methods of adjustment, as stipulated in article 33 of the Charter. Belgium submitted an amendment to the Brazilian draft, which specifically mentioned the possibility of resorting to the International Court of Justice to determine the validity of the treaty of 1836. This was not, therefore, an instance in which there was an attempt to secure an advisory opinion, but rather a recommendation to the parties. The United Kingdom attached great importance to this Belgian proposal and the

60. Letter from the Secretary of State of the United States of America to the Registrar of the International Court of Justice, Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, I.C.J. Pleadings 19, 22 (1949).

61. 5 U.N. GAOR, Annexes, Agenda Item No. 50, U.N. Doc. A/1347 (1950). There is a useful account in SOHN, CASES ON UNITED NATIONS LAW (1956).

United States likewise supported it. Ambassador Herschel Johnson tried to persuade the Egyptians to agree, arguing:

> there is no reason why it should be expected that the International Court of Justice would necessarily take an entirely technical view. Even if the International Court of Justice should rule, contrary to the Egyptian contention, that the treaty is technically valid, there would be nothing to preclude pursuance of the case along other lines. In my opinion, if such a ruling were forthcoming, the United Kingdom might well renounce any rights it held under such a technical finding.[62]

Nonetheless, only Belgium, the United States, Australia and France voted for the Belgian amendment; six members of the Security Council abstained and Britain did not participate in the vote.[63] The case illustrates early attitudes toward the Court and contrasts with subsequent efforts of the Arab states to secure advisory opinions on aspects of the Palestine question.

Another instance during 1947 in which the Security Council actually adopted a resolution urging the parties to take a dispute to the International Court of Justice was the *Corfu Channel Case.*[64] British warships on mine-sweeping patrol in the Corfu Channel struck mines that Great Britain asserted had been planted there by Albania. The British delegation introduced a draft resolution on April 3, 1947, urging the parties to take the case to the International Court. Ambassador Herschel Johnson of the United States said that his Government "wholeheartedly supports this resolution."[65] The resolution was adopted by a vote of eight to zero, with two abstentions; the United Kingdom did not participate in the vote. When the case did go to the Court, it rendered its first judgment on March 25, 1948.[66] The Court held Albania responsible for the Corfu Channel incident, but that state refused to pay the damages assessed by the Court. This was the only instance in all the years of the existence of a permanent international court that there has been a flat refusal to comply with a judgment.

By 1948, there was already a "cold war" atmosphere surrounding various attempts to use the International Court. One such case arose when the Soviet Union refused to allow one of its nationals, a woman married to the son of the Chilean Ambassador in Moscow, to leave the U.S.S.R. with her husband. Chile, in negotiations with the Soviet Government, offered to submit to the Permanent Court of Arbitration

62. 2 U.N. SCOR 2296 (1947).
63. 2 U.N. SCOR 2303 (1947).
64. The Corfu Channel Case, [1948] I.C.J. 53.
65. 2 U.N. SCOR 686 (1947).
66. [1948] I.C.J. 15.

or to the International Court of Justice the question of the wife's right to accompany her husband. When the offer was rejected, Chile placed the question on the agenda of the General Assembly. Australia introduced a draft resolution calling on the Assembly to submit to the International Court a rather general question regarding the extent of the privileges and immunities of members of the family of a diplomatic officer. The United States had a special interest in the question because there were 350 Soviet wives and 65 Soviet husbands of American citizens who had been denied the right to leave the Soviet Union. The State Department instructed the United States delegation to suggest to other delegations the desirability of referral to the Court, but it found a majority opposed. Acting in accordance with what is known as a State Department "position paper," Durward Sandifer of UNA urged at a U.S. delegation meeting in New York on September 29, 1948, that the United States should push the proposal. Ambassador Gross doubted whether there was a rule of international law under which a diplomat's wife could claim the right to leave her country. In addition, he noted that the Court might well rule that the Soviet action was not illegal. Nonetheless, the position paper was approved. Ambassador Gross, speaking in the Sixth Committee for the United States, deplored the Soviet Government's rejection of the Chilean offer to submit the matter to judicial settlement.[67] Just before the adjournment for Christmas, 1948, the Australian draft resolution was defeated by a vote of thirteen to nine, with twelve abstentions.

Although it cannot be classified strictly as a "cold war" item, another important question involving an East-West confrontation attracted attention in United Nations circles in 1949. The background lay in discussions at the Yalta Conference of 1945 concerning the future freedoms of people who had been under German domination during the Second World War. In the peace treaties with the former Axis countries of Bulgaria, Hungary and Romania, those states undertook to secure to all persons in their jurisdiction "without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental human freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting."[68] Under the pretext of eliminating Nazi and Fascist organizations--a point on which Stalin had been happy to agree at Yalta—the Communist governments of the

67. 3 U.N. GAOR, 6th Comm. 738 (1948).

68. Peace Treaty with Bulgaria, Feb. 10, 1947, art. 2, 61 Stat. 1915, T.I.A.S. No. 1650, 41 U.N.T.S. 21; Peace Treaty with Hungary, Feb. 10, 1947, art. 2, 61 Stat. 2065, T.I.A.S. No. 1651, 41 U.N.T.S. 135; Peace Treaty with Romania, Feb. 10, 1947, art. 3, 61 Stat. 1757, T.I.A.S. No. 1649, 42 U.N.T.S. 3.

three countries adopted policies that the United States challenged as being systematic violations of human rights. General indignation was aroused early in 1949, following the imprisonment and trial of Cardinal Mindszenty in Hungary and of the Protestant churchmen in Bulgaria.[69]

The peace treaties with Bulgaria, Hungary and Romania contained rather elaborate provisions for the settlement of disputes arising under their provisions. After direct diplomatic negotiations had failed, the United States invoked those procedures beginning with the specified meeting of the Ambassadors of the United States, the United Kingdom and the Soviet Union in the three Balkan capitals. The Soviet Government refused to participate in such meetings and alleged, *inter alia*, that the matters complained of were within the domestic jurisdiction of the states concerned. The United States then asked the three governments to proceed with the appointment of the commissions that also were provided for in the peace treaties. The three governments refused.

The General Assembly met in New York from April 5 to May 18, 1949, in continuation of the third regular session that had been held in Paris. Bolivia and Australia placed on the agenda the violation of human rights in Hungary and Bulgaria, with special reference to the trials of the churchmen. The State Department informed the United States Mission in New York that it would be preferable to exhaust the peace treaty procedures before resorting to the U.N. The Latin American states were particularly incensed with this policy and the United States staff had difficulty in dissuading Cuba from bringing the case at once to the Security Council. The arguments at the spring session were largely concerned with the issue of the competence of the United Nations to deal with a matter that the Slav states insisted was purely domestic. While it sought to give priority to the treaty procedures, the United States argued in favor of U.N. competence, especially in view of the provisions of the peace treaties. It joined Bolivia in sponsoring a resolution that noted with concern the charges made, reminded Bulgaria and Hungary of their obligations under the treaties and kept the question on the agenda for the next session. Only the six Slav delegations voted against the resolution, while nine states abstained.

When the fourth regular session of the General Assembly met on September 20, 1949, the United States had decided that there was no hope of getting action under the peace treaty procedures and, therefore, that there should be a request for an advisory opinion from the International Court of Justice. One question involved the right

69. The Cardinal finally returned to the Vatican in 1971.

of the Secretary-General to appoint a third member to the commissions specified in the treaties who would be authorized to pass on the issues in conjunction with a commissioner named by the Western Powers, when the Balkan states refused to name their own commissioner in accordance with the treaty procedure. Abraham Feller of the U.N. Secretariat told the United States delegation on the day after the Assembly convened that they were studying the question. On that same day, the United Kingdom put forward a draft resolution requesting on advisory opinion from the Court. The United States supported the move, as did many other delegations, but there were the usual discussions about the drafting of the resolution. Professor Manley O. Hudson, a former judge of the Permanent Court of International Justice, was consulted by the United States delegation on the phrasing of the text. On October 3, the issues were described in detail by David Popper of UNA for the benefit of the political officers of the United States delegation, who have the duty to explain their delegation's position to members of other delegations. At a U.S. delegation meeting on that same day, Eric Stein, a State Department specialist on security affairs, explained the resolution that the United States was to introduce jointly with Bolivia and Canada. The resolution would pose four questions: first, whether disputes existed that were subject to solution by the peace treaty procedures; second, whether all the signatories were bound to resort to those procedures and to appoint their commissioners; third, if the Court answered the first two questions in the affirmative, whether the Secretary-General could then appoint a third commissioner; and, finally, whether a commission composed of two members would be competent to make a binding decision settling the dispute. I objected to putting contingent questions to the Court in this fashion and wondered whether we could provide for use of the Interim Committee of the General Assembly, which might interpret for the Secretary-General the Court's opinion on the first two points. Leonard Meeker, Assistant Legal Adviser, said that the State Department had prepared a draft which provided that the Interim Committee should consider the Court's answers to the first two questions and decide whether it was advisable to ask the Court to answer the last two questions. Meeker noted, however, that the Department preferred to leave the matter with the Secretary-General. At a further meeting of the U.S. delegation on the following day, the resolution was approved after some minor redrafting. On October 22, the resolution was adopted by the General Assembly by a vote of 47 to 5, with 7 abstentions.[70] The case for the United States was stated fully by Benjamin V. Cohen, a

70. 4 U.N. GAOR 150 (1949).

member of the U.S. delegation and a veteran in U.N. affairs. He said that the United States was prepared to accept the Court's opinions as binding and hoped that Bulgaria, Hungary and Romania would do likewise.[71] In the State Department, Sandifer of UNA and Thompson of EUR told Fisher, the Legal Adviser, that this case was highly important for the United States because it had initiated and co-sponsored the request for an advisory opinion. The Deputy Legal Adviser, Jack Tate, prepared a memorandum that Fisher sent to Under Secretary of State Webb, stating that the task of preparing our argument before the Court was a big one and he would need to hire extra help. The United States was among those states that filed both written and oral statements with the Court.

The Court rendered its opinion on March 30, 1950. The Court answered the first two questions in the affirmative, but, in response to the third question, held that the Secretary-General was not entitled to appoint a third commissioner in the case envisaged. At the fifth session of the General Assembly in 1950, Mr. Cohen again spoke for the United States and declared that it would abide by the Court's opinions "in letter and spirit," although it did not agree with the answer to the third question.[72] His speech in the plenary session was a blistering attack on the policies of the Soviet Union and its satellites. Following the Court's opinion, the General Assembly was impotent to proceed further to secure respect for human rights in these three Balkan states. Its resolution of October 5, 1950, took note of the advisory opinions of the Court, condemned "the wilful refusal of the Governments of Bulgaria, Hungary and Romania to carry out their obligations under the peace treaties," and expressed the opinion that those governments were "callously indifferent to the sentiments of the world community." The resolution was adopted by a vote of 35 to 5, with 13 abstentions, in the Ad Hoc Committee and by a vote of 40 to 5, with 12 abstentions, in plenary session on November 3, 1950.[73]

As I noted earlier, the General Assembly in 1946 had soft-pedalled the Indian complaint of the treatment of its nationals in South Africa and had avoided referring the basic issues of racial discrimination to the International Court of Justice. In that first year of the life of the United Nations, governments were still unsure of the role that the Court might play. In the United States, the uncertainty may have been even greater than it was in some other countries, since we had not shared in the experience of the League of Nations, where the Council of the League had abundantly used the advisory opinions of the

71. 4 U.N. GAOR 132 (1949).
72. 5 U.N. GAOR, Ad Hoc Pol. Comm. 10 (1950). *See also id.* at 40.
73. 5 U.N. GAOR 368 (1950).

Permanent Court of International Justice as an aid to the solution of various political controversies arising from the new territorial and political alignments created at Versailles, Trianon and St. Germain. By 1949, however, views about the Court had become clearer and in that year the United Nations began a long series of efforts to use the Court as an aid to the solution of the problems raised by South Africa's administration of the territory of South West Africa, which it held under a League of Nations mandate. A number of attempts were made to induce the South African Government to abandon its policy of *apartheid*, which denied to the black and "colored" populations of South West Africa the "material and moral well-being and . . . social progress" that the terms of the mandate required the mandatory to promote "to the utmost" in discharging the "sacred trust of civilization" referred to in article 22 of the Covenant of the League of Nations.[74] This series of cases will be described here before returning chronologically to other invocations of the judicial process in 1949.

In 1947, the Union of South Africa gave an undertaking to submit reports on its administration of South West Africa to the United Nations and, in 1948, the General Assembly adopted a resolution recommending that such reports should continue to be filed annually in order that the Trusteeship Council could keep in touch with the situation. In July, 1949, South Africa informed the Secretary-General that no further reports would be submitted, which led to long debates in the Fourth Committee of the General Assembly—the Committee charged to deal with territories under trusteeship and other dependent territories. After a good deal of controversy, it was decided that a hearing should be given to representatives of indigenous groups from South West Africa. The delegations of Denmark, Norway, Syria and Thailand then submitted a draft resolution that would ask the International Court of Justice for an advisory opinion concerning the international status of the territory of South West Africa and the nature of South Africa's international obligations thereto. At that point, there ensued a long process of submission of textual amendments, discussions of them, and votes on particular words and phrases. In the course of the debates, Mr. Fahy for the United States spoke in favor of asking the Court for such an opinion because his delegation "was firmly convinced that an advisory opinion given by the International Court of Justice would be profoundly wise and would enable the General Assembly to determine what relations should exist

74. My own opinion about South Africa's violations of its obligations under the mandate is set out in my Dissenting Opinion to the Judgment of the International Court of Justice in the South West Africa Cases, [1966] I.C.J. 1, at 323-442. The issues will not be reargued here.

between South West Africa and the international community."[75] On December 2, 1949, the United States delegation decided to propose further textual amendments; when these were not adopted, the United States abstained in the final committee vote in which the resolution was adopted by 30 to 7, with 9 abstentions.[76] In the plenary session, the United States and sixteen other members proposed an amendment that restored language rejected in the Fourth Committee; the amendment was adopted by a vote of 39 to 6, with 7 members abstaining, after which, on December 6, the amended draft was adopted by a vote of 40 to 7, with 4 abstentions.[77] In the debate leading up to the vote, a long statement explaining the position of South Africa was made by one of its ablest and most fair-minded representatives, Ambassador Jooste.[78] He stated that South Africa believed implicitly in the rule of law. Nevertheless, by the manner that the draft resolution was framed and in light of the debate in the Fourth Committee, it was evident that an opinion of the Court that was contrary to the views of his Government would not be respected and that political considerations would dominate legal ones. Mr. Fahy, for the United States, favored further amendment of the draft resolution and insisted that legal and political issues should not be mixed. A provision of the draft resolution to which the United States objected was adopted by the close vote of 21 to 20, with 11 abstentions, after which the United States joined in the favorable vote of 40 to 7, with 4 abstentions on the resolution as a whole. Such a final swallowing of an entire text disapproved of in part is not unusual in United Nations proceedings, and the United States delegation had decided in advance that it would approve of reference to the Court, even if its amendments to the text of the resolution were defeated.

The United States was one of five states that submitted to the Court their views on the questions asked. The Court's opinion, delivered on June 11, 1950, affirmed the basic proposition that South West Africa was a territory under the mandate and that South Africa continued to have international obligations with respect to the territory, including the obligation to submit reports and to transmit petitions to the United Nations.[79] The Court's opinion was considered in the Fourth Committee of the fifth General Assembly. Eventually, a vote was taken on a draft resolution sponsored by the

75. 4 U.N. GAOR, 4th Comm. 276 (1949).
76. 4 U.N. GAOR, 4th Comm. 282 (1949).
77. 4 U.N. GAOR 537 (1949).
78. 4 U.N. GAOR 523-29 (1949).
79. Advisory Opinion on the International Status of South West Africa, [1950] I.C.J. 128.

United States, together with Brazil, Denmark, Peru, Syria and Thailand. The resolution specified that "the General Assembly accepts the advisory opinion," urged the South African Government to give effect to it, and, as the United States especially urged, appointed a committee of five to confer with South Africa on the necessary procedural measures. This resolution was adopted on December 13, 1950, by a vote of 45 to 6, with 5 abstentions.[80]

The United States served on the Special Committee on South West Africa, which made a report to the General Assembly on procedures for dealing with matters affecting that mandated area. It was during the debates in that Committee that the Legal Adviser, Adrian Fisher, sent a memorandum that was drafted in part by Leonard Meeker to Jack Hickerson, then Assistant Secretary of State for United Nations Affairs. The memorandum of October 3, 1952, dealt with a proposed Arab-Asian item on the agenda of the General Assembly concerning racial relations in South Africa. The Legal Adviser was of the opinion that the General Assembly would have jurisdiction to pass a resolution disapproving of the racial policies of South Africa and that this would not constitute an "intervention" or otherwise violate article 2, paragraph 7 of the Charter. Fisher felt that if the question of jurisdiction were raised in the General Assembly, the United States should so state and should add that although no advisory opinion was needed, the United States, given its general policy of favoring resort to the Court, would not object if others wished to make such a request. Finally, Fisher believed that the United States should take the position, as part of the over-all policy of support for the effective functioning of the Court, that all members of the United Nations ought to give the Court all possible help.[81]

One specific question that came up in the same Committee on South West Africa was the nature of the voting procedure in the General Assembly that should be adopted in order to assure compliance with some of the specifications in the Court's advisory opinion of 1950. The United States, along with India, Mexico, Norway and Syria, sponsored in the General Assembly in 1954 a draft resolution to ask the Court for another advisory opinion on the question of whether the Committee's proposal concerning voting procedure would be in compliance with the Court's previous opinion. On November 8, 1954, the U.S.-supported recommendation to seek an advisory opinion was defeated in the Fourth Committee by a vote of eighteen to eighteen, with sixteen abstentions. In the plenary meeting

80. 5 U.N. GAOR 628-29 (1950).

81. DEPARTMENT OF STATE, OPINIONS OF THE LEGAL ADVISER, pt. 2, at 308 (1952) (unpublished).

on November 23, however, a draft resolution calling for an advisory opinion carried by a vote of 25 to 11, with 21 abstentions.[82] The United States voted in favor, but did not speak in the final debate.

The United States was one of three countries that submitted written statements to the Court. Other governments merely referred to the views that their representatives had expressed in the debates in the General Assembly. The Court gave its unanimous advisory opinion on June 7, 1955, stating that the General Assembly's proposed rule on voting procedure was based on a correct interpretation of the Court's advisory opinion of July 11, 1950.[83] At the next meeting of the General Assembly, the United States joined Mexico, Pakistan, Saudi Arabia, Syria and Thailand in submitting a draft resolution whereby the General Assembly would accept and endorse the advisory opinion. Laird Bell spoke briefly on behalf of the United States in support of the resolution, which was adopted by the General Assembly on December 3, 1955, by 54 votes in favor, none opposed and 4 abstentions.[84]

In any review of the ways in which the services of the International Court of Justice have been utilized in helping to solve political issues before the General Assembly, it is interesting to note the meticulous care with which the delegates sought to insure the avoidance of any technical illegality in the procedures. The Court had hardly delivered its opinion endorsing the General Assembly's voting procedures when another dispute arose over the question whether oral hearings should be granted to petitioners from South West Africa. The Court had already indicated that the United Nations should, so far as possible, follow the procedures of the League of Nations, and there was a difference of opinion in the Fourth Committee concerning the propriety of oral hearings. The United States at first co-sponsored a resolution that would have denied the legality of oral hearings, while proposing alternate procedures. When a resolution was introduced by Mexico, Lebanon, Liberia and Thailand proposing that the issue be

82. 9 U.N. GAOR 326 (1954). It is one of the curiosities of the procedure of the General Assembly that a vote in one of the committees may be so different from a vote on the identical question in the plenary session. The explanation sometimes is found in the free-wheeling operation of a member of a delegation in the committee which may be reversed by the head of his delegation after a persuasive conversation or a little "arm-twisting" on the part of the head of another delegation which had taken the opposite position in the committee.

83. Advisory Opinion on the Voting Procedures on Question Relating to Reports and Petitions Concerning the Territory of South West Africa, [1955] I.C.J. 67.

84. 10 U.N. GAOR 399 (1955).

referred to the International Court of Justice for an advisory opinion, however, the United States agreed and voted for the resolution. The resolution submitting the question to the Court was adopted in the plenary session on December 3, 1955, by 32 votes to 5, although there were 19 abstentions.[85]

The Court's advisory opinion was handed down on June 1, 1956, and held, by eight votes to five, that the granting of oral hearings to petitioners would be consistent with its previous opinion of July 11, 1950.[86] After a normal series of arguments about the text of the resolution, the General Assembly adopted a resolution on January 23, 1957, which again used the expression "accepts and endorses the advisory opinion."[87] The United States cast one of the 60 votes in favor; there were no opposing votes and nine abstentions.

Since this is not an attempt to write a history of South West Africa (now known as "Namibia"), it is sufficient to note that since discussions with the Government of South Africa proved fruitless, Ethiopia and Liberia filed contentious proceedings against South Africa on October 28, 1960. When the President of the Court cast his deciding vote on July 18, 1966, to break the tie of 8 to 8, the Court, in effect, gave support to the South African position.[88] This is a matter of history about which there is abundant literature. As indicated earlier, the focus of this article is upon the position of the United States on various proposals for advisory opinions from the International Court. It is not germane to this particular study to trace the attitude of the United States Government in opposing the position of South Africa in regard to Namibia. The latest attempt to secure judicial support for the almost worldwide effort to free Namibia from South African domination and control is significant because for the first time in the twenty-five years of the life of the United Nations, the Security Council asked the Court for an advisory opinion. Due largely to the initiative of Representative Jakobson of Finland, the Security Council in February, 1970, established a special ad hoc subcommittee to consider the Namibian situation. The debates turned particularly on the validity of a General Assembly resolution that had declared that South Africa had forfeited its right to continue as mandatory and that the mandate was ended. The Security Council endorsed the position of the General Assembly, which had declared that the presence of South Africa in South West Africa was illegal and

85. *Id.*

86. Advisory Opinion on Admissibility of Hearings of Petitioners by the Committee on South West Africa, [1956] I.C.J. 23.

87. 11 U.N. GAOR 967 (1957).

88. South West Africa Cases, [1966] I.C.J. 4.

that all of the South African acts in Namibia were void and of no effect. The outcome of the debate in the Security Council was the adoption on July 29, 1970, by a vote of twelve to zero, with three abstentions, of a resolution asking the Court to give an advisory opinion on the legal consequences for states of the continued presence of South Africa in Namibia.[89] The United States supported the proposal throughout and submitted to the Court not only a written statement, but also full oral argument by the Legal Adviser, John Stevenson.

The Court gave its opinion on June 21, 1971.[90] Despite a flurry of separate and dissenting opinions, the Court's pronouncement was clear:

> (1) by thirteen votes to two, the Court held that the continued presence of South Africa in Namibia is illegal and that South Africa is, accordingly, under an obligation to withdraw its administration from Namibia and to end its occupation immediately;
>
> (2) by eleven votes to four, the Court held that members of the U.N. are obliged to recognize this illegality and the invalidity of South African acts in Namibia and to refrain from any action countenancing such acts; and
>
> (3) by the same vote, the Court concluded that it is incumbent on non-member states to assist in any action taken by the United Nations with respect to Namibia.

The Court's opinion was discussed in the United Nations at some length and the majority view was favorable to the result of the Security Council's request. The Security Council opened a debate on Namibia on September 27, 1971, and continued for five days scattered through the next two weeks. The representative of France criticized what he called "certain erroneous interpretations" of the Charter in the opinion and denied flatly that the General Assembly could make decisions which would be binding on states. The representative of the United Kingdom said that the British Government could not accept the Court's conclusion that the General Assembly had the competence to terminate the mandate. During the General Assembly's debate on the Court's opinion, on October 4, 1971, Secretary of State Rogers said: "We have decided to accept the Advisory Opinion of the International Court of Justice on the legal

89. 25 U.N. SCOR, 1550th meeting 16 (1970); U.N. Doc. S/Res/284 (1970).

90. Advisory Opinion on South West Africa (Namibia), [1971] I.C.J. 16. [Ed. Note: An extended discussion of this case is found on pages 213 through 242 *infra*.]

consequences for States of South Africa's continuing occupation of Namibia."[91]

As this article is being written, the daily press is full of reports about the admission of the People's Republic of China to the United Nations, but gradually it is becoming understood that the question is not that of "admitting" a new member but rather one of accepting the credentials of one or another delegation, each of which purports to be entitled to the place of "China" in the U.N. organization. Simultaneously, the General Assembly, rather pro forma, did admit to membership the microstates of Bhutan, Bahrein and Qatar, bringing the total membership to 130. Perhaps before these words are in print, the United Nations will have acted on the wise recommendation of a panel of the United Nations Association of the United States of America that the organization should act on the "general principle of the value of inclusiveness" by assuring a seat in the General Assembly for the Republic of China on Taiwan and by admitting to membership at the same time the Federal Republic of Germany, the German Democratic Republic, North Korea and South Korea and North Vietnam and South Vietnam.[92]

At an earlier period in the history of the United Nations, the question of admitting new members, singly or in groups, provoked prolonged controversy. The issue was argued on technical grounds involving the interpretation of the Charter and on diplomatic grounds in terms of the probable increase in voting strengths of the two blocs—Western and Eastern. The key to the legal situation is article 4 of the Charter, which reads as follows:

> 1. Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
>
> 2. The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

It soon became apparent that in interpreting the words "peace-loving," "peace" was to be identified with either one or another state or group of states. Thus, if state A "loved" the Soviet Union, the United States and its friends questioned its love for peace, whereas

91. U.N. Doc. A/PV.1950, at 8 (1971).

92. THE UNITED NATIONS IN THE 1970's—A STRATEGY FOR A UNIQUE ERA IN THE AFFAIRS OF NATIONS 18-19 (1971) (report of the National Policy Panel established by the United Nations Association of the United States of America) [hereinafter cited as THE UNITED NATIONS IN THE 1970's].

state B, which "loved" the United States, was in the eyes of the Soviet Union a war-lover. Of course, this was not the terminology used in the Assembly debates but, since the Soviet Union could veto the application for membership of any state in the Security Council without declaring the reasons for its opposition, a group of states decided that it would be well to ask the International Court of Justice for an opinion on the legal bases that would justify an adverse vote. The lines had been drawn when in August, 1946, the United States proposed the admission of eight states--Afghanistan, Albania, Ireland, Iceland, Outer Mongolia, Portugal, Sweden and Trans-Jordan—and the Soviet Union proposed admitting Italy, Hungary, Romania, Bulgaria and Finland. When both Australia and the U.S.S.R. opposed the United States "package," the United States withdrew its proposal. When the Soviet Union advocated blanket admission for its five candidates, however, the United States urged that each applicant should be considered separately on its own merits. Ambassador Adlai Stevenson spoke on the merits of certain of the U.S. candidates that had not secured the necessary support of the Soviet Union in the Security Council, and although he did not discuss a pending Belgian draft resolution calling on the Court for an advisory opinion, that resolution was adopted on November 17, 1947, by a vote of 40 to 8, with 2 abstentions.[93] The United States made no oral argument, but it was one of fifteen states to present a written argument to the Court.

The Court gave its opinion on May 28, 1948, with six judges dissenting.[94] It is one of the many instances in which those who would denigrate the Court by asserting that its members vote purely on political lines are baffled to explain how the dissenters included such a mixed group as the judges from England, Canada, France, Poland, Yugoslavia and the U.S.S.R. The Court advised that when a member of the United Nations is called upon to vote on the admission of a state, it "is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1"[95] of article 4. Further, the Court ruled that when a member recognizes that the conditions for admission set forth in article 4 are satisfied, it cannot "subject its affirmative vote to the additional condition that other States be admitted to membership" at the same time.[96]

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93. 2 U.N. GAOR 1078, U.N. Doc. A/471 (1947).

94. Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), [1948] I.C.J. 56.

95. *Id.* at 65.

96. *Id.*

Amid a welter of resolutions, both general and particular, the General Assembly in effect expressed the hope that the members of the Security Council would be guided by the Court's opinion. Several of the draft resolutions remarked pointedly that certain states had received nine favorable votes in the Security Council, but that no recommendation had been made to the General Assembly because of the opposition of one of the permanent members of the Security Council. (It was unnecessary to specifically name the U.S.S.R.). Many of the resolutions asked the Council to reconsider the various applications. The United States sponsored a special resolution in favor of the admission of Austria, which had received one of the negative votes. A special resolution sponsored by Australia favored the admission of Ceylon, which the Soviet Union had challenged on the ground that it was still a British appendage and not an independent sovereign state. When the Security Council reconsidered the Ceylon case at a meeting in Paris, I left the hospital to cast the United States' vote in favor of admission, while the Soviet Union again vetoed.

Frustrated and irritated by the Soviet delegation's adamant refusal to yield to the views of the vast majority of the members of the United Nations, many delegates at the fourth session of the General Assembly sought to find some way out of the impasse. Dr. Arce, the eminent Buenos Aires surgeon, who was head of the Argentine delegation to the General Assembly, tried to bring the diseased organ under the knife—to cut out the veto from that principal organ known as the Security Council. The Argentine thesis was based on an interpretation of article 4 of the Charter to the effect that the article left to the General Assembly the right to "decide" on admission to membership, while the Security Council had only a right to "recommend." Dr. Arce was a champion of the "sovereignty" of the General Assembly, in which all members of the United Nations are represented. The lawyers in the State Department, however, were not convinced. Since the record of the ensuing debates in the U.S. delegation is illustrative of the highly democratic process by which decisions are reached and votes cast in certain situations, it seems worthwhile to record it here. It should be observed, however, that to a large extent the debate turned on tactics, whereas if a basic substantive principle had been involved, more explicit instructions would have been sent from Washington.

The record begins with a memorandum, or "position paper," dated October 22, 1949. The memorandum concludes that the Security Council was unlikely to be able to reach an agreement on a report recommending the admission of new members. It added that the United States was to continue its support for the admission of Jordan, Ireland, Portugal, Italy, Austria, Finland, Ceylon, Korea and Nepal.

The candidacies of these states had been sustained through a series of Security Council meetings, but had been blocked by Soviet vetoes. The Soviets were sponsoring the Mongolian People's Republic, Albania, Bulgaria, Romania and Hungary. It has already been noted why Bulgaria, Hungary and Romania were in disfavor during that period; furthermore, in the Security Council on September 15, 1949, Albania and Mongolia received only the affirmative votes that were cast by the U.S.S.R. and the Ukraine. The Soviets suggested a package deal by which all states approved by nine members of the Security Council and by a majority of the General Assembly would be admitted along with the five discredited Soviet candidates. The United States memorandum reiterated the standard U.S. view that the U.N. should be a universal organization, but that this result should not be achieved by disregarding the criteria set forth in article 4 of the Charter. This position was not overly rigorous since it implied that while not all applicants could be admitted that year, the United States would not take a position that would prejudice any later arrangement. The United States position paper suggested that casual conversations on the subject with the Soviet delegation were permissible, but that the United States delegation should not take the initiative. If the Soviets again proposed a package deal, the United States delegation should oppose it, citing the reasons given by the International Court in its advisory opinion. But the United States position in the General Assembly should be moderate. Because the United States did not agree with Dr. Arce's proposal, the United States delegation should oppose any suggestion that the General Assembly could admit states to membership even in the absence of a Security Council recommendation. If a proposal was made to ask the Court for an advisory opinion on this point, the United States delegation should discourage the idea in conversations with other delegates; if the issue came to a vote, the United States should vote against it or abstain.

This position was debated by the United States delegation at a meeting in New York on November 1, 1949. Paul Taylor began the discussion by referring to the fact that the delegation had already made it clear that it opposed the Argentine proposal of Dr. Arce. If the Argentine delegation should press for an advisory opinion, the United States should vote against it or abstain. Assistant Secretary of State Jack Hickerson thought that the United States delegation should tell Arce that it felt he was wrong, but that it would not object to referring the question to the Court. On the other hand, Ambassador Austin, the Permanent Representative to the United Nations and the Chief of the U.S. delegation, liked Dr. Arce's proposal. Benjamin Cohen, a specialist in matters of Charter interpretation and reference to the Court, said that the text of a resolution referring the matter to

the Court should not make any reference to the record of discussions at San Francisco. Instead, the Court itself should take them into consideration. He said that he would hesitate to send many important constitutional questions to the Court before they had been thoroughly aired in political debate. There was no use in submitting any question to the Court unless that body could settle the issue with finality. Charles Fahy, Legal Adviser of the Department, generally agreed with Cohen, although if an amended resolution were proposed, he thought that the United States should not vote against it. In general, Jack Tate, Deputy Legal Adviser, thought it improper to "pass the buck" to the Court except as a last resort. Sam Kopper, who maintained special liaison with the Asian and Arab delegations, reported that they liked the Arce proposal as a means of breaking the membership deadlock. If a vote were taken on the proposal, however, he favored abstention. James Hyde, with whom I agreed, urged that we vote in favor of asking the Court for an advisory opinion, but also that we request Dr. Arce to put his arguments in a brief before the Court rather than in the draft resolution. Harley Notter, who had a leading role in the pre-San Francisco planning of the United Nations Charter, suggested that we be careful not to contravene our basic position that the Court should be resorted to as frequently as possible. Furthermore, he felt that the membership issue was a legitimate matter for judicial determination. This was a strong statement from a devoted advocate of the United Nations. Alternate Representative Wilson Compton and Adviser Hayden Raynor, as well as Mrs. Eleanor Roosevelt, who was a member of the U.S. delegation, all supported Hyde's view. The discussion ended with Cohen, Hickerson and myself urging further talks with Arce, making it clear that we thought his view was incorrect but not opposing a possible reference to the Court.

In the end, the resolution asked the Court the simple question whether a state could be admitted to membership by the General Assembly in the absence of a recommendation by the Security Council. The resolution was adopted by 42 votes to 9, with the United States voting with the majority.[97] On March 3, 1950, the Court by twelve votes to two answered the question in the negative.[98] There were further attempts to secure from the Court some opinion that would offset the Soviet vetoes, but they were ultimately abortive.

At the fifth session of the General Assembly in 1950, there was abundant debate on an issue of treaty procedure that was eventually

97. 4 U.N. GAOR 329 (1949).

98. Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I.C.J. 4.

referred to the International Court of Justice for an advisory opinion. The controversy surrounded the fact that some multilateral conventions provided that ratifications should be deposited with the Secretary-General of the United Nations and that he should publish from time to time the names of the states parties to the convention in question. But in carrying out these duties, the Secretary-General often faced a dilemma. After perhaps a dozen states had deposited their notices of ratification, a thirteenth state might advise the Secretary-General that it ratified the convention, but that it did not accept a particular article and, therefore, made the reservation that it would not be bound by that article. Some of the states that had already ratified the treaty without reservation would inform the Secretary-General that they did not agree with the thirteenth state, refuse to accept its reservation and proclaim that it was not to be considered a party to the treaty at all. The complications can be imagined. The problem was first posed in the General Assembly in terms of broad rules of international law regarding reservations to miltilateral treaties. At that stage, Mr. Tate, Assistant Legal Adviser of the Department of State, argued that the whole issue should be referred for study to the International Law Commission, which has a broad mandate to deal with the codification of international law. Tate noted that while the Commission was studying the matter, there would be no point in asking the International Court of Justice to give an advisory opinion on the subject. However, the issue soon crystalized around the multilateral Convention on the Prevention and Punishment of the Crime of Genocide.[99] When the question was thus narrowed, the United States supported a reference to the International Court because, as Tate explained, there was now a precise and concrete question on which the Court could pass.

The questions put to the Court were actually quite complicated. When the Court's equally complicated opinion was considered at the sixth session of the General Assembly, the United States proposed a draft resolution that provided that the General Assembly, "having considered and noted" the opinion, as well as a report of the International Law Commission, "commends" the opinion to all states, "recommends" that all United Nations' organs be guided by it, and "authorizes" the Secretary-General to follow certain specified rules.[100] Following amendments, the draft resolution recommended that the drafters of multilateral conventions in the future should "bear in mind" the desirability of inserting a clause dealing with the right to

99. 78 U.N.T.S. 278 (1951).
100. U.N. Doc. A/C.6/L.188 & Rev.1 (1951).

make reservations. The amended resolution, in which the Secretary-General was merely "invited" to follow certain rules, was adopted on January 4, 1952, by a vote of 23 to 18, with 7 abstentions.[101] In speaking of the draft resolution in the Sixth Committee, Benjamin Cohen explained that "it had been the general practice of the United States to accept and follow the advisory opinions of the International Court of Justice, even when it had itself originally advanced different views."[102] In this particular case, Cohen though that the reasoning of the Court was sound. Subsequently, Mr. Maktos, speaking for the United States, said that the opinion of the Court "had already become part of international jurisprudence."[103] On January 12, 1952, the draft resolution, as amended, was adopted by a vote of 32 to 17, with 5 abstentions.[104]

Cohen's declaration that the United States generally accepted the opinions of the Court even when it had had a contrary view was soon put to a severe test. It was the McCarthy era and I do not pretend to review the events of those unhappy years with scholarly objectivity. Secretary-General Trygve Lie devotes a chapter of his autobiography to *The Communist Issue in the Secretariat.* I agree with what he wrote:

> It was a cruel turn of fate that the Secretariat, the Delegations, and I should have been battered by all the turmoil of highly charged emotions, mutual misunderstandings and even recriminations in those months [of 1952-1953]. Being human, I of course made mistakes; but both blame and praise came to me then for positions I did not take and beliefs I did not share.[105]

Suffice it to say that during 1952 and 1953, the Secretary-General separated—*i.e.*, discharged—21 employees of U.S. nationality, 17 of whom, when questioned by official U.S. investigating bodies, invoked their fifth amendment privilege against self-incrimination and refused to answer questions concerning their suspected connection with "subversive (Communist) activities." I quote this expression from the 1954 *Report of the President to the Congress on the United Nations*—a report transmitted officially by President Eisenhower but, of course, prepared in the State Department under Secretary of State John Foster Dulles. All 21 of these persons appealed to the U.N. Administrative Tribunal, which is a body set up by the General Assembly to hear appeals of staff members alleging non-compliance

101. 6 U.N. GAOR, 6th Comm. 146 (1951).
102. 6 U.N. GAOR, 6th Comm. 71 (1952).
103. 6 U.N. GAOR, 6th Comm. 82 (1952).
104. 6 U.N. GAOR 346 (1952).
105. TRYGVE LIE, IN THE CAUSE OF PEACE 386 (1954).

with their terms of employment. The Administrative Tribunal upheld the action of the Secretary-General in ten cases and in the other eleven held that he had not acted in accordance with staff regulations. Trygve Lie exercised his option to refuse to reinstate any of the eleven persons and the Tribunal subsequently awarded them penalties totalling some 180,000 dollars.

The United States fought this award vigorously. Mr. James P. Richards had the task of explaining the United States case to the Fifth Committee, which handles the budget of the organization and rarely enters into such a controversial matter. He spoke at great length on December 3, 1953.[106] Most pertinent to the theme of this article were his remarks about the reviewability by the General Assembly of decisions of the Administrative Tribunal. He asserted the Assembly's right to review the mistakes alleged to have been made by the Administrative Tribunal and gave the Committee a taste of the then current Administration notion that invocation of a constitutional privilege was strong evidence of guilt, although he did not phrase his speech in just those terms. But the United States had to yield to the vote of the General Assembly on December 9, 1953, in favor of asking the International Court of Justice for an advisory opinion on the question of whether the General Assembly had a right to review the judgments of the Administrative Tribunal. The vote was 41 to 6, with the United States included among the 13 abstentions. The United States did succeed, however, in deferring payment of the indemnities until after the Court had given its opinion.[107]

The United States submitted both written and oral statements to the Court in support of its opposition to the awards. Nonetheless, on July 13, 1954, with three judges dissenting, the Court held that the General Assembly had no right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal.[108] To the great credit of the United States, it must be noted that despite the strong American view, Senator Fulbright, as a member of the U.S. delegation to the ninth session of the General Assembly, told the Fifth Committee:

> . . . while the United States delegation did not share the Court's opinion as to the relationship between the Administrative Tribunal and the principal organs of the United Nations, it would maintain its consistent policy and continue to respect the Court's authority and competence.[109]

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106. 8 U.N. GAOR, 5th Comm. 281-88 (1953).

107. 8 U.N. GAOR 461 (1953).

108. Advisory Opinion on the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, [1954] I.C.J. 47.

109. 9 U.N. GAOR, 5th Comm. 271 (1954).

A similar problem, however, soon arose in another form. The Director-General refused to renew the contracts of four United States nationals who had been employed by the United Nations Educational, Scientific and Cultural Organization because of their refusal to appear before the United States International Organizations Employees Loyalty Board. The four persons brought their cases to the Administrative Tribunal of the International Labour Organisation, the jurisdiction of which previously had been recognized by UNESCO in dealing with disputes concerning staff employment. The ILO Administrative Tribunal found that the Director-General of UNESCO had acted illegally and that the contracts had to either be reinstated or damages of some 51,000 dollars be paid to the persons affected. In the Executive Board of UNESCO, the question was whether UNESCO should exercise its privilege of requesting the International Court of Justice to give an advisory opinion on the correctness of the ILO Administrative Tribunal's award. The representative of the United States on the UNESCO Executive Board was Dr. Athelstan Spilhaus, a distinguished meteorologist and oceanographer who frankly explained to the Board that he was not a lawyer and found some of the technical procedural arguments "hard to understand." Spilhaus explained, however, that he had obtained advice "from the top lawyers of my Government who deal with international matters of this kind." He then made a statement worthy of the most highly qualified jurist:

> In discussing this matter, I have sometimes heard the comment that the issue is trivial and that this is something like taking a traffic offence to the highest court in a country, but where a matter of principle and precedent is involved, it is perfectly proper to take a traffic offence to the high court. I know that in the history of the early development of the law in the United States, many of the basic definitions of principle were formulated by the Supreme Court on cases which were perhaps of themselves small in the amount of damages or the substantive issues involved. It seems to me that the same thing holds here. It is a question of establishing the law in this case and to appeal the decisions of the Tribunal in no way reflects on or undermines our respect for the Tribunal. Whatever the decision of the ICJ may be, my Government will immediately accept it.[110]

In an opinion rendered on October 23, 1956, the Court upheld the action of the Administrative Tribunal.[111] The Executive Board of UNESCO took note of the opinion and authorized the Director-General to pay the awards granted by the Tribunal. Mr. E. G.

110. UNESCO Doc. 42 EX/SR 1-27 (SR.14), at 138.

111. Advisory Opinion on the Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization, [1956] I.C.J. 77.

Trueblood, substituting for Dr. Spilhaus, informed the UNESCO board that the United States "did not agree with the majority opinion of the Court and, anyone reading the report of the opinion, would probably support the United States Government's view. However, under the Statute of the Tribunal, the Court's opinion was binding, and, since the United States Government had a long tradition of respect for international law, it would not contest that opinion. . . ."[112] Thus, the United States passed the severe strain of the McCarthy era episodes with credit to its history of support for the role of the international judicial process, consistently bowing to the views of the International Court of Justice even when it had been opposed in the course of litigation.

Another opinion of the Court, this time in agreement with the views of the United States, was of very considerable importance in the history of the United Nations. This was the matter of *Certain Expenses of the United Nations*, in which the Court was asked to rule on the question of whether states, members of the United Nations, were obligated to pay their assessed shares of expenses incurred in the U.N. peacekeeping operations in the Congo and the Middle East.[113] I was a member of the International Court of Justice when the Court rendered its opinion on this question and therefore I prefer not to go into its substantive aspects. For the purposes of this article, however, I may say merely that the United States supported the Court's view that members were under a legal obligation to pay their assessments. The United States was one of the seven co-sponsors of the resolution referring the case to the International Court of Justice. The refusal of the Soviet Union and France to accept this opinion of the Court has brought the United Nations to the brink of bankruptcy. The resolution of the General Assembly that accepted the advisory opinion was adopted on December 12, 1962, by a vote of 75 to 17, with 14 abstentions.[114] The United States cast one of the affirmative votes.

IV. Conclusion

Since 1945, when the United Nations was born with the International Court of Justice as its "principal judicial organ," the United

112. UNESCO Doc. 45 EX/SR 1-29 (SR.9), at 50.

113. Advisory Opinion on Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), [1962] I.C.J. 151.

114. 17 U.N. GAOR, 5th Comm. 350 (1962). The General Assembly adopted the resolution at a plenary meeting on December 19, 1962, by a vote of 76 to 17, with 8 abstentions.

States has not been an assiduous advocate or patron of the Court. The American tradition of submission of international disputes to judicial settlement has been largely discarded. The record of France and of Great Britain has been better. There are several possible explanations for the contrasting position of those two important states. It may be due in part to the fact that they had been parties to the Statute of the Permanent Court of International Justice since 1921 and had utilized that tribunal during the League period. As members of the Council of the League, they frequently had participated in voting to request the Permanent Court to give advisory opinions that were found to be helpful in solving some of the post-war political problems in Europe. On the other hand, despite the advocacy of every President of the United States from 1920 to 1940, the United States had failed to become a party to the Statute of the Permanent Court. This failure was due largely to the strength of the isolationist element in the Senate.

At San Francisco, the United States delegation was too fearful of the Senate and opposed the wish—or at least the willingness—of all delegations except the Soviet bloc to give the new International Court of Justice compulsory jurisdiction. Personalities were important. Senators Vandenberg and Connally were members of the U.S. delegation and opposed compulsory jurisdiction. Leo Pasvolsky, who was the principle American architect of the Charter, had a political rather than a legal turn of mind; he would be classed today as a "realist"—probably congenial with Kissinger. John Foster Dulles could have been expected to promote the Court, but later was actually the instigator of the Connally Amendment, whose deleterious effects have been noted. Green Hackworth was a State Department Legal Adviser of the old school, not an aggressive innovator. Charles Fahy, the Solicitor General of the United States, represented the Attorney General, who had wished to be a member of the U.S. delegation but who was barred by the President's decision not to include members of the Cabinet other than Secretary of State Edward Stettinius. Stettinius was chairman of the U.S. delegation, but gave no leadership at all. Fahy practically had to fight his way into the delegation meetings, while I, as a minor "Assistant on Judicial Organization," was admitted to only one meeting. At that meeting, which was to discuss the international court, Senator Connally presided in the absence of Stettinius and the meeting opened with a statement by Senator Vandenberg that the question of compulsory jurisdiction was already settled.

On May 28, 1945, at a meeting of Committee IV/1, which was in charge of drafting the Statute of the new International Court, Senator Connally accompanied Legal Adviser Hackworth, who stated that the

Senator had asked him to explain the position of the United States. Mr. Hackworth amplified his explanation at a meeting of a subcommittee on the next day. The United States, he said, was devoted to the principle of judicial settlement and arbitration of international disputes, but it had not been possible to get the Senate to agree to accept the Statute of the Permanent Court of International Justice. He referred to the fact that two leading Senators were at San Francisco as members of the U.S. delegation and suggested that it was real progress to find that the United States was now willing to be a party to the Statute of the International Court of Justice. He would not say that if the committee voted to include a provision for compulsory jurisdiction the United States would refuse to participate, but the whole trend of his argument suggested that this was the case. He suggested there was need for time to bring about an "evolutionary" development. When the subcommittee report was laid before the full committee on May 31, 1945, Mr. Hackworth objected to the way his statement was reported. He had not said it would be "impossible" for the United States to join if the Court were given compulsory jurisdiction; he had only said it would be "easier" without that provision.

Golunsky, one of the two very able Soviet jurists on their delegation, followed Hackworth in both the committee and the subcommittee and in each case said that his position was absolutely the same as that of Mr. Hackworth. He said that there had been a certain change in opinion in the U.S.S.R. regarding an international court, but not enough to make it possible to accept a court with compulsory jurisdiction. Was it not better, Golunsky asked, to have all states participate in the Court even though it did not meet the desires of all the delegations at San Francisco? He said that if compulsory jurisdiction were not included, the U.S.S.R. would become a party to the statute and (as I wrote in my notes of the subcommittee meeting) "a considerable part of their legal disputes would be brought before the Court in various ways." Regrettably, that has not proved to be the case. At the May 31 meeting, Krylov of the U.S.S.R., who was later to be a judge of the International Court of Justice, stated emphatically that "impossible" was the correct word to use to describe the Soviet opposition to compulsory jurisdiction.

Toward the close of the San Francisco Conference, the United States delegation decided upon a daring and, some thought, dangerous enterprise. Under the chairmanship of Isaiah Bowman, President of the Johns Hopkins University and Special Adviser to the U.S. delegation to San Francisco, a group of nine of us who were attached to the U.S. delegation prepared a summary and explanation of the Charter that was to be sent by the Secretary of State to the President

immediately after the Charter was signed. Ordinarily, governments or foreign offices and state departments do not risk public commitment to interpretations of such a formidable document until after there has been time for detailed study by all the experts. We worked night and day and the letter of transmittal from Secretary Stettinius to President Truman was signed on the same day that the Charter was signed. The report, with its appendices, is a document of 266 pages.[115] I wrote the section on the International Court of Justice and Mr. Hackworth approved it without change. On the question of compulsory jurisdiction, the report recalls the debates that led to the inclusion in the I.C.J. Statute of the same provision that was in the Statute of the Permanent Court of International Justice, known as the "optional clause" by which states may, if they choose, declare that they accept for the future the jurisdiction of the Court for a listed category of legal disputes. (It was to its acceptance of this "optional clause" that the United States Senate attached the emasculating Connally reservation). The report states that a majority of the delegates on the committee took the view that it was now possible to move beyond the optional clause and provide for compulsory jurisdiction. On the other hand, it was pointed out that the inclusion of such a provision at that time might make it difficult, if not impossible, for some states to accept the Statute, a result which no delegate wished to precipitate. In order to reach agreement, therefore, the committee decided to retain the present system with its optional clause.

The decision was a wise one under all the circumstances and it was the expectation of many on the U.S. delegation that the Senate would agree to the acceptance of the optional clause without any crippling reservation. Since the Statute of the International Court was made "an integral part" of the Charter, the Soviet Union might have refused membership in the organization had the Statute provided for compulsory jurisdiction. Krylov, the brilliant Soviet jurist, at one committee meeting submitted his personal opinion that it would not have been possible, from a legal point of view, for a state to accept the Charter but attach a reservation excluding acceptance of the Statute of the Court.

115. U.S. DEP'T OF STATE, PUB. NO. 2349, CHARTER OF THE UNITED NATIONS—REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE BY THE CHAIRMAN OF THE UNITED STATES DELEGATION, THE SECRETARY OF STATE, JUNE 26, 1945, (1945) (chapter 13 deals with the Court). The group that prepared the report with President Bowman included Hamilton Fish Armstrong, John D. East, Wilder Foote, Philip C. Jessup, Walter M. Kotschnig, Archibald MacLeish, Edward G. Miller, Jr. and Leo Pasvolsky.

Despite the Connally reservation, the United States could have made more use of the Court. Furthermore, it can still do so. On numerous occasions when new Administrations have taken office, the State Department's Legal Adviser, or some of his staff, have combed from the files a list of unsettled disputes with other countries that might be cleared up by submission to the International Court of Justice. To be sure, the other party can always invoke the Connally Amendment on the basis of reciprocity and thus block resort to the Court, but, to my knowledge, the United States has taken the initiative in only a few cases.

On the other hand, the record of the United States during those occasions when the U.N. General Assembly has asked the Court for an advisory opinion has been, on the whole, creditable. I find the deficiency to exist in the failure of the United States to play a more positive role in promoting resort to the Court. The Connally Amendment seems to have become more a frame of mind than a legal obstacle. One Administration after another has announced that it favored repeal of the Amendment, but no President has put the item high enough on his legislative priorities to throw the whole weight of his office behind such a proposal.

As I have tried to indicate, I think that there is substantial value in building up the activity of the International Court of Justice. The use of the Court stimulates the "law habit" in the conduct of foreign policy. The jurisprudence of the Court develops and clarifies the applicable rules of international law. As the Court gains in reputation and importance, I anticipate more care and sincerity in the selection of the judges.

As a member of a panel under the chairmanship of Nicholas Katzenbach, which was convened by the United Nations Association to analyze "The United Nations in the 1970's," I warmly endorse the following recommendations of that panel:

> The Panel has considered how to get increased international judicial action under way. It believes this, too, requires a concerting of action by a group of UN Members.
>
> The Panel believes the United States should seek a coalition of Members, which would:
>
> (a) Agree to vote in the United Nations for the referral to the International Court of Justice for Advisory Opinions of all disputes over important legal questions concerning the interpretation or application of treaties which have been sponsored either by the General Assembly or the Security Council, and to accept such Advisory Opinions as decisive. (This provision would in no way alter the obligations of states party to treaties containing a compulsory ICJ referral clause.)

(b) Agree to refer to the Court for decision all disputes between two or more members of the coalition on such subjects as:

(i) protection of the environment
(ii) air navigation
(iii) hijacking
(iv) extradition

(c) Agree to accept the compulsory jurisdiction of the Court to decide any important legal issue in disputes between members of the coalition in which:

(i) the Security Council recommends reference of such an issue in the dispute to the Court;
(ii) the General Assembly recommends by a three-fourths majority reference of such an issue in the dispute to the Court.[116]

Finally, the panel also recommended the repeal of the Connally Amendment.

116. THE UNITED NATIONS IN THE 1970's, *supra* note 92, at 36.