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## INTERNATIONAL LAW-INTERNATIONAL COURT OF JUSTICE- ADVISORY OPINIONS-ADMISSION TO MEMBERSHIP IN THE UNITED NATIONS

William C. Gordon  
*University of Michigan Law School*

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INTERNATIONAL LAW—INTERNATIONAL COURT OF JUSTICE—ADVISORY OPINIONS—ADMISSION TO MEMBERSHIP IN THE UNITED NATIONS—The International Court of Justice is the principal judicial organ of the United Nations,<sup>1</sup> and the Statute of the Court forms an integral part of the United Nations Charter.<sup>2</sup> The Court is essentially a continuation of the Permanent Court of International Justice, which operated in connection with the League of Nations. Like its predecessor, the Court is composed of fifteen judges, nominated in a manner designed to ensure impartiality and elected by the General Assembly and the Security Council voting separately upon a list of nominees.<sup>3</sup>

#### A. *Jurisdiction of the Court*

Jurisdiction of the Court is of two kinds: (1) it may decide cases and (2) it may render advisory opinions. In the decision of cases, only states may be parties,<sup>4</sup> and the Court's jurisdiction depends upon their con-

<sup>1</sup> U.N. Charter, art. 92.

<sup>2</sup> *Ibid.*

<sup>3</sup> Arts. 4-12 of the Intl. Ct. of J. Stat. prescribe the method of selection. Art. 3 requires that each judge be from a different state. Judges are elected for nine years, but to preserve the continuity of the Court, the terms of the original bench are staggered (art. 13). Thus, Judge Hackworth of the United States and Judge Krylov of the U.S.S.R. have six-year terms. See Hackworth, "The International Court of Justice and the Codification of International Law," 32 A.B.A.J. 81 (1946); 41 AM. J. INT. L. 481 (1947) (a review of a three volume work by Judge Krylov and the legal adviser to the Soviet United Nations delegation); Hudson, "The New Bench of the World Court," 32 A.B.A.J. 140 (1946).

<sup>4</sup> Intl. Ct. of J. Stat., art. 34. Under art. 35, the Security Council may lay down the conditions under which a non-member state may have access to the Court. For action already taken by the Council, see Hudson, "The Twenty-Fifth Year of the World Court," 41 AM. J. INT. L. 1, 8 (1947). In general, see Jessup, "The Subjects of a Modern Law of Nations," 45 MICH. L. REV. 383 (1947).

sent.<sup>5</sup> Jurisdiction may be conferred on the Court by special agreement for the reference of a particular case, by prior agreement to submit questions which may arise with respect to interpretation of a treaty or convention, or by acceptance of the so-called "optional clause" providing for compulsory jurisdiction.<sup>6</sup> Many of the member states have shown considerable reluctance to accept compulsory jurisdiction under all conditions, thus largely limiting the control of the Court over crucial questions which may arise.<sup>7</sup> In the absence of wider acceptance of the "optional clause" it may be expected that states will seldom resort voluntarily to the Court for settlement of vital issues.

But the Court may assume a greater role through its power to give advisory opinions at the request of organs of the United Nations or of certain specialized agencies.<sup>8</sup> On November 14, 1947, the General Assembly adopted a resolution urging submission to the Court of difficult and important questions of law, including those which relate to interpretation of the Charter.<sup>9</sup> Since the concurrence of a majority of the General Assembly is sufficient to request an advisory opinion, this aspect of the Court's function may be considerably enhanced. While an advisory opinion lacks the binding force of a judgment,<sup>10</sup> it has great doctrinal and moral authority.

### B. *The Advisory Opinion*

In a recent advisory opinion, the Court shed some light on its future in the United Nations structure. The request for the opinion arose because the Soviet Union conditioned its assent to the admission of Italy and Finland to the United Nations upon simultaneous admission of Bulgaria, Hungary and Romania.<sup>11</sup> The Russian delegate to the

<sup>5</sup> Intl. Ct. of J. Stat., art. 36.

<sup>6</sup> *Ibid.*

<sup>7</sup> The conditional acceptance of the United States has been widely criticized. See, for example, 33 A.B.A.J. 430 (1947); Preuss, "Questions Resulting From the Connally Amendment," 32 A.B.A.J. 660 (1946).

<sup>8</sup> An authorized body may request such opinion on "any legal question." U.N. Charter, art. 96; Intl. Ct. of J. Stat., art. 65.

<sup>9</sup> Genl. Assembly Res. 171 (11) A (Nov. 14, 1947), found in U.N. Doc. A/P.V. 113 (Nov. 14, 1947).

<sup>10</sup> The judgment of the Court with regard to cases is final. Statute of the International Court of Justice, art. 60. This is reinforced by art. 94 of the Charter which permits recourse to the Security Council if a party fails to fulfill the obligations imposed by the judgment. These articles do not apply to advisory opinions. But it is possible to provide that the conclusions reached by the Court in an advisory opinion shall have binding effect. See, for example, Convention on the Privileges and Immunities of the United Nations, §30, 1 UNITED NATIONS TREATY SERIES 16, 30 (Feb. 13, 1946).

<sup>11</sup> Conditions of admission of a State to membership in the United Nations (Charter, art. 4), Advisory Opinion: I.C.J. Reports 57 (1948).

Security Council, Mr. Gromyko, argued that under the Potsdam Agreement and the Peace Treaties of Paris, these five ex-enemy states with which treaties had been concluded should be admitted together.<sup>12</sup> A majority of the General Assembly thought that the rejection of the applications for membership was based on grounds not included in the Charter. Their request for an advisory opinion was couched in the following terms:

“Is a Member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?”<sup>13</sup>

The Court was faced essentially with problems of interpretation. It was required to decide its competency, under the Charter, to give an advisory opinion on this question. If jurisdiction was found to exist, determination of the scope of the Charter provisions relating to membership was necessary.

### 1. *Jurisdiction to Render the Advisory Opinion*

a. *Interpretation of the Charter for other organs of the United Nations.* Several states opposed the request for an advisory opinion on the ground that the Court lacked power to interpret the Charter for other organs of the United Nations.<sup>14</sup> This objection had been raised many times before. It was extensively debated in the General Assembly before the resolution of November 14, 1947, was passed call-

<sup>12</sup> U.N. Doc. S/P.V. 204 (Sept. 25, 1947). See also U.N. Doc. S/P.V. 279 (April 10, 1948).

<sup>13</sup> Genl. Assembly Res. 113 (11) B (Nov. 17, 1947). Art. 4 of the Charter states that “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.” See GOODRICH AND HAMBRO, *THE UNITED NATIONS CHARTER* 80 (1946).

<sup>14</sup> U.N. Doc. A/P.V. 117 (Nov. 17, 1947). The resolution requesting the opinion was adopted by 40 votes to 8, with two abstentions. U.N. Doc. A/P.V. 118 (Nov. 17, 1947).

ing for frequent use of the Court for advisory opinions, including requests for interpretation of Charter provisions.<sup>15</sup> Nowhere does the Charter specifically entrust the Court with this function.<sup>16</sup> At San Francisco, it was recognized that each organ was competent to interpret the parts of the Charter applicable to it, and a proposal to expressly confer upon the Court a general power of interpretation was rejected.<sup>17</sup> However, the Court is given jurisdiction over "any legal question"<sup>18</sup> without specific restriction, and it was argued that this provision covers such matters as the interpretation of the Charter. Opponents of this position contended, since the constitutions of many states stipulate that their Courts may perform the interpretative function, no such power exists in absence of a specific grant. The proponents of wider use of the Court then pointed out that its jurisdiction in legal disputes includes the interpretation of treaties and that the Charter is fundamentally a multilateral treaty.<sup>19</sup> Mr. Vyshinsky sought to distinguish the legal characteristics of the Charter from those of a treaty, asserting that the competence to interpret treaties does not include the power to interpret Charter provisions applicable to other organs of the United Nations.<sup>20</sup>

A majority of the General Assembly clearly thought it desirable that the Charter should be interpreted by the Court.<sup>21</sup> But some representatives believed such resort to the Court would give it priority in

<sup>15</sup> Gen. Assembly Res. 171(11)A (Nov. 14, 1947). The arguments are found in U.N. Doc. A/P.V. 113 (Nov. 14, 1947).

<sup>16</sup> Such interpretive clauses are common incidents of treaties. See, for example, *TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND CHINA*, Art. 28, 80th Cong., 1st sess., Executive J. (1948). The text of the treaty is also found in 43 *AM. J. INT. L. SUPP.* 27 (1949).

<sup>17</sup> See report of the sub-committee, IV/2/B, U.N.C.I.O. Doc. 887- IV/ 2/ 39 (June 9, 1945). Both sides placed much emphasis on this report, drawn up by a group of jurists in answer to the question "How and by what organs of the Organization should the Charter be interpreted?" The report confirmed the belief that each organ had inherent power to interpret applicable parts of the Charter, thus making it unnecessary to expressly authorize such practice. It indicated further that the Court was not intended to occupy a position analogous to that of the Supreme Court of the United States with respect to the United States Constitution. But the report also stated that members are free to submit disputes arising out of differences in interpretation to the International Court of Justice, "as in the case of any other treaty." Similarly, the report indicated that the General Assembly or the Security Council could ask the Court, in appropriate circumstances, "for an advisory opinion concerning the meaning of a provision of the Charter."

<sup>18</sup> U.N. Charter, art. 96; *Intl. Ct. of J. Stat.*, art. 65.

<sup>19</sup> The argument was made by Mr. Evatt of Australia. U. N. Doc. A/ P.V./ 113 (Nov. 14, 1947).

<sup>20</sup> U.N. Doc. A/P.V. 113 (Nov. 14, 1947). Dr. Lange of Poland was chief supporter of Mr. Vyshinsky's arguments.

<sup>21</sup> The resolution was passed by a vote of 46 to 6, with 2 abstentions. U.N. Doc. A/P.V. 113 (Nov. 14, 1947).

matters of interpretation and would be used to circumvent the Security Council. They doubted the political wisdom of requesting such advisory opinions, and pointed out that if an opinion were not followed the Court and the General Assembly would be discredited. This basic difference in approach cannot be attributed to some delineation between East and West.<sup>22</sup> Such divergent views have been present among our own publicists. Some conceive a Court of broader jurisdiction as a valuable contribution to our international machinery, if not a panacea.<sup>23</sup> Others regard the International Court of Justice as inherently limited, at least as long as states do not voluntarily consent to jurisdiction, and fear that delicate international balance may be upset if the Court entertains questions beyond these limitations.<sup>24</sup>

The Court itself had no doubts about its power to interpret Charter provisions applicable to other organs of the United Nations. It disposed briefly of the contrary argument, holding that it was authorized to interpret the Charter, a "function which falls within the normal exercise of its judicial powers."<sup>25</sup> Only Judge Krylov of the U.S.S.R., in his dissenting opinion, expressed any doubts on this point.<sup>26</sup>

*b. Political or legal question.* Another obstacle to the Court's assuming jurisdiction was presented in the argument that the General Assembly's request involved determination of a "political" and not a "legal" question. In its opinion, however, the Court held the request called for interpretation of a treaty provision, which is a legal function. In a joint dissenting opinion, four members of the Court agreed with this view as to the first part of the question posed by the General Assembly, concerning the general validity of withholding consent to admission for reasons not mentioned in the Charter.<sup>27</sup> But they thought the second part of the request was political in nature since it required an assessment by the Court of the validity of a "particular political con-

<sup>22</sup> It is true, however, that the United States has tended toward the use of impartial third parties to settle controversies, while the Russians find direct negotiations a more attractive method.

<sup>23</sup> See, for example, Sohn "Drumming up Business' for the World Court," 33 A.B.A.J. 1224 (1947); KELSEN, *PEACE THROUGH LAW* (1944).

<sup>24</sup> For examples of this view see Hudson, "The Twenty-Sixth Year of the World Court," 42 AM. J. INT. L. 1, 15-18 (1948); Gilmore, "The International Court of Justice," 55 YALE L. J. 1049, 1062-4 (1946). For arguments which would support this view see BRIERLY, *THE LAW OF NATIONS*, 3d ed., pp. 219 et seq. (1942).

<sup>25</sup> I. C. J. Rep. 61 (1948).

<sup>26</sup> *Id.* at 109.

<sup>27</sup> Vice-President Basdevant of France wrote the opinion. Judges Winiarski of Poland, McNair of Great Britain and Read of Canada joined in this dissent.

sideration upon which a Member relies."<sup>28</sup> Both of these opinions indicate the Court will be satisfied that the question is a legal one if it is cast in abstract form.<sup>29</sup>

In an individual concurring opinion, Judge Azevedo of Brazil favored examination of questions which were on the frontiers of political action.<sup>30</sup> He argued that even the broadest discretionary powers have legal limitations and that the legal elements could be sifted from their political context by applying an objective criterion. Since the majority opinion placed no limit on the abstract questions which may be asked, the Court may adopt such an expansive formula as Judge Azevedo's in deciding whether a "legal question" is presented.

Judge Zoricic of Yugoslavia, dissenting, argued that to deal with this request in the abstract would be to work in a vacuum,<sup>31</sup> since the request arose from views relating primarily to political acts expressed in a political body.<sup>32</sup> He thought the Court's reply would be construed as an indirect judgment on the action of certain members of the Security Council without knowledge of the legal arguments made before that body.<sup>33</sup> Judge Krylov, in his dissenting opinion, agreed the legal question should not be examined in the abstract, pointing to the practice of the Permanent Court of International Justice in dealing with concrete situations.<sup>34</sup>

In an individual concurring opinion, Judge Alvarez of Chile expressed the most dynamic view of the problem. He felt that the traditional distinctions between what is legal and what is political have been greatly modified, and that policy and law are now closely linked.<sup>35</sup> He found the legal element predominated in the request submitted, "not so much because it is a matter of interpreting the Charter, but because

<sup>28</sup> I. C. J. Rep. 93 (1948).

<sup>29</sup> Gilmore, "The International Court of Justice," 55 *YALE L.J.* 1049, 1065 (1946), mentions the adaptability of the form of the request.

<sup>30</sup> I.C.J. Rep. 77 (1948).

<sup>31</sup> *Id.* at 96.

<sup>32</sup> *Id.* at 95. American courts have often refused to decide cases involving the exercise of discretion by the executive or legislative branches of the government. There is considerable support, by analogy, for the argument that this is a "political question." Sloan, "The World Court and the United Nations," 33 *IOWA L. REV.* 653, 663-4 (1948). Sloan, "Comparative International and Municipal Law Sanctions," 27 *NEB. L. REV.* 1, 23 (1947). However, the International Court of Justice is not troubled by these problems which have caused concern to the Supreme Court of the United States, according to Jessup, "The International Court of Justice and Legal Matters," 42 *ILL. L. REV.* 273, 286 (1947).

<sup>33</sup> I.C.J. Rep. 95 (1948).

<sup>34</sup> *Id.* at 108-109.

<sup>35</sup> *Id.* at 69.

it is concerned with the problem whether States have a *right* to membership<sup>36</sup> if they fulfill the requisite conditions.

## 2. *Interpretation of Charter Provisions Relating to Membership*

Having assumed jurisdiction, the Court found the natural meaning of article 4, relating to membership, so clear that no resort to preparatory work by the draftsmen of the Charter was necessary.<sup>37</sup> In this regard, the Court referred to the practice of the Permanent Court of International Justice. After analyzing the text, the Court named five requisites to membership. An applicant "must (1) be a state; (2) be peace-loving; (3) accept the obligations of the Charter; (4) be able to carry out these obligations; and (5) be willing to do so."<sup>38</sup> Furthermore, the Court held that these were the only conditions to membership which could be imposed.

None of the dissenting judges found the text free from ambiguity. Therefore, they investigated the preparatory materials and concluded that the enumerated conditions were not intended to be exhaustive. Judge Krylov, in addition to examining preparatory work, took into account the practice followed by the political organs of the United Nations with respect to the admission of new members.<sup>39</sup>

The Court, in reiterating the so-called rule of treaty construction "that there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear," approached the problem along traditional lines.<sup>40</sup> But some authorities, in anticipating the general approach of the Court, thought it would not look solely to the text as a clear expression of intent.<sup>41</sup> This was expected because of the danger, inherent in applying such a rule, that the search for the design of the parties might be subordinated "to the form which a text is permitted to assume."<sup>42</sup> Furthermore, resort to preparatory work might be necessary to determine whether the provision is clear.<sup>43</sup> Perhaps most

<sup>36</sup> *Id.* at 70.

<sup>37</sup> See note 13, *supra*.

<sup>38</sup> I.C.J. Rep. 62 (1948).

<sup>39</sup> *Id.* at 112-114.

<sup>40</sup> 2 HYDE, *INTERNATIONAL LAW*, §533 F (1945). The "rule" is sometimes said to be derived from Anglo-American methods of construction. But American and British courts do not hesitate to use preparatory work to interpret treaties; see Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties," 48 *HARV. L. REV.* 549, 562-71 (1935).

<sup>41</sup> 2 HYDE, *INTERNATIONAL LAW* 1492 (1945).

<sup>42</sup> *Id.* at 1498.

<sup>43</sup> 5 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 260 (1943), quotes Elihu Root's statement that "while it is inadmissible to depart from the absolutely clear meaning

important is the Court's application of this method of construction, not to an ordinary treaty, but to the "basic constitutional instrument of the organized community of states."<sup>44</sup> Among those who agreed with the result reached by the Court, only Judge Alvarez clearly regarded the character of the Charter, without following the strict formula of treaty interpretation which governed the other opinions.<sup>45</sup>

The practical effect of this interpretation of article 4 is limited. The Court restricted its inquiry to determination of the validity of a member's negative vote in the light of its statements. The Court was not concerned with the process by which a member arrived at an affirmative or negative vote.<sup>46</sup> And, as Judge Zoricic points out, a member may remain silent as to the reasons for his vote.<sup>47</sup> But Judge Azevedo stated that "Once it is admitted that a State has proved that it has all the required qualifications, a refusal to accept its application might be considered tantamount to a violation not only of an interest but of a right already established."<sup>48</sup> This accords with the view of Judge Alvarez, who concluded that states fulfilling conditions requisite "have a *right* to membership," and that member states are under a corresponding duty to admit them except in certain unusual circumstances.<sup>49</sup> There are some implications of a similar attitude in the majority opinion. Therefore, if a case were presented in which the state requesting admission clearly met the requirements, the Court might recognize such a right. Although the dissenting judges would not recognize a right to admission upon the fulfillment of the requisite conditions, they

of the treaty, there ought to be the greatest reluctance to assume, without exhaustively examining the available sources, that the meaning is absolutely clear." See art. 19 (a) of the Harvard Draft Convention on the Law of Treaties, 29 AM. J. INT. L. SUPP. 653, 661 (1935).

<sup>44</sup> Hudson, "Admission to the United Nations: Advisory Opinion of World Court as to Conditions," 34 A.B.A.J. 652 (1948).

<sup>45</sup> Although Judge Alvarez stated in his opinion that he does not think the Court should look solely to the terms of the Charter, his doubts as to the value of preparatory work raise a highly controversial question. In this connection, he advanced the interesting proposition that "an instrument once established acquires life of its own independent of elements which have given birth to it." Cf. Eagleton, "International Law and the Charter of the United Nations," 39 AM. J. INT. L. 751, 753 (1945), which indicates the importance attached to preparatory work on the Charter. See also GOODRICH AND HAMBRO, *THE UNITED NATIONS CHARTER* 48-49 (1946).

<sup>46</sup> I.C.J. Rep. 60 (1948).

<sup>47</sup> *Id.* at 103.

<sup>48</sup> *Id.* at 81.

<sup>49</sup> *Id.* at 71. In reaching this result, Judge Alvarez stressed "the mission of universality of the United Nations Organization." The joint dissenting opinion indicated that the principle of universality was rejected by the adoption of a system of admissions as distinguished from a system of accession.

would agree that the choice of political considerations may not be arbitrary, but must be guided by good faith.<sup>50</sup>

### C. *Conclusions*

It appears that the Court will not refuse jurisdiction over questions merely because they call for an interpretation of the Charter.<sup>51</sup> Implicit in such result is a belief that this assumption of jurisdiction will enhance, rather than detract, from the essential harmony of the United Nations. There is no reason to believe the Court will restrict this interpretive function to advisory opinions. It seems likely, however, that the advisory opinion process will be resorted to for the more important matters, unless there is a greater acceptance of the "optional clause" of compulsory jurisdiction.

The Court "may give an advisory opinion on any legal question."<sup>52</sup> Since this language is permissive, it would seem that the Court could refuse to consider a question even though it is "legal" in nature.<sup>53</sup> But in view of the attitude evinced by the Court, such refusal is unlikely. Therefore, the method used to define a "legal question" may become the criterion of the breadth of the Court's activities. If the Court should continue to base its conclusions solely on the form of the request, without more fully taking into account the intertwining of policy and law, the questions which may be put in the abstract would seem virtually without limit.<sup>54</sup> On the other hand, an investigation of which aspect predominates would go far toward satisfying some critics who fear that the Court may be brought into the welter of politics.

After taking jurisdiction, the Court will probably adhere to the guides for interpretation enunciated by the Permanent Court of International Justice. There is reason for hoping that these will be considered merely as guides and will not divert the Court from its purpose of ascertaining the design of the parties.

<sup>50</sup> See, for example, the opinion of Judge Krylov; *id.* at 115.

<sup>51</sup> In considering the possible future approach of the Court, it must be kept in mind that the International Court of Justice is not bound by precedent, even where an actual case is decided. *Intl. Ct. of J. Stat.*, art. 59.

<sup>52</sup> *Intl. Ct. of J. Stat.*, art. 65.

<sup>53</sup> Judge Zoricic emphasized this. *I.C.J. Rep.* 94 (1948).

<sup>54</sup> It appears that the Court will not be deterred from rendering an *advisory opinion* merely because no sanctions attach to the act or omission in question. It has been suggested that the Court may be less prone to find a question is "legal" where it arises in an actual case. See Sloan, "The World Court and the United Nations," 33 *IOWA L. REV.* 653, 664 (1948).

In any event, this opinion indicates that the Court will adopt an approach as much divorced from political and national influences as can be expected. The gamut of views held by the judges, and their resultant opinions, can be explained largely on the basis of divergent legal concepts.<sup>55</sup> A continuation of such an approach should help keep the prestige and effectiveness of the Court at a high level.

*William C. Gordon*

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<sup>55</sup> The only other time that the jurisdiction of the International Court of Justice has been invoked was in the Corfu Channel case. The Corfu Channel Case (preliminary objection) Judgment, I.C.J. Rep. 4 (1948). The unanimity of the regular judges as to the jurisdictional point there presented evoked much favorable comment. See Hudson, "Corfu Channel Case: Significance of First Ruling by Present Court," 34 A.B.A.J. 467 (1948).