



100 Years of International Justice – Time to consider a reform of the International Court of Justice

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I. Introduction

On 28th of August 2013 a centennial celebration of the Peace Palace in The Hague was marked and together with it – a 100 years of international justice.¹ Since its establishment, the Peace Palace and the institutions inside became a symbol of international justice and peace, especially the International Court of Justice. The International Court of Justice is the principal judicial organ of the United Nations² and as such it shall preserve the peace-making process and the dispute resolution in accordance with its mandate. However, it is left outside of the discussion for potential reform which is on the agenda of the United Nations for a long time. In 2005 the General Assembly adopted Resolution with list of ambitious reform proposals including all of the United Nations principal organs except the International Court of Justice.³ In addition, many legal scholars, non-governmental organizations, high level legal experts etc. are addressing the reform of the United Nations and are constantly making new proposals but the International Court of Justice is widely neglected. Given the substantial criticism towards the International Court of Justice, its numerous shortfalls and declining influence, should it not be put on the first row for a reform? What is the reason for the 'World Court' being left outside this global discussion? Should this be changed and how the matter could be put on the United Nations table for discussion? And moreover, is not the time when we celebrate already 100 years of international justice the most appropriate reminder for reforming the system of the World Court?

This paper will address these questions and will examine whether the International Court of Justice should be reformed. Chapter II will begin with a brief background of the International Court of Justice in order to outline the biggest deficiencies of the current working system. Chapter III will list the most essential reform proposals in response to the shortfalls discussed in Chapter II. Chapter IV will expose the author's view on reform proposals which must be considered first, what are the problems in the current system, how could they be reformed etc. The focus will be on the composition of the Court and its jurisdiction. Chapter V will summarize the main arguments and will offer conclusions.

II. Criticism towards and shortfalls of the current working system of the International Court of Justice

The International Court of Justice (hereinafter ICJ) is the successor of the Permanent Court of International Justice (PCIJ). The ICJ was created with the ambition to improve the existing system and to become a new and sophisticated international court, to address the deficiencies of the League

¹ Peace Palace Official website, '100 Years', available at: <http://100year.vredespaleis.nl/> accessed 5th December 2014.

² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI Art. 92.

³ The official document is available at: <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf> accessed on 29 January 2014.

of Nations and, under the influence of the United Nations (UN), to become more powerful and influential than the PCIJ.⁴

Criticism towards the Politics of the International Court of Justice

The ICJ is independent from the UN and its Security Council and no formal hierarchy exists between them in theory. However, the separation of powers is not practically exemplified here and does not exist as it does at state level.⁵ Through history we see a pattern signifying the politicization of the Court and since this paper uses the argument of politics having big impact over the work of the Court, this issue should be analyzed in detail.

There have been numerous arguments why the ICJ is influenced by politics. They include, *inter alia*, claims that the judges are being biased by domestic affairs as ruling in favor of their home state, seeking to maximize their profit, status or political goals.⁶ The aim of this paper is not to examine all of the related claims and to give them legitimacy so in the context of the current discussion the argument that the focus will be on is the influence of the United Nations over the ICJ.

The UNSC is conceived by some authors as considering itself as the 'policy-maker' amongst all the UN bodies.⁷ One argument is the election of the ICJ judges which takes place at the UN. The United States, United Kingdom, and France are permanent members of the Security Council and this gives three of the most powerful NATO states substantial decision-making power. They also have the veto power giving them the opportunity to exclude an unwanted judge candidate, which at the same time puts their desired ones in a better position. Moreover, the diplomatic negotiations between states in the UNGA and the UNSC have been a practice for many years and it is easy to win the support of one state in exchange of certain privileges. The politics of the election of the judges will be discussed further in the paper.

More central question is the interplay between the ICJ and the UNSC and the influence of the latter over the former in the judgments. Starting with the Nicaragua case,⁸ going through the Aegean crisis⁹ and pointing specifically at the Lockerbie case,¹⁰ one can witness this trend and the reluctance of the Court to be in conflict with the Council's actions and resolutions.

In the Nicaragua case the United States, being sued by Nicaragua, withdrew its consent from the jurisdiction of the Court in disputes relating Central America¹¹, did not participate in the merits of the case and completely ignored the judgment of the Court proclaiming that the United States violated international law and had to subsequently pay compensation to Nicaragua.¹² Moreover, USA made use of its veto power in the UNSC and vetoed the enforcement resolution, prepared by five non-permanent members, calling for "full and immediate compliance with the Judgment of the ICJ" in the case.¹³ This particular example shows how if a state cannot achieve its interest in front of the ICJ, it can nevertheless do so in front of the UNSC, providing that it has the power required as the United States being a permanent member with veto power.

⁴ Eric A. Posner and Miguel de Figueiredo, 'Is the International Court of Justice Biased?' (2004) Chicago Law & Economics, Working Paper, available at SSRN: <http://ssrn.com/abstract=642581> or <http://dx.doi.org/10.2139/ssrn.642581>.

⁵ Bermejo Perez, 'International Justice and the United Nations Security Council: toward meaningful reform' in Kalliopi Koufa *International Justice* (Sakkoulas, Thessaloniki, 1997) p. 862.

⁶ <http://www.ericposner.com/Is%20the%20International%20Court%20of%20Justice%20Biased.pdf>

⁷ Bermejo Perez, 'International Justice and the United Nations Security Council: toward meaningful reform' in Kalliopi Koufa *International Justice* (Sakkoulas, Thessaloniki, 1997) p. 870.

⁸ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986.

⁹ *Aegean Sea Continental Shelf* (Greece v. Turkey), Interim Protection, 1976 I.C.J. Rep.3.

¹⁰ Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident in Lockerbie (Libya v. UK; Libya v. US), 1992 I.C.J. Rep. 3.

¹¹ Declaration of 7 October 1985 terminating acceptance of ICJ Compulsory Jurisdiction, 24 I.L.M. 1742 (1985).

¹² *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.A.), 1986 I.C.J. Rep. 14.

¹³ Bermejo Perez, 'International Justice and the United Nations Security Council: toward meaningful reform' in Kalliopi Koufa *International Justice* (Sakkoulas, Thessaloniki, 1997) p. 861.

In the Lockerbie case the ICJ refused to impose provisional measures against the United States and the United Kingdom, by request of Libya, because if it did so it would have had contravened the UNSC Resolution 748¹⁴. After this case, the question was posed as to whether the ICJ should have power of judicial review even if and when the UNSC has been seized with an issue and had issued a binding decision. Both the UN Charter and the ICJ Statute are silent on this matter.¹⁵ The danger here is that international politics have substantial power to override international law. And since the UNSC is the political organ of the UN, shouldn't the 'World Court' have authority to scrutinize its actions? This idea is more than utopian, however, it would have avoided many of the political conundrums in the Court.

The Aegean crisis case raises similar issues as the Lockerbie case. Provisional measures, requested by Greece, were refused by the ICJ following the UNSC Resolution 395(1976), calling upon the parties "to resume direct negotiations over their differences" and appealing them "to do everything within their power to ensure that these (negotiations) result in mutually acceptable solutions." The UNSC, furthermore "invited Turkey and Greece in this respect to continue to take into account the contribution that appropriate judicial means, in particular the ICJ, are qualified to make to the settlement of any remaining legal differences which they may identify in connection with their present dispute."¹⁶ Later on the parties signed an agreement for negotiations over the issue but the essence is that after a UNSC resolution, the ICJ adopted the same approach and hence limiting the actions of the parties to the options provided by the Council.

To conclude briefly on the political landscape of international justice, scholars agree that the ICJ being the judicial organ of the UN should have its role maximized, instead of being paralyzed by international politics.¹⁷ However, such an ambitious change requires a reform not only to the 'World Court' but also to the UNSC in order to avoid abuse of power.

Criticism towards the substantive methods of the International Court of Justice

The ICJ has its legal ground in the Statute of the International Court of Justice.¹⁸ Its jurisdiction encompasses disputes between states only¹⁹ and is non-compulsory in nature²⁰ with consent required as a prerequisite. This is considered as an essential shortfall of the ICJ by many actors and from the other angle, useful loophole. One argument is that due to the non-compulsory jurisdiction, there is no effective recourse to justice with the option to decline jurisdiction and avoid litigation. This has been "abused" many times in the history of the Court, several of them by states of the United Nations Security Council (UNSC) Permanent Five Members.²¹ This will be addressed in Chapter IV.

From another side, the ICJ has also many procedural shortfalls. The procedures are time consuming and sometimes lead to uncertainty. The Court hears the cases in panel of fifteen judges, each nominated for nine years after which they could stand for election again.²² Some of them are acting as arbitrators separate from the Court. Both of these facts create uncertainties related to the impartiality of the judges and the fairness of the elections.

The latter issues will be considered in Chapter IV.

¹⁴ U.N.S.C. Res. 748 (31 March 1992), imposing sanctions against Libya, extended by U.N.S.C. Res. 883 (1993)

¹⁵ *Ibid.* p. 865.

¹⁶ UN Security Council, Resolution 395 (1976) *Adopted by the Security Council at its 1953rd meeting, on 25 August 1976, 25 August 1976, S/RES/395 (1976)*

¹⁷ *Ibid.* p. 880.

¹⁸ Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.

¹⁹ *Ibid.* Art.34.

²⁰ *Ibid.* Art 36.

²¹ The UNSC Permanent Five Members include China, France, The Russian Federation, The United States of America and the United Kingdom of Great Britain and Northern Ireland.

²² Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 Art. 13.

To summarize the criticism towards the ICJ and the need for a reform, reference could be made to Oscar Schachter who puts it in a very concise manner:²³

Litigation is uncertain, time-consuming, troublesome. Political officials do not want to lose control of a case that they might resolve by negotiation or political pressures. Diplomats naturally prefer diplomacy; political leaders value persuasion, manoeuvre and flexibility. They often prefer to “play it by ear”, making their rules to fit the circumstances rather than submit to pre-existing rules. Political forums, such as the United Nations, are often more attractive, especially to those likely to get wide support for political reasons. We need only compare the large number of disputes brought to the United Nations with the few submitted to adjudication. One could go on with other reasons. States do not want to risk losing a case when the stakes are high or be troubled with litigation in minor matters. An international tribunal may not inspire confidence, especially when some judges are seen as “political” or hostile. There is apprehension that the law is too malleable or fragmentary to sustain “true” judicial decision. In some situations, the legal issues are viewed as but one element in a complex political situation and consequently it is considered unwise or futile to deal with them separately. Finally we note the underlying perception of many governments that law essentially supports the *status quo* and that the courts are [not] responsive to demands for justice or change.²⁴

Chapter III will discuss some of the significant proposals for reform of the Court and will explain how the deficiencies mentioned above could be addressed.

III. Overview of significant proposals for reform of the International Court of Justice

Although the reform of the ICJ is not on the UN agenda for the moment, there are numerous suggestions addressed by various actors –individuals, NGOs, states, and the Court itself.²⁵ This paper will concentrate on two main proposals. However this Chapter intends to make an overview in general of the most essential reform proposals. The reform would be beneficial for the ICJ, the UN and the international community, however, it is not easy to reach. Some of the potential reforms could be made through amending the UN Charter and/or the ICJ Statute and others do not require such steps. The former may not be very feasible since no amendments of the ICJ Statute have ever been adopted.²⁶ Neither has the UN Charter been known for its frequent amendments especially for the last 40 years.²⁷ Nonetheless, multiple discussions on potential reform have been stimulated in and outside the Court.

It is complex to classify the proposals for the reform of the Court due to their different nature, volume and significance. The International Law Association’s American Branch (ABILA) has created a Committee in 2001 on Intergovernmental Settlement of Disputes which produced a study on possible reforms of the ICJ and issued a comprehensive report.²⁸ The report included the expansion of the ICJ

²³ The citation is taken from: Geoffrey Palmer, ‘International Law and Reform of the International Court of Justice’ in Antony Anghie and Garry Sturgess *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Nijhoff, 2004) p. 586-587.

²⁴ Oscar Schachter, *International Law in Theory and Practice* (1982), Académie de La Haye, 178 Recueil des Cours 9, p. 208.

²⁵ International Law Association Study Group on United Nations Reform, ‘United Nations Reform Through Practice’ (2011) available at SSRN: <http://ssrn.com/abstract=1971008>.

²⁶ International Court of Justice Basic Instruments, ‘Statute of the Court’ available at: <http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0> accessed 11 December 2012.

²⁷ United Nations, ‘Charter of the United Nations, Introductory Note’ available at: <http://www.un.org/en/documents/charter/intro.shtml> accessed 11 December 2013.

²⁸ ABILA Committee on Intergovernmental Settlement of Disputes, ‘Reforming the United Nations: What About the International Court of Justice?’ (2006) 5 Chinese JIL 39-65.

membership,²⁹ the re-election and tenure of the judges, the age limit for the judges, the increase in the number of the female judges, the standing of NGOs before the Court and the potential power of the Human Rights Council and of other international courts and tribunals to request advisory opinions.

The International Law Association (ILA) issued another report on the United Nations Reform which included considerations over the ICJ.³⁰ The report includes all the proposals observed in the ABILA Report and added several more.³¹ One of the proposals was favouring the amendment of Article 38 for bringing clarity and simplicity to the language, even though those kinds of proposals are rare.³²

The procedures and working methods were also on the ILA table for discussion³³ together with the working conditions of the Court. Another point in the report is the need to address and reassess the role of the ICJ due to its heavy workload.³⁴ Despite the fact that these reform proposals would undoubtedly improve the overall working system of the Court, it is the author's opinion that the ICJ's ineffectiveness would be better addressed through more substantial and drastic reforms.

Another interesting source for reform proposals is the Resolution of the 9th of September, 2011 passed by the Institut de Droit International relative to recommendations for the judges in international courts, including the ICJ.³⁵ The Resolution considers again the criteria for the selection of the judges. One of the recommendations includes in Article 2 that "in order to strengthen the independence"³⁶ of the judges, it is better that they are elected for a longer period but without possibility for re-election. It is in the author's opinion that a special emphasis shall be put on Article 3 which shares the view that it is "undesirable for judges serving in courts and tribunals with heavy workload to engage in arbitrations or in substantial teaching activities" and that they should not "engage in any activity capable of impinging on their independence or susceptible of raising doubts on their impartiality in a given case".³⁷ The author believes that the attention should be focused on these provisions because both the re-election of the members of the Court and their outside work as arbitrators put them in vulnerable position and may trigger doubt relating to their loyalty to the ICJ and their priorities. The process of re-election might be heavily influenced by politics and hence one candidate might stand better chances than the others, depending on the politics of the national campaigns conducted in the UNSC and the UNGA. Arbitration, on the other hand, as an external activity also might influence the priorities and the independence of the judges by both financial and political means and to transpose them in their ICJ work. These issues will be considered in depth in Chapter IV. The Resolution examines also other matters such as immunities, privileges, remunerations, conditions of service etc.

Moreover, the International Bar Association Human Rights Institute (IBAHRI) addressed as well the selection of judges for the international courts and tribunals in its Resolution of 31 October 2011 on the values pertaining to the judicial appointments to international courts and tribunals.³⁸ IBAHRI stressed on the independence, integrity, impartiality, propriety, diligence of the judges.

²⁹This expansion would be in case the UNSC made a reform for its membership.

³⁰ International Law Association Study Group on United Nations Reform, 'United Nations Reform Through Practice'(2011) available at SSRN: <http://ssrn.com/abstract=1971008>.

³¹ Therein the classification was based on: composition of the Court, jurisdiction, applicable law, procedure and working methods, working conditions, the role of ICJ and its workload and measures taken at the UNGA.

³² International Law Association Study Group on United Nations Reform, 'United Nations Reform Through Practice'(2011) 66 available at SSRN: <http://ssrn.com/abstract=1971008>.

³³ These proposals addressed matters such as the length of the proceedings, the management, the workload, the improvements to the administrative system, the provisional measures and others.

³⁴ The proposal is that other organs or tribunals could be dealing with part of the cases.

³⁵ Resolution 'The Position of the International Judge', Sixth Commission, institute de Droit International (9 September, 2011) available at: http://www.idi-iil.org/idiE/resolutionsE/2011_rhodes_06_en.pdf accessed 11 December 2013.

³⁶ *Ibid.* p.2.

³⁷ *Ibid.* arts. 3(2) and 3(3).

³⁸ International Bar Association Human Rights Institute, Resolution on the Values Pertaining to Judicial Appointments to International Courts and TribunalsThe official text is available at:

Lastly, one more attempt to stimulate discussion could be mentioned, namely, the Group of Friends of the UN Reform.³⁹ It was formed in 2004 on the initiative of the Mexican President.⁴⁰ One of the papers submitted by this group focused on the role of the ICJ.⁴¹ Several aspects were considered which require more attention: increase in the number of the states accepting the compulsory jurisdiction, the option for establishing chambers if the plenary of Court is not being practical, the role of the UNSC in securing compliance with judgments, non-compliance and the working methods.

The documents reviewed in this Chapter are merely examples of proposals regarding the reform of the ICJ. Numerous other proposals have been made. The actors who are formulating them also differ. The purpose of the chapter is to exemplify how diverse is the spectrum of the actors and the instruments they use to propose different ideas. From this diversity one can only conclude that now the reform of the ICJ is getting more and more important and the interest in reforming the World Court is getting wider. In addition, comparing all the various documents and proposals will show the different levels of impact they would have. This is important so a fictional hierarchy between the proposals could be structured and more effort could be put on the most beneficial ones. The next chapter will consider the reform proposals which in the author's opinion should be put on the top of the fictional hierarchy.

IV. Reform proposals considered by the author

After having presented the different proposals for the reform of the ICJ, this Chapter will examine two reform proposals which in the author's opinion shall be put first on the action plan for the ICJ reform. They can be divided in two categories: proposals concerning the composition of the Court and proposals concerning the jurisdiction of the ICJ. The paper focuses on these particular proposals for mainly one reason. Both categories of reform proposals concern issues that are influenced much by the international politics and by the policies of the United Nations. The opinion of the author is that the starting point of any reform should be the disintegration of international politics and international justice. As will be seen in the following subchapters, both the composition of the Court and its jurisdiction are currently vulnerable to manipulation by political factors and external interests. The author believes that international justice cannot be effective if political interests have such a big impact on it. That is the reason why the proposals for reform in this paper concentrate on this division.

The first category will be divided into two sub-categories. The first sub-category concerns the re-election of the judges in the ICJ and the second – their role as arbitrators outside the ICJ. The second category concerns the jurisdiction of the Court and it will observe a proposal for expansion of the jurisdiction and proposal related to the non-compulsory nature of the jurisdiction. This kind of reform is not easy to achieve as it will require amendments to the ICJ Statute. However, if we indeed strive for achieving effect with the legal system of the ICJ, there is a need for drastic reforms to be made.

<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=CA79763C-39CC-4B54-8174-DD247A894150> accessed 11 December, 2013.

³⁹ Group of Friends for the Reform of the United Nations, Permanent Mission of Mexico in the United Nations available at <http://www.un.org/en/ga/president/65/statements/mexicoconfcreform180711.shtml> accessed 11 January 2014.

⁴⁰ The group included Algeria, Australia, Canada, Chile, Colombia, Germany, Japan, Kenya, Netherlands, New Zealand, Pakistan, Singapore, Spain and Sweden.

⁴¹ Group of Friends for the U.N. Reform, Final Report 'The Role of the International Court of Justice in the context of United Nations Reform' (2005).

Composition of the Court

The ICJ is composed of fifteen judges elected by the UNSC and the UNGA for the term of nine years.⁴² Their term of office is renewable. Judges must be independent from any government and they shall serve impartially.⁴³ Even though this is the idea behind the Statute, in practice the judges have often been criticized as not being qualified with these characteristics. A good example is the Nicaragua case and the reluctance of the USA to present sensitive material due to the presence of judges from the then Eastern European bloc.⁴⁴ An interesting detail is the rule that the judges must not be involved with any other occupation or case outside their role as judges in the ICJ. However and according to the interpretation of these rules, contained in Articles 16-18 of the Statute, they may still take part in arbitrations as long as there are no conflicts of interests. Two controversial counter-arguments can be presented therein, and will be further discussed.

Re-election of the judges

Article 13 of the ICJ Statute grants the right of the judges to be re-installed at their posts once their mandate has expired. This has been considered as one substantive shortfall due to several reasons. First of all, it shall be borne in mind that the election of the judges takes place simultaneously at the UNSC and the UNGA.⁴⁵ The national campaigns that take place in New York for the election of the judges therefore could be politicized due to political influence and state-to-state relations. If we view the UN as in the Montesquieu's model of *trias politica*⁴⁶ the UNSC will be the enforcement branch and the ICJ the judicial. Therefore, the two branches must be independent from each other so that impartiality and fairness of the election is to be achieved. As mentioned earlier, the separation of powers is not used in the system of the UN as it is applied on state level but it still needs to be considered. If the ICJ is the main judicial organ of the UN and the only international court of its kind, then full impartiality must be ensured. When giving the opportunity to government officials in the UNGA and the UNSC to vote for the judges of the ICJ, the procedure leaves vulnerable possibility for conflict of interests and influence by political considerations.⁴⁷ Another situation arises when the election of the judges is scheduled at the same time as the candidate is ruling over a particular case and decision is to be taken. Then an even bigger conflict of interests is possible as the judge could secure a vote for himself in the UNSC and in the UNGA in exchange of positive influence over the case.⁴⁸

A comparison could be made with the International Criminal Court (ICC) where the judges are elected for a period of nine years with no option of re-election.⁴⁹ Moreover, the Rome Statute contains extensive provisions on the election of judges, their qualifications, terms of office etc,⁵⁰ a framework which the ICJ could learn from. The case is the same with the European Court of Human Rights where the judges are elected for the term of nine years without a possible re-election.⁵¹

The proposal for reform regarding this aspect is that the re-election of the judges of the ICJ should be forbidden. It could be amended in the Statute of the Court which would guarantee judicial independence and impartiality. A possible alternative is to prolong the tenure to twelve years, as

⁴² A third of the Court is elected every three years so that continuity of office could be granted.

⁴³ Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 Art. 2; 20.

⁴⁴ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v USA), [1986] ICJ Reports 14, 158–60 (Merits).

⁴⁵ Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 Art. 10.

⁴⁶ Baron de Montesquieu, Charles-Louis de Secondat *The Spirit of the Laws*, Thomas Nugent (trans.) (New York: MacMillan, 1949).

⁴⁷ ABILA Committee on Intergovernmental Settlement of Disputes, 'Reforming the United Nations: What About the International Court of Justice?' (2006) 5 Chinese JIL 39-65.

⁴⁸ This is relevant for states which are participating in the case in question.

⁴⁹ Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 Art. 36(9).

⁵⁰ Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 Art. 36.

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended)(ECHR) Art. 23 (1).

proposed by various actors.⁵² As Geoffrey Palmer notes, the appointment of the judges for more than once is the most unfortunate⁵³ and hence, this proposal should be one of the starting points of potential reform.

The role of the judges as arbitrators

The other controversial issue relative to the judges of the ICJ is the possibility they have to act as arbitrators outside of their duties for the ICJ. The Statute of the Court restricts the judges from engaging in any other occupational activity, political or governmental campaign etc.⁵⁴ However, they may, and in practice they do, engage in arbitration proceedings outside of the ICJ cases. This fact puts them in a vulnerable position similar to the one discussed in the former sub-chapter. The arbitration proceedings may involve both more finance and sometimes even political influence. Therefore, when one state participating in arbitration elects and hence pays for its own selected international judge, this contractual relationship could possibly be transferred in further proceedings before the ICJ.

One practical example is the arbitration between Mauritius and the United Kingdom before the Permanent Court of Arbitration in 2010 in which the United Kingdom appointed Judge Sir Christopher Greenwood who is also a current member of the ICJ.⁵⁵ In the proceedings Mauritius challenged the selection of Judge Sir Greenwood and took the position that his long, close and continuing relationship with the Government of UK is "incompatible with the necessary objective of the appearance of independence".⁵⁶

The main argument proposed here is that since arbitration and adjudication are considered as different branches and they possess different characteristics, the officials who are presiding over the cases should also be different. Unlike adjudication, arbitration seems to be involving more finance and political influence. Nonetheless, international judges are referred to as more independent in theory.⁵⁷ Hence when allowing the judges from the ICJ to serve as arbitrators separately from the Court, the practice may create these opportunities for vulnerability and influence over ICJ decisions. Therefore, the proceeding before the Court could become much more transparent if the judges were restricted from acting as arbitrators and be more dedicated to their functions at the ICJ. This would also most probably reduce the length of the proceedings and increase the efficiency.

Jurisdiction of the ICJ

The second reform proposal discussed in this paper relates to the jurisdiction of the ICJ. The current jurisdiction of the ICJ encompasses only states⁵⁸ which is a very delicate matter since it prohibits individuals or international organizations from having *locus standi*. The other aspect of the jurisdiction is its non-compulsory nature. There is prior requirement that the states must consent to the Court's jurisdiction which makes it difficult and sometimes impossible to proceed to litigation. In this way states can just decline jurisdiction, once they have been involved in a case before the Court

⁵²See ABILA Committee on Intergovernmental Settlement of Disputes, 'Reforming the United Nations: What About the International Court of Justice?' (2006) 5 Chinese JIL 50; Sienho Yee, 'Notes on the International Court of Justice (part 2) : Reform Proposals regarding the International Court of Justice: a Preliminary Report for the International Law Associations Study Group on United Nations Reform' (2009) 8 Chinese JIL 184.

⁵³ Geoffrey Palmer, 'International Law and Reform of the International Court of Justice' in Antony Anghie and Garry Sturgess *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Nijhoff, 2004) 595.

⁵⁴ Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 Art. 16-18.

⁵⁵ Republic of Mauritius v. United Kingdom of Great Britain and Northern Ireland in the Matter of an Arbitration Before an Arbitral Tribunal Constituted Under Annex VII of the 1982 United Nations Convention on the Law of the Sea, Reasoned Decision on Challenge (Perm. Ct. Arb. Nov. 30, 2011), available at http://www.pca-cpa.org/showpage.asp?pag_id=1429.

⁵⁶ *Ibid.*

⁵⁷ Anna T. Katselas, 'International Arbitration vs. International Adjudication, Adjudication for the Settlement of Disputes between States and International Organizations' http://ils.univie.ac.at/fileadmin/user_upload/legal_studies/student_paper/Anna_T._Katselas_International_Arbitration_vs._International_Adjudication_for_the_Settlement_of_Disputes_Between_States_and_International_Organizations.pdf accessed 13 December 2013.

⁵⁸ Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 Art 34(1).

and thus “escape” from the unwanted proceedings. There are many arguments for and against expanding the jurisdiction and making it compulsory. On the one hand lays the ineffectiveness of the current system created by these loopholes, but on the other hand the sensitive question of State sovereignty. This chapter will review those questions and will provide ideas for reform proposals relative to the jurisdiction of the ICJ.

Expanding the Jurisdiction of the Court

One of the arguments for a jurisdictional reform is whether the *ratione personae* jurisdiction of the ICJ should be expanded to also international organizations and NGOs. This is a strong argument nowadays considering the big amount of international organizations and NGOs and their role in the international forum. Back in 1945 when the ‘World Court’ was established as the successor to the PCIJ, the situation was entirely different. The states were the main actors, there were not many international organizations, nor NGOs. The number of the member states in the UN was also very limited, starting from 51 original member states and growing today to 193 states.⁵⁹ In addition, in the last twenty years more and more NGOs have a role in the activities of the UN – CARE, Christian Aid, the Aga Khan Foundation and others.⁶⁰ They are considered to have a big bearing on the work of the organization and helping in various aspects. One recent example is the Chad-Cameroon pipeline project where the voice of the local communities was heard and expressed through the NGOs commitment.⁶¹ NGOs assist in voicing concerns at the international level that are neglected by the states, asserting political pressure, proposing new reforms etc.

International organizations are the other actor which is worth considering. International and regional organizations are getting more and more power and sometimes they have more influence than the states do. Their role is already foreseen in the UN Charter⁶² whereby some of the major organizations as the European Union, the Arab League, the Organization of the African Unity are mentioned. Furthermore, in the ICJ caseload we have some examples which created difficulties, especially where the Court either limits or extends its jurisdiction. One comparison can be made with the WHO Opinion case⁶³ where the ICJ refused to give an advisory opinion on the question submitted, claiming that it does not have jurisdiction and hence limiting its scope. From the other side, on different occasions the Court was extending its jurisdiction as it is in the Lockerbie case.⁶⁴ Another reason for international organizations to have standing before the Court is the technicalities which could be avoided. For instance, during the Kosovo war in 1999 and the NATO intervention, Yugoslavia tried to bring a case against the NATO on the question of the legality of its intervention. The Court denied hearing the case Yugoslavia vs. NATO with the reasoning that it lacked jurisdiction.⁶⁵ Then, Yugoslavia proceeded in bringing separate cases against eight different states⁶⁶ acting on behalf of the ‘Operation Allied Force’ which created only burden and a heavier workload for the Court. Another comparison could be made with the WTO where regional organizations such as the European Union have standing before the Dispute Settlement Body which makes the procedure easier and more feasible.⁶⁷

⁵⁹United Nations, ‘Growth in United Nations Membership, 1945-present’ available at: <http://www.un.org/en/members/growth.shtml> accessed 15 December 2013.

⁶⁰ Peter G. Danchin, *United Nations Reform and the New Collective Security* (Cambridge University Press, 2010) 377.

⁶¹ *Ibid.* 378.

⁶² United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI Art. 53, 54.

⁶³ Legality of the Use by a State of Nuclear Weapons in Armed Conflict 1996 I.C.J. 66 (Advisory Opinion of July 8).

⁶⁴ Lu Bingbin, ‘Reform of the International Court of Justice – A Jurisdictional Perspective’ (2004) Perspectives 5.

⁶⁵ ABILA Committee on Intergovernmental Settlement of Disputes, ‘Reforming the United Nations: What About the International Court of Justice?’ (2006) 5 Chinese JIL 39-65.

⁶⁶ Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal and the UK.

⁶⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 of the Agreement Establishing the World Trade Organization (adopted 15 April 1994; entry into force 1 January 1995) art. 2, 3.

The Non-Compulsory Nature of the Jurisdiction

The second issue of the jurisdictional perspective is whether or not the jurisdiction of the ICJ should be compulsory. The current jurisdiction of the Court is not compulsory and it is required that states provide their consent to it before starting the proceedings. If no such consent is expressed, the Court does not have jurisdiction over the case.⁶⁸ This is an opportunity for states not to get involved in international litigation by simply not consenting to it. Hence, there is this major loophole in the whole system of the Court which renders it practically not that effective as it is considered in theory. In fact, only sixty three states have recognized the jurisdiction of the Court as compulsory and many of them did so with reservations.⁶⁹ There are numerous examples whereby the Court ruled it has no jurisdiction due to lack of consent or reservations. In addition, almost all of the UNSC members have also benefited from this practice. The United States withdrew its consent in 1985,⁷⁰ France in 1974. The United Kingdom is the only permanent UNSC member that still recognizes the jurisdiction of the Court as compulsory.⁷¹ The Fisheries Jurisdiction case, on the other hand, is an example whereby the ICJ did not have jurisdiction due to a reservation made by Canada.⁷² In this case the Kingdom of Spain brought a claim against Canada in 1995 but in 1998 the ICJ ruled that it lacks jurisdiction to adjudicate over the case. Spain relied on the declarations made by both parties under article 36(2) of the Statute for acceptance of the ICJ jurisdiction. However, Canada challenged the claim for jurisdiction and invoked its reservation in the 10th of May 1994 declaration that excludes jurisdiction over "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area".⁷³ In its reasoning, the ICJ found that the dispute between the Parties constituted a dispute "arising out of" and "concerning" "conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area" and "the enforcement of such measures". Therefore, the dispute comes within the terms of the reservation contained in Canada's declaration and the Court had no jurisdiction to deal with the merits of the case.⁷⁴ This case illustrates clearly how even if states had recognized and accepted the Court's jurisdiction, they can still freely make a selection by the means of reservations to exclude particular fields of litigation that are not in their interest. As outlined above, this constitutes additional hurdle to the working system of the Court equivalent to the lack of consent to jurisdiction.

To answer the question of the non-compulsory nature of the jurisdiction, one needs to go back to the time when the ICJ was created. The idea behind its creation was to replace the PCIJ with more influential court with authority over state disputes and with compulsory jurisdiction because at this time state to state disputes were considered essential.⁷⁵ However, when the PCIJ was founded in 1920 the United Kingdom, Italy and France rejected proposals for a compulsory jurisdiction. This continued later in the San Francisco Conference where the UN Charter was drafted⁷⁶ and together with the opposition from the United States and the Russian Federation, the proposal for compulsory jurisdiction failed again.⁷⁷ These were the current super powers and consequently no decision could be achieved without their consent. Nevertheless, there are many states which back the proposal for reform of the non-compulsory jurisdiction. Australia and New Zealand are two examples of states

⁶⁸ Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 Art. 36.

⁶⁹ Lu Bingbin, 'Reform of the International Court of Justice – A Jurisdictional Perspective' (2004) Perspectives 5.

⁷⁰ *Ibid.*

⁷¹ S. Gozie Ogbodo, 'An Overview of the Challenges Facing the International Court of Justice in the 21st Century' (2012) 18 Annual Survey of Int'l & Comp. L. 93; available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/7/>

⁷² *Fisheries Jurisdiction* (Spain v. Can.) 1998 I.C.J. 432 (Judgment of Dec. 4).

⁷³ International Court of Justice, Fisheries Jurisdiction (Spain v. Canada) Press Release 1998/41 accessible at: <http://www.icj-cij.org/docket/index.php?pr=302&code=ec&p1=3&p2=3&p3=6&cas> accessed 12t January 2015.

⁷⁴ *Ibid.*

⁷⁵ A. Zimmerman, Tomuschat & Oellers-Frahm (eds.) *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, ed. 2006) 35.

⁷⁶ United Nations Conference on International Organization (San Francisco, 1945).

⁷⁷ Lu Bingbin, 'Reform of the International Court of Justice – A Jurisdictional Perspective' (2004) Perspectives 5.

which are supporting compulsory jurisdiction for a long period of time. One proposal is that these countries could lead the discussion relative to the reform.⁷⁸

One interesting analogy which could be done relates to the link between the PCIJ and its successor ICJ, compared to the connection between the GATT of 1947 and its successor the WTO and the transitions between these two sets of entities. When the system of GATT of 1947 was reformed and created the WTO, two major amendments were made – the introduction of compulsory jurisdiction and of the appellate review.⁷⁹ Since then, there is tremendous improvement in the work and the functions of the organization. As an analogy, why we should not have the same major change implemented as the PCIJ evolved to the ICJ? The compulsory jurisdiction is obviously more efficient and the casework of the WTO can exemplify this. The two bodies are very different, they have jurisdiction over separate issues, and trade is generally quite different than issues of international law. However, the ICJ could only learn from the WTO experience and legal framework. The compulsory jurisdiction may be perceived by some as utopian but it could nevertheless be considered a possibility for an appellate review just as the Dispute Settlement Mechanism of the WTO.⁸⁰ Another proposal is to limit the reservations which could also benefit the process. This suggestion has also been elaborated by New Zealand at the United Nations Conference on International Organization.⁸¹

Despite having so many different proposals for reform of the ICJ, it is the author's opinion that the two proposals discussed above need special attention and they should be of priority. The next chapter will provide an overview of the topic and concluding remarks.

V. Final observations and conclusion

In light of the above discussion several remarks can be made.

First of all, it is more than evident that the current working framework of the ICJ is not functioning properly. There are numerous deficiencies, political influence, weak enforcement of due process and many ambiguities which must be put immediately on the table for discussion of the UN reform.

It is inadmissible for the World Court to be perceived only as an utopic idea of international court while it is expected to address states disputes and maintain peace. In reality, however, it fails in almost all of the aspects thereof. As shown in this paper there are various proposals from the least to the most radical ones. It is the author's opinion that in order to reform the Court in such a manner so it becomes more efficient international body, the reform should be strong and drastic. Hence, major issues should be reformed and not just some minor details.

The paper examined the proposals for reform of the composition of the ICJ and its jurisdiction. The argument is that what matters is who sits over the cases and how are they dealt with. The judges, as the leaders of the judicial process, must be impartial and independent.

In order for this to become practice some details need to be reformed. It was explained how and what kind of vulnerabilities arise from the processes of re-election and the double role of the

⁷⁸ Geoffrey Palmer, *International Law and Reform of the International Court of Justice* in Antony Anghie and Garry Sturgess *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Nijhoff, 2004) 593.

⁷⁹ Understanding on Rules and Procedures Governing the Settlement of Disputes, annex 2 of the Agreement Establishing the World Trade Organization (adopted 15 April 1994; entry into force 1 January 1995).

⁸⁰ *Ibid.*

⁸¹ Geoffrey Palmer, *International Law and Reform of the International Court of Justice* in Antony Anghie and Garry Sturgess *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Nijhoff, 2004) 598.

judges as arbitrators. The starting point is to eliminate these possibilities so the Court can become less politicized.

Even more important is the question of jurisdiction. If the ICJ is designed to become the 'World Court' and the main judicial body of the UN, it should have more influence over the disputes that arise in the international fora. This could not be easily achieved through its non-compulsory jurisdiction. There are several proposals which could be considered in the future on the question of the reform of the ICJ:

1. Regarding the re-election of the judges and their role as arbitrators, an amendment of the Statute of the Court could be made. One available option is to create an informal group of friends of the Court where discussion could be started. At a later stage, this could proceed before the UNGA by establishing an open working group dedicated to the ICJ reform.
2. Another way to back the reform is through prior consultations in the UNSC.⁸² Ideally, the consultations would start between the permanent members. However, most of them are opposed to the idea for compulsory jurisdiction, for instance. Hence, it should start from other interested countries which could lead the dialogue.
3. There is also the issue of the relation between the UNSC and the ICJ and the aim of enforcing "separation of powers" between them. This could be done through a "constitutional control" for instance, as proposed by Colombia in response of the GA Resolution 47/62 of 11 December 1992 on Equitable Representation in the Security Council.⁸³ This idea involves a separate body which will review the legality of the UNSC actions and in such a manner that this could also have bearing on the ICJ since both are usually acting in conjunction. Thus, this could create a watchdog mechanism.
4. A last proposal which could be considered is the creation of a chamber of the ICJ with capacity to pass down opinions on the constitutionality of actions by UN bodies, including the SC.⁸⁴ This proposal relates to the previous one and again gives the opportunity for a kind of "checks and balances".

As a conclusion, these proposals are only guidelines and an idea for the beginning of a dialogue on the ICJ reform. There are many ways in which the reform can be approached but the initiative should be taken and the states should involve in serious discussion. Since there are already many initiatives for an overall UN reform, the ICJ as an essential part of the system, must not be neglected. Therefore, the international and the civil communities must raise these concerns more persistently and loudly so the Court and the UN start working together towards a meaningful reform.

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