# Should the Membership of the International Court of Justice be Enlarged?

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## I.

The United Nations have grown from the original 50 members to 82. This means that the organs of the Organisation to some extent have changed their representative character. They have all shrunk in relation to the total membership in such a way that it is increasingly difficult for the members of the Organisation to become members of councils and committees and it is more difficult to obtain membership for individuals in those committees where individuals in their personal capacity are supposed to be elected. It is, therefore, widely felt that the composition of the organs should be changed so as to reflect the growing membership of the Organisation. Proposals to this end have been introduced and to some extent already been adopted. Such proposals have also been made in regard to the International Court of Justice. It is, however, not at all a foregone conclusion that the membership of the Court ought to be enlarged even if it is found that it is normal and desirable to increase the membership in the other organs of the United Nations. It may be claimed that the Court is not a political but a legal organ and for that reason should not be treated in the same way as the more political organs. Furthermore it may be claimed that individuals and not States are elected to the Court and that this should be taken into account when the composition of the Court is discussed. Furthermore, it can be claimed that the paramount consideration in relation to the Court is its efficiency as a judicial organ and not its representative character. These three points shall be given some more consideration further out in this article. It is, however, necessary to examine the question also in its historical context.

## II.

The composition of tribunals has been a difficult and important question throughout the history of international arbitration. In the heyday of international organisation in old Greece it happened that whole towns were acting as courts of arbitration. In modern times the Senate of Hamburg has twice acted in this way. Also the other end of the scale has been used. There are several examples of one man arbitrations, with crowned heads, the Pope or Presidents of Republics as arbitrators. Some individual arbitrations of prominent lawyers have been about the most successful and important in the whole history of modern arbitration. It is enough to mention Judge Max Huber in the Las Palmas Case and Judge Bagge of Sweden in the Finnish Ships Case. On the other hand the most usual commissions, committees or tribunals in modern times consisted of a number between three and seven even though larger commissions were not unknown. It may be stated that the most usual number was five as exemplified by the Alabama and North Atlantic Fisheries Case as well as by modern arbitrations like the Ambatielos Claim.

The question of the composition of a court is considerably more difficult when there is a question of a permanent court. If the parties to the suit cannot decide which judges they want, but are to some extent bound to accept the court as they find it, great circumspection must be shown.

All efforts to create really permanent courts in modern times have been shipwrecked on this rock. The great powers wanted to be quite sure that they always had a judge and did not risk to be judged by smaller states whereas the smaller states felt very strongly that there had to be absolute equality before the law. The efforts at the Hague Peace Conferences foundered also on this cliff. The only successful effort which was made before the first world war, apart from the Central American Court of Justice which was of local character, was the international prize court which should consist of fifteen judges and be based on an ingenious system of rotation, but it never entered into force.

The Permanent Court of Arbitration became only a list of judges which might or might not function according to the wish of the parties.

The present system was devised for the Permanent Court of International Justice and continued for the International Court of Justice. We need not investigate the problems of the deputy judges.

It was decided that the Court should consist of fifteen members. The judges had to – and the same applies today – obtain the majority in both the Council and the Assembly. It was thus – or so thought the drafters – certain

that the Great Powers would always be sure to be represented. This, however, has never been a foregone conclusion since the Great Powers never had the majority of the seats in the League Council. Still, they always had a judge of their nationality on the Court which shows the common sense of the other members. This tradition has continued in the United Nations where the smaller or medium states always have had the majority of the members of the Security Council.

## III.

The most important rule for the composition of the Court is contained in article 2 of the Statute:

> "The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law."

This indicates quite clearly that the personal qualities of the judges are of the highest importance. No Court can give convincing judgments if it does not possess good judges. It is true that they are and always will be of uneven caliber.

It is certain that some of them will be even more outstanding than the rest. The fact remains, however, that a nucleus of first class people is necessary and also sufficient. They will pull the rest with them, and will give confidence in the judgments of the Court. Without such a nucleus no court can work. It is, therefore, it is submitted, essential to bear in mind that the individual candidates must be of the highest caliber. This article is in the very forefront of the Statute. It can only be ignored at the peril of decline in the respect for international law. The Court will always be watched and the members will be scrutinized and criticised. Criticism does not mean disrespect for the Court, but shows a keen and lively interest in the application of law. However, the nucleus of the Court must stand up to strictest of tests if the Court shall fulfill its high function.

## IV.

It must be kept in mind also that the Court is an international court. It is, therefore, of some importance that it should be or appear to be international in its composition as well as in its function. These two aspects of the matter

do not necessarily cover each other. It is perfectly possible for a national organ, that is national in its composition, to fulfill international functions and thereby become an international organ, like for instance the Senate of Hamburg as an international court. It is likewise possible that an organisation may be international in its composition and still be national in its function, like for instance certain of the public services in China before the war.

However, the ideal clearly is, in the political environment of these days, that an organ is international both in function and in composition.

If the Court shall be a permanent court for the whole international community it seems reasonable that its composition should reflect this fact. It is, therefore, stipulated in article 9 of the Statute:

> "At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured."

This article is difficult to interpret and difficult to apply. First of all it should be emphasized that the task of the Court is to apply international and not national law, in spite of the fact that the Court from time to time must deal with municipal law as well as with conflict law. It should, therefore, in principle be immaterial from which part of the world the judges come if they know the law to apply. However, the same argument could be used against an international staff for any international organisation. The main thing is that the job is properly done and not by whom it is done. But it is well known that States prefer to have the job done by their own nationals or by people from related regions. It is, therefore, of cardinal – perhaps far too great for efficiency – importance to have the international secretariat international in its composition. The same is to some extent the case with the International Court of Justice. Two stipulations take this into account apart from Article 9. The one is that not two judges must be citizens of the same State and the other that the States which have not got a judge of their nationality on the Court have the right to appoint a judge *ad hoc*. Particularly the last of these stipulations is a clear expression of the importance of sovereignty and nationality in international adjudication. From a legal point of view it is to be regretted, but from a political point of view it is probably still a necessity. There is also a further political or psychological factor which should not be ignored. International law started as a European and Christian law. The new members of the international community have had very little influence in shaping it. They must be forgiven if they are reluctant to put full confidence in it if they are not given an active part in applying and developing it.

## V.

It may be asked on the basis of these considerations whether the Court actually consists of individuals and not of States to any greater extent than other organs of the international community. It is a recognized principle that the judges once they are elected are independent. This is clearly expressed in their solemn declarations:

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

They are not entitled to ask for or act on instructions from anybody. Once they are elected they serve the international community and not their own States. It is possible that their national background can be detected in the way they vote and argue. Nothing is more natural. Any man is influenced by his background, by his education and by his previous experience. One of the reasons for Article 9 is exactly to profit from as wide and broad background as possible. It is not necessary in this article to debate the problem of the judge *ad hoc* in this connection since we are not dealing with the problem of the attitude of judges here, but simply with the composition of the court in general.

It is perfectly clear that the judges should act independently and as individuals and not receive any instruction; but this does not necessarily mean that they must be elected independently. It is perfectly possible that a person is elected by or appointed by a State or a group of States and still is supposed to exercise his functions in complete independence. This is the case with the members of the Court of the European Coal and Steel Community. It is also possible that people who are nominated or appointed by an international organisation still will have to obey the orders or instructions given by that organisation like the members of the Secretariat. It is also possible that a judge is appointed by his own government but still is free and independent. This would theoretically be the case of the judges *ad hoc* of the International Court of Justice. The record of their votes seems however to indicate that perhaps they are not quite so free and independent as the professsional judges.

It might be ventured as a generalisation to say that individuals nominated or elected or appointed by a State are apt to be less free from influences than if they were elected internationally. The Statute of the Court has obviously proceeded on that basis. Not only are the judges elected by the General Assembly and the Security Council but they are not even nominated by national governments. The whole procedure of having the candidates nominated by the national groups of the Permanent Court of Arbitration

aims at making the judges even more independent than if they were nominated by national governments. There are also many other articles in the Statute which aim at securing their full and complete independence.

If the aim is to make the Court an independent body applying international law, it must be clear that the judges should be free and independent and that any system of election should be designed to further this end. If there is any conflict between the principle of geographical representation and personal qualifications, it is hardly open to doubt that prime importance must be attributed to the personal qualities of the judges. A lowering of this standard would sound the death knell of the Court and be a serious decline in international adjudication.

## VI.

It must now be investigated whether the Court is in fact and in theory less of a political organ than the other organs of the international community.

It is generally supposed that the difference between a political and a legal dispute is that the latter is a dispute about what is the law between the parties whereas the former is a conflict about what ought to be, what should be the law between them. A decision of a legal conflict aims at establishing the law, finding it out, stating it and applying it whereas a settlement of a political dispute or a conflict of interest consists in making the law, in shaping it for the future. If this is the case, it is clear that the International Court of Justice is a legal and not a political organ. It is also a legal and not a political body in the way of its deliberation and voting. The Court should not try to effect a compromise but only to establish what is the law. It is not a question of give and take or of reaching a solution which can satisfy the greatest number of participants. Neither is it possible for the Court to refuse to make a decision if that should be deemed the wiser course, but obviously the members try to agree on as wide a measure as possible. They can keep away from certain disputes by declaring them political and not legal. On the whole the Court is apolitical. This does not mean that the disputes are not at times of a strongly political character in so far that the subject matter can be a danger in the political life, as witnessed by the Corfu Channel Case. The Subject matter may also be of the greatest possible economic and practical importance as witnessed by the Anglo-Norwegian Fisheries Case.

Before leaving the question of whether the Court is political or not, it should be stated that the Court does not always only apply the law in existence. It clarifies this law, it develops it and at times even changes it. There is no absolute limit between application and creation of law. There-

fore, the Court is also of political importance. The greater importance one attaches to international law, the more significant will the place of Court be in the life of nations. It is, therefore, not possible to state categorically that the Court is not political and that the elections are not politically important. The difficulty of drawing a line between law and politics is also clearly seen in the elections to and the work of the International Law Commission.

It is to be expected that political considerations will to some extent be of importance during the elections of the members of the Court, but the paramount consideration must be to assure a Bench as highly qualified as possible.

## VII.

Before we discuss how and to which extent the composition of the Court should be changed, it would be advisable to examine what would be the effect on the work of the Court if the membership should be enlarged.

It would be agreed by anybody with any experience of international courts or international committees, that the difficulty of the work increases with the size of the organ. A Court of three, five or seven members would be easier to deal with than a court of eleven, thirteen, fifteen or more.

The practice by which the International Court of Justice reaches its decisions is well known. It should be admitted that the work is slow, cumbersome and complicated even though it may be difficult to devise a better method. The reason why the present system has been evolved is to give all the fifteen members equal opportunities and equal duties to participate in the work of the Court. Full debates in the whole Court on each little drafting point must lead to difficulties. If an effort should be made to increase the Court's efficiency, it would be an effort to reduce the number of judges and not to enlarge it, or to design a system whereby the Court could work in chambers. It will probably not be disputed by anyone that a smaller court would be a more efficient organ. However, a decrease in the membership is not practical politics. It would, therefore, if efficiency were the paramount consideration, seem wiser not to touch the Court but to let it stay as it is. Any change in this respect would only weaken the Court. In spite of this, however, it is necessary to examine what would happen if it were increased and which increase is likely.

## VIII.

It is possible to enlarge the membership of the Court to such an extent that all the signatories to the Statute would be represented. It is perfectly

feasible to have a court with 85 members – one for each of the members of the United Nations and one each for Liechtenstein, San Marino and Switzerland. What is not feasible, however, is to let the 85 members sit together in each case. It must be established in advance that the Court should sit with three, five, seven, nine, eleven or fifteen members for each case. It would also be necessary to make fairly strict rules about this in advance so that a system of rotation was established. It can not be left to the parties in each suit to choose the individual judges. First of all this might be invidious in regard to the judges. Secondly it would give the parties great opportunities for sabotaging the Court and thirdly it would reduce the Court to become another court of arbitration and in reality to be a second panel of judges.

Without in any way belittling the work of the Permanent Court of Arbitration it might be stated that one does not need two courts of this kind. It would, therefore, seem to be out of the question to increase the Court to this extent. This possibility is only mentioned for the sake of completeness.

The proposals which will be made and which have already been mentioned by different delegations and which have been the subject of debates in the United Nations are much more modest. It will probably be proposed to increase the Court to 21 at the most as has been done with the International Law Commission or to increase it in the same way as the General Committee of the General Assembly, which shall be mentioned further down in this article.

If the Court should be enlarged in this way, two possibilities are open. Either the Court could continue to function as it does now or it could be divided into chambers.

If the full Court should give judgment in all cases, means must be designed to ensure that all the 21 judges do not sit in the same case because experience shows that even 15 judges are more than the optimum number for efficient drafting. This could be done in different ways. The easiest would be to give them leave of absence in accordance with article 27 of the Statute, more often. The other system is that one simply draws lots each time there are more than 15 judges. It might also be possible to let them all sit and listen to the case and then to draw lots at the end so that not more than a certain number participates in the case. Such a system is often applied to juries in the procedure before national courts. It is also, of course, possible for the Court to change the system of deliberation and to attribute greater importance to the elected drafting committee.

The other solution is to organize the work of the Court in such a way that judgments are delivered by chambers. This might entail a change in the Statute of the Court because until now the parties have the right to demand

a hearing by the whole Court, as stated in the first paragraph of article 25 of the Statute. On the other hand, the Chamber for Summary Procedure provided for in article 29 clearly shows that judgments by chambers are not considered abnormal.

According to article 26 the Court can always form chambers either for classes of disputes or for one particular dispute, but these Chambers are only used if the parties desire it. So far no Chamber under article 26 has been formed, and the Chamber of Summary Procedure has been used only once, and that in the time of the Permanent Court. This would indicate that the parties consider international cases important enough to necessitate the participation of the whole Court.

It might, therefore, if the number of judges should be increased, be necessary to stipulate in article 26 for instance, that judgments shall be delivered by a Chamber of the Court if the Court does not decide otherwise.

Article 26 may be changed to the effect that the Court shall, for judicial business, be divided, *e. g.* into three chambers of seven judges each or two chambers of nine judges each.

The composition of the chambers and the division of work between them should probably be left to the discretion of the judges and be subject of stipulations in the Rules of Court.

The judges would then decide whether it would be necessary or advisable to devise a system by which the parties would not know in advance which chamber should judge or which judges made up each chamber. If they knew in advance, they might try to choose the chamber according to how they thought the individual judges would decide a case, and that kind of jockeying for position would hardly be conducive to good justice.

If the number of cases should become much greater than it is today, new methods of procedure would have to be devised because the Court in its present composition and with its present system of oral procedure and deliberation in the Council Room would not be able to deal with more than five or six cases a year.

However, with the present number of cases there is no urgent need to experiment with new systems.

It might be added that a Chamber for Summary Procedure or for advisory opinions might be useful for urgent cases during sessions of international organs.

## IX.

If it is thought desirable to enlarge the membership of the Court and to keep the present character of the Court, the increase ought to be as modest as possible.

If, however, it is deemed reasonable to enlarge it to the same membership as for instance the International Law Commission, it would be necessary to search very carefully for means by which the principles of article 9 of the Statute can be implemented.

An additional basis of comparison is offered by the General Committee of the General Assembly. This Committee now consists of the President of the General Assembly, the chairmen of the main seven committees and 13 vice presidents. This means all in all 21. It is agreed that among the vice presidents two should be from Latin American States, four from Asian and African States, one from Eastern Europe, two from Western Europe and other States and five from the States with permanent seats in the Security Council. The region from which the President comes will be counted so that the number will be reduced to thirteen. It was also agreed that at least one of them within the groups as outlined, should be from a Commonwealth country. The General Committee during the 12th Session which, this time, exceptionally consisted of 17 members, had the following composition:

5 from countries with permanent seats;
4 from Asia and Africa, Ceylon and Tunisia as vice presidents, Iran (first Committee), Thailand (fourth Committee);
3 Latin-America, Paraguay (vice president), Guatemala (special political Committee), and Venezuela (sixth Committee);
4 Western Europe and other States, New Zealand (President), Spain (vice president), Norway (third Committee), Netherlands (fifth Committee);
1 Eastern Europe Czechoslovakia (second Committee).

To this would now be added four members in such a way that the Committee probably would have consisted of five representatives of the States with permanent seats on the Security Council, six from Asia and Africa, two from Eastern Europe, four from Latin America and four from Western Europe and other States.

It might seem as if Asia and Africa and Latin America are too fully represented compared with Europe.

The Court as it is at present consists of one member each from States with permanent seat of the Security Council, four from Latin America, one from the British Commonwealth, one from Africa, one from Western and one

from Eastern Europe, and one from a State, Pakistan, which is both a member of the Commonwealth and an Asian country and finally Greece which would probably be counted Western Europe. If one adds two more judges, it seems that one should come from the African countries and one from Western Europe. If one adds six judges, it is to be anticipated that one more would come from Asia, one from Africa, one from Eastern and one from Western Europe, one from Latin America and one from a country which would otherwise not be represented.

Another illustration of a system for geographical or political composition is offered by the governors of the atomic agency.

## X.

It will, indeed, be very difficult to distribute the seats since not the political importance of the countries or their voting power in the General Assembly should be taken into consideration, but their civilisation and legal system. And it is very difficult to know what that may mean. The Scandinavian countries for instance have their system of law which is built on their old Germanic laws, and is very different from the German system. Should they be assured a seat for that reason?

Geographical regions are not the same as forms of civilisations, nor is a political group the same as a principal legal system.

The Latin American States branch off from the continental code system so that they form a group with France. The Australian Judge does not represent any legal system different from the common law of U.S.A. and Great Britain. The same is to a large extent the case of Pakistan. Thus there are five or with Greece six code countries, and four common law countries represented on the Bench as well as two Eastern (communist) States, one Islamic, one Far East and one Scandinavian state.

If the Court were increased to 17 or 18 members it would be easier for certain countries which had never been represented on the Court to get a member. This happened at the last election with Greece. Turkey has never had a member, or Syria, or Iceland. No automatic system can be found. It might even be dangerous to make any kind of gentlemen's agreement about it since the main preoccupation must be to get the best candidates available at each election. This can not be achieved if it is agreed in advance that certain countries are assured representation. There ought to be possibilities for changing the seats so that due regard can be had to the individual qualifications of the candidates. But even so it is quite clear that to some extent

elections to the Court as in the other organs of the United Nations would be used for log rolling and for political bargains.

The political pressure to enlarge the Court may become irresistable, but from a legal point of view it ought to be resisted as long and as strongly as possible.

If the Court is looked upon as a legal organ and in the framework of international law, and international law alone, it cannot be doubted that it is very dangerous to treat it on par with the more political organs. Any tampering with the Court will weaken it, and no augmentation of the membership can make it more efficient.

However, this answer to the question may seem too simple. The Court does not live in a vacuum, but in a political world consisting of independent sovereign States with diversified interests. It may, therefore, on balance, seem not entirely unreasonable to add two or more new Judges to the Bench if such an addition can create a more general confidence in international law and in the Court which is its organ. The problem is not strictly speaking a legal but a political one. The lawyer can only point out the disadvantages of a greater Court and suggest means to overcome these difficulties if it should be decided for political reasons to enlarge the membership.