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THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. This article looks at the ICJ's creation and how it works. It concludes with some recommendations on how to attract greater attention to the ICJ and international law generally.



The ICJ's Creation

The roots of the ICJ go back to an era - at the beginning of the 19th century - when visionaries believed that war could be outlawed and that governments could settle their disputes by using an international court. This vision is still a long way from reality.

The 1899 Hague Peace Conference was convened by the Russian Czar. He had been presented with a dilemma: he wanted to expand domestic social welfare programme (to undercut support for left-wing republican movements in Russia) but could not afford to do so while also maintaining high military expenditure. Therefore, he hoped for an international peace conference to ban war and so limit military the need for military expenditure. That grand aim failed but the conference did lead to various small ways of regulating how international war was fought.

One of the treaties was the Hague Convention for the Peaceful Settlement of International Disputes. Countries that agreed to be bound by that treaty agreed to settle their disputes by peaceful means, such as through as the new Permanent Court of Arbitration. The Permanent Court of International Justice (PCIJ) was created in 1920 alongside the League of Nations. Between 1922 and 1940 it dealt with 29 contentious cases brought to it by countries, and it gave 28 Advisory Opinions to the Council of the League of Nations.

During World War II thought was given to a new League and a new international court. The ICJ Statute forms part of the UN Charter that was signed in June 1945 and entered into force on October 24 1945. A member of the UN automatically becomes a member of the ICJ. It still has the same two main tasks as the PCIJ.

First, it handles contentious cases brought to it by countries that have accepted its jurisdiction. Its workload has varied. It was quite busy between 1946 and about 1966. Then its work tailed off in the 1970s. Communist countries and Third World countries boycotted it as a club for rich western countries. Since the late 1980s it has been busier than ever before (and much busier than the PCIJ ever was). Countries have now found greater use of it; ironically about

a third of recent cases have been disputes between African countries. As at February 2005, the ICJ had delivered 89 judgements since 1946, dealing with such matters as land frontiers and maritime boundaries, territorial sovereignty, the non-use of force, non-interference in the internal affairs of countries, diplomatic relations, hostage-taking, the right of asylum, nationality, rites of passage and economic rights. The details are on the website: <http://www.icj-cij.org>.

The ICJ's second task is to give Advisory Opinions to the main UN institutions. The Opinions are not binding on the UN institutions that ask for them – and no country is bound to take notice of any Opinion. Since 1946, the ICJ has given 25 Advisory Opinions, concerning such matters as admission to UN membership, reparation for injuries suffered in the service of the UN, territorial status of South-West Africa (Namibia) and Western Sahara, payments for UN operations, status of UN human rights rapporteurs, the legality of the threat or use of nuclear weapons, and the legal consequences of the construction of a wall in the occupied Palestinian territory.

The ICJ is composed of 15 judges elected to nine-year terms of office by the UN General Assembly and Security Council sitting independently each other. It may not include more than one judge of any nationality. Judges serve in their personal capacity and do not represent their governments. Britain's Dame Rosalyn Higgins QC was the first female judge.

✓ Limitations of the ICJ

The ICJ has made a great deal of progress. It has managed to survive all the ideological struggles of the Cold War and the winding up of colonies. It has a renewed sense of relevance – and a busy workload to prove it. As at June 2005, the ICJ had 12 cases pending. It has lasted twice as long as the PCIJ and (barring an accidental World War III) there are no signs of the ICJ's disappearing. But the ICJ is a long way from the having the primary role in settling international disputes that visionaries had for an international court a century ago. There are six limitations: two are of a general nature and four relate to the ICJ in particular.

First, there is a lack of a common global philosophy underpinning respect for one system of international law. The distant roots of the ICJ go back to disputes between the UK and US in the 18th and 19th Centuries, such as the 1794 Jay Treaty which created a commission to settle disputes between both countries and then the 1872 settlement of legal disputes arising out of the UK's role in the American Civil War (1861-5). The details of these matters are not as important, in this context, as the common philosophy they manifested: that disputes should be settled peacefully. This was then taken up by the (western) visionaries a century ago who wanted a permanent international court which would implement one common system of international law. There really was a belief a century ago – however naïve it may seem today - that the 20th Century would be the world's greatest century, with increasing peace and prosperity for all. An

international court fitted that optimistic mindset. Law and order was flourishing at home, why could it not also do so overseas?

World War I (1914-8) shattered that western optimism. Then the communist governments after 1917 argued that international law was a tool of the capitalist imperialists and should be boycotted. Dictators from the 1930s onwards, notably Hitler and Mussolini, also had no time for an international court because they thought that military force could settle all international problems. Meanwhile, emerging new countries after 1945, freed from colonialism, resented western values and so also ignored the ICJ as a tool of western governments.

An aspect of how naïve people (particularly in the internationally-minded NGOs) can be is the assumption that somehow the UN is above politics. In fact, it is among the most political of the world's institutions. For example, there is the assumption that national governments will act for the benefit of the long-term common global good, rather than out of narrow nationalistic self-interest. Many NGOs may think in those terms but governments do not. In fact, governments act almost entirely out of narrow nationalistic self-interest, which is often in terms of short-term immediate gain, with little heed for tomorrow. If the world's governments were more sensible, high-minded and visionary this journal would have far fewer issues to examine, such as war, exhaustion of natural resources and pollution of the environment.

What all this means for the ICJ is that it is operating in a very hostile international environment. Instead of complaining about how little it has achieved, there should be a sense of marvel that it has managed to be created at all and that it has operated for so long.

Second, there is the impact of national sovereignty. Many governments have been unwilling to accept that the ICJ has an automatic right to hear cases brought against them ("compulsory jurisdiction"). According to the basic principles of international law and national sovereignty, governments cannot be forced into accepting international obligations against their will. Therefore, although 191 countries are members of the ICJ, they do not necessarily accept its jurisdiction and so membership of the UN and ICJ does not give the ICJ automatic jurisdiction over every member-state. Only 65 members of the UN's members accept its jurisdiction.

There are times when a country finds a use for the ICJ and others when it does not. For example, in the mid-1970s, Australia led the ICJ case against French nuclear testing in the South Pacific. France said that nuclear testing was a matter of national security and so it did not accept that the ICJ had the right to interfere in its nuclear testing programme. It boycotted the ICJ case brought by Australia. Fiji and New Zealand (although coincidentally it stopped testing in the atmosphere). Currently Australia is embroiled in a dispute with the new country of East Timor dividing up the oil and natural gas resources in the seabed between both countries. On March 22 2002, Australia notified the ICJ that it no longer accepted ICJ's jurisdiction on maritime boundary disputes and so in effect it will boycott any hearing that East Timor may bring against it. Meanwhile in mid-2005, with no hint of embarrassment, the same Australian Government

announced that it would try to take Japan to the ICJ over its proposed resumption of whaling (which is a major issue of outrage in Australia).

Third, only nation-states can be parties to an ICJ case. This means that only countries can bring a case and only countries can be defendants. In Australia, for example, there are occasionally statements that Aboriginal groups will take Australia to the ICJ because they disagree with a government policy. They cannot. Particular ethnic groups and indigenous peoples have no standing in their own right at the ICJ.

By the way, the ICJ's limitation to affairs between nation-states is a reason for the creation of the new International Criminal Court (ICC). The ICC hears cases brought against particular individuals accused of committing particular crimes. The ICC, also based in The Hague, is completely separate from the ICJ.

Similarly, a country cannot take a non-nation-state entity to the ICJ. The most obvious example of such an entity is a transnational corporation (although it could try to take the country which has the TNC headquarters on its territory). This is now a major limitation when it is recalled just how much international economics and international politics are affected for good or ill by transnational corporations. Some TNCs have an annual turnover greater than the annual gross national products of some countries. They are a major factor in influencing public consumption tastes. Today's world is much more complicated than that of the PCIJ in 1922. There were hardly any TNCs in existence in the 1920s. Now they are major players in the international system.

Another form of non-state entity is the international NGO. Some NGOs (such as Amnesty International, Greenpeace and International Physicians for the Prevention of Nuclear War) are also major players in the international system. The creation of the new ICC itself is an example of this impact. Some NGOs were major campaigners (such as the World Federalist Movement) for an ICC and so in terms of creating this new international institution some NGOs were more important than most governments, which were willing to let those NGOs do the work. But NGOs cannot bring cases at the ICJ and no NGO can be brought before the ICJ.

Fourth, there is no international enforcement system. Once an ICJ decision is made, there is no automatic "police force" to follow it up. The matter could be referred to the UN Security Council but here it would be vulnerable to the veto system of the five permanent members. For example, in the 1980s Nicaragua took the United States to the ICJ over the mining of its harbours. When the US realized that the case was going badly, it walked out of the ICJ and then vetoed attempts by the UN Security Council to enforce the ICJ decision.

Fifth, not every dispute may be suitable for handling by an international court system. An example concerns the Suez Canal in the late 1950s, when Egypt was refusing the canal to be used by ships trading with Israel. The US was on good terms then with both Israel and Egypt, and urged both to take the dispute to the ICJ. But both refused since the ICJ would give a clear

decision and neither side wanted to risk a clear judgement against it (governments sometimes prefer a blurred result).

Finally, there are problems over the procedural aspects of the ICJ, such as evidence. In the domestic legal systems, the lower courts deal with facts (what actually happened?) and the higher (appellate) courts deal with matters of interpretation of the law and in ensuring due process. The ICJ has to deal with both. Compared with the evolution of some municipal legal systems that have evolved over the centuries (such as England's), the ICJ system is still new and unsophisticated.

ICJ judges are often appointed with a national appellate court, academic or government background, with an interest in treaty creation (which is useful for appellate work). But they may have limited experience in the work of lower courts in sifting the evidence. There is an assumption that governments provide evidence honestly, and so the ICJ sees its task as weighing up the legal arguments of both sides. But there is a risk that the evidence may be accidentally or deliberately false. Finally, ICJ judges are drawn from all over the world and so there may also be cultural differences in how the evidence is interpreted.

To sum up, most of the world's flourishing national legal systems have evolved by trial and error (so to speak) over the centuries. The English system (which is followed in many countries around the world, including in Australia) is a good example of how a system has become stronger as it has evolved. The ICJ, by contrast, is a mere infant compared with that mature legal system. Some internationally-minded NGOs argue that humankind is gradually evolving towards a one-world system of international law and practice but it will take time for a fully mature system to evolve – as it has taken time for the English system to evolve.

Recommendations

International law in general and the ICJ in particular need to be brought in from the cold. For example, the UN Decade of International Law came and went with little impact. This was proclaimed by the UN General Assembly to cover the period 1990-1999 (up to the hundredth anniversary of the first Hague Peace Conference). In keeping with the way that international law itself is neglected, there was little publicity given to this Decade. Even natural supporters of international law, such as UN Associations, failed to make the most of this Decade, for example, making it the basis of co-operating with educational bodies and law firms in exploring ways of generating greater respect for international law.

Here are three proposals. First, there should be more attention to international law. International law is a neglected subject. It is neglected in academic institutions, such as university courses, where it is on the fringe of both law and political science. Indeed, it is now possible (given

the large range of "optional courses") for students to graduate in law or international relations without having any systematic teaching in international law.

International law is also neglected by non-governmental organizations (NGOs). For example, environmental or human rights NGOs may campaign on particular treaties but there are few NGOs that are campaigning generally for the codification and progressive development of international law. Even many UN Associations have neglected this matter.

Second, there should be a campaign to encourage governments to accept the ICJ's compulsory jurisdiction. This should be part of a general concern by citizens in expecting a better standard of international behaviour from their governments. There needs to be a general monitoring system by NGOs on how governments are living up to - or failing to live up to - their international obligations.

Third, because every international dispute may not be suitable for settlement by the ICJ, then greater attention should also be given to other peaceful ways of settling disputes, such as mediation. The overall issue of the peaceful settlement of international disputes is a neglected subject. History is often written as the biography of generals and battles. The work done in settling disputes without the use of force is often overlooked, and so people grow up believing that war is the only way to settle disputes. For example, Argentina has been involved in disputes over two sets of islands in the South Atlantic. Most people know of one dispute (in 1982 with the UK over the Falklands/ Malvinas) but very few know about the other (with Chile over the Beagle Channel). The latter was settled by a mediating team sent in by the late Pope John Paul II. This outbreak of peace was ignored by the mass media. War is covered by the mass media but peace is not. This concern about the lack of "equal opportunity" for peace should stimulate campaigns for the introduction of peace studies and conflict resolution training in schools and universities.

To conclude, this is very exciting era for international law. Although it has old roots, its period of greatest growth has come only in the last 60 years or so. This growth reflects the increasing interdependence of the world. Even governments grudgingly realize that international law is essential to facilitate global co-operation. It is necessary that there be more public education on its importance to create a greater public expectation that more use will be made of international law and the ICJ.

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