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# Reforming the United Nations: What About the International Court of Justice?*

ABILA Committee on Intergovernmental Settlement of Disputes

## Abstract

In September 2005, the UN General Assembly adopted an ambitious list of reforms of the UN structure, mandate and agenda. If implemented, it is going to be the most radical reform of the UN to date. Yet, the International Court of Justice, the principal judicial organ of the organization, has been largely ignored. This Report suggests that States should take advantage of the reform-mood at the UN to consider also some essential reforms of the ICJ. These include: Should the Security Council be enlarged, then UN member States should consider expanding the membership of the ICJ, too; judges should not be allowed to be re-elected and their tenure should be increased to 12 years; age limits should be introduced; the number of female candidates to be elected should be increased; intergovernmental organizations should have capacity to be a party in contentious proceedings; the new Human Rights Council and certain international courts and tribunals should be given the power to request advisory opinions.

## I. Resolution of the ABILA Committee on intergovernmental settlement of disputes

In recognition of the important contribution that peaceful settlement of international disputes can make to international peace and security, the ILA's American Branch established in the fall of 2001 a Committee on Intergovernmental Settlement of Disputes (as it is currently called). Its present membership consists of Pieter H.F. Bekker, Chair; Davis Robinson; Aarno Liuksila; Sienho Yee; Claudia Annacker; Cesare P.R. Romano; and David W. Bowker.

Believing that the International Court of Justice (ICJ), the principal judicial organ of the United Nations, should form an integral part of the ongoing reform agenda of the

* This is an official document. No editing has been made.

United Nations, the Committee decided to embark upon a project to study possible reforms affecting the ICJ, and appointed Dr Cesare P.R. Romano as the Special Reporter to assist its work. Dr Romano submitted his draft Report on 28 September 2005, and subsequently received comments from members of the Committee. He submitted his final Report on 21 December 2005.

Having studied the issue with assistance of the draft Report and the final Report, the Committee, in accordance with its working procedures, adopts the ''conclusions and recommendations'' set forth in the Report, which are as follows:

(1) Should the Security Council be enlarged, then UN member States should consider expanding the membership of the ICJ, possibly to reflect the number of members in the reformed Security Council. This should be done only if: (a) the ICJ Statute also is modified to allow for the formation of Chambers of the Court either at the request of one party or by decision of the Court *proprio motu*; (b) UN member States are ready to approve the increase in the Court's budget that such a step would require; and (c) the Court is ready to embark on a process of reconsideration of how deliberations are conducted, at least in the case of decisions to be rendered by the full Court.

*Provision to be modified*: Article 3 of the Statute.

*Other changes recommended*: Article 26 of the Statute and Article 17 of the Rules of Court dealing with formation of Chambers.

(2) The possibility of having ICJ judges re-elected should be eliminated and their tenure should be increased to 12 years.

*Provisions to be modified*: Article 13 of the Statute and Article 2.1 of the Rules.

(3) Age limits should be introduced for ICJ judges. States should not nominate individuals for election to the Court who, at the time of election, are older than 70.

*Provisions to be modified*: None. This ''reform'' can be achieved through declarations by the General Assembly and the Security Council to be issued at the time of elections.

(4) The number of female Members of the Court should be increased. States should nominate an adequate number of women, and, when voting for candidates in elections, they should take into consideration the need to ensure that the Court does not represent only the main forms of civilization and legal systems, but also that it represents both genders.

*Provisions to be modified*: None. This ''reform'' can be achieved through declarations by the General Assembly and the Security Council to be issued at the time of elections. Alternatively, a stricter requirement might be introduced by modifying Article 9 of the Statute.

(5) Intergovernmental organizations should be given the option of having standing (jurisdiction *ratione personae*) in contentious proceedings before the Court. This is subject to the basic legal instruments and/or relevant rules of each organization. Alternatively, and only as *de minimis*, the option of standing in contentious proceedings should be given to UN organs and agencies.

*Provisions to be modified*: UN Charter, Articles 93, 94 and 110; ICJ Statute, Article 34 and 36.2. Alternatively, UN Charter, Article 93; Articles 34. 35.2, 36.2 of the Statute, and the Security Council needs to adopt a resolution.

(6) The new Human Rights Council and certain International Courts and Tribunals should be granted the power to request advisory opinions.

*Provisions to be modified*: None. This ''reform'' can be achieved through resolutions of the General Assembly. However, in the case of certain international courts and tribunals it might require some amendments to the pertinent constituent instruments so as to allow the judicial body in question to request advisory opinions.

The Committee acknowledges the solid work of the Special Reporter, and commends him for his contribution.

The Committee directs its Chair, Dr. Pieter H.F. Bekker, and the Special Reporter to promote the dissemination of this Resolution and the final Report to the widest extent possible.

27 December 2005

# II. Report by Dr Cesare P.R. Romano, special reporter**

## II.A. Introduction

In September 2005, the United Nations held its largest summit of world leaders to date. Heads of State and government gathered in New York for a three-day High-level Plenary Meeting (the 2005 World Summit) to reflect on the accomplishments of the Organization after 60 years and to discuss what needs to be changed in order to face the challenges lying ahead. The ''2005 World Summit Outcome Document'' (hereafter also referred to as ''Outcome Document''), adopted at the eleventh hour on the eve of the opening of the General Assembly's plenary session, outlines the general contours of the envisaged

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reform.[1] The Assembly's 60th annual session faces the difficult task of determining how exactly these reforms can be implemented.

The agenda is substantial, but at the time of this writing it is not clear on how many issues the necessary majorities can be found and how much of the "Outcome Document" will remain unaccomplished. Certain reforms will require amending the UN Charter, a treaty that has proven time and again difficult to modify. Other reforms will require less politically arduous tweaks and adjustments to the Organization's structure.

A remarkable aspect of the current discussions on UN reform is the fact that the International Court of Justice (hereafter "ICJ", "the Court" or "the World Court"), the principal judicial organ of the United Nations, is largely absent. In the current round of discussions on UN reform, which started towards the end of the 1990s, the question of reforming the ICJ has never appeared on the agenda. In the documents on UN reform that have been officially circulated, there are few, if any, references to the Court. Mostly, they merely contain a generic call on States, which have not yet done so, to consider recognizing its jurisdiction.[2]

It seems that the general feeling amongst diplomats and scholars is that the ICJ, while it can greatly improve its practices and management, is not in need of any structural reform; that its specific role within the UN system and within the international community as a whole is fulfilled in such a way as not to warrant major changes; and that adding the question of ICJ reform onto an already crowded and controversial agenda might create unnecessary and unwanted complications.

It is true that no reform of the UN structure currently under discussion necessitates *per se* a revision of the provisions of the UN Charter pertaining to the ICJ, or of the Court's Statute.[3] Yet, there are aspects of the current reform agenda which, if implemented, might require more careful thinking about whether any adjustments could or should also be made to the ICJ's structure. Also, the "reform mood" currently animating the UN might lower resistance to reforms and adjustments to the ICJ.

While generations of scholars and diplomats have analyzed what should and could be done to enhance the role of the Court both within the United Nations and the international system at large for more than six decades, the time seems hardly ripe for implementing many

1 (www.un-ngls.org/un-summit-FINAL-DOC.pdf) UN Doc.A/60/L.1 (last visited 10 December 2005).

2 The Outcome Document's only references to the ICJ are: "We emphasize the obligation of States to settle their disputes by peaceful means in accordance with Chapter VI of the Charter, including, when appropriate, by the use of the International Court of Justice. All States should act in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, in accordance with the Charter", para.73. "Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States, and the value of its work, we call upon States that have not yet done so, to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work, including by supporting the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis", para.134. The High-Level Panel report (A/59/565) does not make mention of the ICJ but to say that that it was a feature of the post-1945 (implying, also that it was a feature of a world gone by), para.11.

3 UN Charter, (1945), 59 Stat.1031, 24 UST 2225, TIAS No.7739 (hereinafter UN Charter). International Court of Justice Statute, 24 Oct. 1945, 59 Stat.1031, UNTS 993.

of the proposed changes.[4] There is little chance that any proposal or change aimed at increasing the profile or role of the ICJ within the Organization be implemented in the current international environment.

Accordingly, this Report concentrates on only two kinds of possible reforms pertaining to the Court. First, the Report examines the reforms that might be needed to complement changes to the UN structure, agenda and mandate currently under discussion. Although some of these reforms might require formal amendments to the Charter and the Statute, the Report will focus only on those for which the necessary majority of members could realistically be found. Second, the Report addresses changes that might be desirable in order to improve the overall effectiveness, efficiency and perceived legitimacy of the Court, but which do not need to be implemented by amending the Charter or the Statute, and which are not likely to modify the delicate balance of power among UN organs or to increase the powers of the Court at the expense of States. Thus, this Report focuses on two key aspects: Composition and Election of Judges; and Access to the Court.

In order to limit its scope, this Report does not review nor comment on previous proposals and other standing proposals for reform of the ICJ. Commentary on certain proposals will be provided only to the extent that they are referred to in this Report.

## III. Background: reforming the United Nations and the ICJ

The United Nations system has been undergoing periodical bouts of reform, at various levels of visibility and magnitude, for most of its history.[5] The Secretary-General's report

4 See, e.g. Mohamed Sameh M. Amr, The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations (2003), 380 et seq.; Sean D. Murphy, Amplifying The World Court's Jurisdiction Through Counter-Claims And Third-Party Intervention, 33 George Washington ILR (2000), 5; Geoffrey Palmer, International Law and the Reform of the International Court of Justice, in: Antony Anghie and Garry Sturgess (eds), Legal Visions of the 21st Century: Essays in Honor of Judge Christopher Weeramantry (1998), 579–600; Connie Peck and Roy S. Lee (eds), Increasing the Effectiveness of the International Court of Justice (1997); Louis Sohn, Important Improvements in the Functioning of the Principal Organs of the United Nations That Can Be Made Without Charter Revision, 91 AJIL (1997), 660; Derek W. Bowett et al., The International Court of Justice: Process, Practice and Procedure (1997); Derek W. Bowett, James Crawford, Ian Sinclair and Arthur D. Watts, The International Court of Justice: Efficiency of Procedures and Working Methods—Report of the Study Group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law, Supplement to 45 ICLQ (1996); Lori Damrosch (ed.), The International Court of Justice at a Crossroads (1987); Louis B. Sohn, Broadening the Advisory Jurisdiction of the International Court of Justice, 77 AJIL (1983), 124; Anwar-i-Qadeer, The International Court of Justice: A Proposal to Amend its Statute, 5 Houston JIL (1982), 35; Grenville Clark and Louis B. Sohn, World Peace Through World Law (1st ed. 1958, subsequent editions were published in 1960 and 1966).

5 In the early 1960s, the main issues triggering reform negotiations were how to give Socialist countries adequate representation in the Organization as well as budgetary and financing issues. From the later 1960s, development became the main priority as the membership altered to include a growing number of developing countries. At end of 1970s and into the 1980s, concerns with nuclear proliferation and other security issues informed the Palme Commission, but declining faith in multilateralism, and budgetary problems restricted its impact. From the late 1980s, the failure of the development agenda came to light at the same time as the end of the Cold War opened up the collective security field. This led in the early 1990s to reform proposals along both the security and development tracks.

Over the years, both the direction and intensity of interest in formally amending the Charter have varied. In 1974 the General Assembly created an Ad Hoc Committee on the Charter (Charter Committee), consisting of 42

*Management and Organizational Measures* and *Renewing the United Nations: A Programme for Reform* (1997) triggered the current phase of reform.[6] The *Report of the Panel on United Nations Peace Operations* (Brahimi Report) (2000),[7] the final declaration of the 2000 summit of Heads of State (the *Millennium Summit*—September 2000) dedicated to "The Role of the United Nations in the Twenty-First Century",[8] the report of the Secretary-General's *High-level Panel on Threats, Challenges and Change* (2004),[9] and the Secretary-General's March 2005 report titled "In Larger Freedom",[10] are the most significant milestones in the current round of discussions about UN reform. Many other reforms have been proposed by member States, and many more have been proposed by NGOs, civil society and academia.[11]

These documents form the background to the "Outcome Document".[12] In many regards the "Outcome Document" is less ambitious than its predecessors, as it represents the final bargain of complex diplomatic negotiations among 191 States. At the risk of gross approximation and neglect of some noteworthy aspects, it mainly touches upon the Organization's management, political agenda and direction (stressing human rights, development, peacekeeping, and the fight against terrorism). It also sets forth some very minor and long overdue changes to the Charter, such as the elimination of references to "enemy States" in Articles 53, 77 and 107 of the UN Charter, which is a relic of World War II, and the elimination of the Trusteeship Council, which no longer meets and whose remaining functions are carried out by other bodies of the United Nations.

Part of the agenda is also whether the Security Council should be enlarged and/or a class of semi-permanent members, or permanent members without veto powers, should be created. This would indeed require revising the Charter in a fundamental way.

In the past, the Charter has been amended in only three instances. The amendments all dealt with the enlargement of the membership of the Organization's main organs (Security Council and Economic and Social Council) and their consequences for the required majorities—reforms that were imposed by the remarkable expansion of the Organization's overall membership, but

member States, to discuss proposals of amendment conveyed by governments, as well as other proposals for the more effective functioning of the UN not requiring amendments. UNGA Res.3349 (XXIX), 17 December 1974. As the Committee had been increasingly unable to conclude discussion on any item related to Charter amendments, it has eventually taken over work in other areas, notably that of the peaceful settlement of disputes (e.g. the Manila Declaration on the Peaceful Settlement of International Disputes (1982) UNGA Res.37/10, 15 November 1982, Annex 2; and the 1988 General Assembly Declaration on the Prevention and Removal of Disputes and Situations that Might Threaten International Peace and Security. UNGA Res.43/51, 5 December 1989, Annex 2).

6 A/51/950.

7 A/55/305–S/2000/809.

8 A/54/959.

9 A/59/565.

10 A/59/2005.

11 There does not exist to date a consolidated list of proposals under discussion. The Global Policy Forum's website contains many of the proposals under discussion (www.globalpolicy.org/reform/index.htm, last visited 10 December 2005).

12 Above n.1.

that could only be attained by way of formal amendment.[13] Yet, the creation of a special class of members besides the veto-wielding States and the other members, if enacted, would probably be the most significant change to the Organization's structure since its inception.

In addition to these far-reaching changes there have also been a significantly greater number of tweaks to the Organization's structure by way of informal or de facto amendments. As a matter of fact, the manifold efforts to reform the UN made in the past half-century have, by and large, taken place without significantly touching the Organization's basic constituent document: the Charter. This is largely because the procedure to amend the Charter is rather burdensome. First, amendments need to be adopted by the General Assembly by a two-thirds majority (out of a total membership of, currently, 191), and then they have to be ratified by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council, in accordance with their respective national constitutional processes.[14] This explains why the Charter has been formally amended only a couple of times.[15]

In sum, in over sixty years of existence, the UN Charter has proven time and again extremely difficult to be modified. Only those changes strictly necessary to accommodate new members have been made, while changes that might alter the balance of power within the Organization (between principal bodies) or between the Organization and States, have never been implemented.

The difficulty of revising the UN Charter has necessarily also affected the ICJ. The World Court's legal foundations are, hierarchically:

- The UN Charter (Articles 92–96);
- The ICJ Statute;
- The Rules of Court; and
- Practice Directions and the Resolution Concerning the Internal Judicial Practice of the Court (Practice Directions and Resolution).

The Statute of the ICJ is annexed to the UN Charter, of which it forms an integral part. Thus, the Statute is subject to the same revision provisions as the Charter itself.[16] This

13 In 1945 the UN had 51 members, while nowadays it has 191. The first amendments were introduced in 1963–1965 (UNGA Res.1991 A and B (XVIII), 17 Dec. 1963; GA Res.2046 A, B and C (XX) of 8 Dec. 1965); the second in 1965–1968 (UNGA Res.2102 (XX), 20 Dec. 1965, entered into force on 12 June 1968 with the ratification of 83 members); and the third in 1971–1973 (UNGA Res.2847 (XXIV), 20 Dec. 1971; ECOSOC Res.1757 (LIV), 18 May 1973).

14 UN Charter, Art.108.

15 The UN Charter contains also another provision providing for a more comprehensive revision. Article 109 provides for the convening of a General Conference of the UN members to review the Charter to be held within ten years of the inception of the Organization, but it has never been implemented. It was included in the Charter as a way of overcoming the resistance of many small and medium sized states to the "Yalta formula", giving five countries permanent seat in the Security Council and veto powers and the conference in San Francisco where the Charter was negotiated. The prospect of a review conference, to be held in the foreseeable future, where power equilibria would be reconsidered made the bargain acceptable.

16 Article 69 of the Statute: "Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions

renders the ICJ as difficult to reform as the organization of which it forms a part.[17] The provisions of the UN Charter dealing with the ICJ and the ICJ Statute lay out the structure of the Court, powers, jurisdiction, composition, and legal force of judgments. In other words, they determine what the Court is and what it does. For their part, the Rules of Court, Practice Directions and the Resolution Concerning the Internal Judicial Practice of the Court determine how, within the limits of the Charter and the Statute, the Court goes about its daily judicial business.

The Rules, the Practice Directions and the Resolution have been drafted and adopted by the Court itself under the power given to it by the Statute,[18] and, accordingly, the Court itself can modify them. They have been amended frequently during the Court's sixty years of existence.[19] Conversely, only the UN Members can, by way of agreements among them, modify the Statute of the ICJ. To date, the Statute has never been formally amended.

## IV. Suggestions for ICJ reform

The foregoing section has highlighted the reasons why reforms of the ICJ necessitating a modification of the relevant provisions of the UN Charter or the Statute have seldom been seriously considered. This is why this Report aims to focus as much as possible on reforms that do not require amending the Charter and/or the Statute. When this Report considers reforms that could require amending the UN Charter and/or the ICJ Statute, it will attempt to suggest only those amendments that closely mirror other amendments that would have to be made to the Charter, should current discussions on UN reform lead to them. The overall aim of the exercise is to maintain the coherence of the UN system, and to increase the effectiveness, efficiency and perceived legitimacy of the Court.

which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations." It should be noted that Art.70 of the Statute gives the Court the power to propose amendments to the Statute as it may deem necessary, through written communications to the Secretary-General, for consideration in conformity with the Charter amendment procedures.

It is interesting to note that the Statute of the Permanent Court of International Justice, the predecessor of the ICJ, was a separate treaty, not legally dependent on the Covenant of the League of Nations. The incorporation of the ICJ Statute into the Charter as an annex was due to the desire to secure the Court the support of all members; it was the fruit of historical circumstances at the San Francisco conference; and it was supported by reasons of legal policy, too. Shabtai Rosenne, The World Court: What it is and How it Works (1995), 26.

17 This also explains why overtime scholars proposing reforms of the ICJ have gradually lowered their aims eventually focusing only on these reforms that can be implemented without modifying the Charter or the Statute. See, e.g. L. Sohn, Important Improvements and Sean D. Murphy, above n.4.

18 "The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure", Statute, Art.30.1.

19 On 5 May 1946 the Court adopted Rules largely based on the latest version of the Rules of Court of the PCIJ, which dated from 1936. In 1967, it embarked upon a thorough revision of its Rules and set up a standing Committee for that purpose. On 10 May 1972 it adopted certain amendments which came into force on 1 September that year. On 14 April 1978 the Court adopted a thoroughly revised set of Rules which came into force on 1 July 1978. The object of the changes made was to increase the flexibility of the proceedings, making them as simple and rapid as possible, and to help reduce the costs to the parties, so far as these matters depended upon the Court. They were again amended on 5 December 2000, on 14 April 2005, and on 25 September 2005.

The proposed reforms are grouped into two main categories: Composition and election of members of the Court; and Access to the Court.

## IV.A. Reforms concerning the composition and election of the members of the ICJ

One issue that should be reconsidered is who should be elected to the Court and in what manner.

Election of ICJ judges takes place in accordance with the following provisions:

- The Statute of the Court (Articles 2–4, 7–12 and 14);
- The Rules of Procedure of the General Assembly (Rules 150 and 151);
- The Provisional Rules of Procedure of the Security Council (Rules 40 and 61).

### *IV.A.i. Number of judges*

The reform that is associated with the highest political stakes (and hence the one that is most arduous to realize) is the enlargement and modification of the membership of the Security Council. Currently, to summarize the various pertinent documents, both official and unofficial, under discussion, the two main models are:

- Model A—the addition of six new permanent seats, with no veto, and three new two-year term elected seats;
- Model B—the creation of a new category of eight seats, renewable every four years, and one new two-year, non-renewable seat.

Neither the High-Level Panel's report nor the Secretary-General's March 2005 report entitled "Enlarging Freedom" or the "Outcome Document" express a preference for either model. In both cases the Council would be expanded to comprise 24 members, from the current 15, to reflect the increase in UN membership experienced over the past two decades.

The two alternatives are on the agenda of the 2005 annual session of the General Assembly, but to date there are little signs that an agreement could be reached eventually. Despite the fact that there seems to be broad agreement that an expansion is warranted, the Security Council reform debate might block the broader reform agenda of the Organization, and might, therefore, be abandoned at the last minute to facilitate the much-needed overhaul of the Organization.

Originally, the Security Council was composed of 11 members. The number of Council members was increased to 15 only twenty years after the foundation of the UN through an amendment of the Charter, but has been fixed ever since.[20] The number of members enjoying a special status on the Council (permanent seat and veto) was never altered.

Article 3 of the ICJ Statute provides that "The Court shall consist of fifteen members, no two of whom may be nationals of the same state". According to Article 9, "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

20 UNGA Res.1991 A and B (XVIII), 17 Dec. 1963. From 51 UN members in 1945, to 112 in 1963.

of the main forms of civilization and of the principal legal systems of the world should be assured''.

As Shabtai Rosenne, the leading ICJ scholar, has noted, the election of members of the Court encounters two sets of problems. The first is how the seats on the Court will be allocated *to* the main forms of civilization and to the principal legal systems of the world. The second problem is how, after the primary allocation has been made, the positions will be shared *within* the main forms of civilization and the principal legal system of the world. As Rosenne has pointed out, ''these problems are resolved partly by a series of 'understandings' which have either been negotiated diplomatically or have emerged de facto in the United Nations''.[21] The first understanding is that the candidate of any of the five permanent members of the Security Council—China, France, Russia, UK, and USA—will be elected to the Court.[22] The second understanding, dating back to the mid-1960s, is that the regional distribution of seats amongst members of the Court should roughly parallel the regional distribution of seats on the Security Council, which at present is also composed of 15 members.[23] Of course, this does not mean that every member of the Council is correspondingly assured of having one of its nationals represented on the bench of the ICJ. Rather, it means that, say, African States will occupy about the same number of seats on the Council and the Court.

Therefore, the proposed enlargement of the membership of the Security Council raises the question whether the two basic understandings would have to be reconsidered, or, if they were to be maintained, how they would affect the Court in light of the new situation.

It should be noted that both models under discussion propose expanding the Security Council to 24 members. As was said, for the first two decades of the UN's existence, the Security Council and the ICJ did not have the same number of members (11 and 15, respectively). But for the past forty years they have been equal in size. The question is therefore: should the number of judges at the ICJ be increased simultaneously with an increase in the number of Council members? There are strong reasons militating both in favor and against this proposition.

Let's consider first the reasons in favor. With a 24-judge court, five seats could be allocated permanently to ''the big five'', according to the ''understanding'' that has been respected for sixty years now, and six or eight could be allocated to the ''second tier'' States, depending on which model (A or B) is adopted. This would leave between 11 and 13 seats available to allocate to any other State. Such a change would constitute an improvement compared to the current situation. Indeed, currently only a handful of seats on the Court are genuinely available at every election. Besides the five seats traditionally reserved for the ''big five'', some other States have traditionally—since the Court's inception or at least for a very long period of time—had a national of theirs on the bench (e.g. Japan, Italy, and (West)

21 Rosenne, The World Court, above n.16, 55.

22 The exception is China. There was, in fact, no Chinese Member of the Court from 1967 to 1984.

23 Currently, both the composition of the Security Council and the ICJ reflects the following distribution: Africa, 3; Latin America, 2; Asia, 3; Western Europe and other States, 5; Eastern Europe, 2.

Germany), thereby further reducing opportunities for nationals of other States to be given one of the seven seats available, at best.

Overall, a 24-judge, or even just a 19-judge, court of an intergovernmental organization comprising 191 members might better represent "the main forms of civilization and of the principal legal systems of the world", because it would provide a larger number of States with an opportunity to have a judge on the Court (by comparison, the International Tribunal for the Law of the Sea has 21 judges out of a total of 145 States having ratified the UN Law of the Sea Convention).

However, there also are cogent reasons to discourage enlargement of the Court. To begin with, expanding membership from 15 to 24 judges would require, at a minimum, an amendment of the Statute, a proposition that, as explained earlier, has proven to be cumbersome.[24]

Second, a substantial increase in the number of judges, if unaccompanied by far-reaching reforms as to the way the Court operates may be expected to slow down the administration of justice in cases under deliberation. It would put strains on the coherence of decisions, as it would potentially magnify the number and impact of separate and dissenting opinions by individual judges. And it would further burden the already scarce human, material and financial resources of the Court; unless, of course, such resources are increased as well—but this would require a greater budget for the Court and would entail an extra financial burden on UN member States.

Third, provided the above two issues can be addressed, the overwhelming number of cases is usually heard by the full Court, rather than by *ad hoc* chambers of the Court.[25] Cases are submitted to chambers of the Court only if both parties request it, and the Court cannot form *ad hoc* chambers *proprio motu*.[26] For the Court to benefit from an enlargement of its membership, it would require making the chambers a quasi-permanent feature of its functioning. This would call for amendments to other provisions of the Statute and to the Rules of Court.[27] Although dividing members in chambers—like the European Court of Human Rights

24 Statute, Art.3.

25 On five occasions, since the adoption of the new Rules, parties have made use of the possibility of requesting the formation of a chamber in a specific case. The first was formed in 1982 in the case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States); the second was formed in 1985 in the case concerning the Frontier Dispute (Burkina Faso/Mali); the third was formed in March 1987 in the case Elettronica Sicula S.p.A. (ELSI) (United States/Italy); the fourth was formed in May 1987 in the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras). The most recent one was formed in 2002 in Frontier Dispute (Benin/Niger).

26 "The Court may at any time form a chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties", Statute, Art.26(2).

27 Namely Art.17 of the Rules. "1. A request for the formation of a chamber to deal with a particular case, as provided for in Article 26, paragraph 2, of the Statute, may be filed at any time until the closure of the written proceedings. Upon receipt of a request made by one party, the President shall ascertain whether the other party assents; 2. When the parties have agreed, the President shall ascertain their views regarding the composition of the chamber, and shall report to the Court accordingly. He shall also take such steps as may be necessary to give effect to the provisions of Article 31, paragraph 4, of the Statute; 3. When the Court has determined, with the approval of the parties, the number of its Members who are to constitute the chamber, it shall proceed to their election, in accordance with the provisions of Article 18, paragraph 1, of these Rules. The same procedure shall be followed as regards the filling of any vacancy that may occur on the chamber; 4. Members of a chamber formed under this Article who have been replaced, in accordance with Article 13 of

(ECHR), which is composed of 45 judges divided in four chambers—would allow the ICJ to process more cases, the caseload of the ICJ is not yet—and probably will never be—at such levels as to warrant such a change.[28] Moreover, the ECHR, despite deciding most cases in chambers, manages to maintain overall coherence of jurisprudence between chambers because it is structured on a two-tier system of chambers and Grand Chamber, composed of seventeen judges.[29] Mirroring this structure would require a major reconsideration of the ICJ's structure.

On balance, this Reporter is inclined to recommend expanding membership of the ICJ, possibly to reflect the number of members in the reformed Security Council, but this should be done only if, simultaneously, (1) the ICJ Statute is modified so as to allow the formation of Chambers of the Court either at the request of one party, or by decision of the Court *proprio motu*; (2) UN member States are ready to approve the increase in the Court's budget that such a step would entail; and (3) the Court is ready to embark on a process of reconsideration of how deliberations are conducted, at least in the case of decisions to be rendered by the full Court.

*IV.A.ii. Re-election and tenure*

ICJ judges are elected for nine-year terms of office. To ensure that judges are not rotated or confirmed all at once, one-third of the bench is re-elected every three years. States are free to decide whether to nominate again a judge whose mandate has expired and the other States are free to decide whether they wish to re-elect that person. Also, there is no limit on how many times incumbent judges can be re-elected.[30]

Re-election time is always an awkward period for judges as their record on the bench comes under scrutiny of States. Also, a real or apparent conflict can arise where a decision of the Court is scheduled for vote during re-election time, subjecting the judges in question to influence by inappropriate political considerations.

One might argue that since this happens every nine years, and not all judges might wish to be re-elected, issues of independence are not likely to carry great weight. However, one should also consider that a third of the whole Court comes under scrutiny every three years. This affects a significant portion of the Court, and at significantly short intervals. Cast this way, the question of independence of judges acquires a different dimension.

It would be desirable to consider eliminating the possibility of having judges re-elected to eliminate actual or potential sources of pressure that could come to bear on them at re-election time.[31] This should be accompanied by lengthening their tenure to 12 years

the Statute following the expiration of their terms of office, shall continue to sit in all phases of the case, whatever the stage it has then reached."

28 In 2003, the European Court of Human Rights rendered 703 judgments.

29 The Court's Grand Chamber may review a judgment rendered by a Court's Chamber, provided that one of the parties makes such a request within three months from the date of the judgment. Referral will only be accepted if a panel of 5 judges of the Grand Chamber accepts the request. Article 43 of the European Convention of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No.5, as amended by Protocols Nos 3, 5, 8 and 11.

30 Statute, Art.13.

31 This suggestion has been taken up in 2004 in the case of the ECHR with the adoption of a nine-year non-renewable term of office, in place of a six-year term with the possibility of re-election. Protocol No.14 to the

(compatible with the question of age raised below) to ensure that judges stay an adequate number of years on the bench for purposes of creating stability in the Court's jurisprudence.[32] This reform would require amending Article 2.1 of the Rules,[33] but, most of all, and most problematically, Article 13 of the Statute.[34]

*IV.A.iii. Age limits*

Article 2 of the ICJ Statute provides: ''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.''

Probably chief amongst these qualifications is experience, and, one might add, wisdom. Yet, experience comes with maturity, and this has to be set against the loss of energy and powers of concentration that inevitably accompany old age. Elderly judges might find a whole day in court, in public or private sittings, tiring.[35]

As pointed out above, ICJ judges are elected for renewable nine-year terms of office and there is no limit on how many times they can be reelected.[36] In order not to increase excessively the average age of the Members of the Court over time, the General Assembly and the Security Council might wish to consider discouraging States from nominating individuals who at the time of election are older than 70. The General Assembly and the Security Council are already alerted to this problem, as statistics show. Indeed, the average age of ICJ judges at the time of their first election to the Court is 60 (7 were in their seventies, 41 in their sixties, 31 in their fifties and 3 in their forties). The average age of ICJ judges during their term of office has stabilized at about 64.[37] Considering that there is no limit on how many times ICJ judges can be reelected and how long they can remain on the Court; that this number is an average number; and taking into account the fact that life expectancy tends to increase over time throughout the world, there might be a trend towards an ageing bench which could be forestalled by informal age limits.

European Convention on Human Rights and Fundamental Freedoms, adopted by the Committee of Ministers of the Council of Europe on 13 May 2004, Art.2, amending Art.23 of the Convention.

32 Ram, above n.4, 392. The average length of time that judges have served on the Court is 9 years and 10 months, the longest period being that of Judge Lachs, at almost 26 years, and the shortest that of Judge Baxter, at 19 months (www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm, last visited 10 December 2005).

33 ''The term of office of Members of the Court elected at a triennial election shall begin to run from the sixth of February in the year in which the vacancies to which they are elected occur'', Rules, Art.2(1).

34 ''1. The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years'', Statute, Art.13.

35 Bowett et al., above n.4, 90.

36 Above Sec.III.2.

37 (www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookchapter2.HTM, last visited 10 December 2005) This is a 1994 figure provided by the Court itself. It might be worthwhile to determine whether ten years since the average age increased, decreased or remained stable.

This could be achieved by a simple declaration by the General Assembly and the Security Council, issued at the time of every election cycle, reminding States of the desirability of "not nominating individuals who, at the time of election, are older than 70". There is no need to consider an exemption from this rule for judges who run for re-election, provided the above-mentioned proposal to abolish re-election is adopted.[38] Should this not be feasible, then it would be desirable to let judges who are older than 70 at the time of re-election remain on the bench.

*IV.A.iv. Women*

The World Court has an unenviable record regarding female participation. Over its sixty years of existence it has had only one woman sitting as a member.[39] The question of why international judicial institutions should count amongst its members a sufficient number of women has been discussed in recent years in a number of fora and symposia.[40]

Historically, women have been underrepresented in international judicial bodies because the pools from which candidates are usually selected (diplomacy, high magistracy, academia) were predominantly male. Yet, this is largely an issue of the past as women have made great strides in the legal profession, in all its manifestations.

The anachronism of the ICJ is even more striking when one considers the number of women sitting on other international judicial bodies. At the ICC, 7 out of 18 are women; at the ICTY and ICTR respectively 2 out of 17 and 8 out of 18 judges (including ad litem judges) are women, while the figures for Appeals judges (common to both tribunals) is 2 out of 7. At the ECHR figures are 12 out of 45, while at the ECJ 2 out of 25 are women. Even the Inter-American Court of Human Rights and the WTO Appellate Body boast one female judge out of seven. The Statutes of the most recently created international judicial bodies, such as the ICC and the ACHPR, contain provisions providing for the election of an adequate number of women.[41]

Only the ITLOS fares worse, having no female judge among the 21 judges. This is a questionable situation that can be easily addressed by the General Assembly and the Security Council. At the time of elections, these organs could encourage States to nominate an adequate number of women, and, when voting for election, to take into consideration the need

38 Above Sec.III.2.

39 Rosalyn Higgins was elected to the Court in 1995, and re-elected. Suzanne Bastid sat as ad hoc judge in Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya).

40 The Project on International Courts and Tribunals sponsored four of such meetings: Women and Public International Litigation, London, July 2001; Women and Public International Litigation (cont.), New York, September 2002; Fair Representation: The ICC Elections And Women, New York, January 2003; Gender and the Delivery of International Justice, Florence, October 2003. (More information and background materials can be found at www.pict-pcti.org/research/access_partecip/meetings.html.) See in particular the paper by Jan Linehan, entitled "Women and Public International Litigation" (www.pict-pcti.org//activities/meetings/London_07_01/Women1.pdf, sites last visited 10 December 2005).

41 Rome Statute of the International Criminal Court, UN Doc.A/CONF.183/9 of 17 July 1998, Art.36(8)(a)(iii); Art.12.2 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 9 June 1998, OAU Doc.OAU/LEG/EXP/AFCHPR/PROT (III).

to ensure that the Court does not only represent the main forms of civilization and legal systems, but also that it represents both genders. While not requiring an amendment to a specific provision of the ICJ Statute, Rules or other pertinent document, further postponement of this long-overdue reform is hardly justifiable.

## IV.B. Reforms of access to the ICJ

Another issue that is in need of reconsideration is who can appear before the Court and in what kind of proceedings: the issue of standing, or, in technical terms, jurisdiction *ratione personae*. It has long been recognized that the international community is no longer exclusively composed of sovereign States. A large number of entities other than States are bearers of rights and duties under international law, and are as such significant subjects of international law. One might add that they are, increasingly, actors in international relations.

The International Court of Justice exercises basically two kinds of jurisdiction: contentious and advisory.[42] It renders binding decisions with regard to disputes submitted to it by States and it delivers mostly non-binding advisory opinions requested by certain UN organs and some of the UN's specialized agencies. Widening access to the Court's contentious jurisdiction would require amending the Charter and the Statute, *in primis*, and a number of provisions of the Rules, and Practice Directions. On the other hand, widening access to the advisory jurisdiction of the Court would not require any Charter or Statute amendments, but would take only simple action, in the form of declarations or resolutions, by the General Assembly.

### *IV.B.i. Contentious jurisdiction*

The ICJ is the only existing international tribunal that does not allow standing in contentious proceedings for intergovernmental organizations and/or their organs.[43] Under the Court's Statute, intergovernmental organizations have no standing in contentious cases. Only States do.[44] Not even the United Nations itself, or any of its principal organs, has standing before the Court in such cases. Whenever intergovernmental organizations, including the UN, want to resort to adjudication to settle disputes with other intergovernmental organizations or with States—even when it involves their own members—the forum resorted to is usually an arbitral tribunal. With limited exceptions,[45] if a question arises concerning the

42 To this, for the sake of completeness, one must also mention that the Court has, from time to time, also exercised appellate jurisdiction, particular in regard to judgments of the ILO and UN Administrative tribunals. See, e.g. the advisory opinion on Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO. The Court has also interpreted judgments rendered by arbitral tribunals. E.g. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal); Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua).

43 The European Community is party in its own right, as contrasted to that of its member States, to both the World Trade Organization's agreements and the United Nations Convention on the Law of the Sea. Because of that, the EC has standing before the two legal regimes judicial organs: the WTO dispute settlement system, and the International Tribunal for the Law of the Sea.

44 "Only states may be parties in cases before the Court", ICJ Statute, Art.34.

45 See Charles N. Brower and Pieter H.F. Bekker, Understanding "Binding" Advisory Opinions of the International Court of Justice, in: Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum (eds), Liber Amicorum Judge Shigeru Oda (2002), 351–68.

interpretation or implementation of their respective constitutive instruments, or of conventions adopted in pursuance thereof, it is for the member States of an organization to bring contentious proceedings before the ICJ, instead of the organizations themselves.[46] The organization can do no more than provide the Court with relevant information.[47]

There are several reasons why it might be time to consider making available the Court's contentious jurisdiction to give access to intergovernmental organizations, or, at a minimum, to the UN itself and its organs and/or agencies.[48] We will begin by analyzing the case for giving intergovernmental organizations standing (both as applicant and as respondent) before the Court in contentious cases. Yet, before we do so, we must make it clear that the proposal advanced here is about giving intergovernmental organizations the *possibility*, *just the option*, of being a party in a case. Standing relates to jurisdiction *ratione personae* and leaves unaffected the fundamental requirement of the existence of jurisdiction *ratione materiae*, or the consent of the organization concerned, in a particular case. It does not intend to raise or address institutional or "constitutional" issues within any given intergovernmental organization, such as the possible responsibility of member States for the acts or omissions of the organization, or the immunities enjoyed by the organization.[49] We believe that, to the extent that the participation of certain intergovernmental organizations in contentious proceedings might raise such issues, these are questions that are better left to the given intergovernmental organization to consider, on a case-by-case basis.[50]

First, intergovernmental organizations have become important, if not fundamental, actors in international relations. The international community is no longer made up exclusively of

46 In such a case the organization concerned is informed of the proceedings by the Registrar and receives copies of the pleadings. E.g. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan); Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom).

47 Intergovernmental organizations may also furnish information in other circumstances, either on their own initiative or at the request of the parties or of the Court itself. The constitutions of some (e.g. FAO, UNESCO, WHO, ICAO, ITU, WIPO) or agreements between them and the United Nations stipulate that where they are requested to furnish information they are obliged to do so. The Rules of Court provide that time-limits for doing so may be imposed and that the parties to the case may comment on the information furnished. Only ICAO has furnished such written comments in the case concerning the Aerial Incident of 3 July 1988.

48 On the issue, see also Paul Szasz, Granting International Organizations Ius standi in the International Court of Justice, in: A. Muller et al. (eds), The International Court of Justice: Its Future Role after Fifty Years (1997), 169; Ignaz Seidl-Hohenveldern, Access of International Organizations to the International Court of Justice, ibid., 189.

49 On this point, see Sienho Yee, The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership or their Conduct Associated with Membership, in: Maurizio Ragazzi (ed.), International Responsibility Today: Essays in Memory of Oscar Schachter (2005), 435–54. The International Law Commission is currently working on this issue and is asking governments for comments (Prof. Giorgio Gaja as Special Rapporteur). See ILC Report 2005 (A/60/10), 9–11, para.26.

50 One way to leave the issue of standing before the ICJ to the member States of a given organization is by tying such standing to the relevant law of that organization in the enabling clause contained in the ICJ Statute. Thus, Art.34(1) of the Statute could be amended to read as follows: "Only states and, to the extent authorized by an enabling clause in their organizational documents or other relevant rules of the organization, [duly authorized] international organizations may be parties in cases before the Court."

sovereign States like it was until the end of the nineteenth century. The number and nature of functions that they carry out in the contemporary world is staggering.[51]

Second, one of the leitmotifs of the discourse over UN reform since the end of the Cold War is the need for the UN to create stronger relationships with regional, sub-regional and specialized organizations. A whole section of the Charter (Chapter VIII) is dedicated to the maintenance of international peace and security through regional organizations. The provisions in the Charter for the creation of a UN force to carry out peace-enforcement and peacekeeping duties are still, and for the foreseeable future will remain, a dead letter.[52] At the same time, regional organizations, when operating under the mandate of the Security Council, provide a better political alternative to unilateral actions.

In the peace-enforcement and peacekeeping fields, the most famous examples of regional organizations' active involvement in the past few years are NATO (North Atlantic Treaty Organization), which has operated in the Balkans and in Afghanistan, and ECOWAS (Economic Community of West African States), operating in Liberia and Côte d'Ivoire. Besides, the UN, having a limited capacity and budget, routinely partners with dozens of specialized and regional organizations to carry out activities in many fields other than peacekeeping, such as disaster relief, humanitarian aid, stabilization, electoral monitoring, and human rights, to mention a few.

The ''sub-contracting'' or ''outsourcing'' of activities by the UN to regional and specialized organizations is a key element of the current discussions on UN reform. The trend is likely to continue, if not strengthen, given the reluctance to expand the resources of the UN itself.

In the current age, a ''States-only'' World Court can lead to nonsensical situations that create severe practical difficulties for the Court's functioning. To illustrate this point, when in 1999, during the war in Kosovo, NATO waged an air campaign against Yugoslavia without authorization by the Security Council, Yugoslavia attempted to bring the question of the legitimacy of NATO's actions before the Court. However, as NATO does not have standing due to limitations in the ICJ Statute, Yugoslavia tried to circumvent this obstacle by submitting ten cases simultaneously against as many NATO members. In two of them the Court held at an early stage that it manifestly lacked jurisdiction to entertain the case and dismissed them,[53] while the remaining eight eventually were rejected during the preliminary objections phase on similar grounds of lack of jurisdiction.[54] Still, the latter eight cases remained on the Court's docket for five years and hearings had to be held for each of them.

51 In 1951 there were 123 intergovernmental organizations, in 1991, 4561 and in 1997, 6115. Union of International Associations, 3 Yearbook of International Organizations (1997–1998), Table 2, Appendix 3, 1794.

52 UN Charter, Arts 45–7.

53 Legality of Use of Force (Yugoslavia V. United States of America); Legality of Use of Force (Yugoslavia V. Spain), Order of 2 June 1999.

54 Case concerning Legality of Use of Force (Serbia and Montenegro v. United Kingdom); Case concerning Legality of Use of Force (Serbia and Montenegro v. Portugal); Case concerning Legality of Use of Force (Serbia and Montenegro v. Netherlands); Case concerning Legality of Use of Force (Serbia and Montenegro v. Italy); Case concerning Legality of Use of Force (Serbia and Montenegro v. Germany); Case concerning Legality of Use of Force (Serbia and Montenegro v. France); Case concerning Legality of Use of Force (Serbia and Montenegro v. Canada); Case concerning Legality of Use of Force (Serbia and Montenegro v. Belgium). Judgments of 15 December 2004.

These ten separate cases involving a single set of claims for a court which, on average, receives about two new cases per year, was an unwelcome development that placed an unnecessary burden on the Court. If the Court were ever hit by a "cluster case" of this sort, it could seriously hamper, if not paralyze, it. Although Yugoslavia may still have proceeded as it did, the proceedings before the Court could have been easily consolidated, if NATO itself had had the option of becoming a party to the case and if the Court had had jurisdiction over NATO regarding this matter.

Legal reasons also militate in favor of making the Court's contentious jurisdiction available to duly authorized intergovernmental organizations. Neither international personality nor the capacity to bring claims is restricted to States in contemporary international law.[55]

In this context, one must distinguish between, on the one hand, disputes between an intergovernmental organization and one or more of its own members, and, on the other hand, disputes with States that are not members. Several international legal regimes and organizations are endowed with their own judicial bodies to settle disputes between member States, the organization and its organs, and other entities, including legal entities and individuals (e.g. the European Communities and the European Court of Justice; the Council of Europe and the European Court of Human Rights; the World Trade Organization and its dispute settlement mechanism). Extending ICJ jurisdiction to disputes between States parties to these legal regimes or members of these organizations, or between those States and the organization or the regime's organs, is not desirable (with the possible exception of the UN itself, as will be explained below). Those are purposely legally self-contained specialized organizations and regimes, and should remain so. But as concerns disputes between intergovernmental organizations and States that are not members, like the above-mentioned case of Yugoslavia and NATO, the ICJ might play a useful dispute settlement role.

For those intergovernmental organizations that have been authorized by their member States to avail themselves of the Court's jurisdiction *ratione personae* pursuant to an enabling clause in the organizational documents or other relevant rules of the organization, jurisdiction *ratione materiae* of the Court could be established on an *ad hoc basis*, by express consent given by both the State and the organization concerned, for the purposes of a specific dispute; it also could derive from a compromissory clause inserted in a treaty concluded between a State and an intergovernmental organization (e.g. headquarters agreement; agreements on privileges and immunities; loan agreements; technical assistance agreements; etc.); or it might be established by way of an optional protocol to the Statute providing for the Court's jurisdiction *ratione materiae* for certain kinds or categories of dispute, which States and intergovernmental organizations could ratify should they so desire. The question of which organ, or organs, would initiate proceedings, or which organ or organs would control the

55 Of course, intergovernmental organizations and States have, under international law, different legal personalities, and thus different rights and duties. See, generally, Pieter H.F. Bekker, The Legal Position of Intergovernmental Organizations (1994).

actual conduct of litigation, can be left for decision by (the member States of) each intergovernmental organization. The same applies to the issue of the extent of the jurisdiction *ratione materiae* that the member States are willing to provide for their organization. In each case, it is for the organizational documents or the relevant rules of the organization to provide for the possibility of standing before the ICJ and, if standing is so authorized, to define the scope and content of the Court's jurisdiction *ratione materiae* in contentious cases involving the organization. It is not the place here to address these issues of international institutional law, which are the prerogative of the member States of each organization.

A more complicated question is how the organization would become bound by any decision. This could be accomplished by changing the wording of Article 94 of the Charter whereby "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party", and by allowing intergovernmental organizations to become parties to the ICJ Statute, which would require an amendment of Articles 93[56] and 110 of the UN Charter.[57] Another option would be to modify Article 35.2 of the Statute by adding "... and international organizations ..." to the provision "... the conditions under which the Court shall be open to other states shall ... be laid down by the Security Council", and then to have the Security Council pass a resolution to that effect.[58] Article 34 of the Statute, which provides that only States may be parties in cases before the Court, will have to be modified anyway. Article 36(2) may also have to be modified to provide for the possibility of vesting the Court with jurisdiction *ratione materiae* over intergovernmental organizations.

If extending the Court's contentious jurisdiction to intergovernmental organizations in general would be considered too radical, albeit desirable, a change, at a very minimum one should consider providing standing to the UN, some or all of its main organs, and possibly at least some of its specialized agencies. All the practical reasons put forward for giving intergovernmental organizations standing are also valid in the case of the UN.

It is recognized that there might be some drawbacks to this proposal. One would be the danger of further burdening a court with a limited capacity to handle a growing docket of cases. However, considering that arbitration of disputes between intergovernmental organizations (UN or others) and States are, in any event, rare and sporadic, chances are that such a reform would not "open the floodgates" to a huge wave of litigation.

There might be some objections to giving standing in contentious cases to the UN in particular. If standing is given, for the sake of fairness and equality, it should be both as

56 "1. All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice. 2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on condition to be determined in each case by the General Assembly upon the recommendation of the Security Council", UN Charter, Art.93.

57 "The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes", UN Charter, Art.110.

58 In 1946, the Security Council passed a resolution under Art.35.2 of the Charter specifying the conditions under which States not members of the UN could submit to the Court's jurisdiction. UNSC Res.9, 15 October 1946.

applicant and as respondent. But this might give States the possibility to challenge the legality of UN acts (e.g. Security Council resolutions) in a judicial forum, which raises highly contentious issues.[59] This problem might be avoided by carefully limiting the basis of jurisdiction *ratione materiae* through the exclusion of certain categories of disputes or legal questions from the Court's reach in the relevant instruments, as it is already done in the case of disputes between States. An organization could also be shielded from counterclaims by a respondent by adding a proviso to the relevant article in the Rules of Court (Article 80) that makes it clear that no counterclaims are admissible in the case of contentious proceedings initiated by intergovernmental organizations.

Some might argue that giving the UN, some or all of its organs and some of its specialized agencies, standing in contentious cases would also raise the question of a possible bias of the Court in disputes with third parties or States. After all, the Court is a UN organ. Such concerns are ill-conceived. The independence of the Court from the UN and its main organs has been shown to be adequate time and again.[60]

Finally, some might argue that instead of granting full *ius standi*, a lower-profile, less momentous and easier reform project would be to grant access to the Court's advisory jurisdiction. Yet, this would be only a second best option, and a highly imperfect one. As it will be discussed in the next section, some of the UN organs and some of its agencies already have access to the Court, since they can ask the Court for advisory opinions. But, at least in the case of the ICJ and the UN, settling disputes is not the main purpose of advisory opinions. Their *raison d'être* is to provide an organ of the UN or a specialized agency with the possibility of obtaining a legal opinion on a legal question which is in need of resolution before certain action can be taken. The practice of resorting to advisory opinions in order to submit to the Court disputes between the UN and some of its members,[61] or even between member States and/or non-State entities, where the concerned States have not accepted the Court's jurisdiction,[62] is unsatisfactory because even when the Court's jurisdiction is accepted as such, "respondents" in "binding" advisory proceedings do not have a similar power to request them.[63]

Granting standing to intergovernmental organizations, including UN bodies, in contentious proceedings is a far better alternative. It should be kept in mind that at the ICJ standing

59 See Pieter H.F. Bekker, Review of "The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations" (by Mohamed S. Amr), 99 AJIL (2005), 517.

60 Amr, above n.4, 386. Derek Bowett, "The Court's Role in Relation to International Organizations", in: Vaughan Lowe et al. (eds), Fifty Years of the International Court of Justice (1996), 189; Eli Lauterpacht, Aspects of the Administration of International Administration (1991), 60–6.

61 E.g. Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, ICJ Reports 1988, 12; Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, ICJ Reports 1989, 177.

62 E.g. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004.

63 On this point, see Christian Dominicé, Request of Advisory Opinions in Contentious Cases?, in: Laurence Boisson de Chazournes, Cesare Romano and Ruth MacKenzie, International Organizations and International Dispute Settlement: Trends and Prospects (2002), 91–103. Also, Amr, above n.4, 386.

in any given case is always conditional upon acceptance of the jurisdiction by *both* parties. Jurisdiction never exists in the absence of consent.[64] Thus, on the one hand, should States and intergovernmental organizations accept jurisdiction, this would provide a potentially useful and efficient alternative to the existing practice of bringing disputes before the Court under the guise of advisory proceedings. On the other hand, should States and intergovernmental organizations decide not to consent to jurisdiction, as they are entitled to decide, it would further reinforce the message that there is no desire whatsoever amongst parties to the dispute to have the Court seized of the matter, thus reducing the margin of maneuver for the Court to proceed nonetheless.

*IV.B.ii. Advisory jurisdiction*

Under the UN Charter, the General Assembly and the Security Council can request the ICJ to give an advisory opinion on any legal question.[65] The General Assembly may also authorize other UN organs and "specialized agencies" to do so, but only within the scope of their activities.[66] Under the UN Charter and the Statute, as currently worded, intergovernmental organizations outside the UN family and/or their organs and agencies, and States, are excluded from the Court's advisory jurisdiction.

The practice of the United Nations shows that the General Assembly enjoys wide discretion with regard to the advisory jurisdiction of the Court, and has used its broad right to request advisory opinions, albeit rather cautiously. To date, sixteen UN agencies or entities assimilated thereto have been given the right to ask the Court for an advisory opinion.[67] Amongst UN organs, besides the General Assembly and the Security Council, which have a Charter-based right, the other active organ which has been authorized is the Economic and Social Council.[68]

64 The doctrine of forum prorogatum affords an informal way for a state to express consent to the Court's jurisdiction, but consent is an inescapable element. The respondent state, or more accurately the state against which the application has been filed, is in effect given an opportunity to accept the jurisdiction of the Court. Sometimes the respondent agrees, either by express declaration or by successive conduct implying agreement to accept the Court's jurisdiction, post hoc, after proceedings with respect to the dispute have been instituted. Once this is done, the Court would consider its jurisdiction to have been established and proceed to adjudicate the dispute. On forum prorogatum at the ICJ, see: Sienho Yee, Forum Prorogatum Returns to the International Court of Justice, 16 Leiden JIL (2003), 710.

65 UN Charter, Art.96(1).

66 UN Charter, Art.96(2). Under Art.65 of the Statute, "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

67 These include: International Labour Organisation (ILO); Food and Agriculture Organization of the United Nations (FAO); United Nations Educational, Scientific and Cultural Organization (UNESCO); World Health Organization (WHO); International Bank for Reconstruction and Development (IBRD); International Finance Corporation (IFC); International Development Association (IDA); International Monetary Fund (IMF); International Civil Aviation Organization (ICAO); International Telecommunication Union (ITU); World Meteorological Organization (WMO); International Maritime Organization (IMO)1; World Intellectual Property Organization (WIPO); International Fund for Agricultural Development (IFAD); United Nations Industrial Development Organization (UNIDO); International Atomic Energy Agency (IAEA).

68 The Trusteeship Council; Interim Committee of the General Assembly; Committee on Applications for Review of Administrative Tribunal Judgments have also been authorized in the past but are no more active organs of the Organization.

Authorization takes the form of a resolution of the General Assembly and does not require an amendment to the Charter or the Statute—hence it is relatively easy to effectuate in contrast to a Charter and/or Statute amendment. Such authorization can be either open-ended, giving an agency or organ the power to request any opinion that the agency or organ concerned desires, or it can be limited to a case-by-case basis. The difference is, of course, that in the case of the former the General Assembly creates a right and delegates a power, while in the latter the General Assembly retains ultimate control of when, and to whom, access is granted to the Court in advisory proceedings.

Over the years diplomats, scholars and judges of the Court itself have put forward a number of proposals to expand or lower barriers to access the Court's advisory jurisdiction. These include lowering the quorum required for the General Assembly to decide to submit a request for an opinion;[69] include other principal organs of the UN in the list of those authorized, such as the Secretariat (as such or through the persona of the Secretary-General);[70] allow other currently unauthorized agencies or certain UN programs, such as UN Development Program or the UN Environmental Program, or the UN High Commissioner for Refugees or the UN High Commissioner for Human Rights; allow intergovernmental organizations outside the UN family, such as NATO or the Organization of American States, or other international courts and tribunals, or even States.

While each and every proposal should be evaluated on its own merits, having specific advantages and drawbacks, it is not the place here to do so. This Report focuses on only two entities whose access to advisory jurisdiction might be beneficial for the UN and the overall international legal system. We will discuss them in greater detail below.[71]

For the moment, it suffices to note that the general drawback of enlarging access to advisory jurisdiction is the risk of increasing the docket of an already overburdened Court. Yet, it should be noted that an authorization to request advisory opinions does not imply an *obligation* to request them. This means that an increase in the number of authorized entities does not necessarily translate into an increase in the number of requests pending before the Court. As a matter of fact, historically the large majority of advisory opinions have been requested by the General Assembly itself.[72]

Caution is also dictated by the way advisory jurisdiction has been used in the past. As was pointed out, advisory proceedings sometimes have been resorted to by UN organs and some of its agencies as a roundabout way to overcome their lack of standing in contentious proceedings. At times, this has been done to bring under the scrutiny of the Court situations involving States that do not accept the Court's contentious jurisdiction and do not want to be subject to the Court's scrutiny. Because of this consideration, unless it is coupled with an institutional filter or some sort of guarantee or discipline, expansion of the advisory

69 Sohn, Important Improvements . . . , above n.4, 659.

70 An Agenda for Peace (A/47/277–S/24111), para.38; Amr, above n.4, 57–61.

71 Below Sec.IV.B.ii.a and b.

72 To date, the General Assembly has requested 15 advisory opinions of the Court in 14 cases; the Security Council requested one; the Economic and Social Council two. Of the specialized agencies, the WHO requested two; and the Executive Board of UNESCO, and the Assembly of the IMO one each.

jurisdiction of the Court to a greater number of entities might simply lead to a greater number of instances of abuses of the process.

Having said that, the General Assembly should carefully consider granting access to the Court's advisory jurisdiction at least to the Human Rights Council and to International Courts and Tribunals, as discussed below.

*IV.B.ii.a. Human Rights Council.* One of the central elements of the current negotiations on UN reform is the modification of the Organization's main human rights body, the United Nations Commission on Human Rights (the Commission). The Commission was established in 1946 as a subsidiary body of the Economic and Social Council (ECOSOC). It includes 53 member States, and has the mandate to establish and monitor international human rights standards. Over the years, there has been growing criticism of the Commission and an increase in calls for its reform. Critics denounce the body as bureaucratic, excessively political, and ineffectual. It has come under fire when ECOSOC elected to it States with questionable human rights records, such as Zimbabwe, Libya, and Sudan.

In its December 2004 report on UN reform, the High-Level Panel on Threats, Challenges and Change recommended that the Commission adopt universal membership and prepare an annual report on the state of human rights worldwide.[73] Kofi Annan's March 2005 report "In Larger Freedom" went still further by calling for the Commission's abolition and the establishment of a smaller Human Rights Council, not linked to the ECOSOC and with a central role in the organization, which would meet year-round and have its membership restricted to countries that "abide by the highest human rights standards".[74]

In both cases, there seems to be a consensus that human rights should become a fundamental focus of the UN and somewhat repositioned at the center and fore of the UN agenda and structure. The Outcome Document provides for the creation of such a Council, but leaves undetermined its mandate, modalities, functions, size, composition, membership, functioning and procedures. It delegates the task to find agreement on all of these issues to the President of the General Assembly.[75]

Regardless of these undetermined elements, however important they may be, it is already clear that the Human Rights Council will become the center piece of the UN human rights system. Indeed, it is meant to be responsible for promoting universal respect for all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.[76]

In view of the fact that the international human rights system is highly codified and complex, considering also the considerable network of human rights conventions concluded under the aegis of the UN, and given that the Human Rights Council will have ultimate responsibility to oversee their coordination and implementation (albeit only concurring or complementary with that of treaty-specific bodies and probably limited only to gross

73 Above n.9, para.285.

74 Ibid., para.183.

75 Outcome Document, above n.1, paras 157–60.

76 Ibid., para.158.

violations),[77] the Council would greatly benefit from an ability to ask the World Court for advisory opinions on legal questions arising in the course of its operations. There are a number of areas where it is already evident that there is such a need, including the question of the compatibility of reservations with human rights treaties.

Of course, should the need arise, nothing bars the General Assembly from requesting an advisory opinion on behalf of the Human Rights Council, if asked, but considering that the General Assembly and the Human Rights Council might have different memberships, and should the Secretary-General's proposal to restrict membership to countries that will "abide by the highest human rights standards" be accepted, then there would be room for considering an open-ended authorization independent from the will of the General Assembly. Still, it would be framed in such a way as to restrict as far as possible the possibility that the Human Rights Council might resort to advisory opinions of the ICJ in order to gain leverage in disputes with specific member States over the implementation of human rights.

*IV.B.ii.b. International courts and tribunals.* One of the most remarkable features of contemporary international law is the multiplication of international judicial bodies. Depending on which criteria are adopted to define what an international court or tribunal is, it is estimated that currently there are 21 such bodies in operation.[78] Of these, 13 are organs of regional economic and/or political integration organizations, and eight have jurisdiction not restricted to any particular geographic area or are organs, or sub-organs, of the United Nations.

The multiplication of international judicial bodies, at times dubbed the "proliferation" of such bodies, has raised concerns in many quarters about the risks that it implies for the unity and coherence of international law.[79] It has also raised questions about the need or desirability to create linkages (soft or hard) between these bodies in order to move away from a state of mere aggregation toward a system-like structure.

77 Ibid., para.159.

78 Project on International Courts and Tribunals, Synoptic Chart (www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf, last visited 10 December 2005). The Chart resorts to five criteria to determine what international judicial bodies are: a) permanent institutions; b) composed of independent judges; c) adjudicate disputes between two or more entities, at least one of which is either a State or an International Organization; d) work on the basis of predetermined rules of procedure; and e) render decisions that are binding.

79 For concerns, and arguments against those concerns, see, in general Jonathan Charney, Is International Law Threatened by Multiple International Tribunals?, 271 Hague Academy Collected Courses (1998), 101; The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order, Speech by Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000 (www.icj-cij.org, last visited December 10, 2005); Philip Jessup, Do New Problems Need New Courts?, 65 Proceedings of the American Society of International Law (1971), 261–8; Thomas Buergenthal, Proliferation of International Courts and Tribunals: Is it Good or Bad, 14 Leiden JIL (2001), 267–75; Gerhard Hafner, Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?, in: Lucius Caflisch (ed.), Le règlement pacifique des différends entre États: Perspectives universelle et européenne: The Peaceful Settlement of Disputes between States: Universal and European Perspectives (1998), 25–41; Chester Brown, The proliferation of International Courts and Tribunals: Finding Your Way Through the Maze, 3 Melbourne JIL (2002), 453; José Alvarez, The New Dispute Settlers: (Half) Truths and Consequences, 38 Texas ILJ (2003), 405; Cesare Romano, The Proliferation of International Courts and Tribunals: The Pieces of the Puzzle, 31 NYU JILP (1999), 709–52.

With these considerations in mind, in 1999, then ICJ President Stephen Schwebel, in his annual address to the General Assembly, suggested that "in order to minimize . . . significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law".[80] The question was raised anew by his successor, Judge Gilbert Guillaume, the following year, albeit in more nuanced terms.[81]

So which judicial bodies should be granted the right to request advisory opinions? One should consider the arguments in favour and against authorizing only certain specific, designated and currently existing judicial bodies, and the arguments in favor and against opting for an open-ended designation that would only specify the criteria that a body must meet in order to be considered as an international court or tribunal. Be that as it may, it seems that the most cautious and judicious approach would be the limited listing of existing judicial bodies.

President Schwebel suggested that we should start from "international tribunals that are organs of the United Nations, i.e., the international tribunals for the prosecution of war crimes in the former Yugoslavia and Rwanda".[82] If the organic relationship of these two *ad hoc* tribunals with the UN is the rationale for the proposal, then one should also consider adding to the list those hybrid courts that have been created under the authority given by the Security Council to a Special Representative of the Secretary-General (such as the mixed bodies in East Timor and Kosovo), and those created by way of a treaty concluded between the UN and a State (such as the special courts for Sierra Leone and Cambodia).[83] President Schwebel also submitted that "there is room for the argument that even international tribunals that are not United Nations organs such as the International Tribunal for the Law of the Sea, or the International Criminal Court" might be added to the list.

As pointed out above, nothing prevents the General Assembly or the Security Council from asking the Court for advisory opinions on behalf of international judicial bodies, if such bodies so request.[84] But one might wonder whether, from the point of view of an ideal separation of powers, having a political body (or a committee of that body) work as a kind of filter between two judicial bodies is a satisfactory solution.

It should be stressed again that the power to request advisory opinions does not imply the duty to do so. In addition, advisory opinions are not binding on the requesting party. These considerations should alleviate concerns about repeated and unwarranted

80 Address to the Plenary Session of the General Assembly of the United Nations by Judge Stephen Schwebel, President of the International Court of Justice, 26 October 1999 (www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresidentGA54_19991026.htm, last visited 10 December 2005).

81 A/55/PV.41. Judge Guillaume suggested that "international tribunals . . . could be encouraged to seek advisory opinions from the Court, by way of the Security Council or the General Assembly".

82 Address to the Plenary Session of the General Assembly, above n.80.

83 See, in general Cesare Romano, André Nollkaemper, Jann Kleffner (eds), Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo and Cambodia (2004).

84 Request by way of the General Assembly is the scheme suggested both by Schwebel and Guillaume.

intrusions into another court's sphere of judicial competence, authority and legitimacy. Be that as it may, even if advisory opinions of the Court are not binding they do carry great authority and place a heavy burden on the requesting entity, especially if it decides not to follow the advice. Thus one might also wonder whether, should certain international courts and tribunals be given this power, they would ever actually use it.[85]

## V. Conclusions and recommendations

In light of the above discussion, the conclusions and recommendations contained in this Report may be summarized as follows:

(1) Should the Security Council be enlarged, then UN member States should consider expanding the membership of the ICJ, possibly to reflect the number of members in the reformed Security Council. This should be done only if: (a) the ICJ Statute also is modified to allow for the formation of Chambers of the Court either at the request of one party or by decision of the Court *proprio motu*; (b) UN member States are ready to approve the increase in the Court's budget that such a step would require; and (c) the Court is ready to embark on a process of reconsideration of how deliberations are conducted, at least in the case of decisions to be rendered by the full Court.

*Provision to be modified*: Article 3 of the Statute.

*Other changes recommended*: Article 26 of the Statute and Article 17 of the Rules of Court dealing with formation of Chambers.

(2) The possibility of having judges re-elected should be eliminated and their tenure should be increased to 12 years.

*Provisions to be modified*: Article 13 of the Statute and Article 2.1 of the Rules.

(3) Age limits should be introduced for ICJ judges.

States should not nominate individuals for election to the Court who, at the time of election, are older than 70.

*Provisions to be modified*: None. This ''reform'' can be achieved through declarations by the General Assembly and the Security Council to be issued at the time of elections.

(4) The number of female Members of the Court should be increased.

States should nominate an adequate number of women, and, when voting for candidates in elections, they should take into consideration the need to ensure that

85 In this sense, see Stephen Schwebel, The Reality of International Adjudication and Arbitration, 12 Willamette JIL and Dispute Resolution (2004), 359–65, 363.

the Court does not represent only the main forms of civilization and legal systems, but also that it represents both genders.

*Provisions to be modified*: None. This "reform" can be achieved through declarations by the General Assembly and the Security Council to be issued at the time of elections. Alternatively, a stricter requirement might be introduced by modifying Article 9 of the Statute.

(5) Intergovernmental organizations should be given the option of having standing (jurisdiction *ratione personae*) in contentious proceedings before the Court. This is subject to the basic legal instruments and/or relevant rules of each organization. Alternatively, and only as *de minimis*, the option of standing in contentious proceedings should be given to UN organs and agencies.

*Provisions to be modified*: UN Charter, Articles 93, 94 and 110; ICJ Statute, Article 34 and 36.2. Alternatively, UN Charter, Article 93; Articles 34. 35.2, 36.2 of the Statute, and the Security Council needs to adopt a resolution.

(6) The new Human Rights Council and certain International Courts and Tribunals should be granted the power to request advisory opinions.

*Provisions to be modified*: None. This can be achieved through resolutions of the General Assembly. However, in the case of certain international courts and tribunals it might require some amendments to the pertinent constituent instruments so as to allow the judicial body in question to request advisory opinions.

## VI. Final conclusion

This Report proposes some specific changes to the UN Charter, the ICJ Statute, the Rules of Court and other relevant documents. Of the many aspects of the Court's structure, *modus operandi*, and powers that might be considered, it focuses on two key aspects: Composition and Election of Judges; and Access to the Court.

The Report deliberately avoided highly contentious possible changes, which have virtually no chance of ever being implemented, while not shying away from recommending amendments to the UN Charter and the ICJ Statute, international agreements that have proven time and again most difficult to modify. The Report proposes the most obvious and evident amendments needed to implement the changes recommended, without aiming to exhaust all the possible tweaks and adjustments that might be required.

Most of all, the Report focuses on those changes most urgently needed to keep the World Court in synch with the UN itself, should it be reformed, and with the modern age. While none of the reforms under discussion at the UN necessitates, *per se*, a change in the ICJ's structure, powers or operations, if increasing the overall effectiveness, efficiency and perceived legitimacy of the Court is a goal shared by all UN member States, then the reforms suggested in this Report are believed to be useful means to achieve it.