

## RECENT DEVELOPMENTS

### A NASCENT PROPOSAL FOR EXPANDING THE ADVISORY OPINION JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

On December 17, 1982, the U.S. House of Representatives unanimously adopted a resolution<sup>1</sup> urging the President to consider the feasibility of pursuing, through the United Nations, an expanded advisory opinion<sup>2</sup> jurisdiction for the International Court of Justice (ICJ or the Court). Such an expanded jurisdiction would allow national courts to obtain an advisory "preliminary opinion" on important questions of international law before making a final decision in a case.

The House resolution recommends that the President consider the establishment of a special committee within the United Nations which would channel requests from national courts to the

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1. H.R. Con. Res. 86, 97th Cong., 2d Sess., 128 CONG. REC. H10197 (daily ed. Dec. 17, 1982). The text of the resolution is as follows:

*Resolved by the House of Representatives (the Senate concurring), That* (a) the Congress finds that increased utilization of the International Court of Justice should be encouraged and that one means of increasing utilization of the Court would be to expand its advisory opinion jurisdiction to include questions of international law referred by national courts.

(b) Therefore, the President is urged to consider the feasibility of pursuing, through the United Nations, such an expanded advisory opinion jurisdiction for the International Court of Justice. In such consideration, the President —

(1) should take into account the Department of State study, prepared in 1976 by the Office of the Legal Advisor, entitled "Widening Access to the International Court of Justice", which endorsed the idea of providing a procedure through which national appellate courts could, before rendering judgment in a case, have recourse to the International Court of Justice for an advisory "preliminary opinion" on issues of international law; and

(2) should explore the appropriateness of the establishment of a special committee, under United Nations auspices, authorized to seek an advisory opinion of the International Court of Justice, upon request by a national court or tribunal which is duly authorized by national legislation to make such a request, regarding any question of international law of which such court or tribunal has jurisdiction.

2. The essence of the International Court of Justice advisory opinions is that, unlike the Court's judgments in contentious cases, they have no binding effect. Only in a few specific cases, where it is stipulated beforehand, will an opinion have binding force. Although advisory opinions are not binding in the formal sense, the substance of the opinion is of the same high judicial quality as that of judgments. *See generally*, D. PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 227-70 (1972).

ICJ. The United Nations Charter currently grants authority to request advisory opinions only to the General Assembly, the Security Council, and other organs of the United Nations when authorized by the General Assembly.<sup>3</sup> A national court, of course, could not make a request for an advisory opinion directly to the Court, but a U.N. organ, if duly authorized by the General Assembly, could make such a request on behalf of the national court. The establishment of a special committee by the General Assembly would avoid the necessity of revising the U.N. Charter or the Statute of the ICJ, an undertaking opposed by some members of the United Nations.<sup>4</sup>

The House resolution was backed by the American Bar Association (ABA) and was based on an ABA proposal for the adoption of a procedure by which national courts could refer difficult questions of international law to the ICJ.<sup>5</sup> The current ABA proposal suggests limiting the United States' initial acceptance to issues relating to interpretation of multilateral and bilateral treaties, but notes that the expanded advisory opinion jurisdiction would eventually be appropriate for the entire range of international legal issues.<sup>6</sup>

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3. U.N. CHARTER art. 96. The Statute of the Court allows it to give an advisory opinion only to a body authorized by or in accordance with the Charter. Statute of the International Court of Justice art. 65, 15 DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 355, reprinted in S. ROSENNE, DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 61, 87 (2d ed. 1979).

4. See Sohn, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124, 125 (1983). Amendments to the U.N. Charter require a vote of two-thirds of the members of the General Assembly, including all the permanent members of the Security Council. U.N. CHARTER art. 108. A resolution establishing a special committee to channel requests to the Court could be passed with a majority—probably a two-thirds majority—of the General Assembly. *Id.* art. 18.

5. AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1982 MIDYEAR MEETING 12 (Chicago 1982). The resolution was based on an October 14, 1981 report of the Committee on International Courts of the Section of International Law and Practice.

6. Committee on International Courts, *Revised Report concerning the Expansion of the Advisory Jurisdiction of the International Court of Justice*, 1982 A.B.A. SEC. INT'L L. 4 [hereinafter cited as ABA REPORT]. The ABA proposal also recommends that Congress consider including issues that raise the "act of state" doctrine and extraterritorial application of domestic antitrust laws within the proposed expanded jurisdictional base of the ICJ. *Id.* at 5.

The proposal envisages a federal statute to determine which federal courts would be authorized to submit questions of international law to the ICJ. The option would be

The ABA proposal is similar to the procedure developed by the General Assembly in 1955 to allow the Court to receive requests for review of judgments of the Administrative Tribunal of the United Nations without the necessity of amending the U.N. Charter.<sup>7</sup> The General Assembly established a Committee on Applications for Review of Administrative Tribunal Judgments to determine whether such a request should be presented to the Court. Unlike the Court's opinions under that procedure, however, the preliminary advisory opinions requested by national courts would not necessarily be binding.<sup>8</sup>

The fact that national courts might disregard the advisory opinions of the ICJ may have the unpropitious effect of detracting from the Court's prestige. Such a conflict, however, may not arise often.<sup>9</sup> The view of the General Assembly and most authorities is that advisory opinions of the ICJ represent authoritative statements of international law.<sup>10</sup> The advisory opinions that the ICJ would provide to national courts would serve, in any event, to promote a uniform interpretation of international law.<sup>11</sup>

There is a general consensus among international legal scholars that the ICJ has been seriously under-utilized.<sup>12</sup> In 1970, the General Assembly adopted a resolution to review the role of

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available to state legislatures to implement a system for the state courts. The proposal suggests that model uniform legislation could be drafted by the National Conference of Commissioners on Uniform State Laws in this regard. *Id.*

7. G. A. Res. 957, 10 U.N. GAOR Supp. (No. 19) at 30-31, U.N. Doc. A/3116 (1955). See also Sohn, *supra* note 4, at 125-26.

8. For a discussion of the non-binding character of advisory opinions of the Court, see 2 S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 744-47 (1965), and D. PRATAP, *supra* note 2, at 254-59.

The ABA proposal emphasizes that there is no intention of establishing a hierarchy of courts, only a system of cooperation through which the ICJ would assist national courts in the interpretation of international law. Each country could limit the scope of its acceptance of the Court's jurisdiction. Should a conflict arise between a rule of international law, as interpreted by the ICJ, and a rule of domestic law, the national court would be free to determine how such a conflict should be resolved. ABA REPORT, *supra* note 6, at 11-12.

9. *Id.* at 12.

10. Szasz, *Enhancing the Advisory Competence of the World Court*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 499, 507-08 (L. Gross ed. 1976). It is expected that the proposed "preliminary" advisory opinions would achieve a legal status similar to that of advisory opinions in general.

11. See Sohn, *supra* note 4, at 127.

12. See, e.g., Anand, *Role of International Adjudication*, in 1 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 1-21 (L. Gross ed. 1976); Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Rôle in the International Legal Order*, 65 AM. J. INT'L L. 253-75 (1971).

the Court.<sup>13</sup> A questionnaire returned by member states to the Secretary-General in response to the resolution indicated the insufficient extent of the use of the Court.<sup>14</sup> A number of states responded with proposals that the advisory jurisdiction of the Court should be expanded.<sup>15</sup> The General Assembly later adopted a resolution which called upon member states to use the Court more often.<sup>16</sup> Although the Court should not be burdened with trivial issues,<sup>17</sup> conspicuous inactivity detracts from its prestige.<sup>18</sup> Under the congressional proposal, a number of safeguards exist to protect the Court from inappropriate, trivial, or politically sensitive cases. The proposed special committee to be created by the General Assembly would be authorized to screen cases, and to limit the number of cases based on the docket of the Court.<sup>19</sup> Arti-

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13. G.A. Res. 2723, 25 U.N. GAOR Supp. (No. 28) at 128, U.N. Doc. A/2723 (1970). This resolution considered the desirability of finding ways and means of enhancing the effectiveness of the Court. The resolution invited member states to submit to the Secretary-General views and suggestions concerning the role of the Court on the basis of a questionnaire prepared by the Secretary-General.

14. U.N. Doc. A/8382, paras. 30-41, at 15-19 (1971) (issued in mimeographed form only).

15. *Id.* paras. 263-294, 299-305, at 90-101. Responses supporting an expanded advisory opinion jurisdiction were received from: Cyprus, Laos, Denmark, Guatemala, United States, Argentina, Italy, Finland, Mexico, Switzerland, Netherlands, Sweden, Canada, Madagascar, Iraq, Austria, Yugoslavia, and Belgium. *Id.* The French Government opposed extending the advisory jurisdiction of the Court on the grounds that it was unnecessary and might lead to circumvention of the principle that no state may be subjected to international justice without its consent. *Id.* paras. 295-298, at 99-100.

16. G.A. Res. 3232, 29 U.N. GAOR Supp. (No. 31) at 141, U.N. Doc. A/3232 (1974).

17. See M. POMERANCE, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N.* ERAS 380 & n.27 (1973) (citing address by Edvard Hambro in 1968 *Proceedings of the American Society of International Law* 269, 272).

18. See Szasz, *supra* note 10, at 510.

19. See Sohn, *supra* note 4, at 128. For a discussion of the potential role of the proposed U.N. special committee designated to transmit queries to the Court, see Szasz, *supra* note 10, at 524-28. The composition and method of selection of the special committee is an open question at this stage. It would most likely be similar to the Committee on Applications for Review of Administrative Tribunal Judgments: That Committee is composed of the "Member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly." Statute of the Administrative Tribunal art. 11, para. 4, U.N. Doc. AT/11/Rev. 4 (1972). The General Committee, in turn, is composed of the President and thirteen Vice-Presidents of the General Assembly, and the chairmen of the seven main committees. These are elected at the beginning of each session of the General Assembly. The General Committee serves a function similar to a steering committee for the Assembly. B. KOM, *THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL* 89 (1966). Under article 11, paragraph 1 of the Tribunal's statute, "a Member State, the Secretary-General or the person in respect of whom a judgment has been rendered" may apply to the Committee on Applications to request an advisory opinion of the ICJ. U.N. Doc. AT/11/Rev. 4 (1972). See also, *supra* notes 7 & 8 and accompanying text. The Court itself should probably retain a degree of control in determining which questions of international law it wishes to hear.

cle 65 of the Statute of the Court makes it clear that the Court has discretion whether to reply to requests for opinions.<sup>20</sup> Consequently, even if the special committee presented a case to the Court, the Court could still decline to give an advisory opinion.<sup>21</sup>

A U.S. Department of State study in 1976 entitled *Widening Access to the International Court of Justice*, strongly endorsed the proposition that it was desirable to increase the activity, use, and contribution to international law of the Court.<sup>22</sup> House Concurrent Resolution 86 specifically requests the President to consider the State Department study when determining the feasibility of pursuing an expansion of the advisory opinion jurisdiction of the Court through the United Nations.<sup>23</sup> The study, however, does not consider the alternative of a special committee of the General Assembly to channel requests for advisory opinions to the Court. Rather, the study recommends an amendment to the U.N. Charter and Statute of the Court to allow national courts to refer questions of international law directly to the Court for a preliminary advisory opinion.<sup>24</sup>

The State Department study points out that the reference procedure for preliminary advisory opinions would avoid possible problems for the United States under its Constitution. There would be no direct appeal by an individual to the ICJ from the United States Supreme Court, thereby avoiding a foreign tribunal's superior review and possible reversal of a Supreme Court decision. In addition, there would be no question of permitting a foreign court to exercise judicial power over U.S. nationals.<sup>25</sup>

The State Department study also reaffirms strong support for strengthening the role of the ICJ and expresses concern over its relative disuse. The study points out the modern need for

20. The practice of the Court, however, has been to consider itself under a duty to reply to any valid request for an advisory opinion unless compelling reasons indicate otherwise. See K. KIETH, *THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE* 142-50 (1970).

21. The process would be similar to the United States Supreme Court's system of deciding whether to grant a writ of certiorari. See Szasz, *supra* note 10, at 527-28.

22. OFFICE OF THE LEGAL ADVISOR, DEPARTMENT OF STATE, *WIDENING ACCESS TO THE INTERNATIONAL COURT OF JUSTICE* (1976), reprinted in part in 16 I.L.M. 187, 188 (1977) [hereinafter cited as DEPARTMENT OF STATE STUDY].

23. See *supra* note 1.

24. DEPARTMENT OF STATE STUDY, *supra* note 22, at 204-05. The study analyzes the potential for various entities to be afforded access to the Court, including individuals, corporations, public international and intergovernmental organizations, non-governmental organizations, and regional organizations.

25. *Id.* at 191.

uniformity in law affecting transnational activities and the potential of the Court for meeting this requirement. Overall, the study favors expanding the jurisdictional capacity of the Court through the preliminary opinion procedure.<sup>26</sup> The major problem with the study is that it does not consider the option of a reference procedure via a special committee of the General Assembly, thereby avoiding the need to amend the U.N. Charter and Statute of the Court.

The proposed reference procedure from national courts to the ICJ is analogous to the system in the European Economic Community (EEC) whereby member states' national courts are entitled to ask for preliminary rulings from the European Court of Justice under Article 177 of the EEC Treaty.<sup>27</sup> Article 177 empowers the European Court to rule on the interpretation of the EEC Treaty and acts of Community institutions.<sup>28</sup> The reference procedure is also analogous to the system of "certification" under which United States federal courts may obtain an opinion from state courts on questions of state law.

One aim of the EEC reference procedure is to promote uniformity in the interpretation of community law. For similar reasons, in respect to international law, Judge Jessup supported the idea of an expanded advisory opinion jurisdiction for the ICJ.<sup>29</sup> Judge Lachs has also endorsed the proposal, emphasizing that "the national courts would obviously retain full jurisdiction over the case."<sup>30</sup>

Expansion of the advisory opinion jurisdiction would allow the International Court of Justice to make an even greater contribution to the development of international law. The plan would further the Court's objective of promoting unification in the interpreta-

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26. *Id.* at 203-04.

27. Treaty Establishing the European Community, March 25, 1957, 298 U.N.T.S. 11 (effective Jan. 1, 1958). The Treaty is also referred to as the Treaty of Rome.

28. For a discussion of reference procedure under article 177, see Caffisch, *Reference Procedure and the International Court of Justice*, in 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 572, 573-88 (L. Gross, ed. 1976), and Alexander & Grabandt, *National Courts Entitled to Ask Preliminary Rulings Under Article 177 of the EEC Treaty: The Case Law of the Court of Justice*, 19 COMM. MKT. L.R. 413-21 (1982).

29. Gross, *Conclusions*, in 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 727, 740, 772 n.83 (L. Gross ed. 1976).

30. Lachs, *Problems of the World Court: A Member's Perspective*, in 3 NEW YORK UNIVERSITY CENTER FOR INTERNATIONAL STUDIES, POLICY PAPERS 20 (1970), cited in Gross, *Conclusions*, *supra* note 29, at 740, 772 n.84.

tion and application of international law. Although the proposal is supported by the ABA, the 1976 Department of State study and many international legal scholars, it still faces numerous challenges.<sup>31</sup> Much study of the legal issues raised by the proposal is still required, particularly in the United Nations.

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31. The primary opposition will probably be from U.N. member states that anticipate the proposal would open the door to Court decisions which would be contrary to their national interests.