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## Revision of the South West Africa Cases

An Analysis of the Grounds of Nullity in the Decision  
of July 18th, 1966 and Methods of Revision

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# Revision of the South West Africa Cases

## An Analysis of the Grounds of Nullity in the Decision of July 18th, 1966 and Methods of Revision

WILLIAM M. REISMAN \*

*"Nothing is settled until it's settled right."*

LINCOLN

It is with the greatest reluctance that one suggests an examination of the question of validity *vel* nullity of a judgment of the International Court of Justice. The fabric of the authority of international adjudication is delicate and has been sorely strained in the recent past. If subjected to more stress, it may be irreparably torn asunder. Hugo Grotius, anticipating erroneous judgments, counseled that they be accepted with a detached stoicism. Grotius' counsel, from which, it may be noted, Pufendorf, Vattel and the majority of subsequent publicists have dissented, based itself on the nature and interests of the international system. It is not difficult to adduce policies for the immutability of international judgments. It is definitional, indeed truistic, of any organized community that the common interest takes priority over private interests. The common interest lies obviously in the stability of law and, derivatively, in the finality of judicial applications. However, it is equally obvious that a mature community which posits itself on an appreciation of the fundamental and inherent value of every human being seeks constantly to strike a balance between public and private interests — choosing that manner of safeguarding the public interest which imposes the fewest arbitrary restrictions on the rights of the individual. This balance is sought for a theoretical, doctrinal reason: belief in the inherent value of the individual. It is further desirable for a practical, political reason; that polity which, because of its principles, commands the

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respect and loyalty of its citizenry regulates itself more economically, persuasively and expeditiously.

These considerations bear directly on the question of the impregnability of international judgments. Adjudication is the most rational and just method of dispute settlement which humanity has thus far developed. In an emerging community in which adjudication is consensual rather than compulsory, faith in the process and willingness to resort to it for decision on vital matters will depend, to a significant degree, on the impression which international courts and tribunals communicate to potential litigants. International litigants, in contrast to their national counterparts, are free to take their disputes elsewhere or nowhere. Courts will be attractive loci of dispute resolution only if they evidence a capacity for accurate and just (if not infallible) legal decision and, at the same time, maintain enough internal vigor to correct those mistakes which inevitably occur. The demand that a legal system be strong enough to correct and compensate its mistakes is, after all, hardly immoderate. "Finality" is indeed a crucial element of social stability. Yet, as Rupert Emerson observed,<sup>1</sup> the fact that primitive societies placed such a high premium on stability may have contributed in part to their remaining primitive. At this critical crossroad of world legal order, the future of international adjudication, if not global peace, may paradoxically depend on the capacity of our supreme judicial organ to say *mea culpa*.

### I. REVISION AND RATIONALITY

The *South West Africa Cases*, delivered by the International Court of Justice on July 18, 1966,<sup>2</sup> have surprised and disconcerted the world. Criticisms of the judgment have been legion. Many informed students of international law have expressed apprehension over the effect that the judgment may have on the future of the Court and international adjudication in particular, and the future of international law in general.<sup>3</sup> Given the enormous world constitutional im-

1. See generally EMERSON, *FROM EMPIRE TO NATION: THE RISE TO SELF ASSERTION OF ASIAN AND AFRICAN PEOPLES* 105-187 (1962).
2. International Court of Justice opinions in their final and generally cited form are published at Sijthoff of Leyden at least seven weeks after they have been publicly delivered. References in this work are to the typed manuscript of limited circulation which is available on the day the decision is handed down. The majority opinion numbers its paragraphs consecutively, hence references to sections of that opinion are by paragraph number. Where separate or dissenting opinions are examined, references are to the page of the typed manuscript unless the judge in question numbered his paragraphs.
3. See, e.g., the report of Lester Pearson's speech to the A.B.A. Convention in Montreal, in which the decision is assailed as a blow to world law, N.Y. Times, Aug. 10, 1966, p. 2, col. 4; *id.*, July 19, 1966, p. 1, col. 5; *id.*, p. 17, col. 5.

pacts of this decision, the quantity of attention and criticism which it has evoked, the perspectives of international law and international relations which it has affected and the stream of proposals for alternative and sometimes radical action which it has stimulated,<sup>4</sup> it is appropriate to subject the decision and some of the procedures by which it was reached to a detailed juridical analysis.

Legal decisions, like any other human enterprise, may be erroneous. Law, however, asserts its rationality in its anticipation of, and provision for, error. Statutes which fail or have ceased to serve the social function for which they were promulgated can be repealed; unauthorized administrative decisions can be enjoined; arbitral decisions may be annulled; incorrect judicial applications may be appealed to a higher adjudicative instance—to the highest instance for a reconsideration, to a different branch of government or ultimately, by referendum to the community at large. It seems inconceivable that the institutional procedures of the International Court of Justice should make no provision for human frailty and the rectification of errors, which even the most learned and best intentioned officials of the world community might make. Motivations of the deepest respect for the World Court require a careful analysis of the possible errors in the decision of July 18, 1966. Comprehensive examination requires investigation of the treatment by general international law of decisions and awards which are vitiated by error, the specific treatment accorded decisions of the International Court in this regard, and the available procedures for rectifying errors if they should occur.

## II. NULLITY IN INTERNATIONAL LAW

The concept of the nullity of judicial and arbitral decisions in international law arises from the nature of international adjudication. International tribunals are, in Judge Moore's words, "tribunals of limited powers."<sup>5</sup> They are not created by a hierarchical sovereign power to resolve disputes between individuals subject to that sovereign. They are created by coarchical nation-states, and they derive their existence and their power from the consent of those states.<sup>6</sup>

4. See N.Y. Times, July 19, 1966, *supra* note 3. For radical South African plans, see The Times (London), July 24, 1966, p. 2, col. 3.

5. Case of the Mavromattis Palestine Concessions, P.C.I.J., ser. A, No. 2, at 60 (1924). In this particular case, the court split on matters of substance. They were, however, in complete agreement on the limited character of their tribunal's powers. The majority held that "its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists insofar as this consent has been given." *Id.* at 16. *Accord*, *Affaire Ambatielos Case*, [1953] I.C.J. Rep. 10, at 19; *Case Concerning The Factory at Chorzow*, P.C.I.J., ser. A, No. 9, at 32 (1927).

6. See *Case of the Monetary Gold Removed from Rome in 1943*, [1954] I.C.J. Rep. 10, at 32; *Case of the Rights of Minorities in Upper Silesia*, P.C.I.J., ser. A, No. 17, at 37 (1932); *Case of the Mavromattis Palestine Concessions*, *supra* note 5, at 16 (note the court's resort to the word "exists" in

Their ambit of operation is limited by the specific instrument which created them—the *compromis*—and whatever supplementation is provided by general international law. As the Secretariat's Commentary on the Draft Convention on Arbitral Procedure puts it:

An international tribunal is not a court of general jurisdiction nor is it a court free from the established rules of law governing any judicial proceeding. The jurisdiction of the tribunal is determined by the agreement of the parties; it may decide only the questions submitted to it. The tribunal must decide under the rules of law applicable to it. It must conduct its proceedings in a judicial manner and with due observance of the fundamental rules of procedure.<sup>7</sup>

Though they may interpret their jurisdiction,<sup>8</sup> an act which is integral to the effective performance of their function, they must remain within the limits or perimeters of the competence granted them in the *compromis* and in international law.<sup>9</sup>

Limited jurisdiction and limited competence immediately pose the question of the effect of putative judicial or arbitral acts which exceed the initial authority granted by the parties and international law. On the one hand, a judicial decision, as well as an arbitral award, is final. Although the vast majority of arbitral agreements reiterate

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the majority opinion). For doctrinal statements, see CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 64 (1946) where the author states: "The tribunal accordingly derives its life and vitality from the *compromis*"; WITENBERG, *L'ORGANISATION JUDICIAIRE, LA PROCEDURE ET LA SENTENCE INTERNATIONALES* 3 (1937).

7. *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session*, U.N. Doc. No. A/CN.4/92 at 105 (1955).
8. The implicit right of determining its own jurisdiction or "*competence de la competence*" was stated in Article 48 of the 1899 Hague Convention, Convention with Certain Powers for the pacific settlement of international disputes, July 29, 1899, art. 48, 32 Stat. 1779, T.S. No. 392 [hereinafter cited as 1899 Hague Convention], and Article 73 of the 1907 Hague Convention, Convention with Certain Powers for the pacific settlement of international disputes, Oct. 18, 1907, art. 73, 34 Stat. 2199, T.S. No. 536 [hereinafter cited as 1907 Revised Hague Convention]. That these provisions were not absolute is clear from Articles 55 and 83 of the respective conventions as well as the general jurisprudential grounds of nullity. An indication that this is a widely held view is provided by the Sixth Committee's reaction to Article 11 of the International Law Commission Draft Convention on Arbitral Procedure. U.N. GEN. ASS. OFF. REC. 7th Sess., Supp. No. 9 at 7 (A/2163) (1952). The French version had rendered the tribunal the "*maître*" of its competence, while the English version had the tribunal as "*judge*" of its competence. The Committee demanded that both versions employ the term "*judge*".
9. For doctrinal examination of the scope of this competence, see, *e.g.*, SHIHATA, *THE POWER OF THE INTERNATIONAL COURT OF JUSTICE TO DETERMINE ITS OWN JURISDICTION* (1965).

this point, it is definitional.<sup>10</sup> Article 37 of the 1907 Revised Hague Convention stated that "recourse to arbitration implies an engagement to submit in good faith to the award."<sup>11</sup> On the other hand, unqualified, unappealable finality renders the concept of limited jurisdiction a polite fiction. If any award is final, merely granting it can cure an excess of jurisdiction; the entire concept of a "tribunal of limited powers" is then drained of all meaning. The matter is still further complicated by the fact that a broad institution of nullification of judicial and arbitral decisions for excess of jurisdiction is susceptible to abuse; a dissatisfied litigant may simply "nullify" the offensive award by asserting an excess of jurisdiction.

### A. *The Historical Perspective*

A survey of the matter through three centuries of international experience demonstrates that potential abuse by unilateral nullification was perceived as the key problem and the root justification for a severely restricted concept of arbitral nullity. In contrast, the municipal or national institution of appeal, a mode of nullification regulated by the organized community and not by the spleen of a dissatisfied litigant, was relatively insulated from abuse and, hence, viewed as a positive legal function. The point is amply demonstrated by Hugo Grotius:

[A]lthough with regard to arbiters who are referred to by compromise, the Civil Law may direct and does in some places direct that it shall be lawful to appeal from them and to complain of their wrong; this cannot have place between kings and peoples. For, in their case, there is no superior power, which can either bar or break the tie of the promise. And therefore they must stand by the decision whether it be just or unjust.<sup>12</sup>

Pufendorf dissented from this counsel:

But where it is said that the parties ought to abide by the award of the Arbitrator, whether he has given it justly or not, that

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10. See, e.g., GUERMANOFF, *L'EXCES DE POUVOIR DE L'ARBITRE* 31 (1929); WITENBERG, *op. cit. supra* note 6, at 352-53 where the author states: "Le recours à l'arbitrage implique, en effet d'une manière absolument nécessaire l'engagement de respecter la sentence et de s'y conformer. S'il en était autrement, le recours à l'arbitrage n'aurait plus de sens."
  11. 1907 Revised Hague Convention, art. 37. Compare Draft Convention on Arbitral Procedure, art. 27, *Commentary on Arbitral Procedure adopted by the International Law Commission at its Fifth Session, op. cit. supra* note 7, at 93; U.N. CHARTER art. 94, para. 1; STAT. INT'L CT. JUST. art. 59.
  12. GROTIUS, *DE JURE BELLI ET PACIS* 350-51 (1st ed. Whewell transl. 1853). The editor of a French translation of Grotius added a note to the following section. "Notre auteur suppose sans doute qu'il n'y ait point de fraude ou de collusion de la part d'un arbitre." Barbeyrac, *Grotius: Le droit de la Guerre et de la Paix*, in BALASKO, *CAUSES DE NULLITE DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC* 8 (1938).

must be accepted with some reservation. For though we cannot recede from an agreement to arbitrate because the award is given against us, whatever hopes we had cherished, yet the award of the Arbitrator will surely not be binding if it manifestly appears that he was in collusion with the other party, or was corrupted by a bribe from him or entered into an agreement for our detriment.<sup>13</sup>

Pufendorf's view, in essence, has become the majority opinion of international law. Vattel, following Pufendorf's reasoning, stated the grounds for a nullification more broadly:

[I]f the arbitrators should render a decision which is evidently unjust and unreasonable, they would thereby divest themselves of their character as arbitrators and their decision would have no weight since they were only chosen to decide doubtful questions.<sup>14</sup>

Vattel tempered his rather extensive ground for nullity with the suggestion that the degree of unauthorized deprivation attendant upon an improper award should guide the loser in nullifying or not nullifying:

If the injustice is of little moment, it must be put up with for the sake of peace; and if it is not absolutely evident, it should be borne with as an evil to which the State voluntarily exposed itself; for if it were necessary to be convinced of the justice of a sentence before submitting to it, it would be quite useless to appoint arbitrators.<sup>15</sup>

Subsequent doctrinal work on the subject of nullity was concerned not so much with its existence as with its regulation. Where an impartial organ was assured for reviewing a claim of nullity, the grounds of nullity were set out in elaborate detail. Where, however, drafters despaired of an impartial organ, the grounds of nullity were presented in a highly restrictive form in order to mitigate their abuse. Thus, Levin Goldschmidt, in his draft for the *Institut de Droit International* of 1875, assured an ultimate review of the merits of

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13. Pufendorf, *De Modo Litigandi in Libertate Naturali*, INTERNATIONAL TRIBUNALS 130-41 (4th ed. 1904). Though Pufendorf opted for nullity, he was aware of the problem of infinite regress:

[S]hould either of the contending parties raise a doubt as to the equity of the award, the question would have to be submitted to another Arbitrator, who would investigate that issue, and if again doubt were raised, another Arbitrator would have to be appointed and so on without end.

*Id.* at 134.

14. Vattel, *The Law of Nations or the Principles of Natural Justice*, CLASSICS OF INTERNATIONAL LAW 224-25 (1916).

15. *Id.* at 225.

the assertion of nullity by some impartial organ<sup>16</sup> and proceeded to detail eleven grounds of nullity.<sup>17</sup> The *Institut* discarded his proposal for organs of review and restricted the grounds to four.<sup>18</sup> The restriction was, however, semantic, since one of the four grounds, *excès de pouvoir*, covered all of Goldschmidt's causes.<sup>19</sup>

Goldschmidt's draft is of historical importance in that it introduced the concept of *revision*.<sup>20</sup> Whereas nullity was a unilateral act not subject to review by another tribunal, revision conceded the possibility of arbitral nullity but made it contingent upon recourse to another arbitral tribunal or to a properly organized decision organ. The unilateral element which was so prone to abuse was exorcised and supplanted by an institution approximating municipal appeals. The idea of revision was salutary, but its implementation was retarded by the consensual rather than compulsory character of international jurisdiction. Nevertheless, it represented a great advance in international law in that the policy of rectification of awards and the policy of supervision by an impartial organ were, at least in theory, deemed compatible. Henceforth, unilateral nullification of an impugned award was lawful under international law only if the other party refused to agree to resubmit the claim of nullity to the same tribunal or to a new tribunal constituted for that specific purpose.

The concept of revision came to fruition in Article 55 of the Hague Convention of 1899. The *Act for Pacific Settlement of International Disputes* created the Permanent Court of Arbitration and laid out a comprehensive arbitral *régime*. The problem of nullity was hotly discussed at the Conference. Martens argued against any possibility of nullifying or revising an arbitral award.<sup>21</sup> Holls, of the American delegation, proposed the following draft:

Every litigant before the international tribunal shall have the right to make an appeal for reexamination of a case within three

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16. Goldschmidt, *Projet de Règlement pour Tribunaux Arbitraux Internationaux*, 6 REV. DROIT INT'L 421, art. 33, at 447-48 (1874).

17. *Id.*, art. 32, at 446-47.

18. Institut de Droit International, *Projet de Règlement pour la Procédure Arbitrale Internationale*, 7 REV. DROIT INT'L 277, art. 27 at 282 (1875).

19. On the essential substantive identity between the normative and casuistic approach to the grounds of nullity, see Part IV *infra*.

20. A rich variety of terms has been proposed to describe the process by which errors in awards are corrected by an impartial organ rather than by unilateral denunciation. In the course of the discussion in the 10th Assembly of the League regarding the Finnish proposal to make the Permanent Court a general revisory tribunal, terms such as "review," "revision," "appeal," "*recours*," etc., were proposed. A survey of the record reveals that the reference of these terms was the same. See LEAGUE OF NATIONS OFF. J., 10th Ass., Special Supp. No. 76 at 13 (1929).

21. Martens presented the Anglo-Venezuelan *compromis* as a proposal. It provided for absolute finality and no possibility of revision. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: CONFERENCE OF 1899, 186 (Carnegie Endowment for International Peace ed. 1921).

months after notification of the decision, upon presentation of evidence that the judgment contains a substantial error of fact or law.<sup>22</sup>

The ultimate formulation of Article 55 was as follows:

The parties can reserve in the *compromis* the right to demand the revision of the award. In this case, and unless there be an agreement to the contrary, the demand must be addressed to the tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on the award, and which, at the time the discussion was closed, was unknown to the tribunal and to the party demanding the revision. . . .<sup>23</sup>

In the 1907 Revised Convention, the comparable article, Article 83, introduced the phrase "stipulation to the contrary" in place of "agreement to the contrary." The emendation emphasized the dispositive character of the right of revision; it could be denied the parties and the tribunal only by an express stipulation to that effect. If there was any ambiguity arising from the coexistence of a finality clause<sup>24</sup> and a revision clause, it was settled in favor of revision by this clarification. There is no contradiction between finality and the right of revision for the theory of international arbitral and judicial decision is posited on the concept of limited decisional powers.

It is in the context of that theory that the principle of *res judicata* is to be considered. It is not the fact alone that the *compromis* may provide that the award is binding on the parties which makes it so binding. The view of States that international law makes an arbitration award binding, the circumstance that the tribunal faithfully has adhered to the fundamental principles

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22. *Id.* at 189. Marten's reaction to a similar recommendation by Holls was that there was "danger in so providing." *Id.* at 742.

23. Compare Article 55 with General Treaty of Arbitration between Italy and the Argentine Republic, July 13, 1898, art. 13, 85 MARTENS (1 N.R.G. 2d) 137 (1898). Article 13 provided for revision in the case of false or erroneous documents or for an error of positive or negative fact. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: CONFERENCE OF 1899, *op. cit.* *supra* note 21, at 202.

24. The finality clauses of the 1899 Hague Convention and the 1907 Hague Convention are Articles 54 and 81 respectively. Article 81 provides: "The award duly pronounced and notified to the agent of the parties, settles the dispute definitively and without appeal." (Article 81 is virtually identical to Article 54, the former substituting the word "settles" for "puts an end to" in the latter.) In this regard, the word "duly" is frequently adduced as further support for the existence of revision or nullity or both. The word is not notionally necessary in Articles 54 and 81. If it has a *substantive* reference, there is no doubt that the traditional grounds of nullity are incorporated. If it has only a *procedural* reference, then vitiating effects must arise from defective pronouncement, even if pronouncement refers to no more than the formality of delivering the judgment.

of law governing its proceedings, these are the ultimate sources of the binding authority of an international arbitral award.<sup>25</sup>

In the light of the historical development of the concept of nullity, it is somewhat surprising that a majority of the 1899 committee used the restrictive phrase, "some new fact," in the final formulation of Article 55. It is particularly so if the dynamics of the drafting committee are considered; Holls, a fervent advocate of a broad concept of review, supported Article 55 enthusiastically, though his own draft set forth "substantial errors of fact or law" as a ground for revision. Holls does not appear to have held a minority position on this point. An examination of the verbatim record indicates that the committee was interpreting "new facts" quite broadly and that the term was not confined to *ante-judicial* events. For example, in the twelfth meeting of the commission, Holls, in response to a question, stated that "fraud evidently constitutes a case of nullification and a new fact."<sup>26</sup> No exception was taken to this construction.

It is a commonplace legal phenomenon that ordinary words, through legal usage, become *termini technici* with special legal references which may diverge sharply from the semantic references ordinary to common usage. In this respect, "new facts" covered much the same territory that the omnibus term *excès de pouvoir* covered in the *projet* of the *Institut de Droit International*. Holls' unchallenged explication in the twelfth meeting indicates that "new facts" was not restricted to facts about the case prior to its submission to arbitration. It referred to facts about the case in its broadest, most extensive meaning: facts arising from and by the operation of the tribunal as well as pre-arbitral facts.

In subsequent applications it has been common to import the traditional grounds of nullity in a revision. Thus in the *Orinoco Steamship Company* case before the Permanent Court of Arbitration in 1910,<sup>27</sup> Article 1 of the *compromis* referred explicitly to "the causes which by universal jurisprudence give rise to its nullity. . . ." <sup>28</sup> There is no indication that the parties deemed the language of Article 55 to have attenuated in any way the traditional grounds.

25. *Commentary on the Draft Convention on Arbitral Procedure Adopted by the International Law Commission*, *op. cit. supra* note 7, at 105.

26. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: CONFERENCE OF 1899, *op. cit. supra* note 21, at 753.

27. The *Orinoco Steamship Company* Case (United States v. Venezuela), in SCOTT, HAGUE COURT REPORTS 226 (Perm. Ct. Arb. 1910), 11 U.N. Rep. Int'l Arb. Awards 227 (1910). The first instance of this case is in the *Orinoco Steamship Company* Case (United States v. Venezuela), [1904] Opinions of Comm'rs and Umpire Under the Protocol of February 17, 1903, Between the United States and Venezuela, 9 U.N. Rep. Int'l Arb. Awards 180 (1904).

28. *Orinoco Steamship Company* Case (United States v. Venezuela), SCOTT, HAGUE COURT REPORTS 226, 236 (Perm. Ct. Arb. 1910): 11 U.N. Rep. Int'l Arb. Awards 227, 234 (1910).

### B. *The Statute of the Court*

Article 61, identical in the Statutes of the Permanent Court and the International Court, provides for a revision of judgments.<sup>29</sup> The relevant section of that article reads as follows:

An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The minutes of the 1920 Committee of Jurists indicate that the form and thinking involved in the formulation of Article 61 follow that of the Hague Conventions.<sup>30</sup> In the Third Committee's revision of the draft, the word "new" was deleted from the first paragraph.<sup>31</sup> The deletion was obviously devoid of substantive significance, for the Third Committee added, at the same time, a fourth paragraph to Article 61 which read: "The application for revision must be made at latest within six months of the discovery of the *new fact*." (Emphasis supplied).

Thus, as this brief historical survey indicates, Article 61 of the Statute of the Court represents neither an innovation nor a radical substantive change. It conforms in all substantive matters to the traditional juridical treatment of limited powers and nullity. The traditional grounds were included in the term "new facts" coined by the Hague Conventions and are carried over into the Statute of the Court. If the term "new facts" had any emendative effect, it was extensive rather than restrictive. Review jurisdiction would now include questions of fact, which, it has been contended, are determined with finality by the first instance.

### C. *The Status of Defective Judgments of Cogentive Tribunals*

Until 1899, the concept of a cogentive<sup>32</sup> or permanent tribunal was *de lege ferenda*. After 1899 and particularly after the creation of the Permanent Court of International Justice, there were some grounds for questioning the susceptibility of the decisions of cogentive tri-

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29. Article 61 of the Statute and the provisions in the Rules of Court are found in an appendix at the end of this work.

30. See the Synoptic Table prepared for the Committee in ADVISORY COMMITTEE OF JURISTS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, PROCES VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 91-93 (1920).

31. 1 RECORDS OF FIRST ASSEMBLY OF LEAGUE OF NATIONS, 375 (1920).

32. The extent of durability is only one aspect of institutionalization but since the durability of a tribunal is a factor in the construction of its authority, it is suggested that tribunals be distinguished as *ad hoc*, dispositive (e.g. the Permanent Court of Arbitration) and cogentive (e.g. the PCIJ and the ICJ).

bunals to the traditional causes of nullity. An effective system requires that some decisions be final. In a static sense, an appropriate organ for final decisions is the highest judicial tribunal. But if the judgments of this tribunal are subject to unilateral nullification, the tribunal is transmogrified from a decisional to a hortatory organ. Hence part of the *raison d'être* of a cogentive tribunal would be lost by conceding that its decisions were susceptible to nullity; part of its international judicial character would be lost by denying it. On the one hand, the durability of cogentive tribunals emphasizes their similarity to municipal judicial institutions. The decisions of the latter are not in the strict sense susceptible to nullity. However, incorrect municipal decisions are in no sense immutable, since broad corrective mechanisms operate on the national level. On the other hand, cogentive international tribunals are institutions of limited powers and are required to operate within the ambit of their jurisdiction. To contend that their decisions are not reversible is to render limited powers limitless and to validate any excess of jurisdiction through the mere formality of handing down a judgment.

There are two possible exits from this apparent impasse. One is simply to assume that the traditional grounds for nullity in international jurisprudence apply with full vigor, since the surface similarity between an international cogentive tribunal and a national court in no way infringes upon the limited powers concept under which international tribunals, as such, must labor. The other is to argue that though the traditional grounds for nullity do not apply to international cogentive tribunals, a deviation from the Statute is an act *ultra vires* and hence without legal validity. In effect, both these formulations amount to the same thing; the traditional ground of nullity in international law, *excès de pouvoir*, is no more than an elaboration of the concept of *ultra vires* through several centuries of legal ingenuity.

In application, the principle of *ultra vires* will follow the same course and reach the same result as that of *excès de pouvoir*.<sup>33</sup> Never-

33. The concept of *ultra vires* was devised in the 19th century to designate acts beyond the explicit powers of a corporation. As such, these acts were not automatically unlawful, though an action lay against the parties responsible. There is an obvious parallel here with the international usage of the term *excès de pouvoir*. The difference is that there is no unilateral nullification in the case of an assertion of acts *ultra vires*. Hence there is utility in exploiting its connotations in international law in place of *excès de pouvoir*. Claims of *ultra vires* may be substantively somewhat more restrictive than claims of *excès de pouvoir* if the conclusion of a permanent statute is assumed to *exclude* all the general powers which international law accords dispositively to a tribunal. But this construction would prevent the tribunal from drawing on general norms in unanticipated situations and render the tribunal a highly inflexible instrument.

It is noteworthy that the International Court in the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal Case*, [1954] I.C.J. Rep. 47, used the term *ultra vires* but emphasized that the Tribunal as an international institution partook of the general, implicit powers afforded any international tribunal.

theless, there may be some utility in the use of the former term rather than excess of jurisdiction, since it is not contended that a claim of *ultra vires* can be decided by the unilateral decision of an interested party. Arguably, *excès de pouvoir* is susceptible to unilateral decision under certain circumstances.

The International Court appears to have opted for the second exit. In the *Administrative Tribunal Case*,<sup>34</sup> the Court was asked to determine whether the General Assembly, which had constituted the internal tribunal, was capable of revising or nullifying its awards. The Court stated:

It may be asked whether the General Assembly would in certain exceptional circumstances be legally entitled to refuse to give effect to awards of compensation made by the Administrative Tribunal. The first Question submitted to the Court asks, in fact, whether the General Assembly has the right to refuse to do so "on any grounds". When the Court defined the scope of that Question above, it arrived at the conclusion that *the Question refers only to awards of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence*, and the previous observations of the Court are based upon that ground. If, however, the General Assembly, by inserting the words "on any grounds", intended also to refer to awards made in excess of the Tribunal's competence or to any other defect which might vitiate an award, there would arise a problem which calls for some general observations.<sup>35</sup> (Emphasis supplied).

Thus the Court distinguishes validity through compliance with the constitutional and functional requirements of the Statute of the Tribunal from validity through non-operation of the traditional grounds of nullity. The Court continues:

This problem would not, as has been suggested, raise the question of the nullity of arbitral awards made in the ordinary course of arbitration between States. The present Advisory Opinion deals with a different legal situation. It concerns judgments pronounced by a permanent judicial tribunal established by the General Assembly, functioning under a special statute and within the organized legal system of the United Nations, and dealing exclusively with internal disputes between the members of the staff and the United Nations represented by the Secretary General. In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal in-

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34. Effect of Awards of Compensation made by the U.N. Administrative Tribunal, [1954] I.C.J. Rep. 47.

35. *Id.* at 55.

strument governing it should contain an express provision to that effect.<sup>36</sup>

As subsequent parts of the opinion reveal, the Court sought to avoid a review of the Tribunal's judgments by the Assembly on the traditional grounds of nullity. However, the Court did not go so far as to say that *all* decisions of the Tribunal, which operated under limited powers, were *ipso facto* valid.<sup>37</sup> The Tribunal was required to comply with its constitutive and functional norms and a deviation from those would render its decision invalid. The Court sought to maintain the traditional grounds of nullity as a check on arbitral power, but to attenuate the potential for abuse which they presented. Substantially the same grounds were introduced in a new guise. In the transfer, the right of revision was removed from the General Assembly.

There is, then, no basis for arguing that all awards or decisions of cogentive tribunals, operating under a permanent constitutive instrument which limits their powers, are *eo ipso* valid. There is room only to argue over the proper formulation of the limits. This is a matter of taste and not of substance. In terms of substantive outcomes, there will be no difference between a finding of a deviation from constitutive and functional requirements as set in the statutory instrument and the finding of a traditional ground of nullity. Both an investigation of nullity and an investigation of *ultra vires* begin with the powers granted and denied in the compromissory instrument and then proceed to the dispositive powers accorded by general international law.

The International Court, as any international arbitral tribunal, must render decisions which comport with international law. If its judicial behavior falls under any of the causes of nullity fixed by international jurisprudence, the decision must be revised. A unilateral nullification which is prohibited by international law so long as a revision procedure is available is *absolutely* proscribed by the Statute.<sup>38</sup> The language of Article 61 implies a unilateral and not necessarily bilateral application. The Court's practice in regard to the parallel provisions of Article 60 demonstrate that it has been construed in this manner.<sup>39</sup> Moreover, the Court's important

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36. *Id.* at 55-56.

37. See, in this regard, Judge Winiarski's separate opinion: "An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void . . . . The administrative Tribunal, organized as it is, for important practical reasons, is a permanent tribunal . . . . It does not and cannot constitute an exception to the general rule." *Id.* at 65.

38. Articles 59 and 60 of the Statute posit the finality of a judgment, but Article 60 *fin* and Article 61 provide respectively for interpretation and revision. Hence other procedures may be deemed unauthorized by operation of the *exclusio* canon. For further discussion, see text at fn. 246-48.

39. Article 60 provides for interpretation of the judgment by the Court "in the event of dispute as to the meaning or scope of judgment." The Court acts "upon the request of any party." See Request for Interpretation of the Judgment of November 20, 1950 in the Asylum Case, [1950] I.C.J. Rep. 395.

ruling in the *Corfu Channel* case is authority for the proposition that a consent to jurisdiction for a case is a grant for all aspects of that case.<sup>40</sup> It follows that consent to jurisdiction includes consent to a revision hearing, if the Court deems it proper, as well as to new hearings and a new judgment if the Court should determine factors which vitiate the original decision.

### III. AGENTS OF REVISION OF AN ICJ JUDGMENT

#### A. Revision by a Tribunal

Revision differs from nullity in that it proscribes unilateral denunciation and requires instead that the assertion of a defect vitiating the decision be brought to an impartial organ. There is some dispute among scholars of international law in regard to the appropriate organ of revision.<sup>41</sup> The 1899 and 1907 Hague Conventions required that a revision proceeding be brought, within a fixed time limit, before the original tribunal.<sup>42</sup> Two difficulties may arise in such a case. The tribunal may have dissolved itself as *functus officio*.<sup>43</sup> Assuming that the impugning party is physically and financially capable of reconstituting the tribunal, there is no assurance that the individual arbitrators will see themselves, once again, as a properly constituted tribunal. It is most probable that they will not. In the *Pelletier* claim,<sup>44</sup> between the United States and Haiti, the arbitrator was ap-

40. In the third phase of the *Corfu Channel* Case, [1945] I.C.J. Rep. 244, Albania contested the Court's jurisdiction to assess damages. The Court rejected the argument holding that its finding of jurisdiction in the first phase covered subsequent phases. *Id.* at 248.

41. The 1899 and 1907 Hague Conventions specified the original tribunal as the organ of revision, as has been noted in Part II *supra*. In the League discussion of the Finnish proposal there was some dispute over the proper title for the function proposed for the P.C.I.J. LEAGUE OF NATIONS OFF. J., 10th Ass., Special Supp. No. 76, at 13 (1929). For policy reasons, the word "appeal" was avoided. Yet "revision," it was noted, had come to mean an action before the original tribunal. Article 33 of the Goldschmidt *projet*, on the other hand, permitted *recours* to any of a number of successive instances. 6 REV. DROIT INT'L 448 (1874).

42. Article 55 of the 1899 Hague Convention and Article 83 of the 1907 Revised Hague Convention.

43. The facts effecting a state of *functus officio* are difficult to determine. If, for example, it is argued that a tribunal has an inherent right to correct errors, then it is not *functus officio* until a valid award has been rendered. See Part VII *infra*. The entire concept of *functus officio* requires reexamination. There are some fundamental confusions here between authority and control. On the one hand, there are questions of whether a tribunal *should* retain some legal existence or "half life" after award. However, there are questions regarding the physical possibility or feasibility of reviving a tribunal. Fifty years ago reviving an *ad hoc* tribunal was extremely difficult. Hence the international doctrine of *functus officio* was probably dominated by control considerations. Subsequent improvements in transportation and communication have all but neutralized the control problem. Thus, the current realistic question is one of authoritative policy.

44. *Pelletier and Lazare (United States v. Hayti)*, 2 MOORE, INTERNATIONAL ARBITRATIONS 1749 (1898).

proached after award and shown some subsequently disclosed evidence. He immediately conceded that it was credible and that on the basis of the evidence his award was wholly incorrect, but declared himself incapable of rectifying the error because the tribunal had dissolved.<sup>45</sup>

The second difficulty in bringing revision proceedings before the original tribunal is that it is somewhat incongruous (if not inconsistent with the *nemo iudex* rule<sup>46</sup>) for the same individuals to be called upon to review their own actions for possible errors. Further, if the claim relates to fraud, its presentation to the original tribunal may result either in the impugned arbitrator sitting *in sua causa* or in his disqualification depriving the tribunal of a quorum. Considerations such as these probably account for revision proceedings before the Permanent Court of Arbitration transpiring before new tribunals rather than the original panel.<sup>47</sup>

The constitution of a new tribunal is, of course, within the power of the parties, but it does require mutual agreement. Revision before the original tribunal, assuming it is not *functus officio*, does not require new agreement and hence would accord the losing party an opportunity to sue for revision despite the objection and perhaps abstention of the other litigant. This appears to explain why both the 1899 and 1907 Conventions took pains to accord to the original tribunal a power of revision. If it had not been so stated, the winning party could have invariably frustrated revision applications by not concurring in the establishment of a new tribunal. The first of these two difficulties is of only tangential relevance to the International Court. The Court is a permanent tribunal and hence is not threatened by the general status of *functus officio*. The *nemo iudex* aspect presents a thornier problem. In circumstances other than revision, personnel changes which alter the composition of the Court are not deemed as creating a new tribunal for a particular case.

In the *Anglo-Iranian Oil Co.* case,<sup>48</sup> the *Interhandel* cases<sup>49</sup> and the *United States Nationals in Morocco* case,<sup>50</sup> personnel changes made after the initiation of the case, but before consideration on the merits, required neither a recommencement nor the disqualification

45. *Id.* at 1793, 1801.

46. See Interpretation of the Treaty of Lausanne, P.C.I.J., ser. B, No. 12 (1925); LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 1958. In relation to international arbitration, see FOX & SIMPSON, INTERNATIONAL ARBITRATION 253-54 (1959).

47. See The Orinoco Steamship Co. (United States v. Venezuela), in SCOTT, HAGUE COURT REPORTS 226 (Perm. Ct. Arb. 1910), 11 U.N. Rep. Int'l Arb. Awards 227 (1910) reviewing an award of 1903; The Pious Fund (United States v. Mexico), 9 U.N. Rep. Int'l Arb. Awards 1 (1902), SCOTT, HAGUE COURT REPORTS 1 (Perm. Ct. Arb. 1902) reviewing an award of 1868.

48. [1951] I.C.J. Rep. 89, [1952] I.C.J. Rep. 93, [1951-1952] I.C.J.Y.B. 89.

49. [1957] I.C.J. Rep. 105, [1959] I.C.J. Rep. 6, [1958-1959] I.C.J.Y.B. 108.

50. [1952] I.C.J. Rep. 176, [1952-1953] I.C.J.Y.B. 69.

of the new judges.<sup>51</sup> This practice has developed despite the language of Article 13(3) of the Statute of the Court, the second sentence of which provides that:

The members of the Court shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

The Court has obviously been governed in its interpretation of this provision by the context and specific judicial requirements of each case. Thus, in the *Right of Passage* case,<sup>52</sup> an anticipation of the nature of that case made the Court postpone merits arguments until the new judges were installed.<sup>53</sup> This is consistent with the Minutes of the 1920 Commission of Jurists, which indicate that the framers set only guiding policies and intended to leave the illumination of the Article to the Court.<sup>54</sup>

As to the composition of the Court in considering an application for revision of one of its own judgments, the same general principles—the context and specific judicial requirements of each case—should govern. The optimum composition of a revision tribunal reviewing its own work would be radically different from that of the original panel. Without in any way denigrating the capacity of the individual judges of the International Court for objective appraisal and correction of their own work, it is difficult to ignore the internal motivations and external pressures which would impede any human being in such an endeavor. A greater degree of objectivity would be projected, if not attained, by different judges reviewing a matter in which they had not participated. However, a radically recomposed tribunal may not be feasible. Elections for judges may not take place until several years in the future<sup>55</sup> and the disqualification of the original majority could deplete the Court below its minimum quorum requirements.<sup>56</sup> The facts of the case might not permit registration of the application and postponement of hearings for an extended period—until a new panel could be installed. Therefore, in a situation such as this, the Court as originally composed might deem it the

51. 1 ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 199 (1965). It should be noted that the practice of the Court is inconclusive on the meaning of "case" in the type of provision found in Article 13(3). *Ibid.*

52. [1957] I.C.J. Rep. 125, [1960] I.C.J. Rep. 6, [1957-1958] I.C.J.Y.B. 85.

53. [1958-1959] I.C.J.Y.B. 108.

54. The primary concern of the framers, it seems, was that the League Council and/or Assembly would meet irregularly, in which case the Court could be depleted by termination of incumbency on a fixed date rather than upon instalment of a replacement. See HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 140-41 (1934). See also RULES PERM. CT. INT'L JUST. art. 13, para. 2.

55. The periodicity of turnover is set in STAT. INT'L CT. JUST. art. 13, para. 1, which, as originally planned, fixes a change of one third of the Court's composition every three years. See also *id.* art. 15.

56. *Id.* art. 25, para. 3 sets a nine-man quorum.

lesser of two evils to undertake revision itself. The attitudes of the litigants would be a significant contextual element in such a finding.

### B. *Revision by Political Organs*

#### 1. *The Security Council*

##### a. A "Threat to the Peace"

There is no question that the Council of the League of Nations<sup>57</sup> was competent, or that the Security Council of the United Nations is competent to review, revise or terminate a decision of the International Court of Justice if the existence of such a decision or a complex of facts arising on that decision constitutes a "threat to the peace." Article 39 of the Charter<sup>58</sup> and Article 11 of the Covenant<sup>59</sup> must, by their language, nature and purpose, sustain such a construction. Such an operation—which might be termed political revision *in extremis*—need not invoke defects of any sort in the judicial decision in question.<sup>60</sup> Once such a finding is made, the Council's possible decision to set aside or terminate a Court judgment is based on considerations of exigent maintenance of the peace and not on the traditional jurisprudential causes of nullity. Moreover, in such circumstances, the Council's authority is paramount. The validity of the decision and its possible quality of *res judicata* cannot be raised as a bar to compliance with the Security Council's decision. The interaction of Articles 25 and 103 of the Charter<sup>61</sup> are an unequivocal assertion of the primacy of obligations assumed via membership in

57. The revisory jurisdiction of the Council is discussed here for two reasons. It had an influence on the drafting of Article 94 (2) of the U.N. Charter and hence is of aid in clarifying the latter provision. A comparison sets similarities and divergencies in relief. In a more direct sense, since the General Assembly may be able to exercise the Council's jurisdiction in regard to South West Africa, the meaning of Article 13 (4) of the League Covenant acquires a current legal vitality of its own.

58. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

59. LEAGUE OF NATIONS COVENANT art. 11, para. 1 provides: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council."

60. See Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 21 (1960).

61. U.N. CHARTER art. 25 provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.* art. 103 provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

the United Nations. If it be argued that, under Article 93(1),<sup>62</sup> a judgment of the Court has the same status in the Charter regime as has a Security Council decision, the asserted conflict between decisions of the two organs must be resolved in favor of the Security Council under Article 24(1)<sup>63</sup> of the Charter and the general principle of *lex posterior derogat*. A Council finding, under Article 39, of "threat to the peace" makes its jurisdiction in the matter paramount, since Article 24 of the Charter accords it "primary responsibility for the maintenance of international peace and security"; the Statute of the Court gives the latter no jurisdiction whatsoever in this area. This ground of jurisdiction is, however, contingent on such a finding by the Security Council, which the practice of the Council indicates is not made lightly.<sup>64</sup>

b. *No "Threat to the Peace"*

Can the United Nations (or could the League of Nations before) undertake revision of a judicial or arbitral decision in which the intensity of crisis precipitated by the decision in question is not tantamount to a "threat to the peace"? The superficial interjection that revision, as a judicial function, is a legal question and hence inappropriate for a political organ is no more than a *petitio principii*. The distinctive elements of a political as opposed to a legal question have never been clearly or authoritatively stated. In effect, a given question becomes "political" only after one has decided that it is. This decision, in itself, is of trifling importance. What are relevant are the effects—legal or otherwise—which flow from a determination of "political" or "legal."

The background of the Covenant and of the Charter are extremely instructive in this regard. An article in a draft Covenant composed by Col. House<sup>65</sup> and subsequently adopted *verbatim* by President Wilson as Article 5 of his original draft,<sup>66</sup> provided for the cassation appeal of any arbitral award directly to the *League*:

On the appeal of a party to the dispute the decision of the arbitrators may be set aside by a vote of three fourths of the Delegates, in case the decision of the arbitrators was unanimous,

62. *Id.* art. 93, para. 1 provides: "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."

63. *Id.* art. 24, para. 1 provides: "In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

64. See GOODRICH & HAMBRO, *CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS* 262-72 (2d rev. ed. 1949).

65. 2 MILLER, *THE DRAFTING OF THE COVENANT* 9 (1928).

66. *Id.* at 13. See also *Hearings on the Treaty of Peace with Germany Before the Senate Committee on Foreign Relations*, S. DOC. No. 106, 66th Cong., 1st Sess. 1167 (1919).

or by a vote of two-thirds of the Delegates in case the decision of the arbitrators was not unanimous, but unless thus set aside shall be finally binding and conclusive.

When any decision of arbitrators shall have been thus set aside the dispute shall again be submitted to arbitrators chosen as heretofore provided, none of whom shall, however, have previously acted as arbitrators in the dispute in question, and the decision of the arbitrators rendered in this second arbitration shall be finally binding and conclusive without right of appeal.

This remarkable proposal amounted to a full-fledged "appeal." The House draft provided for an international court,<sup>67</sup> hence provision for an "appeal" to an international judicial instance was quite possible. Article 5 was, apparently, considered seriously. After discussions with the British and French, changes were introduced in the original draft, but Article 5 remained intact.<sup>68</sup> It reappeared in the second printing of Wilson's draft.<sup>69</sup> On January 31, the proposal was deleted as a result of a conference between Wilson and Lord Robert Cecil, the British representative. It was decided that a provision for a permanent court would be substituted.<sup>70</sup> The obvious implication is that the new court's powers would include those in the deleted Wilson provisions.

Article 13(4) of the Covenant dealt with the enforcement of international judicial and arbitral decisions:

The Members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

Hambro has offered what appears to be the only feasible construction of this article in regard to the question of nullity and revision.<sup>71</sup> If, he reasons, international law recognized causes of nullity, the Council would have been obliged to ascertain the validity of the award as a preliminary or jurisdictional matter; if the award proved invalid, there was no basis for the operation of Article 13(4). In short, the obligation to enforce imported, by necessity, a preliminary obligation to determine validity. Any other construction would clash with the traditional theory of *res judicata* in the context of international arbitration. The only possible bar to such a construction is the

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67. 2 MILLER, *op. cit. supra* note 65, at 8.

68. *Hearings on the Treaty of Peace with Germany*, *supra* note 66, at 1216.

69. *Id.* at 1220.

70. See 1 MILLER, *op. cit. supra* note 65, at 67, 73.

71. HAMBRO, *L'EXECUTION DES SENTENCES ARBITRALES* 85-87 (1936).

implied relation between political and legal organs. Thus Déak argues:

[I]t seems extraordinary that the Council of the League, an exclusively political body, should inquire into a strictly legal question such as the jurisdiction of an arbitral tribunal, established by a treaty, with reference to a case already decided. An analogous instance in the United States would be an inquiry by Congress into the jurisdiction of a Federal Court. This, however, is unheard of . . . .<sup>72</sup>

But, of course, the analogy which Déak cites is familiar and quite lawful.<sup>73</sup> Generally, a political body may perform "legal" functions just as a judicial body performs "political" or "administrative" functions. The point is that according to municipal as well as international law doctrines there is nothing inherent in a so-called political function which might prevent it from performing an act generally associated with a judicial organ. Flexibility is required even more in international law in which there is as yet little structural articulation; the alternative to flexibility is frequently that the function will simply not be performed. There is nothing theoretical or institutional barring the Security Council (or its predecessor, the Council of the League) or any other non-judicial organ from reviewing judgments or awards in the proper circumstances.

The Council operated in only one case under the authority of Article 13(4), that of the *Rhodopian Forests* (Bulgaria v. Greece).<sup>74</sup> The case provides little illumination since Bulgaria announced that it would comply with the arbitral decision shortly after Greece put the matter on the agenda. The Council, in the Rumanian-Hungarian Land Dispute, or *Optants* case,<sup>75</sup> exercised a review-enforcement jurisdiction which it had acquired through provisions of the relevant peace treaties<sup>76</sup> and which was substantially the same as that accorded in Article 13(4). Hungarian nationals whose property had been expropriated presented claims to the Hungarian-Rumanian

72. DEAK, *THE HUNGARIAN-RUMANIAN LAND DISPUTE* 106 (1928).

73. For a recent example, see Foreign Assistance Act (Hickenlooper Amendment), 22 U.S.C. § 2370(e) (2) (1964), revising American adjudicative jurisdiction as fixed in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

74. See *Request Submitted to Council by Greece under Article 13, Paragraph 4, of the Covenant*, LEAGUE OF NATIONS OFF. J., 15th Ass. 1477 (1934). A brief history of the case and the merits of the award may be found in 28 AM. J. INT'L L. 760 (1934).

75. LEAGUE OF NATIONS OFF. J., 8th Ass. 1379-1414 (1927).

76. Article 239 of the Treaty of Trianon empowered the Council to appoint deputy arbitrators to the Mixed Arbitral Tribunal in case the two governments concerned failed to reach agreement. Although there is no indication that the drafters examined the review function implicit in the appointment operation, it is clear that an examination of the justifying claims put forward by the defaulting party is a prerequisite to deciding to appoint an arbitrator in lieu of the national panel member.

Mixed Arbitral Tribunal. Rumania demurred to the Tribunal's jurisdiction, but the Tribunal, in the *Kulin* case, upheld its own competence and instructed Rumania to file her answer within a fixed period.<sup>77</sup> Thereupon Rumania announced that she would not accept the decision and withdrew her arbitrator. Both parties turned to the League. Rumania, invoking Article 11(2), claimed that the decision was a nullity through excess of jurisdiction. Hungary, under Article 239 of the Treaty of Trianon, requested that the Council appoint deputy arbitrators to fill the places left vacant by the Rumanians. Without pursuing the detailed and complicated history of this case, it will suffice to note that the Council implicitly accepted the Rumanian argument and did not appoint arbitrators.<sup>78</sup> The result was that the Tribunal was rendered incapable of adjudicating optant disputes; Rumania won her point.<sup>79</sup>

The case indicates that the Council was capable of reviewing arbitral decisions and did not view itself as obliged to enforce them automatically. For obvious reasons, an explicit nullification was not taken, but that was clearly the result sought and achieved. The case also indicates that a final decision was not a necessary prerequisite for Council action; the *Kulin* ruling did not relate to the merits but only to the question of the preliminary standing of Hungarian optants under Article 250(3) of the Treaty of Trianon.<sup>80</sup>

### c. Negative Decisions

The *Kulin* case does not, however, indicate the Council's role in the case of a negative arbitral decision, a decision either to disseize jurisdiction initially (for reasons of defective jurisdiction, inadmissibility or lack of a showing of adequate "legal interest") or a rejection on the merits. The grounds of such a decision, however, are as susceptible to nullification as are those of a positive decision. Indeed, the *Orinoco* case<sup>81</sup> and the *Caracas* arbitrations,<sup>82</sup> were nullified not

77. Emeric Kulin père c. Etat Roumain, 7 Recueil des décisions des Tribunaux Arbitraux Mixtes, 38-162. Tribunal Arbitral Mixte Roumano-Hongrois, Docket No. R. H. 139. For a translation of the full text of the judgment, including the dissenting opinion of the Rumanian arbitrator, see DEAK, *op. cit. supra* note 72, at 181.

78. See *supra* note 75.

79. The texts and correspondence of the ultimate diplomatic resolution of the dispute may be found in 25 AM. J. INT'L L. SUPP. 19-48 (1931).

80. In the history of the nullification of arbitral awards, executive and legislative bodies have played a significant role. The *Pelletier* and *Lazare* awards were nullified by the joint action of the Executive and Congress; the dominant role in the nullification of the *Caracas* case was played by Congress. There has been no criticism of this. In regard to Déak's contention that an essentially legal matter cannot be executed by a political organ it may be noted that in the *Pelletier*, *Lazare*, *Caracas* and *Optant* cases, special jurists commissions were employed, although their conclusions were only hortatory.

81. 11 U.N. Rep. Int'l Arb. Awards 231 (Perm. Ct. Arb. 1910).

82. 2 MOORE, INTERNATIONAL ARBITRATIONS 1659 (1898).

because too much was given or decreed, but rather because too little, and in some claims nothing at all, was decreed. The Council's role in the revision of negative decisions turns ultimately on whether its function was revisional or implementational. If it was primarily implementational, then the competence to revise or nullify must be viewed as a subsidiary power whose operation was contingent on an application for enforcement. If, however, its role was to supervise the effectiveness of international arbitration in general, then revisory and implementatory powers were equal bases of jurisdiction under Article 13(4); claims for revision could properly be brought on both positive and negative awards.

The language of Article 13(4) itself is equivocal on this matter. The Article does not, *expressis verbis*, prohibit revisory jurisdiction for negative arbitral and judicial decisions. Since the revisory power incorporates by implication the international jurisprudence of nullity and since the latter does not distinguish between positive and negative awards, it would appear that without express exclusions a revisory power for negative awards must obtain. Moreover, since Article 5 of the Wilson draft clearly included such a power and since it was, according to the available *travaux*, deemed covered in other articles of the Covenant and hence superfluous in separate form, it would appear that such a power did reside in the League. There are two possible conclusions. First, a revisory power for negative awards was included in Article 13(4). Alternatively, a revisory power inhered in the League, but its proper jurisdictional ground for activation was not Article 13(4). It could have been Article 11(2), the operative article in Rumania's successful nullification of the *Optants* ruling. The precise answer is of more than historical importance. For, assuming that the revision of a case arising on a League mandate cannot be brought to the Security Council under Article 94(2), it may be possible to bring it to the General Assembly *under Article 13(4) of the Covenant*, a question which will be discussed below.

The provision of the United Nations' Charter corresponding to Article 13(4) of the Covenant is Article 94(2) which states:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The Council's capacity to nullify an erroneous judgment—either by specific declaration or by inaction—is more explicit than the Covenant's comparable formulation. The words "may, if it deems necessary" were introduced at a late stage of drafting, with realization, as the record shows, that "this phrase may diminish the authority of the court."<sup>83</sup> While Article 94(2) does not make explicit mention

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83. "Cette phrase risque d'amoindrir l'autorité de la Cour." Doc. No. 982, IV/1/81, 13 U.N. CONF. INT'L ORG. DOCS. 461 (1945).

of a revisionary power for negative decisions, the language of the paragraph clearly allows an initial standing on this ground. If the merits have not been adjudicated and are in dispute, either party may be in genuine doubt as to "the obligations incumbent upon it under a judgment rendered by the Court." This state of mind would appear to permit recourse to the Council under Article 94(2). Although the obvious clarifier should be the Court, it cannot clarify "obligations," if, for example, it has already characterized them as "political" and hence beyond its purview. Once the Council has been seised under Article 94(2), its necessarily implied revisionary powers must come into operation.

d. *Effect of Political Revision on the Court*

It remains to examine the effect of a Council nullification of a negative judgment on the subsequent behavior of the Court. If a decision under Article 94(2) is construed as pertaining to Chapter VII of the Charter, there is no doubt that the Court is obliged to follow the Council's directive.<sup>84</sup> If, however, the contingencies for operation of Article 94(2) do not require or imply a "threat to the peace," then, theoretically, the Court is not obliged to follow the Council's decision.<sup>85</sup>

The extent to which Article 94(2) is contingent on a finding of "threat to the peace" or is a separate form of action is controversial. The origins of the controversy are contemporaneous with the drafting of the article. Three views were put forward. The Chinese position was that "the failure of a party to carry out an arbitral award would affect peace and security."<sup>86</sup> Under this construction, the mere fact of non-compliance was *eo ipso* a threat to the peace. A finding of such a threat by the Council was hence superfluous and measures under Chapter VII could be taken immediately. Moreover, since the Council was fulfilling its function of maintaining the peace, its decisions in regard to the judgment or award in question would bind the Court. The Russian position, as forwarded by Golunsky, was that Article 94(2) expanded the authority of the Council without regard to the question of threat to the peace.

Formerly, the Security Council had jurisdiction only in matters concerned with the maintenance of peace and security. This Article would give the Council authority to deal with matters which might have nothing to do with security.<sup>87</sup>

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84. See *supra* note 58.

85. As has been noted, the organs of the United Nations are coarchical in matters of shared jurisdiction. It is only in matters relating to a threat to the peace that the Security Council (or the General Assembly acting under its secondary responsibility) acquires a paramount jurisdiction binding all other organs as well as all State-members.

86. 17 U.N. CONF. INT'L ORG. DOCS. 97-98 (1945).

87. *Id.* at 97.

In short, Article 94(2) created an independent form of action, not contingent on a finding of threat to the peace under Article 39. The Russian understanding of the provision was reiterated in a doctrinal article afterwards.<sup>88</sup> The American construction of the Article, as presented by Dr. Pasvolsky during the drafting and subsequently by him and by Mr. Green Hackworth to the Senate Committee on Foreign Relations in the course of the ratification procedures,<sup>89</sup> was that the operation of Article 94(2) was wholly contingent on a finding of a threat to the peace. Dr. Pasvolsky went so far as to observe in the drafting committee, that Article 94(2) might be a duplication.<sup>90</sup> Under the American construction, it indeed was. The one instance in which Article 94(2) has been invoked—the interim measures phase of the *Anglo-Iranian Oil Co.* case<sup>91</sup>—provides no illumination of the article.

Each of the proposed constructions of Article 94(2) has important legal consequences in regard to (a) the role of the Council in the revision and implementation of Court judgments and the preliminary conditions for its functioning; (b) the relation between discordant Council and Court decisions; (c) the role of the General Assembly in revision and enforcement of Court decisions. As a matter of policy or of teleological construction of the Article, it seems that the Chinese construction would best serve the interests of the world community. It should be remembered that Article 94(2) was originally proposed by the Cuban delegation at the United Nations Conference on International Organizations to assure that Court decisions would be effectively backed by the capable organs of the United Nations.<sup>92</sup> A construction of non-compliance as *eo ipso* a threat to the peace would permit immediate action to the Security Council, permit General Assembly action if the Security Council proved incapable of functioning and assure conformity by the Court with whatever findings and decisions the Council or the Assembly might ultimately make.

## 2. *The General Assembly*

In regard to the *South West Africa Cases*, the General Assembly may acquire a revisory or implementative power through two channels. The first would be a residual or inherited power from the Council of the League of Nations, under the interpretation developed in the International Court's first advisory opinion in this regard. Briefly

88. Korovin, *The Second World War and International Law*, 40 AM. J. INT'L L. 742 (1946).

89. *Hearings on the Charter of the United Nations Before the Senate Committee on Foreign Relations*, 79th Cong., 1st Sess. 112-13, 157 (1945).

90. 17 U.N. CONF. INT'L ORG. DOCS. 98 (1945).

91. [1951] I.C.J. Rep. 89; U.N. SECURITY COUNCIL OFF. REC. 6th year, 559th meeting 1 (S/PV.559) (1951).

92. WD 41, IV/1/48, 13 U.N. CONF. INT'L ORG. DOCS. 507 (1945); see subsequent emendation, Doc. No. 948, IV/1/61, *id.* at 509.

restated, Article 13(4) of the Covenant gave the Council a revisory and implementative power which would have applied to contentious judgments arising from the jurisdictional clauses in the Mandates. The League Council's powers in regard to the Mandates were transferred in part to the General Assembly. The principle underlying this transfer was to sustain the effective international supervision of the Mandates. The International Court has, in fact, found that a number of the institutional rights deriving from the Mandate for South West Africa have devolved, by operation of law, to the General Assembly.<sup>93</sup> The League system had provided *inter alia* for the rectification of judicial errors as an element of effective supervision. Hence the Assembly must have inherited a revisory and/or implementative power. To argue otherwise is to deny the principle motivating the devolution of powers to the Assembly, for the transfer of powers exclusive of a revisory one would have rendered defective an otherwise effective system. But this is absurd. Therefore, the Assembly must be deemed to have power to revise and implement judgments (and awards, in distinction from Article 94(2) of the Charter) relating to the Mandates.

The second channel by which the General Assembly may acquire a revisory-implementative power over the judgments of the International Court is through the operation of General Assembly Resolution 377A(V), "Uniting for Peace."<sup>94</sup> Under the terms of this resolution, as construed by the International Court, the "secondary responsibility" of the General Assembly for the maintenance of peace becomes operative when the Security Council proves incapable of acquitting itself of its primary responsibility.<sup>95</sup> The outer limits of this contingent power of the Assembly have not as yet been authoritatively fixed. It would appear, however, that it should be co-terminous with that of the Security Council; the resolution was framed in order to sustain powers which the Council was to exercise for the United Nations and which, in a given case, could not be exercised by that body due to certain structural difficulties. But Resolution 377A(V)'s effect on Article 94(2) is contingent upon acceptance of either the American or Chinese construction of the latter Charter provision. "Uniting for Peace" would not appear, on its face, to relate to Security Council activities unrelated to the task of maintenance of the peace.

### *C. Evaluation of the Alternate Agents of Revision*

#### Cumulative responsibility in the performance of certain duties as

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93. International Status of South West Africa, [1950] I.C.J. Rep. 128.

94. U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20, at 10-12 (A/1775) (1950).

95. See A(1) of the Resolution, [1950] U.N.Y.B. 193; U.N. GEN. ASS. OFF. REC. 5th Sess., Plenary 302 (A/PV. 302) (1950). See also Certain Expenses of the United Nations (Article 17(2) of the Charter), [1962] I.C.J. Rep. 151.

well as sequentially conditional responsibilities for performance are not unknown to national systems and are certainly not exceptional in international law. Since the great weakness of contemporary international law is the absence of effective centralized organs, it is obvious why international jurisprudence is so dependent upon cumulative rather than exclusive grants of competence. In cases of cumulative or shared jurisdiction, however, simultaneous seisin is to be avoided. The policies underlying the municipal principle of *lis alibi pendens* are equally applicable to the international sphere. Certain statements in the Security Council in the course of the interim measures phase of the *Anglo-Iranian Oil Co.* case as well as numerous statements made during the pendency of the *South West Africa Cases* indicate a recognition of the principle.<sup>96</sup> The Security Council felt that it was inappropriate to seize jurisdiction of a matter which already lay before the Court.

If there is a threat to the peace involved in a Court decision's aftermath, the revisory jurisdiction of the Security Council is paramount. Assuming that no threat to the peace portends, it would appear that the Court is the appropriate starting point for the initiation of revision. Article 61 of the Statute of the Court, which by operation of Article 92 of the Charter is an integral part of the latter instrument, is the only express statement of a revision procedure. Moreover, within the framework of the jurisprudential theory of nullity, an adjudicative organ is the most appropriate if not the only valid arena of decision. A revision proceeding before the Court would assure competent juridical analysis of the validity *vel* nullity of the July 18th decision. It would also occasion the least long-range damage to the Court; since a number of the potential defects of the decision relate to internal workings of the Court, there may be compelling reasons for avoiding disclosure. If the Court is seised of a revision application, the Security Council and the General Assembly should refrain from entering into the issue in accordance with the general principle of *lis alibi pendens*.

If the Court refuses an application under Article 61 of the Statute or rejects it on the merits, the parties may turn to either the Security Council or the General Assembly. It would appear to be appropriate to turn to the Council first, since the Assembly's jurisdiction in the matter would be perfected on two grounds if the Council either refused or was unable to deal with the case.

#### IV. GROUNDS FOR NULLITY AND REVISION

Traditionally, international law has divided the grounds for nullification into two categories: (1) defects in the tribunal's constitution which impair the authority of its legal existence and hence drain *any*

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96. *But see* Johnson, *Sanctions Against South Africa? The Legal Aspect*, SANCTIONS AGAINST SOUTH AFRICA 62, 77 (Segal ed. 1964).

pronouncements which it purports to make of all legal consequence and (2) defects in the decisional procedures of an otherwise properly constituted tribunal which vitiate part or all of its holdings.<sup>97</sup> The distinction between constitution and application or—as the Statute of the International Court states it—“organization” and “function”<sup>98</sup> is obvious and is reflected in the constitutive instruments of all tribunals. The analytical distinction between the two categories has been blurred somewhat by merging the particular cause of nullity with its effect, the nullification of the judgment or award. It is clear that in the case of *ad hoc* tribunals, the discovery of a serious cause of nullity, whether constitutive or applicational, nullifies the ensuing award and the putative legal existence of the tribunal as a tribunal *pro hac vice*. Such would be the case, for example, were an arbitrator found to be corrupted or were a tribunal to presume to operate with a deficient quorum. On the other hand, a claim of essential error in a specific claim might vitiate that particular award but not undermine the legal existence of the tribunal nor the finality of all other untainted awards.

As to permanent or cogent tribunals, the effect of a vitiating factor, whether constitutive or applicational, is to nullify the judgment but not to terminate the juridical life of the tribunal. Thus, a constitutive defect in the International Court would nullify a decision, but once corrected, would not render the Court incompetent in other matters. Moreover, circumstances may result in a Court which is constitutively insufficient for a particular case or class of cases, but quite competent, in terms of constitutional integrity, to adjudicate all other classes of cases.<sup>99</sup>

Grounds for nullity arising on defective *applications* of an other-

97. The first class of grounds of nullity derives from the concept of an international tribunal as a creature of consent, created by the agreement of the litigating parties. A defect in the consent or a deviation in the constitutive realization of the tribunal from the norms prescribed by the parties results in the legal non-existence of the tribunal. Hence it is possible to classify the first class of grounds, as did de LaPradelle, as those of *inexistence*. de LaPradelle, *L'Excès de pouvoir de l'arbitre*, 2 REV. DROIT INT'L 5 (1928). The term *inexistence* is avoided here because de LaPradelle suggests different remedial techniques for such contingencies which it is believed are not correct or desirable. But see the first ground set out in the Institute de Droit International's project, Institute Droit International, *Projet de règlement pour la procédure arbitrale internationale, adopté par l'Institut*, 7 REV. DROIT INT'L 423, 424 (1875). See also BALASKO, CAUSES DE NULLITE DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC 102-11 (1938); STOYKOVITCH, DE L'AUTORITE DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC 189 (1924).

98. STAT. INT'L CT. JUST. art. 1.

99. See Part V *infra*. The International Court, for example, might have quantitative and qualitative integrity for certain “regional” cases, but be constitutionally incapable of adjudicating inclusive constitutive cases because certain legal systems and forms of civilization as set out in Article 9, STAT. INT'L CT. JUST., and fixed by the General Assembly and the Security Council, are prevented from participating.

wise properly constituted tribunal may be stated normatively or casuistically. The normative formulation confines itself to the technical term *excès de pouvoir* or excess of power or jurisdiction. Since all the powers accorded to a tribunal are limited, such an excess of jurisdiction may occur in any phase of the operation of the international judicial and arbitral process, unless international law specifically excludes it. The casuistic formulation details a varying number of specific causes of nullity, including *excès de pouvoir*; here the term performs an *ejusdem generis* function. There is an inconsistency in this latter usage, since in theory a casuistic formulation should have exhausted the various grounds comprising *excès de pouvoir*. This point was emphasized in Levin Goldschmidt's 1874 draft for the *Institut de Droit International*, in which he detailed eleven grounds of nullity and discarded the term *excès de pouvoir* as an empty husk.<sup>100</sup> The *Institut* rejected this formulation and stated only four grounds of nullity, one of which was *excès de pouvoir*.<sup>101</sup> Goldschmidt commented:

Or, l'article . . . qui remplace le 32 du projet primitif, porte simplement nullité de la sentence *en cas d'excès de pouvoir*. Mais quand y a-t-il excès de pouvoir? C'est ce qui peut être fort douteux.<sup>102</sup>

A detailed study of claims of *excès de pouvoir* would thus require a framework of analysis of the component phases of both the process of concluding a *compromis* (the compromissory process) and the arbitral process. The proper ambit of power for each of these phases would be clarified. The term *excès de pouvoir* could then be specified for particular cases, although the generic concept would continue to animate each of the detailed grounds.<sup>103</sup>

Such a study is beyond the scope and objectives of the present article. It will suffice to present various grounds of nullity which relate directly to the *South West Africa Cases* and to illuminate their

100. Goldschmidt, *Projet de Règlement pour Tribunaux Arbitraux Internationaux*, 6 REV. DROIT INT'L 421, art. 32 at 446 (1874).

101. *Institute Droit International, Projet de règlement pour la procédure arbitrale internationale, adopté par l'Institut*, 7 REV. DROIT INT'L 277, art. 27 at 282 (1875).

102. Goldschmidt, *Observations Supplémentaires Relatives au Règlement pour Tribunaux Internationaux*, 7 REV. DROIT INT'L 423, 424 (1875).

103. The most comprehensive and detailed analysis of the grounds of nullity, though not following this recommended analysis, is found in BALASKO, *op. cit. supra* note 97. See also CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION passim* (1946), which is in effect a detailed analysis of limited arbitral jurisdiction and contingencies of nullification. The International Court has discoursed on the susceptibility of cogent tribunals to nullity in the *Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, [1954] I.C.J. Rep. 47, and on the substantive grounds of nullity in the *Case Concerning the Arbitral Award made by the King of Spain*, Dec. 23, 1906, (*Honduras v. Nicaragua*), [1960] I.C.J. Rep. 192.

position in international law as it bears on the Statute and on the Court's judgment.

### V. CONSTITUTIVE DEFECTS (1)

A fundamental requirement for the validity of a judgment is the proper constitution of the decision organ. In theory, an organ of unqualified competence can perfect itself at any moment by simply changing its normative constitutive requirements in such manner that they accord with its current capacities.<sup>104</sup> In contemporary international law, no such organ exists. Under the doctrine of the sovereignty of states, which is recognized in a constitutive instrument as fundamental as the Charter of the United Nations,<sup>105</sup> an organ acquires a legal existence and decisional competence vis-à-vis states by two means: an explicit grant in a statute, constitution or charter and/or the cumulative and often implicit grant of general international law, whose origin may be either custom or convention.<sup>106</sup>

The initial acquisition of a legal existence and inchoate decisional competence must be distinguished from the question of scope of jurisdiction. The latter presumes the legal existence of a decision organ and seeks to clarify those matters which it has a competence to decide—its jurisdiction *ratione materiae* or *ratione personae*. At least since 1899, there has been little dispute over the right of a tribunal to interpret its jurisdiction.<sup>107</sup> It has, however, never been asserted that a tribunal has an inherent right to perfect its constitution—to create itself either generally or for a specific case *ex nihilo*.

#### A. Peremptory Character of Constitutive Requirements

A defect in constitution has invariably been deemed to nullify all pronouncements emanating from the presumed tribunal. This principle may be traced back to Pufendorf.<sup>108</sup> International case law

104. A parliament, for example, which has evolved over a period of time and does not operate under an express constitution, or a parliament which is, by the most fundamental norms, the sovereign power of a polity is limited under positivistic doctrine only by its own pronouncements. It may change these pronouncements at any time. Hence, if under a prior statute it is constitutionally incapable of certain acts, it may change the *requirements*, thereby rendering itself capable.

105. U.N. CHARTER art. 2, para. 1.

106. "The tribunal accordingly derives its life and vitality from the *compromis*. Respect for its constitutive treaty is its cardinal rule of action. Yet, when it is charged with the decision of a dispute in accordance with the rules of international law, it is more than the mere servant of the parties. It is an international court, drawing from the accumulated precedents of past tribunals . . . ." CARLSTON, *op. cit. supra* note 103, at 64.

107. See 1899 Hague Convention, art. 48. *But see* discussion in Part II *supra*.

108. Pufendorf, *De Modo Litigandi in Libertate Naturali*, DARBY, INTERNATIONAL TRIBUNALS 60-61 (2d ed. 1899).

has consistently followed it. In the *Caracas* arbitration of 1866,<sup>109</sup> one of the national arbitrators was appointed fraudulently and practiced fraud in the course of the tribunal's operation. When the fraud was subsequently discovered, the awards rendered were nullified and a new tribunal was constituted.<sup>110</sup> Since the members of the impugned tribunal had heard a number of cases severally, and since a number of awards had been given by individual members whose integrity was not questioned, the reconstituted tribunal was compelled to decide whether awards which were not affected by the fraudulent arbitrator should be permitted to stand. The tribunal held that *all* awards rendered by the impugned tribunal were null. The presence of a fraudulent arbitrator was a constitutive defect going to the very heart of the purported tribunal's legal existence.<sup>111</sup> In the French-Mexican arbitrations pursuant to the *compromis* of September 25, 1924,<sup>112</sup> the requirement of initial constitutive integrity was applied under different circumstances. There the Mexican member of the panel had removed himself from the proceedings. The president of the tribunal thereupon requested that the Mexican government appoint another arbitrator in his place, but the latter government responded that the tribunal should postpone its deliberations until the original arbitrator could return.<sup>113</sup> The president, probably fearful that the duration of the *compromis* would run out before all claims could be heard, ruled that the two remaining arbitrators could continue to hear claims and based his ruling on the inherent power of a tribunal to interpret its jurisdiction.<sup>114</sup> Subsequently, all the awards rendered by the amended tribunal were nullified and all of the claims reheard.<sup>115</sup> The attempt to perfect constitution as opposed to jurisdiction was not within the power of the tribunal.

The International Court of Justice applied the principle of initial constitutive integrity in the *Peace Treaties* case.<sup>116</sup> In that case, the Court was requested to determine whether the Secretary General of the United Nations, who was empowered by the relevant *compromis* to choose a third member if the parties deadlocked, could appoint an individual in place of a national member on default of one of the parties. The Court ruled, in accordance with the principle of initial constitutive integrity, that the Secretary General could not do this. No tribunal could exist and be subject to the perfecting procedures until the parties had so constituted it.

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109. 2 MOORE, INTERNATIONAL ARBITRATIONS 1659 (1898).

110. *Id.* at 1664.

111. *Id.* at 1670-91.

112. 79 L.N.T.S. 418 (1928); 5 U.N. Rep. Int'l Arb. Awards 313 (1924).

113. 5 U.N. Rep. Int'l Arb. Awards 510-11 (1929).

114. 5 U.N. Rep. Int'l Arb. Awards 512-14 (1929).

115. Convention between France and the United Mexican States, August 2, 1930, art. 1, 5 U.N. Rep. Int'l Arb. Awards 318. See generally CARLSTON, *op. cit. supra* note 103, at 46-47.

116. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, [1950] I.C.J. Rep. 65, 221.

There is much to criticize in this rule. Indeed, the Court in the above cited case indicated its dissatisfaction with the law, though it viewed itself as constrained to apply it. Subsequently, the International Law Commission in its Draft Code on Arbitral Procedure proposed that the International Court be empowered to appoint a national arbitrator in case of default in order to perfect the constitution of the tribunal.<sup>117</sup> The draft was not accepted by the Sixth Committee.<sup>118</sup> Thus, the law remains that a defect in the constitution of a tribunal may not be perfected by the tribunal.

The status of a tribunal such as the International Court of Justice introduces a number of complexities into the consideration of this general principle of law. The Court, in distinction from *ad hoc* tribunals, has been constituted by the community of nations. Under Articles 92 and 93 of the Charter, the Court was created as "the principal judicial organ of the United Nations" and all members of the organization were "*ipso facto* parties to the Statute." In one sense, the Court has a cogentive as opposed to *ad hoc* existence and is legally constituted until it is legally terminated. In a more fundamental sense, however, even the International Court can fail to satisfy the requisite constitutive integrity in particular instances. The most obvious example of such a situation would be a Court which, at the time of submission, *lis pendens* or decision, had suffered personnel depletions through death, illness or disqualifications reducing its judicial complement below the statutory quorum requirement.<sup>119</sup> The Court would not, thereby, cease to exist. It would, however, fail to satisfy requisite constitutive integrity, and if it presumed to adjudicate, its pretended decision would clearly be a nullity.

### B. Repair of a Defect

A defect in the constitution of a bilateral *ad hoc* tribunal may be repaired by agreement between the two parties. This agreement may take the form of renegotiation and an amended *compromis*<sup>120</sup> or it might simply be implied, the conduct of one of the parties amounting to a waiver of his right to challenge the defect.<sup>121</sup> In the

117. International Law Comm'n, *Commentary on the Draft Convention on Arbitral Procedure*, U.N. Doc. No. A/CN.4/92 (1955).

118. [1955] U.N.Y.B. 339, 340.

119. Article 25(3) of the Statute of the I.C.J. provides that nine judges suffice to constitute the Court.

120. See, e.g., BALASKO, *op. cit. supra* note 97 at 106; 1 MERIGNHAC, *TRAITE THEORIQUE ET PRATIQUE DE L'ARBITRAGE INTERNATIONAL* 556 (1905).

121. Should a litigant, who is aware of the defect, refrain from raising it and continue to litigate, such behavior is interpreted as tacit agreement to a constitutive repair. Both parties, assuming knowledge or reasonable opportunity to inform themselves, are estopped from challenging the defect. In accordance with this principle, the International Court, in the *Award of the King of Spain* case, refused to examine the content of the Nicaraguan claim that there were defects in the constitution of the 1907 tribunal. *Arbitral Award made by the King of Spain*, December 23, 1906, [1960]

case of an international tribunal which functions under a permanent, multilateral statute or *compromis*, such bilateral repair of a constitutional defect, be it general or restricted to a specific case, is not possible. A multilateral treaty can be amended only by agreement of all states privy to it, through the normal procedures of negotiation, signature and ratification, unless the treaty itself includes a modified revision or amendment procedure. In the case of the International Court, Article 69 of the Statute provides that amendments will be effected by the procedures applicable to amendments of the Charter. Article 108 of the Charter states that amendments require the vote and ratification of two-thirds of the membership of the General Assembly including all the permanent members of the Security Council. But can two or several litigants before the Court perfect the tribunal's otherwise defective constitution *pro hac vice* and only for themselves, stating in the *compromis* that this repair is neither precedential nor creative of customary international law? The answer is emphatically *no*. Although, according to Article 59 of the Statute, "the decision of the Court has no binding force except between the parties and in respect of that particular case," the reference is clearly only to the operative part of the judgment, the *dispositif*.<sup>122</sup> Article 59 cannot obscure the fact that under Article 38, the Court's function "is to decide in accordance with international law," a law which, by definition, regulates and binds all members of the international community, a *fortiori* States-parties to the Statute and to the explicit obligations in the Charter. While adherence to the Charter and/or Statute constitutes an *a priori* acceptance of the International Court as the "principal judicial organ" and its pronouncements as authoritative statements of international law, this acceptance is conditioned on the constitution and functioning of the Court in harmony with the Statute.

The Court's meticulous concern with constitutive and jurisdictional matters through the years evidences its fine appreciation of its mandate and its restrictions. In one phase of the *Savoy and Gex* case,<sup>123</sup> the Permanent Court was requested, by joint submission, to perform a function which it deemed beyond the perimeters of its formal constitutive power. Had the same submission been brought to an international arbitral tribunal, it is almost certain that the tribunal would have accepted the task as part of its initial or amended constitutive *compromis* and that its interpretation would have been correct. The Permanent Court rejected the request cryptically, viewing

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I.C.J. Rep. 192. The Court noted that Nicaragua, though aware of the defects, had litigated and had not aired the claim of nullity until several years after the award. *Id.* at 213.

122. Any other construction would reach the absurd conclusion that the judicial act of applying a general norm to a specific case would thereafter deny that norm its generality.

123. Case of the Free Zones of Upper Savoy and the District of Gex, P.C.I.J. ser. A, No. 24 (1930).

the impossibility of acceptance as almost self-evident.<sup>124</sup> Although the decision has been criticized, it is clear that the Court was correct in its ruling. Thus, specific litigants may not introduce constitutive changes in the Court by express agreement.<sup>125</sup> What cannot be done by express agreement cannot be done by implied or tacit agreement or by estoppel.

### C. Constitutive Requirements of the Court

Article 1 of the Statute unequivocally distinguishes constitution and function in stating that the Court "shall be constituted and shall function in accordance with the provisions of the present Statute." The fundamental constitutive provisions are found in Chapters 1 and 2 but must, obviously, be construed in the context of the entire instrument and in the light of general international law.

### D. Quantitative and Qualitative Requirements

At the core of constitutive integrity is the personnel complement of an organ. The personnel complement of a tribunal in international law must fulfill two cumulative requirements: a quantitative requirement and a qualitative requirement. The minimum quantitative requirement is, of course, the quorum fixed in the *compromis*. Should the complement fall below this requirement, the tribunal is incapable of functioning. Thus, the withdrawal of the American members at one phase of the *Jay* arbitrations depleted the constitution and prevented the remaining panel members from continuing<sup>126</sup>. The attempt of the Franco-Mexican Commission to continue despite the withdrawal of one member resulted in a vacating of the awards which had been rendered in the interim.<sup>127</sup> The refusal of Hungary, Rumania and Bulgaria to complement the envisaged tribunal was a bar to initial constitutional integrity which the International Court in the *Peace Treaties* case held could not be perfected by general international law.<sup>128</sup> Similarly, the inability of the International Court to muster at least nine judges would be a defect in constitutive integrity.

Qualitative personnel requirements are a more subtle element of constitutive integrity. Rarely, if ever, does an international *compromis* provide that any individual may serve as an arbitrator. In

124. *Id.* No. 24 at 10.

125. It has been argued that the Court is capable of adjudication on an agreed basis i.e. a specific limitation rather than extension of its jurisdiction. While this might be permitted to an arbitral tribunal, it is denied the Court for the reasons presented above. Even a specific limitation, it may be noted, would not affect the operation of the *curia novit* rule.

126. See 1 MOORE, *op. cit. supra* note 109, at 290 (the Bishop Inglis Claim).

127. 5 U.N. Rep. Int'l Arb. Awards 512-14 (1929).

128. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania [1950] I.C.J. Rep. 221.

the *Caracas* arbitrations, the fact that an unintended individual though of the same name as the appointed arbitrator, was installed and functioned was a contributing factor to the nullification of the awards.<sup>129</sup> The *compromis*, as well as general international law, sets up qualitative requirements which may be formulated positively or negatively. Generally, a provision provides for a high level of juridical competence and moral character. Frequently, however, extremely idiosyncratic demands are presented in great detail. Consider, for example, the relevant provisions of the Gamez-Bonilla Treaty of 1894<sup>130</sup> between Honduras and Nicaragua, providing for the delineation of their common border by a joint commission and, in case of the former's deadlock, by an arbitral tribunal. Article III of the Treaty stated that the two national arbitrators would, in concert, choose as third arbitrator a "member of the foreign Diplomatic Corps accredited to Guatemala."<sup>131</sup> Article V stated:

In case the foreign Diplomatic Representative should decline the appointment, another election shall take place. . . . When the membership of the foreign Diplomatic Corps is exhausted, any other foreign or Central American public figure may be elected, by agreement of the Commissions of Honduras and Nicaragua, and should this agreement not be possible, the point or points in controversy shall be submitted to the decision of the Government of Spain and failing this, to that of any South American Government upon which the Foreign Offices of both countries may agree.<sup>132</sup>

From the nature of the dispute and the evidence on which the award was to be based (Spanish colonial documents) and from the express provisions of Articles III and V of the Gamez-Bonilla Treaty, it is clear that the parties wanted a neutral diplomat, hence one not accredited exclusively to either country. Particular idiosyncratic qualities which were sought in the nominee were conversance with the particular situation of Central America, its language and mores; accordingly, a foreign diplomat in Central America, a foreign or Central American public figure (by agreement of the Commission), the government of Spain or that of any South American country, were preferred in that order.

Detailed qualitative requirements are also found in the Lena Goldfields' Concession Agreement of April 30, 1925. Paragraph 90 of the agreement provided that the third "super arbitrator" was to be chosen by both parties in concert; if agreement could not be reached a de-

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129. In at least one instance, the absence of juridical qualifications was cited as a contributing factor of nullity. See H.R. REP. No. 787, 44th Cong., 1st Sess. (1876), dealing with the American Arbitrator in the *Caracas* case.

130. A translation from Spanish of the relevant articles of the Treaty appears in [1960] I.C.J. Rep. 199.

131. *Id.* at 200.

132. *Id.* at 200-01.

tailed procedure was given for the choice of the arbitrator, from a list of six professors of either the Freiburg Mining Academy or of the Royal Technical College of Stockholm.<sup>133</sup> It is clear that there was a dual requirement here: professional expertise as well as a regional origin which indicated either neutrality, disinterest or equivalent degrees of partiality toward both of the parties. These examples indicate the extent to which idiosyncratic qualities may be demanded in a *compromis* and their peremptory character in regard to constitutional integrity.

General international law introduces a number of dispositive as well as cogentive norms in regard to qualitative requirements. Attention is usually concentrated on the demand for impartiality or, stated negatively, freedom from an "interest" in the outcome of the case. This demand, it may be noted, is dispositive; if the litigating parties under a bilateral arbitration agreement know or are reasonably capable of knowing of an arbitrator's interest and still consent to his functioning on the tribunal, that interest, whether operative or not, cannot subsequently be invoked as a ground of nullity. It would appear, however, that parties litigating before a cogentive tribunal operating under a multilateral statute cannot cure a qualitative defect which is proscribed either by that statute or, by implication, by general international law, unless the statute clearly accords them this power. The reasons, as noted above, are the community interest in the decisions of a cogentive tribunal and the universal legal effects which flow from such decisions.

The interpretation of the quantitative and qualitative requirements of the International Court of Justice for constitutive integrity presents a particularly difficult task. Quantitative and qualitative requirements are closely, if not inextricably, intertwined. The 1920 Committee of Jurists was motivated, in its formulation of the provisions, by the principles of efficient tribunal size and adequate representation of different systems of legal thought.<sup>134</sup> The final formulations reflect these principles. Article 2 of the Statute provides for a Court of fifteen members of different nationalities, and Article 9 provides:

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

133. Central Concessions Committee of the U.S.S.R., *Documents Concerning the Competence of the Arbitration Court Set Up in Connection with the Questions Outstanding between the Lena Goldfields Company and the U.S.S.R.* at 44-46 (Moscow 1930), cited in *Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session* at 23, n.19, U.N. Doc. No. A/CN.4/92 (1955).

134. See HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 127 (1934).

The concern for representation of diverse systems is implicit in the origins of institutional international adjudication. In his well-known instructions to the American delegation to the 1907 Hague Peace Conference, Secretary of State Root suggested that "judges should be so selected from the different countries that the different systems of law and the principal languages shall be fairly represented."<sup>135</sup> This injunction was assured by the composition procedures of the Hague Conventions.<sup>136</sup> In the 1920 Committee hearings, there was a strong consensus that this policy be perpetuated. The Committee's report stated that the reference to the main forms of civilization was essential "if the Permanent Court of International Justice is to be a real World Court for the Society of all Nations."<sup>137</sup> The drive to diversity was not based on a desire to secure a spectrum of political sentiments. All judges are required to act impartially.<sup>138</sup> Article 9 was concerned with a representation of all systems in the development and application of world law.<sup>139</sup> The probability of certain disagreements on such a panel was certainly not overlooked by the Committee of Jurists. Yet, as Judge Levi Carneiro said in the *Anglo-Iranian Oil Co.* case, "this is inevitable, and even justified, because in its composition the Court is to be representative of 'the main forms of civilization and of the principal legal systems of the world.'"<sup>140</sup> There is abundant evidence that the desire for diversity is a significant factor in the election of judges.<sup>141</sup> Any effort to construe this as a "political matter" not relevant to the internal administration of the Court must fail in the light of the explicit language of Article 9 of the Statute and its unequivocal legislative history.

The background and application of Articles 2 and 9 indicate their fundamental *constitutive* character in the regime of the Court. Although it is the General Assembly and the Security Council that initially fix the contours of diversity of the Court's complement<sup>142</sup> by determining the civilizations and systems to be represented on the Court, it is the Court itself that must coordinate its panel in specific

135. ADVISORY COMMITTEE OF JURISTS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE, PROCES VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, Annex. No. 2, at 403 [hereinafter cited as 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS].

136. See articles 23 and 44 respectively of the 1899 and 1907 Hague Conventions.

137. HUDSON, *op. cit. supra* note 134, at 136.

138. Article 2 of the Statute of the I.C.J. provides that the Court will be composed of "a body of independent judges."

139. The key concern was not a geographical representation. A proposed amendment which would have introduced this qualification was rejected. 1 RECORDS OF FIRST ASSEMBLY OF LEAGUE OF NATIONS 359 (1920).

140. *Anglo-Iranian Oil Co. case*, [1952] I.C.J. Rep. 161, quoted in 1 ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 168 (1965).

141. See 1 ROSENNE, *op. cit. supra* note 140, at 168-69. Rosenne finds a double criterion for the election—professional qualification and political qualification—and argues that, in case of conflict, the latter should be favored!

142. STAT. INT'L CT. JUST. art. 8.

cases in such a manner that the cumulative constitutive requirements of Articles 2 and 9 are realized. As will be seen, the Statute expressly allows some flexibility in quantitative constitution, but there is no language to support qualitative deviations. It does not necessarily follow that no qualitative variations are permitted. It does, however, indicate that such variations must be evaluated in terms of the entire instrument and the context of the given case.

The minimum quantitative quorum requirement as set out in Article 25(3) is nine judges. Yet the first paragraph of Article 25 states that "the full Court shall sit except when it is expressly provided otherwise in the present Statute." The second paragraph of Article 25 provides that rotations and leaves may not deplete the Court below eleven judges. This article was modeled on Article 14 of the 1907 Revised Hague Convention and was vigorously debated in the 1920 Committee of Jurists. Lord Phillimore succeeded in convincing the members that the Court should always sit *in pleno* so as to "make use of all of its resources."<sup>143</sup> But the concept of plenum was qualified, clearly, by allowance for the impossibility of some judges' appearance.<sup>144</sup> Moreover, Articles 26 to 29 of the Statute envisage chambers of three or more judges for special cases and summary proceedings.

The implications of these interrelated provisions are (1) that a preference is to be had for a plenary Court unless otherwise stipulated and (2) that appropriate attention must be given to the proper diversity of civilization and legal system in any composition. Minor variations on diversity introduced by the Court in its own constitution would not amount to a constitutive defect vitiating its decision. Also, a degree of flexibility must be maintained to provide a Court with constitutive integrity despite the vicissitudes of death, illness, bereavement and disqualification which can deplete the number of judges. However, the effect such an act will have on the qualitative heterogeneity and quantitative complement of the Court must be a factor in a decision to disqualify a judge; the legislative history of Article 24 of the Statute, about which more will be said below, points clearly in this direction. Finally, the nature of particular cases may permit a higher degree of flexibility in heterogeneity. In some cases, depletions affecting the heterogeneity of the Court, though not amounting to a constitutive defect, might be classed as "irregularities" in constitution.

Despite the constitutive character of quantitative and qualitative requirements arising directly from the Statute of the Court, a measure of discretion is accorded the President in certain cases. The power to appoint a chamber of three or more must import permis-

143. 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 169.

144. Articles 16, 17, 18, 23(2), 23(3) and 24 clearly envisage situations in which a judge cannot participate. Article 25(3) sets the quorum at 9 judges.

sion to restrict, or at least amend, the heterogeneity and legal diversity of the Court as constituted by the Assembly and the Council.<sup>145</sup> The principles which govern such an attenuation and, presumably, an attenuation of the heterogeneity of the plenary Court would appear to depend upon the context or *milieu* of the case as well as the institutional character of the Court as a whole.

The Court, as the judicial organ of the United Nations, can never view itself as a private tribunal deciding a matter idiosyncratic to two States. Its pronouncements are international law which, by definition, binds all members of the international community. The most private and unique of cases is a matter of world-wide interest because of the institutional character of the Court. Yet, one can distinguish cases which are *inclusive*, in that their impact in terms of fact and law have direct effect on all states, and cases which are *exclusive*, in that their impact in terms of fact and law are limited to less than the entire community<sup>146</sup>—to two states, a sub-regional grouping, a region, and so on. The demand for heterogeneity in the latter instance would not be as strict as in the former. Thus, for example, the norms in the *Asylum*<sup>147</sup> and *Haya de la Torre*<sup>148</sup> cases were recognized as uniquely Latin-American phenomena. Hence the requirement of heterogeneity, though operative, would not have been as strict.

#### E. *The South West Africa Cases*

The question of qualitative requirements for constitutive integrity bears directly on the *South West Africa Cases*. The Court, as constituted in 1966, had titular judges of fifteen nationalities: Australia, China, France, Greece, Italy, Japan, Mexico, Pakistan, Peru, Poland, Senegal, UAR, USSR, United Kingdom and the United States. In 1962 it had the same grouping except that an Argentinian and a Panamanian held the places subsequently taken by a Pakistani and a Mexican. In both the 1962 and the 1966 decisions, each party availed itself of the right to appoint an *ad hoc* judge.<sup>149</sup>

Although the nationalities represented could equally be described as separate civilizations and legal systems, they can, with no intention of denigrating their individuality, be grouped—in terms of legal system—in both 1962 and 1966 as Common law systems and continental or code systems. In terms of civilizations represented in 1962, there was an extended English group (United States, United Kingdom, Australia), an Hispanic-American group (Mexico, Peru, Pan-

145. It would be impossible to approximate the diversity found on a bench of 15, in a chamber of 3.

146. For development of this distinction see MCDUGAL, LASSWELL & VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 151 ff. (1963).

147. [1950] I.C.J. Rep. 266.

148. [1951] I.C.J. Rep. 71.

149. The Court viewed Ethiopia and Liberia as "several parties in the same interest" under article 31, paragraph 5 of the Statute of the I.C.J.; hence they chose only one *ad hoc* judge jointly.

ama), a continental European group (Greece, Italy, France, Poland, USSR), an African group (Senegal), a Middle Eastern Arab-Islamic group (UAR) and a Far Eastern Asian group (China, Japan). Since this was a diversity within the meaning of Article 9, as determined by the General Assembly and the Security Council, and since all the members participated, there is no question of defective constitutive integrity in the decision of 1962.

In 1964-65, the Council and the Assembly changed the qualitative heterogeneity of the Court by introducing a representative of the civilization of the Indian sub-continent in place of one of the Hispanic-Americans.<sup>150</sup> There is no need to comment on the merits of the reallocation other than to note that a South East Asian system and civilization was deemed by the appropriate authorities to merit representation and to provide a proper balance of systems and civilizations under Article 9.

In the 1966 decision, however, two civilizations were not represented: Judge Badawi died *pendente lite* and his replacement, Judge Amoun of Lebanon, did not participate. Judge Sir Muhammad Zafrullah Khan, who represented the system and civilization of the Indian sub-continent, was disqualified.<sup>151</sup> Thus, through a concatenation of coincidences, two main forms of civilization were not represented in the decision of 1966.

The effect of the coincidental non-compliance with the qualitative requirement of Article 9 turns on the context or *milieu* of the dispute. If the *South West Africa Cases* are classified as matters of exclusive interest—affecting only the immediate litigants—then the coincidental non-compliance with the requirement may be dismissed as, at most, an irregularity. If, however, the cases are classified as matters of inclusive interest, the non-compliance with Article 9 of the Statute may constitute a defect in constitutive integrity.

The *South West Africa Cases* were instances of inclusive concern from any realistic perspective of the relevant facts. Although the matter is treated in detail below, it will suffice to note that the subject was the interpretation of an aspect of the Covenant under which the Mandates were concluded, that the issues involved in the interpretation were constitutional and hence of concern to the entire world community, that the specific language of the relevant mandate indicated its inclusivity, that the matter was intimately linked with questions of human rights which are, by their nature, of universal concern, and that a majority of the General Assembly requested an advisory opinion on the mandate in question on three separate occasions—all are facts demonstrating that the matter is of inclusive concern.

Since the case was of inclusive concern, the fullest demands for

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150. U.N. GEN. ASS. OFF. REC. 18th Sess. (A/PV.1249) (1963).

151. For an examination of the facts and law relevant to disqualification, see Part VI *infra*.

heterogeneity as fixed in Article 9 and in the decisions of the General Assembly and the Security Council, were incumbent on the Court in any variations on its qualitative composition. Because of this, there were compelling reasons to seek to avoid the disqualification of one of the judges, unless such a disqualification was demanded by the language of the Statute. For these reasons, it is submitted that the constitutive integrity of the Court in its decision of July 18, 1966, was deficient.

## VI. CONSTITUTIVE DEFECTS (2)

### A. Disqualification

It is precisely because the personnel complement of a tribunal is a matter of constitutive integrity in qualitative as well as quantitative senses, that the question of judicial disqualification acquires a fundamental importance. Disqualification is a delicate matter. Even a valid disqualification may introduce an irregularity or defect in the constitution of the Court under Article 9, while the alternate decision not to disqualify may detract from the judicial character of the Tribunal. And an incorrect disqualification which prevents the Court from meeting the qualitative requirements of Article 9 (heterogeneity in legal system and form of civilization) or the quantitative requirements of Articles 2 and 25 (1) is no less serious a matter than a Court complement which includes a judge laboring under a disability. Exercising a presumption in favor of the effectiveness of the Court, we may assume that there is a correct answer even in the closest of cases—a judicial solution which permits the tribunal in question to function. Since, then, the matter is one of rational judicial decision and not arbitrary administration, it is appropriate to inquire into the treatment which general international law as well as the Statute and its *travaux* have accorded the problem.

The Statute of the Court does not provide a right of challenge or *récusation* as the institution is known on the Continent.<sup>152</sup> Articles 17 and 24, however, provide for disqualification through internal Court procedures. Article 17, in relevant part, provides:

2. No member may participate in the decision of any case in which he has previously taken part as agent, counsel or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

3. Any doubt on this point shall be settled by the decision of the Court.

152. See ZIVILPROZESSORDNUNG par. 42 (Ger. 39th ed. Beck 1965); RATTEGANGSBALK (Code of Civil Procedure) chap. 4, par. 13(9), in SVERIGES RIKES LAG 1017 (Swed. 86th ed. 1964). See generally, CODE CIVIL tit. 20 (Fr. 62d ed. Dalloz 1966); Bengston v. Federal Republic of Germany, 28 Int'l L. Rep. 549 (1963); Schätzle, *La Récusation d'un Membre d'un Tribunal International*, MELANGES GIDEL 513, 519 (1961).

Article 24 provides:

1. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.
2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.
3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

The copresence of these two apparently redundant, or at least overlapping, sections presents initial construction problems. Hudson seems to suggest that Article 17(2) presents the substantive grounds or "disabilities" while Article 24 outlines the disqualification procedure to be followed.<sup>153</sup> If this is the case, then "special reason" in Article 24 refers generally only to the detailed disabilities in Article 17(2). On the other hand, it has been opined that the "special reason" of Article 24 refers to grounds of possible disqualification other than those enumerated in Article 17(2).<sup>154</sup>

The available *travaux* of these Articles are obscure and apparently incomplete. The forerunner of Article 17 was Article 62 of the 1907 Revised Hague Convention.<sup>155</sup> The generality of the language of Article 17 indicates the difficulties inherent in defining the elements of partiality or impartiality. The 1920 Advisory Committee of Jurists rejected a proposed *procédure de récusation* and the matter was internalized within the Court. The move was a wise one. Some twenty years earlier, Lord Salisbury had remarked:

It would be too individious to specify the various forms of bias by which, in any important controversy between two great powers, the other members of the commonwealth of nations are visibly affected. In the existing conditions of international sentiment each great power could point to nations whose admission to any jury by whom its interest were to be tried it would be bound to challenge; and in a litigation between two great powers the rival challenges would pretty well exhaust the catalogue of the nations from which competent and suitable arbiters could be drawn.<sup>156</sup>

The *travaux* reveal that in a late stage of the drafting, the words "should not" in the first and second paragraphs of Article 24 re-

153. HUDSON, *op. cit. supra* note 134, at 144-45, 149.

154. 1 ROSENNE, *op. cit. supra* note 140, at 196-97.

155. The third paragraph of Article 62 provided that "The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them Members of the Court."

156. Letter from Lord Salisbury to Sir Julian Pauncefote, March 5, 1896, FOREIGN REL. U.S. 222-23 (1896) cited in CARLSTON, THE PROCESS OF INTERNATIONAL ARBITRATION 54 n.1 (1946).

placed the word "cannot".<sup>157</sup> If there is an identity between the "special reason" of Article 24 and the detailed disabilities of Article 17, as Hudson argued, then a conflict develops between the imperative formulation of Article 17 and the subjunctive mood of Article 24. If Articles 17 and 24 refer to different disabilities, then it would appear that a number of contextual factors must enter into a decision to disqualify despite the presence of a "special reason". The framers may have introduced this flexibility for two reasons. Since the capacity to participate impartially is highly subjective and known best, and perhaps only, to the judge in question, the subjunctive as opposed to indicative mood introduces the possibility of the judge convincing the President and/or the Court of his impartiality despite evidence suggesting an objective "reason". It is also possible that the change in wording was introduced in anticipation of possible disqualifications affecting the qualitative or quantitative integrity of the Court; the amended subjunctive mood would then oblige the Court to consider the putative disability in the broader context of the effective functioning of the Court. Whatever the reason behind this change, it must have been purposeful and its significance should be explored.

This internalized process of disqualification may be initiated either by the member in question or by the President. It appears that no other member of the Court may raise the matter.<sup>158</sup> A restrictive interpretation, such as this, would prevent the introduction of mistrust and cameral hostility which might develop if judges—in place of litigants—could undertake reciprocal evaluation of their degree of impartiality.

In the event that the President and the judge in question disagree on either qualification or disqualification, the matter is "settled by the decision of the Court." It is important to note that the President is not competent to make the decision himself. In the 1920 Advisory Committee of Jurists, Baron Descamps stated that "it would indeed be dangerous to allow the president to have the right of deciding whether or not the judge should sit."<sup>159</sup> Ricci-Busatti added that in case of disagreement between the President and the judge in question, "the decision can never be made by the former; it is reserved for the Court."<sup>160</sup>

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157. DOCUMENTS PRESENTED TO THE 1920 ADVISORY COMMITTEE OF JURISTS 129 (P.C.I.J. 1920); 1 RECORDS OF FIRST ASSEMBLY OF LEAGUE OF NATIONS 359 (1920).

158. STAT. PERM. CT. INT'L JUST. art. 24. It is arguable that any Member of the Court may bring to the attention of the President the existence of a disability under Article 17, as a matter of objective fact rather than subjective appreciation required for grounds of disability under Article 24. In the course of the drafting of this Article, De Lapradelle suggested that a party could bring to the attention of the President the existence of a "special reason" but Committee reaction to this suggestion appeared to be equivocal. 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 474.

159. *Id.* at 472.

160. *Id.* at 474.

The English version of the Statute seems to imply a casual procedure of decision by the Court. The French version, however, dispels this impression by its terse statement "la Cour decide," words which, in the context of the Statute, imply full judicial decision.<sup>161</sup> The promulgation of disqualification is made at the outset of the oral arguments in terms so neutral that frequently one cannot tell if it was self-inflicted or imposed by the Court. The revelation following the July 18th decision indicates that this may be little more than a polite convention which may, in fact, conceal disagreement on the matter.

### B. Normative Requirements of a Disqualification Procedure

Since the potential effects of a disqualification are great, it is important that certain normative requirements are followed by the Court in a disqualification procedure when the president and the judge in question disagree. In this regard, two general points would appear incontestable.

First, although a high degree of formality is not necessarily demanded, the Court must follow some adjudicative procedure. For one thing, the International Court is a Court. Moreover, the institution of disqualification or *récusation* is, in the national systems in which it exists, a matter to be initiated and argued by the litigants since they are directly affected by it. Though the Statute removes the matter from the hands of litigants, it does not thereby remove a matter which is eminently justiciable from the sphere of adjudication. The phrase "la Cour decide" in Articles 17 and 24 refers throughout the Statute to the adjudicative mode of decision. Finally, the root importance of constitutive integrity and the potential impacts of a disqualification brings us inexorably to the conclusion that the framers, in delegating the power of the decision over disputes about disqualifications, must have intended that function to be performed judicially. Adjudication is the optimum form of legal decision and the natural decisional mode of the Court.

Second, since neither the Statute nor the Rules indicates the procedure to be followed in a process of disqualification and since the function is a judicial one, the proceedings must comport with the minimum procedural standards set in international law, the so-called "rules of natural justice". These standards are: (1) that the decision be made by a properly constituted and impartial tribunal; (2) that all parties to the dispute are given an opportunity to be heard; (3) that the decision be based on a manifest and reasoned opinion.

161. Thus Dr. Rosenne, after a survey of the background of the Statute and the practice of the Court, submits: "... the word 'decision' (*décision*) appearing in Article 59 of the Statute is identical in meaning with the word 'judgment' (*arrêt*) appearing in Article 60, and refers not merely to the operative clause of the judgment, but to its reasons as well. This is clearly the case as regards the meaning of the word 'judgment' (*sentence*) appearing in Article 63." 2 ROSENNE, *op. cit. supra* note 140, at 627-28.

These norms characterize adjudication; they are peremptory and cannot be ignored in any judicial or quasi-judicial process. Beyond these minimum requirements, the Court is permitted a degree of flexibility but will presumably be guided by international arbitral practice and the general principles common to national systems. Some brief comments on the fundamental rules are in order.

### 1. *The Opportunity to be Heard*

The right to present one's case directly to the seised tribunal is a fundamental element of the judicial process. Among publicists who have written on international arbitral procedure, there is virtual unanimity both on this requirement as well as on the absolute nullification attendant on a failure to honor it.<sup>162</sup> The matter is supported in international case law. In the "Umpire cases" before a U.S.-Colombian Mixed Commission in 1864,<sup>163</sup> claims heard by a previous commission were vacated since one of the parties had been deprived of an opportunity for a hearing. It may be noted that the award was vacated despite the fact that the *compromis* provided expressly that the proceedings would "be final and conclusive with respect to all claims before it."<sup>164</sup> It seems incontrovertible that a disqualification proceeding taken without providing the judge in question with an opportunity of presenting his case to the Court, properly constituted, would nullify the decision to disqualify.

### 2. *Decision by a Properly Constituted and Impartial Tribunal*

A judicial tribunal is a collective social organism which is characterized by joint deliberation and discussion. Litigants do not "lobby" separate judges; they address the Court as a whole. When hearings are terminated, individual judges do not write opinions and then canvass support among their colleagues; judges convene as a judicial body and deliberate collectively. Although only one arbitral code treats the absence of joint deliberation as a ground of nullity,<sup>165</sup> the dynamics of judicial interaction are a factor which cannot be waived. The public interest is not in the views of individuals, but in the views of the Court. It was precisely on this point that the Special Claims Commission under the Convention of September 10, 1923 (U.S.-Mexico) was disrupted. The American commissioner in his dissenting opinion wrote:

Because of ill health, or otherwise, the Presiding Commissioner did not meet in conference with his associates to discuss the case.

162. See CARLSTON, *op. cit. supra* note 156, at 40 n.1, for a listing of nine authorities concurring on this point. The writer is unaware of any dissenting view on this point.

163. *Id.* at 41-42.

164. 1 MALLOY, TREATIES art. 5, at 321 (1910) cited in CARLSTON, *op. cit. supra* note 156, at 41 n.3.

165. See DARBY, INTERNATIONAL TRIBUNALS 240, 248 (1900) (Articles 27 and 57 of the 1894 Code).

Because of continued ill health he went to Cuba where he wrote his final decision, one of the Commissioners being at his home in Mexico and the other in the United States. If there could have been just one conference; if there could have been just one opportunity to present and have answered one question perhaps it would have been unnecessary to write this dissenting opinion.<sup>166</sup>

The U.S.-Mexican General Claims Commission of 1931 was disrupted for the same reason.<sup>167</sup> The Convention of September 10, 1923, under which it operated,<sup>168</sup> expressly called for joint deliberation. The American commissioner stated in his dissenting opinion:

The other two Commissioners have signed the "Decision" in this case. However, no meeting of the Commission was ever called by the Presiding Commissioner to render a decision in the case, and there has never been any compliance with the proper rule . . . .<sup>169</sup>

The requirement of joint deliberation is summarized felicitously by Carlston:

They (the arbitrators) are selected, not as individual arbitrators, but as members of a judicial body. Accordingly, their judgment must be exercised, not in separate solitude, but in joint discussion, debate, and deliberation with one another as a single judicial body.<sup>170</sup>

The general procedures for cameral deliberations of the International Court are set out in Article 30 of the Rules. The implications in the paragraphs of this article are a joint deliberation. On May 6, 1946, the International Court adopted the judicial procedures of the Permanent Court as drafted and adopted by the latter tribunal in 1931.<sup>171</sup> These procedures call for *three joint deliberations* interspersed with private study of the records and relevant documents.

As regards the standard requiring an impartial tribunal, the fol-

166. Special Claims Commission, *United States and Mexico*, 26 AM. J. INT'L L. 172, 188 (1932). Commissioner Perry attributed the sharply diverging view of law and facts in the various opinions to the absence of joint deliberation.

167. CARLSTON, *op. cit. supra* note 156, at 45.

168. *Id.* at 44-45.

169. *United States ex rel. Dickson Car Wheel Co. v. Mexico*, 175, 206 (1931), *United States ex rel. Int'l Fisheries Co. v. Mexico*, 207, 286 (1931), *Opinions of Comm'rs Under the Convention Concluded Sept. 8, 1923, Between the United States and Mexico, Oct. 1930 to July 1931*, 4 U.N. Rep. Int'l Arb. Awards 691, 746 (1951.V.1) (1931) cited in CARLSTON, *op. cit. supra* note 156, at 45.

170. CARLSTON, *op. cit. supra* note 156, at 43.

171. ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, P.C.I.J., Ser. D, No. 1 at 62 (4th ed. 1940); ACTS AND DOCUMENTS CONCERNING THE ORGANIZATION OF THE COURT, I.C.J., Ser. D. No. 1, at 63 (2d ed. 1947).

lowing questions are pertinent: (1) should the tribunal include the impugned judge; (2) should it include the President, whether or not he has initiated the proceedings; (3) should it include the *ad hoc* judges. In regard to the impugned judge, there is a diversity of opinion in the doctrinal literature.<sup>172</sup> In national procedures of *récusation*, the judge in question does not take part in the decision;<sup>173</sup> this appears to be on all fours with the *nemo iudex* principle. In international law, dispute has arisen because the non-participation of one arbitrator may, under the terms of the *compromis*, deplete the quantitative requirement of the tribunal, terminating its constitutive integrity and nullifying the very decision which sought to anticipate and avoid nullity. Thus, Merignhac suggested that an *ad hoc* replacement be appointed for this decision.<sup>174</sup> The International Law Commission, in Article 8 of its Model Rules, states that "the decision shall be taken by the other members of the tribunal."<sup>175</sup> In other words the Commission seeks to inject into general international law a dispositive provision which would be part of the *compromis* unless otherwise provided.

The *nemo iudex* principle would require that a judge not participate in a decision concerning his capacity to sit in a particular case. An exception to the rule would be that non-participation might result in a tribunal incapable of deciding the question of partiality. Since the problem of quantitative depletion does not normally arise in the Court (Article 25(3)), it appears that the *nemo iudex* rule should operate and that the judge in question should not participate in the decision regarding his disability.

The appropriate status of the President presents difficult problems. His non-participation is not prevented by a provision of the Statute. On the contrary, the Vice-President might easily chair the *tribunal de récusation*,<sup>176</sup> just as he would assume the presidency were the President to disqualify himself. The delicacy of the President's position arises from the fact that the Statute makes him both prosecutor of disqualification for one of the parties and the general community,

172. The controversy arises from the requirement in many *compromis* that all judges participate in a decision. Goldschmidt's *projet* stated non-participation as a cause of nullity. Arbitral procedure has sought to construe non-participation as a negative vote, thereby avoiding a challenge of nullity. See WITENBERG, L'ORGANISATION JUDICIAIRE, LA PROCEDURE ET LA SENTENCE INTERNATIONALES 281 (1937).

173. See Bengston v. Federal Republic of Germany, *supra* note 152, at 564, for a survey of national legislation. German law refuses to disqualify if the claim is patently frivolous. Swedish law will not disqualify if the disqualification would incapacitate the tribunal.

174. 1 MERIGNHAC, TRAITE THEORIQUE ET PRATIQUE DE L'ARBITRAGE INTERNATIONAL 556 (1905).

175. COMMENTARY ON THE DRAFT CONVENTION ON ARBITRAL PROCEDURE: ADOPTED BY THE INTERNATIONAL LAW COMMISSION AT ITS FIFTH SESSION, 31 (A/CN.4/92) (1955).

176. RULES INT'L CT. JUST. art. 11.

as well as President of the Court. This *dédoublement fonctionnel* may give rise to conflicts. Presumably, the drafters of Article 24 were cognizant of this possibility. Significantly, they do not suggest in Article 24(3) that the President disqualify himself if he has initiated the disqualification or has disagreed with the self-disqualification of the judge in question. In the opinion of the writer the matter is left to the president's discretion. He may sit unchallenged or disqualify himself, depending on his appreciation of his own predilections.

The appropriate status of *ad hoc* judges in a procedure of *récusation* turns on international law's perspective of the relative partiality or impartiality of this unique judicial status. The institution has been maligned. *Ad hoc* judges have been called "judge-advocates,"<sup>177</sup> yet the Statute makes no distinction as to the treatment of *ad hoc* and regular judges. They are subject to the regular judicial oath set out in Article 5 of the Rules of Court<sup>178</sup> and probably even to the provisions of Article 24. While no *ad hoc* judge has ever been disqualified under the latter Article, the history of international adjudication contains cases of individuals who have been approached and have refused to be installed, presumably because of their perception of a ground for disqualification.<sup>179</sup> Moreover, statistical studies of the aggregate voting patterns of *ad hoc* judges reveal that they have been no more prone to "national bias" than have permanent judges.<sup>180</sup>

How does an individual, appointed by a State as its judge for a particular case, view himself and his obligations toward the appointing state? There appear to be no statements on this point by *ad hoc* judges of the Permanent Court and International Court. However, the statement made by Sir Raeder Bullard, the British arbitrator in the *Buraiimi* arbitration, is in point and is instructive:

I have always regarded my own position as one of complete independence of the British Government and this, I know, is the position which the British Government desired me to occupy. Indeed, I regard it as essential to any system of arbitration that each member of the Arbitration Tribunal should feel completely at liberty to give any decision he thinks right, including one against his own government.<sup>181</sup>

There is evidence in both the Statute and in the Court's practice that *ad hoc* judges in no way fall below the qualities and obligations

177. SIMPSON & FOX, INTERNATIONAL ARBITRATION 88 (1959).

178. Article 5 states that the oath will be taken by "every judge." Note that Article 8 of the Rules provides a different oath for "assessors."

179. President Taft, for example, declined nomination as arbitrator in a case because he felt U.S. nationals might subsequently make similar claims against the defendant. See 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW 83 (1943).

180. See 2 LIACOURAS, THE INTERNATIONAL COURT OF JUSTICE 523 A (1962).

181. The Times (London), Sept. 17, 1955, p. 6, col. 4, cited in SIMPSON & FOX, *op. cit.* *supra* note 177, at 89 n.19.

of permanent judges. The institution of *ad hoc* judge in Article 31 may be no more than a carry-over from international arbitration and evidence the Court's origins and close links with that venerable tradition.

If an *ad hoc* judge is expected to be no less impartial than a regular judge of the Court, as is the opinion of this writer, then there are no bars—in terms of role if not in terms of individual personality—to participation in a *récusation*. If this is the case, then it would follow that provisional appointment of an individual who was not subsequently installed as an *ad hoc* judge *would not* constitute a disability under Article 17 or a “special interest” under Article 24 of the Statute. If, however, the status of an *ad hoc* judge imports *eo ipso* foregone partiality (and, by implication, inchoate but unfulfilled appointment as an *ad hoc* judge constitutes a disability or “special interest”), then *ad hoc* judges may not sit in a proceeding under Article 24 of the Statute.

The Court appears to have opted for the first construction and to have presumed that, for the purposes of decisions under Articles 17 and 24, no defects in impartiality flow from the status of *ad hoc* judge. On March 15, 1965, the Court went into closed session to deal with an application by one of the parties relative to the composition of the Court. On March 18, the Court revealed that it would not accede to the application. The record indicates that both *ad hoc* judges participated in the decision. It also appears that the judge who was the subject of the application did not participate in the decision.<sup>182</sup>

### C. Grounds for Disqualification

Explicit disabilities, which, if present, prohibit a member of the Court from participating in a decision, are given in Article 17(2), quoted earlier. Article 17(3) provides that “doubt on this point shall be settled by the decision of the Court.”

The sweeping character of Article 17(2) and the *ejusdem generis* conclusion have never been applied with full vigor. Dr. Rosenne, in his recent study, notes a number of cases in which prior activities which seemed to fall under Article 17(2) were not treated as disabilities.

None of those judges who participated as members of their national delegations at San Francisco, or even those who were members of the San Francisco Advisory Committee of Jurists, have been disqualified from participating in the cases concerned with the interpretation of the Charter. Judge Sir Arnold McNair, who in 1927 was a member of the Subcommittee of the Committee of Experts for the Progressive Codification of International Law which prepared a report for the Council of the

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182. SOUTH WEST AFRICA CASES—PLEADINGS, ORAL ARGUMENTS AND DOCUMENTS (I.C.J. 1965).

League on the subject of reservations to multilateral conventions, subsequently adopted by the Council, was not disqualified from participating in the *Reservations* case. Judge Klaestad, who had been a member of the Supreme Court of Norway which had decided a case involving Norwegian territorial waters invoked by the parties in the *Fisheries* case, was not barred from taking part in the case. Judges Basdevant and Hackworth were not disqualified from sitting in the *U.S. Nationals in Morocco* case, although they had both been the legal advisers of their Foreign Ministries during part of the period in which the dispute had existed on the diplomatic level.<sup>183</sup>

In the Permanent Court, a disqualification took place because the judge in question had acted as *rappporteur* for the League Council in a matter related to the pending case.<sup>184</sup> In another instance, two members were disqualified because they had been members of a Committee of Jurists of the League which had submitted a report bearing on the matter pending before the Court.<sup>185</sup> There have been a number of instances of disqualification in the International Court. Sir Benegal Rau did not sit in the *Anglo-Iranian Oil Co.* case;<sup>186</sup> prior to his installment he had represented India on the Security Council when the latter was seised of the British application against Iran. Judge Basdevant was disqualified in the *UN Administrative Tribunal Case*;<sup>187</sup> his daughter was President of the latter tribunal. Judge Lauterpacht, who had advised a party in the *Nottebohm* case, did not participate in that phase of the case which arose during his incumbency.<sup>188</sup> Judge Jessup did not participate in *Preah Vihear*.<sup>189</sup>

183. 1 ROSENNE, *op. cit. supra* note 140, at 197.

184. WITENBERG, *op. cit. supra* note 172, at 47.

185. *Id.* at 48.

186. ANGLO-IRANIAN OIL CO. CASE—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 427 (I.C.J. 1952); [1951-1952] I.C.J.Y.B. 89-90. According to the Yearbook, disqualification was incurred under both Articles 17 and 24. It is possible that the Court considered Articles 17 and 24 as setting identical grounds, or providing an overlap or that there were separate reasons and disabilities for the disqualification. In the 1963-64 Yearbook the following statement, appearing identically under Article 17(2) and Article 24, reads: "A Judge who, prior to his election as a member of the Court, had participated in the work of the Security Council as a representative of his country when the Security Council considered a complaint by the United Kingdom concerning the interim measures of protection indicated by the Court, considered it his duty not to sit while the Court dealt with the preliminary objections raised in this case. The Court expressed its agreement." [1963-1964] I.C.J.Y.B. 100-01.

187. UNITED NATIONS ADMINISTRATIVE TRIBUNAL CASE—PLEADINGS, ORAL ARGUMENTS AND DOCUMENTS 281 (I.C.J. 1954); [1963-1964] I.C.J.Y.B. 101-02.

188. [1954-1955] I.C.J.Y.B. 88; [1963-1964] I.C.J.Y.B. 100. Judge Lauterpacht, it may be noted, specifically cited Article 17 in his letter of February 7, 1955 to the Court.

189. [1963-1964] I.C.J.Y.B. 101-02. Judge Jessup in a letter to the Court noted that he had been Counsel for one of the parties in the preparation of the case and specifically cited Article 17(2) of the Statute.

Judge Zafrullah Khan was disqualified in the *Barcelona Traction* case.<sup>190</sup>

The Court's cryptic statements of disqualifications provide some indication of the underlying jurisprudence. A survey of the cases in light of the relevant articles seems to indicate two major categories of disabilities. Article 17(2), with its *ejusdem generis* conclusion, comprises instances in which a judge, in some *official capacity*, has been involved with a case that subsequently comes before the Court. The word *official* is not used in the section; however, the terms "take part in" and the examples which follow as well as the word "capacity" (rendered in the French version as "titre") appear to import an *official* relation. Moreover, the relation must be to that particular "case." The disqualification of Sir Benegal Rau suggests that "case" is not restricted to an appearance before a judicial instance; it would include claims made *on the same facts* to a political organ.<sup>191</sup> (The inclusion of the institution of a commission of inquiry is somewhat equivocal in this regard since, under traditional definitions, it is comprised of both political and judicial elements.) Judge Lauterpacht's disqualification in the second phase of *Nottebohm* and Judge Jessup's disqualification in *Preah Vihear* would seem to indicate that Article 17(2) extends to preparing an opinion for one of the litigants.

A relation would not be deemed disqualificatory if it were related to the law in question but not the facts about to be adjudicated. The law alone would not, for one thing, constitute a "case." If interpreted otherwise, every member of the Court could be disqualified in certain cases. No judge, as was noted, who participated in UNCIO has disqualified himself from an Advisory Opinion relating to the Charter.

This would appear to exhaust the minimum grounds for disabilities under Article 17. It is unlikely that the framers intended a broad construction, which could have been indicated by criteria such as "any relation" or "any contact" with the case. Moreover, it is questionable if a broad construction would serve contemporary needs. Marginal cases, with one possible exception to be discussed immediately, could be entered under the second category of disabilities—arising from "special reasons."

The exception relates to a publicist who has published an article or book on the subject of the case. Since Article 38(1)(d) of the Statute cites such works as "a subsidiary means for the determination of rules of law," it is arguable that the element of *official* relation to the case is fulfilled. Assuming that this is correct, it would follow that a judge who had committed himself to an opinion in a

190. The explanation given by the Yearbook states only that "A Judge informed the President that, in his view, there were reasons for which he ought not to participate in the decision of this case." *Id.* at 101.

191. *Sed quare* if an official relation to another case sharing some facts with the instant case would require disqualification under Article 17(2).

treatise or an article on the pending matter would be subject to disqualification under Article 17(2). This hypothetical construction would turn on whether the article or book in question was related only to a general question of law or was based upon the specific facts of the pending case. In the former instance, no disability would arise; in the latter case, it is not impossible that a ground for disability would lie.

General legal articles, of course, are not framed as memoranda. There has been no study of the genealogy of articles. It seems certain, however, that many specific problems occur to scholars because of concrete cases that arise or appear to be developing. The article deals with the case or, at least, with the facts of the case, though the matter is generalized, perhaps cloaked. In a few instances, the relation to the case will be apparent on the face of the article. In most instances, however, the genealogy of the article will be known with certainty only by the writer. If there is a relation, it might constitute a disability under Article 17, assuming that a doctrinalist, by virtue of his status in Article 38 of the Statute, is considered an official for the purposes of Article 17. Certainly, a strongly held position in an article would *prima facie* constitute a "special reason" under Article 24.<sup>192</sup>

The second possible category of disqualificatory grounds is presented in Article 24 as a "special reason" with no further authentic illumination. Again, the drafting history of this Article, insofar as it is available, is opaque.<sup>193</sup> The only ground mentioned in relation to Article 24 and not occurring in Article 17 was kinship and the primary controversy in the Committee seems to have been the extent to which kinship should be traced.<sup>194</sup> It seems clear that Baron Descamps' demand for an extended understanding of kinship was rejected as was the demand of certain members for an unqualified right of *récusation*.<sup>195</sup> Article 24 in its final form appears to have been a compromise in which unresolvable differences were neutralized in ambiguity. The concept "special reason" which is broader than kinship was balanced by the possible, but not necessary,<sup>196</sup> disqualification attendant on a given "special reason."

The question, then, for the current Court is to what extent grounds other than kinship ought to be considered "special reasons" for purposes of disqualification. An adequate legal definition of partiality is one of the most difficult problems in international law and one

192. South West Africa Cases, 2d phase, PLEADINGS, ORAL ARGUMENTS AND DOCUMENTS 27 (I.C.J. 1965).

193. 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 298, 472, 574.

194. *Id.* at 376. Hudson notes that Article 17 was probably linked in the initial conception to Article 24. HUDSON, *op. cit. supra* note 134, at 149.

195. See HUDSON, *op. cit. supra* note 134, at 167.

196. The change in the Assembly from "cannot" to "should not" introduced the possibility of finding a "special reason" but declining to disqualify for other contextual reasons.

which faces decisional bodies daily.<sup>197</sup> It has been much discussed in the literature on international arbitration. While there is unanimous agreement on the nullifying effect of partiality,<sup>198</sup> there is some divergency on the components of that vice.<sup>199</sup> It is generally conceded that a search into the matter could be endless since innumerable subjective elements contribute toward a predilection in decision.<sup>200</sup> Precisely because circumstantial evidence is so easily adducible here, there is a general demand for a manifest showing of partiality to justify disqualification. Carlston sums up the views of the writers as follows: "partiality of an arbitrator to be a cause of nullity must be fully demonstrable, exercised in bad faith and the source of substantial prejudice to the party."<sup>201</sup> In short, a claim of nullity for reasons of arbitral partiality brought *ex post facto* must indicate both actual partiality, its exercise and its effects.

Preliminary disqualification because of suspicion of partiality may be based on other principles. However, neither Article 24 nor the practice of the Court gives any indication of what these principles may be. The only instance which bears unequivocally on Article 24 is Judge Basdevant's disqualification in the *Administrative Tribunal Case*, which was based on grounds of kinship.<sup>202</sup> The *Home and Thomas Claim* of 1869 was similarly a preliminary disqualification for kinship.<sup>203</sup> If other grounds are to be operative under Article 24, the following considerations would appear to be pertinent guides in decision. (1) The "special reason" should be generally held to be a factor which is incompatible with the judicial function. For example, the fact that a judge is known to have certain views and was elected to the Court because he had these views and the electors installed him because they wished these views to be put into judicial application would not appear to be a disability under Article 24. If an official connection could be established, it might constitute a dis-

197. See LANGROD, *THE INTERNATIONAL CIVIL SERVICE* 74-98 (1963) for a penetrating examination of theory and practice of the impartial third party; BAILEY, *THE SECRETARIAT OF THE UNITED NATIONS* 28-33, 48-52 (1962). See also Report of Secretary General of UN, Permanent Staff Regulations of the UN, General A/1360, at 6 (Sept. 13, 1950).

198. See CARLSTON, *op. cit. supra* note 156, at 55 n.9 for a comprehensive survey of doctrinal opinion.

199. Compare BALASKO, *CAUSES DE NULLITE DE LA SENTENCE ARBITRALE EN DROIT INTERNATIONAL PUBLIC* 119 (1938); Castberg, *L'Excès de pouvoir dans la justice internationale*, 35 *Rec. des Cours* (Neth.) 441 (1931); CARLSTON, *op. cit. supra* note 156, at 54.

200. See Schätzel, *Rechtskraft Und Anfechtung Von Entscheidungen Internationaler Gerichte* 23 (1928), in 6 *FRANKFURTER ABHANDLUNGEN ZUM KREIGSVERRHUTUNGSRECHT*.

201. CARLSTON, *op. cit. supra* note 156, at 53.

202. The disqualification of Sir Benegal Rau, discussed *supra*, note 186, is cited in the Yearbooks as an action under both Articles 17 and 24. Yet the reasons given in the Annuals indicate grounds only for Article 17.

203. 2 LAPRADELLE—POLITIS, *RECUEIL DES ARBITRAGES INTERNATIONAUX* 529 (1957).

ability under Article 17(2). Without such a connection, the holding of views cannot be treated as a "special reason." Any other construction would have the absurd result of forcing candidates aspiring to the Court into a lifetime of silence on issues of public importance. But this would deny them a basic civil right and the community the benefit of their expertise. It would also sever the intended ties between the political appointive organs and the judicial organs. (2) The "special reason" must be manifest. (3) There should be indications that the "special reason" will actually be exercised. The procedural order of Article 24 as well as the subjunctive mood in paragraphs 1 and 2 demonstrate the subjective aspect of "special reasons" and the necessary inquiry by the Court into the actual capacity of the judge in question to render an impartial opinion.

The policy that justice should be manifestly done does not mean that a judicial body must purge its members on the showing of the slightest possibility of an outsider deducing favoritism. A cogent tribunal is created by the entire community and the judges who are installed enjoy the confidence of the community. The Court, in varying its composition for a "special reason," owes an obligation to the community to do this only for the most compelling of reasons. Proper acquittal of this function requires that the Court show courage, confidence in itself and in its own members and faith in its image as a Court. The recent *Bengston* case<sup>204</sup> is a fine example of a tribunal with the fortitude to examine the merits of a number of equivocal connections which were adduced as signs of partiality and to reject them as inadequate grounds for disqualifying a judge. The automatic disqualifications of a querulous tribunal will serve manifest justice no better than will a rigid refusal to disqualify.

#### D. *The South West Africa Cases*

On March 15, 1965, at the opening of the oral pleadings of the *South West Africa Cases*, the President of the International Court announced that Judge Zafrullah Khan would not participate in the decision of the case.<sup>205</sup> No reasons were given. On July 25, 1966, in an interview with the London correspondent of the *Dawn*, Judge Zafrullah Khan was asked if a report appearing in the *New York Times* six days earlier stating that he had disqualified himself, were correct. Judge Zafrullah Khan's answer, as reproduced in a memorandum circulated by the Pakistani Mission to the United Nations on August 1, 1966, was as follows:

I never disqualified myself. There were no grounds for disqualifying me. The President of the Court was of the view that it would be improper for me to sit as I had at one time been

204. *Bengston v. Federal Republic Of Germany*, [1963] Int'l L. Rep. 549.

205. SOUTH WEST AFRICA CASES—PLEADINGS, ORAL ARGUMENTS AND DOCUMENTS (I.C.J. 1965).

nominated judge *ad hoc* by the Applicant States, though I never sat in that capacity. I disagreed entirely with that view and gave the President my reasons which I still consider were good reasons. But he told me that a large majority of the Judges agreed with him that I should not sit. So I had no option.<sup>206</sup>

Unfortunately, Judge Zafrullah Khan's statement alone exhausts the public record of this episode. The record is visibly incomplete, but since it is the record, students of the Court will have no choice but to derive the obvious conclusions, until a more comprehensive version is made available. Several points should be noted. There is no mention of a hearing, which, as has been seen, would appear to be required of the Court, as a judicial organ, in the disqualification of a judge and the alteration of the constitutive form of the Court as determined by the General Assembly and the Security Council. Moreover, there appears to be no indication of a motivated opinion. Finally, there appears to be no indication that the Court, as a collective judicial body, convened and decided, under either Article 17 or Article 24, to disqualify Judge Zafrullah Khan. If all or any of these suppositions are correct, then it would appear that the decision to disqualify Judge Zafrullah Khan was a nullity since it was violative of the three basic procedural standards demanded by judicial decision.

As far as substantive grounds are concerned, the nomination though non-installment of a judge *ad hoc* is, at least arguably, not included in the terms of Article 17. At least two questions arise: First, is a judge *ad hoc* under the Statute of the Court viewed as *ipso facto* partial to his appointer? As was noted earlier, the Statute makes no distinctions between the partiality-proneness of titular and *ad hoc* judges. A comparison of the voting records of titular and *ad hoc* judges gives no evidence that the latter have betrayed the Statute's trust. Second, at what point does a nominee or pre-nominee begin to be considered an *ad hoc* judge for the purposes of Article 17? The obvious point in time for initiation of the status would be the oath-taking ceremony which officially installs the *ad hoc* judge.<sup>207</sup>

Although Judge Zafrullah Khan's statement mentions only his nomination as judge *ad hoc* as the cause for his disqualification, certain other matters of substantive import remain to be considered. As President of the 17th General Assembly, Sir Zafrullah Khan presided over the debate on South Africa, a regular feature of the As-

206. At first, Ethiopia and Liberia had chosen the Honorable J. Chesson, then Sir Muhammad Zafrullah Khan, then Sir Adetokunboh A. Ademola and finally Sir Louis Mbanefo.

207. Digest of Decisions, [1963-1964] I.C.J.Y.B. 103-04. "Judges *ad hoc* make their solemn declarations at the beginning of the first hearing in the case for which they have been chosen." *Id.* at 104. "Judges *ad hoc* make a solemn declaration for each new case they hear, even if they have already sat upon the bench in a previous case." *Id.* at 103.

sembly.<sup>208</sup> In the light of three advisory opinions of the Court,<sup>209</sup> such a discussion was clearly within the competence of the General Assembly. There can be little doubt of the fact that Sir Zafrullah Khan's presence in the debate does not constitute a disability under Article 17. The disqualification of Sir Benegal Rau in the *Anglo-Iranian Oil Co. Case* (Preliminary Objections) is not in point.<sup>210</sup> First, the Assembly, as a purely political organ, could not be categorized as a commission of enquiry, which partakes of political and judicial elements. Furthermore, the discussion in the Assembly is not *in pari materia* with a discussion in the Security Council, for, other things being equal, only the latter is a decision organ of binding competence<sup>211</sup> capable of being seized of a "case." Even in its most extensive meaning, "case" must be a complex of events of which a *decision organ* is seized. To extend the reference beyond this would drain the concept of official decision of all meaning and, moreover, impose a ban of silence on all international lawyers who wished to discuss a "case" under the most private conditions.

On the other hand, one may argue that explicit views which have a direct bearing on the case before a judicial instance constitute a "special reason" under Article 24. But this construction, though valid on its face, cannot apply when the views derive from a widely held consensus of what the law is. In the instant case, the views were based on a complex of human rights instruments and International Court opinions. The implication is that Sir Muhammad Zafrullah Khan, as an international lawyer, should have ignored *droit reçu* in an arena in which it was the major concern. But this puts the international lawyer who strives for impartiality in an impossible position. Finally, the General Assembly and the Security Council, who elected Judge Zafrullah Khan to the international bench after he had stated his views and at the moment when the merits phase of the *South West Africa Cases* was pending, were clearly aware of his predilections. We may assume that they chose him either because he held those views or because those views were deemed irrelevant. It seems inconceivable that the Assembly, which has always been concerned with South West Africa and has, itself, initiated three advisory opinions to the Court, would have chosen a judge for the pinnacle case who they believed would be disqualified. Few lawyers deny the impact of political and social views held by a judge on his opinions.

208. It should be noted for the purposes of Article 17 that the debate was about apartheid in South Africa, which was a substantially different question or case from that of South West Africa. Furthermore, the Indian-Pakistani initiative against the effects of apartheid on its nationals, which was not adjudicated, again related to South Africa and not South West Africa. Hence these political discussions do not constitute a "case" within the meaning of Article 17 of the Statute.

209. International status of South West Africa, [1950] I.C.J. Rep. 128; [1955] I.C.J. Rep. 67; [1956] I.C.J. Rep. 23.

210. See *supra* note 186.

211. U.N. CHARTER, ch. 4.

Where the judiciary is appointed by political organs and where judicial organs share with the legislature the task of implementing broad constitutional principles for the community, judges are chosen precisely because of their political views and predilections. The practice has never been challenged. Indeed, to challenge it is to challenge the very function and operation of constitutional law. To consider such views "special reasons" for disqualification would empty the bench and extinguish the constitutional role of the highest courts.

#### E. *Conclusions and Revision Procedures*

The foregoing discussion has shown, as a matter of law, that the power given to the International Court to introduce changes in its constitutional form is limited by both the Statute and general international law and that a change made by improper procedures or by the application of the wrong substantive criteria of decision renders the ensuing judgment subject to nullification. The fact that the Court is required to treat these matters in camera is, in no sense, a *carte blanche* invitation to diverge from general rules—conventional and customary—and general principles of international law.

The facts are visibly incomplete. Yet, there are, at the very least, grounds for suspecting that excesses of jurisdiction, essential errors and mistakes of law and fact attended the constitutive decisions. There is no ground whatsoever for asserting fraud. The personal integrity of the President of the Court as of all the judges is beyond question. Mistakes, if there are any, can be traced to errors in good faith and to the caprice of circumstances. Whatever their origin, the effect of such mistakes may be to vitiate the judgment.

Obviously, the suspicion of errors in constitution can be expected to activate the litigants. It should be emphasized that the Court has an interest, as great, if not greater, in dispelling any doubt on this point. Judge Fitzmaurice's classic statement of the Court's obligation to protect the judicial function, made in the *Northern Cameroons* case, is equally applicable here.<sup>212</sup> The efficacious performance of this function will depend, in great measure, on the image of the Court as a judicial institution manifestly meting out justice. Uncertainties in regard to that image have come into being and they must be dispelled as quickly as possible.

Due to the cameral nature of the Court's supervisory and regulatory powers in regard to its constitution, the Court may understandably be reluctant to indulge in a public hearing under Article 61 of the Statute, even though such a hearing would constitute the optimum method of dispelling any doubts. In the aggregate practice of the two Courts over almost fifty years, it is probable that an internal "case law" illuminating the relevant articles has been generated.

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212. Case Concerning The Northern Cameroons, [1963] I.C.J. Rep. 15, 102. See also the dissenting opinion of Judge Lauterpacht in *Interhandel*, [1959] I.C.J. Rep. 104: "The Court is the guardian of its Statute."

Open hearings would require a disclosure of these matters. Two alternate procedures present themselves. On an application for revision, deriving from improper constitution, the Court may, under Article 61, determine the existence of a "new fact" without appearance of the parties, as a purely internal matter. Though such a procedure would be somewhat unorthodox, it would appear to be acceptable in the unique context of the present case. A more preferable alternative would be a closed hearing in which the parties participate. The registry would make available the relevant internal documents on the understanding that they were to be treated as confidential and returned at the close of the proceedings. A public-motivated opinion would, of course, be given.

## VII. *EXCESS OF JURISDICTION* (1)

An excess of arbitral jurisdiction is committed, in its most elemental form, by a clear deviation from the terms of the *compromis* or constitutive statute of the tribunal. The tribunal's power is that which is given in the *compromis*; its decisional actions, in order to be valid, must be exercises of that power. A decision is vitiated by nullity when the tribunal purports to decide by exercise of powers not accorded it in the *compromis* or when it purports to decide in a manner deviating from a peremptory norm of its constitutive regime. The latter class of excesses may be conveniently distinguished as arbitral misfeasances, malfeasances and nonfeasances. In each of these latter excesses, the nullifying defect relates to a manifestly improper application of an element of the *compromis* and not to an action which cannot be related to a power in the tribunal's constitutive document.<sup>213</sup> In the former class of excess, the mere fact that a power not expressly given in the *compromis* is exercised does not automatically lead to nullity. The review authority is obliged to determine whether general international law accords the tribunal a dispositive power.

### A. *The Effect of Res Judicata*

One of the most perplexing features of the judgment of July 18, 1966, is the apparent conflict between this decision and the Court's 1962 decision on preliminary objections.<sup>214</sup> In 1962, in response to the preliminary objections of the Government of South Africa, the Court upheld its jurisdiction and the case proceeded to the merits phase.<sup>215</sup> In 1966, the majority opinion held that although the Court had jurisdiction, the parties were not entitled to a decision on the

213. See AUDRY, *LA REVISION DE LA SENTENCE ARBITRALE* 76 (1914); Hertz, *Essai sur le Probleme de la Nullité*, 20 REV. DROIT INT'L (3<sup>e</sup> ser.) 450, 465 (1939).

214. South West Africa Cases, (Preliminary Objections), [1962] I.C.J. Rep. 319.

215. *Id.* at 346-47.

merits because they did not have an adequate "legal interest" in the case. Although the Court sought to demonstrate that its 1966 holding was in no way inconsistent with its prior holding in 1962 (the merits of which demonstration will be examined below), a number of contradictions lie on the face of the Judgment. In the first place, the Court's construction of the requisite legal interest is so narrow that, as becomes clear in paragraph 97 of the Judgment, no State can acquire "interest", *even under an optional clause declaration*, in a case relating to the conduct provisions of the Mandate. This holding makes the Mandate provision pointless and renders the 1962 Judgment an absurdity; the Court has jurisdiction to hear the merits but no state has standing to raise questions relating to the merits. In the second place, although the requirement of a showing of legal interest is an element of adjudicative jurisdiction, one cannot find a single example in the history of international adjudication of a case in which a Court or tribunal, after finding jurisdiction, *proprio motu* raised legal interest questions.<sup>216</sup>

International res judicata and the general question of the extent to which an international tribunal operating under a cogentive statute is bound by its own rulings present difficult and delicate problems. Obviously, a degree of flexibility must be maintained. Events may change rapidly. A rigid doctrine of res judicata can paralyze a tribunal and prevent it from responding appropriately to new circumstances. Yet the flexibility must operate within the set limits of the judicial prerogative. The popular interpretation of the Judgment of July 18th in this regard has injured the overall image of the Court as an institution of justice. According to the popular view, seven members of a plenary court of seventeen, whose views had been rejected by the majority of the Court in the preceding phase of decision, suddenly found themselves a functional majority due to the vicissitudes of death, illness and disqualification. Rather than accept the prior decision of the Court, they exploited their opportunity, ignored the majority view and imposed on the world community a minority view which had been explicitly rejected.<sup>217</sup> The very fact that such an image is rampant requires a clarification of the nature of international res judicata insofar as it bears on the *South West Africa Cases*.

The traditional theory of res judicata is that a matter which has

216. Entitling a decision "Second Phase" is not unique in International Court practice. In the *Nottebohm Case*, [1955] I.C.J. Rep. 4, what was apparently a jurisdictional question was argued in a second phase successfully. *But see* the dissenting opinion of Judge Guggenheim. However, in that case, both parties joined issues on the point in question and it became a key aspect of the pleadings. Compare, however, South Africa's final submission in the instant case.

217. See N.Y. Times, July 19, 1966, p. 16, col. 4; see also Pakistani Memorandum reproducing remarks of Judge Zafrullah Khan, circulated in the United Nations on August 1, 1966.

been litigated and validly decided may not be re-litigated, barring some statutory provision for revisions, *recours*, appeal, etc. *Res judicata* operates only if there is identity between the parties to the suit, the cause of action, and the sought object of the dispute. As Judge Anzilotti described it in the interpretation phase of the *Factory at Chorzow* case: "*persona, petitum, causa petendi*."<sup>218</sup> The major *extrinsic* condition for *res judicata*, assuming the three *intrinsic* elements are present, is the validity of the judgment. In the *Administrative Tribunal* case,<sup>219</sup> the Court clearly enunciated the requirement of validity by construing the question put to it by the General Assembly as referring "only to awards of compensation made by the Administrative Tribunal, *properly constituted and acting within the limits of its statutory competence*. . . ." (Emphasis supplied).<sup>220</sup> The Court held that these desiderata of validity were demanded even if the Assembly, in framing the Tribunal's statute, intended to exclude the operation of the traditional grounds of nullity in international law. *Res judicata*, it may be added, is a "general principle of law" in the meaning of Article 38(1) (c) of the Statute and was expressly cited in this regard by the Committee of Jurists.<sup>221</sup> Hence, unless the Statute otherwise so provides or implicitly requires, the principle of *res judicata* is an element of the Court's legal regime by operation of Article 38 in addition to any other statutory provisions made for it.

Article 59 of the Statute provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case."

Article 60 states: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party."

Article 61, which has been discussed earlier, provides for the revision of a judgment upon the discovery of new facts and sets out the procedures to be followed in such an application.

### B. *Effect on the Parties and on the Tribunal*

The initial question arising in regard to this complex of provisions is whether a decision binding on the parties under Article 59 (subject to the contingencies set out in Article 61) is equally binding on the Court. Four reasons why it is so binding may be adduced. First, if Article 59 or Article 38(1) (c), or both, incorporate the general concept of *res judicata*, such concept is, as a general principle of

218. Interpretation of Judgments Nos. 7 and 8 (*Factory at Chorzow*), P.C.I.J., ser. A, No. 13, at 23 (1927).

219. Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13, 1954, [1954] I.C.J. Rep. 47.

220. *Id.* at 55.

221. 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 335 (Lord Phillimore).

law, binding on the Court as well as other parties. Second, since the Court's pronouncements are, under Article 38(1) "international law" and since, under the same Article, the Court is enjoined to "decide in accordance with international law," the Court is bound, with or without an explicit obligation deriving from Article 59, to respect its own judgments as *res judicata*. Third, since Article 61 provides for a revision by fixed procedures, the *exclusio* principle would prevent the Court from lawfully revising a prior judgment other than through the prescribed procedures of Article 61. Fourth, the legislative history of Article 59 reveals quite clearly that the provision was introduced by the Council in order to permit states to protest not against particular decisions but rather "against any ulterior conclusions to which that decision may seem to point." It is worth adding that Lord Cecil's proposal for Court decisions to be "binding precedents . . . for itself," though not accepted, does not relate to the question of the *res judicata* quality of a particular case but rather to the precedential value of the rules clarified and applied for future cases.<sup>222</sup>

### C. *Provisional and Final Decisions*

Under what conditions may the Court properly view decisions in previous phases of a case as provisional, and hence not *res judicata* and not preclusive of a reconsideration without recourse to the procedures of Article 61? The Statute mentions only one instance and, since it expressly resorts to the word "provisional," there is some ground for arguing that it excludes provisionality from other decisions expressly dealt with in that instrument. Article 41 provides:

1. The Court shall have the power to indicate, if it considers that circumstances so require, *any provisional measures* which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council. (Emphasis supplied).

The Court has held that although some evidence of a *prima facie* case is necessary before interim measures will be indicated, such tentative findings are in no way preclusive of a reconsideration in subsequent phases.<sup>223</sup>

Article 62 of the Rules of Court concerns preliminary objections. The decisional function of the Court in regard to a preliminary objection is described in the English version as "to give a decision"

222. 1 MILLER, *THE DRAFTING OF THE COVENANT* 62 (1928); see HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 176 (1934).

223. *Anglo-Iranian Oil Co. Case (Interim Measures of Protection)*, [1951] I.C.J. Rep. 89.

and in the French version as "statuer"; both terms throughout the Statute and the Rules refer to the plenary decisional actions of the Court.<sup>224</sup> Paragraph 5, however, permits the Court to join the objection to the merits.<sup>225</sup> A decision to join preliminary objections to the merits may be described in two ways: it is either no decision on jurisdictional objections whatsoever, but merely a deferral of the matter until more evidence (which happens to be part of the merits) is adduced, or it is a provisional finding of jurisdiction subject to reconsideration on the merits. If described in the latter terms, it may be said that the Court can revise its provisional holding of jurisdiction without recourse to Article 61. Such action, however, requires the express reservation of the Court through joinder to the merits. There is no mention in the Statute and the Rules of any other revisional proceeding bypassing Article 61.

It is arguable that a submission of new claims regarding jurisdiction may, in effect, enjoin the Court to overturn a prior ruling on jurisdiction. Some hint to this effect may be found in the Permanent Court's ruling in a phase of the *German Interests in Polish Upper Silesia* case.<sup>226</sup> Having found jurisdiction, the Court refused to consider subsequent claims touching on jurisdiction because of improper formulation.<sup>227</sup> The most cautious construction of this case is that it throws no light on the matter, since the Court never examined the subsequent admissibility of a jurisdictional claim. On the other hand, in the assessment phase of the *Corfu Channel* case,<sup>228</sup> Albania contended that the Court's prior finding of jurisdiction did not extend to post-merits assessment. The Court stated:

[T]he Albanian Government disputed the jurisdiction of the Court with regard to the assessment of damages. The Court may confine itself to stating that this jurisdiction was established by its Judgment of April 9th, 1949, that, in accordance with the Statute (Article 60), which, for the settlement of the present dispute, is binding upon the Albanian Government, that Judgment is final and without appeal, and that therefore the matter is *res judicata*.<sup>229</sup>

In *Nottebohm*,<sup>230</sup> the Court entertained what amounted to preliminary objections in the second phase of the case and in fact acceded to them.

224. See 2 ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 627 (1965).

225. Article 62(5) of the Rules: "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. . . ."

226. Case Concerning Certain German Interests in Polish Upper Silesia, P.C.I.J., ser. A, No. 6, at 21 (1925).

227. Case Concerning Certain German Interest in Polish Upper Silesia (The Merits), P.C.I.J., ser. A, No. 7, at 34-35 (1926).

228. The *Corfu Channel* Case, [1949] I.C.J. Rep. 244.

229. *Id.* at 248.

230. *Nottebohm* Case, [1955] I.C.J. Rep. 4.

These objections were new, however.<sup>231</sup> It would appear to follow that parties can reserve for themselves the right to bring *new* claims of defective jurisdiction after the preliminary ruling. Since the law generally frowns on "wait and see" tactics in litigation, the Court could reject the claims if it felt that they could quite easily have been brought in the first phase. The Court could base itself either on Article 59 or on the general principle of prorogued jurisdiction. On the other hand, the Court could entertain the claims if it felt that it would have been inconvenient or impossible to bring them earlier or that they were genuinely an integral part of the merits.<sup>232</sup> In regard to the *South West Africa Cases*, this discussion is purely theoretical, since the respondent neither adduced new facts nor brought different claims relating to jurisdiction in the second phase.<sup>233</sup>

#### D. *Initiation of Procedures*

Article 61 does not specify who may initiate the revisory procedure. It is obvious, and apparent from that Article's heritage in Article 55 of the 1899 Hague Convention, that either of the parties to the case may initiate a revision procedure. Article 61 does not appear to permit the Court itself to initiate a revision. Express mention is made of an "application" as the means of initiating the procedure. Article 61(2) states:

The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision *and declaring the application admissible on this ground*. (Emphasis supplied).

The relevant provisions in the Rules do not indicate that the Court can initiate revision.<sup>234</sup>

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231. They were also jointly at issue. It is worth adding that *Nottebohm* is susceptible to the same substantive criticism as the decision of July 18th; the protection of human rights might have justified moving directly to the merits.

232. But see SHIHATA, *THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION* 76 (1965) for the cautious practice now followed by litigants.

233. For an investigation of the merits of the four "new facts" brought by South Africa, see the dissenting opinion of Judge Jessup. It is interesting to note that the majority opinion does not refer to these adduced facts.

234. It has been asserted that tribunals enjoy an inherent power to rectify errors even though this involves overturning a *res judicata*. There is some language to that effect in the *Administrative Tribunal* case, though it is not unequivocal. "This rule contained in Article 10, paragraph 2, cannot however be considered as excluding the Tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered; and the Tribunal has already exercised this power." [1954] I.C.J. Rep. at 55. In the context of the surrounding paragraphs, the Court, it is seen, was distinguishing between self-revision and revision

The Statute's limitations on an inherent revisory power appears to be extremely wise policy. The framers of the Statute were well aware of the incremental effect the case law of the Court would have on international law. Judicial "second thoughts" on issues, implicit revisions through qualifications, and "illuminations" on past decisions, might have confused a relatively clear flow of prescriptions. The result would have been to confuse States who sought to derive from the holdings of the Court clear guides to the normative requirements imposed upon them by international law. The Statute permits a revision but it seeks to protect the clarity of the law by demanding that such revision be explicit, be open to the parties affected by the change, and follow adjudicative procedures.

### E. *The South West Africa Cases*

The question in regard to the *South West Africa Cases*, then, is whether the 1962 decision rejecting the jurisdictional objections of South Africa related only to the Court's jurisdiction or also related to the "legal interest" objections put forward by the respondent. Since the 1962 decision makes no mention of a joinder and does not characterize itself as "provisional," the validity of the majority opinion of 1966 turns on whether the matter was adjudicated in 1962. This is a question of fact which is determined by an examination of the 1962 decision.<sup>235</sup> It is submitted that, should the facts of the 1962 decision be equivocal, a presumption of *res judicata* on the question of "legal interest" should operate for the following reasons. Both litigants in the course of the proceedings operated on the assumption that the question of the legal interest of the applicants had been decided in 1962. Moreover, the question of legal interest was intimately connected with the question of jurisdiction and not, as the majority opinion seeks to understand, with the question of the merits. It is significant that the Court, as the basis for its "second phase" decision, turned to the major documents that were adduced in the preliminary objections phase to establish jurisdiction and not to the mass of material which was adduced after 1962 for the merits.

In the preliminary objection phase of the case, the Government of South Africa presented the following submissions:

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by another organ, but not revision *proprio motu*. Even assuming an inherent power in tribunals, Article 61 of the Statute would appear to deprive the Court of it. But see the doctrinal note on the *Von Tiedmann* case (Polish-German Mixed Arbitral Tribunal) in Bos, *LES CONDITIONS DU PROCES EN DROIT INTERNATIONAL PUBLIC* 320 (1957).

235. To argue that the 1962 Court did not state the law of "legal interest", but only the factum of its sufficiency in terms of Article 7(2) of the Mandate, is hardly an adequate reason for a revision *sub silentio*. The judicial perception of a given event as a fact is obviously based on a complex of pre-dispositions, many of which could be termed unenunciated assumptions of law. Be that as it may, this does not "defactualize" the decision.

For all or any one or more of the reasons set out in its written and oral statements, the Government of the Republic of South Africa submits that the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings, and that the Court has no jurisdiction to hear or adjudicate upon the questions of law and fact raised in the Applications and Memorials, more particularly because:

*Firstly*, by reason of the dissolution of the League of Nations, the Mandate for South West Africa is no longer a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court, this submission being advanced

(a) with respect to the said Mandate Agreement as a whole, including Article 7 thereof, and

(b) in any event, with respect to Article 7 itself;

*Secondly*, neither the Government of Ethiopia nor the Government of Liberia is 'another Member of the League of Nations', as required for *locus standi* by Article 7 of the Mandate for South West Africa;

*Thirdly*, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a "dispute" as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Government of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;

*Fourthly*, the alleged conflict or disagreement is as regards its state of development not a "dispute" which "cannot be settled by negotiation" within the meaning of Article 7 of the Mandate for South West Africa.<sup>236</sup>

In its introductory prayer, it will be noted, the Government of South Africa set out two independent grounds for its case. The second ground is that the Court has no jurisdiction. *The first ground is that "the Governments of Ethiopia and Liberia have no locus standi in these contentious proceedings."* In the third paragraph South Africa put into issue, as a reason for refusing jurisdiction, that "no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby." It is thus untenable to argue, as the decision of 1966 imports, that the question of the "legal interest" of the applicants was not put in issue in 1962.

The Court, in 1962, dismissed the four propositions submitted by South Africa and upheld its jurisdiction and the legal interest under Article 7 of the Mandate of the applicants. In regard to Article 7, the Court stated:

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236. South West Africa Cases (Preliminary Objections), *supra* note 214, at 326-27.

The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to "the provisions" of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. *For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members.* (Emphasis supplied).<sup>237</sup>

And, in concluding the rejection of the third ground, the Court of 1962 said:

While Article 6 of the Mandate under consideration provides for administrative supervision by the League, Article 7 in effect provides, with the express agreement of the Mandatory, for judicial protection by the Permanent Court by vesting the right of invoking the compulsory jurisdiction against the Mandatory for the same purpose in each of the other Members of the League. *Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated territory are not less important.* (Emphasis supplied).<sup>238</sup>

It is thus equally untenable to argue that the question of the "legal interest" of the applicants was not definitely decided in favor of the applicants in the 1962 decision.

If the fact that the question of adequate legal interest under Article 7 of the Mandate was a central consideration of the 1962 decision requires further substantiation, one can turn to the joint dissenting opinion of Judges Spender and Fitzmaurice in 1962.<sup>239</sup> It is particularly relevant to examine this opinion since its authors provided 3 of the 8 votes making up the 1966 majority and since such a large portion of their dissenting opinion of 1962 is reproduced in the majority opinion of 1966. Not only did Judges Spender and Fitzmaurice consider Article 7 of the Mandate; they construed it as the key reason for refusing jurisdiction. The learned judges stated:

Having regard to the view we take on the third Preliminary Objection, namely that Article 7 was only intended to safeguard

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237. *Id.* at 343.

238. *Id.* at 344.

239. *Id.* at 465.

the individual interests of League Members in the Mandated territory, conferred under the terms of the Mandate, and did not cover disputes about the conduct of the Mandate, much of the discussion on the first preliminary objection (as also the second) has for us a certain unreality, since these objections are hardly meaningful, and are in any event unnecessary, in the context of this case, if Article 7 does not relate to the conduct of the Mandate.<sup>240</sup>

There is, then, simply no ground for maintaining that the question of Article 7 and the legal interest requirements which it set out were not in issue, not argued, not definitively decided, and not viewed as adequately presented in the preliminary objections.

The 1966 judgment, which denied *locus standi* to the applicants on the ground of insufficient "legal interest" under Article 7 of the Mandate, treats the question of res judicata, somewhat inappropriately, in paragraph 59 of its opinion. The Court found it unnecessary to examine whether a decision on a preliminary objection constitutes a res judicata for the purposes of Article 59 or Article 60 of the Statute.

The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection. When preliminary objections are entered by the defendant party in a case, the proceedings on the merits are, by virtue of Article 62, paragraph 3, of the Court's rules, suspended. Thereafter, and until the proceedings on the merits are resumed, the preliminary objections having been rejected, there can be no decision finally determining or pre-judging any issue of merits. It may occur that a judgment on a preliminary objection touches on a point of merits, but this it can do only in a provisional way, to the extent necessary for deciding the question raised by the preliminary objection. Any finding on the point of merits therefore, ranks simply as part of the motivation of the decision on the preliminary objection, and not as the object of that decision. It cannot rank as a final decision on the point of merits involved.

This construction is thoroughly erroneous and finds no basis in the Statute, the Rules, or the practice of the Court. In the first place, if a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, then there is no ground for the entire institution of preliminary objections to jurisdiction: If a decision upholding jurisdiction is not preclusive of a merits question, then a decision denying jurisdiction is a denial of justice, in that a hearing on the merits might well demonstrate grounds for jurisdiction.

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240. *Id.* at 473.

Why should a rejection of jurisdiction be more preclusive than an acceptance of jurisdiction, if both are, according to the Court, incomplete until a hearing of the merits? The necessary *reductio* of the Court's reasoning is that the institution of preliminary objections to jurisdiction is unjust—it should be abolished and in its place an automatic joinder to the merits imposed. But the rules expressly provide for preliminary objections, and the Court, as the majority of 1966 so often reiterated, is obliged to apply and not to make law.

Secondly, Article 62(5) of the Rules expressly considers situations in which the question of jurisdiction is so inextricably interwoven with the merits that a separate preliminary decision on jurisdiction cannot be made. If this is the case, the Court may join the preliminary objection to the merits, i.e., either defer decision or make a provisional decision that may be subsequently revised without recourse to Article 61 of the Statute. But the Court's construction of the extent of the finality of a decision on preliminary jurisdiction<sup>241</sup> drains Article 62(5) of the Rules of all meaning.

Third, the Court's construction<sup>242</sup> of Article 62(3) of the Rules<sup>243</sup> is wholly erroneous. The Court seeks to read into this provision the requirement that on the initiation of preliminary objections all consideration of any matter related to the merits must stop. Hence, argues the Court, the decision on preliminary objections cannot be complete if it relates to the merits. Therefore, all decisions on preliminary objections which touch on the merits must be provisional. The legislative history of the relevant provision—"proceedings on the merits shall be suspended"—shows that the only concern was the time limits which the Court sets on receipt of the initial application and before it receives, or even knows that it will receive, a preliminary objection to its jurisdiction. If a preliminary objection is lodged, the time limits for Memorials may run out before the Court has ruled on the objections. The alternative ways of circumventing this impasse were either to accord the Court, in the Rules, a power to make extensions, or "to stop the clock," so to speak. The discussions of these alternatives in the 1936 Revision Meetings of the Permanent Court are presented in Judge Jessup's dissenting opinion.

It was noted that extensions would probably have to be granted if the Court overruled the preliminary objection. Thus Judge Fromageot proposed inserting in paragraph 3 the words "the time-limits originally fixed for the proceedings on the merits shall be suspended." (*P.C.I.J. Series D, Third Addendum to*

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241. See paragraphs 59 and 60 of the judgment.

242. See paragraph 59 of the judgment.

243. "Upon receipt by the Registrar of a preliminary objection filed by a party, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time-limit within which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned."

No. 2, p. 706.) When it was suggested by another member of the Court "that the proceedings on the merits were suspended as from the submission of the objection", Judge Fromageot revised his phrasing to read: "From that moment, the time-limits originally fixed for the proceedings on the merits shall be suspended." Thereafter "The REGISTRAR pointed out that there was not, strictly speaking, a suspension of the time-limits. *What was suspended was the obligation of the parties to file a particular Memorial by a given date.*" (*Ibid.* p. 707; italics added (Judge Jessup's)) Judge Fromageot then at once proposed the phrasing ultimately adopted: "The proceedings on the merits shall be suspended."<sup>244</sup>

The Court's attempted construction of this provision has no basis in the legislative history. Moreover, the construction is unfeasible, since, again, it contradicts Article 62(5).

Finally, as a simple matter of fact, there have been few cases before the international bar in which questions of jurisdiction and questions on the merits have been so clearly and cleanly demarked. As a jurisdictional question, the Court was obliged to determine the continued existence of certain legal regimes and, if so, the extent of the applicants' legal interest in the adjudication of matters pertaining to them under Article 7 of the Mandate, the relevant jurisdictional clause. It is appropriate to restate the majority holding in 1962:

[T]he manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members.<sup>245</sup>

...  
Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated Territory are not less important.<sup>246</sup>

On the basis of this holding, the applicants, in the 1966 merits phase of the case, sought a declaratory judgment stating that South Africa had not fulfilled its obligations under the Mandate and had, in certain matters, acted clearly contrary to its "sacred trust." In other words, the question in 1962 was whether certain treaties still had legal vitality and, if so, whether the Applicants had standing to seek a declaratory judgment in regard to certain matters. In 1966 the question was whether there was substance in the allegations made by the Applicants in regard to those matters which the Court had held in

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244. Dissenting opinion of Judge Jessup at 353.

245. [1962] I.C.J. Rep. 343.

246. *Id.* at 344.

1962 to be still subject to the mandate and susceptible to judicial invocation by the Applicants. Although the majority reiterates in its judgment that the question of interest is related to the merits, nowhere does it spell out how it is so related. It is surprising that in 1962 neither Judge Spender nor Judge Fitzmaurice noted a need to join the question of preliminary jurisdiction to the merits. Despite talk of an inextricable link, one cannot but feel a certain uneasiness in noting that the majority opinion of 1966 is so similar both in reasoning and in adduced evidence to the Spender-Fitzmaurice dissent of 1962.<sup>247</sup>

The Court continues its discussion of the 1962 decision in paragraphs 60 and 61. In paragraph 60, the Court holds, quite correctly, that the question of jurisdiction and legal right are separable, but that the Court in 1962 had determined only jurisdiction. But this is incorrect. The 1962 decision, as the quoted passages clearly indicate, decided both matters. There is simply no other possible way of reading the 1962 decision.

For the reasons stated above, it is submitted that the Court's treatment of the 1962 decision upholding jurisdiction and the legal interest of the Applicants was an excess of jurisdiction. Under Articles 59 to 61 of the Statute and Article 62 of the Rules, the decision of the Court in 1962 was *res judicata*. Consequently, the Court was obliged in 1966 to follow that decision unless it specifically resorted to the revision procedure of Article 61, including a judgment expressly recording the existence of a "new fact." To seek to overturn a valid decision without specific recourse to the provisions of Article 61 of the Statute was an act in excess of jurisdiction. Moreover, such an act was a severe denial of justice to the parties, in that it changed law binding them under Article 59 of the Statute<sup>248</sup> without providing them with the procedures of pleading guaranteed in Article 61.

### VIII. EXCESS OF JURISDICTION (2)

Correct application of jurisdiction requires not only that the tribunal remain within its delegated power but also that, within the parameters of its power, it give full application to its jurisdiction. If a tribunal is required by its constitutive instrument to apply certain rules or look to certain sources of law, and yet construes its authority so as to prevent such an application, it has committed an *excès de pouvoir*. The doctrine was unequivocally stated by a tribunal of the Permanent Court of Arbitration in the revision phase of the *Orinoco* case.

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247. *Id.* at 465-563.

248. Since the decision, under Article 59, is of binding force between the parties, to change that decision without their participation is to deprive them of an aspect of their sovereignty. A consent to jurisdiction imports participation in the decision process.

[E]xcessive exercise of power may consist, not only in deciding a question not submitted to the Arbitrators, but also in misinterpreting the express provisions of the Agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied.<sup>249</sup>

*A. Plenary Application of Article 38*

Article 38 of the Statute of the International Court is generally treated as an authoritative catalogue of the components of international law which the Court is, moreover, required to apply. The relevant parts of that Article provide:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
  - (b) international custom, as evidence of a general practice accepted as law;
  - (c) the general principles of law recognized by civilized nations.

The majority opinion in the July 18th decision fails to exercise the full legislative sources as set out in Article 38 of the Statute and thus commits an excess of jurisdiction. Specifically, the majority's formulation of its methodology prevents an application of Article 38(1) (b) and Article 38(1) (c).

In paragraph 16 of the Judgment, the Court states:

[T]he Court must place itself at the point in time when the mandates system was being instituted and when the instruments of mandate were being framed. The Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation.

In paragraph 89, the Court dismisses developments after the date of entry into force of the Mandate as "considerations of an extra-legal character, the product of a process of after-knowledge." The full impact of the standpoint which the Court chooses for itself is expressed in paragraph 17 of the Judgment:

It follows that any enquiry into the rights and obligations of the Parties in the present case must proceed principally on the basis of considering, in the setting of their period, the texts of the in-

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249. 11 U.N. Rep. Int'l Arb. Awards 227, 239 (1910).

struments and particular provisions intended to give juridical expression to the notion of the "sacred trust of civilization" by instituting a mandates system.

In undertaking to determine the legal right of the applicants, the Court proceeds to a close textual analysis. In paragraph 49, it posits that it "can take account of moral principles only insofar as these are given a sufficient expression in legal form." Humanitarian principles can have no more legal effect than can the preamble of the United Nations Charter! (paragraph 50). Although all states have an interest in such matters, this interest, in itself, is not a juridical interest (paragraph 50). An interest generates legal rights and obligations when it is clothed in legal form (paragraph 51). Legal form is textual form (paragraph 51) which indicates itself *expressis verbis* as legal (paragraphs 53-54). A unilateral declaration of intention to honor a prior engagement is not "legal form" (paragraph 56). Legal form, once fixed, is impermeable to changes wrought by time. The derivation of new rights by appeal to the initial moral basis of a regime is not a legal task (paragraph 57), and would, in any case, involve a limitless process (54). Without considering for the moment the Court's rejection of the applicants' legal interest at the time of the framing of the Mandate, it is significant that the Court also refused to derive new rights on the basis of sustained intention and radically changed circumstances.

Article 38(1) does not indicate priorities. An effort to introduce such priorities in the course of its drafting was rejected.<sup>250</sup> Hence it would be incorrect to assume that the temporal order allows a preference for any one "source". It is clear from the legislative history of the Article and it is widely held by international jurists that all the primary sources of international law are to be applied.<sup>251</sup> The statement of Baron Descamps on this matter in the Committee of Jurists<sup>252</sup> should be read with care. The simultaneous application of all three sources is imposed by the very nature of international law. A treaty, for example, can never be considered in a vacuum. It must be viewed in the context of both customary international law and general principles, in regard to its creation, language, subsequent history and effects.<sup>253</sup> If a treaty "recognized by the contesting parties" obtains, it is the obvious starting point of judicial inquiry,<sup>254</sup> but the very act of judicial construction would introduce customary

250. 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 729.

251. See HUDSON, *op. cit. supra* note 222, at 194-95; see also Judge Read in the *Nottebohm Case*, [1955] I.C.J. Rep. 4, at 37; Judge Azevedo in the *Asylum Case*, [1950] I.C.J. Rep. 266, at 338; Judge Nyholm in the *Lotus Case*, P.C.I.J., ser. A, No. 10, at 63 (1927).

252. 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 322.

253. Some authority for such contextual and multifactorial examination may be found in the separate opinion of Judge Fitzmaurice in the *Northern Cameroons Case*, [1963] I.C.J. Rep. 15, at 101.

254. 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 322.

law and general principles. In the case of the International Court, explicit examination of all "sources of law" is mandatory.

For present purposes, a disquisition on the nature of custom is not necessary. It is sufficient to note that custom is creative of legal or juridical rights which are neither initially nor necessarily ever textual. Custom is, like all law, a set of shared subjectivities about normative behavior, generated by the interaction of individuals over a period of time rather than by explicit formal agreement, as in the case of conventional international law. The absence of textual guides has compelled international jurisprudence to determine the existence of objective words and deeds, the regularity and intensity of which provide some indication of *opinio juris*.<sup>255</sup>

Custom is ubiquitous; it regulates relations in the absence of formal agreements and embroiders formal agreements over a period of time. With the possible exception of a *jus cogens* or peremptory norm, custom can supplant or modify extant law. In the same manner that a majority of the nations of the world may, by treaty, make law for all states of the globe, they may do the same by custom. In this regard, custom is a harbinger of a future world order; unanimity is not required.

An individual lawyer's preference for clean, clear, concise conventional law is a tolerable whim. But a judge of the International Court who is enjoined under the Statute to apply three sources of law, one of which is custom, may not indulge that whim. He may not overlook custom and may not formulate a definition of international law and a definition of international rights based only on conventional international law. To do so is to commit an *excès de pouvoir* through non-compliance with Article 38 of the Statute and to subject his judgment to nullification.

The majority opinion presents a constricted formulation of international law and international rights as only to be found in a document framed almost half a century ago. It fails to examine customary development since then. This is an error of fundamental and irremedial consequence in an international constitutional case. The Mandates were, and continue to be, matters of fundamental constitutional importance in international law. Whether a functional or organic definition of constitutionalism is employed, it is impossible to deny constitutional character to a legal regime which introduces a new state status, which affects the lives of hundreds of thousands of human beings, which restricts their choice of a sovereign and transfers sovereignty to a foreign state. The fact that mandates and trusteeships are found respectively in the Covenant<sup>256</sup> and the

255. See Silving, "Customary Law": *Continuity in Municipal and International Law*, 31 IOWA L. REV. 614, 622 (1946); ROSS, A TEXTBOOK OF INTERNATIONAL LAW 83 (1947); SORENSEN, LES SOURCES DU DROIT INTERNATIONAL, ch. IV (1946); Tunkin, *Co-existence and International Law*, 95 Rec. des Cours (Neth.) 11-12 (1958).

256. LEAGUE OF NATIONS COVENANT art. 22.

Charter,<sup>257</sup> fundamental constitutional documents, and are subject to the supervision of the organized world community indicates their organic constitutional character.

Constitutional interpretation in a community posited on principles of democracy—as is the United Nations<sup>258</sup>—must be somewhat different than the day-to-day judicial construction of more mundane commercial instruments. The animating principle of political democracy is that the individual human beings of a polity have a genuine and effective voice in the major decisions that affect their lives. But constitutional documents, generally the starting point of judicial construction in constitutional cases, are often venerable legacies of past generations. To interpret such documents only by reference to the past is to deny democracy, to introduce a dictatorship of the past if not of the present. This result does not occur in the construction of a commercial document several years old, which was made by the parties who are currently litigating. Democracy is maintained in constitutional interpretation by balancing textual interpretation with the application of contemporary custom—the *opinio juris* of the present. Indeed, custom is the most democratic of legislative or prescriptive processes in that all individuals, by their behavior, participate in its formulation. To ignore custom in an international constitutional case is to shackle the present and the future to the dictatorship of *mortmain*.

### B. *Equitable Construction*

A second deviation from the peremptory requirements of Article 38 of the Statute is found in the majority opinion's concept of equitable construction. There are a number of references to the moral basis of the instruments under examination and the general humanitarian aspect of the applicants' claims; but a rigid line is drawn between "law" and "morality and humanitarianism". In paragraph 49 of the Judgment, the Court states:

Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only insofar as these are given a sufficient expression in legal form.

Again, in paragraph 50 of the Judgment, the Court says:

Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such

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257. U.N. CHARTER ch. 11.

258. U.N. CHARTER Preamble; art. 1, para. 2; art. 1, para. 3; and art. 2, para. 1.

considerations do not, however, in themselves amount to rules of law. All States are interested—have an interest—in such matters. But the existence of an “interest” does not of itself entail that this interest is specifically juridical in character.

In paragraph 52, the Court applies this thinking to the Mandates:

In the present case, the principal of the sacred trust has as its sole juridical expression the mandates system. As such, it constitutes a moral ideal given form as a juridical regime in the shape of that system. But it is necessary not to confuse the moral ideal with the legal rules intended to give it effect. For the purpose of realizing the aims of the trust in the particular form of any given mandate, its legal rights and obligations were those, and those alone, which resulted from the relevant instruments creating the system, and the mandate itself, within the framework of the League of Nations.

The Court's understanding of equitable construction is to be found in paragraph 90 of the decision:

It is always open to parties to a dispute, if they wish the Court to give a decision on a basis of *ex aequo et bono*, and are so agreed, to invoke the power which, in those circumstances, paragraph 2 of this same Article 38 confers on the Court to give a decision that basis, notwithstanding the provisions of paragraph 1. Failing that, the duty of the Court is plain.

The Court's construction of the nature of law in general and the implications of the judicial function in particular make things rather easy for tribunals. Under the interpretation given above, a court apparently need not examine why a regime was created, the context of conditions at the time of creation and the time of application, and the massive and possibly deprivatory impacts which a decision may have. Legal rules were of course generated by human desires but, once formulated, they achieve a life of their own. The Court's function is simply to arrange these desiccated rules into an appropriate mosaic. And if the resulting pattern is clearly contrary to the original intentions of the parties or current social requirements . . .? With disarming simplicity, the Court directs the parties to the international legislator, but does not indicate who that entity is (paragraph 57):

Another argument which requires consideration is that in so far as the Court's view leads to the conclusion that there is now no entity entitled to claim the due performance of the Mandate, it must be unacceptable. . . . If, on a correct legal reading of a given situation, certain alleged rights are found to be non-existent, the consequences of this must be accepted. The Court cannot properly postulate the existence of such rights in order

to avert those consequences. This would be to engage in an essentially legislative task, in the service of political ends the promotion of which, however desirable in itself, lies outside the function of a court-of-law.

These statements not only indicate that the Court as an institution is shirking social responsibility, but they are contrary to general principles of law and the requirements of Article 38 of the Statute. Legal analysis has divided the concept of equitable or just construction into three classes; *infra legem*, *praeter legem* and *contra legem*. An equitable construction *infra legem* is applied when a given instrument is susceptible, on its face, to several interpretations; the court, as an organ of justice, chooses that construction which is most equitable or just. An equitable construction *praeter legem* is applied when the possible interpretations on the face of the instrument would be inequitable or unjust in their results; the court applies an equitable construction which, though not apparent on the face of the instrument, is not contrary to its express terms. Interpretations *infra legem* and *praeter legem* do not require a special grant of authority from the parties. In turning to a court, parties, by implication, accept the authority of that court to seek the most equitable and just interpretation consonant with the terms of the instrument in question.

An equitable or just interpretation which is clearly contrary to the terms of the instrument—*contra legem*—is the only case in which a special grant of authority is required from the parties. It is to this situation that Article 38(2) <sup>259</sup> refers. In regard to the implicitly authorized equitable interpretations—*infra legem* and *praeter legem*—the tasks imposed on the judiciary are enormous and should not be minimized. However difficult, this is the function of a judge, and it may not be avoided.

Equitable or just construction *infra* or *praeter legem* is a component of judicial decision and clearly is imported by the reference to general principles in Article 38(1) (c) of the Statute. The majority opinion's interpretation of its task is in polar opposition to the intentions and spirit of the framers of the Statute. In the Committee of Jurists, Baron Descamps, President of the Committee, stated:

[I]t is absolutely impossible and supremely odious to say to the judge that, although in a given case a perfectly just solution is possible: "You must take a course amounting to a refusal of justice" merely because no definite convention or custom appeared.<sup>260</sup>

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259. Article 38(2) of the Statute provides, "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto".

260. 1920 PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS 323.

In concluding his discourse to the Committee, Baron Descamps added:

One of the most profound convictions of my life, which has been devoted to the study and application of international law, is that it is impossible to disregard a fundamental principle of justice in the application of law, if this principle clearly indicates certain rules, necessary for the system of international relations, and applicable to the various circumstances arising in international affairs.<sup>261</sup>

The majority opinion of July 18th disregards this fundamental principle. It disregards peremptory provisions of its Statute, thereby exceeding its jurisdiction.

### IX. ERRORS OF FACT AND LAW

The majority opinion holds that individual Members of the League of Nations did not have several rights vis-à-vis the Mandatory in regard to "conduct provisions" of the Mandate. The Court's reasoning is as follows: Article 22 of the Covenant states that Mandates would be entrusted to advanced nations "on behalf of the League" (paragraph 20); the same idea is found in the third paragraph of the preamble to the Mandate for South West Africa (paragraph 21). (This derivation is somewhat inconsistent in that in paragraph 50 of the judgment it is stated that preambular statements do not amount to rules of law; they are not clothed in proper juridical form.) Article 2 of the Covenant states that the "action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a League Council with a permanent Secretariat" (paragraph 18). The Court finds in the interaction of these provisions "an *implied* recognition" (paragraph 21; emphasis added) that rights and obligations regarding conduct provisions existed only between the League and the Mandatory. Building on this implied recognition, the Court asserts that:

No other behalf was specified in which the Mandatory had undertaken, either actually or potentially, to exercise the Mandate (paragraph 21).

#### A. Plain and Natural Meaning

The immediate difficulty which this conclusion encounters is the "plain and natural" <sup>262</sup> meaning of Article 7(2) of the Mandate for South West Africa. That Article provides:

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261. *Id.* at 324.

262. Vattel's dictum that there is no need to interpret a clear document must be given a provisional quality in the light of current linguistic analysis. It is incontestable that no communication, *a fortiori* a past communication, is plain and natural. On the other hand, an apparent meaning is an obvious starting point for investigation and probably a sound presumption from the standpoint of policy; it encourages joint efforts toward optimum, clear communication and drafting.

The Mandatory agrees that, if *any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate*, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations. (Emphasis supplied).

Article 7(2) relates simply and unqualifiedly to the "provisions of the Mandate." How then does the Court conclude that this broad conferral of jurisdiction relates only to the diplomatic protection of national missionaries in South West Africa?<sup>263</sup> From where does it derive the "implied recognition"?

It is an elementary principle of all purposive thinking, that an investigator resorts to speculations and presumptions only when he has exhausted the available facts but has failed to derive a solution from them. Paradoxically, the majority opinion does not proceed to an examination of the specific background of Article 7(2), but moves directly to a number of other provisions in the Covenant and the Mandate Agreements in order to derive an "implied recognition". A comprehensive examination of the complex legislative history is undertaken in the dissenting opinion of Judge Jessup, from which it clearly arises that Article 7(2) of the Mandate agreement intended and meant what it said. Moreover, Judge Jessup traces the subsequent judicial and doctrinal illumination of the Article and finds that the majority view has been that Article 7(2) means what it says. These are questions of fact; it is arguable that the majority had other facts at its disposal, though it is difficult to imagine a more comprehensive and detailed examination than that of Judge Jessup. If the majority did have other facts at its disposal, it is obliged, under Article 56 of the Statute, to state them. If it does not state them or has failed to examine them, its judgment does not conform to the judicial requirements of the Statute.

Assume however, *ex hypothesi*, that Article 7 is equivocal. Are there extrinsic grounds in general international law for construing Article 7(2) of the Mandate and Article 22 of the Covenant so as to cover only the protection of national missionaries? The doctrine of sovereignty permeated international law at the turn of the century. A treaty, under this doctrine, was construed restrictively because a sovereign state could be deemed to surrender only those rights of which it expressly divested itself. Assuming that the rights conferred by signatory nations on the League formerly resided in those states severally, the conclusion reached by the Court would have required the word "exclusive" to appear in Article 22 in such manner that it read "on the exclusive behalf of the League." Even assuming that the

263. South West Africa Cases ¶ 79, at 47 (Tent. Draft, July, 1966): "... [A]t the time much importance was attached to missionary rights."

rights were created by the Covenant signatories solely for the Mandates, a bar to tracing a right through the League would still have required the word "exclusive". The Court's own reasoning requires a construction holding that, at some moment before or at the time of the entry into force of the Covenant, the rights existed in the Members through some form of offer and acceptance, for the Court states in paragraph 56 that a unilateral declaration is not the proper juridical form for the creation or vesting of rights. Since the word "exclusive" does not appear in Article 22, the preliminary assumption must be that the signatories surrendered only what was explicitly given. Hence, a shared or cumulative right resided in both the League and its several Members. This conclusion, as will be seen, is supported by the nature of the right given in Article 7(2) and the structural incapacity of the League to exercise it.

The Court's statement at paragraph 21 is thus wholly discordant with fundamental principles of interpretation.

There was no similar recognition of any right as being additionally and independently vested in any other entity, such as a State, or as existing outside or independently of the League as an institution; nor was any undertaking at all given by the Mandatory in that regard.

Article 7(2) clearly says the contrary. Even assuming that it did not, this formulation puts things backwards. The source of the rights must have been in the signatories at the moment of the framing of the Covenant: *nemo dat quod non habet*. The question is not the quantum of rights which they invested in themselves, but the quantum of rights of which they *divested* themselves and conferred on the Mandatory and/or League, as the case may be. Arguably, the doctrine of sovereignty in 1966 has been so attenuated that the initial presumption of restrictive interpretation no longer obtains. Be that as it may, the Court in the July 18th decision addresses itself only to the law as of 1920. It is incontestable that at that time the prevailing doctrine of sovereignty required initial restrictive interpretation.

The majority feels constrained to presume that the Court had no role in the conduct provisions because an individual right to activate the Court in regard to asserted violations of the conduct provisions would have made the Mandate System unworkable. The point is introduced subtly in paragraph 18 of the Judgment and delivered with full force in paragraph 34:

If the latter [each Member-State] had been given a legal right or interest on an individual "State" basis, this would have meant that each member of the League, independently of the Council or other competent League organ, could have addressed itself directly to every mandatory, for the purpose of calling for explanations or justifications of its administration, and generally

to exact from the mandatory the due performance of its mandate, according to the view which that State might individually take as to what was required for the purpose.

Earlier, the Court notes that any Member of the League was capable of doing in the Council precisely what the Court seeks to avoid. In fact, the procedures and expenses involved in initiating a purely prevaricative action in the Council were minimal compared to those required in the Permanent Court. Moreover, the Council was incapable of making any binding decision without the consent of the Mandatory and of imposing any sanctions—e.g., costs—for abuse of process. If the Court's construction were internally consistent, it would have been forced to deny a *locus standi* even in the Council in the interests of the "effective" functioning of the Mandate. The framers of the Covenant and the Mandates did not appear to be overly concerned with the detrimental effects international jurisdiction might have had on the effective functioning of the Mandates. They appeared to operate on an understanding of the word "effective" quite different from that of the Court. The Court's conception of effective functioning is to permit the Mandatory to do as it will without any means of supervising or correcting deviations from the norms prescribed in the relevant instruments.<sup>264</sup> An integral element of the framers' conception of effectiveness was securing compliance with the conduct provisions of the "sacred trust" which they had accorded the Mandatory.

Are the Court's constructions and innovative presumptions consonant with the real interests of the Mandate System? Are they so required for the effective functioning of the Mandate that the "plain and natural" meaning of Article 7(2) is to be denied? Much of the answer to these questions turns on who defines "effectiveness." A Mandatory would obviously define it as a "hands off" policy; any interference would impede effectiveness. People living under the Mandate regime and the international community which had created the institution would define it as including some method of supervising, regulating and correcting conduct which was inimicable to the stated rights and privileges of the peoples of the Mandated Territories. The Court is unable to see beyond the Mandatory's understanding of the term. It is thus forced to deny the "plain and natural" meaning of Article 7(2).

Is there a possible reading of Article 7(2) which can harmonize its obvious meaning, the interests of the Mandatory, and the more comprehensive interests of the founders of the "sacred trust" in the welfare of the peoples of the Mandated Territories? It is submitted that there is such a reading. The cumulative character of the rights and privileges shared by the League as a corporate entity and its several members would have required that action by members be

264. This follows since the Council required either the agreement or the abstention of the Mandatory to reach a binding decision and the Mandates Commission was restricted to a hortatory role. *Id.* ¶ 86-87, at 49-50.

taken initially in the League Council. Binding decisions could not be taken by the Council, for it labored under a unanimity rule. Hence, final recourse was open to the Court, *the only organ which could make binding decisions in regard to the conduct of the Mandate*.<sup>265</sup> The Court is not required to adjudicate obviously prevaricative claims. The judicial process is armed with an arsenal of techniques and sanctions which permit it to stop *in limine* a plaintiff seeking ends other than justice. Foremost among these is the requirement that other processes of resolving disputes—negotiation and the League Council—be exhausted.<sup>266</sup> The Court, under the Mandates scheme, was required, in its wisdom, to safeguard the narrow and broad interests of Mandate effectiveness.

### B. 'Through the Looking Glass'

The Court contends that the Permanent Mandates Commission and the Council of the League were the only means for controlling and regulating the conduct provisions of the Mandate. The conduct provisions of the Mandate institution were the very heart of the "sacred trust". They constituted the single element which prevented the Mandates from being simply a hypocritical post-war "spoils system." The Court notes that the powers of the Mandate Commission were only hortatory and that no decision could be taken in the Council of the League without the concurrence of the Mandatory. The Court concludes that:

The plain fact is that, in relation to the "conduct" provisions of the mandates, it was never the intention that the Council should be able to impose its views on the various mandatories—the system adopted was one which deliberately rendered this impossible. It was never intended that the views of the Court should be ascertained in a manner binding on mandatories, or that mandatories should be answerable to individual League members as such in respect of the "conduct" provisions of the mandates (paragraph 86).

265. Its decisions through operation of Article 7 of the Mandate and Article 59 of the Statute would be binding on the Mandatory and, as a measure of protection for the Mandatory, on the claimant state.

266. Under Article 36(6) of the Statute of the I.C.J., the Court is frequently required to ascertain whether there is a dispute, i.e., whether the difference between the parties has "matured" to the point where a "dispute" in its technical sense has emerged. The Court has frequently been asked to hold and may indeed hold that there is no dispute if negotiations have not been pursued. But both the P.C.I.J. and the I.C.J. have demonstrated great flexibility in handling this claim. See *Mavromattis Palestine Concessions*, P.C.I.J., ser. A, No. 2 at 13 (1924); *South West Africa Cases (Preliminary Objections)*, [1962] I.C.J. Rep. 319, 346; *Case Concerning Right of Passage over Indian Territory*, [1957] I.C.J. Rep. 124, 148-49; BENTWICH & MARTIN, COMMENTARY ON THE CHARTER 77-78 (1950).

The common law lawyer will respond that this is a mockery; that to speak of rights without remedies is to lose touch with law, for *ubi jus ibi remedium*. The Court replies:

In this situation there was nothing at all unusual. In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception . . . (paragraph 86).

A structural defect in international relations that treaty-making explicitly seeks to overcome has, by a strange process of judicial consuetude, become a presumption against the effectuation of treaties. In effect, the Court is saying that of two possible interpretations, one giving effect to rights and one rendering them beyond effectuation, one should presume in favor of the latter; despite the fact that parties make agreements at law in order to create enforceable interests, they should be presumed not to be doing that since international law is not really enforceable. The brooding presence of John Austin, though grossly distorted, looms heavily over the International Court.

Law, despite the Court's construction of it, is made to be implemented. The "sacred trust" was not and is not, as the Court's construction implies, a sham, a convenient means of transferring sovereignty without upsetting the popular ideals for which the First World War was fought. The supervisory clauses—including the jurisdictional clause—were not inserted in order to mean nothing. The possible difficulties which a Mandatory might encounter under an international supervision requiring it to comply with obligations it freely undertook were not and are not a satisfactory reason for denying such supervision. A "sacred trust" cannot be easily executed or easily denied. It is submitted that the sections of the judgment discussed here suffer from gross errors of fact and law and, hence, are subject to nullification and revision.

#### X. THE NEXT PHASE

There are several compelling grounds for nullity and revision in the Judgment of July 18th and there is evidence of a great number of substantive and procedural irregularities. This study has made no attempt to exhaust the defects and errors in the majority decision. In the final analysis, one defect, for example the disqualification of Judge Zafrullah Khan, is adequate to initiate revision procedures. A number of alternative means of revision have been noted and evaluated. It remains for the parties directly concerned to take positive action. Many prominent individuals who are in a position to right a grievous error have publicly declared themselves against the decision and its reasoning. The citizenry of the world may properly demand action from these individuals and states.

*A. Legal Aid in the Protection of Human Rights*

Should the *South West Africa Cases* be brought back to the Court for revision and reconsideration, a number of improvements in the presentation of the case will be in the interests of the litigants, the Court, and the general community. It is common knowledge that the applicants, Ethiopia and Liberia, were financially incapable of matching the resources which the respondent, South Africa, was able to put into the case. Reliable American newspapers have reported that South Africa invested almost ten times as much as did Liberia and Ethiopia.<sup>267</sup> South Africa's legal staff was many times larger than that mustered jointly by Ethiopia and Liberia.<sup>268</sup> As a result, counsel for the applicants labored under enormous disadvantages. Moreover, Ethiopia and Liberia made a great financial sacrifice in the interests of the international protection of human rights, which is properly an inclusive community concern. It is questionable whether these two nations will be able to continue to make these sacrifices; it should not be incumbent upon them to do so.

Methods for balancing the resource investments of litigants before the Court will improve the quality of the presentation and make the international judicial process more fair. Ideally, an international legal aid fund should be set up under the auspices of the United Nations, the most comprehensive of international organizations in terms of membership and scope of goals. Yet the implementation of such a plan would require time, and time, under the clock of Article 61 of the Statute, is short. As an interim measure, the Organization of African Unity, the Organization of American States, or the Arab League should set up a South West African Legal Aid Fund, tax its members, and invite members of other organizations or other individual states to contribute according to a scale, e.g., the UN budget or the Special Fund. If it is possible to pursue the matter on the organizational level, a joint OAU-OAS-Arab League Fund Committee could be formed to coordinate the scheme within each regional organization. It may also be possible to coordinate national civic groups in the effort.

In the future, such a Fund should be institutionalized for the purpose of adjudication of human rights matters. The money could be collected through the United Nations or the International Labor Organization and kept on deposit in the World Bank. An interorganizational protocol would empower the Bank to disburse the Funds to applicants, on a showing of a *prima facie* cause of action, financial disinterest, and financial need. Such an institution would greatly aid the international judicial enforcement of human rights.

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267. N.Y. Times, July 19, 1966, p. 17, col. 5.

268. Compare the staff directly cited in Pleadings. It has been reported that the Pretorian government maintained a full time staff of fifty lawyers for preparation of the case. D'Amato, *Legal and Political Strategies in the South West Africa Cases*, unpublished paper delivered to the Convention of the American Political Science Association on Sept. 9, 1966.

### B. Alternate Strategies

The July 18th decision leaves open the possibility of a resubmission by one of the League Powers, who, according to the construction of the Mandate offered by the Court, may have a residual right after the dissolution of the League of Nations. Although it is within the realm of political possibility to persuade such a power to apply to the Court under Article 7(2) of the Mandate, it would not appear in the common interest that this be done. The current challenge to the world community is now not only the adjudication of the dispute regarding the Mandate for South West Africa, but also the correction of some fundamental misconceptions in the Judgment of July 18th. That decision goes far beyond a mere rejection of the competence of the Applicants in this particular case. The Court's construction of an adequate legal interest in non-material matters is so restrictive that it is now doubtful if any State, even with an optional clause, can bring a matter of human rights, deriving from conventional or customary international law, to the Court unless one of its nationals is involved.<sup>269</sup> This ruling obliterates the procedural evolution of international law, a painstakingly slow advance which has transpired over several generations. The interidentifications of the members of the world community cross nation-state boundaries; this flow must be encouraged rather than retarded.

An equally compelling reason for revision is the substantive implications of the decision. The interpretation that the July 18th Judgment is procedural and does not touch on the merits and in no way contradicts the holdings of the three Advisory Opinions is simply wishful thinking. Maine observed that "substantive law has at first the look of being generally secreted in the interstices of procedure."<sup>270</sup> Substantive holdings are secreted in the majority opinion. A rational concept of law demands a degree of implementation which is adequate to sustain expectations of the overall efficacy of the legal process. The Court, in paragraph 86, states:

The plain fact is that, in relation to the "conduct" provisions of the mandates, it was never the intention that the Council should be able to impose its views on the various mandatories—the system adopted was one which deliberately rendered this impossible. It was never intended that the views of the Court should be ascertained in a manner binding on mandatories . . . .

To excise the implementability of a right is to slay that right. A non-remedial right means no more to a plaintiff than no right at all. The

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269. Several of the dissenting judges noted the impact of the instant decision on the Genocide Convention. It may be added that application of the July 18th decision would eviscerate the doctrine enunciated in the *Reparation for Injuries Suffered in the Service of the United Nations Case*, [1949] I.C.J. Rep. 174.

270. MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1886).

Court does not address itself directly to the substantive allegations of violations of the conduct provisions by the Government of South Africa. However, in paragraph 87, it states:

As regards the possibility that a mandatory might be acting contrary not only to the views of the rest of the Council but to the mandate itself, the risk of this was evidently taken with open eyes; *and that the risk was remote, the event proved.* (Emphasis supplied.)

This case, despite its stated reservations, says much on the merits, as the Government of South Africa has been quick to note.<sup>271</sup>

Revision is not the only available strategy. An advisory opinion might be requested by the General Assembly,<sup>272</sup> praying that the Court clarify the status of the Mandate and its incidents in view of the confusions caused by the decision of July 18th. The Court, in a substantially new composition, would probably follow the vector set in the three previous opinions on South West Africa.<sup>273</sup> No matter how positive an opinion the Court returned, however, this course would have minimal political effect. The earlier advisory opinions have received neither the compliance of South Africa nor the support of the permanent members of the Security Council; there is scant reason to believe that new opinions will. The Court might also be petitioned to declare that the Mandate had terminated and that direct supervision reverted to the General Assembly. It should be recalled that the first advisory opinion on South Africa had rejected this request in 1950 by only a small majority.<sup>274</sup>

The weakness of the advisory opinion strategy is that it can provide only minimum authority, when maximum authority is called for. Verbal sympathy has been expressed for the peoples of South West Africa. Yet reluctant powers have found it easy to avoid tangible commitment so long as no formally "binding" decision compelled them. The South West African problem was moved into the arena of contentious jurisdiction in order to compel the participation of

271. See, e.g., Pogrand, *Verwoerd to Step Up Apartheid*, The Times (London), July 24, 1966, p. 2, col. 2; Pogrand, *Verwoerd to Strengthen Control over South West Africa*, The Times (London), July 31, 1966, p. 2, col. 3; N.Y. Times, Aug. 16, 1966, p. 6, col. 1.

272. Article 96 (1) of the Charter.

273. International Status of South West Africa, [1950] I.C.J. Rep. 128; Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa, [1955] I.C.J. Rep. 67; Admissibility of Hearings of Petitioners by the Committee on South West Africa [1956] I.C.J. Rep. 23.

274. The second part of question B submitted to the Court by the General Assembly in 1950 had been whether the then Union of South Africa was under a legal obligation, by operation of Chapter XII of the Charter, to place the territory under the Trusteeship System. The Court ruled that South Africa was not under such an obligation. The vote was 8-6, in marked contrast to the Court's relative unanimity on the other questions submitted at that time.

those States whose active cooperation was vital for effecting a change in the administration of the territory. It was believed, perhaps naively, that a contentious judgment could be brought to the Security Council for enforcement in accordance with Article 94(2) of the Charter. Faced with the compelling authority of a judgment (as opposed to opinion) of the Court, the most reluctant power would not have been able to evade its responsibility. On the whole, the strategy was sound. There is, however, no recourse to Article 94(2) for an advisory opinion which is, in the strict sense, only hortatory.

An attempt by the General Assembly to terminate or modify the Mandate faces the same difficulties. A *quo warranto* action would lie only on the most restrictive reading of the Charter, yet the question is not one of formal but of effective authority. The aftermath of the *Certain Expenses* case<sup>275</sup> demonstrates with depressing clarity that the Assembly lacks effective authority.

Revision, then, appears to be the only feasible political strategy now available. It alone has a chance of harnessing the power of the Security Council. A request for an interpretation<sup>276</sup> of the Judgment of July 18th would be a stop-gap measure, somewhat short of revision. It would, however, at least press the Court to clarify its position on the continuing validity of the Mandate regime.

### C. *The Agents of Law*

The July 18th Judgment brings out, with stunning clarity, that the theories *about* law held by judges are a highly significant, if not decisive, determinant of judicial outcomes. The method by which facts and rules are approached is as important as the facts and rules themselves. The World Court and the world community require a theory about law of broad contextuality. A jurisprudence which fabricates a distinction between law and policy and proceeds to apply the desiccated results of the distinction without judicial cognizance of the most intense expectations and demands of the vast majority of the peoples of the world is a retreat into mysticism. A jurisprudence which has so little confidence in the vigor of law that it must concern itself first with the purity of its own "discipline" rather than the functional and instrumental character of law in social process can hardly serve the needs of a rapidly changing world community. A jurisprudence that can, in the name of law, reach a conclusion which is against the moral and humanitarian principles that it itself concedes, is disquieting. A jurisprudence, which cannot grasp the inevitable, subjective, policy-choice element in legal decision but shuttles through the corridors of Aristotelean logic in order to be "forced" to a conclusion which is not consonant with community policy, lacks the spleen which the modern world may properly demand of theories about law.

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275. *Certain Expenses of the United Nations*, [1962] I.C.J. Rep. 151.

276. Article 60 of the Statute.

If the International Court is to make its full contribution to world legal order, it must be staffed by individuals who appreciate the dynamic quality of legal process, who understand its techniques for reacting to change and responding to new social needs as they arise, who respect the past but are not shackled to it to the point where they must deny the present. It would be salutary if in the future the requirements of Article 2 of the Statute were construed broadly enough to include an examination of the nominee's theory about law and its relation to the social process. It is one of the ironies of our age that the knowledge which the behavioral sciences have put at our disposal about the impacts of personality on decision is applied only at the clerk-typist level of our bureaucracies.

#### D. *The Effectiveness of Law*

An adequate contemporary jurisprudence must be capable of distinguishing the elements of authority and control in authoritative decision. This matter is of direct relevance to the question of enforcement of a possible decision regarding the conduct of the Mandate for South West Africa. Both the Permanent Court and the International Court have stated that their function is to declare the law and to presume that the parties to the judgment will comply.<sup>277</sup> Yet, the decisions of the Courts indicate what Dr. Jenks has termed a judicial "preoccupation with enforceability".<sup>278</sup> Some *obiter* comments in the dissenting opinions as well as reports of participants in the litigation intimate that the possible problem of enforcement weighed heavily on the Court's mind.<sup>279</sup> In certain circumstances, there may be sound reasons for sidestepping a decision; a judicial institution may be quite validly concerned with the continuation of its own authority and may consider the effects a repudiated judgment may have on it. Yet such considerations stretch to the limit the realm of judicial discretion. The decision to "duck" a case may be taken in only the most exigent of circumstances and should not defeat its own purposes. An image of temerity is hardly distinguishable from an image of political impotence.

It is particularly important to grasp the idea that the implementation of authoritative decisions is not an "either-or" matter but a continuum. Few major social programs can be put into effect overnight. The implementation of an authoritative decision is an ongoing process to which a variety of subsidiary decisions contribute positively or negatively. There are indications that the South African Government introduced certain ameliorations in South West Africa

277. *E.g.*, Case of the S.S. "Wimbledon," P.C.I.J., ser. A, No. 1, at 32 (1923); Case of the Readaptation of the Mavromattis Jerusalem Concessions, P.C.I.J., ser. A, No. 10, at 4 (1927).

278. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATIONS* 667 (1964).

279. South West Africa Cases 347 (Tent. Draft, July, 1966) (dissenting opinion of Judge Jessup).

after 1960 precisely because it then appeared that the matter was one which the organized international community considered within its material jurisdiction. There is no doubt that the recommendations of the Odendaal Commission were not implemented in South West Africa because the question of appropriate mandatory treatment was under international adjudication. In short, the fact that the international community, through its authoritative organs, demonstrated that it was capable of decision and did deem South West Africa a matter of international concern became a factor in all of the South African Government's policy decisions in regard to the Mandate Territory. The assertion of jurisdiction, and no more, was a contributing factor to the partial implementation of many of the principles of the Mandate agreement.

If the Judgment of July 18th was made because of a "preoccupation with enforceability," it has engendered precisely the opposite of the desired effect. By locking the door to the one persuasive process which could have imposed a "binding obligation" on the Government of South Africa, the Court has invited South Africa to exercise its will in the mandate territory,<sup>280</sup> irrespective of the resounding demand for the development and well-being of the peoples of South West Africa under international supervision.

### APPENDIX

#### ARTICLE 61 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

4. The application for revision must be made at latest within six months of the discovery of the new fact.

5. No application for revision may be made after the lapse of ten years from the date of the judgment.

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280. See, *e.g.*, articles cited *supra* note 271. Note the South African protest over the American construction of the case reported in N.Y. Times, Aug. 16, 1966, p. 6, col. 1.

## ARTICLES 78, 80, 81 of the RULES OF COURT

## ARTICLE 78.

1. A request for the revision of a judgment shall be made by an application.

The application shall state the judgment of which the revision is desired, and shall contain the particulars necessary to show that the conditions laid down by Article 61 of the Statute are fulfilled, and a list of the documents in support; these documents shall be attached to the application.

2. The request for revision shall be communicated by the Registrar to the other parties. The latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

3. If the Court admits the application for a revision, it will determine the written procedure required for examining the merits of the application.

4. If the Court makes the admission of the application conditional upon previous compliance with the judgment to be revised, this condition shall be communicated forthwith to the applicant by the Registrar and proceedings in revision shall be stayed pending receipt by the Court of proof of compliance with the judgment.

## ARTICLE 80.

If the judgment to be revised or to be interpreted was given by the Court, the request for its revision or interpretation shall be dealt with by the Court. If the judgment was given by one of the Chambers mentioned in Articles 26 or 29 of the Statute, the request for its revision or interpretation shall be dealt with by the same Chamber.

## ARTICLE 81.

The decision of the Court on requests for revision or interpretation shall be given in the form of a judgment.