THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE: CUSTOMARY INTERNATIONAL LAW; STATE SOVEREIGNTY; AND THE DOMESTIC JURISDICTION

by

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and the Domestic Jurisdiction

ABSTRACT

Purpose and Limits of the Present Study.

International litigation is primarily concerned with finding a solution for the conflicting and contradictory claims of the disputant states who have different notions of justice for their acts and omissions at the international level. This problem becomes more acute when one party asserts its right against the other, and, in the absence of any treaty or convention, tries to establish and prove the existence of such right, on the basis of long usage, practice or custom, recognized as such by the civilized nations of the international community. The

International Court of Justice, like its predecessor, the Permanent Court of International Justice, had to face those problems in a number of cases brought before it, and it succeeded, to a great extent, in solving those complicated problems, and, by crystallizing those rudimentary rules of customary law, which in the past had been a source of confusion for the international jurists, has made important contributions to the development of international law.

It is the purpose of the present study to analyze the jurisprudence of the Court and, to find those principles of customary international law that the Court has applied for arriving at a particular decision. The approach is basically expository, and is confined to scrutinize that volume of authority, which the Court has produced on "international custom, as evidence of a general practice accepted as law."[1] Within this limited range it was thought desirable not to ignore the fundamental questions relating to state sovereignty and "domestic jurisdiction", which present various problems in international adjudication. Since the object of the present thesis is to extract, assemble, and evaluate the nature of those principles which the Court enunciated in its Judgments, it was found necessary to draw upon the individual opinions of the dissenting Judges, or, the separate opinions of those who

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1 Art. 38 (1) (b) of the Statute of the Court.

concurred in the operative part of the Judgment, but, gave different reasons for arriving at the same conclusion, because it has been said that: "A dissent in a court of last resort is an appeal to the broadening spirit of the law, to the intelligence of a future day where a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[1]

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1 Charles Evans Hughes, U.S. Supreme Court 68 (1928) (quoted by Kunz, "The Nottebohm Judgment (second phase)," 54 AJIL (1960), p. 539; see however, Lauterpacht, The Development of International Law by the International Court of Justice, Stevens, London, 1958, pp. 66-7).

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International Arbitration

> The end of law is peace. The means to that end is war. So long as the law is compelled to hold itself in readiness to resist the attacks of wrong - and this it will be compelled to do until the end of time - it cannot dispense with war. The life of the law is struggle, - a struggle of nations, of the State power, of classes, of individuals. All the law in the world has been obtained by strife.
>
> Rudolph Von Jhering

Historical Retrospect.

Tolerance of ideas and systems is the price that human beings pay to avoid the modern cries of war which develop and end up in various isms. This traditional thought is as true today as it used to be in the antiquity of the Greek City-State System. The human mind has been working continuously to establish peace - not by propagating war; by creating conditions under which rule of law at the international level could be established.

The first successful effort was made in 1648, when the Peace of Westphalia was signed. The "Machiavellian Prince" became honest for the first time and brought an end to the scourge of the Thirty Years War, which had disrupted the medieval Christendom of the European continent. The Peace of Westphalia has been considered by the international jurists as a "first of several attempts to establish something resembling world unity on the basis of states exercising untrammeled sovereignty over certain

territories and subordinated to no earthly authority."[1] In this Treaty one finds the seeds of international arbitration, the faint beginning of an international constitutional law, and a first instance of deliberate enactment of common regulations by concerted action.[2] However, this "faint beginning" lacked a juristic approach for settling international disputes, and therefore, cannot be considered as a harbinger of international arbitration.

The modern international lawyer traces the history of arbitration for the pacific settlement of international disputes from the date when the Jay Treaty of 1794 was signed, after the process of arbitration, in the preceding period of a century or more, had come to be regarded as virtually desuetude.[3] This General Treaty of Friendship, Commerce and Navigation, concluded between the United States and Great Britain was a new starting point for the development of international relations, since the parties stipulated to accept the arbitral award as legally binding for the settlement of their international disputes. Read J., pictured John Jay, the Secretary of State of the United States who incorporated the arbitral provision in

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1 Leo Gross, "The Peace of Westphalia, 1648-1948." 42 AJIL (1948), p. 20.

2 F.S. Dunn, "International Legislation." 42 Pol. Sci. Q. (1927), p. 577.

3 See Simpson and Hazel, International Arbitration, Stevens, London, 1959, pp. 1-3; Hudson, International Tribunals, Washington, 1944, pp. 3-4.

the Treaty, as a "legitimate parent of international justice."[1]

The third important phase in the annals of international arbitration started from the Anglo-American Alabama Claims of 1872, which gave new impetus to the settlement of disputes by pacific means, and introduced a number of rules and general practices which, subsequently, were carried over to the two Hague Conventions of 1899 and 1907. By the end of the 19th century, arbitration had become a wide-spread international custom and the statesmen had started thinking in the terms of establishing a permanent international tribunal.

The First Hague Convention of 1899 succeeded in adopting a "Convention on the Pacific Settlement of International Disputes" and envisaged the organization of a Permanent Court of Arbitration with an International Bureau at the Hague to serve as its Secretariat and a Permanent Administrative Council. The Second Hague Convention of 1907 was an improvement on the First Convention, and strengthened the foundations of the Court of Arbitration and provided for summary procedure in disputes concerning matters of secondary importance.

Strictly speaking, the Permanent Court of Arbitration is not a court, but merely a panel of arbitrators out of which a tribunal could be formed. As

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1 Read, John E. The Rule of Law on the International Plane, Clarke, Irwin & Co., Toronto, Vancouver, 1961, p. 11.

such, it has no permanency in the real sense of the term. It is a court by courtesy - a device for creating ad hoc tribunals: "It is permanent only in the sense that a panel is permanently available from which arbitrators may be chosen, that the Administrative Council is constituted as a continuing body, and that a permanent International Bureau exists to facilitate the creation of tribunals."[1] Besides these drawbacks, it is a slow-moving process - a costly hypothesis, which requires "an agreement on principles" for adjudication purposes, and therefore, lacks the characteristics of an international court in the true sense of the term.

The First World War brought an end to the hopes of those who wanted to establish a rule of law at the international plane. Hobbes' prophecy: "A perpetual war in which men take arms against each other", proved to be true, and the four years of war, caused all-round frustration, starvation, bloodshed and misery. Amid these grim tragedies man was still struggling to find the means through which he could achieve the end; the establishment of peace was his only worry.

The Hague Conventions (of 1899 and 1907) guided the Paris Peace Conference of 1919, and Article 14 of the Covenant of the League of Nations provided that: "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall

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1 Hudson, Manley O. Treatise on the Permanent Court of International Justice, Macmillan, New York, 1934, at p. 11.

be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

This was the first successful effort at the international level where the nations agreed to resolve their differences through peaceful methods. During the term of its "tenure"[1] the Permanent Court of International Justice served as an agency for the promotion of peace. It raised a new vista of hope in its capacity to develop international law and to achieve pacific settlement of international disputes. The Court gave, during the term of its existence, thirty-two Judgments and twenty-seven Advisory Opinions.[2] These Judgments and Opinions bear eloquent testimony to the sincere efforts of the Court for easing international tension by elucidating the thorny questions of international law, since some of the cases "related to differences which, if the Court had not been

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1 The writers have different notions about the period of the existence of the Court. However, officially, the Court has been deemed to have existed from 1921 to 1946.

2 Hudson, The Permanent Court of International Justice: 1920-1942, (1943), p. 779. For a brief analysis of the jurisprudence of the Permanent Court, see Wilfred Jenks, "The Compulsory Jurisdiction of International Court and Tribunals." Preliminary Report, 24th Commission, 47 Annuaire, Institute de Droit International, Vol. I (1957), pp. 119-132.

available and if they had been allowed to fester, might have led to serious complication."[1]

In spite of this impressive record of fence-building to contain war, "it would be difficult to say that any of the cases (brought before the Court) threatened to become a casus belli."[2] The minor and major hostilities continued to be the effective source of settlement of international disputes, and finally the Second World War broke out, when the peace-loving world failed to convince the war-loving generals that international disputes could be settled through peaceful methods, short of war.

While the daredevil drama of death and destruction was still being staged in its last "session" in the early 1940's, the "peace-loving countries" had started to fashion the World Organization which could "save the succeeding generation from the scourge of war." The United Nations Organization, whose function is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,"[3] came into existence. And with this Supranational Organization, it was hoped, in the words of the Rapporteur of Committee IV/1 to the U.N. Commission

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1 Hudson, International Tribunals op. cit. supra, p. 238.

2 Ibid.

3 Preamble of the Charter.

at San Francisco, that:

> On the basis of the texts proposed for the Charter and for the Statute, the first Committee ventures to foresee a significant role for the new Court in the international relations of the future. The judicial process will have a central place in the plans of the United Nations for the settlement of international disputes by peaceful means. An adequate tribunal will exist for the exercise of the judicial function, and it will rank as a principal organ of the Organization. It is confidently anticipated that the jurisdiction of this tribunal will be extended as time goes on, and past experience warrants the expectations that its exercise of this jurisdiction will commend a general support.
>
> A long road has been traveled in the effort to enthrone law as the guide for the conduct of states in their relations one with another. A new milepost is now to be erected along that road. In establishing the International Court of Justice, the United Nations holds before a war-stricken world the beacons of Justice and Law and offers the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.[1]

Assuming that these were the ideals set forth for the Court, the writer intends to explore (though incidentally, still less critically, and within the limits

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1 Report of the Rapporteur of Committee IV/1 to Commission IV, Doc. 913 (June 12, 1945) 13 UNCIO. Doc. p. 381, at p. 393; The United Nations Conference on International Organization (Selected Documents), Washington, 1946, p. 846, at p. 854.

of customary rules of international law), whether the Court has played such a role, with regard to the hopes and aspirations of those who envisaged that law would be enthroned as a guide for the conduct of the sovereign states, to settle their disputes by peaceful means, and in conformity with principles of justice and international law.

CHAPTER I

Customary International Law in the Jurisprudence of The International Court of Justice

> International Law is not a thing of treaties or conventions but the result of centuries and centuries of experience.
>
> J. B. Scott

Article 38, paragraph 1 (b) of the Statute, directs the Court to apply international custom, as evidence of a general practice accepted as law. But unfortunately, there are few instances in international sphere where a custom has been universally acknowledged to have a binding force. Moreover, customs are local, regional, or general, and in the absence of any accepted

principles of international law, no general theory can be evolved to determine their nature and extent. This has posed problems for the International Court of Justice.

The jurisprudence of the Court shows that it has applied different "standards" in order to ascertain the validity of those customs on which the parties based their claims. These standards, although recognized as "incontestable facts"[1] by some of the writers, are nevertheless, very confusing, and at certain times, very restrictive in their application.

For the satisfactory appraisal of the jurisprudence of the Court, it is worthwhile to re-examine some of the decisions of the Court, where it prescribed certain "standards", for the qualification of those customs, the recognition of which had been disputed by the international community.

I "Standards" for the Proof of Customary Law:- A Custom Must Have a Binding Force.

In the Asylum case[2] the Court had to deal at length with the application of the principles of customary international law. In that case, the Colombian government had granted asylum to a political fugitive, Haya de la Torre, the founder of the Alianzana Popular Revolucionaria

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1 See Kopelmanas, "Customs as Means of Creation of International Law," 18 BYIL (1937), p. 7.

2 I.C.J. Reports, 1950, p. 266.

Americana (1924), who was working, more often underground or as a political exile, to further the cause of alliances among the Indo-American states, or trying to build a united front against the imperialistic domination of the Latin American, or small Asiatic states. He was often condemned by the Americans as a communist, or, as a revolutionary socialist. At home, he was honoured as a sincere patriot who understood the socio-economic problems of his country and was trying to attain freedom from poverty.

On October 3, 1948, a military rebellion broke out in Peru. It was suppressed on the same day. On October 4, Haya de la Torre's party was charged with the organization of that rebellion. The American People's Revolutionary Alliance was outlawed and the judicial proceedings against Haya de la Torre and others were started, charging them with a "crime of military rebellion."[1]

There was another coup d'etat by the Military Junta of Peru which had overthrown the former government. This Military Junta Government, on November 16, made an Order requiring Haya de la Torre and others to answer the accusation brought against them "for the crime of military rebellion." Haya de la Torre did not report and instead of answering the accusations laid against him, he sought refuge in the Colombian Embassy in Lima. The Colombian

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1 I.C.J. Reports, 1950, p. 272.

Ambassador immediately demanded safe-conduct for the refugee. The Peruvian government refused to comply with that demand and asked for his surrender. Diplomatic correspondence followed, leading up to the Act Lima of August 31, 1949, whereby the dispute which had arisen between the two governments was referred to the Court.[1]

The Colombian government justified its action of granting asylum on various grounds.[2] It argued that a local custom, peculiar to Latin America, had developed out of a practice followed for a hundred years. It supported its contention by citing numerous cases of asylum that had been granted and honoured in that part of the world. It maintained that asylum was an institution which had been respected by all the Latin-American states, and therefore, had acquired the binding force of law.

The Court had to decide the case on merits. In the absence of any precise rules for the determination of customary international law - the Court laid down certain "standards" to evaluate the validity of such a custom upon which the Colombian government had based its contention. The Court said:

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1 I.C.J. Reports, 1950, p. 273.

2 The Colombian government had mainly relied on the Bolivarian Agreement on Extradition of July 18th, 1911, and on the Convention on Asylum of February 20th, 1928, and on American international law in general. For the purposes of the present paper, only relevant provisions of these Treaties and Agreements, which deal with customary international law, have been discussed.

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State ....[1]
>
> (italics added)

The standard of proof, laid down above in the italacized words may be accepted as a principle of international law since the Court, in the same passage added that "This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.'"[2] After formulating the conditions essential for the existence of a customary rule, the Court proceeded to apply them in an exacting manner.[3]

The Colombian government had supported its contention[4] by citing twenty cases of asylum which occurred

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1 I.C.J. Reports, 1950, p. 276.

2 Ibid., at pp. 276-277. This principle was confirmed in the Case concerning rights of nationals of the United States of America in Morocco, I.C.J. Reports, 1952, 176, at p. 200.

3 See Lauterpacht, The Development of Int. Law.... op. cit. supra, p. 375.

4 The Colombian submission read: "That the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th, 1911, and the Convention on Asylum of February 20th, 1928, and of American international law in general." I.C.J. Reports, 1950, pp. 270, 271, 273.

since 1928 in the foreign embassies and legations accredited in Colombia. In all these cases, asylum was respected and safe-conducts granted. It also cited the eleven cases of unilateral qualifications in which it had to yield to the wishes of the other governments, because of the existence of a customary rule of international law among the Latin-American states.[1] It also gave the comprehensive list of all the cases, and tried to prove that customary law existed in Latin America under which a state granting asylum was allowed, as a matter of right, to qualify the offence of the political fugitives who were granted asylum. In proof of this contention, the Colombian government referred to various Conventions and Treaties[2] which had been ratified by almost all of the Latin-American states. It tried to prove that the above treaties or conventions were nothing more than the existence of a fact that customary international law existed and these treaties and conventions incorporated that law.[3]

Referring to all these contentions, and after applying the standard for proof in an exacting manner[4],

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1 See particularly Diss. Opin. of Judge Castilla, ibid., at p. 363 and citations thereto for the cases referred.

2 Havana Convention of 1928; Montevideo Convention of 1889, 1933 and 1939.

3 Article 18 of the Bolivarian Agreement of 1911, read: "Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law." I.C.J. Report, 1950, at p. 274.

4 Lauterpacht, op. cit., at p. 375.

the Court observed:

> Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or - if in some cases it was in fact invoked - that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.[1]

In this way, the Court based its judgment on the standard that it had already laid down for the proof of a customary rule of international law - the standard of constant and uniform practice accepted as law.

In the above case, the Colombian government failed to meet all the requirements - the requirements of

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1 I.C.J. Reports, 1950, at p. 277.

"binding force"; "constant and uniform practice"; and of "a right appertaining to duty." By a majority of fourteen votes to two, the Court held that there did not exist any rule of customary international law among the Latin-American states which could give to a state granting asylum the right to determine the nature of the offence by a unilateral and definitive decision.[1]

It is submitted that the Court has laid down very rigid standards for adducing a proof for the validity of a custom in international law. The standard may not be quite impossible to be met, but nevertheless, it is noted that wherever the Court applied the above standards[2], the parties failed to produce proof which could meet all the requirements of the above standards.

It is submitted that by applying the rigid standards for adducing strict proof for the existence of a customary rule of international law from the Latin-American practice of asylum, the Court's judgment is not necessarily a contribution to the development of international law in general. In this case, the Court was dealing with a Latin-American practice - a regional custom which required special treatment. The application of a universal rule to the regional custom was undesirable for all practical purposes.

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1 Ibid., at p. 288.

2 See the Right of U.S. Nationals in Morocco case, I.C.J. Reports, 1952, pp. 199-200; see also the Right of Passage case, I.C.J. Reports, 1960, Diss. Opin. of Judge Chagla, p. 120.

Moreover, according to the jurisprudence of the Court, the decisive effect was to be attributed to a "particular practice" which was "to prevail over any general rule."[1] But in this case the Court failed to do so, because it had already established the "exacting interpretation of conditions of international custom."[2]

The Court failed to recognize the importance of the institution of asylum, which had developed in the Latin-American states due to various reasons peculiar to the political conditions of that part of the world. The political upheavals; the instability among the governments; the revolutions; and the humanitarian reasonings - all had contributed towards the development of this practice, which proved to be uncertain and inconsistent in the reasoning of the Court. In this context Judge Castilla, in his dissenting opinion, remarked: "The Judgment of the Court refrains from considering the institution of asylum as it appears in Latin America. Basing itself on such grounds, the Judgment of the Court was necessarily bound to arrive at very debatable conclusions with which I cannot agree."[3]

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1 See the Right of Passage over Indian Territory case, I.C.J. Reports, 1960, at p. 44.

2 Lauterpacht, op. cit., at p. 374.

3 I.C.J. Reports, 1950, at pp. 359-60. See also the Diss. Opin. of Judge Azevedo, ibid., at pp. 335-336, where he maintained that "... It is indisputable that Latin-American countries practise asylum extensively, whether actively or passively; they sign conventions, even if they sometimes fail to ratify them; they make solemn declarations, they issue press communiques, they praise the services rendered by asylum. In a word, they appear generally proud of the extensive and continued application of this ancient institution."

It is noted that the Court failed to give a closer examination to the "American international law" - an incontestable fact the existence of which could hardly be denied.[1] This factor required special consideration since the institution of asylum was closely related to this branch of international law in which twenty Latin-American Republics were involved.[2] Judge Read laid special emphasis on this point and said: "There is - and there was, even before the first conventional regulation of diplomatic asylum by the Conference at Montevideo in 1889 - an 'American' institution of diplomatic asylum for political offenders."[3] In the opinion of the Court this institution had been recognized only by way of convenience and without any legal obligation.[4] Perhaps the standards of the Court were too rigid to accommodate an institution which had developed from a local practice unrecognized by "general and universal" customary international law.

On legal grounds, the Colombian government tried to prove the customary rule of international law concerning the institution of asylum. The Court again applied the

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1 Cf., e.g., see Diss. Opin. of Read J., I.C.J. Reports, 1950, at p. 316, where he wrote: "With regard to 'American international law', it is unnecessary to do more than confirm its existence - a body of conventional and customary law, complementary to universal internal law, and governing inter-State relations in the Pan American world."

2 Ibid.

3 Ibid.

4 I.C.J. Reports, 1950, at p. 286.

above standards and came to the conclusion that: "In the absence of precise data, it is difficult to assess the value of such cases as precedents tending to establish the existence of a legal obligation upon a territorial State to recognize the validity of asylum which has been granted against proceedings instituted by local judicial authorities ...."[1] The Court not only demanded the proof for the validity of a custom, but also wanted to test the Colombian contention by applying the general principles of international law, that those cases must tend to establish a precedent for their valid recognition. In the opinion of the Court those cases did not establish any legal precedent, and were the result of simple "considerations of convenience or simple political expediency" without having "any feeling of legal obligation."[2]

The Colombian government had further relied on the Montevideo Convention (of 1933), and had contended that the Convention was an expression of the Latin-American customary international law. It maintained that the customary law of granting asylum was already existing, and the Convention was purported to codify the law related to asylum, and therefore, was valid as a proof of customary law against Peru.[3] However, after indicating that the

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1 Ibid.

2 Ibid.

3 Ibid., at p. 277.

Convention had not been ratified by a large number of Latin-American states including Peru, the Court said:

> ... The limited number of States which have ratified this Convention reveals the weakness of this argument, and furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.[1]

In order to prove its case that asylum had been recognized as an institution in accordance with the customary rules of international law (prevailing among the Latin-American states), the Colombian government gave the following documentary proof:

> Aside from the stipulations of the present Agreement; the signatory States recognize the institution of asylum in conformity with the principles of international law.[2]

The Ambassador of Colombia sent a note to the Peruvian Minister, which read: "... I have the honour to inform Your Excellency that the Government of Colombia, in accordance with the right conferred upon it by Article 2 of the Convention on Political Asylum signed by our two countries in the city of Montevideo on December 26th, 1933, has qualified Senor Victor Raul Haya de la Torre as a political refugee."[3]

From the above facts, one may conclude that these

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1 Ibid.

2 Art. 18, of the Bolivarian Agreement of 1911. I.C.J. Reports, 1950, p. 274.

3 I.C.J. Reports, 1950, p. 273.

Conventions and Agreement, were primarily concerned with the codification of a customary law of asylum, and that the repeated efforts were being made for the purpose of attaining uniformity in the Latin-American practice. But the standards set by the Court for an exacting proof did not enable the Court to accept the above arguments as a valid proof of customary international law. By rejecting the above submissions, the Court came to the following conclusion:

> The Court cannot ... find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic offence.[1]
>
> (italics added)

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1 Ibid., at pp. 277-78; This reasoning of the Court contradicts the Report of the International Law Commission which it submitted to the General Assembly in 1950. The Report reads: "A principle or rule of customary international law may be embodied in a bipartite or multipartite agreement so as to have, within the stated limits, conventional force for the States parties to the agreement so long as the agreement is in force; yet it would continue to be binding as a principle or rule of customary international law for other States. Indeed, not infrequently conventional formulation by certain States of a practice also followed by other States is relied upon in efforts to establish the existence of a rule of customary international law. Even multipartite conventions signed but not brought in to force are frequently regarded as having an evidence of customary international law ...." Y.B. of Int. Law Comm. (1950), Vol. II, Doc. A/1316, p. 364.

It is submitted that the reasoning of the Court, in the above paragraph lacks clarity and precision. Peru had ratified the Agreement of 1928; the Agreement was to be interpreted by the provisions contained in the Montevideo Convention of 1933 and the Peruvian government had signed that Convention. If Peru had failed to ratify that Convention which was intended to codify the customary rules of international law[1], the logical conclusion to be drawn from that "failure" or "silence" would have been that Peru had given its implied consent, because, had it any intention of repudiating the Convention of 1933 - it could have done so in the proceedings of the later Convention of 1939 to which it was a signatory state.[2] But it did not do so. In other words Peru did not deny the existence of the customary law - the institution of asylum which had acquired a place of honour among the Latin-American states.[3]

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1 See supra, pp. 9-10.

2 See the Temple of Preah Vihear case, I.C.J. Reports, 1962, p. 6 at p. 23 where the Court held: "... In fact ... an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period .... They did not do so ..., and thereby must be held to have acquiesced. Qui tacet consentire videtur si loqui debuisset ac potuisset." (italics added)

3 Cf., e.g., see Diss. Opin. of Judge Azevedo, I.C.J. Reports, 1950, pp. 335-36.

Even if one grants that the Montevideo Convention of 1933 could not be invoked against Peru since it had not been ratified by it, how could it be presumed that the Havana Convention of 1928 had ceased to exist when its provisions were still to be interpreted by the subsequent Conventions? Moreover the Peruvian Counter-claim affirms the Colombian contention that there was an institution of asylum, and the former still validly recognized the Convention on Asylum, signed in 1928. The Counter-claim reads "... that the grant of asylum by the Colombian Ambassador at Lima to Victor Raul Haya de la Torre was made in violation of Article 1, paragraph 1, and of Article 2, paragraph 2, item 1 ..., of the Convention on Asylum signed in 1928, and that in any case the maintenance of the asylum constitutes at the present time a violation of that treaty."[1] The Peruvian government was asking, in the simple language to interpret the various provisions of the Conventions; it had not contested the validity of the institution of asylum. "To apply such a construction" Judge Read remarked, "would be to revise, and not to interpret the Havana Convention; a course which I am precluded from adopting by the rule laid down by this Court when it said: 'It is the duty of the Court to interpret the Treaties, not to revise them.'" (Interpretation of

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1 I.C.J. Reports, 1950, at p. 273

Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports, 1950, p. 229).[1]

The jurisprudence of the Court demands that the Court should not try to legislate on the fundamental issues which are decisive for the settlement of the disputes. In this case, the Court laid down very rigid standards for testing the validity of a customary rule of international law, and subsequently it became very difficult for the Court to apply the same standards in each and every situation. Had the Court applied the "liberal approach" in asking for a proof of custom; it could have easily avoided all those pitfalls which have become the subject matter for criticism. Moreover, judicial legislation at this stage of the underdeveloped nature of customary international law seems to be undesirable, since it is the very antithesis of the international justice.[2] And if this "legislation" tends to violate the principles of trust and faith that a state bestows upon the Court, it is very doubtful whether the Court will command sufficient respect to attract a large number of cases for adjudication.

The same. The Right of U.S. Nationals in Morocco case[3]:-

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1 Ibid., at p. 229.

2 Cf., e.g., see Lauterpacht, op. cit. supra, at p. 156 where he said: "... The denial on the part of the Court or of individual Judges of any intention to legislate is legitimate and proper. Any contrary attitude would constitute a usurpation of powers - doubly dangerous in the international sphere."

3 I.C.J. Reports, 1952, p. 176.

Strong Proof is Required to Establish Customary Rights if they Conflict with Treaty Rights.

U.S. Nationals in Morocco case is another illustration of the above point that customary law cannot be proved validly if the Court applies the test of "rigid standards" that it "invented" in the Asylum case. In this case, one of the questions at issue was whether, apart from treaty provisions and the operation of the most-favoured-nation principle, the United States was entitled to claim consular jurisdiction and other capitulatory rights in Morocco on the basis of "custom and usage."[1]

After observing that the United States' contention related to "custom and usage preceding the abandonment of capitulary rights in the French Zone by Great Britain in 1937", and the practice that developed after that date, the Court held that:

> ... the United States consular jurisdiction was in fact based, not on custom or usage, but on treaty rights. At all stages, it was based on the provisions of the Treaty of 1787 or of the Treaty of 1836, together with the provisions of treaties concluded by Morocco with other Powers, especially with Great Britain and Spain, invoked by virtue of the most-favoured-nation clauses ....[2]

The Court gave too much weight to the treaty rights, although it was never certain as to whether the United

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1 Ibid., at pp. 180, 200.

2 Ibid., at p. 199.

States' rights were based upon the provisions of the Treaty of 1787, or that of the Treaty of 1836.[1] The "gap" of fifty years shows the weakness of the findings of the Court on which it based its judgment. Moreover, the United States government had cited numerous cases which showed that the consular rights in Morocco were enjoyed by various states upon the basis of "custom and usage", and not upon any treaty provisions. The Court rejected this argument as well and in order to justify its own findings, the Court said:

> .... It is true that there were Powers represented at the Conference of Madrid in 1880 and at Algeciras in 1906 which had no treaty rights but were exercising consular jurisdiction with the consent or acquiescence of Morocco. It is also true that France, after the institution of the Protectorate, obtained declarations of renunciation from a large number of other States which were in a similar position. This is not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage.[2]
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> (italics added)

The above reasoning of the Court was based on the Treaty of 1937 between Great Britain and France, which terminated the consular rights of all the states by

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1 Ibid.

2 Ibid., at pp. 199-200.

operation of the most-favoured-nation clause.[1] The Court thought, that with this Treaty, the consular rights of the U.S. Government also terminated since it could not hold a better title from those who were also enjoying the similar rights. Thus the claim of the United States based upon custom and usage was rejected "summarily" by the Court since the former failed to produce sufficient evidence in support of its claim. Recalling[2] its "standards" that it had set in the Asylum case concerning the proof required of an "alleged custom peculiar to Latin-American States", the Court held:

> In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco.[3]

The United States, on the strength of correspondence that followed between the two governments over this dispute, tried to prove that its consular rights (apart from treaties), had been acknowledge by France by allowing the former to exercise those rights since 1787 uninterruptedly,

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1 This view has been criticized by the dissenting Judges. They said that the "consular jurisdiction" embedded in the Act of Algeciras "being based inter alia upon long established usage, which is only another name for agreement by conduct can only be terminated in the way in which international agreements can be terminated." I.C.J. Reports, 1952, p. 218. Diss. Opin. of Judges Hackworth, Badawi, Levi Carneiro and Sir Bengal Rau.

2 I.C.J. Reports, 1950, pp. 276-277.

3 I.C.J. Reports, 1952, at p. 200.

and that practice was a sufficient proof of an established custom against the latter. The Court acknowledged the importance of that correspondence, but nevertheless, after applying the test essential for a proof of such custom, the Court came to the conclusion that:

> ... There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgments of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court cannot (sic) ignore the general tenor of correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither Party intended to concede its legal position ....[1]

It is submitted that whenever the Court applied the rigid standards, it came to the same "standard" conclusion that the custom had not validly been proved. The Court admitted that those rights "might be regarded as acknowledgments of United States claim", but on the other hand, it did not hesitate to pronounce that those rights were the disputed rights, since "neither Party intended to concede its position."[2] Had the Court applied the liberal approach for ascertaining the validity of a custom, it could have arrived at an acceptable solution without destroying the sanctity of a century old practice.[3]

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1 Ibid.

2 Loc. cit.

3 Comp. the Fisheries case, where the Court considered "the elements of humanity; the socio-economic conditions of Norway, and even tolerated few uncertainties in the Norwegian Practice."

The dissenting Judges, Hackworth, Badawi, Levi Carneiro and Bengal Rau were of the opinion that the evidence produced by the United States for supporting its claim was sufficient to prove that it had acquired consular jurisdiction through "custom and usage."[1] They maintained that "The conduct of the French Government was not due merely to what was described during the hearings as 'gracious tolerance.'"[2] They quoted the letter of October 1937, written by the Secretary of State of the United States to the French Ambassador in Washington, which read in part "that American capitulatory rights in Morocco are derived not only from the American-Moroccan Treaty of 1836, but also from other treaties, conventions, or agreements and confirmed by long-established custom and usage."[3] After quoting the letter they said:

> Thus the French Government knew in 1937 that the United States was asserting usage as at least one legal basis of its rights, and in spite of this knowledge, the French Government continued the old practice without any reservation. It was not, therefore, a case of mere "gracious tolerance". As we have shown, usage has been continuously at work, in varying measure, during a period of nearly a hundred years, if not longer, and, therefore, what has been happening since 1937 is evidence of a continuous process which began nearly a century before that date.[4]

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1 I.C.J. Reports, 1952, at pp. 219-220.

2 Ibid., at p. 221.

3 Ibid., at p. 221

4 Ibid.

In spite of all the above proofs which the United States produced to support its contention that it had acquired the consular jurisdiction by a century old practice, the Court, by a majority of six votes to five,[1] rejected its Submission concerning consular jurisdiction (based upon custom and usage); but on the other hand, the Court unanimously declared "that the United States of America is entitled, by virtue of the provisions of its Treaty with Morocco of September 16th, 1836, to exercise in the French Zone of Morocco consular jurisdiction."[2] This unanimous Judgment was nothing more than a moral satisfaction for the United States of America since it had no value in the eyes of law. Moreover, in the operative part of its judgment, the Court rejected all the claims which the United States had brought against the French government. The standards of the Court, because of their rigidity, will never accommodate any of the claims which the parties may desire to bring for adjudication.

II Mitigation of the Harshness of the "Rigid Standards"; the "Liberal Approach" for the Proof of Customary Law:- Local Custom Must Prevail over General Rules of Customary Law.

From the above discussions one may be led to conclude that the Court has always demanded a strict proof for the

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1 Ibid., at p. 212.

2 Ibid.

validity of a custom which a party could never produce, and therefore, the application of these standards is undesirable. However, this is not the whole truth. The Court has tried to mitigate the rigours of these rigid standards by adopting a "liberal approach". Wherever the exigencies of the case demanded, and whenever it was necessary to safeguard the interest of the international community, the Court applied the liberal test for the proof of a custom, and solved most of the complicated problems, which it could never have solved, had it adhered to the rigid standards.

In the Case concerning Right of Passage over Indian Territory (Merits)[1], the Court had to deal with a problem of international importance[2], in which, an intermediate territorial sovereign was denying a right of passage to another sovereign who had no other means to reach its territory.

In the above case, the Portugese government claimed a right of passage over the Indian territory in order to exercise its sovereign rights in the two enclaves - Dadra and Nagar-Aveli. The enclaves were so surrounded by the Indian Union that there was no other approach to the

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1 I.C.J. Reports, 1960, p. 6. See also infra, under "State Practice".

2 The problem had an international significance since most of the African, Asiatic, European and Latin-American countries have to cross one another's territory in order to reach their own. More specifically Swaziland and Bosuto-land may face this problem if the Union of South Africa is involved in any dispute with these small states.

villages by land, air, or by sea, and therefore it had become impossible for Portugal to maintain its sovereignty over its own land. The Portugese government contested that the right claimed by it had been "confirmed by the agreements which it formerly concluded with the Marathas, by local custom and general custom, as well as by the concordance of municipal legal systems with respect to access to enclaved land."[1] It maintained that "in the relations between Portugal and the successive sovereigns of the territories adjoining the enclaves there was established and consolidated in the course of nearly two centuries, an unbroken practice in respect of the maintenance of the indispensable communications between coastal Daman and the enclaves; and ... that practice was based, on the part of all concerned, on the conviction that what was involved was a legal obligation (opinio juris sive necessitatis)."[2]

The Indian government denied the existence of these conventional or customary rights on the grounds that the rights claimed by Portugal were contradictory; their content was indeterminate and indeterminable; and therefore, they could not be enforced against it.[3]

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1 I.C.J. Reports, 1960, at p. 11.

2 Ibid.

3 Ibid., at p. 23.

It argued that Portugal's right had no basis in customary international internal law or "in general custom, or in the principles of international law which can be derived therefrom, or in the general principles of law recognized by civilized States, or in particular agreements, or in local custom which, if it exists, must be assimilated to the particular agreements."[1] It further maintained that no local custom could be established between two states only to have a valid recognition by customary international law.

It is noted that the Court in this case did not ask Portugal, that "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party."[2] Without labouring over this problem of a proof of local custom, the Court found that "there had developed between the Portugese and the territorial sovereign with regard to passage to the enclaves a practice upon which Portugal relies for the purpose of establishing the right of passage claimed by it."[3]

Having found that a practice had been rooted firmly, and having found that Portugal had been enjoying the right of passage over Indian territory, the Court rejected the

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1 I.C.J. Reports, 1960, at p. 23.

2 I.C.J. Reports, 1950, at p. 276.

3 I.C.J. Reports, 1960, at p. 39.

Indian contention that "there could be no valid local custom between the two states which the international law recognized."[1] By applying the liberal test, the Court observed:

> ... It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[2]

In this case the reasoning of the Court was quite different from that of its previous Judgments. In the Asylum case and in the U.S. Nationals in Morocco case, the Court had applied rigid standards in order to determine whether or not a custom had developed by a long, continued, uninterrupted, uniform and constant practice to acquire the binding force of law. But in this case the Court applied the liberal test peculiar to the factual circumstances of the case under consideration, and established beyond doubt that a long and continued practice between the two states was sufficient proof to establish the validity of a local custom.

However, this liberal approach of the Court does not conform to its jurisprudence and the standards that it had

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1 Loc. cit.

2 I.C.J. Reports, 1960, at p. 39.

set in the former two cases. Judge Chagla strongly criticized this attitude of the Court which he thought was contrary to the Court's jurisprudential system. In his dissenting opinion, he said: "On the question of local custom it is undoubtedly true that throughout the material period there was in fact transit between Daman and the enclaves - there was a constant and almost continuous traffic of goods and men. If the establishment of a local custom depends merely on a piling up of a large number of instances, then undoubtedly local custom can be said to be established in this case. But local custom under international law requires much more than that. It is not enough to have its external manifestation proved; it is equally important that its mental or psychological element must be established. It is this all-important element that distinguishes mere practice or usage from custom. In doing something or in forbearing from doing something, the parties must feel that they are doing or forbearing out of a sense of obligation. They must look upon it as something which has the same force as law. If I might put it that way, there must be an overriding feeling of compulsion - not physical but legal. That is what the jurisprudence on the subject calls the conviction of necessity."[1]

Judge Chagla, in the above passage, repeated the

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1 I.C.J. Reports, 1960, p. 116, at p. 120.

words of the Court[1] in order to establish that a local custom must be tested by the general principles of customary international law, and in order to give them a legal force in the international community, these local customs must meet all those requirements which have been laid down in Article 38, paragraph 1 (b) of the Statute of the Court.[2]

It is submitted that Judge Chagla's approach is primarily a psychological one which complicates the matter rather than provide a workable solution for ascertaining the validity of customary law. Moreover, the Court's findings were based upon facts; on principle; and on "law"[3], and therefore are beyond reproach.

In international transactions, local customs play an important part in governing the conduct of the international community. And if, in any case, the question at issue involves the determination of a local custom, it is not necessary that the Court should always apply the universal principles of customary international law.[4] Thus, in the above case, the Portugese government invoked (apart from

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1 See the Asylum case, I.C.J. Reports, 1950, at pp. 276-277.

2 I.C.J. Reports, 1960, p. 120

3 See the Report of the International Law Commission to the General Assembly, op. cit. supra, note 2, p. 11

4 Cf., see Jenks. The Prospects of International Adjudication, pp. 234-235.

the local custom), general international custom, as well as the general principles of law recognized by civilized nations, in support of its claim of a right of passage.[1] The Court said:

> ... Having arrived at the conclusion that the course of dealings between the British and Indian authorities on the one hand and the Portugese on the other established a practice, well understood between the Parties, by virtue of which Portugal had acquired a right of passage in respect of private persons, civil officials and goods in general, the Court does not consider it necessary to examine whether general international custom or the general principles of law recognized by civilized nations may lead to the same result.[2]

Likewise,

> As regards armed forces, armed police and arms and ammunition, the findings of the Court that the practice established between the Parties required for passage in respect of these categories the permission of the British or Indian authorities, renders it unnecessary for the Court to determine whether or not, in the absence of the practice that actually prevailed, general international custom or the general principles of law recognized by civilized nations could have been relied upon by Portugal in support of its claim to a right of passage in respect of these categories.[3]

These passages indicate that it is not necessary to apply the universal principles of cutomary international law

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1 I.C.J. Reports, 1960, pp. 11, 43.

2 I.C.J. Reports, 1960, p. 43.

3 Ibid., at pp. 43-44.

or the general principles of law where a local custom or practice clearly governs the rights and the obligations of the parties. Moreover, the Court was dealing with a "concrete case" of "special features"[1], where a particular practice had been established historically. Under these circumstances, the Court could not do better than to declare that "Such a particular practice must prevail over any general rules."[2]

The same. The Fisheries case[3]:-

An Alleged Custom Must Acquire the Authority of General International Law.

If the Court has applied the most rigid standards in the Asylum case to test the validity of a custom, in the Fisheries case, it mitigated the rigours of those standards by applying the most flexible and liberal tests for upholding the Norwegian contention that was based upon a long usage.

In this case, Norway was defending its claim to the territorial waters on historic grounds. It requested the Court to adjudge and declare that the delimitation of the fisheries zone fixed by the Norwegian Royal Decreee of July 12, 1935, was based upon a long usage, and therefore

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1 Ibid., at p. 44.

2 I.C.J. Reports, 1960, p. 44.

3 I.C.J. Reports, 1951, p. 116. See also infra under "State Practice".

was not contrary to the principles of international law.[1] In support of its contention, the Norwegian government argued that due to the peculiar conditions of its coast, and due to the economic and social conditions of its fishermen, it had followed a practice of measuring the breadth of territorial waters on the principle of straight lines from the low-water mark, and that, that method had not been opposed by other states for a long time (about three hundred years)[2], therefore, its Decree of 1935 was not contrary to the principles of international law.

The British government, in its legal, and most technically worded Submissions[3], requested the Court to declare: "That the Norwegian Royal Decree of 12th July, 1935, is not enforceable against the United Kingdom to the extent that it claims as Norwegian waters (internal or territorial waters) areas of water not covered by Nos. (1) - (11)."[4] It also pleaded that the ten-mile rule was a general principle of international law and should be considered as effective against Norway even if the claim to territorial waters was historic.

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1 Ibid., at p. 124.

2 Cf., e.g., see the formulation of the issues by the Court, ibid., at p. 124, where it says "... British fishermen refrained from fishing in Norwegian coastal waters for a long period, from 1616-1618 until 1906."

3 I.C.J. Reports, 1951, pp. 119-123.

4 Ibid., at p. 123.

After applying its rigid tests to the British claims, and after taking a liberal attitude towards the Norwegian defence[1], the Court came to the conclusion that a customary rule (the ten-mile rule for the demarcation of bays as contested by the British government), "although ... has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of internal law."[2] It further held that "In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast."[3] And finally, by applying the subjective test[4], the Court said:

> The notoriety of the facts, the general toleration of the international

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1 See ibid., pp. 128, 133, 138, where the Court said: "In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing."; "... certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage." "The Court considers that too much importance need not be attached to the few uncertainties or contradictions, ..." (italics added); See also Jenks, op. cit. supra, Note 52 at p. 249.

2 Ibid., at p. 131.

3 Ibid.

4 Cf., see Lord McNair's Diss. Opin., I.C.J. Reports, 1951, at p. 169.

> community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.[1]

It is noted that by applying the rigid standards and by demanding strict proof from the British government for the existence of a customary rule of international law, and conversely, by placing the Norwegian government on a better footing[2], the Court has involved itself in a legal controversy.[3] For instance, Judge Read remarked that: "The true legal character of the problem has been obscured. It has been treated as if the issue concerned the existence or non-existence of a rule of customary international law restricting the exercise of sovereign power by coastal

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1 I.C.J. Reports, 1951, at p. 139.

2 See Jenks, op. cit. supra note 52, at p. 249, where he comments upon the following passage of Sir Gerald Fitzmaurice: "The issue here involved is one of the greatest importance, not only as a matter of principle - because it goes to the root of State rights, the relationship of State Sovereignty to international law, and also the whole concept of the rule of law in international relations - but also because of the decisive effect it may have on the outcome of a litigation." Jenks' remarks: "It is not too much to say that in the last analysis the Fisheries case was lost and won on this issue. The Norwegian Government was obviously in a very strong position if all it had to do was to show that its action was 'not contrary' to international law - for if it could establish that the rules of international law relative to territorial waters were unsettled or controversial, all that need then be shown was that the Norwegian Decree did not actually contravene any recognized rule ...."

3 For controversial points and criticism. See infra under "State Practice."

States. It has been assumed that the United Kingdom must establish the existence of such a restrictive rule in order to challenge the validity of the 1935 Decree. It has been suggested that the British case must fail, unless it can be proved that such a restrictive rule is founded on customary international law."[1]

Legally speaking, the Court's strict adherence to the universality of the principles of customary international law, in this case, has not contributed largely to the growth of maritime customary international law. Commenting on the decision of the Court, Sir Hersch Lauterpacht wrote that: "The fact that the Court found itself unable to give to a practice which was preponderant, though not universal, the status of a binding rule of customary international law raises, in this sphere, an issue of a fundamental nature. If universality is to be made the condition of the application of customary rules, it may become doubtful whether many rules would qualify for that purpose. For while in most fields of international law there is agreement as to broad principle, there is almost invariably a pronounced degree of divergence with regard to the application of specific rules. To say, therefore, that with regard to any particular matter no rule of international law exists unless practice is unanimous or approaching unanimity may result in giving judicial imprimatur to the

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1 I.C.J. Reports, 1951, at p. 189.

existence of wide gaps in international law unless at the same time the Court lays down, by reference to existing practice and principle, what is the alternative binding and effective rule on the subject."[1]

III Avoidance of Proof; Recognition and the Application of International Customs:-

From the above discussions, the jurisprudence of the Court concerning customary international law may be understood as expressing two extreme views: first, adherence to the rigid standards for the proof of customary law; second, the liberal or subjective approach, peculiar to the circumstances of the individual cases. However, the Court has followed another method for the recognition and the application of international customary law without asking the parties to satisfy any of the above conditions. In the following cases, the Court has frequently recognized and applied international custom without requiring any proof of custom:

The Corfu Channel case[2]:-

Right of Innocent Passage - A Well-Recognized Principle of Customary International Law.

In this case, the Albanian government contested that the British government had violated its sovereignty by

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1 Lauterpacht, op. cit. supra, at p. 370.

2 I.C.J. Reports 1949, p. 4.

sending the warships through the North Corfu Strait without its previous authorization. In support of its claim, the Albanian government argued that the Strait was exclusively used by the Albanians for the local traffic from the ports of Saranda and Corfu and that the Strait was of secondary importance which did not belong to the class of international highways.

The Court, in this case, adopted a novel approach to solve the problem. It did not ask any of the parties to prove whether or not that Strait belonged to the class of international highways. Relying upon the simple "information"[1] given by the British Agent, the Court said that it is "generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent ...."[2] With these observations, the Court held that "Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace."[3]

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1 Ibid., at pp. 28-29. The information about the traffic passing through the Strait was only from April 1, 1936 to December 31, 1937.

2 I.C.J. Reports, 1949, at p. 28.

3 Ibid.

In this way the Court recognized the customary rule of international law, and by applying the same rule, it found that the British government had not "violated Albanian sovereignty by sending the warships through the Strait without having obtained the previous authorization of the Albanian Government."[1]

In the same case, the Court, by applying the rules of customary international law "found" the law for its decision by observing, that "international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation."[2] Thus, the Court did not hesitate to apply the principles of customary international law because of the universal acknowledgment of the customary rule of "right of innocent passage."

The same. Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)[3]:-

Consent: Fundamental Principle of Customary International Law.

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1 Ibid., at pp. 29-30.

2 Ibid., at p. 18. The Court had already found that the knowledge of the mine laying could not be imputed to the Albanian government "by reason merely of the fact that a mine field discovered in Albanian territorial waters caused the explosions of which the British warships were the victims." Ibid. But, by applying the rules of customary international law the Court said: "... this fact by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof." Ibid.

3 I.C.J. Reports, 1954, p. 19.

This case is primarily concerned with the acknowledgment of the principle of customary international law that the Law of Nations is based upon the common consent of the member-states of the Family of Nations.[1]

In this case, the parties involved - Great Britain, France, and Italy, were contesting their claims to the monetary gold removed by the Germans from Rome in 1943, but subsequently recovered and possessed by the United States.[2] The British government claimed that the gold should be delivered to it in partial satisfaction of the Court's judgment of December 15, 1949.[3] Italy claimed that the gold should be delivered to it in partial satisfaction for the damage that it had suffered as a result of an Albanian law of January 13, 1945. However, in the Washington Statement of April 25, 1951, France, Great Britain and the United States, to whom the Reparation Agreement of 1946 had been entrusted, decided that the gold should be delivered to the British government unless, within a certain time limit, Italy or Albania applied to the Court requesting it to adjudicate on their respective rights. Albania took no action in the matter, but within the prescribed time limit Italy made an application to the Court.

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1 Cf., e.g., see Oppenheim, op. cit. supra, p. 25.

2 It had been found that the gold belonged to Albania.

3 I.C.J. Reports, 1949, p. 244.

The Court applied the universally acknowledged principle[1] of customary international law and found that:

> The Court cannot decide such a dispute without the consent of Albania .... To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law ....[2]

The same. The Nottebohm case[3]:-

Nationality - a Matter of Domestic Jurisdiction.

In this case Liechtenstein claimed restitution and compensation from Guatemala on the ground that the latter had acted toward Mr. Nottebohm, a naturalized citizen of Liechtenstein, in a manner contrary to international law.

In order to decide this claim, the Court thought it necessary to determine whether Liechtenstein was entitled to protect Mr. Nottebohm's interests - a German national whose property had been confiscated by Guatemala during the Second World War, and whose naturalization was disputed by the latter.

The Court referred to the established principle of customary international law that "leaves it to each State to lay down the rules governing the grant of its own nationality"[4], but in order to decide whether such a

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1 See above.

2 I.C.J. Reports, 1954, at p. 32.

3 Nottebohm Case (second phase), I.C.J. Reports, 1955, p. 4.

4 Ibid., at p. 23.

naturalization has any "international effect"[1], the Court said that "it is international law which determines whether a State is entitled to exercise (that) protection...."[2]

In the absence of any rules of customary international law, the Court based its Judgment on the state practice which had established at least one thing with a reasonable certainty that "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[3] The Court supported these findings by making a reference to the studies carried on in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations. It explained the provisions of the Hague Convention (of 1930) relating to the Conflict of the Nationality Laws which laid down that "the law enacted by a State for the purpose of determining who are its nationals shall be recognized by other States in so far as it is consistent with .... international custom, and the principles of law generally recognized with regard to nationality."[4]

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1 Ibid., at p. 21

2 Ibid.

3 Ibid., at p. 22.

4 Ibid., at p. 23.

In this case the Court did not think it necessary to enter into the details of such practice; nor did it ask any of the parties to prove or disprove the validity of that practice which recognized the "legal bond" for deciding whether nationality had been conferred according to the principles of customary international law, or according to practice followed by the states.[1]

The same. The Interhandel case[2]:-

Customary Law concerning Exhaustion of Local Remedies.

In this case the United States in its Third and Fourth Preliminary Objections requested the Court adjudge and declare "that there is no jurisdiction in this Court to hear or determine any issues raised by the Swiss Application or Memorial concerning the seizure and retention of the vested shares of General Aniline and Film Corporation,

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1 Judge Klaestad criticized this policy of the Court which was in derogation to the policy that it enunciated in the Asylum case for the proof of a custom. He said that: "The Government of Guatemala would have to prove that such a custom is in accordance with a constant and uniform State practice 'accepted as law' (Article 38, para. 1 (b) of the Court's Statute). But no evidence is produced by that Government purporting to establish the existence of such a custom." Ibid., at p. 30. Similarly, Judge Read said: "I am bound to proceed on the assumption that Liechtenstein might be entitled to a finding of denial of justice, if the case should be considered on merits." Ibid., at p. 35. See also Diss. Opin. of M. Guggenheim, ibid., p. 50, at p. 60. Cf., Kunz, "The Nottebohm Judgment (second phase)." 54 AJIL (1960), p. 566; see infra pp. 111-114.

2 I.C.J. Reports, 1959, p. 6. See also under "Domestic Jurisdiction", infra.

for the reason that such seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States."[1] (italics added).

The Court, without going into the details of this rule of international law, upheld the contention of the United States by observing that:

> The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occured should have an opportunity to redress it by its own means, within the framework of its own domestic legal system ....[2]

The Court did not consider it necessary to dwell upon the Swiss assertion that "the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts."[3] The Court was of the opinion that it "must attach decisive importance to the fact that the laws of the United States make available to interested persons who consider that they have been

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1 Ibid., at p. 11. The Court rejected this objection, and upheld the Third Objection which was worded substantially in the same manner.

2 Ibid., at p. 27.

3 Ibid.

deprived of their rights by measures taken in pursuance of the Trading with the Enemy Act, adequate remedies for the defence of their rights against the Executive."[1]

It is submitted that the customary rule of exhaustion of local remedies required flexible interpretation according to the circumstances of the case. The Court followed this procedure with regard to this rule in the Ambatielos[2] case and repeated it in the Right of Passage case[3], but in this instance, the Court acknowledged the same principle as a well-established principle of customary international law which required that the "local remedies must be exhausted before international proceedings" were to start.[4] Moreover, the Court has tolerated even certain uncertainties[5] in the state practice since it was essential to do so for

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1 I.C.J. Reports, 1959, p. 25. It is noted that the Interhandel dispute was settled by the compromise between the parties under the Stipulation of Settlement (Dec. 20, 1963) as Amended by Supplementary Agreement (of March 25, 1964). This was made possible by amending the Trading with Enemy Act by Public Law 87-846 (of Oct. 22, 1962, 76 Stat. 1107, 1113, 50 U.S.C. App. Sec. 9) which authorized the United States government to sell the General Aniline and divide the proceeds: 89% of the vested shares to go to Interhandel and the remaining shares to the United States. For full text of the Agreement and Sale Proceeds, see International Legal Materials Vol. III (Jan. 1964), pp. 426-443.

2 I.C.J. Reports, 1953, pp. 18, 22 and 23.

3 I.C.J. Reports, 1957, pp. 148-149; I.C.J. Reports, 1960, pp. 32-33.

4 Loc. cit.

5 Fisheries case see below under "State Practice - Few Uncertainties to be Tolerated."

the proper administration of justice. In this case, however, in spite of the fact that justice demanded the flexible interpretation of the rule of the exhaustion of local remedies - the Court did not do that, and upheld the United States contention, without asking the parties for the proof of that rule of customary international law.

Note: The Conclusions have been drawn after discussing the "State Practice." See below.

CHAPTER II

Practice of States, Accepted as Law?

"Customary international law is the generalization of the practice of States...."

Read J., (I.C.J. Rep. 1951, p. 191)

Article 38 (b), of the Statute of the Court directs the Court to apply international custom, as evidence of general practice accepted as law. This general practice need not be universal; it is sufficient to establish that the practice has been accepted as law by the states concerned.

The Court confirmed the above principle in the Right of Passage over Indian Territory case in the following words:

> ... It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[1]

With this liberal approach, the Court has mitigated the rigours of the rigid standards of customary international law and solved a large number of problems without facing substantial difficulties.

I Few Uncertainties - to be Tolerated:-

In the Fisheries case, the United Kingdom government pointed out that the Norwegian government had not uniformly and consistently followed the practice of delimitation of its territorial waters.[2] It also contended that the law of June 2, 1906, which prohibited fishing by foreigners, merely forbade fishing in "Norwegian territorial waters"[3], and therefore there was no definite system which existed at that time. Sir Eric Beckett, the British representative supported this contention in the following words:[4]

> Then followed an important law of 2nd June, 1906 (Ann. 22 of Counter-Memorial Vol. II, p. 82), which prohibited foreigners from fishing in

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1 I.C.J. Reports, 1960, p. 39.

2 I.C.J. Reports, 1951, p. 137.

3 See ibid., see also I.C.J. Proceedings, 1951 (Fisheries case) Vol. IV, p. 447.

4 Ibid.

> Norwegian waters. One would certainly expect that this law would be carefully drafted with reference to any special Norwegian system - if it existed - but one finds nothing of the kind: it merely refers to "territorials waters". We have, however, some useful evidence how it was understood. A note in the Rapport of 1912, page 5, says that the Royal proposition of the law states that references in the law to Norwegian territorial waters should be interpreted by reference to the 1812 Rescript and continues "where the border has been fixed by a special decree, this decree applies". Here we see that the Royal proposition of the law is saying that decrees such as those of 1869 are derogations from the general law, the general law being the 1812 Rescript, and we have just seen the Faculty of Law[1] in 1898 indicating that the general law - the Rescript of 1812 - was the tide-mark rule. Surely that makes it clear that there was no Norwegian system of base-lines in 1906.

Besides this, the British government supported its contention on the letter of March 24, 1908, written by the Norwegian Foreign Minister to the British Minister of National Defense, which indicated that Norway adhered to the rule of low-water mark contrary to the Norwegian claims of 1935.

In addition to the above, the British government referred to the letter of November 11, 1908, written by the Norwegian Foreign Minister to the French Charge d'Afaires, which read: "Interpreting Norwegian regulations

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1 See the Report of the Faculty of Law ibid., at p. 446, and in Annex 105 of the Rejoinder, ibid., Vol. III, p. 605 et seq.

in this matter [of delimiting the territorial waters], whilst at the same time conforming to the general rule of the Law of Nations, this Ministry gave its opinion that the distance from the coast should be measured from the low-water mark and that every islet not continuously covered by the sea should be reckoned as a starting point."[1]

The British government argued that by reference to "the general rule of the Law of Nations"; instead of referring to its own system of delimitation entailing the use of straight-lines, and by its statement that "every islet not continuously covered by the sea should be reckoned as a starting-point"; the Norwegian government completely departed from the practice that it had claimed to be uniform and consistent with its system of delimitation.

From these arguments one may deduce that the Norwegian system of delimitation of territorial waters was not "constant and uniform." Moreover, the authoritative statement of the Ministry of Foreign Affairs indicated with a reasonable amount of certainty that the Norwegians still believed to delimit their territorial waters according to the principles recognized by the Law of Nations. But the Court refused to give any importance to this authoritative statement and said:

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1 I.C.J. Reports, 1951, p. 137.

> ... it is impossible to rely upon a few words taken from a single note to draw the conclusion that the Norwegian Government had abandoned a position which its earlier official documents had clearly indicated.[1]

It follows from the above observations, that the Court did not stick to its former standards, although the British government had found that a few uncertainties and contradictions existed in the Norwegian system of delimitation of territorial waters. The Court's liberal approach is revealed in the following words:

> The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian Practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812, and are not such as to modify the conclusions reached by the Court.[2]

II Element of Humanity[3]:-

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1 Ibid., at p. 138. See however, Lord McNair's Diss. Opin. in which he states: "It is possible that this fact (paragraph 96 of the Counter-Memorial) may explain the absence of any categorical assertion of the Norwegian system of straight base-lines as a system of universal application along the Norwegian coasts and the notification of that system to foreign States ...." Ibid., at p. 180.

2 Ibid., at p. 138.

3 See also the enunciation of this principle in the Corfu Channel case, I.C.J. Reports, 1949, p. 4, at p. 22, where the Court said: "... Such obligations are based, not on the Hague Convention of 1907, ... but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of maritime communications; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."

The Court has taken into consideration the element of humanity in order to decide whether a principle of international law has been violated by a particular practice followed by a state.

In the Fisheries case, the Court considered this "principle of humanity" while deciding whether the Norwegian practice of delimitation of territorial waters was contrary to the principles of international law.

In that case the Norwegian government tried to establish historically that its method of delimitation of territorial waters was rooted in its practice, which it had followed for the last hundreds of years. The reasons given for the development of such practice were, the peculiarity of its coast, and the dependence of its fishermen on coastal fishing.

In proof of the above contention the Norwegian government argued that, at the beginning of the 17th century, the British fishermen refrained from fishing in Norwegian territorial waters, when the King of Denmark and Norway made a complaint to the British government. It also maintained that up to 1906, the British fishermen did not violate the Norwegian laws.

The Norwegian government pointed out, that after 1906, the British fishermen, with their powerfully equipped trawlers, started appearing in greater numbers, as a result of which the local fishermen were perturbed, and in order to safeguard the interest of its nationals, it had to take

measures to specify the limits within which fishing was to be prohibited to the foreigners.

The British government did not agree with this line of reasoning. It contested its claim on purely legal grounds, and maintained, that the Decree of 1935 for the delimitation of Norwegian territorial waters was contrary to the principles of international law, since there was no uniformity in the Norwegian practice which could entitle Norway to justify its claim.

After taking into consideration all the facts, the Court came to the conclusion that:

> In these barren regions the inhabitants of the coastal zone derive their livelihood essentially from fishing.
>
> Such are the realities which must be borne in mind in appraising the validity of the United Kingdom contention that the limits of the Norwegian fisheries zone laid down in the 1935 Decree are contrary to international law.[1]

The non-legalistic attitude of the Court, as a gesture

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1 I.C.J. Reports, 1951, p. 128. See also the Diss. Opin. of Lord McNair who supports the legal solution to the problem: "... I have every sympathy with the small inshore fisherman who feels that his livelihood is being threatened by more powerfully equipped competitors, especially when those competitors are foreigners; but the issues raised in this case concern the line dividing Norwegian waters from the high seas, and those are issues which can only be decided on a basis of law." Ibid., at p. 158. See, however, Jens Evensen, "The Anglo-Norwegian Fisheries Case and its Legal Consequences." 46 AJIL (1952), p. 621. "This statement may serve as a fundamental basis for the Court's rulings as a whole in this case."

towards the basic necessities of human beings of a particular area, may be hailed as an acceptable alternative for those situations, where the practice is uncertain and does not yield any rule of international law. Here the Court was concerned with the administration of justice, and in order to achieve the end, it refused to follow the hard line of law, that could have destroyed the element of humanity, which was of vital importance in this case.

III Economic Necessities:-

In the above case, the Court specifically mentioned the economic necessities of the Norwegian nationals which made their government to extend the territorial waters, and which subsequently developed into a usage to give them the exclusive right to fish. While taking the geographical factors into consideration and the economic necessities of the Norwegians, the Court observed:

> Finally, there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.[1]

In this way the Court gave more importance to the economic necessities of the Norwegian fishermen; the primary motive being the administration of justice.

Legally speaking, the Court was trying to find a

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1 Ibid., at p. 133.

ground to base its decision[1], since it had failed to find any source in the rules of customary international law; in conventional or treaty law; or in the uniform practice of the states. In the absence of any source - the Court trenched its faith in the practice of Norway which was not contrary to the principles of international law.[2]

Lauterpacht termed this liberal approach of the Court as a piece of judicial legislation[3] although he believed that "some such considerations may mitigate any emphasis of criticism in relation to this aspect of the Judgment of the Court."[4] Lord McNair criticized this approach on legal grounds, and in his dissenting opinion said, that: "In my opinion the manipulation of the limits of territorial waters for the purpose of protecting economic and other social interests has no justification in law; moreover, the approbation of such a practice would have a dangerous tendency in that it would encourage States to adopt a subjective appreciation of their rights instead of conforming to a common international standard."[5]

Lord McNair's approach, as already stated, is too

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1 See ibid.

2 See ibid., p. 134.

3 See Lauterpacht, The Development of Int. Law .... p. 195.

4 Ibid., at p. 196.

5 I.C.J. Reports, 1951, p. 169.

legalistic. He considered the economic necessities or certain uncertainties as a derogation from the international law standards. If one looks into the provisions of the Geneva Convention on Territorial Sea and the Contiguous Zone[1], one would find enough support for the Court's consideration of economic realities. More specifically, Article 4 (4) of the above Convention confirms what the Court had observed in the Fisheries case. It reads in part: ".... account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage."[2]

IV Geographical Consideration[3]:-

The Court justified the Norwegian system of delimitation on geographical grounds as well. It took into consideration the geographical configuration of Norway which was of unusual nature and said:

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1 U.N. Doc. A/CONF. 13/L 52 (April 28, 1959).

2 Ibid., at p. 2.

3 See also under "Customs" supra. See the Corfu Channel case, I.C.J. Reports, 1949, p. 4, at p. 28, where, in order to decide whether the Channel belonged to the international highways, the Court said: "... the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation." It is noted that the Court did not consider the geographical factors in the Right of Passage case, where Portugal had no other means to reach its enclaves, except having a right of passage through the intervening Indian territory. For details see under "Political Justice", infra.

> Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of base-lines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.[1]

After taking into considerations various Decrees[2] of Norway relating to the delimitation of territorial waters, the Court observed:

> The 1812 Decree was similarly construed by the Territorial Waters Boundary Commission ..., sent by the Norwegian Government to the Secretary-General of the League of Nations, in which it was said: "The direction laid down by this Decree should be interpreted in the sense that the starting-point for calculating the breadth of the territorial waters should be a line drawn along the 'skaergaard' between the furthest rocks and, where there is no 'skaergaard', between the extreme points." The judgment delivered by the Norwegian Supreme Court in 1934, in the St. Just case, provided final authority for this interpretation. This conception accords with the geographical characteristics of the Norwegian coast and is not contrary to the principles of international law.[2]

The justification given by the Court for liberal application of the principles of international law in the

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1 I.C.J. Reports, 1951, at p. 133.

2 Ibid., at p. 134.

circumstances of the case under consideration is worthy of appraisal.[1] The Court followed the realistic approach in order to administer justice and the geographical conditions of the Norwegian coast provided reasonable grounds to base its decision. The Court upheld the Norwegian practice that had developed out of necessity and due to the peculiar geographical situation. This practice in the opinion of the Court was not contrary to the principles of international law.

Some of the writers have doubted the authority of the Judgment on legal grounds.[2] The doubt is tenable to some extent. For example, Lord McNair pointed out that the effect of the judgment would encourage further encroachments upon the high seas by the coastal states[3], and a year after his findings proved true when Jens Evensen (one of the counsel for the Norwegian government in the

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1 Cf., e.g., see Lauterpacht, The Development of Int. Law .... Op. cit. supra, pp. 195-196; Wilberforce, "Some Aspects of the Anglo-Norwegian Fisheries Case," 38 Grot. Soc. Transc. (1953), p. 163; where he wrote "....The judgment would therefore have to combine liberality of outlook with some precision of statement: and the proper reaction of lawyers would have been admiration for its courage and a loyal effort to work out the application of its principles."

2 See the Diss. Opins. of Judge Read and Lord McNair, I.C.J. Reports, 1951, pp. 186-206, and 158-185, respectively; see also Waldock, "The Anglo-Norwegian Fisheries Case," 28 BYIL (1951), pp. 114-171; Jenks, The Prospects of Int. Adjudication, op. cit. supra, pp. 232-234, 247-251.

3 Op. cit., at p. 185.

Fisheries case), remarked: ".... Consequently, the way is open for Norway to apply hereafter, as before, this traditional system along the whole of the coast of Norway, and not only to the part thereof affected by the 1935 decree."[1] (italics added).

However, the critism is no more valid now. The Geneva Conventions on the Law of the Sea (1958) have brought an end to all these controversies. Most of the principles enunciated by the Court in the Fisheries case and in the Corfu Channel case, have been embodied in those Conventions. Moreover, the Anglo-Norwegian Treaty[2], signed in Oslo on November 17, 1960, and ratified by the both parties on March 3, 1961, has brought an end to the question of fishing rights of the British fishermen in the Norwegian territorial waters.

V Historical Grounds[3]:-

In the same case, the British government contested that, for the purposes of determining the internal waters which fell within the conception of a bay, as defined in international law, the ten-mile rule must be considered as a preponderant rule of international law. And while granting, that Norway was entitled to claim territorial

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1 "The Anglo-Norwegian Fisheries Case." 46 AJIL (1952), at p. 628; Cf., Schwarzenberger International Law, Vol. I, (1957), p. 322.

2 Treaty Series No. 25 (CMND. 1352 (1961)).

3 See also under "Customary Int. Law" supra, and above under "Element of Humanity."

waters on historic grounds, it maintained, that the rule of ten-mile was to be applied in measuring the length of those waters, since, that was the normal practice which the states followed in their national, as well as in international treaties.[1]

The Court dismissed the British contention, and held that:[2]

> In these circumstances the Court deems it necessary to point out that although the ten-mile rule has been adopted by certain States both in their national law and in their treaties and conventions, and although certain arbitral decisions have applied it as between these States, other States have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law.
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> In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to Norwegian coast.[3]

After making it clear that Norway had not applied the ten-mile rule to its coast, the Court further held:

> Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees in 1869 and in 1889, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute ... the application of a well defined and uniform system, it is indeed

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1 See the Statement of Sir Beckett, I.C.J. Proceedings, op. cit. supra, pp. 56, et. seq., 83-84.

2 For the definition of the "historic waters" and the observations of the Court in this context see I.C.J. Reports, 1951, pp. 129-131.

3 Ibid., at p. 131.

> this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.[1]
> (italics added)

And finally the Court said:

> The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government itself in no way contested it ....[2]

The Court came to this conclusion by taking into consideration the social, economic, geographical and historical factors and justified its findings by observing;

> The principle that the belt of territorial waters must follow the general direction of the coast makes it possible to fix certain criteria valid for any delimitation of the territorial sea ... (and) in order to apply this principle, several States have deemed it necessary to follow the straight base-lines method and that they have not encountered objections of principle by other States ....[3]
> (italics added)

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1 Ibid., at p. 138.

2 Ibid.

3 Ibid., at p. 129; cont. see Lord McNair's quote from the Report on Territorial Waters, approved by the League Codification Committee (1927). League Doc. C. 196 M. 70, 1927, V; see also the British complaints of 1911 after the Lord Roberts incident; the Negotiations between the two governments in 1922 and the British Memorandum of July 27, 1933, where the British government complained that in delimiting the territorial sea the Norwegian authorities had made use of unjustifiable base-lines. I.C.J.Reports, 1951, p. 124 and I.C.J. Proceedings, Fisheries case, Vol. II, pp. 740-741, and 102-106; Vol. I, 171-172, 324-325

VI Proposals are not Law:-

In its written memorandum, the British government argued that even if the method of straight lines was to be applied; the length of straight lines must not exceed the ten-mile rule, since that was the generally accepted rule which the states followed in delimiting their territorial waters.

The Court did not accept the British contention, since, it lacked sufficient proof which was essential to establish that such practice was constantly and uniformally followed by the states in order to have the binding force of law. The reasons given by the Court for rejecting it were, that:

> In this connection, the practice of States does not justify formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagoes to conditions analogous to the limitations concerning bays (distance between islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got [sic] beyond the stage of proposals.[1]
>
> (italics added)

Similarly, the Court rejected the British contention that arcs of circles method was constantly used by the states for delimiting their territorial waters.

The Court said:

> The arcs of circles method, which is constantly used for determining the position of a point or object at sea, is a new

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1 I.C.J. Reports, 1951, at p. 131.

> technique in so far as it is a method for delimiting the territorial sea. This technique was proposed by the United States delegation at the 1930 Conference for the codification of international law. Its purpose is to secure the application of the principle that the belt of territorial waters must follow the line of the coast. It is not obligatory by law, as was admitted by the Counsel for the United Kingdom Government in his oral reply ....[1]

Practically speaking, in this case, the Court did not create any new principles of international law; nor did the Court try to destroy the practice which was being followed by different states in different manners.[2] All that the Court did was the administration of justice based upon the principle of "elementary considerations of humanity."[3]

Moreover, in the absence of any proof of customary rules of international law, and in the presence of diverse practices of the states - if the Court took those social, economic, geographic and historical factors to base its judgment; there seems to be nothing wrong with this bold approach in resolving international disputes. Such considerations are not only desirable, but necessary in certain circumstances. In this case, it was the "exceptional" geographical configuration of the Norwegian coast which

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1 Ibid., at p. 129.

2 Cf., see Colombos, The International Law of the Sea, (5th ed., 1962), pp. 107-108.

3 See Corfu Channel case, I.C.J. Reports, 1949, p. 22.

made it to declare, that straight lines which follow the general direction of the coast and satisfy the criteria laid down for the enclosure of inland waters, were not contrary to the principles of international law.

VII Unilateral Qualifications:-

The Court did not accept the Norwegian contention that a coastal state is entitled to delimit its territorial waters as it likes. On the other hand, the Court gave due consideration to the practices of the state, and when it found that those state practices were of unsettled nature without having any uniformity in their rules and regulation, it upheld the Norwegian practice, which in its opinion was the unchallenged and a well established fact.

In these diverse circumstances, the impartiality of the Court, and the contribution that it has made to the recognition of the principles of international law, is visible, when it said:

> It does not follow that, in the absence of rules having technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always (been)(sic) an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the Coastal

> State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[1]

The Court's observations are more true today than they used to be in 1951. The failures of the Geneva Conventions of 1958 and 1960 to delimit the breadth of territorial sea and the related problems of fishery zones, confirm the findings of the Court that there was no uniform practice which the states followed.[2]

Similarly in other cases[3] where there were no rules of customary international law and the state practices were not uniform, the Court did not allow the contesting states to qualify their acts unilaterally. For instance, in the Nottebohm case[4], the Liechtenstein government contended that the naturalization of Mr. Nottebohm in Liechtenstein on October 20, 1939, was granted in accordance with its municipal law and was not contrary to international law.[5] The Court confirmed the claim of Liechtenstein that it was entitled to settle, by its own legislation,

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1 I.C.J. Reports, 1951, at p. 132.

2 The U.S.-Canada proposal (of 1960), for the adoption of a six-mile territorial sea and a twelve-mile fishery limit, subject to a ten-year period of phasing out, failed by one vote to secure the necessary two-thirds majority. The Conference was attended by 88 states. U.N. Doc. No. A/CONF. 19/L. 11, April 22 (1960).

3 See infra, "Domestic Jurisdiction".

4 I.C.J. Reports, 1955, p. 4.

5 See ibid., p. 7.

the rules relating to the acquisition of its nationality, and to confer nationality by naturalization granted by its own organs in accordance with that legislation. The Court confirmed this as well that "It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain."[1]

After confirming these rights of a state to grant nationality as it pleases, the Court considered the effect of that unilateral act on other states and made the following observations;

> But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place one-self on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.[2]
>
> (italics added)

Thus, even if the Court recognized that the question of nationality is within the exclusive domain of a state concerned, it made it quite clear that it is international law which decides the effect of nationality on other states.

Similarly, in the Asylum case, the Colombian government contended that it was competent to qualify the nature

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1 Ibid., at p. 20.

2 Ibid., at pp. 20-21.

of the offence by a unilateral and definitive decision binding on Peru.[1] It based its submission on rules resulting from certain agreements and on customary law of the Latin-American states. Particularly, it relied on Article 18 of the Bolivarian Agreement of 1911, which was framed in the following words:

> Aside from the stipulations of the present Agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law.[2]

The Court did not accept the Colombian contention that it was authorized to qualify the offence of Haya de la Torre unilaterally, since it believed that:

> ... the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum.[3]

These are various other decisions where the Court has confirmed that no state can qualify its acts by unilateral declarations to be recognized as valid by international law. In this way, the Court avoided the possibility of international anarchism which could have resulted from its liberal approach towards "exceptional" circumstances.

VIII Every State Practice is not Law:-

It would amount to over-simplification to state that

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1 See I.C.J. Reports, 1950, p. 274.

2 Ibid.

3 Ibid.

the Court applied this liberal approach uniformally, to determine whether a state practice conformed to the principles of customary international law. There are instances in the jurisprudence of the Court where it adhered to its rigid "standards" of adducing proof 'in accordance with constant and uniform usage practised by states to have a binding force of law'.[1]

In the Asylum case, the Colombian government contended that the Republic of Peru, as the territorial state, was bound to give the guarantees necessary for the departure of Haya de la Torre from the country, with due regard to the inviolability of his person.[2] It maintained its claim on the grounds of customary rules of international law, and on the provisions of Article 2 of the Havana Convention of 1928, which read:

> .... The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee from the country with due regard to the inviolability of his person.[3]

The Court did not accept the interpretation given by the Colombian government that under the provisions of this Article, Peru was bound to guarantee the safe departure

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1 The Asylum case, I.C.J. Reports, 1950, at p. 276.

2 Ibid., at pp. 270, 271, 278.

3 Ibid., at p. 279.

for the refugee. In its opinion, the above Article could be interpreted - either the state of refuge had a right to demand the safe departure for the refugee, or, the territorial state was under no obligation to guarantee the safe-conduct for the refugee if the conditions precedent to the above right had not been fulfilled. The Court explained those conditions by adding that, asylum was "regularly granted and maintained"; the refugee was "a political offender" not condemned for common crimes; and the case was of urgent necessity "strictly indispensable for the safety of the refugee."[1] With these explanations the Court pulled itself out of the controversy in which it could have involved itself by upholding the contention of either of the parties to the dispute.

To solve the above controversy, the Court sought guidance from the practice of the states and observed that:

> There exists undoubtedly a practice whereby the diplomatic representative who grants asylum immediately requests a safe-conduct without awaiting a request from the territorial State for the departure of the refugee. This procedure meets certain requirements: the diplomatic agent is naturally desirous that the presence of the refugee on his premises should not be prolonged; and the government of the country, for its part, desires in a great number of cases that its political opponent who has obtained asylum should depart. This concordance of views suffices to explain the practice which has been noted in this connexion, but this practice does not and cannot mean that the State, to

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1 See ibid., p. 278.

> whom such a request for safe-conduct has been addressed, is legally bound to accede to it.[1]

The observations made by the Court indicate that even if a practice is followed by certain states, its validity in international law can be recognized provided that it is backed by legal acknowledgments by other states.

In the above case, the Court did not adhere to the liberal approach for recognizing the validity of asylum, although the Colombian government had tried to prove its case by citing various cases, and the Latin-American states customarily supported the institution of asylum. By introducing the element of legality, and by applying the rigid standards, the Court made it quite difficult for the Colombian government to prove its contention. Perhaps, in the opinion of the Court, the Asylum case, did not fall under the category of the "exceptional" circumstances, where a liberal approach could have solved the problem.[2]

The Court did not concern itself with the subjective appreciation of the institution of asylum. It based its judgment on the objective existence of the facts and after holding that "the grant of asylum from January 3rd/4th, 1949, until the time when the two Governments agreed

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1 Ibid., at p. 279.

2 It is noted that Haya de la Torre enjoyed the forced hospitality of the Colombian government for about three years after the decision of the Court. After that, his government welcomed him by withdrawing all the charges against him. Today he is an active political leader and a prominent figure in the Republic of Peru.

to submit the dispute to its jurisdiction, has been prolonged for a reason which is not recognized by Article 2, paragraph 2, of the Havana Convention"[1], the Court came to the conclusion:

> This finding implies no criticism of the Ambassador of Colombia. His decision to receive the refugee on the evening of January 3rd, 1949, may have been taken without the opportunity of lengthy reflection; it may have been influenced as much by the previous grant of safe-conduct to persons accused together with Haya de la Torre as by the more general consideration of recent events in Peru; these events may have led him to believe in the existence of urgency. But this subjective appreciation is not the relevant element in the decision which the Court is called upon to take concerning the validity of the asylum; the only important question to be considered here is the objective existence of the facts, and it is this which must determine the decision of the Court.[2] (italics added)

This objective approach of the Court is quite different from the line of reasoning that the Court followed in the Fisheries case.[3] In this case the Court demanded strict proof; in the Fisheries case it tolerated even few uncertainties. It is quite difficult to reconcile the line of approach followed by the Court for adducing proof for the practice followed by the states. However, the "Naturalists" may find the answer from the "results" of the

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1 I.C.J. Reports, 1950, p. 287.

2 Ibid.

3 See Lord McNair's remarks about the subjective approach. I.C.J. Reports, 1951, at p. 169.

decisions of the Court; the "Positivists" may ignore the "results" and find a legal ground for criticising the line of reasoning of the Court which changed with the circumstances of the case in question.

It is submitted, that the best alternative would be to follow the old dictum, that justice demands certain flexibilities and not strict adherence to legal formalism. Moreover, Article 59 of the Statute of the Court lays down that "The decision of the Court has no binding force except between the parties and in respect of that particular case." And if, according to the provisions of this Article, the decision of the Court is not binding on other states, it cannot be considered as binding on the Court for its subsequent decisions.[1] The decisions of the Permanent Court in the Case concerning certain German Interests in Upper Silesia (Merits), supports the above contention. In that case the Permanent Court said: "The object of this article [Article 59] is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes."[2]

IX State Practice and the Political Justice[3]:-

The Right of Passage over Indian Territory case is another illustration of the above point - that every

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1 Cf., see Lauterpacht, The Development of Int. Law, op. cit. supra, p. 22.

2 P.C.I.J. Series A. No. 7 (1926), at p. 19.

3 See supra under "Custom" & infra pp. 135 et seq.

practice which a state follows cannot be recognized as valid, if it fails to meet the standards set by the Court for the proof of customary international law. Particularly, this case falls in-between the two approaches discussed above: the "liberal" approach, and the "rigid standards" approach, which the Court followed in the Fisheries and in the Asylum cases respectively. More conveniently, this approach may be classified under the above heading since the decision of the Court is based upon the subjective and objective evaluation of the rights of the both parties to the dispute.

In that case the Portugese government claimed a right of passage relating to private persons, civil officials, goods in general, armed forces, armed police, and arms and ammunition, limited to the needs for the exercise of its sovereignty and subject to the restrictions and regulations prescribed by the Indian Union, the sovereign in the intermediate territory. It based its claim on local and general customs and on the practice which had developed between Portugal and the successive sovereigns of the Indian peninsula for the last two hundred years.

The Indian government disputed the existence of such rights and contended that "the right claimed by Portugal is too vague and contradictory to enable the Court to pass judgment upon it by the application of the legal rules enumerated in Article 38 (1) of the Statute."[1] Besides

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1 I.C.J. Reports, 1960, p. 36.

the legal justification of its denial of the right of passage to Portugal, the Indian government took the plea of 'national sentiment' against the Portugese who had shown their contempt for the Asiatic races in the past.[1] It also tried to justify its refusal to grant such rights on the grounds that the liberation movement had started in those enclaves. It further maintained that "once the liberation movement had been begun at Dadra, the Indian Union was entitled, both in accordance with the principle of international law of non-intervention and out of regard for the right of self-determination of peoples recognized by the Charter, to refuse the Portugese authorities authorization for the passage of reinforcements assuming that any had been available."[2]

Before dealing with the judgment of the Court in this case, it is desired to make a reference to the "Indian sentiment", expressed by Judge ad hoc Chagla in his Dissenting Opinion, in the Right of Passage over Indian Territory (Preliminary Objections) case[3], where he said:

> .... When a State comes to this Court claiming a right against another State, it must be a right which should be enforceable. It must be a right which, if conceded by the Court, could be given effect to by the defendant State. No Court would give judgment which could not be carried out by the losing

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1 Ibid., p. 24.

2 Ibid., p. 25.

3 I.C.J. Reports, 1957, p. 125.

> party. And the most surprising feature of Portugal's claim in this case is that if she were to succeed in her contentions, the judgment she would obtain from this Court could never be given effect to by India. If the Court were to declare that Portugal has a right of transit over Indian territory from Daman to the enclaves, it would be impossible for India to know what the nature, extent or content of that right would be. Would Portugal be entitled under this right to transport a whole army from Daman to the enclaves in order to supress the revolt which has taken place there? Would she be able to transport tanks and artillery and all the paraphernalia of modern arms and armaments? Would she be able to fly aeroplanes over Indian territory in order to bomb the enclaves in order to reduce them to subjection? .... It would be a sheer waste of time of this Court to join this issue to the merits when at the end of it the Court would have to come to the conclusion that no effective declaration can be made in favour of Portugal.[1]

It is submitted that the Court did not involve itself in any of the political controversies raised by the parties. It followed the simplest procedure of formulating the issue in the following terms:-

> (1) The existence in 1954 of a right of passage in Portugal's favour to the extent necessary for the exercise of its sovereignty over the enclaves, exercise of that right being regulated and controled by India;
> (2) Failure by India in 1954 to fulfil its obligation in regard to that right of passage;
>
> (italics added)
>
> (3) In the event of a finding of such failure, the remedy for the resulting unlawful situation.[2]

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1 I.C.J. Reports, 1957, pp. 175-176.

2 I.C.J. Reports, 1960, at p. 36.

After framing these issues, the Court said that: "For the purpose of determining whether Portugal has established the right of passage claimed by it, the Court must have regard to what happened during the British and post-British periods."[1] The Court did not consider it necessary to deal with the Portugese Submission of October 1959[2], since it thought that it was no part of the judicial function of the Court to declare in the operative part of its judgment that any of those arguments concerning Portugal's rights were or were not well-founded.[3]

Having eliminated the "main issue" from its general list[4] - the issue which involved the "overthrow" of the Portugese regime from the two enclaves; the Court found the law for its decision from the common understanding of the parties that the passage of private persons and civil officials was not subject to any restrictions, beyond routine control, during the Maratha period and the post-1954 incidents. On the basis of this common understanding the Court held:

> The Court, therefore, concludes that with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued

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1 Ibid., at p. 39.

2 See ibid., at pp. 10-21, particularly pp. 16-19.

3 Ibid., at p. 32.

4 Loc. cit.

> over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.[1]

In this case, the Court's approach was objective. It looked into the factual circumstances of the case and found that Portugal had established its right as far as civilian officials and goods in general were concerned. The Court did not care to adhere to its old principles of demanding a strict proof from a party "which relies on a custom of this kind."[2]

With regard to the above findings of the Court, there seems to be nothing in the record which could contradict that.[3] But the real problem in the case was the protection of the enclaves; the right of passage for the exercise of Portugese sovereign rights for which it had brought the case before the Court. It was this "right" (the right to sovereignty) which the Indian government had denied to Portugal for compelling the latter to abandon its claim over those enclaves.[4] And it was this "right" for which

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1 I.C.J. Reports, 1960, at p. 40.

2 See Asylum case, I.C.J. Reports, 1950, p. 276.

3 I.C.J. Reports, 1960, p. 40.

4 See the declaration made on September 6, 1955, by the Prime Minister of India before the Rajya Sabha - Observations on the Preliminary Objections, Annex I, Appendix 4, I.C.J. Pleadings, Vol. I, pp. 650-651.

the Portugese government was trying to find a solution through the peaceful methods, enshrined in the United Nations Charter.

However, the Court was not ignorant about the developments that had taken place, nor about the sentiments of the Indian nationals who wanted to liberate not only the enclaves, but also the whole of Goa from Portugese domination.[1]

Under these circumstances, where Portugal was trying to establish its right on the grounds of a long usage, and where the Indian government had shown its helplessness to grant such rights[2], the Court, in order to administer "international justice", according to the principles of international law, followed the strict legalistic approach to decide whether or not there was a legal right to send armed police and armed forces through the Indian territory to the Portugese enclaves.

The Court accepted the Portugese claim that there was a practice to send armed police or armed forces with the

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1 See the Diss. Op. of Judge Moreno Quintana, where he states: "To support the Portugese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof is to fly in the face of the United Nations.

As a judge of its own law - the United Nations Charter - and a judge of its own age - the age of national independence - the International Court of Justice cannot turn its back upon the world as it is." I.C.J. Reports, 1950, at pp. 95-96.

2 See ibid., p. 26.

permission of the territorial sovereign, and that such permission was always granted. But nevertheless, the Court held:

> .... Having regard to the special circumstances of the case, this necessity of authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation.[1]

Having found the grounds on which to base its decision that there was no obligation on the British or Indian governments to grant such right, it went on to say that:

> The Court is, therefore, of the view that no right of passage in favour of Portugal involving a correlative obligation on India has been established in respect of armed forces, armed police, and arms and ammunition. The course of dealings established between the Portugese and the British authorities with respect to the passage of these categories excludes the existence of any such right. The practice that was established shows that, with regard to these categories, it was well understood that passage could take place only by permission of the British authorities. This situation continued during the post-British period.[2]

It is noted that the Court had already accepted that the

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1 I.C.J. Reports, 1960, at pp. 42-43.

2 Ibid., at p. 43.

"... Portugese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently tacitly recognized by India."[1] It is further noted that permission was always granted by the territorial sovereign to the Portugese authorities to send its armed police, armed forces or arms and ammunition.[2] Thus, in this concrete case of special features where a particular practice was to prevail over any other rules[3] - how could it have been possible for the Portugese government to maintain its sovereign rights over the enclaves without having a right of passage to reach those enclaves? Therefore, to uphold Portugal's right to sovereignty over the enclaves but to deny her the means necessary for the exercise of those sovereign rights, was to deny her the right to sovereignty over the enclaves. Portugal had not instituted the proceedings merely to obtain moral satisfaction[4] that it could only send the civil officials and not the armed police and armed forces; it instituted the proceedings to get a declaration from the Court concerning its legal rights - the rights which the Indian government had disputed on political grounds.[5]

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1 Ibid., at p. 39.

2 Loc. cit. (Note No. 1).

3 See I.C.J. Reports, 1960, p. 44.

4 Cf., see ibid., Diss. Op. of Judge ad hoc Fernandes, at p. 125.

5 See ibid., Counter Memorial of the Government of India filed on October 6, 1959, p. 21, at pp. 24-25, 26.

It is at this crucial point where one feels that the Court has not only to apply international law as stated in Article 38 of the Statute of the Court, but also to take into consideration the political aspects of the case, whenever the exigencies of the case demand. In this case the Court did so allegedly under the cover of the "non-existence of legal obligations". This did not bind India to allowing the Portugese government to send its forces to the enclaves where the political climate had been changed, and where the inhabitants of those enclaves had established their independent "government" with the connivance of the Indian Union.

It is submitted that the International Court of Justice, as a principal organ of the United Nations, was created to further the cause of the United Nations in resolving international disputes through peaceful methods. To allow the Portugese government to send its forces to the enclaves would have contradicted the very purposes of the United Nations. One could imagine the consequences of the decision of the Court, had it upheld the Portugese claim and allowed it to send its armed police, armed forces, arms and ammunition. Instead of resolving the international dispute, the Court could have sown the seeds of discontentment among the two governments. India and Portugal could have raised arms against each other; the former justifying its action on political grounds, the latter justifying its action on the basis of the decision

of the Court.

It is submitted that this international anarchy has been avoided by the Court by administering "political justice", since there was no other alternative which could have solved this intricate problem at the underdeveloped stage of international law.[1] This "political justice" was the very basis for which the Court applied the objective test for establishing the validity of a local custom which had developed from a long, continuous and uninterrupted practice and by which Portugal had acquired a right of passage to send its civil officials and goods in general. But on the other hand, the Court applied the subjective test in order to establish that there was no "legal obligation" on the part of the Indian government to allow the Portugese government to send its armed police, armed forces, and arms and ammunition, since the danger of upholding such a right was quite apparent.

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1 Cont., see Julius Stone, "The International Court and World Crisis." 536 Int. Conciliation (Jan. 1962), p. 29, where he wrote: "Certainly the lamentable sequel to the Right of Passage case - India's resort to force in Goa in December 1961 - suggests that Court's flexibility in this regard is not necessarily a contribution to peaceful settlement."

CONCLUSION

I General.

It is submitted that in the course of its adjudication concerning the recognition and the application of the principles of customary international law, the Court did not follow any particular ideology in basing its decisions. Moreover, the complexities of the problems, and the multiplication of the issues involved in every case was another factor responsible for detracting the Court from following any particular line of reasoning. Under these circumstances, and in the absence of any generally recognized principles of customary international law, it shall be too hasty to ascribe a definite philosophy to the jurisprudence of the Court.

However, the authoritative interpretation and the application of the customary rules by the Court may help one in deducing certain principles which are the natural outcome of its decisions.

II Proof of Customary Law.

As already stated[1], the Court demanded strict proof for the validity of customs which, to a greater extent, proved detrimental to the growth of customary international law. Had the Court followed the liberal approach, it could have solved most of the intricate problems and could have

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1 See above under "The Standards for the Proof of Customary Law."

avoided the grave consequences which resulted in the "denial of justice"[1], or, gave the critics a chance to brand the decision as "subjective"[2].

In this connection, C. Wilfred Jenks, while discussing the jurisprudence of the Court[3] related to the "Six Controversial Decisions"[4], wrote that: "If we take these cases together, and generalize from a series of decisions each of which relates to highly special facts, they are liable to be regarded as authority for a series of propositions which would make it virtually impossible to give satisfactory proof of custom in international adjudication unless there is an undisputed course of practice including unequivocal acts by both the parties; where the practice is as clear-cut as this, one may reasonably hope that international adjudication will be unnecessary; it is where practice is less certain that the

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1 See supra, the Interhandel case; the Nottebohm case; The Right of Passage case.

2 Lord McNair, op. cit. supra.

3 The Permanent Court and the International Court.

4 The Prospect of International Adjudication, op. cit. supra, at p. 225; where he discusses the following cases:-

1. The Lotus case, P.C.I.J., 1927, Series A, No. 10.
2. The Asylum case.
3. The Genocide case, I.C.J. Reports, 1951, pp. 15-55.
4. The Fisheries case.
5. The United States Nationals in Morocco case.
6. The Right of Passage over Indian Territory case.

judicial recognition of, or refusal to recognize, custom may be important."[1]

After indicating the importance of the international adjudication where the Court had to deal with the uncertain nature of a particular practice followed by the states, Jenks deduces certain propositions from the decisions of the Court and observes that: "Taken together these ... propositions may appear to verge upon the extreme positivist position that no State is bound by custom in the absence of proof of its own recognition of the alleged custom in deference to an opinio juris sine [sic] necessitatis."[3]

Jenks finds inconsistencies with the decisions of the Court and criticises its jurisprudence for relying too much on the proof of customs when the facts of the case demanded the discretion of the Court for the administration of proper justice. His conclusions, although very harsh are nevertheless full of information distilled from the jurisprudence of the Court. He concludes his remarks about the jurisprudence of the Court by observing that:

> .... If this is indeed the logic of these decisions of the International Court we are confronted with the most tragic paradox in the development of international law and international institutions. A court which holds that international law permits whatever it does not specifically

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1 Jenks, op. cit. supra, at p. 235.

2 See ibid., at pp. 235-237; and infra, loc. cit.

3 Ibid., at p. 237.

> prohibit, which will not presume that legal obligation, which accepts dissent from or repudiation of a custom as proof that it is inapplicable, which regards a divergence of views in a political assembly as evidence that there is no generally accepted rule of law, and which views with reserve as constituent elements of custom treaty obligations, the practice of international organizations, municipal judicial decisions and the views of publicists, thereby debars itself from playing a constructive part in the progressive crystallisation of custom into law. The crucial problem of all legal and institutional development is to enlist inertia for rather than against law and order as an element in peace based on justice. It may be unreasonable to require, and impossible to supply, detailed proof of something which has been taken so much for granted that it has never been questioned. To weigh the burden of proof in favour of anarchy is to undermine the foundation of the rule of law.[1]

The "tragic paradox" as coined by Jenks may not be an acceptable proposition to the international jurists; but, on the other hand, it is hard to deny that the Court has frequently applied the rigid standards for determining the validity of customs. By interpreting Article 38, paragraph 1 (b) of the Statute, in strict legal terms and, subsequently, by applying the same rigid standards - the standards of "uniform and constant practice accepted as law"; the Court has put certain restrictions and limitations on the transformation of customary law into general international law. For instance, in the Asylum case, by introducing the element of "legality" for the proof of a

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1 Op. cit. supra, at pp. 237-238.

custom, the Court undermined the importance of the institution of asylum - sacred to the Latin-American world.[1] Similarly, in the Fisheries case, the Court declined to recognize the preponderant practice, followed by a majority of states "in their national law and in their treaties and conventions."[2] The Interhandel case, and the Nottebohm case, present another extreme view where the Court applied the "well-established rule of customary international law"[3], without going into the merits of the cases.

III Desirability for Flexible Approach.

This policy of the Court for applying rigid standards for the proof of customary law has been criticised by most of the writers.[4] These critics are of the opinion that some modification, in the present policy of the Court that

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1 I.C.J. Reports, 1950, at p. 286, the Court observed: "If these remarks tend to reduce considerably the value as precedents of the cases of asylum cited by the Government of Colombia, they show ... that asylum as practised in Latin America is an institution which, to a very great extent, owes its development to extra-legal factors ...." (italics added)

2 I.C.J. Reports, 1951, p. 131.

3 I.C.J. Reports, 1959, at p. 27 (Interhandel case). In the Nottebohm case, the Court found the law "According to the practice of States"; but the Court did not ask any of the parties whether that practice had been accepted as law.

4 See particularly Jenks, op. cit. supra, pp. 225-265; Lauterpacht, op. cit. supra, pp. 368-393 (passim), his remarks about the decision of the Asylum case are noteworthy. He wrote: "The insistence ... on the 'psychological element' in customary law was not in the nature of a new departure in the practice of the Court ...." Ibid., at p. 384.

has been responsible for retarding the growth of international law, is desirable.

Lauterpacht's study reveals that, in order to determine the validity of a customary rule of international law, it is desirable to apply the principle of opinio juris sive necessitatis. He admitted that the solution may not be altogether satisfactory, but, in his opinion, it is probably more acceptable than the alternative method of exacting rigid proof of the existence of customary international law in a manner which may reduce to a bare minimum its part as a source of law.[1]

McGibbon is of the opinion that "Although the opinio juris scarcely fulfils the function commonly attributed to it as an essential element in the formation of all customary rules, its relevance is most marked with respect to the development of customary obligations ... which involve not merely passive acquiescence in the exercise of a right, but the taking of positive steps to secure its implementation."[2]

Kopelmanas thinks that the formation as well as the determination of a custom can be ascertained by two factors: the material fact - the repetition of similar acts by states; and a psychological factor - the opinio juris - the feeling on the part of the states that in

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1 Ibid., at p. 380.

2 "Customary International Law and Acquiescence", 33 BYIL (1957), p. 129.

acting as they act they are fulfilling a legal obligation.[1]

Professor Briggs, while commenting on the Asylum case suggested that the proper way to express the process by which customary international law is created is to say that a particular pattern of state conduct, hitherto legally discretionary, has acquired obligatory force through its general acceptance by states as a legal obligation.[2] To these conclusions, Professor McGibbon added[3], "That general acceptance, or recognition, has frequently assumed the form of acquiescence, which ... mitigates the rigours of the positivist view and imparts a welcome measure of controlled flexibility to the process of formation of rules of customary international law."

Charles De Visscher in his "Reflections on the Present Prospects of International Adjudication", wrote that "The customary rule is a source of living law only insofar as, by adhering to the flexibility of its own process, it is capable of providing courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.[4]

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1 See Lazare Kopelmanas, "Custom as a Source of the Creation of International Law." 18 BYIL (1937), p. 129.

2 See Briggs, "The Colombian-Peruvian Asylum Case and Proof of Customary Int. Law." 45 AJIL (1951), p. 730.

3 Op. cit. supra, at p. 145.

4 50 AJIL (1956), at p. 473 (Translated from French by Eleanor H. Finch).

Taking all these opinions of the learned authors, together with the dissenting opinion of various Judges of the International Court as well as criticism of the individual cases by international lawyers, one may conclude that "flexibility" for determining the validity of customary rule of international law is more acceptable and more reasonable as compared to the rigid approach that the Court followed in some of the cases. There may be some danger in adopting the principle of opinio juris, or the flexible approach as suggested by these writers, but on the other hand, the reluctance of the Court to uphold the authority of a recognized custom may make the states more hesitant to accept its compulsory jurisdiction.[1]

It is noted that the Court has followed this liberal approach in deciding some of the cases.[2] It has tolerated even few uncertainties in state practice against the principle of "uniform and constant practice accepted as law."[3] It has taken into consideration the social,

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1 Cf., Jenks, op.cit. supra, pp. 765-767.

2 See particularly the Fisheries case, as far as Norwegian position is concerned, supra, pp. 37-49. See also the Ambatielos case (jurisdiction), I.C.J. Report, 1952, pp. 28-46. In this case, the Court refused to accept the plea of the fundamental principle of customary international law", i.e., "the non-exhaustion of local remedies." I.C.J. Reports, 1953, pp. 18, 22, and 23.

3 See above, the Asylum case.

economic, geographic and historical factors.[1] It has given preference to an established state practice where it thought necessary that "a particular practice must prevail over any general rules."[2] And if it abandons its rigid approach, and continues to follow the flexible approach in asking for a proof of customary law; it is submitted that the Court will not depart from its practice[3], which has proved useful for the proper administration of international justice, as well as for the development of international law.[4]

It is submitted that the decisions of the Court have always been considered as authoritative and have served as "guiding principles" in some of the international conventions.[5] But if the Court follows the inflexible rigid standards which tend to disprove the validity of customs,

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1 See the Fisheries case, supra, pp. 37-49.

2 The Right of Passage case, I.C.J. Reports, 1960, at p. 44.

3 See Lauterpacht, op. cit. supra, pp. 382-384.

4 See Jenks, The Common Law of Mankind, Stevens, London, 1958, p. 429, where he wrote: ".... A high standard of respect for the existing law is an important element in enhancing the future authority of a more developed body of law ...." If the Court had tried to recognize the law which was already existing, instead of caring what the law "ought" to be; it is submitted that the Court could have substantially contributed to the growth of international law.

5 See particularly The Geneva Conventions on the Law of the Seas, op. cit. supra. Besides this, the influence of the decisions of the Court can be seen in the Draft Convention on the Law of Treaties. See U.N. Doc. G/A. A/CN 4/L107 (Jan. 7, 1965).

it is very likely that it may destroy the existing value of customary rules, since the states might desist to follow the same practice which has no recognition on the international plane.

It is suggested that the Court should have used its discretionary powers wherever it was necessary to do so. It is not bound to follow the rigid set of standards that it "invented"[1] in the Asylum case. Moreover, the decisions of the Court are neither binding on the third parties, nor on the Court itself.[2] It can decide its own line of approach "on the basis of such reasons as it may consider relevant and proper."[3] With these wider powers, and with a reasonable amount of care and caution, if the Court applies flexible tests (according to the circumstances of the cases) for ascertaining the validity of a custom, there is every possibility that the Court may attract a large number of cases, since the parties would know before hand that their claims are not going to be frustrated for want of "extra-special proof."[4]

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1 The Asylum case, I.C.J. Reports, 1950, p. 276.

2 Cf., Lauterpacht, op. cit. supra, at p. 22. Article 59 of the Statute of the Court reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case." See above p. 81.

3 The Nottebohm case, I.C.J. Reports, 1955, p. 116.

4 See Jenks, op. cit. supra, pp. 263-264.

CHAPTER III

State Sovereignty; and the Jurisprudence of the Court

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages .... Restrictions upon the independence of States cannot therefore be presumed.
>
> The Permanent Court of International Justice[1]

The International Court and the State Sovereignty.

In this chapter, it is proposed to deal with the

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1 The Lotus case, P.C.I.J. 1927, Series A, No. 10, at p. 18.

notion of state sovereignty - a fundamental principle of international law[1], and the jurisprudence of the Court relating to this principle, in the following way:-

1. Submissions - (concerning sovereign rights based upon customary international law)

2. Court's Observations - (and the importance of international law against such sovereign rights)

3. Judgments - (recognition or non-recognition of the sovereign rights or the maintenance of status quo)

I The Corfu Channel case[2] and Territorial Sovereignty.

The Corfu Channel incident, which gave rise to three Judgments by the Court[3], arose out of the explosions of certain anchored mine fields in the North Corfu Channel on October 22, 1946, which resulted in the death and injury of certain members of the crew and heavy damage to the British warships. Owing to the political tension between Albania and Great Britain, the matter was brought before the United Nations, and, in consequence of a recommendation by the Security Council, it was referred to the Court.[4]

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1 See the Corfu Channel case, I.C.J. Reports, 1949, p. 35; the Charter of the United Nations; the Covenant of the League of Nations. Cf., Schwarzenberger, International Law, Vol. I (3rd. ed., 1957), pp. 9, 18-19 and 114.

2 The Corfu Channel case (Merits), I.C.J. Reports, 1949, p. 4.

3 I.C.J. Reports, 1947-48, p. 15; ibid., 1949, p. 4; ibid., p. 222.

4 I.C.J. Reports, 1948, p. 54.

The Court was asked to decide two questions:

(1) Was Albania responsible under international law for explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and was there any duty to pay compensation?[1]

(2) Had the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and was there any duty to give satisfaction?[2]

The British government argued that the passage of warships was "an exercise of the right of innocent passage, according to the law and practice of civilized nations."[3] The Albanian government denied the existence of such rights and contended that the British government had violated its sovereignty by sending its warships through the Strait which did not belong to the class of international highways through which a right of passage could be claimed without its previous authorization.

To the British contention, the Court replied that in its opinion, it was "generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits

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1 I.C.J. Reports, 1949, at p. 6; see also pp. 11-12, the "Special Agreement."

2 Ibid.

3 Ibid., at p. 10.

used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent."[1] And since the North Corfu Channel, according to the findings of the Court, belonged to the class of international highways[2], the Court was of the opinion that the British government had not violated Albanian sovereignty by sending its warships through the Strait without having obtained the previous authorization of the Albanian government.[3]

Similarly, the Court upheld the Albanian claim by observing that due to "exceptional circumstances", Albania was "justified in issuing regulations in respect of the passage of warships through the Strait."[4]

In this way the Court upheld the validity of customary international law; justified the British act of sending the warships through the Strait[5]; and finally, recognized the right of Albania in issuing regulations for

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1 I.C.J. Reports, 1949, at p. 28; see also supra, pp. 29-31.

2 I.C.J. Reports, 1949, at p. 29.

3 Ibid., at pp. 29-30.

4 Ibid., at p. 29.

5 It is doubtful whether the warships of one country could claim a right of innocent passage through the territorial waters of another state in 1946. Cf., Judge Krylov, I.C.J. Reports, 1949, pp. 73-75 (and authorities thereto, cited by him in this regard). Cf., Dr Ecer, I.C.J. Reports, 1949, at p. 130.

the passage of warships through the North Corfu Channel.

The Albanian government tried to prove that the passage of British warships was not an innocent passage since it did not conform to the principles of customary international law. In support of this contention, the Albanian government said that the passage was not an ordinary passage, but a political mission; the ships were manoeuvring and sailing in diamond combat formation with soldiers on board; the position of the guns was not consistent with innocent passage; the vessels passed with crews at action stations; the number of the ships and their armaments surpassed what was necessary in order to attain their object and showed an intention to intimidate and not merely to pass; the ships had received orders to observe and report upon the coastal defences and that this order was carried out.[1]

It is noted that the Court had already upheld the British action of sending the warships through the Strait without violating the Albanian sovereignty, and, in the presence of above reasons advanced by the Albanian government, which purported to prove that the British government had acted contrary to the principles of customary international law; it became difficult for the Court to acknowledge the sovereign rights of one state and to disregard that of the other. However, the Court solved this

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1 I.C.J. Reports, 1949, at p. 30.

problem in this way:

> .... The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law ... .[1]

It is submitted that the Court gave too much protection to the British sovereign acts. For instance, the Albanian government referred to the documents known as XCU[2], issued by the British Defence Ministry to the Commander of the Volage, which, presumably, contained orders to reconnoitre Albanian coastal defence. The Court, in accordance with Article 49 of its Statute and Article 54 of its Rules, requested the British government to produce those documents. However, those documents were not produced, the British Agent pleaded naval secrecy, and the United Kingdom witnesses declined to answer questions relating to them.[3]

According to the customary rule of international law, the Court could have applied the principle of presumptio juris[4], and could have drawn conclusions from this refusal.[5] But here the Court applied the "subjective

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1 Ibid., (italics added).

2 I.C.J. Reports, 1949, pp. 31-32.

3 Ibid., at p. 32.

4 Cf., see Diss. Opin. of Judge Ecer, ibid., pp. 119, et seq., 127, 129.

5 Cf., Ecer, ibid., at p.129.

standards"[1], and observed that the purpose of that Order was only to prevent the incident of May 15th, 1946[2], and therefore, it could not deduce anything from the non-production of such documents.[3]

With all the above observations, the Court came to the conclusion that "the United Kingdom did not violate the sovereignty of Albania by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946."[4]

Having upheld the British contention that it had not violated the Albanian sovereignty by sending its warships through the North Corfu Channel, the Court considered the second question of the "Special Agreement."[5] This related to the mine sweeping operation, known as "Operation Retail" which was carried out by the British government under the protection of aircraft carriers, cruisers and other war vessels. The Albanian government had notified the British authorities that any mine sweeping undertaken without its

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1 Ibid.

2 On that date, the Albanian coastal guard had fired at the British cruisers which were passing through that Strait.

3 I.C.J. Reports, 1949, p. 32. The Court's logic in this situation is rather confusing. If the purpose of that Order was only to prevent the past incident, or, to give information about the contingency of shots being fired from the Albanian coastal guards; then why conceal the production of that "Simple Order"?

4 Ibid.

5 See above at p. 104.

previous consent in its territorial waters where foreign warships had no reason to sail "could only be considered as a deliberate violation of Albanian territory and sovereignty."[1]

In spite of this warning the British government swept the mines, and in its defence argued that the matter was of extreme urgency which entitled it to carry out the operation without anybody's consent. It classified that action as an act of "self-help or self-preservation."[2]

The Court refused to accept this line of defence and said that the British action was a manifestation of a policy of force which could not find any place in international law.[3] It upheld the sovereign rights of the states and confirmed that "Between independent States, respect for territorial sovereignty is an essential foundation of international relations."[4]

In its concluding remarks about the British mine

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1 I.C.J. Reports, 1949, p. 33.

2 Ibid., at p. 35. According to orthodox doctrine of "self-help or self-preservation", a state could justify its acts of aggression as well. This doctrine had been propagated and defended by Nazi leaders and was quite notorious before, and after, the First World War. The Court condemned this doctrine. See ibid., at pp. 34-35.

3 Ibid., p. 35.

4 I.C.J. Reports, p. 35.

sweeping operation, the Court said that "to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty."[1]

It is noted that the Court gave satisfaction to the Albanian government "in accordance with the request" which the latter made. But on the contrary, the Court said that "the action of the British Navy was not a demonstration of force for the purpose of exercising political pressure on Albania", and that the Albanian government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes were extenuating circumstances for the action of the British government.[2] In other words the Court gave moral satisfaction to the Albanian government and upheld the British claim although the latter had violated the sovereignty of the former by demonstrating a sheer force against Albania.

The Judgment of the Court relating to sovereignty has established two things: first, that the "respect for territorial sovereignty is an essential foundation for international relations"; second, there is no such thing as "absolute sovereignty", for "a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation."[3]

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1 Ibid.

2 Ibid.

3 Loc. cit. It is noted that the Albanian government did not pay the damages, which the Court, by its Judgment of Dec. 15, 1949, awarded to the British government.

II The Asylum case[1]:-

Equality of Sovereign States.

[Colombia (foreign sovereign) v. Peru (territorial sovereign)][2]

The Republic of Colombia and the Republic of Peru - the two friendly countries, under the Act of Lima of August 31, 1949[3], agreed that "proceedings before the recognized jurisdiction of the Court may be instituted on the application of either of the Parties without this being regarded as an unfriendly act toward the other, or as an act likely to affect the good relations between the two countries."[4]

According to the terms of the above agreement, the Colombian government requested the Court to adjudge and declare that "the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum", and that "the Republic

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1 (1) I.C.J. Reports, 1950, p. 266.
(2) I.C.J. Reports, 1950, p. 395 (Request for Interpretation).
(3) I.C.J. Reports, 1951, p. 71 (Haya de la Torre case).

2 For customary international law see supra, under "Custom" and "State Practice", here it is proposed only to discuss the effect of the Judgment on the sovereign rights of two states.

3 I.C.J. Reports, 1950, pp. 267-268.

4 Ibid., p. 268. Art. II of the "Act of Lima".

of Peru, as the territorial State, is bound ... to give the guarantees necessary for the departure of M. Victor Raul Haya de la Torre from the country, with due regard to the inviolability of his person."[1]

The Colombian government contested the above rights on the grounds of customary, as well as conventional and treaty law; whereas the Peruvian government denied the existence of such rights on the same grounds, and maintained that the asylum granted to the fugitive was illegal.

Observations:-

> In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State .... Such a derogation from territorial sovereignty cannot be recognized unless its basis is established in each particular case.[2] (italics added)

The Judgment:-

> ... Colombia is under no obligation to surrender Victor Raul Haya de la Torre to the Peruvian authorities; [and] the asylum granted ... and maintained since that time, ought to have ceased after the delivery of the Judgment of November 20th, 1950, and should terminate.[3]

In delivering this Judgment the Court made it clear that there was no contradiction between those findings,

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1 Ibid., at pp. 269, 270 and 271.

2 I.C.J. Reports, 1950, at p. 275.

3 I.C.J. Reports, 1951, at p. 83.

"since surrender is not the only way of terminating asylum."[1]

It is submitted that the Court gave moral satisfaction to both of the parties and did not change the existing status quo. The Colombian government, the Court said, was under no legal duty to surrender the refugee to the Peruvian authorities who had contested the "legality"[2] of asylum granted to him. In other words, the Court left it up to the parties to find the solution for terminating the asylum "by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, have always held a prominent place in the relations between the Latin-American republics."[3]

The Judgment of the Court did not alter the status quo between the two friendly "sovereigns" who wanted to seek a legal solution for a problem which could be termed as a "political", "humanitarian", or "legal" one. However, it is submitted, that diplomatic asylum is as much a matter of politics as of law; perhaps it is more a matter of politics, with the role of law confined largely to limited attempts to regularize a rather erratic practice.[4] The Court's non-interference with the rights of two sovereign

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1 Ibid., at p. 82.

2 See I.C.J. Reports, 1950, p. 279.

3 I.C.J. Reports, 1951, at p. 83.

4 See Alona E. Evans, "The Colombian-Peruvian Asylum Case: The Practice of Diplomatic Asylum." 46 A. Pol. Sci. Rev. (1952) p. 157.

states could be justified on the grounds that neither was there any immediate necessity for terminating the asylum; nor were the parties so keen to make asylum as a "major issue" in their international relations. They remained friendly throughout the tenure of asylum, and after its termination, the political refugee was received back by his government with full honours.[1] In these circumstances, the Court's stare decisis[2] policy could have produced adverse results.

III The Fisheries case[3]:-

Predominance of International Law over the Sovereign Acts of States.

In this case, against the British complaint, the Norwegian government requested the Court "to adjudge and declare that the delimitation of the fisheries zone fixed by the Norwegian Royal Decree of July 12th, 1935, is not contrary to international law."[4]

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1 See supra, under "Custom" and "State Practice."

2 It is noted that the Court's reasoning for not indicating the method of terminating the asylum does not conform to the reasoning that it gave in the Corfu Channel case. For instance, in that case, the Court said that: "If, however, the Court should limit itself to saying that there is a duty to pay compensation without deciding what amount of compensation is due, the dispute would not be finally decided. An important part of it would remain unsettled." I.C.J. Reports, 1949, at p. 26 (italics added).

3 For customary international law and state practice. see supra.

4 I.C.J. Reports, 1951, at p. 124.

The British government had maintained its claim on general international law applicable to the delimitation of territorial sea as followed by the majority of the states "in their national law and in their treaties and conventions."[1]

Observations:-

> Thus the Court ... finds that the Norwegian Government in fixing the base-lines for the delimitation of the Norwegian fisheries zone by the 1935 Decree has not violated international law.[2]
>
> It does not at all follows that, in the absence of rules having the technically precise character alleged by the United Kingdom Government, the delimitation undertaken by the Norwegian Government is not subject to certain principles which make it possible to judge as to its validity under international law. The delimitation of sea areas has always been an international aspect; it cannot be dependent upon the will of a coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.[3] (italics added)

The reasons for this Judgment, the realities of which the Court tried to resolve in accordance with what it considered to be the requirements of justice[4], have been

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1 Ibid., at p. 131.

2 Ibid., at p. 132.

3 I.C.J. Reports, 1951, at p. 132.

4 See ibid., at p. 128.

discussed elsewhere.[1] Here, it is sufficient to say that although the Court acknowledged the rights of a coastal state to delimit its territorial waters; it made this clear as well, that the validity of such delimitation depends upon international law.

In this way the Court maintained the primacy of international law over municipal law and tried to avoid the international anarchy in the regime of the seas.

The findings of the Court in this case may lead one to conclude that in the absence of strong proof of customary rules of international law universally acknowledged as having a binding force and evidenced by a unanimous consent, states may be presumed to be free from international obligations.[2]

The above proposition could be supported by citing the decision of the Court from this case where it declined to accept a preponderant practice of delimiting the territorial waters, followed by a majority of states "both in their national law and in their treaties and conventions"[3], because, that practice had "not acquired the authority of a general rule of international law."[4] And "in any event the ... rule would appear to be inapplicable

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1 See supra under "Customs" and "State Practice."

2 Cf., see Lauterpacht, The Development of International Law, op. cit. supra, pp. 362-372.

3 I.C.J. Reports, 1951, at p. 131.

4 Ibid.

as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian system."[1]

The above reasoning of the Court and the "non-opposition"[2] on the part of other states, lends further support to the above proposition, since in the Court's opinion, the Norwegian system of delimitation was not (under the above circumstances) contrary to international law.

Thus, while administering international justice[3], the Court acknowledged the rights of a territorial sovereign which were not contrary to international law; maintained the rule of law by establishing the primacy of international law over the unilateral acts of a state; and finally, left certain questions of secondary importance to the will of a coastal state for settlement.[4]

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1 Ibid.

2 Ibid., at pp. 136-37: "The Court ... finds that this system [of delimitation] was consistently applied by Norwegian authorities and that it encountered no opposition on the part of other States." See also ibid., p. 139, where the Court said: "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."

3 See H.A. Smith, "The Anglo-Norwegian Fisheries Case." 7 YBWA (1953) p. 283, at p. 301, where he remarked that "The Fisheries Case is an example of international justice at its very best, particularly in the readiness with which a Great Power has accepted a decision contrary to its own policy and interests. ..."

4 See I.C.J. Reports, 1951, pp. 142-143.

IV The Anglo-Iranian Oil Co. case[1]:-

Right of Sovereignty is not Subject to Complaint?

In 1951, the Iranian government nationalized the Anglo-Iranian Oil Company, owned and operated by the British nationals on whose behalf the British government instituted proceedings against Iran for the grant of interim measures of protection, pending the final decision of the Court.

In its reply, the Iranian government disputed the jurisdiction of the Court and maintained that "exercise of the right of sovereignty is not subject to complaint."[2] It rejected the Request for the indication of interim measures of protection presented by the British government, on behalf of the Company, on the grounds that "this dispute pertaining to the exercise of the sovereign rights of Iran was exclusively within the national jurisdiction of that State and thus not subject to the methods of settlement specified in the Charter."[3]

Considering that the complaint made by the British government against Iran was "one of an alleged violation

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1 Order of July 5th, 1951, Indication of Interim Measures, I.C.J. Reports, 1951, p. 89; Anglo-Iranian Oil Co. case (jurisdiction), I.C.J. Reports, 1952, p. 93. See also infra under "Domestic Jurisdiction".

2 I.C.J. Reports, 1951, at p. 92.

3 Ibid.

of international law" and "a denial of justice", the Court granted the interim measures of protection pending the final decision.[1]

It is noted that the Iranian government refused to attend the proceedings of the Court concerning the indication of interim measures of protection, and while maintaining that the exercise of right of sovereignty is not subject to any complaint, it refused to acknowledge the Order of the Court that had granted interim measures of protection to the British government.

The British government, being disappointed by the non-execution of the Order of the Court, filed another application instituting proceedings before the Court against the Iranian government for a declaration that the Iranian government was bound to submit the dispute to arbitration under the Concession Convention of April 29th, 1933.[2]

The Iranian government maintained its previous stand and filed a document entitled "Preliminary Observations: Refusal of the Imperial Government to recognize the jurisdiction of the Court."[3] It supported its contention

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1 Ibid., at pp. 92-94. The Court has discretionary powers to grant provisional measures to preserve the respective rights of the parties. See Art. 41 of the Statute of the Court.

2 I.C.J. Reports, 1952, p. 97.

3 Ibid., at p. 96.

relying mainly on Article 2, paragraph 7, of the Charter of the United Nations which, according to the Iranian interpretation, justified its sovereign act of nationalization of the Company - a matter which fell exclusively within its domestic jurisdiction over which no organ of the United Nations, including the International Court of Justice, had any jurisdiction.[1]

Dr. Mossadegh, the Prime Minister of Iran, further made it clear that his country would not expose itself to the slightest risk of an unfavourable decision, and that the nationalization of the Company was within the exclusive competence of his government for which no outside interference, under any of the circumstances, could be tolerated.[2]

However, the Court did not think it proper to deal with the merits of the case since it thought the "jurisdiction of the Court to deal with or decide a case on the merits depends upon the will of the Parties."[3] It

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1 See I.C.J. Pleadings (Anglo-Iranian Oil Co. case) pp. 292-294; and I.C.J. Reports, 1952, at pp. 96 and 101.

2 See I.C.J. Pleadings, pp. 437-42, Declaration of Dr. Mossadegh at the Public Meeting of June 9, 1952. More specifically see his criticism of the United Nations, and the prerogatives of the sovereigns that the States derive from the Charter by limiting the competence of the Organization; and also the criticism of the British Imperialism and of the activities of the Company for helping and encouraging sabotage in economic, industrial and political affairs of the Iranian government. Ibid., pp. 438-442.

3 I.C.J. Reports, 1952, p. 103.

found that "Having filed a Preliminary Objection for the purpose of disputing the jurisdiction, it has [the Iranian government] throughout the proceedings maintained that Objection."[1] For these reasons, the Court said that no element of consent could be deduced from the conduct of the Iranian government, and therefore, the British complaint against the former could not be entertained.[2]

The Court came to the conclusion that it had no jurisdiction to deal with the case and its former Order of July 5, 1951, indicating the interim measure "ceases to be operative upon the delivery of this Judgment and that the Provisional Measures lapse at the same time."[3]

It is submitted that the Court did not deal with the legal issues involved in this case. It transformed the whole case into a "jurisdictional" matter, although both governments had accepted the compulsory jurisdiction of the Court. Taking the plea of reciprocity, the Court found that, as the Iranian Declaration was more limited in scope, "it is the Iranian Declaration on which the Court must base itself."[4]

This "side-track" followed by the Court in order to administer "political justice", and to avoid interference

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1 Ibid., at p. 114.

2 See ibid., pp. 113-115.

3 Ibid., at p. 114.

4 Ibid., at p. 103.

with the sovereign rights of a government is in accordance with the principles of the United Nations of which it is a principal organ. On the other hand, it diminishes the importance of international adjudication for disallowing the legitimate claims of a party who has no other means of redress except to resort to force, which is the very antithesis of the international justice.[1]

Moreover, too much reliance of the Court, on the national law of Iran, passed by the Majlis on June 14, 1931[2], to which it characterized as "a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court,"[3] tends to show that the Court, dealing with a case in 1952, preferred the application of classical international law which recognized the domain of "absolute" sovereign rights of a state.[4]

Judge Read criticised this policy of the Court. He said that:

> The making of a declaration is an exercise of State sovereignty, and not, in any sense, a limitation. It should therefore be construed in such a manner as to give effect to the intention of the State, as indicated by the words used; and not by a restrictive interpretation, designed to

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1 See, for instance, the Declaration of Mossadegh, op. cit. supra, pp. 438-42.

2 I.C.J. Reports, 1952, at p. 106.

3 Ibid., at p. 107.

4 Cf., Judge Alvarez, Diss. Opin., ibid., pp. 124-127.

> frustrate the intention of the State in exercising this sovereign power.[1]

The Court could have avoided that criticism had it followed a liberal approach in determining the intention of the party concerning the acceptance of its compulsory jurisdiction. But in that case, the apparent danger of deciding against the will of a country (which the Court wanted to avoid) was also visible.

One cannot deduce anything from the Judgment of the Court relating to sovereignty, since the Court did not consider the Iranian contention that "the exercise of the right of sovereignty is not subject to any complaint."[2] However, logically, one may construe that the Court impliedly accepted the sovereign rights of a state to regulate its own internal affairs as it deemed proper for the cause of its national interest, and that a foreign sovereign had no right to interfere with the domestic

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1 Diss. Opinion, I.C.J. Reports, 1952, at p. 143. See also the criticism for too much reliance of the Court on the municipal law of Iran: Lord McNair, Indi. Opin., I.C.J. Reports, 1952, at p. 121; Hackworth, Diss. Opin., ibid., at pp. 136-137. Hackworth maintained that it was not "necessary or even permissible for the Court to rely upon the Iranian Parliamentary Act of Approval as evidence of the intention of the Iranian Government, since that was a unilateral act of a legislative body of which other nations had not been apprised." Ibid., at p. 136.

2 Loc. cit.

affairs of a territorial sovereign, if the latter insisted on enforcing its own will within its own domain and without any discrimination against any person of any particular nationality.[1]

To mitigate the rigours of this concept of sovereignty, Judge Alvarez in his dissenting opinion suggested, that: "Every State in the world is today a member of the international community, or rather, of the international society; all are subject to the law of nations and have the rights and obligations laid down by the law. It is impossible to suppose that a State not a Member of the United Nations, or one which has not accepted the jurisdiction of the Court, should be able to violate the rights of other States and that it should not be possible to bring it before the Court; or conversely, that a State which is a Member of the United Nations should be able so to act with regard to a non-member State."[2] He said that: "The Court must not apply classical international law, but

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1 On March 15th and 20th, 1951, the Iranian Majlis and Senate, respectively, passed a law enunciating the principle of nationalization of the oil industry in Iran. On April 28th and 30th, 1951, they passed another law "concerning the procedure for enforcement of the law concerning the nationalization of the oil industry throughout the country." I.C.J. Reports, 1952, at p. 102. Thus the law was not discriminatory, and could be justified on these grounds. But this would have again involved the question of sovereign rights of a state which the Court wanted to avoid.

2 I.C.J. Reports, 1952, at pp. 132-133.

rather the law which it considers exists at the time the judgment is delivered, having due regard to the modifications it may have undergone following the changes in the life of peoples; in other words, the Court must apply the new international law."[1]

V The Minquiers and Ecrehos case[2]:-
Acquisition of Sovereignty by Effective Occupation.

Under a "Special Agreement"[3], the Court was requested to determine whether the sovereignty over the islets and rocks (insofar as they were capable of appropriation) of the Minquiers and Ecrehos groups, respectively, belonged to the United Kingdom or the the French Republic.

The United Kingdom government requested the Court to declare in its favour that under international law it was entitled to full and undivided sovereignty over these islets or rocks, "by reason of having established the existence of an ancient title supported throughout by effective possession evidenced by acts which manifest a continuous display of sovereignty over the groups."[4]

The French government claimed "original title" to these islets and rocks and asked the Court to decide that such sovereignty belonged to that one of the parties to

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1 Ibid., at p. 125.

2 I.C.J. Reports, 1953, p. 47.

3 See ibid., pp. 49-50.

4 Ibid., at p. 50.

whom it belonged before August 2nd, 1839.[1]

The parties had excluded the status of res nullius as well as that of condominium, and therefore, it was for the Court to determine which of the two governments had produced the more convincing proof of title to one or the other of these groups, or to both of them.[2]

After dealing with the historical development of the dispute, which presumably supported the British claim, the Court said that "What is of decisive importance ... is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups."[3] In order to make the problem more simple, the Court said that: "Nor can the contention that the Court should determine to which Party sovereignty belonged in 1839, be considered as consistent with the Special Agreement of 1950, by which the Court is requested to determine to which Party sovereignty belongs at present,"[4] since, in the opinion of the Court, the dispute had "crystallized" only in 1950 and not in 1839.[5]

The Court, according to the old and well-established rule of customary international law, applied the principle

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1 Ibid., at pp. 50, 51.

2 Ibid., at p. 52.

3 Ibid., at p. 57.

4 Ibid., at p. 59.

5 Ibid.

of "acquisition of sovereignty by effective occupation", and unanimously found that the legislative, judicial and executive acts performed by the British authorities in that area of the islets and rocks of Ecrehos and Minquiers groups, were sufficient to establish the British sovereignty, and that the group of those islets and rocks, insofar as they were capable of appropriation, belonged to the United Kingdom.[1]

Two propositions could be evolved from this decision of the Court concerning sovereignty: First, the Court acknowledged what existed in fact, that is, the British possession, and gave little importance to the claim of the French government which had no effective control, but wanted to establish that on the basis of treaties[2], or, some of the administrative acts performed by it (which were not "sufficient" in the opinion of the Court)[3]: Second,

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1 Ibid., pp. 60-71, and 72.

2 The French government mainly relied on the Convention of 1839 concerning fishery rights (particularly the right to fish oyster) between the Island of Jersey and the neighbouring coast of France. Had the Court found that the Ecrehos and Minquiers groups were included in that fishery zone, the French government could have validly established its claim. But the Court said that "Even if it be held that these groups lie within this common fishery zone, the Court cannot admit that such an agreed common fishery zone in these waters would involve a regime of common user of the land territory of the islets and rocks, since the Articles relied on (Art. 3) refer to fishery only and not to any kind of user of territory." Ibid., at p. 58.

3 Ibid., at p. 73.

the decision of the Court is another landmark in international adjudication where questions relating to sovereignty can be solved through peaceful means without resorting to arms, and that the rule of law can be maintained in the international community if the nations agree to abide by the decision of the Court.[1]

VI The Nottebohm case[2]:-

Sovereign Rights and their Recognition in International Law.

By the application filed on December 17, 1951, Liechtenstein instituted proceedings against Guatemala in which it claimed restitution and compensation on the ground that the latter had "acted towards the person and property of Mr. Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law."[3] In its Counter-Memorial[4], Guatemala contended that that claim was inadmissible on a number of grounds, and one of its objections to the above claim related to the nationality of Nottebohm for whose protection Liechtenstein had seized the Court.

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1 See also the Temple of Preah Vihear case, and the Case concerning Sovereignty over Certain Frontier Land. In both of these cases, the parties honoured the decision of the Court; withdrew their authorities from the areas under dispute, and transferred the "actual possession" to the "legal" claiments. See infra.

2 I.C.J. Reports, 1953, p. 111 (Preliminary Objection); I.C.J. Reports, 1955, p. 5; see also supra, pp. 32-33.

3 Ibid., pp. 6-9.

4 Ibid., pp. 9-12.

Guatemala "referred to the well-established principle of international law" that "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection", and since, it maintained, that Liechtenstein had not conferred nationality on Nottebohm according to that principle, Liechtenstein was not entitled under international law to proceed against Guatemala.[1] It requested the Court to declare "that no violation of international law has been shown to have been committed by Guatemala" and that "Guatemala was not obliged to regard the naturalization of Friedrich Nottebohm in the Principality of Liechtenstein as binding upon her, or as a bar to his treatment as an enemy national in the circumstances of the case."[2]

The "real issue"[3] before the Court was the admissibility of the claim, in respect of Nottebohm against Guatemala only, and not the recognition of nationality by all other states.[4]

Having formulated the issue in precise terms where only two states were involved, the Court said that "Since no proof has been adduced that Guatemala has recognized the title to the exercise of protection relied upon by

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1 Ibid., p. 13.

2 Ibid., p. 12

3 Ibid., p. 16.

4 Ibid., p. 17.

Liechtenstein as being derived from the naturalization which it granted to Nottebohm, the Court must consider whether such an act of granting nationality by Liechtenstein directly entails an obligation on the part of Guatemala to recognize its effect, namely, Liechtenstein's right to exercise its protection."[1] In other words the Court wanted to determine whether that unilateral act of Liechtenstein was one which could be relied upon against Guatemala in regard to the exercise of protection.[2]

In this way the Court segregated the question from international domain and confined its scope to the rights and obligations between two sovereign states against each other. Confirming the rights of each sovereign state to regulate its laws concerning nationality, the Court said that "It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation."[3] But, the Court said, that "the question to be decided is whether that act has international effect", and "whether naturalization conferred on Nottebohm can be successfully invoked against Guatemala."[4]

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1 Ibid., p. 20.

2 Ibid.

3 Ibid.

4 Ibid.

The Court found that in the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, in the presence of a long-standing and close connection between him and Guatemala where he had spent thirty-four years of his life, the nationality obtained by him was not genuine. It observed that the naturalization was requested and obtained, not so much for the purpose of becoming wedded to the traditions, interests or way of life of Liechtenstein, as it was to enable Nottebohm to substitute for his status as a national of a belligerent state to that of a national of a neutral state, with the sole aim of coming within the protection of Liechtenstein. In these circumstances, the Court held that Guatemala was under no obligation to recognize the nationality conferred by Liechtenstein upon Nottebohm, and consequently, Liechtenstein was "not entitled to extend its protection to Nottebohm vis-a-vis Guatemala."[1]

The Judgment of the Court has been criticised by some of the writers. They have characterized it as a denial of justice[2], since Nottebohm was practically declared to be a stateless person on whose behalf no state could maintain his claim.

It is submitted that the Court's line of reasoning in this case does not conform to its jurisprudence. For

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1 Ibid., at p. 26.

2 See supra, pp. 50-52, and infra, pp. 132-133.

instance, in the Asylum case, when the Court was confronted with a contention of unilateral qualification, it based itself on the principle of state sovereignty and held that a party which relies on an alleged custom, must prove that the rule invoked is in accordance with uniform and constant practice accepted as law. In this case, it was for Guatemala to prove that the nationality conferred upon Nottebohm was not in accordance with the general practice accepted as law.

The Court acknowledged that international law recognized the sovereign rights of every state with regard to matters concerning nationality laws. If this is so, then under international law other states cannot deny their international responsibility by refusing that prerogative of the sovereign if it is not intended to injure the cause of any other state. In this case, Liechtenstein exercised that constitutional prerogative, the validity of which was in accordance with the principles of international law. Moreover, Guatemala recognized the legality of that sovereign right when Nottebohm's passport was duly endorsed by the Guatemalan authorities, and proper enteries were made in Guatemalan registers. According to German law, Nottebohm became a citizen of Liechtenstein from the day when he was naturalized by Liechtenstein. Then where is the illegality which does not conform to the standards of international law?

Commenting upon the decision of the Court, Kunz wrote

that: "The Nottebohm Judgment has not only precluded the Court from the possibility of adjudicating the important issue of war confiscation measures, but it has also deprived Nottebohm of the only legal remedy he had ... , and has prevented justice from being done to him, either on the municipal or international level. That cannot be a proper administration of international justice."[1]

The only justification that could be given for this Judgment is that the Court wanted to avoid interference with the sovereign rights of two states. "To hold otherwise" Professor Gross wrote "would have placed one state (Guatemala), in a matter which affects its interests protected by international law, under the sway of another state, and thus would have denied to the former the protection to which it was entitled under existing principle of international law."[2] He continued that "To criticize the holding of the Court in the Nottebohm Case for introducing an element of uncertainty by relying on subjective criteria is to criticize international law and particularly that part of it relating to nationality, which exhibits all the elements of uncertainty corresponding to the prevailing degree of international integeration."[3]

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1 Kunz, "The Nottebohm Judgment (second phase)" 54 AJIL (1960) p. 566; see also Diss. Opin of M. Guggenheim, I.C.J. Reports, 1955, p. 64: "... It must not prevent justice from being done."

2 Leo Gross, "Some Observations on the International Court of Justice." 56 AJIL (1962) p. 54.

3 Ibid., at pp. 54-55.

If this be the case, that one state is not necessarily bound to recognize the laws of another state that involve international obligations, then there seems to be no need for all these lengthy proceedings of academic value. The Court was not created to recognize the claims to sovereignty; it was created for the law-abiding states who want to resolve their international disputes through peaceful means and through this principal organ of the United Nations.

There is no question of imposing a will of one state against the other. If the claim is legitimate, then the proper course for the Court is to recognize that claim on the basis of those principles that it evolved in the Corfu Channel case, viz., "the elementary considerations of humanity more exacting in peace than in war"; or, that it considered in the Asylum case as the "requirements of justice."

It is submitted that to recognize, tacitly or impliedly, the sovereign rights of a state and to leave the legitimate and reasonable claims for which there is no other legal remedy unsettled, would not only make the states hesitant to seek solutions for their international problems through the International Court, but would also reduce considerably the importance of international adjudication.

VII The Right of Passage over Indian Territory case[1]:- Absolute Sovereignty?

In this case the Portugese government requested the Court to recognize and declare that the Indian government "has prevented and continues to prevent the exercise of the right in question (right to sovereignty), thus committing an offence to the detriment of Portugese sovereignty over the enclaves of Dadra and Nagar-Aveli and violating its international obligations."[2]

In its reply to the above charges, the Indian government denied the existence of such rights, disputed the jurisdiction of the Court, urged that the dispute was not a legal dispute which could be decided by the Court under Article 38, paragraph 1, of the Statute (of the Court), and being a territorial sovereign, asserted its exclusive competence to decide whether such right was to be granted or to be withheld.[3]

The Portugese government contended that "the international legal system is essentially based upon mutual respect of sovereignties", and that "by that recognition, the Union of India has unequivocally recognized the sovereignty of Portugal over the two enclaves just as

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1 I.C.J. Reports, 1957, p. 125 (Preliminary Objections); I.C.J. Reports, 1960, p. 6 (Merits); See also under "State Practice" and "Customs".

2 I.C.J. Reports, 1957, at p. 128.

3 Ibid., pp. 130-131 and 148-149.

indeed it had been recognized by the previous sovereigns of the Indian territory."[1]

The Portugese government argued that by denying the right of passage to the Portugese authorities, the Indian government had rendered it impossible for the government to maintain its sovereignty over the enclaves.

The Indian government maintained that there could be no question of any right of passage for the exercise of right of sovereignty, since Portugese sovereignty in the enclaves had already been paralyzed. Also even if any obligations with regard to passage had in the past been binding upon India, "they sould be regarded as having lapsed as a result of the change which has occurred in the essential circumstances, in particular by reason of the formation at Silvassa of an independent local administration."[2]

Relying upon the doctrine of rebus sic stantibus, the Indian government further maintained that Portugal could not claim any right of passage, since the circumstances under which such an alleged right, even if it existed, had been changed by the de facto local government which had acquired complete control over the enclaves.[3]

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1 Ibid., at p. 11.

2 Ibid., at pp. 25-26.

3 See I.C.J. Pleadings (Right of Passage case), Vol. III, (1960), pp. 304-310; ibid., Vol. IV, pp. 867-868.

The Judgment:-

> The Court ... concludes that, with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.[1]
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> It would thus appear that, during the British and post-British periods, Portugese armed forces and armed police did not pass between Daman and the enclaves as of right and that, after 1878, such passage could only take place with previous authorization by the British and later by Indian, accorded either under a reciprocal arrangement already agreed to, or in individual cases. Having regard to the special circumstances of the case, this necessity for authorization before passage could take place, constitutes, in the view of the Court, a negation of passage as of right. The practice predicates that the territorial sovereign had the discretionary power to withdraw or to refuse permission. It is argued that permission was always granted, but this does not, in the opinion of the Court, affect the legal position. There is nothing in the record to show that grant of permission was incumbent on the British or on India as an obligation.[2] (italics added)
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> The Court is, therefore, of the view that no right of passage in favour of Portugal involving a correlative obligation on

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1 I.C.J. Reports, 1960, at p. 40.

2 Ibid., at pp. 42-43.

> India has been established in respect of armed forces, armed police, and arms and ammunition. ...[1]

This Judgment has raised certain debatable questions concerning sovereignty. Is sovereignty divisible? Can a state maintain its control over its territory without having its armed police there? Could it be possible for a state to defend itself from internal revolutions or external aggression without maintaining its armed forces?

The Indian government, throughout its arguments, maintained that it had absolute sovereignty over its territory and exclusive competence to determine whether or not there existed any right of passage. Concerning the "elementary principle of international law that a state has exclusive competence within its own territory", Judge Chagla quoted a passage from the Schooner Exchange case[2], where Chief Justice Marshall had said, that: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and

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1 Ibid., at p. 43.

2 Schooner Exchange v. McFadden, 7 Cranch 116, at p. 136 (U.S. 1812); I.C.J. Reports, 1957, at p. 176.

complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." Chagla further made it clear that even if Portugal were to succeed in her contentions, "the judgment she would obtain from this Court could never be given effect to by India."[1]

It is noted that the intention of the Indian government to force Portugal to leave not only those enclaves but also the whole of Goa were brought to the notice of the Court by the Portugese government. It produced a statement of the Prime Minister of India made before the Indian Parliament (the Rajya Sabha), which read: "Our approach in regard to Goa is not that it will not be merged in the Indian Union. I think that is inevitable. But stress has to be laid on the factor of Portugal leaving Goa. Merger of Goa into India was the second step, which I have no doubt will have to be taken. But we are not prepared to tolerate anyhow the presence of a foreign colonial Power. I do draw a distinction. We are not prepared to tolerate the presence of the Portugese in Goa, even if the Goans want them there.... No Foreign Power can have any kind of foothold here, and it is from this point that we look at this Goa question."[2] (italics added)

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1 Ibid., at p. 175.

2 Rajya Sabha Debates (Sept. 6, 1955). "International Situation" 2213, at 2214. Reproduced in Annex 4 of the Portugese Observations on the Preliminary Objections. I.C.J. Pleadings, op.cit. supra. Vol. I, pp. 650-651; see however, the reply of Prof. Waldock (representing India) I.C.J. Pleadings, ibid., Vol. IV, p. 860.

The above statement reflects the Indian attitude towards Portugal vis-a-vis Goa, and indicates that the Indians were not only concerned with their own sovereignty, but were claiming the right to "absolute sovereignty" in the traditional sense, i.e., 'even if the inhabitants of Goa wanted the Portugese to stay there; the Indian government was not prepared to tolerate their presence'.

The Indian government argued that the enclaves had acquired a status of a de facto sovereign and therefore, being a neutral sovereign, it could not interfere with the sovereignty of other states. It invoked the provisions of the United Nations Charter in order to justify its stand.[1]

However, the Court did not throw any light on all these questions. It made a simple declaration of fact that the Indian government had tacitly recognized the Portugese sovereignty over the enclaves[2]. It also held that Portugal in 1954, had a right of passage over intervening Indian territory between coastal Daman and the enclaves and between the enclaves, in respect of private persons, civil officials and goods in general, to the extent necessary, as claimed by Portugal, for the exercise of its sovereignty

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1 Article 1, 55, 56 and 62 of the U.N. Charter; see Rejoinder of the Indian government, paras, 617-624, and paras, 639-641, I.C.J. Pleadings, op. cit. supra, Vol. III, pp. 298-300, 305-306; see also Argument of Prof. Waldock, ibid., Vol. IV, pp. 857-859.

2 I.C.J. Reports, 1960, p. 39.

over the enclaves, and subject to the regulation and control of India.[1]

The last sentence "subject to the regulation and control of India", again confirms the Indian discretion with regard to the legal rights of Portugal which the latter had acquired through a long practice. In other words, if the Indian government considered that the Portugese authorities were a menace to the former's national interest, the Indian authorities, according to the Judgment of the Court, were legally authorized to refuse the right of passage, or, to enact such regulations that could virtually make it impossible for Portugal to exercise its sovereignty over the enclaves. In more simple words, Portugese sovereignty over the enclaves was subject to the discretion of the Indian government.

The above statement is in accordance with the Judgment of the Court since the Indian government had refused a right of passage to the Delegates of the Governor of Daman (limited to three persons only) who wanted to go to Nagar-Aveli in order to enter into contact with the population, to examine the situation and to take the necessary administrative measures at the spot.[2]

To the complaint of the Portugese government for the denial of a legal right by the Indian government, the

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1 Ibid., at p. 40.

2 Ibid., at pp. 44-45.

Court replied: "In view of the tension then prevailing in intervening Indian territory, the Court is unable to hold that India's refusal of passage to the proposed delegation and its refusal of visas to Portugese nationals of European origin and to native Indian Portugese in the employ of the Portugese Government was action contrary to its obligation resulting from Portugal's right of passage. Portugal's claim of a right of passage is subject to full recognition and exercise of Indian sovereignty over the intervening territory and without any immunity in favour of Portugal. The Court is of the view that India's refusal of passage in those cases was, in the circumstances, covered by its power of regulation and control of the right of Passage of Portugal."[1]

In the light of the above findings of the Court and the foregoing discussions, one may conclude that sovereignty, although divisible, is nevertheless, subject to the whims of the territorial sovereign, i.e., no one can claim any rights against the wishes of a territorial sovereign if the latter denies the existence of such rights.

To the 2nd and 3rd questions raised above; it is impossible to conceive that a sovereign could maintain internal peace, or could check external aggression without keeping the proper forces. In this connection, Judge

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1 Ibid., at p. 45.

Wellington Koo said, that: "Since international law makes no distinction between one sovereignty and another, Portugese sovereignty over the enclaves is as much entitled to exist as the sovereignty of the State by whose territory it is encircled. And the passage of troops, armed police, and arms and ammunition is as indispensable to the exercise of the Portugese as, if not more so than, the passage of private persons, civil officials and ordinary goods ...."[1] Similarly, Sir Percy Spender, in his dissenting opinion said that: "Sovereignty is not a mere status, it connotes an ability to exercise the rights of sovereignty. Recognition that sovereignty over the enclaves was vested in Portugal was a recognition of Portugal's rights to exercise sovereignty within them; otherwise the recognition of sovereignty would have been meaningless."[2]

It is submitted that the Court's recognition of the Indian government's express violation of its obligations under international law is not only against the fundamental principle of right to sovereignty, but is also against the spirit of the Declaration of Rights and Duties of States which the International Law Commission adopted on June 9, 1949, and Article 13 of which provides that: "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international

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1 Ibid., at p. 66.

2 Ibid., at p. 109.

law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."[1]

On legal grounds, therefore, it is submitted, that the Judgment of the Court is not free from doubts. The "majority" with which the Court gave its decision (8 votes to 7)[2], also shows that the Court was divided over this issue.

The justification for this decision has been given elsewhere.[3] Here, it is sufficient to say that the Court had no other alternative except to decide the case on factual circumstances which had undergone various changes since 1954. Moreover, the function of the Court is to resolve the disputes by peaceful means. It would have violated the spirit of the Charter of the United Nations had it allowed the Portugese authorities to send its forces in those enclaves in order to regain its sovereignty, that it had lost to the revolutionaries, who had established a "de facto local government."[4] In other words the Court could not administer legal justice amidst political realities where a territorial sovereign had

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1 U.N. Gen. Ass. Off. Rec. 8th Sess., Supp. No. 10. (A/925) at pp. 8-9.

2 I.C.J. Reports, 1960, p. 49: "The Court ... by eight votes to seven, finds that Portugal did not have in 1954 such a right of passage in respect of armed forces, armed police, and arms and ammunition."

3 See supra, pp. 81-91, at p. 87, et seq.

4 Loc. cit.

determined to oust the foreign sovereign from the former's soil.[1]

VIII Case concerning Sovereignty over certain Frontier Land[2]:-

Legal Title to Sovereignty cannot be Dislocated by Effective Acquisitive Titles.

By a "Special Agreement"[3] concluded between the Netherlands and Belgium, signed at the Hague on March 7, 1957, the Court was requested to settle a dispute concerning sovereignty over two plots of land situated in an area north of the Belgian town of Turnhout where the frontier between the two countries presents certain unusual features.

From the documents produced by both the Governments it appeared that a Communal Minute drawn up by the authorities of the two communes (Baerle-Duc, the Belgian commune, and

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1 See supra, the Statement of the Indian Prime Minister; see also the Diss. Opin. of M. Moreno Quintana, I.C.J. Reports, 1960, pp. 95-96, where he said: "To support the Portugese claim in this case, which implies survival of the colonial system, without categorical and conclusive proof, is to fly in the face of the United Nations."; and: "As judge of its own law - the United Nations Charter - and judge of its own age - the age of national independence - the International Court of Justice cannot turn its back upon the world as it is. 'International law must adapt itself to political necessities', said the Permanent Court of Arbitration in its award on indemnities to Russian individuals (11 XI 1912). That is the reason why the Charter made legal provision to cover the independence of non-self-governing territories."

2 I.C.J. Reports, 1959, p. 209.

3 Ibid., at pp. 210-211.

Baarle Nassau, (the Netherlands commune) between 1836 and 1841 (on which the Netherlands relied) attributed the two plots in question to Baarle-Nassau, whereas the Descriptive Minute of the Frontier annexed to the Boundary Convention of 1843 which was concluded after the separation of Belgium from the Netherlands (and on which Belgium relied) attributed them to Baerle-Duc.

The Netherlands government maintained that the Boundary Convention recognized the existence of the status quo as determined by the Communal Minute, under which sovereignty over the disputed plots was recognized as vested in the Netherlands. Also that the provision by which the two plots were attributed to Belgium was vitiated by a mistake as was evident from a mere comparison of the terms of the Communal Minute with those of the Descriptive Minute.

In its last contention, the Netherlands government submitted that, "should it be held that the Boundary Convention determined the sovereignty in respect of the disputed plots and is not vitiated by mistake, acts of sovereignty exercised by it since 1843 over the plots have displaced the legal title flowing from the Boundary Convention and have established sovereignty in the Netherlands."[1]

The Judgment:-

The Court found that under the Boundary Convention,

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1 Ibid., at p. 217 (italics added).

the disputed plots were determined to belong to Belgium[1], and that "no case of mistake has been made out and that the validity and binding force of the provisions of the Convention of 1843 in respect of the disputed plots are not affected on that account."[2]

To the last alternative submission of the Netherlands, the Court replied in this way, that:

> This is a claim to sovereignty in derogation of title established by treaty. Under the Boundary Convention, sovereignty resided in Belgium. The question for the Court is whether Belgium has lost its sovereignty, by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.[3]

The Netherlands government relied, in addition to the incorporation of the plots in the Netherlands survey, the entry in its registers of land transfer deeds and registrations of births, deaths and marriages in the communal registers of Baarle-Nassau, on the fact that it had collected land tax on the said plots without any resistance or protest on the part of the Belgian government.[4]

The Netherlands government maintained, that besides the above administrative acts, it had publically announced the sale of certain heathland from those plots in 1853;

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1 Ibid., at p. 222.

2 Ibid., at p. 227.

3 Ibid.

4 Ibid., p. 228.

had collected rents from the houses built on those plots; and had granted a railway concession which related to a length of line, a small portion of which passed through the disputed plots.

The Court said that: "The weight to be attached to the acts relied upon by the Netherlands must be determined against the background of the complex system of intermingled enclaves which existed. The difficulties confronting Belgium in detecting encroachments upon, and in exercising, its sovereignty over these two plots, surrounded as they were by Netherlands territory, are manifest. The acts relied upon are largely of a routine and administrative character performed by local officials, and a consequence of the inclusion by the Netherlands of the disputed plots in its survey, contrary to the Boundary Convention. They are insufficient to displace Belgian sovereignty established by that Convention."[1]

For these reasons, the Court held that the Belgian sovereignty established in 1843 over the disputed plots had not been extinguished.[2]

This was the first daring Judgment concerning sovereignty ever pronounced by the Court where it upheld the claim of a legal sovereign to that of a sovereign in effective possession, who had acquired that title through

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1 Ibid., at p. 229.

2 Ibid., at p. 230.

a long and continuous exercise of sovereign acts.

Can this decision of the Court be reconciled (as far as customary law is concerned) with the jurisprudence of the Court concerning similar situations? The answer is obviously in the negative. For instance, in the Minquiers and Ecrehos case, the Court had to deal with a similar kind of situation where a question of sovereignty over those two groups of islets was involved. In that case, the Court applied the test of "effective possession"[1], and found that the administrative acts of local nature, performed by the British authorities were sufficient to establish Great Britain's title to sovereignty.[2] In this case, the Netherlands government relied upon the same kind of administrative acts which the Court declared as insufficient to displace Belgian sovereignty established by a Convention.[3]

In the Fisheries case, the Court gave too much importance to "the notoriety of the facts, the general toleration of the international community", and to the "prolonged abstention" for making any complaints for the consolidation of a right.[4] But in this case, the Court did not think it proper even to consider that "important

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1 I.C.J. Reports, 1953, p. 55.

2 See ibid., pp. 65-70 and 72.

3 I.C.J. Reports, 1959, p. 229.

4 I.C.J. Reports, 1951, p. 139.

factor."[1]

In spite of these "legal omissions", which can be justified by Article 59, of the Statute, the Judgment of the Court is free from doubts. It is a step forward towards the recognition of a rule of law, and the progressive settlement of international disputes.

IX The same. Case concerning the Temple of Preah Vihear.[2]

In this case, Cambodia instituted proceedings against Thailand for the violation of the former's territorial sovereignty. Cambodia complained that since 1949 Thailand had persisted in the occupation of the Temple of Preah Vihear, a sacred place of pilgramage and worship for the people of Cambodia. It requested the Court to declare that territorial sovereignty over the Temple belonged to the Kingdom of Cambodia, and that Thailand was under an obligation to withdraw the detachments of armed forces it had stationed since 1954 in the ruins of the Temple.[3]

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1 Cf., e.g., see Diss. Opin. of Judge Armand-Ugon, I.C.J. Reports, 1959, p. 233, at p. 250. See however, Armand-Ugon's concluding remarks, ibid., p. 251, where he wrote, " ...the title which is based on the effective, peaceable and public exercise of State functions by the Netherlands over the disputed plots must be given preference over the title of sovereignty relied upon by Belgium, which has never really exercised the State competence which it regards itself as holding."

2 Cambodia v. Thailand, I.C.J. Reports, 1961, p. 17; Ibid., I.C.J. Reports, 1962, p. 6.

3 I.C.J. Reports, 1962, at p. 10.

Cambodia based its claim on the map drawn up and published by the Mixed Delimitation Commission set up by the Treaty of February 13, 1904, between Indo-China and Siam (Annex I to the Memorial of Cambodia). It argued that besides this treaty right, Cambodia had acquired the possession of the temple by virtue of the doctrines of acquiescence, estoppel and prescription.[1]

Thailand denied the existence of Cambodia's territorial sovereignty over the Temple. It argued that the map, or the Treaty of 1904 was not binding upon it since the map had been published by the French authorities alone and not by the Commission constituted under the Treaty of 1904. It asked the Court to declare in its favour, since it had always exercised full sovereignty in the area of the Temple to the exclusion of Cambodia.[2] It contested that the watershed line was the true test to determine whether or not sovereignty over the Temple area belonged to Thailand.[3]

The Judgment:-

The Court found that the said map in question had not been formally approved by the First Mixed Commission as such, since that Commission had ceased to function a few months before the production of the map, and therefore,

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1 Ibid., at pp. 11 and 12.

2 Ibid., at pp. 12, 13 and 14.

3 Ibid., at pp. 12 and 21.

the map had no binding character.[1]

The Court said, that: "In fact, ... an acknowledgment by conduct was undoubtedly made in a very definite way; but even if it were otherwise, it is clear that the circumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced. Qui tacet consentire videtur si loqui debuisset ac potuisset."[2]

The Court refused to accept the Thai contention that the mistake in the map could not be detected earlier because of the lack of expertise in the science of cartography by those officials who had first seen the map. It said:

> The Court ... considers that there is no legal foundation for the consequence it is attempted to deduce from the fact that no one in Thailand at that time may have known of the importance of the Temple or have been troubling about it. Frontier rectification cannot in law be claimed on the ground that a frontier area has turned out to have an importance not known or suspected when the frontier was established.[3]
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> (italics added)

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1 Ibid., at p. 21.

2 Ibid., at p. 23.

3 Ibid., at p. 25.

> It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error. ...[1]

For these reasons (besides other treaty provisions and the application of general principles of international law which have not been noted here) the Court came to the conclusion that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia, and that Thailand was under an obligation to withdraw its armed forces and to restore all the objects (if any) removed from the Temple.

It may be mentioned that this Judgment (like its previous Judment that the Court delivered in the Case concerning Sovereignty over certain Frontier Land) cannot be reconciled with the Judgments that the Court delivered in the Minquiers and Ecrehos case, and in the Fisheries case.

In the present case, the Court did not ask Cambodia to establish that it had not relinquished its claim to territorial sovereignty over the Temple. It ignored the test of "notoriety of facts and the general toleration of the international community." It refused to give any weight to the effective control and possession, and to

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1 Ibid., at p. 26.

the administrative acts performed by the Thai officials.

Likewise, the application of the Roman principle that "he who keeps silent is held to have consented if he must, or could speak", was not desirable in the field of international law, since "territorial sovereignty is not a matter to be treated lightly, especially when the legitimacy of its exercise is sought to be proved by means of an unauthenticated map."[1]

Jennings, while commenting upon the decision of the Court and the importance that it gave to the principle of estoppel or perclusion, wrote: "What is not clear from the judgment is whether perclusion was regarded as one among other self-sufficient reasons for decision; or whether it was merely an adjunct of a kind of process of prescription ... ; or whether it was regarded as being merely of assistance in a question basically one of treaty interpretation. Indeed, looking simply to the majority judgment one is hard put not to lump it all together in an omnibus concept of 'consolidation of title by lapse of time'. What is immediately striking about the case is the exiguous assistance that the Court derived from acts of either party on the ground - acts which indeed by themselves merely indicated a situation of ambiguity."[2]

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1 See the Diss. Opin. of Judge Moreno Quintana, I.C.J. Reports, 1962, pp. 69-70; see also, the Diss. Opion. of Judge Wellington Koo, ibid., pp. 96-97.

2 Jennings, R.Y., The Acquisition of Territory in Int. Law, Manchester Univ. Press, 1963, at pp. 49-50.

Similarly, Sir Percy Spender in his dissent wrote, that: "With profound respect for the Court, I am obliged to say that in my judgment as a result of misapplication of these concepts and an inadmissible extension of them, territory, the sovereignty in which, both by treaty and by the decision of the body appointed under treaty to determine the frontier line, is Thailand's, now becomes vested in Cambodia."[1]

This "reactionary Judgment", by which the Court shifted the "sovereignty" of a sovereign in possession to that of a sovereign claiming legal title to that "sovereignty", resulted in disastrous consequences. For example, Thailand boycotted the meetings of the Southeast Treaty Organization (SEATO) for approximately one month after the decision was rendered[2]; it cut off its trade with Poland, stating that the Court which had decided against it was headed by a Polish Judge; and lastly, it recalled its ambassador to France, the apparent reason for this move being that two French lawyers were on the Cambodian legal team.[3]

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1 I.C.J. Reports, 1962, at p. 146.

2 It is noted that Thailand did not willingly submit itself to the jurisdiction of the Court. It was through the influence of SEATO that it agreed to submit itself to the jurisdiction, which it later disputed in its Preliminary Objections. See N.Y. Times, July 19, 1962, p. 2. Col. 3. (Quoted by Christopher R. Brauchli in "World Court - Cambodia v. Thailand - Boundary Dispute", 40. Denvor LCL (1963), p. 58, at p. 59, Note 7).

3 N.Y. Times, June 23, 1962, p. 2, Col. 1 (quoted by Brauchi op. cit. supra, p. 59, Note 8).

Whatever might have been the political consequences of this decision, one thing seems to be quite certain, that the Court decided this case on purely legal grounds. It refused to consider the arguments of the parties which were of a physical, historical, religious and archaeological character since, these arguments, in the opinion of the Court were not "legally decisive."[1]

The logical conclusion that could be drawn from this Judgment is that international transactions must be respected and honoured under all circumstance, and that the territorial rights of a sovereign under a treaty or settlement cannot be extinguished by mere possession of that territory by another sovereign, who had acquiesced in its alleged territorial rights by its subsequent conduct.

Finally, this Judgment may be characterized as "historic" in the jurisprudence of the Court for settling an international dispute which had generated tension between the two countries for many years.

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1 I.C.J. Reports, 1962, p. 15. It is noted that in the Fisheries case, the Court gave decisive importance to the historical and geographical factors; in the Corfu Channel case, it relied on the fundamental principle of humanity and in the Right of Passage case, it gave consideration to a "concrete case of special circumstances"; but in the present case the Court formed an opinion that they were not of decisive nature.

CONCLUSIONS[1]

(1) In almost all the cases, the Court has acted as the guardian of the sovereignty of both the applicant and the respondent states.[2]

(2) In this world of interdependence, there is no such thing as "absolute sovereignty."[3]

(3) The policy of the Court had been to avoid interference of one state into the affairs of another state.

(4) Its jurisprudence has left an impression that the Court would prefer to maintain the status quo rather than to change the existing position between the parties, or, in Jennings' words: "... the bias of the existing law is towards stability, the status quo, and the present effective possession; the tendency of international courts is to let sleeping dogs lie."[4]

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1 These conclusions have been drawn from the jurisprudence of the Court concerning "sovereignty" in which customary international law was involved. The Sovereignty over Frontier Land case, and the Temple of Preah Vihear case, form an exception to the above conclusions, since these cases were concerned with the interpretations of treaties or conventions.

2 See Leo Gross, "Some Observations on the International Court of Justice." 56 AJIL (1962) pp. 53-55.

3 See I.C.J. Reports, 1949, pp. 34-35.

4 R.Y. Jennings, op. cit. supra, p. 70.

(5) In the presence of a treaty, or a settlement, the Court would refuse to accept the claim of a party to the territorial sovereignty if it is based on effective possession only, and the other party can establish its claim on legal grounds, i.e., on the basis of that treaty or settlement.[1]

(6) And finally, for the proper administration of international justice, the Court may impliedly recognize the sovereign rights of a state if they are in accordance with the U.N. Charter.[2]

It is submitted that the Court could have administered justice in a more exacting way, had it tried to civilize sovereignty as it did in the Corfu Channel case. For instance, in that case the Court refused to accept the British contention that "Operation Retail" was a special kind of intervention by means of which the state intervening could secure possession of corpora delecti, from

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1 In the case of Frontier Land (Belgium/Netherlands), the Court dismissed the Belgium claim to a customary title to sovereignty in derogation of a title established by a treaty on the basis of the facts of the case without attempting to determine in the abstract how far custom may derogate from a treaty obligation. See Wilfred Jenks, The Prospects of Int. Adjudication, op. cit. supra, pp. 253-254.

2 The Anglo-Iranian Oil Co. case, and the Right of Passage case - are the best examples, where the Court's legal approach to the situations could have produced adverse results.

the territory of another state, in order to submit that to an international tribunal and thus to facilitate its task. It said:

> ... The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice.[1]

In this way the Court settled the question of intervention and denounced the act of a powerful state which wanted to justify its unilateral act by the "application of the new and special theory of intervention."[2]

Had the Court followed this approach, it could have contributed more for settling the unsettled nature of customary international law. But in the majority of the cases (including the above case), the Court did not follow this approach beyond the point of observations since, in its operative part of the judgments, one finds that the Court tried to maintain the status quo without changing the position of the parties which existed at the time when the proceedings were started, or the judgments were

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1 I.C.J. Reports, 1949, at p. 35.

2 Ibid., p. 34.

delivered. This policy of the Court requires modification.[1]

It is suggested that the Court should not hesitate to incorporate the new principles of international law whenever the exigencies of the case demand, and whenever the Court is satisfied that the dispute cannot be resolved by the application of the existing rules of customary international law related to sovereignty, which are, to a greater extent, based upon the traditional concept of the sovereignty of states, and which contradict the principles of the rule of law at the international plane.[2]

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1 Cf., e.g., see Jenks, The Prospects of Int. Adjudication, op. cit. supra, pp. 497-500. "We nevertheless find in the treatment of sovereignty in the pronouncements of the Court the elements, not fully self-conscious and not always fully self-consistent, of an international public policy that sovereignty should be civilized by being treated as the creature rather than the master of the law." Ibid., at p. 500.

2 See however, Jenks, The Common Law of Mankind, pp. 428-430; Leo Gross, "Some Observations on the Int. Court of Justice." op. cit. supra, pp. 61-62.

CHAPTER IV

Domestic Jurisdiction; and the Jurisprudence of the Court

> .... So long as international law does not impose any limitations on the exercise of sovereign rights, such matters are within the exclusive jurisdiction of sovereign States.
>
> Schwarzenberger[1]

Due to the maximum liberty granted by the Optional

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1 International Law, Vol. I (1957) op. cit. supra, at p. 116.

Clause[1], some of the states have devised a method to avoid the interference of the Court in their domestic affairs by introducing the subjective type of reservations in their Declarations of Acceptance of the Court's compulsory jurisdiction.[2] This was designed so the states could decide for themselves, whether or not a case falls within the jurisdiction of the Court. This tendency of reservations has created certain problems for the Court, since Article 36, paragraph 6, of the Statute, directs the Court that: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of

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1 Article 36, paragraph 3 of the Statute of the Court lays down that: "The declarations ... may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time." It is noted that Article 2 (7) of the Charter of the United Nations has become much controversial for delimiting the powers of the United Nations "in matters which are essentially within the domestic jurisdiction of any state", since, this Article does not explain, what are the matters which are "essentially" within the domestic jurisdiction, which do not require the Members to submit such matters to settlement under the present Charter. See also, and compare, Article 36 (1) of the Statute of the Court which reads: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in the treaties and conventions in force." However, this question relating to the Charter has been discussed fully in the conclusions.

2 The United States initiated this device by making a reservation of "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States." France, Mexico, Pakistan, India, South Africe, Liberia, and Great Britain followed suit. For recent changes in Declarations, see I.C.J. Yearbook, 1963-64, pp. 218-241.

the Court."

It is proposed here to deal with this problem by analysing the Submissions of the Parties; the decisions of the Court; and by looking at the results of all those cases in which the Court had to deal with the questions relating to the domestic jurisdiction.

I The Anglo-Iranian Oil Co. case[1]:-

Matters Which are Essentially Within the Domestic Jurisdiction of a State (Art. 2 (7) of the Charter).

In this case, the Court entertained the Application of the British government for the grant of interim measures of protection against the Iranian government which had nationalized the Anglo-Iranian Oil Co. Ltd. - a Company which was owned and operated (principally) by the British nationals.

The Iranian government in its written message of June 29, 1951, informed the Court that "it rejected the Request for the indication of interim measures of protection presented by the United Kingdom Government on the grounds principally of the want of competence on the part of the United Kingdom Government to refer to the Court a dispute which had arisen between the Iranian Government and the Anglo-Iranian Oil Company, Limited, and of the fact that this dispute pertaining to the exercise of the sovereign

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1 Order of July 5th, 1951, I.C.J. Reports, 1951, p. 89.

rights of Iran was exclusively within the national jurisdiction of that State and thus not subject to the methods of settlement specified in the Charter."[1]

The Court refused to accept this line of reasoning of the Iranian government and said, that as the complaint made by the British government was one of an alleged violation of international law by the breach of the agreement for a concession of April 29, 1933, and by a denial of justice, "it cannot be accepted a priori that a claim based on such a complaint falls completely outside the scope of international jurisdiction."[2]

Deriving its power from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of the Court, the Court granted the interim measures of protection proprio motu.[3]

In this case, the Court assumed that the act of nationalization was not within the exclusive jurisdiction of the Iranian government, and therefore, it had jurisdiction to grant the interim measures of protection as requested by the British government. This "assumption"

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1 I.C.J. Reports, 1951, p. 92.

2 Ibid., p. 93.

3 Ibid.

in international law has become a matter of controversy[1] and, to some extent, has been responsible for creating doubts with regard to the impartiality of the Court in settling international disputes. For instance, the Iranian government, not only refused to comply with the Order of the Court, but also, on July 10, 1951, denounced its Declaration of Acceptance of Compulsory Jurisdiction, on the ground of the alleged partiality on its part in issuing such an Order which encroached upon its domestic jurisdiction and interfered with its sovereignty.[2]

In their joint dissenting opinion, Judges Winiarski and Badawi Pasha, criticised this policy of the Court and said that: "In international law it is the consent of the parties which confers jurisdiction on the Court; the Court

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1 See the Joint Diss. Opin. of Judges Winiarski and Badawi Pasha, I.C.J. Reports, 1951, p. 97: "... This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed: if there exists weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exists serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated." See also Lauterpacht, op. cit. supra, pp. 110-113.

2 See I.C.J. Proceedings (Anglo-Iranian Oil Co. case) p. 443. The Iranian Representative in his submissions invoked this fact as one of the reasons (for the Court), that it should have declared itself as incompetent for deciding this case because of its partiality.

has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. ..."[1]

In the subsequent course of these proceedings[2], the British government made another bid to get this dispute settled through the International Court of Justice since Iran and Great Britain, both had accepted the compulsory jurisdiction of the Court under Article 36 (2).[3]

The Iranian government in its "Preliminary Observations: Refusal of the Imperial Government of Iran to recognize the jurisdiction of the Court", replied, that the Court had no jurisdiction to deal with the case, because, within the maining of Article 2, paragraph 7, of the U.N. Charter "the matters dealt with by the Nationalization

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1 I.C.J. Reports, 1951, p. 97; see however Rosenne, The Law and Practice of Int. Court, Sijthof, Leyden. 1965, Vol. I, pp. 424-428; and, Lauterpacht, op. cit. supra, 345-347.

2 I.C.J. Reports, 1952, p. 93.

3 I.C.J. Reports, 1952, p. 99.

Laws" were "essentially within the domestic jurisdiction of States and incapable of being the subject of an intervention by any organ of the United Nations"; because the Court has jurisdiction only insofar as conferred by the Declarations of the Parties, and the Iranian Declaration did not include "questions which, according to international law, are within the exclusive jurisdiction of States"; and because local remedies under international law had not been exhausted.[1]

The Iranian government did not stop here. It conceded its inability to sell oil abroad in order to put

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1 Ibid., pp. 97-99; It is noted that there was no ground left for the local remedies, since the Company's protest for the said act of nationalization, and its request to the Iranian Prime Minister, made on May 8, 1951 for submitting the matter to arbitration was turned down by the Iranian government. The Iranian Finance Minister on May 20th, 1951, wrote a letter to the Company and informed the latter about the non-availability of any remedies in the following words:

"First: The nationalization of industries is based on the right of the sovereignty of nations, such as exercised by other governments, including the British Government itself and the Mexican Government in different cases.

Second: A private agreement cannot obstruct the enforcement of this right, which is based on the principles of international rights.

Third: The nationalization of the oil industry, which is based on the enforcement of the right of sovereignty of the Persian people, is not subject to arbitration, and no international authority is qualified to investigate this matter." I.C.J. Proceedings (Anglo-Iranian Oil Co. case) at p. 40 (translation).

pressure on the Court[1], as it had already done by refusing to enforce the Order of the Court, and by challenging the Court's impartiality.[2]

Faced with this complicated problem where one nation was taking the plea of Article 2 (7) of the Charter for justifying its nationalization act, and the other was emphasizing that "the Court derives no jurisdiction at all from the Charter but derives all its jurisdiction from the consent of States given in one of the methods enumerated in Article 36 of the Statute,"[3] the Court said that:

> While the Court derived its power to indicate these provisional measures from the special provisions contained in Article 41 of the Statute, it must now derive its jurisdiction to deal with the merits of the case from the general rules laid down in Article 36 of the Statute. These general rules, which are entirely different from the special provisions of Article 41, are based on the principle that the jurisdiction of the Court to

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1 New York Times, June 27, 1952, at p. 6, Col. 5 (quoted by Duncan Noble in "Int. Law - Jurisdiction of the I.C.J.", 51 Mich. L.R. (1953) p. 442, at p. 443, Note 3); see also Noble's remarks in the above article at p. 443: "On June 26, Iran, severely hurt economically, and with the fields shut tight, conceded its inability to sell oil abroad since nationalization. Faced with this situation the Court held: it did not have jurisdiction for want of Iran's consent under her Declaration of 1932 made pursuant to Article 36, paragraph 2, of the Statute of the International Court."

2 See above.

3 I.C.J. Pleadings, op. cit., at p. 572 (Argument by Sir Eric Beckett).

> deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction.[1]

In this way the Court changed the subject matter of the dispute from domestic jurisdiction to its own jurisdiction and avoided all those important issues on the basis of which the Iranian government had denied jurisdiction to the Court, since it thought that "the Court is without jurisdiction in the present case, it need not examine any argument put forward by the Iranian Government against the admissibility of the claims of the United Kingdom Government."[2]

It is suggested that the Court should try to avoid this subjective approach which is detrimental to the cause of international justice. In this case, the Court was requested to deal with a question of Iranian law of nationalization which had affected the interest of a British Company, and, which amounted to denial of justice due to the inadequate compensation.[3] But the Court avoided that question, and found that it had no jurisdiction to deal with the case. What happened to the Company

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1 I.C.J. Reports, 1952, p. 102-103.

2 Ibid., p. 114.

3 For discussion on nationalization and domestic jurisdiction see the Diss. Opin. of Judge Levi Carneiro, ibid., p. 151, at pp. 159-162.

and how it was compensated - perhaps that was not the concern of the International Court of Justice.

It is submitted that the fault does not lie with the Court; it is the defendants who do not want any interference by any organ of the United Nations whenever their own national interest is involved in a dispute over which they have exclusive control. Under these circumstances, it is futile to criticise the jurisprudence of the Court, especially, when a party threatens to upset the whole system of international adjudication by denouncing its Declaration of Acceptance of the Compulsory Jurisdiction, under the Optional Clause, or, by refusing to attend the proceedings of the Court, when an action has been brought against it for a breach of international law.[1]

If every state starts behaving in this manner, then international anarchy is liable to prevail over which the International Court shall have no control, and the very purpose for which the Court was created shall be defeated. It is for the states to trench their faith in the jurisprudence of the Court for the settlement of their international disputes, and for the maintenance of the rule of law at the international plane.

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1 Judge Alvarez, in his Diss. Opin. pointed out that Articles 36 and 38 of the Statute are very defective, and therefore, it is for the International Court of Justice to determine its true scope. I.C.J. Reports, 1952, p. 130.

In this case, the Iranian government not only ignored the Order of the Court granting interim measures of protection, but also made its intention clear by indicating that: "However our faith may be in the justice of our cause, more so because it is a total conviction, we cannot expose what is vital to our nation to the slightest risk of an unfavourable decision."[1]

In these circumstances, the Court had to look more towards the political aspect of the problem. The blame is again on the parties who still believe in the dogma of "domestic jurisdiction" as their sole prerogative of sovereignty.

II The Nottebohm Case (Preliminary Objections)[2]:-

"Domestic Jurisdiction" and International Law.

On December 17, 1951, the Principality of Liechtenstein filed an application instituting proceedings before the Court against the Republic of Guatemala, for a breach of international obligation on the part of the latter, and, for confiscating the property of Mr. Nottebohm - a citizen of Liechtenstein.

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1 See Declaration of Dr. Mossadegh, op. cit. supra, p. 438; (author's translation), the original passage reads: "Quelque grande que soit notre confiance dans la justice de notre cause, plus exactment parce que c'est une conviction totale, nous ne pouvons pas exposer ce qui est vital pour la nation au moindre risque de decision defavorable."

2 I.C.J. Report, 1953, p. 111.

The Guatemalan government disputed the jurisdiction of the Court and informed the latter "That the Republic of Guatemala recognized the compulsory jurisdiction of the Court, but not in an absolute and general form, since this would have implied an indefinite submission to the detriment of its sovereignty and not in accordance with its interest, if by reason of unforeseen circumstances the international situation changed."[1] It contended that "the time-limit provided for in its Declaration of January 27th, 1947[2], expired with the last hour of January 26th, 1952, and that from this moment the International Court of Justice has no jurisdiction to treat, elucidate or decide cases which would affect Guatemala."[3]

For these reasons, the Guatemalan government showed its inability to appear before the Court since "it would

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1 Ibid., at pp. 114-115.

2 The Declaration of Acceptance read: "The Government of Guatemala declares that, in accordance with Article 36 (ii) and (iii) of the Statute of the International Court of Justice, it recognizes as compulsory, ipso facto and without special agreement, in relation to any other State accepting the same obligation, and for a period of five years, the jurisdiction of the Court in all legal disputes. This declaration does not cover the dispute between England and Guatemala concerning the restoration of the territory of Belize, which the Government of Guatemala would, as it has proposed, agree to submit to the judgment of the Court, if the case were decided ex acquo et bono, in accordance with Article 38 (ii) of the said Statute.
Guatemala, 27 January 1947." (italics added)
I.C.J. Reports, 1953, at p. 113, I.C.J. Yearbook, 1952-53, at pp. 173-174.

3 I.C.J. Reports, 1953, at p. 115.

be contrary to the domestic law of that country"[1] to contest a case over which the International Court had no jurisdiction.

The Court did not think it necessary to confine itself to the Guatemalan contention. It proceeded to deal with the case ex parte, although the Guatemalan government had shown its intention to appear before the Court, provided the oral proceedings were postponed.[2]

Basing itself on the "broadest terms" of Article 36 (6) of the Statute, the Court referred to "a rule consistently accepted by general international law in the matter of international arbitration" since the Alabama case, and the earlier precedents, that, "in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction."[3]

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1 Ibid., at pp. 115-116.

2 Ibid., at p. 117, the Guatemalan Charge d'affaires in Paris, On November 9, 1953, transmitted to the Registry a message, addressed to the Court by the Minister for Foreign Affairs of Guatemala, requesting the Court to postpone the date fixed for oral proceedings, or, in the event of the postponement not being granted, to confine its decision exclusively to the Guatemalan objection that the Court had no jurisdiction to deal with the case.

3 I.C.J. Reports, 1953, p. 119.

The Court said that the above principle had been expressly recognized in Articles 48 and 73 of the Hague Conventions of July 29, 1899, and October 18, 1907, for the Pacific Settlement of International Disputes to which Guatemala became a party. And therefore, "This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, in the present case, the principal judicial organ of the United Nations."[1]

The Court cited certain cases[2], where it had to deal with the similar situations concerning its own jurisdiction, and came to the conclusion that "the Court must ascertain and decide whether the expiry on January 26th, 1952, of the Declaration by which Guatemala accepted the compulsory jurisdiction of the Court has had the effect of depriving the Court of its jurisdiction to adjudicate on the claim stated in the Application, of which it was seized on December 17th, 1951, by the Government of

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1 Ibid.

2 The Corfu Channel case, I.C.J. Reports, 1949, pp. 23-26 and 36; the Ambatielos case, I.C.J. Reports, 1952, p. 28. See I.C.J. Reports, 1953, pp. 119-120.

Liechtenstein."[1]

The Court observed, that since the Application was filed in the Registry on December 17, 1951, at the time when the Declarations of Acceptance of both the parties were in force, therefore, "the subsequent lapse of the Declaration of Guatemala, by reason of the expiry of the period for which it was subscribed, cannot invalidate the Application if the latter was regular; consequently, the lapse of the Declaration cannot deprive the Court of the jurisdiction which resulted from the combined application of Article 36 of the Statute and the two Declarations."[2]

With regard to the domestic laws of Guatemala, the Court said:

> .... In the opinion of the Court, the Government of Guatemala, on the premise that the Court lacked jurisdiction in an absolute manner, meant that, by reason of the Court's lack of jurisdiction, the laws of Guatemala did not authorize that Government to be presented before a Court which had no power to adjudicate. The Court does not consider it necessary to ascertain what the laws of Guatemala provide in this connection. It will confine itself to stating that, once its jurisdiction has been established by the present Judgment with binding force on the Parties, the difficulty, in which the Government of Guatemala considered that it had been placed, will be removed and there will be nothing to prevent that Government from being represented before the Court in accordance with the provisions of the Statute and Rules. ...[3]
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> (italics added)

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1 Ibid., at p. 120.

2 Ibid., at pp. 122-123.

3 Ibid., at p. 123.

This Judgment, although it does not say anything concerning the primacy of international law over domestic law, nevertheless, indicates that international law cannot be disregarded by the impediments imposed upon a state by its national law.[1]

In the subsequent proceedings (second phase)[2], the Guatemalan government appeared before the Court and raised certain pleas in bar. It requested the Court to declare that the claim of Liechtenstein was inadmissible on the grounds:

that there was the absence of diplomatic negotiations which could have established a dispute between the two states;

that Nottebohm had not properly acquired the nationality in accordance with the law of Liechtenstein;

that the naturalization was not granted to Nottebohm in accordance with the generally recognized principles in regard to nationality;

that the nationality had been solicited by Nottebohm fraudently, with the sole object of acquiring the status of a neutral national before returning to Guatemala, and

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1 However, Judge Klaestad in his separate declaration said, that: "With regard to the allegations of the Government of Guatemala that provisions of its national law prevent that Government and its officials from appearing before the Court, it suffices to say that such national provisions cannot be invoked against rules of international law." I.C.J. Reports, 1953, at p. 125.

2 Nottebohm case (second phase) I.C.J. Reports, 1955, p. 4.

without any genuine intention to establish a durable link, excluding German nationality, between the Principality and himself; and lastly,

on the ground of the non-exhaustion by Nottebohm of the local remedies available to him under the Guatemalan legislation, even if Guatemala had acted contrary to the principles of international law.[1]

As to the merits, the Guatemalan government asked the Court to declare that it was not obliged to regard the naturalization by Liechtenstein as binding upon it or as a bar to his treatment as an enemy national in the circumstances of the case.

Since no proof had been adduced that Guatemala had recognized the title to the exercise of protection relied upon by Liechtenstein as being derived from the naturalization which the latter granted to Nottebohm, the Court said that it must consider whether such an act of granting nationality entails an obligation on the part of Guatemala to recognize its effect, namely Liechtenstein's right to exercise its protection. In other words, the Court wanted to determine whether that unilateral act by Liechtenstein was one which could be relied upon against Guatemala in regard to the exercise of protection.[2]

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1 Ibid., pp. 10-12.

2 Ibid., at p. 20.

Although the Court recognized, that according to international law every sovereign state is competent to settle by its own national laws the rules relating to the acquisition of its nationality, on the other hand it said, that:

> ... the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein that that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.[1]

The Court applied the "link theory"[2] and found that there was no genuine link between Liechtenstein and Nottebohm. By eleven votes to three, the Court held that Guatemala was under no legal obligation to recognize such a nationality, and that the claim of Liechtenstein was

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1 Ibid., at pp. 20-21.

2 Ibid., at p. 23: "... nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-a-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national."

inadmissible.[1]

It is submitted, that the Court, narrowing its range of judgment, "on the basis of such reasons as it may itself consider relevant and proper,"[2] again avoided the basic issue involved, and did not pronounce upon the question, whether the naturalization granted to Nottebohm was valid or invalid either under international law or under the national law of Liechtenstein. Leaving this question open the Court decided that Liechtenstein, under international law, was not entitled to extend its protection to Nottebohm as against Guatemala, and that Guatemala was under no obligation to recognize the nationality conferred upon Nottebohm by Liechtenstein.

This segregation of diplomatic protection from the question of nationality, and the limitations imposed upon the right of diplomatic protection was "not even contended for by Guatemala nor discussed by Liechtenstein."[3] Klaestad severely criticised this line of reasoning of the Court; on the ground that it did not conform with the argument and evidence submitted by the parties; and added, that some facts "show how necessary it would have been, in the interest of a proper administration of justice, to afford to the Parties an opportunity to argue this point before it

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1 Ibid., at p. 26.

2 Ibid., at p. 16; see also p. 17.

3 J. Mervyn Jones, "The Nottebohm Case," 5 Int'l & Comp. L.Q. (1956), 230, at p. 238; cf., Judge Klaestad, Diss. Opin. I.C.J. Reports, 1955, p. 28, at p. 30.

is decided."[1]

The writer has no intention to criticise the "novel", "revolutionary", or "unpredictable" judgment of the Court[2], but would like to mention that the Court should not create "gaps" in its jurisprudence, which pose various problems on the international plane. For instance, in the present case, the Court said that: Liechtenstein is entitled to confer nationality on Nottebohm according to its own national law, since international law leaves this matter entirely on the will of the sovereign state; but on the other hand, Guatemala is under no obligation to recognize that nationality of Nottebohm as conferred by Liechtenstein. In this case, the Court did not declare that the naturalization granted to Nottebohm on October 13, 1939, was invalid under the national law of Liechtenstein. Should one assume, that the nationality conferred on Nottebohm was valid (since the Court did not say that it was invalid); could

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1 Loc. cit. pp. 30-31; see also Diss. Opin. of Judge Read, id., 34, at p. 38, where he said: "Accordingly, the matter is governed by the principle which was applied by this Court in the Ambatielos case (Jurisdiction), Judgment of July 1st, 1952, I.C.J. Reports, 1952, at page 45: 'The point raised here has not yet been fully argued by the Parties, and cannot, therefore, be decided at this stage."

2 See Josef L. Kunz, "The Nottebohm Judgment (second phase)." 54 AJIL (1960) p. 536, at p. 563, and the authorities cited thereto. See also his remarks at p. 562, id., where he wrote, that: "It must be stated de lege lata that the Nottebohm Judgment is not based on international law actually in force. ..."

international law debar Liechtenstein from affording diplomatic protection to its own national?

Posing the similar question, Judge Klaestad replied in this way, that:

> .... In such circumstances, it is difficult to see on what legal basis the Government of Liechtenstein could be considered as being debarred from affording diplomatic protection to him in respect of measures taken by the Government of Guatemala against his property at a time when he was a permanent resident in Liechtenstein. His link or connection with that country was at that time of such a character that the reasons relied on in the Judgment should constitute a solid ground for the recognition of the right of the Government of Liechtenstein to extend its protection to him as against Guatemala in respect of all measures taken against his property during his permanent residence in Liechtenstein.[1]

These misunderstandings are liable to occur if the Court confines itself to the limited range of its decision "as it thinks proper".

There is another aspect of the problem which the Court overlooked due to its narrow range. In its letter of September 9, 1952, the Guatemalan government wrote to the Court:

> "I. That the Government of the Republic of Guatemala has taken note of the claim presented by the Government of the Principality of Liechtenstein on supposed official acts to the alleged detriment of Mr. Federico Nottebohm.

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1 I.C.J. Reports, 1955, p. 31; see also Diss. Opin. of Judge Read, op. cit., pp. 45-46.

> II. That this Ministry (of External Affairs) is quite willing to begin negotiations with the Government of the said principality, with a view to arriving at an amicable solution, either in the sense of a direct settlement, an arbitration, or judicial settlement, with the preference for the last mentioned by means of the High Tribunal presided over by Your Excellency.[1]
>
> (italics added)

This communication could have helped in determining the intention of the Guatemalan government that it was willing to arrive at a settlement with Liechtenstein in regard to Nottebohm's claim. Had it been otherwise, the Guatemalan government could never have agreed to entertain the claim of an "enemy alien" on whose behalf Liechtenstein had brought an action against the former.

It is submitted, that it is due to the narrow range of the decision of the Court that some of the issues of vital significance have been left unclarified, and have been responsible for creating a confusion among the international jurists, who are of the opinion that this Judgment amounted to a denial of justice.[2]

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1 I.C.J. Reports, 1953, pp. 114 and 115.

2 See the Diss. Opin. of Judge Read, I.C.J. Report, 1955, pp. 35-36; Kunz op. cit. supra, pp. 536-571; J. Mervyn Jones, op. cit. supra, pp. 230-244.

Conclusions:-

In spite of the fact that the Court did not deal quite exhaustively with all the issues involved in this case; yet these Judgments[1] are entitled to the highest respect because of the contribution that they have made in the clarification of the customary rules of international law, concerning domestic jurisdiction of the sovereign states.

The Judgments tend to establish:

(1) that once the Court has been regularly seized; no state is entitled to plead that its domestic laws forbid it from appearing before the Court;

(2) that the judgment of the Court in these circumstances (i.e., if the Court has been regularly seized), will be considered as binding on a party, even if it chooses to abstain from attending the proceedings of the Court; and finally,

(3) that the questions relating to the domestic jurisdiction of a sovereign state do not automatically become binding on the third states; it is international law which determines their extent to have a valid recognition on the international plane.[2]

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1 I.C.J. Reports, 1953, pp. 111-125, and I.C.J. Reports, 1955, pp. 4-27.

2 "International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions ...." I.C.J. Reports, 1955, p. 21.

III Case of Certain Norwegian Loans[1]:-

"Domestic Jurisdiction" - as Understood by a State: Reciprocity.

Certain Norwegian loans had been floated in France (and in some other countries) between the years 1885 and 1909. The Bonds of these loans contained a gold clause under which the amount of the obligation was to be paid in gold or in any currency convertible in gold.

Due to the instability in its currency, the Norwegian government, from time to time, issued certain decrees suspending the convertibility of its currency into gold. This method of stabilizing the currency was finally affirmed by the promulgation of a Royal Decree of 1931 and was still in force during the late 50's.

Espousing the cause of its bondholders, the French government requested the Court to adjudge and declare that the international loans issued by the Norwegian government, by the Mortgage Bank of the Kingdom of Norway and by the Small Holding and Workers' Housing Bank, stipulated in gold the amount of the borrower's obligation for the service of coupons and the redemption of bonds; and that the borrower could only discharge the substance of his debts by the payment of the Gold value of the coupons on the date of payment and of the gold value of the redeemed

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1 I.C.J. Reports, 1957, p. 9.

bonds on the date of repayment.[1]

To the above claim, the Norwegian government filed four Preliminary Objections. In the first Objection the Norwegian government maintained that subject matter of the dispute was within the exclusive domain of the national law of Norway, and that it did not fall within any of the categories of disputes enumerated in Article 36 (2), of the Statute, by reference to which both parties had by their Declarations[2] accepted the compulsory jurisdiction of the Court.[3]

In the second part of the above Objection, the Norwegian government relied upon the French reservations with regard to differences relating to matters which were "essentially within the national jurisdiction as understood by the Government of the French Republic."[4] Therefore, on the basis of reciprocity, the Norwegian government contended that the Court had no jurisdiction to deal with the case.[5]

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1 Ibid., pp. 13-15 and 20.

2 The French Declaration had made certain reservations in regard to matters concerning domestic jurisdiction. The relevant part of the French Declaration read: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic." (italics added) I.C.J. Reports, 1957, p. 21; I.C.J. Yearbook, 1957-58, p. 199; see the new Declaration of the French government, I.C.J. Yearbook, 1963-64, p. 225.

3 I.C.J. Reports, 1957, pp. 14, 16-17 and 21.

4 Loc. cit.

5 I.C.J. Reports, 1957, pp. 14, 16-17, 21 and 23.

The second Objection was based on the fact that the French Declaration limited its acceptance of the compulsory jurisdiction of the Court to "all disputes which may arise in respect of facts or situations subsequent to the ratification" of the said Declaration.[1] The Norwegian government contended that the dispute arose in respect of facts or situations prior to March 1, 1949, and that, by virtue of the condition of reciprocity, the Court was excluded to undertake such complaints which originated prior to that date.[2]

The third Objection was designed to obtain a finding that the French Application was inadmissible as regards that part of the claim which related to the bonds of the two Norwegian Banks on the ground that they possessed a legal personality distinct from that of the Norwegian State.[3]

Lastly, the fourth Objection sought a finding of the Court that the French complaint was inadmissible on the ground that the French bond holders had not previously exhausted the local remedies.[4]

However, in the Counter-Memorial, the Norwegian government withdrew its second Objection and both the parties

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1 Ibid., at p. 22.

2 Ibid., pp. 14, 16-17 and 22.

3 Ibid.

4 Ibid.

discussed the remaining Objections in their Memorials, the Counter-Memorials, the Replies, the Rejoinders and in the oral proceedings.[1]

The Court picked up the second part of the first Objection, and basing itself on the jurisprudence of the Permanent Court of International Justice[2], and on that of its own jurisprudence[3], the Court said that:

> .... A comparison between the two Declarations shows that the French Declaration accepts the Court's jurisdiction within narrower limits than the Norwegian Declaration; consequently, the common will of the Parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation.[4]

And since France had limited her acceptance of the compulsory jurisdiction of the Court by excluding before hand disputes "relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic", the Court said that:

> .... In accordance with the condition of reciprocity to which acceptance of the compulsory jurisdiction is made subject in both Declarations and which is provided for in Article 36, paragraph 3, of the Statute, Norway, equally with France, is

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1 Ibid., at p. 22.

2 Phosphates in Morocco case, P.C.I.J. 1938, Series A/B, No. 74, p. 22; Electricity Company of Sofia and Bulgaria case, P.C.I.J. 1939, Series A/B, No. 77, p. 81.

3 Anglo-Iranian Oil Co. case, I.C.J. Reports, 1952, p. 103: "As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself."

4 I.C.J. Reports, 1957, p. 23.

> entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction.[1]

It is submitted that the Court left the question of domestic jurisdiction open; and without going into the details of this fundamental principle of customary international law, declared that:

> .... the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it.[2]

In this case, the French government had contended that the dispute was an international dispute, concerning an international transaction, and therefore, could not be covered under the "domestic jurisdiction". Relying upon the Hague Convention of 1907 relating to Contract Debts, to which both states were the signatories, the French government maintained that:

> Between France and Norway, there exists a treaty which makes the payment of any contractual debt a question of international law. In this connection the two States cannot therefore speak of domestic jurisdiction.[3]
>
> (italics added)

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1 Ibid., at p. 24.

2 Ibid., at p. 27.

3 Ibid., at p. 24.

However, the Court did not attach any importance to this Convention since it thought the aim of that Convention was not to introduce compulsory arbitration: its aim was only to outlaw the use of force before a party had tried arbitration. For these reasons, the Court could "find no reason why the fact that the two Parties are signatories of the Second Hague Convention of 1907 should deprive Norway of the right to invoke the reservation in the French Declaration."[1]

Confining itself within those limits which in its "judgment" were "more direct and conclusive"[2], the Court ignored all those points which the parties had discussed in their pleadings. It did not discuss the Norwegian contention that the subject-matter of the dispute was not related to international law. It did not think it necessary to pronounce upon: what matters are within the domestic jurisdiction of a state, or whether the local remedies had not been previously exhausted.

It is submitted that it becomes difficult to form any definite opinion about the jurisprudence of the Court, when the Court selects to make "brief observations"[3], or considers itself free "to base its decision on the ground

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1 Ibid.

2 Ibid., p. 25.

3 Ibid., p. 24.

which in its judgment is more direct and conclusive."[1] Under these circumstances, the questions relating to domestic jurisdiction are liable to remain unsettled; they are liable to create confusion among the international jurists because of their undetermined nature, especially, when the Highest Tribunal hesitates to adjudicate upon them.

Mention may also be made about the reluctance of the Court to pronounce upon the matters which are essentially within the domestic jurisdiction of a state as understood by the latter.[2] The Court could have solved this controversial problem, and could have determined the "legality" or "illegality" of these "automatic reservations"[3] which are in direct contradiction to the provisions of the Statute of the Court.[4]

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1 Loc. cit.

2 I.C.J. Reports, 1957, pp. 26-27: "The Court does not consider that it should examine whether the French reservation is consistent with the undertaking of a legal obligation and is compatible with Article 36, paragraph 6, of the Statute ...."

3 See the Sep. Opin. of Sir Hersch Lauterpacht, ibid., pp. 34, 39-66, and at p. 66: "... the French Declaration of Acceptance is invalid for the reason:

(1) That it is contrary to the Statute of the Court;
(2) That it is incapable of giving rise to a legal obligation inasmuch as it claims, and effectively secures, the right of unilateral determination of the extent and of the existence of the obligation of judicial settlement with regard to a comprehensive and indefinite category of disputes covering potentially most disputes which may come

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Footnote No. 3 Cont'd

before the Court;

(3) That the particular qualification of the reservation in question forms an essential part of the Acceptance and that it is not possible to treat it as invalid and at the same time to maintain the validity of the reservation to which it is attached or of the Acceptance as a whole.

Accordingly, ... the entire French Declaration of Acceptance must be treated as devoid of legal effect and as incapable of providing a basis for the jurisdiction of the Court. ..." ; see also the Diss. Opin. of Judge Guerrero, ibid., pp. 68-69; and infra "conclusions".

4 Art. 36, paragraph 6, empowers the Court to decide whether it has jurisdiction or not; the "automatic reservations" empower a state to decide whether a matter can be decided by the Court or not, since it reserves for itself the power to decide "matters which are essentially within the domestication ... as understood by it." Cf., Judge Klaestad (Diss. Opin. Interhandel case) I.C.J. Reports, 1959, p. 76; Sir Percy Spender, id., p. 56; Lauterpacht, I.C.J. Reports, 1957, p. 43; see also Kelson, The Law of the United Nations (1951), pp. 526-30.

IV Interhandel case[1]:-

Automatic Reservations.

in 1942, the United States vested almost all of the shares of the General Aniline and Film Corporation, a company incorporated in the United States, on the ground that those shares, which were owned by the Interhandel, a Swiss company incorporated in Switzerland, belonged in reality to an "enemy alien", I.G. Farbenindustrie of Frankfurt (Germeny).

On October 1, 1957, the Swiss government requested the Court for a declaration that the United States was under an obligation to restore to Interhandel all the assets of that company which had been vested or, alternatively, that the dispute on the matter was to be settled by judicial settlement, arbitration or conciliation, under the Washington Accord of 1946.[2] It also asked the Court to indicate, as an interim measure of protection, that the United States should not part with those assets so long as the proceedings in that dispute were pending and, in particular, should not sell the shares of the General Aniline, which were claimed by the Swiss government as the property of its nationals.[3]

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1 I.C.J. Reports, 1957, p. 105; I.C.J. Reports, 1959, p. 6.

2 I.C.J. Pleadings (Interhandel case) Annex I, pp. 17-18; I.C.J. Reports, 1959, pp. 17-18.

3 I.C.J. Reports, 1957, p. 106.

On October 11, 1957, the United States filed a preliminary objection under Article 62 of the Rules of the Court and stated in part, that: "The United States Government has determined that such sale or disposition of the shares in the American corporation, title to which is held by the United States Government in the exercise of its sovereign authority, is a matter essentially within its domestic jurisdiction. Accordingly, pursuant to paragraph (b) of the conditions attached to this country's acceptance of the Court's compulsory jurisdiction, dated August 14, 1946, this country respectfully declines, without prejudice to other and further preliminary objections which it may file, to submit the matter of the sale or disposition of such shares to the jurisdiction of the Court."[1]

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1 Ibid., at p. 107; the American Declaration of Acceptance has made the following reservations since 1946:

"(a) Disputes the solution of which the Parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

(b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America; or

(c) Disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction ...."

I.C.J. Reports, 1959, pp. 14-15; I.C.J. Yearbook, 1963-64, pp. 240-241. (italics above are mine)

The Swiss government challenged the U.S. Reservation, on a number of grounds, and stated that, in its examination of a request for the indication of interim measures of protection, the Court would not wish to adjudicate "upon so complex and delicate a question as the validity of the American reservation."[1]

In spite of this challenge, the Court did not touch the subject-matter of the American reservation, and, in the light of the information that the U.S. had furnished, it made an Order in which it noted that, the sale of the shares in question could only be effected after the termination of judicial proceedings pending in the United States, in respect of which there was no indication of a speedy conclusion; that it was the stated intention of the United States government not to take action at that time to fix a time schedule for the sale of the shares and that accordingly there was no need to indicate interim measures of protection.[2]

In its "new claim involving the merits of the dispute"[3], the Swiss government requested the Court to declare that the property, rights and interets which Interhandel possessed in General Aniline had the character of non-enemy (Swiss) property, and consequently by refusing to return

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1 I.C.J. Reports, 1957, p. 111.

2 Ibid., pp. 111-112.

3 I.C.J. Reports, 1959, p. 20.

the said property, the United States was in breach of Article IV, paragraph 1, of the Washington Accord of May 25, 1946, and of the obligations binding upon it under the general rules of international law.[1]

To the above complaint, the United States filed four preliminary objections, and requested the Court to adjudge and declare:

(1) that there is no jurisdiction in the Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that the dispute arose before August 26th, 1946, the date on which the acceptance of the Court's compulsory jurisdiction by this country became effective;

(2) that there is no jurisdiction ... for the reason that the dispute arose before July 28th, 1948, the date on which the acceptance of the compulsory jurisdiction by this country became binding on this country as regards Switzerland;

(3) that there is no jurisdiction ... for the reason that Interhandel, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts;

(4) (a) that there is no jurisdiction ... to hear or determine any issues ... concerning the sale or disposition of the vested shares of General Aniline and Film Corporation ..., for the reason that such sale or disposition has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country; and

(4) (b) that there is no jurisdiction to hear or decide the issues ... concerning the seizure or retention of the vested shares of General Aniline ... , for the reason that such

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1 Ibid.

> seizure and retention are, according to international law, matters within the domestic jurisdiction of the United States.[1]

The Court rejected the First, Second and Fourth (b) Preliminary Objections; found that it was not necessary to adjudicate on part (a) of the Fourth Preliminary Objection; and, basing its decision on the "well-established rule of customary international law", that "local remedies must be exhausted before international proceedings may be instituted", held that the Swiss Application was inadmissible, since the local remedies available to Interhandel had not been previously exhausted.[2]

This was the first time that the Court had an occasion to adjudicate upon the question of automatic reservations, since the Swiss government had expressly challenged the legality of the American reservation.

In the Norwegian Loans case, the Court had a "valid excuse" to refuse to adjudicate upon the question of automatic reservations, since the validity of reservation was not in dispute, and since, both parties to the dispute had considered the reservation "as expressing their common

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1 I.C.J. Reports, 1959, pp. 10-11; (italics added).

2 Ibid., pp. 29-30. The Court considered the Third Preliminary Objection as a bar, not to its own jurisdiction, but to the admissibility of the Swiss Application: "Although framed as an objection to the jurisdiction of the Court, this Objection must be regarded as directed against the admissibility of the Application of the Swiss Government. ..." Ibid., p. 26.

will relating to the Court's competence." But in the present case, the American government had maintained throughout the proceedings that its reservation (b)[1] was valid as against Switzerland, and that the Court was without jurisdiction for the reason that the sale or disposition by the Government of the United States of the shares of the GAF which had been vested as enemy property "has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction, to be a matter essentially within the domestic jurisdiction of this country."[2]

The Co-Agent of Switzerland challenged the legality of this reservation, and maintained (inter alia) that:

> As we have already said in our observations, so-called automatic reservations are incompatible not only with the very principle of compulsory arbitration (Article 36 (2) ... of the Statute), but also with Article 36 (6) ... which gives the Court the power to determine its own jurisdiction.[3]

And in his Observations, the Co-Agent had already pointed out that:

> ... the Court would not wish to adjudicate 'upon so complex and delicate a question as the validity of the American Reservation.[4]

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1 American Declaration of Acceptance, Loc. cit. supra.

2 I.C.J. Reports, 1959, p. 25.

3 Translation by Sir Percy Spender, Sep. Opin. ibid., p. 54, at p. 55.

4 Loc. cit. supra.

In spite of this "open invitation" to decide upon the legality, or illegality of the automatic reservations, the Court stepped aside, and, by ten votes to five, came to the conclusion that it was not necessary to adjudicate on part (a) of the Fourth Objection.[1] The reason that it gave for this conclusion was, that:

> Although the Agent for the United States maintained the Objection throughout the oral arguments, it appears to the Court that, thus presented, part (a) of the Fourth Objection only applies to the claim of the Swiss Government regarding the restitution of the assets of Interhandel which have been vested in the United States. Having regard to the decision of the Court set out below in respect of the Third Preliminary Objection of the United States, it appears to the Court that part (a) of the Fourth Preliminary Objection is without object at the present stage of the proceedings.[2]

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1 I.C.J. Reports, 1959, p. 29. It is noted that the Court relied upon the statement of Mr. Becker, who had said that that particular Objection was limited to the sale and disposition of the shares of Interhandel; that the U.S. Supreme Court had reversed the dismissal of Interhandel's domestic suit; that the local remedies were once more available to Interhandel; that pending the final decision of the local courts, the disputed shares could not be sold; and that, therefore the Objection had lost its practical significance and had become "somewhat academic" and "somewhat moot". I.C.J. Pleadings, op. cit. supra, p. 507; see also I.C.J. Reports, 1959, p. 26.

2 Ibid. It is noted that even Mr. Becker did not reply to the Swiss contention because of the reason stated above (Note 1, supra). He said: " ... The first part of our Fourth Preliminary Objection thus somewhat moot, we do not consider it necessary to elaborate upon it at this time or to reply to Chapter V of the Swiss Observations which is specifically directed to that Preliminary Objection." I.C.J. Pleadings, Loc. cit. id., at p. 507.

It is noted that the Court did not follow its previous practice "to base its decision on the ground which is more direct and conclusive"[1]; it answered all the questions except one under discussion. This policy of the Court "to decide upon all other objections raised by the United States to the Court's jurisdiction and not to deal with this Objection", which strikes "at the very roots of the Court's jurisdiction", has been strongly criticised by Sir Percy Spender.[2] He said that:

> There is more than a little practical wisdom to recommend this as a course to follow. The Objection presents issues of far reaching significance. They concern not only the interests of the two States engaged in the present proceedings but those of other States as well. ...[3]

He continued that

> If the reservation of the United States is invalid because of incompatibility with Article 36 of the Statute of the Court, it would be impossible for the Court to act upon it. More than this, if it is invalid this may involve, as in my opinion it does, the total invalidity of the United States Declaration of Acceptance rendering it null and void.

It is submitted, that it is the silence of the Court on this important question, that has created doubts with regard to the validity of these automatic reservations.

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1 I.C.J. Report, 1957, p. 25.

2 I.C.J. Reports, 1959, p. 54.

3 Ibid.

4 Ibid., at p. 55.

Moreover, the jurisprudence of the Court bears testimony to the fact, that the Court has always given first consideration to all those questions which relate to its own jurisdiction, before it undertook to decide other issues involved.[1] In this connection, Judge Armand-Ugon remarked, that "the Court ought ... to have decided on Objection 4 (a)" before it could admit the Third Objection, in order to give a full and final effect, in dismissing the Swiss Application.[2] He continued, that:

> There is another reason why the Court ought to have done this. Examination of its jurisdiction was necessary in order that it might duly consider the Third Objection, which belongs to the class of objections to admissibility. But that objection could only be considered by the Court after it had established that it had jurisdiction.[3]

The Court could have removed all these controversies by adjudicating on this controversial point, since it had an occasion to do so, and since the American Agent had

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1 Besides various decisions of the Court on Preliminary Objections, Paragraph 5, of Article 62, of the Rules of the Court provides that: "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. ..."

2 Diss. Opin. I.C.J. Reports, 1959, p. 91.

3 Ibid.; see also Diss. Opin. of Sir Hersch Lauterpacht, I.C.J. Reports, 1959, pp. 97-98: "... in so far as there arises in the present case the question of the validity of the automatic reservation and of the Declaration as a whole - and it is these questions which inevitably call for an answer before the Court can in any way assume jurisdiction in the matter, even to the extent of deciding on the other preliminary objections - it seems immaterial whether the automatic reservation covers all or merely one aspect of the case."

reaffirmed his Government's faith in automatic reservations by declaring that: "We shall merely reaffirm our objection 4 (a) as stated in our Preliminary Objections and in our statement at the November 6th sitting, and ask the Court to judge and decide as there requested."[1]

Not only this, he had also indicated the desire of his Government for the examination of these reservations, and had maintained that:

> Our use of the automatic reservation limited to the sale or disposition of the GAF vested shares is not arbitrary; the Court has never examined and we assume will not examine into the motives which lead nations to exercise the automatic reservation. Suffice it to say, any examination would nevertheless reveal the reasonableness of the United States position despite the extravagant charges of arbitrariness which have been made here.[2]

Under these "challenges", the Court's reluctance to adjudicate upon the question of automatic reservations cannot be justified. The United States had invoked these reservations; it had maintained its stand throughout the proceedings; the Swiss government had challenged the legality of these reservations; the United States had asked the Court "to judge and decide as there requested"; therefore, under these circumstances, that question (of automatic reservations) was "of immediate legal relevance"[3],

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1 Reply of Mr. Becker (Nov. 14, 1958), I.C.J. Pleadings, op. cit. supra, p. 610.

2 Ibid.

3 Lauterpacht, Diss. Opin. I.C.J. Reports, 1959, p. 99.

and the Court ought to have adjudicated upon that question.

However, if the Court was right in entertaining the Third Objection, i.e., local remedies must be exhausted before a dispute could be brought before the Court; the Court might have found that it had jurisdiction to deal with the case. And if it was competent to do so, then why did it avoid answering that question, that had challenged its jurisdiction?

Assuming that the Swiss government had exhausted all the local remedies: would not the Court be bound, under those circumstances, to adjudicate upon that matter and decide in favour of Switzerland, since, it had already dismissed all other Preliminary Objections of the United States?

Assuming that the United States had maintained its previous stand to justify the confiscation of the property belonging to Interhandel under its "domestic jurisdiction"; could the Court say, that "part (a) of the Fourth Preliminary Objection is without object at the present stage of the proceedings"?

Assuming that the Court had upheld the Swiss claim (as it would be bound to do for the above reasons); would that not amount to the rejection of part (a) of the Fourth Preliminary Objection?

Under these circumstances, the American reservations would become null and void, devoid of having any legal effect on the international plane, since it is the Court,

and not the United States, that would decide whether or not part (a) of the Fourth Objection is within the domestic jurisdiction of the United States of America.

It is submitted that it was this conflict that the Court wanted to avoid since, on the one hand, the United States of America accepted the compulsory jurisdiction of the Court with an express condition: " ... Provided, that this declaration shall not apply to ... Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America"; whereas, on the other hand, Article 36 (6) of the Statute provides that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

V The Right of Passage Case[1]:-

Matters which are not Exclusively Within the Domestic Jurisdiction of a State as Determined by International Law.

The Portugese government instituted proceedings against the Indian government alleging that the latter had denied to it the right of passage over Indian territory between the territories of Dadra and Nagar-Aveli. In its Application, it contended that the Court had jurisdiction

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1 I.C.J. Reports, 1957, pp. 133-134; I.C.J. Reports, 1960, pp. 33-34.

in the dispute for the reason that both Portugal and India had accepted the compulsory jurisdiction of the Court under the Optional Clause.

In its Fifth Preliminary Objection the Indian government contested that the Court had no jurisdiction to entertain the Portugese Application. It relied upon its Declaration of Acceptance of February 28, 1940 under which it had excluded from the jurisdiction of the Court disputes with regard to questions which by international law were essentially within the domestic jurisdiction of India.

The relevant Submissions of the Indian government filed on September 27, 1957, were based largely on the following assertions: in paragraph (a) of its Submission of the Fifth Objection it was asserted that "the Portugese claim to a right of transit ... cannot be regarded as a reasonably arguable cause of action under international law unless it is based on the express grant or specific consent of the territorial sovereign", and that "the facts presented to the Court in the Pleadings of the Parties show no such express grant or specific consent of the territorial sovereign as could place a limitation on the exercise of India's jurisdiction ...." In paragraph (b) it was asserted that none of the grounds put forward by the Portugese government, namely, treaty custom and general principles of law, could be regarded on the facts and the law which had been presented to the Court as reasonably arguable under international law. The Indian government

urged that the Fifth Preliminary Objection must be sustained for the reason that "regardless of the correctness or otherwise of the conclusions set out in paragraphs 4 (a) and 4 (b), the uncontradicted facts presented in the Pleadings of the Parties establish that the question of transit between Daman and the enclaves has always been dealt with both by Portugal and the territorial sovereign on the basis that it is a question within the exclusive competence of the territorial sovereign."[1]

The Court joined this objection to the merits for the reason that the elucidation of those facts and their legal consequences, involved an examination of the actual practice of the British, Indian, and Portugese authorities in the matter of the right of passage - in particular as to the extent to which that practice could be interpreted, and was interpreted by the Parties, "as signifying that the right of passage is a question which according to international law is exclusively within the domestic jurisdiction of the territorial sovereign."[2]

In support of its contention, the Indian government submitted that: "if its examination of the merits should lead the Court to a finding that Portugal has not established the existence of the titles which she has invoked,

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1 I.C.J. Reports, 1957, pp. 130-131 and pp. 149-150.

2 Ibid., at p. 150.

and that these titles must accordingly be regarded as non-existent, it must follow that the question of the grant or refusal of the passage claimed over Indian territory falls exclusively within the domestic jurisdiction of India and that the dispute is outside the jurisdiction of the Court."[1]

The Court did not accept this line of reasoning, and rejected the Indian contention, that the subject-matter of the dispute was within the exclusive domain of the Indian government. In order to determine the nature of that dispute, i.e., whether that dispute was an international dispute, or, a dispute within the exclusive domain of the Indian government, the Court observed that:

> In the present case Portugal is claiming a right of passage over Indian territory. It asserts the existence of a correlative obligation upon India. It asks for a finding that India has failed to fulfil that obligation. In support of the first two claims it invokes a Treaty of 1779, of which India contests both the existence and the interpretation. Portugal relies upon a practice of which India contests not only the substance, but also the binding character as between the two States which Portugal seeks to attach to it. Portugal further invokes international custom and the principles of international law as it interprets them. To contend that such a right of passage is one which can be relied upon as against India, to claim that such an obligation is binding upon India, to invoke, whether rightly or wrongly, such principles is to place oneself on the plane of international law. ... To decide upon the validity of those principles, upon the existence of such a right of Portugal

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1 I.C.J. Reports, 1960, p. 21

> as against India, upon such obligation of India towards Portugal, and upon the alleged failure to fulfil that obligation, does not fall exclusively within the Jurisdiction of India.[1]

For these reasons, the Court, by thirteen votes to two rejected the Fifth Preliminary Objection.[2]

In this case the Court did not find any difficulty in rejecting the Indian contention, since the Indian "reservation" of 1940, had excluded those matters from the jurisdiction of the Court "which by international law fall exclusively within the jurisdiction of India."

It is noted that although the Indian government had contested the case, both on the grounds of Preliminary Objections concerning the jurisdiction of the Court and on Merits, it had started taking measures for delimiting the jurisdiction of the Court from the day the Portugese government had filed the Application against it. It replaced its Declaration of 1940, and precisely covered all those matters which the Portugese government could bring against it.[3] However, the Indian government could not use that "new shield", since the Portugese government had seized the Court at the time when the Indian Declaration of 1940 was still in force. This tendency to make "automatic reservations" is undesirable, and it is for the states to realize their responsibility in order to make international adjudication more effective.[4]

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1 I.C.J. Reports, 1960, p. 33.

2 Ibid., at p. 45.

3 The Indian government, by a letter dated January 7, 1956, addressed to the Secretary-General of the United Nations and received on January 9, 1956, gave a notice of the termination of the Declaration of February 28, 1940. The new Declaration reads: " ... in pursuance of paragraph 2 of Article 36 of the Statute of the International Court of Justice, the Government of India recognize as compulsory ipso facto and without special agreement, on condition of reciprocity and only till such time as notice may be given to terminate this Declaration, the jurisdiction of the ... Court ... in all legal disputes arising after the 26th January, 1950 with regard to situations or facts subsequent to that date ....
but excluding the following:-
... (iii) disputes in regard to matters which are essentially within the domestic jurisdiction of India as determined by the Government of India; and (iv) disputes arising out of or having reference to any hostilities, war, state of war or belligerent or military occupation in which the Government of India are or have been involved ...." (italics added)
I.C.J. Yearbook, 1955-56, pp. 186-187.

4 The Indian Government on September 14, 1959, made another Declaration replacing the above Declaration, and omitted the words "as understood by the Government of India." See I.C.J. Yearbook, 1959-60, pp. 241-242.

CONCLUSIONS

No conclusions can be drawn from the jurisprudence of the Court concerning matters "which are essentially within the domestic jurisdiction of a state", because of the reason that the Court avoided to deal with this complicated question, which involves interpretation of the Charter of the United Nations; the Statute of the Court; and domestic laws of the disputant states. For instance, in the Anglo-Iranian Oil Co. case, the Iranian government invoked the "domestic jurisdiction" clause, and in order to support its contention argued that the Court's competence to deal with the case depends more on the Charter of the United Nations rather than on its own Statute, since the Statute of the Court was incorporated in the Charter and made an integral part thereof. This can be modified only by revision of the Charter, and finally, being in terms of Article 92 of the Charter, the principal judicial organ of the United Nations, its norms of functioning cannot be contrary to, or even different from, the constitutional rules of the international society for which it is created. Therefore, it concluded, that the application of Article 36 (2) of the Statute is bound by Article 2 (7) of the Charter of the United Nations.[1]

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1 See I.C.J. Pleadings (Anglo-Iranian Oil Co. case), pp. 292-293; more specifically see arguments of Prof. Rolin, id., pp. 465-472, 501 et seq., 619 et seq.

The Iranian government wanted to put a constitutional limitation on the jurisdiction of the Court by establishing that the Court is the principal judicial organ of the United Nations; its Statute is annexed to the Charter; it derives its power from the Charter, and therefore, it cannot violate the provisions of Article 2, paragraph 7, of the Charter, which lays down that: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter ...."

In the light of the above arguments, the Iranian government submitted that, Article 2 (7), so far as the Court is concerned, has to be applied as if it read as follows:

> Nothing in the present Charter and annexed Statute shall authorize the International Court of Justice to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter and annexed Statute.[1]

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1 Translated and quoted by Waldock, "The Plea of Domestic Jurisdiction before International Legal Tribunals." 31 BYIL (1954) p. 122. Waldock criticised this interpretation which the Iranian government wanted to "impose" upon the International Court. He said that: "There is nothing in the words of Article 2 (7) to preclude the Court, or any other organ of the United Nations, from intervening in matters essentially within domestic jurisdiction if it has been authorized to do so by the States concerned in an instrument dehors the Charter. ..." id., p. 123.

Professor Rolin (representing Iran) based the above interpretation upon Kelsen's study, who is of the opinion that:

> .... Since Article 2, paragraph 7, does not confer upon a organ of the United Nations the power to determine what matters are essentially within the domestic jurisdiction of a state, only the state concerned is authorised to decide this question, and that, consequently, the Court has to decide the dispute concerning its jurisdiction in favour of the party which claims the dispute to arise out of a matter which is essentially within its domestic jurisdiction. ... This interpretation of Article 36 of the Statute in connection with Article 2, paragraph 7, of the Charter, implies that a party to a dispute before the Court, in spite of its declaration to recognize as 'compulsory' the jurisdiction of the Court in all legal matters, may withdraw any such dispute from the jurisdiction of the Court by declaring it as regarding a matter which is essentially within its domestic jurisdiction ....[1]

It was this controversy that the Court wanted to avoid, and therefore, it refrained from adjudicating upon that delicate question, which was liable to generate more heat rather than to produce any light after the decision.

There are writers who are of the opinion that it is "an utterly hopeless task to endeavor to state what is an 'essentially domestic matter' at any given time, or to lay down any slide-rule test for determining what is or

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1 Kelsen, The Law of the United Nations (1951), p. 29; contra Kopelmanas, L'Organisation des Nations Unis, p. 236 (footnote), cited and quoted by Sir Eric Beckett, I.C.J. Pleadings, op. cit. p. 571.

is not an 'essentially domestic matter'."[1] This tendency was also reflected at the United Nations Conference on International Organization, where Mr. Dulles strongly criticised the opinion of those, who asserted, that "domestic jurisdiction should be determined in accordance with international law."[2] He pointed out, that "international law was subject to constant change and therefore escaped definition."[3] He refused to accede to the Greek proposal (supported by the Peruvian Representative) that the questions relating to domestic jurisdiction "should be left to the International Court of Justice at the request of a party to decide whether or not such a situation or dispute arises out of matters that under international law, fall

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1 Ernest A. Gross, "Impact of the United Nations upon Domestic Jurisdiction" U.S. Dept. of State, Bulletin, 18 (No. 452), Feb. 29, 1948, p. 267; see also A.M. Stuyt, The General Principles of Law as Applied by International Tribunals to Disputes on Arbitration and Exercise of State Jurisdiction, Nijhoff, the Hague, 1946, pp. 262-263, where he wrote, that: "it would be dangerous to convert national questions into international questions, or the reverse, although it cannot be denied, that, in a given case, it will not be easy to draw a dividing line between instances where a question, primarily a domestic one, shades off into an international question, just as it is, sometimes, a delicate matter to distinguish, in international relations, a political question from a judicial one."

2 Seventh Meeting of Committee I/1, UNCIO, Doc. 1049, I/1/42, p. 508.

3 Ibid.

within the domestic jurisdiction of the State concerned."[1]

It is submitted, that the prospects of international adjudication primarily depend upon the "consent" of the parties, and if that consent is not forthcoming voluntarily, there seems to be no sense in pronouncing whether a particular matter falls within the exclusive domain of a sovereign state, or, whether that matter could be considered as a proper subject of international law to be decided by the International Court of Justice. And, because of the fact that the system of international adjudication is still at the laissez-faire stage of development[2]; it would be too hasty to demand that a state must submit all those matters to the jurisdiction of the Court, that the former considers to be essentially within its domestic jurisdiction.

There is another problem which is being posed in international adjudication by the parties, when they declare openly that they would feel justified in defying the

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1 Ibid., p. 509. See however, the remarks of Prof. Briggs over Mr. Dulles' attitude in the Conference, for propagating the cult of negotiating a treaty, concerning matters of domestic jurisdiction and then going to the Court for adjudication. Prof. Briggs wrote that: "With cavalier disregard for the institutional developments of 75 years in the judicial settlement of international legal disputes, Mr. Dulles favored turning the clock back to the Alabama Arbitration of 1872 as a precedent, where the parties first negotiated a treaty establishing the law to be applied before going to the Court." "The United States and the International Court of Justice: A Re-Examination." 53 AJIL (1959) p. 312.

2 See Brierly, The Law of Nations (1963), p. 74.

Court, if its judgment were to go against their own notion of "domestic jurisdiction". For instance, in the U.S. Senate debate on "Connally Amendment", there arose a question concerning the enforceability of the judgment of the Court if it were to go against the United States. To This question, Senator Austin replied in this way, that:

> The only power this court has is moral power, and if the situation should arise ... that a state, a party, has been ruled against when it raised the question of jurisdiction, and that state has held up its head and said, "Notwithstanding the decision we know from our history, and our experience, and existing conditions that this is a question which is domestic, and that we will disregard the decision of the Court," that state has the final decision instead of the Court. The court cannot execute its judgment.[1]

To this statement, Senator Connally added, that "in case the Court should decide that a question which the United States considered to be domestic was nondomestic and international we would be justified ... in defying the Court."[2]

If this is the way of thinking, then, it is submitted, that the Court cannot be reproached for avoiding the question of "domestic jurisdiction". Moreover, it is for the states to avoid the use of this ambiguous terminology, which could prove detrimental to their own cause. For

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1 Cong. Rec., Vol. 92, No. 153, Aug. 2, 1946, pp. 10761 (quoted by Lawrence Preuss, "The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction." 40 AJIL (1946) p. 720, at pp. 728-29).

2 Cong. Rec., ibid., p. 10763 (quoted by Preuss, ibid., at p. 729).

instance, in the Norwegian Loans case, the French government failed to pursue the cause of its nationals, because of the reason that the Norwegian government had invoked the "French reservation" which had excluded, from the jurisdiction of the Court, "matters which are essentially within the national jurisdiction as understood by the Government of the French Republic". Similarly, the United States government had to withdraw its complaint, that it had filed against Bulgaria, when the latter invoked "made in America - the Connally Amendment."[1] It was for this very reason that Lauterpacht "labelled" these "automatic reservations" as

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1 See Leo Gross, "Bulgaria Invokes the Connally Amendment." 56 AJIL (1962) p. 361. It is noted that the American government withdrew its complaint against Bulgaria, because of its Connally Amendment (and various other reasons), and the Court, by its Order of May 30, 1960, removed the case from the list (I.C.J. Reports, 1960, pp. 146-148). However, for the American "version" of Connally Amendment, see the Statement of the United States, which read: "The United States Government, which was the author of the reservation now sought to be invoked by Bulgaria, is unable to agree with this view. The United States does not consider that reservation (b) [Connally Amendment] authorizes or empowers this Government, or any other government on a basis of reciprocity, to make an arbitrary determination that a particular matter is domestic, when it is evidently one of international concern and has been so treated by the parties." I.C.J. Pleadings (Aerial Incident case, U.S.A. v. Bulgaria) p. 323; contra, Preuss "The I.C.J., the Senate, and Matters of Domestic Jurisdiction." 40 AJIL (1946) p. 729; "The effect of the Connally Amendment is to give to the United States a veto upon the jurisdiction of the Court after a dispute has been referred to it by an applicant state. It constitutes an extension of unilateral determination into a field in which it has hitherto been unknown ...."

"legally ineffective", since, he was of the opinion that "While it ["automatic reservation"] unfailingly protects the declarant Government from the jurisdiction of the Court, it deprives it, with equal certainty, of the benefits of that jurisdiction in cases in which the declarant Government is the plaintiff."[1]

It is suggested, that in order to further the cause of international adjudication and, to establish a regime of law and order in the international community, it would be necessary for the states to renounce their present policy of reserving to themselves the right to decide what the law is.[2] If every state starts describing every matter that it could, plausibly, though not necessarily accurately, as a matter essentially within its domestic jurisdiction, and if that state is the judge of that question, then "the element of legal obligation would be reduced to a vanishing point,"[3] and the very purposes of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained," would be defeated."[4]

The Court has never misappropriated its powers; its

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1 Interhandel case, Diss. Opin. I.C.J. Reports, 1959, p. 119.

2 Cf., Francis O. Wilcox, "The United States Accepts Compulsory Jurisdiction." 40 AJIL (1946) pp. 699-719.

3 Lauterpacht, Norwegian Loans case, Sep. Opin. I.C.J. Reports, 1957, p. 52.

4 Preamble of the United Nations Charter.

function is "to ensure respect for international law, of which it is the organ"[1]; it has given learned Opinions, whenever it was called upon to decide questions relating to the domestic jurisdiction[2]; its judgments are without reproach whenever it decided whether a matter, according to international law is, or, is not within the domestic jurisdiction of a state[3]; and if the states, by taking all these facts into consideration, confine their faith in the jurisprudence of the Court, and allow it, to handle international matters, which, according to international law are not within the exclusive domain of the sovereign states, then, it is submitted, that the rule of law could possibly be maintained at the international level.[4]

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1 Corfu Channel case (Merits) I.C.J. Reports, 1949, p. 35.

2 See Interpretation of Peace Treaties (Advisory Opinion), I.C.J. Reports, 1950, p. 71: " ... The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature, lies within the competence of the Court." See also Nationality Decrees Issued in Tunis and Morocco. P.C.I.J. Series B. No. 4 (1925) p. 23: "From one point of view, it might well be said that the jurisdiction of a State is exclusive within the limits fixed by international law ...." (italics added); ibid., p. 25: " ... that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15." ibid., p. 26: " ... once it appears that the legal grounds (titres) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds (titres), the provisions contained in paragraph 8

Footnote No. 1 Cont'd

of Article 15 cease to apply within the domestic jurisdiction of the State, enters the domain governed by international law."

3 See the Nottebohm case; the Right of Passage case; the Fisheries case, and the Asylum case. In all these cases, the Court made a clear distinction between the questions relating to the exclusive domain of a state, and the questions of international law.

4 It is noted that most of the states have "modified" their Declarations of Acceptance, and have replaced the words "as determined by ...." with the words "disputes which by international law fall exclusively within the domestic jurisdiction." India, France, Pakistan and Great Britain have followed the above practice; whereas the United States, Portugal, Sudan, Liberia, and the Union of South Africa still adhere to the "Connally type Amendments". For recent changes in the Declarations, see I.C.J. Yearbook, 1963-64, pp. 218-241. See however, on the question of matters which are essentially within the domestic jurisdiction of a state, Prof. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the I.C.J." 93 Recueil De Cours, Academie De Droit International" Vol. I (1958) pp. 229-363. He was of the opinion that these automatic reservations are either useless or ineffectual as a bar to the Court's jurisdiction, and suggested, that the states should avoid inserting such reservations in their Declarations. Ibid., pp. 261-263.

EVALUATION

Chronological Survey

The chronological survey of the jurisprudence of the Court shows that the Court had not been entrusted with a duty that it was supposed to perform.[1] During the last twenty years of its existence (1946-66), it had been called upon sixty-one times to issue orders, deliver Judgments, or

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1 See Leo Gross, "Some Observations on the International Court of Justice." 56 AJIL (1962) p. 33: " ... With respect to the hope or expectation that law would be enthroned as a guide for the conduct of states or that the Court would play a significant role in the United Nations, there is hardly a difference of opinion; neither has the Court played such a role nor has international law significantly expanded its moderating and regulatory influence in the relations of states."

to give Advisory Opinions.[1] There were only thirty-six contentious cases that were submitted to the Court.[2] Fourteen cases were removed from the list of the Court without being discussed, either due to the lack of jurisdiction, or the parties made a settlement outside the Court. In seventeen cases the jurisdiction of the Court was challenged on the grounds of "domestic jurisdiction", or "because of the fact that exercise of the right of sovereignty is not subject to complaint", or the parties refused to appear before the Court.

Under Article 96 of the Charter, the General Assembly, Security Council, or the various specialized agencies of the U.N. are authorized to request for an advisory opinion of the Court, for legal questions. But the Court has only been requested twelve times for such advisory opinions.[3]

Three Judgments, or Orders of the Court have been defied[4]; such refusals to comply with the Judgments or Orders had been indicated by the Parties in their

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1 I.C.J. Yearbook, 1963-64, pp. 117-119.

2 Ibid., pp. 42-44.

3 The General Assembly requested ten times for such opinion; UNESCO, once and Assembly of the Intergovernmental Maritime Consultative Organizatione, once. See I.C.J. Yearbook, 1963-64, pp. 48-49.

4 Corfu Channel case; Anglo-Iranian Oil Co. case; and the Right of Passage case - in all these cases, the parties refused to comply with their international obligations.

pleadings, or through their ad hoc judges. In another case,[1] the party (defendant) adopted a novel attitude for making a protest against the Judgment of the Court; it broke off its trade-relations with a country, whose national happened to be the President of the Court. Yet in another case[2], the defendant party withdrew its Declaration of Acceptance of the Court's compulsory jurisdiction, when the Court had found jurisdiction against the wishes of that party, which was denying such jurisdiction to the Court on the grounds of its national laws.

Out of 120 Members of the United Nations, who are ipso facto parties to the Statute of the International

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1 Temple of Preah Vihear case. Thailand did all these things. See Brauchli "World Court - Cambodia v. Thailand - Boundary Dispute." 40 Denvor LCL (1963) p. 59, Note 8 and the citations thereto.

2 The Nottebohm case, I.C.J. Reports, 1953, p. 111. The Guatemalan Declaration of Acceptance had expired on Jan. 26, 1952; whereas, the Court had been seized on December 17, 1951, by Liechtenstein, when the latter filed its Application. In its preliminary objections, while denying jurisdiction to the Court, on the grounds of "respect for its domestic laws", had promised that: " ... in case and as soon as this new declaration of submission is definitely approved by the competent organs of State with a view to accepting the compulsory jurisdiction of the Court, it will immediately deposit this declaration with the Secretary-General of the United Nations in order that it shall serve as a norm for jurisdiction in relation to Guatemala and other States, on a basis of reciprocity, so far as new disputes, as well as those, if any, which were waiting to be dealt with or decided on January 27th, 1952, are concerned." Ibid., p. 116. However, the Guatemalan government never carried out its promise; the reasons are still unknown.

Court of Justice[1], thirty-six have accepted the compulsory jurisdiction.[2] In all, there are only 39 states, who have accepted the compulsory jurisdiction of the Court under the Optional Clause.[3] Out of these 39 states, Australia, India, United Kingdom, Israel and various other states have made "special" type of reservations over which the Court has no jurisdiction. Liberia, Sudan, Union of South Africa and the United States, have reserved for themselves, the right to decide what matters are within their "domestic jurisdictions" as understood by their governments, respectively.

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1 Art. 93 (1) of the Charter.

2 Under Article 93 (2) of the Charter, "A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."
Under Resolution 91 (I) of the General Assembly (December 11, 1946) Switzerland was granted permission to become a party to the Statute; Switzerland deposited its Declaration of Acceptance on July 28, 1948. See I.C.J. Yearbook, 1947-48, pp. 30-31.
Under Resolution 363 (IV) of the General Assembly (Dec. 1, 1949) Liechtenstein deposited its Declaration of Acceptance on March 29, 1950. See I.C.J. Yearbook, 1949-50, p. 161.
Under Resolution 806 (VIII) of the General Assembly (Dec. 9, 1953) San Marino deposited its Declaration of Acceptance on Feb. 18, 1954. See I.C.J. Yearbook, 1953-1954, pp. 204-205.
Similarly, Japan, before becoming a Member of the United Nations, was a party to the Statute of the Court from April 2, 1954 to Dec. 18, 1956.

3 See I.C.J. Yearbook 1963-64, pp. 218-241; In 1947-1948, there were only 34 states who had accepted the jurisdiction of the Court under the Optional Clause. I.C.J. Yearbook, 1947-48, pp. 38-39.

Besides these reservations, the record shows, that even if the parties agreed to submit their disputes before the Court, they did not furnish the Court with the means to arrive at an independent solution. On the contrary, the parties had stipulated before hand to limit the action of the Court by indicating the "legal data applicable to the case."[1]

These severe limitations imposed upon the "freedom" of the Court within which it was to administer international justice, shows the lack of confidence on the part of the sovereign states, who "desire" to establish a rule of law at the international level, but hesitate to submit to the authority of the Court "whose function is to decide in accordance with international law such disputes as are submitted to it."

One may recognize that the reluctance of governments to submit their controversies to judicial settlement stems in part from the fragmentary and uncertain character of international law as it now exists; or one may consider, that the governments still believe, that the ordinary customary and conventional rules of international law are insufficient for the purpose of judicial settlement of international disputes.[4] Does that imply that there is no

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1. See the Asylum case, Agreement of Aug. 31, 1949, I.C.J. Pleadings (Asylum case) Vol. I, p. 170, Vol. II, p. 202; I.C.J. Reports, 1950, pp. 267-68;
Minquiers and Ecrehos case, Agreement of Dec. 20, 1950, I.C.J. Reports, 1953, pp. 49-50;

Footnote No. 1 Cont'd

Case concerning Sovereignty over Certain Frontier Land, Agreement of March 7, 1957, I.C.J. Reports, 1959, pp. 210-11;
In Corfu Channel case, special Agreement had been concluded between Albania and United Kingdom, see I.C.J. Pleadings, Vol. II, pp. 28 and 29;
In Arbitral Award Made by the King of Spain on Dec. 23, 1906, which was brought before the Court by an Application of Honduras against Nicaragua, filed in the Registry on July 1, 1958, the parties had previously concluded an Agreement at Washington on July 21, 1957, with regard to the procedure for submitting the dispute to the Court. I.C.J. Yearbook, 1957-58, p. 228. See also the Diss.Opin. of Judge Azevedo, Asylum case, I.C.J. Reports, 1959, p. 357.

2 Art. 38 of the Statute of the Court.

3 See Annual Report of the Secretary General (Dag Hammarskjold) on the Work of the Organization: July 1, 1954 to June 15, 1955, Gen. Ass. 10th Sess. Off. Rec. Supp. No. 1, p. xiii (Doc. A/2911).

4 See Lauterpacht, Private Law Sources and Analogies of International Law, Longmans, London, 1927, p. 62.

international law, and therefore, states are justified for not submitting their disputes to judicial settlement? Or, does that mean that the sovereign states still consider that the "traditional ways" of settling international disputes are more effective and therefore there is no need to submit to the authority of a Court whose law is indeterminate, and indeterminable?

It is submitted that unless the sovereign states can have confidence in the law that the Court applies, unless states do not empower it sufficiently to be independent, without fear or favour, to apply the law that has been prescribed for it for the settlement of international disputes, unless it is freed from the necessity of deciding the disputes within the confined limits that the states prescribe for it; it will lack the authority required for effective adjudication, and will not be in a position to enthrone the rule of law, as envisaged by the founding fathers of international adjudication.[1]

The Development of International Law by the International Court and Limitations Imposed upon the Judgments under Article 59.

It is true that the Judgment delivered by the Court in a particular case has no bearing whatsoever with regard to other cases, since Article 59 of the Statute provides that

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1 See Hudson's conclusions for "Functions Served by International Tribunals", in International Tribunals, Carnegie, Washington, 1944, pp. 233-249.

'the decision of the Court has no binding force except between the parties and in respect of that particular case', yet it is hard to believe that 'the Court, whose function is to decide in accordance with international law', does not make any contributions to the development of international law, by deciding the cases upon the basis of those principles of international law which have been enunciated in Article 38 of its Statute.[1] Every decision that the Court renders is a contribution to the development of international law. The principle that it applies to arrive at that decision is a confirmation of the existence of a rule of international law; and the effect of that principle that it produces is a new source of international law, which, with the passage of time finds its way into

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1 See however, Fitzmaurice, "The Law and Procedure of the I.C.J.: General Principles and Substantive Law." 27 BYIL (1950) p. 1; " ... Frequently, the decision or opinion of a judicial tribunal has no interest except in relation to the particular facts of the case. What is of general interest is the underlying principle: the immediate decision or opinion itself may turn simply on how that principle is to be applied to the circumstances of the case, or to the terms of the treaty provision under consideration." See also Lauterpacht, The Development of Int. Law by the Int. Court of Justice, op. cit. supra, p. 8: " ... It has also been suggested, more plausibly, that the limiting terms of Article 59 refer to the actual "decision" of the Court, i.e., to the operative part as distinguished from the reasoning underlying the decision and containing the legal principles on which it is based. Moreover, the apparent rigour of Article 59 is mitigated by Article 38, which admits judicial decisions - including, it must be assumed, the decision of the Court itself - as a subsidiary means for determining the rules of law."

international conventions, or, into the practice of states, to develop into another principle of international law. In this way, a continuous chain of confirmations by the Court and their transformation into international law starts; international law is encriched, refined and attains certainty.

The Importance of Customary International Law in International Adjudication.

Customary international law is the original and older source of international law[1]; in its simple, but impressive design, it is the result of an evolution which has extended over nearly a millenium, its importance for regulating the conduct of the sovereign states, therefore, cannot be underestimated.[2] It is conceived to be self-enforcing and states do observe the rules of customary international law without being compelled by any external agency.[3] It has as its guarantee the consensus of opinion and usage of the civilized world, and it forms intrinsically the most important portion of international law, for it is deeply rooted in the habits, sentiments, and interests of mankind.[4]

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1 Oppenheim, op. cit. supra, p. 25.

2 See Schwarzenberger, The Inductive Approach in International Law, Stevens, London, 1965, p. 104.

3 See ibid., p. 181.

4 Hershey, Essentials of International Public Law and Organization (1927), p. 24 (quoted by George A. Finch, in the Sources of Modern International Law, Carnegie Endowment, Washington, 1937, at p. 44). See also C. Wilfred Jenks, The Prospects of International Adjudication, op. cit. supra, pp. 258-262.

Although the Court is bound in the first place to consider international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, it is by reference to international custom that these conventions or treaties are interpreted, in case any doubt may arise with regard to their validities.[1]

The jurisprudence of the Court shows, that the Court has always applied customary law whenever it was satisfied about the reasonableness of a custom. It is, however, unfortunate that in cases where the parties brought the claims on the basis of customs or state practice, it prescribed rigid standards and unsettled the nature of that part of customary law, which had been widely, if not universally, acknowledged by the parties.[2]

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1 See Oppenheim, op. cit. supra, p. 26; Lauterpacht, The Development of International Law .... op. cit. supra, p. 387: " ... In the international sphere, where legislation in the true sense of the word is non-existent, custom is still the primary source; it supplies the framework, the background and the principal instrument of interpretation of treaties." See also the Case concerning Rights of Nationals of the United States of America in Morocco, Diss. Opin. of Judges, Hackworth, Badawi, Carneiro and Sir Bengal Rau, I.C.J. Reports, 1952, p. 176, at p. 220: " ... Usage and sufferance are only different names for agreement by prolonged conduct, which may be no less binding than agreement by the written word. ..."

2 See also Jenks, The Prospects of Int. Adjudication, op. cit. supra, p. 263: "A number of decisions the International Court have created, and should create, grave concern as to whether the Court is not in process of evolving an attitude towards proof of custom which will severely limit its capacity to crystallise custom into law by its judicial recognition."

In spite of this treatment, customary law, for a long time to come, will continue to play an important part in international adjudication. The development of international law therefore will depend upon the technique of the Court, how it consolidates, determines, settles or unsettles those international customs.

Court as a Principal Judicial Organ of the United Nations: Its Role Towards the Maintenance of Peace.

The International Court of Justice, the principal judicial organ, is essentially an integral part of the United Nations - a political organization, whose function is to maintain international peace and security, and, which provides, that all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.[1] The definition of the status of the Court and its Statute as given in the Charter, emphasizes the fact, that international adjudication is a function which is performed within the general framework of the international community, and in accordance with the spirit of the Charter, and therefore, the purposes of international adjudication could never be different from the purposes of the United Nations. In other words the Court has a political task to perform, that is, a task related to the pacific settlement of

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1 Arts. 1 (1), and 2 (3) of the Charter.

international disputes, and hence to the maintenance of international peace.[1]

To maintain equilibrium between law and politics is essentially a difficult task for the judicial organs of democratic countries[2], and perhaps more complicated (if not altogether impossible) for the International Court - the Highest World Tribunal. That difficult task, which might involve the Hegelian logic to find a synthesis from the thesis of law and the antithesis of naked-power, has been successfully performed (to a greater extent, and within the limited powers) by the Court during the past years when it was called upon to decide those cases, which could have threatened to become a "casus belli", had it not been available, and had the states been allowed to find a solution for themselves.

The critical situations created by some of the cases,

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1 See Rosenne, The International Court of Justice, op. cit. supra, p. 2: " ... That international adjudication is a political operation does not cease to have political consequences when the States concerned agree to have recourse to the Court. The political factor continues influencing the litigating States in their handling of the case, though in a subdued measure (due to the special discipline which the law and litigation imposes upon their participants), and emerges again to the fore after judgment has been given, and the litigating States are faced with the problem of complying with what has been decided. Litigation is but a phase in the unfolding of a political drama."

2 See the most recent case: Banco Nacional De Cuba v. Sabatino. 376 U.S. 398 (U.S. Supreme Court, March 23, 1964).

which had focussed the world opinion towards the jurisprudence of the Court, were: the Corfu Channel case; the Anglo-Iranian Oil Co. case; the Temple of Preah Vihear case; and the Right of Passage over Indian Territory case.

In these cases, tension had been created between the parties by the use of force, or due to the fear, that it might be used at any time. The war-causing potentialities were always present, and therefore, there existed an actual threat to peace. Under these circumstances, the Court was sensible enough to make a "compromise" between law, and the ideals of the United Nations, in order to tackle those problems. The Judgments that the Court delivered in those cases sufficiently prove, that the Court, being the principal judicial organ of the United Nations, has to perform a political, as well as the legal role; it has to decide the cases according to the letter of the Statute, and while doing so, it cannot ignore the spirit of the Charter.[1]

It may be true that "the maintenance of peace through the recurrent crises of the recent years has been secured by political restraint reinforced by a balance of terror and not by any contribution made by judicial process to international harmony."[2] On the other hand, it is also true that the same peace could be maintained through the

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1 See the Diss. Opin. of Judge Moreno Quintana, I.C.J. Reports, 1960, pp. 95-96.

2 Jenks, The Prospects of Int. Adjudication, op. cit. supra, p. 759.

judicial process, had the nations entrusted the Court with a sufficient power to solve their international disputes, without fear or favour.

For the successful functioning of a judiciary, sufficient power, enforcement procedure, and the independence, are the necessary ingredients: International Court lacks all these qualities. Its powers are limited, and sometimes, enumerated mathematically; its judgments carry the moral force; its independence is debatable. Therefore, it is submitted, that in order to establish a rule of law at the international plane, it is necessary to cure these inherent diseases; it is then and then only, that the world of order and justice towards which the international community is striving, could be built on firm foundations of international law.[1]

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1 See Annual Report of the Secretary-General on the Work of the Organization: July 1, 1954 to June 15, 1955. Gen. Ass., 10th Sess., Off. Rec. Supp. No. 1, p. xiii (Doc. A/2911).

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