RELATIONSHIP OF ADVISORY OPINIONS OF THE INTERNATIONAL COURT OF JUSTICE TO THE MAINTENANCE OF WORLD MINIMUM ORDER

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I. CONTEXT, PROCESS OF INTERACTION, BACKGROUND

If the world were organized as well as most of the territorial polities which make up international society, these comments would be unnecessary. The fact is, of course, that we live in a very disorganized world. The differences among the “community of nations” have usually been more significant than the similarities and identities. Nevertheless, men of one nation have moved among those of another, carrying their ideas and goods with them, to such an extent that it is no longer accurate to characterize the members of the family of nations as narcissistic, completely sovereign, or without need from other members of the family. Communication across continents and oceans has carried religious beliefs, scientific information, and demands for goods and services. We may accurately call this process of social interaction “civilization.”

One supreme irony of the ages has been the development of this “fellow feeling” in apparent juxtaposition to fear of other tribes, races, and nations, competition for dominance of land and other resources, and separateness in the building of those social institutions which make possible what we call “law and order.” Yet we hear daily the cry that in the world community there is very little law and a good deal less order. Primary attention is given to the periodic outbreak of hostilities, the fighting of nation against nation, that has cursed nearly every generation in the modern world. But challenges to this state of affairs have not been wanting, and the latest response from man’s desire for “peace and security” has taken the form of something which future generations may perhaps call “the forum of the loquacious elites,” but what we now call the United Nations.

Born in an era of world war, the United Nations is perhaps only now emerging from an infancy deeply shadowed by the acrimonious rivalry of the Cold War. Whatever might have been the prospects of the United Nations—with its rudimentary legislature, its hyphenated

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executive, and its remote tribunal—in a world arena more nearly akin to the cooperative spirit of the war-time allies, its progress in the contemporary real world of contending systems of public order has not been crowned with the laurel wreath. Yet it has survived, and it has served the cause for which it was founded. If the “peace and security” envisioned at San Francisco have not been achieved, at least we have a kind of peace, a kind of order—albeit one whose continued existence is precarious because of the overriding threat of thermo-nuclear war. The nation-states capable of waging such a war, the so-called great powers, have by their own devices achieved a kind of stability or stalemate among themselves, but they remain peculiarly unable to turn back the clock and pick up where they were at San Francisco. Meanwhile other nations stand in the wings, dreading the spark which may set off the general conflagration.

The task attempted here at the outset is not to unravel the gordian knot but simply to describe in outline the context in which the process of interaction in the world community takes place. A traditional international lawyer might either condemn or ignore, depending on his individual assumptions, much of what takes place in this context. For example, some action is said to be “illegal” as running afoul preconceived notions about a universal moral code inductively ascribed to every nation from a European base or said to possess no normative character at all and to have meaning only as part of the power-oriented “facts of life” of man—in this or any other age. If law be regarded as a process of clarifying common interests, as it will be in the perspective of a policy-oriented study, then the task

1 Several systems of public order exist in the world today. Assertions of a single universal system are harmful to efforts to build a world community comprising those who do share the values of human dignity. Unfortunately, little has been done toward identifying the presently existing systems. A guide for systematic enquiry, however, is provided by McDougal & Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, 53 Am. J. Int'l L. 1-29 (1959). See also Kunz, Pluralism of Legal Systems and International Law, 49 Am. J. Int'l L. 370 (1955).

2 Examples might include the confiscation of a foreign-owned enterprise by the government of an emerging nation-state, atmospheric testing of nuclear devices, or shooting down of a foreign reconnaissance plane in the air-space of a particular nation-state.

3 “Professional lawyers and men of affairs the world over exhibit the most extreme oscillation between overaffirmation of the authoritativeness of what they term ‘international law’ and overdenial of the validity of any significant claims put forward in the name of such a system.” McDougal & Lasswell, supra note 1, at 2. Compare the following representative statements from recent writings. “A number of great legal philosophers—Hobbes, Pufendorf, Bentham, and Austin are examples —have all doubted the legal character of international law, and the charges and counter charges which pervade the international community today seem to provide empirical support for their view.” Kaplan & Katzenbach, The Political Foundations of International Law 5 (1961). “Politically we have for the first time the formal framework of a universal world order . . . . Legally we have for the first time the formal elements of a universal legal order . . . .” Jenks, The Common Law of Mankind 80 (1958). Dean Acheson, speaking at the 1963 annual
becomes more complicated. It is not a permissible alternative in such an inquiry merely to deplore the facts of our existence or to explain them away dogmatically.

As postulated above, contemporary man desires to live in "peace and security," and this remains the overriding objective of the United Nations as expressed in its charter. Given such expression, the human desire can legitimately be translated into a demand, a demand directed at ruling elites in all nation-states and in every arena of effective power. This demand constitutes the focus of the present inquiry. How it has been met in the practice of the international organizations of the United Nations shall be briefly considered.

While the Security Council had been designed to carry the main burden of meeting threats to the peace, its usefulness was largely undermined by the deep division characterizing postwar international relations, the so-called "Cold War." "Collective security" was to have been based upon unity of plan and action among the great powers represented in the Security Council. Although the Security Council

meeting of the American Society of International Law said: "In my estimation the quarantine is not a legal issue or an issue of international law as these terms should be understood. Much of what is called international law is a body of ethical distillation, and one must take care not to confuse this distillation with law." AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 14 (1963). See also SIEFFER, THE LEGAL COMMUNITY OF MANKIND (1954); SCHWARZENBERGER, POWER POLITICS: A STUDY OF INTERNATIONAL SOCIETY (1951).

Postulating such a process comprehends a wider context which can also be referred to as a process—a world social process, "social" because human beings are the active participants, "process" because there is interaction. And within this wider context is the daily flow of decisions of all sorts made with respect to various values or preferred events. Of these decisions those which are at once authoritative and controlling are the ones which characterize the process known as law. A public order, then, is defined as those features of the wider context which receive protection by the legal process. We treat here only a minimum order, by which is meant a public order built upon the principle that force or highly intense coercion is not to be used as an instrument of unauthorized change.

The contribution which a policy-oriented jurisprudence makes is contextuality (with respect to all processes and their inter-relatedness, even though in a given study widest contextuality may be unnecessary), systematic analysis of multiple factors affecting decision, along with categorization in terms of more than one value ("power" usually receives singular attention in traditional approaches), and the performance of other relevant intellectual tasks such as invention and appraisal (and even reappraisal) of alternative policies which may be adopted by decision-makers in practice to effectuate clarified community goals.

For this model acknowledgment is explicitly made of the great debt owed to Professor Myres S. McDougal and his associates. For fuller treatment see McDOUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961) (especially chapters 1, 4); McDOUGAL, LASSWELL & VLASIC, LAW AND PUBLIC ORDER IN SPACE (1963); McDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER (1960) (especially Introduction and chapters 1, 2, 11, 12). Also of basic interest is LASSWELL & KAPLAN, POWER AND SOCIETY (1950). Of course these scholars do not share any responsibility for the particular application of their model in this instance.

One writer has recently explained the unanimity requirement with this joint statement of the sponsoring powers at San Francisco: "In view of the primary responsibilities of the permanent members, they could not be expected, in the present condition of the world, to assume the obligation to act in so serious a matter as the consequence of a decision in which they had not concurred." CROSS, THE UNITED NATIONS: STRUCTURE FOR PEACE 39 (1962).
was not itself meant to be an agency for mediation, arbitration, or judicial settlement of disputes threatening the peace, it was intended to set in motion the procedures which would lead to such settlement. The same is true of the General Assembly to which more and more disputes and potentially dangerous situations have been referred because of the earlier impotence of the Security Council. Very recent events have demonstrated, however, the Council’s capacity to act when the direct interests of the large powers do not dictate otherwise. In March of 1964 the Council voted unanimously to recommend the creation of a United Nations peace-keeping force for Cyprus. The Congo operation, although spear-headed by Security Council resolutions, involved the Assembly substantially, for example, in its financial role and in seating of Congo representatives. But perhaps these cases represent the more acute situations, involving as they did the use of armed forces to restore order to an area threatening to embroil an increasingly large number of participants.

In a less urgent situation the United Nations' responsibility under the charter is to call upon the parties to settle their differences by resort to one of seven means specified in the charter, viz., negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or any "other peaceful means of their choice." If no settlement is reached, then the United Nations' second task is to recommend more specific "appropriate procedures or methods of adjustment." Should a third reference to the United Nations become necessary, the charter authorizes the Assembly or Council to lay down terms of a settlement, but still only by recommending them to the disputants. Only if the dispute constitutes a "serious danger to peace" can more direct action be taken. But, of course, if the parties consent to United Nations settlement, then the more direct course may be taken regardless of the seriousness of the threat to the peace.

6 See U.N. Charter chs. VI, VII where competence to deal with dangerous disputes and situations is conferred upon the Security Council.

7 Of course the Korean case is unique. There the Security Council acted to give community backing to United States action when the Soviets had voluntarily abdicated themselves.

8 U.N. Security Council Resolution, 19th year, 1102d meeting (S/5575) (1964). Subsequent events demonstrated that the presence of the force alone was not enough to guarantee the return of internal order. But United Nations involvement has apparently had a salutary effect on the attitudes of interested third-party nations—Turkey and Greece in this instance—for even though Turkish forces were briefly committed on August 8 and 9, the cease fire called for by the Security Council continues as of this writing. See N.Y. Times, Aug. 11, 1964, p. 1, col. 8.

Not all disputes, however, are of the kind which lend themselves to General Assembly or Security Council resolution, nor are those bodies equipped to handle a flow of involved cases ground from the plentiful grist of international relations (the process of interaction) set in the supercharged Cold War context. The charter admonishes the Security Council, in making recommendations for appropriate procedures to settle disputes, to "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice . . . ."¹⁰ Two factors should be noted here in connection with the Court’s involvement in dispute settlement. First, the relevant charter provisions distinguish between "legal" and "other" disputes, which the traditional writers take to mean "political."¹¹ Second, the Security Council cannot of its own accord hale the disputing parties into court. Rather the charter provides that the parties should refer their legal disputes to the Court. Thus there must be consent to the Court’s jurisdiction before a binding judgment may be made, before a settlement is attempted. The Court in fact acquires the competence to render judgments in particular contentious cases either through special agreement of the disputants, notifying the Court of their agreement, or by an application from one state where both it and the defendant state have agreed in advance to the Court’s jurisdiction, whether through terms of a particular treaty or by depositing declarations under the "optional clause."¹² Neither approach has generated very much litigation in comparison to the number of tensions and inchoate disputes spawned in the process of interaction during the first decade and a half of the Court’s existence. From 1946 to 1962 forty-eight contentious cases were filed with the Court.¹³ Only twenty-six judgments have been rendered,¹⁴ however, since several

¹⁰ U.N. Charter art. 36, para. 2.  
¹¹ See, e.g., Sohn, supra note 9, at 230.  
¹² See generally Jessup, The International Court of Justice and Legal Matters, 42 ILL. L. REV. 273 (1947).  

The remainder most went to judgment on the basis of a preliminary objection to jurisdiction or admissibility of the case. Of the total cases filed with the Court
cases were never argued as the defendant state would not agree to have the matter subjected to community prescription. Of such a type was the case instituted by the United States against the Soviet Union, involving treatment of American aircraft crewmen in Hungary. Neither of these great powers had committed itself in advance by use of the "optional clause." In fact the United States, when it first acceded to the Court's statute, reserved to itself the right to determine preliminarily whether any matter which might be brought to the Court dealt with internal matters and therefore was not for adjudication by the community tribunal. This practice has unfortunately been emulated by other states, with the result that only 38 of the 107 members of the international judicial community accept the compulsory jurisdiction. Two rather large obstacles then are placed in the way of judicial settlement of contemporary world problems: the great reluctance of nation-states to concede third-party competence and the very fact that thus far both the community tribunal and traditional scholarship have viewed authority based on consent as an overriding and primary principle. Both of these problems will have pertinence in a subsequent section on Clarification of Policies.

The charter does provide one additional way for the Court to become involved in dispute settlement, a less direct way. This is through the advisory jurisdiction of the ICJ. Unlike the practice of the United States and certain other national courts, the World Court is granted competence to render advisory opinions on "legal questions" submitted to it by the Security Council, the General Assembly, and specialized agencies and organizations authorized by the General Assembly. Thus far twelve requests for

\[ \text{a few have been settled or withdrawn before a ruling could be made. E.g., Compagnie du Port, des Quais et des Entrepots de Beyrouth and Societe Radio-Orient (France v. Lebanon). Another such case, withdrawn in 1961, was revived in 1962, Barcelona Traction, Light and Power Co. (New Application: 1962), [1962] I.C.J. Rep. 310.} \]

\[ \text{Case of the Treatment in Hungary of Aircraft of the United States, [1954] I.C.J. Rep. 103.} \]

\[ \text{Interhandel Case (Interim Measures of Protection), [1957] I.C.J. Rep. 105, is illustrative.} \]

\[ \text{France, for example, had so qualified its acceptance of compulsory jurisdiction, probably to its chagrin after the Norwegian Loans Case, [1957] Lauterpacht's Int'l L. Rep. 782, 784 (1961); but in 1959 France filed a new declaration accepting compulsory jurisdiction and exempting only "disputes relating to questions which by international law fall exclusively within the domestic jurisdiction," and not as determined by France. [1959-1960] I.C.J.Y.B. 240.} \]

\[ \text{ROSENN, THE WORLD COURT 83 (1962).} \]

\[ \text{U.N. CHARTER art. 96. "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." STAT. INT'L CT. JUST. art. 65, para. 1.} \]

\[ \text{Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory} \]
advisory opinions have been made by the General Assembly, two by specialized agencies (UNESCO and the Intergovernmental Maritime Consultative Organization) and, not surprisingly, none by the Security Council, where a veto by a permanent member would be sufficient to defeat the request.\(^\text{21}\) In the Assembly, on the other hand, at most only a two-thirds majority vote is required.\(^\text{22}\)

Several points require clarification here. First, although the charter in speaking of the advisory jurisdiction specifies legal questions, the Court has yet to refuse to give an opinion on this ground despite specific objections on this point in several instances.\(^\text{23}\) Furthermore, only United Nations organs, not member states, are granted the initial competence to invoke this special jurisdiction.\(^\text{24}\) The actual parties to a dispute, if any, need not be before the Court when the question is argued. The statute of the Court, however, does require opinions of the Court on legal questions arising within the scope of their activities." U.N. Charter art. 96(2). (Emphasis added.)

Thus far four United Nations organs have been so authorized: the Economic and Social Council, the Trusteeship Council, the Interim Committee of the General Assembly, and the Committee on Applications for Review of Administrative Tribunal Judgments. All agencies are now so authorized, with the exception of the Universal Postal Union which has its own internal system for settling disputes. ROSENNE, THE WORLD COURT 40 (1962). For a complete listing see [1959-60] I.C.J.Y.B.

This authorization is to be exercised subject to the double condition that no question concerning the relationships of the agency and the United Nations or other agency be submitted and that the Economic and Social Council be informed of the request. ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 445-52 (1957); ROSENNE, THE WORLD COURT app. V (1962).

This derivative competence seems necessarily circumscribed by the policy mentioned in note 24 infra. Thus the Secretariat, although an integral part of the United Nations, is not likely to be given the competence to request advisory opinions. On the other hand some organizations of states like the Organization of American States, though not specialized agencies or organs, may initiate a request to the General Assembly (or Security Council) itself to request the opinion. See art. 61 of Organization of American States (Pact of Bogota), April 30, 1948 [1951] 2 U.S.T. & O.I.A. 2394, T.I.A.S. No. 2361. Assembly or Security Council discretion in this area should be limited to questions involving the major purposes of the United Nations and its particular responsibilities related thereto. See note 9 supra.


\(^\text{22}\) There is as yet no definitive answer on the majority required. U.N. Charter art. 18 specifies a two-thirds vote for "important questions," but the Assembly has never decided categorically that all requests for advisory opinions raise an "important question." For the view that voting will continue to be ruled on an ad hoc basis, depending on the procedural context, see ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 478 (1957).

\(^\text{23}\) See pp. 543-47 infra.

\(^\text{24}\) The underlying policy for this limitation—aside from its complementing the traditional notion that individual persons have their rights protected through the offices of their respective nation-states and the assumption that nation-states themselves would find their way to the Court under its contentious jurisdiction—is reflected in this passage from a 1950 special report by the Secretary-General:

The right to present requests for advisory opinions has been conferred by the Charter . . . only to certain organs which are expected to weigh the proposal in the light of the general interests of the United Nations as well
notification to all signatories to the charter or statute of the Court, thus making available the opportunity to submit a written statement, to make oral argument, or both, addressed to the question presented. Furthermore, in one case the Court allowed the views of individual interested persons to be made available to the Court through the channels of the organ requesting the opinion. Even so, the advisory opinion remains just that: it is not commonly regarded as "binding," as is a judgment in a contentious case, on any state or United Nations organ. But in practice the organs and agencies concerned have followed the opinions faithfully.

The range of problems dealt with in this manner is not great, but the requests made have all been significant both because of the importance of the subject matter and because competence has been accorded and accepted by world community decision-making bodies. Treaty interpretation, United Nations membership requirements, standing of the United Nations to sue for injuries to its agents, status of League of Nations' mandated territory, propriety of specialized agency's election—all have been dealt with under the Court's advisory jurisdiction. Furthermore, the Court's opinions themselves have been conspicuous for their statements accepting third-party competence. In the latest advisory opinion, the Congo and Middle East operations and United Nations finance question (1962), a milestone was passed when the Soviet Union for the first time appeared and made argument in a judicial setting.

But severe handicaps to "peaceful settlement" of disputes still remain. The advisory opinion certainly is no substitute for the judgment and court order addressed to particular disputants. Where large world issues are concerned, the machinery for invoking the advisory jurisdiction is cumbersome and unpredictable since dependent

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as in regard to the particular question. During the drafting of the Charter at San Francisco, the policy was laid down that the right to make requests for advisory opinions should be restricted to public international organizations which are part of the United Nations or brought into relationship with it. The language of article 96(2) was carefully drawn up to express this policy.

Rosenne, The International Court of Justice 447 (1957).

25 U.N. CHARTER art. 93; Stat. Int'l. Ct. Just. art 66. This access is also extended to any "international organization considered by the Court ... as likely to be able to furnish information on the question. ..." Stat. Int'l. Ct. Just. art. 66, para. 2. Thus, while the right to invoke the Court's advisory jurisdiction is limited to "public bodies" analogous to officials like attorneys-general in American state practice, the right to be heard on a question is extended to every member nation-state.


27 See pp. 555-57 infra.

28 Formal acceptance of the Court's opinion by the organ requesting it may effectively settle the matter at hand or not, depending on the extent to which action is required by third-party participants. See pp. 554-55 infra.

on processes in the larger forum of the Assembly. Indeed the largest question involving expanded use of the advisory jurisdiction is whether the General Assembly (and on occasion the other organs and perhaps some of the specialized agencies) can translate the significant but everyday questions arising from the current context of the Cold War into resolutions and requests for opinions which the Court will feel itself competent to handle. Such questions, however, can be better posed in the more comprehensive framework of a policy-oriented study, making use of the other intellectual tasks of goal and policy clarification, trend description, and appraisal and recommendation of policy alternatives.

II. Processes and Policies

A. Power Process and Process of Claim

Out of the larger context of social interaction in the world community with its more or less constant state of flux, wherein are mixed the raw materials of order as well as confusion, the ingredients of purpose as well as accident, the observer must find the strands of relevancy. He must identify entities, events (preferred and historical), resources, and techniques which operate together as a vital process—consciously or not—toward some ends which have significance for public order, and do it in terms conceptually consistent with and useful to a perspective which deliberately seeks to affect the course of future conduct.

Actually it is possible to identify two different kinds of such processes. There is in the factual setting of the world process of interaction the almost daily series of demands made by major participants on other such participants (nation-states). These are made in pursuit of various objectives, which are identifiable in terms of a range of values such as power, wealth, well-being, respect, skill, and enlightenment. But the value variable chiefly concerned in a study specifically related to minimum order is power itself—power in the multiple sense of access to and participation in the whole set of global processes, of freedom from intense coercion and relative ability to withstand minor coercion, of ability to control people, resources, and

30 By "preferred event" we mean a value. See note 31 infra and accompanying text.


32 The distinction lies essentially in the recognition that violent unilateral redistribution of values is wasteful of all values and in the realization that in the contemporary poorly organized world arena some competence to resort to permissible coercion in response is preserved to particular target states and sometimes a collectivity of states. See generally McDougal & Feliciano, op. cit. supra note 4, at 121-260.
institutions in the context of the larger framework of the processes of interaction in the pursuit of other values. These are sought in a variety of factual situations differing as to relevant detail in a time-space continuum. In support of these objectives in these varying settings participants have at their disposal certain base or instrumental values such as control over people, resources, and institutions which are identifiable in familiar terms of wealth, prestige, and respect.

Practices or strategies employed in these varying situations in support of certain objectives include categories identifiable as military, economic, diplomatic, and ideological. The employment may be singly or in multiples and of varying degrees of intensity. Thus a nation-state may employ foreign aid and minor coercions in support of a single objective, although directed at different specific targets.

The outcome of the process may be—again in terms related to the whole community—a challenge to minimum public order, that is a resort to severe coercion; or a value change which is neutral or without visible effect on public order; or the change may consist of a low-order of coercion, according perhaps with general community expectations.

One long-term effect of this "power process" is to generate other demands or claims not necessarily counterposed vis-à-vis the identical objectives in immediate factual terms, but capable of description in equivalent operational terms of participants, objectives, situations, bases of power, strategies, and effects.

Participants in this "process of claim" are nation-states and international organizations which assert the demand for peaceful settlement of disputes among other states where such disputes rise to the level of general concern either because of the intensity of commitment by one or both sides or because of the extent of involvement among the membership of the community.33

Objectives sought are those which relate in the broadest sense to the principle that states, like individuals, seek to maximize their values (of security, wealth, well-being, and so on) and in a more restrictive sense those related to shorter-range goals of preventing coercion and violence across state lines as more conducive to a more economic production of those values.

33 The prime actor in the interactions of the social process transcending state lines is of course the individual human being who acts in many different roles, unorganized and organized. But in the power process of claim as related to minimum world order in the contemporary context it would be misleading and unrealistic to identify individuals as major claimants or participants in any but an indirect and instrumental sense.
Situations include a variety of settings wherein conflicting claims of states develop and, left unresolved, grow more acute. Competing claims to control a particular piece of territory may be made by two or more states, for example, or a demand for payment of a state loan may be asserted and denied; liability for failure to afford protection of persons or property may be charged and denied, and so on. The existence of great weapons systems in a few states may give rise to a fairly universal demand for reduction of forces or arms control, for the conclusion of agreements, for their faithful execution, and so on.

Base values at the disposal of the claimants relate principally to the wielding of persuasive influence. These values include enlightenment, skill, prestige or respect, rectitude, and, of course, control over people, resources, and institutions.

Strategies employed in the process are diplomatic, economic, and ideological. Primary emphasis, of course, is placed on those particular procedures which traditionally have been conducted among foreign offices and international governmental organizations. The modality may be formal or informal, but the cooperation becomes increasingly tangible, as with the development of a new nation-state’s resources, and at the same time more verbal as the claimants articulate their philosophical preferences to the whole community.

Outcomes may be the amicable settlement of disputes by voluntary means or by appeal to community decision-making, in which case the effect is to bolster the process of authoritative decision. At any rate, the more usual outcome is invocation of the process of authoritative (and/or effective) decision in the world arena.

B. Clarification of Policies

At the highest and most general level we postulate a world public order of human dignity as an overriding and ultimate goal, an order in which all values are widely shaped and shared and in which private choice is emphasized over coercion as the main modality of power.44 Related to this long-range goal, at a slightly lower level, is the middle-range goal of a minimum world public order, or one in which persuasion is preferred to coercion as an instrument of policy, but where the exercise of coercion tends to be increasingly the result of world community prescription and application rather than a response to the exclusive short-range interests of various major participants or nation-states. Again at a slightly lower level of abstraction, but

directly related, is the more immediate goal set out in the United Nations Charter—"maintenance of peace and security" by resort to peaceful settlement of disputes. Of particular relevance here are two provisions of the charter: article two, paragraph three, which imposes on members the duty to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered," and article one, paragraph one, declaring as a major purpose of the United Nations "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace . . . ."

The secondary policy, expressed in this latter charter provision, of conforming to principles of justice and law suggests recourse to third-party decision-making as the most desirable modality. Thus we expressly state a policy of encouraging third-party or judicial settlement, at the same time discouraging the practice of self-judgment so common in traditional international law and still prevalent in the contemporary world arena. A concomitant policy is often expressed in terms of "expanding the Court's jurisdiction." A less radical expression might be that where authority is to be achieved gradually and in response to custom—as in a disorganized world arena—utilization of existing institutions and institutionalized practices should be greatly encouraged both as an exercise in developing authoritative practices as an end in itself and as a means toward achieving shorter-range objectives such as the peaceful conclusion of a particular dispute, the clarifying of community policies, or the discovery and expression of common interests. Confronting such a policy is the fact that third-party competence rests in traditional international law on consent of the nation-state disputants 35 and the fact that states have been most reluctant to accord such competence to community tribunals 36. However valid the consent principle may be in the contemporary context—and we do not reject it out of hand, but neither do we accord it a fixed place of honor among alternative principles of operation—the continued utilization of the advisory jurisdiction of the ICJ need not of necessity run counter to it. Contentious cases will reach the Court only if the parties consent. But the community's greater need to have expressions of clarified prescription should not be gainsaid by

35 See pp. 533-34 supra.
36 Professor McDougal writes that this reluctance "derives quite obviously from concern for both effectiveness and the will of the governed." McDougAL & ASSOCIATES, op. cit. supra note 34, at 263. But he goes on to cite two advisory opinions of the ICJ as casting doubt on the "continuing authority of the principle of consent," agreeing with Lauterpacht on the point. Id. at 191 nn.69 & 70.
insistence that every such clarification should await an application as well. Indeed some current commentary suggests that the chance for growth in community authority depends upon the "extent that the advisory function of the Court is drawn upon . . . . The possibilities which lie in that direction have hardly been explored, let alone exploited." 37

C. The Process of Authoritative Decision

Complementary to the process of claim and in light of clarified community goals it is possible to identify another process. This is the process of authoritative decision which in combination with the process of claim provides focus for a systematic overview of that part of the whole process of interaction most relevant to the tasks of the international legal observer. Although a comparable scheme of who, where, with what values, etc., is employed, the emphasis here is on functional outcomes which are utilized with fewer base values available to more self-conscious elites in fewer but perhaps more inclusive and more visible arenas or forums.

Decision-makers are the members of the General Assembly, the Security Council, the governing bodies of the specialized agencies, and the judges of the International Court of Justice.

Objectives sought relate principally to achievement and maintenance of minimum order in the world community through settlement of international disputes by peaceful means, as prescribed in the charter. While the establishment of basic order across state lines encompasses a range of more specific security goals, 38 the aim of most concern here is prevention of potential breaches of public order "by bringing about conditions calculated to predispose effective decision-makers to noncoercive, nonviolent, strategies of change . . . ." 39

External structures of authority include the principal organs of the United Nations and the ICJ, plus the United Nations' specialized agencies which initially characterize the issues on invoking the judicial prescriptions of the Court. Internal structures of authority include

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37 Gross, Some Observations on the International Court of Justice, 56 Am. J. INT'L L. 33, 61 (1962). On the other hand at least one writer has complained that the possible "substitution of the advisory jurisdiction for the contentious" would be "a real distortion of the true function of the Court." ROSENNE, THE WORLD COURT 90 (1962).

38 These are identifiable in terms of prevention, deterrence, restoration, rehabilitation, and reconstruction. See generally MCDOUGAL & FELICIANO, op. cit. supra note 4, at 261-383.

39 Id. at 263.
the traditional foreign offices, executive councils, and legislative bodies of the territorially-organized bodies politic called nation-states.

Bases of power or base values most relevant in the contemporary context to decision-makers in the external structures of authority are those which reinforce formal authority itself—respect, enlightenment, loyalty, and rectitude.\footnote{Nothing need be said here about the base values available in internal structures except this reminder: "Nation-states continue to reserve to themselves control, by unilateral and exclusive decision, over most of the important bases of effective power which can be employed to sustain general community authority. This is most obvious with respect to control over resources (territory, technology, etc.), people (residents, armed forces, etc.), and the institutional practices of the territorial community by which values are shaped and shared." \textit{Id.} at 358-59.}

Strategies or instruments of policy realistically available to decision-makers in external structures of authority concentrate on diplomatic and economic means, and primarily on the former.\footnote{So far only token use of the military instrument has been possible. Unless we include the Korean action, only the emergency forces sent to the field by the United Nations may be cited in this context.} Although the ideological instrument is not consciously employed (the United Nations' agencies speak to governments and not to individuals, at least formally), there is a display of symbols in certain actions of the United Nations (such as dispatch of national troops in United Nations' colors) and in certain documents (such as the Court's advisory opinion itself), which while primarily directed at decision-makers in arenas of effective power must necessarily condition in some measure the predispositions of a wide range of participants including parties, pressure groups, and individuals.

Outcomes involve seven authority functions wherein the several levels of decision-makers undertake at various points in time to form and apply community policy. These include intelligence or \textit{information gathering} undertaken both by officials of the United Nations and the judges on the Court in either formulating or considering a particular dispute or problem. This function, of course, leads to the \textit{recommending} done both by United Nations officials again and those states which make arguments to the Court. Articulation of community \textit{prescription} is done not all at once or by any one group of decision-makers, but rather proceeds from the practice of the United Nations under the charter and the decision-making of its officials and the judges of the ICJ. A sufficient majority of United Nations members may \textit{invoke} the process by which the Court renders advisory opinions, the Court coming then to \textit{apply} the community prescriptions. \textit{Appraisal} and \textit{termination} of the consequences of policy prescriptions and
applications again are the responsibility of the collectivity of community decision-makers, seeking more enlightened future prescription and application.

As major participants in the whole process of interaction are brought to pattern their conduct according to the applied prescriptions of the community, the result is a tendency to build a community in fact, bringing about changes in predispositional and environmental factors influencing ruling elites in favor of greater inclusivity of objectives, increasing thereby the very authority of the community process initially invoked. One short-range effect is to generate the expectation (in the wider social context) of compliance with the Court's opinion at least by the invoking body and to a lesser extent by other participants not directly involved.

III. ADVISORY OPINIONS AND THEIR EFFECT

A. The Trend of Decisions

The thirteen advisory opinions rendered by the Court can be described and analyzed conveniently, at least for initial purposes, under such familiar traditional concepts as "legal questions," "domestic jurisdiction," and "dispute pending." In a subsequent section our analysis passes to terms more rationally conceived in relation to the problems of maintaining public order.

1. "Legal Questions" and "Domestic Jurisdiction"

In most of the earlier requests for advisory opinions, the first and most stringent objection to a reply by the Court was that the question presented was not a "legal" one. Thus, in the very first request, Conditions of Admission of a State to Membership in the United Nations, Charter Art. 4, the Polish representative in oral


43 See text accompanying note 11 supra.
argument declared that "political motives and considerations and criteria have guided many [United Nations] representatives in the discussion and voting on the admission of new Members to the United Nations." 44 This assertion was documented as follows: "The lack of diplomatic relations being an obstacle in one case, was not invoked when another State was involved; en bloc admission was considered incompatible with the charter in a case where the similarity of the cases was obvious, but was advanced at another occasion when there was no justification for it at all." 45 Counsel insisted that the subject of "political" debate in the General Assembly could not subsequently become a question fit for judicial determination. But by a vote of nine to six the Court concluded that it could decide such a question. 46 In the Court's view, the interpretation of a treaty provision was involved—"the character (exhaustive or otherwise) of the conditions for admission stated therein"—and consequently a legal question. 47

The issue was raised again in another Cold War situation. The opinion of March 30, 1950, Interpretation of Peace Treaties, 48 dealt with the failure of Bulgaria, Hungary, and Rumania to appoint commission members to consider charges of violation of human rights, as provided by the Peace Treaties. Charges made by the United States against Bulgaria, for example, were quite specific: that that country had dissolved all opposition political parties, executed named leaders,

44 CONDITIONS OF ADMISSIONS OF A STATE TO MEMBERSHIP IN THE UNITED NATIONS (ARTICLE 4 OF THE CHARTER)—PLEADINGS, ORAL ARGUMENTS, AND DOCUMENTS 105 (I.C.J. 1948) [hereinafter cited as ICJ Pleadings with date of presentation].

45 Ibid.

46 By resolution of November 17, 1947, the General Assembly had submitted a request for the Court's opinion on this question:

Is a member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the U.N., juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph one of said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the U.N. together with that State?

ICJ Pleadings 9 (1947). U.N. CHARTER art. 4, para. 1 reads as follows: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

47 Admission of a State to Membership in the United Nations, [1947-1948] I.C.J. Rep. 57, 61 (1948). Thus Albania, Bulgaria, Hungary, Italy, Finland, Ireland, Portugal, Rumania, and Jordan all were admitted in accordance with article 4 of the charter on December 14, 1955. Mongolia came in on October 27, 1961, but along with Mauretania. En bloc admissions are still the custom, but, as the court has ruled, the charter does not require such a practice.

prohibited free publication, and harassed religious groups—all in alleged contravention of the Treaty of Peace concluded among Bulgaria, Hungary, and Rumania on the one hand and the allied powers on the other. The General Assembly had aired these charges during its third and fourth sessions, in which the Soviet bloc insisted that the matters complained of were exclusively within the domestic jurisdiction of these East European countries and were consequently beyond the competence of the Assembly, under article 2, paragraph 7. But the great majority of members were convinced that the Assembly's competence rested upon article 14, authorizing it to “recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations . . . .” Serious regard for the protection of human rights—even among new members—could warrant concern for “the general welfare” and for the “friendly relations among nations.” Discussion about and resolutions inveighing against the situation in the three countries resulted only in their refusal to comply with the provisions of the treaties. The General Assembly responded with a resolution asking for an advisory opinion as to whether a dispute existed between the signatories, and if so whether Bulgaria, Hungary, and Rumania were obligated to appoint commissioners, and if they were but did not do so, whether the Secretary-General could appoint the “third” member. In deciding to reply to these questions the Court only briefly answered the contention that it lacked competence to proceed because the Assembly’s action in making the request was allegedly ultra vires. To the Court the Assembly’s action was simply a function of the United Nations’ promotion, under article 55, of “universal respect for, and observance of, human rights


50 “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; but this principle shall not prejudice the application of . . . enforcement under chapter VII.” U.N. CHARTER art. 2, para. 7.

51 Interpretation of Peace Treaties, [1950] I.C.J. Rep. 65, 66-68. Articles 36, 40, and 38 of the Peace Treaties With Rumania, Bulgaria, Hungary, Feb. 10, 1947, T.I.A.S. Nos. 1649, 1650, 1651, respectively provided that the Heads of Diplomatic Missions of the United States, Soviet Union, and United Kingdom in the three former enemy countries would settle any dispute not settled by direct diplomatic negotiations. And if they could not agree, then the parties to the dispute themselves were each to choose one representative, these two choosing a third person from another country to form a commission. The Soviet Head of Mission refused to meet with the other two, so the United States invoked the second procedure. The three states refused to appoint a commissioner, asserting that no dispute existed.

52 The treaty provided for a three-man commission, one each from the two contracting parties, the third to be named by the other two unless they could not agree, in which event the Secretary-General was to appoint the third member.
and fundamental freedoms." The contention that the matter was essentially within a State's domestic jurisdiction was not tenable, because

the Court is not called upon to deal in the charges brought before the General Assembly since the Questions put to the Court relate neither to the alleged violations of the provisions of the treaties concerning human rights and fundamental freedoms nor to the interpretation of the articles relating to these matters. The object of the Request is much more limited. It is directed solely to obtaining from the Court certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes by the Commissions provided for in the express terms [of the treaties]. . . . 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.

The Court, significantly, took the opportunity to censure national self-judging of preliminary questions upon which the very competence of the community tribunal often depends. Thus as to the question whether a dispute existed in fact, the Court in answering in the affirmative declared: "Whether there exists an international dispute is a matter for objective determination . . . ." 55

In the second Admissions case, 56 where the questions submitted involved the Assembly's right under the charter to elect members in the absence of an affirmative recommendation from the Security Council, the Court grew bolder in the assertion of its advisory competence. The objection had been made that the charter was not subject to interpretation by the Court and that the question had a "political character." Relying on its ruling in the first Admissions case, 57 the Court simply noted that the charter as a multilateral treaty was, of course, subject to judicial interpretation and that the question itself, framed in abstract terms, called for nothing more than treaty interpretation. 58

54 Id. at 70-71.
55 Id. at 74. The court cited the charges made by the United Kingdom, Australia, Canada, New Zealand, and the United States, and the denial made by Bulgaria, Hungary, and Rumania as patently disclosing a dispute. Such a simple formula seems deceptively facile. Would it suffice—as Cuba argues—to force the United States to answer in formal proceedings charges of aggression against that island State?
The treaty involved in a succeeding case, one of the most far-reaching yet decided by the Court, was the Genocide Convention. While the United Nations itself was not a signatory, it had indeed taken the initiative in drafting the compact, opening it for signature, and so on, thereby creating an interest sufficient to justify the Court's answering the request for an advisory opinion. The General Assembly and the Secretary-General (depository for the instruments of ratification and accession) "have an interest in knowing the legal effects of reservations to that Convention and more particularly the legal effects of objections to such reservations." Thus did the Court dismiss the contention that by interpreting this treaty for the General Assembly it would in fact be meddling in the affairs of the actual signatories who had not asked for any interpretation.

In an additional observation which has raised candid comment about the ICJ's developing advisory competence, the Court asserted that "a reply to a request for an Opinion should not, in principle, be refused." That is, the discretionary power of the Court to render an opinion will not be withheld where two conditions are satisfied; one, the Court finds that a legal question is presented; and two, the request comes appropriately from an organ authorized to make the request and with "a legitimate interest in seeking an opinion in the matter from the Court." In view of the possibility that an actual dispute may be pending between States not before the Court, such assertions have led some commentators, as we shall see below, to fear that other traditional features of jurisdiction and competence may be threatened or undermined.

2. Assertion of Further Competence

While in 1950 in the Peace Treaties case the Court was willing to declare that Bulgaria, Hungary, and Rumania were remiss in

60 Ibid. The principal question presented was: "Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?" Id. at 16. While the Court begged this substantive issue by declaring that "if the reservation is compatible with the object and purpose of the Convention," id. at 29, then the reserving signatory can be regarded as a party, more importantly, by giving an answer, the Court continued an unbroken chain of affirmative responses to requests from the General Assembly for advisory opinions.
61 Id. at 19.
62 See Fitzmaurice, The Law and Procedure of the International Court of Justice, 1951-54: Questions of Jurisdiction, Competence and Procedure, 34 Brit. Year Book Int'l L. I, 138-39 (1958), for the remark that in this case the Court "carried a stage farther the already very thorough consideration given by the court to the nature of its advisory jurisdiction [in the two Admissions cases and the Peace Treaties case]."
63 See pp. 548-50 infra.
64 Id. at 142-43.
their treaty obligations, it was not prepared to allow the other parties to remake the contract to effectuate its substantive provisions. In 1955, however, the Court went beyond a mere declaration of rights and duties in *Admissibility of Hearings of Petitioners by the Committee on South-West Africa*. There the Union of South Africa, a mandatory under the League of Nations and now responsible in a similar capacity to the United Nations, refused to assist in the implementation of an earlier advisory opinion. As a result, the General Assembly's Committee was held to have been justified in granting oral hearings on conditions in South-West Africa as a substitute for required reports from the mandatory. In a separate concurring opinion Judge Lauterpacht wrote that such action was in accord with the principle that a court of law was not powerless to give effect to the "major purposes of [an] instrument" where one party refused to act upon it, that it could interpret the instrument as continuing in validity and as fully applicable "subject to reasonable re-adjustment" to preserve its effectiveness (in this case, the Court's former ruling that South-West Africa was subject to United Nations supervision).

3. "Disputes Pending" and "Absence of Parties"

"The fact that the matters in which the request for an opinion relates are in dispute between two or more States is not in itself a ground for refusing to comply with the request." Court practice has made this a well-established principle regarding its advisory opinions, as illustrated by the *Reservations* and the *Peace Treaties* cases discussed above. The fear that this trend could undermine the contentious jurisdiction of the Court is often based on the reasoning of the older case of *Eastern Carelia*, decided under the Permanent Court of International Justice. There the Permanent Court declined to give an opinion because "the question put to it was directly related to the main point of a dispute actually pending between two States," so that answering the question would be substantially equivalent to deciding the dispute between the parties." It has been suggested

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67 *Admissibility of Hearings of Petitioners by the Committee on South-West Africa*, [1956] I.C.J. Rep. 23, 55-56. Judge Lauterpacht tried to distinguish the cases, saying that in *Peace Treaties* there was no emergency scheme available to render the commission scheme effective. *Quaere* whether that is a distinction with a meaningful difference?
68 Fitzmaurice, *supra* note 62, at 140.
69 The two States were Finland and Russia.
that the reason for the ICJ's more dynamic assertion of competence results from the fact that the present Court is more an organ of the United Nations than the Permanent Court was of the League of Nations, and perhaps also from article 68 of the statute of the Court which permits the use of contentious procedure in the consideration and hearing of requests for advisory opinions.\textsuperscript{71} In any case it seems clearly established that the ICJ will not be deterred from its tasks by the empty admonition that its pronouncements may "decide the dispute."

The contention has also been made in argument before the Court that a decision may prejudice the interests of parties not present at the hearings.\textsuperscript{72} However, not only do all members of the United Nations have the privilege to file written statements or make oral argument, but in the case of \textit{Judgments of the Administrative Tribunal of the ILO Upon Complaints Against UNESCO},\textsuperscript{73} the Court actually made special provision for the interests of individual persons, the UNESCO officers whose jobs had been restored by the ILO tribunal.\textsuperscript{74} UNESCO "took an appeal" to the Court to test the ILO tribunal's competence to hear cases against its sister agency. "The judicial character of the Court requires that both sides directly affected by those proceedings shall be in a position to submit their views and their arguments to the Court," it was said in the opinion.\textsuperscript{75} Accordingly the Court had UNESCO, the "appellant," submit the "observation" of the individuals concerned and furthermore dispensed with the oral proceedings entirely, thus attempting to equalize the positions of the real disputants in the case.\textsuperscript{76} Here, it seems, is an effective alternative procedure created by the Court to answer a genuine community need. The right to be heard was not sacrificed to the rigidity of a procedural rule, nor was the request for an opinion on this important administrative matter withheld.

\textsuperscript{71} See Fitzmaurice, \textit{supra} note 62, at 141.


\textsuperscript{73} [1956] I.C.J. Rep. 75 (advisory opinion).


\textsuperscript{75} [1956] I.C.J. Rep. at 86.

\textsuperscript{76} Two criticisms have been made of this procedure: (1) the absence of true equality because the individual's papers go through the agency and not directly to the Court; (2) the truncation of the Court's procedure, depriving the judges of the vitality of the oral arguments. See \textit{id.} at 155, 166-67 (Cordova, J., dissenting); Gross, \textit{Participation of Individuals in Advisory Proceedings Before the International Court of Justice, Question of Equality Between the Parties}, 52 \textit{Am. J. Int'l L.} 16 (1958). Gross suggests that the charter be amended to allow international civil servants direct access to the International Court of Justice, thus preserving equality while retaining the oral argument. \textit{Id.} at 35-40.
Of course, where the rendering of an opinion will not immediately decide a question upon which depend the rights of a party not in court, and not capable of being in court, as was the case with Israel in the Reparations case, then the Court does not concern itself with "observations" from that party. In the Reparations case the issue presented was whether the United Nations had international capacity to sue a State for damages resulting from the wrongful death of its agents in that State. Israel, the potential defendant in such a case, not being a United Nations member, could not be heard in the matter. Nor does it seem that such a handicap in any way prejudices a State's essential rights in a case on the merits yet to be heard in an as-yet-undetermined forum.

4. Other Substantive Matters

In two other advisory opinions the ICJ has demonstrated its readiness to continue interpretation of the charter and other treaties, and of particular administrative procedures related to them. Thus in 1954 the General Assembly asked whether its votes on reports from South-West Africa had to be as for "important questions" (requiring two-thirds majority vote under article 18, paragraph 2). In the second case the Assembly of the Inter-Governmental Maritime Consultative Organization gained an opinion which prevented possible alienation of the "convenient flag" States from the Maritime Safety Committee.

By far the most portentious development in advisory opinions until now dealt with the General Assembly's critical need for authoritative characterization of expenses incurred in recent peacekeeping missions. By resolution of December 20, 1961, the Assembly asked the Court whether the expenditures authorized in various General Assembly resolutions over the years 1956-1959 and 1960-1961 relating to United Nations' operations in the Middle East (UNEF) and in the Congo (ONUC) constituted "expenses of the Organization" within the meaning of article 17, paragraph 2, of the charter.
Court, by a vote of nine to five, answered that the expenditures did constitute "expenses of the Organization" since "expenses of any organization are not only ordinary maintenance and administrative costs but also 'amounts paid out to defray the costs of carrying out the purposes of the Organization.'" In the words of the Court, the purposes of the United Nations are achievement of "the goal of international peace and security and friendly relations" and "the achievement of economic, social, cultural and humanitarian goals and respect for human rights" and, finally, "to be a center for harmonizing the actions of nations in the attainment of these common ends."

The Court then examined each General Assembly and Security Council resolution to determine if the measures voted (both as to field operations and financing) were in accord with these major purposes. The Court felt it necessary to separate in its analysis the procedures used in the Middle East and those in the Congo, for General Assembly initiative had created and sustained the former effort, while in the latter initial authorization came directly from the Security Council.

The Court dismissed the contention that UNEF was created for "enforcement action" against a State, allowable under chapter VII of the charter only to the Security Council. UNEF, on the other hand, was in the nature of a "measure," albeit with some form of action, undertaken with the consent of the nations concerned and legitimately cognizable under article 14. Furthermore, and more importantly, the Court concluded from an examination of the resolutions themselves that the expenses of UNEF "from year to year" had been treated by the General Assembly as expenses of the Organization, and from

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82 Id. at 158-61.
83 Id. at 168.
86 The General Assembly resolutions did not mention the article relied on, but if one or more of them had specified article 11, wherein appears the provision for referring to the Security Council questions "on which action is necessary," then the Court would have faced a harder question. As it was, the Court could assume that they were based on the more permissive article 14 providing for "the peaceful adjustment of any relation . . . likely to impair the general welfare or friendly relations among nations." See [1962] I.C.J. Rep. at 172. This approach illustrates how authority not only sustains itself from case to case but also increases itself by being authoritatively enunciated in cases of general applicability.
a similar examination of Security Council resolutions that during the Congo crisis that body had “confirmed, approved, and ratified” the actions of the Secretary-General, thus working a sort of estoppel on those who would contend that the Security Council’s prerogative had been usurped. After all, the Court pointed out, “the Charter does not forbid the Security Council to act through instruments of its own choice . . . .” Finally, it was plain to the Court that all these resolutions—to return to the issue raised at the outset—were directed toward “carrying out the purposes of the Organization,” whether that meant “[promoting and maintaining] a peaceful settlement” (language used by the Court in characterizing the Assembly resolutions) or maintaining “international peace and security.”

The long-range significance of this latest advisory opinion does not lie in the forcefulness or cogency of its reasoning, for it is not a model in that respect, or even in the result reached, although admittedly favorable to the United Nation’s progress in the peace-keeping area. Far more importantly it revealed a conception of the Court’s role in the process of authoritative decision which is judicially activist but at the same time deferential to the effective role played by the “political” organs of the United Nations. Thus the Court at the outset of its opinion took occasion to state, as it had done before in Administrative Tribunals of the ILO, that only “compelling reasons” should lead it to refuse a requested advisory opinion and that the “reply of the Court [to a request for an advisory opinion] represents its participation in the activities of the Organization, and, in principle, should not be refused.” However, in discussing the nature of “expenses incurred for United Nations purposes,” the Court gave primacy to the characterizations initially made by the United Nations organ in question:

In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals

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88 E.g., Security Council resolution of Aug. 9, 1960, adopted without dissent, takes note of the Secretary-General’s report and “confirms the authority given to the Secretary-General by the Security Council’s resolutions of July 14 and July 22, 1960, and requests him to continue to carry out the responsibility placed on him thereby.” See [1962] I.C.J. Rep. at 176.
89 The word choice is that of this writer, but see the Court’s opinion, id. at 175-77.
90 Id. at 177.
91 Id. at 179.
92 Id. at 175.
made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in the course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute “expenses of the Organization.”

B. Utilization of Advisory Decisions

It is possible to discover in these advisory opinions a fairly definite trend, begun early and strengthened ever since, toward an assumption of a broad competence to deal with an ever-increasing range of problems arising from the process of claim in the context of a global arena. Furthermore, these opinions reflect both an awareness of the limited role ascribed to the Court by some other participants in the process of decision and yet a commitment to use its limited opportunities to clarify community policies.

The major participants in the global power process to some extent also appear to be ascribing to the Court at least part of the wider competence it has been asserting. This is seen in the increasing number of member States filing briefs with the Court and in the increased number making oral argument. To illustrate, in the Expenses case twenty States submitted written statements, and nine States made oral presentation, the greatest participation to date. Not only did

95 [1962] I.C.J. Rep. at 168. This relates to the finding that the General Assembly had continually regarded the expenses as germane to the United Nations’ major purposes. See note 87 supra.

96 With one notable exception (Eastern Carelia case) the advisory opinions of the Permanent Court of International Justice, predecessor of the ICJ, on cursory comparison seem to reflect a similar trend. From 1922 to 1935 the Permanent Court handled twenty-seven advisory cases on a variety of problems. For a summary see HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942, at 513-22 (1943). Two dissimilarities in experience of the two courts should be mentioned here. It was the Council of the League, rather than the Assembly, which was the leader in invoking the Court’s advisory competence. And while then, as now, individual States could not directly request an opinion of the Court, there were more advisory cases submitted to the Permanent Court which dealt with disputes between States. The record for voluntary compliance was also good. See id. at 513-22.

97 Of course the variation in numbers may be partially explained by greater interest in some cases than in others, but even so, the figures themselves suggest that a substantial number of member States are not willing to sit by and let an opinion issue without participating in argument.

98 Norway argued orally although it had not filed a written statement.

an appreciably larger number make oral arguments than in any previous case, but for the first time representatives of the Soviet Union actually made an appearance before the Court.

It is not possible at this time, however, to report a similar re-enforcing trend in another significant phase of the process of decision, invocation of the Court's advisory competence. As already mentioned, initiative here rests on the principal organs of the United Nations and most of its specialized agencies—all composed of nation-states as constituent members. In view of the great flow of events in these arenas and among these member States, there have been remarkably few requests for advisory opinions.

The responsibility for giving effective application to the authoritative view enunciated by the Court rests with these same organs and agencies, including—at least—a sufficient majority of their member States. While these organs have apparently been reluctant on occasion to invoke the advisory jurisdiction, in general they have followed the advisory decisions once given, although “several states have refused to implement advisory opinions, on matters of close concern to them, after opposing the request.” The Assembly has, at least, accepted by formal resolution each advisory opinion received. On occasion it has gone further, for example, instructing its special committee, condemning certain governments for failing to

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100 See the table in Rosenne, The International Court of Justice 497 (1957).

101 Although the Soviet Union had taken the lead in refusing to pay its share of the expenses incurred in the United Nations operations in question in the Expenses case, giving them a prime interest in the advisory proceedings, they could have ignored the proceedings, possibly with telling effect on the confidence in and of the Court.

102 Reference here is both to the overall process of interaction as well as the more “refined” process of claim and phases of the process of decision.


104 While the advisory jurisdiction is invoked in the name of the Assembly, the member States rather than the Assembly are represented before the Court. While article 66 of the statute of the Court contemplates submissions or appearances by “any international organization considered by the Court . . . as likely to furnish information on the question,” practice seems to limit this to the administrative type case, for example, ILO Administrative Tribunal (UNESCO), [1955] I.C.J. Rep. 127, [1956] I.C.J. Rep. 77.

105 Rosenne, The International Court of Justice 495 (1957).


fulfill obligations confirmed by the Court,\textsuperscript{108} or requesting the Secretary-General to conform his practice to the Court's opinion.\textsuperscript{109} In one case an unsuccessful attempt was made to achieve direct implementation by a member State.\textsuperscript{110}

It is fair to conclude in light of this history that acceptance or other effective recognition has had a high correlation to the general expectations generated by the Court's opinions. Most recently, in the highly charged \textit{Expenses} case,\textsuperscript{111} the Assembly has accepted by resolution \textsuperscript{112} the opinion of the Court. However, as the experience of the \textit{South-West Africa} case attests, difficult tests of effectiveness or enforcement have not been passed. The \textit{South-West Africa} case, however, was not an optimal test, for the strategies available to achieve compliance were unsuited to the task. A fairer evaluation is at this writing in prospect. The Court's opinion in the \textit{Expenses} case has been accepted by the Assembly, and therefore every member able to do so must pay the share of United Nations expenses allocated to it. Under article 19 of the charter a member in arrears in an amount equal to its contribution for the preceding two years "shall have no vote in the General Assembly." The Assembly has been asked to apply this sanction.\textsuperscript{113}

A further question concerns the effect \textit{in law} attributable to advisory opinions. This question is traditionally dealt with in terms of "binding force versus persuasive authority," or in equivalent language. The inadequacy of such a formulation should be clear in light of our analysis of the process of authoritative decision. Thus it would be at best misleading to attempt a categorical answer to this question. This prevalent verbal formulation cannot be ignored, for in fact it constitutes a short-hand expression of common expectations about the pertinent application of the Court's advisory opinions. The position of the United States, as revealed in this passage from a recent state-

\begin{footnotes}
\textsuperscript{108} See, \textit{e.g.,} Interpretation of Peace Treaties, [1950] I.C.J. Rep. 65.
\textsuperscript{109} See, \textit{e.g.,} Reservations to the Convention on Genocide, [1951] I.C.J. Rep. 15.
\textsuperscript{112} In the same resolution the Assembly providently re-established the Working Group of Fifteen to consider methods of financing future United Nations peacekeeping operations.
\textsuperscript{113} See Memorandum of Law on article 19 prepared by the Office of the Legal Adviser, United States Department of State, of February 1964 in \textit{Contemporary Practice of the U.S. Relating to International Law}, 58 AM. J. INT'L L. 752, 753-78 (1964). Indeed, the American position is that application of the rule of article 19 "entails no decision of the General Assembly." \textit{Id.} at 753. There is force in the argument. But as the principal offenders are the Soviet Union and France, the Assembly in all probability will have to consider the matter formally—particularly in view of the Secretary-General's recently disclosed concern that if the Soviets lose their vote, they might "walk-out." See N.Y. Times, Aug. 2, 1964, p. 1, col. 6; note 128 infra.
\end{footnotes}
ment by Ambassador Klutznik before Committee V of the General Assembly, is not atypical:

In both advisory and contentious cases the Court has declared the law. The difference between a judgment in a contentious case and an advisory opinion relates not to the validity of the Court's statement of the law but to the obligations that flow from that statement. While an advisory opinion does not have binding force, it does not follow that it is not an authoritative statement of the law . . . . The advisory opinion has no binding force because in advisory proceedings there are no parties on whom the obligation of compliance can be imposed. But this fact, as a leading authority on the Court has said, "does not affect the quality of the opinion as an authoritative pronouncement of what the law is." 114

The difficulty with such a formulation is its overly rigid concept of "law" both as a set of abstract rules on the one hand and also as the rules applied by elites to subjects.115 This view of course fails to take account of the interrelations of human institutions, while it places undue emphasis on the formalities of organized society.116 Although the principle of effectiveness thus continues to hold the focus of many contemporary international lawyers, not surprisingly in view of their experience with the systems of a well-organized territorial polity,117 contemporary international lawyers and writers committed to demo-

114 Reprinted in Contemporary Practice of the United States Relating to International Law, 57 AM. J. Int'l L. 403, 423 (1963). The authority paraphrased must have been Rosenne, The International Court of Justice 492-93 (1957). See Schwarzenberger, The Frontiers of International Law 305-06 (1962), for a more conservative view that advisory opinions "have no legally binding force whatsoever," yet are entitled to "persuasive authority"—particularly when (and presumably not "if") they are "well-reasoned." Compare Stone, Legal Control of International Conflict 120-21 (1954), which places emphasis on the word advisory but refers to prevailing practice of organs which is never squarely in conflict with the Court's opinion. In accord is the view of Judge Sir Gerald Fitzmaurice given off-handedly in his separate opinion in the recent Expenses case, [1962] I.C.J. Rep. 151, 202-03.

Advisory opinions are sometimes said to be comparable in many respects to "declaratory judgments of national law." Goodrich, The Nature of the Advisory Opinions of the Permanent Court of International Justice, 32 AM. J. Int'l L. 738, 756 (1938). For a more cautious statement to the same effect, see Rosenne, The International Court of Justice 459 n.2 (1957).

115 The attitude of the Soviet Union seems fairly to reflect a literal reading of such formulations. As a Russian Embassy counsel once remarked to this writer at a social gathering in Washington, "The Court's opinion [in the Expenses case] is only an opinion and not a judgment directed against us."

116 Little or no recognition is taken of what has been called the "contextual character of human behavior." McDougal & Feliciano, Law and Minimum World Public Order 343 (1961). Illustrative generalizations with supporting detailed conditioning factors may be found in Berelson & Steiner, Human Behavior, An Inventory of Scientific Findings (1964).

C. Factors Affecting Decisions

Low expectations of the possibility of implementing prescriptions formulated by the Court in some measure doubtless discourage invocation of the Court's competence. But other equally influential factors appear to be operative in the invocation process, particularly at the level where the formal decision is made to invoke the jurisdiction. An examination of the position of the General Assembly is illustrative.

Prominent among predispositional factors is the lack of identification with the personnel of the Court by substantial numbers of participants at the invoking level. Also influential might be a feeling of alienation from the participants within the invoking arena itself, here the General Assembly. Furthermore, there is a widespread

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118 Significant indications of these attitudes appear in Gross, supra note 103, at 33.
119 It should be borne in mind that General Assembly delegates are not popularly elected members of a constituent body like a national parliament who represent in varying degrees their own predispositions as shaped of course by environmental factors peculiarly identified with that territorial polity. Rather they are officials or agents of the governments accredited to the United Nations. Obviously, therefore, complete analysis on this point must take account of a larger number of individual participants than those sitting at any given time in New York City.
120 The underlying proposition here is that every human act or group response is a function not merely of environmental factors but also of predispositional factors. LASSWELL & KAPLAN, POWER AND SOCIETY 5-6 (Yale Law School Studies No. 2, 1950).
121 E.g., the view of an Indian scholar that "there is need for a more adequate representation of the Asian-African states on the Bench of the International Court." Anand, Role of the "New" Asian-African Countries in the Present International Legal Order, 56 AM. J. INT'L L. 383, 404 (1962). The need in this regard, it is said, is not "cultural and legal" dispersion but "psychological"—a confidence-building step. Id. at 404. Compare ROSENNE, THE INTERNATIONAL COURT OF JUSTICE 140-41 (1957): "Whereas previously the Court was essentially the reflection of European legal philosophy, it has been a catalyst for fundamentally different legal cultures." He notes that two places on the Court represent Islamic law; three represent Communist law as new additions to the mixture; meanwhile common law and civil law representation have held their own. See also STONE, op. cit. supra note 114, at 114.
122 This is particularly evident when a new member seats its delegation, a ceremony often accompanied by displays of national pride and folk identification—as by the giving of speeches glorifying the transition from colonial status to inde-
fear that by voting for inclusive prescription (i.e., for a resolution asking for an advisory opinion) or by initially moving to draft and consider such a resolution (whether or not it is affirmatively approved) one “big power” or another will be grievously offended. This is a very real concern where the great power can freely manipulate indulgences and deprivations, as by increasing or decreasing foreign aid.

Some of the more powerful major participants less rationally fear that resort to third-party decision-making on questions of peculiar interest to them will result in similar undesirable indulgences or deprivations. This response appears unjustified where the differences are at a low level of intensity and are thus unlikely to lead to violence in case of adverse decision, especially if the alternative is continued stalemate. Furthermore, in many such situations the change in the status quo could bring about unforeseen advantages. It need hardly be said, additionally, that willingness to have inclusively prescribed community policies invoked in these relatively “shallow” problems would conform to the expectation—itself in part generated by earlier efforts of these major participants in composing the United

123 During the Korean action Syria and India expressed fears in Assembly debate that passage of a resolution condemning the People’s Republic of China as an aggressor would not end hostilities but extend and expand them. [1951] UNITED NATIONS YEAR BOOK 218-19.

124 E.g., the Aswan Dam project in Egypt.

125 Here the main features of culture, class, interest, etc. can be seen applied to nonindividual participants. For example, it is felt in some quarters that one principal reason for Afro-Asian countries’ reluctance to accede to third-party competence to decide their disputes with Western nations is that they occupy a debtor position vis-a-vis the respondent nation-states. See Anand, supra note 121, at 400-03; Stone, A Common Law for Mankind?, 1 INT’L STUDIES 430-31 (1959).

126 E.g., Soviet fears about United Nations expenses; United States fears about the admission to membership of the People’s Republic of China. Indonesia’s alleged fear of Malaysia, purportedly underlying her objection to the temporary seating of Malaysia on the Security Council, can only partially explain Indonesia’s announced decision to withdraw from the United Nations. See N.Y. Times, Jan. 5, 1965, p. 3, col. 4.

127 For example, the United States would not likely resort to intensive coercion merely because Communist China were admitted to the United Nations.

128 E.g., the ability to focus energies or allocate additional resources to other areas; or the opportunity to appear in the role of peace-maker by ultimate compliance. For example, if and when the Soviets pay their United Nations assessments, there will be a general consensus that a “lessening of tensions” has taken place. The Soviets possibly may do this, perhaps in the form of some sort of “donation” to the treasury of the United Nations. As of this writing there is evidence of mounting pressure on the “delinquents” by smaller nations to make some payments to avoid a direct clash. See N.Y. Times, Jan. 6, 1965, p. 5, col. 3.
Nations Charter, etc.—that disputes would increasingly be resolved by resort to international tribunals.

On the other hand there are situations in which it is not at all reasonable to expect major participants not to oppose efforts for a third-party decision. These are the disputes which have risen in intensity of potential commitment (through all types of strategies, including the military) to the level of imminent violence or intense coercion constituting, in the view of the major participant, a severe threat to its security. Notable examples in the recent past include the Hungarian revolution of 1956 and the American limited quarantine of Cuba in 1962. As the problems shade away from this end of the power spectrum, it becomes more reasonable to expect major participants to oppose less and less, if not indeed actively seek, the invocation of inclusively prescribed policies to resolve every kind of dispute, not alone those of prime significance to international organizations themselves.

At least two environmental factors also seem in some measure to explain the rarity of decision-makers' invocation of the Court's advisory competence: the absence in the arena of the General Assembly of a guiding "executive" leadership such as is found in comparable bodies in internal arenas (Parliaments and Congresses) and the reliance placed on other modalities (particularly the traditional diplomatic and ideological) to bring about peaceful resolution of disputes and inchoate disputes.

A more recent example is the first Gulf of Tonkin incident (North Vietnamese torpedo boats attacking a single U.S. destroyer) in August of 1964. On the Cuba quarantine see AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 164-65 (1963) (Remarks of Professor McDougall); Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid under International Law, 31 GEO. WASH. L. REV. 335 (1962).

The list of potential problems of general community concern is long, varied, and of course speculative. For example, validity of future financing plans for the United Nations, election and succession of the Secretary-General and proposals to make that office over into a multi-individual one, sanctions against member States not complying with community prescriptions, possible sanctions against nonmember States. In this latter connection see the interesting suggestion of such strategies in Falk & Mendlovitz, Toward a Warless World: One Legal Formula to Achieve Transition, 73 YALE L.J. 399 (1964). Other possibilities for third-party adjudication might include: interpretation of trade agreements, special "appeals" from bloc or regional associations; the validity and effect of Assembly "recognition" of one regime over another in areas of international instability like the Congo. Perhaps a multipartite settlement of the future status of Cyprus, a possibility at this writing, could be reviewed in some unexpected future context as, for example, the respective rights and obligations of Greece and Turkey.

In widest compass these embrace all the component features of world power processes already briefly discussed. More narrowly here the discussion relates to those factors of more direct significance to the process of decision. See note 120 supra.

As the conclusion indicates, this should not be taken as a preference for the newer, more inclusive modality suggested by increasing resort to the Court's advisory competence.
IV. Conclusion

If our goal is a more peaceful and secure public order in the world community, one in which there is at least a decreasing resort to intense coercion and an increasing resort to modalities of persuasion and an increasing employment of third-party decision-making within community-wide structures of authority, it is possible to be optimistic in one respect about the trends previously described. The community tribunal of the International Court of Justice has developed through its advisory opinions a willingness to undertake problems from the other structures of authority in the world organization which require the deliberate, rational, and informed consideration of a relatively small group of learned men. The problems themselves seem to be of increasing pertinence to the mainstream of international organizational development, the answers of growing impact in international law generally. And there is no reason now to suggest that the Court will retreat from this advanced position.

The corollary trend to invoke the Court's advisory competence, to the extent it exists at all, is slower and less dynamic, strikingly so in comparison with the variety and number of issues or potential issues arising in the larger context of interaction and out of the world power process. In view of the limitations inherent in the structures of authority where this decision has to be formally taken and the other factors affecting decision at this state, it seems doubtful that the immediate future will witness any radical change in this trend. In all likelihood the General Assembly, and more rarely a specialized agency, will infrequently (perhaps once every two years) call for advisory opinions. While there will be variety in the background of the questions submitted (in time, place, circumstance, and procedural context, etc.), most of them will be concerned with problems peculiar to the United Nations, or its associated agencies. More rarely will a decision be called for on questions dealing with relations between the organization and constituent member States.\(^\text{133}\)

If instead of allowing passive trends to take their natural courses decision-makers in the appropriate structures of authority undertake deliberately to encourage resort to the Court's advisory competence, the result is likely to be more in accord with the clarified goals of the world community. To this end decision-makers might involve the Court more routinely in the affairs of the world organization, its

\[\text{133 The Assembly's action following the Expenses case should be helpful, at least cathartically in this respect, although it probably will not decisively move the trend one way or another.}\]
associated agencies, and ultimately its constituent members as a timely means of settling divisive issues which might lead to disputes of greater intensity likely to disrupt the peace. No structural changes are a prerequisite to this increased usage, although some eventual consideration will probably have to be given to a wider representative composition of the Court itself.\textsuperscript{134} In the more immediate future the lead in the direction recommended will probably have to be taken by "western countries."\textsuperscript{135} In the longer term, however, most major participants probably could not afford to thwart the rising expectation that disputes, particularly of the subcrisis level, will be submitted for authoritative prescription. Although from that point in time it may not be important to recall the genesis of the prevailing practice, the Court's own earlier assertion of wider, more inclusive competence may prove to have provided a modest foreshadowing.

In my opinion the positive trend discovered in the advisory opinions of the Court should be encouraged as a policy alternative. The dispute-settling machinery of the contemporary world arena is too meagre to allow additional possibilities to go unnoticed. Nor are the pitfalls to be ignored. Of course there is a real chance that disputants will flaunt the community tribunal's decision, leaving the facts unchanged. This is no less true in other, better organized arenas. Development of adequate sanction techniques, it would seem, need not be prior in time or in principle.

The realistic alternatives to a policy of encouraging the use of advisory opinions for peaceful dispute settlement, a policy recommendation aimed primarily at the members and their representatives in the United Nations General Assembly, are at least two in number. We may reject the negative one of attempting to discourage the use of advisory opinions as being regressive or past-oriented. The other possibility would seem to be to say and do nothing specifically with reference to the advisory competence and particular world problems, that is "to let nature take its course." In the contemporary context, where authoritative settlement is the exception rather than the rule, this is a self-defeating policy, for it assumes no postulated goal but the status quo and comprehends no modality but indifference. If rational policy alternatives are not employed as they are available, the commitment to overriding goals can more easily be challenged.

\textsuperscript{134} See note 121 \textit{supra} and accompanying text.

\textsuperscript{135} "The future flow of cases depends, in realistic terms, upon disputes between members of the Free World being steered in the direction of the Court." Gross, \textit{supra} note 103, at 61.