

BOOK REVIEWS

THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE.
Edited by Leo Gross. 1976. Dobbs Ferry: Oceana. 2 vols., x and 862 pp.
\$50.00.

When the Permanent Court of International Justice was established at the end of the first world war many welcomed it as heralding a new era in international relations with judicial settlement becoming the means for asserting and upholding the rule of law, even though recourse to the Court was optional. While it cannot be said that this hope had been vindicated by the outbreak of the second world war, there was still some measure of idealism and trust in international justice, enough to make the World Court in its new guise as the International Court of Justice a principal organ of the United Nations and the judicial arm of that body. Despite the references to judicial settlement in the Charter recourse to the Court has not by any means been frequent and, even though the number of pages comprising the law reports may appear impressive, this is largely the result of lengthy separate and dissenting opinions or judgments, many of which far outweigh the majority view in bulk even if not in substance. In so far as the jurisprudence of the Court since 1945 was concerned, one is left with the impression that states and the United Nations are more likely to ignore than use that tribunal. In fact, Mr. Rovine describes it as "clearly the least successful and most disappointing major organ of the United Nations system. . . . Its influence negligible and its place in the international arena hardly assured" (p. 313). By 1974, it had rendered 15 opinions and 36 judgments (p. 502), but not all on separate issues (*see e.g.*, Southwest Africa and the asylum issue between Colombia and Peru). As often as not, a year's work was summed up in but one or two judgments. It is perhaps not surprising, therefore, that international lawyers and their various societies have been concerned in examining the shortcomings of the Court and seeking means to make it more effective. Among such bodies is the American Society of International Law and the papers prepared by its Panel on the Future of the Court are now brought together under the editorial guidance of Leo Gross, whose basic contribution considers the requirements for enhancing its role in the international legal order, accepting a proposal originally put forward by Lauterpacht that rather than contracting into the compulsory jurisdiction of the Court, states might contract out, thus enabling them to allow the Court to proceed in relation to non-vital disputes without the need of entering into special agreements (p. 78). In so far as the advisory jurisdiction is concerned, he would like to see arbitral tribunals and other judicial organs given the right to seek an advisory opinion from the Court (p. 87), thus making it to some extent supra-international, in much the same way as the European Court has become supranational for the judicial institutions of the states members of the European Community.

While Professor Gross is concerned with proposals to widen the jurisdiction, Professor Anand draws attention to the "crisis of confidence" that has hit the Court (p. 2), which he attributes to some extent to the different attitudes towards judicial settlement and the "old" law on the part of the newly-independent states (p. 4, *et seq.*), together with their

conviction that in its composition the Court has not become sufficiently universal, but remained "Euro-centric" (p. 9), a view that is not fully shared by Dr. Rosenne in his discussion on the composition of the Court (p. 381, and table p. 382). Moreover, the Court may be suffering on the international law level from what Mr. Gordon describes as judicial "power to the people" (p. 353), and he suggests that the judges should "address their campaign, through judgments and outside the judicial process itself, over the heads of government to the people governments only sometimes represent. . . . [They] must see as their own mission serving the objectives people share, whether or not these objectives are vigorously advanced by governments" (p. 357). How many lawyers, international or national, share this view of the judicial function?

Although, unlike national tribunals, the Court has no enforcement body on which to fall back, by and large the judgments of the Court tend to be observed, even though Albania has never paid to Britain the damages awarded against her in the *Corfu Channel* case. It is true Article 94 of the Charter envisages possible enforcement by way of the Security Council, which some fear may be the back door to a revision process. Mr. Kerley in his paper on compliance points out that the organs of the UN have tended not to question the reasoning or the law in a judgment or opinion (pp. 278-9), and suggests that the most extreme sanction for non-compliance might well be suspension from UN membership, together with an arrangement whereby Member states make provision in their municipal legislation for satisfaction of monetary judgments, although such "judgments have been so rare in the history of the Court that it may be difficult to persuade the Security Council that this problem is important enough to require its attention" (p. 284).

Reference has already been made to the suggestions of Professor Gross for enlarging the Court's jurisdiction. The paper subscribed by Sir Gerald Fitzmaurice is concerned with enlarging the contentious jurisdiction, while Mr. Szasz devotes his attention to the enhancement of the advisory jurisdiction. Sir Gerald points out that to some extent state hesitancy to use the Court depends on an unwillingness to lose control of the issue by taking it out of the political arena, and its placement in cold storage for perhaps two years while the wheels of justice turn. In addition, he is frank enough to suggest that states may well wish to keep political issues alive if only for their nuisance value, and this is impossible once the Court has assumed jurisdiction (p. 463). As a former legal adviser of Great Britain and former judge of the World Court it is also interesting to note his "disquiet" at the non-continuity of the bench—perhaps inevitable with a body elected by the Security Council and the General Assembly—and the lack of qualification in so far as international law is concerned on the part of many of the judges (p. 467; *see also* Rosenne, p. 381). From a substantive point of view, Sir Gerald suggests that the contentious procedure might be opened to international organizations, even non-governmental, as for example the International Committee of the Red Cross or the Inter-Parliamentary Union, and perhaps even international corporations. He points out that the basic problem depends on governments and their will and attitude, reminding us that "political change is not a matter for the jurist, but the education that may lead to it perhaps is" (p. 490). As to the advisory jurisdiction, Mr. Szasz remarks that there is no reason to expect those bodies now entitled to use this procedure to make more use of it in the future than they have done in the

past, "indeed there is no particular hope or expectation that the past trend towards decreasing use of this facility will soon be reversed" (p. 508). One way to reverse it would be to extend the jurisdiction to bodies that so far have no competence, including the Secretariat of the United Nations itself (p. 513). He also suggests it could be used in disputes between states or institutions, especially when the former may be unwilling to initiate the full panoply of ordinary judicial settlement (p. 516). On the other hand he points out that legal counselling on a potential or actual legal controversy is not "generally appropriate for a judicial organ that might later be called on to evaluate such conduct or to decide such controversies in a litigation also concerning the interests of parties not involved in the original consultation" (p. 522).

The range of subjects covered are legion and the points made with regard to the use of the Court to date, and its potential enhancement in the future, are both interesting and provocative and certainly merit close attention. While some of these may be highly practical and even appealing, at least in the developed world, the point made by Professor Gross in his conclusion to the collection must not be overlooked. He points out the extent of the desire to have issues settled by the states which are affected by them rather than by way of the Court: "These attitudes can only be explained by total opposition to the normative character of international law itself. . . . Then no matter what improvements can or could be made in the composition of the Court and consequently in the application of the law, they would not induce these States—and they are the great majority of Members of the United Nations—to change their conduct. In view of this it may be questioned . . . what is the point in electing members of the Court from countries which will not subject themselves to the judgment of these members and on having these members adjudicate cases in which their Governments are not and are unlikely ever to be involved. The parochial attitude of these States has prevented a review of the future role of the Court. The rule-of-law oriented States have been deprived of an opportunity to study ways and means of improving the functioning of the Court . . . [which may well find itself] caught between the Scylla and the Charybdis, that is between the bloc of countries which have no use for it no matter what its composition may be, and the group of rule-of-law oriented States which have used or may wish to use it but have been or will be discouraged from doing so by its composition and its handling of both jurisdictional and substantive law" (pp. 764-5). This view is in accord with that which has been increasingly pressed by the present reviewer, that we may well be moving into an area of two international laws—that which we have to subscribe to because of its high-sounding moral tone, and that which we really are prepared to enforce and have enforced against us.

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