participate in the decisions of government under the rule of law. "If there had been firmer support for that principle some 45 years ago," he added, "perhaps our generation wouldn't have suffered the bloodletting of World War II."[69] But so, too, the Argentine invasion of the Falklands and resultant bloodshed would probably have been unthinkable if the international community had defended those principles more vigorously in inconvenient settings like the Middle East, Afghanistan, East Timor, and the Western Sahara.

One must assume, perhaps naively, that Britain and all those who supported it at the United Nations have made a bond in blood that commits them, not to the kelpers, but to uphold in future—regardless of pragmatic strategic and geopolitical considerations—the important rules of civilized conduct for which the Falkland war was fought.

THOMAS M. FRANCK

BROADENING THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

The adoption of the Manila Declaration on the Peaceful Settlement of International Disputes by the General Assembly on November 15, 1982, has focused attention again on the need to improve means for the settlement of international disputes. Among existing means that might be improved is use of the International Court of Justice. While states have shown great reluctance to increase the jurisdiction of the International Court of Justice to render binding decisions, it might be possible to broaden the Court's advisory jurisdiction, if it can be done without revising the Charter of the United Nations or the Statute of the Court.

Under the Charter of the United Nations, the General Assembly and the Security Council were granted broad power to request that the Court give an advisory opinion on "any legal question."[1] The General Assembly was also empowered to authorize other organs of the United Nations and specialized agencies to request advisory opinions of the Court, but only with respect to "legal questions arising within the scope of their activities."[2] The General Assembly gave such authorization to several organs of the United Nations and to more than a dozen of the specialized agencies.[3] By 1982, 15 requests for advisory opinions had been made by United Nations organs, and 3 by specialized agencies.[4]

Proposals for broadening the advisory jurisdiction of the Court have envisaged in particular the following possibilities:

[69] N.Y. Times, June 9, 1982, at A16.

[1] UN CHARTER art. 96(1). [2] *Id.* art. 96(2).

[3] For a list, see the latest Y.B. ICJ, ch. III, sec. II.

[4] 1981 *id.* at 46 nn.2–4, and 47 nn.1–3.

1. The most common has been the proposal that the General Assembly should authorize, in addition to the specialized agencies, other public international organizations, general or regional, to request advisory opinions of the Court.[5]

2. More controversial has been the proposal that two or more states should be permitted to submit a dispute between them to the Court for an advisory opinion, especially when they cannot agree to submit it to the Court for a binding decision.[6] It has been contended that it would discredit the Court if states were free to treat as only advisory an opinion that they had voluntarily solicited.[7]

3. Some objections have also been raised to the proposal that a national tribunal that has to decide a complex issue of international law might find it useful to refer that issue to the Court for an advisory opinion.[8]

All these proposals have run into the basic difficulty that both the United States and the Soviet Union are reluctant to allow a revision of the Charter of the United Nations or of the Statute of the International Court of Justice, which would be necessary to provide direct access to the Court in the cases contemplated. In the search for a way around this objection, the idea has emerged to use the solution adopted by the General Assembly with respect to references to the Court of cases considered by the Administrative Tribunal of the United Nations.

When faced with various challenges to the judgments of that Tribunal, the General Assembly in 1955 established a Committee on Applications for Review of Administrative Tribunal's Judgments. Its sole purpose is to present requests to the International Court of Justice for an advisory opinion whenever

[5] See the 1971 Report of the Secretary-General summarizing the views of various governments concerning the role of the International Court of Justice, UN Doc. A/8382, paras. 263–305, at 90–101 (1971) (proposals by Argentina, Austria, Canada, Cyprus, Denmark, Finland, Guatemala, Iraq, Italy, Madagascar, Mexico, the Netherlands, Sweden, Switzerland, the United States, and Yugoslavia). For a discussion of these proposals, see *Report on steps that might be taken by the General Assembly to enhance the effectiveness of the International Court of Justice,* in AMERICAN BRANCH, INTERNATIONAL LAW ASSOCIATION, 1971–72 PROC. & COMMITTEE REPORTS 142, 156–58; Golsong, *Role and Functioning of the International Court of Justice: Proposals Recently Made on the Subject*, 31 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 673, 681–82 (1971). *See also* Szasz, *Enhancing the Advisory Competence of the World Court*, in 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 499, 514–16 (L. Gross ed. 1976). The question was revived in 1977 in the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. *See* the report of the committee, 32 GAOR Supp. (No. 33) at 61–62, 147–48, UN Doc. A/32/33 (1977).

[6] UN Doc. A/8382, *supra* note 5, para. 274, at 92–93 (United States).

[7] *Id.*, para. 284, at 95 (Switzerland); UN Doc. A/C.6/SR.1212, at 3–5 (1970) (Soviet Union).

[8] *See* C. W. JENKS, THE PROCESS OF INTERNATIONAL ADJUDICATION 161, 166–68 (1964); P. JESSUP, THE PRICE OF INTERNATIONAL JUSTICE 67–71 (1971) (citing earlier suggestions by W. R. Bisschop and Sir Hersch Lauterpacht); Gross, *The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order*, 65 AJIL 253, 275–76, 308–13 (1971). For a detailed discussion of problems created by this proposal, see Caflisch, *Reference Procedures and the International Court of Justice*, in 2 THE FUTURE OF THE INTERNATIONAL COURT, *supra* note 5, at 572–609.

the committee finds that there is a substantial basis for an objection to the judgment of the Tribunal made by a member state, the Secretary-General, or the person in respect of whom the judgment of the Administrative Tribunal was rendered.[9] When necessary, the Tribunal is obliged to revise its judgment "in conformity with the opinion of the Court."[10] Thus, this procedure has two novel features: it allows a de facto appeal from the judgment of the Tribunal, and it gives individuals indirect access to the International Court of Justice. In the two opinions requested in this manner, the Court carefully examined the legitimacy of the procedure and found it acceptable.[11] Building on this precedent, a suggestion has been made that the General Assembly create "an organ of the United Nations specially for the purpose of requesting advisory opinions in defined circumstances" and subject to specified conditions.[12] This suggestion was revived recently by the American Bar Association (ABA), which recommended the "approval by the United States of expansion of the advisory opinion jurisdiction of the International Court of Justice to include questions of international law referred by national courts."[13]

The ABA proposal deals only with the reference by a national court of difficult questions of international law to the Court for an advisory opinion, but it can be easily extended to presentation of questions to the Court by an international organization or a pair of states. Of these three proposals, it might be useful to discuss in more detail the reference by a national court, which is more complex but at the same time might be more fruitful; after a slow start, a similar procedure before the Court of Justice of the European Communities is now used in more than 60 cases per year.[14]

The adoption of a reference procedure from national courts would require coordinated measures by international and national authorities: the adoption by the General Assembly of an appropriate resolution establishing a Special Committee on Advisory Opinions and determining the modalities of such reference; the approval of an authorizing statute by each national legislature willing to accept this procedure; and appropriate action by state or provincial legislatures in the United States and other federal states.

[9] GA Res. 957 (X), Nov. 8, 1955, 10 GAOR Supp. (No. 19) at 30–31, UN Doc. A/3116 (1955). For the text of the revised Statute of the Administrative Tribunal of the United Nations, Art. 11, see UN Doc. AT/11/Rev.4 (1972) (UN Pub. Sales No. E.73.X.1).

[10] Statute of the UN Administrative Tribunal, *supra* note 9, Art. 11(3).

[11] Application for the Review of Judgment No. 158 of the United Nations Administrative Tribunal, 1973 ICJ REP. 166, 171–75; and Application for the Review of Judgment No. 273 of the United Nations Administrative Tribunal, 1982 *id.* at 325, 331–40.

[12] C. W. JENKS, *supra* note 8, at 160–61.

[13] AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1982 MIDYEAR MEETING 12 (Chicago 1982). The report of the Committee on International Courts of the Section of International Law and Practice, of Oct. 14, 1981, on which this resolution was based, was prepared by the Chairman of the Committee, L. B. Sohn, with the assistance of an Ad Hoc Committee composed of David E. Birenbaum, Edison W. Dick, Anthony F. Essaye, Alan Kashdan, Stuart Lemle, Arthur Rovine, George Spina, and Leonard Theberge.

[14] *See, e.g.*, SYNOPSIS OF THE WORK OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES IN 1978, at 7, 14 (1979) (62 decisions in 1978 in cases referred to the Court; 495 such cases decided by the end of 1978).

The ABA proposal envisages referral to the International Court of Justice early in the proceedings, as soon as it has become evident that a complex issue of international law is involved. Once the parties to the dispute have agreed to the referral, the national tribunal would formulate the question to the Court and forward it to the Special Committee of the General Assembly, together with the briefs prepared by the litigants. The Special Committee would submit the question to the Court only after deciding that it satisfied the criteria for referral established by the General Assembly.

The procedure proposed by the ABA does not establish a hierarchy of courts. It is not an appeal procedure that would allow the International Court of Justice to revise a national decision. Instead, the proposal would establish a system of cooperation, allowing the Court to help national tribunals deal with difficult problems relating to the interpretation of international law, especially a treaty. The opinions of the Court would thus make it possible for tribunals of different countries to apply a particular rule of international law in a uniform fashion, and even would be of assistance when different tribunals in the same country disagree on the interpretation of an international agreement, as has been happening recently in the United States.

There would be no interference by the International Court of Justice in the interpretation of domestic law, which would remain within the unfettered competence of the national tribunal that referred the question to the Court. Should a rule of international law as interpreted by the International Court of Justice conflict with a rule of domestic law, the national tribunal would be free to decide—in accordance with national constitutional law—how that conflict should be resolved. For instance, in the United States the rule is that a domestic law is to be construed, as far as possible, so as not to bring it into conflict with international law.[15]

While the International Court of Justice would provide a uniform interpretation of an international rule, the national tribunal would decide how that rule should be applied, if at all, to the case before it.

Originally, the ABA considered that any question of international law might be referable to the Court, but in view of the current uncertainty about some important questions of international law, exemplifed by several important disputes between the developed and developing countries, it has been suggested that United States acceptance be limited to questions involving the interpretation or application of bilateral and multilateral treaties. These treaties contain the rules of law agreed by the parties to them; consequently, the controversy can relate only to the meaning of the rule and not to its very existence. Moreover, since the United States has already accepted the jurisdiction of the International Court of Justice in more than 40 international agreements, treaty interpretation is an area in which the United States might be willing to accept additional jurisdiction.

[15] As Chief Justice Marshall stated, "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." Murray v. Schooner *Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). This early principle was confirmed not too long ago in Lauritzen v. Larsen, 345 U.S. 571, 578 (1953).

United States courts are not strangers to this kind of reference procedure. They engage in a similar system of "certification," as federal courts faced with a difficult question of state law have found it useful to gain the views on that question of the highest court of the state concerned.[16] The Supreme Court has pointed out that the certification procedure "does, of course, in the long run save time, energy, and resources and helps build a cooperative federalism"; it also can be depended upon to produce the correct determination of the state law in question.[17]

As was already noted, in the European Communities the reference system has been adopted on the international level in the form of "preliminary rulings" concerning, *inter alia*, the interpretation of the Community Treaty of 1957. This procedure is optional for lower national tribunals, but obligatory for tribunals of last instance.[18] The Community Court has carefully avoided decisions on the merits of a case, and when necessary has rephrased the questions to enable it to give an abstract interpretation, "without interfering with the competence of national courts to decide controversies."[19]

The novel feature of the procedure proposed by the ABA is that requests from national courts would not go directly to the International Court of Justice but would be filtered through the Special Committee of the General Assembly. While entitled to submit the questions to the Court, the Special Committee would not be obliged to do so in every case. It does not seem desirable to give unrestricted access to the Court to possibly hundreds or even thousands of national courts, as such access might overwhelm the Court with "trivial, inappropriate, needlessly involved, unripe and politically sensitive cases."[20] The Special Committee may be authorized by the General Assembly to limit the cases to those which seem to raise important issues: *e.g.*, when there have already been conflicting interpretations of a particular rule by tribunals of different countries. The Special Committee may also be authorized to adjust the number of questions forwarded to the Court in the light of the Court's docket, either by submitting fewer requests when the Court has many cases between governments before it, or by submitting more requests when—as at present—the Court has few cases before it.

While the proposal has been approved by the ABA, it still faces many obstacles. Although the idea was endorsed in principle by the U.S. Govern-

[16] *See* Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344 (1963); Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. REV. 888 (1971).

[17] Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

[18] European Economic Community Treaty, 298 UNTS 11, Art. 177. There are similar provisions in other Community treaties and in the 1965 Treaty Establishing the Benelux Court of Justice. *See* L. BRINKHORST & H. SCHERMERS, JUDICIAL REMEDIES IN THE EUROPEAN COMMUNITIES 250 (2d ed. 1977) ("the preliminary ruling has become the most important function of the Court of Justice"); J. W. Schneider, *The Benelux Court*, 4 NETH. Y.B. INT'L L. 193 (1973).

[19] M. Waelbroeck, *The Application of EEC Law by National Courts*, 19 STAN. L. REV. 1248, 1255 (1967).

[20] Szasz, *supra* note 5, at 517.

ment during the Carter administration,[21] the Department of State was not enthusiastic about it. At first, the Department believed that an amendment to the United Nations Charter would be required and it stated that the United States was opposed to any Charter amendment.[22] When confronted with the idea that amending the Charter could be avoided by establishing a Special Committee to act as an intermediary to the Court, the Department expressed doubts about the compatibility of such device with the Charter. As a compromise, it has been suggested that the United States might ask the General Assembly to study the matter, and if necessary request an advisory opinion of the Court on the very question whether implementation of the Special Committee proposal would be compatible with the Charter.

The various issues raised by the ABA proposal are being explored now in Congress[23] and at the United Nations. Although there are obstacles to be overcome before this proposal is realized, the task is not impossible; it may, however, take a while.

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[21] DEP'T OF STATE, REFORM AND RESTRUCTURING OF THE UNITED NATIONS SYSTEM 7 (Selected Documents No. 8, 1978) (statement by the President: "we would support a national appellate court, before rendering its own judgment in a case, having recourse to the International Court of Justice for an advisory 'preliminary opinion' on issues of international law").

[22] *Id.* at 16–17. *See also Department of State Study on Widening Access to the International Court of Justice*, 16 ILM 187, 190–91, 204–06 (1977).

[23] On Dec. 17, 1982, the House of Representatives adopted a resolution presented by the Committee on Foreign Affairs (H.R. Con. Res. 86, as revised), urging the President "to consider the feasibility of pursuing, through the United Nations," the idea of expanding the advisory jurisdiction of the International Court of Justice, and in particular to:

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

128 CONG. REC. H10198 (daily ed. Dec. 17, 1982).

* This comment is based on a statement made on Nov. 6, 1982, at the meeting of the International Studies Association-South, held in Atlanta, Georgia.