Dissemination of information by international organisations: reflections on law and policy in the light of recent developments

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"Robert Q. Quentin-Baxter was a great international lawyer who brought, in addition to the highest skills of our craft, wisdom, tolerance, generosity and gentle humour. It was a privilege to know and work with him and to draw from his strength, patience and optimism. Those who knew him best loved him most and miss him most deeply."

International organisations play an important but little noticed role in facilitating multilateral communication amongst states. In particular, an important function of both the United Nations Secretariat and the Registry of the International Court of Justice, is that of depositary. In its opinion on the recent Nicaragua *case, however, the International Court appears to attach unusual legal significance to the fulfilment of those functions. The author argues that this is inconsistent with the purposes of these bodies as intended by the United Nations Charter and as established by practice, and may well damage and undermine a positive contribution to world public order.*

I. COMMUNICATION AND INTERNATIONAL ORGANISATIONS

The acquisition, processing and dissemination of information are indispensable to the international political system. Information is indispensable for government officials responsible for domestic policies on monetary, economic, agricultural, and social matters. They must also have access to relevant information about the neighbouring states or states with which they have substantial socio-economic relations. Officials charged with political strategy have to be able to communicate with and have ready access to information about the behaviour of their allies and adversaries in other parts of the world.

The earlier and simpler direct bilateral communication between states and even a later more limited multilateral communication between states have now been replaced by a complex and multifaceted information network. The prediction of particular behaviour by a state might once have been determined by direct communication between the officials of states. Often, it must now be forecast

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through a variety of direct and indirect official and unofficial communications as well as interviews, lectures and statements by political leaders in learned societies. A more limited but more direct multilateral communication between states has now been combined with an almost universal and sometimes indirect communication system to which international organisations contribute substantially.

Multilateral communication channels created by international organisations have unique and special features. States primarily, communicate through them but sometimes pressure groups such as national liberation movements and non-governmental organisations become important communicators. The purpose of communication varies from a serious and true expression of intentions and demands to cryptic signals and manoeuvres, including uncertain and sometimes incoherent expressions, on through to pure propaganda with no visible intention of enforcement. Communications through international organisations may be heard by everyone but are not always intended for a universal audience. They may be addressed to a group of states or even a single state or a pressure group, but within a multilateral setting. To organise and make coherent this complex network of communication, international organisations have devised their own systems of receiving and disseminating this form of communication. Their secretariats perform an essential role. While not the ultimate intended audience, they become intermediaries who receive, register and communicate the content of information received from member states and pressure groups.

In addition to this intermediary role, secretariats perform another important function: collection, analysis and dissemination of general information about states, including economic, political, legal and scientific matters useful and in many ways essential to the system of world public order. Such information may be referred by member states or gathered by the secretariats or other bodies of the international organisations on their own.

Every year the Secretariat of the United Nations produces over half a million pages of reports containing communications received from member states, basic facts and analyses. The legal evaluation of these materials is not easy. Precisely because it is useful and sometimes all that is available, it is tempting to ascribe a degree of authority to it which is not warranted by the procedures used in collection and processing and indeed by the legal authority of the Secretariat performing these functions. Paradoxically, such an "elevation" of what is essentially intermediation would undermine performance of that function. For, considering the intensity of political pressure under which the Secretariat operates,[1] the attachment of legal significance to its reports and documents would invite greater pressure by member states on the Secretariat, which could well end in paralysing the communication network of international organisations. Moreover, the performance of other authorised and sometimes highly political functions clashes with that of dissemination of neutral and unequivocal information.

1 The United Nations was characterised by the International Court of Justice as a political body "charged with political tasks of an important character". *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* [1949] I.C.J. Rep. 174, 179.

Sometimes communications received from member states are incomplete or vague. The Secretariat, while not in a position to refuse the dissemination of such cryptic communications, has to restrain itself from interpreting their content. The Secretariat has traditionally chosen to present them non-committally in its reports transmitting the cryptic or contradictory nuances of the communication, as the case may be. In contrast, the Secretariat has a freer hand to utilise its considerable resources in preparing studies, research papers and statistical information on economic, legal, scientific and social subjects which provide general and useful information to state officials and professional, scientific and learned groups. So far the United Nations Secretariat has been able to strike a certain balance between restraining itself when reporting delicate political matters with potentially major consequences and being more decisive in judgements involved in the collection and presentation of facts and analysis, thanks to the lack of objections and interference by its member states. Some oversight by member states of the Secretariat's function may be useful and may actually improve this process and correct its defects. But too much pressure and interference by states could paralyse the basic purposes of communication through international organisations and even render it a useless and wasteful exercise.

II. THE DEPOSITARY ROLE: U.N. SECRETARIAT AND I.C.J. REGISTRY

One of the functions of the Secretariat, which has tended to escape notice and comment, is that of depositary. Under Charter Article 102 Member States are to register, with the Secretariat of the United Nations, treaties and international agreements they enter into after the Charter comes into force. Under Article 36, paragraph 4 of the Statute of the International Court of Justice, states shall deposit their declarations accepting the compulsory jurisdiction of the Court, with the Secretary-General of the United Nations. The Secretary-General then transmits copies of such declarations to the parties to the Statute and to the Registrar of the Court. The Secretariat of the League of Nations performed a similar depositary function with regard to declarations made under the Statute of the Permanent Court of International Justice.[2]

The general normative requirements of the depositary function have been modified in articles 76 and 77 of the Vienna Convention on the Law of Treaties of 1969. Under article 76(2) the function of the depositary is international in

2 The Statute of the Permanent Court of International Justice did not contain a provision similar to paragraph 4 of Article 36 of the Statute of the International Court of Justice. However, the Protocol of Signature of the Statute of the Permanent Court of 16 December 1920 and the Protocol concerning the Revision of the Statute of the Permanent Court of 14 September 1929, provided that the Secretariat of the League (first Protocol) or the Secretary-General of the League (second Protocol) were the depositaries of these instruments. See P.C.I.J. *Acts and Documents Concerning the Organization of the Court* Series D, No. 1, pp. 8 and 9.

character; the depositary should act impartially in performing its function.[3] Article 77 recites a long list of the technical functions of the depositary.[4] One of these technical functions is to examine whether the signature or any instrument, notification or communication relating to the Treaty is in "due and proper *form*" (emphasis added) and if necessary to bring the matter to the attention of the state in question.[5] None of the functions of the depositary relate, in the slightest way, to interpreting or expressing any judgement on the legal status of the deposited instrument. Even if the deposited instrument is not in a proper form, *all* the depositary may do under article 77(2) of the Vienna Convention, is to bring the matter to the attention of the sending state. And if there are any differences between a state and the depositary regarding its functions, the depositary, under article 77(2), shall bring the matter to the attention of the signatory states and contracting states and, where appropriate, the competent organ of the international organisation concerned. The functions of the depositary under article 77(1)(d)

3 Article 76 of the Convention provides:

Article 76
Depositaries of treaties

1. The designation of the depositary of a treaty may be made by the negotiating States, either in the treaty itself or in some other manner. The depositary may be one or more States, an international organization or the chief administrative officer of the organization.
2. The functions of the depositary of a treaty are international in character and the depositary is under an obligation to act impartially in their performance. In particular, the fact that a treaty has not entered into force between certain of the parties or that a difference has appeared between a State and a depositary with regard to the performance of the latter's functions shall not affect that obligation.

4 Article 77 of the Convention provides:

Article 77
Functions of depositaries

1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:
(a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
(b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
(c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
(d) examining whether the signature of any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
(e) informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
(f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
(g) registering the treaty with the Secretariat of the United Nations;
(h) performing the functions specified in other provisions of the present Convention.
2. In the event of any difference appearing between a State and the depositary as to the performance of the latter's functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organisation concerned.

5 Idem.

and (2), in any case, are without prejudice to the judicial finding that a court or tribunal may itself reach.

Apart from the depositary function, in order to disseminate the content of communications transmitted by states to the Secretariat under Charter Article 102, the Secretariat publishes the United Nations *Treaty Series*. This is a cumulative series which includes bilateral and multilateral treaties deposited by one of the parties, or multilateral treaties concluded under the auspices of the United Nations. In respect of multilateral treaties which must be deposited with the Secretary-General, the Secretariat issues an annual report entitled *Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions*. In these reports the list of signatures, ratifications and accessions pertaining to these treaties is annually updated. As for the dissemination of the content of communications transmitted to the Secretary-General under Article 36(4) of the Statute of the International Court of Justice, the Secretary-General includes the names of the states communicating declarations in his annual report on multilateral treaties in respect of which he performs depositary functions. The Registrar of the International Court of Justice prepares and issues the *Yearbook of the International Court of Justice* in which the list of states who have transmitted communications under Statute Article 36(4) is included. This essentially clerical, even mechanical, and scrupulously non-judgemental procedure prescribed for and used by the Registry of the Court and by the Secretariat of the United Nations to receive and disseminate communications transmitted from states, should be kept in mind in the discussion that follows.

In the recent decision of the International Court of Justice in the jurisdiction part of the *Case Concerning Military and Para-military Activities In and Against Nicaragua*,[6] the Court attached unusual importance to the reports prepared by the Registry of the Court and by the Secretariat for *dissemination of information*.[7] In this case, the Court founded jurisdiction on two grounds, one of which was the validity of the 1929 Nicaraguan declaration accepting the compulsory jurisdiction of the Permanent Court of International Justice. To establish its jurisdiction on this ground, the Court's reasoning relied heavily, at least for purposes of confirmation, on the content and the format of the reporting system of the Secretariat of the United Nations and the Registry of the Court. These indicated, in the opinion of the Court, that Nicaragua's 1929 declaration, while not binding prior to 1945, did enter into force by virtue of the U.N. Charter and the Statute of which it is part.

This is the first time in the history of the Permanent Court of International Justice and of the International Court of Justice that such significance has been

6 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Jurisdiction of the Court, Judgment of 26 November 1984, [1984] I.C.J. Rep. 392.

7 Ibid., paras. 36, 37 and 40. For an opposing view to the Court's decision on this issue, see Judge Schwebel's dissenting opinion, paras. 41-52, Judge Oda's separate opinion, pp. 483-488, Judge Jenning's separate opinion, pp. 540-545. See also the separate opinion of Judge Ago, para. 30 and that of Judge Mosler, p. 464.

attached to this communication function of the Secretariat. The innovations implicit here must be explored both by states and by the Secretariat. The Court introduced a different conception of the role of the Registry and of the Secretariat as media of communication than was traditionally conceived. This new conception of the function of the Secretariat and the Registry is, in the opinion of this author, a cause for serious concern, for it could lead to more interference by states in and consequently limit even more, this part of the communication function of the Secretariat and of the Registry. The Court appeared to overlook the political and other restraints imposed upon the Registry and the Secretariat in their role as media of communication. The target audience of communications transmitted under Statute Article 36(4) is not the Registry or the Secretariat. The Court implied that the Registry and the Secretariat are competent to interpret communications received under Statute Article 36(4) for which the Court itself has the sole jurisdiction.[8] This implication reflects an insensitivity to the restraints imposed upon the depositary and clashes with Articles 76 and 77 of the Vienna Convention on the Law of Treaties. The Court further implied that the Registry and the Secretariat are international organisations *per se* and that their publications constitute *conduct* of international organisations.[9] All these points introduce a different conception of, and possibly some negative consequences, for the communication function of international organisations. These will be examined in this article.

III. THE *NICARAGUA* FACTS: PRE-1946

The Protocol of Signature of the Statute of the Permanent Court of International Justice was drawn up in Geneva in December of 1920. The members of the League of Nations and the states mentioned in the annex to the League Covenant were entitled to sign and ratify the 1920 Protocol of Signature of the Statute of the Permanent Court and thereafter, on the basis of the Protocol, to make a declaration under the optional clause as provided for under Statute Article 36(2). The Protocol was subject to ratification; instruments of ratification were to be sent to the Secretary-General of the League. The function of the League Secretariat was simply to receive and deposit the instruments submitted by member states under Article 36(2) of the Statute of the Permanent Court. To disseminate such information, the Registry of the Permanent Court produced the listing of states and the instruments which they submitted under Statute Article 36(2) in the annual report of the Court.

Nothing in the League Covenant, in the Statute of the Permanent Court, or in customary international law empowered the Secretariat of the League or the Registry of the Permanent Court to interpret or evaluate the legal validity or significance of the instruments submitted to them by states under Article 36(2) of the Statute. On the contrary, such judgements by the Secretariat or the Registry would have trespassed on the question of the jurisdiction of the Court, thereby interfering with the competence of the Court in this regard. It is significant

8 Supra note 6, paras. 37 and 40.
9 Ibid. para. 36.

that this judgemental function by the Secretariat and the Registry is not provided for in the Statute of the Court. It is improbable as a customary development or necessary structural usage, for many reasons. It could only create confusion. The two administrative bodies are not equipped with the necessary legal expertise to render opinions about such complex questions. The Registrar and most of the staff of the Registry of the Permanent Court and of the International Court of Justice have often been linguists and not always lawyers. Hence decisions are often made by administrators without legal training. That deficit means that they may not even appreciate that a thorny legal issue is posed and hence not find it necessary to consult with the legal office of the Secretariat. Finally, it is important to bear in mind that these administrative bodies were created to perform a completely different function and they lack government support for making such judicial findings. A review of the performance of the depositary function and reporting system of the League Secretariat and of the Registry of the Permanent Court, as well as those of their successors, attests to the scrupulously limited functions that these administrative bodies viewed as proper for themselves.

On 24 September 1929, Nicaragua, as a member of the League, signed the Protocol and made a declaration under Article 36 (2) of the Statute of the Permanent Court. But Nicaragua had not yet ratified the Protocol of Signature which was required for its coming into force in relation to Nicaragua. Nicaragua's unconditional declaration read "On behalf of the Republic of Nicaragua I recognize as compulsory unconditionally the jurisdiction of the Permanent Court of International Justice."[10] This declaration was transmitted to the Secretariat of the League of Nations. The Registry of the Court listed Nicaragua as a State which had signed but not yet ratified the Protocol, included its declaration of 1929 in its *Collection of Texts Governing the Jurisdiction of the Court* under the heading "texte des déclarations apposées à la disposition facultative", and reproduced the text of the declaration.[11]

On 16 December 1942, the acting legal advisor of the League Secretariat wrote to Nicaragua's Foreign Minister to point out that he had not received the instrument of ratification, the deposit of which was necessary for the obligation to become effective.[12] In so doing, the acting legal advisor of the Secretariat of the League was fulfilling the depositary function and re-stating the requirements of the Protocol of Signature. He was not expressing any judgement as to the validity and eventual enforceability of Nicaragua's instrument, since under Article 36 of the Statute of the Permanent Court, it is the Court which makes such decisions. At the same time, in the performance of their common function of dissemination of information, the Secretariat of the League and the Registry of the Permanent Court could not have refused publication of Nicaragua's declaration.

Similar restraint by the Secretariat of the League and of the Registry of the

10 P.C.I.J. *Collection of texts Governing the Jurisdiction of the Court,* Series D, No. 6, p. 51 and also *Permanent Court of International Justice, Sixth Annual Report* (1929-1930), Series E, No. 6, p. 485.

11 P.C.I.J. *Collection of texts,* supra note 10 at p. 51.

12 Supra note 6, para. 16.

Permanent Court is demonstrated with regard to communications from Paraguay. On 11 May 1933, Paraguay also signed the 1920 Protocol of Signature and made an unconditional declaration accepting the compulsory jurisdiction of the Permanent Court. Almost five years later, in view of border disputes with Bolivia, Paraguay passed a decree in which it withdrew its declaration recognising the compulsory jurisdiction of the Permanent Court. On 27 May 1938, the Paraguayan Minister in France sent to the Secretary-General of the League the text of that decree.[13] Since the Paraguayan declaration had been made unconditionally and without limitation of time and there was neither provision in the Statute nor any indication in the jurisprudence of the Permanent Court regarding the withdrawal of such declaration, the Secretary-General of the League, who had to perform his depositary function and act as a medium of communication, was not in a position to make a judgement on his own. Therefore, by a letter dated 13 June 1938, he informed the Paraguayan Minister that in the absence of an express provision in the Statute regarding the denunciation of such declarations, he was obliged to confine himself to circulating copies of the Minister's communication to the states parties to the Protocol of Signature of the Statute of the Permanent Court and to the members of the League of Nations.

The Secretary-General did so. By 15 June 1939, he received replies from the governments of Bolivia, Belgium, Brazil, Sweden, Czechoslovakia and the Nether-

13 The Decree No. 6172 by which Paraguay withdrew its acceptance of the Permanent Court's jurisdiction was adopted on April 26, 1938 and provided in part:

Whereas the National Executive Authority, in pursuance of Law No. 1298 of January 14th, 1933, accepted the compulsory jurisdiction of the Permanent Court of International Justice in accordance with Article 36, paragraph 2, of the Statute of the Court;

Whereas such acceptance was in some measure a consequence of Paraguay's membership of the League of Nations, the Court having been set up in pursuance of a provision of the Treaty of Versailles;

Whereas Paraguay has ceased to be a Member of the League;

Whereas, furthermore, Paraguay's acceptance of or adherence to the compulsory jurisdiction of the Court was a simple acceptance or adherence unaccompanied by any undertaking to maintain such acceptance or adherence for any stated period;

Whereas the above-mentioned Law No. 1298 contains no imperative rule, but merely authorises the action of the National Executive Authority;

Whereas therefore nothing stands in the way of the withdrawal of Paraguay's acceptance of the above-mentioned jurisdiction;

Whereas, moreover, in regard to the frontier dispute between Paraguay and Bolivia, the protocol of June 12th, 1935, provides for a special mode of settlement to be reached through direct agreement or through legal arbitration, the bases, manner and precise terms of which are to be determined exclusively by the Parties concerned;

The opinion of the Council of Ministers having been heard,

THE ACTING PRESIDENT OF THE REPUBLIC
DECREES AS FOLLOWS:

Article 1. — The acceptance by Paraguay of the compulsory jurisdiction of the Permanent Court of International Justice in accordance with Article 36, paragraph 2, of the Statute of the Court is hereby withdrawn.

See *Permanent Court of International Justice, Fourteenth Annual Report* (1937-1938), Series E, No. 14, pp. 57 and 58, n.1.

lands.[14] The certified copies of these communications were transmitted by the Secretary-General to the Registrar of the Permanent Court for information. The Registry, not being competent to make a judicial determination about the effect of Paraguay's decree, *continued* listing Paraguay among states bound by the optional clause, accompanying it with a footnote indicating the Paraguayan decree, the communication between the Secretary-General of the League and the Paraguay Minister and the replies from other states.[15]

Neither the Secretary-General of the League nor the Registry of the Court tried to interpret the validity and the binding force of Paraguay's declaration in view of the conflicting national attitudes expressed by states parties. They simply continued in a format neutral, reasonable and consistent with their function, to report the communications they had received from states. They were aware of their separate existence from the Court and that their actions in the reporting system were only to disseminate and to provide access to information in this matter but not to interpret it. The reporting format of the Registry of the Permanent Court was not only appropriate for the reporting of the administrative body of an international court but also consistent with the format of annual reports, prepared by the Registry itself, which were designed not to engage the responsibility of the Court or to affect its judicial functions. In the introductory section of all of the annual reports of the Permanent Court, there is a disclaimer signed by the Registrar of the Court indicating that those publications were prepared by the *Registry* and in *no way engaged the Court.*

IV. THE *NICARAGUA* FACTS: POST-1946

With the dissolution of the Permanent Court and its replacement by the International Court of Justice, the Registry of the International Court of Justice continued its reporting system under the same material restraints imposed upon its predecessor. The Registry, aware of its separate identity from the judicial component of the Court, was not, of course, in a position to make a decision as to the status of Nicaragua's declaration and Paraguay's Decree. In the first year-

14 The reply from Bolivia read: "the *Bolivian* Government makes the most formal reservations as to the legal value of the decree and requests the Secretary-General to communicate these reservations to the States signatories of the Statute and to the Members of the League of Nations."; the reply from Belgium read: "the *Belgian* Government, in taking note of this denunciation, feels bound to make all reservations."; the reply from Brazil read: "the *Brazilian* Government cannot accept such declaration without express reservation."; the reply from Sweden read: "the *Swedish* Government finds itself obliged to formulate every reservation: in its view it will be for the Court itself, should occasion arise, to pronounce on the legal effects of that declaration."; the reply from Czechoslovakia read: "the *Czechoslovak* Government is of opinion that, in the absence of any provision in the Statute regarding the denunciation of declarations, the matter is one in which reference should be made to the general rules of international law concerning the termination of international undertakings."; and the reply from the Netherlands read: "the *Netherlands* Government, while not opposed to the denunciation, finds itself obliged to formulate every reservation as regards the right of States to denounce treaties which do not contain a clause to that effect.".
See *Fifteenth Annual Report* (1938-1939), Series E, No. 15, p. 227, n.2.

15 See *Sixteenth Report* (1939-1945), Series E, No. 6, p. 358, n.2.

book of the International Court, 1946-1947, the Registry listed Nicaragua and Paraguay under the heading "Members of the United Nations, other States parties to the Statute and States to which the Court is open".[16] Both States, however, were attended to by a footnote explaining their special circumstances. In the last chapter of the same yearbook, under the heading "List of States which have recognized the compulsory jurisdiction of the International Court of Justice or which are still bound by their acceptance of the Optional Clause of the Statute of the Permanent Court of International Justice (Article 36 of the Statute of the International Court of Justice)",[17] both Nicaragua and Paraguay are again listed but accompanied by footnotes making cross-references to their special circumstances.

The yearbooks of 1949-1950 to 1955-1956 continued, in their chapters regarding texts governing the jurisdiction of the Court, to include Nicaragua and Paraguay in the list of states which had recognised the compulsory jurisdiction of the International Court of Justice or which were still bound by their declaration accepting the compulsory jurisdiction of the Permanent Court in that fashion. In these six yearbooks, the footnotes explaining the special circumstances associated with Nicaragua and Paraguay were replaced by cross-references drawing attention to the appropriate part of the earlier yearbooks or volumes of the yearbooks in which the declarations of acceptance were included. As of 1956, under the new Registrar, Mr. J. López Oliván (who was also the last Registrar of the Permanent Court and a member of the Delegation along with the Court's President, Judge Hudson, representing the Permanent Court of International Justice at the San Francisco conference), the yearbooks continued to include Nicaragua and Paraguay under the list of states that had accepted the compulsory jurisdiction of the Court with a variation in presentation. In the last chapter of the yearbooks, as of 1956, under the heading "acceptance of the compulsory jurisdiction of the Court in pursuance of article 36 of the Statute"[18] both Nicaragua and Paraguay are listed and are accompanied by footnotes directly indicating their special circumstances. These slight changes in format of presentation may be associated with the dispute between Nicaragua and Honduras over the arbitral award rendered by the King of Spain and a correspondence between the Registrar at the time and Judge Hudson, the former President of the Permanent Court of International Justice. In a letter to Judge Hudson on 2 September 1955, the Registrar concluded:[19]

> I do not think one could disagree with the view you express when you say that it would be difficult to regard Nicaragua's ratification of the Charter of the United Nations as affecting that State's acceptance of the compulsory jurisdiction. If the declaration of September 24, 1929, was in fact ineffective by reason of failure to ratify the Protocol of Signature, I think it is impossible to say that Nicaragua's ratification of the Charter could make it effective and therefore bring into play article 36, para. 5, of the Statute of the present Court.

In addition to the general disclaimer in the preface of the yearbooks of the International Court of Justice, a paragraph in the introductory section of the 1957

16 *Yearbook of the International Court of Justice* (1946-1947) 110.
17 Ibid. 221.
18 *Yearbook of the International Court of Justice* (1956-1957) 207.
19 Supra n.6, see the dissenting opinion of Judge Schwebel, para. 44.

Yearbook deals with jurisdiction of the Court. It states:[20]

> The text of declarations set out in this Chapter are reproduced for convenience of reference *only*. The inclusion of a declaration made by any State should not be regarded as an indication of the view entertained by the Registry or, *a fortiori*, by the Court, regarding the nature, scope, or validity of the instrument in question.

In short, the Yearbook, as the publication of the Registry, reports without judgement, the communications received from states. The entirely different question as to whether or not the 1929 Nicaragua declaration is valid is a legal one which has to be decided by the Court and through its judicial procedures in which the relevant state parties are entitled to participate. It requires an interpretation of international law for which the Secretariat has neither authority nor institutional facilities for conducting the requisite procedures. A decision at the Secretariat and even more, at the Registry level, to exclude the name of Nicaragua or Paraguay would have been an interpretation on the part of the Secretariat or the Registry regarding the international legal validity or meaning of the declaration of Nicaragua or of the national decree of Paraguay.[21] Cases such as Nicaragua's and Paraguay's place the Secretariat and the Registry in a most delicate situation. Their response was not inappropriate: presenting the two states under the list of states that had accepted the compulsory jurisdiction of the Court or states which are still bound by their adherence to the Optional Clause of the Statute of the Permanent Court and that have submitted a declaration under the optional clause, but adding footnotes indicating their special circumstances.

A similar reporting format was adopted in the reports by the Secretary-General on "multilateral treaties deposited with the Secretary-General". Since 1949, the Secretary-General has been submitting this report, including its information on states accepting the compulsory jurisdiction of the Court. But the latter, rather than being independently compiled, has been taken from the yearbooks of the International Court of Justice. In the 1949 report, under the heading "States whose declarations were made under article 36 of the Statute of the Permanent Court of International Justice and deemed to be still in force", the following sentence appears: "all data and footnotes concerning these declarations are reprinted from the yearbook 1947-1948 of the International Court of Justice."[22] Thus although the Secretary-General is the despositary of the declarations under the Optional Clause, the information provided in his annual report on multilateral treaties deposited with him is not original in the sense that decision-making on his part was not required. It only reflected the materials already contained and published by the Registry of the Court in the yearbook of the International Court of Justice. Taking into account the nature of the Secretariat's and the Registry's publications — simply for informational purposes with no binding effect on the part of the Court or on the part of other principal bodies of the United Nations — and in

20 Supra n.18, 207.

21 As of 1960-1961 *Yearbook of the International Court of Justice,* the name of Paraguay was dropped.

22 *Signatures, Ratifications, Acceptances, Accessions, etc. concerning Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary,* Sales No.: 1949, V. 9, p. 18.

the absence of any other instructions from the governments in question or from the Court, their format of presentation was appropriate, and expressed their cryptic but nonetheless unequivocal nuances.

V. PREVIOUS CASES

In at least one case in the past, *Temple of Preah Vihear*,[23] the Court reached a conclusion contrary to the presentation of materials in the I.C.J. Yearbooks. This case involved the question of territorial sovereignty of Cambodia or Thailand over the Temple of Preah Vihear. Thailand contested the Court's jurisdiction. When Thailand (then called Siam) signed the Protocol of Signature[24] on 20 September 1929, it made a declaration under the optional clause accepting the Permanent Court's jurisdiction for ten years. This declaration was renewed on 3 May 1940. Eight months after the demise of the Permanent Court, on 19 April 1946, Thailand, on 16 December 1946, joined the United Nations. Not knowing what the status of Thailand's ten year declaration was, the Registrar of the Court, as well as the Secretary-General, continued to list Thailand among the states which had recognised the jurisdiction of the International Court of Justice or which were still bound by their acceptance of the optional clause of the status of the Permanent Court. The Yearbooks of 1946-1947, 1947-1948, 1948-1949 listed Thailand's 1929 declaration and indicated that it was renewed in 1940. Thailand's 1940 declaration expired on 6 May 1950. On 20 May, 14 days after the lapse of the 1940 renewal action, Thailand again informed the Secretary-General that it was renewing its 1929 declaration for another ten years. The yearbooks of the Court, as well as the reports of the Secretary-General on multilateral treaties, rightly continued to list Thailand under the same heading, referring to the 1929 declaration as the original one and mentioning the subsequent renewals. Neither the Secretariat nor the Registry were authorised to take any decisions as to, first, whether the obligation of Thailand's 1929 Declaration could be carried over in relation to the new Court, even though Thailand joined the United Nations after the lapse of the Permanent Court, and, second, whether Thailand's 1950 renewal, having been made after the expiry date of the 1940 renewal action, could legally be considered as a renewal of the 1929 declaration. These questions were legal and clearly within the competence of the Court and not of the depositary or the administrative body of the Court.

In 1959, in the *Aerial Incident*[25] case, the Court had decided that binding declarations under the optional clause made by those states that joined the United Nations after the dissolution of the Permanent Court, were terminated and not carried over in relation to the new Court.[26] This conclusion by the Court was contrary to the practice of the Secretariat and the Registry both of which had included Thailand, since 1946, as a state that remained bound by its 1929 declaration. In 1959, Cambodia instituted a proceeding against Thailand. While the

23 *Case Concerning The Temple of Preah Vihear (Cambodia* v. *Thailand), Preliminary Objections,* Judgment of 26 May 1961: [1961] I.C.J. Rep. 17.
24 The instrument of ratification was submitted on 7 May 1930.
25 *Aerial Incident* of 27 July 1955 (Israel v. Bulgaria), Judgment [1959] I.C.J. Rep. 127.
26 Ibid. 137-138.

Court eventually found jurisdiction on another ground, it stated that Thailand's obligations under its 1929 declaration were terminated at the moment of the dissolution of the Permanent Court, on 19 April 1946. The Court further seemed to suggest that Thailand's declaration of 20 May 1950, 14 days after the expiry date of its 6 May 1940 renewal, was not another renewal of its 1929 declaration, but rather an assumption of a totally new obligation. The Court stated:[27]

> *Thailand had thus either never been bound since 1946, or had on any view, ceased to be bound as from 6 May 1950.* Thailand was therefore at this point (20 May 1950) entirely unfettered and not bound by the compulsory jurisdiction of this Court. She was completely free at that point either to accept or else not to accept that jurisdiction for the future. In this situation, she proceeded to do what Bulgaria never did, namely to address to the Secretary-General of the United Nations a communication embodying her Declaration of 20 May. By this she at least purported to accept, and clearly intended to accept, the compulsory jurisdiction of the present Court. The question is — and it is really the sole pertinent question in this case — did she effectually carry out her purpose?
>
> This Declaration of May 1950 was a new and independent instrument and has to be dealt with as such. It was not, and could not have been, made under paragraph 5 of Article 36 of the Statute. In the first place, this paragraph contained no provision for the making of specific declarations by States: where it operated, it operated *ipso jure* without any such specific declaration — that indeed was its whole point. In the second place, paragraph 5 was so worded as only to preserve the declarations concerned for the duration of the unexpired portion of the terms for which they still had to run; and *Thailand's previous Declaration of 1940,* whether or not kept alive by Article 36, paragraph 5, *was in any case due to expire on 6 May 1950, by its own terms.* The operation of Article 36, paragraph 5, was therefore, on any view, wholly exhausted by that date so far as Thailand was concerned. *It follows that Thailand's Declaration of 20 May 1950 was not a declaration which Thailand either did make, or ever could have made, under Article 36, paragraph 5, even if she had wanted to; and from this it follows that the 1950 Declaration must have been one which Thailand was making under paragraphs 2-4 of that Article,* and in at least purported or attempted acceptance of the compulsory jurisdiction of the present Court, which is the only tribunal contemplated by those paragraphs.

The Court's conclusions are clearly contrary to the format in which the Secretary-General's reports on multilateral treaties and the I.C.J. Yearbooks had been presenting Thailand's declaration and its subsequent renewal. The Court, rightly it is submitted, never once referred to the publications of the United Nations nor ascribed any legal or policy significance to them in relation to its judicial findings.

VI. THE *NICARAGUA* CASE

In its opinion in the *Nicaragua* case, the Court refers to the *conduct* of states and of international organisations. It states:[28]

> This finding as regards the interpretation of Article 36, paragraph 5, must, finally, be compared to the *conduct* of States and international organisations in regard to this interpretation. In that respect, particular weight must be ascribed to certain official publications, namely the *I.C.J. Yearbook* (since 1946-1947), the reports of the Court to the General Assembly of the United Nations (since 1968) and the

27 Supra n.23, 29. (Emphasis added).
28 Supra n.6, para. 36. (Emphasis added).

annually published collection of *Signatures, Ratifications, Acceptances, Accessions, etc., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary.*

By reference to the conduct of international organisations and considering the publications of the Registry and of the Secretariat of the United Nations as conduct of international organisations, it seems that the Court is suggesting that, first, the Secretariat of the United Nations and the Registry of the Court constitute *international organisations* and, second, that their publications *per se,* including republications, constitute *conduct* of international organisations. Both propositions are novel.

The International Court of Justice and the Secretariat are two of the six principal organs of the United Nations created under Charter Article 7(1).[29] The International Court of Justice has maintained, as did its predecessor the Permanent Court of International Justice, a rather independent stance as an international organisation due to the nature of its judicial functions. But the Secretariat has not been identified as an independent international organisation. The Secretariat, which provides the support system and performs a communication function for all the other principal and subsidiary bodies of the United Nations, does not qualify as an "international organisation"; it is only one component of an international organisation.[30] The Secretariat may be qualified as an international administrative apparatus of international organisations, but not as an international organisation *per se.*[31]

The identification of the Registry of the Court as an international organisation is even more puzzling. The Registry of the Court is created as an administrative assistant to the Court which is a judicial organ. Its Registrar is appointed by the Court, under Statute Article 21(2).[32] With the exception of the Registrar and the Deputy Registrar who are appointed by the Court, the rest of the staff of the Registry is appointed by the Registrar himself. The Registry could hardly

29 Paragraph 1 of Article 7 of the Charter provides:
1. There are established as the principal organs of the United Nations: A General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council and International Court of Justice, and a Secretariat.

30 Under Article 1(1) of the "Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character", of 14 March 1975, international organisation "means an intergovernmental organization". Under subparagraphs (a) and (b) of Article 1(4), an "organ" means any principal or subsidiary organ of an international organisation; or any Commission, Committee or sub-group of any such organ in which States are members.

31 Only the Secretary-General is appointed by the General Assembly on the recommendation of the Security Council as the *chief administrative officer* of the Organisation under Article 97 of the Charter. Otherwise, the staff of the Secretariat, international civil servants, are appointed by the Secretary-General under paragraph 1 of Article 101 of the Charter. Staff members are not government representatives, and they are prohibited from seeking or receiving instructions from any governments under paragraph 1 of Article 100 of the Charter.

32 Paragraph 2 of Article 21 of the Statute reads:
2. The Court shall appoint its Registrar and may provide for the appointment of such other officers as may be necessary.

qualify as an international organisation as the term is generally understood in international law. The Court was created as the principal judicial organ of the United Nations. Its importance resides in its decisions and opinions, i.e. its judicial functions. The Registry has no judicial function and its publication of the *Yearbook of the International Court of Justice* is part of the administrative function, which is controlled and directed by the Registrar of the Court.[33] Although the yearbooks are published with the consent of the Court, the Court does not appear to make decisions as to their content or the format in which the information should be provided.[34] Even if the Court was actively involved in

33 Subparagraphs (i) and (m) of paragraph 1 of Article 26 of the Rules of the Court provide:

"1. The *Registrar,* in the discharge of his functions, shall:

(i) *be responsible* for the printing and publication of the Court's judgments, advisory opinions and orders, the pleadings and statements, and minutes of public sittings in cases, and of such other documents as the Court may direct to be published;

. . .

(m) ensure that information concerning the Court and its activities is made accessible to Governments, the highest national courts of justice, professional and learned societies, legal faculties and schools of law, and public information media;" (Emphasis added).

34 The annual reports of the Permanent Court of International Justice, which are equivalent to the yearbooks of the International Court of Justice, were in fact prepared at the request of the Secretary-General of the League and by the decision of the Council. The Secretary-General of the League asked the Council at a session held in Rome in November, 1924, whether the Permanent Court of International Justice should be invited to prepare, for the information of the Assembly, an annual report. The Council adopted the proposal. This matter was examined by the Court at its extraordinary session, in January, 1925, and its favourable decision was transmitted by the Registrar to the Secretary-General on 24 January, 1925. See *Annual Report of the Permanent Court of International Justice,* 1 January, 1922-15 June, 1925, Series E, No. 1, p. 8.

The Permanent Court later decided that the Series E volumes, annual reports, should cover the entire activities of the Court in order to offer a complete picture of them. The Registrar of the Permanent Court, Mr Hammerskjöld, after referring to this decision in the introduction of the first annual report of the Permanent Court of International Justice (1922-1925), further states that it is to be understood that the contents of the annual reports, prepared and issued by the Registry, in no way engage the Court.

As for the International Court of Justice, it is indicated in its 1948-1949 yearbook that on 13 March 1947, the International Court of Justice instructed the Registrar to publish a yearbook providing general information concerning its organisation, jurisdiction and activities. Once again it is stated in the introduction to the yearbooks that they are prepared by the Registry and in no way involve the responsibility of the Court.

Therefore, it appears that the International Court of Justice (like its predecessor) made a decision to publish the yearbooks and that is its only administrative decision in this regard. The publications were prepared by the Registry under the directorship of the Registrar of the Court. There is no indication that the Court has made additional decisions as to the content or the format in which the yearbooks appeared. There is nothing, then, in the yearbooks to indicate that the decision to include Nicaragua and Paraguay under the list of States that have made a declaration under the optional clause was an administrative decision by the Court. Such a characterisation is inconsistent with the introductions in the yearbooks of the International Court of Justice emphasising that the yearbooks were prepared by the Registry and that it in no way engages the Court. It cannot be assumed that the Registry's decisions are the decisions of the "Court" in its "administrative capacity", for reasons developed in the text.

choosing the content and the format of the yearbooks, its "decisions" regarding jurisdiction could hardly be considered binding upon the states or the Court, for such decisions can only be made by the Court in its judicial capacity and through its judicial procedures in which the parties affected by it are entitled to participate. Were the Court to do otherwise it would move beyond the parameters established for it and act in *excès de pouvoir*. Not surprisingly, the Court itself admits in the opinion that decisions in its administrative capacity, do not bind the Court in its judicial capacity.[35]

In its opinion, the Court refers to the *conduct* of international organisations. Conduct is of course a term of art in international law. Characterising the functions of the Secretariat and of the Registry and particularly of the communication aspect of that function as international conduct presents certain problems. The functions of neither the Secretariat of the United Nations nor the Registry of the Court are comparable to those of the executive branch of governments. The Secretariat provides administrative support for the Organisation.[36] Contrary to governments, which generally act through their executive branch, the United Nations does not and cannot always act through its Secretariat. It has to rely on the goodwill and cooperation of its member states.[37] Moreover, not every activity of the Secretariat can be regarded as representing the views of the decision-making bodies of the Organisation.

Is the mere presentation of state communications within a certain format by the Secretariat or by the Registry *conduct?* Conduct, in its ordinary usage, involves more than words, more than a mere presentation of communications, without for the moment dealing with the fact that the communication in question says expressly that it is not decisive. In circumstances in which the Secretariat reports the behaviour of other principal organs, namely the decision-making organs of the United Nations *and then itself behaves consistently with those reports,* one may find the behaviour of the Secretariat as supporting the general conduct of the Organisation, the decision-making principal bodies as well as the Secretariat itself. But when the Secretariat simply reproduces the communications transmitted to it by its member states, it is neither reporting the decisions or the conduct of other decision-making principal bodies of the United Nations, nor is there any possibility that it itself might behave consistently with that report. If the Secretariat or the Registry, relying on their own understandings of the information received, would have made additional decisions relating to matters other than the mere presentation of the communications, those decisions might, as a reasonable use of language, be qualified as *conduct,* but still not conduct of international organisations.

35 Supra n.6, para. 38.

36 The Secretary-General is the chief administrative officer of the organisation. (See Charter Article 97.) In addition to acting in that capacity in the meetings of the Security Council, the Economic and Social Council and the Trusteeship Council, the Secretary-General must perform "such other functions as are entrusted to him by these organs". (See Charter Article 98.)

37 See for example, measures to be taken under Chapter VII of the Charter, "Actions with respect to threats to the peace, breaches of the peace and Acts of Aggression", Articles 39-51.

Later in its opinion, the Court states that a certain understanding was created on the part of states by the Secretariat *official* publications.[38] In this regard, the Court makes two assumptions: first, that the publications of the Secretariat unquestionably presented Nicaragua as a State that had accepted compulsory jurisdiction and that this was clearly understood by Nicaragua and by other states; second, because states did or should have attributed sufficient importance to the publications of the Secretariat, a lack of reaction on their part regarding the content and the format of publication and the reproduction of the same materials in the domestic publications of some states proves their acceptance of it.

Both of these assumptions encounter serious problems. As for the first, the format employed by the Registry of the Court and later reprinted by other Secretariat publications did not, as shown, convey a certain understanding that Nicaragua had become bound by the compulsory jurisdiction of the Court. The format was non-committal and it expressed cryptic but hardly mistakable nuances on the matter. The second assumption, that states did or should have attributed sufficient importance to the publications of the Secretariat and that therefore a lack of reaction on their part proves their acceptance of it, cannot be categorically relied upon in this case. Taking into account the disclaimer in the introductions of all the yearbooks of the International Court of Justice, it is difficult to understand how anyone could responsibly rely upon the information presented in the yearbooks. In addition, it is unrealistic to expect states, among all their other responsibilities, to read every year and examine carefully some half a million pages of the Secretariat's publications, most of which are for information, and react to all of them. Furthermore, the term "*official* publications"[39] of the United Nations only means that they are published by the United Nations and carry the U.N. symbol or sales number, a matter of form and of identification of the documents. The word "official" can neither be construed as having any bearing on the substance and the content of what has been printed nor does it always represent the attitude of the parties involved, particularly if the "official publication" is not their own. As regards the United Nations publications, the attribution of attitude to the parties concerned with the content of those documents should be made even more carefully. Take, for example, the United Nations *Reports on International Arbitral Awards,* an official publication of the United Nations which reprints inter-state arbitration awards. The purpose of the Reports is to make more readily available the evidence of international law for information purposes. But the mere reprinting of the awards in a U.N. official publication cannot be interpreted as meaning that the award is an accurate statement and application of international law, that the parties to the arbitration have consented to the award and that this would prevent any of them from challenging the award for nullification or requesting revision or clarification of it. Such an interpretation would stretch the purpose of such publications far beyond the Secretariat's intentions, and probably lead prudent legal offices in member states to withhold documents or otherwise impede the information function to the detriment of the international community.

38 Supra n.6, paras. 38, 39 and 40.
39 Ibid. para. 36. (Emphasis added).

VII. CONCLUSION

Thus it would be most damaging to the communication function of the Secretariat and the complex network of communications created for this purpose by international organisations to superimpose an extensive legal importance on the publications of the United Nations. The political restraints on the Secretariat when it performs this function will become even more severe henceforth, if it is understood that its publications, instead of providing and disseminating information, may actually bind states in areas where neither the Secretariat nor the states had intended it.

There is nothing in the Charter of the United Nations to prevent the Secretariat from interpreting international law. But such an interpretation, in many ways useful for informational purposes, should not be considered as binding states. U.N. documents are often prepared by smaller departments or divisions within the Secretariat, some consisting of a few staff members. It would be unrealistic and ultimately counter-productive to assume that international civil servants' interpretations of certain facts or law express state consensus and actually bind states. Even without that burden, misunderstandings and political frustration often force staff members to apply "a form of self-censorship" on themselves and the documents they produce.[40] The reports on *general information,* on facts and analysis of legal, social and economic matters should not be considered any more authoritative, for example, than those of learned societies. Otherwise states will become resentful of and will attempt to minimise and reduce the scope of the communication function of international organisations performed by the Secretariat.

The purpose of this article is not to comment on the Court's conclusions as to its jurisdiction in the case between Nicaragua and the United States. It is only to express concern about certain novel propositions, direct and implied, made by the Court regarding the purpose, procedure and legal significance of the United Nations communication function, performed primarily by its Secretariat and by the Registry of the Court. These propositions are inconsistent with the purposes and the functions of the Secretariat as intended and designed by the Charter and established by practice. As a matter of long-term policy, they will undermine this important but little noted contribution which international organisations have been able to make to the maintenance of world public order.

40 In a recent report of the Joint Inspection Unit of the United Nations entitled "Reporting to the Economic and Social Council" (JIU/REP/84/7) prepared by Maurice Bertrand, the effect of political considerations on the reports to ECOSOC was explained as follows: "Misunderstandings and frustrations develop both within the Secretariat and among delegations. *Interpretations of the political situation lead staff members in many cases to apply a form of self-censorship which is not favourable to the dissemination of information,* the development of initiatives or the formulation of constructive proposals." (Emphasis added).