

General Introduction*

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A. Introduction

- 1 The Statute of the ICJ is the legal instrument that expresses and establishes the kind of tribunal the Court was to be, its powers and competences, and the limitations on those powers and competences. It seems right, therefore, to begin by describing some of the main characteristics of the court thus established. That is the purpose of Part A of this Introduction. Part B is a chronological survey of the work of the Court to see how it fared at various stages of its, now, more than half a century of being. Part C suggests certain general conclusions.

B. General Issues

I. The Relation between the Present Court and the PCIJ

- 2 The intention in 1946 was that there should be continuity between the new Court and the old Court, the PCIJ.¹ The archives of the PCIJ had, throughout World War II, remained intact in the Peace Palace at the Hague, so that the ICJ was able to take over both the premises and the archives of the former Court. Accordingly the Statute of the International Court of Justice was firmly based upon the final version of the Statute of its predecessor; the arrangement and even the numbering of the Articles being largely parallel in both versions. The necessary redrafting to bring in references to the United Nations in place of the references to the League of Nations, and the incorporation of other desired new elements was accomplished, first by the United Nations Committee of Jurists which met in Washington in 1944, and then by Committee IV of the United Nations Conference on International Organization in San Francisco (UNCIO) in 1945. Less well-known is the work of a 1943–1944 Informal Inter-Allied Committee (the ‘London Committee’) which, on the initiative, and under the chairmanship of Sir William Malkin, the then Foreign Office Legal Adviser, had also studied the ‘Future of the Permanent Court of International Justice’.² This report was hardly mentioned in Washington and San Francisco; nevertheless it was a representative committee,³ and it is interesting to see where their Report differed from the solutions ultimately reached; for some of their differing views are still sometimes heard.
- 3 One of the most interesting was the view of the London Committee that it had been a mistake to make an organic connection between the PCIJ and the League of Nations, for it had meant that the old Court had been affected by the varying fortunes of the League.

¹ For an assessment of the PCIJ’s work, and its influence on the ICJ *cf.* Spiermann, Historical Introduction.

² The report is reproduced in *AJIL* 39 (1945) (Supplement), pp. 1–42. On the work of the London Committee *cf.* the late Geoffrey Marston’s essay ‘The London Committee and the Statute of the International Court of Justice’ in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 40–60. Readers who refer to this article by the late Geoffrey Marston will realize the debt that the present part of this Introduction owes to that article, to which readers are referred for a fuller description of both the work of the London Committee and the later and definitive work at Washington and San Francisco.

³ The invitees included Australia, Belgium, Canada, Czechoslovakia, the French National Committee, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, South Africa, the Soviet Union, and Yugoslavia; *cf.* Marston, in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 40, 47, fn. 25. The jurists who were able to be there included, *e.g.*, Kaeckenbeek for Belgium, Cassin and Gros from the French National Committee, Stavropoulos for Greece, and Winiarski for Poland.

This view of the London Committee had to be abandoned when it became apparent at the Dumbarton Oaks discussions that both the United States and the Soviet Union were in favour of a strong connection between the new Court and the United Nations. Nevertheless the worries of the London Committee are in a way echoed in the history of the International Court of Justice which has vacillated between an early policy of purposely keeping the United Nations somewhat at arm's length and the more recent one of actively cultivating a close connection with the United Nations and more especially with the General Assembly as well as its Sixth Committee.⁴

Also interesting because it seems now to be again the subject of discussion, was the view of the London Committee that there should be no permanent representation of certain countries and that no express provision should be made for the representation of different legal systems. They also thought that 15 was too large a number of judges for satisfactory working and that nine, with a quorum of seven, would be better. This would have been a return to what was the situation in the PCIJ before it was enlarged to its present size of 15 by the 1929 Protocol for the Revision of the Statute of the PCIJ⁵ which came into effect in 1936. The London Committee also thought the nomination of candidates to be judges of the Court by the national groups of the Permanent Court of Arbitration was 'unsatisfactory' and would have left it to the governments.⁶

More important were the London Committee's ideas about the scope of the jurisdiction of the new Court. They wanted its jurisdiction to be confined to matters which are really 'justiciable'. As a consequence '[a]ll possibility should be excluded of its being used to deal with cases which are really political in their nature and require to be dealt with by means of political decision and not by reference to a court of law'.⁷ Whether it would have been wise to have had a provision to this effect may be doubted, but the importance of the sentiment can hardly be denied. The rule of law in a community requires ways of making two different kinds of decisions, both of them needed and both complementing each other: the decisions made by applying rules of law; and decisions made by applying reasons of policy. The notion once taught by academic international lawyers, that a court of law can and should deal with any kind of dispute is, in this writer's opinion, fundamentally erroneous. The organs of government must include, alongside courts, other organs for making policy decisions, and in respect of those policy decisions the function of the court of law should be confined to determining whether the political organ is acting *intra vires* its powers as defined by the applicable constitutional and administrative law. It was consistently with this, that the London Committee was, like Dumbarton Oaks and San Francisco, in favour of retaining advisory opinions 'if only to serve as a method of dealing with constitutional questions arising in a future general international organization'.⁸

⁴ The recent practice has been that the President of the Court and the Registrar, often accompanied by some other judges, are present in the United Nations at some of the time of the autumn meeting of the General Assembly. President Nagendra Singh started the practice of actually addressing the Sixth Committee; President Jennings in 1992 initiated a practice of the President addressing the General Assembly as well as the Sixth Committee. Both practices appear to have continued. The dependence of the Court on the United Nations for its budget tends to make close ties now essential.

⁵ PCIJ, Series D, No. 1, pp. 9 *et seq.*; for further details *cf.* Spiermann, Historical Introduction, MN 36–38.

⁶ On the procedure established by Arts. 4–8 *cf.* the respective commentaries by Zacklin/Golitsyn/Georget.

⁷ Para. 56 of the Committee's report, *AJIL* 39 (1945) (Supplement), pp. 1, 17.

⁸ *Ibid.*, p. 22 (para. 69). For a stimulating comment on such questions *cf.* Bowett, D.W., 'The Court's Role in Relation to International Organizations', in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 181–192.

- 6 The close relationship of the new Statute to the Statute of the PCIJ means that it is quite often useful still to make more or less extensive reference to the provisions and experience of the earlier Statute. There are very few of the more important aspects of the present Court that have not been derived from the equivalent provisions of the former revised Statute of 1929, which amended several articles in the light of experience and added the new Chapter IV (Arts. 65–68 of the revised Statute) on advisory opinions. It is remarkable that this Statute has, in more or less the same terms other than the changing of references to the League of Nations into references to the United Nations, served the two courts for over 80 years.

The principal characteristics of the ‘World Court’ thus imagined and created seem to be the following.

II. The Court and the Charter of the United Nations

- 7 The PCIJ had been provided for in Art. 14 of the Covenant of the League of Nations, which stated that the Court should ‘be competent to hear and determine any dispute of an international character which the parties thereto submit to it’; and that the Court ‘may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly’ of the League of Nations. This double function of the Court—contentious jurisdiction and advisory opinion—was in 1946 continued for the new ICJ and was readily fashioned to fit the UN context instead of the League of Nations.

- 8 To comprehend the relationship of the ICJ and the United Nations, however, one has to consult, as well as the Court’s Statute, Chapter XIV (Arts. 92–96) of the UN Charter, which is headed ‘The International Court of Justice’.⁹ These Charter provisions placed the ICJ in a relationship with the United Nations markedly different from the former relationship of the PCIJ to the then already existing procedures of judicial settlement. Article 1 of the 1922 Statute had stated by a simple recital that the PCIJ would be ‘in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement’. The PCIJ was thus ranked, as it were, alongside other existing procedures and institutions for the settlement of disputes between States.

- 9 The position of the 1946 court was relatively much enhanced by Art. 92 of the UN Charter which provided that:

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

The effect of the Statute being part of the Charter meant *inter alia* that it would be politically very difficult to amend.¹⁰

- 10 When Art. 92 UN Charter provides that the ‘International Court of Justice shall be the principal judicial organ of the United Nations’, one has to be grateful for the use of the definite article, for this presumably means that there is only one ‘principal’ judicial organ of the United Nations and the ICJ is it. What qualities can be said to flow from

⁹ For further details *cf.* Oellers-Frahm on Arts. 92–96 UN Charter.

¹⁰ *Cf.* further Karl on Arts. 69 and 70, *passim*.

that position must depend upon changing practices rather than from such inferences as might be drawn from this text.

It is further provided (Art. 93 UN Charter) that all Members of the United Nations are *ipso facto* parties to the Statute of the ICJ; and that other States may become parties to the Court's Statute 'on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council'.¹¹

Most importantly, Art. 94, para. 1 UN Charter provides that '[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party'. This accurately limits the *res judicata* to States parties to the particular case; a quite different problem from that of the decision as a precedent source of law, which might later be found to be binding upon other States. Article 94, para. 2 UN Charter provides that:

[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations to decide upon measures to be taken to give effect to the judgment.¹²

In addition, Art. 95 UN Charter provides: 'Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future'. That is a very desirable liberty which would manifestly be compromised if general 'compulsory jurisdiction' for the Court were ever to be achieved.¹³

Finally, Art. 96 UN Charter in turn lays down which organs are to be entitled to seek an advisory opinion. Obviously the General Assembly and the Security Council 'may request' an advisory opinion 'on any legal question'. For other certain kinds of organs, Art. 96, para. 2 provides that '[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities'.¹⁴

III. The Court's Ambivalent Position

One feature of the ICJ that is unusual for any higher court but one that it now shares with several other international tribunals, including most arbitrations, is that in the exercise of its jurisdiction, the Court is normally in the position of being at the same time both a court of first instance and a court from which no appeal is possible. It is the 'principal' judicial organ of the United Nations but there is no hierarchical system of courts in the UN system that would give some clear and practical meaning to this quality. This position of being both the first and the last court explains why the Court finds itself so often spending a great proportion of its time over preliminary questions of a kind which, for most higher courts, have normally already been dealt with by lower courts. In recent decades the so-called 'proliferation' of other kinds of international tribunals has produced significant problems.¹⁵

¹¹ For further details *cf.* Oellers-Frahm on Art. 93 UN Charter, *passim*.

¹² For further details *cf.* Oellers-Frahm on Art. 94 UN Charter MN 18–31.

¹³ For further details *cf.* Oellers-Frahm, on Art. 95 UN Charter, *passim*.

¹⁴ For further details *cf.* Oellers-Frahm on Art. 96 UN Charter, as well as Frowein/Oellers-Frahm on Art. 65, both *passim*.

¹⁵ The Court's relationship with other international courts and tribunals is assessed by Gaja, Relationship; on the issue of proliferation *cf.* especially MN 23–24.

IV. The Consensual Basis of Contentious Jurisdiction

- 16 The consensual basis of the Court's contentious jurisdiction—the only jurisdiction or competence the Court has to make decisions that are legally binding upon the parties—is not merely inherited from the Statute of the PCIJ but is also a concomitant of a fundamental principle of international law itself. This is the area which, ever since the Hague Peace Conferences, has been the scene of an endeavour by some international lawyers, to try to bring about some degree of so-called 'compulsory' jurisdiction for an international court. The only compromise solution found attainable in both 1920 and 1946 was that enshrined in the second paragraph of Art. 36 of the ICJ Statute, the so-called 'optional clause' jurisdiction (it was in its original PCIJ form an optional protocol). But typical 'declarations' of acceptance made under Art. 36, para. 2 by governments have tended to be more or less qualified by carefully drafted reservations;¹⁶ and these have inevitably provided a tempting space for argument by parties and by judgments on preliminary questions of jurisdiction. This sometimes gave rise to the unfortunate apprehension that, even when the World Court had an appearance of being quite busy, much of its 'work' was about preliminary matters and usually about jurisdiction; and that these preliminary proceedings often led to a decision that the Court had no jurisdiction to decide any of the substance of the matter brought before it.
- 17 There is, however, an important gloss on the principle of consensual jurisdiction that is briefly referred to in the final paragraph of this same Art. 36 (in both the 1922 and the 1946 versions). In 1946 this became para. 6 of that article and provides that '[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'.¹⁷ This is also the position in principle for international tribunals generally and may be one of the few clear examples of those 'general principles of law' referred to in Art. 38 of the Statutes of both Courts;¹⁸ it is also frequently referred to by its French name of the *compétence de la compétence*. The co-existence of the consensual jurisdiction principle with the principle that a tribunal can nevertheless itself determine disputes about jurisdiction is a situation which is not free from an element of contradiction, and is fertile ground for some often highly technical disputes which the Court has had to settle.¹⁹

V. The Size of the Court

- 18 The number of 'members' of the Court, as the judges are referred to in the Statute, has varied; but since the 1929 Protocol for the Revision of the Statute of the PCIJ, in its revised Art. 3, and also since the 1946 Statute of the ICJ, Art. 3, para. 1, the number has remained as 15²⁰ (with a quorum of nine as provided by Art. 25, para. 3 of the

¹⁶ Cf. Tomuschat on Art. 36 MN 76 *et seq.*; and from the rich literature *e.g.* Oda, S., 'Reservations in the Declarations of Acceptance of the Optional Clause and the Period of Validity of those Declarations: The Effect of the Shultz Letter', *BYIL* 59 (1988), pp. 1–30.

¹⁷ For an analysis *cf.* Tomuschat on Art. 36 MN 101 *et seq.*

¹⁸ On these principles *cf.* Pellet on Art. 38 MN *et seq.*

¹⁹ For a penetrating and thorough discussion of the principle of consent and its possible variations, it is still very useful to refer to Fitzmaurice, Sir G., 'The Law and Procedure of the International Court of Justice, 1951–4; Questions of Jurisdiction, Competence and Procedure', *BYIL* 34 (1958), pp. 1–161, pp. 66 *et seq.*; for a new seminal study of the many aspects of the jurisdiction question *cf.* Orakelashvili, A., 'The Concept of International Jurisdiction: A Reappraisal', *LPICJ* 2 (2003), pp. 501–550.

²⁰ Cf. Aznar Gómez on Art. 3 MN 1–3.

Statute²¹). The question of size is tempered also by the provisions in Art. 9 that ‘in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured’.²² These are not qualifications that lend themselves readily to definition. It is clear however that this representative function of the judges has to mean that a sitting of the full court of all the members may be seen as carrying greater, or at least broader, authority than a chamber of a few members. Maybe this is the reason why most governments minded to bring cases before the Court’s contentious jurisdiction elect to go before the full Court rather than before chambers. And indeed the Rules and the practice of the Court reflect this notion that a large element of the undoubted authority of the Court is derived from its ensuring this representative capacity even in the details of its procedures of decision-making.²³

It must also be borne in mind however that, if the full Court is to be the main workhorse of the Court system, the total membership must be within reasonable limits if the Court is to be able to involve the entire membership in the carrying out of the work of the Court’s decision-making. This is often far from easy to ensure even with 15 members (which may be inflated to 16 or 17 with *ad hoc* judges). Enlargement of the Court’s membership, or indeed any serious extension of the use of *ad hoc* chambers of the Court,²⁴ would entail a fundamental change in basic principles governing the ways in which the Court works. Such a change might eventually be found to be necessary and even desirable if the work of the Court continues to expand. But the qualities that the Court’s existing procedures have brought about should not be lost sight of when considering changes in the size or form of the Court.

VI. The Court as an Institution

A crucial quality of the Hague ‘World Court’ (a useful shorthand name for the two Courts) was, as the initial use of the word ‘permanent’ in the title of the PCIJ clearly implied, that it was to be an institution; a court that would always be there waiting for cases and that it would never be necessary for it to be constituted as a tribunal *ad hoc*. As Professor Abi-Saab so well puts it, it:

is the organ of the legal order of that community [the international community] and not of the parties to the dispute before it; it is an instrument put by the international legal order at the disposal of the litigants, without however depending on them in its structural and functional properties or in its judicial policy.²⁵

VII. The Court’s Adversarial Process

This is not the place to get involved in the debate between so-called adversarial and inquisitorial ways of proceeding, and one might accept the opinion that all courts have a mixture of both tendencies, and it is just a matter that ‘some systems are more adversarial—or inquisitorial—than others’.²⁶ The essential point to be made about the

²¹ On the required quorum *cf.* Palchetti on Art. 25 MN 13–19.

²² On this criterion *cf.* Fassbender on Art. 9 MN 28–37.

²³ Jennings, Sir R.Y., ‘The Internal Judicial Practice of the International Court of Justice’, *BYIL* 59 (1988) pp. 31–47.

²⁴ *Cf.* Palchetti on Art. 26 MN 28–39.

²⁵ Abi-Saab, G., ‘The International Court as a World Court’, in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 3–16, p. 7.

²⁶ Jolowicz, J. A., ‘Adversarial and Inquisitorial Models of Civil Procedure’, *ICLQ* 52 (2003), pp. 281–295, p. 281

ICJ is that the procedure laid down, especially in the Rules of the Court (which the Court itself has power to 'frame' under Art. 30 of the Statute)²⁷ do opt for an adversarial procedure in the sense that the procedure requires and ensures a series of ritual confrontations between the parties; the first, which is initially confidential, in the written mode and then a second in the public oral procedures in the Great Hall of Justice of the Peace Palace.²⁸ Indeed the ultimate ritual confrontation of arguments in public is what most parties seek and expect when they invoke the contentious jurisdiction of the ICJ. It has certain consequences. This way of proceeding is different in mode, effects and feel from the political arena in which the case will probably have been dealt with hitherto. Many of the former arguments may now no longer be relevant. Instead, the requirement is that the parties at various stages make their 'submissions', which submissions are designed to have the effect of 'reducing' the matter into listed, particular disputed issues of law or fact, which particular issues the court is invited to determine. This process of reduction to listed disputed issues is the very stuff of the judicial function. The Statute of the Court (Art. 38, para. 1) even defines the contentious jurisdiction in general as being to decide 'disputes' in accordance with international law.²⁹ These issues, or some of them, will then henceforward become the focus of the argument of the parties and eventually of the Court's own deliberations. In other words, resort to 'judicial determination' is a very specific and formalized method of seeking a decision and is crucially different in form and discipline from the other methods listed in Art. 33, para. 1 UN Charter.³⁰ It is this ritual, 'artificial' (in the good sense of that word) and with its elaborate rules of courtesy and forms of pleading, that gives the method great strength and accounts for the fact that most judgments are observed by the parties in one form or another; and that a judgment in any event at least changes the position and the relative strengths of the parties.

- 22 This Court scene of two or more teams of agents and counsel confronting each other in accordance with known rules, practices and rituals, can also face the judges themselves with a dilemma: whether their proper function should be to try to do what they see as 'justice' between the parties; or whether it is rather to act as an umpire judging between the performances of each team of counsel when compared with their opponents.³¹ The dilemma is not made easier by the fact that the two possible attitudes are usually not entirely distinguishable. The dilemma can present itself in a variant form: is the business of a court just to decide the dispute or is it to develop the law? The problem sometimes emerges into the open when a court gives as a reason for its decision an argument that did not feature in the pleadings of either party. The complaint on this score, when there is one, usually comes not from the party but from counsel who naturally tend to put it in terms of an assertion that a court should never decide on a ground which has not been argued by counsel in open court. The usual reply is along the lines that it can hardly be wrong for judges to do some research on their own and to demand a new argument by counsel would be costly both in delay and in money. This question is a classic judicial dilemma and is a matter for judicial experience and experiment rather than fixed rules. It is notable that the instances of generally accepted innovations by a court—trying to do

²⁷ For further comment on that power *cf.* Thirlway on Art. 30 MN 4 *et seq.*

²⁸ On the two parts of the Court's procedure *cf.* Talmon on Art. 43, especially MN 17 *et seq.*

²⁹ For further elaboration on the notion of 'disputes' *cf.* Tomuschat on Art. 36 MN 8–10.

³⁰ For further elaboration *cf.* Tomuschat on Art. 33 UN Charter MN 24.

³¹ The problem also arises of course in domestic courts; *cf. e.g. Air Canada v. Secretary of State for Trade* (1983) 2 AC 394, in the English House of Lords, and the comment by Jolowicz, J. A., *On Civil Procedure* (2000), p. 178.

justice and even to 'develop' the law—are ones where the judges have got their timing right for making the change.

VIII. The Reporting of Cases

From the beginning both the PCIJ and the ICJ cases, contentious and advisory, have appeared in a series of reports. Wherever there is a system of reports, the development of a case law will follow; and both courts have shown great respect for their own earlier decisions. In recent years the tendency of the Court only to refer to its own cases has given way to occasionally permitting even in judgments a reference to other courts and even to arbitration awards. The system of reports is more lavish than will be found even in common law systems which have been built upon the availability of law reports; and in England at least there is no series of 'official' reports, and what is thought good to report and what is ignored is for the reports editor to decide. The ICJ pleadings series publishes case documentation and written and oral arguments in addition to the series of judgments and opinions. Moreover every case is reported as, even, are orders. It remains to be seen whether so lavish a system will be able, or need, to cope with the present strong flow of decisions from the ICJ.³² The new strong flow of cases must be good for the development of case law. It will be good if it spells the end of the time when each case was seen as an isolated great event. What a healthy case law needs is a strong flow of related cases, giving rise to what the French call a '*jurisprudence*'.

IX. Separate and Dissenting Opinions

It is clear from the Statute (Art. 57) and from the Rules and the conventions established by practice that the framers of the ICJ Statute, when dealing with the question of separate, including dissenting, opinions, were minded to follow the practice of common law courts in giving a free rein to those judges who wish to write separate opinions.³³ The judges have tended to enjoy this privilege to the full. The ICJ separate opinions (both assents and dissents) can on occasion be very long and sometimes longer than the Court's own decision.

This tendency towards sheer length was encouraged by the questionable doctrine invented by the late Judge Sir Hersch Lauterpacht, and eagerly subscribed to, and indeed practised, by Judges Jessup and Fitzmaurice: that it is incumbent upon international judges to deal comprehensively with every serious argument raised in the case by a 'sovereign' State; a doctrine encapsulated in a memorable phrase as displaying 'a full measure of exhaustiveness'; the implication being presumably that 'international' judges are much more important than other kinds of judges. This purely indulgent stance was extended by Fitzmaurice even to excuse dealing in a separate opinion with 'points that lie outside the strict *ratio decidendi* of the case'.³⁴ These suggestions calling upon writers of separate opinions freely to indulge themselves has encouraged what may be called the

³² Jennings, *ILR* 102, pp. ix–xxiii.

³³ On the drafting history cf. Hofmann/Laubner on Art. 57 MN 4–11.

³⁴ Cf. Judge Fitzmaurice in the *Barcelona Traction, Light and Power Company, Limited (Belgium/Spain)*, Second Phase, ICJ Reports (1970), p. 65. cf. also Judge Jessup in the same case (p. 162); and for the invention of the doctrine cf. Lauterpacht, Sir H., *The Development of International Law by the International Court* (rev. ed. 1958), p. 37 where he calls for 'a full measure of exhaustiveness of judicial pronouncements of international tribunals'. It should be said that this particular Fitzmaurice opinion in the *Barcelona case* was of such quality as to make one glad of its thoroughness and even of its exhaustiveness.

'monograph' type of opinions which may be stimulating in professorial seminars but can only confuse and discourage governments from becoming parties to a case if what they seek is a clear and unambiguous solution of their particular dispute. The Court has indeed greatly and vitally 'developed' international law; but to carry full authority this should be done with persuasive skill and good timing and above all a manifest relevance to the instant case; for the parties are not usually keen to see a 'development' of the existing law as it had been explained to them by their counsel before they decided to go to the Court.

X. Chambers of the Court

- 26 The Statute of the PCIJ in its original form (Arts. 26–30) provided for the creation of chambers to deal either with particular kinds of cases (*e.g.* labour cases) or for 'summary jurisdiction'. The 1929 Protocol introduced a number of changes to Arts. 26, 27 and 29. The ICJ Statute also provides for chambers, but in rather different terms, though in the like numbered articles.³⁵ Chambers have indeed been employed for some cases no less important or less complex than cases before the full court.³⁶
- 27 There is one general point about chambers of the Court that is not dealt with in either the Statute or the Rules: the chambers of the Court all include in their membership some members of the full Court. Therefore the very existence of a working chamber means that at certain times either a full court case has to be delayed or the chamber case has to give way and itself be delayed. To put the same point another way: a working chamber tends to irk those members of the Court who have no part in it, whilst the members who are members of the chamber may tend to feel that the chamber does not enjoy the support and help the chamber ought to enjoy from the Court as a whole; especially as it is provided in Art. 27 that '[a] judgment given by any of the chambers in Arts. 26 and 29 shall be considered as rendered by the Court'.³⁷
- 28 Having now at any rate a partial picture of the kind of tribunal that the Statute drafters envisaged, one may turn to see how it has fared in the half century or rather more since it has been an essential part of the rule of law in international affairs.

C. Activity of the Court

- 29 The measure of the successes or failures of the ICJ is to be found primarily in the nature and importance of the cases it has decided.³⁸ That work has inevitably changed from time to time in accordance with the changes in the international community that the Court exists to serve and of which it is a part. The Court is bound to have shared the successes and also the weaknesses of the United Nations of which it is the principal judicial organ.

³⁵ For information on the historical development of these provisions *cf.* Palchetti on Art. 27 MN 1 and on Art. 26 MN 20–21.

³⁶ Some of the cases decided by chambers of the ICJ are discussed *infra*, MN 97–107; for a fuller treatment *cf.* Palchetti on Arts. 26–29, *passim*. ³⁷ *Cf.* Palchetti on Art. 27 MN 2–3.

³⁸ The cases are conveniently listed in the volumes of the ICJ Yearbook, and also in Summaries of Judgments, Advisory Opinions and Orders of the ICJ, published by the United Nations. *cf.* also the work by Patel for convenient lists, summaries and references. Unfortunately there have been very few even partial studies of the subsequent histories of decisions of the Court. This is a work that needs to be done. But it is the lawyers' besetting sin to believe that when the case papers have disappeared into the archives that that is the end of the matter. For comments upon the legal content of the decisions the definitive work is Thirlway, 'Law and Procedure', in successive volumes of the *BYIL* in and after vol. 60 (1989).

Probably the greatest change that has affected the International Court of Justice, and this soon after its inauguration, was the process of decolonization which, in the first decades of the new Court, produced a significant and increasing number of new and independent sovereign States members of the United Nations. In their view of international law these newly independent nations understandably tended towards a conservative emphasis on the importance of national sovereignty, which was at odds with the pre-war views of many international lawyers that emphasis on the sovereignty of States was a hindrance to the fuller development of international law; in particular, this new love-affair with sovereignty could hardly have been a climate of opinion less favourable to the more general acceptance of optional cause jurisdiction of the Court. 30

This situation was aggravated by suspicions about the, at that time, undeniably predominantly European and Western representation of the membership of the Court; and this at a time when the sheer number of new States and new members of the United Nations made the unbalance more glaring. It was quite a change to have the constituency that the Court had to serve doubled and then trebled in the space of a few years. At the time of writing the membership of the United Nations amounts to 191. 31

The other big change in international relations which was to last for four decades of the ICJ was the 'Cold War'. This could not be a comfortable situation for a Court whose membership continued to represent both sides of the Cold War and also indeed the third group of non-aligned countries that emerged. But such difficult problems were the inescapable lot of a 'World Court' that was making, in all the circumstances, a valiant effort to fulfil that role. 32

The changes also produced changes in international law as it attempted to find answers to deal with novel situations: concepts such as self-determination;³⁹ the rather curious expansion of the idea of *uti possidetis juris* from being a Latin-American law to a general law for the determination of the boundaries of new States;⁴⁰ the notions of a 'new economic order' and of 'sovereignty over national resources',⁴¹ and the new problems to be answered by a changing law of the succession of States and the succession of governments;⁴² these were all powerful engines of change which could produce both opportunities for the ICJ, and also potential disaster if and insofar as the Court failed to handle them wisely. 33

So, with these basic changes in the context in which the ICJ was henceforward to operate, we may now look at the cases to assess how the judges coped. Clearly it will not be possible in this introduction to look in any detail at the something like 100 contentious jurisdiction cases decided by the time of writing and the some 30 advisory opinions. It will however be possible to look at the general tendencies of the Court during the period, and thus also get some feel for the future of the Court and for whatever changes may or may not be needed. 34

It will be convenient to divide this more detailed survey of the Court's work into four periods, treating in turn the first three decades of the Court's history and then the period of growth from 1976 to the present time. However, it should be added that this is purely for the convenience of exposition. The story in reality is of course continuous. 35

³⁹ Cf. Crawford, J., 'The General Assembly, the International Court and Self-Determination', in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 585–605.

⁴⁰ For a brief discussion cf. Wooldridge, F., 'Uti Possidetis Doctrine', EPIL IV, 1259 *et seq.*

⁴¹ On these developments cf. Tomuschat, C., 'New International Economic Order', EPIL III, 578 *et seq.*

⁴² For a discussion cf. Fiedler, W., 'State Succession', EPIL IV, 641 *et seq.*

I. The First Decade: 1946–1956

- 36 During this period the Court was reasonably busy; indeed it might be said to have been ‘fully employed’.⁴³ It made a distinguished start with its first case, the *Corfu Channel case*⁴⁴ between the United Kingdom and Albania. After the Court had rejected preliminary objections to the jurisdiction, the parties were then able, under some pressure from a recommendation of the Security Council,⁴⁵ to enter into a Special Agreement. In the decision on the merits the judgment importantly defined the legal position of territorial straits leading between different parts of the high seas and also dealt with some delicate problems about the legal limits on the use of force.
- 37 Much depended upon findings of fact, a problem in which the Court has not always been shown at its best. In the *Corfu Channel case*, however, the Court appointed a Committee of ‘neutral’ naval officers to inspect the sites involved and to report to the court with answers to eight specific questions they had been asked to investigate.⁴⁶ This seems to have worked very well. The case was therefore an important precedent because little guidance is to be found either in the Court’s Statute or in its Rules of Court, on the methods to be employed to determine disputed questions of fact.
- 38 The *Corfu Channel case* was a very good beginning for the Court; indeed, the principal decision of the Court about the legal position of international straits was adopted as law in Art. 16, para. 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone.
- 39 Bolder, but very influential, was the judgment in another maritime matter, the *Norwegian Fisheries case*.⁴⁷ This in effect changed the law as it had hitherto been widely understood to be, concerning the extent and boundaries of national internal waters, thus also pushing out the baselines of territorial waters. The Court seems to have been persuaded that the west coast of Norway—deeply indented and cut into and with a fringe of islands—was geographically a most unusual coast; it was a curious irony that the geography of the Norwegian coast was paralleled by the west coast of Scotland, to which a like regime was later applied by the claimant in the case, the United Kingdom. The Court’s decision was not popular with the maritime powers, but it was nevertheless quickly generally accepted and was to receive its final *imprimatur* in its adoption as Art. 4 of the Geneva Convention on the Territorial Sea,⁴⁸ which was in 1982 also incorporated in the UN Convention on the Law of the Sea. It was an impressive example of the power of a bold and innovative but also very successful decision of the Court.
- 40 Other judgments in this first decade were also important but nothing like so far-reaching as the first two. The *Anglo-Iranian Oil Company case*⁴⁹ was one in which the Court found that it did not have jurisdiction over the case. In the *Asylum case*⁵⁰ the Court found itself faced with a difficult case between Columbia and Peru over the interpretation of the Havana Convention on embassy asylum, but was able to make a

⁴³ Cf. Sinclair, Sir I., ‘The Court as an Institution: its Role and Position in International Society’, in Bowett, ICJ, pp. 21 *et seq.*

⁴⁴ *Corfu Channel* (United Kingdom/Albania), ICJ Reports (1948), pp. 15 *et seq.*; ICJ Reports (1949), pp. 4 *et seq.*

⁴⁵ Cf. Stein on Art. 36 UN Charter MN 12–13 and 27–28.

⁴⁶ Cf. Walter on Art. 44 MN 8 and Tams on Art. 50 MN 7.

⁴⁷ *Norwegian Fisheries case* (United Kingdom/Norway), ICJ Reports (1951), pp. 116 *et seq.*

⁴⁸ UN Doc. A/Conf.13/L.52-L. 55.

⁴⁹ *Anglo-Iranian Oil Company* (United Kingdom/Iran), ICJ Reports (1952), pp. 93 *et seq.*

⁵⁰ *Asylum case* (Columbia/Peru), ICJ Reports (1950), pp. 266 *et seq.*

decision by goodly majorities. Similar matters surfaced again in the *Haya de la Torre case*⁵¹ which was decided unanimously except for a dissent of one *ad hoc* judge on one point. The *Rights of Nationals of the United States of America in Morocco case*⁵² was decided with a useful majority.

The *Minquiers and Ecrechos case*⁵³ between France and the United Kingdom over the sovereignty of two tiny groups of rocks offshore the Channel Island of Jersey gave rise to extremely learned argument and pleadings from both sides. Yet the practical importance of the rights over these tiny rocks was the implications for fishing rights in the neighbouring waters; and the two parties had earlier made an agreement about fishing so a main question at issue had already been disposed of. It gives the impression of having been a case much enjoyed by all those who took part in it.

The *Monetary Gold case*⁵⁴ arose from an attempt by the United Kingdom to attach gold belonging to Albania, but lodged with the applicant Italy, in order to use it to satisfy the damages awarded by the Court in the *Corfu Channel case*. The Court found that it could not adjudicate the claims but so found in such a technical and complicated a way as to have inspired much comment. In sharp contrast is the Declaration expressed in one elegant and short paragraph in which President McNair gave his opinion simply that the claim was ‘misconceived’ and therefore should have been quite shortly dismissed.⁵⁵

The not very satisfying *Nottebohm case* (Liechtenstein/Guatemala)⁵⁶ serves to illustrate the dangers of hitting upon an innovatory way of disposing of a case without considering possible effects in a different kind of situation. One can only presume that the members of the Court, who voted for the ‘genuine link’ formula to qualify the rule of the nationality of claims, simply had not thought how that might work for the nationality of merchant vessels as it led straight to the ‘flags of convenience’ problem.⁵⁷

The *Ambatielos case*⁵⁸ was a more or less satisfactory dealing with a jurisdiction problem and the meaning of a treaty obligation to arbitrate between Greece and the United Kingdom; a case which meandered somewhat inconclusively for a considerable time and also involved domestic courts of the United Kingdom.

During this first decade of the Court’s existence it was also much occupied with requests for advisory opinions. These included two opinions on the *Admission of States to the UN*;⁵⁹ an important opinion on *Reservations to the Genocide Convention*;⁶⁰ no less

⁵¹ *Haya de la Torre* (Colombia/Peru), ICJ Reports (1951), pp. 71 *et seq.*

⁵² *Rights of Nationals of the United States of America in Morocco* (France/United States), ICJ Reports (1952), pp. 176 *et seq.*

⁵³ *Minquiers and Ecrechos* (France/United Kingdom), ICJ Reports (1953), pp. 47 *et seq.*

⁵⁴ *Monetary Gold Removed from Rome in 1943* (Italy/France, United Kingdom und United States), ICJ Reports (1954), pp. 19 *et seq.*

⁵⁵ *Ibid.*, p. 35.

⁵⁶ *Nottebohm case* (Liechtenstein/Guatemala), ICJ Reports (1953), pp. 111 *et seq.*; ICJ Reports (1955) pp. 4 *et seq.*

⁵⁷ The Court was later faced with some of the consequences in the advisory opinion of 8 June 1960 concerning the *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, ICJ Reports (1960), pp. 150 *et seq.*

⁵⁸ *Ambatielos case* (Greece/United Kingdom), ICJ Reports (1952), pp. 28 *et seq.*; ICJ Reports (1953), pp. 10 *et seq.*

⁵⁹ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, ICJ Reports (1948), pp. 57 *et seq.*; *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Reports (1950), pp. 4 *et seq.*

⁶⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951), pp. 15 *et seq.*

than three opinions on various aspects of the *South West Africa* question;⁶¹ and an opinion on the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*.⁶²

46 Of great and lasting importance was the extremely important advisory opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*.⁶³ The question was whether the United Nations was competent in international law to bring a claim concerning the assassination of an individual who was assassinated whilst acting as a servant of the United Nations. The opinion in effect determined the direction in which international law was to develop concerning what persons, and what entities other than States, could themselves bring and support claims based on the alleged breach of international law rules. This was a case where the ICJ was able to give a bold and even innovatory opinion with remarkable effect. This opinion was arguably one of the most important ones ever made by either of the courts.

47 So, if one might summarize the position at the end of the first decade of the Court, it had made a very good start and had kept busy with significant cases and with its reputation well intact.

II. The Second Decade: 1956–1966

48 At the beginning of this second decade there was a development in the United Nations which greatly affected nomination of candidates for membership of the Court. For some time there had been informal regional groupings of governments in the United Nations, but in 1957 the General Assembly officially recognized their existence in Resolution 1192 (XIX) of 12 December. There were at this time six of these working groups: African States; Asian States; Eastern European States; Latin American and Caribbean States; Western European and other States. These met regularly in confidential meetings to discuss business and to decide joint attitudes. These Groups have long powerfully influenced and indeed sometimes decided many aspects of UN matters and have been much involved in candidatures, which of course included nominations of candidates for election to the ICJ. These Groups have often been of decisive influence and their meetings are usually confidential (there are now five, the African and Asian Groups having merged in 1970). As to nominations and elections to the Court, it has to be said that some decisions have effectively been made in these confidential meetings; and contemplation of the nomination and election procedures set out in the Statute of the Court and in the Charter of the United Nations give only a partial and inadequate idea of what actually happens in practice.⁶⁴

49 The actual work load of the Court fell a little in its second decade, but included several difficult cases; and two judgments about South West Africa, one in 1962 and the other in 1966, were to prove very damaging to the Court.⁶⁵ But the second decade's work began with more mundane matters.

⁶¹ *International Status of South West Africa*, ICJ Reports (1950), pp. 128 *et seq.*; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, ICJ Reports (1955), pp. 67 *et seq.*; *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, ICJ Reports (1956), pp. 23 *et seq.*

⁶² *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports (1950), pp. 221 *et seq.*

⁶³ *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), pp. 174 *et seq.*

⁶⁴ Cf. e.g. Blokker, N./Muller, S., 'The 1996 Elections for the International Court of Justice', *ICLQ* 47 (1998), pp. 211–223; and Harland, C., 'International Court of Justice Elections: A Report of the First Fifty Years', *Canad. YIL* (1996), pp. 303–367. Cf. also Zacklin/Golitsyn/Georget on Art 4 MN 14–21.

⁶⁵ Cf. *infra*, MN 58–60.

The *Norwegian Loans case*⁶⁶ was more important for preliminary problems of jurisdiction than for the substantive issue about the meaning of a loan agreement between France and Norway, and whether the debt should be paid in gold value. France, the claimant in the case, had accepted the optional clause jurisdiction but subject to what became known as an 'automatic' reservation: that France did not accept the jurisdiction of the Court over matters which were 'domestic' to France as this term was defined for each case by France. Norway pleaded reluctantly but correctly that, because of the rule of reciprocity, Norway was entitled to plead France's automatic reservation. Norway accordingly did define the matter before the Court as one 'domestic' to Norway and governed by Norwegian law. The majority of the Court held, by nine votes to six, that this defence of the respondent was valid, so the Court had no jurisdiction to decide the case.

Judge Sir Hersch Lauterpacht, whilst agreeing with the Court's decision, elaborated in a careful and strongly felt separate opinion a different, and in his view a prior, reason for that decision: that the automatic reservation was contrary to the letter and intention of the Statute of the Court and therefore the French declaration under Art. 36 was itself null and void.⁶⁷ This opinion caused a great stir in academic international law circles. But it produced hardly a ripple of effect in the practical world of governmental policy towards the Court.

In the *Interhandel case*,⁶⁸ Switzerland was the claimant and the United States of America the respondent. The Court, after first rejecting a Swiss application for provisional measures of protection, then went on to hold that it had no jurisdiction to decide the question of the treatment of a Swiss company by the US government, because the local remedies in the United States had not been exhausted. This decision was hardly calculated to diminish the growing feeling that the Court's proceedings could take a long time but that in the end the claimant was likely to be told that the Court had no jurisdiction and therefore was unable even to consider the merits of a claim.

This familiar pattern of long hearings over jurisdiction again featured in the case, between Portugal as claimant and India as respondent, over alleged rights of passage of the claimant over Indian territory joining two Portuguese enclaves.⁶⁹ The Court had first to deal with no fewer than six preliminary objections by India, of which the last two were joined to the merits. The Court found finally that there were certain narrowly defined rights of passage but that India had not breached the rights. The matter was meanwhile resolved by the Indian Government taking over the Portuguese enclaves by force of arms.

Another abortive result was reached in three 'aerial incident' cases.⁷⁰ In the first one brought by Israel against Bulgaria⁷¹ the Court found that it had no jurisdiction. In two others, United States of America against Bulgaria and United Kingdom against Bulgaria,⁷² the cases were removed from the list at the request of the parties.

⁶⁶ *Certain Norwegian Loans* (France/Norway), ICJ Reports (1956), pp. 73 *et seq.*; ICJ Reports (1957), pp. 9 *et seq.*

⁶⁷ Sep. Op. Lauterpacht, ICJ Reports (1957), pp. 34 *et seq.*

⁶⁸ *Interhandel* (Switzerland/United States), ICJ Reports (1957), pp. 122 *et seq.*; ICJ Reports (1959), pp. 6 *et seq.*

⁶⁹ *Right of Passage over Indian Territory* (Portugal/India), ICJ Reports (1957), pp. 125 *et seq.*; ICJ Reports (1960), pp. 6 *et seq.*

⁷⁰ For a proper treatment of this question *cf.* Shubber, S., 'The Contribution of the International Court of Justice to Air Law' in Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 316–329.

⁷¹ *Aerial Incident of 27 July 1955* (Israel/Bulgaria), ICJ Reports (1959), pp. 127 *et seq.*

⁷² *Aerial Incident of 27 July 1955* (United States/Bulgaria), ICJ Reports (1960), pp. 146 *et seq.*; ICJ Reports (1959), pp. 264 *et seq.*

- 55 There was one substantial case about disputed land territory between Cambodia and Thailand.⁷³ This, as usual, was in two stages: the first about jurisdiction and the second on the merits. A merits decision was eventually made by the Court over a small but celebrated site which was important for the tourist industry.
- 56 An application by Honduras brought to the Court a territorial dispute with Nicaragua over the implementation of an arbitral award made in 1906 by the King of Spain.⁷⁴ This resulted in a judgment in favour of Honduras.
- 57 The *Northern Cameroons case*,⁷⁵ a dispute between Cameroon and the United Kingdom about the previous British mandate for that territory and the obligations of the mandatory, the Court found by ten votes to five (with powerful dissents, including an especially closely and persuasively argued dissent of *ad hoc* Judge Morelli)⁷⁶ that it was unable to exercise jurisdiction because a decision was ‘now without point’; a decision that did not escape both surprise and criticism.⁷⁷
- 58 This second decade was, however, to end with a 1966 decision that did grave damage to the Court. The case had in fact begun on 4 November 1960 when both Ethiopia and Liberia made identical applications to the Court alleging that South Africa, as the mandatory for South West Africa, had in several respects failed in its international legal duties to the United Nations as successor to the League of Nations. The Court, by an order, decided that the identical applications be joined as being in the same interest; so the parties were limited to suggesting only a single *ad hoc* judge.⁷⁸ There followed the stage of deciding on South Africa’s preliminary objections to the jurisdiction, and by eight votes to seven it was decided (with some powerful dissents) that the Court did have jurisdiction to hear the merits.⁷⁹ The Court accordingly fixed the merits stage for the summer of 1966.
- 59 In the meantime the membership of the Court had changed owing to a routine election, and Sir Percy Spender had been elected the new President. Both parties and their counsel arrived in 1966 expecting to argue the merits. Seven members of the Court, however, now returned to the preliminary objections and were minded to hold that the applicants had failed to establish any legal right or interest in the subject matter of their claims and that their case ought therefore to be dismissed. Another seven members were opposed to this course and only the casting vote of the President ensured a judgment ending the case on the ground of lack of jurisdiction.⁸⁰ The decision surprised even the respondent and was bitterly contested both inside and outside the Court (the report with its numerous very long separate or dissenting opinions extends to 508 pages).⁸¹
- 60 In strictly legal terms there was much to be said for the bare majority opinion but it was politically inept in that it served only to fuel the suspicions of the third world. There

⁷³ *Temple of Preah Vihear* (Cambodia/Thailand), ICJ Reports (1961), pp. 17 *et seq.*; ICJ Reports (1962), pp. 6 *et seq.*

⁷⁴ *Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras/Nicaragua), ICJ Reports (1960), pp. 192 *et seq.*

⁷⁵ *Northern Cameroons* (Cameroons/United Kingdom), ICJ Reports (1963), pp. 15 *et seq.*

⁷⁶ Diss. Op. Morelli, ICJ Reports (1963), pp. 131 *et seq.*

⁷⁷ Cf. e.g. Mann, F. A., ‘Doctrine of International Jurisdiction Revisited After 20 Years’ in *Further Studies*, pp. 1–83, p. 59.

⁷⁸ *South West Africa* (Ethiopia/South Africa; Liberia/South Africa), ICJ Reports (1961), pp. 13 *et seq.*; on the underlying problem cf. Kooijmans on Art. 31 MN 26–36.

⁷⁹ ICJ Reports (1962), pp. 319 *et seq.*

⁸⁰ ICJ Reports (1966), pp. 6 *et seq.*

⁸¹ Different aspects of this decision are e.g. discussed by Dugard (on Art. 13 MN 17–18), Fassbender (on Art. 55 MN 12), and Bernhardt (on Art. 59 MN 15, 27, 29).

is no need to doubt the sincerity of either side on the split court. Certainly Sir Gerald Fitzmaurice who was strongly for the dismissal of the case was also a man who deeply loathed the South African policy of ‘apartheid’;⁸² but he also believed passionately that the law as it stands must, however unpopular or unattractive the result, be applied strictly by the principal judicial organ of the United Nations. The case demonstrates with great clarity that judging is an art rather than a science and that it can be an agonizingly difficult role to fulfil. The timing of this decision could hardly have been worse. It was indeed to produce a relative famine of cases in the 1970s and to fuel calls, at the Third UN Conference on the Law of the Sea, for the creation of a new court, the International Tribunal for the Law of the Sea, to deal with the maritime cases which alone were within the remit of the conference. But many advocates of a new court at the conference saw it rather as a competitor and alternative to the ICJ.⁸³

Before leaving this rather unfortunate second decade, mention should also be made of 61 four advisory opinions. Two of them were about South West Africa: one was advising on the voting procedures in the General Assembly on *Questions Relating to Reports and Petitions Concerning the Territory of South Africa*,⁸⁴ and the other on the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*.⁸⁵ The third opinion was that of 1960 on the *Constitution of the Maritime Safety Committee* of what is now the International Maritime Organization (IMO).⁸⁶ This opinion, asked for by the Assembly of IMO, simply applied the somewhat less than far-seeing decision made by the Court in the *Nottebohm case* to the question of which were the ‘largest ship-owning nations’.

The most important advisory opinion of this period was that about *Certain Expenses of 62 the United Nations*.⁸⁷ The question involved was a product of the Cold War, and resulted in a well-thought-out treatment of a range of problems in the constitutional law of the United Nations. It is valuable because the need for a more developed international constitutional law is a question that has seldom enjoyed the attention that it deserves; either from the Court or from international lawyers in general.

III. The Third Decade: 1966–1976

This was a crucial time for the Court and not at all an easy one. The 1966 decision on 63 South West Africa had inspired some actual hostility to the Court, and this became apparent from some delegations to the Third UN Conference on the Law of the Sea. There was a marked falling off of the number of cases during the early 1970s, but it began to pick up again towards the end of this third decade.

The dangers to the Court after the unhappy 1966 judgment did not go unnoticed in 64 the United Nations. General Assembly Resolution 2723 (XXV) of 15 December 1970 asked the Secretary General to institute a review of the ‘Role of the International Court of Justice’ and this was accomplished by addressing a series of well-chosen questions to members of the United Nations and publishing their replies in a Secretary General’s

⁸² A private handwritten letter to this writer is on file with the author.

⁸³ On the background of the Tribunal’s establishment cf. e.g. Boyle, A., ‘Dispute Settlement and the Law of the Sea Convention. Problems of Fragmentation and Jurisdiction’, *ICLQ* 46 (1997), pp. 37 *et seq.*

⁸⁴ *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, ICJ Reports (1955), pp. 67 *et seq.*

⁸⁵ *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, ICJ Reports (1956), pp. 23 *et seq.*

⁸⁶ *Constitution of the Maritime Safety Committee*, ICJ Reports (1960), pp. 150 *et seq.*

⁸⁷ *Certain Expenses of the United Nations*, ICJ Reports (1962), pp. 151 *et seq.*

Report of 15 September 1971.⁸⁸ This document is a source of informed comment from several governments about many questions arising from both the practice of the Court and the provisions of its Statute. One of the most interesting of the questions was inevitably the problem of different phases of the same case being considered by a court with a changing membership; a matter which had already arisen in the PCIJ in the case of the *Free Zones of Upper Savoy and the District of Gex*.⁸⁹ The Report has some very interesting discussions of this and of many other still topical matters (the Swiss contribution is especially informed and interesting). But many of the answers quickly run into the inescapable political difficulties of bringing about any change in the Statute of the Court.

- 65 A more promising way of effecting change is to change the Rules of Court, which the Court has full power to do; and this was not unnoticed by the members of the Court in this same period of difficulty. For when the case load fell off, the Court, and most certainly the members of the Court's Rules Committee, were far from idle. They conducted a thorough review and rewriting of the Court's Rules, which resulted in the 1978 version which is still, with a few modest recent changes, the one basically in force.⁹⁰ It is not possible to consult the minutes of those meetings of the Committee, which are kept confidential. But the changes were timely and very well done and all friends of the Court owe a debt of gratitude to those judges who laboured so effectively.

1. Contentious Cases

- 66 If one turns now to the cases in this third decade in the Court's history beginning with the year 1967, there was a very promising burgeoning in 1968 with what is still one of the most important of the cases at any time: the *North Sea Continental Shelf case*, with Denmark and the Netherlands on the one side and the Federal Republic of Germany on the other.⁹¹ The task given to the Court was potentially of broader general significance than this particular matter of the North Sea, for the case was about continental shelf boundaries; and there were at that time many such other boundaries that were undetermined and potentially disputed.
- 67 The Court, however, was not asked to delimit the disputed boundaries but to give an answer to one question, disagreement on which had brought negotiations to a halt: whether the law required the employment of the principle of equidistance, which Denmark and the Netherlands wished to espouse, or a looser notion of 'equitable principles' which Germany espoused. So the Court was requested to decide 'what principles and rules of international law are applicable to the delimitation as between the parties of the areas of the continental shelf in the North Sea which appertain to each of them'.⁹² Denmark and the Netherlands had ratified the 1958 Geneva Convention which espoused the equidistance rule but Germany had not.
- 68 The decision of the Court on the merits, and which favoured the German thesis, is still one of the most cited and respected of all the Court's judgments; indeed the main

⁸⁸ UN Doc. A/8382.

⁸⁹ *Free Zones of Upper Savoy and the District of Gex* (France/Switzerland), PCIJ, Series A/B, No. 46, pp. 96 *et seq.* The matter is further discussed by Dugard, Art. 13 MN 13–18.

⁹⁰ *Cf.* Thirlway on Art. 30 MN 8.

⁹¹ *North Sea Continental Shelf case* (Germany/Denmark; Germany/Netherlands), ICJ Reports (1969), pp. 3 *et seq.* A Court order decided that Denmark and the Netherlands were in the same interest and that the case should be heard together and treated as one: ICJ Reports (1968), pp. 9 *et seq.*; for further elaboration on this point *cf.* Kooijmans on Art. 31 MN 30.

⁹² ICJ Reports (1969), pp. 3, 6.

decision was incorporated into Art. 76 of the 1982 UN Convention on the Law of the Sea.

The judgment is learned, elegant and the result of skill and deep thought about the basic issues involved. One of the surprises however is that, in spite of the clearly restricted request made by the parties, the judgment does indicate—and plots in a diagram—what the majority believed to be the correct boundaries according to ‘the principles and rules’ of international law. Yet the three governments, once the judgment had loosened what had caused the deadlock of their negotiations, went on to negotiate new boundaries which were significantly different from those plotted by the Court. But the decision was successful in enabling the parties to continue their negotiations; which is what they had gone to court to achieve. It was also important in helping to restore the Court’s reputation. It showed that the judicial process could be usefully resorted to, in a matter likely to produce a series of cases; a hope which did eventually materialize, though also quite a few such cases went to *ad hoc* arbitrations rather than to the Court. 69

Here mention should be made of a heavy-weight but unhappy case which had actually started life on 23 September 1958, with an Application by Belgium against Spain: the *Barcelona Traction, Light and Power case* rather scandalously kept the Court more or less occupied for some ten years and finally achieved a judgment in 1970.⁹³ The main issue in the case was controversial and difficult, but it was also simple and elementary: could Belgium claim a remedy in international law on behalf of the Belgian shareholders of a Canadian company (Canada took no part in the case) claiming reparation for the losses incurred after an obscure local court in a small Spanish town had declared the company bankrupt, in proceedings of which the shareholders said they had not been notified? After very lengthy pleadings and arguments the Court in 1970, in ‘a decision of almost incredible narrowness’⁹⁴ decided that it was unable to offer any remedy to the claimant. 70

It was not good for the reputation of the Court that this negative result had taken so long to reach. It was a case in which the Court seems to have allowed the counsel to have their expensive way. Both sides had teams which varied in number at the stages of preliminary objections and of the merits, but both apparently found it necessary to field more or less a dozen or even more counsel and advisers. The expense of both money and time for achieving this very narrow and negative decision was manifestly disproportionate. 71

2. Non-appearance

This third decade saw a troubling flourishing of the ‘non-appearance’ of respondents; not a new phenomenon but one appearing in a new form and threatening to become almost routine.⁹⁵ The Court was faced with this problem in 1972, in the two *Fisheries Jurisdiction cases* of the United Kingdom against Iceland and of the Federal Republic of Germany against Iceland, about fishing boundaries.⁹⁶ Iceland was extending its claimed exclusive fishing rights to a belt of 50 miles from the shore. The cases, which were not joined, began with requests for provisional measures of protection, in what was also 72

⁹³ The relevant decision can be found in ICJ Reports (1961), pp. 9 *et seq.*; ICJ Reports (1964), pp. 6 *et seq.*, ICJ Reports (1970) pp. 3 *et seq.*

⁹⁴ Mann, p. 59.

⁹⁵ For studies of the whole subject of non-appearance cf. Thirlway, H.W.A., *Non-appearance before the International Court of Justice* (1985); as well as von Mangoldt/Zimmermann on Art. 53, *passim*.

⁹⁶ *Fisheries Jurisdiction* (United Kingdom/Iceland)(Germany/Iceland), ICJ Reports (1972), pp. 12 *et seq.* and pp. 30 *et seq.*; ICJ Reports (1973), pp. 3 *et seq.* and pp. 49 *et seq.*; ICJ Reports (1974), pp. 3 *et seq.* and pp. 175 *et seq.*

threatening to become a routine method of getting priority for a hearing (see. Art. 74, para. 1 of the Rules of Court),⁹⁷ though priority was clearly justified where the conservation of fish stocks was in question. The requests were granted in both cases in long, technical and carefully drafted orders of the Court.

73 The respondent Iceland had refused to appear before the Court in either case or in any of the proceedings. As was to become usual in such cases, the absence of the respondent government from the counsels' benches did not prevent the government from itself sending a closely argued letter or letters to the Court, in effect a written pleading of sorts; or of posting a representative amongst the audience in court to observe and to take notes. Non-appearance was not of course a novel idea, it was contemplated even in the Statute of the PCIJ and is provided for in Art. 53 of both Statutes.⁹⁸ It is not an unlawful tactic but there are legal consequences such as the possibility of judgment by default.

74 The Court in these fisheries cases found itself in a difficult position quite apart from the non-appearance of the respondent; for the law of the sea was very much on the move and the Icelandic claim was within a few years in effect to be justified at any rate for the future by the provisions of the 1982 UN Convention on the Law of the Sea. The Court's judgment on the merits was elaborate but the two basic principles were first that the Icelandic claim was not 'opposable' to the United Kingdom, or to Germany; and that all parties were under a legal obligation to negotiate a solution. On the whole one might be justified in saying that a difficult problem was dealt with by the Court sensitively and constructively. The Court was regaining its touch.

75 The continental shelf proper and its boundaries was again before the Court in the *Aegean Sea Continental Shelf case*—a long-standing and politically-charged claim brought by Greece against Turkey in 1976 (the hearings in that year were again on the matter of a request for interim protection; the final judgment was not until 1978). Here, Turkey chose not to appear but the Court refused provisional measures of protection before first addressing the matter of jurisdiction; and then, in the merits phase, found very plausibly that the Court did not have jurisdiction.⁹⁹

76 There shortly followed another example of the non-appearance tactic, this time used by the respondent France in a brace of cases brought against her by Australia and by New Zealand respectively. The claimants were objecting to France's series of nuclear atmospheric tests carried out from islands in the South Pacific. There were requests for interim measures of protection by the applicants, and these were granted in both cases, though in rather mild terms of simply avoiding aggravation of the dispute.¹⁰⁰ France did not appear in any part of the cases but stated in a communication to the Court that its lack of jurisdiction was manifest. When it came to the merits,¹⁰¹ again in the absence of France, the Court held, perhaps rather weakly, that the French government having recently made statements that its tests were completed or at any rate about to cease, it could now be said that the two applications no longer had 'any object', and that therefore the Court was not called upon to make a decision. Thus was the earlier *Cameroons* decision¹⁰² put to a use far from its original context. It should also be mentioned that

⁹⁷ On these procedural aspects *cf.* Oellers-Frahm on Art. 41 MN 48–50.

⁹⁸ For further information *cf.* von Mangoldt/Zimmermann on Art. 53 MN 7–16.

⁹⁹ *Aegean Sea Continental Shelf* (Greece/Turkey), ICJ Reports (1976), pp. 3 *et seq.*; ICJ Reports, (1978), pp. 3 *et seq.*

¹⁰⁰ *Nuclear Tests* (Australia/France), ICJ Reports (1973), pp. 99 *et seq.* and *Nuclear Tests* (New Zealand/France), ICJ Reports (1973), pp. 135 *et seq.* respectively.

¹⁰¹ ICJ Reports (1974), pp. 253 *et seq.* and pp. 457 *et seq.*

¹⁰² *Cf. supra*, MN 57.

Fiji had, before the merits phase, requested permission to intervene; but this was refused in accordance with what was then the habitual Court hostility to intervention.¹⁰³

France was unforgiving of the Court and in the mid 1970s withdrew entirely her acceptance of the optional clause jurisdiction and for a long time resisted the submission to the Court of any disputes in which France was involved.¹⁰⁴ It was for this reason that Anglo-French continental shelf boundary disputes in the English Channel and the Western Approaches were submitted not to the Court—which the United Kingdom would surely have accepted—but to an *ad hoc* court of arbitration in 1977;¹⁰⁵ which court nevertheless had two ICJ judges in its membership.

Again, the same explanation serves for three other important arbitrations: the French disputes with Canada over *La Bretagne*;¹⁰⁶ and the 1992 dispute with Canada over St. Pierre and Miquelon;¹⁰⁷ and with New Zealand in 1990 over the vessel *Rainbow Warrior*.¹⁰⁸ France, as a permanent member of the Security Council, has still retained its ‘right’ to have a French judge on the Court¹⁰⁹ and indeed recently provided a distinguished President of it.

3. Advisory Opinions 1966–1976

There were three advisory opinions during this decade. There was *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970)*.¹¹⁰ This was an important opinion—and there were dissents from Judges Fitzmaurice and Gros¹¹¹—since it dealt with a matter involving the relationship of the Court and the Security Council.

On the other hand it would be difficult to find a matter of less importance in international relations than the next advisory opinion on an *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*,¹¹² but all courts have to take the cases as they come, the less important with the important. Nevertheless, it took 47 pages for the opinion to uphold the judgment of the Administrative Tribunal. The declaration of President Lachs suggesting that it ought to be possible to find a better way of dealing with this sort of question rather than appeal to the ICJ, was eventually to bear fruit.¹¹³

Rather different was the third and last of the advisory opinions of this third decade: the opinion on the *Western Sahara*.¹¹⁴ This was in answer to questions posed by a General Assembly resolution of 13 December 1974, concerning a former Spanish colonial territory and which Spain no longer wished to claim but the destiny of which was disputed between Morocco, Mauritania and Algeria; or there was perhaps also a

¹⁰³ Cf. ICJ Reports (1974), pp. 530 *et seq.* and pp. 535 *et seq.*; for further analysis of the Court’s cautious approach cf. Chinkin on Art. 62, especially MN 17–19.

¹⁰⁴ Cf. however *infra*, MN 84, for more recent cases in which France again appeared before the Court.

¹⁰⁵ ILM 18 (1979), pp. 397 *et seq.*

¹⁰⁶ *Dispute concerning Filletting within the Gulf of St Lawrence (La Bretagne)* (Canada/France), 82 ILR 590 *et seq.*

¹⁰⁷ *Delimitation of Maritime Areas between Canada and the French Republic (St Pierre and Miquelon)*, ILM 31 (1992), pp. 1145–1178.

¹⁰⁸ ILM 82 (1990), pp. 499 *et seq.*
¹⁰⁹ On the tendency of electing judges from countries with a permanent seat on the Security Council cf. Zacklin/Golitsyn/Georget on Art. 4 MN 25, 29; Fassbender on Art. 9 MN 20–21.

¹¹⁰ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971), pp.16 *et seq.*

¹¹¹ Diss. Op. Fitzmaurice, *ibid.*, pp. 220 *et seq.*; Diss. Op. Gros, *ibid.*, pp. 323 *et seq.*

¹¹² *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, ICJ Reports (1973), pp. 166 *et seq.*

¹¹³ Cf. Zimmermann/Thienel on Art. 60 MN 9 for brief comment.
¹¹⁴ *Western Sahara*, ICJ Reports (1975), pp. 12 *et seq.*

right of self-determination for the creation of a new independent State. The request, however, was about an historical question: 'Was Western Sahara (Rio De Oro and Sakiet El Hamra) at the time of colonialization by Spain a territory belonging to no one (*terra nullius*)?' And if the answer were in the negative then a further request was '[w]hat were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?'¹¹⁵ This undoubtedly raised some critical, difficult and elementary questions about the laws governing the acquisition of territorial sovereignty, particularly territories inhabited by nomadic tribes; and the opinion is much cited by lawyers interested whether academically or practically in those matters. But the underlying doubts of some critics turn on whether it is right for the Court, when asked to answer a technical and particular question which is closely related to actual or potential territorial disputes, to answer that question not in contentious proceedings between actual claimants but as an abstract and historical question which nevertheless might be crucial to a particular claim that has been or might in the future be made? The Court needs to consider, when faced with this kind of dilemma, what would be its position if an actual case involving the same crucial point were thereafter to come before the Court's contentious jurisdiction; and probably a court with a different membership.¹¹⁶

4. *Summary of the Decade 1966–1976*

- 82 This third decade of the International Court of Justice began badly with the 1966 decision on South West Africa. It fed the beginnings of actual hostility to the Court. Fortunately this hostility, in the third UN Conference on the Law of the Sea, was successfully channelled into the more constructive role of the creation of the International Tribunal for the Law of the Sea, which could not be seen so much as a rival of the ICJ but as a needed and useful alternative, and providing remedies that are not possible for the ICJ.
- 83 But despite a bad beginning to the third decade, it was rather splendid that the work was carried on mostly very well, and that thus was laid a foundation for the new flow of cases from the mid 1980s onward, when Libya and Nicaragua, both very much from the third and developing world, became eager and loyal litigants before the ICJ. In considering the revival of the Court and the new flow of business, it is well to remember the part played by counsel encouraging their clients to go to the Court. So, to this happier period, extending to the present time, we may now turn.

IV. 1976 to the Present Time¹¹⁷

1. *General Considerations*

- 84 The new vitality of the ICJ is shown by the present General List of cases. In earlier times one had to be grateful if there was one case, or more rarely two cases, on the Court's list.

¹¹⁵ GA Res. 3292 (XXIX) of 13 December 1974.

¹¹⁶ The PCIJ had no doubts about the need for caution over giving an opinion in this kind of situation; cf. *Request for Advisory Opinion Concerning the Status of Eastern Carelia* (1923), Series B, No. 5. The present Court's approach is best illustrated by its treatment of the two *Nuclear Weapons* opinions and the *Wall case* (on which *infra*, MN 118–122). For comments on the place of advisory opinions generally, cf. Higgins, R., 'A Comment on the Current Health of Advisory Opinions', in Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 567–581.

¹¹⁷ Given the number of cases submitted to the Court, the subsequent survey cannot aim to be exhaustive. In particular, the writer has sought to avoid expressing too firm a view on cases in which he has been personally involved (and on which he has, at times, felt the need to state his assessment in the form of an individual opinion appended to the Court's judgment).

Now the Court has a long General List¹¹⁸ of cases waiting to be dealt with. The Court can now be said to be very busy and indeed hard pushed to cope. The geographical spread of the Court's work amply shows that it has already become more nearly a world court. The litigating States comprise Scandinavia and Greenland,¹¹⁹ the Balkans,¹²⁰ through the Middle East,¹²¹ Africa,¹²² the Far East,¹²³ Latin America,¹²⁴ and the Indian Sub-Continent;¹²⁵ there is still, however, a lack of any cases involving two of the members of the United Nations with a permanent seat on the Security Council and therefore so far always having judges on the Court: China and Russia.¹²⁶

The geographical spread is paralleled by the spread of the subject matter of the cases. 85
The attraction of the Court for the settlement of disputed land boundaries has been strongly maintained and in this matter the Court has the benefit of great experience, as may be exemplified by reference to the case between Libya and Chad over a large area of disputed territory in which at that time Libyan troops were present. The judgment of the Court favoured Chad.¹²⁷ The Libyan troops were evacuated, their departure having been monitored by the United Nations. Nor has there been any lack of maritime boundary disputes, often coupled with questions about land boundaries too; nor are the maritime cases any longer focused only on continental shelf. The water column boundaries have been every bit as common.

A quite different kind of case, however, that came at the beginning of this period, 86
signalled a more determined posture and the beginning of a period of recovery for the Court: the case of *The United States Diplomatic and Consular Staff in Teheran*. This

¹¹⁸ The 'General List' is not referred to in the Statute but is a product of the Rules and of the practice of the Court. Cf. the characteristically thorough and informative article by Rosenne, S., 'The General List of the International Court of Justice', in *Theory of international law at the threshold of the 21st century. Essays in Honour of Krzysztof Skubiszewski* (Macarcyk, J., ed., 1996), pp. 805–816.

¹¹⁹ Cf. e.g. *Passage through the Great Belt* (Finland/Denmark), ICJ Reports (1991), pp. 12 *et seq.*; *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark/Norway), ICJ Reports (1993), pp. 38 *et seq.*

¹²⁰ Cf. *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina/Yugoslavia), ICJ Reports (1996), pp. 595 *et seq.*; the various *Cases concerning Legality of Use of Force*, ICJ Reports (1999), pp. 124 *et seq.* as well as the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia/Yugoslavia); cf. also *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina/Yugoslavia) (Yugoslavia/Bosnia and Herzegovina), ICJ Reports (2003), pp. 7 *et seq.*

¹²¹ Cf. e.g. *Case concerning Maritime Delimitation between Guinea Bissau and Senegal* (Guinea-Bissau/Senegal), ICJ Reports (1995), pp. 423 *et seq.*; *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar/Bahrain), ICJ Reports (1994), pp. 112 *et seq.*

¹²² Cf. e.g. *Case concerning the Territorial Dispute* (Libyan Arab Jamahiriya/Chad), ICJ Reports (1994), pp. 6 *et seq.*

¹²³ Cf. e.g. *Case concerning Certain Phosphate Lands in Nauru* (Nauru/Australia), ICJ Reports (1992), pp. 240 *et seq.*; *East Timor* (Portugal/Australia), ICJ Reports (1995), pp. 90 *et seq.*

¹²⁴ Cf. e.g. *Case concerning the Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), ICJ Reports (1987), pp. 10 *et seq.*; ICJ Reports (1989), pp. 162 *et seq.*; ICJ Reports (1990), pp. 3 *et seq.* and pp. 92 *et seq.*; ICJ Reports (1992), pp. 351 *et seq.*

¹²⁵ *Case concerning the Aerial Incident of 10 August 1999* (Pakistan/India), ICJ Reports (2000), pp. 12 *et seq.*

¹²⁶ It should be noted however that another permanent member, France, recently agreed to accept the Court's jurisdiction in the case brought by the Republic of Congo on 9 December 2002 concerning crimes against humanity; cf. ICJ Press Releases 2002/37 and 2003/14; furthermore, France along with the United Kingdom, was one of the ten NATO-States against which the Federal Republic of Yugoslavia (Serbia and Montenegro) had brought the case concerning the *Legality of the Use of Force*, ICJ Reports (1999), pp. 363 *et seq.* This may be contrasted to France's attitude adopted after the Court's decisions in the *Nuclear Tests cases*, described *supra*, MN 76–77.

¹²⁷ *Territorial Dispute* (Libyan Arab Jamahiriya/Chad), ICJ Reports (1994), pp. 6 *et seq.*

concerned the seizure and detention as hostages of US diplomatic and consular staff in Tehran and Tabriz and Shiraz, as also of two US citizens.

87 This was another case where the respondent decided not to appear, but to send a closely argued letter to the Court rejecting the US case and denying the jurisdiction of the Court. There was first a request from the United States for provisional measures of protection and these were granted by a large majority.¹²⁸ In May of the following year the Court gave a judgment for the United States, a considerable part of which was unanimous and the rest by large majorities.¹²⁹

88 These clear decisions in this politically highly sensitive case gave a timely boost to the Court. It helped to destroy the former damaging notion that the Court might, where the respondent was powerful and determined, lean towards finding no jurisdiction. The present resurgence of the Court is in no small measure owed to the determined leadership of President Sir Humphrey Waldock in the *Tehran Hostages* case. The invigorated Court also saw changes in the attitude towards third-party intervention, which call for mention.

2. *Third-party Intervention*

89 Boundary disputes, and maritime boundary disputes in particular, are apt to encourage neighbouring third parties to try to intervene.¹³⁰ A like question arose in the *Continental Shelf* case between Libya and Malta,¹³¹ where Italy wished to intervene, and made an impressive case. The request was, as was probably anticipated, refused. But the final judgment of the Court was so anxious not to seem to encroach on possible Italian interests that there was some question whether perhaps Italy had done better out of a refusal than it might have done if the request had been granted. Nevertheless, a change of attitude was in the offing.

90 The Statute of the ICJ in its Art. 62, does empower the Court to permit intervention by a third party which considers that 'it has an interest of a legal nature that may be affected by the decision in the case', and which submits a request to intervene.¹³² An obvious difficulty, however, is the consensual character of the Court's jurisdiction. It would seem odd if a third State were permitted to intervene in a case where, owing to the lack of necessary consent, the Court would otherwise have had no jurisdiction in respect of it. This consideration, as well as the understandable distaste for a new complication added to a case already under way, presumably explains the early persistent reluctance to give Art. 62 intervention a try.

91 Article 63 of the Statute, on the other hand, expressly permits a State to intervene as of right '[w]henever the construction of a convention to which States other than those concerned in the case are parties is in question'; and the Registrar has to notify such States, which then have the statutory right, if they so choose, to intervene; though only at the cost that the resulting construction of the convention will be equally binding upon the intervening State.¹³³

¹²⁸ *United States Diplomatic and Consular Staff in Tehran* (United States/Iran), ICJ Reports (1979), pp. 7 *et seq.*

¹²⁹ ICJ Reports (1980), pp. 3 *et seq.*
¹³⁰ Cf. e.g. *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1981), pp. 3 *et seq.*, where Malta sought to intervene but where the request was refused.

¹³¹ *Continental Shelf* (Libya/Malta), ICJ Reports (1984), pp. 3 *et seq.*

¹³² For a detailed assessment cf. Chinkin on Art. 62; the main characteristics of intervention under Art. 62 are described in MN 7–11.

¹³³ Cf. further Chinkin on Art. 63; on the distinction between Arts. 62 and 63 cf. Chinkin on Art. 62 MN 11 and on Art. 63 MN 9–11.

The question arose again, and this time in an Art. 63 form, in the case brought by Nicaragua against the United States of America where El Salvador made a declaration of intention to intervene as of right under Art. 63. The Court, by nine votes to six, decided not to hold a hearing on the declaration of intervention; and held by 14 votes to one that the declaration was inadmissible 'insofar as it relates to the present proceedings instituted by Nicaragua against the United States of America'.¹³⁴ The 'present proceedings' were about jurisdiction and admissibility and there was some sense for saying that the question of jurisdiction was, initially at least, one strictly between the original parties; though it is not easy to find any convincing reason why the majority of the Court refused to hear the would-be intervener to argue the point. 92

The implication of that decision not to permit intervention at the jurisdiction stage seemed to imply that El Salvador might have requested intervention at the merits stage. El Salvador did not make a second attempt, and one can only assume that, having seen which way the wind was blowing, it thought it wiser not to court another refusal. 93

A change came, however, in the chamber case between El Salvador and Honduras in the *Land, Island and Maritime Frontier Dispute* which was the subject of an elaborate special agreement between the parties of 11 December 1986, and ended with a judgment of 11 September 1992.¹³⁵ It involved a very long land frontier as well as some delicate maritime law questions about the Bay of Fonseca and the islands within the bay. It was by far the biggest case ever submitted to decision by a chamber. Its interest here, however, is that Nicaragua, also a coastal State on the Gulf of Fonseca, sought permission under Art. 62 to intervene, and undertook to accept the decision of the chamber (which suggests that Nicaragua, even if allowed to intervene, had not expected to be made a 'party' to the case). The chamber decided to permit Nicaragua to intervene, and so made it the first successful Art. 62 request to intervene in the history of the ICJ.¹³⁶ Nicaragua was present and was heard, but did not have the rights and status of a party. 94

The full Court did follow the same route in the complicated case of the *Land and Maritime Boundary* between Cameroon and Nigeria where a request from Equatorial Guinea to intervene was granted.¹³⁷ 95

A later case where the law of intervention is very fully argued in the Court's judgment, and where the *Gulf of Fonseca chamber* case was cited with approval, was over the request of the Philippines to be allowed to intervene in a territory case between Indonesia and Malaysia, in the *Case concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan*.¹³⁸ The request was, after very careful examination, refused; but on the substantive ground that the Philippines had not 'discharged its obligation to convince the Court that specified legal interests may be affected in the particular circumstances of the case'. This judgment effectively wraps up the whole question of intervention by the ICJ and will be eagerly studied by any government desirous in the future of intervening. 96

3. *The Further Development of Chambers of the Court*

The idea of allowing litigants to choose the members of a chamber for their case was initiated by Judge Jiménez de Aréchega who was President of the Court from 1976 to 97

¹³⁴ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua/United States), ICJ Reports (1984), pp. 169 *et seq.*

¹³⁵ ICJ Reports (1992), pp. 351 *et seq.*

¹³⁶ ICJ Reports (1990), pp. 92 *et seq.*

¹³⁷ *Land and Maritime Boundary* (Cameroon/Nigeria), ICJ Reports (1998), pp. 275 *et seq.* and ICJ Reports (1999), pp. 983 *et seq.*

¹³⁸ *Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indonesia/Malaysia), ICJ Reports (2001), pp. 575 *et seq.*

1979; precisely the period when the Court was suffering from the results of the 1966 *South West Africa* case; and manifestly he had the sympathy of the Court as a whole in using this device to try to bring work back to the Court.¹³⁹

- 98 The idea of a chamber of the Court was, of course, there from the beginning, in the Statute of both the PCIJ and the ICJ (Arts. 26–29 of the present Statute). The pre-*Arécheqa* chambers, however, clearly did not have much appeal. It seems especially surprising that the chamber for ‘summary procedure’ (Art. 29) has only been used once in the history of the Court, namely in the *Case concerning Interpretation of Paragraph 4 of the Annex Following Article 179 of the Treaty of Neuilly*.¹⁴⁰ Perhaps nowadays matters that could be dealt with summarily tend to be dealt with on the telephone by legal advisers.
- 99 There is no doubt, however, that the *de Arécheqa* idea did appeal to governments; presumably precisely because of the liberty to choose certain members rather than others. This was deemed to conform to the existing Statute by means of an interpretation of para. 2 of Art. 26 and in particular of the phrase ‘with the approval of the parties’.
- 100 This system was successfully followed in the territorial boundary dispute Burkina Faso and Mali brought to the Court by a special agreement of 16 September 1983. A chamber of five judges was constituted by the Court in 1985, with two judges *ad hoc*. The chamber first made a detailed and firm order of provisional measures. The merits hearings were held in 1986.¹⁴¹ The chamber then also, and in accordance with the special agreement, nominated three experts who were to assist the parties in the demarcation of the frontier.¹⁴² This must be accounted a highly successful settlement of a delicate and dangerous frontier question.
- 101 An even bigger territorial and maritime dispute where the new device was successfully employed was the chamber constituted in 1982 to determine the *Maritime Boundary in the Gulf of Maine Area*, which boundary had been long disputed between Canada and the United States of America. There had been earlier diplomatic negotiations between legal and diplomatic teams from both countries. These negotiated strenuously for several years and ultimately successfully. They not only agreed a boundary but also drafted implementing agreements.
- 102 But the draft agreements required ratification. In the United States this required the consent of the Senate and of the President. The Senate, however, was determined to introduce amendments which would have wrecked the delicate balance of the proposals. The proposed amendments were not acceptable to Canada. The two governments therefore agreed that the only way out was to resort to judicial settlement.
- 103 The two teams already had a draft agreement for the constitution of an *ad hoc* arbitration tribunal. But the alternative of a chamber of the ICJ proved acceptable to both parties, but always provided that they could choose the membership of the chamber. Accordingly, on 25 November 1981 the two governments notified the

¹³⁹ On the modification of the system of *ad hoc chambers* cf. Palchetti on Art. 26 MN 29; Thirlway on Art. 30 MN 8; and further *id.*, ‘Procedural Law and the International Court of Justice’ in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 390–396; Jiménez de Arécheqa, E., ‘The Amendments to the Rules of Procedure of the International Court of Justice’, *AJIL* 67 (1973), pp. 1–22.

¹⁴⁰ PCIJ, Series A, No. 3; the request for interpretation of this judgment was also handled by the said chamber, cf. *Case concerning Interpretation of Judgment No. 3*, PCIJ, Series A, No. 4. Cf. also Palchetti on Art. 29 MN 1 and 3–5 (discussing the main problems of Art. 29) and Zimmermann/Thienel on Art. 60 MN 16–17.

¹⁴¹ *Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1986), pp. 554 *et seq.*

¹⁴² ICJ Reports (1987), pp. 7 *et seq.* On the role of experts, and the distinction between independent and party-appointed experts cf. further Tams on Art. 50, especially MN 2–8.

Registrar of the Court of a special agreement dated 29 March 1979, by which they submitted the Gulf of Maine dispute to a chamber of the Court. This was to be a chamber of five members to be constituted after consultation with the parties pursuant to Art. 26, paras. 2 of the Statute of the Court and to Art. 31. The Court was also notified by the parties that, since there was no Canadian national on the Court, Canada would wish to appoint a judge *ad hoc*. The Court by an order of 20 January 1982 agreed to form a special chamber and elected a chamber of five judges including Judge Ruda who had been asked by the acting President to give place in due course to a Canada appointed judge *ad hoc*; and he had agreed to do so.¹⁴³

This chamber gave its lengthy judgment on 12 October 1984.¹⁴⁴ It is doubtful 104 whether the chamber's 'solution' was an adequate substitute for the one offered in the draft treaties that the negotiating teams had agreed. In any event it now appears to have been too late. The area, formerly the richest fishing banks in the world, have now been over-fished to such an extent that what had been for many generations a resource of the greatest importance for mankind is now virtually destroyed.

The new kind of chambers of the Court did for a time attract cases. It is not surprising 105 that this was also a time when *ad hoc* arbitrations were also much in use. A striking example of the use of a chamber for a matter which was very much in the pattern of the former arbitration and even claims commission cases, was the *ELSI* case brought by the United States against Italy. Here the claimant was, under the rule of the nationality of claims, seeking redress for injuries alleged to have been suffered by Raytheon, a US company. To settle the matter the Court constituted a chamber of five members of the Court and since it included the Italian Judge Ago and the US Judge Schwebel, the question of *ad hoc* judges did not arise. The representatives of Raytheon were very much present in the Hall of Justice, and partaking as witnesses in the procedure.¹⁴⁵

It was clear then that the new notion of chambers with flexible choice of members 106 was, at a crucial point in the history of the Court, a success. There is one big difference between the full Court and the chamber that is perhaps not always realized by parties because it only becomes evident in the privacy of the deliberation chamber. The deliberation of the full Court of 15 or even 16 or 17 members, for obvious reasons, simply has to take the form of a series of speeches heard for the most part in the order in which judges wishing to speak have attracted the attention of the President; but a smaller tribunal's deliberation can and usually does indulge in the direct give and take of real argument. That is a matter in which a small chamber can enjoy great advantage.

Be that as it may, the demand for chambers of the Court has more recently declined, 107 and going to the full Court is again in full vogue. Again it is not clear why, but it could only be another mark of approval of the Court as now organized.

4. *The Law of the Sea and Maritime Boundaries*

The part played by the Court in the development of the law of the sea has been 108 impressive. It is true that the third UN Conference on the Law of the Sea agreed on the creation, by the 1982 Convention, of the International Tribunal on the Law of the Sea,

¹⁴³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States)*, ICJ Reports (1982), pp. 3 *et seq.* For further comment *cf.* Palchetti on Art. 26 MN 14.

¹⁴⁴ ICJ Reports (1984), pp. 246 *et seq.*

¹⁴⁵ *Case concerning Elettronica Sicula S.P.A. (United States/Italy)*, ICJ Reports (1987), pp. 3 *et seq.*; ICJ Reports (1988), pp. 158 *et seq.*; ICJ Reports (1989), pp. 15 *et seq.*

and that this was at least in part the result of the suspicions of the ICJ generated by the 1966 case. But it took a considerable time before the new court was established in the Free and Hanseatic City of Hamburg, and in the meantime the ICJ had in a large number of cases already made the general international law of the sea very much its own subject.¹⁴⁶ One of the first of these cases was a welcome resort to the Court by two African States, Libya and Tunisia, in the case concerning the *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya) with the result of a special agreement of 1977 between Libya and Tunisia about their offshore continental shelf boundary.

109 This case naturally involved much argument derived from the propositions of the *North Sea Continental Shelf* case judgment;¹⁴⁷ particularly since, as in those cases themselves, the Court was not to plot the boundary but to say what principles and rules of international law should be applied when doing so. Moreover the Court was quirkily required to take into consideration ‘the recent trends admitted at the Third Conference on the Law of the Sea’.¹⁴⁸ The Court’s judgment insisted on the principle of the *North Sea* judgment, namely that the delimitation was to be ‘effected in accordance with equitable principles, and taking account of all relevant circumstances’.¹⁴⁹ This did indeed reflect the ‘recent trends’ at the Law of the Sea Conference where ‘equitable principles’ had become the watchword of the Third World as opposed to the favoured equidistance of the larger maritime powers.

110 Very much a sea and island case was that between Qatar and Bahrain over which the Court—as indeed also the parties, no doubt for good reasons—showed no inclination to hurry the proceedings. The application by Qatar was dated 8 July 1991. The final judgment in the case was delivered on 16 March 2001.¹⁵⁰ In the meantime there had been several orders and interim decisions and it should also be said that the preliminary stages included a lengthy dealing by the parties and by the Court with question of the authenticity of some of the documents submitted to the Court by Qatar.¹⁵¹

111 Australia was the respondent in the case brought by Portugal over the legal status of East Timor and the legal questions raised by an agreement Australia had made with Indonesia about the legal status of the waters and continental shelf off shore of East Timor. This case is important for the law of territory including maritime territory, but also for the notion of self determination.¹⁵²

112 In the *Fisheries Jurisdiction* case (Spain/Canada)¹⁵³ the Court had to consider besides the general law of jurisdiction on the high seas, both a NAFTA regime and regulations and the law of the European Union. It was decided that the Court had no jurisdiction in the case. The judgment illustrates what has been said above about the imbalance achieved by some separate opinions.¹⁵⁴ The judgment occupies 37 pages and the separate

¹⁴⁶ Cf. Kwiatkowska, B., ‘Equitable Boundary Delimitation’, in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 264–292.

¹⁴⁷ *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), ICJ Reports (1982), pp. 18 *et seq.* On the *North Sea Continental Shelf* cases cf. *supra*, MN 66–69.

¹⁴⁸ Cf. Art. 1 of the Special Agreement between Tunisia and Libya, referred to in the Court’s judgment: ICJ Reports (1982), 18, 23 (para. 4).

¹⁴⁹ *Ibid.*, pp. 18, 37, para. 23.
¹⁵⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar/Bahrain), ICJ Reports (2001), pp. 40 *et seq.*

¹⁵¹ *Ibid.*; on the documents in question cf. Sep. Op. Fortier, *ibid.*, p. 451.

¹⁵² *East Timor* (Portugal/Australia), ICJ Reports (1995), pp. 90 *et seq.*; cf. also Cassese, A., ‘The International Court of Justice and the Right of Peoples to Self-Determination’, in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 351–372.

¹⁵³ *Fisheries Jurisdiction* (Spain/Canada), ICJ Reports (1998), pp. 432 *et seq.*
¹⁵⁴ *Supra*, MN 24–25.

opinions 268. The Spain-nominated *ad hoc* judge in his dissent took 154 pages.¹⁵⁵ It might be said that he earned his nomination.

5. *The Court and the Environment*

The environment is a topic which, at least *eo nomine*, has featured in the work of the Court only in recent decades, for it is only recently that the conservation of the environment has become a separate heading in its own right in the general system of international law.¹⁵⁶ The *Gulf of Maine* case was in its substance about, and the purpose of, the conservation of a fish stock environment of the greatest value; but environment law was not a governing concept in the long judgment. A main part of the reasoning was preoccupied with the seeming puzzle of the sensible but 'novel' request of the parties to have a single boundary line for both the shelf and the water column. Therefore the chamber decided it must seek a 'criterion . . . which does not give preferential treatment to one of these two objects to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them'.¹⁵⁷ Unfortunately, therefore, the presence of fish stocks and the extreme urgency to preserve them—in fact the reason why the case was brought to the Court—did not seem to qualify as a 'criterion'.

But things have more recently improved and there have been cases in which the environmental factor was acknowledged as such and taken into consideration in the decision. A notable case of this kind was that concerning *Certain Phosphate Lands in Nauru* (Nauru/Australia)¹⁵⁸ brought by Nauru against Australia, complaining of the devastation, without rehabilitation or adequate other reparation, of the island by the long continued mining of phosphates by the respondent government. Nauru had been an Australian mandate under the League of Nations system. The essence of the matter was responsibility for the physical devastation of the island.

Another, and major case which was admitted in the pleadings, and by the judgment, to be directly concerned with the environment was the one between Hungary and Slovakia about the *Gabčíkovo-Nagymaros case*, which was brought to the Court by a special agreement. It was about a scheme, formerly agreed upon in a treaty between Hungary and Czechoslovakia in 1992, before Slovakia became a separate State. The scheme then agreed was to divert a boundary stretch of the river Danube for the building of a dam, which also affected the flow of the river Danube after it had entered Hungarian territory. A principal issue was inescapably the legal status of the treaty after the changes of State and governments. But the protection of the environment was also a crucial factor. The case was notable for the first visit of the full Court to view a disputed territory;¹⁵⁹ this visit would not have been appropriate for a question of treaty law but very much so for an environmental case.

The *Great Belt case* between Finland and Denmark¹⁶⁰ is one which offers a useful variation of the uses of preliminary decisions of the Court. There were lengthy proceedings after which the Court refused the provisional measures requested by Finland but added an observation encouraging continuing negotiations for a settlement; and this

¹⁵⁵ *Fisheries Jurisdiction* (Spain/Canada), Diss. Op. Torres Bernárdez, ICJ Reports (1998), pp. 584–738.

¹⁵⁶ Cf. Fitzmaurice, M., 'Environmental Protection and the International Court of Justice' in: Lowe/Fitzmaurice, *Fifty Years of the ICJ*, pp. 293–315. ¹⁵⁷ ICJ Reports (1984), pp. 246, 327 (para. 194).

¹⁵⁸ ICJ Reports (1992), pp. 240 *et seq.*

¹⁵⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports (1997), pp. 7 *et seq.*; cf. also Meadows, F., 'The First Site Visit by the International Court of Justice', in *Leiden J. Int'l. L.* 11 (1998), pp. 603–608 and Walter on Art. 44 MN 6. ¹⁶⁰ ICJ Reports (1991), pp. 12 *et seq.* and pp. 41 *et seq.*

was welcomed by Judge Broms, the *ad hoc* judge nominated by Finland. The only further proceeding was an Order of the Court of 29 July 1991¹⁶¹ fixing the times for further pleadings and in the knowledge that negotiations were proceeding; and these negotiations succeeded in reaching a settlement of the case. This exercise of the Court in acting to some extent almost as a mediator rather than one eager for a decision by judgment was, some might think, a healthy variation on the normal procedures.

6. *The Court and the Review of Arbitration Awards*

- 117 Very much concerned with the role of the Court sought to be used as a reviewing authority in relation to an arbitration tribunal's award was the *Case concerning the Arbitral Award of 31 July 1989* (Guinea Bissau/Senegal).¹⁶² This arose from an application for provisional measures in relation to an arbitral award the validity of which was in question. The Court did not for this preliminary purpose have to decide definitely whether or not it had jurisdiction in the case, though it thought there was a *prima facie* case that it had. The Court, however, refused interim measures. In the eventual judgment the Court in effect upheld the validity of the award and enjoined the parties to apply it.

7. *Advisory Opinions*

- 118 Advisory opinions in these recent years have been few compared with the number of contentious jurisdiction cases. This ought not to cause surprise. Most international organizations have their own procedures for dealing with disputes, and bureaucracies do not on the whole welcome outside advice; especially when that advice is merely a recommendation and not a binding decision (except where there has been a separate agreement to treat an opinion as binding). So generally speaking one can expect a qualified organization to seek such interference only when it wants to pass to the Court the responsibility of deciding.
- 119 It is probably healthy that the advisory jurisdiction has in recent times become mainly of secondary importance in the number of cases arising. There were, however, two difficult cases that both raised a question almost any answer to which was bound to arouse both strong opposition of some as well as the strong approval of others. The first case was the question posed by the World Health Organization on 14 May 1993: 'In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?'¹⁶³ The manifest weakness of this request was that there did not seem to be a proper connection between the functions of the WHO and the question posed to the Court. A goodly majority of the Court was able therefore to decide that the Court was not able to give an opinion.¹⁶⁴ There were, even so, three dissenting opinions, two of them at very considerable length (70 and 52 pages respectively).¹⁶⁵
- 120 The second case, raising substantially the same question, was initiated by a Resolution of the UN General Assembly on 15 December 1994: 'Is the threat or use of nuclear weapons in any circumstances permitted under international law?'¹⁶⁶ This is not the

¹⁶¹ ICJ Reports (1991), pp. 12 *et seq.*

¹⁶² *Arbitral Award of 31 July 1989* (Guinea Bissau/Senegal), ICJ Reports (1990), pp. 64 *et seq.*; ICJ Reports (1991), pp. 53 *et seq.*

¹⁶³ Res. WHA 46.40 of 14 May 1993.

¹⁶⁴ *Legality of the Use by a State of Nuclear Weapon*, ICJ Reports (1996), pp. 68 *et seq.*

¹⁶⁵ Namely the dissents by Judges Weeramantry and Koroma, ICJ Reports (1996), pp. 101 *et seq.* and 172 *et seq.*

¹⁶⁶ GA Res. 49/75K of 15 December 1994.

place to describe the Court’s lengthy answers.¹⁶⁷ Suffice it to say that the principal conclusion, passed with the President’s casting vote, was that the use or threat of nuclear weapons would ‘generally be contrary to’ international law.¹⁶⁸ But there followed the qualification:

in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence in which the very survival of a State would be at stake.¹⁶⁹

The case illustrates forcibly the extremely difficult position the Court finds itself in when asked a question which clearly exposes the different conceptions of international law within the Court. As Judge Schwebel’s dissenting opinion put it: 121

More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principle. It is accordingly the more important not to confuse the international law we have with the international law we need.¹⁷⁰

The Court’s answer did not excite general admiration; but it was probably a very wise one at that time. Nevertheless though there have been fewer opinions the ones that have been requested have been important; and sometimes too important. The one requested by the General Assembly in Resolution 49/75K of 15 December 1994, on *The Legality of the Threat or Use of Nuclear Weapons* is an example of a new tendency of the General Assembly to ask for opinions about matters of topical major import. Yet it is also impressive that such matters should be referred to the Court; it can only be a mark of confidence in the Court.¹⁷¹ 122

D. Outlook

I. General Issues

The assessment of the position of the ICJ at the present time can only be that it is prospering as never before. The Court’s Yearbook 2000–2001, the most recent one available to the present writer, gives under the heading of ‘Cases before the Court’ a list of 26 cases; since the list of States qualified to appear in the Court is still less than 200, this list of cases is remarkable and an astonishing change from even two decades ago. 123

One of the most heartening features of the present resurgence of interest in the ICJ has been the part played by some African States, as also the continuing loyalty of the Latin American States to the Court. If one seeks reasons for these changes, there are no doubt many. But one should certainly not forget one of the main reasons: the influence of counsel who have encouraged their government clients to go to the Court. This powerful and very healthy influence of what might now usefully be called the International Bar, has been of the greatest importance to the ICJ. 124

When considering, now or at any time in the past, how occupied the judges are or have been, it should always be borne in mind that the Court is unusual in that it is the 125

¹⁶⁷ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), pp. 226 *et seq.*

¹⁶⁸ *Ibid.*, p. 266 (para. 2E of the *dispositif*). ¹⁶⁹ *Ibid.* ¹⁷⁰ *Ibid.*, pp. 311 *et seq.*

¹⁷¹ Note of the editors: Due to the death of Sir Robert Jennings, the most recent advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004 could not be covered here. For a discussion cf. Frowein/Oellers-Frahm on Art. 65 MN 32–35 and 41–42.

members of the Court—the judges themselves—who are responsible for the domestic administration of the Court. Most if not all of the judges are members either of the Rules Committee or of the Administrative Committee and several will be members of both. The Administrative Committee is responsible for not only administration but also for the finances of the Court and for the preparation in detail of the budget of the Court to be presented to the United Nations. From time to time some of the members of the administrative committee, and often all the judges, have to entertain and negotiate with visiting members of the Second (Finance) Committee of the General Assembly of the United Nations and its sub-committees and explain how the money allowed to the Court has been spent and forecast what the position is likely to be in the next few years. This committee also has to oversee the administrative staff of the Court, to appoint to each one of its main offices and to deal with staff grievances. All this takes time and energy. Yet it all has to be fitted somehow into the daily work even when important cases are pressing for attention. It is not perhaps the wisest way of using international judges. But the system forces it upon them, partly because they have always done it and so are expected to go on doing it; but mostly because there is not a permanent staff sufficiently large to take over the work. The small size of the permanent staff permitted to the Court by the United Nations—at the time of writing, 82 established staff and 14 temporary posts—compares dramatically with that of the ICTY, for which it is not easy to get official figures but an informed estimate quotes 1,200 established staff.

126 Another change in the context in which the Court now operates, has been the proliferation of other, and to some extent even rival, international courts and tribunals (for all tend to be rivals for funds if not in their work). The Iran/United States Tribunal has now been in The Hague since July 1981. It was the coming to The Hague—what the Hague *Burgermeisters* like to call the ‘legal capital’ of the world—of the ICTY, with its vastly greater staff and resources, that has worked changes in the Hague scene. The United Nations decided from the beginning that the judges of the ICTY should have the like salaries as the judges of the ICJ; it was the easy solution. So the members of the ‘principal judicial organ’ of the United Nations have inevitably in the public estimation tended to become just one particular kind of the many such people now to be found in The Hague.

127 Other changes, clearly for better efficiency, have been in the internal practices of the Court; but these have necessarily been made, not by attempted changes to the Statute, but by modest amendments to the Rules, and to the Court’s own resolution of 12 April 1976 concerning the Internal Judicial Practice of the Court, and also by the issuing of the novel Practice Directions.¹⁷²

II. The Traditional Demand for Compulsory Jurisdiction

128 Perhaps a word is called for about the stilling of the former demand what was called ‘compulsory jurisdiction’ for an international court. Traditionally, to be able to achieve this jurisdiction was one of the reasons why in 1922 the Court had to be ‘permanent’ and to become an independent institution. The crusade for compulsory jurisdiction, pursued so ardently by many of the international lawyers of an earlier generation, was prominent from the time of the Second Hague Conference of 1907, extended to the time when the PCIJ Statute was being drafted, and was pursued passionately in the inter-war period by prominent international law thinkers.

¹⁷² On these regulatory instruments *cf.* Thirlway on Art. 30 MN 9–13.

The most that was in fact achieved in that direction for the World Court was the so-called ‘optional clause’ of the PCIJ Statute, and now embodied in para. 2 of Art. 36 of the Statute of both courts.¹⁷³ This option, however, did not prove popular with the newly independent States that appeared after 1946; preoccupied as they were over notions of sovereignty and independence. So the theme of discussion in the fifties and onwards became not so much compulsory jurisdiction but deploring the decline of the optional clause.¹⁷⁴ 129

The perspective in which this former preoccupation with compulsion has to be seen has in recent decades changed. In the 1930s, and even more recently, settlement of disputes by judicial means was seen almost as a ‘good’ of itself. It represented the ‘peaceful’ means of dispute settlement as opposed to force; for it was simplistically supposed that wars are about ‘disputes’. Thus the achievement of compulsory settlement by an international court was even seen as an essential step in the abolition of war and the illegal use of force. The underlying assumption was that a court of law could ‘settle’ any ‘dispute’ provided it were enabled to do so. No doubt it could after a fashion; but the question remains whether it should be allowed to do so in a developed community governed by the rule of law. One thinks again of the wise distinction made by the London Committee on the future international court: that it should deal with matters truly ‘justiciable’, *e.g.* not such as need a decision on the basis of policy and statesmanship rather than a legal decision. One thinks further of the lessons to be learned from the successful Antarctica Treaty, which was achieved not by judicial ‘settlement’ but by clever ‘management’ of a series of the situation, accompanied by an agreement precisely not to attempt to settle any of the many legal disputes involved.¹⁷⁵ Furthermore the proliferation of international tribunals makes it seem odd to demand compulsory jurisdiction for one of them, even for the one that is—in the words of Art. 92 UN Charter—the ‘principal judicial organ’ of the United Nations. 130

III. The Limitations Imposed by Art 34, para. 1

What is a growingly potent qualification of the competence of the ICJ is the effect of Art. 34, para. 1, that ‘only States may be parties before the Court’.¹⁷⁶ When the 1946 Statute even of the present Court was drafted, this provision of Art. 34, para. 1 seemed almost a truism. It then said in effect that the Court would be confined to cases governed by public international law. Public international law has now, however, a very different content and meaning from the international law of 1946; due in no small measure to the long-term effects of the tendency noted and approved in the Court’s own advisory opinion on the *Reparation for Injuries*.¹⁷⁷ More and more international law is concerned with individuals and with entities other than States. It follows that the Court is, by virtue of Art. 34, para. 1, to an important extent prevented from dealing with these newer kinds of international law issues. The Court, however, has to live with this limitation because, if it were opened to cases from claimants other than States it would soon be swamped. 131

The survey of the history of the Court prompts the question why the Court has, after its very mixed and chequered record, nevertheless in recent decades managed, one could 132

¹⁷³ Cf. further Tomuschat on Art. 36 MN 61 *et seq.*

¹⁷⁴ Cf. Waldock, Sir H., ‘Decline of the Optional Clause’, *BYIL* 33 (1955–1956), pp. 244–287.

¹⁷⁵ For a general assessment cf. Watts, Sir A., *International Law and the Antarctic Treaty System* (1992).

¹⁷⁶ For criticism of that approach cf. Dupuy on Art. 34 MN 15 *et seq.*

¹⁷⁷ ICJ Reports (1949), pp. 174 *et seq.* On the relevance of the Court’s opinion cf. *supra*, MN 46.

almost say quite suddenly, to become a hard-pressed court, truly busy with a great flow of cases; none of them trivial and some of critical importance? There are doubtless many reasons, not least the strength of example. When several governments decide to resort to the Court, then others will always follow.

133 But there is another reason which is, in the view of the writer, critical. The idea formerly commonly held especially perhaps by academic international lawyers, was that resort to the ICJ was *per se* a good and virtuous thing for a government to do; and even that it could be a sort of rightful substitute for war—the ‘go to law not to war’ school of thought. Instead of this sentiment, there is now a much more earthy notion that this highly specific and technical method of judicial settlement is, in point of fact, a remarkably effective way of disposing, not indeed of all and any dispute, but of certain kinds and certain stages of disputes. There is something about the ceremonial, ritualized confrontation in public and before a bench of judges that makes their decision usually remarkably effective in disposing of the matter. It is not easy to find a decision of the ICJ which has not been accepted and carried out in some way or another by the parties. This very special and specific process, which is an historic one, has much in common with the medieval jousting which was likewise a strictly controlled ritual with a result that might have been unpredictable but was unquestionably final. It is an artificial process in the good sense of that word, meaning something specially created for a purpose. It is this writer’s view that the present popularity of the Court is at least partly because of a much more realistic and practical approach from litigating governments, who appreciate both the strengths and the limitations of the judicial process.

134 Furthermore resort to the Court is a method where the final responsibility for the decisions is clearly and publicly, and with great ceremony, passed from the hands of the national politicians and their teams of agents, advisers and counsel, into the hands of the judges. The solemn moment when the arguing between the parties is stilled and the whole thing is publicly taken over by the bench to deliberate, decide and draft in complete privacy and confidentially is of the very essence of the process; and this handing over of the ultimate responsibility is a feature which the officers of the governments concerned tend to regard as a politically useful one. It is the judges who take on the final and direct responsibility for the decision. It is in fact a greater appreciation of the practical utility of the judicial process that is, it is submitted, one powerful reason for the quite remarkable increase in the work of the Court.

135 There is one part of this judicial process that still seems to be capable of improvement. The more favourable view of judicial settlement which governments appear to have learned is not at all reflected in the views of the general public or of the media. Such publicity as the Court gets, tends to be uniformed, dismissive and sneering. Might this be partly because the Court virtually never addresses itself to the public or the media in its decisions? Many cases are potentially of great interest. But when the judgment is read out in the Great Hall of Justice one has a distinct impression that the language of the Court is addressed not to the public or the media but exclusively to the learned members of the now highly specialized profession of international lawyer. If one thinks of great judges of the past, such as Mansfield or Stowell in English law—and there are surely great parallel figures in other systems—they, in their decisions, addressed themselves to intelligent people in general and to anyone who was listening; and most of their words, immensely learned and scholarly as these people certainly were, could nevertheless be understood by any inquiring mind. It is harder to do this when the decision is the

product of a committee; but at least one might try rather harder to interest the intelligent public and not appear to be addressing, not members of the public and not even the parties, but rather the row of learned international lawyers who have been counsel in the case.

There is an aspect of the happy resurgence of the Court that may finally be noted: the way the Statute of the Court has continued to serve the Court through times good and bad through more than half a century, and is still found eminently workable. One can only pay humble homage to those who, in 1920, then in 1929, and again in 1946, produced this astonishingly successful piece of drafting. 136

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