

THE INTERNATIONAL COURT OF JUSTICE

THE POSITION OF THIRD PARTIES RECONSIDERED

BASHIRIDEEN IDDRISU KORAY

Thesis submitted to the London School
of Economics and Political Science,
University of London,
for the degree of Doctor of Philosophy
in the Department of Law

September 1991



UMI Number: U048642

All rights reserved

INFORMATION TO ALL USERS

The quality of this reproduction is dependent upon the quality of the copy submitted.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if material had to be removed, a note will indicate the deletion.



UMI U048642

Published by ProQuest LLC 2014. Copyright in the Dissertation held by the Author.
Microform Edition © ProQuest LLC.

All rights reserved. This work is protected against
unauthorized copying under Title 17, United States Code.



ProQuest LLC
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106-1346

THESIS
F9700



1282187

ABSTRACT

This thesis seeks to investigate the impact of the decisions of the International Court of Justice on third parties from the perspective of the general and specific guarantees available for the protection of their interests under the Court's Statute. In the first chapter, the general protection extended to third parties is considered from the viewpoint of the general principle of the relative effect of judicial decisions, their value as building blocks of the Court's jurisprudence and their role as a subsidiary legal source.

The second and third chapters are devoted to a critical analysis of the nature, scope, effect and conditions for the operation of the specific third party guarantees, namely, intervention for the purpose of the protection of the interest of a third party and intervention when the construction of a convention is in issue in a pending case.

The fourth chapter examines the position of third parties in relation to the Court's advisory jurisdiction by considering the nature and effect of advisory opinions, by defining and identifying "third parties" in the context of the advisory procedure, by assessing the nature and extent of their participation in advisory proceedings and by undertaking a brief empirical survey of the impact of advisory opinions on them.

Finally, some of the principal observations are

recapitulated and suggestions for improving and strengthening the third party safeguards, which have been explored, are offered.

The main conclusion of this study is that in the final analysis the utility of the various third party safeguards considered, lies both in a liberal interpretation of the conditions governing their operation and in full participation by interested parties in contentious and advisory proceedings.

TABLE OF CONTENTS

	<u>Page</u>
Acknowledgements	10
List of Abbreviations	13
Table of Cases	17
INTRODUCTION	26
CHAPTER ONE: GENERAL PROTECTION FOR THIRD PARTIES: ARTICLES 59 AND 38(1)(d) OF THE STATUTE	32
1. Introduction	32
2. Structure of a Judgment	33
(a) Elements of the Judgment	33
(b) The Operative Provisions of the Judgment	35
(c) The Reasons in Point of Law	37
(d) Individual and Dissenting Opinions ..	39
3. The Impact of the Judgment	42
(a) Article 59 of the Statute	43
(b) Article 59 and the Doctrine of Stare Decisis	50
(c) The Decisions of Other Tribunals	56
(d) Decisions of Municipal Tribunals	64
(e) Reasons for Observance of Judicial Precedent	68
(f) State Practice and Judicial Precedent	72
4. Article 38(1)(d) of the Statute	77
(a) Background	78

(b)	Judicial Decisions as a Source of Law	86
(c)	Limitations of Judicial Decisions as a Source of Law	99
(d)	Normative Impact of Judicial Decisions	102
(i)	<u>Corfu Channel Case</u>	103
(ii)	<u>Fisheries Case</u>	109
(iii)	<u>The North Sea Cases</u>	112
5.	Conclusion	114
CHAPTER TWO: SPECIFIC PROTECTION FOR THIRD PARTIES: DISCRETIONARY INTERVENTION		117
1.	Introduction	117
2.	Preliminary Remarks	119
(a)	Definition	119
(b)	Objectives	120
(c)	How does one account for the Slow Acceptance of Intervention by the International Judicial System?	123
(d)	Types of Intervention	126
(e)	Evolution of Article 62 of the Statute	128
3.	Conditions Necessary for Discretionary Intervention	132
(a)	Who may intervene under Article 62?	132
(b)	The Meaning of "an interest of a legal nature"	133
(i)	The Permanent Court of International Justice	134
(ii)	The International Court of Justice	135
(iii)	<u>The Maltese Intervention Case</u>	138
(iv)	<u>The Italian Intervention Case</u>	146
(v)	<u>The Nicaraguan Intervention Case</u>	150

(c)	The "interest of a legal nature" and the Precise Object of Intervention	151
(d)	Classification of an "interest of a legal nature"	158
(e)	How the "interest of a legal nature" may be affected for Purposes of Discretionary Intervention	174
4.	Intervention Proceedings	188
(a)	The Role of the Court and the Parties	188
(b)	Procedure and Timing of Intervention	205
5.	Unresolved Issues of Intervention	217
(a)	The Issue of the Scope of Intervention	217
(b)	The Issue of the Status of the Intervening Party	223
(c)	The Issue of the Jurisdictional Link	228
(i)	Background	228
(ii)	The Principle of Consent	231
(iii)	Incidental Jurisdiction	236
(iv)	The Principle of Equality	239
(v)	Reciprocity of Rights and Obligations	240
(vi)	Other Arguments Concerning the Jurisdictional Link	242
6.	Conclusion	248
CHAPTER THREE: INTERVENTION AS OF RIGHT		252
1.	Introduction	252
2.	Evolution	253
3.	Conditions for the Operation of Intervention as of Right	257
(a)	The Meaning of Article 63(1)	258
(b)	The Practice of the Permanent Court of International Justice	262

(c)	<u>The SS Wimbledon Case</u>	262
(d)	The Practice of the International Court of Justice	268
(e)	<u>The Haya de la Torre Case</u>	268
(f)	The Position under the 1972 and 1978 Rules	275
(g)	<u>The Salvadorean Intervention Case</u>	279
(h)	The Role of the Parties	288
(i)	The Role of the Court	290
(j)	The Concept of Intervention as of Right	292
4.	Procedure	295
(a)	Identification of Parties to a Convention	296
(b)	The Significance of the Notification ...	300
(c)	The Character of the Notification	301
(d)	The Phase of a Case at which Notification may be sent	304
(e)	The Timing of Filing a Declaration	307
(f)	Conventions regarding whose Construction Notification may be sent	312
(g)	Timing of the Notification	316
5.	Effect of Intervention as of Right	318
6.	Amicus Curiae	324
7.	Controversial Issues of Intervention as of Right	326
(a)	Intervention in the Preliminary Objection Phase of a Case.....	327
(b)	Intervention regarding Declaration under the Optional Clause	330
8.	Conclusion	336
CHAPTER FOUR: THE IMPACT OF ADVISORY OPINIONS ...		340
1.	Introduction	340

2.	(a)	Legal Basis of Advisory Opinions	342
	(b)	Purposes Served by Advisory Opinions ...	343
3.		Effect of Advisory Opinions	345
	(a)	The Binding Force of Advisory Opinions	345
	(b)	Advisory Opinions with Binding Force	346
	(c)	The Authority of Advisory Opinions	348
4.		Third Parties in Advisory Proceedings	351
	(a)	Meaning of Third Parties	351
	(b)	Requesting Organs	353
	(c)	States and International Organisations as Amici Curiae in Advisory Proceedings ..	355
	(d)	Intervention by States in Advisory Proceedings	361
	(e)	Consent of Interested States in Advisory Opinions	362
	(f)	Advisory Opinions as Precedents	390
	(g)	Advisory Opinions as a Source of Law ...	395
	(h)	Judges Ad Hoc and Advisory Proceedings	396
	(i)	Individuals or Private Persons	411
5.		The Impact of Advisory Opinions on "Third Parties": A Brief Empirical Study	426
	(a)	Introduction	426
	(b)	<u>The Admissions and Competence Cases</u>	427
	(c)	<u>The Reparations Case</u>	433
	(d)	<u>The Peace Treaties Cases</u>	437
	(e)	The South West Africa and Namibia Advisory Opinions	442
	(i)	<u>The South West Africa (Status) Case</u>	442
	(ii)	<u>The South West Africa (Voting) Case</u>	444
	(iii)	<u>The South West Africa (Committee) Case</u>	446

(iv)	<u>The South West Africa Cases</u>	449
(v)	<u>The Namibia Case</u>	450
(f)	<u>The Reservations Case</u>	456
(g)	Review of Administrative Tribunal Judgments	462
(i)	<u>The UN Administrative Tribunal Case</u>	463
(ii)	<u>The ILO Administrative Tribunal Case</u>	465
(iii)	<u>The Fasla Case</u>	467
(iv)	<u>The Mortished Case</u>	468
(v)	<u>The Yakimetz Case</u>	470
(h)	<u>The IMCO Case</u>	473
(i)	<u>The Expenses Case</u>	476
(j)	<u>The Western Sahara Case</u>	487
(k)	<u>The WHO Case</u>	494
(l)	Interpretation of the United Nations Headquarters Agreement	498
(m)	<u>The Mazilu Case</u>	503
6.	Conclusion	507
CHAPTER FIVE: CONCLUDING OBSERVATIONS		511
Bibliography		526

ACKNOWLEDGEMENTS

I wish to record my special debt to Professor Rosalyn Higgins for suggesting the subject-matter of this thesis, for acting as my supervisor and friend and for giving me constant encouragement and practical advice. The period under her guidance has been a very rewarding experience. Her enthusiasm, her encouragement and her provocative and stimulating ideas are all greatly appreciated. My other debt is to my friend, Tom Millar, Professor Emeritus, who read parts of the thesis to me and made many useful suggestions for the improvement of my style.

I would like to acknowledge the assistance and support which I received from a number of colleagues and friends at the London School of Economics and Political Science during the preparation of this thesis. The nature of such assistance and support ranges from the gathering, photocopying and recording of research material, to the transcription of the Braille script and the reading and correction of the thesis. They include: Andria Wilson, Chikako Nakazawa, Jeroen Weimar, Patty Habraken, Reem Yassawi, Bemil Okorodudu, Eleni Caligas, Alexandra Payne, Valerie Read, Lynn McFadden, Andy Crowell, Kirsty Ayre, Sabin Fievet, Marcia Froes, Jamsheda Amad, Jemile Senulubas and Stelios Stabridas. Others to whom I owe a special vote of thanks include Della Percival, Alexandra Crolla, Ananda Guha, Giavanna Campello, Bethan Duck, Simon Miller, Diana Wong, Siu-Mei Lai, Alison Gordon, Claire Mucklow,

Kemi Alabala, Sally Strand, Petty Tout, Jill Passey and Tasos Bisopoulos. To all these people, I wish to express my sincere gratitude for their kindness and friendship. From outside the London School of Economics and Political Science, I particularly wish to thank Messrs. Derek Marshall, Peter Oloyi, Yao Amuah and Richard Hopkins, Dr. Kaiyan Kaikobad, as well as Dr. Michael Addo and Mrs. Sue Addo for their help and friendship.

I wish to offer my sincere thanks to the staff of the library of the Institute of Advanced Legal Studies, especially Mrs. Gilespie for assisting with the photocopying of research material. My thanks also go to Mr. Martin Wattam, the librarian at the London UN Information Centre for his help in tracking down elusive UN documents.

Sincere thanks are also due to the British Library of Social Sciences at the London School of Economics and Political Science for granting me privileges like a study, free photocopying facilities, etc. My many thanks also to the staff of the library, especially Beverly Britain and the porters, whose help sometimes went beyond the bounds of duty. I am also deeply grateful to the Welfare Office of the Students Union of the London School of Economics and Political Science for assistance with finding readers and for granting me access to photocopying facilities in the early stages of the preparation of this thesis.

I wish to record my profound gratitude to the government of Ghana for awarding me the scholarship which has enabled me to undertake this study. I am also deeply

grateful to the Scholarships Office of the London School of Economics and Political Science and the Vice-Chancellor Discretionary Fund of the University of London for the generous supplementary financial assistance without which it would have been impossible to complete this study. I am also grateful to the Royal National Institute for the Blind for a generous student equipment grant. Miss Beverly Byfield was most instrumental in arranging for special grants toward the acquisition of equipment which facilitated my work, and I thank her warmly.

Notwithstanding the help which I have received, and, obviously, my inability directly to read print, I, of course, take full responsibility for all mistakes of substance or presentation which may have crept into this work.

B.I.K.

LIST OF ABBREVIATIONS

ADIRC	Academie de Droit International Recueil des Cours
AFDI	Annuaire Francais de Droit International
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
ALJ	Australian Law Journal
ALR	Anglo-American Law Review
ASILP	American Society of International law Proceedings
AV	Archiv des Volkerrechts
BJIL	Brooklyn Journal of International Law
BULR	Boston University Law Review
BYIL	British Year Book of International Law
Cal.LR.	California Law Review
CJIL	Columbia Journal of Transnational Law
CLP	Current Legal Problems
CLR	Columbia Law Review
Comp	Compiled
CS	Comunicazioni e Studi
CULR	Catholic University Law Review
CWRJIL	Case Western Reserve Journal of International Law
CYIL	Canadian Yearbook of International Law
ECOSOC	Economic and Social Council
EPIL	Encyclopedia of Public International Law
ESS	Encyclopedia of the Social Sciences

FA	Foreign Affairs
GAOR	General Assembly, Official Records
GJICL	Georgia Journal of International and Comparative Law
HILJ	Harvard International Law Journal
HLJ	Harvard Law Journal
HLR	Harvard Law Review
IA	International Affairs
ICAO	International Civil Aviation Organisation
ICJ	International Court of Justice
ICJYB	Yearbook of the International Court of Justice
ICLQ	International and Comparative Law Quarterly
IJIL	Indian Journal of International Law
ILC	International Law Commission
ILCYB	Yearbook of the International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
ILR	International Law Reports
IO	International Organisation
IR	International Relations
IYIA	Indian Yearbook of International Affairs
JA	Judge ad hoc
JAIL	Japanese Annual of International Law
JAJS	Journal of American Judicature Society
JCLTIL	Journal of Comparative Legislation and International Law
JILI	Journal of the Indian Law Institute

JILP	Journal of International Law and Policy
JMLQ	John Marshall Law Quarterly
KCA	Keesing's Contemporary Archives
LLR	Louisiana Law Review
LNOJ	League of Nations, Official Journal
LQR	Law Quarterly Review
Mich.LR	Michigan Law Review
MLR	Modern Law Review
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
OAU	Organisation of African Unity
Para.	Paragraph
PBAQ	Pennsylvania Bar Association Quarterly
PCIJ	Permanent Court of International Justice
RBDI	Revue Belge de Droit International
RDI	Rivista di Diritto Internazionale
RDIDC	Revue de Droit International et de Droit Compare
RDISDP	Revue de Droit International de Sciences Diplomatiques et Politiques
REDI	Revue Egyptienne de Droit International
Res	Resolution
RGDIP	Revue General de Droit International Public
RHDI	Revue Hellenique de Droit International
RPP	Revue Politique et Parlementaire
SCOR	Security Council, Official Records
SJILC	Syracuse Journal of International Law and Commerce

SLR	Saskatchewan Law Review
Stan.LR	Stanford Law Review
Supp	Supplement
SYIL	Soviet Yearbook of International Law
TGS	Transactions of the Grotius Society
TILJ	Texas International Law Journal
UNCIO	Documents on United Nations Conference on International Organisation
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UPLR	University of Pennsylvania Law Review
UTFLR	University of Toronto Faculty of Law Review
VJIL	Virginia Journal of International Law
VJTL	Vanderbilt Journal of Transnational Law
VLR	Villanova Law Review
V-P	Vice President
WHA	World Health Assembly
WHO	World Health Organisation
WT	World Today
YLJ	Yale Law Journal
ZAORV	Zeitschrift fur Auslandsches Offentliches Recht und Volkerrecht

TABLE OF CASES

A

Admission Case, ICJ Reports 1947-8, 57
54, n.59; 55, n.61; 350, n.34; 376, n.116; 409, n.216; 427-
31; 432; 442, n.294

Aegean Sea Case (Interim Measures), ICJ Reports 1976, 3;
(Judgment), ICJ Reports 1976, 3
54, n.59

Aerial Incident Case (Preliminary Objections), ICJ Reports
1959, 127
48; 56, n.62; 73; 74; 77, n.133; 299

Anglo-Iranian Oil Company Case (Interim Measures), ICJ
Reports 1951, 89; (Preliminary Objections), ICJ Reports
1952, 93
306, n.156

Re Arbitral Award Case, ICJ Reports 1960, 172
37; 62, n.82.

Asylum Case, ICJ Reports 1950, 266
268; 270; 271; 272; 273; 274

Atlantis Development Corporation v. United States, 379f,
2nd 818 (5th Circuit 1967)
193, n.182

The Austro-German Customs Union Case, PCIJ Series A/B,
No.41, 37
350, n.34; 399; 407, n.214; 410, n.219

B

Barcelona Traction Case (Preliminary Objections), ICJ
Reports 1965, 6
56, n.62; 73

Barcelona Traction Case (Merits), ICJ Reports 1970, 3
74; 93; 102, n.206; 146, n.73

Brazilian Loans Case, Judgment No.15, PCIJ Series A,
Nos.20/21, 93
66; 85, n.163

Burkina Faso/Mali Case, ICJ Reports 1986, 554
49, n.44; 56, n.62; 71, n.113; 89, n.176; 90, n.181; 183

C

Chorzow Factory Case (Interpretation), PCIJ Series A, No.13, 20
47, n.37; 177, n.141

Chorzow Factory Case (Merits), PCIJ Series A, No.17, 4
54, n.58; 66, n.95

Chorzow Factory Case (Jurisdiction), PCIJ Series A, No.9,
4
61, n.79; 65; 66

Competence Case, ICJ Reports 1950, 4
55, n.61; 427; 431-2

Competence of the ILO for the International Regulation of
Conditions of Agricultural Labour, PCIJ Series B, No.2, 9
322, n.191

Corfu Channel Case (Preliminary Objections), ICJ Reports
1947-8, 15
306, n.156

Corfu Channel Case (Merits), ICJ Reports 1949, 4
55, n.61; 57; 61, n.80; 103-8; 110; 316

Corfu Channel Case (Compensation Case), ICJ Reports 1949,
4, 244
159; 507, n.462

Costa Rica Packet Case, Moore, International Arbitrations,
5:4948; Martens, Nouveau Recueil General, 2nd Ser., 23:808
60; 73

D

Danzig Legislative Decrees Case, PCIJ Series A/B, No.65;
41, 65
368, n.80; 399; 405, n.211; 414; 422

Delimitation of the Territorial Waters Between the Island
of Castellarizo and the Coast of Anatolia, PCIJ Series A/B,
No.46, 4, 51
54, n.59

E

Eastern Carelia Case, PCIN Series B, No.5, 7
54, n.59; 56, n.62; 73; 349; 365-71; 373, n.103; 374; 375;
378; 379; 381; 384; 387; 388; 389; 398, n.186; 403, n.205

European Commission on the Danube Case, PCIJ Series B,
No.16, 6
54, n.58; 398

Expenses Case, ICJ Reports 1962, 151
350; 373, n.103; 377, n.118; 476-86

F

Fasla Case, ICJ Reports 1973, 166
393, n.173; 421, nn.241-2; 467

Fijian Intervention Cases, ICJ Reports 1973, 320, 324; ICJ Reports 1974, 530, 535
136, n.56; 137; 143; 190; 209; 215; 230, n.296; 237, n.316;
241, n.326; 244, n.331; 286-7

Fisheries Jurisdiction Cases (Jurisdiction), ICJ Reports 1973, 49
54, n.59; 95

Fisheries Jurisdiction Case (Merits), ICJ Reports 1974, 3,
175
54, n.59; 96, n.190; 306, n.156

Fisheries Case, ICJ Reports 1951, 116
61, n.79; 66, n.95; 94, n.187; 109-11

Franco-British Arbitration, 54 ILR 6
93

Franconia Case, UR 2 Ex.Div. 63
65

Free Zones Case, PCIJ Series A/B, No.46, 96
47, n.38

Free Zones Case (Second Phase) (Order of Dec. 6th 1930), PCIJ Series A, No.24, 4
47, n.38

G

German Interests in Polish Upper Silesia Case, PCIJ Series A, N.6, 4
57; 58

German Interests in Polish Upper Silesia Case (Merits), PCIJ Series A, No.7, 4
47, n.37; 54, n.59; 356, n.52

German Minority Schools Case, PCIJ Series A/B, No.40, 4
413, n.225

German Settlers Case, PCIJ Series B, No.6, 6
368; 369, n.81

Greco-Turkish Agreement, PCIJ Series B, No.16, 4
54, n.59

Grisbadarma Case, The Hague 1909
62, n.82

Gulf of Maine Case, ICJ Reports 1984, 246
38, n.19; 56, n.62; 58, n.69; 61; 75; 89; 93; 100, n.201;
114, n.233

H

Haya de la Torre Case, ICJ Reports 1951, 71
142; 202; 211, n.232; 236, n.315; 268-75; 278; 285-6; 288;
289; 292; 321, n.187; 322; 337; 517

I

ICAO Case, ICJ Reports 1972, 46
260, n.28; 416, n.229

ILO Administrative Tribunal Case, ICJ Reports, 1956, 77
36; 54, n.59; 345, n.12; 369, n.81; 393; 416-21; 422,
n.245; 465-7; 508, n.467

IMCO Case, ICJ Reports 1960, 150
377, n.177; 473-5; 508, n.467

Interhandel Case (Interim Measures of Protection), ICJ Reports 1957, 105
331, n.217

Interhandel Case (Preliminary Objections), ICJ Reports, 1959, 6
36

Italian Intervention Case, ICJ Reports, 1984, 3
49, n.43; 54, n.59; 55, n.61; 76, n.129; 85, n.163; 119,
n.5; 121, nn.8, 9; 122-3, nn.12-7; 125, n.20; 126, n.23;
127; 131; 146-50; 152, n.84; 153, n.87; 165; 170, n.126;
172; 175, n.137; 177, n.142; 178, n.144; 180-3, nn.149-50;
186; 187, n.167; 189, n.170; 191; 195-200, nn.184-97; 202;
203, n.206; 204; 205, n.215; 207; 215, n.241; 216; 217,
nn.248-9; 218; 219-22; 225, n.279; 226, nn.282-5; 229,
nn.293-5; 230-1, nn.297-302; 232, n.305; 233-8, nn.308-18;
239; 240, n.325; 241, n.326; 242-3, nn.328-30; 244-7; 251,
n.343; 253, n.4; 284; 319, n.181; 324, n.194; 325; 327,
n.205; 361, n.64; 363, n.66; 513

J

Jaworzina Case, PCIJ Series B, No.8, 6
60

Jeglins Case, cited in PCIJ Series B/A, No.76, 19-21
65

L

Legal Status of Eastern Greenland, PCIJ Series A/B, No.53,
22
135; 183

Libya/Malta Case, ICJ Reports 1985, 13
38, n.19; 39, n.22; 54, n.59; 58, n.68; 61, n.81; 75,
n.128; 90, n.180; 146, n.75; 184

Lighthouses Case, PCIJ Series A/B, No.62, 4
45, n.32

Lighthouses in Crete and Samos Case, PCIJ Series A/B,
No.71, 94
45, n.32

Lotus Case, PCIJ Series A, No.10
61, n.79; 65; 66; 67; 73; 95

M

Maltese Intervention Case, ICJ Reports 1981, 3
54, n.59; 76, n.129; 119, n.5; 128, n.28; 129, nn.30-1;
135, n.55; 138-45; 164; 169, n.125; 172; 177, n.143; 182,
n.154; 186; 191; 192; 195, n.183; 197; 199, n.196; 202;
203, n.205; 204; 205; 207; 216; 217, n.249; 218, n.252;
219; 225, n.278; 226, n.285; 228, n.291; 229, n.293; 237,
n.316; 238, n.317; 240, n.323; 243, n.329; 246, n.336; 248;
513

Marbury v. Madison, 1 Cranch 137 (1803)
437

Mavrommatis Palestine Concessions Case, PCIJ Series A,
No.2, 6
56, n.62; 231, n.302

Mazilu Case, ICJ Reports 1989, 177
385-7; 503-6; 508, n.468

Meerauge Arbitration Case, G. Fr. de Martens, Nouveau
Recueil Général de Traités et Autres Actes Relatifs aux
Rapports de Droit International, 3rd ser., continued by H.
Triepel, Vol.3, 3:71
60

Minority Schools in Albania Case, PCIJ Series A/B, No.64,
399

Monetary Gold Case, ICJ Reports 1954, 19
48, n.39; 74, n.122; 75; 131; 132; 135, n.55; 149; 158-65;
172; 185; 186; 238; 363, nn.66-7

Mortished Case, ICJ Reports 1982, 325

393, n.173; 421, nn.241-2; 425, n.250; 468-70

Mosul Case, PCIJ Series B, No.12, 6
369-373, n.103; 398, n.186

N

Namibia Case, ICJ Reports 1971, 16
359, n.60; 378-9; 390, n.1162; 402-3; 406-7; 410; 450-6;
508, n.468

Namibia Case (Order), ICJ Reports 1971, 12
402, n.201

Nicaraguan Intervention Case, ICJ Reports 1990, 92
75, n.127; 131, n.39; 150-3; 165-7, n.118; 172; 175-6,
nn.139-40; 186, nn.164, 166; 198; 202, nn.202, 204; 203,
n.206; 204; 208, n.225; 216-7, n.247; 223, n.273; 227; 231-
2, nn.302-5; 234, n.310; 236, n.314; 237, n.314; 248; 272,
n.66; 277, n.76;

Nicaragua/United States Case (Provisional Measures), ICJ Reports 1984, 169
146, n.73; 210, n.228; 229, n.295

Nicaragua/United States Case (Jurisdiction and Admissibility), ICJ Reports 1984, 392
279, n.83; 282, n.88; 333, n.223

Nicaragua/United States Case (Merits), ICJ Reports 1986, 14
49, n.44; 54, n.59; 55, n.61; 95; 25-6, nn.190-1; 108,
n.218; 279, n.83; 282, n.88; 507, n.462

Northern Cameroons Case, ICJ Reports 1963, 16
48; 49, n.42; 363, n.68; 365, n.72; 373, n.103; 377, n.117

North Sea Cases, ICJ Reports 1969, 3
38, n.19; 54, n.59; 112-4

Norwegian Loans Case, ICJ Reports 1957, 9
330; 331, n.217; 332

Norwegian Shipowners Case, Scott, The Hague Court Reports, Second Ser. (1932), 82
72

Nottebohm Case (Preliminary Objections), ICJ Reports 1953, 111
55, n.61

Nottebohm Case (Second Phase), ICJ Reports 1955, 4
46; 57; 74

Nuclear Tests Cases (Interim Measures), ICJ Reports 1973, 136

Nuclear Tests Cases (Judgment), ICJ Reports 1974, 253; 457
209; 229; 273; 287; 331

P

Pakistani Prisoners of War Case (Interim Measures), ICJ Reports 1973, 328, 344
75; 302

Panevazys-Saldutiskis Railway Case (Preliminary
Objections), Series A/B, No.75, 53; PCIJ Series A/B, No.76,
4
34

Peace Treaties Cases, ICJ Reports 1950, 65, 221
56, n.62; 73; 350; 365, n.71; 371, n.96; 373-7; 380; 386;
387-8, n.154; 399, n.196; 409, n.216; 410; 411, n.221; 437-
41; 508, n.468

Personal Work of the Employers Case, PCIJ Series B, No.13,
6
55, n.61; 65

Peter Pazmany University Case, PCIJ Series A/B, No.61, 208
60, n.79

Polish Postal Service in Danzig Case, PCIJ Series B, No.11,
6
60, n.79; 65, n.93

Polish War Vessels in the Port of Danzig Case, PCIJ Series A/B, No.43, 128
399, n.191

R

Railway Traffic between Lithuania and Poland Case, PCIJ Series A/B, No.42, 108
399, n.191

Reparations Case, ICJ Reports 1949, 174
54, n.59; 61; 533-7; 508, n.467

Reservations Case, ICJ Reports 1951, 15
261; 297; 359, n.60; 377-8; 393, n.174; 456-62; 508,
nn.467-8

Rights of Passage Case (Merits), ICJ Reports 1960, 6
85, n.163

S

Salvadorean Intervention Case, ICJ Reports 1984, 215
152, n.86; 192-3; 259, n.26; 279-88; 293, n.122; 294; 306,

nn.156, 158; 307, n.159; 313-6; 327, n.206; 328-9; 332; 337; 521

Schooner Exchange v. McFaddon, 11 US (7 Cranch), 116 67, n.100

Serbian Loans Case, PCIJ Judgment No.14, Series A, No.20/21, 5 56, n.62; 66

Smuck v. Hobson, 408f. 2nd 175 (District Court Council 1969) 193, n.182

Société Commercial de Belgique, PCIJ Series A/B, No.78, 160 206, n.218

South West Africa Case (Status), ICJ Reports 1950, 128 359, n.60; 410, n.219; 424; 442-4; 449-50

South West Africa Case (Voting), ICJ Reports 1955, 67 444-6

South West Africa Case (Committee), ICJ Reports 1956, 23 446-8

South West Africa Cases (Preliminary Objections), ICJ Reports 1962, 319 449, n.317

South West Africa Cases (Second Phase), ICJ Reports 1966, 6 45, n.31; 96, n.191; 145, n.73; 403, n.206; 449

SS Wimbledon Case, PCIJ Series A, No.1, 6 128, n.28; 134; 190; 261, n.34; 262-7; 278; 291; 321, n.187; 322; 336

T

Temple Case (Preliminary Objections), ICJ Reports 1961, 17 48; 54, n.59; 55, n.61; 56, n.62; 70, n.112; 73-4; 90, n.182

Temple Case (Merits), ICJ Reports 1962, 6 54, n.59

Treatment of Polish Nationals in Danzig Case, PCIJ Series A/B, No.44, 4 399, n.191

Tunis and Morocco Nationality Decrees Case, PCIJ Series B, No. 4, 3 56, n.62; 356, n.53

Tunisia/Libya Case, ICJ Reports 1982, 18
38, n.19; 54, n.59; 61, n.81; 75, n.126 85, n.163; 89,
n.176; 114, n.233; 139, n.60; 143; 150; 163-4

U

UN Administrative Tribunal Case, ICJ Reports 1954, 47
37; 54, n.59; 345, n.12; 359, n.60; 416, n.230; 463-5; 508,
n.467

UN Headquarters Agreement Case, ICJ Reports 1988, 12
61, n.81; 498-502

US Nationals in Morocco Case, ICJ Reports 1952, 176
54, n.59

W

Western Sahara Case, ICJ Reports 1975, 12
370, n.93; 372, n.100; 379-85; 386-7; 388-90; 403-4; 406-7;
410; 487-94; 507, n.465

WHO Case, ICJ Reports, 1980, 73
494-8; 508, n.467

Y

Yakimetz Case, ICJ Reports 1987, 18
421, n.241; 470-3

INTRODUCTION

The position of third parties before the International Court of Justice is a subject which has attracted relatively little attention. Indeed, the neglect of this subject¹ is in part probably a result of the sense of complacency generated by the protection which the operation in international adjudication of the principle of the relative effect of judicial decisions is believed to afford to third parties. The adequacy of such an important technical and formal protection appears to be doubtful when viewed against the operation of the doctrine of judicial precedents, whether masked under the notion of the consistency of jurisprudence, or under any other guise and the role of judicial decisions as a subsidiary means for determining rules of law to be applied by the Court.

The foregoing considerations represent only one of the main strands of the subject of this study, another aspect of which relates to intervention, that incidental procedural device which involves the interposition of a third party, a stranger to the principal proceedings, to protect its interests. The Statute of the Court provides for two different forms of intervention by states which are

¹ This subject forms part of international procedure which has for long been regarded as "the Antarctica of international law".

not from the outset concerned in a suit brought before the Court. As regards the first type of intervention, a state which considers that its legal interest may be affected by the decision in a pending case may apply to be permitted to intervene. The fate of such an application rests entirely with the Court. As regards the second kind of intervention, whenever the construction of a convention arises in a case before the Court, states other than the parties to the proceedings which are parties to the convention have a right to intervene in the case. A state which exercises this right is bound by the construction of the convention contained in the judgment.

For a very long time, state practice regarding intervention has been relatively sparse. Consequently, there was scant judicial authority and comparatively little academic discussion on the nature and scope of the institution of intervention. However, the last two decades witnessed a dramatic change in this situation, with a resurgence of practical and theoretical interest in the institution of intervention. Attempts by states to intervene in pending proceedings gave the Court ample opportunity to clarify the law on the procedure of intervention in the context of actual litigation in accordance with the decision taken nearly 70 years ago to resolve matters as they arose. The Court's response to attempts at intervention is bound to create expectations for the future and thus have significant implications for states contemplating recourse to intervention. Whether and to what effect the opportunity represented by the recent

renewal of practical interest in the institution of intervention has been utilised by the Court, remains to be discovered.

It may seem strange to speak of "third parties" in relation to the advisory function which the Court performs as the judicial arm of the United Nations, since, in advisory proceedings, there are, technically speaking, no parties and no binding decisions. However, in terms of access to the Court, the conduct of the proceedings and the effect of advisory opinions, the participants in advisory proceedings may be regarded as "third parties". Moreover, the fact that the Court does not treat the legal advice it proffers as confidential, but insists on following a judicial procedure even in rendering advisory opinions, amounts to a recognition that such opinions are of interest to actors other than the requesting organs or bodies who may be considered as "third parties". Given that the advisory jurisdiction is not based on the consent of states, an advisory opinion may be rendered despite the opposition of interested "third parties". The Statute of the Court provides certain procedural safeguards for "third parties" which enable them to play an amicus curiae role in advisory proceedings. In appropriate circumstances, the Court may assimilate its advisory procedure to that followed in contentious proceedings. In addition to ascertaining the influence of advisory opinions on the work of the requesting organs or bodies, we shall enquire into whether these procedural guarantees and the non-binding character of the opinions are sufficient to protect the

rights and interests of other "third parties".

In the first chapter, we shall examine the nature of judicial decisions and the scope and limits of the principle of the relative effect of judicial decisions in relation to third parties. It will be shown that the limitations sought to be placed on the Court's ability to follow the doctrine of judicial precedents have neither affected the place of judicial decisions in the Court's jurisprudence, nor prevented them from contributing significantly to the development of international law. The purpose of the chapter is to show that by contributing to the development of the law, judicial decisions undoubtedly affect the rights and interests of third parties, whatever else may be claimed for the principle of the relative effect of such decisions in international practice.

While the principle of the relative effect of judicial decisions may possibly protect third parties from the binding effect of the Court's decisions, they do not and cannot prevent such rights or interests from being affected. This is the proper role of the institution of intervention, with which we will be concerned in the next two chapters. We shall review the genesis of discretionary intervention, the conflicting policies associated with its exercise, the conditions governing its operation and its consequences. The role of the Court and the parties concerned will also be considered and the Court's approach to the resolution of related controversial issues will be critically analysed.

Enquiry in the third chapter will be directed towards

exploring the evolution and conditions necessary for the operation of intervention as of right, the extent, if any, of the discretion exercised by the Court in the matter of determining the admissibility of a declaration of intervention, and the effect of the Court's judgment on a third state whose declaration of intervention has either been allowed or dismissed.

In the fourth chapter, we will describe the legal basis, nature and purposes of the advisory jurisdiction. "Third parties" will be defined and identified in relation to advisory proceedings. A consideration of the procedural safeguards available to "third parties" will be followed by a brief empirical assessment of the impact of advisory opinions on them.

The final chapter recalls, though not exhaustively, many of the principal deductions and projections that emerge from the discussion in the preceding chapters and the suggestions proffered.

In contrast to other studies, which have focused on one or other of the aspects of the subject, the present study seeks comprehensively to explore and analyse the objects, scope and limits of the third party procedural guarantees from various perspectives so as to attempt to assess their effectiveness and utility in safeguarding the rights and interests of third parties, as well as their future applicability. Suggestions for improvement will be offered in appropriate cases. It is hoped that the present study may help to increase awareness of the procedural protective devices available to third parties in

proceedings before the International Court and related unresolved issues. By stimulating and provoking academic discussion of such outstanding matters, it is hoped that this study may make a modest contribution to knowledge on the subject of the position of third parties before the International Court.

CHAPTER ONE

GENERAL PROTECTION FOR THIRD PARTIES:

ARTICLES 59 AND 38(1)(d) OF THE STATUTE

1. Introduction

The purpose of this chapter is primarily to examine the nature of judicial decisions, especially those of the International Court of Justice,¹ and ascertain the effect of such decisions on the litigants, that is the narrow circle of parties in particular, and third parties or states, and the development of international law in general. This will involve an analysis of the relevant provisions of the Statute and Rules of the Court,² and their application in the jurisprudence of the Court. An attempt will be made to show that notwithstanding the apparent constraints placed on the Court's authority to apply the doctrine of judicial precedent by Article 59 of the Statute, the Court has adopted the essence of that doctrine in nearly all its aspects. It will be shown in consequence that in spite of the qualification placed by Article 38(1)(d) of the Statute on judicial decisions in relation to the other elements of law to be

¹ Hereinafter "the Court". For the purposes of this study, we shall treat the Permanent Court of International Justice (sometimes "the Permanent Court") and the International Court of Justice (sometimes "the International Court") as one (the latter being the successor of the former) except where it is considered necessary to distinguish them.

² Hereinafter "the Rules".

applied by the Court, in practice it has elevated such decisions to the same status as treaties, custom and general principles of law. It is hoped to establish eventually that judicial decisions, regardless of the provisions of the Statute, have an effect and scope which extend far beyond the narrow circle of the parties, to the international community with significant implications for the shaping and moulding of international law.

2. Structure of a Judgment³

(a) Elements of the Judgment

The elements of the judgment⁴ with which we are here concerned include the operative provisions, the reasoning, separate or individual and dissenting opinions, as well as declarations. The two last-mentioned elements, in addition to their general contribution to the development of international law, by explaining more fully the vexed issues relating to the various forms of intervention permissible under the Statute of the Court other than the judgments of the Court as a whole, have greatly aided our understanding of such issues, the

³ This also includes advisory opinions, but the subject of advisory opinions is dealt with in another part of this work; see Chapter 4, below.

⁴ See Articles 59 and 38(1)(d) of the Statute of the Court. The Statute is reprinted in, e.g., I. Brownlie, Basic Documents in International Law, 3rd ed. (Oxford: Clarendon Press, 1983), 387-404 (hereinafter "Basic Documents"); T.B. Millar (ed.) with R. Ward, Current International Treaties (New York: New York University Press, 1984), 129-45 (hereinafter "Treaties"); S. Rosenne, (comp. and ed.), Documents on the International Court of Justice (Leiden: A.W. Sijthoff, 1974), 59-89 (hereinafter "Documents").

clarification of which the Court itself has until recently consistently and consciously evaded.

In accordance with a decision taken in 1948 the Court reads and approves the summary which precedes each judgment, advisory opinion and sometimes order.⁵ The status of headnote does not appear in either the resolution on the internal judicial practice adopted on 12 April 1976 or Article 95 of the Rules of Court adopted on 14 April 1978.⁶ Paragraph 1 of Article 95 of the Rules lays down that the judgment shall indicate:

- (i) whether it is rendered by the Court as a whole or a Chamber thereof;
- (ii) the date on which it is read;
- (iii) the names of the participating judges;
- (iv) the names of the parties and their representatives, that is agents, counsel and advocates;
- (v) a summary of the proceedings;
- (vi) submissions of the parties;
- (vii) a statement of the facts;
- (viii) the reasons in point of law;
- (ix) the operative provisions of the judgment;
- (x) the decision, if any, in regard to costs;
- (xi) the number and names of the judges constituting the

⁵ See S. Rosenne, Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice (The Hague: Martinus Nijhoff Publishers, 1983), 198 (hereinafter "Procedure".)

⁶ See *ibid.*

majority; and
(xii) a statement as to the text of the judgment which is authoritative.⁷

(b) The Operative Provisions of the Judgment

The term "decision" in legal terminology is used in a broad sense to refer to the whole of the judgment. When used in a narrow sense, however, the term is normally assumed to imply the operative provisions of the judgment. Article 59 of the Statute of the Court which is not infrequently interpreted as affording protection and respect for the rights and interests of states other than those which are parties to the case before the Court, uses the term "decision" instead of "judgment".⁸ The only other instances of the use of the terms

⁷ Parties to a case before the Court may choose to conduct the case in either French or English, the two official languages. Judgment is rendered in the language in which the parties have agreed to conduct the case. Should the parties fail to agree on the choice of language each of them may employ the language of its preference in its pleadings in which case the Court will deliver its judgment in both languages, and determine which of the two texts will be considered authoritative. Though the Court approves both texts of its judgment, owing to the speed with which they are prepared and the problems encountered in rendering technical legal texts from one language to another, the version of the judgment or individual dissenting opinion which is not the authoritative text should be used with care. See on this point, S. Rosenne, The Law and Practice of the International Court, 2nd rev. ed. (Dordrecht: Martinus Nijhoff Publishers, 1985), 600 (hereinafter "Law and Practice".) See Statute, Article 39.

⁸ Cf. Articles 56-8 and 60-1 of the Statute which also employ the term "judgment". Article 94(1) of the Charter of the United Nations (which is reprinted in e.g. Brownlie, Basic Documents, 1-34; Millar, Treaties, 94-128; Rosenne, Documents, 1-57) uses the term "decision", while paragraph 2 of the same Article employs the term "judgment". It does not

"decision" or "decisions" may be found in Articles 62 and 38(1)(d) respectively. The operative provisions are that part of the judgment which carries out the main object thereof. They are also known as the *dispositif*.⁹ No matter the term or word used, the operative provisions are couched in terms of a decision.¹⁰ As a matter of strict law, it is only the *dispositif* of the decision or judgment which has binding force.¹¹ The expression "to implement the decision" was defined by the Court in the Interhandel Case (Preliminary Objections) as "to apply its operative part".¹² In the ILO Administrative Tribunal Case, the Court defined the Tribunal's decision as "the operative part of its judgment on a given point and not the grounds of decision invoked by that Tribunal".¹³ Where necessary the Court may vote on each operative provision of a judgment separately.¹⁴

seem unreasonable to infer from this that the obligations imposed on the parties to a case are contained in the decision, that is, the operative part of the judgment.

⁹ See E. William, A. Jowitt and C. Walsh, Jowitt's Dictionary of English Law, 2nd ed., J. Burke (ed.), 2 vols. (London: Sweet & Maxwell, 1977), s.v. "*Dispositif*", "*Judgment*", "*Operative part*" (hereinafter "*Jowitt*").

¹⁰ See Rosenne, Law and Practice, 601.

¹¹ See E.M. Hambro, "Intervention under Article 63 of the Statute of the International Court of Justice", 14 CS (1975) (hereinafter "*Intervention*"), 387. Also see *id.*, "The Reasons Behind the Decisions of the International Court of Justice", 7 CLP (1954), 212 at 214 (hereinafter "*Reasons*").

¹² See ICJ Reports 1959, 28.

¹³ See *ibid.* 1956, 4 at 8.

¹⁴ See Rosenne, Law and Practice, 601.

(c) The Reasons in Point of Law

The stipulation that the judgment shall state, among other things, the reasons in point of law contained in Article 95(1) of the Rules is meant to give effect to Article 56 of the Statute which enjoins the Court to state the reasons on which the judgment is based. In other words, the Statute requires that the judgment be motivated. In the UN Administrative Tribunal Case, the Court considered this statutory requirement as one of the provisions necessary to establish the judicial character of an organ endowed with authority to make decisions with binding force.¹⁵

The Arbitral Award Case¹⁶ provided the Court with another occasion to express itself on this statutory requirement. Answering the contention that the Award was a nullity on grounds of alleged inadequacy of reasons in support of the conclusions reached by the Arbitrator, the Court, having examined the Award in question, found that it dealt in logical order and in some detail with all relevant considerations and that it contained ample reasoning and explanation in support of the conclusions reached by the Arbitrator.

While the operative part has binding force,¹⁷ it is the reasoning behind the judgment which creates law in a broader

¹⁵ See ICJ Reports 1954, 47 at 52.

¹⁶ See *ibid.* 1960, 192 at 216.

¹⁷ See Hambro, "Intervention", 392-3; *id.*, "Reasons", 214.

sense and contributes to the clarification and development of international law which is notoriously imprecise, fragmentary, uncertain and controversial.¹⁸

The reasons in point of law (or the reasoning) usually contain the legal rules and principles by means of which the conclusion is reached. The accumulation of reasons in point of law over a period of time constitutes the jurisprudence of the Court. This probably explains the tendency of the Court to refer frequently to "the jurisprudence".¹⁹

The value of the reasoning contained in judicial decisions as a source of law has received recognition in Article 38(1)(d) of the Statute, which directs the Court to apply, subject to Article 59, judicial decisions amongst others as subsidiary means for determination of rules of law. Rosenne, in explaining the apparent contradiction between the use of judicial decisions as precedents and Article 59, wrote that the decision which was only binding on the parties to a particular case was found in the operative clauses of the

¹⁸ See Hambro, "Intervention" 392-3; *id.*, "Reasons" 214; M. Virally, "Sources of International Law" (hereinafter "Virally"), Manual of Public International Law, ed. M. Sorensen (London: Macmillan & Co., 1968), 150.

¹⁹ See ICJ Reports 1982, 23; *ibid.* 1969, 4 at 53, para.101(c)(i); *ibid.* 1985, 13 at 40-1, para.49. For similar references to jurisprudence, see *ibid.*, 35, para.40, 45, para.58; *ibid.* 1982, 78, para.132. The Court has also referred to "international case-law", see e.g., ICJ Reports 1984, 294, para.95, 295, para.100, 298, para.108; "decided cases", see e.g., *ibid.*, 297-8, para.107; and "case-law", see e.g., *ibid.*, 208-9, para.143. See further L. Gross, "Some Observations on the International Court of Justice", 56 AJIL (1962), 33 at 43; J.N. Saxena, "The Court Without a Case", 12 JILI (1970), 676 at 688 (hereinafter "Saxena").

judgment, while "The Court's reasoning - its statement of what it regards as the correct legal position and why - enters into the general storehouse of public international law." This, in his view, accounts for the fact that decisions of the International Court have become one of the most important repertoires for the rules of international law and one of the law's most powerful instruments for adaptation to the constantly changing conditions.²⁰

(d) Individual and Dissenting Opinions²¹

We may deduce from the foregoing analysis of the first two elements of a judgment that its operative provisions, which are in the nature of things usually addressed specifically to the actual case before the Court,²² are binding on the parties to the instant case and in that case alone. The truth of this proposition must necessarily be qualified by the fact that the conclusions from which the operative provisions stem are themselves firmly rooted in the legal principles and rules embodied in the reasoning which forms part of the jurisprudence of the Court in particular,

²⁰ See S. Rosenne, The World Court, 3rd rev.ed. (Leiden: A.W.Sijthoff, 1973; Dobbs Ferry, New York: Oceana Publications, 1973), 98. This is the edition cited in the rest of this chapter. Cf. A.S. de Bustamante, The World Court, (New York: Macmillan Co., 1925), 241, para.225 (hereinafter "de Bustamante").

²¹ See generally, I. Hussain, Dissenting and Separate Opinions at the World Court (Dordrecht: Martinus Nijhoff Publishers, 1984) (hereinafter "Hussain").

²² See ICJ Reports 1985, 43, para.55.

and of international case law or judicial practice in general, which in turn binds third parties.

It might appear that disproportionate attention has been devoted in this study to an examination of the role of separate and dissenting opinions, considering their marginal status in relation to the judgments and the apparent lack of any obvious connection between the subject of this study and the part they play in the jurisprudence of the Court. There are very good reasons why we do not share these views. Not only do the separate and dissenting opinions form a peripheral, albeit important part of the individual majority decisions to which they relate, but they also form a part of the whole of the Court's jurisprudence. They have been said to be more revelatory of the sources of law than the majority decisions themselves.²³ If there is one subject which the Court has until recently persistently refused to face squarely, but which has been thoroughly explored by individual judges in their separate and dissenting opinions,²⁴ that subject is discretionary intervention which will be considered in the next chapter. Indeed, the contribution of such

²³ See R.D. Kearney, "Sources of Law and the International Court of Justice", in L. Gross (ed.), The Future of the International Court of Justice, Vol.2 (Dobbs Ferry, New York: Oceana Publications, 1976) (hereinafter "Future of the Court"), 615 (hereinafter "Kearney"). See also Rosenne, Law and Practice, 597.

²⁴ See C.M. Chinkin, "Third Party Intervention Before the International Court of Justice", 80 AJIL (1986), 495 at 522 (hereinafter "Chinkin"); P.C. Jessup, "Intervention in the International Court", 75 AJIL (1981), 903 (hereinafter "Jessup").

opinions to the illumination of the controversial issues regarding intervention mainly, though by no means solely, accounts for the considerable emphasis which we have placed on the treatment of the role of individual opinions in the Court's jurisprudence.

Pursuant to Article 57 of the Statute, which permits any judge who does not share the opinion of the majority to deliver a separate opinion, Article 95(2) of the Rules allows a judge who so desires to append his individual opinion to the judgment, whether he dissents from the majority or not.²⁵

In 1948 the Court decided that the opinion of a judge who disagreed with a judgment or advisory opinion should be called a dissenting opinion, while a separate opinion delivered by a judge who supported the operative part, the view of the majority but not its reasons, should be called an individual opinion.²⁶ In practice these proposed labels appear to have been ignored by many judges with the result that the English version of concurring opinions have been called separate opinions while the French texts have been styled "opinions individuels".²⁷ Article 95(2) of the 1978 Rules provides

²⁵ The provisions of this paragraph also apply to orders made by the Court.

²⁶ See ICJYB 1947-8, 68.

²⁷ See Rosenne, Procedure, 197-8; F. Jhabvala, "The Scope of Individual Opinions in the World Court", 13 NYIL (1982), 46-8 (hereinafter "Scope of Individual Opinions"). On separate and dissenting opinions see further, R.P. Anand, "The Role of Individual and Dissenting Opinions in International Adjudication", 14 ICLQ (1965), 788-807 (hereinafter "Individual and Dissenting Opinions"); M.O. Hudson, "The 28th Year of the World Court", 44 AJIL (1950), 20; E.M. Hambro,

that a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration.²⁸

3. The Impact of the Judgment

The preceding analysis of the component parts of a judgment of the Court has served to bring out clearly the different functions which they perform as regards the effect of the judgment as a whole. We shall now turn to an

"Dissenting and Individual Opinions in the International Court of Justice", 17 ZAORV (1956-7), 240-1, 243-4; L. Hand, The Bill of Rights, The Oliver Wendell Holmes Lectures 1958 (Cambridge: Harvard University Press, 1958), 71-2; W.A. Bowen, "Dissenting Opinions", 17 Green Bag (1905), 693; J.W. Sanders, "The Role of Dissenting Opinions in Louisiana", 23 LLR (1963), 677; E.T. Lee, "Editorial Notes: Dissenting Opinions", 2 JMLQ (1936-7), 405; W.E. Hirt, "In the Matter of Dissent Inter Judices de Jure", 31 PBAQ (1959-60), 258-9; G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: General Principles of Substantive Law", 27 BYIL (1950), 1-2 (hereinafter "27 BYIL (1950)"); *id.*, "Hersch Lauterpacht - The Scholar as Judge: Part 1", 37 BYIL (1961), 1-72 (hereinafter "Hersch Lauterpacht"); C.E. Hughes, The Supreme Court of the United States (New York: Columbia University Press, 1928), 68; R.G. Simmons, "The Use and Abuse of Dissenting Opinions", 16 LLR (1956), 498; S. Rosenne, "Sir Hersch Lauterpacht's Concept of the Task of the International Judge", 55 AJIL (1961), 852-3, 861; M. Politis, "How the World Court Has Functioned", 4 FA (1926), 451; W.O. Douglas, "The Dissent: A Safeguard of Democracy", 32 JAJS (1948), 197; E.J. Cohn, "Citadelle der Freien Richterpersonlichkeit", 64 Der Englische Gerichtstag (1958), cited in K.H. Nadelmann, "The Judicial Dissent: Publication v. Secrecy", 8 AJCL (1959), 430, n.128; H.F. Stone, "Dissenting Opinions Are Not Without Value", 26 JAJS (1942), 78; E. McWhinney, "The Legislative Role of the World Court in an Era of Transition" (hereinafter "McWhinney"), in Volkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift für Hermann Mosler (Berlin: Springer-Verlag, 1983) (hereinafter "Mosler Collection"), 576.

²⁸ On declarations see F. Jhabvala, "Declarations by Judges of the International Court of Justice", 72 AJIL (1978), 830 (hereinafter "Declarations").

investigation of the impact of the judgments of the Court in the light of the relevant provisions of the Statute and Rules, and their application in practice as well as the practice of states and the views of theorists of international law, so as to discover both the myth and the reality which lie behind the facade of the general safeguards provided by the Statute for the protection of the interests of third parties. Such an extensive and detailed investigation will not only help to place the issues with which we are here concerned in their true perspective, but it will also enable us to determine the adequacy or otherwise of the said general safeguards.

(a) Article 59 of the Statute

Article 59 of the Statute, which provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case" has been interpreted in a number of ways in the jurisprudence of the Court, arbitral tribunals, state practice and the writings of publicists.

The text of Article 59 is exactly the same as that of its counterpart in the Statute of the Permanent Court. The wording of Article 59 resembles that of Article 84 of the First Hague Convention of 1907, which also had a negative formulation. In contrast to Article 59 of the Statute, Article 30 of the Model Rules of Arbitral Procedure, which incorporates both Article 59 and Article 94(2) of the 1978 Rules, adopted a positive formula as follows: "Once rendered,

the award shall be binding on the parties". It has been suggested that this formulation more accurately expresses the law.²⁹

Article 59 is supplemented by Article 94(2) of the 1978 Rules, which provides that "the judgment shall be read at a public sitting of the Court and shall become binding on the parties on the day of the reading". Both these provisions must be read in conjunction with Article 94 of the Charter of the United Nations, according to whose terms each member undertakes to comply with the decision of the Court in a case to which it is a party. The Article further provides that:

If 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 or decide upon measures to be taken to give effect to the judgment.

It has however been suggested that the negative formula adopted in Article 59 is to be explained by the fact that the rule that the Court's decision is binding upon the parties is laid down by Article 94 of the Charter.³⁰ It is also

²⁹ See Rosenne, Law and Practice, 619, n.2

³⁰ See Virally, 149. It would appear that the framers of the Statute adopted this negative formula for Article 59 in order to avoid a repetition of that which is contained in the provisions of Article 94 of the UN Charter. As regards enforcement of judgments under Article 94 of the Charter, it may be noted that the US vetoed a Security Council resolution which would have required it to comply with the judgment handed down by the International Court concerning its dispute with Nicaragua. See Vol.32, KCA (Bristol: Keesing's Publications, 1986), 34549. The position regarding the enforcement of interim orders of protection is even less clear, as they are, technically speaking, not judgments. See generally, V.S. Mani, "Interim Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the Charter",

believed that Article 59 operates to confer on decisions of the Court the authority of res judicata.³¹

The view that the drafting of the text of Article 59 of the Statute leaves room for improvement and consequently that it must be interpreted more liberally than its terms seem to allow, finds some support in the jurisprudence and literature. In considering the meaning of the phrase "in respect of that particular case" embodied in that Article, an arbitral tribunal, presided over by Verzijl, in the last phase of the Lighthouses dispute between France and Greece, which had previously been before the Permanent Court on two occasions,³² after deciding that the dispute of which it was seised was not distinct from that which was decided in 1937, interpreted Article 59 thus:

One could moreover maintain also, arguing juridically, that the text of Article 59 is badly drafted, and that

10 IJIL (1970), 359-72 (hereinafter "Interim Measures"); J.B. Elkind, Interim Protection, A Functional Approach (The Hague: Martinus Nijhoff Publishers, 1981). See also, Rosenne, The World Court, 114. Also for an insight into the difficulties the Security Council might face with regard to carrying out Article 94(2) of the UN Charter, see L. Gross, "Treaty Interpretation: The Proper Role of an International Tribunal", 62-3 ASILP (1968-9), 109 (hereinafter "Treaty Interpretation"). See further, ICJYB 1986-7, 165-6; 1987-8, 153-4; 1988-9, 167-8; and 1989-90, 164-5.

³¹ See Virally, 149. Cf. the attitude of the Court in the South West Africa Cases (Second Phase), ICJ Reports 1966, 6, where preliminary issues which had been disposed of in an earlier judgment were reconsidered by the Court. See also R. Higgins, "The International Court and South West Africa: The Implications of the Judgment", 42 IA (1966), 580 (hereinafter "The Court and South West Africa").

³² See Lighthouses Case between France and Greece, PCIJ Series A/B, No.62, 4-60; Lighthouses in Crete and Samos, PCIJ Series A/B, No.71, 54-153.

one must necessarily interpret it in a more liberal sense than its terms appear to justify. There is much to be said in favour of this thesis. If it were true that the judgment of the International Court is clothed with the authority of res judicata only in the case which has been decided, that would mean that if the lis concerns the interpretation of a clause of a treaty, the interpretation given could be used again in arguments in any future lis concerning the same clause of the treaty. Such a result would not only be absurd, it would put Article 59 in irreconcilable contradiction with the last sentence of Article 63 of the Statute. The res judicata extends in content beyond the limits of the case decided.³³

Professor Guggenheim, as judge ad hoc for Liechtenstein in the Nottebohm Case (Second Phase), observed that "the scope of the judicial decision extends beyond the effects provided for in Article 59 of the Statute".³⁴ It has been observed that the Court itself has not apparently attempted to contradict this proposition but rather "to limit its application or potential application in a concrete case".³⁵

In theory it would appear that both the Permanent Court and the International Court have adopted the doctrine of plain meaning in the interpretation of Article 59. This doctrine stresses the necessity of giving effect to the plain terms of a treaty or construing words according to their general and ordinary meaning or their natural significance and of not

³³ See H. Lauterpacht (ed.), ILR 1956, No.23 (London: Butterworth & Co., 1960), 82 at 86-7. See also Rosenne, Law and Practice, 622, n.1.

³⁴ See ICJ Reports 1955, 61.

³⁵ See Rosenne, Law and Practice, 622, n.2. See generally, ibid., 621-2.

seeking aliunde for a meaning when the terms are clear.³⁶

In the German Interests in Polish Upper Silesia Case, the Permanent Court stated the object of Article 59 as being "to prevent legal principles accepted by the Court in a particular case from being binding upon other states or in other disputes".³⁷ This statement does not appear to have been followed in the second phase of the Free Zones Case (Second Order), where the Court explained that it would be incompatible with the character of the judgments rendered by the Court to which binding force is attached by virtue of Article 59 and Article 63(2) of the Statute, to give a judgment which either of the parties might render inoperative. On the other hand, there seems to be nothing to prevent the Court from rendering a judgment by consent.³⁸

The Court has explained that Article 59 rests on the assumption that the Court is at least able to render a binding decision in a matter connected with a title of jurisdiction and the subsistence of properly constituted proceedings. If the proceedings are not properly constituted the Court cannot give a decision binding on any state, either a third state whose interests constitute the real subject matter of the

³⁶ See A. McNair, The Law of Treaties (Oxford: Clarendon Press, 1961), 365.

³⁷ The Court also added that Article 59 did not exclude purely declaratory judgments. See PCIJ Series A, No.7, 19, confirmed in Chorzow Factory Case (Interpretation), PCIJ Series A, No.13, 20.

³⁸ See PCIJ Series A, No.24, 14 confirmed in PCIJ Series A/B, No.46, 161.

dispute or any of the parties.³⁹

In the Temple Case (Preliminary Objections) the Court, alluding to the decision in the Aerial Incident Case, explained that the decision by reason of Article 59 was only binding qua decision as between the parties to that case and could not have any effect on Thailand. On the other hand, the Court distinguished carefully between the binding effect attributed to the decision, by Article 59, and the statement of what the Court considered had to be the correct legal position, and it examined the issue whether the legal position was relevant to the circumstances in the case before it.⁴⁰

In the Northern Cameroons Case, the Court formally clarified the breadth of the scope of Article 59 by indicating that the judgment would not be binding on any other state not a party to the proceedings or on any organ of the United Nations.⁴¹

The Court clarified the position regarding declaratory judgments in the Northern Cameroons Case, where it considered it as indisputable that in an appropriate case it may make a declaratory judgment and implied the basic condition as being that if the declaratory judgment expounds a rule of customary

³⁹ See Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and the United States of America), ICJ Reports 1954, 33-4 (hereinafter "Monetary Gold Case"). See also Rosenne, Law and Practice, 620.

⁴⁰ See ICJ Reports 1961, 27.

⁴¹ See ICJ Reports 1963, 33. Cf. Rosenne, Law and Practice, 621, n.1.

law or interprets a treaty which remains in force, the judgment should have a continuing applicability. The Court stressed what it called the forward reach of the judgment as establishing once and for all, and with binding force as between the parties, a legal position which cannot again be called into question in so far as the legal effects ensuing therefrom are concerned.⁴² In 1984⁴³ the Court explained that a third state could either choose to rely on the protection which Article 59 provides, or to intervene under Article 62 of the Statute.⁴⁴

In adhering to the doctrine of plain meaning, the Court has consistently declared that the effect of its decision is restricted to a narrow circle of parties and therefore is res inter alios acta vis-à-vis third states. Similarly, the effect of the decision is confined to the case decided and at least formally cannot be invoked in future cases. The res judicata effect of the decision is reinforced by Article 60 of the Statute which provides that the judgment shall be final and subject to no appeal. An application may, however, be made for the interpretation or, providing certain conditions

⁴² See ICJ Reports 1963, 37.

⁴³ See Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta: Application by Italy for Permission to Intervene, ICJ Reports 1984, 26, para.42 (hereinafter "Italian Intervention Case").

⁴⁴ The Court subsequently drew attention to the protection which Article 59 of the Statute affords to third parties. See ibid. 1986, 25-6, para.21; 554 at 577-588, para.46, 579, paras.49, 50.



are fulfilled, revision of the judgment.⁴⁵ In reality, it is difficult to square the Court's utterances with its practice regarding Article 59.

(b) Article 59 and the Doctrine of Stare Decisis

Our examination of judicial pronouncements concerning Article 59 of the Statute would seem to point to the conclusion that the World Court strives to observe both the letter and the spirit of that provision. Indeed, one would be forgiven for believing on the strength of such dicta that the impact of the Court's decisions is confined to the actual cases decided and the parties to them. The following survey of the Court's practice with respect to Article 59 will, however, reveal that the judicial remarks already examined do not tell the whole story, and that as a rule the Court pays lip service to the express prohibition contained in that provision with the result that the impact of judicial decisions extends to third parties.

Common lawyers regard judicial decisions as an authoritative source of law. This probably explains why common law is also known as judge-made law. Conversely, civil lawyers tend to look upon such decisions as binding judgments between parties to a particular dispute. In theory they therefore do not regard judicial decisions as a source of law applicable to the body politic as a whole, nor do they

⁴⁵ See Articles 60 and 61 of the Statute.

recognise the common law doctrine of stare decisis.⁴⁶ While the common law adopts the pragmatic and practical approach based on former judicial experience, the civil law relies on abstract reasoning from general principles.⁴⁷

Article 59 is identical to Article 5 of the French Civil Code which forbids judges to lay down rules of general application to govern future cases.⁴⁸

The positivist doctrine in international law has interpreted Article 59 as constituting a limitation on the power of judicial precedents in the international sphere, for the reason that international tribunals owe their very existence and such jurisdictional powers as they possess to the will of states whose sovereignty will be impaired by raising judicial decisions to the authority of a source of

⁴⁶ See to the same effect, M.K. Nawaz, "Other Sources of International Law: Are Judicial Decisions of the International Court of Justice a Source of International Law?", 19 IJIL (1979), 526 (hereinafter "Nawaz"). Also see generally, A. Chayes, "A Common Lawyer Looks at International Law", 78 HLR (1965) 1396-1413; A.O. Adede, "International Law from a Common Law Perspective: A Second Look", 60 BULR (1980) 46-76 (hereinafter "Adede"); M. Zander, The Law-Making Process, 3rd ed. (London: Weidenfeld & Nicolson, 1989), 179-224, 271-80, 293-369 (hereinafter "Zander").

⁴⁷ See H. Lauterpacht, "The So-Called Anglo-American and Continental Schools of Thought in International Law", 12 BYIL (1931), 31 at 52, 56 (hereinafter "Schools of Thought"); see also, *id.*, The Development of International Law by the International Court (London: Stevens & Sons, 1958), 69 (hereinafter "Development").

⁴⁸ Cf. Sir Maurice Sheldon Amos and F.P. Walton, Introduction to French Law, 3rd ed. by F.H. Lawson A.E. Anton, L. Neville Brown (Oxford: Oxford University Press, 1967), 9-12; Zander, 218-21.

law.⁴⁹

Though it has been argued that Article 59 does not amount to an adoption of the civil law position concerning judicial precedents,⁵⁰ there is some support for the view that the idea of incorporating some elements of civil law into the Statute of the Permanent Court and the International Court was not entirely absent from the minds of those framers of the Statute who had been brought up in the civil law tradition.⁵¹

It should, however, be pointed out that the difference between the civil and common law approaches concerning judicial precedent appears to have been grotesquely exaggerated, for its practical significance, if any, is very limited. The French, for instance, recognise what they call "une jurisprudence constante". In all civil law jurisdictions, the inherent worth of judicial decisions is recognised and acknowledged.⁵²

⁴⁹ See H. Lauterpacht, "Schools of Thought", 56.

⁵⁰ See *ibid.*

⁵¹ See PCIJ Series D, No.2, 195-8, 283. See also the observations of Politis in League of Nations, Minutes of the Committee of Jurists on the Statute of the Permanent Court of International Justice, Document No. C166, M66, 1929, 5 at 51. See further A.W.H. Hammarskjold, "Sidelights on the Permanent Court of International Justice", 25 Mich.LR (1926-7), 334.

⁵² See H. Lauterpacht, "Schools of Thought", 52, 53, n.1; Sir Maurice Sheldon Amos, "The Code Napoleon and the Modern World", 10 JCLIL, (1928), 222; O.J. Lissitzyn, The International Court of Justice: Its Role in the Maintenance of International Peace and Security, United Nations Studies No.6 (New York: Carnegie Endowment for International Peace, 1951) 20 n.25 (hereinafter "Lissitzyn"); Rosenne, The World Court, 97.

The Reichsgericht of Germany in the inter-war years is reported to have made elaborate references to its own previous judgments in its decisions, such references usually concluded with the words "this must be adhered to". As a result of judicial activity much of the Civil Code is said to have been interpreted out of existence and the Civil Code law of mortgages was adapted to the extraordinary requirements of inflation at the time. This shows that there exists in both France and Germany, and indeed in all civil law jurisdictions, judge-made case law.⁵³

In common law jurisdictions the authority of precedent as a formal source of law is limited by the requirements of justice, convenience and reasonableness. Consequently, the absolutely authoritative precedent is not exempt from the process of distinguishing in which free judicial activity necessarily asserts itself as it does in civil law jurisdictions in respect of the written law.⁵⁴

In practice, the Court has not treated its earlier decisions in as narrow a spirit as the pronouncements mentioned above appear to indicate. While it has held back from expressly declaring itself as being under a duty to follow the doctrine of judicial precedent, the constant operation of that doctrine may be said to be the general rule

⁵³ See H. Lauterpacht, "Schools of Thought", 53, 54.

⁵⁴ See *ibid.* For the view that Article 38, para.1(d) of the Statute represents an interesting compromise between the common law adherence to judicial precedent and the civil law adherence to doctrine, see Rosenne, The World Court, 113-4.

in its jurisprudence in keeping with which it constantly refers to its own previous pronouncements and habitually cites its own earlier judgments and advisory opinions as well as those of other courts and tribunals.⁵⁵ However, it does not appear to have evolved any definite pattern, method or set of rules for this practice.⁵⁶ While some of the references and citations may be regarded as:

little more than a form of incorporation by reference to previous statements, a technical feature of composition which lends itself to the elliptical phrasing so characteristic of contemporary international judgments,⁵⁷

some have undoubtedly been intended for the purpose of illustration.⁵⁸ One also comes across typically bold and more forthright references to previous pronouncements.⁵⁹

Such dicta and holdings are not just employed for mere

⁵⁵ See H. Lauterpacht, Development, 20; Virally, 150.

⁵⁶ See Rosenne, Law and Practice, 612.

⁵⁷ See *ibid.*

⁵⁸ See for example, Chorzow Factory Case (Merits), PCIJ Series A, No.17, 37; European Commission on the Danube, PCIJ Series B, No.14, 36.

⁵⁹ See German Interests in Polish Upper Silesia Case (Merits), PCIJ Series A, No.7, 31; Greco-Turkish Agreement of December 1926, PCIJ Series B, No.16, 15. For other references to its previous decisions, see PCIJ Series A/B, No.46, 172; ICJ Reports 1952, 176 at 196, 200, 206; *ibid.* 1950, 74, 229, 326; *ibid.* 1954, 47 at 56, 59; *ibid.* 1949, 182; *ibid.* 1961, 17. See further, PCIJ Series B, No.5, 29; ICJ Reports 1962, 155; *ibid.* 1956, 86; *ibid.* 1947/8, 61; *ibid.* 1973 at 302; *ibid.* 1984, 3 at 8, para.12, 20, para.31, 9, para.13, 18, para.28; *ibid.* 1981, 12, para.17, 17, para.29; *ibid.* 1982, 61, para.73, 37, para.23, 66-7, para.87; *ibid.* 1969, 18, para.96; *ibid.* 1978, 36, para.86; *ibid.* 1974, 23, para.53, 192, para.45; *ibid.* 1985, 24-5, para.20, 37-8, para.43, 38-9, para.45; *ibid.*, 1986, 23-5, paras.27-9, 25, paras.30, 31, 83-4, para.155.

illustration, explanation and emphasis, but they are also relied upon for instruction and authority. One aspect of the Court's treatment of judicial precedent is the continuity of jurisprudence in both the work of the Permanent Court and that of the International Court. Indeed, it has been suggested that the International Court has, since its inception, been aware of the need to maintain a continuity of tradition, case law and methods of work and that consequently, without being bound by judicial precedent as a principle or rule, the Court frequently seeks guidance in the decisions of the former Court with the result that there has evolved a remarkable unity of precedent, an important factor in the development of international law.⁶⁰ It has also been observed that this continuity of jurisprudence has been prominent in the way in which the International Court has relied upon or indirectly acknowledged the persuasive authority of its own previous judgments and opinions as well as those of the Permanent Court.⁶¹

A perusal of the Court's judgments and opinions reveals that it strives to achieve and maintain a very high degree of consistency in its jurisprudence. To this end the Court does not only refer to its former judgments and opinions because

⁶⁰ See the address delivered by President Winiarski on the 40th Anniversary of the Inauguration of the Permanent Court, in ICJYB 1961-2, 2.

⁶¹ See H. Lauterpacht, Development, 11; see for example, PCIJ Series B, No.13, 38; PCIJ Series A, No.9, 21; ICJ Reports 1947/8, 63; ibid. 1950, 8; ibid. 72; ibid. 1961, 32-3; ibid. 1953, 19, 121; ibid. 1949, 24; ibid. 1984, 26-7, para.43; ibid. 1986, 10-11, para.29.

the facts, circumstances or legal rules and principles established in such cases are identical to those in the case under consideration, but also for purposes of contrasting one case with the other. While on occasion the Court does this on its own initiative, in the majority of cases it has undertaken such differentiation for the reason that parties in the case under consideration have sought to rest their cases on such previous judgments or opinions or portions thereof.⁶²

The relative character of the requirement of consistency of jurisprudence is undoubtedly an important guiding element in the course of judicial activity.

(c) The Decisions of Other Tribunals

Our earlier discussion of the Court's practice regarding Article 59 dealt entirely with its own jurisprudence and that of its predecessor, the Permanent Court. The other, if minor,

⁶² For example, in the Peace Treaties Cases, the Eastern Carelia Case was distinguished. See ICJ Reports 1950, 65 at 71-2. In the Barcelona Traction Case (Preliminary Objections), the Aerial Incident Case was distinguished. See ICJ Reports 1964, 28, 29, 31, 47. The Tunis and Morocco Nationality Decrees Case was distinguished in the Mavrommatis Palestine Concessions Case, PCIJ Series A, No.2, 16; PCIJ Series E, No.3, 217-8; ibid., No.4, 92, 293; ibid., No.6, 300. See Rosenne, Law and Practice, 613-4 and the literature cited therein. For other instances in which the Court distinguished previous cases, see PCIJ Series A, No.20, 16; ICJ Reports 1961, 17; ibid. 1959, 127; ibid. 1984, 266-7, paras.24-6, 309, para.144, 309-10, paras.147, 150; ibid. 1986, 573-5, para.39-41, 578, para.47, 579, para.49. For the view that the Court engages in distinguishing and adheres to judicial precedent because it aims at a fairly substantial degree of consistency, see I. Brownlie, Principles of Public International Law, 3rd ed. (Oxford: Clarendon Press, 1979), 22-3 (hereinafter "Principles"). This is the edition cited in the rest of this chapter.

feature of such practice relates to the use which the Court makes of the jurisprudence of other international tribunals and municipal courts. For instance, in the Corfu Channel Case, the International Court noted that indirect evidence was admitted in all systems of law, and that its use was recognised by international decisions.⁶³ Similarly, in the Nottebohm Case (Second Phase), the Court decided to resolve the issue before it in accordance with the principles evolved by arbitrators and applied by international arbitrators and the courts of third states.⁶⁴ The practice of applying jurisprudence other than its own finds some basis in the Statute. We shall now take a look at this second feature of the practice of the Court which serves to enhance the scope of the impact of the decisions of the Court and other international tribunals and municipal courts to third parties.

The practice of habitually invoking its previous judgments and opinions finds qualified support in Article 38(1)(d) of its Statute, which directs the Court to apply among others, and subject to Article 59, judicial decisions as subsidiary means for the determination of the rules of law. It has been observed that this subparagraph mitigates the

⁶³ See ICJ Reports 1949, 23.

⁶⁴ See *ibid.* 1955, 21-2. In that case the Court adopted the definition of nationality accepted by the practice of states, arbitral and judicial decisions and the opinions of writers. See *ibid.*, 23.

apparent rigour of Article 59.⁶⁵ It is generally agreed that the "judicial decisions" of which Article 38(1)(d) speaks include decisions of the Court itself.⁶⁶ It is understood that the term "judicial decisions" also includes decisions of other international tribunals and national or municipal courts.⁶⁷

The Court sometimes compendiously refers to "judicial decisions".⁶⁸ The Court takes the view that such "judicial decisions" also include decisions of arbitration tribunals.⁶⁹

The Court's finding in the German Interests in Polish Upper Silesia Case that mixed arbitral tribunals and the Permanent Court of International Justice are not courts of the same character,⁷⁰ coupled with the relative reserve with which it has treated the decisions of other tribunals, has led some observers to conclude that the Court clearly considers its own opinions as having a different status from those of

⁶⁵ See H. Lauterpacht, Development, 8. Cf. Rosenne's view that the effect of the creation of a substantial body of international case law through the constant accumulation of judicial precedents has been the incorporation of a sensible modification in the apparent rigidity of Article 38(1)(d). See Rosenne, Law and Practice, 611-2.

⁶⁶ See Virally, 149.

⁶⁷ See M.O. Hudson, The Permanent Court of International Justice 1920-42: A Treatise (New York: Macmillan Co., 1943), 613 (hereinafter "The Permanent Court").

⁶⁸ See, for example, ICJ Reports 1985, 38-9, para.45.

⁶⁹ See ICJ Reports 1984, 290-1, para.83, 302-3, para.123, 324, para.187.

⁷⁰ See PCIJ Series A, No.6, 26.

any other tribunal, however exalted.⁷¹ Kearney wondered whether in view of the limits placed on the Court by Article 59 such an assumption of a special status could be justified, more so since being the creature of a special compact it cannot confer on itself a position superior to the compact. Kearney found ratiocination in the statement that "this answer would overlook the capacity for growth in all human institutions which modify and expand the formal limitations of their conception".⁷² Perhaps we may add that the Court is indeed entitled to postulate for itself a superior position or status, for after all on Kearney's own admission it is the creature of a special compact, namely the Statute, which is an integral part of the Charter of the United Nations, a special multilateral treaty. Furthermore, the Court is one of the principal organs - indeed the principal judicial organ - of the United Nations.⁷³ Moreover the quality of arbitral tribunals, usually composed of a sole arbitrator or a small group of jurists with a standing inferior to that of the International Court and attracting less emphasis than that of the Court, has been observed to be considerably varied.⁷⁴ This differentiation between the International Court and other international tribunals is by no means designed to detract

⁷¹ See Kearney, 699.

⁷² See *ibid.*

⁷³ See Charter Article 92.

⁷⁴ See D.W. Greig, International Law (London: Butterworths, 1970), 36; Brownlie, Principles, 20; Lissitzyn, 10.

from the contribution of such tribunals to the development of international law. For there is no denying that a number of awards have contained notable contributions from renowned jurists sitting as arbitrators, umpires or commissioners, to the development of international law and jurisprudence.⁷⁵

The Court has on occasion referred to decisions of other tribunals.⁷⁶ Such reference has been to arbitral practice generally or on a specific issue. The Meerauge Arbitration Case, decided by an arbitral tribunal in 1902,⁷⁷ was cited to sustain a view taken by the Court in the Jaworzina Boundary Case.⁷⁸ The Costa Rica Packet Case decided by an arbitral tribunal in 1897, to which a party had referred, was cited by the Court but found to be distinguishable from the case before it.⁷⁹

⁷⁵ See Brownlie, Principles, 20 for examples of such decisions; H. Lauterpacht, Development, 19; Lissitzyn, 9-10; A.D. McNair, The Development of International Justice (New York: New York University Press, distributed by Oceana Publications, 1954), 1-5 (hereinafter "International Justice").

⁷⁶ See Brownlie, Principles, 20-1; Greig, International Law, 33; H. Lauterpacht, Development, 15-8 passim; Hudson, The Permanent Court, 613-4.

⁷⁷ See G.Fr. de Martens, Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International, 3rd ser., continued by H. Triepel, Vol.3 (Leipzig: Librairie Dieterich, Theodor Weicher, 1910), 3:71; see also Hudson, The Permanent Court, 613.

⁷⁸ See PCIJ Series B, No.8, 42-3.

⁷⁹ See J.B. Moore, History and Digest of the International Arbitrations to Which the United States Has Been a Party, Vol.5 (Washington: Government Printing Office, 1898), 5:4948 (hereinafter "International Arbitration"); G.Fr. de Martens, Nouveau Recueil Général, 2nd ser., continued by Felix Stoerk (Leipzig: Librairie Dieterich, Theodor Weicher, 1898), 23:808.

In the Reparations Case the Court said that "international tribunals are already familiar with the problem of the claim in which two or more national states are interested and they know how to protect the defendant state in such a case".⁸⁰ A notable departure from the Court's tradition of not referring specifically to arbitral decisions in the texts of its judgments occurred in the string of continental shelf delimitation judgments rendered between 1982 and 1985, in which the Franco-British Arbitration decision of 1977 was referred to.⁸¹

Sometimes the Court finds it necessary to distinguish arbitral decisions, especially when parties to cases before it attempt to avail themselves of legal principles and rules embodied in such decisions; for example in the Gulf of Maine

See also PCIJ Series A, No.10, 26; Hudson, The Permanent Court, 613-4. For other instances of reference to the decisions of other tribunals by the Permanent Court, see PCIJ Series A, No.9, 31; *ibid.*, No.17, 31, 47, 57; Permanent Court of Arbitration, Hague Court Reports, ed. J.B. Scott (New York, 1916), 3; PCIJ Series B, No.11, 30; Permanent Court of Arbitration, Hague Court Reports, 2nd ser., ed. J.B. Scott (New York, 1932), 84; PCIJ Series A/B, No.53, 45, 46; *ibid.*, No.61, 243. See also ICJ Reports 1951, 131.

⁸⁰ See ICJ Reports 1949, 187.

⁸¹ See ICJ Reports 1982, 38, para.25, 57, para.66; *ibid.*, 1984, 267, para.25, 290, para.83, 293, para.92, 302-3, para.123, 324, para.187; *ibid.*, 1985, 42, para.52, 44, para.54. In the UN Headquarters Agreement Case, reference was made to the Alabama Arbitration. See *ibid.* 1988, 34, para.57. See also Nagendra Singh, The Role and Record of the International Court of Justice (Dordrecht, Boston, London: Martinus Nijhoff, 1989), 145 (hereinafter "Singh").

Case,⁸² the case before the Court was distinguished from that decided by the Franco-British Arbitration of 1977.

It is evident from the foregoing examination of cases that references to arbitral practice by the Court are relatively sparse. In the majority of cases such references have been far too general to be of value. Some arbitral awards have distinctly contributed to international law "by reason of their scope, their elaboration and the consciousness with which they have examined the issues before them."⁸³ It is in the interests of the continuity, development and sound administration of international justice that it should not leave out of account the body of precedent which is full of instruction and authority built up by arbitral law.⁸⁴ While considerations of economy in the method of pronouncements of the Court have been advanced as an explanation for the tendency of the Court to avoid detailed or extensive examination of arbitral awards, we would like to point to the Court's inclination to regard itself as occupying a higher status than other tribunals, and its pronouncements as having

⁸² See ICJ Reports 1984, 301, para.117. The Grisbadarma Case concerning the delimitation of fishing grounds between Norway and Sweden was distinguished with regard to the doctrine of acquiescence, see *ibid.*, 309, para.146. The Arbitral Award Case was also distinguished, see *ibid.*, 309-10, para.147.

⁸³ See H. Lauterpacht, Development, 18.

⁸⁴ See *ibid.*, 17-8. For the role of the Permanent Court of Arbitration as well as the Permanent Court of International Justice and the International Court of Justice in the development of international law, see J.E.S. Fawcett, "The Development of International Law", 46 IA (1970), 131-4 (hereinafter "Fawcett").

a special character vis-à-vis those of such tribunals, as another reason or explanation for its relative unwillingness to refer as frequently to arbitral decisions as it does to its own judgments and opinions. Whatever the reasons of the Court, the result is that the full potential of Article 38(1)(d) is yet to be fully and beneficially exploited as far as arbitral decisions are concerned.

Besides arbitral tribunals, states may by agreement establish other tribunals to undertake specific or well-defined tasks. The International Military Tribunal for the Trial of German Major War Criminals⁸⁵ provides a classic example of such a tribunal. Though such tribunals may produce valuable pronouncements on delicate issues and thus contribute in some way to the development of international law, their ability to do this must necessarily depend on their standing, the calibre of the jurists who serve on them, the conditions under which they carry out their tasks and the procedures they employ. It has been observed that the judgment of the military tribunal for the trial of German major war criminals

⁸⁵ See International Military Tribunal (Nuremberg), Judgment and Sentences, reprinted in "Judicial Decisions", 41 AJIL (1947), 172. See also V.V. Pustagarov, "The Nuremberg Case and the Development of International Law", SYIL (1986), 144; H.-H. Jescheck, "Nuremberg Trials", in instalment 4, EPIL, ed. R. Bernhardt (1982), 50-7; Q. Wright, "Legal Positivism and the Nuremberg Judgment", 42 AJIL (1948), 405-14; id., "The Law of the Nuremberg Trial", 41 AJIL (1947), 38-72; E. Schwelb, "Crimes Against Humanity", 23 BYIL (1946), 178-226; G.A. Finch, "The Nuremberg Trial and International Law", 41 AJIL (1947), 20-37; F.B. Schick, "The Nuremberg Trial and the International Law of the Future", *ibid.*, 770-94. In connection with the punishment of war criminals see generally, A.N. Sack, "Punishment of War Criminals and the Defence of Superior Order", 60 LQR (1944), 63-8.

contains some important findings on issues of law.⁸⁶

(d) Decisions of Municipal Tribunals⁸⁷

Article 38(1)(d), which refers simply to "judicial decisions", does not appear to restrict the power of the Court to apply such judicial decisions "as subsidiary means for determination of rules of law" to decisions of the Court and other international tribunals alone. Consequently, the Court is at liberty to apply decisions of municipal courts and tribunals in this way also. It has in practice been most reluctant to refer to the decisions of municipal courts and tribunals, even when they have been cited by parties and in spite of general agreement in legal circles that such decisions do have evidential value.⁸⁸ However, municipal courts and tribunals seldom have to decide questions involving international law issues.⁸⁹ A municipal decision may provide a statement of evidence of what the court concerned considers to be a rule of international law. The weight to be accorded such a statement must surely depend on the availability of

⁸⁶ See Brownlie, Principles, 24. For the contribution of international administrative tribunals to the development of international administrative law, see Greig, International Law, 36-7.

⁸⁷ See generally, H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", 10 BYIL (1929), 65-95.

⁸⁸ See McNair, International Justice, 12-3. Cf. Hambro, "Reasons", 213.

⁸⁹ With the exception of prize courts, dealing with the legality of the seizure of ships and cargoes in time of war.

other evidence corroborating the existence of the rule of law in question.

In the Chorzow Factory Case (Jurisdiction),⁹⁰ a bare reference was made to the jurisprudence of municipal courts. In the Lotus Case⁹¹ both the Court itself and the parties before it referred to a number of municipal decisions on the question of criminal jurisdiction in cases of collision on the high seas. As this jurisprudence was divided, the Court concluded that it was hardly possible to see in it any indication of the existence of a restrictive rule of international law.⁹² The judgment of an English court in the Franconia Case (Regina v. Keyn (1897) L.R. 2 Ex.Div. 63) was examined. It was said that the conception of international law upon which the majority of the judges may have proceeded was peculiar to English jurisprudence, not generally accepted even in common law countries, and abandoned in more recent English decisions.

In the Personal Work of Employers Case, reference was made to municipal jurisprudence on the constitutionality of legislation.⁹³ In its application of the rule as to the exhaustion of local remedies in the Panevezys-Saldutiskis Railways Case (Preliminary Objections) the Court examined the Jeglina Case in some detail. This case, which had been

⁹⁰ See PCIJ Series A, No.9, 31.

⁹¹ See *ibid.*, No.10, 1.

⁹² See *ibid.*, No.10, 26-30.

⁹³ See PCIJ Series B, No.11, 20.

decided by a Lithuanian court, had been referred to as an element of the issues before the Court. The Court held that no call for the decisions of a Lithuanian court existed to relieve against the application of the rule.⁹⁴ Similar reference was made in the Chorzow Factory Case (Jurisdiction) to the decision of a Polish court at Katowice.⁹⁵

The Court may have to examine the decisions of the courts of a state if called upon to apply the judicial decisions of that state. In the Serbian and Brazilian Loans Cases, the Permanent Court referred to the doctrine and jurisprudence of French courts.⁹⁶

Municipal decisions may also serve as evidence of the practice of the state of the forum, being evidence of international custom.⁹⁷ They are used more frequently in individual and dissenting opinions.⁹⁸ In the Lotus Case, Judge Moore sounded the note of caution that international tribunals

are not to treat the judgments of the court of one state on questions of international law as binding on other states but while giving to such judgments the weight due to judicial expressions of a view taken in a particular country ought to follow them as authority only so far as

⁹⁴ See PCIJ Series A/B, No.76, 19-21.

⁹⁵ See PCIJ Series A, No.17, 33-4. In the Fisheries Case, Norwegian decisions were quoted by the Court in order to prove Norwegian conceptions. See Hambro, "Reasons", 213, n.10. Cf. *id.*, "Address to the American Society of International Law", 62 ASILP, (1968) 267 at 271.

⁹⁶ See PCIJ Series A, No.20, 47, and No.21, 124-5.

⁹⁷ See H. Lauterpacht, Development, 20.

⁹⁸ See Hudson, The Permanent Court, 615.

they are found to be in harmony with international law.⁹⁹

What the foregoing examination of the Court's attitude to municipal decisions suggests is that though the Court seldom refers to such decisions they have some value. For instance, if the municipal jurisprudence cited in the Lotus Case was found to be sufficiently uniform, the Court might have been willing to consider what value to attribute to it. By providing evidence of the practice of the state of the forum and of the rules of international law in the states in which they are rendered, municipal decisions do perhaps indirectly contribute to the course of international law and justice. They have also contributed perhaps directly, to the development of international law. It was Chief Justice Marshall of the United States Supreme Court who, in 1812, laid down what came to be accepted as the classic statement on the immunity of ships belonging to a foreign sovereign from the jurisdiction of the territorial state.¹⁰⁰

In fact virtually the whole of the law of sovereign immunity which is regarded as a doctrine of international law has evolved through national jurisprudence; and it is in the nature of that claim that cases concerning immunity from local jurisdiction have by and large been dealt with by municipal courts. Our understanding of international law in this area has been developed through municipal court decisions which

⁹⁹ See PCIJ Series A, No.10, 74.

¹⁰⁰ See The Schooner Exchange v. McFaddon, 11 US (7 Cranch), 116.

have in turn been supplemented by municipal legislation.

Boundary disputes between various states of the union have made it possible for the Federal Supreme Court to apply and develop the relevant principles of international law.¹⁰¹ In maritime law in general and prize law in particular the contribution of English courts has received recognition and acknowledgement. In addition, municipal decisions constitute a valuable source for materials on recognition of belligerency, of governments and of state succession, sovereign immunity, diplomatic immunity, extradition, war crimes, belligerent occupation and the concept of state of war.¹⁰² While widespread state practice indicative of a view of a rule of law contrary to that contained in a municipal decision will undoubtedly minimise the importance of such a decision, where evidence in favour of a rule is uncertain, or existing authority scanty, municipal decisions may be of immense value.¹⁰³

(e) Reasons for Observance of Judicial Precedent

The above survey of the practice of the Court with regard to Article 59 has established, first, that the Court has not involved itself with the difference in approach of the common

¹⁰¹ See Greig, International Law, 38; Brownlie, Principles, 24-5. Also see K.H. Kaikobad, "The Shatt-al-Arab River Boundary: A Legal Reappraisal", 56 BYIL (1985), 49 at 73-6; McNair, International Justice, 15.

¹⁰² See Brownlie, Principles, 24.

¹⁰³ See Greig, International Law, 39.

and civil law jurisdictions to the doctrine of stare decisis; second, that in theory it has in its pronouncements bearing directly on Article 59, scrupulously observed the injunction laid down therein; and third, that in practice, for reasons of continuity and consistency of jurisprudence, it cites its previous judgments and opinions in spite of the express prohibition thereof contained in Article 59.

Adherence to judicial precedents makes for certainty, stability and uniformity, all of which are essential requirements for the sound administration of justice.¹⁰⁴ Observance of judicial precedent is consonant with the need to avoid any semblance of abuse or excess of judicial discretion, a point which assumes added significance in the international sphere.¹⁰⁵ Judicial decisions constitute a repository of legal experience which it is not only convenient to follow but also to which it is politic to have recourse for guidance and instruction.¹⁰⁶ The tendency to recognise that judicial decisions have some value as precedents is a natural one for all tribunals which can develop independently of the need for artificial doctrines of the binding force of precedents or difficult theories of judicial legislation.¹⁰⁷ Similarly,

¹⁰⁴ See Hudson, The Permanent Court, 613, as well as President Winiarski's remarks referred to above, 55, n.60.

¹⁰⁵ See to the same effect, H. Lauterpacht, Development, 14.

¹⁰⁶ See *ibid.*; *id.*, "Schools of Thought", 52-3.

¹⁰⁷ See Rosenne, Law and Practice, 612; H. Lauterpacht, "Schools of Thought", 52-3; J.B. Moore, "The Organisation of the Permanent Court of International Justice", 22 CLR (1921),

judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they have been wrong in the past. As an illustration, Lauterpacht cites the example of the way in which English Chancellors administering the original elastic rules of equity, regularly learned to recognise the authority of case law with a rigidity frequently surpassing that of the common law whose conservatism they set themselves to combat.¹⁰⁸ Judicial precedents are followed everywhere because of their intrinsic merit. They influence judges in future cases with materially similar facts because they contain what the Court had previously held to be good law.¹⁰⁹ Judicial decisions are therefore treated with respect in view of their persuasive authority.¹¹⁰ A further reason for the observance of judicial precedent is the absence of a code of a generally recognised system of law and the lack of opportunities for authoritative and impartial statements of the law.¹¹¹

While the Court will not depart from "the established jurisprudence", "the long-established jurisprudence"¹¹² or

510 (hereinafter "Organisation").

¹⁰⁸ See H. Lauterpacht, Development, 14.

¹⁰⁹ See *ibid.*, 14-5.

¹¹⁰ See *ibid.*, 18; McNair, International Justice, 12; Rosenne, Law and Practice, 614.

¹¹¹ See H. Lauterpacht, Development, 14.

¹¹² See ICJ Reports 1961, 32, 34.

"firmly established rule"¹¹³ without good reason, it is not always possible or even desirable to follow precedent mechanically. However, if the Court deems it proper to overturn the consistency, continuity and uniformity of precedent or jurisprudence it is bound to adduce reasons in explanation thereof, thus the process of distinguishing is sometimes employed to set aside a holding or dictum which the Court is unable to follow. Where the previous practice has not been sufficiently uniform and the precedents therefore vary, as for example on such questions as the admissibility of recourse to preparatory work in the interpretation of treaties or the restrictive interpretation of limitations of state sovereignty, the Court has tended to rely on one set of precedents to the exclusion of the rest¹¹⁴ without feeling bound to explain the choice thus made. The Court has largely adopted the substance of judicial precedent and yet managed, through the technique of distinguishing, to retain the flexibility necessary to enable it to modify previous positions it has perceived to be untenable. In consequence the Court has observed the letter if not the spirit of Article 59 of its Statute. If viewed from this perspective it will be crystal clear that the mandatory language of that Article is not without import.¹¹⁵

¹¹³ See *ibid.* 1986, 632, para.147.

¹¹⁴ See to the same effect, H. Lauterpacht, Development, 18-19, 121ff and 300ff and the authorities therein cited.

¹¹⁵ See *ibid.*, 19.

(f) State Practice and Judicial Precedent

So far we have observed that the Court's application of international jurisprudence has served to expand the scope of its judgments to third parties, which, on account of Article 34(1), invariably means third states. Article 38(1)(b) and (c) require the Court to apply international custom as evidence of a general practice accepted as law and the general principles of law recognised by civilised nations in deciding disputes submitted to it.

The fact that judicial decisions assume the character of precedents with persuasive authority finds some support in state practice. This may sometimes be apparent in the correspondence between states with regard to arbitral awards and judicial decisions. A case in point is the concluding passage of the letter addressed on 26 February 1923 by Mr. Charles Evans Hughes, the United States Secretary of State, to the Norwegian Minister at Washington, concerning the award given in the Norwegian Shipowners Case, in which the United States government, having regard to certain alleged shortcomings of the award, declared that "the award cannot be deemed by that government to possess an authoritative character as a precedent".¹¹⁶

In 1929 the British government, in accepting the jurisdiction of the Court under the "optional clause" of the Statute, said that in comparison with codification "the method

¹¹⁶ See *ibid.*, 22, n.74. See also Hague Court Reports, 2nd ser., 82.

of building up a body of law by a series of legal decisions, a method which produced the English common law, may be the more suitable for at any rate some important branches of the Law of Nations".¹¹⁷

In cases before the Court, states frequently refer to judicial and arbitral decisions.¹¹⁸ Indeed, such decisions are cited by states much more often than by the Court. In the Lotus Case,¹¹⁹ the Court had to distinguish the Costa Rica Packet Case¹²⁰ to which one of the parties had referred. In the same case national decisions concerning the jurisdiction of flag states were cited by both parties (see above,).

In the Peace Treaties Cases the Court distinguished the Eastern Carelia Case, on which the states concerned sought to rest their challenge to the Court's jurisdiction. Similarly, the Court had to distinguish the Aerial Incident Case from two later cases, namely the Barcelona Traction Case (Preliminary Objections),¹²¹ and the Temple Case (Preliminary

¹¹⁷ See Great Britain, Parliamentary Papers, Misc. No.12, Memorandum on the Signature by His Majesty's Government in the United Kingdom of the Optional Clause of the Statute of the Permanent Court of International Justice, Cmnd. 3452 (1929), 8. See Lissitzyn, 12-3.

¹¹⁸ See Virally, 151; Rosenne, Law and Practice, 611-4; Greig, International Law, 32-3.

¹¹⁹ See PCIJ Series A, No.10, 26.

¹²⁰ See Moore, International Arbitrations, 5:4948, and Martens, Nouveau Recueil Général, 2nd Ser., 23:808.

¹²¹ See ICJ Reports 1964, 6.

Objections).¹²² Perhaps more important for our purposes is the fact that in the Aerial Incident Case, the substantive rules upon which Israel relied were supported in its pleadings "by a wealth of authority drawn particularly from previous decisions of the Court".¹²³

In the Nottebohm Case (Second Phase)¹²⁴ the portion of the Liechtenstein pleadings relating to the obligations of the belligerent concerning the treatment of the person and property of nationals of a neutral state, abounded in illustrations from international jurisprudence.¹²⁵ In the Barcelona Traction Case (Merits) the Court dismissed summarily an attempt by the parties to rely on general arbitral jurisprudence and explained that since in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or Claims Commission and determining what rights might enjoy protection, they could not give rise to generalisation going beyond the special circumstances of each case. Nor would the Court accept other cases allowing or disallowing claims by way of accession, as directly relevant to the case before it. The Court also distinguished the case actually being heard from the Nottebohm Case (Second Phase) by saying that "given both

¹²² See *ibid.* 1961, 17, 25, 28. See also *ibid.* 1954, 29-32.

¹²³ See ICJ Reports 1959, 127. See also Greig, International Law, 33.

¹²⁴ See ICJ Reports 1955, 4.

¹²⁵ See Greig, International Law, 32-3.

the legal and factual aspects of protection in the present case there can be no analogy with the issues raised or the decision given in that case".¹²⁶

In Pakistani Prisoners of War Case (Interim Measures), India cited the Monetary Gold Case precedent in relation to the absence from the proceedings of Bangladesh.¹²⁷ The Gulf of Maine Case also provides an excellent illustration of reliance by the parties on judicial and arbitral precedents.¹²⁸

The preceding examination of state practice clearly shows that, like the Court, states have perhaps for diverse reasons relied on the reasoning and pronouncements of the Court in previous judgments and opinions. It does not appear that states do so for continuity or consistency of jurisprudence. It would seem that the primary though by no means exclusive reason for which states tend to rely on earlier cases is that of self-interest. A state will therefore not hesitate to

¹²⁶ See ICJ Reports 1970, 42. See also *ibid.* 1982, 43-4, paras.36-7; 46-7, para.44; 57, para.66; 62-3, para.76; 75-6, para.100.

¹²⁷ See J.B. Elkind, Non-Appearance Before the International Court of Justice; Functional and Comparative Analysis (Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1984), 64-5 (hereinafter "Non-Appearance"). In 1990, a chamber of the Court had to distinguish the Monetary Gold Case on which the applicant state sought to rely. See Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, ICJ Reports 1990, 92, at 107, para.34; 114-6, paras.52-6; 122, para.73 (hereinafter "Nicaraguan Intervention Case").

¹²⁸ See ICJ Reports 1984, 295, paras.99-100; 298, para.108; 302, para.123; 308-9, paras.143; 144; 146; 309-10, paras.147, 149. In this connection see also, *ibid.* 1985, 32, para.31; 38, para.44; 46, para.59.

invoke a reasoning or observation in a former judgment or opinion, if this will help its case. Where a state which is a party to a case before the Court considers that insistence on the plain meaning of Article 59 of the Statute will be to its benefit, it will often take that course of action. Nowhere is the ambivalent attitude of states to the rule laid down in Article 59 more manifest than in their approach to the issue of discretionary intervention.¹²⁹ Who can blame them? If the Court has largely adopted the substance of judicial precedent, thereby rendering its behaviour in given situations more predictable, states are fully entitled to take advantage thereof. Besides, through the Statute, states have directed the Court to apply judicial decisions as subsidiary means for determining rules of law subject to Article 59.¹³⁰

The value of judicial decisions as precedents probably explains why jurists attach great importance in their writings to statements of law which emanate from the Court, and the crucial role of international jurisprudence in resolving legal issues. As O'Connell has observed, the practising international lawyer "selects as his sharpest and most valued tool the judicial decisions which will support his case".¹³¹

State practice with regard to judicial precedent has

¹²⁹ See ICJ Reports 1984, 14-5, paras.20, 22; 17-8, para.26. Cf. *ibid.* 1981, 8-9, para.13; 11, para.16.

¹³⁰ See Statute, Article 38(1)(d).

¹³¹ See D.P. O'Connell, International Law (London: Stevens & Sons, 1965), 30 (hereinafter "O'Connell"). See also, Nawaz, 538-40; H. Lauterpacht, Development, 58; Lissitzyn, 11-3.

largely been influenced, if not guided, by the practice of the Court itself. Such state practice has also been suggestive of what might be called double standards. The position of Malta in the 1981 and 1984 cases in which it was involved provides an example of this.¹³² Such ambivalence is also implicit in the Libyan argument opposing the Italian application for permission to intervene in the case between Libya and Malta. States have thus tended to observe precedent when it suits them to do so, otherwise they have insisted on the ordinary meaning of Article 59. However, on balance the former attitude seems to predominate over the latter.¹³³ In sum it may be concluded that like the Court, states have also largely adopted the essence of judicial precedent.

4. Article 38(1)(d) of the Statute

So far we have considered some of the elements which compose a judgment of the Court, and noted that irrespective of the rule contained in Article 59, the res judicata effect

¹³² We are of the opinion that Malta could justify its shift of position in 1984 on the grounds that the rejection by the Court of its position regarding the meaning of Article 59 of the Statute in 1981 amounted to a correction of that position by the Court which, according to the principle jura novit curiae is supposed to know the law and also possess a superior understanding of the law by virtue of the proprio motu principle. (Concerning the latter principle, see Higgins, "The Court and South West Africa", 582. For a discussion of the former, see below, 96, n.191.) As happened in 1984, both Malta and Libya found themselves on the same side as the Court as far as the meaning of Article 59 of the Statute was concerned.

¹³³ See the position of the United States with respect to Article 59 in the Aerial Incident Case, ICJ Reports 1959, 127.

of the judgment refers only to the operative provisions of the judgment which are binding in that case only and on the parties alone. The reasoning embodied in the judgment and the relevant individual and dissenting opinions pass into the Court's jurisprudence on which it relies for guidance and instruction, among other things, and the persuasive authority which it may invoke when deciding future cases. The Statute sanctions such use of jurisprudence subject to certain conditions, probably designed to restrict the effect of the judgment to the parties to the case and the case alone. In reality, the Court has not felt inhibited by such limitations from applying judicial decisions as a source of law. In consequence, it cannot be maintained that third parties are immune from the impact of the judgments of the Court.

(a) Background¹³⁴

Article 38(1) in part authorises the Court to apply "subject to Article 59 judicial decisions ... as subsidiary means for determination of rules of law". This provision is identical to the corresponding provision in Article 38(4) of the Statute of the Permanent Court.¹³⁵ It seems that the

¹³⁴ See generally, Kearney, 610-4.

¹³⁵ Article 38 of the present Statute, like many others, was taken over almost in toto from Article 38 of the Statute of the Permanent Court, which stemmed from an article embodied in the Descamps proposal, which directed the judge to apply in the solution of international disputes among others "international jurisprudence as a means for the application and development of law". See PCIJ, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, The Hague, 1920, 307 (hereinafter

main objection to the draft of this article as proposed by Baron Descamps was that it permitted too wide a latitude to the Court. The relevant paragraph of the revised text submitted by Elihu Root required the Court to apply within the limits of its jurisdiction, among others "the authority of judicial decisions ... as means for the application and development of law".¹³⁶ This draft was accepted with minor alterations as a basis for consideration by the drafting committee¹³⁷ whose text of the Court's statute was submitted to the Committee of Jurists. The pertinent paragraph in the Root proposal which had become Article 31 instructed the Court within the limits of its jurisdiction to apply, inter alia, "rules of law derived from judicial decisions ..."¹³⁸

In the discussion of the Article, a proposal by Descamps for the addition of the words "as subsidiary means for the determination of rules of law" to that paragraph was adopted.¹³⁹ So was a proposal by Lord Phillimore for the deletion of the clause "rules of law derived from".¹⁴⁰

The provision became Article 35 of the text adopted on

"Procès-Verbaux").

¹³⁶ See *ibid.*, 344.

¹³⁷ See *ibid.*, 336-8. During the discussion of the Root draft an amended text was presented by M. Ricci Bussati, the main effect of which was to emphasise that judicial decisions and legal writings were not sources of law, *ibid.*, 351.

¹³⁸ See *ibid.*, 567.

¹³⁹ See *ibid.*, 584, 620.

¹⁴⁰ See *ibid.*

first reading¹⁴¹ and adopted without further change in the final reading.¹⁴²

The report to the Council of the League which accompanied the draft prepared by M. De Lapradelle said among other things that there was no question of giving such an unrestricted field to the decision of the Court as contained in Article 7 on an International Prize Court. The relevant provision of the Article in the report enjoined the Court to apply "judicial decisions ... as subsidiary means of determining the rules of law".¹⁴³

The Council of the League at its meeting in Brussels on 27 October 1920 considered and accepted the draft Statute but proposed certain amendments. The only amendment in respect of Article 35 was to make its operation subject to Article 57 bis. This article was one of the Council's amendments to the Statute and provided that "the decision of the Court has no binding force except between the parties and in respect of that particular case".¹⁴⁴ This addition was based upon the report submitted by the French member Léon Bourgeois as a direct expression of a rule contained by implication in Article 61 of the draft regarding the binding effect of a

¹⁴¹ See *ibid.*, 665-6.

¹⁴² See *ibid.*, 680.

¹⁴³ See *ibid.*

¹⁴⁴ See Documents Concerning the Action taken by the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court, Geneva, 1921, 58-9 (hereinafter "League of Nations, Documents").

decision upon states which exercise the right of intervention.¹⁴⁵

The most important statement in the report of the Sub-Committee said:

An Argentinian Amendment proposed a new text of this Article intended among other things to limit the power of the Court to attribute the character of precedent to judicial decisions. The Sub-Committee has not adopted this amendment. On the contrary, it considered that it would be one of the Court's most important tasks to contribute through its jurisprudence to the development of international law.¹⁴⁶

Article 35 became Article 38 in the draft Statute annexed to the Sub-Committee report and its wording is that of the Statute as finally adopted by the League Assembly 13 December, 1920.

Chapter 7 of the Dumbarton Oaks Proposals recommended the establishment of an international court of justice whose statute should be either the Statute of the Permanent Court with any desirable modifications, or a new statute based upon that of the Permanent Court.¹⁴⁷ No changes in respect of Article 38 were proposed in the comments submitted by states regarding amendments to the Statute of the Permanent Court as part of the preparatory work for the San Francisco conference.

The informal Inter-Allied Committee commented that "the law to be applied by the Court is set out in Article 38 of the

¹⁴⁵ See *ibid.*, 50.

¹⁴⁶ See *ibid.*, 211.

¹⁴⁷ See Documents of the United Nations Conference on International Organisation, San Francisco, 1945, Vol.14 Committee of Jurists, London, 1945, 499 (hereinafter "UNCIO").

Statute and although the wording of this provision is open to criticism it has worked well in practice and its retention is recommended".¹⁴⁸

The changes contained in a Cuban proposal included a very substantial modification of the fourth paragraph which read "the rules of international law for the establishment of which judicial decisions of an international order ... shall serve".¹⁴⁹

The Washington Committee of Jurists, whose task was to propose a draft statute for submission to the San Francisco conference, merely revised the internal enumeration of Article 38 and commented that the Article had given rise to more controversies in doctrine than in practice.¹⁵⁰

The Chilean proposal that the first paragraph of Article 38 be amended to read "the court whose mission is to decide in accordance with international law such disputes as are submitted to it shall apply"¹⁵¹ was adopted by Committee 1 of Commission IV on Judicial Organisation. This is the source of the addition of the introductory clause which opens the first paragraph of Article 38 of the present Statute.

There is nothing in the drafting history of Article 38 to support the view that with the exception of the fourth paragraph, the hierarchical principle was intended by the

¹⁴⁸ See *ibid.*, 45.

¹⁴⁹ See *ibid.*

¹⁵⁰ See *ibid.*, 127.

¹⁵¹ See UNCIO, Vol.13, 453.

framers of the Statute to operate with respect to that Article. In fact it is probably truer to conclude from the deletion of such words or expressions as "in the under-mentioned order"¹⁵² "in the order following"¹⁵³ from earlier formulations of the Article, that this principle was rejected out of hand. Had such phrases been retained in the final version of Article 38, the freedom of the Court to declare and develop the law would have been severely curtailed.¹⁵⁴ By directing the Court to decide disputes in accordance with international law and by providing some indication of the law to be applied by the Court, Article 38 has endowed the Court with the desired legal and judicial character which sets it apart from its forerunners.¹⁵⁵

The use of the word "civilized" in Article 38(1)(c) is unfortunate¹⁵⁶ and inappropriate as it appears to imply a value judgment. Since Article 9 speaks of "the main forms of civilization" and the "principal legal systems" it is doubtful whether well-defined criteria exist for determining "civilized nations". While it might have been quite in keeping with the mood and psychology of the times to use the term "civilized"

¹⁵² In both the Descamps and Root draft of the Article.

¹⁵³ In the Drafting Committee's version of Article 31.

¹⁵⁴ See to the same effect, Kearney, 614, 697, 707.

¹⁵⁵ See *ibid.*, 615. See also, A.P. Fachiri, The Permanent Court of International Justice, 2nd ed. (London: Oxford University Press, Humphrey Milford, 1932), 101 (hereinafter "Fachiri").

¹⁵⁶ See Rosenne, Law and Practice, 608.

when the Statutes of both Courts were being drafted, one wonders whether its continued retention in the present Statute reflects the real state of affairs. Furthermore, as the states which framed the Statute were all considered to be civilized, one finds the necessity for the use of the word puzzling. In any case, can it not be safely assumed that all states which accede to the Statute of the Court are adjudged to be civilized in the pertinent sense in which that word is used in the Statute? It is even debatable to suggest that today those states which have not acceded to the Statute are not civilized. For these reasons, among others, it is respectfully submitted that the retention of the word civilized in Article 38(1)(c) has outlived its usefulness. Rosenne has observed that the use of the word civilized in that paragraph is in the view of most persons "superogatory as well as meaningless".¹⁵⁷

Article 38(1)(c) was inserted into the Statute to prevent the situation from arising in which the Court would be compelled to throw out a case because it has no law available on which to decide it. This situation, commonly referred to in the legal literature as non liquet,¹⁵⁸ was one of the

¹⁵⁷ See Rosenne, The World Court, 113. Cf. Singh, 46, 144.

¹⁵⁸ See generally H. Lauterpacht, The Function of Law in the International Community (Oxford: Clarendon Press, 1933), 51-84 (hereinafter "Function"); id., "Some Observations on the Prohibition of 'Non Liqueet' and the Completeness of the Law", in Symbolae Verzijl (The Hague: Martinus Nijhoff Publishers, 1958), 196-221; J. Stone, "Non Liqueet and the Function of Law in the International Community", 35 BYIL (1959), 124-61.

serious problems which dominated the deliberations of the Committee of Jurists responsible for preparing a plan for the establishment of a Permanent Court.¹⁵⁹

The fact that there has never been a case in which Article 38 has been a key issue before the Court serves to underscore the veracity of the assertion that it has proved satisfactory in practice notwithstanding the doctrinal problems which it might have caused.¹⁶⁰ Its practical success is further underlined by the fact that it is frequently taken over into international arbitration agreements.¹⁶¹ It has also been regarded as a successful accomplishment of the codification of the sources of law.¹⁶² Article 10 of the Model Rules of the ILC on arbitration procedure proposed making it a general feature of the law of arbitral procedure.¹⁶³

¹⁵⁹ See Kearney, 611-2; also, Rosenne, Law and Practice, 605.

¹⁶⁰ See Rosenne, Law and Practice, 604, 605; also see M.O. Hudson, International Tribunals, Studies in the Administration of International Law and Organisations, No.2 (Washington: Carnegie Endowment for International Peace, 1944), 19, 254.

¹⁶¹ See Rosenne, Law and Practice, 604.

¹⁶² See UN, Survey of International Law in Relation to the Work of the International Law Commission, Memorandum of the Secretary-General of the United Nations, New York, 1949, Document A/CN.4/1/Rev.1, 22; Rosenne, Law and Practice, 604.

¹⁶³ See *ibid.* Rosenne also points to the sparsity of direct jurisprudence on the article as an indication of its satisfactory operation in practice, *ibid.*, 605. See PCIJ Series A, No.20-1, 20 and ICJ Reports 1960, 37. In addition to these the article has also been mentioned in passing in a few recent cases. See, for instance, *ibid.* 1982, 37, para.23; *ibid.* 1984, 290-1, paras.83-4.

(b) Judicial Decisions as a Source of Law

The meaning of the term "source" is a matter which has aroused some controversy. In common law, the term is used in a number of senses. When we speak of a formal source we are referring to the law-creating process, or the acts or facts by which a material source is clothed with legal validity and obligatory force. A material source alludes to that source from which the substance of the law is derived, or the content of the law.¹⁶⁴ As Kearney has rightly observed the distinction between formal and material is not an easy one to make.¹⁶⁵ Historical sources are those sources which the law itself acknowledges. The Roman legal system affords a very good example of this type of source. Last but not least by a literal source we mean the place where the law is found. An Act of Parliament provides an example of literal source.¹⁶⁶

Given that these diverse meanings render the concept of source in both municipal and international law confusing, it is no wonder that some theorists of international law, notably P.E. Corbett, have advocated its abandonment from the terminology of international law.¹⁶⁷ The term may however be

¹⁶⁴ See to the same effect, Nawaz, 526. Also, G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", in Symbolae Verzijl (The Hague: Martinus Nijhoff Publishers, 1958), 153, 154 (hereinafter "Some Problems"); Kearney, 697.

¹⁶⁵ See *ibid.*, 617.

¹⁶⁶ See Nawaz, 526.

¹⁶⁷ See P.E. Corbett, "The Consent of States and the Sources of the Law of Nations", 6 BYIL (1925), 20.

retained if we make sure how it is intended to be used. For example, we have been admonished not to use it in relation to the question why international law is in general binding.¹⁶⁸ It has been suggested that the term source be replaced by the term "evidence", since the evidence of international law is the documents proving the consent of a state to its rules. As consent is the essential basis of international law, it is to those documents that prove consent that one must look in an enquiry about sources of international law. It has been argued that the term "evidence" is better suited to the international legal system which is an aggregate of rules governing interstate relations.¹⁶⁹ Nawaz points to Sorensen's definition of sources of international law as "those things which indicate the actual or concrete content of this system" which he calls "this functional meaning of the term source" as lending support to the proposition that it be discarded in favour of the term evidence.

It is significant that the word source is conspicuously absent from the provisions of Article 38 and also that they are not explained in unqualified terms. It does not therefore seem that the enumeration contained in Article 38 is meant to be or indeed is exhaustive.¹⁷⁰ On the assumption that the consequence of the amendment to Article 38 of the Statute of

¹⁶⁸ See C. Parry, The Sources and Evidences of International Law (Manchester: Manchester University Press, 1965), 4 (hereinafter "Parry"). See also O'Connell, 9.

¹⁶⁹ See Nawaz, 527.

¹⁷⁰ See to the same effect, Nawaz, 527-8.

the Permanent Court is to declare that the four enumerated sources of law are intended as "an authentic emanation of the various components of existing law to be applied by the Court", Kelsen objects to the four categories as being exclusive or normative.¹⁷¹ Kearney comments that "presumably Kelsen is using the term 'authentic' in the same sense as 'the authentic interpretation' of German law, an interpretation that is as binding and of the same quality as the legal instrument which is being interpreted."¹⁷²

Fitzmaurice has observed that:

Article 38 ... is not technically an abstract statement of what the sources of international law are, but a standing directive to the Court (analogous to any corresponding provision of a compromis in a particular case) as to what it is to apply in deciding cases brought before it. Insofar as Article 38 does purport to contain or reflect an abstract statement of the sources of international law it is defective because (a) it does not distinguish between the formal and material sources; (b) it establishes no system of priorities, except on one point or inferentially and then not in all respects the right one, and (c) the formal sources of international law, while covered by it, are imperfectly or inappropriately stated.¹⁷³

If we agree with Fitzmaurice that Article 38 is a standing directive to the Court, then its significance must necessarily lie in its value as a tool rather than its quality as a doctrinal exposition. While the absence of a rigid

¹⁷¹ See H. Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems, 4th impression, bound in supplement (London: Stevens & Sons, published under the auspices of the London Institute of World Affairs, 1964), 531-4 (hereinafter "Kelsen"); see also Kearney, 654.

¹⁷² See *ibid.*

¹⁷³ See Fitzmaurice, "Some Problems", 176.

classification with respect to the first three paragraphs of the article as we have already seen affords the Court ample latitude to declare and develop the law, the lack of distinction between material and formal sources of law enhances the flexibility available to the Court in carrying out its functions. It must be pointed out that this so-called defect has not prevented the decisions of the Court, as well as those of other tribunals, from performing their legitimate role in the development of international law and jurisprudence. To this extent, these so-called defects may after all prove to be the strength of the article.¹⁷⁴

In spite of the difficulties regarding the use of the word "sources" in legal terminology, Article 38 has not infrequently been regarded as listing the sources of international law.¹⁷⁵ In fact, the Court itself has referred to "the legal sources specified in Article 38(1)...".¹⁷⁶ In the Gulf of Maine Case a chamber of the Court, in order to ascertain the principles and rules of international law which in general govern the subject of maritime delimitation, had to refer to

conventions, (Article 38, para.1(a)) and international custom (para.1(b)), to the definition of which judicial decisions (para.1(d)) either of the Court or of arbitration tribunals have already made a substantial

¹⁷⁴ See Kearney, 697.

¹⁷⁵ See Rosenne, Law and Practice, 604, n.2.

¹⁷⁶ See ICJ Reports 1982, 37, para.23; *ibid.* 1986, 575, para.42.

contribution.¹⁷⁷

It is clear that the Court considers judicial decisions as a source of law though it has never expressly indicated the nature or the kind of source it is. We have seen¹⁷⁸ how the Court, in spite of the emphatic language of Article 59 which seeks to limit the formal authority of the decision to the case in which it is rendered and to the narrow circle of parties thereto, has, subject to the overriding principle of res judicata, reconsidered the substance of the law as contained in an earlier decision and also regularly cited previous decisions and opinions. It has also been pointed out¹⁷⁹ that the ratio decidendi of the Court's judgment and opinions as opposed to its *dispositif* greatly enrich the general corpus of international law. It is for this reason that one encounters references to "well established principles",¹⁸⁰ "firmly established rule",¹⁸¹ "the established jurisprudence"¹⁸² or "the long established jurisprudence" in the Court's judgments and advisory opinions. The practice of the Court leads one to conclude that it regards judicial decisions as the source of law. State practice largely influenced or determined by that of the

¹⁷⁷ See *ibid.* 1984, 290-1, para.83.

¹⁷⁸ See above, 50-6.

¹⁷⁹ See above, 37-9.

¹⁸⁰ See *ibid.* 1985, 40, para.47.

¹⁸¹ See *ibid.* 1986, 632, para.147.

¹⁸² See *ibid.* 1961, 32, 34.

Court, though not usually entirely consistent, tends to confirm the view that states do consider judicial decisions as a source of law.

Juristic opinion on the answer to the question whether judicial decisions, especially those of the International Court, constitute a source of law as far as can be discerned from the legal literature, is by no means unanimous. There is, however, little doubt that many distinguished theorists of international law look upon judicial decisions as a source of law.¹⁸³

The view that judicial decisions constitute a source of international law is also contained in Article 24 of the Statute of the ILC which imposes on that body the duty to consider ways and means for making the evidence of customary international law more readily available, by reference to "documents concerning state practice and of the decisions of national and international courts on questions of international law". The ILC went on record as saying that "such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law", as particulars of the evidence of which it mentioned:

¹⁸³ See Kearney, 697-8; H. Lauterpacht, Development, 21. See also Nawaz, 528-9. For a very cautious and hesitant, if practically identical view, see S. Rosenne, The International Court of Justice (Leiden: A.W. Sijthoff, 1957), 425 (hereinafter "The ICJ"); *id.*, The World Court, 113-4; *id.*, Law and Practice, 611-2. See also Higgins, "The Court and South West Africa", 591; Jhabvala, "Scope of Individual Opinions", 52.

- (a) Texts of international instruments;
- (b) Decisions of international courts;
- (c) Decisions of national courts;
- (d) National legislation;
- (e) Diplomatic correspondence;
- (f) Opinions of national legal advisers (with reserve); and
- (g) Practice of international organisations.¹⁸⁴

The ILC therefore recognises judicial decisions as evidence of international law.

To the reasons already adduced in explanation of the Court's reluctance to rely on the decisions of other tribunals,¹⁸⁵ we would like to add, and this may be especially valid in the early years of the Permanent Court, the fact that the Court would have had to rely on the jurisprudence of other tribunals as the cornerstone of its own jurisprudence, had it cultivated habits in its formative years of invoking the decisions of such tribunals which may not have shared its judicial character. While this may not be totally undesirable it is debatable whether given the relative sparsity of general arbitral jurisprudence, let alone its non-judicial character, such jurisprudence would have been an appropriate launching pad for the take-off of the kind of system of international adjudication for which both the Permanent Court and the International Court were created. In

¹⁸⁴ See UN, GAOR, Supp. No.12, A/316. See also Nawaz, 529.

¹⁸⁵ See above, 59.

fairness to the International Court, however, it should be said that the attitude it adopted towards international arbitral jurisprudence exemplified by its summary dismissal of general arbitral jurisprudence in the Barcelona Traction Case (Merits), appears to have been somewhat modified in recent times. This change in the Court's attitude regarding arbitral jurisprudence is evidenced by frequent references to the Franco-British Arbitration of June 1977 in subsequent continental shelf delimitation cases which have come before it. Moreover, in theory at least, it does not seem that the Court has ascribed a secondary role to such jurisprudence. Some indication of this comes out very clearly in the Court's reference to Article 38 of the Statute in the Gulf of Maine Case.

It has also been pointed out that the Court never cites decisions of municipal courts. It regards such decisions as being in a category different from those of other tribunals.¹⁸⁶ It has been suggested that the decisions of municipal courts which are organs of the state, when vested with authority and uniformity, may be regarded as expressing the opinio juris of that state. When a series of concordant and authoritative decisions of municipal courts cover a point of international law, such decisions may properly be regarded as evidence of international custom in which sense, in addition to serving as subsidiary means for determining rules of international law according to the terms of Article

¹⁸⁶ See H. Lauterpacht, Development, 20.

38(1)(d), they also act as evidence of a general practice accepted as law under Article 38(1)(b).

By virtue of the rule contained in Article 59 judicial decisions are certainly, at least in theory, not a formal source, though they may be a material or literary source. Fitzmaurice has described them as a "formally material" source.¹⁸⁷

Besides the fact that the employment of judicial decisions as a source of law is subject to Article 59, in relation to other the legal sources enumerated in the first three subparagraphs of that Article, they are also it is a subsidiary source. The meaning of the term subsidiary is not clear. According to Hudson

It may be thought to mean that these sources are to be subordinated to others mentioned in the Article. That is, to be regarded only when sufficient guidance cannot be found in international conventions, international customs and general principles of law.

He further adds that "the French term auxiliaire seems however to indicate that confirmation of rules found to exist may be sought by referring to jurisprudence".¹⁸⁸

It has been argued that state practice which is responsible for the creation of new rules and clarification of existing rules of international law, is the primary means for

¹⁸⁷ See Fitzmaurice, "Some Problems", 172-3. Fitzmaurice explains that "judicial decisions are a source which tribunals are bound to take into account, even if they are not bound to follow them...". See also Fitzmaurice's characterization of the decision in the Fisheries Case (ICJ Reports 1951, 116) as a "quasi-formal" source of law. See also Kearney, 699.

¹⁸⁸ See Hudson, The Permanent Court, 612-3.

the determination of those rules; and that only infrequently will tribunals be called upon to adjudicate on inter-state disputes, so that judicial decisions are subsidiary means for determining rules of law.¹⁸⁹

The part played by state practice has been expressly acknowledged in subparagraph (b), and implicitly recognised in subparagraphs (a) and (c) of Article 38(1). It is therefore difficult to sustain the argument that it is the primary means for the creation of rules of international law in relation to Article 38(1)(d), not least because it would seem to transfer the judicial task of ascertaining the law from the Court to states, a proposition which is both impracticable and patently unacceptable.

Besides the standing directive given to the Court by states through the medium of the Statute, it may be said that the law lies in the bosom of the Court, that is, the law lies within the judicial knowledge of the Court. In the Nicaragua/United States Case the Court explained that

The principle jure novit curia signifies that the law is not solely dependent on the argument of the parties before it with respect to the applicable law (Lotus Case, PCIJ Series.A, No.10, 31) so that the absence of one party has less impact.

It recalled its observation in the Fisheries Jurisdiction Cases that:

The Court as an international juridical organ is deemed to take judicial notice of international law and is therefore required ... to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute, it being the duty of the

¹⁸⁹ See Greig, International Law, 32.

Court itself to ascertain, in applying the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed on any of the parties for the law lies within the judicial knowledge of the Court.¹⁹⁰

So while the views of the parties to a case as to the law applicable to their dispute are material, particularly when those views are concordant,¹⁹¹ in the final analysis the Court must decide as to the law to be applied to the dispute.¹⁹²

Many Soviet writers espouse the view that decisions of the Court constitute a subsidiary source of international law.¹⁹³ Tunkin points to the rejection of judicial precedent by Article 59 of the Statute,¹⁹⁴ and seeks justification for

¹⁹⁰ See ICJ Reports 1986, 24, para.29. Also, *ibid.* 1974, 9, para.17, 181, para.18.

¹⁹¹ See *ibid.* 1986, 24, para.29. See also Rosenne, Law and Practice, 603-4 and the authorities therein cited. After having observed in connection with the Court's judgment in the South West Africa Cases (Second Phase) that "the proprio moto principle is not a licence to ignore established legal concepts nor to avoid issues upon which one has legal jurisdiction to pronounce", Higgins remarked that "it [the proprio moto principle] is a principle designed to affirm the Court's superior understanding of the law to that of the parties before it". See Higgins, "The Court and South West Africa", 582. See also, Jhabvala, "Scope of Individual Opinions", 50, where he points out that judges are presumed to have a recognised competence in international law. See Article 2 of the Statute. See also Singh, 143.

¹⁹² For the view that the practical significance of the label "subsidiary means" in Article 38(1)(d) is not to be exaggerated, see Brownlie, Principles, 20.

¹⁹³ See G.I. Tunkin, Theory of International Law (London: Allen & Unwin, 1974; Cambridge, Mass.: Harvard University Press, 1974), 182 (hereinafter "Theory"), for his view and other Soviet citations. Cf. W.E. Butler, Soviet Law, 2nd ed. (London: Butterworths, 1988), 51-3.

¹⁹⁴ See Tunkin, Theory, 183.

his position that the decisions of the Court are not part of the process for creating and modifying norms of international law in the argument that decisions of the Court reflect the opinion of its members who are specialists in international law. He declares that "this brings decisions of the Court closer to doctrine and not without reason does the Statute of the Court speak of judicial decisions and the teachings of international law simultaneously".¹⁹⁵

Tunkin's stance has been criticised, and rightly so, for denying to judicial authority its due place in legal doctrine and practice. It has been pointed out that the Court's decisions are certainly on a different plane from juristic opinions and that the Court is neither a mere assemblage of highly qualified publicists nor its decisions mere expressions of juristic writings.¹⁹⁶

Tunkin's view regarding judicial decisions closely resembles the classical position of which Virally is an exponent. To Virally the judicial decisions mentioned in Article 38(1)(d) refer first and foremost to the decisions of the Court itself. He makes the point that the Court refers constantly to its previous decisions, the illustrative value of which, in his view, depends upon the authority of the Court and the procedure by which they have been reached, rather than on their binding force which is restricted to the circle of

¹⁹⁵ See *ibid.* See also Nawaz, 530.

¹⁹⁶ See *ibid.*

parties and to the actual judgment or order.¹⁹⁷ For Virally, judicial decisions create particular rules in a derivative manner by imposing obligations on the parties by virtue of superior rules. Having differentiated between the operative part and the reasoning of the judgment, he points out that general principles of law are, in practice, incorporated into international law through judicial decisions. Unlike the first three legal sources listed in Article 38(1), judicial decisions are seen by Virally as not being autonomous, but mere subsidiary means for the ascertainment of general rules of law. In summing up his discussion of judicial decisions as a source of law he enters the caveat that

It must be understood that 'subsidiary' does not mean 'secondary'. On the contrary, in many areas of international law such decisions constitute the best means of ascertainment of what the law is. Judicial... decisions [Virally concludes] represent an integral part of international practice in the creation of customary rules.

Another category of judicial decision, which also constitutes an autonomous source of law, is that pertaining to jurisdictional questions, for under Article 36(6) "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by a decision of the Court". Such

¹⁹⁷ See Virally, 150-1. For the view that the decisions of the Court on procedure constitute an autonomous source of law, see Virally, 151-2; see also Muhammad Zafrullah Khan, "Address by the President of the International Court of Justice at a Special Sitting of the Court held on 27 April 1972 to mark the 50th Anniversary of the Inauguration of the International Judicial System", reprinted in 19 NILR (1972), 12; see also ICJYB 1971-2, 128-40 where the address is also reprinted. On the Court's power to regulate its procedure, see Articles 30 and 48 of the Statute. See also, Moore, "Organisation", 506.

a determination will be final and binding on the parties under the terms of Articles 60 and 59 respectively.

De Bustamante adopts a position substantially similar to that of Virally when he observed, in relation to the amendment of Article 35(4) (now Article 38(1)(d)) by the Council of the Assembly of the League which made the operation of that article subject to the provisions of Article 37(a) (now Article 59), that "this indicates in a rather confused manner the difference not discussed by anyone between jurisprudence as a source of law and the effect of res judicata".¹⁹⁸ Concluding his treatment of the law applied by the Court he wrote:

The final revision of this Article slightly diminished, in No. 4, the obligatory force of international jurisprudence. Its creative legal power, in the absence of written or customary law, is limited to being an auxiliary method for determining its rules. [He hastens to add that] There is however no standard, outside of jurisprudence ... for determining what are the principles of law recognised by civilized nations ...¹⁹⁹

(c) Limitations of Judicial Decisions as a Source of Law²⁰⁰

The international judicial system suffers from a number of severe limitations which militate against the tendency to

¹⁹⁸ See de Bustamante, 241-2.

¹⁹⁹ See *ibid.*

²⁰⁰ On the contrasts between national and international judicial systems, see generally L.F. Damrosch, "Multilateral Disputes", in The International Court of Justice at the Crossroads, L.F. Damrosch (ed.) (Dobbs Ferry, NY: Transnational Publishers, 1987), 376 at 378-80 (hereinafter "Damrosch"); J.G. Merrills, International Dispute Settlement (London: Sweet & Maxwell, 1984), 103 (hereinafter "Merrills").

regard judicial decisions as a source of law. The particular reasoning and unintegrated character of the system render it difficult, if not impossible, to regard judicial decisions as a source of law.²⁰¹ The view has been expressed that "it is incautious to extract general propositions from opinions and judgments devoted to a specific problem or settlement of disputes entangled with the special relations of two states".²⁰² Another limitation of the international judicial system is the lack of automatic enforcement of its orders indicating interim measures of protection and judgments. Under Article 94(1) of the United Nations Charter "each member of the United Nations undertakes to comply with the decision of the International Court of Justice to any case to which it is a party". Under paragraph 2 of the same article

even if a party to the same 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 or decide upon measures to be taken to give effect to the judgment.

It is clear from the provisions of the Charter that the Security Council will not normally, on its own initiative, take action to give effect to a judgment of the Court. It must be approached by one of the parties to the case decided.

²⁰¹ See ICJ Reports 1984, 290, para.81, concerning uniqueness of cases.

²⁰² See Brownlie, Principles, 21. See also Rosenne, The World Court, 114; id., The ICJ, 495. On this uninterpreted character of the international judicial system, see Article 9 of the Statute.

When such an approach is made, there is no guarantee that the Security Council resulting draft resolution would not be subjected to the veto by a permanent member.²⁰³

One further limitation which is somewhat connected to the last mentioned, pertains to the absence of compulsory jurisdiction. The essentially voluntary character of the system means that judicial traditions, strictly speaking, cannot create general rules binding on all states just as judicial precedent binds individuals in common law jurisdictions or just as in all states those rules which are the object of what is called "the settled jurisprudence" bind individuals who are subject to the compulsory jurisdiction of the courts.²⁰⁴

The international judicial system has yet another limitation which makes the proposition that judicial decisions represent a source of law seemingly untenable. This has to do with the relative sparsity of international litigation.²⁰⁵

²⁰³ See above, 44, n.30. On the enforcement of international judicial decisions, see generally, E.K. Nantwi, The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law (Leiden: A.W. Sijthoff, 1966); R.P. Anand, Studies in International Adjudication (Delhi: Vikas Publications, 1969), 250-86 (hereinafter "Studies"); W.M. Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards (New Haven: Yale University Press, 1971) (hereinafter "Nullity"); id., "The Enforcement of International Judgments", ASILP (1968), 13-35.

²⁰⁴ See Virally, 151.

²⁰⁵ See Rosenne, The World Court, 113-4; Higgins, "The Court and South West Africa", 593; Saxena, 676; Nawaz, 532; T.O. Elias, Africa and the Development of International Law (Leiden: A.W. Sijthoff, 1972), 76 (hereinafter "Africa"). See also ICJYB 1969-70, 24.

The aforementioned limitations notwithstanding, judicial decisions, especially those of the International Court, have made an invaluable contribution to the development of international law. They constitute a "principle method by which the law can find some concrete measure of clarification and development".²⁰⁶

(d) Normative Impact of Judicial Decisions

So far we have examined the tendency of the International Court to refer to its own jurisprudence and that of its predecessor, the Permanent Court, whose lead it may be said to be following in this regard. The effect of this tendency on the attitude of states and the doctrinal writing of jurists has also been clearly shown. Some judgments have also exerted a profound and decisive influence on the codification and progressive development of international law, through their impact on international codifying agencies and conferences. It is this impact of the jurisprudence of the Court on the course of international law which we propose to explore by a brief study of some of these judgments.

²⁰⁶ See the dissenting opinion of Fitzmaurice J. in the Barcelona Traction Case (Merits), ICJ Reports 1970, 64. See also Elias, Africa, 76, 77; S. Oda, "The Role of the International Court of Justice" 19 IJIL (1979), 162-3 (hereinafter "Role of the Court"); Rosenne, The World Court, 128; Fawcett, 134; H. Lauterpacht, Development, 87, 190-9 passim; Greig, International Law, 34; Fitzmaurice, "Some Problems", 170.

(i) Corfu Channel Case²⁰⁷

This dispute, which gave rise to three Judgments by the

²⁰⁷ See ICJ Reports 1949, 4. For references to this case in the literature see, for example, Fawcett, 134; Rosenne, The World Court, 121-3; J. Verzijl, The Jurisprudence of the World Court: A Case-by-Case Commentary, Vol.2, The International Court of Justice (1947-65) (Leiden: Institute for International Law of the University of Utrecht, 1966), 22-36 (hereinafter "Verzijl"); E.M. Hambro, The Case Law of the International Court (Leiden: A.W. Sijthoff, 1952), 55, 71, 95-7, 123-5, 129-31, 161, 327, 329, 363-5, 367, 419, 421, 423 (hereinafter "Case Law"); G. Elian, The International Court of Justice (Leiden: A.W. Sijthoff, 1971), 98-100 (hereinafter "Elian"); I. Brownlie, "The Use of Force in Self-Defence", 37 BYIL (1961), 183 at 223, 233, 244, 250, 266 (hereinafter "Use of Force"); Parry, 60, 149, 182; C.G. Tornaritis, "The Review of the Role of the International Court of Justice", 24 RHDJ (1971), 34 (hereinafter "Tornaritis"); G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points", 28 BYIL (1951), 18-9, 21, 27 (hereinafter "28 BYIL (1951)"); *id.*, "The Law and Procedure of the International Court of Justice, 1951-54: Questions of Jurisdiction, Competence and Procedure", 34 BYIL (1958), 8, 31, 81, 82, 84-5, 91, 99 (hereinafter "34 BYIL (1958)"); *id.*, "The Law and Procedure of the International Court of Justice, 1954-9: General Principles and Sources of International Law", 35 BYIL (1959), 183, 212, 234 (hereinafter "35 BYIL (1959)"); *id.*, The Law and Procedure of the International Court of Justice, Vol.2 (Cambridge: Grotius Publications Ltd., 1986), 2:4-6, 13, 17, 19-22, 27-31, 33, 59-60, 62, 68, 100-1, 109-11, 124, 126-31, 183 n.3, 434, 457, 504, 508 n.2, 510-1, 517, 525, 577, 582, 585-6, 614, 709 n.9, 770 n.4, 771 n.2 (hereinafter "Fitzmaurice"); Elkind, Non-Appearance, 38-41; Merrills, 96, 103; I.F.I. Shihata, The Power of the International Court to Determine Its Own Jurisdiction (The Hague: Martinus Nijhoff Publishers, 1965), 56, 131, 135-6 (hereinafter "Shihata"); J.R. D'Angelo, "Resort to Force by States to Protect Nationals: The US Rescue Mission to Iran and its Legality under International Law", 21 VJIL (1981), 486, 502-3 (hereinafter "D'Angelo"); H.K. Hubbard, "Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice", 38 Stan.LR (1985), 169, 174, 180; G.F. Jones, "Termination of Declarations under the Optional Clause: Military and Paramilitary Activities in and against Nicaragua", 20 TILJ (1985), 557, 559, n.11 (hereinafter "Jones"); G. Weissberg, "The Role of the International Court of Justice in the United Nations System: The First Quarter Century", in L. Gross (ed.), The Future of the Court 131, 132, 165-8, 172, 173 (hereinafter "Weissberg").

Court, arose out of the explosions of mines by which some British warships suffered damage while passing through the Corfu Channel in 1946, in a part of Albanian waters which had previously been swept. The ships were severely damaged and several crew members killed.

On the recommendation of the Security Council the United Kingdom instituted proceedings against Albania in the International Court on 22 May 1947. The Court rejected a preliminary objection filed by Albania and decided that the proceedings on the merits should continue.

The Court, in its judgment of 9 April, 1949, found sufficient evidence to hold Albania the territorial state responsible in law for the incident of 22 October 1946 and under a duty of making compensation for the resulting loss and damage. The Court also held that while the passage of British warships through the Corfu Channel on 22 October, was not a violation of Albanian sovereignty as it had the character of innocent passage, the minesweeping activities of 12 and 13 November 1946 certainly had that effect, and that this declaration by the Court constituted in itself appropriate satisfaction.²⁰⁸

The significance of this case for our enquiry lies in the rules applied by the Court to the right of innocent passage through the territorial sea in general, and through straits serving international navigation in particular,²⁰⁹ as well as

²⁰⁸ See ICJ Reports 1949, 36.

²⁰⁹ See Oda, "Role of the Court", 162.

the formulation of the law of state responsibility.²¹⁰ On the duty of the Albanian authorities to shipping in the territorial sea in general, the Court said:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based ... on elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States ...²¹¹

In reply to Albania's contention that the North Corfu Strait did not belong to the class of international highways through which a right of passage existed, on the grounds that it was only of secondary importance, and not even a necessary route between two parts of the High Seas, and that it was used almost exclusively for local traffic to and from the ports of Corfu and Swanda, the Court declared that the decisive criterion was rather the geographical situation of the Strait as connecting two parts of the High Seas, and the fact that it was being used for international navigation. The Court concluded that having regard to these various considerations: "the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace."²¹²

²¹⁰ See H. Lauterpacht, Development, 87ff; also Elias, Africa, 77.

²¹¹ See ICJ Reports 1949, 22.

²¹² See ibid., 29.

While the Court conceded Albania's right to regulate the passage of warships through the strait, in view of the exceptional circumstances then prevailing, it did not consider that Albania was justified in prohibiting such passage or subjecting it to the requirement of special authorisation.²¹³

The Corfu Channel Case was the first of a series of cases in which the Court was to discuss matters concerning the law of the sea. The rules applied by the Court to the regime of the straits used for international navigation and the innocent passage of warships, engaged the attention of the ILC to which the General Assembly of the United Nations had assigned the task of the codification of the Law of the Sea. On the basis of the work of the ILC it was possible for the 1958 Geneva Conference on the Law of the Sea to lay down general rules governing the right of innocent passage through the territorial sea and through straits serving international navigation.²¹⁴

The rules governing the regime of the Straits used for international navigation and the innocent passage of warships, embodied in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone were incorporated into the 1982 United Nations Convention on the Law of the Sea.²¹⁵ Article 24 of

²¹³ See *ibid.*, 29-32.

²¹⁴ See Rosenne, The World Court, 127-8; *id.*, The ICJ, 495.

²¹⁵ See UN, The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index (New York, 1983), Articles 17, 19, 24, 45; the Convention is also reprinted in e.g. Brownlie, Basic

the Convention reflects the Court's ruling in the Corfu Channel Case concerning the obligations incumbent upon the Albanian authorities to notify, for the benefit of shipping in general, the existence of a minefield and to warn the approaching British warships of the danger to which the minefield exposed them. Article 24 is also consistent with the Court's ruling that Albania was not justified in prohibiting the passage of ships through the North Corfu Strait, or subjecting such passage to special authorisation. It will be noticed that the references in the Convention to "straits used for international navigation" and "between a part of the high seas" are identical to the criteria relied on by the Court to describe the North Corfu Channel "as belonging to the class of international highways through which passage cannot be prohibited by a coastal state in time of peace".²¹⁶

In formulating the law of state responsibility, the Court considered it as clear that the mere fact that the explosions which had caused damage, injury and death to British warships and naval personnel were caused by a minefield in Albanian territorial waters could not justify the imputation to that government of the knowledge of the fact that the mines were being laid. The Court conceded that a state in whose territorial waters a breach of international law occurred could not evade a request to render an explanation just by claiming ignorance of the act constituting the said breach and

Documents, 85-203; Millar, Treaties, 145-74.

²¹⁶ See above, 105.

its authors. In the view of the Court, the state concerned may be under a limited obligation to prove the use it has made of the means of information and enquiry at its disposal.²¹⁷

The Court qualified the liability of the state concerned by observing that the mere fact of control exercised by a state over its territorial waters could not constitute an adequate basis for concluding that it necessarily knew, or should have known, of any unlawful act committed therein, nor yet that it necessarily knew, or ought to have known, the authors.²¹⁸ The Court thought that this qualification of the liability was in turn also limited by the consideration that the injured state should be permitted a more liberal recourse to inferences of fact and circumstantial or indirect evidence.²¹⁹ Thus, in the Corfu Channel Case judgment the Court had through a shrewd mixture of "judicial restraint and economy of expression" formulated a balanced law of state responsibility and thereby made a useful contribution to international law. The Court has been criticized for not indicating the source of the law it applied in this case in relation to state responsibility, especially its failure to cite any provisions of the UN Charter.²²⁰

²¹⁷ See ICJ Reports 1949, 18.

²¹⁸ See *ibid.* Cf. the Court's observations in the Nicaragua/United States Case (Merits), ICJ Reports 1986, 84, para.155 and 86, para.160.

²¹⁹ See ICJ Reports 1949, 18.

²²⁰ See D'Angelo, 501-3; Lissitzyn, 26-7.

(ii) Fisheries Case²²¹

The judgment delivered by the Court in this case ended a long controversy between the United Kingdom and Norway which had aroused considerable interest in other maritime states. In 1935 Norway enacted a decree by which it reserved certain fishing grounds situated off its northern coast for the exclusive use of its own fishermen. The question at issue was whether this decree, which laid down a method for drawing the baselines from which the width of the Norwegian territorial waters had to be calculated, was valid international law. This question was rendered particularly delicate by the intricacies of the Norwegian coastal zone, with its many fjords, bays, islands, islets and reefs. In its judgment of 18 December 1951, the Court found that, contrary to the submissions of the United Kingdom, neither the method nor the actual baselines stipulated by the 1935 decree were contrary to international law.

²²¹ See ICJ Reports 1951, 116. For references to this case in the literature, see for example: Fawcett, 134; Oda, "Role of the Court", 160, 162-3; Rosenne, The World Court, 126-8; id., "On the Non-Use of the Advisory Competence of the International Court of Justice", 39 BYIL, (1963), 1 at 30 (hereinafter "Non-Use"); Nawaz, 532-4; J.G. Starke, "International Legal Notes: The Locus Standi of a Third State to Intervene in Contentious Proceedings before the ICJ", 58 ALJ, (1984) 356 (hereinafter "Locus Standi"); Verzijl, 100-16; Hambro, Case Law, 73-81, 345; Elian, 100-1; Tornaritis, 34; Merrills, 94, 104-5; Fitzmaurice, 86, 138-84, 197, 199-259, 436, n.5, 505, n.5, 506, n.4, 579-80, 538 n.4; id., "The Law and Procedure of the International Court of Justice 1951-54: Points of Substantive Law, Part I", 31 BYIL (1954), 1, 8-47, 70 (hereinafter "31 BYIL (1954)"); id., 35 BYIL, 183, 235; F. Vallat, "The Function of the International Court of Justice in the World Community", 2 GJICL (1972), 55-6; Weissberg, 173, 189.

The Court's decision in this case in effect created a new rule of international law for the delimitation of maritime frontiers in parts of the world where unusual geographical and economic factors are present. In addition to the effect of the decision on the thinking of foreign offices throughout the world, the applicable principles for the delimitation of the territorial sea expounded by the courts also influenced the ILC²²² to which the General Assembly of the United Nations had entrusted the first phase of the task of codifying the Law of the Sea in 1950. The problem of formulating general rules from the specific principles and rules applied in the Fisheries Case as well as those applied earlier in the Corfu Channel Case (Merits)²²³ relating to the right of innocent passage through the territorial sea in general and through straits used for international navigation in particular, was addressed by the ILC with political guidance from the General Assembly of the United Nations and individual governments.²²⁴

The rules of general application thus formulated were approved on the political level²²⁵ by the first United Nations Conference on the Law of the Sea in Geneva in 1958. The Convention on the Territorial Sea and the Contiguous Zone adopted by that conference assimilated the straight baselines

²²² See H. Lauterpacht, Development, 197.

²²³ See above, 106-7.

²²⁴ See Rosenne, The World Court, 128; *id.*, The ICJ, 495.

²²⁵ See Rosenne, The World Court, 128.

method.²²⁶ The same rule was eventually incorporated in paragraphs 1 and 5 of the United Nations Convention on the Law of the Sea of 1982.²²⁷

The similarity of the language used by the Convention to describe economic interest with that used in the judgment is particularly striking. Article 15 of the Convention concerning delimitation of the territorial sea between opposite or adjacent states, which prohibits either of two states with opposite or adjacent coasts in the absence of agreement to the contrary, from extending their territorial sea beyond the median line every point of which is equidistant from the nearest points on the baseline on which the breadth of territorial seas of each state is measured, also contains a proviso that it does not apply where it is necessary by reason of historic title or other special circumstances to delimit the territorial sea of the two states in a way which is at variance therewith.²²⁸

The effect produced by the decision in the Fisheries Case on the subsequent course of the development of international law relating to the matters discussed in the judgment bears out the normative value of judicial decisions.

²²⁶ See Article 4 of the Law of the Sea Convention (1958) in Brownlie, Basic Documents, 87-8.

²²⁷ See Brownlie, Basic Documents, 145.

²²⁸ See *ibid.*, 147-8.

(iii) The North Sea Cases²²⁹

These cases concerned the delimitation of the continental shelf of the North Sea as between Denmark and the Federal Republic of Germany, and as between the Netherlands and the Federal Republic, and were submitted to the Court by special agreement. The parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis. By an Order of 26 April 1968 the Court, having found Denmark and the Netherlands to be in the same interest, joined the proceedings in the two cases. In its judgment, delivered on 20 February 1969, the Court found that the boundary lines in question were to be drawn by agreement between the parties and in accordance with equitable principles in such a way as to leave to each party those areas of the continental shelf which constituted the natural prolongation of its land

²²⁹ See ICJ Reports 1969, 3. For references to this case in the literature, see for example: D.N. Hutchinson, "The Concept of Natural Prolongation in the Jurisprudence Concerning Delimitation of Continental Shelf Areas", 55 BYIL (1984) 133; *id.*, "The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law", 56 BYIL (1985) 115-62; Oda, "Role of the Court", 160, 162-4; Rosenne, The World Court, 158-9; *id.*, Procedure, 36, 38, 39, 47, 201-6 *passim*; Nawaz, 535-8; Elian, 128-30; Hussain, 62, 164-72; 189-90; 203, 275 n.104, 295 nn.1 and 2, 296 n.27; Angelo Davi', L'Intervento davanti alla Corte Internazionale di Giustizia (Naples: Casa Editrice Jovene, 1984), 17 (hereinafter "Davi"); Kearney, 655-61; Merrills, 108. See also, A.W. Rovine, "The National Interest and the World Court", in L. Gross (ed.), Future of the Court, 313, 318, 324; P.C. Szasz, "Enhancing the Advisory Competence of the World Court", in L. Gross (ed.), Future of the Court. 499 at 515 n.100 (hereinafter "Szasz"); A.O. Adede, "Toward the Formulation of the Rule of Delimitation of Sea Boundaries between States with Adjacent or Opposite Coastlines", 19 VJIL (1978-9), 207 at 315, 216, 234-5, 253.

territory under the sea, and it indicated certain factors to be taken into consideration for that purpose. The Court rejected the contention that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in the 1958 Geneva Convention on the Continental Shelf. The Court took account of the fact that the Federal Republic had not ratified that Convention, and held that the equidistance principle was not inherent in the basic concept of continental shelf rights, and that this principle was not a rule of customary international law.

It has been observed that

It is the elucidation of the limits of the continental shelf and the role of equity in delimitation of lateral boundaries in contemporary international law that make [this] decision one of the landmarks in international jurisprudence.²³⁰

Nawaz further points out that the 200 metre isobath criterion laid down by the 1958 Geneva Continental Shelf Convention alongside exploitability, received from the judgment a jolt probably never witnessed in the history of international law.²³¹ The reverberations of the judgment were echoed at the Third United Nations Conference on the Law of the Sea in the emphasis which many states placed on the importance of geological and geomorphological factors underlining the theory of natural prolongation. The decision, not surprisingly, brought about a change in the definition of the continental shelf as embodied in the 1958 Geneva

²³⁰ See Nawaz, 536.

²³¹ See *ibid.*, 537.

Convention on the Continental Shelf and the 1982 Convention on the Law of the Sea.²³²

Once again, we witness the impact of a decision of the Court on the codification and progressive development of the law of the sea. In subsequent continental shelf cases the Court has made remarks acknowledging the contribution of its jurisprudence in the North Sea Cases to the development of the principles and rules governing the delimitation of the continental shelf.²³³

The 1969 judgment demonstrates the unique value of the International Court in both evidencing lex lata and influencing lex ferenda.²³⁴ This case, in which the parties sought a declaratory judgment from the Court, also served as a mode for seising the Court which was adopted in subsequent cases of a similar nature.²³⁵

5. Conclusion

Whatever the weaknesses of judicial legislation, the fact

²³² See Articles 76(1) and 83(1) of the 1982 UN Convention on the Law of the Sea in Brownlie, Basic Documents, 177, 181.

²³³ See for example, ICJ Reports 1982, 46, para.32; 47, para.45; 92, para.132; *ibid.* 1984, 293, para.91; 293-4, para.93; 294, para.95; 299-300, para.112; 324, para.187; 339, para.230.

²³⁴ See to the same effect, Nawaz, 538.

²³⁵ See H. Mosler, "The Area of Justiciability: Some Cases of Agreed Delimitation in the Submissions of Disputes to the International Court of Justice", in Essays in International Law in Honour of Judge Manfred Lachs, J. Makarczyk (ed.), (The Hague: Martinus Nijhoff Publishers, 1984), 407-21 *passim* (hereinafter "The Lachs Collection").

that the Court employs it as a means of laying down the law for parties other than those to the immediate dispute and for future cases is indisputable. A unique characteristic of judicial decisions as a legal source, which has very often been overlooked, relates to the fact that, in the final analysis, it serves as a catalyst to development of international law and its influence permeates the other principal autonomous legal sources specified in Article 38(1). Judicial decisions, whether they are to do with the interpretation of treaties, the ascertainment or affirmation of rules of international customary law or the application of general principles of law, will usually be considered by the Court as representing the best and most authoritative evidence of international law. In view of the all-pervading influence of judicial decisions on the other legal sources, the idea that they constitute merely a subsidiary source of law seems very hard to sustain.

In the light of the foregoing considerations the conclusion seems inescapable that as far as the development of international law goes, neither Article 38(1)(d) nor Article 59, each by itself or operating in conjunction with one another, can adequately safeguard third parties from the effect of judgments and opinions of the Court. The formal protection which the said provisions are intended to provide is without any practical value. In fact it has been argued, perhaps rightly, that the somewhat wide provision of Article 59 may be explained by the possibility that the framers of the

Statute of the Permanent Court in 1920 did not appreciate all the possibilities in the direction of the development of international law of the activity of the Court about to be established.²³⁶ It is instructive to note that in recognition of the inadequacy of the protection of the interests of third parties provided by Articles 38(1)(d) and 59, the Statute makes specific provision for the safeguarding of such interests through the institution of intervention,²³⁷ to the study of which we shall turn in the next chapter.

²³⁶ See H. Lauterpacht, Development, 8.

²³⁷ See Articles 62 and 63 of the Statute.

CHAPTER TWO
SPECIFIC PROTECTION FOR THIRD PARTIES
DISCRETIONARY INTERVENTION¹

1. Introduction

The statutory provisions on intervention may be regarded as specific guarantees for safeguarding the rights and interests of third states. Unlike the provision contained in Article 59 of the Statute, their effect is neither general nor automatic. They must be specifically invoked. They are granted subject to certain conditions and under different circumstances. Under Article 62 of the Statute, a state which considers that it has a legal interest which may be affected by the decision in a pending litigation may submit a request to the Court to be permitted to intervene in the case. The Court decides whether to grant or refuse such a request. For this reason, this form of intervention has been called discretionary intervention, or intervention by leave of the Court.²

Under Article 63 of the Statute, any state which is party to a convention whose construction is in question in a pending litigation has the right to intervene in the case. If it

¹ See generally, Davi, 17-50, 146-226, 227-262.

² Cf. Schwarzenberger, who has described intervention under Article 62 as "legal interest intervention". See G. Schwarzenberger, International law as Applied by International Courts and Tribunals, Vol.4, International Judicial Law (London: Stevens and Soud Ltd., 1986), 399 (hereinafter "4 Schwarzenberger").

exercises this right, it is bound by the interpretation of the Convention given in the judgment. This kind of intervention has been referred to as intervention as of right.³ The subject matter with which the former is concerned is general in character, while that of the latter is special or particular. The possibility, scope and legal effects of third party intervention in pending primary proceedings are circumscribed by the consensual nature of the judicial settlement of international disputes.⁴

In this chapter we are concerned mainly with the former type of intervention, that is intervention under Article 62 as a specific guarantee for the protection of the rights or legal interests of third states. We shall analyse the attitude of the Court towards this remedy as reflected in its application or interpretation of the conditions stipulated by the Statute to govern its operation in its rules and its jurisprudence and its approach to the resolution of related controversial issues. A possible method for resolving such matters will be suggested. It is hoped that this discussion will serve to shed some light on the role which states, whether they are invoking or opposing intervention, and theorists of international law consider that this procedural remedy should play in international adjudication. This will involve, among other things, a brief review of the genesis of discretionary

³ Cf. Schwarzenberger who has characterized this as "construction of treaty intervention". See *ibid.*

⁴ See *ibid.*

intervention, the conflicting policies associated with its exercise, the conditions governing its operation, as well as a consideration of the role of the Court and the parties concerned.

2. Preliminary Remarks

(a) Definition

The institution of intervention is a procedural legal device known and accommodated by the principal legal systems of the world, ancient and modern. It has existed as a legitimate means, indeed an appropriate remedy, which has afforded third parties, extraneous to a pending legal dispute already commenced by the original parties, the opportunity to participate in the proceedings so as to defend their legal rights or interests which may otherwise be affected by the course of the proceedings.⁵

⁵ See the dissenting opinion of V-P. Sette-Camara in the Italian Intervention Case, ICJ Reports 1984, 3 at 72, para.2; 88, para.85; 124, para.16 (Ago J dissenting). See also separate opinion of Oda J. in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya: Application by Malta for Permission to Intervene), Judgment of 14 April 1981 (hereinafter "Maltese Intervention Case"), 3 at 25, para.5. See further, Chinkin, 523; Starke, "Locus Standi", 356. It must be emphasised that in this study we are merely concerned with intervention in the World Court and that the term 'intervention' is used to refer to a device of legal procedure and has nothing whatsoever to do with the other senses in which that term is often employed. It should therefore be distinguished from, for example, intervention as used in Article 2(7) of the Charter of the United Nations and military intervention. For a discussion of the use of intervention in these and other senses, see for example, W.E. Hall, A Treatise on International Law, 9th ed. (Oxford: Peane Higgins, 1924), 337-50; L.F.L. Oppenheim, International Law,

Similarly, the procedural faculty of intervention is known and recognised as an institution by means of which a third state may take part in litigation already set in motion at the instance of two or more states for the protection or safeguarding of its own rights or interests.⁶

(b) Objectives

The significance of intervention lies in the fact that, by avoiding circuitry of actions or multiplicity of decisions in the same case, it is useful in promoting economy of litigation. It achieves this by providing a means whereby several courses of action concerning the same set of rights or litigation may be dealt with and disposed of through a single proceeding, thereby simplifying the work of the Court and helping to bring about judicial economy. Thus, intervention prevents the same or substantially the same questions or issues being tried more than once with different results and the consequent loss of prestige, credibility or weakening of moral authority which this might entail for the Court. In

8th ed., Vol.1 "Peace", ed. Hersch Lauterpacht (London: New York/Toronto: Longmans, Green & Co., 1955), 304-320 (hereinafter "Oppenheim"); J.L. Brierly, The Law of Nations: An Introduction to the International Law of Peace, 5th ed. (New York: Oxford University Press, 1955), 308-15; W. Simons, The Evolution of International Public Law in Europe Since Grotius (New Haven: Yale University Press, 1931), 72 at 84-95; Hambro, Case Law, 410-21; P.B. Potter, "L'Intervention en Droit International Modern", 32 ADIRC (1930), II, 611.

⁶ See V.S. Mani, International Adjudication: Procedural Aspects (The Hague: Martinus Nijhoff Publishers, 1980), 248 (hereinafter "Mani").

short,⁷ intervention ensures that the purpose of the general principle of litigation, namely that all necessary and proper parties but no others should be before the Court to enable the effectual and complete determination of the issues arising in the proceedings, is not defeated.⁸

Intervention may also enable a state to secure what has been called "procedural economy of means" by relieving it of the burden of subsequent direct litigation against the principal parties.⁹ This may not only prove convenient but it will also save time and costs.¹⁰

Furthermore, in an increasingly interdependent world, we cannot pretend that litigation between two or more states may

⁷ This is probably more important in the municipal than in the international sphere because of the lack of compulsory jurisdiction in the latter.

⁸ See Sir Jack Jacob (ed.), The Supreme Court Practice 1985, Vol.2 (London: Sweet & Maxwell Ltd.) Order 15, Rule 6, section 7, 180-1 (hereinafter "Supreme Court Practice"). See also, P. Langan & D.G. Lawrence, Civil Procedure (London: Sweet & Maxwell, 1976), 130ff (hereinafter "Langan & Lawrence"); D.N. Barnard, The Civil Court in Action (London: Butterworths, 1977), 120ff (hereinafter "Barnard"); Halsbury's Laws of England, Vol.37, 4th ed., Editor-in-Chief Lord Hailsham of St. Marylebone (London: Butterworths, 1982), 159ff, para.215 (hereinafter "Halsbury's"); Paul Bastid, "L'intervention devant les Juridictions Internationales", 36 RPP (1929), 100 (hereinafter "Bastid"); Mani, 249; Damrosch, 387-8. See also the dissenting opinion of Oda J. in the Italian Intervention Case, ICJ Reports 1984, 92-3, paras.6, 7; 98, para.18.

⁹ See the Italian Intervention Case, *ibid.*, 26, para.42, and the dissenting opinion of Schwebel J., 134, para.10.

¹⁰ See Langan & Lawrence, 131-2; Barnard, 120; Supreme Court Practice, Order 16, Rule 6, 238. It is important not to overstress this point.

not raise issues of international law affecting other states.¹¹

Though the decision of an international tribunal may be final and binding on the parties to the litigation, it may also amount to "a considered and authoritative pronouncement" concerning all rights and duties of the type in the instant case.¹² In the circumstances a third state concerned with a conflict situation of a similar nature will be better off participating in the pending proceedings than by commencing fresh proceedings after their termination, by which time the outcome of the principal proceedings will have created an authoritative, non-binding precedent which may prejudice its own claims juridically. In this sense intervention may enable a third state to avoid the creation of a judicial precedent which will be likely to put its claims in jeopardy.¹³

By providing another means of seising the Court,

¹¹ See H.E. Richards, "The Jurisdiction of the Permanent Court of International Justice", in 2 BYIL (1921-2), 4; Mani, 249. See also T.O. Elias, The International Court of Justice and Some Contemporary Problems: Essays on International Law (The Hague/Boston/London: Martinus Nijhoff Publishers, 1983), 91, (hereinafter "The ICJ"); id., "The Limits of the Right of Intervention in a Case before the International Court of Justice", in Mosler Collection, 159 at 165 (hereinafter "The Limits").

¹² See Mani, 249; Chinkin, 502, 529; G.P. McGinley, "Intervention in the International Court: The Libya/Malta Continental Shelf Case", 34 ICLQ (1985), 671 at 689ff (hereinafter "McGinley"); the dissenting opinion of Jennings J. in the Italian Intervention Case, ICJ Reports 1984, 157, para.27.

¹³ See the separate opinion of Mbaye J. in Italian Intervention Case, ICJ Reports 1984, 47. See also Bastid, 100-1; Mani, 249.

intervention performs a procedural function. In this way it may open up a side door towards wider use of the Court for the settlement of disputes.¹⁴ It does not appear that the hope that intervention would encourage states to make greater use of the Court has been realised.¹⁵

Intervention also affords states the opportunity to contribute to the development of international law by the International Court which is "an authoritative source for the progressive development of international law".¹⁶ Intervention may also make it possible for the Court to be supplied with full or additional information concerning the dispute submitted to it.¹⁷

(c) How does one account for the Slow Acceptance of Intervention by the International Judicial System?

Notwithstanding the foregoing merits of intervention, which had first evolved in diverse municipal legal systems,

¹⁴ See Moore, "Organisation" 507; Mani, 249. See also the separate opinion of Mbaye J., ICJ Reports 1984, 41.

¹⁵ See Mani, *ibid.*

¹⁶ See Jhabvala, "Scope of Individual Opinions", 52. See also for example, the observations of Mr. Balfour in League of Nations, Documents, 38; Moore J. in Acts and Documents concerning the Organisation of the Court, PCIJ Series D, No.2, 91; the separate opinion of de Aréchaga J.A. in the Italian Intervention Case, ICJ Reports 1984, 62, para.22. See further J.T. Miller Jr., "Intervention in Proceedings before the International Court of Justice", in Future of the Court, 550 at 556 (hereinafter "Miller").

¹⁷ See Chinkin, 500-1; see also the Italian Intervention Case, ICJ Reports 1984, 25, and the separate opinion of Mbaye J., 43.

the international judicial system has, for a variety of reasons, been very slow in adopting this procedural remedy, especially that form of it for which Article 62 of the Statute provides.¹⁸ First, in view of the interdependence of international relations, events which end up in international litigation will necessarily impinge upon the legal interests of states in various ways. Should an unrestrained right of intervention be allowed nearly every third state would be able to identify some interest, whether it concerns the construction of a convention or the interpretation of the principles and rules of international law. Any state which perceives its legal interest to be threatened by the course of a litigation between other states will be induced by the principles of economy and efficiency to seek to intervene in the case.¹⁹

Secondly, in a system of international adjudication based mainly on consent, sovereign states as parties to disputes may usually not take kindly to intervention by a third state in the absence of any prior agreement. Consistent with this view it has been argued that intervention runs counter to some

¹⁸ See W.M. Farag, L'Intervention Devant la Court Permanente de Justice Internationale (Paris: Librairie Générale de Droit International et de Jurisprudence, 1927), 9-38 (hereinafter "Farag"). See also Mani, 249-50. See generally, R.V. Rogers, "Intervention at Common Law", 57 LQR (1941), 400-8; D.L. Shapiro, "Some Thoughts on Intervention before Courts, Agencies and Arbitrators", 81 HLR (1968), 721-72; Moore's Federal Practice: US Supreme Court Practice and Rules, 2nd ed., Ch.24.

¹⁹ See Chinkin, 500. See also Mani, 250, and the comments of Mr. Balfour in League of Nations Documents, 38 and Moore J. in PCIJ Series D, No.2, 91.

fundamental postulates on which the international judicial system is based, that is the principles of reciprocity of rights and obligations and of equality of parties before the Court. Moreover, intervention may also serve to modify and widen the scope of the Special Agreement concluded by the original parties by which the original dispute was referred to the Court and lead the Court to pronounce on matters unenvisaged by that Agreement and hitherto unknown to the parties. In this way intervention would expand the scope and disrupt the development of the dispute already submitted to the Court.²⁰

Thirdly, it has been pointed out that an international tribunal which lacks the requisite authority to check any abuse of its process may be unable to handle a possible deluge of unwarranted interventions.²¹

Fourthly, by enabling third states to participate in proceedings already instituted by the original parties, intervention may cause additional expense and necessitate the taking of new evidence. In this connection Mani has observed that "international adjudicative process is an expensive exercise for the parties instituting it, and any procedure that tends to retard the proceedings thereby hampering expeditious disposal of the dispute is generally discouraged

²⁰ See Italian Intervention Case, ICJ Reports 1984, 15, 18, paras.21, 27; 22, paras.34, 35. See also separate opinions of Judges Morozov, *ibid.*, 39, para.3, Singh, *ibid.*, 33; Mbaye, *ibid.*, 42-3; and de Aréchaga J.A., *ibid.*, 59-62, paras.13-21.

²¹ See Mani, 250.

in international practice".²²

Fifthly, states are not ordinarily favourably disposed to intervention on the grounds that it enables the intervenor to enjoy an unfair advantage over the main parties to the case. Judge Schwebel concedes that there is a measure of advantage inherent in the capacity of intervenor. This unfair advantage arises because by the time a third state intervenes in the proceedings the original parties are already committed to certain positions or lines of argument by the contents of their pleadings which are usually well known to the intervenor whose position they know next to nothing about.²³

Finally, it has been pointed out that "the efficacy of international law as a body of predictable and well-contoured norms of behaviour of states is not of the same order and character as that of a well developed municipal legal system".²⁴

(d) Types of Intervention

The procedural remedy of intervention follows various models in different municipal legal systems. Intervention may assume the "principal model", the "accessory model", the

²² See *ibid.* See also Halsbury's, 10-2, paras.2-3, and Supreme Court Practice, Order 1502.

²³ See ICJ Reports 1984, 14, para.19; and Maltese Intervention Case, ICJ Reports 1981, 35 (separate opinion of Schwebel J.).

²⁴ See *Mani*, 250.

"assistance model" or the "aggressive model".²⁵ In his separate opinion in the Italian Intervention Case Judge Ad Hoc de Aréchaga identified two types of intervention in municipal law, namely, principal or competing intervention (or an intervention ad excludendum) and supporting intervention (or intervention ad adjuvendum). In the former the intervenor requests the Court to reject the claims of the original parties. Consequently, the original parties find themselves in the position of respondents or defendants vis-à-vis the intervenor. In the case of the latter the third party intervenes to support either the plaintiff or defendant.²⁶ It would appear that three forms of intervention were envisaged by the framers of the Statute of the Permanent Court, on which the Statute of the present Court is largely based. The relevant parts of the report of the drafting group of the Advisory Committee of Jurists, presented by Mr. de Lapradelle, its Chairman, at the 32nd meeting, whose reading was completed at the 34th meeting, reads as follows:

Lastly, the question of the right of intervention ... is dealt with explicitly in this plan. There are three possibilities. A party may wish to take sides with the plaintiff or the defendant. A party may claim certain exclusive rights, or a party may request that one of the two contesting states should withdraw on the ground that it is not the real dominus of the right which it claims.

²⁵ See for example, Chinkin, 523. See dissenting opinion of V-P. Sette-Camara in ICJ Reports 1984, 71, para.3. See also, G. Morelli, "Fonction et Objet de l'Intervention dans le Procès International", in The Lachs Collection, 404-5 (hereinafter "Morelli"). On the analysis of intervention in municipal legal systems, see Davi, 115-45.

²⁶ See Italian Intervention Case, ICJ Reports 1984, 67, 68.

In this latter case intervention tends to become exclusion but as a rule a state is content to take joint action with one of the parties: should this be allowed? The Committee replies in the affirmative but on condition that an interest of a legal nature is involved ...²⁷

The Statute of the Court provides for two different forms of intervention, namely discretionary intervention or intervention by leave of the Court and intervention as of right.²⁸ In this chapter we are mainly concerned with the former type of intervention, the origin and evolution of which we will now briefly trace.

(e) Evolution of Article 62 of the Statute²⁹

Article 62 of the Statute of the International Court had

²⁷ See S. Oda, "Intervention in the International Court of Justice: Articles 62 and 63 of the Statute", in Mosler Collection, 629 at 635 (hereinafter "Intervention"). During an earlier discussion on intervention, Lord Phillimore, in explaining the right of intervention as it existed in English law, emphasised in particular the fact that in England an intervening body could only associate itself with the defendant. Mr. Loder explained that Dutch law admitted of intervention both on the side of the plaintiff and of the defendant. The President thought that the solution of the question of intervention should be drawn from common law and proposed a wedding based on the idea. See *ibid.*, 633.

²⁸ See, for example, the S.S. Wimbledon Case, PCIJ Series A, No.1, 9-13 at 12; Maltese Intervention Case, ICJ Reports 1981, 13, para.21. See also, Miller, 550; Chinkin; 496, Mani, 254, 255, 258; Rosenne, Procedure, 173; Emmanuel Decaux, "L'arret de la CIJ sur la requete a fin d'Intervention de Malte dans l'Affaire du Plateau Continental entre la Tunisie et la Libye", 27 AFDI (1981), 177 at 181 (hereinafter "Decaux"); Charles Rousseau, "Le Règlement Arbitral et Judiciaire et les Etats Tiers", in Mélanges offerts à Henri Rolin - Problèmes de Droit des Gens (Paris: Pedone, 1964) 300 at 308 (hereinafter "Rousseau"); and B. Smyrniadis, "L'Intervention devant la Cour Internationale de Justice", 9 REDI (1953), 28 (hereinafter "Smyrniadis").

²⁹ See generally, Davi, 105-14.

no forerunner in state practice in 1920. It was introduced into the draft Statute of the Permanent Court by the Advisory Committee of Jurists during their consideration of Article 23 of the text of the draft scheme for the establishment of a Permanent Court of International Justice prepared by its drafting committee, concerning intervention where the construction of a convention is in question (now Article 63 of the Statute).³⁰ In the course of the discussion it was suggested that the institution of intervention be made complete by the addition of Article 48 of a plan previously prepared by a conference of five neutral powers, the first paragraph of which reads as follows: "Whenever a dispute submitted to the Court affects the interests of a third state, the latter may intervene in the case."³¹ It was also pointed out that the interest affected must be a legitimate³² one.

The President of the Advisory Committee, Baron Descamps, proposed the following wording:

Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. It will be for the Court to decide upon this request.³³

This formula was adopted by the Committee subject to

³⁰ See Maltese Intervention Case, ICJ Reports 1981, 22; Oda, "Intervention", 631; Procès-Verbaux (1920), 561-71, 587-94.

³¹ See Oda, "Intervention", 631; Maltese Intervention Case, ICJ Reports 1981, 22.

³² It would appear that this term was used erroneously in place of "legal".

³³ See Oda, "Intervention", 633.

revision and made a separate article which was inserted immediately before the present Article 63. As Article 60 this new provision read as follows:

Should a state consider that it has an interest of a legal nature which may be affected by the decision in a case it may submit a request to the Court to be permitted to intervene as a third party. It will be for the Court to decide upon this request.³⁴

Article 62 remained unaffected by the amendment of the Statute by a Protocol concerning the Revision of the Statute of the Permanent Court of International Justice, which formed the subject of a resolution of the Assembly of the League of Nations on 14 September 1929, and which came into effect on 1 February 1936.³⁵

The Committee of Jurists designated by the United Nations met in Washington in April 1945 to prepare, and submit to the San Francisco Conference, a Draft Statute of the International Court of Justice.³⁶ The only change in Article 62 in revisions of the text of the Statute of the Permanent Court prepared by the Drafting Committee on the basis of the American draft, was the deletion of the expression "as a third party" from its English version as misleading.³⁷ The Drafting Committee explained that the formal emendations of

³⁴ See *ibid.*, 638.

³⁵ See *ibid.*, 639.

³⁶ See generally 14 UNCIO.

³⁷ See *ibid.*, 323-47, 485-500; Oda, "Intervention", 639. Jessup, 907. See also Smyrniadis, 29; Davi, 1; Damrosch, 381, n.19. See further ICJ Reports 1981, 15, para.22.

the English text "do not change the sense thereof."³⁸ Thus Article 62 of the Statute of the International Court of Justice, as finally adopted, provides:

(1) Should a state consider that it has an interest of a legal nature which may be affected by the decision in a case, it may submit a request to the Court to be permitted to intervene.

(2) It shall be for the Court to decide upon this request.

Intervention for the protection of a legal interest is analogous to that which has been known and recognised in all legal systems of the world without exception.

Intervention, like the acceptance of the jurisdiction of the Court, is voluntary in character as it depends solely on the decision of the state concerned. The International Court itself expressed this view when it distinguished the Italian Intervention Case from the earlier Monetary Gold Case by observing that:

In the absence from the Court's procedures of any system of compulsory intervention whereby a third state could be cited by the Court to come in as a party it must be open to the Court and indeed its duty to give the fullest decision it may in the circumstances of each case, unless of course, as in the Case of Monetary Gold Removed from Rome in 1943 the legal interest of a third state would not only be affected by the decision but would form the very subject matter of the decision which is not the case here.³⁹

The Court declined to exercise jurisdiction in the latter case in the absence of Albania, "a necessary and indispensable

³⁸ See 14 UNCIO, 626; Oda, "Intervention", 639.

³⁹ See Italian Intervention Case, ICJ Reports 1984, 25, para.40; Monetary Gold Case, ibid., 1954, 19 at 21; Nicaraguan Intervention Case, ICJ Reports 1990, 92 at 135, para.99.

party to the proceedings".⁴⁰ Emphasising the voluntary character of intervention under Article 62, Elias commented that in the Monetary Gold Case⁴¹ the Court fell just short of inviting Albania to intervene.⁴²

3. Conditions Necessary for Discretionary Intervention

(a) Who may intervene under Article 62?

Under the Statute,⁴³ only states may intervene in proceedings before the Court. However, it is not clear from the wording of Article 62(1) if the procedural faculty of intervention is available to all states regardless of whether they have accepted the jurisdiction of the Court by being signatories to its Statute and members of the United Nations. If, however, states other than those which are party to the Statute are able to gain access to the Court as is the case under the terms of paragraphs (2) and (3) of Article 35 of the Statute, it is not inconceivable that such states may, at a theoretical level at least, be able to intervene under the terms therein specified.⁴⁴ There is, however, no doubt that states which possess the capacity to seek justice from the

⁴⁰ See the individual opinion of Read J., *ibid.*, 1954, 19 at 38.

⁴¹ See *ibid.*, 32.

⁴² See Elias, The ICJ, 89; *id.*, "The Limits", 163.

⁴³ See Statute, Articles 34(1), 35 and 62(1). See also Oppenheim, 20; Miller, 551; Mani, 255; Singh, 25.

⁴⁴ See Statute, Article 35, and Article 93(2) of the UN Charter. Cf. Elias, The ICJ, 93; *id.*, "The Limits", 167.

Court under the provisions of the Statute⁴⁵ concerning the competence rationae personae of the Court may intervene within the meaning of Article 62(1). The importance of the acceptance of the jurisdiction of the Court cannot be over-emphasised since a state cannot be bound by the decision of the Court in the absence of its consent to its jurisdiction.⁴⁶

(b) The Meaning of "an interest of a legal nature"

Article 62(1) lays down two conditions which a state desiring permission to intervene must satisfy. The state should consider: (a) "that it has an interest of a legal nature", and (b) that such an interest "may be affected by the decision in a case".⁴⁷

In common law, a person who has no legal but merely a commercial interest in the outcome of a litigation between a plaintiff and an original defendant cannot be added as a party for the convenience of the Court or otherwise. A person may, however, be added as defendant, either on his own application or on that of the original defendant, where his proprietary or pecuniary rights are or may be directly affected by the proceedings, either legally or financially, by any order which

⁴⁵ See Statute, Articles 34 and 35; see also Farag, 79; Mani, 255.

⁴⁶ See Farag, 80; Mani, 255; Hudson, The Permanent Court, 420.

⁴⁷ See ICJ Reports 1981, 19, para.33; *ibid.* 1984, 9, para.13; *ibid.* 1990, 114, para.52.

may be made in the action, or where the intervenor may be rendered liable to satisfy any judgment either directly or indirectly.⁴⁸ The only reason which makes it necessary for a person to be made a party is so that he should be bound by the result of the action.⁴⁹

(i) The Permanent Court of International Justice

The practice of the Permanent Court is of little help in explaining the meaning of the expression "an interest of a legal nature" since it had no experience regarding the operation of Article 62 of its Statute. In the SS Wimbledon Case, the Permanent Court observed that intervention under Article 62:

is based on an interest of a legal nature advanced by the intervening party and the Court should only admit such intervention if the existence of this interest is sufficiently demonstrated.⁵⁰

Poland's invocation of Article 63 to supplement the basis of its application originally made under Article 62, led the Court to observe that:

The attitude thus adopted renders it unnecessary for the Court to consider and satisfy itself whether Poland's intervention is justified by an interest of a legal nature within the meaning of Article 62 of the Statute. It will suffice to note that in this case the interpretation of certain clauses of the Treaty of Versailles is involved in the suit and that the Polish Republic is one of the states which are parties to this

⁴⁸ See Halsbury's, para.223, 168ff, and para.226, 171ff.

⁴⁹ See ibid., para.226, 171ff.

⁵⁰ See PCIJ Series A, No.1, 12.

treaty.⁵¹

In 1931 Iceland notified the Court that it had an interest of a legal nature which might be affected by the decision in the Legal Status of Eastern Greenland Case, but apparently it did not ask to be permitted to intervene.⁵²

The 1922 Rules⁵³ merely provided among others that "the application shall contain (1) a specification of the case in which the applicant desires to intervene, (2) a statement of law and of fact justifying intervention, (3) a list of documents in support of the application; these documents shall be attached". This provision, which does not mention "an interest of a legal nature" survived the revision of the Rules in 1936.⁵⁴

(ii) The International Court of Justice

For almost three decades the International Court had no experience regarding discretionary intervention.⁵⁵ In 1973, Fiji requested permission to intervene under Article 62 in proceedings instituted against France by Australia and New Zealand in respect of a dispute as to the legality of

⁵¹ See *ibid.*, 13. For the view that Poland had an interest of a legal nature sufficient to enable it to intervene under Article 62, see Davi, 3ff, n.6.

⁵² See Hudson, The Permanent Court, 372.

⁵³ See Article 59 of the 1922 Rules.

⁵⁴ See Article 59 of the 1936 Rules.

⁵⁵ Discretionary intervention was brought briefly, if indirectly, to the Court's attention in the Monetary Gold Case, ICJ Reports 1954, 19 at 32. See also Maltese Intervention Case, *ibid.* 1981, 15.

atmospheric nuclear tests in the South Pacific region. The Court deferred action on Fiji's application until it had given a ruling on its jurisdiction to entertain the basic dispute between France and Australia and New Zealand. In 1974 the Court found that the claims of the applicants no longer had any object and that as a result it was not called upon to give a decision thereon. In consequence, the Court found that there no longer would be any proceedings before it to which the application for permission to intervene could relate, and that the application of Fiji for permission to intervene had lapsed and no further action thereon was called for on the part of the Court.⁵⁶

Like Article 59 of the 1936 Rules of the Permanent Court, Article 64(2) of the 1946 Rules of the International Court provided that the application for permission to intervene shall contain a description of the case, a statement of law and of fact justifying intervention and a list of the documents in support of the application and that these

⁵⁶ See Nuclear Tests Cases (Australia v. France) (New Zealand v. France), ICJ Reports 1973, 320ff and 324ff, and 1974, 530ff and 535ff (hereinafter "Fijian Intervention Cases"). A masterly analysis of the Court's attitude to the Fijian attempt to intervene in the Nuclear Tests Cases can be found in 4 Schwarzenberger, 403-9. For other references to this case in the literature, see: Rosenne, The World Court, 163 and id., Procedure, 174, n.1, 176; Eduardo Jiménez de Aréchaga, "Intervention Under Article 62 of the Statute of the International Court of Justice" in Mosler Collection, 463-4 (hereinafter "Intervention"); McGinley, 673; Decaux, 185, n.41, 195-6; Chinkin, 495, n.1, 498, 507-8, n.1, 511, 518-20, 521-5, 528, 529-30; Mani, 254, 263, 267-8, 411, n.103; Miller, 554-5; A. Berg, "Nuclear Tests Cases (Australia v. France; New Zealand v. France)" in Bernhardt (ed.), EPIL, [Instalment 2 (1981)], 216-9 at 218.

documents shall be attached. This provision was reproduced, verbatim, in Article 69(2) of the 1972 Rules.

Article 81(2) of the 1978 Rules requires an application made under the terms of Article 62 to specify the case to which it relates, and to set out (a) the interest of a legal nature, which the applicant state considers may be affected by the decision in that case, (b) the precise object of the intervention, and (c) any basis of jurisdiction which is claimed to exist as between the applicant state and the parties to the case. This provision requires far more information from an applicant state than had previously been the case. In fact, it represents the first serious attempt by the Court to come to grips with the various issues associated with discretionary intervention. It is also undeniable that this attempt to grapple with such issues was in part attributable to the Court's experience with the abortive application by Fiji for permission to intervene in the Nuclear Tests Cases which made the spectre of discretionary intervention seem a very real possibility in the eyes of the Court. It is therefore no surprise that Article 81(2) lays down, among other things, that the state desiring to intervene should indicate the interest of a legal nature. This was to exclude "political intervention".⁵⁷

The requirement that the would-be intervenor specify the precise object of its intervention is designed to assist the Court in deciding whether the state concerned has indeed shown

⁵⁷ See Oda, "Intervention", 635.

that it has an interest of a legal nature. In fact the distinction between the "interest of a legal nature" and the "precise object of the intervention", if any, is more one of form than of substance. Both have been said by the Court to be essential to a determination of the precise implications of a request for permission to intervene.⁵⁸ The application of Article 62 and the relevant provisions of the 1978 Rules by the Court in the cases in which that Article was at issue has gone some way towards clarifying the various questions raised in connection therewith.

(iii) The Maltese Intervention Case⁵⁹

By a Special Agreement the Republic of Tunisia (hereinafter "Tunisia") and the Socialist People's Libyan Arab

⁵⁸ See Maltese Intervention Case, ICJ Reports 1981, 17-8, para.30.

⁵⁹ See ibid., 3, Application to Intervene. For a discussion of the case in the literature, see for example, S. Rosenne, "Some Reflections on Intervention in the International Court of Justice", 34 NILR (1987) (hereinafter "Some Reflections"), 78-9, 85-7, 88-90; id., Procedure, 174, n.1, 176, n.1, 180; McGinley, 671-5, 679, 682, 689 and 693; de Aréchaga, "Intervention", 453, 454, 461; Decaux, 177-202; Elias, "The Limits", 167, n.15, 168 n.18, 169-72; id., The ICJ, 93, n.15, 75, n.18, 96-9; Morelli, 406-8; Jessup, 903; 4 Schwarzenberger, 406ff; G. Guyomar, Commentaire du Règlement de la Cour Internationale de Justice, Adopté le 14 Avril 1978: Interprétation et Pratique (Paris: Editions A. Pedone, 1983), 530ff, 549ff, 553 (hereinafter "Guyomar"); T. Licari, "Intervention Under Article 62 of the Statute of the ICJ", VIII BJIL, (1982), 167 at 274-86 (hereinafter "Licari"). See also, generally, Davi, 17-27; Singh, 186-7, 206, 207-10, 390, 416. Though this list of page references conflicts with that provided in the section of the work entitled "List of Cases Cited" (Annexure I, 278), we believe that it is the correct one, since we were unable to find references to the case in any of the pages therein listed.

Jamahiriya (hereinafter "Libya") requested the Court to indicate the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining respectively to them, and to specify precisely the practical way in which the aforesaid principles and rules apply in this particular situation so as to enable the experts of both countries to delimit those areas without any difficulties.⁶⁰ After the parties had filed their memorials and counter-memorials, Malta, invoking Article 62 of the Statute, submitted to the Court a request to intervene in the case. Since the Maltese application was opposed by the parties, the Court held public hearings to ascertain their views and those of the applicant.

Malta's position was that the only condition prescribed by the Statute as necessary to found a request for permission to intervene under Article 62 was that the applicant should "consider that it has an interest of a legal nature which may be affected by the decision" in a case. While noting and complying with the requirement concerning jurisdiction in Article 81(2)(c) of the 1978 Rules, Malta contended that this provision could not create a new substantive condition for the grant of permission to intervene. Malta also argued that since the intervention for which it had applied would not seek any substantive or operative decision against either party, no

⁶⁰ See Articles of the Special Agreement in the Continental Shelf (Tunisia-Libyan Arab Jamahiriya), ICJ Reports 1982, 18 at 21-4, paras.1-4 (hereinafter "Tunisia/Libya Case").

question of jurisdiction, in the strict sense of the word, could arise as between it and the parties. Malta explained that its "interest of a legal nature" lay in the legal principles and rules for determining the delimitation of the boundaries of its continental shelf. It considered that, regardless of Article 59 of the Statute, its interest might be affected by the dispositif and the "effective decisions contained in the Court's reasoning".⁶¹ Malta identified the precise object of its intervention as being to enable it to submit its views to the Court on the issues raised in the case without obtaining any form of ruling or decision concerning its continental shelf boundaries with either or both parties.

Libya and Tunisia argued that a jurisdictional link with the applicant was an essential condition for the intervention to be admitted. They also maintained that Malta had no interest of a legal nature which might be affected by the decision, because the Special Agreement contemplated delimitation of the continental shelf by the parties, rather than the Court, and secondly because the Court's jurisdiction was limited to adjudicating upon the extent of the continental shelf boundaries of the parties. They also argued that Malta's interests would be safeguarded by the relative effect of the Court's judgment under Article 59. They further argued that the purpose of intervention was neither to submit views nor to argue general law.

⁶¹ See Maltese Intervention Case, ICJ Reports 1981, 3 at 8-9, para.13.

Tunisia maintained that though Malta in common with other states had an interest of a legal nature that might be touched but not affected by the decision of the case, that interest was not sufficient to justify intervention under Article 62. It then suggested that Malta's avowed object had, in fact, already been achieved by the intervention proceedings, in view of the explanations she had there been able to give of her preoccupations.

After examining whether the interest of a legal nature invoked by Malta and the object of its intervention were such as to justify the granting of its application on the basis of the applicable provisions of the Statute and in the light of the particular circumstances of the case, the Court concluded that the interest of a legal nature which Malta had invoked could not be affected by the decision in the case and that the request was not one to which, under Article 62, it might accede. The Court stressed that its jurisdiction was limited to the dispute submitted to it by the two parties, carrying the implication that its decision would not affect Malta's legal interests.

In point of fact, the Court did not expressly deny that Malta had an interest of a legal nature directly in issue between the original parties.⁶² The limited object of Malta's intervention led the Court to conclude that its legal interest could not be affected within the terms of Article 62

⁶² See ICJ Reports 1981, 18-9, paras.31 and 33. Cf. also, *ibid.*, 12-3, para.19; McGinley, 674.

of the Statute.⁶³

The position of Malta was a difficult one. The case in which it sought to intervene was unique in that, though it was a contentious proceeding, no conflicting claims existed between the parties at the outset. Their Special Agreement requested the Court to identify the principles and rules of international law which could be applied to the delimitation of their respective areas of continental shelf.⁶⁴ The object of the main case would therefore seem to be "to secure a statement from the Court of what the appropriate law will be for the delimitation of the respective areas of the continental shelf of Tunisia and Libya".⁶⁵

On the face of the Special Agreement, the arguments of the original parties would be confined to the principles and rules of international law applicable to the delimitation of the continental shelf and not related to concrete claims to any title. It is not clear from the judgment why the object of Malta's intervention should go beyond enabling it to present its views on the principles and rules of international law. Malta's position in the case has been compared to that of Cuba when it intervened in the Haya de la Torre Case under Article 63 of the Statute, and contrasted with the position of

⁶³ See ICJ Reports 1981, 18-9, paras.31 and 32; 12-3, paras.19-21; 18-9, para.32; 19-20, para.34.

⁶⁴ See *ibid.*, 19, para.33 and the separate opinions of Judges Oda, *ibid.*, 31-3, paras.19 & 20; and Schwebel, *ibid.*, 39.

⁶⁵ See separate opinion of Oda J., *ibid.*, 32-3, para.20.

Fiji when it sought to intervene in the Nuclear Tests Cases, in which the subject matter was clearly defined in terms of specific claims. Aside from the question of jurisdiction, Fiji could have identified its own interest with those of Australia and New Zealand, in specifying the legal interest which might have been threatened by the action taken by France, the legality of which was in dispute. Thus, although Fiji might have been required to specify its own claim as a plaintiff together with Australia and New Zealand against France, this requirement would have arisen from the very nature of the case. After pointing out that the Tunisia/Libya Case was of a completely different nature, Judge Oda declared that "more cannot be demanded of Malta than of Tunisia and Libya".⁶⁶

It does not seem right that Malta should have been expected to submit its own claims for decision and to expose itself to counterclaims by the original parties, when, as pointed out by counsel for Malta, as far as could be made out from the Special Agreement, neither Tunisia nor Libya had advanced particular claims or sought the decision of the Court upon them.⁶⁷ In any event, how could Malta be expected to know in what precise ways its interests might be engaged in the case when the Court had declined to respond positively to

⁶⁶ See *ibid.*, 31-2, para.19. See also the observations of Schwebel J., 35-6.

⁶⁷ See *ibid.*, Schwebel J., 39.

its request for copies of the pleadings?⁶⁸

The suggestion by the Court that Malta was not willing to be bound by the decision within the terms of Article 59 of the Statute, with all due respect, does not appear to have any basis.⁶⁹ Responding to the contention that Malta had in effect indicated that it would not be bound by the Court's judgment, the Attorney-General of Malta in the Court's public sitting of 23 March 1981 declared that "by its application to intervene Malta submits itself to all the consequences and effects of intervention whatever they may be". Expatiating on this statement, counsel for Malta observed that:

Malta has never asserted that it will not be bound by the decision of the Court ... What Malta has said is that it does not seek an order or a remedy against Libya and Tunisia. But that is not the same thing as saying that Malta will not be bound by the decision of the Court ... What the Court says the law is, is the law and it will bind Malta ... And insofar as the Court says what the law will be in relation to the continental shelf feature in the central Mediterranean Sea, Malta has a legal interest which specially and uniquely will be affected by the Court's decision.

Malta's counsel particularly stressed that Malta's action was founded on the view that a decision of the Court relating to the specific features of the area would inevitably bind Malta in its relations with Libya and Tunisia simply as a statement of law.⁷⁰

The most that Malta could seek to do in the proceedings would be to participate therein on the terms of the Special

⁶⁸ See *separate opinion* of Schwebel J., *ibid.*, 35 and 39.

⁶⁹ See Schwebel J., *ibid.*, 38.

⁷⁰ See *ibid.*, 38, 39.

Agreement concluded by the original parties with the necessary modifications so as to enable the Court to indicate the principles and rules of international law applicable to the delimitation of the continental shelf appertaining to Tunisia, Libya and Malta, and to specify the practical way to apply them. In that case Malta, like the original parties, would have had to submit its own legal interest in the subject matter of the dispute for decision and as a party to the proceedings.⁷¹ In that event the question whether a link of jurisdiction with the original parties is a necessary condition of the grant of permission to intervene, would have called for the Court's immediate consideration.⁷² Even if a third state succeeded in surmounting the obstacle of the jurisdictional link and intervened in this way, it would find that it would have been much easier to achieve the same objective by becoming a party to the Special Agreement concluded by the original parties from the outset, thereby becoming an original party itself, than through the troubled, uncertain and difficult path of intervention.⁷³

⁷¹ See *ibid.*, 18, 19, para.32.

⁷² See *ibid.*

⁷³ It would seem that after the decision in the Maltese Intervention Case, intervention in order to raise fundamental issues of international law on behalf of the international community cannot be a legitimate purpose of this procedural remedy. In this sense, at least, this appears to be a reinstatement of the view taken by the Court in the South West Africa Cases (Second Phase) in which, by the casting vote of its President, the Court refused to allow the applicants to take legal action in vindication of a public interest, thus limiting contentious proceedings to issues raising direct interests of a legal nature between the parties. Such a

(iv) The Italian Intervention Case⁷⁴

In 1982 Libya and Malta under a special agreement requested the Court to indicate the principles and rules of international law which may be applied for the delimitation of their respective areas of continental shelf.⁷⁵

After the parties had filed their memorials and counter-memorials Italy, invoking Article 62 of the Statute, submitted to the Court a request for permission to intervene in the case. Since the Italian application was opposed by the parties, the Court held public hearings to ascertain their views and those of the applicant.

Italy considered that its interests might be affected by the decision in the pending case because the area of continental shelf to be delimited between the parties belonged

formalistic restriction on the role of international adjudication was thought to have been overturned by the decision in the Barcelona Traction Case (Merits) where the Court recognised that all states can be held to have a legal interest in the protection of certain rights, which by virtue of their fundamental nature are the concern of all states. See Nicaragua/United States Case (Provisional Measures), ICJ Reports 1984, 169 at 190, 196, Order of 10 May (Schwebel J. dissenting), *ibid.*, 223; *ibid.* 1966, 6; *ibid.* 1970, 4 at 32. See also Chinkin, 512-3.

⁷⁴ See ICJ Reports 1984, 3ff. For a discussion of this case in the literature see, for example, McGinley, 671; Starke, "Locus Standi", 356; 4 Schwarzenberger, 407ff; Rosenne, "Some Reflections", 79, 81; K. Oellers-Framm, "Stellungnahmen: Anmerkungen zur Intervention Italiens in Verfahren zur Abgrenzung des Festlandsockels zwischen Malta und Libyen", in 44 ZAORV (1984), 840; see also generally, Davi, 27-43; Singh, 206, 207, 210-2, 375, 390, 416. See above, 138, n.59.

⁷⁵ See Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, ICJ Reports 1985, 13 at 16, para.2 (hereinafter "Libya/Malta Case").

to the same region of the central Mediterranean of which it is a coastal state and in which, consequently, some of the continental shelf area over which it considers it possesses rights, is located. Its interests were also involved inasmuch as it had reservations as to what it understood to be Libyan views on such matters as the status of a considerable part of the Gulf of Sirte. It was concerned that by indicating the rules and principles applicable to a delimitation between states other than Italy, the judgment would decide, albeit implicitly, that given areas of continental shelf do not appertain to Italy. The object of Italy's intervention was "to ensure the defence of its interest of a legal nature so that the principles and rules of international law applicable to the delimitation of the continental shelf between Malta and Libya and in particular the practical method of applying them are not determined without awareness of that interest and to its prejudice".⁷⁶

Italy also undertook to submit to such decision as the Court might make with regard to its rights, in conformity with the terms of Article 59, and suggested that, once permitted to intervene, its status in such circumstances would be that of an intervening party entitled to make submissions. While contending that there was no provision in Article 62 which required the existence of a basis of jurisdiction as a condition for intervention, and that Article 81(2)(c) of the 1978 Rules does no more than lay down a mere requirement for

⁷⁶ See ICJ Reports 1984, 12, para.17.

information to be supplied to the Court, Italy argued that Article 62 afforded a sufficient basis either in itself or in conjunction with the acceptance of the jurisdictional power of the Court by becoming a party to its Statute. Nevertheless, Italy cited its being a party to the European Convention on the Peaceful Settlement of Disputes in order to satisfy the procedural obligations arising under Article 81 of the Rules.

The parties contended that Italy had failed to establish a legal interest sufficient to render its intervention admissible.⁷⁷ Moreover, the object of Italy's intervention remained obscure. They further maintained that Italy's legal interest would not be affected by the decision in the case because the Special Agreement put in issue only the rights of the parties and was res inter alios acta as regards third states.⁷⁸ They also considered Italy's application inadmissible because of the absence of a jurisdictional link between themselves and Italy.

After having considered Italy's interest of a legal nature by assessing the object of its intervention in the light of the Statute, the Court found that the intervention fell into a category which could not be accepted. Nevertheless the Court was satisfied that Italy's legal interest would be protected by Article 59 of its Statute in particular and the relative effect of international judicial decisions in general.

⁷⁷ See *ibid.*, para.25.

⁷⁸ See *ibid.*, 17, para.26.

Once again, the Court rejected an application to intervene, but this time for the reason that it understood the object of the intervention to amount to the introduction of a distinct dispute. It reached this conclusion notwithstanding the fact that the absence of a previous dispute had been invoked by the original parties to justify the operation of the principle of estoppel against Italy.⁷⁹

Article 59 does not play the role assigned to it in the judgment in the Italian Intervention Case. This is illustrated by the fact that neither the Court nor the parties treated the law on intervention as a tabula rasa, so that previous decisions of the Court could be disregarded as applying only to the parties involved in the cases in which they were rendered. Such prior decisions were invoked by the Court and the parties to support their positions. In consequence, the legal position of Italy was adversely affected by the reasoning adopted by the Court in some earlier decisions. The Court relied on its reasoning in the Maltese Intervention Case to hold that the decision to grant or refuse intervention was not one solely within its discretion, and on the reasoning in the Monetary Gold Case, in concluding that Italian interests were insufficiently affected to make Italy an indispensable party to the proceedings.⁸⁰

⁷⁹ See the dissenting opinion of V-P. Sette-Camara, *ibid.*, 84-5, paras.67-74; Judges Oda, 107, para.33; Ago, 124-5, para.16; Schwebel, 131, para.2; Jennings, 150, para.7.

⁸⁰ See, for example, ICJ Reports 1984, 8-9, para.12; also 25, para.40. See McGinley, 691, 692.

The truth of the foregoing assertion is evident in the essential contradiction in the Court's reasoning, which is manifested by its ambivalent attitude to the effect of its decision on the legal interests of Italy. While maintaining that Italy's interests would be safeguarded by Article 59, the Court also said that its future judgment would be expressed upon its face to be without prejudice to the rights and interests of third states and that such interests would be taken into account in the same way as was done in the Tunisia/Libya Case.

(v) The Nicaraguan Intervention Case⁸¹

In 1986, El Salvador and Honduras, by a special agreement, submitted the dispute concerning their land, island and maritime frontier to a chamber of the Court. In 1989, Nicaragua applied to be permitted to intervene in respect of some aspects of the case under Article 62 of the Statute. Since the Nicaraguan application was opposed, particularly by El Salvador, public sittings were held in order to hear the applicant and the parties.

Contrary to the contentions of El Salvador, the Chamber considered that for purposes of Article 62, Nicaragua had shown an interest of a legal nature which might be affected by the Chamber's decision on the question of the existence or nature of a regime of condominium or community of interests within the Gulf of Fonseca; that the object of Nicaragua's

⁸¹ See ICJ Reports 1990, 92.

intervention was not improper; and that the absence of a jurisdictional link between Nicaragua and the parties was no bar to intervention being permitted.

Consequently, the Chamber unanimously found that Nicaragua had established a legal interest which might be affected by part of the judgment on the merits, namely, the decision on the legal regime of the waters of the Gulf of Fonseca, but that Nicaragua had not shown such an interest in respect of any decision which the Chamber might be required to make concerning the delimitation of those waters, or any decision as to the legal situation of the maritime spaces outside the Gulf, or any decision as to the legal situation of the islands in the Gulf. The Chamber accordingly permitted Nicaragua to intervene in the case "to the extent, in the manner and for the purposes set out in the present judgment, but no further or otherwise".⁸²

(c) The "interest of a legal nature" and the Precise Object of Intervention

The Court has declared itself bound to consider the object of the application and the way in which that object corresponds to what is contemplated by the Statute and to

⁸² In his separate opinion attached to the judgment, Oda J. reasoned that Nicaragua should not have been excluded from expressing its views in due course on any delimitation between the parties within the Gulf which may fall to be effected by the Chamber, and with respect to any delimitation which may fall to be effected outside the Gulf in the event that some title may have been established in favour of Honduras. See generally, ICJ Reports, 1990, 138-46.

satisfy itself that the object of the intervention corresponds to what is envisaged by the Statute.⁸³ Until quite recently, the Court has tended to consider the interest of a legal nature, mentioned in Article 62(1) of its Statute, and the precise object of the intervention, as contained in Article 81(2)(b) of its Rules, as closely connected and of the same value in assisting it to determine the implications of a request for permission to intervene.⁸⁴

This approach is, with respect, flawed. While it is true that the object of the intervention may flow from the nature of the legal interest, it does not necessarily follow that the two requirements are always linked. It has been observed, for example, that "A state might well have a genuine interest involved in the case but be intervening for the purpose of politically embarrassing the main parties".⁸⁵ Intervention may also be put to other improper purposes. These may include, an attempt by the applicant to delay the main case for its own motives, to prevaricate or to use intervention along with other diplomatic steps against one or more of the original parties.⁸⁶

⁸³ See the Nicaraguan Intervention Case, ICJ Reports 1990, 128, para.85; ibid. 1984, 18, para.28.

⁸⁴ See Maltese Intervention Case, ICJ Reports 1981, 12, 17-8, paras.18, 30. See also Italian Intervention Case, ICJ Reports 1984, 18-9, para.28.

⁸⁵ See McGinley, 678; de Aréchaga, "Intervention", 456, para.9.

⁸⁶ Although not directly on the point, an example of this type of conduct was the Declaration of Intervention in the Nicaragua/United States Case by El Salvador. Order of 4

Previously the Court accorded precedence to the precise object of the intervention, a provision of its Rules, over the interest of a legal nature, a provision of its Statute. While the Court is bound to safeguard the institution of intervention from abuse, it is not right that it should elevate a provision of its Rules to the same status as a provision of its Statute, or worse still, accord primacy to the former over the latter.⁸⁷

The recent judgment of a special Chamber of the Court in the Nicaraguan Intervention Case has gone some way towards rectifying this anomaly. Not only did the Chamber accord priority to the interest of a legal nature over the object of the intervention, but it also shifted the emphasis from the issue of the nature of the relationship between both requirements to that of the priority of the object of the intervention.

In its application, Nicaragua indicated the object of its intervention as being, first, generally to protect its legal rights in the Gulf of Fonseca and adjacent maritime areas by all legal means available. Second, to inform the Court of the nature of its legal rights which are in issue in the dispute. This form of intervention would have the conservative purpose

October, 1984, ICJ Reports 1984, 215 (hereinafter "Salvadorean Intervention Case"). The declaration was filed while the regional initiative known as the Contadora Process was being pursued and the political organs of the United Nations were also seized of matters relating to the main dispute. See Chinkin, 507.

⁸⁷ See Italian Intervention Case, ICJ Reports 1984, 71 at 81, paras.52, 53 (V-P. Sette-Camara dissenting).

of seeking to ensure that the determination of the Chamber did not trench upon the legal rights and interests of Nicaragua. It further stated that: "if the Chamber should feel that the Application ... goes too far, or remains too limited, Nicaragua would be willing to adjust to any procedure indicated by the Chamber. The only thing that Nicaragua seeks is to protect its legal interests in any way the Statute allows."⁸⁸

Opposing the Nicaraguan application, El Salvador contended that Nicaragua had not described the precise object of its intervention, and that its stated object was improper.⁸⁹ It further argued that Nicaragua did not sufficiently indicate its rights, how they may be affected, or the substantive purpose of its intervention.⁹⁰

The Chamber observed that in order to be permitted to intervene, a state does not have to show that it has rights which need to be protected, but merely an interest of a legal nature which may be affected by the decision in the case. It identified the substantive purpose of Nicaragua's request as being to inform the Chamber of its rights or interests, and to protect them by all legal means available, i.e., to prevent them from being affected by the Chamber's decision, or to ensure that a decision affecting them is only taken after

⁸⁸ See ICJ Reports 1990, 108-9, para.38; 128-9, para.86.

⁸⁹ See *ibid.*, 129, para.86; also, 111, para.45.

⁹⁰ See *ibid.*, para.87.

Nicaragua has been heard.⁹¹

El Salvador also argued that:

[The] differing descriptions of the object of the intervention ... constitute an attempt to avoid the dilemma confronting a State seeking to intervene ... If the object of the intervention is to inform the Court of its rights or claims, Nicaragua will have a full opportunity to do so ... in the oral proceedings to be convened in accordance with ... the Rules, without any need to allow its intervention. If, on the other hand, the object of the application is to protect its claims by all legal means, including that of seeking a favourable judicial pronouncement on these claims, then such a purpose will signify the introduction ... of additional disputes requiring a valid link of jurisdiction, which does not exist.⁹²

The Chamber rejected the implication of this argument, namely, that intervention in most cases would have to be refused, if not for the one reason, then for the other, and that the purposes of Article 62 would thus be frustrated. In the first place, with regard to the stated object of informing the Court of the third state's rights, it is evident that if it were necessary for a state which considered that its legal interests might be affected by the decision in a case to give an exhaustive account of these interests in its application, or at the hearings held to consider whether permission to intervene should be granted, there would be no point in the institution of intervention and in the further proceedings to which it should give rise under the Rules.⁹³

In considering Nicaragua's application, the Chamber

⁹¹ See *ibid.*

⁹² See *ibid.*, 129-30, para.88.

⁹³ See *ibid.*, 130, para.89.

looked to the substance rather than to the form of the object of the intervention. It considered it as the purpose of intervention for an intervenor to inform the Chamber of its rights or interests in order to ensure that they may not be "affected" without the intervenor being heard, and that the use in an application of language more forceful than that of Article 62 is immaterial, provided the object actually aimed at is a proper one. It does not follow that for a state to seek by intervention "to protect its claims by all legal means" necessarily involves the inclusion in such means of "that of seeking a favourable judicial pronouncement" on its own claims. The "legal means available" must be those afforded by intervention for the protection of a third state's legal interests. So far as the object of Nicaragua's intervention is "to inform the Court of the nature of its legal rights which are in issue in the dispute", it cannot be said that this object is not a proper one. It seems indeed, to accord with the function of intervention.⁹⁴

The requirement in Article 81(2)(a) of the Rules, under which the applicant has to set out the legal interest which it considers may be affected by the decision in the case, would appear to be a reinforcement of the condition laid down in Article 62(1) of the Statute. Since the Rules cannot alter the Statute, it has to be assumed that the indication of the precise object of the intervention and the jurisdictional requirement embodied in Article 81(2)(b) and (c) are

⁹⁴ See *ibid.*, 130-1, paras.90-2.

additional items of information designed to enable the Court to appreciate more effectively whether the statutory conditions for intervention are fulfilled. The former requirement is presumably to enable the Court to assure itself how far the object of the intervention is indeed the safeguarding of legal rights which may be affected by the decision and how far this purpose might be involved. Furthermore, the precise object of the intervention would also enable the Court to consider what the applicant proposes to ask it to do about its legal interests which, it apprehends, may be affected by the decision. For instance, were its application to be granted, how might it ask the Court to modify its decision in the principal case, or in what other ways might it desire to be assisted by the Court?⁹⁵ Apart from the conditions stipulated in the Statute and the Rules, there are no additional requirements for discretionary intervention. So, for example, the requirement that the would-be intervenor must show an existing dispute with either or both of the original parties or a history of attempted negotiation of agreement where the case is about delimitation of continental shelf boundaries, which was advanced by the parties as a ground for opposing the Italian and Nicaraguan applications to intervene, may be said to fall outside the purview of Article 62 of the Statute.⁹⁶

⁹⁵ See ICJ Reports 1984, 152, paras.12 and 14 (Jennings J. dissenting).

⁹⁶ See *ibid.*, 152-3, paras.15, 16 and 17; *ibid.* 1990, 113-4, paras.50-1.

(d) Classification of an "interest of a legal nature"

In its most restricted form an "interest of a legal nature" is the same as the type of legal interest indicated by the Court in the Monetary Gold Case.⁹⁷ In view of the importance of some of the observations made by the Court in this case to the clarification of some of the issues relating to intervention, we should like briefly to review it.

In 1953 Italy instituted proceedings in the Court against France, the United Kingdom and the United States in the matter of the disposal of the monetary gold removed from Rome by the Germans in 1943 which was held by an arbitrator to belong to Albania. Italy submitted that the respondents should deliver to it any share of the monetary gold that might be due to Albania under the Paris Act of 14 January 1946 in partial satisfaction of the damage caused to it by the Albanian Law of 13 January 1945, and that its claim to the monetary gold must

⁹⁷ See ICJ Reports 1954, 19ff. This case has either been discussed or briefly mentioned in, for example: D.H.N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943", 4 ICLQ (1955), 93-115; P.A. Lalive, "L'Affaire de l'Or Monétaire Albanais", 58 RGDIP (1954), 438-60; C. Oliver, "The Monetary Gold Decision in Perspective", 49 AJIL (1955), 216-21; Miller, 556; Elias, The ICJ, 88; id., "The Limits", 162; McGinley, 681; Chinkin, 508, 509, 510; Rosenne, The World Court, 143-4; id., Procedure, 79; 4 Schwarzenberger, 402; P.M. Eisemann, V. Coussirat-Coustère, & P. Hur, Petit Manuel de la Jurisprudence de la Cour Internationale de Justice, 2nd ed. (Paris: Editions A. Pedone, 1971), 64-7; 2 Verzijl, 208; C.W. Jenks, The Prospects of International Adjudication (London: Stevens & Sons Ltd., 1964; Dobbs Ferry, New York: Oceana Publications, 1964), 84, 86, 135, 253, 284, 678, 703, 705, 723 (hereinafter "Prospects"); Licari, 269, n.6; Guyomar, 502, 508, 510, 515, 529ff; Wuhler, 195; Jones, 559, n.11; Singh, 22, 201-6, 375, 390, 405. See above, 138, n.59.

have priority over that of the United Kingdom to receive the gold in partial satisfaction of the judgment in the Corfu Channel Case (Compensation).

Italy requested the Court to adjudicate upon the preliminary question of its jurisdiction to deal with the matters of the claim set forth in the first of its earlier submissions. The Court suspended the proceedings on the merits in order to consider the preliminary question. At the hearing, Italy argued that since the Washington Statement of 25 April 1951 signed by the respondent states did not constitute a sufficient basis upon which to found the jurisdiction of the Court to deal with the merits of the claim contained in its application, the Court consequently lacked jurisdiction to deal with the case.

The United Kingdom contended, inter alia, that in view of Italy's objection to the Court's jurisdiction, its application was at variance with the Tripartite Washington Statement and was therefore invalidated. The other respondents did not deposit formal submissions.

The Court found that it had been validly seised of the Italian application, which contrary to submissions of the United Kingdom, still subsisted. It observed that the first submission in Italy's application centred around a claim to indemnifications for an alleged wrong committed by Albania. To determine whether Italy was entitled to receive the gold, the Court had to establish whether Albania had committed any international wrong against Italy, and whether it was under an

obligation to compensate Italy and, if so, to determine the amount of the compensation. In order to decide such questions the Court had to determine whether the Albanian law of 1945 was contrary to international law. In the determination of questions concerning the lawful or unlawful character of certain Albanian actions vis-à-vis Italy, only those two states were directly interested. The Court could not go into the merits of such questions, that is, decide a dispute between Italy and Albania without the consent of Albania. The Court observed that "to adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a state with its consent."⁹⁸

Responding to the contention that, under the Statute, proceedings may continue in the absence of an interested third state which has refrained from intervening, the Court, after having noted that Albania had not requested to be permitted to intervene observed:

in the present case Albania's legal interest would not only be affected by the decision, but would form the very subject matter of the decision. In such a case the Statute cannot be regarded by implication as authorising proceedings to be continued in the absence of Albania.⁹⁹

⁹⁸ See ICJ Reports 1954, 32.

⁹⁹ See *ibid.* In his individual opinion Read J. concluded that Italy in making an application in which Albania was not named as a party, failed to make an application for the determination of the questions and therefore failed to comply with the terms of the offer set forth in the Washington Statement. Since Albania was a necessary and indispensable party to the proceedings the application, which did not comply

The Court found that although the parties had conferred jurisdiction upon it, that jurisdiction could not be exercised to adjudicate on the first Italian claim. It also unanimously found that, as a result, it must refrain from examining the question of priority between the claim of Italy and that of the United Kingdom, since its adjudication under the terms of the Washington Statement depended on the first claim being decided.

Apart from its observation regarding a state whose legal interests would form the very subject matter of the decision, the Court made other remarks in this case which are worthy of note. First, it asserted that in the determination of rights which related to the lawful or unlawful character of certain actions by one state against another state, only the two states were directly interested. Secondly, it held that it could not adjudicate upon the international responsibility of a state without its consent. In the circumstances specified in the foregoing remarks, the state concerned becomes a necessary and indispensable party to the case, and its participation in it becomes imperative, since otherwise the proceedings will have to be discontinued.

This type of interest is confined to cases which involve the responsibility of a third state and possibly the encroachment on its interest, so universally recognised that

with the provisions of Article 40(1) of the Statute and Article 32(2) of the 1946 Rules, suffered from a fundamental defect. See *ibid.*, 38. For a discussion of the concept of an indispensable party, see Damrosch, 390-3.

its right to intervene cannot be denied.¹⁰⁰ The Monetary Gold Case cannot, however, be regarded as clarifying the meaning of an "interest of a legal nature" for purposes of discretionary intervention, since in the circumstances of that case the third state (Albania) would have been able to institute independent proceedings against the original parties. It also provides an excellent example of a scenario in which the legal interest of the third state was more than affected by the decision.¹⁰¹

The legal interest required for intervention is weaker than that of Albania in the Monetary Gold Case.¹⁰² The fact that a decision would affect the legal interest of a third state does not necessarily mean that the interest of such a state would be subject-matter of the decision in the way that the interests of Albania were in the Monetary Gold Case. In its application for permission to intervene in the case between El Salvador and Honduras, Nicaragua cited the Monetary Gold Case and argued that its interests were so much part of

¹⁰⁰ See McGinley, 682.

¹⁰¹ It has been argued that the Court's dictum to the effect that Albania's legal interest would form the very subject matter of the decision "does not, it seems, finally dispose of the issue for example where the third state's interests are not the very subject matter of the decision, the facts of that case were so unique as to make its value as a precedent slim", Rosenne, Law and Practice, 431; Damrosch, 390.

¹⁰² For the view that a weaker legal interest is required for intervention than for referring a substantive dispute to the Court, see the separate opinion of Jessup J. in ICJ Reports 1962, 432-3; see also Chinkin, 512; Miller, 556, n.55.

the subject-matter of the case that the Chamber could not properly exercise its jurisdiction without its participation.¹⁰³ In examining the Monetary Gold Case¹⁰⁴ the Chamber observed that if, as suggested, Nicaragua's legal interests would form part of the very subject-matter of the decision, this would doubtless justify an intervention by Nicaragua under Article 62 which lays down a less stringent criterion.¹⁰⁵ While the Chamber found that Nicaragua had a legal interest which may be affected by the decision on the question whether or not the waters of the Gulf of Fonseca are subject to a condominium or a community of interests, of the three riparian states, it rejected Nicaragua's contention that its legal interest "would form the very subject-matter of the decision" in the sense in which that phrase was used in the Monetary Gold Case to describe the interest of Albania.¹⁰⁶

This type of legal interest arises where the intervenor apprehends that its position could be threatened by the Court's decision in the case in relation to either or both of the original parties, that is, where the Court's decision could prejudice the rights or interests of the intervenor vis-a-vis one or more of the original parties, either by direct or indirect impact. In the Tunisia/Libya Case, for instance, Malta was concerned that the drawing of baselines and the

¹⁰³ See ICJ Reports 1990, 114, para.52.

¹⁰⁴ See *ibid.*, 114-6, paras.52-6.

¹⁰⁵ See *ibid.*, 116, para.56.

¹⁰⁶ See *ibid.*, 121-2, paras.72-3.

closing of gulfs would adversely affect its bargaining position with Libya. The United States might also have apprehended that the Court would indicate Libyan territorial claims to the Gulf of Sidra, which would have impinged on its interests in the Mediterranean region. This type of interest is identical to the Court's conception of "an interest of a legal nature", as emerges from its jurisprudence. In the opinion of the Court, such an interest must relate to a legal interest of the third state directly in issue as between either or both parties to a case. For instance, if such an interest is in the Court's treatment of the physical factors and legal considerations relevant to the delimitation of continental shelf boundaries of states within a certain defined region, it must be different from those of other states within the same region.¹⁰⁷ What needs to be shown by a state seeking permission to intervene can only be judged in concreto and in relation to all the circumstances of a particular case.¹⁰⁸ For purposes of discretionary intervention, an applicant state must clearly identify any legal interest that may be affected by the decision on the merits. A general apprehension is not enough.¹⁰⁹

In the Maltese Intervention Case, the Court considered

¹⁰⁷ See the Maltese Intervention Case, ICJ Reports 1981, 12-3, para.19, and 19, para.33.

¹⁰⁸ See ICJ Reports 1990, 117-8, para.61. See also, Hudson, The Permanent Court, 371; Elias, The ICJ, 93; id., "The Limits", 167; Chinkin, 496.

¹⁰⁹ See ibid., 118, para.62.

that this type of interest must be established for the intervention to be permitted.¹¹⁰ In the Italian Intervention Case, where this kind of interest was clearly established, the Court considered that a legal interest similar to that of Albania in the Monetary Gold Case must be shown to exist for the case to be discontinued in the absence of a third party.¹¹¹

In the Nicaraguan Intervention Case, the Chamber found that Nicaragua had not shown the existence of any interest of a legal nature which may be affected either by the decision on "the legal situation of the islands, or by any decision of the Chamber delimiting the waters of the Gulf of Fonseca, or by any decision as to the legal situation of the maritime spaces outside the Gulf, including any decision on entitlement or on delimitation between the parties."¹¹² As regards the decision concerning the legal situation of the maritime spaces within the Gulf, the Chamber indicated that Nicaragua had a legal interest which may be affected by the decision as to the legal regime of those waters, and therefore permitted Nicaragua to intervene in respect of that aspect of the principal case.¹¹³

Previously, it was believed that an essential feature of

¹¹⁰ See *ibid.*, 19, para.33.

¹¹¹ See ICJ Reports 1984, 25, para.40. See also McGinley, 682.

¹¹² See ICJ Reports, 1990, 119, para.66; 125, para.79; 128, para.84; 136-7, paras.104-5.

¹¹³ See ICJ Reports 1990, 121-2, paras.72-3; 125, para.79; 128, para.85; 136-7, paras.104-5.

this type of interest is the requirement that the intervenor undertakes to be bound by the decision in the case.¹¹⁴ In the Nicaraguan Intervention Case, the Chamber merely noted Nicaragua's statement of its intention to subject itself to the binding effect of the decision to be given.¹¹⁵ However, after having permitted Nicaragua's intervention in some aspects of the case, it observed that "the intervening state does not become party to the proceedings and does not acquire the rights or become subject to the obligations which attach to the status of a party under the Statute and Rules, or the general principles of procedural law".¹¹⁶

The next type of legal interest exists where a state believes that the Court's decision will promote or hinder certain rights or interests as regards third states. For example, a coastal state may object to special significance being accorded to particular geographical or geomorphological factors in a dispute in any region for the reason that states in its own region may rely by analogy on the Court's finding to advance their own claims in future litigation. A state may, for the same reasons, object to the adoption of a specific principle of law because of the possible impact of such a doctrine on its position with other states. By the same token, a state could, for instance, object to the concept

¹¹⁴ See McGinley, 681; de Aréchaga, "Intervention", 461, para.23. Cf. 2 Fitzmaurice, 552-3; id., 34 BYIL (1958) 126-7; Miller, 556; Oda, "Intervention", 647, 648.

¹¹⁵ See ICJ Reports 1990, 109, para.38.

¹¹⁶ See *ibid.*, 135-6, para.102.

of proportionality as a relevant factor in continental shelf delimitation.¹¹⁷

Amongst the considerations supporting its contention that it had an interest of a legal nature which must inevitably be affected by a decision of the Chamber, Nicaragua listed in paragraph 2 of its application:

... (c) The geographical situation in the Gulf of Fonseca and the adjacent maritime areas.

(d) The essential character of the legal principles, including equitable principles, which would be relevant to the determination of the questions placed on the agenda by the special agreement.

(e) The general recognition by authoritative legal opinion that the issues relating to the Gulf of Fonseca involve a trilateral controversy.

(f) The leading role of coasts and coastal relationship in the legal regime of maritime delimitation and the consequence in the case of the Gulf of Fonseca that it would be impossible to carry out a delimitation which took into account only the coasts in the Gulf of two of the three riparian states.

(g) The fact that a possible element in the regulation of the legal situation of maritime spaces, especially, in a case like that of the Gulf of Fonseca, would be the designation of one or more zones of joint exploration and exploitation: ...¹¹⁸

The Chamber expressly rejected the considerations enumerated in (c), (d), (f) and (g) either as involving general legal rules and principles, or as being too general to justify intervention.¹¹⁹ It did not consider that an interest of a third state in the general legal rules and principles likely to be applied by the decision can justify an intervention even when the applicant state "does not base its application simply

¹¹⁷ See *ibid.*, 680.

¹¹⁸ See ICJ Reports 1990, 108, para.37.

¹¹⁹ See *ibid.*, 124-5, paras.76-8.

on an interest in the Court's pronouncements in the case regarding the applicable general principles and rules of international law", but "on quite specific elements". Under such circumstances, the interest invoked cannot be regarded as one which "may be affected by the decision in the case".¹²⁰

The Chamber observed significantly that:

Whether a state is entitled to a territorial sea, continental shelf, exclusive economic zone, is a question to be decided by application of the principles and rules of the law of the sea on those matters ... An interest in the application of general legal rules and principles is not the kind of interest which will justify an application for permission to intervene.¹²¹

The broadest type of "an interest of a legal nature", is the general interest of all states in the development of international law.¹²² It has been observed that "so intermingled have the economic, technological, technical and geographical interests of states become today that they must expect the possibility that their bilateral disputes might impinge upon the interest of a third state, even tangentially".¹²³ It is thus possible for even a landlocked state which may not be affected to the same extent as a coastal state by developments in continental shelf law to share a general interest in or common concern for the

¹²⁰ See *ibid.*, 124, para.76.

¹²¹ See *ibid.*, 126, para.82.

¹²² In fact, this is one of the functions of the Court. See, for example, Jhabvala, "Scope of Individual Opinions", 35; McGinley, 691; H. Lauterpacht, Development, 67. It has however been observed that this type of interest is more of a political character. See Rosenne, "Some Reflections", 79.

¹²³ See Elias, The ICJ, 92; *id.*, "The Limits", 165.

development of that branch of law. The degree of interest shown by a state in the development of a branch of international law will usually depend on the extent of the impact on that state of the development of that area of law. Granted that all states are in some way interested in or affected by the development of international law, there is no gainsaying the fact that a state inclined to identify a legal interest in any dispute before the Court would succeed in doing so and therefore be able to request permission to intervene in that dispute.¹²⁴ The Court has rejected intervention by a state for the purpose of submitting views on the issues raised in the case, that is, the rules and principles of international law applicable to the delimitation of the continental shelf without placing its own claims vis-a-vis the original parties in issue.¹²⁵

There is, however, no doubt that intervention on the basis of a general interest in the development of international law was envisaged by the framers of Article 62 of the Statute of the Permanent Court, on which the same Article of the Statute of the present Court was largely modelled. The drafting committee of the 1920 Hague Advisory Committee of Jurists recommended that more than one form of intervention should be allowed on condition that an interest

¹²⁴ See Fitzmaurice, 34 BYIL (1958), 126-7; 2 *id.*, 552-3.

¹²⁵ See the Maltese Intervention Case, ICJ Reports 1981, 17, para.30; 19, para.33; *ibid.*, 1990, 124, para.76. Intervention for this purpose was rejected by Tunisia and Libya, *ibid.*, 10-1, paras.15-6.

of a legal nature is involved so that political intervention will be excluded and the right of decision vested in the Court. It is clear that intervention was regarded as a medium through which states would play a part in the articulation of the law.¹²⁶

It has also been argued on the basis of the travaux préparatoires that Article 62 does not provide for intervention based merely on a general interest in the development of the rules and principles of international law. The absence of an intervention of this kind in the draft Statute of the Permanent Court is proffered as the reason for the problem raised by Mr. Balfour in his observation in a note on the Permanent Court to the League Council in Brussels in October 1920, namely the need for some provision by which a state may protest against any ulterior conclusions to which a decision of the Court may seem to point. It has been argued out that, if this type of intervention were permitted by the Statute, then the obvious answer which Mr. Leon Bourgeois would have given in his report to the League Council, which led to the final approval of the Statute, would have been a reference to the existence of Article 62 as constituting the solution. After a transparent allusion to Mr. Balfour's observation, Mr. Bourgeois stated in his report that the Hague jurists had indeed given to non-litigant states the right to

¹²⁶ See Procès-Verbaux (1920), 747-9; League of Nations, Documents, 46, 50. See further McGinley, 683. Cf. the separate opinion of de Aréchaga J.A. in the Italian Intervention Case, ICJ Reports 1984, 62, para.22.

intervene in a case where any interest of a judicial nature which may concern them was involved.¹²⁷ He then proposed the addition to the draft Statute of two new articles apparently designed to solve the problem, which greatly preoccupied the then Great Powers, who feared that the existence of the Court would diminish the predominant influence which they exercised in the development of international law.

The two new articles inserted by the League Council into the draft Statute are mutatis mutandis the present Article 57 concerning the right of any judge to deliver a separate opinion, and Article 59 on the relative effect of the Court's decision. The need for the addition of these articles to the draft Statute, it is maintained, demonstrates that Article 62 was not then understood as giving an answer to the preoccupations of the Great Powers voiced by Mr. Balfour. For the foregoing reasons, de Arechaga concluded that:

... Article 62 does not authorise intervention merely on the basis of a general interest in the development of international law. On the contrary, as Judge Anzilotti has put it, 'the article in question [Article 62] only contemplated cases in which the states desiring to intervene had an actual legal interest in the dispute.'¹²⁸ And the views expressed by Judge Anzilotti are of significance in respect of Mr. Bourgeois' report because, ... Judge Anzilotti, before coming to the Court, in his capacity as legal advisor of the Council, had greatly assisted Mr. Bourgeois in the preparation of the report.¹²⁹

¹²⁷ See League of Nations, Documents, 50. See the dissenting opinion of Oda J., ICJ Reports 1984, 96, para.13.

¹²⁸ See PCIJ Series D, No.2, 87 and 90.

¹²⁹ See de Aréchaga, "Intervention", 455-8, esp. 458, para.15.

Writing without the benefit of judicial guidance, legal commentators have suggested a few negative standards as regards the interpretation of "an interest of a legal nature". Fitzmaurice thought that the phrase must be taken to be intended to exclude cases in which, although the interests of a state may be affected, those interests are of purely political, economic or sociological nature. In his view the Court would probably wish to avoid any interpretation admitting of intervention based on an interest which, even if technically satisfying the requisite conditions, were of a remote or hypothetical character.¹³⁰ The phrase does not seem to involve the interpretation of domestic law¹³¹ and would also exclude the recovery of alleged damages or specific performance of economic obligations.¹³²

The meaning of the expression "an interest of a legal nature" for purposes of discretionary intervention would appear to encompass the narrow interpretation placed on it by the Court in the Monetary Gold, Maltese, Italian and Nicaraguan Intervention Cases. It does not, however, appear

¹³⁰ See 2 Fitzmaurice, 552-3; id., 34 BYIL (1958), 126-7. Hambro has also observed "that the interest must be legal and not merely factual or political". E.M. Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice", 23 BYIL (1940), 133 at 154 (hereinafter "Some Observations"); R.P. Anand, Compulsory Jurisdiction of the International Court of Justice (London: Asia Publishing House, 1961) under the auspices of the Indian School of International Studies, 282 (hereinafter "Compulsory Jurisdiction").

¹³¹ See Jenks, Prospects, 602.

¹³² See Smyrniadis, 39; Farag, 93-104.

to extend to the broad construction placed on it by the travaux préparatoires. Admittedly all states share a general interest in the development of international law because the reasoning embodied in the Court's judgments forms an important part of its jurisprudence, which is employed as a subsidiary means for the ascertainment of the rules of law. If such general interest were regarded as sufficient for purposes of intervention, there could never be a case in which a third state would not possess a potential legal interest in the result. A free-for-all kind of intervention will not exclude political, frivolous or vexatious requests for permission to intervene.

A narrow interpretation, according to which the legal interests of third states can never be affected by the Court's decision, since technically judicial decisions only bind the parties and cannot directly deny rights to, or impose obligations on, third states, thanks to Article 59, would nullify Article 62 and disregard the great persuasive authority of the Court's decision.¹³³ Thus, it seems reasonable that a state which can show that it has a specific legal interest, which it considers to be genuinely threatened and likely to be indirectly affected by the reasoning on which the conclusions and the decision of the Court in a case are based, ought to be granted leave to intervene to protect such an interest.

While the Court may be somehow justified in rejecting the

¹³³ See 2 Fitzmaurice, 552; *id.*, 34 BYIL (1958), 126.

notion that concern over articulations of law can constitute an interest of a legal nature which may be affected by the decision in a case, there seems to be no grounds for adopting the narrow interpretations already indicated and limiting intervention to them. Authoritative opinion generally seems to support the view that the interests of a state may be indirectly affected by the reasoning of the Court and therefore will allow intervention in cases where such an effect may occur, but not, however, simply on the basis of a general concern in the development of international law.¹³⁴

(e) How the "interest of a legal nature" may be affected for Purposes of Discretionary Intervention

Under the terms of Article 62(1) of the Statute, the would-be intervenor is not merely required to demonstrate that it has "an interest of a legal nature" in a pending litigation but such an interest must be one which "may be affected by the decision"¹³⁵ in the case. This requirement has been recognised by some tribunals as a general principle of law.¹³⁶ At first sight, it is one that could be easily fulfilled. This may not, however, be the case, considering

¹³⁴ See for example, McGinley, 685.

¹³⁵ It has been argued that "decision" presumably excludes the full hearings and even arguably the reasoning in the case. "Decision" is also used in Article 59 with respect to the binding force of the judgment on the parties. Chinkin therefore sees an obvious overlap between the two articles. See Chinkin, 497.

¹³⁶ See Mani, 257, n.42, at 409.

that the prospective intervenor is sometimes required to satisfy this condition without the benefit of the pleadings of the original parties.¹³⁷

Nor is the would-be intervenor's task necessarily rendered any easier where it is given access to the pleadings. For, as in the Nicaraguan Intervention Case, the pleadings may reveal that the parties are in dispute about the interpretation of the very provision of the Special Agreement which is invoked in the application for permission to intervene. In such circumstances, it is obvious that the would-be intervenor will experience some difficulty in framing its application.¹³⁸

In the final analysis, the burden of proof rests entirely on the applicant state, which must identify the interest of a legal nature which it considers may be affected by the decision in the case and show in what way that interest may be affected. It has only to show that its interest may be

¹³⁷ See Chinkin, 511. See also the dissenting opinion of V-P. Sette-Camara in the Italian Intervention Case, ICJ Reports 1984, 74, para.17; 71, para.3. On the issue of access to the pleadings, see Articles 38 of the 1922 Rules, 42 of the 1931 Rules, 44(2)(3) of the 1936 Rules of the Permanent Court; Articles 44(2)(3) of the 1946 Rules, 48(2)(3) of the 1972 Rules and 53 of the 1978 Rules of the International Court. See also ICJ Reports 1981, 5, para.4; *ibid.* 1984, 5, para.4; ICJYB 1963-4, 108-9; *cf.* ICJ Reports 1990, 98, para.13; 24, para.47; 30, para.62. See also the separate opinion of Schwebel J. in *ibid.*, 1981, 35; Jennings J. in *ibid.* 1984, 150, para.8; and Singh J.'s separate opinion in *ibid.* 1984, 33, para.II. See further, 4 Schwarzenberger, 407; Miller, 557, 567, n.43; Jessup, 906; Moore, "Organisation", 507; Decaux, 183, n.31; Mani, 150-1; Rosenne, Procedure, 119; Chinkin, 518; Hudson, The Permanent Court, 423; Simpson and Fox, 187.

¹³⁸ See ICJ Reports 1990, 118, para.62.

affected, not that it will, or must be affected. It does not have to show that it has rights which need to be protected, but merely an interest of a legal nature which may be affected by the decision on the merits. Nor does it have to give an exhaustive account of its legal interests. However, a general apprehension is not considered enough.¹³⁹ In the Nicaraguan Intervention Case, the Chamber found that Nicaragua failed to show that it had an interest of a legal nature which might be affected by the decision on the legal situation of the islands, or by any decision delimiting the waters of the Gulf of Fonseca or by any decision as to the legal situation of the maritime spaces outside the Gulf, including any decision on entitlement or on delimitation between the parties. It therefore refused Nicaragua permission to intervene in respect of those aspects of the case.¹⁴⁰

The view that general interest or concern in the development of international law constitutes a legal interest which may be affected by the decision in a case is supported by Article 38(1)(d) of the Statute which enjoins the Court to apply judicial decisions as subsidiary means for determination of rules of law. Though juristic opinion on the nature of the legal interest and the way in which it may be affected by the decision is by no means unanimous, it would appear to hold that the interest of a state may be indirectly affected by the

¹³⁹ See *ibid.*, 1990, 114, paras.83-4; 129, para.87; 130, para.89.

¹⁴⁰ See *ibid.*, 119, para.66; 125, para.79; 127-8, para.84; 136-7, paras.104-5.

reasoning of the Court and that this should suffice to enable such a state to intervene in the case. Such a state may, however, possess a particular legal interest which it considers to be genuinely threatened. There is great merit in this view, for it is only thus that discretionary intervention will be able to function as the specific guarantee for the protection of the interests of third parties which, after all, it was intended to be. In rejecting Italy's request to intervene in the Libya/Malta Case, the Court stated that Italy's rights would be safeguarded by Article 59. The Court cited an observation of the Permanent Court¹⁴¹ to support its interpretation of this provision according to which the principles and rules of international law found to be applicable to the delimitation between Libya and Malta and the indications given as to their practical application could not be relied on by them against any other state.¹⁴² The construction placed by the Court in this case, though technically correct, would appear to be misleading as far as the practical effects of that provision are concerned.¹⁴³

Judge Jennings proffered two alternative interpretations of Article 59 according to the first of which the principles of decision of a judgment are not binding in the sense that

¹⁴¹ See PCIJ Series A, No.13, 21.

¹⁴² See Italian Intervention Case, ICJ Reports 1984, 26, para.42.

¹⁴³ See the separate opinion of Oda J. in the Maltese Intervention Case, ICJ Reports 1981, 27, para.9; dissenting opinion of Schwebel J., *ibid.* 1984, 134-5, para.11.

they might be in some common law systems. However he observed significantly:

... the slightest acquaintance with the jurisprudence of the Court shows that Article 59 does by no manner of means exclude the force of persuasive precedent. [For this reason] the idea that Article 59 is protective of third states' interests in this sense at least is illusory.

He points out in his second interpretation that Article 59 may be considered as applying also more particularly to the dispositif of the judgment and that it is true that the particular rights and obligations created by the dispositif are addressed to the parties to the case and in respect only of that case. It is in this quite particular and technical sense that Sir Robert believed that Italy would certainly be protected.¹⁴⁴ Sir Robert was also of the opinion that if Article 59 were to be given the very broad interpretation espoused by the Court so that every decision is to be analogous to a bilateral agreement and res inter alios acta to third states, the Court will in effect disable itself from making useful and realistic pronouncements on sovereignty and sovereign rights.¹⁴⁵

Sir Robert considered it unrealistic even in consideration of strict legal principle to suppose that the effects of a judgment are wholly confined by Article 59 since every state and member of the Court is under a general

¹⁴⁴ See *ibid.* 1984, 158, para.27. Cf. Singh, 186-7.

¹⁴⁵ See *ibid.*, 158-9, para.31.

obligation to respect its judgments.¹⁴⁶

The position adopted by individual judges in their separate or dissenting opinions with regard to the effect of Article 59 in relation to discretionary intervention is substantially reflected in the relevant academic literature. Jessup points out, for instance, that the Court's interpretation of a Convention in one case is bound to have persuasive authority. He admits that though it is possible for the Court to alter its conclusion or reasoning with new judges on the bench, the weight of precedent is great.¹⁴⁷

McGinley has pointed out that Article 59 was not intended to play, nor does it play the role assigned to it by the Court. He defines the role of Article 59 as being "to prevent the fact that a state failed to intervene from being used against it in a subsequent case involving the same point of law."¹⁴⁸

The Court's view that Italy's rights will be safeguarded by Article 59 throws into sharp relief the issue of the relationship between Articles 59 and 62. For, if, as was contended, Article 59 always provides such adequate protection for third states as to prevent their interests from being genuinely affected in a pending case, then Article 62 would have no sphere of application and would therefore be rendered

¹⁴⁶ See *ibid.*, 158, paras.28-9.

¹⁴⁷ See Jessup, 904, 905, 908; Miller, 554, 556, 564; Starke, "Locus Standi", 356-7; Chinkin, 521.

¹⁴⁸ See McGinley, 690; Reisman, Nullity, 136. See also, 2 Fitzmaurice, 552; *id.*, 34 BYIL (1958), 126; Adede, 74-5.

pointless.¹⁴⁹ The Court pre-empts this conclusion by explaining that Articles 59 and 62 provide a state which considers that its legal interest may be affected by the decision in a case with a choice, between submitting a request for permission to intervene under the terms of the latter Article, thereby securing procedural economy of means on the one hand, and relying on the former Article on the other.¹⁵⁰

If we accept the Court's analysis of both Articles at face value, the object of discretionary intervention, that is, to ensure the protection of a legal interest by preventing it from being affected by the decision in a case, would appear to be transformed into what Judge Schwebel has called "an improbable procedural convenience" which is supported neither by its terms nor its travaux préparatoires.¹⁵¹

The Court's view of the relationship between both provisions of the Statute would also seem to read Article 62 out of the Statute, a situation which is patently unacceptable.¹⁵² For, if Article 59 ensures that the rights of third states can never be affected by a judgment this must mean that they can never be affected in the sense of Article

¹⁴⁹ See Italian Intervention Case, ICJ Reports 1984, 26, para.42; 134, para.9 (Schwebel J. dissenting).

¹⁵⁰ See ibid., and para.10 (Schwebel J. dissenting); ibid. 1990, 115, para.54; 130, para.90.

¹⁵¹ See ibid. 1984, 136, para.14 (Schwebel J. dissenting).

¹⁵² See ibid., 134, para.9 (Schwebel J. dissenting); ibid., 159-60, para.34 (Jennings J. dissenting).

The key to the resolution of the issue would seem to lie in a proper understanding of the respective meanings and objects of both provisions. The fact is often overlooked that Article 59 speaks of the "binding force" of the decision of the Court, while Article 62 provides for intervention to protect a legal interest which may be "affected by the decision in a case". Article 59 refers to the decision, that is the dispositif or operative provisions of the judgment, which in strict law carry binding force. Such a decision creates particular rules for the parties to the case in which the judgment is given by conferring rights or imposing obligations on them alone. Such a decision is therefore res inter alios acta as regards third parties. This protection, though important, is merely general, formal and technical. It cannot and does not prevent the reasoning on which the conclusions and the decision are based from passing into the jurisprudence of the Court, thus serving as a subsidiary means for determination of rules of law within the meaning of Article 38(1)(d) of the Statute. The reference to Article 59 at the beginning of that provision may be said to be for the purpose of the avoidance of any doubt likely to arise in connection with the meaning and purport of that provision under Article 59. Since the jurisprudence of the Court recognises the persuasive authority of precedence, Article 59 may technically protect third parties from the binding effect

¹⁵³ See *ibid.*

of the decisions of the Court; but it cannot prevent the interests of such third parties from being affected by the reasoning in the judgment.¹⁵⁴

After having stated that Article 59 is intended to preserve the relative character of res judicata in a general way, V-P. Sette-Camara noted that:

If it would provide sufficient protection for third states in the circumstances under which they are compelled to apply for permission to intervene, Article 62 would have no place in the Statute.¹⁵⁵

He then explained that recourse to Article 62 by a third state is not by mere choice, as stated in the judgment,¹⁵⁶ but that it was because such a state considered that the decision in the principal case might affect its legal interest. He thought that Article 62 provided a form of direct protection different from the general principle of Article 59 which confined itself to enunciating the principle that judgments are res inter alios acta third states.¹⁵⁷

It appears that the Court would not grant a request for

¹⁵⁴ One may be forgiven for thinking that the use of the term "decision" in Articles 59 and 62, implies that both provisions refer to one and the same thing, namely the dispositif or the operative part of the judgment. Such a view disregards the fact that the term "decision" may also be used generally to refer to the whole of the judgment. See Jowitt, 567, 1025. See also The Maltese Intervention Case, ICJ Reports 1981, 36 (Schwebel J., separate opinion); Italian Intervention Case, ibid. 1984, 157, para.27 (Jennings J. dissenting); and McGinley, 689-92; Chinkin, 502, 521 and 529.

¹⁵⁵ See ICJ Reports 1984, 87, para.81 (V-P. Sette-Camara dissenting).

¹⁵⁶ See ibid., 26, para.42.

¹⁵⁷ See ibid., 87, para.81 (V-P. Sette-Camara dissenting).

permission to intervene if it considered that the interests of the requesting state would be protected in its judgment. While rejecting Italy's application for permission to intervene in the Libya/Malta Case, the Court noted that in its future judgment, it would take account as a fact of other states having claims in the region. To support its stance, the Court relied on a dictum of the Permanent Court in the Legal Status of Eastern Greenland Case that:

Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory is the extent to which the sovereignty is also claimed by some other Power.¹⁵⁸

The Court then commented that this "is no less true when what is in question is the extent of the respective areas of continental shelf over which different states enjoy sovereign rights".¹⁵⁹ It said that its future judgment would, in addition to being limited in its effect by Article 59, be without prejudice to the rights and interests of third states. It would also make it clear that it was deciding between the competing claims of Libya and Malta.¹⁶⁰

In the Burkina Faso/Mali Case, a Chamber of the Court did not consider its jurisdiction restricted simply because the end point of the frontier lies on the frontier of a third state not a party to the proceedings. The Chamber observed

¹⁵⁸ See PCIJ Series A/B, No.53, 46; ICJ Reports 1984, 26, para.43.

¹⁵⁹ See *ibid.*

¹⁶⁰ See *ibid.*

that the rights of Niger, the third state, were safeguarded by the operation of Article 59.¹⁶¹ The Chamber then distinguished the Libya/Malta Case from the case being heard, by stating that in the former, the Court confined its decision to a certain geographic area because it had no jurisdiction either to determine what principles and rules governed the limitations with third states or whether the claims of the parties outside that area prevailed over the claims of local states. The Chamber took the view that the process of determining a line of land boundary between two states was clearly distinguishable from that of identifying applicable principles and rules of continental shelf delimitation. According to the Chamber, the legal considerations in determining the location of the land boundary between the parties do not depend on the position of the boundary between the territory of either of those parties and that of a third state, even where the rights concerned of all three states derive from one predecessor state. Conversely, in continental shelf delimitations a perfectly valid and binding agreement between the parties may, when the relations between the parties and a third state are considered, prove to be contrary to the applicable rules and principles of international law governing continental shelf delimitations. For this reason, the chamber would decline, even if so authorised, to rule upon rights relating to areas in which third states may have such

¹⁶¹ See Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali), ICJ Reports 1986, 554 at 557, para.46 (hereinafter "Burkina Faso/Mali Case").

claims as may contradict the legal considerations, especially in regard to equitable principles which would have formed the basis of its decision.¹⁶²

The Monetary Gold Case, in which it was clear from the record that the legal interests of a third state, that is Albania, would not only be affected by the decision but would form the very subject-matter of the decision, was distinguished from the case in hand. In the former, the Court would decline jurisdiction. The Chamber therefore concluded that it had a duty to indicate the line of the frontier between the parties for the entire length of the disputed area, defining the location of the end point of the frontier in the East, where this frontier ceases to divide the territories of Burkina Faso and Mali. This would not amount to a decision that it is a tripoint which affects Niger, in accordance with Article 59. The judgment would not also be opposable to Niger as regards the course of its frontiers.¹⁶³

Commenting on the leading role of coasts and coastal relationships in the legal regime of maritime delimitation in relation to Nicaragua's contention that it would be impossible to carry out a delimitation which took into account only the coasts in the Gulf of Fonseca, of two of the three riparian states, the Chamber observed, inter alia, that:

It occurs frequently in practice that a delimitation between two States involves taking account of the coast of a third State; but the taking into account of all the

¹⁶² See *ibid.*, 578-9, paras.47 and 48.

¹⁶³ See *ibid.*, 579-80, paras.49 and 50.

coasts and coastal relationships within the Gulf as a geographical fact for the purpose of effecting an eventual delimitation as between two riparian States ... in no way signifies that by such an operation itself the legal interest of a third riparian State of the Gulf, ... may be affected.¹⁶⁴

It would appear from the foregoing that, as far as the conditions in Article 62(1) are concerned, the interest of a legal nature, and how it may be affected by the decision in a case, are inseparably linked, and that the former has primacy over the latter. Without the interests of a legal nature it will not be necessary to ascertain in what way it may be affected and requests for permission to intervene will be rejected out of hand. Where the interest of a legal nature is shown to exist there are a number of ways in which it may be affected by the decision in a case. In the first place, if, as in the Monetary Gold Case,¹⁶⁵ the legal interest of the third state will form the very subject-matter of the decision, provided all other conditions are satisfied, the Court will have no choice but to grant the request for permission to intervene. Otherwise it will have to decline jurisdiction in the absence of the third state.¹⁶⁶

Secondly, the legal interest of a third state may be affected by the operative part of the judgment. It would seem from the Maltese and Italian Intervention Cases that the Court would consider whether a jurisdictional nexus between the

¹⁶⁴ See ICJ Reports 1990, 124-5, para.77.

¹⁶⁵ See ICJ Reports 1954, 19.

¹⁶⁶ See ICJ Reports 1990, 116, para.56.

would-be intervenor and the original parties is required as a condition for the intervention to be allowed. The would-be intervenor would also be required to be bound by the decision in the sense of Article 59. The absence of such a third state can neither frustrate the proceedings nor prevent the Court from exercising its jurisdiction.

Thirdly, subject to the technical protection which Article 59 affords third states, the Court may employ international jurisprudence, including its own, as a subsidiary or auxiliary source of law.

Finally, where the legal interest of a third state may be affected by the decision, such a state may request to be permitted to intervene. The sense in which a legal interest of a third state may be affected under Article 62 is to be distinguished from that of Article 59, under which the decision of the Court is binding only on the parties and in respect to that particular case.¹⁶⁷ Where the legal interest of a state may be affected in the sense of Article 62 it is pointless to maintain that such a state will be protected by Article 59 if it is not permitted to intervene. This is all the more so given that the Court has spelled out the object of intervention as being to ensure the protection of the legal interest of a state by preventing it from being affected by the decision in a case. Article 59 certainly protects third

¹⁶⁷ See the observations of Schwebel J. in his separate opinion in Maltese Intervention Case, ICJ Reports 1981, 36; Italian Intervention Case, ibid. 1984, 133, para.8 (Schwebel J. dissenting).

parties from the binding force of the Court's decision but it does not and cannot protect their interests from being affected by other elements of the Court's judgments.¹⁶⁸ Rules and principles of international law enunciated by the Court bind all states, not by virtue of any particular judgment, but because all members of the United Nations have undertaken to respect and promote international law.¹⁶⁹

We therefore submit that third parties may be said to be affected by the decision in a case though they may not be bound by the decision in the sense of Article 59. If a third party is able to prove that, in addition to the general interest which it shares with all other states in the development of international law, it has a specific legal interest which it considers may be affected by the decision in a pending case, such a third party is undoubtedly affected by the decision in the sense of Article 62 and ought, therefore, to be permitted to intervene in the case.

4. Intervention Proceedings

(a) The Role of the Court and the Parties

Under Article 62(1) of the Statute, a state which considers that it has an interest of a legal nature which may be affected by the decision in the case may submit a request to the Court to be permitted to intervene. Under Article

¹⁶⁸ See ICJ Reports 1981, 36, separate opinion of Schwebel J.

¹⁶⁹ See McGinley, 690-1.

62(2) "it shall be for the Court to decide upon this request". Because of the discretion vested in the Court by this provision intervention under Article 62 has been variously described as discretionary intervention, intervention by leave of the Court, or permissive intervention.¹⁷⁰ The discretion granted to the Court is distinct from, and in addition to its duty to ensure that the conditions embodied in Article 62(1) are met by states requesting permission to intervene.

Any inquiry must necessarily start with an examination of the Court's rules. The rules are an international example of delegated legislation. They are the Court's "political"¹⁷¹ or operational interpretation of its Statute, cast in the form of a general regulatory system. As such they may provide useful indications of the approach favoured by the Court when it is called upon to deal with requests for permission to intervene.

Under Article 59 of the 1922 Rules of the Permanent Court an application for permission to intervene was required to contain: a specification of the case concerned, a statement of law and of fact justifying intervention, and a list of documents in support of the application. This requirement remained unaltered throughout the lifetime of that Court and passed without amendment into Article 64(2) of the 1946 Rules and Article 69(2) of the 1972 Rules of the International

¹⁷⁰ See separate opinion of de Aréchaga J.A., ICJ Reports 1984, 58, para.9.

¹⁷¹ This term is borrowed from Rosenne, Law and Practice, 53. See also Licari, 273.

Court.

Prior to the adoption of the 1978 Rules both Courts considered that all they required to assist them in deciding an intervention request were, besides the arguments and the submissions of the applicant state, a statement of law and of fact justifying intervention and supporting documents. These would demonstrate the interest of a legal nature of the applicant and how it may be affected by the decision.

Since the Permanent Court had no experience of deciding an application to intervene under Article 62 of its Statute, there is no guidance as to how it would have interpreted the relevant provisions of its Rules. During the proceedings on Poland's application to intervene in the SS Wimbledon Case,¹⁷² that Court observed that intervention under Article 62 should be admitted if the existence of an interest of a legal nature is "sufficiently demonstrated".¹⁷³

In his declaration in the Fijian Intervention Cases, Judge de Aréchaga thought that Article 69(2) of the 1972 Rules requiring a statement of law and of fact justifying intervention must be interpreted as including a requirement of establishing an independent jurisdictional link between the would-be intervenor and the original parties.¹⁷⁴ It is perhaps Judge de Aréchaga's observation, which serves to shed some light on the policy considerations concealed in the terse

¹⁷² See PCIJ Series A, No.1, 9-14.

¹⁷³ See *ibid.*, 12.

¹⁷⁴ See ICJ Reports 1974, 533 and 538.

wording of Article 69(2) of the Rules. Such policy considerations, which also reflect the unresolved issues relating to intervention, engaged the attention of the Court during the last revision of its Rules. Article 81(2) of the 1978 Rules requires an application to intervene to specify the case to which it relates and to set out: (a) the interest of a legal nature which the applicant considers may be affected by the decision in the case; (b) the precise object of the intervention; and (c) any basis of jurisdiction which is claimed to exist as between the applicant and the parties to the case.

The pronouncements of the Court in the Maltese and Italian Intervention Cases lead one to conclude that it has taken a narrow view of the discretion conferred on it by Article 62(2) of the Statute. In the former case the Court stressed that it did not consider Article 62(2) "to confer on it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary, in the view of the Court, the task entrusted to it by that paragraph is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute."¹⁷⁵ Thus the Court appears to exclude from this restricted view of its discretion considerations of policy. This position is untenable, not

¹⁷⁵ See ICJ Reports 1981, 12, para.17; *ibid.* 1984, 8-9, para.12. Although the Court sees its task under this provision as one of applying legal standards susceptible of objective determination, it is not clear how it means to ascertain those standards. See Damrosch, 383.

least because the Court cannot ignore the dictates of judicial policies and principles which underlie the administration of justice and to which reference has been made in the judgments, individual opinions and the academic literature. In his separate opinion in the Maltese Intervention Case, Judge Schwebel observed that "there are significant considerations of judicial policy" which suggest that the Court should construe the institution of intervention so as to debar "non-party intervention" or "unequal intervention" as being outside the ambit of the Statute.¹⁷⁶ In the opinion of Judge Oda, the problem raised by the objection that intervention based on an interpretation of the principle and rules of international law would invite many further instances of intervention should be considered from the viewpoint of future policy and the economy of international justice.¹⁷⁷

Another requirement of judicial policy which has been mentioned in individual opinions is that of judicial propriety. Judge Oda, in his separate opinion in the Maltese Intervention Case, observed that in exercising the authority to decide upon a request for permission to intervene, the Court may take into account "considerations of judicial propriety".¹⁷⁸ In his dissenting opinion in the Salvadorean

¹⁷⁶ See ICJ Reports 1981, 35.

¹⁷⁷ See *ibid.* 1981, 12, para.17; see also Jessup, 907.

¹⁷⁸ See ICJ Reports 1981, 23, para.1; see also separate opinion of Singh J., *ibid.* 1984, 33, and his separate opinion in the Salvadorean Intervention Case, *ibid.*, 218; the joint separate opinion of Judges Ruda, Mosler, Ago, Jennings and de la Charrière, *ibid.*, 219, para.4.

Intervention Case, Judge Schwebel thought that "considerations of judicial propriety, of the sovereign equality of states before the law and of fair play required a hearing"¹⁷⁹ to be granted to El Salvador. He regretted that he had to dissent from the order because the Court's refusal to grant El Salvador a hearing departed from the observance of "due process of law"¹⁸⁰ which the Court had traditionally upheld. Judge Schwebel also remarked that if the Court was to deserve and maintain "the confidence of States"¹⁸¹ it must act with scrupulous regard to the letter and spirit of its rules.

It is clear from the foregoing examples that such considerations as judicial policy, judicial propriety, the sovereign equality of states before the law, fair play, due process of law and the need to win and maintain the confidence of states are favoured by individual judges as factors to be taken into account by the Court in dealing with requests for permission to intervene. Given the controversial nature of the procedural faculty of intervention in both municipal¹⁸² and international law it is difficult, if not impossible, to see how the Court can exercise the competence conferred on it by Article 62(2) to decide upon requests for permission to

¹⁷⁹ See *ibid.*, 231.

¹⁸⁰ See *ibid.*, 223.

¹⁸¹ See *ibid.*, 231.

¹⁸² See the observations of Brown J. in Atlantis Development Corporation v. United States, 379f, 2nd 818 at 824 (5th Circuit 1967); and Bazelon C.J. in Smuck v. Hobson (1969) 408f, 2nd 175 at 179 (District Court Circuit 1969). See also Chinkin, 500.

intervene, on legal considerations alone.

Opinion on the role of the Court is by no means unanimous. It has jurisdiction only by consent of the sovereign states which refer disputes to it and only so far as such jurisdiction is granted. While it is true that in principle international adjudication shares some of the conflicting goals of intervention which exist in municipal legal systems, the conflicting policies concerning discretionary intervention may be even more difficult to resolve, since they revolve around the jurisdictional peculiarity which that provision presents, and which is unique to the International Court, namely jurisdiction over the parties. If municipal courts are concerned not to disregard the interests of the original parties, where the question of intervention arises before the International Court, it may claim stronger justification for taking the interests of such parties into account. It must guarantee the protection of the legal interests of third states while observing the fundamental principles underlying its jurisdiction, that is the principles of consent, of reciprocity of rights and obligations and of the equality of sovereign states before the law. The Court must give full effect to Article 62 without appearing to offend against the principle of party autonomy by being too eager to permit intervention and so discourage states from submitting their disputes to it for settlement.

Though the Court has stressed that its task under Article 62(2) is "to determine the admissibility, or otherwise, of the

request [to be permitted to intervene] by reference to the relevant provisions of the Statute", it is nevertheless clear that in performing this task it takes into consideration such other factors as: the Special Agreement concluded by the original parties, as well as their claims and submissions, the claims of third states and the real motives of potential intervenors. The Court has declared itself to be necessarily sensible of the limits of the jurisdiction conferred on it by its Statute and by the parties in their Special Agreement. Consequently its findings and the reasoning by which they are reached will inevitably be directed exclusively to the matters in the Agreement. Therefore no conclusions or inferences may legitimately be drawn from such findings or reasons with respect to the rights and claims of third states.¹⁸³

The Court has also asserted that the scope of its action is defined by the Agreement which embodies the consent of the parties to the settlement of their dispute. The possibility of intervention as a feature of its Statute remains open in cases brought by Special Agreement but the implementation of intervention must in principle be effected within the scope of the Special Agreement.¹⁸⁴

The Court has also remarked that the scope of its decision is normally defined by the claims and submissions of the parties to the case, and that it judges whether or not an

¹⁸³ See ICJ Reports 1981, 20, para.35.

¹⁸⁴ See *ibid.* 1984, 24, para.38; *ibid.* 1990, 133, para.96.

intervention is admissible by reference to the definition of the legal interest and the object of the intervention indicated by the applicant. It has explained that in considering a request for permission to intervene, it regards it as its duty to isolate the real issue in the case, identify the object of the claim and ascertain its true purpose by going beyond the ordinary meaning of the words used and considering all the circumstances and the nature of the subject-matter of the proceedings.¹⁸⁵

In exercising its discretion the Court will seek to establish whether or not the applicant will be adequately safeguarded by Article 59 which is included in the "relevant provisions of the Statute". Italy's intervention was rejected because, among other things, the Court was satisfied that its rights and interests would be sufficiently protected by that provision.¹⁸⁶

Another factor which may weigh with the Court if, for example, it is seised of a territorial dispute, is the possibility of the existence and the extent of third party claims. It may therefore decide that it would take account of the rights or interests of such third parties in reaching its decision, and refuse an application to intervene.¹⁸⁷ This factor may be considered as being included in the "relevant circumstances", usually referred to in Special Agreements by

¹⁸⁵ See *ibid.* 1984, 23, para.39.

¹⁸⁶ See *ibid.*, 26, para.42.

¹⁸⁷ See *ibid.*, 26-7, para.43.

which territorial disputes are submitted to the Court. To this end, it may indicate that its judgment in the principal case is without prejudice to the rights of third states or make it clear that it is deciding only between the competing claims of the parties.¹⁸⁸

The Court is always mindful of how the intervention, if eventually permitted, would affect the position of the original parties. What emerges from some of the Court's observations in the Maltese Intervention Case is that it clearly had in mind the possible attitude of the original parties. It would seem that Malta's application was refused because in the Court's view Malta sought the opportunity to submit arguments to the Court with possibly prejudicial effects on the interests of either or both of the original parties in their mutual relations. The Court thought that to allow such an intervention would, in the particular circumstances of that case, also leave the parties uncertain as to whether and how far they should consider their own separate legal interests vis-à-vis Malta as, in effect, constituting part of the subject-matter of the case. A would-be intervenor is not entitled to place the parties in such a position, especially since it would neither (as Malta proposed to do) be submitting its own claims for decision nor be exposing itself to counterclaims.¹⁸⁹

The Court's attitude in the Maltese Intervention Case

¹⁸⁸ See *ibid.*

¹⁸⁹ See *ibid.* 1981, 19-20, para.34. See also Jessup, 908.

regarding the position of the original parties stands in marked contrast to the somewhat indifferent approach which it adopted with respect to the interests of the parties in the Italian Intervention Case. In the latter case the Court took the view that by objecting to Italy's intervention the original parties had indicated their preferences.¹⁹⁰

In the final analysis, under Article 62(2) the decision on a request for permission to intervene must be seen to be taken by the Court.¹⁹¹

In the Nicaraguan Intervention Case, in which Nicaragua's intervention in some aspects of the case was not opposed by one of the parties,¹⁹² the Chamber stated that the views of the parties regarding the nature or existence of the interests of the applicant state constitute evidence which it may consider.¹⁹³ The Court can permit an intervention even though it be opposed by one or both of the parties to the case. For, "the opposition (to an intervention) of the parties, is, though very important, no more than one element to be taken into account by the Court".¹⁹⁴

¹⁹⁰ See ICJ Reports 1984, 26-7, para.43. On the approach adopted by the Court, see the observations of Morozov J. in his separate opinion, *ibid.*, 30, para.4.

¹⁹¹ See Elias, The ICJ, 95-6; *id.*, "The Limits", 168-9.

¹⁹² See ICJ Reports 1990, para.69.

¹⁹³ See *ibid.*, 118-9, para.63.

¹⁹⁴ See ICJ Reports 1984, 28, para.46; *ibid.* 1990, 133, para.96. See in contrast, McGinley, 694. In his separate opinion, de Aréchaga J.A. apprehended that states would no longer have recourse to the Court if intervention were readily granted. He thought that they might resort to using other

The Court's questionable assertion that it does not accept or reject intervention requests on broad overriding policy grounds has led it to espouse a very restricted view of its discretion.¹⁹⁵ In reality, however, this discretion, though by no means absolute, is very considerable. This is clearly borne out by the requirement embodied in Article 81(2) of the 1978 Rules. It is noteworthy that with the exception of the condition relating to the interest of a legal nature, the other requirements contained in that provision are not to be found in the Statute. Judge Oda has observed that the Court has certain discretionary powers to allow or disallow any requesting state to intervene in the litigation. In his view, any danger of the expansive application of Article 62 will certainly be minimized by the exercise of the Court's discretion.¹⁹⁶

If interpreted in accordance with the ordinary meaning of the words used, Article 62(1) does not seem to be as narrow as the Court makes it appear. It has been rightly observed:

Some international lawyers have long felt that Article 62 is couched in language far too loose and obscure ... The ambiguous words 'interest', 'legal nature' and 'may be

tribunals. This apprehension probably weighed with the Court in the Italian Intervention Case. See ICJ Reports 1984, 64, para.28. On the role of the parties, see Rosenne, "Some Reflections", 83.

¹⁹⁵ See Starke, "Locus Standi", 356. Cf. Rosenne, "Some Reflections", 77, 89-90.

¹⁹⁶ See ICJ Reports 1981, 31, para.18 (separate opinion of Oda J.); also, *ibid.* 1984, 106, para.31 (Oda J. dissenting); 135-6, paras.13-4 (Schwebel J. dissenting); 151, para.9 (Jennings J. dissenting). See also Oda, "Intervention", 647; 2 Fitzmaurice, 553; *id.*, 34 BYIL (1958), 127.

affected' ... should have been supplemented by formulated criteria to give more precise effect to the obvious purpose of the Article, namely, to provide safeguards for states whose vital rights could in the short or long term be seriously impaired by the operation of the Court's decision.¹⁹⁷

Whether the Court must accede to the request when all the stipulated conditions are fulfilled or if it still retains some residual discretion of rejection is a moot point. A text of Article 62 proposed by Lord Phillimore, which would have embodied explicit subjective discretion enabling the Court to grant the request "if it thinks fit", was rejected.¹⁹⁸

Article 62(2) does not spell out any additional grounds for the acceptance or the refusal of a request for permission to intervene. Neither does Article 62(1) enjoin that the request be granted if all the conditions therein specified are fulfilled. However, it would seem that the very concept of a request might be thought to imply an overriding discretion in the decision-maker. The Court's power to interpret the determinative concepts of "proper purpose", "legal interest" and "may be affected", coupled with its insistence that it must decide upon the proper purposes of intervention, gives it wide discretion. The Court's insistence on its duty to decide

¹⁹⁷ See Starke, "Locus standi", 356. See also Rosenne, "Some Reflections", 84. This view contrasts sharply with the opinion expressed by V-P. Sette-Camara that if the texts of Articles 62 and 63, on which the texts of Articles 31 and 32 of the Statute of the International Tribunal on the Law of the Sea have been closely modelled, were "vague...", they would have been "modified" during the long and careful exercise leading to the drafting of the Statute of the new tribunal. See ICJ Reports 1984, 88-9, paras.87-9 (V-P. Sette-Camara dissenting).

¹⁹⁸ See Chinkin, 525.

upon the proper purposes of intervention as well as the lack of clarity in such essential concepts as an "interest of a legal nature", "may be affected by the decision" etc., makes forming value judgments impossible.¹⁹⁹

It is probably in recognition of the wide discretion vested in the Court that it has been implied in some judgments, and expressly stated in some individual opinions, that underlying policies must be evaluated.²⁰⁰ It is even debatable whether the Court's refusal to decide requests for intervention for reasons simply of policy is not itself an important element of judicial policy governing its handling of applications for permission to intervene. The policy considerations which influence the Court's judgments, once identified, will not only lead to a better understanding of the way in which intervention requests are dealt with, but will also indicate whether the Court favours a broad-based notion of intervention or one that operates within tight legal restrictions. The preferred policies of the Court will affect the outcome of any such request and the different conclusions of individual judges will reflect their evaluation of the proper role of intervention in international litigation.²⁰¹

Granted that the Court's discretion is far broader than so far admitted, then it should have been possible for it to exercise such discretion in formulating the type or types of

¹⁹⁹ See *ibid.*

²⁰⁰ See *ibid.*

²⁰¹ See *ibid.*, 500.

intervention²⁰² most appropriate to the conflicting demands of international adjudication. If this were done in the Maltese and Italian Intervention Cases, some difficult issues relating to intervention would have been resolved. The Court could also use such broad discretion to cure defects in an application to intervene which are neither fundamental nor substantive, so as to bring such an application within the terms of Article 62, and thus render it admissible. The Court employed its discretion under Article 63 to modify Cuba's declaration of intervention in the Haya de la Torre Case so as to bring it within the scope of intervention as of right.²⁰³ Even more recently, a chamber of the Court broke new ground by permitting Nicaragua to withdraw its request for the reordering of the written proceedings, the reformation of the Chamber and the limitation of its mandate.²⁰⁴

One effect of the Court's narrow construction of its discretion is a judicial policy which aims primarily at confining intervention within very tight legal limits - a policy which is clearly at variance not only with the wishes which presided at the adoption of the Statute, but also with prevailing international legal opinion. This policy is probably explicable on the basis that, in proceedings

²⁰² As it did in 1990, when it allowed "non-party" intervention by Nicaragua. See ICJ Reports 1990, 92.

²⁰³ See *ibid.* 1951, 77. See also *ibid.* 1984, 128, para.20 (Ago J. dissenting).

²⁰⁴ See *ibid.* 1990, 99, para.21; 108-9, paras.41-2; 111-2, paras.46-9.

concerning discretionary intervention, the Court is usually too willing and ready to defer to the wishes of the original parties in maintaining the integrity of their dispute and the exclusivity of their relationship. Malta's intervention was rejected partly because the Court, which found that to allow such an intervention would leave the original parties uncertain as to their legal relations with the applicant, thought that this was not a proper burden to put on them.²⁰⁵

It has been observed that the tendency of states, which have accepted the Court's jurisdiction in a particular case, to regard such a proceeding as private or exclusive to themselves, is natural and understandable.²⁰⁶ States contemplating litigation before the Court ought to anticipate the possibility of intervention by third states which may perceive their own legal interests to be put at risk by the proceedings.²⁰⁷ Such intervention should therefore not be considered a hostile act. Nor should states have the freedom to negotiate special agreements for the submission of their disputes to the Court which completely disregard the interests

²⁰⁵ See ICJ Reports 1981, 19, paras.33-4; Jessup, 907-8. Cf. Chinkin, 511.

²⁰⁶ See Elias, The ICJ, 91; id., "The Limits", 165. This tendency may be natural but we find it difficult to see how it is understandable, considering that members of the United Nations who are also parties to the Statute are supposed to know about the existence of the procedural faculty of intervention as a feature of the Statute. See ICJ Reports 1984, 24, para.38; ibid. 1990, 133, para.96. In fact, the point is made by Elias himself in the same place. Cf. Chinkin, 500. On multilateral disputes, see generally Damrosch, 376-400, especially at 376-80.

²⁰⁷ See Elias, The ICJ, 91-2; id., "The Limits", 165.

of third states or, indeed, encroach upon such interests.²⁰⁸

The failure of the judgments in the Maltese and Italian Intervention Cases to clarify some difficult aspects about the law on intervention has made discretionary intervention look like an unavailable remedy. In both cases the utility of the institution of intervention within the framework of the Statute was at stake.²⁰⁹ Malta's application was rejected in 1981 because it asked too little and drew back from direct involvement in the dispute between the parties. Italy's application was rejected in 1984 because it had asked too much.²¹⁰ It would therefore seem that those who request to be permitted to intervene have to strike a delicate balance. They risk being accused of referring a dispute to the Court if they prove the existence of a legal interest and ask that it not be prejudiced. Should they refrain from so doing, it may be argued against them that they have no legal interest which may be affected by the decision in the case. In the opinion of Judge Mbaye, the resulting situation "is tantamount to condemning the institution of intervention ... to death."²¹¹

It is to be hoped that the acceptance of "non-party" intervention in the recent Nicaraguan Intervention Case, which

²⁰⁸ See Elias, The ICJ, *ibid.*; *id.*, "The Limits", *ibid.*; Chinkin, 502; McGinley, 688-9.

²⁰⁹ See ICJ Reports 1984, 88, para.84 (V-P. Sette-Camara dissenting).

²¹⁰ See *ibid.*, 150, para.7 (Jennings J. dissenting).

²¹¹ See *ibid.*, 54 (separate opinion of Mbaye J.), and 129-30, para.22 (Ago J. dissenting). Cf. *ibid.* 1990, 129, para.89.

was rejected in the earlier Maltese Intervention Case, may prove to be an attempt to breathe life into the institution of intervention. If, however, the earlier precedents are followed in future cases, Article 62 will stand in danger of becoming a dead letter.

(b) Procedure and Timing of Intervention

Cases may be submitted to the Court, either by notification of a special agreement or by a written application addressed to the Registrar and specifying in either case the subject of and the parties to the dispute.²¹² The Registrar is directed to communicate the fact of the submission of the case to the Court to all concerned, as well as the members of the United Nations through the Secretary-General, and any other states entitled to appear before the Court.²¹³

The rationale for giving publicity to the institution of legal proceedings is to enable third states which are so inclined to intervene in the case.²¹⁴ For, as a feature of the Statute, the possibility of intervention should be anticipated from the moment a case is referred to the Court.²¹⁵ For this reason, though the Court has to a certain

²¹² See Article 40(1) of the Statute.

²¹³ See Articles 40(2) and (3) of the Statute.

²¹⁴ See, e.g., James Brown Scott, "A Permanent Court of International Justice", 14 AJIL (1920), 586; Mani, 261; Procès-Verbaux, (1920), 587-734.

²¹⁵ See ICJ Reports 1984, 24, para.38.

degree allowed the original parties to amend their submissions to take account of new developments,²¹⁶ it seldom permits an unrestricted use of the amendment procedure.²¹⁷ In this respect, it is well settled that an amendment of pleadings which tends radically to alter the nature of the original proceedings is impermissible. Authority for this proposition may be found in the Permanent Court's observation that:

The Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third states to which ... all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention ...²¹⁸

If, on receipt of the notification of the institution of proceedings, a third state decides to intervene under Article 62, it must present its application for permission to intervene as soon as possible, and not later than the closure of the written proceedings.²¹⁹ This provision is intended to avoid problems that might arise in the event of a belated

²¹⁶ See Chinkin, 519; H. Lauterpacht, Development, 207; 4 Schwarzenberger, 401.

²¹⁷ See Mani, 261.

²¹⁸ See the Société Commerciale de Belgique Case, PCIJ Series A/B, No.78, 173. See also, H. Lauterpacht, Development, 207; Mani, 261; Chinkin, 519; 4 Schwarzenberger, 401; Rosenne, Law and Practice, 358.

²¹⁹ See Article 81(1) of the 1978 Rules. In 1978 the closing date for filing an application to intervene under Article 62 was advanced from any time before the commencement of the oral proceedings to the closure of the written proceedings. See 4 Schwarzenberger, 406. Articles 58 of the 1922 and 1936 Rules of the Permanent Court, Articles 64(1) and 69(1) of the 1946 and 1972 Rules respectively of the International Court.

intervention. This probably explains why the Permanent Court in formulating its Rules employed the term "at the latest".²²⁰ The application for permission to intervene may also be admitted, in exceptional circumstances, at a later stage.²²¹ There is no authority on what might be regarded as constituting "exceptional circumstances". In any case, the decision as to whether exceptional circumstances exist to justify the consideration of an application submitted after the stipulated time limit would seem to rest with the Court.²²² It has been explained that this allows for some flexibility in the submission of applications to intervene, and that this is necessary since circumstances could arise in which the political decision to seek to intervene could only be taken in the light of all written proceedings.²²³

As regards Libya's claim in the Italian Intervention Case that Italy's application, submitted only two days before the expiry of the deadline, put the original parties, who were by then committed to the arguments, at a disadvantage, the Court merely noted that the application was filed before the expiry of the time limit fixed by Article 81(1) of the Rules.²²⁴ In the Maltese Intervention Case, in responding to similar claims

²²⁰ See Mani, 268, n.95. See also PCIJ Series D, No.2, add.3, 431.

²²¹ See Article 81(1) of the 1978 Rules.

²²² See to the same effect, Mani, 269; Chinkin, 520.

²²³ See Rosenne, Procedure, 175.

²²⁴ See ICJ Reports 1984, 8, para.10. See also Chinkin, 520.

regarding the submission of its application, Malta argued that it was justified in delaying its request for permission to intervene as long as possible because it had not received the pleadings and annexed documents. In 1990, a chamber of the Court turned down El Salvador's request for the rejection of Nicaragua's application as untimely not only in itself, but because of the late raising of the matters concerning the reordering of the written proceedings, the reformation of the Chamber and the limitation of its mandate, which would be disruptive of the proceedings.²²⁵ Since it is up to the third state to determine the most advantageous moment to file its application to intervene, it may finely balance the request so as to maximise the time available to it, providing that it operates within the deadline given. However, the intervening state must accept the state of the case at the time of its intervention.²²⁶

It is not clear at what stage in the proceedings the time limits fixed by the Rules apply. It is a moot point whether a third state would be able to intervene in such incidental proceedings as an application for interim measures and preliminary proceedings or the jurisdictional phase of a case. It is possible, at least in theory, to intervene during the jurisdictional phase because Article 62 speaks of "the decision" and under Article 36(6) any dispute concerning the

²²⁵ See ICJ Reports 1990, 107, para.35; 112-3, paras.46-9.

²²⁶ See Mani, 267; Chinkin, *ibid.*

Court's jurisdiction is to be settled by the Court itself. It is, however, difficult to see how a third state would be able to persuade the Court that its legal interests may be affected by a decision settling a dispute about the Court's jurisdiction to deal with a case. This probably partly explains why the Court deferred consideration of Fiji's applications to intervene in the Nuclear Tests Cases, preferring instead to give priority to deciding questions of jurisdiction and admissibility. It is, however, instructive to note that Fiji's intention was to intervene in the principal case and not the jurisdictional phase. In the Court's view the applications presupposed that it had jurisdiction and therefore that the principal case was admissible. As it happened France, the respondent in the Nuclear Tests Cases, challenged the Court's jurisdiction to entertain those cases. The Court, thereupon, directed the original parties to address their pleadings first to the question of jurisdiction and admissibility. Consequently, it had to delay consideration of Fiji's application until it had pronounced on these questions.²²⁷

It would seem that a third state cannot intervene in proceedings for the indication of provisional measures in order to protect its legal interest which may be affected by the Court's decision, since here no decision in the sense of

²²⁷ See ICJ Reports 1973, 320, 321, 324, 325. See also Mani, 267, 268.

Article 62 is called for.²²⁸ This is all the more so since the status of such a state in relation to the principal case remains to be determined. A consequence of the postponement of consideration of Fiji's application was the exclusion of Fiji from participation in this phase of the proceedings.²²⁹ In theory, however, if a third state, without asking for interim measures, is able to convince the Court that it is seeking to intervene so as to safeguard its legal interest in this early phase of the principal proceedings, it would seem reasonable to entertain the intervention provided "it can be dealt with speedily so as not to delay unduly the application for interim measures."²³⁰

After having noted that the problem of the timing of intervention is not merely one of policy for both the intervening state and the Court, but also one of juridical significance, Mani observed that from the perspective of the substantive rights of the intervening state, it would probably make a big difference if the intervention were timed during the merits phase rather than during the preliminary objection phase, for during the former the intervenor might not be able successfully to challenge the decision terminating the latter

²²⁸ See ICJ Reports 1984, 195 (Schwebel J. dissenting). See also Chinkin, 521. For the view that a court order of interim protection is binding even on this state, see Mani, "Interim Measures", 371.

²²⁹ See Rosenne, Procedure, 176; Chinkin, *ibid.*

²³⁰ See Chinkin, *ibid.*

phase.²³¹

Another relevant issue in connection with the timing of intervention is whether a third state, which realises, after the Court has disposed of a case, that the decision in that case affects its legal interests, has any course of action with regard to discretionary intervention. Authority exists for the view that a third state which has failed to intervene in a case in which final judgment has been rendered, cannot later impugn it by intervening in a further proceeding concerning the execution of that judgment. Indeed, reopening an earlier decision is not a proper purpose of discretionary intervention.²³²

Another point is whether a third state would be able to intervene in proceedings concerning the interpretation or revision of a judgment. It is difficult to imagine how a third state, which did not participate in the proceedings which resulted in a final judgment disposing of the principal case with the authority of res judicata,²³³ would subsequently be able to intervene in consequential incidental proceedings of this kind so as to protect its legal interest

²³¹ See Mani, 267. With all due respect, this observation, probably due to a misprint, is somewhat vague, if not contradictory. For this observation to be valid, we have to assume that the substantive rights of the intervenor can never be affected during the preliminary objection phase. If this is not so, we see no reason why, in theory, a third state may not intervene during this phase.

²³² See the Court's observation in the Haya de la Torre Case, ICJ Reports 1951, 76-7. See also Mani, 260; Chinkin, 521.

²³³ See Rosenne, Procedure, 201.

which may be affected by the Court's decision. It is clear that proceedings relating to the interpretation or revision of a judgment stem from and have an exclusive bearing on matters which have already been dealt with by that judgment. The original parties to the case, to which the judgment to be interpreted or revised relates, can alone possibly be parties to the proceedings.²³⁴ However, such proceedings may be open to states other than the parties to the original judgment in question if they have a collateral bearing on the interests of such third states.²³⁵

Theoretically, it is possible that the legal interest of a third state may be put at risk by proceedings on the revision of a judgment, thus providing such a state with a justification for seeking to intervene. This is because an application for revision of a judgment must be based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court, and also to the party claiming revision, always provided that such ignorance was not due to negligence. It is possible that this kind of fact may be such as to put the legal interests of that third state in issue in the proceedings. This would be the case especially where a discovery of the new fact is likely to lead to a substantial revision of the judgment. In such circumstances the revision

²³⁴ See Mani, 260. Farag, 108; Rosenne, Procedure, 201, 205.

²³⁵ See Mani, *ibid.*

would be akin to a retrial, judicial review, or even an appeal such as obtains in many municipal legal systems.²³⁶ If, however, the revision is a minor one, the case for intervention by a third state may be weak. Such a state would probably have to content itself with the protection afforded by Article 59 of the Statute, no matter how imperfect this may be. Hypothetically, however, a case may be made for intervention in consequential proceedings, concerning the revision of a judgment.

The third state which has decided to submit a request to the Court to be permitted to intervene in pending primary proceedings, is required by the 1978 Rules to state the name of an agent in its application and to specify the case concerned. Besides the requirements already discussed, the application shall also contain a list of the documents in support, which documents shall be attached.²³⁷

By requiring that the application set out the legal interest of the applicant and the precise object of the intervention, the 1978 Rules for the first time expressly state what has all along been implicit in the earlier requirement, that the application contained a statement of law and of fact justifying intervention. This, together with a requirement that the application shall indicate any basis of

²³⁶ See ICJ Reports 1954, 47 at 55. See also Rosenne, Procedure, 206.

²³⁷ See Article 81(2) of the 1978 Rules reprinted in Rosenne, Procedure, 175. Cf. Articles 59 of the 1922 and 1936 Rules of the Permanent Court and 64(2) and 69(2) of the 1946 and 1972 Rules of the International Court respectively.

jurisdiction which is claimed to exist between the applicant and the original parties, is designed to enable the Court to verify whether an applicant has a legal interest which may be affected by the decision in the case.

Under Article 83 of the 1978 Rules, certified copies of the application to intervene "shall be communicated forthwith to the parties to the case which shall be invited to furnish their written observations" thereon. The Registrar is also directed to transmit copies of the application to the Secretary-General of the United Nations and other states entitled to appear before the Court.²³⁸ This provision is meant to ensure respect for the fundamental procedural rights of the original parties by enabling them to be adequately informed of the intervention and to be given the opportunity to express their view on it. This they may do by raising questions concerning the legal interest of the intervenor, the legal basis of its claim to intervene, as well as the nature and scope of the proposed intervention.²³⁹

In 1981, following the publicity under the Rules of Malta's application to intervene, the original parties submitted written observations in which they opposed the intervention.²⁴⁰ Similarly, after Italy's application for

²³⁸ For a commentary on this provision, see Rosenne, Procedure, 179-80. Cf. Article 59 of the 1922 and 1926 Rules of the Permanent Court. See Hudson, The Permanent Court, 725, 726, n.6.

²³⁹ See Mani, 269.

²⁴⁰ See ICJ Reports 1981, 6, paras.6-7.

permission to intervene in the Libya/Malta Case was publicised, the original parties objected to the intervention in their written observations.²⁴¹

Under the Rules the Court decides whether an application to intervene should be granted as a matter of priority. This provision reinforces Article 62(2) of the Statute, according to which it shall be for the Court to decide upon a request to be permitted to intervene. The Rules further lay down that

if, within the time limit fixed by Article 83 ... an objection is filed to an application for permission to intervene ... the Court shall hear the state seeking to intervene and the parties before deciding.²⁴²

The main novel feature of this article is the introduction of the concept of priority in Article 84(1) for the decision, unless the circumstances of the case lead the Court to determine otherwise.²⁴³ Article 84(1) of the 1978 Rules would appear to consolidate and regularise the practice followed by the Court in the Fijian Intervention Cases. Although Fiji's applications were submitted within a week of the filing of applications instituting the principal proceedings and the requests for the indication of provisional measures and short time limits were fixed within which the parties could present their observations, the Court showed itself disinclined to reach a hurried decision on admitting

²⁴¹ See *ibid.* 1984, 6, paras.6-7.

²⁴² See Article 84 of the 1978 Rules. See also the penultimate paragraph of Article 59 of the 1931 Rules of the Permanent Court.

²⁴³ See Rosenne, Procedure, 180.

the interventions. The significance of Article 84 is that an intervention only becomes effective with a decision of the Court. Whether or not the application is opposed, the Court has to satisfy itself that the intervention conforms to the provisions of Article 62 of the Statute.²⁴⁴ Though Articles 64(6) and 69(6) of the 1946 and 1972 Rules envisaged that the Court's decision on an application to intervene should be "in the form of a judgment", the present rules have omitted any specific reference to the form of the Court's decision, thus appearing to leave the question open. In the Maltese, Italian and Nicaraguan Intervention Cases, however, the Court rendered its decisions in the form of judgments.²⁴⁵

The Rules governing the submission of a request for permission to intervene, the notification of the intervention, proceedings on the admissibility of intervention, and the Court's decision thereon, if strictly enforced, would, on the one hand, discourage any attempt at intervention which might disrupt or unduly retard the progress of a proceeding already in motion and far advanced. On the other hand, this would provide the parties to the proceedings with ample opportunity to be heard on the question of intervention and thus protect

²⁴⁴ See Rosenne, Procedure, 180; Mani, 270.

²⁴⁵ See ICJ Reports 1981, 3; *ibid.* 1984, 3; *ibid.* 1990, 92. See also Mani, 271. The deletion of the rule that the Court's decision on discretionary intervention should be given in the form of a judgment, introduced in 1926, which emphasised the importance of such a decision, fitted into the overall policy of the Court of playing down third state intervention, especially in the legal interest variant. See 4 Schwarzenberger, 406-7.

their substantive procedural rights.²⁴⁶

5. Unresolved Issues of Intervention

(a) The Issue of the Scope of Intervention

Until quite recently the Court deliberately avoided dealing with some of the basic issues of intervention as it thought that they were not necessary to its decision.²⁴⁷ These issues, which are interrelated, concern the scope of intervention, the status of an intervening state and the need for a jurisdictional nexus between the would-be intervenor and the original parties. Neither the travaux préparatoires of the Statute nor the 1922 Rules provide much insight into these issues.²⁴⁸ As the debates of the Permanent Court on these issues in 1922 were inconclusive, it was agreed on the basis of a presidential ruling not to try to resolve them in the Rules but to leave them to be decided as and when they occur.²⁴⁹

The travaux préparatoires of the Statute and Rules of the

²⁴⁶ See Mani, 268.

²⁴⁷ These issues were considered by a Chamber of the Court in the Nicaraguan Intervention Case. See ICJ Reports 1990, 131-7, paras.93-105.

²⁴⁸ See to the same effect the separate opinion of Oda J. in ICJ Reports 1981, 23, para.2; *ibid.* 1984, 90, para.1 (Oda J. dissenting). See also Oda, "Intervention", 640.

²⁴⁹ See PCIJ Series D, No.2, 87-9, 91, 93, 352 and 381. See also ICJ Reports 1981, 14, para.23; 26, para.7 (separate opinion of Oda J.); 1984, 62-3, paras.22-4 (separate opinion of de Aréchaga J.A.); 72-3, paras.11-3 (V-P. Sette-Camara dissenting; 97, para.16 (Oda J. dissenting); 145, para.34 (Schwebel J. dissenting). See further de Aréchaga, "Intervention", 462-3, paras.26-8.

Permanent Court provide some evidence to support the view that discretionary intervention was meant to have a broader scope than that ascribed to it by the Court.²⁵⁰ This view would also seem to be supported by some provisions of Article 38 of the Statute. In addition to sub-paragraph (1)(d), which authorises the Court to apply judicial decisions as subsidiary means for determination of rules of law, the fact that a wide power of intervention was envisaged is consistent with sub-paragraphs (b) and (c) of Article 38(1), whereby the Court was expected to find international law in the practice of states and general principles of law recognised by them. The granting of permission to states to intervene in litigation before the Court so as to express their views on developing norms that might affect them is one mode of achieving this result.²⁵¹ It is also evident from the Court's decisions in the Maltese and Italian Intervention Cases that some judges also share the view that discretionary intervention was meant to have a wider scope than that which the Court has attributed to it.²⁵²

²⁵⁰ See McGinley, 682 and 690; Oda, "Intervention", 635, 636 and 642-3; Elias, "The Limits", 167-8, n.16; *id.*, The ICJ, 94, n.16; see also ICJ Reports 1984, 96, para.13 (Oda J. dissenting). See further the Summary of Previous Discussions on the Question of the Right of Intervention submitted by Beichmann J. at the 17th meeting on 24 February 1922. See ICJ Reports 1981, 26-7, para.8 (separate opinion of Oda J) and *ibid.* 1984, 97, para.16 (Oda J. dissenting).

²⁵¹ See McGinley, 690.

²⁵² See ICJ Reports 1981, 23, paras.1-2, and 27, para.9 (separate opinion of Oda J.); 40 (separate opinion of Schwebel J.); and *ibid.* 1984, 90, para.1, and 93-4, para.8 (Oda J. dissenting); 129-30, para.22 (Ago J. dissenting); 145,

The jurisprudence of the Court in the Maltese and Italian Intervention Cases does not clearly define the scope of discretionary intervention. In the Maltese Intervention judgment the Court appeared to hint that, had Malta agreed to submit its legal interests in the litigation for decision in relation to either or both of the original parties, the nature of its intervention would have been such as to show that its legal interest could be considered as one which might be affected by the decision in the case. If Malta had desired a direct and less limited form of participation in the proceedings and assumed the obligations of a party in the sense of Article 59, such an intervention could properly have been admitted as falling within the terms of Article 62. If the Court had stopped at this observation, the meaning and scope of discretionary intervention would have been very clear. But it further noted that in such circumstances the question whether a link of jurisdiction between the would-be intervenor and the original parties is a necessary condition for the grant of permission to intervene would call for consideration.

In the Italian Intervention Judgment the Court observed that the consequence of its finding that to permit Italy's intervention would involve the introduction of a fresh dispute could be defined by reference to either of two approaches to the interpretation of Article 62, both of which must result in

para.35, and 147, para.39 (Schwebel J. dissenting); 153-4, para.19 (Jennings J. dissenting).

the Court being bound to refuse the request while giving full effect to Article 62. In the view of the Court, both interpretations were facets of the single reality, that is "the basic principle that the jurisdiction of the Court to judge a dispute depends on the consent of the parties thereto".²⁵³ Consistent with its first method of reconciling Article 62 with the principle of consent to its jurisdiction, invocations of that provision in which the Court is requested to decide on rights claimed not merely to insure that they be not affected, should be backed by a basis of jurisdiction.²⁵⁴ Its second method would be to find that where a would-be intervenor asked the Court to give a judgment on the rights which it was claiming, this would not be a genuine intervention within the meaning of Article 62.²⁵⁵ The meaning and scope of discretionary intervention would have been clarified had the Court indicated on which of these two interpretations it based its conclusion that Italy's intervention fell into a category which it could not accept. Characteristically however, the Court evaded the issue by declaring that this conclusion followed from either of the two approaches and that it accordingly did not have to decide between them.²⁵⁶

In fairness to the Court it must be said that it

²⁵³ See ICJ Reports 1984, 22, para.34.

²⁵⁴ See *ibid.*, 22, para.35.

²⁵⁵ See *ibid.* 23-4, para.37.

²⁵⁶ See *ibid.*, 24, para.38.

attempted in its jurisprudence in the Italian Intervention Case to differentiate between a genuine intervention under Article 62 and what is variously described as "the introduction of a fresh dispute",²⁵⁷ "main line application",²⁵⁸ "the instituting of main line proceedings in application of Article 36",²⁵⁹ "a direct action",²⁶⁰ and "an alternative means of bringing an additional dispute as a case before the Court",²⁶¹ by reference to the object and purpose of the intervention. The Court clearly stated the object of intervention as being to ensure the safeguarding of the legal interests of third states by preventing them from being affected by the decision.²⁶² When an applicant state requests the Court to rule upon,²⁶³ decide on,²⁶⁴ or to give a judgment on²⁶⁵ rights which it claims in relation to the original parties, the state would not be considered to be seeking a genuine intervention. The story would be the same if the would-be intervenor were asking the Court to

²⁵⁷ See *ibid.*, 22, para.34.

²⁵⁸ See *ibid.*, 22-3, para.36.

²⁵⁹ See *ibid.*, 23-4, para.37.

²⁶⁰ See *ibid.*

²⁶¹ See *ibid.*

²⁶² See *ibid.*; see also *ibid.*, 18-9, para.28.

²⁶³ See *ibid.*, 20-1, para.32.

²⁶⁴ See *ibid.*, 22, para.35.

²⁶⁵ See *ibid.*, 23-4, para.37.

recognise²⁶⁶ or define²⁶⁷ its individual rights vis-a-vis the parties to the main case, or if it were seeking to intervene for the purpose of asserting an individual right against the parties.²⁶⁸ If, however, an applicant state requests the Court to preserve,²⁶⁹ take account of²⁷⁰ or consider its rights²⁷¹ in its judgment in the principal case so as to ensure that they are not adversely affected, it would be considered to be seeking a genuine intervention in the sense of Article 62. In general, the scope of discretionary intervention is limited to the matters covered by the main case.²⁷² However, the scope of any particular intervention is defined by the legal interest which may be affected by the decision in the case. Thus, a third state may be permitted to intervene in respect of such an interest, but not to make excursions into other aspects of the case. For instance, it is not for the intervenor to address argument to the Chamber on the interpretation of the Special Agreement concluded between the parties, because the Special Agreement is for it

²⁶⁶ See *ibid.*, 19, para.29.

²⁶⁷ See *ibid.*, 21-2, para.33.

²⁶⁸ See *ibid.*, 23-4, para.37.

²⁶⁹ See *ibid.*, 20-1, para.32.

²⁷⁰ See *ibid.*

²⁷¹ See *ibid.*, 23-4, para.37.

²⁷² See ICJ Reports 1984, 148-9, para.3; 153, para.17; 154, para.20.

res inter alios acta.²⁷³

(b) The Issue of the Status of the Intervening Party

Another difficult issue relating to intervention is the status of the applicant state which has been permitted to intervene. On the basis of the English text of Article 62 of the Statute of the Permanent Court, the International Court took the view that "... a state permitted to intervene would become a party to the case".²⁷⁴ However, it has been argued that since there is no suggestion in the travaux préparatoires that in 1920 the drafters of the Statute had specifically in mind the idea of intervention as a party, it does not seem justified to draw conclusions about the meaning of intervention "as a third party" based essentially on the English text, which is largely a translation from the French version.²⁷⁵

²⁷³ See *ibid* 1990, 115-6, para.58; 136, para.103.

²⁷⁴ See *ibid.*, 15, para.24.

²⁷⁵ See ICJ Reports 1981, 23-4, para.3 (separate opinion of Oda J.). See also his dissenting opinion in *ibid.* 1984, 95-6, paras.12 and 14. Though the Protocol of the Signature of the Statute of the Permanent Court expressly states that both the English and the French texts of the Statute are authentic, the Preface to the Procès-verbaux of the Proceedings of the Advisory Committee of Jurists clearly indicates that:

As all the members of the Committee, with the exception of Mr. Elihu Root spoke in the French language, the English text of the Procès-verbaux is to be looked upon as a translation except in so far as concerns the speeches and remarks of Mr. Root.

See the Procès-Verbaux (1920), IV.

The Court's assumption, however weak its basis, is certainly not implausible. The circumstances in which discretionary intervention found its way into the Statute suggest that the idea of this procedural remedy as it existed in common law must have been at the back of the mind of the Advisory Committee of Jurists, or at least those of its members with a common law background.²⁷⁶ In common law the only reason a person may be made a party to a case is so that he should be bound by the result of the action. This was all the more so when one considers that by no stretch of the imagination could a purely literal translation of the French text of Article 62 of the Statute of the Permanent Court into English import the phrase "as a third party" into that text. Moreover, where the text of a provision is rendered in two languages and it happens that one text is unclear, it does not seem unreasonable for the courts to adopt that which is clear.²⁷⁷

The deletion of the expression "as a third party" from the English text of Article 62 has left that provision in the same state as the corresponding French text. If the view of the Court - that on the strength of the English text of Article 62 the Permanent Court assumed that a state permitted

²⁷⁶ See 128, n.27 above.

²⁷⁷ French is the basic language, or the language in which the Statute was drafted. By draft is not meant merely the language of the preparatory work but the final text. The basic language is the working language in which the treaty was negotiated and drafted. See McNair, Law of Treaties, 30 and 43-5.

to intervene would become a party to the case - is not implausible, it is doubtful whether the International Court can now adopt the same position.

In 1981 the Court refused Malta's application to intervene in the Tunisia/Libya Case so as to submit its views with respect to the applicable principles and rules of international law, without putting in issue its own claim concerning those same matters vis-à-vis the original parties. The Court also thought that the "direct yet limited form of participation" in the case for which Malta was seeking permission could not properly be admitted as falling within the terms of discretionary intervention.²⁷⁸

The type of intervention which Malta was seeking has been variously described as "non-party"²⁷⁹ or "unequal"²⁸⁰ intervention or intervention as a "quasi-party"²⁸¹ or

²⁷⁸ See ICJ Reports 1981, 19-20, para.33-4.

²⁷⁹ See *ibid.* 35, 39 (separate opinion of Schwebel J.). Also separate opinion, Oda J., 27, para.9. Though Oda J. does not specifically use the term "non-party" it is obvious that he is referring to the concept of non-party intervention. See further *ibid.* 1984, 98, para.18 (Oda J. dissenting); Oda, "Intervention", 644. Here Oda speaks of intervention "not 'as a party'". See *ibid.* 1984, 38 (separate opinion of Mbaye J.). Here Mbaye J. expressly refers to "intervention by a non-party state" and "position of a non-party intervenor". See Jessup, 907 (also n.12).

²⁸⁰ See ICJ Reports 1981, 35. (separate opinion of Schwebel J.).

²⁸¹ See Jessup, 907, n.12. Libya in its observations on the Maltese application suggested that Malta sought to be a quasi-party. Malta said that it sought the procedural position of a participant by way of intervention. See ICJ Reports 1981, 8, para.12.

"limited",²⁸² "strict",²⁸³ or "strictly limited"²⁸⁴ intervention. This type of intervention was recently held to be the form of intervention envisaged under Article 62 of the Statute. Thus, the intervening state does not become party to the proceedings. It does not acquire the rights or become subject to the obligations which attach to the status of a party under the Statute and Rules, or the general principles of procedural law. It has a right to be heard by the Court. This right is regulated by Article 85 of the Rules, which provides for submission of a written statement and participation in the hearings.²⁸⁵

It has been argued that it is ludicrous to accept the existence of "non-party" intervention,²⁸⁶ and further that intervention on a non-party basis falls outside the purview of the Statute, and would violate the principles of fair dealing and equality.²⁸⁷

²⁸² See *ibid.* 1984, 149, para.5 (Jenning J. dissenting).

²⁸³ See *ibid.*, 150, para.7 (Jennings J. dissenting).

²⁸⁴ See *ibid.*, 153, 155, 156, paras.17, 24, 25 (Jennings J. dissenting).

²⁸⁵ See ICJ Reports 1990, 134, paras.97 and 99-100; 135-6, para.102. Cf. Maltese Intervention Case, *ibid.* 1981, 27, para.9 (separate opinion of Oda J.); Italian Intervention Case, *ibid.* 1984, 98, para.18 (Oda J. dissenting); 148-9, paras.3-5, 153, para.17, 154, para.20, 155, paras.24-5 (Jennings J. dissenting). See also Chinkin, 526. Cf. Article 59 of the Rules of the Permanent Court, as amended in 1926. See also Hudson, The Permanent Court, 725-6, n.5. For a commentary on Article 85, see Rosenne, Procedure, 181.

²⁸⁶ See Elias, "The Limits", 168; *id.*, The ICJ, 95; Chinkin, 527.

²⁸⁷ See de Aréchaga, "Intervention", 454-5, paras.4, 6-7.

While accepting non-party intervention in the Nicaraguan Intervention Case, a chamber of the Court also kept the possibility of intervention as a party open by observing that "It is true, conversely, that provided that there be the necessary consent by the parties to the case, the intervenor is not prevented by reason of that status from itself becoming a party to the case".²⁸⁸ Sir Cecil Hurst, a President of the Permanent Court, is reported to have once remarked that according to Article 62, the English text of which was particularly clear, it was only if the Court allowed the request of the state desiring intervention that the state became a party.²⁸⁹

A state which intervenes as a party should be entitled to all the benefits and burdens of a party, since with its intervention the proceedings would be transformed into tripartite litigation.²⁹⁰ The party intervenor should be allowed to submit arguments to the Court forming an essential part of the litigation. It would have to submit its own legal interest in the subject matter of the proceedings or its own claims for decision as between itself and either or both of the original parties, while at the same time exposing itself to counterclaims and opposing submissions. It would have to assume the rights and obligations of a party to the case

²⁸⁸ See ICJ Reports 1990, 134-5, para.99.

²⁸⁹ See Elias, "The Limits", 168, n.19; id., The ICJ, 95, n.19.

²⁹⁰ See Chinkin, 526.

within the meaning of the Statute. In consequence it would have to be bound by the decision within the meaning of Article 59 of the Statute and Article 94 of the Charter of the United Nations in its relations with the original parties. It would also be liable for its own costs under Article 64 of the Statute. It should be able to claim a remedy. It should also be entitled to a judge ad hoc under Article 31 of the Statute unless it is in common interest with an original party that has already appointed a judge ad hoc.²⁹¹

(c) The Issue of the Jurisdictional Link²⁹²

(i) Background

The problem concerning the scope of admissible intervention, and that of the status of the intervening state, is inextricably bound up with the issue of the need for the existence of a jurisdictional nexus between the would-be intervenor and the original parties.

When the Permanent Court first revised its rules in 1926,

²⁹¹ See, for example, the Maltese Intervention Case, ICJ Reports 1981, 18-20, paras.32-4; Chinkin, 526. For a discussion of the position of the intervening state in this connection, see ICJ Reports 1981, 6, para.8. See also Fachiri, 124; Decaux, 184, esp. n.34; Oda, "Intervention", 638; Rosenne, "Some Reflections", 85-8; id., Law and Practice, 206; id., Procedure, 182, Mani, 273-4; Miller, 569, n.72; Farag, 108. See also de Aréchaga, "Intervention", 465; J.L. Simpson and H. Fox, International Arbitration: Law and Practice (London: Stevens, 1959), 48 (hereinafter "Simpson and Fox"); Mani, 271-3; Hambro, "Some Observations", 154; Anand, Compulsory Jurisdiction, 282. The rules refer to a state which has been permitted to intervene as "an intervening state". See article 85 of the 1978 Rules.

²⁹² For a discussion see Rosenne, "Some Reflections", 81-5.

it had not had any real experience in the operation of Article 62 in practice and therefore its further debates shed little light on the problems connected with its application.²⁹³ Consequently, it would seem that in those early days the need for a jurisdictional link was considered doubtful.²⁹⁴

With the exception of a few changes in respect of the numbering of the relevant provisions on discretionary intervention, no changes were introduced in the substance of the 1946 and 1972 Rules of the International Court with regard to the problem of the need for a jurisdictional link.²⁹⁵

Thus, when in 1973 Fiji requested permission to intervene in the Nuclear Tests Cases, the International Court, like its predecessor, had no practical experience concerning the operation of discretionary intervention, let alone the way in which the question of the need for a jurisdictional link was to be resolved. Although the Court never decided on the Fijian requests, some individual judges thought that those cases had raised for the first time the issue of the jurisdictional link. Unlike Australia, New Zealand and France, the applicants and the respondent respectively in the Nuclear Test Cases, Fiji, which desired to intervene, was not

²⁹³ See ICJ Reports 1981, 15, para.24. In the 1936 revision of the Rules, Articles 58-9 of the 1922 Rules on the prerequisites for an application to intervene, remained the same except for a few drafting changes. See *ibid.* 1984, 75, para.25 (V-P. Sette-Camara dissenting).

²⁹⁴ See *ibid.* 1984, 73 and 80, paras.12 and 50 (V-P. Sette-Camara dissenting).

²⁹⁵ See *ibid.*, 175, para.26.

a party to the 1928 General Act and had not accepted the optional clause. It nevertheless sought to intervene on the side of the applicants and join in their submissions that the conduct of France was inconsistent with international law, violated their rights and should be discontinued. It has been pointed out that if Fiji as an intervenor obtained this kind of declaration it could afterwards claim damages against France on the basis of the res judicata of the declaratory judgment.²⁹⁶

Though Fiji's requests were never determined, the Court must have had on its mind certain aspects of those applications, the only concrete instances in its history in which Article 62 had been invoked, during the drafting of Article 81(2)(c) of the Revised Rules adopted in April 1978.²⁹⁷ This provision actually raised the age-old question of the need for a jurisdictional link.²⁹⁸ According to the terms of Article 81(2)(c) of the 1978 Rules, an application to intervene will set out "any basis of jurisdiction which is claimed to exist as between the state applying to intervene and the parties to the case".

This provision is couched in nebulous language and it is

²⁹⁶ See de Aréchaga, "Intervention", 463, para.29. See also the declaration attached to the orders dismissing the Fijian applications of Judge Onyeama and the joint declaration of Judges Dillard and Waldock, ICJ Reports 1974, 531-2 and 536-7; the declaration of de Aréchaga J., and Barwick J.A., 532-3 and 537-8.

²⁹⁷ See for example, *ibid.* 1984, 116-7, para.5 (Ago J. dissenting).

²⁹⁸ See *ibid.*, 76, para.29 (V-P. Sette-Camara dissenting).

not clear whether it is a requirement simply for the information of the Court or a real prerequisite for the admissibility of intervention.²⁹⁹ However, a perusal of the drafting records of the 1978 Rules shows there was considerable doubt concerning the actual import of Article 81(2)(c) but that the prevailing opinion was that its purpose was merely to draw attention to the point and to ensure that a state that could indicate such a title of jurisdiction should so inform the Court.³⁰⁰ This is all the more so since the rules cannot so modify the Statute as effectively to amend it.³⁰¹

(ii) The Principle of Consent

It is well settled that the Court can only exercise jurisdiction over a state with its consent.³⁰² Thus, the pattern of international judicial settlement under the Statute is that two or more states agree that the court shall hear and determine a particular dispute. Such agreement may be given ad hoc, by a special agreement or otherwise, or may result from the invocation, in relation to the particular dispute, of

²⁹⁹ See *ibid.*, 76, para.32. See also, Rosenne, Procedure, 175.

³⁰⁰ See ICJ Reports 1984, 76, para.31 (V-P. Sette-Camara dissenting), 146, para.36 (Schwebel J. dissenting).

³⁰¹ See *ibid.* 1984, 76, para.30 (V-P. Sette-Camara dissenting); 116, para.6 (Ago, J. dissenting); 152, para.12 (Jennings, J. dissenting).

³⁰² See PCIJ Series A, No.2, 16; ICJ Reports 1990, 133, para.95; *ibid.* 1954, 32; *ibid.* 1984, 22-4, paras.34-7.

a compromissory clause of a treaty or of the mechanism of Article 36(2) of the Court's Statute. Those states are the parties to the proceedings, and are bound by the Court's eventual decision because they have agreed to confer jurisdiction on the Court to decide the case. Normally, therefore, no other state may involve itself in the proceedings without the consent of the original parties.³⁰³ With regard to discretionary intervention, the issue is whether the existence of a valid link of jurisdiction with the parties, in the sense of a basis of jurisdiction which could be invoked by a state seeking to intervene in order to institute proceedings against either or both of the parties, is an essential condition for the granting of permission to intervene.³⁰⁴ It has been argued that to permit a state which has no jurisdictional links with either or both of the original parties to intervene in a pending case would run counter to the basic principle that the Court's jurisdiction to judge a dispute depends on the consent of the parties thereto, and violates the principles of equality of states before the Court and of the reciprocity of rights and obligations.³⁰⁵

In 1981, the Court found it unnecessary to decide the issue of the jurisdictional link since it had reached the

³⁰³ See *ibid.* 1990, 133, para.95.

³⁰⁴ See *ibid.*, 132, para.94.

³⁰⁵ see *ibid.*, 134, para.99; *ibid.* 1984, 22, para.35; 30, para.3 (separate opinion of Morozov J.).

conclusion that, for other reasons, Malta's request for permission to intervene in the Tunisia/Libya Case was not one to which it could accede.³⁰⁶ However, it explained that the jurisdictional requirement embodied in the Rules was introduced to emphasise its importance and in order to ensure that when the question did arise in a concrete case, it would be in possession of all the elements which might be necessary for its decision.³⁰⁷

In 1984, the Court was again able to reach a decision on Italy's application to intervene in the Libya/Malta Case without generally resolving the vexed question of the "valid link of jurisdiction".³⁰⁸ It did so however by stating two alternative lines of argument, one on the basis that such a link would be required, and one on the basis that it would not, and observing that in the circumstances of the case before it, either of the two approaches must result in the Court being bound to reject the Italian application.³⁰⁹ The Court also observed that although the issue of the jurisdictional link was a question of its own jurisdiction, it had no priority of the kind which relates to jurisdictional

³⁰⁶ See *ibid.* 1981, 20, para.36.

³⁰⁷ See *ibid.* 1981, 16, para.27.

³⁰⁸ See *ibid.* 1984, 28, para.45.

³⁰⁹ See *ibid.*, 22, para.34. See also Elihu Lauterpacht, Aspects of the Administration of International Justice, (Cambridge: Grotius Publications, 1991), 27 (hereinafter "Aspects").

objections stricto sensu.³¹⁰ In spite of the Court's refusal to rule upon the issue of the jurisdictional link in these earlier cases,³¹¹ it believed itself to have dispelled some of the doubts surrounding the exercise of discretionary intervention.³¹²

In 1990, a chamber of the court resolved in a positive sense the previously controversial question of whether intervention may be permitted in a case in which there exists no specific jurisdictional link between the applicant state and the original parties, when it concluded that the absence of a jurisdictional link was no bar to permission being given for intervention. The Chamber reasoned that the Court's competence in the matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties, but from the consent given, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute. Acceptance of the Statute entails acceptance of the competence conferred on the Court by Article 62. The nature of the competence thus created is definable by reference to the

³¹⁰ See ICJ Reports 1984, 8, para.11; *ibid.* 1990, 111, para.44. In connection with the Court's position on this point, see 4 Schwarzenberger, 402; see also Damrosch, 381, 383. For the view that Italy's application was refused because of the absence of a jurisdictional link, see ICJ Reports 1984, 35 (separate opinion of Mbaye J.); 139, para.18; 146-7, para.38 (Schwebel J. dissenting); 91-2, para.5; 98-9, para.19 (Oda J. dissenting).

³¹¹ See McGinley, 693-4. Cf. McWhinney, 579.

³¹² See ICJ Reports 1984, 28, para.45. Cf. *ibid.* 1990, 132, para.94.

object and purpose of intervention; that is, the protection of a state's "interest of a legal nature" that might be affected by the decision in an existing case already established between other states, namely, the parties to the case. Citing the location of the institution of intervention in the chapter of the Statute captioned "Procedure", and its position in the section of the Rules headed "Incidental Proceedings", the Chamber noted that incidental proceedings, by definition, must be those which are incidental to a case which is already before the Court or Chamber. An incidental proceeding cannot be one which transforms that case into a different case with different parties. Intervention cannot have been intended to be employed as a substitute for contentious proceedings. It follows, from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervenor and the parties is not a requirement for the success of an application for permission to intervene. On the contrary, the procedure of intervention is to ensure that a state with possibly affected interests may be permitted to intervene even though there is no jurisdictional link.³¹³

Finally, the Chamber observed that the use of the words "any basis" in Article 81(2)(c) of the rules shows that a valid link of jurisdiction is not treated as a sine qua non for

³¹³ On this point see *ibid.* 1981, 10-2, paras.15-6; 22, para.2 (separate opinion of Morozov J.); 1984, 15-6, para.23; 22, para.35; 55-6, paras.3-4 (separate opinion of de Aréchaga J.A.). Cf. *ibid.*, 118, para.7 (Ago J. dissenting).

intervention.³¹⁴

(iii) Incidental Jurisdiction

Intervention is an incident of procedure, the fate of which is determined by the decision of the Court on the application to intervene.³¹⁵ Rather than being based on the consent of the parties, it is founded on institutional instruments (the Statute or the Rules of Court or both) and the jurisdictional fact of a valid seisin of the Court. It has an inherent and objective character.

Patterns of incidental jurisdiction include the Court's power to: determine its own jurisdiction under Article 36(6) of the Statute, indicate interim measures of protection under Article 41(1), make orders for the conduct of a case under Article 48, allow intervention by third states under Articles 62 and 63, interpret a judgment under Article 60, revise a judgment, and decide on counter claims. A preliminary exercise of incidental jurisdiction occurs before or regardless of the determination of the substantive jurisdiction. This is possible only in the case of incidental jurisdiction under Articles 36(6), 41(1), 48, 62 and 63 of the

³¹⁴ See *ibid.* 1990, 133-5, paras.96-101; 111, para.44; 1984, 44 (separate opinion of Mbaye J.); 79-80, para.46 (V-P. Sette-Camara dissenting); 146, para.36 (Schwebel J. dissenting). Cf. Rosenne, Procedure, 176.

³¹⁵ See ICJ Reports 1951, 76. For a discussion of intervention as a procedural incident see *ibid.* 1984, 56-7, paras.5-7 (separate opinion of de Aréchaga J.A.); 85, para.75 (V-P. Sette-Camara dissenting), 118, para.7 (Ago J. dissenting), 140, para.22 (Schwebel J. dissenting), 155, para.24 (Jennings J. dissenting).

Statute. The consequential exercise of incidental jurisdiction presupposes a determination of the question of substantive jurisdiction and is, therefore, consequential upon it. This is particularly so in the case of incidental jurisdiction under Articles 60 and 61 of the Statute. A third state need not establish the existence of a jurisdictional nexus with the original parties in order for its application to intervene to be considered and even admitted. However, a jurisdictional link is required for the introduction of a distinct dispute in the guise of an intervention.³¹⁶

While there is much to be said for the view that, where a state is seeking what might be considered a broad kind of intervention as understood in municipal law, or where its purpose for seeking to intervene is to become a true third party in the case, such a state must be required to

³¹⁶ See *ibid.* 1990, 133, para.96; *ibid.* 1984, 38-9, 45-6, 48-9 (separate opinion of Mbaye J.); 71, para.3 and 86, paras.76-7 (V-P. Sette-Camara dissenting); 93-4, para.8 (Oda J. dissenting), 119-20, para.9 (Ago J. dissenting); 133, para.8 and 140-3, paras.22-9 (Schwebel J. dissenting); 150-1, para.8 and 155, para.24 (Jennings J. dissenting); *ibid.* 1981, 27, para.9 (separate opinion of Oda J.), and 35 (separate opinion of Schwebel J.). See further Shihata, 169-70; Rosenne, Law and Practice, 318-9, 422-3; Fitzmaurice, 34 BYIL (1958), 108-9, 124-5; 2 *id.*, 553-8, 550; Hudson, The Permanent Court, 125, n.68, 407-8, 419-20; Kelsen 522; McGinley, 688-9; Merrills, 97. For Judges Morozov, Singh and de Aréchaga J.A., a valid jurisdictional link is an essential prerequisite for discretionary intervention. See ICJ Reports 1981, 22 (separate opinion of Morozov J.) and *ibid.* 1984, 30, para.3 (separate opinion of Morozov J.); 32, para.(i) and 33-4, para.(iii) (separate opinion of Singh J.), and 56ff, paras.5ff (separate opinion of de Aréchaga J.A.). See de Aréchaga's declarations in the Fijian Intervention Cases, *ibid.* 1974, 532-3 and 537-8. See also de Aréchaga, "Intervention", 463, para.30.

demonstrate its jurisdictional links with the original parties.³¹⁷ But where discretionary intervention is limited strictly to the demonstration and safeguarding of the legal interest of a third state, it does not seem that a jurisdictional link should be required. Such an intervention would not violate the principle of consent.³¹⁸

The Monetary Gold Case illustrates the fact that the absence of a third state may have a direct restraining effect upon the Court's activities, since as was the case in that litigation, the Court would be unable to exercise jurisdiction where the legal interest of such a state would form the very subject-matter of a decision. The absence of a third state from a contentious proceeding can also raise evidentiary problems. For instance in the Corfu Channel Case (Merits), documents were supplied by the Yugoslav government which did not intervene in that case. This caused the Court to note that there was a limitation on its reliance on the evidence due to the absence of the state which had provided the documents.³¹⁹

³¹⁷ This fact is conceded by those who express the view that no jurisdictional link with the original parties is required for discretionary intervention. See, for example, ICJ Reports 1981, 25, paras.5-6 (separate opinion of Oda, J.), and *ibid.* 1984, 92-3, para.6 (Oda J. dissenting) and 117-8, para.6 (Ago J. dissenting) and 143, para.27 (Schwebel J. dissenting), and 150, para.6, 153, para.17, 155-6, para.24 (Jennings J. dissenting).

³¹⁸ See *ibid.* 1984, 148, paras.2-3 and 149, para.5 (Jennings J. dissenting); *ibid.*, 44-5 (separate opinion of Mbeye J.). See also Chinkin, 527 and McGinley, 688.

³¹⁹ See Miller, 556. See also the Corfu Channel Case, ICJ Reports 1949, 17. See further, M. Bartos, "L'Intervention Yougoslave Dans l'Affaire du Detroit de Corfou" in 14 CS (1975), 42, 47-51.

(iv) The Principle of Equality

It is difficult to imagine how an intervention for the purpose of safeguarding the legal interests of a third state would violate the principle of equality of states before the Court. This principle is contained in Article 35 of the Statute under which the Court is open to parties to the Statute and to other states under certain conditions; and by implication, in Article 36(2), concerning the reciprocity of rights and obligations - which also suggests equality.

While this principle is one of general scope,³²⁰ it is doubtful whether it applies to Article 62. In the Italian Intervention Case, the Court regarded the equality of states as a fundamental principle underlying its jurisdiction.³²¹ Even so, this principle is not as valid a consideration when dealing with strictly limited intervention as it must be when independent contentious proceedings are being instituted. Moreover, the idea of inequality is an intrinsic property of discretionary intervention.³²² However, it is not the original parties alone which find themselves in a disadvantageous position as far as discretionary intervention is concerned. An intervening state may suffer disadvantages from lack of access to the pleadings in the principal case, the composition of the Court (where it seeks to intervene as

³²⁰ See ICJ Reports 1984, 61, para.21 (separate opinion of de Aréchaga J.A.).

³²¹ See *ibid.*, 22, para.35.

³²² See *ibid.* 1981, 36 (separate opinion of Schwebel J.); *ibid.* 1984, 14, para.19; McGinley, 688.

a party) and procedural arrangements in connection with the hearings on the admissibility of its intervention.³²³

(v) Reciprocity of Rights and Obligations³²⁴

It has also been argued that to allow intervention in the absence of a jurisdictional link between the applicant state and the original parties would amount to a flagrant violation of the principle of the reciprocity of rights and obligations established by the Statute between the states parties which have accepted the compulsory jurisdiction of the Court. Though this principle is expressly proclaimed in respect of declarations of acceptance of the jurisdiction of the Court and Article 36(2), it has been pointed out that it has a wider scope and that it applies a fortiori to the jurisdiction deriving from Special Agreements by which particular disputes are referred to the Court. As regards the principle of reciprocity ratione materiae, Article 36(2) requires the acceptance of the compulsory jurisdiction to be made "in relation to any other state accepting the same obligation".³²⁵

³²³ See ICJ Reports 1981, 6, para.8; Decaux, 185-6.

³²⁴ See generally, T. Minagawa, "Operation of Reciprocity Under the Optional Clause", 4 JAIL (1960), 32-41; H.W.A. Thirlway, "Reciprocity in the Jurisdiction of the International Court", 15 NYIL (1984), 97-138; E.B. Weiss, "Reciprocity and the Optional Clause", in L.F. Damrosch (ed.), The International Court of Justice at a Crossroads (Dobbs Ferry, N.Y.: Transnational Publishers, 1987), 82-105.

³²⁵ See ICJ Reports 1984, 60, para.17 (separate opinion of de Aréchaga J.A.). See further, Huber J.'s observation in PCIJ Series D, No.2, 87.

The principle of reciprocity ratione personae derives from another provision of Article 36(2), that is, the phrase requiring that the acceptance of compulsory jurisdiction may be made on condition of reciprocity on the part of certain states.³²⁶

We consider that in the case of submitting a substantive contentious case to the Court, it is beyond question that a jurisdictional nexus should exist between the parties if the fundamental principles of consent, reciprocity of rights and obligations and the equality of states, on which the jurisdiction of the Court is founded, are to be observed. However, these principles are not violated where a third state is permitted to intervene to protect its legal interests. It has been suggested³²⁷ that the necessary reciprocity would be extant if all states had a right to intervene in disputes in which they feared their interests would be adversely affected. In that case states which have acceded to the Court's compulsory jurisdiction would be able to intervene in disputes even though they did not have the necessary correlative acquiescence to the Court's jurisdiction as the original parties, as they would be able to intervene in disputes brought by Special Agreement by states which have acceded to

³²⁶ See ICJ Reports 1984, 61, para.19 (separate opinion of de Aréchaga J.A.). See also his declaration in the Fijian Intervention Cases, *ibid.* 1974, 532, 537. To require a jurisdictional link in such circumstances would probably nullify Article 62; see PCIJ Series D, No.2, 88 and 92. See also Hudson, The Permanent Court, 420.

³²⁷ See McGinley, 688.

the Court's compulsory jurisdiction. In other words, there would be a general reciprocal right to intervene in cases that affected the interests of the intervenor.

(vi) Other Arguments Concerning the Jurisdictional Link

The thesis that a jurisdictional link is not a necessary requirement for discretionary intervention is also supported by the fact that where it is not considered sufficient implicitly to vest the Court with jurisdiction, an express reference thereto is made as in the case of Article 53 on the default procedure, which like Article 62 is also found in Chapter 3 of the Statute. Article 53 enables the Court to entertain a case in the absence of one of the parties.³²⁸

It has been argued that by analogy with intervention as of right enshrined in Article 63, which like Article 62 is located in Chapter 3 of the Statute on procedure and for the operation of which there is no jurisdictional requirement, the existence of a basis of jurisdiction is not a condition precedent for discretionary intervention. Moreover, treating intervention as of right and discretionary intervention differently as regards the jurisdictional requirement cannot be justified on the basis of apparent dissimilarity of their

³²⁸ See ICJ Reports 1984, 41-4 (separate opinion of Mbaye J.); 86, para.78 (V-P. Sette-Camara dissenting); 142-3 (Schwebel J. dissenting). See further Elias, "Limits", 163-4; id., The ICJ, 89-90. On the default procedure see generally Elkind; Elias, The ICJ, 33-66; Sir Gerald Fitzmaurice, "The Problem of the 'Non-Appearing' Defendant Government", 51 BYIL (1980) 89-122. For a contrary view, see ICJ Reports 1984, 58, para.11 (separate opinion of de Aréchaga J.A.).

subject-matter, especially where the subject-matter of the latter concerns the interpretation of principles and rules of international law.³²⁹

Those who subscribe to the view that the jurisdictional link is a necessary precondition for discretionary intervention have advanced what we might call the theory of the presumption of negligence, according to which all reference to the jurisdictional requirement was inadvertently left out of Article 62 by the Assembly of the League of Nations after it abandoned the idea of general compulsory jurisdiction in favour of the consensual system. This view was first expressed by Judge Altamira, during the formulation of the first Rules of the Permanent Court in 1922.³³⁰ Though this view was denied by other judges, it was subsequently reiterated on no less than two occasions by Judge de Arechaga who maintained that though Article 62 remained untouched when the system of general compulsory jurisdiction was replaced by the optional clause, it must be interpreted and applied as still subject to the condition that the intervening state would have its own title of jurisdiction in relation to the

³²⁹ See *ibid.* 1981, 30-1, paras.15-6 (separate opinion of Oda J.). See also his dissenting opinion, *ibid.* 1984, 104, para.29; 40 (separate opinion of Mbaye J.); 86-7, paras.79-80 (V-P. Sette-Camara dissenting); 119, para.9 (Ago J. dissenting); 143-4, paras.30-2 (Schwebel J. dissenting); 156-7, paras.25-6 (Jennings J. dissenting). For a contrary view see *ibid.*, 57-8, paras.8-10 (separate opinion of de Aréchaga J.A.).

³³⁰ See *ibid.* 1984, 73, para.15 (V-P. Sette-Camara dissenting); McGinley, 687. See also PCIJ Series D, No.2, 89.

respondents.³³¹

This theory was used by Libya and Malta, the original parties in the Italian Intervention Case in their pleadings.³³² The first opportunity for inserting the jurisdictional requirement in the Statute presented itself during the debate on the whole subject, when the 1920 Hague Advisory Committee of Jurists considered whether or not to include the requirement of the jurisdictional link in intervention proceedings.

The second opportunity arose during the formulation of the General Act of Pacific Settlement of 1928 on the issue of peaceful settlement of disputes in the contemplation of judicial or arbitral proceedings. During the discussion of the issue of compulsory jurisdiction, no specific reference was made to any link with intervention proceedings which must have been regarded as incidental to judicial or arbitral settlement of international disputes. Article 62 was revised during the reconsideration of the Statute, including in particular the question of the Court's compulsory jurisdiction, by the Washington Committee of Jurists, assigned the task of drafting the Statute of the International Court of Justice.³³³ In the light of the foregoing, the theory of the

³³¹ See ICJ Reports 1974, 533, 538; *ibid.* 1984, 55, para.3.

³³² See *ibid.* 1984, 73, para.14 (V-P. Sette-Camara dissenting).

³³³ See Elias, "The Limits", 164; *id.*, The ICJ, 90. See also McGinley, 687; ICJ Reports 1984, 73, paras.15 and 16 (V-P. Sette-Camara dissenting); 144-5, para.33 (Schwebel J.

presumption of negligence has been discredited and should be abandoned.

We may deduce from the preceding survey of the issue concerning the necessity of a jurisdictional nexus, that where the intervention is designed to safeguard a concrete legally protected interest of the intervenor, such a state should not be required to establish any basis of jurisdiction which links it with the parties to the principal case. Such an intervention is different from the original submission of a substantive dispute to the jurisdiction of the Court and therefore would not appear to fly in the face of the fundamental principles of consent, reciprocity and equality which underlie the Court's jurisdiction in the case of an original submission of a dispute. An intervention whose purpose exceeds the protection of the vital interests of the intervenor and thus enables it to make claims against the original parties, however, requires the existence of a valid jurisdictional link between it and the original parties. The possibility of such an intervention, as far as the jurisprudence of the Court is concerned, remains open. It is possible to have a situation where a jurisdictional link exists between the intervenor and the original parties. This may be the case where such a state is linked with the main parties by its acceptance of the compulsory jurisdiction of

dissenting). It is significant that no advantage was taken of any of the opportunities provided by the revision of the Rules prior to 1978, either to insert the requirement of the jurisdictional link in the Rules or to propose a statutory amendment to this effect.

the Court under the Optional Clause of the Statute or through a specific treaty or convention in force, or by concluding a special agreement with them. In such circumstances, the third state would be able to intervene either on the side of the original applicant or respondent, or indeed as an independent claimant. The third state would obviously also be able to institute proceedings on the same subject before the Court.³³⁴ The only reason such a state may prefer intervention to the submission of a fresh dispute to the Court would be its desire to secure what has been termed "procedural economy of means"³³⁵ or "economy of litigation".³³⁶

To cite procedural convenience as the purpose of discretionary intervention is to confer on this protective remedy,³³⁷ a marginal status which does not seem to accord with the wishes and intentions of the framers of the Statute.³³⁸ Thus, there is room for the view that discretionary intervention is perceived as a more useful and effective remedy when it is released from the shackles of the dubious requirement of a jurisdictional nexus, than when such

³³⁴ See *ibid.* 1981, 25, para.5-6 (separate opinion of Oda J.); 1984, 92-3, para.6-7 (Oda J. dissenting). See also Oda, "Intervention", 641-2.

³³⁵ See *ICJ Reports* 1984, 26, para.42; cf. *ibid.*, 47, where Mbaye J. expresses doubts about the usefulness of intervention in this regard.

³³⁶ See *ibid.* 1981, 25, para.5; 1984, 93, para.6 (Oda J. dissenting). See also Oda, "Intervention", 641.

³³⁷ See *ICJ Reports* 1984, 18, para.28 and 23, para.37.

³³⁸ See McGinley, 688.

a link is insisted upon at all costs.³³⁹

Rigid insistence on the existence of a basis of jurisdiction between the intervenor and the original parties as a condition for the operation of discretionary intervention may be regarded as an indirect way of compelling wider acceptance of the Court's jurisdiction, either by accepting the compulsory jurisdiction under the Optional Clause or by conferring jurisdiction on the Court in treaties and conventions. For it would seem that it is only then that states would be able to avail themselves of the potential rights endowed on them by the Statute. Otherwise, if the view of the apologists of the jurisdictional requirement should prevail, there is no doubt that for some states, especially those which have not accepted the Court's compulsory jurisdiction, a remedy like discretionary intervention will remain a tantalising mirage. The framers of the Statute could not, after having abandoned the system of universal compulsory jurisdiction in favour of the consensual system, have devised and enshrined in the Statute the procedural faculty of intervention which would be available only to those states which accept the Court's compulsory jurisdiction or which confer jurisdiction on the Court in treaties and conventions, without expressly saying so.

The argument that to allow intervention in the absence of the jurisdictional link would amount to the introduction of

³³⁹ See ICJ Reports 1984, 145, para.35 (Schwebel J. dissenting).

compulsory jurisdiction, and therefore flout the consensualism which underlies the Court's jurisdiction, would seem to be valid in so far as the object of the intervention is something other than the protection of a legal interest. This argument is patently indefensible in the case of a strictly limited intervention whose object is to safeguard the legal interest of the intervenor. It is the insistence on the existence of a jurisdictional link in the case of strictly limited intervention which is suggestive of the idea of the indirect introduction of at least the spirit, if not the letter, of general compulsory jurisdiction, rather than when such a requirement is dispensed with.

6. Conclusion

Although in the Nicaraguan Intervention Case the Chamber rejected the jurisdictional link as an essential condition for discretionary intervention, it kept alive the possibility that, in certain circumstances, such a link might be required.³⁴⁰ Indeed, in the Maltese Intervention Case, the Court remarked that if Malta were seeking to intervene as a party, the question of the jurisdictional link would call for consideration.³⁴¹ The Chamber's ruling on the issue of the jurisdictional link is, therefore, certainly not the last word on the subject.

In conclusion, we submit that respect for the principles

³⁴⁰ See *ibid.* 1990, 134-5, para.99.

³⁴¹ See *ibid.* 1981, 18-19, para.32.

of consent, reciprocity and equality would seem to be a relevant consideration more in relation to principal than incidental jurisdiction. If therefore the Court were to choose intervention as a party as the only genuine form of discretionary intervention, those states which have not acceded to the optional clause would be able to intervene in proceedings to safeguard their interests. They would, unlike those states which have accepted the Court's compulsory jurisdiction, effectively be denied the choice between intervention as a party and strictly limited or non-party intervention.

In the circumstances the adoption of intervention as a party, and strictly limited or non-party intervention, would appear to hold the key to the resolution of a problem. Not only would this solution enable a state without any valid jurisdictional link with parties to a principal case to intervene in proceedings in that case to protect its legal interests, but it would also give a state with valid jurisdictional links with the original parties the freedom to choose to intervene on either a party or a non-party basis. Above all, it would enable the Court itself, by means of its considerable discretion to decide, in the light of the circumstances of each particular case, which of the two types of discretionary intervention it would grant to the applicant. The case for the adoption of this solution may also be supported on policy grounds by the natural meaning of Article 62, as well as by its travaux préparatoires. Thus, it is

possible to combine teleological interpretation with the plain meaning method of construction, an approach which retains the potential effectiveness of Article 62, which would otherwise be lost by rigid insistence on the jurisdictional requirement as an essential condition for its operation.³⁴² This proposed solution also clarifies and reconciles certain provisions of the 1978 Rules. It makes it possible to reconcile the jurisdictional requirement embodied in Article 81(2)(c) of these Rules with the relevant statutory provisions, especially Article 62. It also clearly highlights the distinction between the wording of Articles 38 and 81(2)(c) as regards the jurisdictional requirement in connection with substantive and incidental jurisdiction.

There is a link between Article 81(2)(b) and (c) which require the indication of the precise object of the intervention and the specification of the existence of any basis of jurisdiction between the applicant and the original parties, in that they enable the Court in limini litis to ascertain whether the applicant intends to intervene as a non-party or as a party. Thus, the proposed solution justifies the existence of Article 81(2)(b) and (c). This solution also has the merit that respect for the principle of optional jurisdiction is ensured, since the jurisdictional link would be required in case of an intervention which would give rise to a dispute, but not where the intervention does not involve a dispute with the original parties. In the latter case, the

³⁴² See to the same effect, Chinkin, 527.

original parties, which would not be compelled to litigate with another state within the meaning of Article 36 of the Statute, would have no cause for complaint. Here, the principle of consent would not be infringed, as with Article 63 of the Statute the original parties would merely be required to tolerate the participation of a third state which does not intend to make claims against them. Another advantage of this solution is that it avoids distorting Article 62 of the Statute by lending it a meaning which it does not convey, and thus enables us to dispense with the argument whereby Article 62 is seen as conferring jurisdiction on the Court whereas derogating from the principle of consensualism.³⁴³

The proposals for two models of discretionary intervention would render this procedural remedy more effective, and therefore more available and attractive to states. Admittedly, frequent recourse to the use of discretionary intervention itself depends to a very great extent on wider use of the Court by states for the settlement of international disputes.³⁴⁴

³⁴³ See to the same effect, ICJ Reports 1984, 43-5 (separate opinion of Mbaye J.).

³⁴⁴ See Jessup, 905. See also Miller, 550. In this connection, see generally Sir Gerald Fitzmaurice, "Enlargement of the Contentious Jurisdiction of the Court", in *Future of the Court, 461-99.

CHAPTER THREE
INTERVENTION AS OF RIGHT¹

1. Introduction

In the preceding chapter, we discussed one of the specific guarantees which the Statute of the Court provides to protect the rights of third states, that is, discretionary intervention.

In this chapter we shall deal with the other variant of intervention enshrined in the Statute, namely, intervention as of right. This type of intervention is contained in Article 63 of the Statute of the Court according to the terms of which:

(1) Whenever the construction of a convention to which states other than those concerned in a case are parties is in question, the registrar shall notify all such states forthwith.

(2) Every state so notified has the right to intervene in the proceedings; but if it uses this right the construction given by the judgment will be equally binding upon it.

Besides exploring the conditions necessary for the operation of this kind of intervention, the extent, if any, of the discretion exercised by the Court in the matter of determining the admissibility of a declaration of intervention by an interested third state will also be examined. Another issue relates to the impact of the Court's judgment on a third state whose declaration of intervention has either been

¹ See generally, Davi, 51-91, 227-63; Guyomar, 525-6.

allowed or dismissed.

2. Evolution²

Though, as already noted,³ discretionary intervention has existed in the principal legal systems of the world for centuries, intervention as of right is peculiar to international law, and consequently has no parallel in municipal legal systems. As regards international law, not only does this latter type of intervention have a longer history, but also until quite recently it was only with this type of intervention that the international judicial system could claim to have any actual experience.⁴

The first document of international character to recognise certain elements of discretionary intervention was the draft rules of international arbitral procedure adopted by the Institute of International Law on 28 August 1875. Under the terms of Article 16 of these regulations:

Neither the parties nor the arbitrators can of their own accord involve any other states or third persons whatever in the case without special authorisation expressed in the compromis and the previous consent of the third party.

The voluntary intervention of a third party is admissible only with the consent of the parties that have concluded

² See generally, Davi, 91-104; Rosenne, "Some Reflections", 75-8.

³ See 119 and 123 above.

⁴ See Miller, 550; Chinkin, 495. See also the dissenting opinion of Ago J. in the Italian Intervention Case in ICJ Reports 1984, 115, para.2.

the compromis.⁵

The delegates to the 1899 Peace Conference, who accepted the principle of limited intervention, must have been inspired by the approach adopted by the International Law Institute. At that conference, Mr. T.M.C. Asser, the Dutch representative, proposed an amendment to the Russian draft of an arbitral code which, with minor modifications became Article 56 of the Convention of 1899 for the Pacific Settlement of International Disputes.⁶

The 1907 Hague Peace Conference embodied substantially the same provision in Article 84 of the 1907 Convention for the Pacific Settlement of International Disputes.⁷

Apart from the Hague Conventions, the only other instance in which third party intervention was expressly provided for was Article 6 of the 1903 Protocols of Agreement between Venezuela and Great Britain, Germany and Italy, to which the United States and other states were also parties, which resulted in the Venezuelan Preferential Claims Arbitration. This provision stated that:

Any nation having claims against Venezuela may join as a

⁵ See Mani, 251.

⁶ See Mani, 252; K.S. Carlston, The Process of International Arbitration (Westport, Conn: Greenwood, 1946), 124; Miller, 550, n.3.

⁷ See Article 84 of the 1907 Convention for Pacific Settlement of International Disputes in, for example, J.H. Ralston, International Arbitral Law and Procedure (Boston: Ginn & Co., published for the International School of Peace, 1910), Appendix B, 335; Mani, 252.

party in the arbitration provided for by the agreement.⁸

The draft scheme for the establishment of a Permanent Court of International Justice, provided in Article 23 for intervention by third states in cases involving the construction of conventions.⁹

This provision was later revised as Article 61 of the draft scheme, to read as follows:

Whenever the construction of a convention in which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. Every state so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be as binding upon it as upon the original parties to the dispute.¹⁰

This text was subsequently adopted without any alterations. The eighth session of the League Council, held in San Sebastian from 30 July to 5 August 1920, in its resolution of 5 August, approved the draft prepared by the Hague Advisory Committee of Jurists.¹¹

The tenth session of the Council held in Brussels from 22 to 28 October 1920 adopted a report on a Permanent Court of International Justice presented by M. Léon Bourgeois of France.¹² The Third Committee of the First Assembly of the

⁸ See Mani, 253.

⁹ See Procès-Verbaux (1920), 571. See also Oda, "Intervention", 632.

¹⁰ See Procès-Verbaux (1920), 659-70; see also Oda, "Intervention", 634 and 637.

¹¹ See League of Nations, Documents, 38; see also LNOJ, No.8, (1920), 12ff; Oda, "Intervention", 636.

¹² See League of Nations, Documents, 45-60.

League, which met from 17 November to 11 December 1920, set up a sub-committee¹³ which presented a draft scheme containing, among other things, Article 63, which was identical to Article 61 of the Brussels text.¹⁴ Mr. Hagerup's report on behalf of the sub-committee which accompanied the draft scheme did not carry any substantive explanations on Article 63.¹⁵ The third committee discussed the plan for a Permanent Court of International Justice submitted by the sub-committee, and this article, among others, was adopted without question.¹⁶ At its twentieth and twenty-first preliminary meetings on 13 December 1920, the First Assembly of the League unanimously adopted a resolution concerning the establishment of a Permanent Court of International Justice with little detailed discussion on, or amendment of, the provisions of the draft scheme. Consequently, the text of Article 63 of the Statute of the Permanent Court remained unaltered.¹⁷

Article 63 did not undergo any revision when the Statute was amended by a protocol concerning the revision of the Statute of the Permanent Court which formed the subject of a

¹³ See *ibid.*, 84-158.

¹⁴ See Oda, "Intervention", 638.

¹⁵ See League of Nations, Documents, 206-13; see also Oda, "Intervention", 637.

¹⁶ See League of Nations, Documents, 100-4; see also Oda, "Intervention", 638.

¹⁷ See League of Nations, Documents, 225-56; see also, Oda, "Intervention", 638.

resolution of the Assembly of the League on 14 September 1929.¹⁸ The protocol came into force on 1 February 1936.

The Committee of Jurists designated by the United Nations to prepare and submit to the San Francisco Conference a draft Statute for an International Court of Justice met in Washington from 9 to 19 April 1945.¹⁹ The Committee submitted a report on a draft Statute of an International Court of Justice to the San Francisco Conference on 20 April.²⁰ The text of Article 63 of the Statute of the International Court, as adopted by the San Francisco Conference, was identical to that of Article 63 of the Statute of the Permanent Court. In short, Article 63 of the present Statute, like its corresponding provision in the Statute of the Permanent Court, was borrowed from the provisions of Article 84 of the 1907 Hague Convention for Pacific Settlement of International Disputes, which was inherited, with some minor modifications, from Article 56 of the 1899 Hague Convention for the Pacific Settlement of International Disputes.

3. Conditions for the Operation of Intervention as of Right

The foregoing résumé of the genesis of intervention as of right indicates not only that both types of intervention

¹⁸ See *ibid.*, 639.

¹⁹ See 14 UNCIO, 485. See also Oda, "Intervention", 639.

²⁰ See 14 UNCIO, 648-80. See also Oda, "Intervention", 639.

enshrined in the Statutes of the International Court have separate histories,²¹ but also that, unlike intervention as of right, discretionary intervention had no precursor in state practice in the period prior to 1920, when the Statute of the Permanent Court was framed.²²

(a) The Meaning of Article 63(1)

It is clear from Article 63(1) that for intervention as of right to be called into operation the construction of a convention must be involved in a case pending before the Court. It is understood that construction of a legal document means the same thing as its interpretation.²³ In fact, construction is defined as the process of ascertaining the meaning of a written document.²⁴ The term 'construction of a convention' cannot and should not be understood to mean that the construction of the whole convention must be in question in a case before the Court. Rather, it must be taken to mean any part of any provision in, and any article or part of an article of a convention.

The word "convention" appears in Articles 38 and 63 of

²¹ See Louis F. del Duca's excellent review of Professor Angelo Davi's L'Intervento davanti alla Corte Internazionale di Giustizia in 81 AJIL (1987), 467 (hereinafter "del Duca").

²² See e.g., Miller, 550-1.

²³ See E. Hambro, "The Interpretation of Multilateral Treaties by the International Court of Justice", 39 TGS (1953), 241 (hereinafter "Interpretation"); also *id.*, "Intervention" 391(5).

²⁴ See, for example, I Jowitt, 646: "Construction, the noun of ascertaining the meaning of a written document".

the Statute.²⁵ It may be assumed that it has the same meaning in both provisions. According to the Vienna Convention on the Law of Treaties, which may, to a large extent, be said to be a codification of international customary law, "treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments in whatever its particular designation.²⁶ It has been noted that the fact that this definition rules out conventions between states and other international subjects, or between other international subjects inter se does not mean that they are not mutatis mutandis covered by the same rules. It has been suggested that such treaties should be included for the purpose of Article 63 even though they did not play an important role during the drafting of the Statute of the Permanent Court in 1920.²⁷

The most difficult aspect of Article 63(1) is probably the meaning of the construction of a convention being "in

²⁵ Fitzmaurice has observed that "... it follows that the convention must be a multilateral, or at least a plurilateral, and not merely a bilateral one." See 2 Fitzmaurice, 550; id., 34 BYIL (1958), 124. Chinkin has observed that: "The use of the words 'states ... are parties' in Article 63 indicates that it must refer to a convention in force". See Chinkin, 503, n.36.

²⁶ See Hambro, "Intervention", 389-90. See also ICJ Reports 1984, 236-7 (Schwebel J. dissenting). The Vienna Convention on the Law of Treaties is reprinted in Brownlie, Basic Documents, 349-87; Millar, Treaties, 10-44.

²⁷ See Hambro, "Intervention", 390.

question". The Court has spoken of certain conventions being "in issue".²⁸ This, however, does not make the meaning of the original phrase any clearer. According to one interpretation, any mention of a treaty in any pleading should be sufficient to bring Article 63 into operation. Another interpretation is that Article 63 should be applied only when the Convention is the main legal consideration of the judgment.²⁹ Neither extreme position is either reasonable or acceptable. The requirement that the construction of a convention must be in question in a case does not necessarily imply that the Court should base its judgment exclusively, or even chiefly, on the convention concerned. Furthermore, it cannot imply that the convention is construed in the operative provisions of the judgment. For even though, in the nature of things, the operative provisions constitute that part of the judgment which alone in principle is legally binding on the parties, to whom it is also usually specifically addressed, it is so brief that it rarely includes a construction of a convention. The logical solution would seem to be that the interpretation of a treaty is found necessary for the judgment in question. That is, in addition to being an obiter dictum it must also form part of the ratio decidendi of the judgment.³⁰

²⁸ See ICJ Reports 1972, 48.

²⁹ See Hambro, "Intervention", 392; id., "Interpretation", 248.

³⁰ See Hambro, "Intervention", 393 and 398; id., "Interpretation", 241.

Intervention as of right is granted to states which are parties to the convention in question. The Vienna Convention on the Law of Treaties defines a party as a state which has consented to be bound by the treaty and for which the treaty is in force. It is, however, not absolutely certain that this restrictive interpretation need be accepted outside the convention itself.³¹ The Court, in the Reservations Case, conferred certain rights on states which had signed but not ratified the Genocide Convention.³² This was later incorporated into the Vienna Convention on the Law of Treaties.

It is believed that intervention as of right has considerably extended the jurisdiction of the Court.³³ Unlike discretionary intervention, it would seem that as regards intervention as of right, any party to a convention, the construction of which is in issue in a pending case, necessarily has an interest in the matter. In other words, the legal interest of such a third state in the proceedings is presumed.³⁴

³¹ See Hambro, "Intervention", 390; id., "Interpretation", 245-6.

³² See ICJ Reports 1951, 28. See also, Hambro, "Intervention", 391; 2 Fitzmaurice, 550-1; id., 27 BYIL (1950), 124.

³³ See Hambro, "Intervention", 391; id., "The Jurisdiction of the International Court of Justice", ADIRC (1950), 148 and 150 (hereinafter "Jurisdiction"); id., "Some Observations", 154; Rosenne, Law and Practice, 433; Anand, Compulsory Jurisdiction, 283.

³⁴ See Chinkin, 523; Jessup, 904. See also PCIJ Series A, No.1, 13.

(b) The Practice of the Permanent Court of International Justice

The provisions concerning intervention as of right in the 1922 Rules of the Permanent Court do not appear to have attempted either to elaborate on or supplement the conditions prescribed by its Statute. Article 60 of those rules merely provided that any state desiring to intervene under the terms of Article 63 should inform the Registrar in writing, before the commencement of the oral proceedings. The Court was required to enable the intervening state to inspect the documents bearing on the interpretation of the convention in question in the case and to comment thereon. In spite of the lack of detailed provisions in its rules regarding intervention as of right, the Permanent Court had to deal with this type of intervention in its first contentious case.

(c) The SS Wimbledon Case³⁵

In March 1921, the German authorities denied the British

³⁵ See SS Wimbledon Case (Application by Polish Government to Intervene), in PCIJ Series A No.1, 5 at 9-14. For references to this case in the literature see, for example, de Aréchaga, "Intervention", 458-61; Elias, "The Limits", 159-61; id., The ICJ, 85-6; Damrosch, 381-2; Hambro, "Intervention", 87, n.12; Oda, "Intervention", 645; Rousseau, 308; Mani, 254, 259, 273; McGinley, 673, nn.19, 20; Miller, 553-5, 557-8; J. Sztucki, "Intervention Under Article 63 of the I.C.J. Statute in the Phase of Preliminary Proceedings: The 'Salvadorean Incident'", 79 AJIL (1985), 1005, 1029 (hereinafter "Sztucki"); 4 Schwarzenberger, 211, 401; Hudson, The Permanent Court, 348, 361, 362, 383, 423, 543, 588, 627, 635; 2 Fitzmaurice, 552; Chinkin, 495; I. Von Munch, "The Wimbledon", in Bernhardt (ed.), EPIL [Instalment 2 (1981)], 293-4; Fachiri, 122-5, 166-74; Smyrniadis, 35, 39-40; Jenks, Prospects, 129; Shihata, 41; Guyomar, 545, 553; Davi, 3ff, 7, 8, 58, 59, 76, 148ff, 168, 223, 228, 229, 257.

ship, the SS Wimbledon, chartered by a French company, bound for Danzig with a cargo of military material destined for Poland, free access to the Kiel Canal. This caused the ship to remain at the entrance of the canal for a few days. The ship then proceeded to Danzig by a longer route, the Danish Straits.

In January 1923, Great Britain, France, Italy and Japan instituted proceedings before the Permanent Court against Germany for demurrage, the cost of remaining idle at the entrance of the canal, and deviation, the cost of the longer trip. Germany sought to justify its action on the grounds that a state of war existed between Poland and Russia and that its regulations on neutrality prohibited the transit of war material through its territory to either country. The applicants contended that Germany was obliged nonetheless under Article 386 of the Treaty of Versailles to keep the canal open.

The issue in the primary proceedings which the Court had to decide was "whether the German authorities were within their rights in refusing to the SS Wimbledon free access to the Kiel Canal and, if necessary, to determine the damages due for the prejudice to this vessel by reason of this refusal."³⁶

In May 1923, Poland, in agreement with the applicants, presented to the Court a request to permit it to intervene in the suit under Article 62 of the Statute and Articles 58 and

³⁶ See PCIJ Series A, No.1, 12.

59 of the Rules on their side.³⁷ Although Article 63 of the Statute was not expressly mentioned, Poland cited in support of its request its participation in the Treaty of Versailles and the violation of the rights and interests guaranteed to it under Article 380 thereof, resulting from the German action.³⁸ Responding to the Polish application, Great Britain suggested that Poland's right to intervene arose under Article 63 rather than Article 62 of the Statute, inasmuch as Poland was a signatory of both the Treaty of Versailles and the Court's Statute.³⁹

Poland altered its presentation, and at a public sitting of the Court on 15 June 1923, announced that it would avail itself of the right conferred upon it as a party to the Treaty of Versailles by Article 63 of the Statute and therefore did not insist that the grounds submitted as justification for intervention under Article 62 should be taken into consideration.⁴⁰ Poland also stated that it would not ask the German government for any special damages for the prejudice caused to it in the case of the SS Wimbledon.⁴¹

Consequently, the Court thought it unnecessary to consider and satisfy itself whether Poland's intervention was justified by an interest of a legal nature within the meaning

³⁷ See *ibid.*

³⁸ See *ibid.*, 12-3.

³⁹ See PCIJ Series C, No.3 Vol.1, 107.

⁴⁰ See PCIJ Series A, No.1, 13.

⁴¹ See *ibid.* See also *ibid.* Series C No.3, Vol.2, 118.

of Article 62. The Court considered it sufficient to note that the suit involved the interpretation of certain clauses of the Treaty of Versailles, and that Poland was a party thereto. After recording that Poland intended to avail itself of the right to intervene conferred by Article 63 on 28 June, the Court accepted Poland's intervention.⁴² It is clear that Poland's application to intervene was granted because Poland had abandoned Article 62 as the basis of its claim to intervene in favour of Article 63. In consequence, Poland disavowed any intention of asking the respondent for any damages for the prejudice caused to it.⁴³

This case furnishes sufficient authority for the view that it cannot be the proper purpose of intervention as of right to seek special damages or make specific claims for compensation from either or both of the original parties. From the Court's handling of the Polish intervention, we may draw the inference that the Court wished to abide strictly by the conditions laid down in its Statute to govern the operation of intervention as of right so as to confine it to cases involving the construction of conventions. This approach is consistent with the position which it adopted in its Rules.

When the Court decided to revise its Rules in 1926 it had handled only one case relating to intervention as of right.

⁴² See PCIJ Series A, No.1, 31.

⁴³ See the Court's observation, *ibid.*; de Aréchaga, "Intervention", 460-1; Miller, 552.

Since the simple provisions of the Rules on this type of intervention had been strictly and literally applied to decide that case, it would seem that there was no interpretation of the relevant rules in its jurisprudence to be incorporated. Thus, no attempt was made to seize the opportunity provided by the revision of the Rules to fill gaps in the provisions concerning intervention as of right.⁴⁴ Similarly, the 1931 Rules did not clarify the wording of Article 63. Article 60 of those Rules stipulated that:

The notification provided for in Article 63 of the Statute shall be sent to every state or member of the League of Nations which is a party to the convention relied upon in the special agreement or in the application as governing the case submitted to the Court... The registrar shall take the necessary steps to enable the intervening state to inspect the documents in the case, insofar as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court. Such observations shall be communicated to the parties, who may comment thereon in Court. The Court may authorise the intervening state to reply.⁴⁵

During the preparation of the 1936 Rules that the Permanent Court modified the provisions concerning intervention as of right. Article 66 of those Rules laid down that any member of the League or state which is a party to the convention in question, and to which the notification has not been sent, may file a declaration of intention to intervene.⁴⁶

⁴⁴ Indeed, it appears to have been assumed that there were no gaps to be filled in provisions on intervention under Article 63. See, e.g., Sztucki, 1029-30.

⁴⁵ See Hudson, The Permanent Court, 726.

⁴⁶ See *ibid.*, 750.

Article 66(3) provided that such declarations shall be communicated to the parties.⁴⁷ If any objection or doubt should arise as to whether the intervention is admissible, the decision shall rest with the Court. Under the terms of Article 66(4), the Registrar shall enable the intervening party to inspect the documents in the case bearing on the interpretation of the convention in question and to comment thereon.⁴⁸ Article 66(5) requires these comments to be communicated to the other parties, who may discuss them in oral proceedings in which the intervening party shall participate.⁴⁹

The framers of the 1936 Rules anticipated the possibility of notifications under Article 63 of the Statute not being sent to potential intervening states by making it possible for such states to file declarations of intervention regardless of whether or not they receive the said notifications. By leaving the ultimate decision on the admissibility of declarations of intervention to the Court, they appeared to recognise the fact that no third state has an absolute right to intervene.⁵⁰

⁴⁷ See *ibid.*

⁴⁸ See *ibid.*

⁴⁹ See *ibid.*

⁵⁰ See Sztucki, 1030; Miller 552; Hambro, "Interpretation", 249.

(d) The Practice of the International Court of Justice

With the exception of the third paragraph of Article 66 of the 1946 Rules of the International Court, which required the Registrar to give publicity to declarations of intervention, the rest of that Article is substantially the same as the corresponding provision of the 1936 Rules of the Permanent Court.⁵¹ It was in the Haya de la Torre Case⁵² that the International Court, in addition to interpreting these provisions, also laid down other conditions to govern the procedural remedy of intervention as of right.

(e) The Haya de la Torre Case

In its judgment in the Asylum Case⁵³, the Court defined the legal relations between the parties with regard to matters relating to diplomatic asylum in general, and particularly to the asylum granted to Senor Victor Raoul Haya de la Torre

⁵¹ See Rosenne, Documents, 181-3.

⁵² See Haya de la Torre Case, Judgment of 13 June 1951, ICJ Reports 1951, 71. The Haya de la Torre Case was considered by the Court to rank formally as a new dispute and not simply as a part or a further development of the previous proceedings in the Asylum Case. See 2 Fitzmaurice, 554, n.1. For other references to this case by the same author, see *ibid.*, 552, n.1, 554-5; *id.*, 34 BYIL (1958), 124, n.1, 126-8. For other references, see: Elias, "The Limits", 161-2; *id.*, The ICJ, 86-7; Hambro, "Intervention", 387, 389, 397; *id.*, "Interpretation", 240; Oda, "Intervention", 644; Guyomar, 540, 544, 546, 549, 555; Jenks, Prospects, 667-8, 287, 420; 4 Schwarzenberger, 401-2; Shihata, 41; Gross, "Treaty Interpretation", 109-10; Davi, 7, 8, 48, 57-9, 65ff, 76, 167, 205, 223, 228ff, 257; Damrosch, 382; Anand, Compulsory Jurisdiction, 283.

⁵³ See ICJ Reports 1951, 77. See also, Colombian-Peruvian Asylum Case, Judgment of November 20th, 1950, ICJ Reports 1950, 266 (hereinafter "The Asylum Case").

(hereinafter Haya de la Torre) by the Colombian Ambassador in Lima on 3-4 January, 1949. The Court found that the asylum was not granted in conformity with Article 2(2) of the Havana Convention on Diplomatic Asylum of 1928. On the day the judgment was delivered Colombia submitted to the Court a request for interpretation, which by the judgment of 27 November 1950 was declared to be inadmissible.⁵⁴

Following disagreement between the parties on the manner of the execution of these earlier judgments, Colombia filed an application instituting proceedings against Peru. It cited Article 7 of its Protocol on Friendship and Cooperation with Peru of 24 May 1934 as the basis of the Court's jurisdiction to deal with the case.⁵⁵

The Court found that since no objection had been raised to a decision on the merits, the conduct of the parties was sufficient to confer jurisdiction on it.

In January 1951 Colombia informed the Registrar that it relied on Article 1(2) of the Convention on Asylum signed at Havana in February 1928 and requested that effect be given to the provisions of Article 63 of the Statute.⁵⁶ Accordingly, the Registrar informed states which were parties to the Convention other than those concerned in the case.

In February 1951 Cuba, which had requested and, after the

⁵⁴ See ICJ Reports 1951, 77.

⁵⁵ See *ibid.*, 73.

⁵⁶ See *ibid.* See also ICJ Pleadings (1950), Haya de la Torre Case, 185.

parties had been consulted, been granted access to the pleadings and annexed documents in the case, addressed to the Registrar a letter and a memorandum which contained its views concerning the construction of the Havana Convention and its general attitude towards asylum.⁵⁷ This letter, considered as a declaration of intervention under Article 66(1) of the 1946 Rules, was, pursuant to Article 66(2)(3), duly publicised. The memorandum attached to the letter, which was considered by Cuba as constituting the written observations provided for in Article 66(4) of the Rules, was simultaneously communicated to the original parties.

Following an objection to Cuba's intervention by Peru, the Court, in application of Article 66(2) of the Rules, decided to hear the observations of the parties and Cuba on the admissibility of the latter's intervention. Peru contended that Cuba's intervention was inadmissible owing to the declaration of intervention being out of time and because of the fact that the declaration and the accompanying memorandum did not constitute intervention in the true meaning of that term, but an attempt by a third state to appeal against the Asylum Case. Peru was of the opinion that the Haya de la Torre Case could not give rise to the construction of a convention within the meaning of the Statute and, in particular, of the Havana Convention, concerning whose meaning judgment was given on 20 November 1950.⁵⁸

⁵⁷ See ICJ Reports 1951, 74; ICJ Pleadings, 1950, 117.

⁵⁸ See ICJ Pleadings, 1950, 123-7; ICJ Reports 1951, 74.

Regarding Peru's contention the Court observed that:

Every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings.⁵⁹

The Court explained that the subject matter of the Haya de la Torre Case, which concerned the question of the surrender of Haya de la Torre to the Peruvian authorities, differed from that of the earlier Asylum Case which was terminated by the judgment of 20 November 1950. This question was outside the submissions of the parties in that case and was therefore not decided by the Asylum Case. The Court further observed that the only point which it was necessary to ascertain was whether the object of the intervention of Cuba "is in fact interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee to the Peruvian authorities."⁶⁰

On this point the Court stated that since the memorandum attached to Cuba's declaration of intervention was devoted almost entirely to a discussion of questions which the Asylum Case had already decided with the authority of res judicata, it did not satisfy the conditions of a genuine intervention.⁶¹

At a later public hearing, Cuba stated that its intervention was based on the fact that the Court was required

⁵⁹ See *ibid.*, 76.

⁶⁰ See *ibid.*, 1951, 77.

⁶¹ See *ibid.*

to interpret an aspect of the Havana Convention which had not been considered in the Asylum Case.⁶²

This led the Court to remark that:

Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute, and the Court, having deliberated on the matter, decided ... to admit the intervention in pursuance of paragraph 2 of Article 66 of the Rules.⁶³

It is significant that Cuba did not seek to intervene in the Haya de la Torre Case in order to claim any specific relief for itself. Indeed, it does not appear that it obtained any specific profit or material benefit from its intervention.⁶⁴

It was in the Haya de la Torre Case that the Court, while underlining some of the characteristics of the "genuine" intervention, prescribed additional conditions for the operation of this procedural remedy.⁶⁵

First, the Court described intervention as being incidental to the proceedings in a case.⁶⁶ Thus, intervention must take place during proceedings actually in

⁶² See *ibid.*

⁶³ See *ibid.* In accordance with Article 66(5) of its Rules, the Court heard a statement on the interpretation of the Havana Convention presented by Cuba.

⁶⁴ See Miller, 553; Oda, "Intervention", 645.

⁶⁵ See 2 Fitzmaurice, 553-5; *id.*, 34 BYIL (1958), 127; Chinkin, 498, 516, n.86. These characteristics, though spelled out in respect of intervention as of right, would apply equally to discretionary intervention.

⁶⁶ See, for example, Mani, 259; Chinkin, 498; 2 Fitzmaurice, 553; *id.*, 34 BYIL (1958), 127; Sztucki, 1015. See further, ICJ Reports 1990, 134, para.98.

progress before the Court. It therefore goes without saying that no third state can intervene in proceedings in a case which has not been commenced or which has been terminated. It is noteworthy that it was only after Cuba had stated that it based its intervention principally on an aspect of the interpretation of the Havana Convention on Asylum which, on the Court's own admission, had not been interpreted in the previous Asylum Case, that the Court decided to admit its intervention.⁶⁷ This case also provides some support for the view that a third state which has failed to intervene in proceedings in a case which culminates in a definitive judgment cannot later impugn it by intervening in further proceedings concerning its execution.⁶⁸ It will be recalled that when the Court found that the primary proceedings in the Nuclear Tests Cases had become moot, it also found, in consequence, that Fiji's applications to intervene in those proceedings had lapsed.⁶⁹

Second, the Court observed that the subject matter of the intervention must be sufficiently related to the pending primary proceedings in order for it to be admissible.⁷⁰ Cuba's declaration of intervention was admitted only after it had been stripped of irrelevancies and trimmed so as to render

⁶⁷ See ICJ Reports 1951, 77.

⁶⁸ See, for example, Mani, 267; Chinkin, 521.

⁶⁹ See ICJ Reports 1974, 530, 535; Chinkin, 498.

⁷⁰ See, for example, Chinkin, 498; Mani, 259; 2 Fitzmaurice, 554; *id.*, 34 BYIL (1958), 128; Miller, 550.

it sufficiently related to the issue in the main case, namely whether in accordance with the Havana Convention on Asylum of 1928, Colombia ought to give effect to the earlier Asylum Judgment by the particular method of causing its Embassy in Lima to surrender Haya de la Torre directly into the hands of the Peruvian authorities.⁷¹

It was in the Haya de la Torre Case that the Court for the first time referred to the concept of the true object of the intervention. After having differentiated the subject matter of the instant case from that of the earlier Asylum Case, the Court remarked that the only point which it was necessary to ascertain was whether the object of Cuba's intervention was, in fact, interpretation of the Havana Convention in regard to the question whether Colombia was under an obligation to surrender the refugee, Haya de la Torre, to the Peruvian authorities.⁷² To the extent that the memorandum accompanying Cuba's declaration of intervention dealt almost entirely with questions which had been decided in the previous Asylum Case, the Court did not hesitate to find that it was not a genuine intervention. Indeed it is difficult to see how the true object of an intervention, the subject matter of which mainly concerned questions which had been settled in a previous judgment, could be an aspect of the interpretation of the Havana Convention which had not been

⁷¹ For other possible methods of terminating the asylum see 2 Fitzmaurice, 555, n.1; id., 34 BYIL (1958), 129, n.1.

⁷² See ICJ Reports 1951, 77.

addressed in that earlier judgment. It was only after Cuba had altered the basis of its intervention that its true object was indeed found to be interpretation of the Havana Convention regarding the question of the surrender of Haya de la Torre to the Peruvian authorities.

The concept of the true object of the intervention which was first mentioned in the Court's jurisprudence in the Haya de la Torre Case, and relied on in subsequent cases, was later incorporated into the 1978 version of the Court's rules.⁷³ The characteristics of intervention as of right outlined in this case may also be considered as constituting significant limitations on the scope and operation of this procedural remedy.⁷⁴

(f) The Position under the 1972 and 1978 Rules

Following the partial revision of the Court's Rules in 1972, Article 66 of the 1946 Rules concerning intervention as of right became Article 71 without any amendment in its substance.⁷⁵ Any substantial modification of the statutory provision on this procedural remedy had to await the completion of the revision of the Court's Rules in 1978.

⁷³ See Article 81(2)(b) of the 1978 Rules. See also ICJ Reports 1981, 12, para.18; 13, paras.19-21, 14, para.23, 15, para.24, 16, para.27, 17, paras.29-30, 18, paras.31-2; *ibid.*, 1984, 3 at 8, para.10, 12, para.17, 15, paras.21-2, 17, para.26, 18, para.28, 19, para.29, 21, para.33, 23, para.36, 24, para.38.

⁷⁴ See Mani, 259; Miller, 554; Rosenne, Law and Practice, 432; *id.*, Procedure, 177; Sztucki, 1012, 1029.

⁷⁵ See Rosenne, Procedure, 177; *id.*, Documents, 181-2

Under the 1978 Rules a state desiring to intervene must file a declaration to that effect before the commencement of oral proceedings. In exceptional circumstances a declaration at a later stage may, however, be admitted. The declaration must contain, among other things:

- (a) particulars of the basis on which the declarant state considers itself a party to the convention;
- (b) identification of the particular provisions of the convention, the construction of which it considers to be in question;
- (c) a statement of the construction of those provisions for which it contends;
- (d) all relevant supporting documents.

Such a declaration may be filed by a state which has not received the notification referred to in Article 63 of the Statute.

The declaration of intervention is to be communicated forthwith to the parties to the case; to the Secretary-General and Members of the UN; to other states entitled to appear before the Court and to any other states which have been notified under Article 63 of the Statute. The parties shall be invited to furnish their written observations within a time-limit to be fixed by the Court. Under the Rules, the Court decides whether a declaration of intervention is admissible as a matter of priority, unless in view of the circumstances of the case the Court shall otherwise determine. If there is an objection to the admissibility of a declaration

of intervention the Court shall hear the declarant State and the parties before deciding. If a declaration of intervention is admitted the intervening state shall be furnished with copies of the pleadings and documents annexed and entitled to comment on the subject matter of the intervention. The observations of the intervening state shall be communicated to the parties and to any other intervening states for their comments.⁷⁶

The 1978 Rules are cast in such a way as to distinguish more clearly than ever between the two forms of intervention as enshrined in the Statute, while at the same time recognising the similarities between them. Certain consequences that flow from the Court's meagre experience regarding intervention have been generalised.⁷⁷ The Court has accomplished this task without dealing with the hybrid situation where both types of intervention might be possible during proceedings in the same case.⁷⁸ It has been suggested that the reference in Article 82(1) to Article 38(3) assimilates the formal aspects of a declaration of intervention to those of an application for permission to intervene under Article 81.⁷⁹

⁷⁶ See Articles 82-4 and 86 of the 1978 Rules, which are reproduced in Rosenne, Procedure, 177-82; and 73 AJIL (1979), 774-6. Cf. ICJ Reports 1990, 135-6, para.102.

⁷⁷ See, to the same effect, Rosenne, Procedure, 173.

⁷⁸ For a discussion of interventions as of right in the general picture of the unitary concept of the institution of intervention, see Davi, 227-55 and 289-92.

⁷⁹ See Rosenne, Procedure, 177.

That part of Article 82(2) which specifies the contents of a declaration of intervention also corresponds to the Court's jurisprudence on advisory pleadings and oral proceedings in the Haya de la Torre Case, in which the Court exercised control over the extent of the intervention to ensure that it would remain within the bounds of Article 63 of the Statute and concern itself only with the interpretation of the Convention in question. It is believed that with the introduction of these specific requirements concerning the contents of a declaration of intervention, the Court further tightened the conditions of intervention as of right.⁸⁰

The principal innovations in Article 84, which is itself new, would seem to be first, the introduction of the concept of priority for the decision in paragraph 1,⁸¹ and secondly, the provision for the holding of a hearing in case of an objection to the intervention in paragraph 2. The latter innovation conforms to the practice of the Court in the Haya de la Torre Case and that of its predecessor, the Permanent Court, in the SS Wimbledon Case where Poland's intervention was not opposed. It is believed that the Court's failure to hold a hearing in respect of El Salvador's Declaration of Intervention, on the assumption that the intervention was

⁸⁰ See ICJ Reports 1951, 76; Rosenne, Procedure, 177; Sztucki, 1011-5.

⁸¹ See Rosenne, Procedure, 180.

unopposed, amounted to a misapplication of the Rules.⁸²

(g) The Salvadorean Intervention Case⁸³

On 9 April 1984, Nicaragua filed an application instituting proceedings against the United States in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. In order to found the jurisdiction of the Court to entertain the case, the application relied on declarations made by the parties accepting the Court's compulsory jurisdiction under Article 36 of the Statute. The application was immediately communicated to the United States and also notified to all other states entitled to appear before the Court. At the same time Nicaragua filed a request for the indication of provisional measures under Article 41.

By an order of 10 May 1984, the Court rejected a request made by the United States for removal of the case from the

⁸² See ICJ Reports 1984, 218 (separate opinion of Singh J.); 219 (joint separate opinions of Judges Ruda, Mosler, Ago, Jennings and de Lacharrière); 221 (separate opinion of Oda J.); 223ff, especially 227-33 (Schwebel J. dissenting); Chinkin, 519-20.

⁸³ See Salvadorean Intervention Case, ICJ Reports 1984, 215. See *ibid.*, 395-6, para.6 and also *ibid.* 1986, 16-7. For reference to this case in the legal literature, see for example: T.M. Franck, "Icy Day at the ICJ" in 79 AJIL (1985), 381; W.D. Rogers, J.A. Beat & C. Wolf, "Application of El Salvador to Intervene in the Jurisdiction and Admissibility Phase of Nicaragua v. USA", 78 AJIL (1984), 929 (hereinafter "Rogers et al"); Sztucki, 1005; 4 Schwarzenberger, 410, n.73; Chinkin, 495, 498, 503, 509, 512-3, 521, 531; Damrosch, 384-6; T.D. Gill, Litigation Strategy at the International Court: A Case Study of the "Nicaragua v. United States" Dispute (Dordrecht: Martinus Nijhoff Publishers, 1989), 145-8; Rosenne, "Some Reflections", 79-81, 87-8.

list, indicating, pending its final decision on the proceedings, certain provisional measures, and decided that until the Court delivered its final judgment, it would keep the matters covered by the case continuously under review. By the same order, the Court further decided that the written proceedings in the case should first be addressed to the questions of the jurisdiction of the Court to entertain the dispute, and to the admissibility of the application.

The pleadings on jurisdiction and admissibility were duly filed by the parties within the time limits fixed by the President by a further order of 14 May 1984. In its pleadings, Nicaragua contended that in addition to the basis of jurisdiction, relied on in the application, the Treaty of Friendship, Commerce and Navigation signed by the parties in 1956 provided an independent basis of jurisdiction under Article 36(1) of the Statute.

On 15 August 1984, two days before the closure of the written proceedings on the questions of jurisdiction and admissibility, El Salvador filed a declaration of intervention in the case pursuant to Article 63 of the Statute and Article 82 of the Rules. In accordance with Article 83 of the Rules, El Salvador was supplied with the written observations of the parties on its Declaration.⁸⁴

⁸⁴ This declaration is reproduced in full in 24 ILM (1985), 38ff; for extracts from the Salvadorean Declaration of Intervention, see also Rogers, et al., 930-1. For the antecedents to the Salvadorean Declaration of Intervention see *ibid.*, 929; the authors of this note represented El Salvador in the proceedings relating to its Declaration of Intervention in the case between Nicaragua and the United States.

El Salvador sought to intervene by right for the sole and limited purpose of arguing that the Court lacked jurisdiction over Nicaragua's application instituting proceedings against the United States and the claims contained therein, and that the application and claims were inadmissible. El Salvador also wished to make it a matter of record that it considered itself under the pressure of an effective armed attack by Nicaragua, and along with the other Central American countries, felt its territorial integrity, sovereignty and independence threatened. The Declaration was later supplemented by further communications of 10 and 17 September, 1984.⁸⁵

The United States did not oppose El Salvador's intervention.⁸⁶ While in principle Nicaragua said it did not object to a proper intervention by El Salvador, it felt bound to draw the Court's attention to certain deficiencies both as to form and substance in the Declaration. In Nicaragua's view the Declaration did not conform to the Rules of the Court. Nicaragua also pointed out that Article 63 of the Statute did not allow intervention for the purpose of opposing jurisdiction or to make things a matter of record, but only

⁸⁵ See ICJ Reports 1984, 215; *ibid.*, 220 (separate opinion of Oda J.), and 225 and 230 (Schwebel J. dissenting) where the letter of 17 September is also mentioned. For excerpts from both letters, see also Rogers et al, (10 September) 931-2, (17 September) 934-5.

⁸⁶ See ICJ Reports 1984, 228 (Schwebel J. dissenting). Extracts from the United States' observations on El Salvador's Declaration of Intervention contained in its letter of 14 September may also be found in Rogers et al., 933.

for the purpose of the interpretation of a convention to which the declarant state is a party. It states that it agreed to El Salvador's intervention on the understanding that such intervention "shall not become the occasion for delaying the proceedings".⁸⁷

By an order of 4 October 1984, the Court, after having noted the fact that El Salvador reserved its right to address the interpretation and application of conventions to which it was also a party in a later substantive phase of the case, decided not to hold a hearing on the declaration of intervention and dismissed the declaration as inadmissible in as much as it related to the jurisdiction and admissibility phase of the proceedings.⁸⁸

There is no gainsaying the fact that in addition to being vague, El Salvador's original Declaration of Intervention was so defective in both form and substance that it did not remotely resemble a declaration of intervention contemplated by Article 63 of the Statute and Article 82(2)(b) and (c) of the Rules. Neither did the Declaration contain an identification of the particular provisions of the conventions

⁸⁷ See ICJ Reports 1984, 228-9 (Schwebel J. dissenting). For a summary of Nicaragua's observations on El Salvador's declaration contained in Nicaragua's letter of 20 September, see also Rogers et al., 933-4. There appears to be an inconsistency regarding the date of this letter as stated in this article and the dissenting opinion of Schwebel J. in ICJ Reports 1984, 228 and 24 ILM (1985), 50; in the article the date of Nicaragua's letter is given as 14 September.

⁸⁸ See ICJ Reports 1984, 215-7; *ibid.*, 395, para.6; *ibid.*, 1986, 17, para.7. The Court's order has also been reproduced in 24 ILM (1985), 43-4 and Rogers et al., 935-6.

whose construction it considered to be in question under Article 82(2)(b), nor a statement of the construction of those provisions for which it contended under Article 82(2)(c).⁸⁹

Apparently for purposes of curing the defects in its original Declaration of Intervention, El Salvador later submitted a letter of 10 September 1984 "which amplified its Declaration in clearer terms which conformed to the essential requirements of Article 82, paragraph 2 of the Rules".⁹⁰ This letter was followed by another of 17 September 1984. The Court does not seem to have attached appropriate weight to these later communications from El Salvador. Its order of 4 October does not even expressly refer to the last-mentioned communication.⁹¹

An even more puzzling aspect of the Court's attitude in the Salvadorean Intervention Case is its stance regarding Nicaragua's observations concerning El Salvador's Declaration of Intervention. Under the terms of Article 84(2) of the Rules, if an objection is filed to the admissibility of a declaration of intervention, the Court shall hear the state seeking to intervene and the parties before deciding. Nicaragua used the ploy of dressing an objection to the admissibility of El Salvador's Declaration as consent to the

⁸⁹ See ICJ Reports 1984, 220 (separate opinion of Oda J.), 224 (Schwebel J. dissenting); 219 (joint separate opinion of Judges Ruda, Mosler, Ago, Jennings and de Lacharrière).

⁹⁰ See *ibid.*, 225.

⁹¹ See ICJ Reports 1984, 220 (separate opinion of Oda J.); 230 (Schwebel J. dissenting). See also Rogers et al., 934.

intervention, so as to prevent the declarant state from being accorded a hearing under this provision.⁹² In the previous Italian Intervention Judgment, the Court had repeated its observation that with reference to an application instituting proceedings or a request for permission to intervene, it cannot, in ascertaining the true object and purpose of the claim, confine itself to the ordinary meaning of the words used.⁹³ In the same judgment the Court also recalled a previous observation that "whether there exists an international dispute is a matter of objective determination. The mere denial of the existence of a dispute does not prove its non-existence".⁹⁴

By analogy with both these foregoing observations one would have expected that in interpreting the observations of the parties on a declaration of intervention, not only would the Court consider the ordinary meaning of the words used, but also that an objective test would be applied to ascertain whether or not the parties object to the intervention. One is therefore at a loss to understand why the Court ignored these observations which may be considered as fairly accurate indications of its approach to the evaluation of the positions of parties to proceedings before it, and probably for policy reasons which as yet remain obscure, took "at full and face

⁹² See ICJ Reports 1984, 229-30 (Schwebel J. dissenting).

⁹³ See *ibid.*, 19, para.29.

⁹⁴ See *ibid.*, 20, para.31.

value",⁹⁵ what Nicaragua said, while at the same time totally disregarding the mandatory language of Article 84(2) of its Rules and refused to grant El Salvador a hearing.

Though the majority decision not to hold a hearing on El Salvador's Declaration of Intervention was reached by nine votes to six, a closer examination of the order and the accompanying separate and dissenting opinions discloses that it was supported by only a bare majority of eight judges to seven. Judge Oda, who was convinced that Nicaragua had actually objected to El Salvador's Declaration of Intervention, voted against granting El Salvador a hearing in deference to the Court's view that Nicaragua had not objected.⁹⁶ A hearing would have made it possible for doubts raised or questions posed by El Salvador's Declaration of Intervention to be satisfactorily resolved.⁹⁷ Such a hearing would also have enabled El Salvador to answer questions which at least one judge of the Court wished to put to it.⁹⁸

Judge Schwebel has quite rightly noted that the Court's failure to grant El Salvador a hearing conflicted with the precedent which it had set in the Haya de la Torre Case. It is significant that the Rules then in force did not provide for a hearing in respect of the admissibility of declarations

⁹⁵ See *ibid.*, 230 (Schwebel J. dissenting).

⁹⁶ See *ibid.*, 220 (separate opinion of Oda J.); 218 (separate opinion of Singh J); 223, 231 (Schwebel J. dissenting); see also Sztucki, 1008.

⁹⁷ See ICJ Reports 1984, 223 (Schwebel J. dissenting).

⁹⁸ See *ibid.*, 231.

filed under Article 63 of the Statute.⁹⁹ It is difficult to comprehend the Court's failure to observe its Rules by refusing to accord El Salvador a hearing or by declining to follow the instructive precedent provided by the Haya de la Torre Case, by not endeavouring either to cure the defects in El Salvador's Declaration or by reducing its scope to appropriate permissible limits so as to render it admissible.¹⁰⁰

It was a practically unanimous Court which decided by fourteen to one that El Salvador's Declaration of Intervention was inadmissible inasmuch as it related to the jurisdictional and admissibility stage of the proceedings. The Court had taken note of El Salvador's statement in its Declaration to the effect that it reserved the right in a later substantive phase of the case to address the interpretation of the conventions to which it was also a party relevant to that phase.¹⁰¹

The Court's handling of El Salvador's Declaration of Intervention may be contrasted with its attitude in the Fijian Intervention Cases.¹⁰² Like El Salvador's Declaration of

⁹⁹ See, to the same effect, *ibid.*, 231.

¹⁰⁰ See Sztucki, 1012.

¹⁰¹ This would appear to be an implicit admission on the part of El Salvador that the interpretation of those conventions was not relevant to the phase of the proceedings in which it wished to intervene.

¹⁰² In the existing context it was immaterial that the ground for intervention invoked in those cases was Article 62 rather than Article 63. See Sztucki, 1012, n.30.

Intervention, Fiji's applications for permission to intervene in the Nuclear Tests Cases were considered to be untimely to the extent that they related to the jurisdiction and admissibility phase of the proceedings. Rather than reject Fiji's applications as untimely, as it did in respect of El Salvador's Declaration, the Court deferred action on them until it had decided the question of its jurisdiction to entertain the primary proceedings. When the Court later declared the Nuclear Tests Cases moot it found in consequence that Fiji's applications had lapsed and that no further action thereon was required.¹⁰³ While rejecting El Salvador's Declaration of Intervention as inadmissible, the Court kept alive El Salvador's right to intervene at the merits phase of the case. It is not easy to understand why, even if El Salvador's Declaration had been found to be inadmissible at the jurisdictional stage of the case, its pendency could not have been preserved inasmuch as it related to the merits phase, as happened with the Fijian applications.¹⁰⁴

Judge Oda was probably right when he concluded that:

Had El Salvador's initial Declaration been properly formulated, had Nicaragua's observations been properly interpreted, and had the procedures of the Court been properly pursued, El Salvador's Declaration might well have been the first case of intervention under Article 63 ... to be considered by the Court at a jurisdictional phase of a case.¹⁰⁵

¹⁰³ See ICJ Reports 1974, 531, 536.

¹⁰⁴ See *ibid.*, 1973, 321, 325; see, to the same effect, Sztucki, 1012-3.

¹⁰⁵ See ICJ Reports 1984, 221 (separate opinion of Oda J.).

The Court availed itself of the opportunity afforded by Cuba's intervention in the Haya de la Torre Case to develop and clarify the law on intervention as of right. By refusing to hold a hearing, it failed to take advantage of the chance offered by the Salvadorean Intervention Case further to clarify the law in the context of actual litigation. Consequently this case is not of much help in improving our understanding of the conditions for the operation of intervention under Article 63. The Salvadorean Intervention Case, however, provides doubtful authority for the view that intervention as of right is inadmissible in the jurisdictional phase of a case.

(h) The Role of the Parties

From the beginning no definite role was envisaged for the parties in proceedings relating to intervention as of right. The Rules of the Permanent Court from 1922 to 1936 did not contain any provisions for the holding of a hearing in the event of objection to a proposed intervention. Indeed, it is even possible that such objections were considered very unlikely.¹⁰⁶ This did not, however, prevent the Permanent Court from granting Poland a hearing, though its application to intervene in the SS Wimbledon Case¹⁰⁷ was unopposed.

The possibility that some doubts or objections might arise concerning the admissibility of an intervention under

¹⁰⁶ See Sztucki, 1029-30.

¹⁰⁷ See PCIJ Series A, No.1, 9-14.

Article 63 was first acknowledged in the 1936 Rules of the Permanent Court, Article 66(3)¹⁰⁸ of which provided that, in case of a challenge to the admissibility of the intervention, the decision shall rest with the Court. This provision became Article 66(2)¹⁰⁹ of the 1946 Rules of the International Court. In the Haya de la Torre Case, Cuba, whose Declaration of Intervention was contested by one of the parties, was granted a hearing.¹¹⁰ Article 66(2) of the 1946 Rules was reproduced verbatim in Article 71(2) of the 1972 Rules¹¹¹ with the result that there was still no provision for a hearing in the Rules in case of an objection to a declaration of intervention. The possibility that the parties to a case might object to a proposed intervention, which had to some extent been acknowledged in both the Rules and the jurisprudence of the Court, received full formal recognition in the 1978 Rules.¹¹²

It would seem that before 1936, parties to a case in which a third state wished to intervene under Article 63 of the Statute, were not entitled to be informed of the fact of the proposed intervention. The idea of notifying the parties

¹⁰⁸ See Hudson, The Permanent Court, 750; see also PCIJ Series D, No.2, 3rd addendum, 960.

¹⁰⁹ See Rosenne, Documents, 181.

¹¹⁰ See ICJ Reports 1951, 71.

¹¹¹ Reprinted in Rosenne, Documents, 181, and 67 AJIL (1973), 195 at 218.

¹¹² See Articles 83(1) and 84(2) of the 1978 Rules, reproduced in Rosenne, Procedure, 179-80, and 73 AJIL (1979), 775.

that a declaration of intervention had been filed was introduced in the 1936 Rules of the Permanent Court. With the introduction of the 1978 Rules the parties were given the opportunity to present written submissions on the declaration of intervention. Should it happen that either or both parties object to the intervention, a hearing would be held to enable the parties and the declarant state to be heard on the proposed intervention.¹¹³

It would appear that the attitude of the parties is not a significant factor in the Court's consideration of a declaration of intervention. Thus, it is immaterial whether they consent or object to the intervention.¹¹⁴ The decision whether to admit or reject the declaration of intervention rests solely with the Court. For this reason any prior agreement of the parties to allow intervention will be invalid and ineffective. The parties may, however, facilitate intervention by agreeing not to object to requests for access to the pleadings and annexed documents.¹¹⁵

(i) The Role of the Court

As far as intervention as of right is concerned, the Court is the principal actor, since it decides whether or not the conditions governing the operation of this procedural

¹¹³ See Article 84(2) of the 1978 Rules, reproduced in Rosenne, Procedure, 180, and 73 AJIL (1979), 718 at 775.

¹¹⁴ See Chinkin, 519-20.

¹¹⁵ See *ibid.*

remedy are met.¹¹⁶ This very important role of the Court which is implied in the provisions of Article 63 of the Statute was also implicitly recognised in the 1922, 1926 and 1931 Rules of the Permanent Court. According to the terms of Article 60 of the 1922 Rules, a state which wished to intervene in a case under Article 63 of the Statute, merely had to inform the Registrar of this fact in writing. Thus, the Permanent Court accepted Poland's intervention in the SS Wimbledon Case after it had significantly observed that:

It will suffice for the Court to note that in this case the interpretation of certain clauses of the Treaty of Versailles is involved in the suit and that the Polish Republic is one of the states which are parties to this treaty.

In view of the facts established above, which are conclusive, and of the statements made at the hearing by the representatives of the applicant powers, who left the matter to the decision of the Court, the Court records that the Polish government intends to avail itself of the right to intervene conferred upon it by Article 63 of the Statute.¹¹⁷

Article 60 of the 1922 Rules appears to have been omitted from the 1926 and 1931 Rules which were silent on the manner in which states had to indicate their intention to intervene under Article 63 of the Statute. The possibility that the admissibility of a proposed intervention might be contested, as well as the Court's power to decide this matter, were

¹¹⁶ For example, the Court must be satisfied that the construction of a convention is in question in a case, and that the convention is of the kind specified by the Statute. The Court must also be convinced that the third state which desires to intervene in the case is a party to the convention whose construction is in question.

¹¹⁷ See PCIJ Series A, No.1, 13.

expressly mentioned for the first time in the 1936 Rules according to the terms of Article 66 of which, a state which desired to avail itself of the right conferred upon it by Article 63 of the Statute was required to file with the Court a declaration to that effect. If any objection or doubt should arise as to whether the intervention is admissible the decision shall rest with the Court.

These provisions which expressly admitted that Article 63 of the Statute was open to interpretation, and that states wishing to intervene thereunder "are not the sole masters of their intentions", were later incorporated into the 1946 Rules of the International Court. In the Haya de la Torre Case the Court exercised this power of decision to narrow the scope of Cuba's intervention so as to keep it within the limits of a genuine intervention under Article 63 of the Statute.¹¹⁸ The idea of making express reference to the likelihood of the admissibility of the proposed intervention being challenged, as well as the Court's overriding power to decide the issue, was further elaborated upon in the 1978 Rules.¹¹⁹

(j) The Concept of Intervention as of Right

Since the Statute speaks in terms of "right to intervene in the proceedings", or "this right", and the Rules also refer to "the right conferred by Article 63 of the Statute", it would seem that if the Court finds that a state has met all

¹¹⁸ See ICJ Reports 1951, 77; see also above, 268-75.

¹¹⁹ See Article 84 of the 1978 Rules; see also above, 275-9.

the conditions set for the operation of this procedural remedy, then its declaration of intervention is bound to be admitted. This appears to be the opinion of the 1920 Advisory Committee of Jurists.¹²⁰

The idea that Article 63 conferred on states a totally unqualified right of intervention by virtue of the simple fact of their participation in a convention was also articulated during the preparation of the 1926 and 1936 Rules of the Permanent Court.¹²¹ Consistent with this view, since 1936 the Rules have always spoken of a declaration of intervention under Article 63 as distinct from an application for permission to intervene under Article 62 of the Statute. Indeed, the notion of "intervention as of right", an "absolute right to intervene" or "an automatic right to intervene" is reflected in state practice.¹²² It is an idea that has also been canvassed in the legal literature.¹²³

¹²⁰ See PCIJ, Procès-Verbaux (1920), 746.

¹²¹ See PCIJ Series D, No.2, Addendum, 159; Addendum 3, 309, 779. See also Sztucki, 1030, nn.104, 105.

¹²² See, for example, U.S. observations in the Salvadorean Declaration of Intervention in ICJ Reports 1984, 227-8 (Schwebel J. dissenting), also in 24 ILM (1985), 49-50. See also Rogers et al., 932-3; Sztucki, 1029, nn.100, 102.

¹²³ See 2 Fitzmaurice, 553; id., 34 BYIL (1958), 127; Hambro, "Interpretation", 251; id., "Jurisdiction", 149; id., "Intervention", 396-7; Oda, "Intervention", 644; Mani, 259; Elias, The ICJ, 93; id., "The Limits", 166. However in 1984 as President of the Court Elias voted in support of the majority view that El Salvador's Declaration of Intervention was inadmissible at the jurisdictional phase of the case between Nicaragua and the United States. See ICJ Reports 1984, 216 (Order), 233 (Schwebel J. dissenting); see also Sztucki, 1031.

While in theory the Court may be said to be vested with a much wider discretion in respect of intervention under Article 62 than under Article 63 of the Statute, in practice the reality would appear to be that there is only a slight difference between the Court's power of decision in both cases.¹²⁴ The similarity between the two types of intervention is reflected in Article 84(1) of the 1978 Rules which enables the Court to decide whether an application for permission to intervene under Article 62 should be granted, and whether an intervention under Article 63 is admissible.¹²⁵ Rosenne has therefore concluded that an intervention only becomes effective with the decision of the Court under this provision.¹²⁶

From the foregoing we may safely conclude that the right conferred by the Statute on a third state to intervene in a case in which the construction of a convention to which it is a party is in question, is neither absolute nor unqualified in that it is subject to the Court's discretion. This is all the more so since a third state whose declaration of intervention is dismissed for reasons unrelated to the conditions expressly prescribed in the Statute (as happened in the Salvadorean Intervention Case) cannot have this right enforced otherwise. It would seem that there is no corresponding duty on the part

¹²⁴ See Sztucki, 1030-1.

¹²⁵ See *ibid.*; Miller, 550.

¹²⁶ See Rosenne, Procedure, 180; *id.*, "Some Reflections", 76.

of the Court (if it is disinclined to grant this right) to see to it that it is exercised. In this sense at least it would appear that the reference to intervention under Article 63 as a right is a linguistic ploy used by the framers of the Statute to bring out the formal rather than the substantive distinction between the two types of intervention allowed by the Statute.¹²⁷

4. Procedure

The purpose of publicising the application or special agreement instituting proceedings is to make it easier for third states to consider the possibility of intervening under either Article 62 or Article 63 of the Statute. Under the terms of Article 63(1), whenever the construction of a convention to which states other than those concerned in a case are parties is in question, the Registrar shall notify all such states forthwith.

On the face of it this seems to be a fairly simple and straightforward rule.¹²⁸ Its practical application may nevertheless entail such difficult problems as how the Registrar determines to which states to send the notification, the significance of the receipt of the notification or lack of it, at what stage in the proceedings the notification is to be sent, the kind of convention concerning whose construction the

¹²⁷ See Miller, 552; Chinkin, 498.

¹²⁸ Hambro thought that Article 63 raised potentially important questions which might seem purely technical and limited in scope. See Hambro, "Interpretation", 240.

notification may be sent, as well as the timing of the sending of the notification. Put in other terms, the first issue relates to how the Registrar identifies states other than those involved in the pending case which are party to the convention in question.

(a) Identification of Parties to a Convention

Upon the institution of legal proceedings, the Permanent Court sought to determine through its Registrar whether the construction of a convention was in question, and, if so, which states were party to the convention and therefore entitled to notification. In this, the Court was usually guided by information obtainable from the government or institution depository of the convention. The Registrar adopted the practice of seeking the decision of the Court if it was sitting, or of its President if it was not, as to whether a given state was party to a convention concerned in a pending litigation.¹²⁹

Concerning the Registrar's duty to identify the parties to the Convention for purposes of sending the notification, Hambro, after having acknowledged that this might not always be easy, noted that:

The obvious way would seem to be to send an official letter to the government or institution which is empowered to accept and guard the ratification. This is also in practice the way the Registrar proceeds in the

¹²⁹ See for example, Hudson, The Permanent Court, 421; Mani, 262; Hambro, "Interpretation", 245-6; id., "Intervention", 392, n.23; Miller, 551; Chinkin, 504.

case of most treaties.¹³⁰

Hambro then went on to hint at some of the difficult problems which might arise in connection with the identification of the parties to a convention by observing as follows:

What will happen if a treaty is ratified by a state which has subsequently been swallowed up by another, when this state of facts is recognised by some but not all members of the community or when it is a question of which government represents the state, or when a state has been divided into two states? [He further observed that] other difficulties in the same field may arise if the secular states having ratified and been bound by the treaty are not the same as the states party to the Statute or admitted to plead before the Court. [In such a case Hambro firmly asserts that] it is confidently believed that Article 63 overrides the limitations on a state to appear before the Court. This Article gives an absolute right to intervene. It is a means to ensure material justice. Such seems also to be the practice of the Court. [He adds, however, that] it is a matter of course that such a state, in case it would wish to intervene, must comply with the conditions laid down by virtue of Article 35 of the Statute.¹³¹

Another difficult case in this connection is that of multilateral treaties opened to signature by other states, an issue which the Court addressed in the Reservations Case, in which it observed that:

It is evident that without ratification signature does not make the signatory state a party to the convention; nevertheless, it establishes a provisional status in favor of that state. This status may decrease in value and importance after the Convention enters into force. But, both before and after the entry into force, this status would justify more favourable treatment being meted out to signatory states in respect to objections than to states which have neither signed nor acceded.¹³²

¹³⁰ See Hambro, "Interpretation", 246.

¹³¹ See *ibid.*

¹³² See ICJ Reports 1951, 28. See also Hambro, "Interpretation", 247.

It may be reasonable to assume on the basis of this and other judicial pronouncements, that notifications under Article 63 in the future may be sent to states other than those which have ratified and become bound by the multilateral treaty concerned.¹³³

Theoretically, it would appear that the duty of notifying parties to a convention whose construction is in question in a pending case, which Article 63 imposes on the Registrar, is an absolute rule. In practice, however, it would seem to be subject to some conflicting considerations. On the one hand, it may be argued that since there is an absolute right to intervene, the notification should be sent in all doubtful cases so as to ensure that the statutory provisions are given full effect. On the other hand, it has been pointed out that as an international civil servant, the Registrar should not take an initiative which could later embarrass the Court. Nor should the Registrar under any circumstances try to create difficulties by encouraging unnecessary intervention. The experience of the Permanent Court, which does not appear to have been contradicted by that of the present Court, shows quite clearly that the Registrar has considered it a duty to apply Article 63 as a matter of routine administration only when it is certain that the treaty warrants it.¹³⁴

¹³³ See *ibid.*

¹³⁴ See as to this, Hambro, "Interpretation", 247-8; Stauffenberg, Cross and De Janasz, Statut et Règlement de la Cour Permanente de Justice Internationale, Eléments d'interprétation (Berlin: Carl Heymanns Verlag, 1934) published for Institut für ausländisches öffentliches Recht

Writing some 22 years after his term as Registrar of the present Court from 1946-1953, Hambro confessed that during his time as Registrar he was often in doubt whether and when notification should be sent. He thought that the cases dealt with in the intervening years did not seem to have satisfactorily clarified the matter.¹³⁵ In the Aerial Incident Case (Preliminary Objections)¹³⁶ no notification was sent, even though it was quite clear that the case turned on a rather difficult, and potentially important issue of the interpretation of Article 36(5) of the Court's Statute. Similarly, in the North Sea Cases,¹³⁷ in which an important multilateral treaty was amply discussed by the parties even though it may not perhaps be claimed that the whole case turned on it, no notification was sent.

The practice of sending notifications has always been somewhat confused. However, it seems to be fairly well settled that in case of doubt notification is not sent. The states concerned may nevertheless be informed in a manner suggesting that they might intervene subject to the possibility that the Court might reject their claimed rights

und Volkerrecht, 443ff (hereinafter "Stauffenberg"); Hudson, The Permanent Court, 419ff. In at least one case the Registrar is reported to have drawn the attention of the states to the stipulation in question but told them that Article 63 of the Statute did not really apply.

¹³⁵ See Hambro, "Intervention", 387, n.3.

¹³⁶ See ICJ Reports 1959, 270ff.

¹³⁷ See *ibid.* 1969, 1ff. See Hambro, "Intervention", 388, nn.7, 8.

of intervention.¹³⁸ Experience appears to indicate that in this matter the Registrar has preferred the cautious to the bold approach.¹³⁹

(b) The Significance of the Notification

Another problem which arises in connection with the Registrar's duty to notify states other than those involved in the pending litigation, but which are parties to the Convention whose construction is in question, is the import of the receipt of the notification or lack of it. It would appear that any state which receives the notification is deemed a party to the Convention concerned and ipso facto invited to consider exercising its statutory right of intervention. The Statute confers the right to intervene in the proceedings on every state to which the notification has been sent.¹⁴⁰ The notification may also be regarded as a prima facie indication that the circumstances may be right for intervention under Article 63.¹⁴¹ The 1926 and 1931 Rules of the Permanent Court merely reinforced the statutory rule by requiring that the notification be sent to every state which

¹³⁸ See Sztucki, 1018, n.49, 1023-4; Mani, 262; Miller 551; Hambro, "Interpretation", 249.

¹³⁹ See Hambro, "Interpretation", 247-8.

¹⁴⁰ See Article 63(2) of the Statute.

¹⁴¹ See to the same effect, Sztucki, 1018.

is a party to the convention relied upon in the case.¹⁴²

The provision in the 1978 Rules by means of which a state, that considers itself a party to the Convention, but which has not received the statutory notification, may, nonetheless, file a declaration to the effect that it desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute,¹⁴³ reflects the stance adopted in the 1936 Rules of the Permanent Court which enabled any state that was party to the convention in issue, but to which the statutory notification had not been sent, to file a declaration of its intention to intervene under Article 63.¹⁴⁴ Since 1936 a state may not be debarred from exercising its statutory right of intervention merely because it has not received the notification referred to in Article 63.¹⁴⁵

(c) The Character of the Notification

One issue which has arisen in connection with the

¹⁴² See Article 60 of the 1926 and 1931 Rules of the Permanent Court. Cf. Article 60 of the 1922 Rules of the Permanent Court, which was mute regarding the notification.

¹⁴³ See Article 82(3) of the 1978 Rules of the International Court.

¹⁴⁴ See Article 66(2) of the 1936 Rules of the Permanent Court. See also Article 66(1) and 71(1) of the 1946 and 1972 Rules of the International Court, respectively. It has been explained that "this Rule enables the Court to rectify any mistake or omission which may inadvertently have been omitted or committed by the Registrar", see Hambro, "Jurisdiction", 149, n.3.

¹⁴⁵ See as to this: Rosenne, Procedure, 100; Miller 551, 564. n.9; Sztucki, 1020; Hambro, "Interpretation", 247.

Registrar's duty to send the notification is the status of the notification itself. At first sight, the sending of the notification appears to be a purely administrative duty which the Statute imposes on the Registrar. Indeed, this would appear to have been the case prior to the adoption of the 1978 Rules.

In the Pakistan Prisoners of War Case (Interim Measures), Judge Petren dissented from the decision not to consider notifying other parties to the 1928 General Act and the Genocide Convention until after the decision on interim measures. In addition to showing that the statutory function of sending the notification may not always be uncontroversial, his disagreement from the rest of the Court also indicates that this duty may be subject to judicial interpretation.¹⁴⁶

The fact that sending the notification which had previously been considered as an administrative matter had come to assume a distinct judicial character was explicitly acknowledged in the 1978 Rules, Article 43 of which provides that:

Whenever the construction of a convention to which states other than those concerned in the case are parties may be in question within the meaning of Article 63, paragraph 1, of the Statute, the Court shall consider what direction shall be given to the Registrar in the matter.¹⁴⁷

It would appear that this new Article contains an

¹⁴⁶ See ICJ Reports 1973, 333-4 (Petren J. dissenting). See to the same effect, Chinkin, 518, 521.

¹⁴⁷ See the text of this Article in Rosenne, Procedure, 100. We should like to observe with respect that there is room for improvement in the drafting of this provision.

apparent divergence from the Statute which unequivocally assigns the duty of sending the notification to the Registrar. This provision, however, conforms to the practice followed by the Registrar since the days of the Permanent Court.¹⁴⁸ While it remains to be seen how it will be implemented in the context of actual litigation, the fact that the President plays no part in the matter when the Court is not sitting, may become a source of difficulty in practice.¹⁴⁹ The apparent strengthening of the Court's role, in a seemingly purely administrative matter, may be ascribed to the practical difficulties generated since 1946, partly because of the proliferation of multilateral treaties and the actual or potential parties to them by the application of Article 63.¹⁵⁰

A possible consequence of the introduction of a judicial element into what has heretofore been mainly considered an administrative task is that, on the one hand, a state which receives the notification sent at the instance of the Court might be misled into believing that there is a high probability of its declaration of intervention being admitted, while, on the other hand, a state to which the notification has not been sent might feel disinclined to seek to exercise its right of intervention, for the reason that its declaration of intervention stands little chance of being accepted. It is

¹⁴⁸ See Miller, 551; Hambro, "Intervention" 395, n.40.

¹⁴⁹ See for example, Rosenne, Procedure, 100.

¹⁵⁰ See *ibid.*

submitted that notwithstanding the transformation of this administrative statutory function into a judicial one, the notification still remains a procedural requirement designed to alert eligible third states to the existence of circumstances conducive to the invocation of their statutory right of intervention. A third state which does not receive such notification does not, in consequence, forfeit this statutory right.¹⁵¹

(d) The Phase of a Case at which Notification may be sent

The question regarding the appropriate stage of the proceedings in a case at which the statutory notification may be sent arises as a direct consequence of the adjudication of a dispute submitted to the Court in more than one phase. This may happen where the Court's jurisdiction to entertain the case is contested by one of the parties, or where one of the parties objects to the admissibility of the application instituting proceedings before the Court. In either event, the Court may decide to deal with the challenge to its jurisdiction or the objection to the admissibility of the application in a separate proceeding, usually termed the preliminary objection phase, and settle the substantive dispute in the merits phase, or join the former to the latter in a single proceeding.

During the time of the Permanent Court the question as to

¹⁵¹ See Sztucki, 1020, 1023-4; Hambro, "Intervention", 396; id., "Interpretation", 247; Mani, 261; Miller, 551, n.9.

the proper stage of the proceedings at which the notification under Article 63 was required does not appear to have been an issue. This question was not even addressed by the Rules.¹⁵² While the 1922 Rules of the Permanent Court provided that any state desiring to intervene under the terms of Article 63 should inform the Registrar of this fact in writing before the commencement of the oral proceedings,¹⁵³ the fixing of the times within which prospective intervenors were to file any cases was left to the Court.¹⁵⁴ The relevant provisions of the 1936 Rules were mute on this question. There is, however, some evidence for the view that the Permanent Court did send notifications under Article 63 during the preliminary objections phase of proceedings in cases of which it was seized.¹⁵⁵

The question concerning the right stage in the proceedings in a case at which the notification under Article 63 may be sent was never an issue for the International Court prior to the adoption of its 1978 Rules. The pertinent provisions of its 1946 and 1972 Rules, which resembled those in the 1936 Rules of the Permanent Court, contain no reference

¹⁵² The 1922 Rules of the Permanent Court did not even mention the notification under Article 63.

¹⁵³ See Article 60 of the 1922 Rules of the Permanent Court.

¹⁵⁴ See Article 59 of the 1926 and 1931 Rules of the Permanent Court.

¹⁵⁵ See PCIJ Series C No.68 at 243, 256 and 264-5; No.89 at 1381-2; No.85 at 1349, 1356; No.89 at 1370-1. See also Sztucki, 1018.

to this question. Before its 1978 Rules came into force, the International Court had followed the practice of its predecessor on this point.¹⁵⁶

In terms reminiscent of, albeit slightly different from, the 1922 Rules of the Permanent Court, the 1978 Rules of the present Court postulate that a state desiring to exercise the right of intervention shall file a declaration to that effect before the opening of the oral proceedings.¹⁵⁷

There is nothing in either the text of Article 63 of the Statute, its drafting history, or the provisions of the Rules previously cited, to suggest that they restrict the notification relating to intervention as of right to the merits phase of the proceedings and preclude its being sent during the preliminary objection phase of a pending case. The practice of the Court serves to confirm this view.¹⁵⁸

The sending of the notification under Article 63, whether it be done at the preliminary objection or merits phase of a case, is one thing, and the admissibility of a declaration of intervention is quite another. It is the latter issue which was brought into sharp relief when the present Court decided that the Salvadorean Declaration of Intervention was

¹⁵⁶ See Corfu Channel Case (Preliminary Objection), ICJ Reports 1947-8 at 17, 20-23; see also ICJ Pleadings (2 Corfu Channel) 9ff; ibid. 1952, Anglo-Iranian Oil Co. Case (Preliminary Objections), 741. See further, ICJ Reports 1974, 255; ibid. 1984, 236-40 (Schwebel J. dissenting); Mani, 263; Sztucki, 1018-20; Hambro, "Jurisdiction", 149-50; esp. n.2 at 150; id., "Interpretation", 242-4.

¹⁵⁷ See Article 82(1) of the 1978 Rules.

¹⁵⁸ See ICJ Reports 1984, 234-5 (Schwebel J. dissenting).

inadmissible inasmuch as it related to the jurisdiction and admissibility phase of the dispute between Nicaragua and the United States.¹⁵⁹ Regardless of the stipulation contained in Article 43 of the 1978 Rules requiring the Court to consider what direction to give to the Registrar concerning the notification, it would seem that the sending of the notification was, on the one hand, merely intended to be an administrative task to be performed by the Registrar prior to the filing of a declaration of intervention, while the decision on the admissibility of such a declaration was, on the other hand, meant to be a judicial function to be exercised by the Court following the filing of the declaration.¹⁶⁰ If this distinction is obscured, receipt of the notification under Article 63 would be regarded as an invitation to intervene as of right, which it clearly is not. If this were so, this procedural remedy would lose its voluntary character. The Court would also certainly cease to exercise any meaningful discretion regarding the admissibility of declarations of intervention, a situation which, if the Court's handling of the Cuban and Salvadorean Declarations of Intervention is any guide, the Court itself would be disinclined to permit to arise.

(e) The Timing of Filing a Declaration

The question concerning the proper stage of the

¹⁵⁹ See *ibid.*, 215 at 216.

¹⁶⁰ See Hambro, "Interpretation", 249.

proceedings in a case at which the notification under Article 63 may be sent, is also related to, though different from the issue regarding the timing of the filing of a declaration of intervention by a third state wishing to intervene as of right. Though the former question has never been addressed in either the Court's Rules or jurisprudence, it is reasonable to infer from the provisions in the Rules concerning the latter question that as a rule, the sending of the notification under Article 63 should necessarily precede the filing of declarations of intervention. The relevant provisions of the 1922 Rules of the Permanent Court which regulated intervention required the would-be intervenors to advise the Registrar in writing of their intentions before the commencement of the oral proceedings.¹⁶¹ The provisions specifically relating to intervention as of right did not carry the proviso, contained in those concerning discretionary intervention, to the effect that the Court may, in exceptional circumstances, consider an application for permission to intervene submitted at a later stage. Subsequent versions of the Rules simply provided in respect of intervention as of right that the Court, shall fix the time within which states desiring to intervene are to file any cases.¹⁶² While the time-limit for the submission of an application for permission to intervene under Article 62 was retained in both the 1946 and 1972 Rules of the present Court,

¹⁶¹ See Articles 58 and 60 of the 1922 Rules of the Permanent Court.

¹⁶² See Article 60 of the 1926 and 1931 Rules of the Permanent Court.

they are significantly silent on the timing of the filing of declarations of intervention under Article 63.¹⁶³ This difference of approach to the timing of both types of intervention has been attributed to the fact that the intervention under Article 63 is an absolute right, whereas the intervention under Article 62 is a discretionary right.¹⁶⁴ The better explanation would seem to be that before 1978 neither Court was able to make up its mind as to prescribing a time limit for what is, subject to the speedy and successful adjudication of a pending case, an apparently open-ended statutory right of intervention.

It has been argued that it may be very awkward to admit intervention at any stage of the proceedings, and, further, that if no rule regarding the timing of intervention is prescribed, it might be assumed that there is no time limit for intervention as of right.

Such a result [it is maintained] should only be arrived at if all other means fail.¹⁶⁵

The construction which the foregoing argument places on intervention under Article 63 is, it is submitted, the correct

¹⁶³ Mani finds the rationale behind the distinction which the 1978 Rules make between the two modes of intervention difficult to understand. See Mani, 268; Smyrniadis has observed that although Article 66(1) of the 1946 Rules does not fix any time limit for the filing of a declaration of intervention considering the prescriptions contained in the other paragraphs of the same article concerning publicity, it may be concluded that the declaration of intervention should be filed before the commencement of oral proceedings. See Smyrniadis, 33; Miller, 560 and 557, n.65 at 569.

¹⁶⁴ See Hambro, "Interpretation", 251.

¹⁶⁵ See *ibid.*

theoretical interpretation. There is nothing undesirable about an open-ended right of intervention providing it does not hinder the prompt and successful adjudication for a dispute submitted to the Court. In other words the apparently open-ended right of intervention under Article 63 may be qualified by the need to avoid disrupting or delaying the proceedings in a case submitted to the Court.

The 1978 Rules of the present Court have prescribed time limits for both forms of intervention. They require an application for the permission to intervene to be filed as soon as possible, and not later than the closure of the written proceedings.¹⁶⁶ As regards declarations of intervention, the Rules demand that they be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. Under the Rules, in exceptional circumstances an application or a declaration submitted at a later stage may, however, be admitted.¹⁶⁷ It will be observed that unlike the situation which obtained under the 1922 Rules of the Permanent Court, the time limits prescribed for both types of intervention are different. A much longer time limit is prescribed for intervention under Article 63 than for that under Article 62. In another departure from the position under the 1922 Rules of the Permanent Court, in "exceptional circumstances" declarations of intervention submitted later than the time specified would be entertained.

¹⁶⁶ See Article 81(1) of the 1978 Rules.

¹⁶⁷ See Article 82(1) of the 1978 Rules.

In the absence of judicial guidance, we are left to speculate on the meaning of "exceptional circumstances" for purposes of intervention under Article 63. The fact of the construction of a convention being in question in a case may not always be obvious at the commencement of the proceedings. The problem of determining whether the construction of a convention is in question does not arise where the convention is invoked in the application or special agreement instituting proceedings. Treaties may be brought into the case at a later stage in the proceedings by either the respondent or even the applicant in the course of the pleadings. In view of the fact that access by third states to the pleadings and annexed documents in a case, which are considered secret and confidential by the parties is by no means automatic,¹⁶⁸ the task of knowing that the interpretation of a treaty is in question in the course of the proceedings may be far from easy. The possibility of treaties being invoked during the oral proceedings cannot be discounted, since it is possible for the Court to admit fresh evidence during the oral hearings.

Invocation of a convention at a late stage in the proceedings may create difficulties for the Court in connection with the sending of the notification under Article 63, as well as third states which are party to that convention. It is submitted that in such a situation

¹⁶⁸ See Hambro, "Interpretation", 245. He cites in support Fisheries Case, ICJ Pleadings, Vol.4, 628-9.

"exceptional circumstances" exist which warrant the operation of the rule concerning the acceptance of declaration of intervention presented at a later stage. The "exceptional circumstances" rule should similarly apply to a third state which wishes to intervene, but to which the notification under Article 63 has not been sent.¹⁶⁹ While such so-called "exceptional circumstances" appear to justify an open-ended statutory right of intervention, it must be remembered that much as it would not be fair to refuse to notify eligible third states of the belated invocation of a convention, it is necessary not to risk tempering justice by interminable delay.¹⁷⁰ Thus, the aim must be to achieve a balance between enabling third states to exercise their statutory right of intervention on the one hand and the speedy and efficient administration of justice on the other. The provision in the 1978 Rules concerning the timing of intervention under Article 63 goes some way towards doing just that.

(f) Conventions regarding whose Construction Notification may be sent

In making a preliminary determination as to whether the statutory conditions set for the sending of the notification under Article 63 obtain, the Registrar must also be satisfied that the Treaty whose construction is in issue is of the kind

¹⁶⁹ Cf. Hambro, "Interpretation", 251; Chinkin, 504.

¹⁷⁰ See Hambro, "Interpretation", 244.

mentioned in the Statute for purposes of sending the notification. The General Act for the Pacific Settlement of International Disputes of 16 September 1928 and the Convention on the Prevention and Punishment of the Crime of Genocide have been cited as examples of conventions whose construction in the jurisdiction phase of proceedings may be susceptible of intervention.¹⁷¹ It therefore follows that where any such convention falls to be construed at the preliminary objection phase of a case, third states which are party thereto may be notified under the terms of Article 63 of the Statute. It would appear that both the Charter of the United Nations and the Statute of the Court also serve as examples of conventions whose construction may attract intervention as of right, either in the jurisdiction or merits phase of a case before the Court. The Charter of the United Nations represents the most important existing component of the body of conventional international law. The practice of the Court in the implementation of Article 63 of the Statute and the relevant Rules, confirms the view that intervention may concern the Charter of the United Nations and the Statute.¹⁷² By an administrative decision of the Court taken early in its history under the presidency of Judge Basdevant, and affirmed by President Winiarski, the Registrar does not routinely send

¹⁷¹ See ICJ Reports 1984, 235-6 (Schwebel J. dissenting).

¹⁷² For a discussion of the sending of the notification under Article 63 in respect of construction of the Charter and the Statute, see *ibid.*, 233-40 *passim* (Schwebel J. dissenting). See also Sztucki, 1015-29.

notifications to the parties when the Charter of the United Nations is cited before the Court, particularly because under the terms of Article 40(3) of the Statute, the Registrar, when a case is brought before the Court, shall forthwith communicate the application to the members of the United Nations and any other state entitled to appear before the Court. It was accordingly decided that since states which could intervene under Article 63 had already had the application communicated to them under Article 40, there was no need to send them a new communication in such cases even though their attention had not been expressly drawn to Article 63.¹⁷³

Some arguments clearly aimed at differentiating between the Charter and the Statute have been advanced against the view that the construction of the Statute should be considered appropriate for intervention. It has been said that because the Court is directed to function in accordance with the provisions of each Statute, it cannot be that the Court gives cause for intervention under Article 63 on questions that may arise regarding those functions. In reply it has been pointed out that Article 63 is concerned with the construction rather than the application of treaty provisions, and that the latter activity does not raise questions of the interpretation of the

¹⁷³ See ICJ Reports 1984, 233-4 (Schwebel J. dissenting). See also Sztucki, 1020 and 1021. He has quite correctly observed that "Still it appears that the aforementioned administrative decision is just another symptom of the Court's tendency ... not to encourage intervention, whether under Article 62 or Article 63." See *ibid.*

Statute. Furthermore, the Court's practice has shown that Article 63 is activated only if a treaty provision is at issue in a case. In that event a third state may be entitled to intervene over its construction.¹⁷⁴

According to the second argument, treating the Statute as a convention within the meaning of Article 63 requires notification in every case, as happens under Article 40. Unlike Article 40, however, Article 63 assumes exceptional notification in some cases rather than routine notification in every case. The problem with this thesis is that it ignores the different purposes of Articles 40 and 63. Whereas notification under the former provision is to inform states about the institution of proceedings, notification under the latter is designed to alert states to the fact that the construction of a convention to which they are parties may be in question either at the commencement or during the progress of a pending case. Furthermore, notification under Article 40 cannot be substituted for notification under Article 63 because intervention under Article 63 does not always result from the application or special agreement instituting proceedings, but sometimes only from a subsequent piece of procedure.¹⁷⁵

The view has also been expressed that treating the Statute as a convention within the meaning of Article 63 could

¹⁷⁴ See ICJ Reports 1984, 239 (Schwebel J. dissenting); Sztucki, 1022.

¹⁷⁵ See to the same effect, ICJ Reports 1984, 239-40 (Schwebel J. dissenting); Sztucki, 1022.

lead to a cascade of interventions, since third states which are party to the Statute would be entitled to intervene whenever there is a jurisdictional dispute between the parties to a case. This view does not accord with the real situation. Since the judgment in the Corfu Channel Case (Merits), which is open to the interpretation that a Statute is a convention within the meaning of Article 63, only Cuba and El Salvador have sought to intervene under Article 63 on a question concerning the construction of the Charter, which establishes the Court as the principal judicial organ of the United Nations; does it not follow that a state can equally intervene in respect of the interpretation of that Statute which is an integral part of the Charter?¹⁷⁶

(g) Timing of the Notification

It is important not to confuse the question of the timing of notification with that relating to the proper stage of a case at which the notification may be sent.¹⁷⁷ Article 63(1) postulates that whenever the construction of a convention to which states other than those concerned in a case are parties is in question, the Registrar shall notify all such states forthwith. The operative term here is "forthwith".¹⁷⁸

¹⁷⁶ See ICJ Reports 1984, 240 (Schwebel J. dissenting); see also Sztucki, 1023.

¹⁷⁷ For a discussion of this question, see Hambro, "Interpretation", 244-5.

¹⁷⁸ In the French version of the Statute, Article 40 enjoins the Registrar to inform states of a new case "immédiatement", whereas Article 63 requires that states be

Though the same term is employed with reference to the notification under Article 40, there is a significant difference between both notifications. The duty imposed on the Registrar in either case is categorical and absolute; but whereas the notification under Article 40 is a matter of expedition in which the Registrar simply gives publicity to the fact of the reference of a dispute to the Court, the notification under Article 63 can only be made if, prima facie, the necessary statutory conditions are satisfied.¹⁷⁹ Where it is evident from the document instituting proceedings that the case involves the construction of a convention, and states party to that convention are identified without delay, it may be possible for both kinds of notification to be made simultaneously. Otherwise some time will be required to ascertain whether the requisite conditions for the notification under Article 63 are present. Where, however, the fact that the construction of a convention becomes apparent in the course of the proceedings, the notification under Article 63 will necessarily be made much later than that under Article 40.

There is, however, one vital respect in which the term "forthwith", as used in both Articles 40 and 63, may be said to have the same meaning. For, once the Registrar is satisfied that the conditions necessary for the notification

informed "sans délai".

¹⁷⁹ See to that same effect, Hambro, "Intervention", 394. For a detailed discussion of this point, see *ibid.*, 394-9.

under Article 63 are fulfilled, the states concerned must be notified within a reasonable time, having regard to the object of the provision and the circumstances of the case. In other words, as with the notification under Article 40, which has to be sent at once, the notification under Article 63 must be sent with the minimum of delay at whatever stage in the proceedings it is considered necessary and feasible. This would seem to be the better interpretation of the term "forthwith" as employed in Article 63(1) of the Statute.

5. Effect of Intervention as of Right

Article 63(2) confers on every state which has been notified that the construction of a convention to which it is party is in question in a pending case, the right to intervene in the proceedings. This provision further states that if a third state exercises this right, the construction of the convention given by the judgment will be equally binding upon it.¹⁸⁰ Theoretically speaking, while the parties to the case in which the construction of a convention is an issue will certainly be bound by the operative provisions of the judgment, the intervening state will only be bound by the construction of the convention given by the judgment in that

¹⁸⁰ It should be pointed out that Article 62 contains no comparable provision concerning the effect of the Court's judgment on the intervener. Professor De Lapradelle, a member of the 1920 Hague Advisory Committee of Jurists which drafted the proposals for the Permanent Court, made an unsuccessful attempt to get the binding effect reference in Article 63 to be made applicable to intervention under Article 62. See Procès-Verbaux (1920), 650. See also Miller, 556, n.54; Chinkin, 497.

case, as well as in any future litigation concerning the application of that instrument in which it may happen to be involved.

In practice, however, in view of the value of judicial decisions not only as an auxiliary source of international law, but also as precedents, the Court is unlikely to disregard the construction which it placed on a convention in an earlier case, should the same convention fall to be construed in a future litigation between different parties. This view is widely shared by legal scholars and commentators.¹⁸¹

Relationship Between Articles 63 and 59 of the Statute

It would appear that the presence in the Statute of Article 59 has rendered Article 63(2) redundant.¹⁸² However, it is possible to differentiate between both provisions.¹⁸³ Whereas in theory, if not in practice, Article 59 seems to restrict the binding force of the dispositif of the Court's judgment to the parties, Article 63(2) attempts to limit the effects of the interpretation of the convention given by the

¹⁸¹ See Oda, "Intervention", 646; see also ICJ Reports 1981, 30, para.14 (Oda J., separate opinion); *ibid.* 1984, 104, para.28 (Oda J. dissenting); Miller, 554; Smyrniadis, 34; Jessup, 904.

¹⁸² See Smyrniadis, 33.

¹⁸³ Miller sees "an apparent inconsistency between Article 59 which limits the impact of a decision to the particular case and Article 63 which indicates that the Court's construction of a convention will be binding on the intervening state". See Miller, 554, n.34.

judgment to the parties and the intervening state. Moreover, Article 59 deals with the binding force of the decision on the parties as such, while Article 63(2) concerns the effect of the interpretation of a multilateral treaty contained in the judgment on the intervening third states.

One important consequence of this last distinction is that a third state which intervenes under Article 63 is not accorded the status of a party within the meaning of the Statute. For instance, before 1978, the Rules imposed on the Court the duty to take the necessary steps to enable a state desiring to intervene under the terms of Article 63 to inspect the documents in the case, in so far as they relate to the interpretation of the convention in question, and to submit its observations thereon to the Court within a prescribed time limit.¹⁸⁴

One other issue which arises as a result of the difference between the status of a party to the case within the meaning of Article 59 and that of the intervening third state under the terms of Article 63(2) is the right to appoint judges ad hoc.¹⁸⁵ According to the terms of the Statute, only parties to a case may appoint judges ad hoc. Any doubt

¹⁸⁴ See Articles 60 of the 1922, 1926 and 1931 Rules and Article 66(4) of the 1936 Rules of the Permanent Court, as well as Articles 66(4) and 71(4) of the 1946 and 1972 Rules of the International Court respectively.

¹⁸⁵ For a discussion of this issue, see Hambro, "Interpretation", 250; Rosenne, The Law and Practice, 286; Mani, 273-4.

concerning this point is settled by the decision of the Court.¹⁸⁶ The question of appointing judges ad hoc does not arise where a third state intervenes on the side of one of the original parties to the principal case.

Since a third state which intervenes under Article 63 does not become a party¹⁸⁷ to the case within the meaning of Article 59, it has, in all probability, no right to appoint a judge ad hoc.¹⁸⁸ The judgment is not res judicata for the intervening state outside the convention in question.¹⁸⁹ In

¹⁸⁶ See Article 31 of the Statute.

¹⁸⁷ The Rules of the Permanent Court spoke of the "intervening state". In the SS Wimbledon Case, however, Poland was referred to as "the intervener" (see PCIJ Series A, No.1, 11). The 1936 Rules of the Permanent Court as well as the 1946 and 1972 Rules of the International Court spoke in terms of the "intervening party". Miller observes that "the status of party was clearly recognised by the Permanent Court when in 1936 it modified paragraphs 4 and 5 of Article 66 of its Rules relating to intervention as of right under Article 63 of the Statute. An intervening state is referred to as a party. [Previously], ... the state was not called a party." (See Miller 552, n.18 where he cites in support Hudson, The Permanent Court, 293; in the Haya de la Torre Case, Cuba was referred to as the "intervening party"; see ICJ Reports 1951, 72; see also Chinkin, 523; the 1946 Rules of the International Court, like those of its predecessor employ the term "intervening state"; see Rosenne, Law and Practice, 433; Hambro, "Interpretation", 240, n.28; *id.*, "Jurisdiction", 149.) The 1978 Rules of the International Court like those of the Permanent Court before 1936 employed the term "intervening state". Cf. Anand, Compulsory Jurisdiction, 222-4. See further ICJ Reports 1990, 135-6, para.102.

¹⁸⁸ See Hambro, "Intervention", 397; Rosenne, "Some Reflections", 85-8; *id.*, Procedure, 26-8.

¹⁸⁹ See Hambro, "Intervention", 397. Commenting on the replacement of the phrase "the other parties" in Article 71(2) of the 1972 Rules with the expression "and to any other state admitted to intervene" in Article 86(2) of the 1978 Rules, Rosenne writes that "this addition may again raise controversy over the question whether an intervenor under Article 63 can be an independent party for the purposes of appointing a judge

neither the SS Wimbledon, nor the Haya de la Torre Case did the intervening state seek to exercise the right to appoint a judge ad hoc. In the former case, Poland renounced its right to appoint a judge ad hoc, as it considered this to be unnecessary. Cuba made no reference to this subject in connection with its intervention in the latter case.¹⁹⁰

Another significance of the differences between Articles 59 and 63(2) of the Statute is that Article 63(2) furnishes the strongest evidence yet that parts of the judgment other than the decision or operative provisions can be binding upon states.¹⁹¹

It has been argued in reliance on the final report of the 1920 Hague Advisory Committee of Jurists that Article 59 of the Statute does not refer to the major question of judicial precedent, but rather to intervention under Article 63.¹⁹² It has, however, also been argued mainly on the basis of the drafting history of both Articles 59 and 63 that the former

ad hoc." Rosenne, Procedure, 182.

¹⁹⁰ See Miller, 558; Hambro, "Interpretation", 250.

¹⁹¹ See Hambro, "Interpretation", 249. Cf. the statement of the Permanent Court to the effect that it is perfectly true that all parts of a judgment concerning the points in dispute explain and complement each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion. See PCIJ Series B, No.2, 29-30. See also Hambro, "Intervention", 398; V.S. Mani, "A Review of the Functioning of the International Court of Justice", 11 IJIL (1971), 27 at 32 (hereinafter "Review").

¹⁹² See H. Lauterpacht, Development, 8; id., "Schools of Thought", 61; Brownlie, Principles, 21; McNair, International Justice, 13; Hudson, The Permanent Court, 207; Stauffenberg, 419-24.

does not improve the meaning of the latter, and further that there is no relation between them. It has been pointed out that Article 59, which was not contained in the draft Statute originally prepared by the 1920 Hague Advisory Committee of Jurists for a Permanent Court of International Justice, stemmed from the comments of Mr. Balfour, the British delegate at the Council of the League of Nations in October 1920, in which, inter alia, he called for some provision by which a third state could enter a protest against any ulterior conclusions to which a judicial decision might seem to point. In a report to the League Council, Mr. Leon Bourgeois, apparently with Mr. Balfour's earlier remarks in mind, observed with reference to intervention under Article 63 that:

This last stipulation establishes, in the contrary case, that if a state has not intervened in a case, the interpretation cannot be enforced against it. No possible disadvantage could ensue from stating directly what Article 61 [now Article 63] indirectly admits.¹⁹³

The report then proposed the addition to the Statute of the text of Article 59. It would therefore seem that the drafters of the Statute apprehended that the Court's interpretation of international law would be influenced by its previous judgments and that by adding Article 59 they intended to inhibit the extension of the modified interpretation of international law to third states. It has been observed that interpreted against this background, Article 59 does not add much to what was contemplated under Article 63 and thus has no

¹⁹³ See League of Nations, Documents, 50.

bearing on it.¹⁹⁴

6. Amicus Curiae

The absence in the Statute and Rules of the Court of any provisions permitting states which enjoy full procedural capacity on the international plane¹⁹⁵ to appear as amici curiae in contentious proceedings is remarkable.¹⁹⁶ Intervention under Article 63 has been perceived in terms of intervention as amicus curiae.¹⁹⁷

A procedure whereby states may appear as amici curiae is both desirable and necessary¹⁹⁸ because of the necessity for the Court to be in possession of all information likely to throw light on questions under consideration, especially in view of the partisan nature of contentious proceedings.¹⁹⁹ It is also in the interest of justice that the Court should benefit from the aid of objective information in deciding in accordance with international law such disputes as are submitted to it. It may be difficult in the extreme to determine the motive of the amicus curiae. It is possible

¹⁹⁴ See Oda, "Intervention", 645-6. See also ICJ Reports 1981, 29-30, paras.13-4 (Oda J., separate opinion) and *ibid.* 1984, 94, para.9, 102-4, paras.27-8 (Oda J. dissenting).

¹⁹⁵ See Article 34(1) of the Statute.

¹⁹⁶ See to the same effect, Chinkin, 515, n.83; Damrosch, 387.

¹⁹⁷ See del Duca, 465; cf. Chinkin, 515.

¹⁹⁸ See Miller, 560; Chinkin, 515, n.83.

¹⁹⁹ See Jessup, 909.

that the contribution of an objective amicus curiae may help the case of one of the parties to a dispute. It is also possible that a third state may seek to call attention to an interest of its own and thus protect it from being prejudiced by the outcome of the proceedings. This type of participation is similar to that described by the late Judge Nagendra Singh in his separate opinion in the Italian Intervention Judgment in which he reasoned, inter alia, that:

However, as far as cautioning the Court of the interests of the third party is concerned, this can always be achieved by an application under Article 62 ... The said provision of the Statute has therefore a utility of its own, however limited it may be.²⁰⁰

Given the multilateral nature of so many international disputes, amicus curiae appearances before the Court would make it possible for interests other than those of the parties to be represented or brought to the attention of the Court.²⁰¹ While such a procedure would enable third states to alert the Court to their interest, its primary purpose would be to assist the Court. Considering the Court's view that intervention for the purpose of the assistance or convenience of the Court is inadmissible,²⁰² such a function may be performed by the amicus curiae. Adoption of this proposal would necessitate modification of the Statute

²⁰⁰ See ICJ Reports 1984, 31-4. For the view that perhaps both Malta and Italy really wanted to bring matters of legitimate concern to the Court's attention in an official way to ensure that the Court could not disregard them, see Chinkin, 515.

²⁰¹ Cf. Chinkin, *ibid*; Damrosch, 387 and 389.

²⁰² See ICJ Reports 1984, 25, para.40.

probably along the lines of its Article 66 on advisory proceedings.²⁰³ Such amicus curiae would not be "parties" in the sense of Article 59. Their status would be similar to that of participants in advisory proceedings. However, the Court would have to overcome its present insistence on limited publication of the pleadings initiating contentious proceedings and find ways to make public the questions of law as to which comments from amici curiae might be received.²⁰⁴ Participation by states as amici curiae should be at the direction and discretion of the Court.

7. Controversial Issues of Intervention as of Right

There are not as many controversial issues relating to intervention as of right as there would seem to be regarding discretionary intervention. For example, the nature and scope of the former are relatively well defined. It is an entirely protective remedy limited to the construction of a convention which is in question in a case before the Court. Both the effect of the intervention and the status of the intervening state are fairly well settled. The intervening state is bound by the interpretation of the treaty given by the judgment and not by the decision in the case. There is, therefore, no question of its being a party to the case within the meaning of Article 59. The issue of the need for a valid link of jurisdiction between the intervening state and the original

²⁰³ See Chinkin, *ibid*; cf. Miller, 560.

²⁰⁴ See Miller, *ibid*.

parties does not arise, as the incidental jurisdiction which Article 63 confers on the Court is sufficient to enable it to admit such intervention.²⁰⁵

(a) Intervention in the Preliminary Objection Phase of a Case

Consequently, what controversial issue there is regarding intervention as of right is necessarily different in nature from those of discretionary intervention. The issue in question is whether intervention as of right is permissible in the preliminary objections phase of a case. It would seem that discretionary intervention is limited to the merits phase of a pending case, among other things, for the reason that the legal interest which a third state may have in the preliminary objection phase would be too remote to be admitted.²⁰⁶ This view can also be based on the doctrinal proposition that "... intervention is merely incidental to the main proceedings...".²⁰⁷

²⁰⁵ See ICJ Reports 1990, 133, para.96; *ibid.* 1984, 58, para.9, where in his separate opinion in the Italian Intervention Case, de Aréchaga J.A. asserted that "The assumption that Article 63 does not require a demonstration of jurisdiction has never been put to the test". Cf. Rosenne who observes that "... in the absence of sufficient judicial experience, the question must be regarded as an open one, especially where the jurisdiction is based on Article 36(2) of the Statute". See Rosenne, Law and Practice, 433-4; *id.*, "Some Reflections", 84; McGinley, 689; Hambro, "Jurisdiction", 148-50; *id.*, "Intervention", 390; Oda, "Intervention", 644. See also ICJ Reports 1981, 28, para.11 (separate opinion of Oda J.); *ibid.* 1984, 99-100, para.21 (Oda J. dissenting).

²⁰⁶ See ICJ Reports 1984, 235 (Schwebel J. dissenting). See also Sztucki, 1015, n.39.

²⁰⁷ See Mani, 260.

Sztucki rightly concludes that this assertion is valid only in respect of the inadmissibility of intervention in consequential proceedings under Articles 60 and 61, but not in the case of preliminary objections. He comments that

On this premise, the very idea of one incident of proceedings (intervention) being related to another incident (preliminary objections) may appear inconceivable and unacceptable to a juridical mind, as incompatible with the general principles of judicial process.²⁰⁸

Sztucki points out that when the drafters of the Statute laid the groundwork for phased proceedings, they did not think in terms of their procedural consequences. After observing that they related all incidents to cases as such, that is, implicitly to the merits, he notes that:

Still, this does not mean that international jurists of the 1920s were unwilling to admit certain procedural consequences of phased proceedings in interstate litigation - they simply did not give them any thought at the inception and in the early years of the Court. But when they did, they had to consider the possibility of an intervention under Article 63 related to another incident of proceedings.²⁰⁹

It appears that the question of barring intervention as of right in the preliminary objection phase was never subsequently considered by the Court.²¹⁰ The Court avoided answering this question which was first raised in the Salvadorean Intervention Case, when it dismissed El Salvador's

²⁰⁸ See Sztucki, 1016.

²⁰⁹ See *ibid.* He cites the example of Judge Anzilotti who thought that an intervention related to counterclaims if the latter involved the interpretation of a multilateral treaty, even if the main claim was based on other grounds.

²¹⁰ See, for example, ICJ Reports 1984, 235 (Schwebel J. dissenting).

Declaration of Intervention as inadmissible in as much as it related to the preliminary objections phase without a hearing.²¹¹ The question whether intervention as of right is permissible in the admissibility and jurisdiction phase of a pending case was given considerable attention by Judge Schwebel in his lengthy dissenting opinion in the Salvadorean Intervention Case.²¹² Judge Schwebel is convinced that the plain meaning of the terms of both the Statute and Rules, as well as the practice of the Court in respect of the sending of the notification under Article 63, support the view that intervention is not only admissible in the jurisdiction phase of a case, but also as regards the construction of the Charter of the United Nations and the Court's Statute.²¹³ The construction in bilateral disputes of multilateral conventions relating to jurisdictional questions can affect the legal position of a third state under such conventions no less than it can affect their position under other conventions whose clauses are substantive rather than jurisdictional.²¹⁴

²¹¹ See *ibid.*, 216.

²¹² See *ibid.*, 223 ff.

²¹³ See *ibid.*, 233-40 *passim* (Schwebel J. dissenting). Schwebel J. has argued that it is other conventions or declarations rather than the terms of the Statute itself which are usually at issue in jurisdictional disputes, because the Statute in principle does not directly confer jurisdiction on the Court, but merely indicates the means by which this can be done, namely, through treaties and conventions under Articles 36(1) and 37, or declarations under paras.2-5 of Article 36: see *ibid.*, 240; also Sztucki, 1024.

²¹⁴ Schwebel J. cites the following example. If one state maintains that the General Act for the Pacific Settlement of International Disputes remains in force and is a basis of the

It has been argued on the basis of the difference in the nature and evolution of both forms of intervention as well as the peculiarity of jurisdictional decisions in international disputes, that intervention as of right is admissible in the preliminary objections phase of a case.²¹⁵

(b) Intervention Regarding Declarations Under the Optional Clause

One issue which has been discussed in connection with the admissibility of intervention under Article 63 in the jurisdiction phase of a case, is whether this type of intervention embraces disputes over the effect of declarations of states under the optional clause of the Statute.²¹⁶ This issue was first raised by Judge Lauterpacht, who reached the conclusion in his separate opinion in the Norwegian Loans Case that intervention under Article 63 is permissible at the jurisdictional phase and not merely with regard to interpretation of the Statute, but even in declarations under the optional clause. With reference to the self-judging element of the submission to the Court's compulsory jurisdiction which was at issue in that case, Judge

Court's jurisdiction and another contests those contentions, why should not a third state party to the Act be able to intervene under Article 63 at the jurisdictional stage of the proceedings to submit a statement of the construction of the relevant provisions of that Act for which it contends?

²¹⁵ See Sztucki, 1016-7; Damrosch, 385-6 and 400.

²¹⁶ For a discussion of such declarations, see generally, Anand, Compulsory Jurisdiction, 141-248.

Lauterpacht observed that a decision of the Court which may affect governments which have had no opportunity to express their views on the subject was a cause of concern. "It would have been preferable if, in accordance with Article 63 ... the governments which had made a declaration in these terms had been given an opportunity to intervene."²¹⁷

In his dissenting opinion attached to the Court's Order of June 1973 in the Nuclear Tests Cases, Judge Petren argued that states parties to the 1928 General Act should have been consulted on the extent to which that Act could have survived the League of Nations and its organs and the effect of such survival on declarations made by states accepting the jurisdiction of the Court.²¹⁸

Chinkin comments that:

There appears to be no reason within the Statute not to allow intervention for the purpose of challenging jurisdiction or for construing the provisions of the Statute on jurisdiction differently from any other conventional terms for the purposes of activating Article 63. [She notes that] This interpretation necessitates allowing for the possibility of intervention under Article 63 whenever jurisdiction is claimed under Article 36(2) of the Statute, or under another treaty. Given the complexities of Article 36(2), this appears to conform with the purpose of Article 63. ... it is likely that only the scarcity of cases commenced under Article 36(2) since then has prevented the development of more

²¹⁷ See Certain Norwegian Loans, Judgment, ICJ Reports 1957, 63-4. See also his separate opinion in the Interhandel Case, Order of 24 October 1957, *ibid.*, 120.

²¹⁸ See the Nuclear Tests Case (Australia v. France), ICJ Reports, Order of June 22, 1973, 125 (Petren J. dissenting). See also McGinley, 691, n.135 where he cites Article 5 of the Vienna Convention on the Law of Treaties of 1969 as treating constituent instruments on a par with ordinary treaties with regard to their interpretation.

jurisprudence on this point.²¹⁹

In his dissent in the Salvadorean Intervention Case,
Judge Schwebel remarked that:

... there is room for another opinion, based on the fact that the declarations which States submit pursuant to Article 36, paragraphs 2,3 and 4 of the Statute are not conventions. May it be maintained that Article 63 - which expressly relates to the construction of 'a convention' - may be extended to include declarations made pursuant to a convention? That appears to be questionable. The legal character of declarations made under the Optional Clause is at issue in the jurisdictional phase of the current case between Nicaragua and the United States. At this point, it would not be appropriate to note more than that neither Party appears to view declarations made under the Optional Clause as treaties or conventions.²²⁰

While conceding that declarations under the Optional Clause are not treaties, and that they establish a consensual regime sui generis, Sztucki associates himself with the view expressed by Judge Lauterpacht in the Norwegian Loans Case, that:

It is irrelevant for the purpose of the view here outlined whether the instrument of acceptance of obligations of the Optional Clause is a treaty or some other mode of creating obligations.²²¹

After identifying and differentiating between two means by which states may accept the Court's obligatory jurisdiction, namely treaties or conventions, and declarations under the Optional Clause, he points out that both sources of jurisdiction are equivalent, and that the Court recognised this fact as regards the effect of their construction.

²¹⁹ See Chinkin, 510, n.64.

²²⁰ See ICJ Reports 1984, 241-2 (Schwebel J. dissenting).

²²¹ See ICJ Reports 1957, 48.

Sztucki makes the point that the construction of a jurisdictional link based on a declaration under the Optional Clause can affect the legal position of third states as much as the construction of such a link based on a provision in a multilateral treaty. Sztucki then asserts that:

It seems to be at variance with basic considerations of equity and logic that states should be allowed to intervene under Article 63 on the construction of a jurisdictional link established by the means envisaged in paragraph 1, but not by the means envisaged in paragraph 2 of the same article, since the function and purpose of both provisions, as well as the effects of their construction by the Court, are exactly the same. Accordingly, ... intervention under Article 63 in respect of the construction of the declaration under the Optional Clause should be regarded as admissible by way of analogy, because of the equivalence of the two independent sources of the Court's jurisdiction - at least in so far as the effects of their construction by the Court (a crucial point in the present context) are concerned. This interpretation remains valid even if intervention in respect of construction of the Statute in general is otherwise regarded as inadmissible, even if, consequently, the admissibility of intervention in respect of declarations under the optional clause could no longer be explained by their appurtenance to the Statute ... under Article 36(2).²²²

Sztucki observes that the admissibility of analogies from the law of treaties regarding particular aspects of declarations under the Optional Clause was recently confirmed by the Court when in considering their termination and withdrawal it held that they "should be treated, by analogy, according to the law of treaties".²²³ He refers to the separate opinion of Judge Jennings in which he remarked that "doubtless some parts of the law of treaties may be applied by

²²² See *ibid.*, 1026-7.

²²³ See Nicaragua/United States Case (Jurisdiction of Admissibility), ICJ Reports 1984, 420.

useful analogy" to these declarations.²²⁴ He also makes the point that the idea of the admissibility of analogies from the law of treaties regarding particular aspects of declarations under the Optional Clause is reflected in the legal literature.²²⁵

Finally, Sztucki finds support for the view that intervention under Article 63 may be applied to the construction of declarations made under the Optional Clause in the history of the Statute. He writes:

The present Article 63 was formulated when the Draft Statute did not envisage an Optional Clause or declarations thereunder. Neither the records of the League of Nations of 1920, nor those of the Committee of Jurists of 1929, nor, finally, those of the UN Committee of Jurists of April 1945 or of the San Francisco Conference reveal any indication that the possible effects upon Article 63 of the introduction of optional jurisdiction were ever given a thought, or that the wording of Article 63 was retained deliberately to exclude declarations under the Optional Clause.²²⁶

The view that intervention as of right should be extended to cover the construction of declarations under the Optional Clause deserves special respect. Indeed there may be instances in which it would be desirable to hear the views of third states with optional clause declarations similar to the

²²⁴ See *ibid.*

²²⁵ Sztucki cites Crawford to the effect that "the Court does not apply to declarations under the Optional Clause rules of treaty interpretation as such; rather, such principles are extended by analogy, or similar principles are generated independently of their application to treaties". See J. Crawford, "The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court", 50 *BYIL* (1979), 63, 77 (hereinafter "Crawford").

²²⁶ See Sztucki, 1027.

one under consideration.²²⁷ However, whether this view would be acceptable to a Court which has a tendency to interpret the forms of intervention enshrined in the Statute rather restrictively, must, in the absence of any relevant judicial authority, remain an open question, not least because, though the construction of declarations made under the Optional Clause may have the same effect on the states concerned as the interpretation of multilateral treaties, the fact remains that such declarations are, technically speaking, not conventions under Article 63 of the Statute, except either indirectly or by implication. In the circumstances, one wonders whether it would not be much easier for a third state to submit to the Court a request to be permitted to intervene in a case concerning the construction of a declaration made under the Optional Clause under Article 62, rather than to seek to use the right to intervene conferred on it by Article 63 whenever the construction of a convention is an issue in a case. A third state which has made a declaration under the Optional Clause in similar terms as the parties to the case in which the construction of the declaration is in question, clearly has an interest of a legal nature which may be affected by the construction of the declaration. A third state which is a signatory of the Optional Clause would also probably be able to prove the existence of a jurisdictional link with the parties in the case in which the declaration is to be construed. By analogy with Article 63(2) of the Statute, such

²²⁷ See Damrosch, 387-8 and 400.

a state would be bound by the construction given to the declaration by the judgment, if its intervention is strictly limited to the construction of the declaration made under the Optional Clause. In theory the Court has sufficient discretion to admit intervention in such circumstances. In practice, however, considering the habitual reluctance of the Court to put a liberal construction on this discretion, it is doubtful whether this view would carry any greater favour with it than that which was first put forward by Judge Lauterpacht.

8. Conclusion

Poland's intervention in the SS Wimbledon Case testifies to the view that from the beginning, the conditions for intervention as of right were given a very liberal interpretation by the Permanent Court. The trend of restrictive interpretation of this remedy became apparent in the 1926 and 1936 editions of the Rules which provided that the convention in question meant a convention relied upon or invoked in the Special Agreement or application as governing the case referred to the Court. Thus, it would appear that those rules did not envisage the possibility of the construction of a convention being in question at a later stage of the proceedings in a case.

It is true that the Rules of the present Court did not require that the convention to be construed should have been relied upon or invoked in the document instituting proceedings; but the degree of control which it exercised

over Cuba's intervention in the Haya de la Torre Case indicated the extent to which it limited the scope of intervention as of right. The administrative decision by means of which the special notification under Article 63 was discontinued in respect of the construction of the Charter, is another indication of the Court's tendency towards a narrow interpretation of intervention as of right. This tendency is also reflected in the 1978 Rules which have further tightened the conditions for this type of intervention. If further confirmation of the trend towards restrictive interpretation of intervention as of right were required, it was furnished when the Court rejected El Salvador's Declaration of Intervention on the basis of written communications.

It may be concluded from this discussion that in principle intervention under Article 63 is permissible in the preliminary objections phase of proceedings in a case. This conclusion is not only supported by the plain meaning of the terms of Article 63 itself and the Court's practice in respect of the sending of the special notification thereunder, but also by the differences between intervention under Articles 62 and 63, as well as the peculiarity of jurisdictional decisions in the judicial settlement of international disputes.

One aspect of this question is whether intervention under Article 63 in the preliminary objections phase of a pending case also extends to declarations made under the Optional Clause of the Statute. Though a considerable case appears to have been made out in the individual opinions of certain

judges and in the legal literature for the extension of such intervention to cover the construction of declarations under the Optional Clause, the answer to the question, regarding how far such an extension would be acceptable to a Court which is loathe to put a liberal interpretation on the forms of intervention permitted under the Statute must, in the absence of judicial experience, remain open. Nevertheless, since it is beyond question that a third state which has made a declaration under the Optional Clause in the same terms as the parties to a pending case involving the construction of such a declaration has a legal interest which may be affected by the interpretation of such a declaration, it is suggested that such a third state might more appropriately submit a request to the Court to be permitted to intervene in the case within the meaning of Article 62 in order to protect its legal interest. A third state which intervenes in such circumstances will be bound by the construction of the declaration given by the judgment in the sense of Article 63(2). Indeed, the discretion invested in the Court under Article 62 is broad enough to enable it to permit such intervention. However, as has been seen every so often, to have the necessary discretion is one thing, and to exercise it so as to extend the scope of intervention is quite another. Another way in which this problem may be solved might be to amend the Statute so as to extend the intervention under Article 63 in the preliminary objections phase of a pending case to cover the construction of declarations made under the

Optional Clause.

CHAPTER FOUR
THE IMPACT OF ADVISORY OPINIONS

1. Introduction

In the previous chapters we have explored the general safeguards which the Statute of the International Court affords for the protection of the rights and interests of third parties. We have tried to argue that because of the value of judicial decisions as an auxiliary source of law, and the adoption by the Court of the substance, if not the form, of the doctrine of judicial precedence, as well as the tendency of states appearing before the Court to rely on earlier decisions when they find it beneficial so to do, such general safeguards are imperfect or inadequate.

We have also discussed the particular and more specific guarantees, namely the two forms of intervention which the Statute provides for the safeguarding of the rights and interests of third states. We have attempted to show that the Court has so restrictively interpreted both variants of intervention as to reduce their effectiveness in achieving the purpose for which they were originally designed.

Thus far, we have been dealing with the position of third parties in relation to the primary contentious jurisdiction of the Court. For the sake of completeness, we now propose to discuss this subject in the context of the Court's secondary advisory jurisdiction which it exercises as the judicial arm of the United Nations. Since

in both a technical and formal sense, there are no parties in advisory proceedings, from the outset it is necessary to point out that the term "third parties" as employed in this part of our study is not intended to carry its conventional meaning. In other words, the notion of "third parties" herein advanced is not in terms of two litigating parties as against third parties. Rather, viewed in terms of access to the Court, and the form of participation in advisory proceedings, as well as the effect of the advisory opinions so rendered, the position of the participants in such proceedings is very similar to that of third parties in the conventional sense. Besides describing the legal basis and purposes of the advisory jurisdiction, it is proposed to identify "third parties" in advisory proceedings and to attempt an analysis of the impact of advisory opinions on them. It is therefore necessary to stress at the outset that the task of this chapter consists mainly in a study of the impact of the advisory function on "third parties", not a general or wide-ranging examination of the nature, scope and operation of the advisory procedure of the Court.

2(a) Legal Basis of Advisory Opinions¹

Articles 7(1) and 92 of the Charter established the International Court of Justice as a principal organ and as the principal judicial organ respectively of the United Nations.² While both Article 92 of the Charter and Article 1 of the Statute enjoined the Court to function in accordance with the Statute, the former further states that the Statute is an integral part of the Charter of the

¹ For a more detailed treatment of the evolution of the advisory competence, see, among others, D. Pratap, The Advisory Jurisdiction of the International Court (Oxford: Clarendon Press, 1972), 1-49 (hereinafter "Pratap"); K.J. Keith, The Extent of the Advisory Jurisdiction of the International Court of Justice (Leiden: A.W. Sijthoff, 1971), 13-26 (hereinafter "Keith"); M. Pomerance, The Advisory Function of the International Court in the League and U.N. Eras (London: Johns Hopkins University Press, 1973), 5-44 (hereinafter "Pomerance"); de Bustamante, 253-66; Hudson, The Permanent Court, 483-4. For a discussion of the advisory function of national courts, see, for example, Hudson, *ibid.*, 485-6; *id.*, "Advisory Opinions of National and International Courts", 37 HLR (1923-4), 970-84 (hereinafter "Advisory Opinions"); F. Frankfurter, "A Note on Advisory Opinions", 37 HLR (1923-4), 1002-9; *id.*, "Advisory Opinions", ESS Vol.1 (1930), 475-8; L.M. Goodrich, "The Nature of the Advisory Opinions of the Permanent Court of International Justice", 32 AJIL (1938), 738, 754-8 (hereinafter "Goodrich"); Pomerance, 9; Keith, 16; Rosenne, The World Court, 4th ed. (Dordrecht: Martinus Nijhoff Publishers, 1989), 80 (this is the edition cited in the rest of this chapter); F. Blaine-Sloan, "Advisory Jurisdiction of the International Court of Justice", 38 Cal.L.R. (1950), 830 (hereinafter "Sloan"); D. Negulesco, "L'Evolution de la Procédure des Avis Consultatifs de la Cour Permanente de Justice Internationale", 57 ADIRC (1936), 5-96 (hereinafter "Negulesco").

² See Articles 7(1) and 92 of the Charter. This does not exclude the possibility of states submitting their disputes to other tribunals or indeed to other means of pacific settlement. See, for example, Lissitzyn, 37; Pratap, 37; Sloan, 835.

United Nations.³ The advisory jurisdiction of the Court is regulated by Article 96 of the Charter and Articles 65-68 of the Statute, as well as the provisions of its Rules.⁴

(b) Purposes Served by Advisory Opinions⁵

The primary purpose of the advisory jurisdiction is to enable the Court to assist the political organs of the United Nations in the pacific settlement of international disputes referred to them for conciliation or mediation by clarifying the legal aspects of the issues involved.⁶ Advisory opinions might also be of assistance to the General Assembly in relation to its functions of coordinating the policies of the specialised agencies in

³ See Article 92 of the Charter and Article 1 of the Statute. See also Prataap, 38, 42 and 117. Cf. the view that it is not made explicit whether the Charter is part of the Statute. See L. Gross, "The International Court of Justice and the United Nations", 120 ADIRC (1967), 319, 323 (hereinafter "The ICJ and the UN") for a discussion of the institutional integration between the International Court and the United Nations. See *ibid.*, *passim*. See further 13 UNCIO, 242.

⁴ See Sloan, 832 ff; Keith, 15 and 35-44 for a discussion of the organs authorised to request advisory opinions. See also Prataap, 37-8; for the action taken by the General Assembly relative to Article 96(2) of the Charter, see *ibid.*, 46-7; Pomerance, 35-7; Bin Cheng, "The Scope and the Limits of the Advisory Jurisdiction of the International Court of Justice I", 24 The Solicitor (1957), 188 (hereinafter "Cheng"); E.M. Hambro, "The Authority of the Advisory Opinions of the International Court of Justice", 3 ICLQ (1954), 5 (hereinafter "Authority"). See also, Rosenne, Procedure, 211-2.

⁵ See generally, Lissitzyn, 84-90.

⁶ See Pomerance, 9, 27, 33, 40 and 42; Hudson, The Permanent Court, 523; Merrills, 97; cf. Singh, 16 for the view that the advisory jurisdiction may be used for the peaceful settlement of disputes, notwithstanding that its primary purpose is to give legal advice and guidance to the requesting organ.

supervising the economic and social activities of the United Nations.⁷ The advisory jurisdiction also makes it possible for the Court to assist other organs and specialised agencies authorised to request advisory opinions in their work, by advising them on legal and constitutional questions which may arise within the scope of their activities.⁸

The advisory jurisdiction has also widened access to the Court.⁹ The advisory procedure has also been employed as part of the machinery for the judicial review of the judgments of administrative tribunals involving individual staff members and the organisations in contentious cases.¹⁰ By serving as a means of gaining time, or of shifting the theatre of discussion in an acute, tense and delicate situation, a request for an advisory opinion may help to calm tempers and provide the states concerned with an opportunity for a more sober reflection on the matters in controversy. The opinion eventually rendered may also help

⁷ See 14 UNCIO, 177 and 179; Pomerance, 27-8 and 40; Pratap, 40.

⁸ See 9 UNCIO, 161, 166, 202, 246 and 247; Pratap, 43; Hudson, The Permanent Court, 523.

⁹ See INOJ (1923) 13217 and 1474; Hudson, The Permanent Court, 523-4.

¹⁰ See D.W. Bowett, The Law of International Institutions, 4th ed. Published under the auspices of the London Institute of World Affairs. (London: Stevens & Sons, 1982) 326-8 (hereinafter "International Institutions"); Pratap, 48-9; M. Lachs, "Some Reflections on the Contribution of the International Court of Justice to the Development of International Law", 10 SJILC (1983), 239 at 275-6 (hereinafter "Lachs"); E. Jiménez de Aréchaga, "The Work and the Jurisprudence of the International Court of Justice, 1947-1986", 58 BYIL (1987) 1 at 7 (hereinafter "Work and Jurisprudence").

to defuse the situation.¹¹

3. Effect of Advisory Opinions

(a) The Binding Force of Advisory Opinions

Advisory opinions of the Court lack the binding force which attaches to its judgments within the meaning of Article 59 of the Statute.¹² However, it would seem that the finality of an advisory opinion may not be very different from that of a judgment and, in practice, they are rarely ignored.¹³

¹¹ See Hudson, The Permanent Court, 523; Rosenne, The World Court, 207, 106.

¹² See, for example, de Bustamante, 264; Rosenne, The World Court, 103-4; K.L. Penegar, "The Relationship of Advisory Opinions of the International Court of Justice to the Maintenance of World Minimum Order", 113 UPLR (1965) 535 (hereinafter "Penegar"); M.O. Hudson, "The Effect of Advisory Opinions of the World Court", 42 AJIL (1948) 631 (hereinafter "Effect"); Lissitzyn, 17; Pratap, 7, 227-8; D.W. Greig, "The Advisory Jurisdiction of the International Court and the Settlement of Disputes Between States", 15 ICLQ (1966), 361 (hereinafter "Advisory Jurisdiction"); Sloan, 850, 855, where he argues that the Court's statement in the Peace Treaties Cases that an advisory opinion has no binding force should not be given a significance beyond the context in which it was made. See also ICJ Reports 1950, 71; 1954, 53; 1956, 84; Hudson, The Permanent Court, 511-2; Kelsen, 486; Hambro, "Authority", 5; Rosenne, The ICJ, 441; Keith, 24-5, 29; F.A. Vali, "The Austro-German Customs Regime before the Permanent Court with Reference to the Proposed Federation of Danubian States", 18 TGS (1932), 79-96.

¹³ See Sloan, 853; Keith, 59-66; Pratap, 255-6; Bowett, International Institutions, 363-4; Rosenne, The World Court, 103, 104-5 and 243; Anand, Compulsory Jurisdiction, 265-8; H. Lauterpacht, The Function of Law in the International Community (Oxford: Clarendon Press, 1933), 333; *id.*, Development, 107-10 and 355; A. Byman, "Student Comments: The March on Spanish Sahara, a Test of International Law", 6 JILP (1976) 75 at 118 (hereinafter "Byman"); G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: International Organisations and Tribunals", 29 BYIL (1952), 54-5 (hereinafter "29 BYIL (1952)").

(b) Advisory Opinions with Binding Force

There are, however, a number of well defined circumstances in which advisory opinions may be just as binding as judgments. In some cases, parties interested in or affected by the opinion may agree in advance to accept the opinion. Such opinions, which have been called compulsive opinions, are as binding on the interested parties as judgments in contentious cases.¹⁴

The idea of compulsive opinions is very similar to a practice which has been likened to "advisory arbitration", whereby organisations authorised to request opinions, and states may include in a convention, bilateral treaty, or a constituent instrument, a stipulation to the effect that they would submit their disputes to the advisory jurisdiction of the Court. In some instances, the parties to the dispute are required to accept the opinion as binding. This practice represents an attempt to overcome the procedural incapacity of international organisations to appear before the Court in disputes with states.¹⁵ The advisory procedure has also been used as part of the machinery for judicial review of the decisions of the administrative tribunals. This usually involves a review of the judgment of the tribunal between an individual staff member and the organisation. In a contentious case under

¹⁴ See as to this, Rosenne, Law and Practice, 682-6; Pratap, 47, n.4. for examples of such agreements and 22ff; Hudson, "Effect", 631-2; Kelsen, 486; Greig, "Advisory Jurisdiction", 361; Keith, 196.

¹⁵ See Pratap, 47-8; Kelsen, 486; Rosenne, The ICJ, 452; Hambro, "Authority", 9; id., "Some Observations", 155-7; Anand, Compulsory Jurisdiction, 281-2.

this procedure, the opinions are binding on the tribunals and organisations concerned.¹⁶

Another instance of advisory opinions with binding force may be cited from the period of the League of Nations. In cases concerning Danzig which came before the Permanent Court, the interested parties were bound by the opinions because under Article 100 of the Geneva Convention between Poland and Danzig, the power of decision in respect of disputes between Poland and Danzig and of appeals from the League High Commissioner for Danzig was vested in the Council of the League. The parties therefore had no choice as to the acceptance or rejection of the Court's opinion if the Council took positive action in relation thereto. It has therefore been rightly observed that:

In all the Danzig cases then the opinions were authoritative [thereby probably meaning binding] either because of the power of decision of the Council ... or as a result of the agreement of Danzig and Poland.¹⁷

In another category of cases, the Court may give what has been termed "negative or passive advice".¹⁸ Such opinions are binding in a negative sense because it would be virtually impossible for a requesting body or interested state to suggest that the law was other than the Court declared it to be.¹⁹ However, strictly speaking, there is no prohibitory force attaching to such opinions and the

¹⁶ See Pratap, 48.

¹⁷ See as to this, Keith, 200.

¹⁸ See Pomerance, 341; Keith, 197ff.

¹⁹ See to the same effect, Fitzmaurice, 29 BYIL (1952), 54-5. See also, Pratap, 228; Sloan, 853; Simpson and Fox, 277; Lissitzyn, 32-3; Keith, 197.

requesting bodies and the states concerned remain free to adopt a solution other than that advocated by the Court. The authoritative character of advisory opinions makes it seem unlikely that they would act in such a manner. Indeed, in no case have they acted in a manner contrary to the law laid down by the Court in these opinions.²⁰

(c) The Authority of Advisory Opinions

The actual authority and judicial nature of the Court's advisory opinions are inseparably bound up with the judicial character of the Court itself. The more authoritative the opinion, the more likely the Court is to insist on a judicial procedure. Conversely, the more juridical the procedure followed in order to arrive at the opinions, the more authoritative they are likely to be.²¹ Although advisory opinions are thought not to be binding in a technical and formal sense, their persuasive character and substantive authority are considerable.²² This is because they are judicial pronouncements of the highest international tribunal and the statements of law contained in them are of the same high quality as those contained in

²⁰ See Pratap, 252.

²¹ See Keith, 21 and 109 and the travaux préparatoires therein cited. See further, *ibid.*, ch.5.

²² See Pratap, 227 and 231; Fitzmaurice, 29 BYIL (1952), 55 and 34; *id.*, 34; *ibid.* (1958), 144; C.H.M. Waldock, "General Course on Public International Law", 106 ADIRC (1962), 115 (hereinafter "Waldock"); Keith, 196; Simpson & Fox, 277.

judgments.²³ As a result, they have substantial moral weight and influence.²⁴ Although advisory opinions are commonly not regarded as binding on any state or UN organ, the organs and agencies concerned have followed them faithfully.²⁵

There is some support for the view that the Court itself regards its opinions as possessing the same authority as its judgments.²⁶ In the Eastern Carelia Case, for example, the Permanent Court remarked that answering the question posed in the request would be substantially equivalent to deciding the dispute between the parties.²⁷ The way in which the Court cites its previous opinions shows that it regards its judgments and advisory opinions as being equally authoritative.²⁸ The Court does not make any distinction between its judgments and advisory opinions in this respect.

The Court's advisory opinions are also regarded by the

²³ See Pratap, 227 and 231 and the individual opinions of former members of the International Court therein cited. See also, Rosenne, The ICJ, 113; S. R. Crilly, "A Nascent Proposal for Expanding the Advisory Opinion Jurisdiction of the International Court of Justice", 10 SJILC (1983), 215, n.2 (hereinafter "Crilly").

²⁴ See Pratap, *ibid.*, and the individual opinions, as well as the views of publicists on the authoritative nature of advisory opinions therein cited. See also, Rosenne, The ICJ, 492-3; Penegar, 555-6; Fitzmaurice, 34 BYIL (1958), 142; de Bustamante, 259, 264. Cf. Sloan, 853.

²⁵ See Penegar, 535.

²⁶ See Keith, 196, 222.

²⁷ See PCIJ Series B, No.5, 29. See also Pratap, 231; Sloan, 854.

²⁸ See, for instance, H. Lauterpacht, Development, 9; Pratap, 257; Hambro, "Authority", 5; Sloan, 855.

requesting bodies and states as authoritative expressions of law. For instance, the General Assembly stated in the preambles to its resolutions requesting the opinions in the Peace Treaties²⁹ and Expenses Cases³⁰ its need for the authoritative legal advice or guidance of the Court.³¹ The fact that agreements providing for the acceptance of the Court's opinions on disputes as binding are concluded in advance (as happens in the case of so-called compulsive opinions and advisory arbitration) goes to confirm the recognition by parties to such agreements of the authoritative character of advisory opinions.³² The opinions are also authoritative in the sense that their correctness cannot be officially questioned by the organs to which they are given.³³

It has been suggested that the authoritative quality of advisory opinions may depend upon their reception or upon the number and merit of the dissenting opinions attached to them. In either case, the moral and doctrinal value of the opinion might be considerably reduced.³⁴ Persistent rejection of advisory opinions cannot fail to affect the international judicial process, but such effect

²⁹ See ICJ Reports 1950, 65, 67.

³⁰ See ICJ Reports 1962, 151, 152.

³¹ See as to this, Pratap, 231-2.

³² See Pratap, 231, n.7.

³³ See Pratap, 232; Sloan, 853.

³⁴ See in this connection, The Austro-German Customs Union and Admission Cases. See also Pratap, 232, n.1 and the many authorities therein cited. See also Hambro, "Authority", 20-2; Lissitzyn, 17.

goes more to the prestige of the Court than to the merit of its opinions, which are widely regarded as representing authoritative statements of international law.³⁵ However, the point that the authority of an opinion will be reduced if it is criticised in more persuasive individual opinions which express better law would seem to have some validity. At any rate, the record of the reception of advisory opinions by the requesting bodies and international organisations and states concerned has not been unimpressive, as will be seen presently.

4. Third Parties in Advisory Proceedings

(a) Meaning of Third Parties

By "third parties" we mean the participants which are affected by or interested in, but are not litigants in advisory proceedings.³⁶ Even the requesting organ or body, which alone has direct and complete access to the Court in such proceedings, is technically not bound by the opinion rendered. Still less is the opinion technically binding on the other participants, namely, other international organisations, states and individuals. In this sense, the effect of the advisory opinion is akin to that of a judgment on third parties. The position of the requesting organ or body and the other participants is also identical to that of third parties. Moreover, where a request for an advisory opinion relates to a legal question actually

³⁵ See Crilly, 217; Szasz, 507-8.

³⁶ Cf. for example, de Bustamante, 259; Rosenne, The World Court, 104; Penegar, 535 and 556; Hudson, "Effect", 631; Lissitzyn, 17; Pratap, 17, 35, 227.

pending between two or more states, the requesting organ or body is cast in the role of a "third party" which seeks the Court's advice on the legal aspects of a dispute to which it is otherwise a complete stranger.

Other international organisations which are not authorised to request advisory opinions, but which may, nevertheless, be interested in, or affected by such opinions, enjoy limited access to the Court in advisory proceedings. Their role in such proceedings is one of supplying information to the Court. This is very similar to the traditional function of the amicus curiae in municipal legal systems. In this sense, such international organisations may be described as "third parties".

The participation of states in advisory proceedings is similarly limited to furnishing the Court with information. This is so, notwithstanding that states may be interested in advisory proceedings either as members of the requesting organ or body,³⁷ or because they may be affected by the subject-matter of such proceedings in a particular way, especially where such proceedings have the character of a quasi-contentious case. Furthermore, not infrequently, the implementation of some advisory opinions have been influenced by the attitude of state members of the requesting organ or body or those states immediately concerned.³⁸

The issue of the position of private individuals

³⁷ Cf. Rosenne, The ICJ, 496.

³⁸ For the use of the term "third parties" with reference to states, see Damrosch, 389.

arises in connection with the employment of the advisory procedure as part of the machinery for judicial review of the judgments of administrative tribunals. Although such a procedure is clearly an appeal of process for review in continuation of the proceedings before the administrative tribunal in which the real parties were the individual staff member concerned and the organisation,³⁹ the former has, so far, only had indirect access to the Court by means of an ad hoc procedural arrangement. For this reason, we regard such participants as "third parties".

Last but not least, it may be noted that an important reason for the Court's insistence on safeguarding its character as a judicial organ even when exercising its advisory jurisdiction, and on regarding the rendering of advisory opinions as a judicial function,⁴⁰ consists in the fact that the opinion may affect the interested participants other than the requesting organ or body.⁴¹ It is to an examination of the impact of advisory opinions on these "third parties" that we shall now turn.

(b) Requesting Organs

³⁹ See Rosenne, The ICJ, 488-9.

⁴⁰ On the judicial character of the advisory function and advisory opinions, see Pratap, 230; Sloan, 848; W. Schwartz, "The International Court's Role as an Advisor to the United Nations. A Study in Retrogressive Development", 37 BULR (1957) 407 (hereinafter "Schwartz"); Hudson, "Effect", 630; id., "Advisory Opinions", 1000; Rosenne, The World Court, 104. On the assimilation of the advisory ^{procedure} to the contentious procedure, see Pratap, 15-36; Keith, 151-95.

⁴¹ For the use of this term in the same sense, see Elian, 74.

The Security Council and the General Assembly of the United Nations are directly authorised by the Charter to request advisory opinions on legal questions.⁴² Other organs of the United Nations and the specialised agencies may be authorised by the General Assembly to request advisory opinions on legal questions which arise within the scope of their activities.⁴³ The Economic and Social Council and the Trusteeship Council have been authorised to request advisory opinions.⁴⁴

The Secretariat, which is a principal organ, is not authorised to request advisory opinions.⁴⁵ The Secretary-General may indirectly seek an opinion of the Court by asking the General Assembly or another authorised organ to make the request.⁴⁶

Besides the principal organs, the Interim Committee of the General Assembly, a subsidiary organ established under

⁴² See Article 96(1) of the Charter.

⁴³ See Article 96(2) of the Charter. For a general discussion of practice regarding this provision, see Vol.5, Repertory of Practice of the United Nations Organs, 1955, 87ff (hereinafter "Repertory").

⁴⁴ See GA Res.89(1) of 11 December 1946 in respect of the Economic and Social Council, and GA Res.171(II) on the need for greater use of the Court of 14 November 1947 and GA Res.224(III) concerning administrative unions affecting trust territories of 18 November 1948 in respect of the Trusteeship Council. See also, Rosenne, The ICJ, 446.

⁴⁵ For suggestions that the Secretary-General might be authorised to request opinions, see for example, Sloan, 833; C.W. Jenks, "The Status of International Organisations in Relation to the International Court of Justice", 32 TGS (1946), 13 (hereinafter "Status"); S.M. Schwebel, "Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice", in The Lachs Collection, 519-29 (hereinafter "Authorizing the Secretary General").

⁴⁶ See Sloan, 833; Rosenne, The ICJ, 446-7.

Article 22 of the Charter, is authorised to request advisory opinions.⁴⁷ The Committee on Applications for Review of Administrative Tribunal Judgments is also authorised to request advisory opinions.⁴⁸ With the exception of the Universal Postal Union, which has its own internal system for settling disputes, all the specialised agencies are now so authorised. Such authorisation may be granted by means of a provision in so-called relationship agreements concluded between each organisation and the United Nations.⁴⁹

(c) States and International Organizations as Amici Curiae in Advisory Proceedings⁵⁰

⁴⁷ GA Res.196(III) of 3 December 1948 and 295(IV) of 21 November 1949. See also, Rosenne, The ICJ, 446; Sloan, 833-4.

⁴⁸ See GA Res.957(X). See also Rosenne, The ICJ, 445-6.

⁴⁹ For a synopsis of the organs of the United Nations and of the specialised agencies authorised to request advisory opinions, see Rosenne, The ICJ, 450-2; see also *ibid.*, 449-50; *id.*, The World Court, 104-5; Pratap, 45; Sloan, 836-7; Penegar, 534-5.

⁵⁰ See generally, E. Jimenez de Aréchaga, "The Participation of International Organisations in Advisory Proceedings before the International Court of Justice", 14 CS (1975), 413-22; Rosenne, The ICJ, 479-80; Mani, "Review", 27 at 33-5; E. Lauterpacht, Aspects, 60-5. On amicus curiae practice in general see Brian A. Garner, A Dictionary of Modern Legal Usage (New York: Oxford University Press, 1987), 40; Jackson's Machinery of Justice, ed. J.R. Spencer (Cambridge: Cambridge University Press, 1987), 495; S. Krislov, "The Amicus Curiae Brief: from Friendship to Advocacy", 72 YLJ (1963), 674, 694; F.B. Wiener, "The Supreme Court's New Rules", 68 HLR (1954), 20; Moore's Federal Practice, 2nd ed., Supreme Court Practice and Rules, Rule 36, Brief of an Amicus Curiae; E. Angell, "The Amicus Curiae: American Development of English Institutions", 16 ICLQ (1967), 1017; F.V. Harper and E.D. Hetherington, "Lobbyists before the Court", 101 UPLR (1953), 1172; Jowitt, 98; D.M. Walker,

Suggestions that states be permitted to request advisory opinions have never been accepted.⁵¹ However, under the contentious procedure, states may bring a case for a declaratory judgment.⁵² Furthermore, states may also ask an authorised organ to request an advisory opinion. This has actually happened on a number of occasions.⁵³

Article 66 of the Statute, the enabling provision which grants access to the Court to states and international organisations in advisory proceedings, stipulates that:

(1) The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

(2) The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organisation considered by the Court ... as likely to be able to furnish information on the question that the Court will be prepared to receive, ... written statements or to hear ... oral statements relating to the question.

(3) Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a

Oxford Companion to Law (Oxford: Clarendon Press, 1980), 53; Davi, 282; The Encyclopedia of Words and Phrases, Legal Maxims, Canada 1825-1978, 3rd ed., ed. Gerald G. Sanagan, v.1 (Toronto, Canada: Richard Deboo Ltd.*), 417; "The Leff Dictionary of Law", 94 YLJ (1985) 2012; Moore and Levi, "Federal Intervention I: the Right to Intervene and Reorganisation", 45 YLJ (1935-6), 565; id., "Federal Intervention, Procedure, Status and Federal Jurisdictional Requirements", 47 YLJ (1937-8), 898.

⁵¹ See 3 UNCIO, 182-319, 373, 447 and 850; 13 ibid., 235 and 496; Pomerance, 28; Pratap, 39-42. See also, the Report of the Informal Interallied Committee, paras.64-75, reprinted in 39 AJIL (1945), Supp., 20-3.

⁵² See German Interests in Polish Upper Silesia Case (Merits), PCIJ Series A, No.7, 19. See also, Pomerance, 42.

⁵³ See e.g., The Tunis and Morocco Nationality Decrees, PCIJ Series B, No.4. See also Hudson, 1 World Court Reports, 134.

written statement or to be heard; and the Court will decide.

(4) States and organisations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organisations ... Accordingly, the Registrar shall in due time communicate any such written statements to states and organisations having submitted similar statements.

Article 66 is supplemented by Article 105 of the 1978

Rules which provides:

(1) Written statements submitted to the Court shall be communicated ... to any States and organisations which have submitted such statements.

(2) The Court ... shall (a) determine the form in which, and the extent to which, comments permitted under Article 66 paragraph 4 ... shall be received, and fix the time limit for the submission of any such comments in writing; (b) decide whether oral proceedings shall take place at which statements and comments may be submitted to the Court under the provisions of Article 66...⁵⁴

The first paragraph of Article 66 may be regarded as a purely administrative duty which the Statute assigns to the Registrar. This duty is similar to that which is imposed on the Registrar under the third paragraph of Article 40 of the Statute when he informs states about the submission of a contentious case to the Court. Notification under this paragraph does not amount to an invitation to present information to the Court. A state which purports to be entitled to present information to the Court on the basis of notification under this paragraph is in no better position than one which pursuant to paragraph 3 indicates a desire to present information on the question. In either case, it lies in the discretion of the Court either to accept or to decline the offer to furnish

⁵⁴ See Rosenne, Procedure, 219.

information.⁵⁵

The duty of the Registrar under the second paragraph of Article 66 of the Statute to advise states and international organisations considered likely to be able to furnish the Court with information on the question that the Court will be prepared to receive such information, appears to involve a judicial element. Not only should it be performed in consultation with the Court, but it appears that its performance implies an exercise of judgment which must necessarily entail appreciation of reasons, factors or circumstances which lead to the conclusion that a particular state or international organisation is likely to be able to furnish information. The notification envisaged under this provision would appear to be an invitation to the state or international organisation concerned to assist the Court with information.

Miller is of the opinion that the notification qualifies the state or organisation as a participant. He contrasts the import of a notification under Article 66 with that in connection with intervention and observes that "notification under Articles 62⁵⁶ and 63 does not in itself qualify any state as an intervener". He further notes that:

In two cases involving multilateral treaties the Court applied Article 63 by analogy in determining the states entitled to notice and communicated with all parties to the treaties. From this it has been reasoned that Article 66 extends to states which would have a right to intervene if the case were a

⁵⁵ See Prapat, 180; Hudson, The Permanent Court, 556.

⁵⁶ Article 62 does not envisage any notification.

contentious one.⁵⁷

Under the terms of the third paragraph of Article 66, any state entitled to appear before the Court which has not received the notification envisaged in the second paragraph may indicate its desire to submit written or oral statements to the Court. The decision rests with the Court.⁵⁸

The Court has generally appeared more liberal in admitting statements from states than from international organisations in advisory proceedings.⁵⁹ In this connection, the omission of any mention of international organisations in the third paragraph of Article 66 is noteworthy.⁶⁰

Under the fourth paragraph of Article 66, states and

⁵⁷ See Miller, 558-9; Rosenne, Law and Practice, 734.

⁵⁸ See Miller, 558.

⁵⁹ See Jessup, 905; Hudson, Permanent Court, 423-4.

⁶⁰ See Pratap, 180. In the South West Africa (Status) Case, ICJ Reports 1950, 128, the Court agreed in principle to receive statements on the legal aspects of the case from the International League for the Rights of Man, *ibid.*, 130, see also ICJYB 1953-4, 105, although eventually this organisation did not avail itself of this authorisation, *ibid.*; ICJ Reports 1950, 130. See also Cheng, 247; Singh, 96. The Court declined to receive a statement of views from the Federation of International Civil Servants Associations in the UN Administrative Tribunal Case, see ICJ Pleadings, UN Administrative Tribunal Case, 389-90; ICJYB 1953-4, 105. See also Miller, 560; L. Gross, "Participation of Individuals in Advisory Proceedings before the International Court of Justice: Question of Equality between the Parties", 52 AJIL (1958), 16 (hereinafter "Participation"); Cheng, 247. In the Namibia Case, the OAU's request to take part in the oral proceedings was granted, see ICJ Pleadings, Namibia Case, Vol.2, 655 and 658. In the Reservations Case, written statements were filed by the Organisation of American States and by the International Labour Organisation. See ICJ Reports 1951, 17-8; see also Singh, 96; Rosenne, The World Court, 229, n.26.

international organisations submitting written or oral statements or both are permitted to comment on the statements submitted by other states and international organisations.⁶¹ This provision implies that the purpose of the participation of states and international organisations in advisory proceedings is much more than the need merely to make all the necessary and relevant information available to the Court. It would appear that the purpose and function of Article 66 is to enable states and international organisations to assist the Court by providing it with the information which it needs while protecting their own interests by bringing such interests to the Court's attention.

In advisory proceedings then, such "third parties" perform a function which is not very different from that served by the *amicus curiae* in municipal legal systems. It is therefore not surprising that Article 66 is generally believed to introduce the *amicus curiae* institution into the Statute in respect of advisory proceedings.⁶²

Where the request for an advisory opinion relates to a dispute actually pending between two or more states, the position of states is much more than that of mere purveyors of information, since, apart from the desire to furnish the Court with the necessary information to enable it to consider the question in all its aspects, the rights and

⁶¹ See Miller, 559.

⁶² See Miller, 559; Pratap, 181; Jenks, "Status", 38; *id.*, Prospects, 131, 189 and 221; Rosenne, The ICJ, 479. Cf. A. Hammarskjöld, Jurisdiction Internationale, (Leiden, 1938), 118.

interests of such states may either be directly or indirectly affected by the opinion. In such circumstances, the advisory proceedings are quasi-contentious in character and the position of the participating states and international organisations is in fact not very different from that of "third parties" in contentious cases. For this reason, the Court may, on account of its judicial character and the judicial nature of the advisory function, further assimilate the advisory procedure to that followed in contentious cases to the extent it deems necessary.⁶³

(d) Intervention by States in Advisory Proceedings

The application of Article 66(2) and (3) of the Statute has led to the view in some quarters that intervention within the meaning of Articles 62 and 63 is permissible in advisory proceedings.⁶⁴

⁶³ See Miller, 559; Pratap, 181.

⁶⁴ See for instance, Hambro, "Jurisdiction", 150. The sole authority which Hambro cites is Hudson, The Permanent Court, 424, especially n.6. However, if we examine Hudson's reflections very carefully, and in their proper context, it becomes quite clear that he did not think that the provisions of the Statute relating to intervention in contentious cases are also applicable in advisory proceedings. The nearest that Hudson comes to suggesting that intervention is possible in advisory proceedings is when he observes, with respect to the practice of the Permanent Court regarding the sending of special notices to states deemed likely to be able to furnish the Court with information under Article 73 of the 1926 Rules, that a tendency was manifest in the early years, also, to apply the underlying principle of Article 63 of the Statute in advisory proceedings. See Hudson, The Permanent Court, 423-4. Pratap has also expressed the view that the provisions of the Statute concerning intervention in contentious cases are applicable by analogy in advisory cases. See Pratap, 19, 181-2. Cf. ICJ Reports 1984, 43 where Mbaye J. in his separate opinion does not seem to distinguish between the Court's contentious and advisory jurisdictions in relation to intervention. See also, de

✓

We submit that Articles 62 and 63 are not applicable in advisory proceedings. In theory it is possible by a strained construction of Article 68 of the Statute which gives the Court discretion to assimilate the advisory procedure to that followed in contentious cases, to hold that intervention within the meaning of these provisions could, by analogy, be allowed in advisory proceedings.⁶⁵ In reality, however, at the present time, considering the tendency of the Court to interpret intervention restrictively in contentious cases, this, to say the least, is most unlikely to happen. When the Court purports to apply Article 63(1) by sending notice to states parties to treaties whose construction may be in issue in advisory proceedings, it may, in reality, only be applying the underlying principle contained in that provision. The kind of participation granted to Rumania in 1923 in lieu of intervention within the meaning of Articles 62 and 63 is the only form of participation which the Statute and the practice of the Court to date grants to third states in advisory cases.

(e) Consent of Interested States in Advisory Opinions

We shall now turn to a brief discussion of the relationship of the consent of interested states to the advisory function. This will entail an examination of the Court's approach to requests for advisory opinions which

Bustamente, 260; Rosenne, The ICJ, 480.

⁶⁵ Even then this would be an intervention sui generis, the necessary conditions and effects of which are beyond the pale of the advisory jurisdiction.

involve the determination of the rights of states, and a consideration of the issue whether in a non-binding opinion, the Court can ever be said to be disposing of the interest of a third state even if the advisory opinion was not absolutely needed for the day to day work of the organisation.

It is a well established principle of international law that the Court can only exercise jurisdiction over a state with its consent.⁶⁶ The Court has stated that where the legal interest of a third state would form the very subject matter of a decision in a case, that case cannot be decided in the absence of the consent of that third state. In such circumstances, the protection which the rule in Article 59 affords for third states would be unavailing because that rule rests on the assumption that the Court is at least able to render a binding decision. Without the consent of the third state, the Court cannot give a binding decision in such a case.⁶⁷ However, it would seem that where the interest of a third state would merely be affected by the decision, the case would be decided without its consent, as such a third state would in theory be protected by the rule in Article 59.⁶⁸ Of course, the specific protection which the institution of intervention affords will also be available to such a third state.

As regards the Court's advisory jurisdiction, the

⁶⁶ See ICJ Reports 1954, 32; *ibid.* 1984, 22-3, paras.34-7. See also, Greig, "Advisory Jurisdiction", 325.

⁶⁷ See ICJ Reports 1954, 33.

⁶⁸ See, for example, ICJ Reports 1963, 33.

issue of the necessity of the consent of an interested state⁶⁹ is not uncontroversial. Some advisory opinions may be so closely related to interstate disputes as to be similar to quasi-contentious cases. While arguably, such cases are disputes between states as to their respective rights and obligations, they come before the Court by way of requests for advisory opinions. Even cases primarily concerned with international, constitutional and organisational matters, or institutional cases, may contain some contentious elements. Indeed, it does not follow that a controversy, simply because it involves a disagreement over the meaning of certain provisions of the Charter or other treaty, is the less vital to the interests of the contesting states.⁷⁰

In contradistinction to the situation regarding contentious cases, it is now well established that the consent of an interested state is not required for the exercise of the advisory jurisdiction, although it may be

⁶⁹ On consent and the advisory function see generally, P. Lalonde, "The Death of the Eastern Carelia Doctrine: Has Compulsory Jurisdiction arrived in the World Court?", 37 UTFLR (1979), 80-100 (hereinafter "Lalonde"); Anand, Compulsory Jurisdiction, 264-82; Pomerance, 287-96; Keith, 89-123; Pratap, 154-69; Rosenne, The World Court, 105-6, 107, 159-60; 233-4, and 242; *id.*, The ICJ, 473. On the nature of the vote required for a request for an advisory opinion, see Sloan, 836-8; Pratap, 99-109; Keith, 45-8. Cf. A.D. McNair, "The Council's Request for an Advisory Opinion of the PCIJ", 3 BYIL (1926), 11-2; Gross, "The ICJ and the UN", 369; Pomerance, 365-8; D. Lenefsky, "A Successful Jurisprudence of Advisory Opinions for the International Court of Justice", 15/16 IYIA (1966/7), 46-8, 66 and 67-8 (hereinafter "Jurisprudence"); *id.*, "Advisory Opinions as a Problem Solving Process", 11 VLR (1966), 528-30, 535-9 (hereinafter "Advisory Opinions").

⁷⁰ See Lalonde, 80; Greig, "Advisory Jurisdiction", 326.

considered in relation to the exercise of the Court's discretion.⁷¹ The outstanding issue in this connection is in what circumstances the Court would exercise its discretion against complying with a request for an advisory opinion.

The only known instance of a refusal to render an advisory opinion is the Eastern Carelia Case,⁷² which concerned allegations by Finland, a member of the League, that Russia, a non-member of the League, was not living up to its obligations under the Treaty of Peace of Dorpat of 14 October 1920 and under the annexed declaration given at the time of signature by the Russian delegation. Finland sought to raise the matter before the League Council, but the peaceful settlement procedures of Articles 12-6 of the Covenant applied only to members. Article 17 of the Covenant did provide for ad hoc acceptance by non-members

⁷¹ See ICJ Reports 1950, 72. The Statute directs the Court to exercise its advisory jurisdiction in respect of legal as opposed to political questions. Moreover, in its advisory capacity, the Court has a discretion whether or not to answer the question submitted to it. In practice, neither limitation has proved a great obstacle to the wide exercise by the Court of its advisory powers. Consistently, the Court has regarded as legal any dispute however serious the political factors involved provided that some answer was possible by the application of legal rules and techniques. Nor has the Court been prepared to accept the political implications of a dispute as a reason for exercising its discretion to refuse to give an opinion. See Greig, "Advisory Jurisdiction", 326. On the Court's handling of challenges to its advisory competence, see e.g. Pomerance, 282-321.

⁷² See PCIJ Series B, No.5. See also, Rosenne, Law and Practice, 716; L.E. Blaydes Jr., "International Law ... Advisory Opinion on Western Sahara 1975", 11 TILJ (1976), 361 (hereinafter "Blaydes"). The Court in one contentious case declined to render a judgment on grounds of judicial propriety. See Northern Cameroons Case, ICJ Reports 1963, 29. See also, Gross, The ICJ and the UN, 341-2.

of the pacific settlements procedures. However, Russia never availed itself of this provision, maintaining that the question of its treatment of the population of Eastern Carelia was purely a domestic matter which lay outside the competence of the League and the Court.⁷³ The question referred to the Court at the instance of Finland required it to determine whether the declaration constituted an international obligation or whether, as Russia claimed, it had been given for information only. The Court did not find it necessary to deal with the issue whether a request for an advisory opinion relating to matters which form the subject of a pending dispute between nations should be put to the Court without the consent of the parties.⁷⁴ The Court pointed out that as Russia was not a member of the

⁷³ See PCIJ Series B, No.5, 12-6.

⁷⁴ See *ibid.*, 27. See also, Hudson, The Permanent Court, 489ff; Cheng, 219; Keith, 93; Pomerance, 287; Lalonde, 84. Cf. the view that this case dealt with the proposition that the consent of the interested state is one of the elements necessary for the establishment of the Court's jurisdiction in advisory cases. See T. Sugihara, "The Advisory Function of the International Court of Justice" 18 JAIL (1974), 23, 33; P.C. Jessup, "The Protocol for American Adherence to the Permanent Court", 25 AJIL (1931) 308, 312; Hambro, "Authority", 11-3; H. Lauterpacht, Development, 107; cf. *ibid.*, 356, n.50. See also Pratap, 16-7, 28, n.2 and 155. In connection with the second part of the 5th reservation of the Senate Resolution concerning the accession of the United States to the Statute of the Permanent Court, which raised the question of a dispute between a state member of the League and a non-member, the 1926 Conference of State Signatories of the Protocol of Signature of the Statute referred to the Eastern Carelia Case which it believed to appear to meet the desire of the United States that the Court should not without its consent entertain any request for an advisory opinion on any dispute or question in which it had or claimed an interest. See *ibid.*, 22; Pomerance, 289; Keith, 101-8.

League, the case fell under Article 17 of the Covenant⁷⁵ under which the peaceful settlement procedures were applicable only with the consent of the non-member. This rule, the Court pointed out, was in keeping with the fundamental principle of international law that "No state can without its consent be compelled to submit its disputes with other states either to mediation, or to arbitration or to any other kind of pacific settlement".⁷⁶ Such consent could be given by acceptance of the Covenant in joining the League, but

as concerns states not members of the League, the situation is quite different. They are not bound by the Covenant. The submission therefore of a dispute between them and a member of the League for solution according to the methods provided for in the Covenant could only take place by virtue of their consent; such consent however has never been given by Russia. The Court therefore finds it impossible to give its opinion on a dispute of this kind.⁷⁷

The Court gave other cogent reasons which rendered it inexpedient for it to render an opinion on the dispute. First, without Russia's participation, it was doubtful that the Court would have material sufficient to enable it to arrive at any judicial conclusion upon the question of fact as to what the parties had actually agreed.⁷⁸ Secondly, "The question put to the Court concerns directly the main point of the controversy between Finland and Russia. Answering the question would be substantially equivalent to

⁷⁵ See PCIJ Series B, No.5, 27.

⁷⁶ See *ibid.*

⁷⁷ See *ibid.*, 27-8.

⁷⁸ See *ibid.*, 28.

deciding the dispute between the parties".⁷⁹

It may therefore be asserted that in the Eastern Carelia Case the Court declined to render an opinion primarily because under the League Covenant the League was incompetent to deal with the dispute and ipso facto incompetent to request the advisory opinion. As Russia was neither a member nor a consenting non-member, the Council was incapable under the Covenant of dealing with the dispute without violating the fundamental principle of international law, namely, the principle of the independence of states. Moreover, the Council was given no role to perform under the Treaty of Dorpat.⁸⁰

This view of the Eastern Carelia Case was confirmed by the German Settlers Case, in which the same Court said that

The question that has been discussed ... falls under two general heads. First, that of the competency of the League of Nations to take cognizance of the matter and secondly, that of the right of the settlers to

⁷⁹ See *ibid.*, 28-9.

⁸⁰ See Pomerance, 287-8; Lalonde, 85; Keith, 96; Cheng, 219-20. In his dissent in the Danzig Legislative Decrees Case, Anzilotti J. reasoned that the fact that the Court's opinion had been requested on a question which related to the municipal law of a particular country apart from any question of international law or of an international dispute, sufficed to justify the Court in declining to accede to the request for the opinion. See PCIJ Series A/B, No.65, 62-3. However, it would appear that in the Court's view, the fact that the League had guaranteed the Danzig constitution meant that it would be called upon to pass upon the constitutionality of the municipal decrees the interpretation of which was within the competence of the League, the requesting organ. This case indirectly supports the view that the Court declined to accede to the request in the Eastern Carelia Case on account of the incompetence of the requesting organ. See Cheng, 220 n.38-9. For a discussion of the Eastern Carelia Case, see e.g., Keith, 89-95; Greig, "Advisory Jurisdiction", 333-4; Lalonde, 82-5. For the reaction of the League Council to the Court's reply, see LNOJ (1923) 1337, 1502.

continue to hold and cultivate the land which they occupy. If as Poland has claimed, the subject-matter of the controversy is not within the competency of the League, the Court will not be justified in rendering an opinion as to the rights of the settlers. The Court therefore will first consider the question of competency.⁸¹

The relationship of the consent of interested states to the advisory function may also be discussed in connection with the Mosul Case.⁸² Under Article 3(2) of the Treaty of Lausanne, Turkey and Great Britain had agreed in the event of their inability to fix the frontier between Turkey and Iraq to refer the matter to the League Council. Like Russia, Turkey was not a member of the League. But unlike Russia, Turkey accepted the Council's invitation to appoint a representative to it⁸³ and participated fully in the Council's debates on the dispute.⁸⁴ At one point Turkey appeared to have agreed to accept in advance any decision the Council should make.⁸⁵ However, after an adverse report from the Council's commission of inquiry Turkey reversed itself and took the position that Article

⁸¹ See German Settlers in Poland advisory opinion, PCIJ Series B, No.6, 18-9. Cf. the ILO Administrative Tribunal Case, ICJ Reports 1956, 98-9. See also, Cheng, 220; Lalonde, 85. Although this interpretation of Eastern Carelia has great merit, it has until quite recently received very little support in the literature. H. Lauterpacht referred to it in a footnote as one possible explanation for the Court's refusal to render the opinion. See H. Lauterpacht, Development, 356, n.50. Negulesco also considered it. See Negulesco, 5.

⁸² See PCIJ Series B, No.12, 6.

⁸³ See LNOJ (1924) 1465-6.

⁸⁴ See LNOJ (1922) 1318-24, 1337-9, 1358-60, 1648-54.

⁸⁵ See LNOJ (1923) 1337-8, 1358-9.

3(2) only contemplated the Council's good offices⁸⁶ and that it would not consider itself bound by the Council's decision. The Council then submitted two questions to the Permanent Court concerning the nature of its powers under Article 3(2).⁸⁷ Turkey protested⁸⁸ but did submit some documents to the Court⁸⁹ and did answer certain questions put to it by the Court.⁹⁰ However, as it had apparently opposed submission of the request⁹¹ in the Council and had maintained throughout that the Court was without jurisdiction,⁹² it is doubtful that these actions could amount to implied consent.⁹³ If this is correct, then the Court was faced with a request in which the dispute involved a non-consenting non-member. Moreover, the dispute was actually pending between two states and it related to one of the state's most vital interests, territory. In affirming its competence the Court distinguished the Eastern Carelia Case by holding that

The circumstances in the present case were distinctly different since the question before the Court referred

⁸⁶ See LNOJ (1925) 1317-27, 1380-1. Early in the proceedings a disagreement arose as to the exact nature of the Council's role, ie. whether it was acting as arbitrator or mediator. See Lalonde, 86.

⁸⁷ See LNOJ (1925) 1377.

⁸⁸ See PCIJ Series B, No.12, 8-9.

⁸⁹ See Mosul Case, PCIJ Series C, No.10, 308.

⁹⁰ See *ibid.*, 317-8, 287-8. See also, Pomerance, 289-90.

⁹¹ See LNOJ (1926) 122.

⁹² See *ibid.*

⁹³ See the Western Sahara Case, ICJ Reports 1975, 23. See also, Lalonde, 86.

not to the merits of the affair, but to the competence of the Council which had been duly seised of the affair and could undoubtedly ask for the Court's opinion on points of law.⁹⁴

The Court made two distinctions. The first is a distinction between the substance of the dispute and the procedure related to its settlement. This distinction is the one most often relied upon by commentators⁹⁵ and was used by the Court itself in a subsequent case.⁹⁶ However, this distinction is somewhat suspect in that the question before the Court in the Eastern Carelia Case did not go to the substantive merits at all, but merely raised the preliminary question of whether Russia had any obligation under international law.⁹⁷ The second distinction appears to be more soundly based. The Council "had been duly seised of the affair" by virtue of Article 3(2) of the Treaty of Lausanne or by virtue of Turkey's consent under Article 17 of the Covenant and could undoubtedly ask the Court's opinion on points of law. The question submitted simply related to the nature of that competence, the manner of its exercise and the legal effect to be attributed to the Council's decision. At no time was there any question of the Council's competence to deal with the substantive dispute.⁹⁸ These opinions of the Permanent Court indicate

⁹⁴ See Annual Report of the PCIJ Series E, No.2, 164.

⁹⁵ See De Visscher, "Les Avis Consultatifs de la Court Permanent de Justice Internationale", 26 ADIRC (1929), 5, 33; Hudson, The Permanent Court, 491

⁹⁶ See ICJ Reports 1950, 72.

⁹⁷ See Lalonde, 87.

⁹⁸ See *ibid.*; Pratap, 167.

only that lack of consent raises considerations of judicial propriety first, when, because one of the parties has refused to participate the Court does not have before it all of the essential facts, and secondly, when a request does not appear to be legitimately required by the requesting organ for purposes of its work.⁹⁹

Another, if secondary¹⁰⁰ reason why the Court declined to render an opinion was that while the Court considered itself entitled in principle to answer any question, it would decline to do so in cases where to answer would conflict with its judicial function. In other words, even if the Court is fully possessed of jurisdiction to comply with the request for an advisory opinion, it ought not as a matter of propriety to do so if this would mean in effect making a judicial pronouncement on a matter at issue between two states.¹⁰¹ The Court expressly recognised the question of propriety when it found that being a court of justice, it could not even in giving advisory opinions depart from the essential rules¹⁰² guiding its activity as

⁹⁹ See Pomerance, 78; Lalonde, 88.

¹⁰⁰ See ICJ Reports 1975, 28.

¹⁰¹ See Fitzmaurice, 29 BYIL (1952), 1, 53; *id.*, 34 *ibid.* (1958), 67; Rosenne, "Nonuse", 3.

¹⁰² This statement points to the independent existence of certain fundamental principles governing the administration of justice transcending the written rules to be found in the Court's Statute and Rules. These essential rules probably belong to those general principles of law recognised by all nations which according to Article 38 of the Statute form part and parcel of international law, the law to be applied by the Court. See Cheng, 220. See also, *id.*, General Principles of Law as Applied by International Courts and Tribunals (Cambridge: Grotius Publications Ltd., 1953), esp. part 4 dealing with general principles of law in judicial proceedings.

a court.¹⁰³

The question of the consent of states to the settlement of their disputes through advisory opinions came before the International Court in the Peace Treaties Case (First Phase)¹⁰⁴ which involved non-consenting non-member states. Both the competence of the Assembly to make the request and the competence of the Court to answer were vigorously challenged by the Soviet bloc countries.¹⁰⁵ No objections were taken to the Assembly's competence on the grounds of lack of consent of the interested states. Objections on this ground were directed solely to the competence of the Court.¹⁰⁶ The Court responded to this challenge to its competence by distinguishing its advisory from its contentious jurisdiction in the following oft-quoted passage:

This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to advisory opinions.

The consent of states parties to a dispute is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the request for an opinion relates to a legal question actually pending between states. The Court's reply is only of an advisory character; as such, it has no binding force. It follows that no state, whether a member of the United Nations or not, can prevent the giving of an

¹⁰³ See PCIJ Series B, No.5, 29; ICJ Reports 1962, 155. See also Lalonde, 84; Cheng, 220. On the nature and inherent limitations of the judicial function, see the Northern Cameroons Case, ICJ Reports 1963, 29-31, 33-4 and 36-8. For a discussion of the Mosul Case, see Keith, 96-101; Greig, "Advisory Jurisdiction", 335; Pomerance, 289-90, 295-6; Lalonde, 86-7.

¹⁰⁴ See ICJ Reports 1950, 65.

¹⁰⁵ See Keith, 114; Pomerance, 284; Lalonde, 89.

¹⁰⁶ See Keith, *ibid.*; Lalonde, *ibid.*

advisory opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's opinion is given not to the states, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the organisation, and in principle should not be refused.¹⁰⁷

The Court by affirming in the most unequivocal manner that lack of consent of an interested party would not affect its jurisdiction sounded the death knell of the theory that the Court had assimilated into its advisory jurisdiction the requirement of consent, which is one interpretation of the ratio of Eastern Carelia. We submit that the Court's position on this point is unassailable. Any strict rule that interested states could prevent the Court from giving to a requesting organ an opinion necessary for guidance in fulfilling its duty will unduly inhibit the effective administration of international justice.¹⁰⁸ Furthermore, such a rule would not only hinder the work of the requesting body, but also prevent the Court from participating in the work of the United Nations. Moreover, can it not be safely assumed that acceptance of Art.96 of the Charter implies acquiescence in the right of the duly authorised bodies to request and receive the Court's advice?¹⁰⁹ A request on a legal question involving a subject-matter within the competence of a requesting organ which is presented after a decision by an affirmative vote of the majority is a request the Court is competent to

¹⁰⁷ See ICJ Reports 1950, 71.

¹⁰⁸ See Lalonde, 90.

¹⁰⁹ See Pomerance, 289, n.39 and 194, n.56.

answer under the Charter.¹¹⁰ This is not to say that lack of consent is irrelevant to the exercise of the Court's discretion. The Court recognised the relevance of its power to decline to render an opinion when it observed:

There are certain limits, however, to the Court's duty to reply to a request for an opinion. It is not merely an 'organ of the United Nations', it is essentially the 'principal judicial organ' of the organisation...

Article 65 of the Statute is permissive. It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request.¹¹¹ In other words, it saw the issue of consent as being relevant to the question of whether the Court could remain faithful to its judicial character. The Court then distinguished the Eastern Carelia Case by stating that in its opinion:

the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia Case (Advisory Opinion No.5) when that Court declined to give an opinion because it found that the question put to it was directly related to the main point of dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.¹¹²

It reiterated that the opinion which it was called upon to give related only to dispute settlement procedures and not the disputes themselves. If the Eastern Carelia Case had laid down a rigid rule that lack of consent of disputant states rendered the Court incompetent to exercise its

¹¹⁰ See Keith, 111; H. Lauterpacht, Development, 357; Lalonde, 90.

¹¹¹ See ICJ Reports 1950, 71-2.

¹¹² See *ibid.*

advisory function, then the Peace Treaties Case was a complete abandonment of that principle.¹¹³ It would seem that the Court was accepting that interpretation of the Eastern Carelia principle according to which, where a request relates to an actual dispute pending between states, whether members or not, lack of consent is relevant only in so far as it raises questions of judicial propriety. The distinction made by the Court between matters of procedure and matters of substance is extremely tenuous in principle. While a question may be in one respect procedural, it often constitutes by itself a pivotal point and will exercise considerable influence on the course to be followed in examining and settling claims.¹¹⁴ The Peace Treaties Case involved a situation in which the two sides held clearly opposite views concerning the interpretation and the execution of their treaty obligations, and it is difficult to see how this conflict of views could not be regarded as a substantive part of the dispute. In any event, on the facts, no such distinction could be drawn between the two cases. In Peace Treaties, the Court went beyond mere enlightenment on the question of procedure.¹¹⁵ While recognising and accepting the proposition that the Court cannot be concerned with the motives which may have inspired the request,¹¹⁶ it also

¹¹³ See Weissberg, 13; H. Lauterpacht, Development, 355; Lalonde, 91.

¹¹⁴ See Lalonde, 91.

¹¹⁵ See H. Lauterpacht, Development, 35; Lalonde, 92.

¹¹⁶ See Admissions Case, ICJ Reports 1947-8, 61.

remains true that "The Court itself and not the parties must be the guardian of the Court's judicial integrity".¹¹⁷ To this end, the Court recognises its duty to verify that the requesting organ has a legitimate interest in the subject-matter of the request.¹¹⁸ If the mischief to be prevented is the abuse of the advisory function, the Court must look beyond the mere form of the request to the substance of the question.¹¹⁹

Invoking the Eastern Carelia principle in the Reservations Case, the Philippines contended that answering the questions raised "would be substantially equivalent to deciding the dispute" pending between itself and Australia which had objected to the Philippine reservation to the Genocide Convention and declined to regard the Philippine ratification as valid. This "dispute", the Philippines maintained, could come before the Court only by means of a joint submission under the Convention's compromisory clause.¹²⁰ The interest of the client, the General Assembly, was both incontrovertible and paramount.¹²¹ The contention that the request related to an existing dispute

¹¹⁷ See Northern Cameroons Case, *ibid.* 1963, 15, 29. In the IMCO Case, the Court rejected any attempt to make it exceed the bounds of the normal judicial function. See ICJ Reports 1960, 153. See also, Rosenne, Law and Practice, 707. See generally, L. Gross, "Limitations upon the Judicial Function", 58 AJIL (1964), 415-31.

¹¹⁸ See Expenses Case, ICJ Reports 1962, 155-6. See also, Lalonde, 92.

¹¹⁹ See Fitzmaurice, 34 BYIL (1958), 143; Lalonde, 93.

¹²⁰ See Reservations Case, ICJ Pleadings, 1951, 295-7. Cf. the Rumanian objection, *ibid.*, 291.

¹²¹ See ICJ Reports 1951, 19.

was not generally acknowledged. Rather, the Court and most of the states represented before it stressed the "abstract" nature of the question.¹²² Even if the request in the Reservations Case was related to an existing dispute, the "Eastern Carelia principle" would have been inapplicable since the parties to such a dispute were all members of the United Nations.¹²³ It is significant that although other objections to the rendering of the opinion were raised, there was no dissent regarding the Court's competence to give an opinion in this case.¹²⁴

The "Eastern Carelia principle" was invoked once more in the Namibia Case and again found to be inapplicable. South Africa argued that since the questions before the Court bore directly on an interstate dispute, the Court should as a matter of its discretion refuse to entertain the request. The participation of South Africa in the proceedings was not to be construed as consent to the Court's acceding to the request.¹²⁵ The Court distinguished the Eastern Carelia Case thus: Unlike Russia, which was not a member of the League, South Africa was a member of the United Nations and bound by Article 96 of the Charter.¹²⁶ Furthermore, while Russia did not

¹²² See *ibid.*, 21. See also Pomerance, 293; Il Ro Suh, "National Judges in Advisory Proceedings of the International Court", 19 IJIL (1979), 32 (hereinafter "Suh").

¹²³ See Pomerance, *ibid.*

¹²⁴ See Pomerance, *ibid.*, and 305-7.

¹²⁵ See the Namibia Case, ICJ Pleadings, 1971, 1, 442-7. See also, Pomerance, 294.

¹²⁶ ICJ Reports 1971, 23.

appear before the Permanent Court in the Eastern Carelia Case, South Africa had participated in the Namibia Case.¹²⁷ Moreover, the Court denied the "quasi-contentious" character of the Namibia Case and emphasised the "client-lawyer" aspect. It pointed out that the purpose of the request was not to obtain the Court's assistance in the exercise of the Security Council's functions relating to the peaceful settlement of a dispute pending before it between one or more states, but to seek legal advice from the Court on the consequences and implications of its own decisions.¹²⁸ The Court insisted that the case involved neither an interstate dispute nor even a dispute between the United Nations and South Africa.¹²⁹ The Court saw no compelling reasons which prevented it from acceding to the request in the Namibia Case. It considered that by acceding to the request, it would remain faithful to the requirements of its judicial character while also discharging its functions as the principal judicial organ of the United Nations.¹³⁰

The Western Sahara Case¹³¹ presented the Court with an

¹²⁷ See *ibid.*, 23-4.

¹²⁸ See *ibid.*, 24.

¹²⁹ See *ibid.* For criticism of the Court's finding as representing a purely formal view of the facts of the case which does not correspond to reality, see the dissenting opinion of Gross J., *ibid.*, 326, the separate opinion of Petren J., *ibid.*, 128-30 and the dissenting opinion of Fitzmaurice J., *ibid.*, 313-6. Dillard J. recognised the existence of a dispute between the United Nations and South Africa. *Ibid.*, 155.

¹³⁰ See *ibid.*, 27.

¹³¹ See ICJ Reports 1975, 12.

opportunity to clarify the position with respect to the consent principle. Spain objected that in such a case lack of consent of an interested state rendered the Court incompetent; that since in this case advisory jurisdiction was being used to introduce compulsory jurisdiction, the Court should decline to answer the request; that consent was particularly essential where a matter of territorial sovereignty was involved, and that the Court was not possessed of all the relevant facts and was therefore unable to pronounce judicially on the matter before it.¹³² The Court observed that the Peace Treaties Case had established the principle that "the absence of an interested state's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Court, but the propriety of its exercise".¹³³ In discussing the nature of its discretion under Article 65(1), the Court confirmed its observations in the first phase of the Peace Treaties Case to the effect that its opinion represented its participation in the activities of the UN and that in principle, should not be refused. It also reiterated emphatically that as a judicial body it was bound to observe the principles and requirements of its judicial character even in rendering advisory opinions.¹³⁴ The Court found that Spain had by its silence rejected Morocco's offer to submit the dispute between them concerning Western Sahara to the Court for decision in

¹³² See *ibid.*, 20-2. See also, Lalonde, 93-4.

¹³³ See ICJ Reports 1975, 21.

¹³⁴ See *ibid.*

contentious proceedings. It further found that in the light of Spain's persistent objections, neither its abstention from the vote on the Assembly's requesting resolution, nor its participation in the advisory proceedings constituted implied consent. The Court then distinguished the Eastern Carelia Case by noting that Russia, one of the parties in that case, was neither a party to the Statute of the Permanent Court nor a member of the League and that lack of competence of the League to deal with a dispute involving a non-member state which opposed its intervention was a decisive reason why the Court declined to accede to the request. In the Western Sahara Case, however, Spain was a member of the United Nations and had accepted the provisions of the Charter and the Statute. It had thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It had not objected, and could not validly object to the General Assembly's exercise of its powers to deal with decolonisation of a nonself-governing territory and to seek an opinion on questions relevant to the exercise of those powers.¹³⁵

The Court considered that its opinion was being requested on a legal question which arose during proceedings in the General Assembly in relation to matters with which that body was dealing. It did not arise

¹³⁵ See *ibid.*, 23-4. See also, Lalonde, 94-5; M.W. Janis, "The International Court of Justice: Advisory Opinion on the Western Sahara", 17 *HILJ* (1976), 609, 611-4 (hereinafter "Janis"); L.L. Herman, "Western Sahara Advisory Opinion - An Analysis of the World*Judgment in the Western Sahara Case", 41 *SLR* (1976-7), 141-2 (hereinafter "Herman").

independently in bilateral relations.¹³⁶ Since the dispute arose in the General Assembly, Morocco's invitation to Spain to submit the matter to the Court's contentious jurisdiction did not have the effect of detaching the dispute from the decolonisation proceedings of the United Nations.¹³⁷ The Court also found that the terms of the Moroccan proposal and the request before it were not substantially identical. While the Moroccan proposal raised the question of Morocco's legal ties with Western Sahara, the Assembly's request raised the overlapping claims of Mauritania.¹³⁸ The Court further observed that the Assembly's request raised the possibility of the application of General Assembly Resolution 1514, thereby placing the legal questions of which it had been seised in a broader frame of reference than the settlement of a particular dispute.¹³⁹ In considering the lack of consent, the Court attached considerable importance to the perceived object and purpose of the request. Consequently, it would look beyond the terms of the request to the full text of the requesting resolution, to formal communications between the parties and to the proceedings in the UN itself.¹⁴⁰ The Court held that the object of the General Assembly was not to bring before the Court by way of a request for

¹³⁶ See ICJ Reports 1975, 25.

¹³⁷ See *ibid.*, 26.

¹³⁸ For a criticism of this distinction, see Lalonde, 96.

¹³⁹ See ICJ Reports 1975, 26.

¹⁴⁰ See *ibid.*, 26-7.

advisory opinion a dispute or legal controversy in order that it may later be the basis of the Court's opinion, or to exercise its powers and functions for the peaceful settlement of that dispute, but to obtain an opinion which the General Assembly deemed of assistance to it for the proper exercise of its functions concerning the decolonisation of the territory.¹⁴¹ While this distinction may be open to the criticism¹⁴² that the decolonisation process is at the heart of the dispute, the significance of this pronouncement lies in what it reveals. As long as the request is couched in terms of assistance to the requesting organ, rather than in terms of the settlement of a particular dispute, the Court will neither consider the wisdom of the request nor the possible value of the opinion. Where the requesting organ deems the opinion will be of value to it, the Court will not examine the underlying motives. In view of the Court's professed duty to participate in the activities of the organisation, there exists a presumption in favour of acceding to requests for advisory opinions. The onus will rest on the non-consenting state to demonstrate the impropriety of answering the request.¹⁴³

The Court rejected Spain's assertion that the exercise of its advisory jurisdiction was improper because the dispute concerned a matter of territorial sovereignty.

¹⁴¹ See *ibid.*, 26.

¹⁴² See Blaydes, 360-1.

¹⁴³ Cf. the individual opinions of Gros, Ignacio-Pinto, Petren and Dillard JJ., ICJ Reports 1975, 69ff, 78ff, 104ff, 116ff. See also, Blaydes, 360.

While not rejecting the proposition that territorial questions always required a state's consent, it pointed out that Spain's right to exercise sovereignty over the territory was not in issue.¹⁴⁴ The Court also rejected Spain's contention relating to the alleged insufficiency of evidence before the Court, noting that this problem was only a secondary reason for the refusal of the Permanent Court to accede to the request in the Eastern Carelia Case. It stressed that the issue in the Eastern Carelia and the Western Sahara Cases was not that there were disputed questions of fact and an absent party, but solely whether the Court could reach a judicial conclusion on the available evidence. The Court found that it was possessed of ample evidence and therefore quite capable of reaching a judicial conclusion.¹⁴⁵

This case also raised many other important questions,¹⁴⁶ e.g. the definition of a legal question for purposes of Article 96 of the Charter and Article 65 of the Statute, and whether the Court should answer a question that was academic and legally irrelevant or devoid of purpose. In so far as these issues raise the fundamental question of the nature of the dispute between Morocco and Spain, they have some relevance. For if the dispute was not over current rights, the importance of consent was diminished. In the words of the Court:

The issue between Morocco and Spain regarding Western

¹⁴⁴ See ICJ Reports 1975, 28.

¹⁴⁵ See *ibid.* See also Lalonde, 96-8.

¹⁴⁶ On its significance, see Blaydes, 355-6.

Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonisation. It follows that the legal position of a state which has refused its consent to the present proceedings is not in any way compromised by the answers that the Court may give to the question put to it.¹⁴⁷

The necessity of the consent of a state to the rendering of an advisory opinion again arose before the Court in the Mazilu Case in which Rumania challenged the competence of the Court to render the opinion on the basis of its reservation to s.30 of the Convention on the privileges and immunities of the United Nations according to which the United Nations could not without its consent submit a request for an advisory opinion in respect of its difference with Rumania. This reservation, Rumania argued, subordinated the Court's competence to deal with any dispute that might have arisen between the United Nations and Rumania, including a dispute within the framework of the advisory procedure to the consent of the parties to the dispute. Since Rumania had not consented to the request, the Court was without jurisdiction to entertain it.¹⁴⁸ The Court pointed out that the advisory jurisdiction enabled United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with the law. "These opinions are advisory not binding. As the opinions are intended for the guidance of the United Nations, the consent of states is not a condition precedent

¹⁴⁷ See ICJ Reports 1975, 27. See also, Lalonde, 98. Cf. ICJ Reports 1975, 72 and 109, for the views of Gros and Petren JJ. respectively that there was no legal dispute pending between Spain and Morocco at the time.

¹⁴⁸ See ICJ Reports 1989, 188.

to the competence of the Court to give them." The Court declared that its reasoning in the Peace Treaties Case concerning the basis of the advisory jurisdiction and the nature of advisory opinions, was equally valid where a legal question was pending not between two states, but between the United Nations and a member state.¹⁴⁹

Nevertheless, the Court observed that:

While, however, the absence of the consent of Rumania to the present proceedings can have no effect on the jurisdiction of the Court, it is a matter to be considered when examining the propriety of the Court giving an opinion. It is well settled in the Court's jurisprudence that when a request is made ... for an advisory opinion by way of guidance or enlightenment on a question of law, the Court should entertain the request ... unless there are 'compelling reasons' to the contrary.

In the Western Sahara Case the Court adverted to a possible situation in which such a "compelling reason" might be present. In that case, commenting on its observations in the Peace Treaties Case, to the effect that its competence to give an opinion does not depend on the consent of the interested states, the Court observed

... that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested state continues to be relevant not to the Court's competence, but for the appreciation of the propriety of giving an opinion. In certain circumstances, therefore, the lack of consent of an interested state may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a state is not obliged to allow its dispute to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it ... would afford sufficient

¹⁴⁹ See *ibid.*, 188-9.

legal means to ensure respect for the fundamental principle of consent to jurisdiction". (Western Sahara Advisory Opinion, ICJ Reports 1975, p.25, paras.32-3.)¹⁵⁰

The Court considered that in the Mazilu Case, to give a reply would not have the effect of circumventing the principle that a state is not obliged to allow its disputes to be submitted to judicial settlement without its consent. The Court then differentiated a dispute between the United Nations and Rumania as to the applicability of the Convention to Mr. Mazilu as contained in the requesting resolution and the question put to the Court in the light thereof on the one hand, from the dispute between the United Nations and Rumania with respect to the application of the General Convention in the case of Mr. Mazilu on the other.¹⁵¹ Thus the Court did not find any compelling reasons to refuse an advisory opinion.¹⁵²

The International Court clarifies the scope of the Eastern Carelia Case according to which the Permanent Court considered the lack of consent of an interested state affected its competence to entertain the request in so far as it went to the incompetence of the requesting organ to deal with the root issue which gave rise to that request.¹⁵³ In the Peace Treaties Case, however, the Court

¹⁵⁰ See *ibid.*, 190-1.

¹⁵¹ We find the Court's differentiation both artificial and unpersuasive.

¹⁵² See *ibid.*, 191.

¹⁵³ See Keith, 124-6; Pomerance, 282-4; Szasz, 505; Pratap, 165; Cf. Hudson, The Permanent Court, 477; Fitzmaurice, 29 BYIL (1952), 53. Cf. Pomerance, 296. See also, Greig, "Advisory Jurisdiction", 326 for the view that the jurisprudence of the present Court, while professing

demonstrated reluctance to delve too deeply into the requesting organ's competence to deal with the root issue.¹⁵⁴ It could also be argued that this is a moot point because there is no provision in the Charter similar to Article 17 of the Covenant which authorises the General Assembly or the Security Council to act whether the dispute is between members or not.¹⁵⁵ A non-consenting non-member would have to rely for example, on such provisions as Article 2(7) to challenge the competence of the requesting organ. As the principle of consent is arguably no longer relevant to the competence of any requesting organ, nevertheless the argument could be made¹⁵⁶ that the Charter provisions themselves in so far as they purport to involve the disputant non-consenting non-members in pacific settlement procedures, conflict with the rule of international law recognised in the Eastern Carelia Case. In this manner, consent could be made relevant to the requesting organ's and thereby, indirectly to the Court's competence. Even though this argument might be available to the non-member of the UN, the Court has impliedly rejected it. In the Western Sahara Case, the Court impliedly accepted the proposition that any matter plausibly falling within the very wide scope of the United

support for the Eastern Carelia principle, has largely undermined its authority.

¹⁵⁴ See ICJ Reports 1950, 71. See also, Pomerance, 284, n.20.

¹⁵⁵ See Pratap, 157; Greig, "Advisory Jurisdiction", 338.

¹⁵⁶ See Keith, 129-30.

Nations Charter and formulated in general terms so as not to raise the objection of Article 2(7), is one with which a requesting organ is competent to deal.¹⁵⁷ In distinguishing the Eastern Carelia Case, the Court in effect confined that case to its peculiar facts. The Court seems to be of the view that the Charter has effected a qualitative change in international law. Thus, the lack of consent of a non-member will probably never again go to the competence of the requesting organ to deal with the dispute.¹⁵⁸ And even if it should, it appears that for the Court it is still a matter of propriety.¹⁵⁹ But after establishing this principle, the Court failed to indicate precisely when lack of consent would cause it to exercise its discretion to refuse an answer. The example it cites is circular and merely restates the problem.¹⁶⁰ One can, however, glean from its handling of objections an indication of those factors the Court will examine in relation to the consent principle, and perhaps, more importantly, those it will not.¹⁶¹

The Court would decline to entertain a request for an advisory opinion, the sole object of which is to assist the requesting organ or body in the settlement of a dispute

¹⁵⁷ See Lalonde, 95.

¹⁵⁸ See Keith, 131-2; Lalonde, 96.

¹⁵⁹ See ICJ Reports 1975, 25.

¹⁶⁰ See *ibid.*, 25. See also, Blaydes, 360.

¹⁶¹ See Blaydes, 360-1; Lalonde, 96-8 and 99; Pomerance, 295-6.

between states.¹⁶² Furthermore, in so far as advisory opinions are formally and technically speaking, not binding on either the Court, the requesting organs or bodies and other "third parties", it is not true to say that in an advisory opinion the Court may dispose of the rights and interests of "third parties". Since, however, in practice such opinions are backed by the Court's authority and prestige, their legal effect is very similar to that of judgments.¹⁶³ Consequently, in spite of the non-binding character of advisory opinions, the Court is not likely to depart from the reasoning contained in previous opinions if they are found to be applicable in later cases. To this extent, the Court will dispose of the rights and interests of "third parties" in discharging the advisory function. Moreover, it has undoubtedly been the usual situation for an advisory opinion to pronounce directly upon the rights and obligations of the states or parties concerned or upon the conditions which if fulfilled would result in the coming into existence, modification, or termination of such a right or obligation.¹⁶⁴

(f) Advisory Opinions as Precedents¹⁶⁵

¹⁶² See ICJ Reports 1971, 24; *ibid.* 1975, 26.

¹⁶³ See Byman, 188; Singh, 26, 41 and 96; Pomerance, 9 and 10, n.16; Elian, 148, n.46; Lalonde, 92; Weisberg, 149; Fitzmaurice, 34 BYIL (1958), 142; Greig, "Advisory Jurisdiction", 363.

¹⁶⁴ See ICJ Reports 1975, 20, para.19.

¹⁶⁵ On this topic, see for example, Keith, Ch.2; Pratap, 257-9; Lissitzyn, 18-21; McNair, International Justice, 12-4; Adede, 61-75.

We begin this section by observing that the remarks in the earlier discussion¹⁶⁶ on the subject of the attitude of the Court concerning the doctrine of stare decisis in respect of its judgment in contentious cases are also equally true, indeed if not more so, of its practice as regards advisory opinions. In order therefore at best to avoid unnecessary repetition, and to reduce necessary repetition to the barest minimum, this section will of necessity be relatively brief. Its chief purpose is through the highlighting of some salient features of the Court's adherence to the doctrine of judicial precedence to illustrate the long-term, if indirect, impact of advisory opinions on "third parties".

First of all, it is necessary to explain that in the performance of its advisory function, the Court is not bound by Article 59 of its Statute in the same sense that it would seem it must be, if only in theory, by that provision in the exercise of its contentious jurisdiction. This is not so only because its advisory jurisdiction is regulated by a different set of rules, separate and distinct from those governing its contentious jurisdiction, but also because of the fact that technically speaking, there are no parties before the Court in such proceedings for whom the decision in the case would be binding in the sense of Article 59.

One result of this situation is that in theory the issue of the relationship between Article 59 of the Statute

¹⁶⁶ See Chapter 1, above.

and advisory opinions does not arise.¹⁶⁷ This would also be the case on the basis of the other thesis, according to which Article 59 is believed to refer only to intervention under Article 63 of the Statute.¹⁶⁸

Another consequence is that both in theory and in reality, therefore, it would appear that the Court has greater liberty to follow the doctrine of judicial precedence in carrying out its advisory function than it would theoretically seem to possess when exercising its contentious jurisdiction. A good reason for this view consists in the fact that there is no rule to be found among the provisions of the Statute governing the Court's advisory procedure which is similar in effect to Article 59.¹⁶⁹

The Court cites its own advisory opinions¹⁷⁰ as well as those of its predecessor, the Permanent Court.¹⁷¹

¹⁶⁷ If the thesis that as regards the Court's contentious jurisdiction, Article 59 refers only to the operative part of the judgment, rather than to the judgment as a whole, has any validity, it would appear that there is no difference between judgments and advisory opinions in respect of their value as precedent. See as to this, Chapter 1 above. See also, Keith, 28-30.

¹⁶⁸ See as to this, Ch. 3 above. See also, Keith, 27-8; McNair, International Justice, 13.

¹⁶⁹ Cf. Sloan, 851-2.

¹⁷⁰ See Keith, 32; Pratap, 259.

¹⁷¹ The practice of referring to previous judgments and advisory opinions goes back to the time of the Permanent Court. See for example, Keith, 31; E. Jiménez de Aréchaga, "Judges Ad Hoc in Advisory Proceedings", 31 ZAORV (1971), 722 (hereinafter "Judges Ad Hoc"). See also Pratap, 259; Lissitzyn, 20; McNair, International Justice, 12. It is curious to observe that while in this work McNair did not differentiate between judgments and advisory opinions in terms of their respective value as legal precedents, in a later edition of a more substantive

The Court has not been successful in its attempts expressly to prevent the effect of certain aspects of an opinion from serving as precedents in future cases. In the ILO Administrative Tribunal Case, for instance, the Court attempted to confine the ad hoc procedural arrangements to that particular case by declaring that it was "not bound for the future by any consent it gave, or decisions which it made with regard to the procedure thus adopted".¹⁷² However, the same procedural arrangements were adopted in subsequent cases of a similar nature.¹⁷³

As far as referring to its previous holdings and pronouncements is concerned, the Court, in keeping with the practice of its predecessor, does not distinguish between its judgments in contentious cases and its advisory opinions.¹⁷⁴ Consequently, it is perfectly normal for the

work, he seemed to have changed his view on the subject. See as to this note 174 below.

¹⁷² See ICJ Reports 1956, 77 at 86.

¹⁷³ See, for example, the Fasla Case, ICJ Reports 1973, 166; and the Mortished Case, ICJ Reports 1982, 325. See also Pratap, 258.

¹⁷⁴ See, for instance, Lissitzyn, 18-9, esp. at 19 where he notes that the Court "has expressly referred to a previous advisory opinion as a precedent". See further, Sloan, 851-2; Hambro, "Authority", 5; Pratap, 257, 258; Rosenne, The ICJ, 493, n.2; Keith, 32. Cf., however, the view expressed by a former President of the Court, Lord McNair, with reference to the Reservations Case (ICJ Reports 1951, 15) that "From the point of view of their value as legal precedents, the opinions of the Court are not on the same level as its judgments." See McNair, Law of Treaties, 168. The sole authority cited for this statement is Hudson, The Permanent Court, 512. However, as Keith has quite rightly pointed out, "Hudson is there not concerned with the precedent value of opinions, but with their actual binding force, clearly a different matter, and does not support Lord McNair's statement in any way." See Keith, 32, n.27. Hudson's statement has also been referred to in the context of advisory opinions as precedents

Court to refer to a principle, rule or pronouncement in an earlier judgment when delivering an advisory opinion and vice versa. To do otherwise would amount to a denial of the authoritative quality of advisory opinions which usually embody the Court's considered views of the questions of law posed in the requests. This might render the law uncertain and therefore adversely affect the prestige and standing of the Court.¹⁷⁵ It is also not unusual to find references to both previous judgments and advisory opinions in an opinion actually being rendered or in a judgment actually being delivered.

A noteworthy feature of the Court's adherence to judicial precedent¹⁷⁶ is that there is no instance in which it has considered itself unable to follow a certain course or reach a certain decision on account of a principle, rule or pronouncement in an earlier opinion or decision. Thus the Court's preoccupation with the consistency of its decisions and opinions has gone hand in hand with the need to maintain the flexibility and dynamism necessary for the development of the law. It is aided in the accomplishment of this task by the technique of distinguishing which is another aspect of the doctrine of judicial precedent employed by the Court.¹⁷⁷

without comment in Pratap, 257, n.3.

¹⁷⁵ See, for instance, Keith, 33-4; Pratap, 259; Lissitzyn, 19. See generally, Lachs, 237-78; Anand, Studies, 152-90.

¹⁷⁶ See Keith, 34; Lissitzyn, 21; McNair, International Justice, 13-4.

¹⁷⁷ See Keith, 33; Pratap, 259; Lissitzyn, 19.

(g) Advisory Opinions as a Source of Law¹⁷⁸

Article 38(1)(d) directs the Court to apply among others, "judicial decisions" as subsidiary means for the determination of rules of law subject to Article 59 of the Statute. It is believed that the omission of any express reference to advisory opinions in Article 38(1)(d) was inadvertent and that there is no distinction between judgments and advisory opinions in this respect.¹⁷⁹

The potential contribution of advisory opinions to the development of international law has also received clear recognition from the General Assembly of the United Nations. Included in the considerations embodied in a resolution which that organ adopted on 14 November 1947 recommending greater use of the Court by the organs and specialised agencies of the UN through the referral of "difficult and important points of law" for advisory opinions, is a recognition by the General Assembly that it is of "paramount importance that the Court should be utilised to the greatest practicable extent in the progressive development of international law both in regard to legal issues between states and in regard to constitutional interpretation."¹⁸⁰

¹⁷⁸ See, for example, Prataap, 259-63; Lissitzyn, 14-6.

¹⁷⁹ See H. Lauterpacht, Development, 22; Prataap, 257, n.3.

¹⁸⁰ See Resolution 171 of 14 November 1947, Official Records of the Second Session of the General Assembly, Resolutions of 16 September-29 November 1947, p.103; ICJYB 1947-8, 19. See also Lissitzyn, 30; Prataap, 260-1; Rosenne, The ICJ, 216. Cf. Review of the Role of the Court, ICJYB 1970-1, 114-6; 1971-2, 126-7; 1972-3, 143-4; 1973-4, 129-30; 1974-5, 124-7. See further Singh, 44-50. See the interesting anecdote concerning a suggestion by a

The role played by advisory opinions in the clarification and development of international law has also been acknowledged in the legal literature.¹⁸¹

(h) Judges Ad Hoc and Advisory Proceedings¹⁸²

One of the safeguards which the advisory procedure provides to enable states to protect their interests which may be involved in advisory proceedings, is the institution of the judge ad hoc or the national judge. This device ensures equality of treatment before the Court for such states. Indeed, the institution of judges ad hoc in the Court's Statute is a corollary of the basic principle of the equality of the parties before the Court.¹⁸³ The true function of the judge ad hoc is one of understanding and interpretation. If during deliberations in a case it appears that despite the best efforts of counsel for a party the case presented by that party has not been clearly

prominent lawyer and statesman in the early years of the Court that the Court might assist the General Assembly in the fulfilment of its functions with regard to the progressive development of international law and its codification, in Sloan, 840 and Pratap, 261.

¹⁸¹ See e.g. Hudson, "Advisory Opinions", 999-1000; Sloan, 840-1; Lissitzyn, 14; Crilly, 220-1. See also S.M. Schwebel, "Widening the Advisory Jurisdiction of the International Court of Justice without Amending its Statute", 33 CULR (1984), 355, 361 (hereinafter "Advisory Jurisdiction"); T.O. Elias, "How the ICJ Deals with Requests for Advisory Opinions", in The Lachs Collection, 355 at 360.

¹⁸² See generally, Denise Mathy, "Un juge ad hoc en Procedure Consultative devant la Cour Internationale de Justice", 12 RBDI (1976), 528-54; Pratap, 203-8. On judges ad hoc in general, see K.S. Chatterjee, "The Role of the Ad Hoc Judge in the International Court of Justice", 19 IJIL (1979), 372-81.

¹⁸³ See de Aréchaga, "Judges Ad Hoc", 697-8.

7

understood, the judge ad hoc is best placed to appreciate this and to expound to his colleagues just what it is that the party concerned has in mind. This is not to say that the judge in question necessarily considers that party's view to be right or that the Court should adopt it as the basis for its decision. However, he can ensure that any rejection of that approach, whether he himself favours rejection or not, is so reasoned as to reassure the party that its point of view has been understood and that justice has been done. The institution of judges ad hoc therefore provides a means to inspire confidence among the parties that their viewpoints and interests will receive full attention and consideration. It also ensures that nothing will be done in secrecy without the knowledge of the judges ad hoc, since they have total equality in every respect with the other members of the Court.¹⁸⁴

Although the 1920 Hague Advisory Committee of Jurists recommended the appointment of judges ad hoc when a dispute pending between two or more states came before the Court for an advisory opinion,¹⁸⁵ both the Statute of the Permanent Court and its Rules which operated until 1927 were silent on the matter. Consequently, no judges ad hoc participated in advisory proceedings in a number of instances in which none of the interested states was represented on the Court, and even in cases where one of

¹⁸⁴ See Singh, 193-4.

¹⁸⁵ See Procès-Verbaux (1920), 211 and 731. See also, de Arechaga, "Judges Ad Hoc", 699.

the interested parties had a national judge on the Bench.¹⁸⁶

In 1926, a proposal to amend the Rules to permit the appointment of judges ad hoc in advisory proceedings was turned down because of doubts as to the constitutionality of such an action.¹⁸⁷ In 1927 the issue of the seating of judges ad hoc in advisory proceedings arose in an acute form when, in The European Commission on the Danube Case¹⁸⁸ all the interested states except Rumania were represented on the Court. However, as the French judge was unable to sit, the Rumanian deputy judge was summoned to take his place.¹⁸⁹ The Rules were amended in September 1927 to permit the appointment of judges ad hoc when a question relating to an existing dispute between two or more states is submitted to the court for an advisory opinion.¹⁹⁰ Subsequently, judges ad hoc participated in a number of

¹⁸⁶ See the Eastern Carelia Case, PCIJ Series B, No.5, 7; Series B, No.10, 6; Series E, No.3, 223-4; Series B, No.12, 6. See also de Aréchaga, "Judges Ad Hoc", 700; Hambro, "Authority", 7-8; Keith, 183.

¹⁸⁷ See PCIJ Series D, No.2 (Add), 185-93 and Series E, No.3, 224. See also, de Aréchaga, "Judges Ad Hoc", 700-1; Hambro, "Authority", 8; Keith, 183.

¹⁸⁸ See PCIJ Series B, No.14, 6. This case involved a dispute between Great Britain, France and Italy on the one hand, and Rumania on the other.

¹⁸⁹ See PCIJ Series E, No.4, 77. See also, de Aréchaga, "Judges Ad Hoc", 702; Keith, 183-4.

¹⁹⁰ See PCIJ Series E, No.4, 72-8 and 196-7. See also, de Aréchaga, "Judges Ad Hoc", 702-4; M. Pomerance, "The Admission of Judges Ad Hoc in Advisory Proceedings: Some Reflections in the Light of the Namibia Case", 67 AJIL (1973), 447-8 (hereinafter "Admission"); Hambro, "Authority", 8; Keith, 184.

advisory opinions delivered by the Permanent Court.¹⁹¹ Applications for the appointment of judges ad hoc were turned down in The Austro-German Customs Union Case¹⁹² and the Danzig Legislative Decrees Case.¹⁹³ In The Minority Schools in Albania Case,¹⁹⁴ the Albanian government apparently did not apply to be permitted to seat a judge ad hoc, but the Court expressed the view that the question did not relate to an existing dispute and that Article 71(2) of the Rules was therefore inapplicable.¹⁹⁵

The introduction of the principle of allowing the appointment of judges ad hoc in advisory proceedings was reinforced by Article 68, a new provision concerning advisory opinions, which was written into the Statute of the Permanent Court as a result of the 1929 revision protocol. This provision, which granted the Court a general discretion¹⁹⁶ to assimilate its advisory procedure to that followed in contentious proceedings, would by implication appear to include the principle of permitting

¹⁹¹ See Jurisdiction of the Courts of Danzig, PCIJ Series B, No.15, 4; Greco-Bulgarian Communities, PCIJ Series B, No.17, 4; Railway Traffic between Lithuania and Poland, PCIJ Series A/B, No.42, 108; Polish War Vessels in the Port of Danzig, PCIJ Series A/B, No.43, 128; Treatment of Polish Nationals in Danzig, PCIJ Series A/B, No.44, 4. See Pomerance, "Admission", 448; de Arechaga, "Judges Ad Hoc", 704. See also, Suh, 20-1.

¹⁹² See PCIJ Series A/B, No.41, 88.

¹⁹³ See PCIJ Series A/B, No.65, 69.

¹⁹⁴ See PCIJ Series A/B, No.64, 4.

¹⁹⁵ See *ibid.*, 6. For a discussion of these cases, see also, de Arechaga, "Judges Ad Hoc", 704-6; Pomerance, "Admission", 448-9; Hambro, "Authority", 9; Keith, 184.

¹⁹⁶ See ICJ Reports 1950, 72; *ibid.*, 1951, 19. See also, de Arechaga, "Judges Ad Hoc", 708.

the seating of judges ad hoc in appropriate advisory cases.¹⁹⁷ It has however been argued that the wide discretionary power which is granted to the Court under Article 68 must by its very nature be considered to be of an exceptional character, not susceptible of being enlarged by an extensive interpretation. This power has been granted in respect of those provisions of the Statute which apply only in contentious cases, but not with regard to the category of statutory provisions appearing in the chapter of the Statute concerning the Court's organisation, which are of an ambivalent character in that they apply directly and ex proprio vigore both to contentious and advisory proceedings. These provisions must be applied and not merely serve as a guide both in contentious and advisory proceedings, and they must be applied to the full extent, and not to the extent to which the Court recognises them to be applicable. They must also be applied in every case in which the precise circumstances which they define are present. Therefore, in every advisory case in which the Court sees before it contesting parties, in order to ensure equality between them regarding their representation on the Bench, the Court is both empowered and obliged to apply Article 31 of the Statute and to admit judges ad hoc as the case may be. According to this argument, this is the principle contained in the Rules of Court. If in a given case, the Court finds that the conditions laid down in the Rules do not exist, it has no discretion to appoint a judge ad hoc for reasons of convenience or preference. A judge

¹⁹⁷ See Suh, 25; Hambro, "Authority", 8.

ad hoc who participates in the proceedings on terms of complete equality with his colleagues, the regular judges, cannot be added to the Court unless the legal conditions prescribed are present.¹⁹⁸ Article 68 of the Statute of the Permanent Court has been retained in the Statute of the International Court. The provisions of the Rules concerning judges ad hoc in advisory proceedings have, with certain drafting changes, also found their way into the Rules of the International Court.¹⁹⁹ Since the International Court has so far not followed its predecessor's practice of publishing the minutes concerning the elaboration of its Rules, there is no way of knowing to what extent the judges intended to apply Article 31 of the Statute in advisory proceedings.²⁰⁰

The International Court rejected an application by South Africa for the appointment of a judge ad hoc in the

¹⁹⁸ See as to this, de Aréchaga, "Judges Ad Hoc", 708-10.

¹⁹⁹ The phrase "any dispute or question" in Article 82 of the old Rules was replaced by the phrase "any legal question" in order to take account of the substitution of the phrase "any legal question" in Article 96 of the UN Charter for the phrase "any dispute or question" in Article 14 of the League Covenant. See ICJYB 1946-7, 103. See also, Suh, 27-8; Hambro, "Authority", 9-11. See further, Articles 82(1) and 83 of the 1946 Rules, Articles 87(1) and 89 of the 1972 Rules and Article 102 of the 1978 Rules. The expression "legal question actually pending between two or more states" is evidently wider than the word "dispute". However, it is doubtful whether this difference is significant. What seems certain is that if there is a dispute between two states, then there is a legal question actually pending between them. See Singh, 94.

²⁰⁰ See Suh, 28; Pomerance, "Admission", 451; Rosenne, The ICJ, 445; Hambro, "Authority", 9.

Namibia Case.²⁰¹ In the view of the Court, there was no dispute or any legal question actually pending between two or more states.²⁰² The fact that the Court in order to answer the question put to it for an advisory opinion may have to rule on disputed issues, does not necessarily make the question a dispute or a legal question actually pending between two or more states.²⁰³ The Court also stated that it had no residuary discretion to permit the seating of such a judge.²⁰⁴ However, there is room for the view that the court could have granted South Africa's request not as a matter of right pursuant to Rule 83, but as a matter of the Court's discretion under Article 68 of the Statute and Article 82 of the Rules. Even assuming that the request does not relate to a legal question actually pending between two or more states, the latter provision would still leave room for the exercise of discretion. Although the legal pendency test is paramount, it is not determinative. It would seem that Article 68 gives the Court a measure of flexibility to make such an appointment under other circumstances. This provision operates as an

²⁰¹ See ICJ Reports 1971, 12. See generally, Pomerance, "Admission", 446-64.

²⁰² Cf. ICJ Reports 1962, 319 where the Court found that a dispute existed between South Africa and the applicants, Ethiopia and Liberia. This finding was used by South Africa as the basis for the case for its application. For a discussion of the arguments of South Africa, see Pomerance, "Admission", 449ff.

²⁰³ See ICJ Reports 1971, 24, para.34.

²⁰⁴ See ICJ Reports 1971, 24-7. See also, de Aréchaga, "Judges Ad Hoc", 706ff; Suh, 36-7. Cf. Preston Brown, "The 1971 ICJ Advisory Opinion on South West Africa (Namibia)", 5 VJIL (1971), 213, 224-6 (hereinafter "Brown").

assurance to states that the fact that a particular interstate dispute is handled in the context of a request for an advisory opinion does not signify that the parties to that dispute lose the protection of the principles and rules of judicial procedure which operate in the context of a contentious case. Even in its absence, the Court would have been bound to see that such protection was available, since, as a court of justice, it is bound to observe the essential rules which govern all judicial activity.²⁰⁵ It may also be argued that since in its 1966 judgment the Court had held that the applicants lacked the locus standi to bring a case against South Africa,²⁰⁶ the request in the Namibia Case did not relate to a legal question or dispute actually pending between two or more states. Indeed, South Africa was hard pressed to specify precisely with which states it was in dispute.²⁰⁷ This is not of course to say that as far as the Namibia Case was concerned, South Africa was not an interested state. South Africa's interest in the case was undeniable.

In the Western Sahara Case, in which Spain, the administering power of the territory of Western Sahara and one of the parties directly interested in the case, was represented on the Court, Mauritania and Morocco, the other parties directly interested in the case, each applied to the Court to be permitted to seat a judge ad hoc. In their view, there was a legal question actually pending between

²⁰⁵ See PCIJ Series B, No.5, 29. See also, Singh, 94.

²⁰⁶ See ICJ Reports 1966, 6.

²⁰⁷ See Pomerance, "Admission", 452.

each of them and Spain over the territory. Morocco's application was granted, but that of Mauritania refused. The Court found that at the particular time, there appeared to be a legal dispute between Morocco and Spain regarding the territory of Western Sahara, that the questions contained in the request for the opinion may be considered to be connected with that dispute and that in consequence, for purposes of the application of Article 89 of the rules²⁰⁸ the advisory opinion requested in that resolution appears to be one on a legal question actually pending between two or more states.²⁰⁹

We find the Court's refusal to allow Mauritania to seat a judge ad hoc very puzzling. First, Mauritania, whose interest in the case was considerable, was undoubtedly a "third party" in the proceedings according to the definition of "third parties" suggested in this chapter. Secondly, it is true that had Spain accepted Morocco's earlier proposal to submit their dispute over Western Sahara to the Court's contentious jurisdiction, Mauritania which laid independent rival claims to the territory would, in the context of such proceedings, have been a classic third party entitled to intervene therein.

²⁰⁸ See Article 102 of the 1978 Rules.

²⁰⁹ See ICJ Reports 1975, 71. Cf. ibid., 103-5, declaration of Singh J, for a critical appraisal of this decision. See also, Singh, 94; Suh, 37; B.O. Okere, "The Western Sahara Case", 28 ICLQ (1979), 299-301 (hereinafter "Okere"); Janis, 609-10; Blaydes, 354-5. For a criticism of the rejection of Mauritania's application to seat a judge ad hoc, see Okere, 300-1; F. Wooldridge, "The Advisory Opinion of the International Court of Justice in the Western Sahara Case", 8 ALR (1979), 92 (hereinafter "Wooldridge").

By amending its rules to permit the seating of judges ad hoc in advisory cases, and by introducing Article 68 into the Statute, the Court was deliberately assimilating its advisory procedure to that followed in contentious cases in order to remain faithful to the requirements of its judicial character even when it is performing its advisory function.²¹⁰ However, as things stand at present, in advisory proceedings it is not always possible to ensure fairness and equality of treatment to all "third parties" as regards representation of their interests on the Court. For instance, if a dispute between an international organisation and a state in whose territory the headquarters of that international organisation is based is referred to the Court for a binding advisory opinion, as is required by several of the treaties regulating the status of the headquarters of international organisations, their privileges and immunities, the disputant state may have a judge on the Court. On the Danzig precedent,²¹¹ the disputant organisation would be in a position of inequality as to representation on the Court.²¹²

The same situation would obtain in advisory proceedings concerning such UN activities as decolonisation

²¹⁰ See for example, the report of Loder, Moore and Anzilotti JJ. and the comments of V-P. Weiss in PCIJ Series E, No.4, 75-7 and 73 respectively, as well as the comment of Lord Finlay, *ibid.*, 78.

²¹¹ In the Danzig Legislative Decrees Case, the application of the Danzig Senate for a judge ad hoc was refused because of the absence of a dispute between states. See PCIJ Series C, No.77, 171; *ibid.* Series A/B, No.65, 69.

²¹² See as to this, Keith, 184-5.

and the promotion of the principle of self-determination. If a dispute exists in a case of this kind, it is certainly a dispute between the UN and whichever state or states which might happen to be most directly interested or concerned. Clearly, since such a dispute is not one between states, the need to ensure equal representation is probably not a critical consideration. However, assuming that it is, it is difficult to see how it can be satisfied in respect of the UN, which is not a state. That such a scenario falls outside the purview of the rules concerning the seating of judges ad hoc in advisory proceedings might help to explain the Court's refusal to grant South Africa's application for a judge ad hoc in the Namibia Case. This reason might also account for the rejection of Mauritania's application to seat a judge ad hoc in the Western Sahara Case, since the Court there found that there was no dispute pending between Mauritania and Spain. However, the analogy between the position of South Africa in the Namibia Case and that of Mauritania in the Western Sahara Case cannot be carried any further, since in the latter case the Court found, probably on the basis of the antecedents of the case, that there was a dispute between Morocco and Spain. Although prior to the request for the opinion Mauritania had not suggested to either Spain or Morocco to submit their differences over Western Sahara to the Court for settlement, Mauritania had made known its own independent and rival claims to Western Sahara.²¹³ Even if,

²¹³ The merit of the Mauritanian case for a judge ad hoc was reflected in the closeness of the vote on its application. The application was rejected by one vote.

technically speaking, there was no dispute between Mauritania and either Spain or Morocco, the fact still remained that Mauritanian interest in the proceedings was considerable. Surely, the need to preserve the judicial character of the Court even in advisory proceedings entails not only the need to ensure equal representation on the Court of interested parties, but also, the need to afford such states the means to protect their interests. The institution of the judge ad hoc could serve this purpose. For this reason, South Africa and Mauritania might have been permitted to seat a judge ad hoc in the Namibia and Western Sahara Cases respectively.²¹⁴ Furthermore, the fact that a request for an advisory opinion relates to a dispute between a state or states and the UN, rather than between states does not dispense with the need to ensure confidence in the impartiality of the Court in the proceedings, as well as the credibility of the proceedings themselves.

Two policy considerations have been identified as being either singly or jointly responsible for the Court's attitude to the institution of judges ad hoc. First, the Court appears to consider that the right to appoint judges

²¹⁴ Although in both these cases, the representation of South Africa and Mauritania by judges ad hoc would have made little difference in the outcome of the proceedings, the Austro-German Customs Union Case shows that the presence of the judge ad hoc could have a decisive influence on the outcome of a case. In that case, the vote on the substantive question was 8-7. Had Austria's application for a judge ad hoc been accepted - acceptance of the Czechoslovakian application was not endorsed by any of the judges - the vote would probably have been evenly divided 8-8 and with the casting vote of the President, a member of the minority of 7, 9-8 in favour of the Austrian position. See Pomerance, "Admission", 447, n.9.

ad hoc should be held to the barest minimum required by the Statute and the Rules. Such a restrictive approach to the system of judges ad hoc is entirely consistent with longstanding doctrinal criticism of that system as an undesirable relic of the concept of arbitration grafted on to the Court and detracting from that body's role as an international magistrature.²¹⁵

The second policy consideration is related to a general policy with respect to advisory opinions. Unlike its predecessor, the International Court has tended to ignore and isolate the quasi-contentious elements involved in advisory opinions and to view all requests in a strictly formalistic light as matters concerning solely the requesting organ and the Court. This tendency has been accompanied by the enunciation of a new doctrine based on the organic relationship between the Court and the UN and involving a duty to cooperate with UN organs barring countervailing compelling reasons. The wisdom of such a restrictive attitude towards the system of judges ad hoc in situations in which it is essential to the character of the Court as a judicial body and the judicial nature of the advisory function to ensure equality and fairness between the interested parties as regards representation on the bench, may, however, be questioned.

One result of the Court's attitude is that states directly concerned in and dissatisfied with particular

²¹⁵ See Pomerance, "Admission", 461-2. Cf. Singh, 194 for the view that "Recognising... that the Court is dealing with sovereign states as parties, the institution of ad hoc judges ... is, nevertheless, one with utility in the international context".

advisory opinions have frequently refused to accept them. The court has in effect discouraged states from lending their participation which is so critical to the Court's effectiveness.

Once the form of the requests for advisory opinions rather than the reality behind them becomes determinative for the Court, it tends to see only one kind of advisory opinion, and the differentiation between the contentious and advisory jurisdictions become sharper. The Court has tended in practice to abolish the distinction between dispute and question with respect to advisory opinions. The Court has thus, albeit for different reasons, moved towards partial acceptance of the thesis advocated by Judge Azevedo in the early years of the International Court.²¹⁶ Judge Azevedo had argued that the substitution of the new formula "any legal question" in Article 96 of the UN Charter for "any dispute or question" in Article 14 of the League Covenant signifies the intention to suppress the anomaly of advisory arbitration and to allow opinions only of a theoretical or abstract nature as far removed as possible from concrete situations of fact. Henceforward, there could only be one category of advisory opinions and Articles 82 and 83 of the 1946 Rules, which endeavoured to maintain an obsolete system represented by the dangerous distinction between a question and a dispute were therefore objectionable and should be abolished.²¹⁷ Judge Azevedo in effect advocated in place of the former process of

²¹⁶ See ICJ Reports 1948, 73-81 and *ibid.* 1950, 79-88.

²¹⁷ See ICJ Reports 1950, 85-6.

assimilation of the advisory and contentious jurisdictions the building of "a wall between the contentious and advisory functions".²¹⁸

In fairness to the Court, it must be noted that with the exception of the Namibia and the Western Sahara opinions, there has been no request for the appointment of judges ad hoc. Both the Statute and the Rules make it quite clear that the initiative for any appointment must come from the states concerned. Since such requests have not been as forthcoming as it would seem they might have been, the Court has not been called upon to consider the issue as often as might have been expected.²¹⁹ In the Peace Treaties Case, after having found that the states accused of the violation of human rights provisions of the peace treaties and their accusers held clearly opposite views, the Court concluded that a dispute existed between the two sides.²²⁰ In that case, some of the dissenting judges thought that the consent of the three states concerned was necessary for the Court to accede to the request for the opinion, and that the appointment of judges ad hoc would have signified such consent. Since the three states concerned had refused to take part in the proceedings, let alone apply to be permitted to seat judges

²¹⁸ See ICJ Reports 1950, 88. See also, Pomerance, "Admission", 462-4.

²¹⁹ See Keith, 185; Pomerance, "Admission", 457; PCIJ Series A/B, No.41, 37-40. It has been reported that tentative enquiries made by South Africa in the 1950 South West Africa (Status) Case concerning the appointment of a judge ad hoc were not pursued. See Rosenne, Procedure, 215, n.7.

²²⁰ See ICJ Reports 1950, 74.

ad hoc, it is difficult to see how the Court could, proprio motu, have allowed them to nominate judges ad hoc to represent them in the proceedings.²²¹

The thesis that the Court has no residuary discretion under Article 68 of the Statute to permit the seating of a judge ad hoc is flawed not only because it wrongly gives precedence to the Rules over the Statute, but also in view of the fact that it puts a much narrower construction on Article 68 than its spirit and tenor, if not its letter would appear to suggest. Considering that the Rules are subordinate and supplementary to the Statute, which they interpret and apply, the conditions which they prescribe for the seating of judges ad hoc in advisory proceedings constitute their construction of the relevant statutory provisions. Consequently, a finding by the Court that the conditions specified by the Rules for the seating of judges ad hoc in advisory proceedings are absent, also amounts to a finding that Article 68 which grants the Court the latitude to assimilate the advisory to the contentious procedure, is inapplicable.

(i) Individuals or Private Persons²²²

²²¹ See ICJ Reports 1950, 91; JJ. Winiarski, 100-1; Zoricic, 107; Krylov, 111. See also Suh, 31.

²²² See generally, H. Lauterpacht, "The Subjects of the Law of Nations: Parts I, II and III", 63 LQR (1947), 439-4 and 450-60; I. Brownlie, Principles of Public International Law, 4th ed. (Oxford: Clarendon Press, 1990), 580-602; this is the edition cited in the rest of this chapter; J.G. Starke, The Introduction to International Law, 10th ed. (London: Butterworths, 1989), 58-70 (hereinafter "International Law"); Mani, "Review", 33-5; E. Lauterpacht, Aspects, 67-72.

The final category of "third parties" are private persons or individuals, for whom in keeping with the traditional notion that only states have full procedural capacity in international law there is no access to the International Court either in contentious or advisory proceedings.²²³ This is so notwithstanding that in this century various attempts have been made to grant such persons access to other international tribunals.²²⁴ However, both the Permanent Court and the present Court have at various times been faced with the problem of access to such "third parties" in advisory proceedings involving petitioners from minority groups and individual employees of international organisations. For either Court, the problem has always been how to reply to requests for opinions involving such "third parties", while still remaining faithful to its judicial character by observing such requirements of justice as the principles of audiatur

²²³ See E.M. Hambro, "Individuals Before International Tribunals", 35 ASILP (1941), 22 (hereinafter "Individuals"); S. Frey, "L'Individu devant les Juridictions Internationales", 39 RDIDC (1962), 437-68, esp. 437-9 (hereinafter "Frey"). An exceptional situation of the Court being open to individuals is when it is empowered to establish a procedure for dealing with disputes between the Registrar and the staff of the Registry under Article 17 of the staff regulations. Disputes over pensions, however, are referred to the UN Administrative Tribunal. See ICJYB 1946-7, 66. See also, Bowett, International Institutions, 318. On individuals or private persons in international law see generally J.J. Lador-Lederer, "The Individual and his Access to International Jurisdiction", Israeli Reports to Sixth International Congress of Comparative Law (Hebrew University of Jerusalem, Institute for Legislative Research of Comparative Law, 1962), 113-35.

²²⁴ For instances of such attempts, see Hambro, "Individuals", 24ff. For instances in Europe in which this has been successfully accomplished, see Frey, 437-68.

et altera pars and the necessity to marshal all the necessary information relevant to the question submitted for an opinion. The procedure and the substantive applicable law which have been employed to solve the problem have been far from satisfactory.

The procedure followed in advisory proceedings involving minority groups in states bound by minority treaties, may be briefly noted in connection with the problem of access by individuals to the Court. In such cases, the parties to the disputes were usually the petitioners, who were nationals of the defendant state. Although such minority groups might have been entitled to access to the Court on terms of complete equality with the opposing parties, the fact of the matter is that, with the exception of the Polish-German Upper Silesia Convention,²²⁵ they had no status whatsoever under the minority treaties before the Council of the League. It was only as a "matter of grace" that the Council, on the suggestion of the committee of three of its members specifically set up for this purpose, actually considered the petitions. In those circumstances, the petitioners could make no claim to be directly represented before the Council, let alone before the Court. Nor was it possible under any customary rule of equality before international tribunals for them to be represented in minority cases by the defendant states of which they were invariably inhabitants. In such cases they were under the rules as to equality represented by the

²²⁵ Which was relevant only to the German Minority Schools Case.

states with which they had the closest connection. Such states were always notified of the requests in the minority cases involving petitioners and were permitted to appear before the Court, thus avoiding any suggestion that the principle of equality was not observed. One commentator has therefore remarked that "whether the petitioners had any status before the Court, and they generally did not, the state with which they were most closely connected other than the defendant state took full and equal part in the proceedings".²²⁶

Another instance of the problem of access to the Court by individuals in advisory proceedings arose in the Danzig Legislative Decrees Case, in which there was a dispute between the defendant, the government on the one hand, and the petitioners (three minority parties in the opposition) on the other, as to the consistency of two decrees amending the Penal Law which were adopted by the Danzig Senate. The latter could send documentation to the Court through the Secretary-General of the League whereas the former was represented before the Court. There was no state to which the petitioners were closely connected which could appropriately adopt their case as happened with the minority opinions. The parties to the dispute were therefore in a position of inequality before the Court.

The League Council probably had at the back of its mind the problem of the inequality of the parties which arose in the Danzig Legislative Decrees Case when, in a resolution of 14 December 1939 requesting the Court's

²²⁶ See Keith, 162.

opinion in the matter of the ex-officials of the governing commissions of the Saar territory, it included elaborate provisions to ensure equality between the Secretary-General of the League and the ex-officials and to forestall the possible necessity of the appearance of the latter or their representatives before the Court. The resolution provided for exchanges of memoranda between the Secretary-General and the claimants and for such documents to be submitted to the Court along with the request for the advisory opinion. The League Council also renounced its right under Article 66 of the Statute to present written and oral statements to the Court. The outbreak of war frustrated the request.²²⁷ Had the Court dealt with the request, the waiver by the League Council of its rights would have resulted in a truncated procedure which would have deprived the Court of the benefit of the contentious procedure provided for in Article 66 of the Statute. Although the procedure adopted might have brought about equality between the parties, it would also have resulted in the paradox of there being no parties at all before the Court.²²⁸

In the case of the present Court, the problem has arisen in connection with its special role as a review tribunal for the administrative tribunals of the United Nations and the ILO. This special procedure is intended to resolve disputes arising between international

²²⁷ See PCIJ Series E, No.16, 60ff; LNOJ 1939, 502-3; see also, Prata, 189-90; Cheng, 246; Pomerance, 318; Keith, 168.

²²⁸ See Gross, "Participation", 16 at 18 ; Prata, 190.

organisations and their personnel.²²⁹ The problem arose in an acute form in the ILO Administrative Tribunal Case²³⁰ in which the Executive Board of UNESCO requested an advisory opinion on matters arising out of the Administrative Tribunal's decision allowing the appeal of some employees of UNESCO against the refusal of the Director-General of that organisation to renew their contracts of employment. This challenge procedure was clearly an appeal of process for review in continuation of the proceedings before the Tribunal in which the real parties were the former employees and the organisation. Under the provisions of the Statute governing both the contentious and advisory procedure of the Court, the former employees of UNESCO could not appear before the Court. It was only UNESCO which could enjoy this right. Pursuant to Article 66(2) of the Court's Statute, the President advised members of UNESCO entitled to appear before the Court, the ILO and other organisations which had recognised the jurisdiction of the Administrative Tribunal, that they were entitled to present statements to the Court. Further procedure was

²²⁹ The Court's jurisdiction may also be invoked when a party is dissatisfied with the decision of the appropriate administrative organ of a specialised agency. Cf. the ICAO Case. By virtue of Article 84 of the Chicago International Civil Aviation Convention, 1944, Article 2, s.2 of the International Air Services Transit Agreement of 1944 and the Council's rules for the settlement of differences a party may appeal "to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the ICJ". See as to this, Lachs, 239, 275.

²³⁰ For a distinction of this case from the earlier UN Administrative Tribunal Case, see Pratap, 190, n.3; Rosenne, The ICJ, 247; Keith, 171, n.119.

reserved.²³¹ Following correspondence involving counsel for the former employees of UNESCO, the legal advisor to UNESCO and the Registrar, it was agreed that UNESCO would forward to the Court without verifying their contents the statements of the former employees,²³² as an appendix to the statement of UNESCO. The Court dispensed with oral hearings and in lieu thereof, allowed states and international organisations a further opportunity to present written statements. Supplementary observations prepared by the former employees commenting on statements already filed were also sent to the Court annexed to the reply of UNESCO.²³³

The Court then observed that as a judicial body it was bound to remain faithful to the requirements of its judicial character in the exercise of its advisory functions.²³⁴ In this connection, the Court noted the overriding importance of the concept of the equality of the parties to judicial proceedings.²³⁵ The Court recognised that both in their origin and in their progress, the advisory proceedings involved a certain absence of equality between UNESCO and its former staff members.²³⁶ The original inequality which pertained to the pre-trial stage

²³¹ See ICJ Reports 1955, 127; Keith, 172.

²³² See ICJ Pleadings 1956, 235-6, 237-8, 245-6, 247-8, 249, 253, 254 and 256. See also Keith, 172-3.

²³³ See ICJ Pleadings, *ibid.*, 170-83, 219-23, 258-9 and 266. See also Keith, 173.

²³⁴ See ICJ Reports 1956, 84.

²³⁵ See *ibid.*, 85.

²³⁶ See *ibid.*

stemmed from the fact that under Article XII²³⁷ of the Statute of the Administrative Tribunal, only the Executive Board of UNESCO can request an advisory opinion of the Court in respect of the judgments of the Tribunal. The inequality in the progress of the proceedings related to the lack of procedural capacity of the former UNESCO employees under Article 66 of the Statute of the Court.

The Court held that the absence of equality between the parties under Article XII of the Statute of the Tribunal, which pertained to the origin of the instant proceedings, did not in fact constitute an inequality before the Court because it was antecedent to the examination of the question in the case and did not affect the manner in which that examination was undertaken. A

²³⁷ The amended Article XI of the Statute of the UN Administrative Tribunal sought to minimise the difficulties resulting from the absence of equality between UNESCO and its former employees in advisory proceedings by attempting to place states, the Secretary-General and the employees of the organisation on a relatively more equal footing in the pre-trial stage. The Article established a Committee on Applications for review which can in certain circumstances on the request of a member state, the Secretary-General or the individual affected by the judgment seek advisory opinions. If this procedure is invoked, the Secretary-General is required to arrange to transmit to the Court the views of the individual affected by the judgment. Further, the Secretary-General undertook to consider it his responsibility to ensure as far as possible an equality of rights with regard to the staff member concerned and accordingly, proposed to follow the procedure adopted by the League Council in the case of the ex-officials of the Saar. See GA(X), a.1, 49, 38. The General Assembly recommended that member states and the Secretary-General should not make oral statements before the Court in any proceedings under the new Article. See GA Res.957(X). See as to this, Keith, 169-70 and 175, n.151; Pratap, 68-71 and 194. The point has however been made that given the provisions of Article XVII of the ILO Administrative Tribunal Statute and the amended Article XI of the UN Administrative Tribunal Statute, more and perhaps more serious difficulties may be anticipated in the future. See Pomerance, 313.

consideration which might seem to support better the Court's conclusion, although the Court made little use of it, would consist in the fact that the Administrative Tribunal constitutes in reality an additional safeguard created at their own expense by international organisations purely for the benefit of their officials and, in the case of the ILO also other persons with whom the I.L.O. has concluded a contract which provides for the submission of disputes concerning its execution to the Administrative Tribunal. Under such circumstances, the unilateral right of the international organisation concerned not to appeal against its judgments but only to challenge them on the grounds of invalidity may not perhaps appear to be so great an inequality as to prevent the Court from cooperating in its review procedure.²³⁸ The Court further pointed out that the absence of equality between the parties to the judgments was somewhat nominal since the former employees had been successful in the proceedings before the Administrative Tribunal and there was accordingly no question of any complaint on their part. The Court therefore considered it unnecessary to pronounce on the legal merits of Article XII of the Statute of the Administrative Tribunal.²³⁹ As regards the difficulty relating to the absence of equality between the parties to the advisory proceedings resulting from Article 66(2) of its Statute, the Court observed that:

The difficulty was met on the one hand by the

²³⁸ See Cheng, 246.

²³⁹ See ICJ Reports 1956, 85-6.

procedure under which the observations of the officials were made available to the Court through the intermediary of UNESCO and on the other hand, by dispensing with oral proceedings. The Court is not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted. In the present case, the procedure which was adopted has not given rise to any objection on the part of those concerned. It has been consented to by counsel for the officials in whose favour the judgments were given. The principle of the equality of the parties flows from the requirements of the good administration of justice. These requirements have not been impaired in the present case by the circumstance that the written statements on behalf of the officials was submitted through UNESCO. Finally, although no oral proceedings were held, the Court is satisfied that adequate information has been made available to it. In view of this, there would appear to be no compelling reason why the Court should not lend its assistance to the solution of a problem confronting a specialised agency of the United Nations authorised to ask for an advisory opinion of the Court. Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials. Any seeming or nominal absence of equality ought not to be allowed to obscure or defeat that primary object.²⁴⁰

The procedure adopted in the ILO Administrative Tribunal Case was followed in a later proceeding involving a review of United Nations Administrative Tribunal Judgment No.158. The Court considered written statements of the views of Mr. Mohammed Fasla, the former United Nations staff member affected by the judgment through the Secretary-General of the United Nations and statements of the Secretary-General on behalf of the organisation. The Court decided not to hold public hearings for the

²⁴⁰ See *ibid.*

submission of oral statements in the case.²⁴¹ The procedure employed in this case would appear to resemble very closely that envisaged under the amended Article XI of the Statute of the UN Administrative Tribunal.

The procedure adopted in these cases to get around the difficulty relating to the problem of equal access to the Court for the parties is unsatisfactory,²⁴² notwithstanding the fact that it was consented to by the persons concerned or their representatives, because far from solving the problem of inequality of the parties before the Court, it probably only succeeded in minimising it.²⁴³ Indeed, the lack of equality between the parties was the common ground on the basis of which the dissenting judges in the ILO Administrative Tribunal Case argued either that the Court should have exercised its discretion against giving the opinion,²⁴⁴ or that the Court lacked the competence to

²⁴¹ See the Fasla Case, ICJ Reports 1973, 166. See also the Mortished Case, *ibid.* 1982, 325; the Yakimetz Case, *ibid.* 1987, 18.

²⁴² Cf. the Fasla Case, ICJ Reports 1973, 172; the Mortished Case, *ibid.* 1982, 342. See also, Lachs, *ibid.* 1982, 276.

²⁴³ The unsatisfactory nature of the procedure is underlined by the fact that one of the parties had to submit its views to the Court through the intermediary of the other party, its adversary. The decision to dispense with oral proceedings deprived the Court of a means by which it usually obtains clarification of the issues before it. A request by a state or international organisation mentioned under Article 66(2) of the Statute for a hearing would have placed the Court in a dilemma and amounted to a veto on its right to reply. See the dissenting opinions of JJ. Winiarski, Klaestad and Zafrulla Khan in ICJ Reports 1956, 107-8, 110 and 114-5 respectively. See also Keith, 176-80.

²⁴⁴ See the dissenting opinions of JJ. Winiarski, Klaestad and Zafrulla Khan in ICJ Reports 1956, 104, 109 and 114 respectively.

deliver the opinion.²⁴⁵ Similarly, in the Danzig Legislative Decrees Case, Anzilotti J. in his dissenting opinion reasoned as follows:

The essential point to my mind is that the Court in order to be able to give its opinion was obliged either to set aside its rules and create a procedure ad hoc, or to deviate from a rule so fundamental as that of the equality of the parties. This may thus suffice to lead to the conclusion that the opinion asked for was outside the scope of the functions for which the Court has been created and organised and that it should not have given the opinion.²⁴⁶

The problem of lack of equality between the parties is not solved however by simply denying access to individuals in proceedings before the Court on the ground that they have not been given any procedural capacity under the Statute and the Rules. The difficulty arises because a request for an opinion may directly concern the rights of individuals and in such a situation the Court must, in order to do justice effectively, provide them with the opportunity to submit their views whether or not they are parties as a matter of procedure. To give the opinion without hearing them would be violating the principle of audiatur et altera pars.²⁴⁷

In this connection, two possible solutions have been suggested. First, in reviewing judgments of the ILO Administrative Tribunal, the Court may admit verbal and oral statements from private individuals directly affected

²⁴⁵ See the dissenting opinion of J. Cordova in ICJ Reports 1956, 155ff.

²⁴⁶ See PCIJ Series A/B, No.65, 66.

²⁴⁷ See I. Brownlie, "The Individual Before Tribunals Exercising*Jurisdiction", 11 ICLO (1962) 719 (hereinafter "Individuals"); Pratap, 189.

by such judgments. While Articles 66 and 67 of the Statute envisage participation by states and international organisations in advisory proceedings, they do not expressly exclude participation in such proceedings by private individuals. Article 34 of the Statute which provides that only states may be parties in cases before the Court should be seen as being applicable only to the contentious procedure. The idea of an international court, required to apply international law, allowing private persons to appear before it may seem very strange. However, once the Court has in principle accepted the function of reviewing judgments of administrative tribunals, it has, by implication, considered that it is able directly to apply the law governing the activities of such tribunals, namely, international administrative law. If this is so, it follows that the Court can permit the employees of those international organisations which recognise the jurisdiction of such tribunals, the subjects of international administrative law, to appear before it.

Alternatively, employees of international organisations directly affected by judgments of administrative tribunals which fall to be reviewed in advisory proceedings may be granted access to the Court through non-governmental international organisations. The Permanent Court permitted a number of such organisations to participate in both the oral and written phases of advisory proceedings.²⁴⁸ While such non-governmental international

²⁴⁸ See Hudson, The Permanent Court, 400 ff. On the practice of the International Court in this connection, see above, 359, n.60.

organisations are not specialised agencies under Article 57 of the UN Charter, and therefore cannot be authorised under Article 96(2) to request advisory opinions, there would appear to be no reason why, on the strength of the precedent in the South West Africa (Status) Case, they should not be included among those international organisations which under Articles 66 and 67 are entitled to participate in advisory proceedings. It is instructive to note that whereas in contentious cases the Statute in Article 34(2) speaks of receiving information from public international organisations with regard to advisory proceedings, it refers in Articles 66 and 67 to states and international organisations without the qualification that they must be of a public or intergovernmental character. The objective of granting private persons directly affected by the judgments of administrative tribunals which are being reviewed in advisory proceedings access to the Court through non-governmental international organisations, may be achieved either with or without appropriate amendments to the statutes or other such constitutional documents of the tribunals. This would allow non-governmental international organisations like staff associations to represent the claims of employees who may be parties before the tribunals either from the beginning or only during the review procedure. If either of these suggestions were adopted, a patent inequality in the procedure for review of judgments of administrative tribunals would be removed and the Court would be able to lend its cooperation to that procedure without resort to ad hoc devices or straining the

bounds and limits which govern the exercise of its advisory jurisdiction.²⁴⁹

Criticism of the system of review of the judgments of the administrative tribunals is not confined to the procedural arrangements adopted to deal with the problem of access to the Court by individuals. The scope of the competence, the substantive applicable law and the marked difference with regard to the officials subject to the jurisdictions of both administrative tribunals are also unsatisfactory and call for serious improvements. This difference has led to calls for the establishment of a single administrative tribunal for all organisations in the United Nations family through the unification of the systems of review for the equal protection of personnel employed by all organisations. It is gratifying to note that such calls have not gone unheeded.²⁵⁰ While the foregoing proposals would doubtless help to improve the situation regarding access to the Court by private persons and individuals, it is suggested that the problem can only be completely solved by amending the Statute to grant such "third parties" full and direct access to the Court in respect of both contentious and advisory proceedings. The requirements of the good administration of justice demand no less than that such "third parties" be afforded the

²⁴⁹ See to the same effect, Cheng, 247-8.

²⁵⁰ See GA Res.119 (xxxiii) UNGAOR Supp. No.45 at 201, UN Doc. A/34/495 1978; GA Res.438 (xxxiv) UNGAOR Supp. No.46 at 274, UN Doc. A/34/771, 1979. Cf. also The Mortished Case, ICJ Reports 1982, 423-33*. See further, Lachs, 276; Bowett, International Institutions, 328.

opportunity to participate fully and directly in judicial proceedings in which they may be involved.²⁵¹

5. The Impact of Advisory Opinions on "Third Parties":
A Brief Empirical Study

(a) Introduction

So far, the International Court has rendered 21 advisory opinions on diverse legal matters. Of these, 13 have been requested by the General Assembly, three by the Committee on application for review of judgments of the UN Administrative Tribunal and one each by the Security Council, the ECOSOC, the IMCO, the ILO and the WHO. We propose to review very briefly the effect (short and long term and direct or indirect) of these opinions on the "third parties" concerned, namely, the requesting organs or bodies and interested states. Since our purpose in this chapter is the limited one of examining the impact of advisory opinions on "third parties", it is not possible to do more than give a succinct account of the facts and holding of each opinion, an indication of the participants, explore the response of "third parties" thereto and allude to its contribution to the Court's jurisprudence and the

²⁵¹ Cf. Bowett, *ibid.*, where he notes that the principle that individuals have no locus standi before the ICJ is undergoing modification, however indirectly. Not only is the Court able to decide disputes other than pension disputes between the Registrar and the staff of the Registry of the Court, in its capacity as an administrative tribunal, but it is also, by way of advisory opinions, becoming a kind of appellate court from the administrative tribunals of the ILO and the UN under the review procedure. In his view, this development, notwithstanding its procedural complications, is nevertheless well worth attention.

clarification and development of international law.

It is necessary to explain at the outset that while various advisory opinions are treated separately, where possible, those relating to the same general subject or matter are considered together under one rubric. For instance, all the advisory opinions concerning South West Africa and Namibia are examined under one heading, as are those pertaining to the review of judgments of administrative tribunals. The opinions concerning the admission of states to the United Nations are also considered together. So are those relating to the interpretation of peace treaties.

(b) The Admission and Competence Cases²⁵²

As a result of a protracted stalemate on the Security Council since early 1946 regarding the admission of new members from both the East and the West to the United Nations, the General Assembly in November 1947 decided²⁵³ to request an advisory opinion from the Court on the question whether a member which is called upon to express itself by its vote either in the Security Council or in the General Assembly on the admission of a state to membership was juridically entitled to make its consent to the admission dependent on conditions not expressly provided for in Article 4(1) of the Charter. In particular, could

²⁵² See ICJ Reports 1948, 57. See also, Rosenne, The World Court, 158-9; Singh, 425; Elian, 132-3; P.O. Humber, "Admission to the United Nations", 24 BYIL (1947), 90-115; Greig, "Advisory Jurisdiction", 340-5.

²⁵³ See GA Res.113b (II) of 17 November 1948.

such a member, while recognising the conditions to be fulfilled, subject its affirmative vote to the condition that other states would be admitted together with that state? This request was apparently designed to obtain a ruling on the legality of a possible package deal by which all outstanding applications for membership would be accepted.²⁵⁴

The competence of the Court to give the opinion was challenged on the grounds that the question was a political one and therefore fell outside the jurisdiction of the Court, that it was abstract and that the Court is not entitled to interpret the Charter.

After dismissing these objections, the Court answered both questions in the negative.²⁵⁵

Two separate opinions were filed by judges forming part of the majority which deviate in some important regards from the majority opinion, which itself contained important qualifications. These individual opinions seemed to indicate that despite their juridical answer, political considerations could not be regarded as irrelevant. This led to considerable confusion as to the actual opinion and

²⁵⁴ In these proceedings written statements were submitted by China, El Salvador, Guatemala, Honduras, India, Canada, the United States, Greece, Yugoslavia, Belgium, Iraq, the Ukraine SSR, the USSR and Australia. Oral statements were made on behalf of the Secretary-General, France, Yugoslavia, Belgium, Czechoslovakia and Poland.

²⁵⁵ See Rosenne, The World Court, 158; The United Nations, The International Court of Justice, 9th ed. (Department of Public Information, New York, 1983), 35 (hereinafter "The UN"); Pratap, 249.

reasoning of the Court.²⁵⁶

After a long debate in the ad hoc political committee in which the opinion was subjected to severe criticism by the Soviet bloc and France, the General Assembly at its third session adopted a number of resolutions. In Resolution 197A(III) after citing the Court's conclusions, the Assembly recommended that "each member of the Security Council and of the General Assembly in exercising its vote on the admission of new members should act in accordance with" the Court's opinion. In Resolution 197B(III) "having noted" the Court's advisory opinion and "the general sentiment in favour of the universality of the United Nations", the Assembly asked the Security Council to reconsider certain pending applications; and in Resolution 197C-H (III) after determining that certain states had fulfilled the requirements laid down in Article 4(1) of the Charter, the Assembly requested the Security Council to reconsider the applications of those states in the light of the Assembly's determination and the Court's opinion.²⁵⁷

These and later resolutions which referred to the 1948 opinion²⁵⁸ proved ineffectual in overcoming the difficulties regarding admission of new members to the United Nations, a problem the solution of which was widely

²⁵⁶ See Rosenne, The World Court, 158; Keith, 205, 207.

²⁵⁷ See GAOR (III 1) Plenary, 177th meeting, 8 December 1948, 797. See as to this, Pomerance, 342; Rosenne, The World Court, *ibid.*; *id.*, The ICJ, 494; Pratap, 250; Keith, 198. For a summary of the debates on this case, see Keith, 205-8.

²⁵⁸ See e.g., GA Res.506 (VI) 1 February 1952, and 620(VII) 21 December 1952.

believed to require agreement between the permanent members of the Security Council.²⁵⁹ The stalemate over the admission of new members was ultimately broken when a package deal was concluded between the USSR and the USA. By a resolution of 14 December 1955, 16 new members were admitted. It has been suggested that this solution was clearly inconsistent with the 1948 advisory opinion.²⁶⁰ However, there was general relief that a solution had eventually been found, the legality of which has apparently never been seriously questioned.²⁶¹ It would seem that in the eyes of the UN membership, the overriding goal of universality apparently justified this retreat from a position of strict legality.

It may therefore be safely concluded that this opinion had no influence on the final solution of the problem.²⁶² In the nature of things, its effect could hardly have been otherwise. Even if there had been no such "package deal" the opinion could have had little effect because of the fact that it was confined to statements made before the voting and did not cover the real reasons for actual voting. A state could comply with the opinion simply by explaining its vote on the basis of its view that the

²⁵⁹ See Pomerance, 342.

²⁶⁰ See Pomerance, *ibid*; Rosenne, The World Court, 159; *id*, The ICJ, 494, n.2. Cf. the view that it is difficult to substantiate this suggestion. See Keith, 208, n.396.

²⁶¹ See Rosenne, The World Court, *ibid*.

²⁶² See Pomerance, 342; Pratap, 250; 2 Verzijl, 207; Schwartz, 425; Sloan, 856; G. Schwarzenberger, "The Impacts of East-West Rift on International Law", 36 TGS (1950), 234; Hambro, "Authority", 19; Rosenne, The ICJ, 51, n.2, 494, n.2.

applicant did not meet the conditions of Article 4 of the Charter and remain at the same time free to take into account any other factor which it considered relevant. The political problem of the admission of new members did not originate in the explanations given for the negative vote, but in the underlying political situation of which those votes were merely an expression. The request for the advisory opinion did not and indeed could not bring out that aspect, and the practical wisdom displayed by the General Assembly in requesting the opinion and in trying to tie its hands on the issue of the package deal is therefore highly questionable.²⁶³

The Competence Case²⁶⁴

The failure of the opinion in the Admissions Case to break the deadlock over the admission of new states to the United Nations led to the emergence of a view according to which in the absence of a recommendation of the Security Council, the General Assembly could nevertheless admit new members. The General Assembly decided²⁶⁵ to request an advisory opinion on the interpretation of Article 4(2) of the Charter.²⁶⁶

²⁶³ See Pratap, *ibid.*; Rosenne, The World Court, 158-9; Schwartz, 410; Hudson, "The 27th Year of the World Court", 43 AJIL (1949), 10.

²⁶⁴ See ICJ Reports 1950, 4. See also, Rosenne, The World Court, 159-60; Singh, 425; Elian, 137.

²⁶⁵ See GA Res.296(IV) of 22 November 1949.

²⁶⁶ In these proceedings written statements were submitted by the Secretary-General and by the Byelorussian SSR, Czechoslovakia, Egypt, the Ukraine SSR, the United States, Argentina and Venezuela. An oral statement was made by France.

After summarily rejecting challenges to its jurisdiction similar to those which had been advanced in the earlier Admissions Case, the Court replied that admission to membership could not be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to secure the requisite majority, or a veto in the Security Council.²⁶⁷

This opinion, which did not call for any action, could not be expected to produce any positive effect because it confined itself to the negative statement that the Assembly cannot admit a member without a positive recommendation from the Security Council. However, the criticism that the General Assembly should not have requested the opinion in the Competence Case because it did not raise any serious or difficult points of law²⁶⁸ is unwarranted. The request for the opinion resulted from political considerations and not from the difficulties of that legal question. The Court's opinion prevented extravagant claims being put forward in the General Assembly and performed a very good function in keeping the dispute confined within given limits.²⁶⁹ The opinion was tacitly adopted by the General Assembly.²⁷⁰

²⁶⁷ See Rosenne, The World Court, 159; The UN, 35-6.

²⁶⁸ See e.g. Hambro, "Authority", 20, n.69.

²⁶⁹ See Rosenne, The World Court, 159; Pratap, 251.

²⁷⁰ See GA Res.495(V), 4 December 1950. For Assembly discussion on the Court's opinion, see GAOR (V) Plenary 318th meeting, 4 December 1950, 565-86 passim. See also, Keith, 198-210; Pomerance, 343; Hambro, "Authority", 14; Rosenne, The ICJ, 494-5.

(c) The Reparations Case²⁷¹

Following the assassination in 1948 in Jerusalem of Count Bernadotte, the United Nations mediator in Palestine, and other members of the United Nations mission to Palestine, the General Assembly asked the Court²⁷² whether the United Nations had the capacity to bring an international claim against the state responsible with a view to obtaining reparation for damage caused to the organisation and to the victim. If this question were answered in the affirmative, it was further asked in what manner the action taken by the United Nations could be reconciled with such rights as might be possessed by the

²⁷¹ See ICJ Reports 1949, 174. See also, Elian, 133-4; Rosenne, The World Court, 160; Singh, 426; Nawaz, 531; 2 Verzijl, 36-45; Hambro, Case Law, 133-4; M.J.L. Hardy, "Claims by International Organisations in Respect of Injuries to Their Agents", 37 BYIL (1961), 516-26; Tornaritis, 34, 40; H. Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties", 26 BYIL (1949), 56-7; Saxena, 676, 689; E. Gordon, "The World Court and the interpretation of constitutive treaties", 59 AJIL (1965), 794, 803 (hereinafter "Gordon"); W. Friedmann, "The International Court of Justice and the Evolution of International Law", 14 AV (1969-70), 314-6 (hereinafter "Evolution"); A. Gros, "Concerning the Advisory Role of the International Court of Justice", in Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup, ed. W. Friedmann, L. Henkin & O.J. Lissitzyn (New York: Columbia University Press, 1972), 313-21; E. Lauterpacht, "The Development of the law of International Organization by the Decisions of International Tribunals", 152 ADIRC (1976), 400-1, 406, 408-9, 423-4, 430-1, 434, 442, 449, 456-7, (hereinafter "Law of International Organisations"); 1 Fitzmaurice, 3, 18, 22-7, 56, 59-60, 71-4, 80-91, 110, 123; Jenks, Prospects, 482-5, 487, 496, 498; R.P. Anand, "Role of International Adjudication", in Gross (ed.) Future of the Court, 508, n.71; 529, n.139 (hereinafter "International Adjudication"); Weissberg, 139-45, 146-7, 148-50.

²⁷² See GA Res.258(III) of 3 December 1948.

state of which the victim was a national.²⁷³

In its advisory opinion of 11 April 1949, the Court held that the organisation was intended to exercise functions and rights which could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane. It followed that the organisation had the capacity to bring a claim and to give it the character of an international action for reparation for the damage that had been caused to it. The Court further declared that the organisation can claim reparation for damage caused not only to itself, but also in respect of damage suffered by the victim or persons entitled through him. Although, according to the traditional rule, diplomatic protection had to be exercised by the national state, an organisation should be regarded in international law as possessing the powers which, even if they are not expressly stated in the Charter, are conferred upon the organisation as being essential to the discharge of its functions. The organisation may require to entrust its agents with important missions in disturbed parts of the world. In such cases it is necessary that the agent should receive suitable support and protection. The Court therefore found that the organisation had the capacity to claim appropriate reparation, including also, reparation for damage suffered by the victim or by persons entitled through him. The risk

²⁷³ Written statements were submitted by India, China, the United States, the United Kingdom and France. Oral statements were made on behalf of the Secretary-General, Belgium, France and the United Kingdom.

of possible competition between the organisation and the victim's national state could be eliminated either by means of a general convention or by a particular agreement in any individual case.

The General Assembly, after a debate,²⁷⁴ adopted a resolution noting²⁷⁵ the opinion and authorising the Secretary-General, in accordance with his proposals, to bring an international claim against the government of a member state or non-member of the United Nations alleged to be responsible, with a view to obtaining the reparation due in respect of the damage caused to the United Nations, and in respect of the damage caused to the victim, or to persons entitled through him, and, if necessary, to submit to arbitration under appropriate procedures such claims as cannot be settled by negotiation. It also authorised him to take steps to negotiate in each particular case the agreements necessary to reconcile action by the United Nations with such rights as may be possessed by the state of which the victim is a national.²⁷⁶ The opinion in the Reparations Case proved effective in that the Secretary-General was successful in recovering the United Nations claim for pecuniary reparation from the Government of Israel. It has however been said that Israel at that time

²⁷⁴ For a summary of the debate, see Keith, 208-9; Pomerance, 358-61.

²⁷⁵ A proposal that the Assembly accept the opinion of the Court as an authoritative expression of international law on the questions considered was not adopted. See Pomerance, 343, n.68.

²⁷⁶ See GA Res.365(IV) 1 December 1949. See also, Pomerance, 343; Hambro, "Authority", 14; Rosenne, The ICJ, 494.

was in a difficult position. It paid the reparation because it could not have afforded to be recalcitrant to the resolutions of the body that created it.²⁷⁷ Other states concerned did not pay, contesting the basis of calculation for damages.²⁷⁸ The Reparations Case stands out as a wholly successful opinion in the sphere of practical politics, presumably because that question did not create any political friction.²⁷⁹

By this opinion, the Court made a significant contribution to the development of international law in respect of the nature and attributes of international legal personality. The Court attributed to international organisations like the United Nations, international legal personality through the enunciation of the principle of implied powers. Such personality gave the organisation the capacity to provide functional as opposed to diplomatic protection for its agents.²⁸⁰ This extension of the rights of the organisation as embodied in the Charter for the purpose of achieving effectiveness undoubtedly created a

²⁷⁷ See Pratap, 250-1; Schwartz, 424. For details of claims made pursuant to the resolution, see L.B. Sohn, Cases on United Nations Law (Brooklyn: The Foundation Press Inc., 1956), 265-70. See also, Pomerance, 343, n.69 and 364.

²⁷⁸ See Pratap, 251; Jenks, Prospects, 665.

²⁷⁹ See Hambro, "Authority", 19; Keith, *ibid.*

²⁸⁰ See Fawcett, 131; Elias, Africa, 77; Lissitzyn, 25; H. Lauterpacht, Development, 178ff; Bowett, International Institutions, 336-7, 340 and 341; Starke, International Law, 65, 66 and 604; Brownlie, Principles, 680-2 and 683; R. Higgins, "The Court and South West Africa", 575; D.A. Rice, "South West Africa Cases: Parties in Interests", 47 CJIL (1965), 78; cf. Rosenne, Law and Practice, 62, n.1; Suh, 23.

new principle in international law. Through the opinion the Court expressed the unspoken premise behind the Charter and reflected its spirit. It is probably no exaggeration to state that the opinion in the Reparations Case had the sweep of Marbury v. Madison²⁸¹ in the constitutional law of the United States of America. In sum, this opinion has supplied important underpinning for the development of the concept of the legal personality of international intergovernmental organisations in international law, now a standard feature of the law.²⁸²

(d) The Peace Treaties Cases²⁸³

From 1948 the General Assembly had been discussing the observance of human rights clauses of the Peace Treaties with Bulgaria, Hungary and Romania which were being accused of gross violations of those provisions. The Treaties each contained a clause for the settlement of disputes which provided among other things for the reference of the dispute to a three-man commission of which the third member should be appointed by the Secretary-General of the United Nations in the event of disagreement. Attempts to refer the disputes to the commissions having failed, because of the refusal of the three states to appoint their commissioners, the question arose in 1949 whether the Secretary-General could make the third appointment. The

²⁸¹ See 1 Cranch 137 (1803).

²⁸² See Rosenne, The World Court, 160.

²⁸³ See ICJ Reports 1950, 65 and 221. See also, Elian, 134-7; Rosenne, The World Court, 165-6; Singh, 426-7; The UN, 37.

General Assembly decided²⁸⁴ to request an advisory opinion on four legal questions:

- (a) Was the existence of disputes disclosed by the diplomatic correspondence? If so;
- (b) Did the provisions of the Peace Treaties for the settlement of disputes come into operation? If the answer to those questions was in the affirmative, and if after a delay of one month the national commissioners had not been appointed;
- (c) Was the Secretary-General authorised to proceed to the appointment of the third commissioner? and
- (d) If so, would such a commission be competent?²⁸⁵

As with the previous advisory opinions which originated in "Cold War"²⁸⁶ issues, here too the competence of the Court was challenged on the ground essentially that if there were concrete disputes, the invocation of the advisory procedure was, in fact, a surreptitious attempt to

²⁸⁴ See GA Res.294(IV) of 22 October 1949.

²⁸⁵ In the first stage of these proceedings written statements were submitted by the United States, the United Kingdom, Bulgaria, the Ukraine SSR, the USSR, the Byelorussian SSR, Romania, Czechoslovakia, Hungary and Australia. Oral statements were made on behalf of the Secretary-General, the United States and the United Kingdom. In the second phase a further written statement was submitted by the United States and oral statements were made on behalf of the Secretary-General, the United States and the United Kingdom.

²⁸⁶ This term is used to describe the hostility between the USA and the Soviet Union and their respective allies following World War II. The term was first used in 1947 by the US politician Bernard Baruch. Fear of nuclear war prevented a military confrontation, and the Cold War was fought on economic, political and ideological fronts. At its most virulent in the 1950s, it had given way by the 1970s to the movement towards detente. See The Macmillan Encyclopedia, "ColdWar" (London: Macmillan, 1986), 293.

introduce a form of contentious case and the Court was not authorised to deal with such a case in the absence of the consent of all the parties. The Court rejected these contentions, and in its first advisory opinion of 30 March 1950 the Court answered the first two questions in the affirmative. In its second opinion of 18 July it answered the third question in the negative, and therefore did not consider the fourth question.

Following a discussion in the ad hoc political committee, the Assembly took note of the two opinions and condemned the wilful refusal of the states concerned to fulfil their obligations under the Peace Treaties, "which obligations had been confirmed by the International Court of Justice". Member states, especially parties to the Peace Treaties involved, were invited to submit evidence in relation to the question to the Secretary-General for transmission to member states of the UN.²⁸⁷

The subsequent policy of the three states concerned was not influenced by the Court's advice on the question of arbitration. These states, which had never recognised the right of either the Assembly or the Court to consider the question, persisted in their refusal to nominate their representatives to the respective treaty commissions in accordance with the opinion. Nevertheless, they were all admitted to membership in the UN in 1955.²⁸⁸

²⁸⁷ See GA Res.385(V) 1950. See also, Pomerance, 343; Keith, 198, 209-10; Pratap, 251; Rosenne, The World Court, 166; id., The ICJ, 495; Hambro, "Authority", 14.

²⁸⁸ See Lissitzyn, 93; Pomerance, *ibid.*; Hambro, "Authority", 19; Pratap, *ibid.*. For a criticism of the Assembly's action, see Rosenne, "Non-Use", 42; id., "The

An indirect effect of the opinions might have been to introduce quasi-compulsory adjudication of disputes by permitting the United Nations indirectly through recourse to the advisory procedure to compel adjudication of disputes.²⁸⁹ They also encouraged the international community to develop new forms of political and arbitral procedures.²⁹⁰

The real significance of the opinions lies in the fact that "they showed once and for all that the Soviet Union and its allies were not prepared to enable the advisory procedure to be employed to handle disputes relating to the Cold War".²⁹¹ However, one wonders whether this was entirely a Cold War case. Humanitarian feelings were strong in the General Assembly at the time and in some quarters there were demands for action by the United Nations although it was evident that no effective action could be taken. The opinions had some "value" in creating the "impression" that something was being done about the alleged violations of the human rights provisions of the Peace Treaties by the ex-enemy states.²⁹²

By rejecting the contention that the General Assembly request was ultra vires because in dealing with the question of the observance of human rights and fundamental

Court and the Judicial Process", 19 IO (1965), 531; id, The ICJ, 495-6.

²⁸⁹ See Pratap, ibid.; Schwartz, 415.

²⁹⁰ See Rosenne, The World Court, 166.

²⁹¹ See Rosenne, ibid.

²⁹² See Lissitzyn, ibid., n.104; Pratap, 251-2.

freedoms it was intervening in matters essentially within the domestic jurisdiction of states, and holding instead that the question of human rights came within the scope of specific provisions of the Charter, especially Article 55, the Court in effect refused to consider the question of human rights as a matter falling within the domestic jurisdiction of member states. Thus, it contributed to the international protection of human rights.²⁹³

From a legal standpoint, the questions put to the Court were on the whole not difficult. The disputes were rooted in a more intractable political situation which the other organs of the United Nations could not solve. It may be concluded that the real and enduring significance of the Peace Treaties Cases may be seen in the considerable light which they shed on the differences between the Court's contentious and advisory jurisdictions and the clarification, no matter how imperfect, of the nature and the legal effect of the latter function. For this reason, we regard as unjustified the criticism that the opinion should never have been requested, or that it might have been better for the Court in order to safeguard its prestige, to decline to render the opinion.²⁹⁴

²⁹³ See de Aréchaga, "Work and the Jurisprudence", 3-4. Cf. the view that through this opinion the Court in effect withdrew from an active role in the sphere of human rights. See Rosenne, The World Court, 166.

²⁹⁴ See Lissitzyn, 93. See generally, Greig, "Advisory Jurisdiction", 325-68; Anand, Compulsory Jurisdiction, 280-1; C. de Visscher, Theory and Reality in Public International Law (translated by P.E. Corbett), 3rd ed. (Princeton University Press: 1968), 330. Cf. Rosenne, The World Court, 107. This criticism recalls the grand debate about political and legal questions, or justiciable and non-justiciable disputes, which is beyond the scope of this

(e) The South West Africa and Namibia Advisory Opinions²⁹⁵

(i) The South West Africa (Status) Case²⁹⁶

This advisory opinion was concerned with the determination of the legal status of the territory of South West Africa, the administration of which had been placed by the League Council in 1920 under the mandate of the Union of South Africa. Under the terms of the C class mandate conferred on South West Africa the mandatory had full powers of administration and legislation over the mandated territory as an integral portion of its own territory, subject to a number of obligations, and the League was to

study. For a discussion of legal and political questions, see e.g. Rosenne, The ICJ, 454-60; Keith, 50-62; Pomerance, 296-303; Pratap, 86-91 and 126-30; F.B. Shick, "Council and the Court of the UN", 9 MLR (1946), 97-104. In any case, as every dispute has generally some justiciable or legal aspect, the requirement that there must be a "legal question" to enable a reference to be made to the Court should be satisfied in the great majority of cases. See Singh, 26 and 97; Rosenne, Law and Practice, 94; *id.*, The World Court, 243; Lenefsky, "Advisory Opinions", 525; G.C. Doub, "The Unused Potential of the World Court", 40 FA (1961-2), 463 at 467 (hereinafter "Doub"). Besides, any fear that the Court might attempt to resolve political problems should have been removed by the Court's own action. In each case where it has been contended that the question was political and not legal, the Court has declared that it is competent to answer legal questions only. See, for example, ICJ Reports 1947-8, 61; *ibid.* 1962, 155. See also, Doub, 466. Cf. the view that there is much to be said for avoiding reference to a judicial body of issues which are essentially political conflicts even though these may turn upon the interpretation of constituent treaty provisions. See Bowett, International Institutions, 278 and 364.

²⁹⁵ See generally, Anand, Studies, 119-51; R.H.F. Austin, "Namibia and Zimbabwe: Decolonisation and the Rule of International Law", 35 CLP (1982), 203-32; L. Meret, "Canada and Namibia", 17 CYIL (1979), 314-23.

²⁹⁶ See ICJ Reports 1950, 128. See also, Elian, 138-41; Singh, 427-9. For the background to and a discussion of the South West Africa and Namibia Opinions, including the contentious cases, see Rosenne, The World Court, 166-72; Pomerance, 148-57.

supervise the administration and see to it that the obligations were fulfilled. After the Second World War the League disappeared and with it the machinery for the supervision of the mandates. Moreover, the Charter of the United Nations did not provide that the former mandated territories should automatically come under Trusteeship. Difficulties over the interpretation and application of the mandate, which had appeared already in the League era, came to a head in the United Nations, when South Africa refused to convert the mandate into a trusteeship agreement, despite repeated urgings by the General Assembly. In 1949 the General Assembly decided²⁹⁷ that the Court's opinion on a number of legal questions was desirable for its further consideration of the matter.²⁹⁸

In its opinion of 11 July 1950, the Court held that the dissolution of the League of Nations and its supervisory machinery had not entailed the lapse of the mandate and that the mandatory power was still under an obligation to give an account of its administration to the United Nations which was legally qualified to discharge the supervisory functions formerly exercised by the League of Nations. The degree of supervision to be exercised by the General Assembly should not however exceed that which applied under the mandate system and should conform as far as possible to the procedure followed in this respect by

²⁹⁷ See GA Res.338(iv) of 6 December 1949.

²⁹⁸ Written statements were submitted by Egypt, South Africa, the United States, the Netherlands and India. Oral statements were made on behalf of the Secretary-General, the Philippines and South Africa. The competence of the Court to give this opinion was not challenged.

the Council of the League of Nations. On the other hand, the mandatory power was not under an obligation to place the territory under Trusteeship although it might have certain political and moral duties in this connection. Finally, it had no competence to modify the international status of South West Africa unilaterally.

The General Assembly accepted this advisory opinion and commenced a long series of efforts to implement it.²⁹⁹ Although South Africa refused to cooperate with the General Assembly in this connection, it nevertheless desisted from annexing the territory of South West Africa as it had proposed to do.³⁰⁰

(ii) The South West Africa (Voting) Case³⁰¹

In the course of dealing with the problem of South West Africa, further questions arose concerning the interpretation of certain passages in the 1950 Opinion on the basis of which the General Assembly had established the Committee on South West Africa,³⁰² broadly analogous to the

²⁹⁹ See GA Resolutions 449A(V) and 570A(VI). This latter resolution is remarkable for the degree of interest it evinces for the authority of international law and the Court. Rosenne, Law and Practice, 750; *id.*, The World Court, 167; Keith, 211. See also, ICJYB 1950-1, 74 and 1951-2, 73-6; Keith, 212; Pomerance, 344-5 for a description of these efforts and for the background to both resolutions. These efforts were largely unsuccessful because they lacked the cooperation of the South African Government which never accepted the opinion for the reason that it was given in ignorance of certain facts and should accordingly be reviewed. See Keith, *ibid.*

³⁰⁰ See J. Barber, "South Africa, The Regional Setting", 42 WT (1986), 8, 11 (hereinafter "Barber"); Pratap, 252.

³⁰¹ See ICJ Reports 1955, 67. See also, UN, 38.

³⁰² See GA Res. 749A (VIII). This marked the beginning of attempts to implement the 1950 opinion without South African cooperation. See also, Pomerance, 345.

Permanent Mandates Commission of the Council of the League. The General Assembly on 11 October 1954 adopted³⁰³ a special rule F on voting procedure to be followed in taking decisions on questions relating to reports and petitions concerning the territory of South West Africa. According to this rule, such decisions were to be regarded as important questions within the meaning of Article 18, paragraph 2 of the United Nations Charter, and would therefore require a two-thirds majority of members of the United Nations present and voting. The General Assembly therefore decided³⁰⁴ to ask the Court for an advisory opinion on that question.³⁰⁵

In its advisory opinion of 7 June 1955 the Court considered that rule F was a correct application of its earlier advisory opinion. It related only to procedure and procedural matters were not material to the degree of supervision exercised by the General Assembly. Moreover, the Assembly was entitled to apply its own voting procedure and rule F was in accordance with the requirement that the supervision exercised by the Assembly should conform as far as possible to the procedure followed by the League Council. The General Assembly accepted this opinion³⁰⁶ and

³⁰³ See GA Res.844(IX) of 11 October 1954.

³⁰⁴ See GA Res.904(IX) of 23 November 1954.

³⁰⁵ Written statements were submitted by the United States, Poland, India, Israel, China, Yugoslavia and the Secretary-General. No state requested to make an oral statement.

³⁰⁶ See GA Res.937(X). South Africa rejected the 1955 opinion which was an interpretation of the 1950 opinion which it had always considered to be erroneous. See Keith, 212. See also, ICJYB 1955-6, 73; Pomerance, 345-6;

persevered with its efforts to solve the problem of South West Africa.

(iii) The South West Africa (Committee) Case³⁰⁷

The Court again found it necessary to seek³⁰⁸ an advisory opinion on the question whether it would be consistent with the 1950 opinion for it to authorise the Committee on South West Africa to grant oral hearings to petitioners.³⁰⁹ The underlying purpose in granting oral hearings was to supplement the Committee's information on the situation in South West Africa.³¹⁰

In its advisory opinion of 1 June 1956 the Court considered that it would be in accordance with the advisory opinion of 1950 on the international status of South West Africa for the Committee on South West Africa established by the General Assembly to grant oral hearings to petitioners on matters relating to the territory of South West Africa if such a course was necessary for the maintenance of effective international supervision of the mandated territory. The General Assembly was legally qualified to carry out an effective and adequate supervision of the administration of the mandated

Rosenne, The World Court, 167-8; id., The ICJ, 495.

³⁰⁷ See ICJ Reports 1956, 23. See also, UN, 39.

³⁰⁸ See GA Res.942(X) of 3 December 1955.

³⁰⁹ 'Under the original mandate system, petitioners could only submit their petitions in writing and the question was whether oral petitions would constitute an excess in the degree of supervision.' See Rosenne, The World Court, 168.

³¹⁰ In addition to the Secretary-General's statement, written statements were submitted by the United Nations, China and India and an oral statement was made on behalf of the United Kingdom.

territory. Under the League of Nations the Council would have been competent to authorise such hearings. Although the degree of supervision to be exercised by the Assembly should not exceed that which applied under the mandate system, the grant of hearings would not involve such an excess in the degree of supervision. Under the circumstances then existing, the hearing of petitioners by the Committee on South West Africa might be in the interest of the proper working of the mandate system.

The General Assembly accepted and endorsed this advisory opinion³¹¹ and authorised the Committee on South West Africa to grant hearings to petitioners. However, none of the Court's opinions, or the Assembly resolutions implementing them, was bringing the UN any closer to the goal of establishing effective supervisory authority with respect to South Africa's administration of South West Africa. While the reports of the Committee and the resolutions of the Assembly grew ever more critical of South African administration, the South African Government grew ever more intransigent in its refusal to submit to any measure of international accountability in respect of the territory.³¹² This prompted the Assembly to search for new courses of action. In particular, the Assembly requested the Committee on South West Africa to study the question

³¹¹ See GA Res.1047(VI). See also, Pomerance, 346; Keith, 212-3; Rosenne, The ICJ, 495.

³¹² The opinions on South West Africa have clarified in large measure the complicated legal situation. See Rosenne, The ICJ, 112-5; de Aréchaga, "Work and Jurisprudence", 1, 4; Pratap, 252. See also, 5 Repertory, 1955, 83. Their practical effect has been considerable in that they have contained the situation.

what legal action was open to UN organs, UN members, or former League members "acting either individually or jointly to ensure that the Union of South Africa fulfills the obligations assumed by it under the mandate".³¹³ Although the possibility of seeking further advisory opinions was not discounted in subsequent reports and resolutions, the main thrust of Assembly thinking on the matter was towards the invocation of the compulsory jurisdiction in the hope that the 1950 opinion would be transformed into an enforceable judgment. The institution of contentious proceedings was encouraged in two Assembly resolutions.³¹⁴

Following a further unsuccessful attempt by the UN to reach a negotiated settlement with South Africa, a good offices committee was established in 1957 to discuss with the Union Government "a basis for an agreement which would continue to accord to the territory of South West Africa an international status". A partition proposal contemplated by the Committee was rejected by the full Assembly.³¹⁵ The 1959 discussions were totally unproductive.³¹⁶

³¹³ See GA Res.1060(XI). See also, Pomerance, *ibid.*

³¹⁴ See GA Resolutions 1142A(XII) and 1361(XIV). See also, Pomerance, *ibid.*; Pratap, 252; Rosenne, The World Court, 168.

³¹⁵ See GAOR (XIII) Annexes A139, 2-10 (UN Doc. A/3900) and 4th committee meetings 756-63 10-16 October 1958, 57-97.

³¹⁶ See *ibid.* (XIV) Annexes A138, 1-5 (UN Doc. A/4224). See Pomerance, 347.

(iv) The South West Africa Cases³¹⁷

Contentious proceedings were instituted by Ethiopia and Liberia in November 1960³¹⁸ concerning the continued existence of the mandate for South West Africa and the duties and performance of South Africa as mandatory power. The Court was requested to make declarations that South West Africa remained a territory under a mandate; that South Africa had been in breach of its obligations under that mandate and that the mandate, and hence the mandatory authority, were subject to the supervision of the United Nations. In May 1961 the Court made an order finding the applicants to be in the same interest and joining the proceedings. South Africa filed four preliminary objections to the Court's jurisdiction. In December 1962 the Court rejected these and upheld its jurisdiction. After pleadings on the merits had been filed within the time limits requested by the parties, the Court held public sittings from 15 March to 29 November 1965 in order to hear oral argument and testimony, and judgment in the second phase was given in July 1966. By the casting vote of the President, the vote having been equally divided 7-7, the Court found that the applicants could not be considered to have established any legal right or interest appertaining to them in the subject-matter of their claims and accordingly decided to reject those claims.

³¹⁷ See ICJ Reports 1962, 319; *ibid.* 1966, 6. See also Singh, 412. Although these cases are not advisory opinions, we recount them here as part of the narrative.

³¹⁸ This action was commended by the Assembly. See GA Res.1565(XV). See Pomerance, *ibid.*

During the course of these protracted proceedings, the Assembly continued to deal with the South West Africa issue³¹⁹ on the basis of the existence of the mandate, although the Assembly was on occasion urged to divest South Africa of the mandate.

(v) The Namibia Case³²⁰

In October 1966 the General Assembly decided³²¹ that the mandate for South West Africa was terminated and that South Africa had no right to administer the territory. The General Assembly assumed direct responsibility for South West Africa until its independence. Attempts by the General Assembly to persuade South Africa to withdraw from the territory of South West Africa proved unsuccessful. Early in 1968 the question of South West Africa was brought to the Security Council by the African states.³²² On 25 January 1968 the Security Council adopted Resolution 245 (1968) in which it backed the General Assembly's 1966

³¹⁹ On the basis of the sub judice principle, South Africa repeatedly objected to Assembly consideration of the South West Africa question. However, the Assembly majority considered the principle inapplicable. Cf. Rosenne, Law and Practice, 84ff.

³²⁰ See ICJ Reports 1971, 16. See also, H. J. Richardson II, "Constitutive Questions in the Negotiations for Namibian Independence", 78 AJIL (1984), 76, 97, 98, 99, 100, 114 and 115 (hereinafter "Richardson"); N.K. Hevener, "The 1971 South West African Opinion - A New International Judicial Philosophy", 24 ICLO (1975), 791-810; Brown, 213-42; Pratap, 271-3. For the change of the name from South West Africa to Namibia, see GA Res. 2372 (XXII).

³²¹ See GA Res. 2145 (XXI). See also, Rosenne, The World Court, 170; Pomerance, 347-8. The compatibility of this action with the 1950 opinion is doubtful. See Pomerance, 347.

³²² See Rosenne, The World Court, *ibid.*; Pomerance, 348.

decision. This was followed by Resolution 246 (1968) of 14 March, censuring South Africa for its refusal to abide by the earlier resolutions. Further resolutions were adopted in 1969, and on 30 January 1970, in Resolution 276 (1970), the Security Council established an ad hoc subcommittee to study ways and means for the effective implementation of the Council's resolutions. At the same time, the Security Council called upon South Africa to withdraw its administration from the territory and declared that the continued presence of South African authorities was illegal and that all acts taken by the South African Government on behalf of or concerning Namibia after the termination of the mandate were illegal and invalid. It further called upon all states to refrain from any dealings with the South African Government that were incompatible with that declaration. One of the recommendations of the subcommittee was for a further advisory opinion to be requested of the Court, and on 29 July 1970, in Resolution 284 (1970), the Security Council decided to ask the Court what were the legal consequences for states of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970). The Court was asked to transmit its opinion to the Security Council at an early date.³²³

³²³ The President decided that states members of the United Nations were likely to be able to furnish information on the question. Accordingly, the Registrar sent them the special and direct communication provided for in Article 66 of the Statute: See ICJ Reports 1971, 17-8. Written statements were submitted by the United Nations, Czechoslovakia, Finland, France, Hungary, India, the Netherlands, Nigeria, Pakistan, Poland, South Africa, the United States and Yugoslavia. Oral statements were made on

In its advisory opinion of 21 June 1971 the Court found that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw its administration immediately. The Court was further of the opinion that states members of the United Nations were under an obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia and to refrain from any act implying recognition of the legality of or lending support or assistance to such presence and administration. Finally, it was of the opinion that it was incumbent on states which were not members of the United Nations to give assistance in the action which had been taken by the United Nations with regard to Namibia.

The Security Council, inter alia, took note with appreciation of the advisory opinion and expressed agreement with it.³²⁴ In its interpretation of Articles 24 and 25 of the Charter, the Court had attributed binding force to the relevant Security Council resolutions even though they had not been adopted under Chapter VII of the Charter. This part of the Court's reasoning was particularly objectionable to many Council members. Some members (most notably, the African states), accepted the

behalf of the Secretary-General of the United Nations, the Organisation of African Unity, Finland, India, the Netherlands, Nigeria, Pakistan, South Africa, Vietnam and the United States.

³²⁴ See SC Res.301 (1971). On the reception of the opinion, see Rosenne, The World Court, 172; Pomerance, 352-4.

opinion's conclusions and its legal premises. Others (including the United States, Japan and Belgium), accepted the conclusions but not the premises. And still others (France and the United Kingdom)³²⁵ accepted neither the conclusions nor the premises.³²⁶

Amongst its many arguments, South Africa advanced the view that GA Resolution 2145 of 1966 terminating its Mandate over South West Africa was invalid, as were Security Council resolutions based thereon. It maintained that these resolutions were at most recommendations which UN members were free to accept or reject after consideration. It further alleged that Security Council Resolution 276 of 1970 was ultra vires so far as Chapters VI and VII of the Charter were concerned.³²⁷

The General Assembly adopted Resolution 2871(XXVI) in which it "noted with satisfaction the advisory opinion", Security Council Resolution 301 (1971) and welcomed the operative provisions of the former. It also called upon all states to respect strictly General Assembly and Security Council resolutions concerning Namibia and the

³²⁵ The United Kingdom rejected the opinion because it saw no basis in the Charter for the attribution to the General Assembly of a competence to adopt resolutions which are other than recommendatory in effect. Furthermore, the Security Council could take decisions generally binding on member states only when it had made a determination under Article 39 of the Charter. See the statement of the representative of the United Kingdom in S/PV1589, at 26 and 28. See also R. Higgins, "The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?", 21 ICLQ (1972), 270 at 273 and 277 (hereinafter "Which UN Resolutions").

³²⁶ see Pomerance, 353.

³²⁷ See R. Higgins, "Which UN Resolutions", 272.

advisory opinion and invited the Security Council to take effective measures in conformity with the relevant provisions of the Charter to secure the withdrawal by South Africa of its illegal administration from Namibia and the implementation of General Assembly and Security Council resolutions designed to enable the people of Namibia to exercise their right to self-determination.³²⁸

The Court's opinion, it seems, had little instant effect on the Council's continued consideration of the Namibia issue. As in the pre-request stage, the Council remained deadlocked over the issue of invoking Chapter VII and as for measures short of Chapter VII, these had practically been exhausted in any case. The opinion may, in a sense, have had a cathartic effect. For although the Council remained committed to bringing the Namibian population to self-determination and independence, henceforward this aim was to be pursued through dialogue with South Africa rather than by a dogmatic insistence on South Africa's withdrawal from that territory in strict compliance with the advisory opinion.

To this end, a proposal for the initiation of contacts with South Africa was adopted by the Council at its Addis Ababa meeting in February 1972.³²⁹ As a result of these contacts³³⁰ maintained by the "Contact Group"³³¹ and the

³²⁸ See ICJYB 1971-2, 144-50.

³²⁹ See S.C. Res. 309 (1971) and 310 (1972). See also Pomerance, 354.

³³⁰ See in this connection, SC Resolutions: 385 (1976), 418 (1977), 431, 435 and 439 (1978); GA Resolution ES-8/2 of 1981.

"Front Line States",³³² and such other factors as the end of Portuguese colonial rule in Angola and Mozambique,³³³ the willingness of the superpowers to cooperate in the settlement of regional conflicts generated by the improved international political climate, and, above all, the liberation struggle waged by SWAPO,³³⁴ Namibia attained its independence under the stewardship of the United Nations on 21 March 1990, after more than a century of colonial rule.³³⁵

In addition to helping to bring about the independence of Namibia, the advisory opinions on South West Africa in

³³¹ This group comprised the five Western Security Council members, namely, the United States, The United Kingdom, France, West Germany and Canada. On its formation and authority, see Richardson, 78-9 and 82-8; Barber, 11.

³³² This group of states included Botswana, Mozambique, Tanzania, Zambia and Zimbabwe with Angola and Nigeria in key supporting roles.

³³³ See Barber, 11; M. Spicer, "Namibia, Elusive Independence", 36 WT (1980), 407 (hereinafter "Spicer").

³³⁴ In October 1966, the South West Africa People's Organisation (SWAPO), a nationalist movement formed in 1960 from the labour-orientated Ovamboland People's Party, began a campaign to liberate Namibia by force since constitutional change was being frustrated by South Africa. See Spicer, 406-7; Richardson, 77, 81, 108, 117 and 119-20. In 1976 the General Assembly recognised SWAPO as "the sole and authentic representative of the Namibian people". GA Res.31/152 (20 December 1976). See also, Barber, 11; Richardson, 81, n.18.

³³⁵ See 1987 Secretary-General's report on the work of the Organisation,*3; *ibid.*, 1988 GAOR 43rd session, Supp. No.1 (A/43/1), 1; *ibid.*, 1989 GAOR 44th session, 1-2. See also R. Higgins, "The United Nations: Still A Force For Peace?", 1988 Manchester University Peace Lecture (unpublished), 23 (hereinafter "Peace Lecture"); Sir Patrick Moberly, "Towards an Independent Namibia", 45 WT (1989), 168-9 and 171; J.E. Spencer, "A Deal for Southern Africa", 45 WT (1989), 80; "Namibia: Independence at Last", UN Chronicle, June 1990, 4-10; "New Era for Last African Colony", The Times, 21 March 1990.

general, and that on Namibia, in particular, which contain several points of major legal interest, have enabled the Court to make a significant contribution to the development of some aspects of international law. These aspects include the law of the international protection of human rights; the law of treaties and the law of international organisations, especially the law of the United Nations. These opinions afforded the Court the opportunity to clarify issues relating to decolonisation and the principle of self determination; the powers of the General Assembly and the Security Council;³³⁶ voting in the Security Council; the legal implications for other states of the continuing presence of South Africa in Namibia; duties of non-member states; and the interpretation of treaties.³³⁷

(f) The Reservations Case³³⁸

³³⁶ e.g. the significance of some General Assembly resolutions; and the legal effect of Security Council resolutions adopted pursuant to Articles 24 and 25 of the Charter; see generally, R. Higgins, "Which UN Resolutions", 270-86.

³³⁷ See Singh, 140-1, 151-2, 158-9, 161 and 259-61; Lachs, 239, 255-62 and 277; de Aréchaga, "Work and Jurisprudence", 1-6, 31 and 32; Richardson, 79.

³³⁸ See ICJ Reports 1951, 15. See also, Rosenne, The World Court, 173-4; I. Sinclair, The Vienna Convention on the Law of Treaties (Manchester University Press, 1984), 56-8 (hereinafter "Sinclair"); Singh, 429-30; Elian, 141-2; The UN, 40; Nawaz, 534-5; 2 Verzijl, 71-81; Hambro, Case Law, 9-25, 245; Crawford, 64, 78; Fitzmaurice, 34 BYIL (1958), 138-49; Rosenne, "Non-Use", 40; Brownlie, "Use of Force", 214; G. Fitzmaurice, "Hersch Lauterpacht - The Scholar as Judge: Part III", 39 BYIL (1963), 176, 178; Jenks, Prospects, 498, 503, 512; Nantwi, 78; S. Rosenne, "Res Judicata: Some Recent Decisions of the ICJ", 28 BYIL (1951), 37; Jones, "The Vienna Convention on the Law of Treaties", 20 TILJ (1985), 557, 559 n.17; R. Kearney & R.E. Dalton, "The Treaty on Treaties", 64 AJIL (1970), 495, 509-10; Szasz, 505, nn.43 and 50; Weissberg, 136, 145, 147, 149, 150. On reservations to multilateral

In November 1950, the General Assembly asked the Court a series of questions as to the position of a state which attached reservations to its signature of the multilateral Convention on Genocide if other states, signatories of the same Convention, objected to these reservations.³³⁹ The Court considered, in its advisory opinion of 28 May 1951, that, even if a convention contained no article on the subject of reservations, it did not follow that they were prohibited. The character of the convention, its purposes and its provisions must be taken into account. It was the compatibility of the reservation with the purpose of the convention which must furnish the criterion of the attitude of the state making the reservation, and of the state which objected thereto. The Court did not consider that it was possible to give an absolute answer to the abstract question put to it. As regards the effect of the reservation in relations between states, the Court considered that a state could not be bound by a reservation to which it had consented. Every state was therefore free

treaties, see C.G. Fenwick, "Editorial Comment: Reservations to Multilateral Treaties", 45 AJIL (1951), 469-74; *id.*, "Reservations to Multilateral Conventions: The Report of the International Law Commission", 46 AJIL (1952), 145-8; D.R. Anderson, "Reservations to Multilateral Conventions: A Re-examination", 13 ICLQ (1964), 450-81; D.W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", 48 BYIL (1977), 67-92; J.K. Gamble, Jr., "Reservations to Multilateral Treaties: A Macroscopic View of State Practice", 74 AJIL (1980), 372-94.

³³⁹ Written statements were submitted by the United Nations, the Organisation of American States and the ILO and by the United States, USSR, Jordan, the United Kingdom, Israel, Poland, Czechoslovakia, the Netherlands, the Ukrainian SSR, Bulgaria, the Byelorussian SSR and the Philippines. Oral statements were made on behalf of the Secretary-General, Israel, the United Kingdom and France.

to decide for itself whether the state which formulated the reservation was or was not a party to the convention. The situation presented real disadvantages, but they could only be remedied by the insertion in the convention of an article on the use of reservations. A third question referred to the effects of an objection by a state which was not yet a party to the convention, either because it had not signed it or because it had signed but not ratified it. The Court was of the opinion that, as regards the first case, it would be inconceivable that a state which had not signed a convention should be able to exclude another state from it. In the second case, the situation was different: the objection was valid, but would not produce an immediate legal effect, it would merely express and proclaim the attitude which a signatory state would assume when it had become a party to the convention.³⁴⁰

The same question had been submitted simultaneously to the ILC which had been charged with the codification and progressive development of international law, and to the Court for an advisory opinion.³⁴¹ When the Assembly discussed the question of reservations and the opinion of the Court, at its 6th session, it was faced with two separate matters, namely, the opinion which by its terms was restricted to the Genocide Convention, and a report of the ILC. Thus, pre-request apprehensions by several

³⁴⁰ In all of the foregoing, the Court adjudicated only on the specific case referred to it, namely, the Genocide convention.

³⁴¹ For a constructive criticism of this approach, see Lissitzyn, 33.

delegates that the Assembly might be faced with conflicting pronouncements were fully substantiated. The Assembly had also to consider what instructions to give to the Secretary-General. Throughout the debates, the speakers, with only a few minor exceptions, expressly or impliedly accepted the opinion as authoritative. This was the general attitude of delegates, whether they agreed with the opinion or not. The real area of dispute concerned the general question of reservations. Nevertheless, after the recognition of the respect due to the Court, most of the sharpest opponents of the compatibility rule agreed to see the opinion applied in relation to the one convention to which it was ostensibly confined, namely, the Genocide Convention. Finally, the Assembly and the Committee adopted a resolution which noted both the opinion and the ILC report, recommended to states that they be guided in relation to the Genocide Convention by the opinion and requested the Secretary-General in relation to the Convention to conform his practices to the opinion.³⁴² This resolution did not, however, limit application of the Court's rule to the Genocide Convention. It went far towards extending the rule, though in its objective variant,³⁴³ to future conventions concluded under UN

³⁴² GA Res.598 (VII) of 12 January 1942. For the 6th Committee debates, see GAOR(VI) 6th Committee, meetings 264-78, 5 December 1951 to 5 January 1952. See also Nawaz, 535; Rosenne, The World Court, 174 ; id., The ICJ, 495; Keith, 211-2; Pomerance, 348-9; Pratap, 253.

³⁴³ In its objective variant, the rule boils down essentially to the Pan-American Union rule for reservations. See G. Fitzmaurice, "Reservations to Multilateral Conventions", 2 ICLQ (1953), 1-26 (hereinafter "Reservations"). See also, Pomerance, 348.

auspices.

The Court's opinion was initially received with disfavour in many quarters. Particular criticism was directed towards the compatibility test on the ground that it is fundamentally subjective and uncertain in its application and would prove to be unworkable in practice.³⁴⁴ Certain of the critics, in addition to expressing doubts about the compatibility test as such, also pointed out that the Court's response to question 2 significantly undermined the principle of the integrity of the text of the treaty and could result in fragmenting multilateral conventions into bilateral treaties of variable content.³⁴⁵

With time, however, support for generalising the Court's ruling increased. The expansion of the international community and the corresponding need for more international legislation in the form of treaties militated against strict conformity with the unanimity rule. Universality of participation in a convention appeared more important than the absolute integrity of the convention. The question of the propriety of the Secretary-General's handling of the "Indian Reservation" to the IMCO Convention resulted in a further Assembly resolution under whose terms the Assembly extended its previous directive to the Secretary-General to all conventions concluded under UN

³⁴⁴ See Fitzmaurice, "Reservations", 1-26; *id.*, "The Law and Procedure of the International Court of Justice (1952-4): Treaty Interpretation and Other Treaty Points", 33 *BYIL* (1957) 272-93; Rosenne, *The ICJ*, 495.

³⁴⁵ See Sinclair, 58.

auspices, i.e., even to those concluded prior to January 1952 (provided of course, that no contrary provisions were contained in the convention).³⁴⁶

In its 1951 report the ILC rejected for general application and impliedly criticised the Court's compatibility rule.³⁴⁷ The ILC took the view that the criterion of compatibility of a reservation with the object and purpose of a multilateral convention applied by the Court to the Convention on Genocide was not suitable for application to multilateral conventions in general.³⁴⁸ It is significant that the ILC subsequently reversed itself on the question of reservations and endorsed the Court's rule in its objective variant for general application.³⁴⁹

The test laid down in the Reservations Case was ultimately sanctified in Article 19(C) of the convention regime on the reservations of the Vienna Convention on the

³⁴⁶ See GA Res.1452B (XIV) 7 December 1959; Part A dealt specifically with the IMCO Convention. For a summary of the 6th Committee's discussions, see UN Doc. A/4311, 1 December 1959. See Pomerance, 349; Keith, 211-2.

³⁴⁷ See ILCYB 1951-II, 238, report, para.24. See further, Pomerance, *ibid.*; Pratap, 252.

³⁴⁸ See ILCYB 1951-II, 125.

³⁴⁹ See Articles 18-21 of the 1962 draft on the Law of Treaties, ILCYB 1962-II, 175ff and Articles 16-19 of the 1966 draft, *ibid.*, 1966-II, 202ff. The compatibility rule was thought to be impracticable for determining the status of the reserving state. Nevertheless, the Court's criterion was said to "express a valuable concept to be taken into account both by states formulating a reservation and by states deciding whether or not to consent to a reservation". First report on the Law of Treaties by Sir Humphrey Waldock, *ibid.*, 1962-II, 65-6. See also Pratap, 253. For a summary of the developments in the ILC, see Sinclair, 58-61.

Law of Treaties.³⁵⁰ It may be concluded that the advisory opinion on reservations to the Genocide Convention had brought about a movement away from the traditional unanimity rule whereby a reservation in order to be valid must receive the assent of all the signatory states. Conversely, adherents of the extreme sovereignty rule school of thought according to which every state had an absolute right to make reservations at will were not satisfied with the limited move away from the unanimity rule represented by the principle underlying this advisory opinion.³⁵¹

(g) Review of Administrative Tribunal Judgments³⁵²

Five cases involving judgments of the United Nations and ILO Administrative Tribunals have come before the Court for an advisory opinion. In some of these cases, the issues are highly technical involving appreciation of relevant staff regulations. No oral proceedings were held in the last four of these cases.

³⁵⁰ See Articles 19-21, UN Doc. A/Conf 39/27, 23 May 1969. See also Sinclair, 61; Pomerance, 349; Rosenne, The World Court, 174; McNair, Law of Treaties, 166, 168; H. Lauterpacht, Development, 184ff.

³⁵¹ See Sinclair, 13-4.

³⁵² See generally, Rosenne, The ICJ, 486-92; id., Law and Practice, 737-9; Bowett, International Institutions, 317-31; Brownlie, Principles, 580, 581-3, 590-2 and 594; W. Friedmann and A. Fatouros, "The United Nations Administrative Tribunal", 11 IO (1957), 13-28; Woon Sang Choi, "Judicial Review of Administrative Tribunal Judgments", Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn, T. Buergenthal (ed.) (Kehl, West Germany: Engel, 1984), 347-70.

(i) The UN Administrative Tribunal Case³⁵³

The United Nations Administrative Tribunal was established by the General Assembly to hear applications alleging non-observance of contracts of employment of staff members of the United Nations secretariat or of the terms of appointment of such staff members. This case concerns the rights of former employees of the organisation, nationals of the United States, who had been dismissed for refusing to answer questions put to them by an investigating committee of the United States Senate relating to membership of the Communist Party or subversive activities in the United States. Following their discharge, they sought redress from the UN Administrative Tribunal which found that the circumstances of the discharge gave rise to a claim for compensation. In accordance with normal procedure, the Secretary-General included appropriations in the 1953 budget to meet the compensation thus awarded. His action was challenged on the ground that the General Assembly was entitled to override the decision of the Administrative Tribunal. The General Assembly decided³⁵⁴ to seek an advisory opinion on the legal issues.³⁵⁵

³⁵³ See ICJ Reports 1954, 47. See also, The UN, 41; Singh, 430; Elian, 143-4.

³⁵⁴ See GA Res.785 A (VIII) of 6 December 1953.

³⁵⁵ Written statements were presented by the United Nations, the ILO, France, Sweden, the Netherlands, Greece, the United Kingdom, the United States, the Philippines, Mexico, Chile, Iraq, China, Guatemala, Turkey, Ecuador, Canada, the USSR, Czechoslovakia and Egypt. Oral statements were made on behalf of the United Nations, France, the United States, Greece, the United Kingdom and the Netherlands.

In its advisory opinion of 13 July 1954 the Court considered that the Assembly was not entitled on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal in favour of a staff member of the United Nations whose contract of service had been terminated without his assent. The tribunal was an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions and not merely an advisory subordinate organ. Its judgments were therefore binding on the United Nations Organisation and thus also on the General Assembly.

Following this advisory opinion, the General Assembly decided to "take note of" the Court's opinion, adopted in principle judicial review of Administrative Tribunal judgments, set up a special committee to study the question and established a special indemnity fund to pay the awards of compensation made by the Administrative Tribunal.³⁵⁶ While the United States joined other states in "taking note of" the opinion and in agreeing to pay the awards, it was its insistence which led to payment of the awards out of the special indemnity fund rather than out of the regular budget. This insistence was prompted by a United States Congressional resolution which declared that no part of the funds appropriated by the Congress should be used for paying the controversial awards.³⁵⁷

³⁵⁶ See GA Res.888(IX) of 17 December 1954.

³⁵⁷ See Pomerance, 350; Pratap, 253; Rosenne, The World Court, 179-80; id., The ICJ, 495; Keith, 198, 212.

The Special Committee on Review of Awards of the United Nations Administrative Tribunal proposed that a screening committee composed of delegates to the General Assembly should be established and authorised to ask for opinions relating to the awards at the request of the Secretary-General, the individual concerned or a member state.³⁵⁸ The Committee on Application for Review of Administrative Tribunal Judgments was established and authorised in terms of Article 96(2) of the UN Charter to request advisory opinions.³⁵⁹

(ii) The ILO Administrative Tribunal Case³⁶⁰

The statute of the Administrative Tribunal of the ILO, the jurisdiction of which had been accepted by UNESCO for the purpose of settling certain disputes which might arise between the organisation and its staff members, provides that the tribunal's judgments shall be final and without appeal subject to the right of the organisation to challenge them. It further provides that in the event of such a challenge the question of the validity of the decision shall be referred to the Court for an advisory opinion which will be binding. In this case, the recourse to the Court was initiated by the executive board of UNESCO which wanted to avail itself of the procedure for review existing under the Statute of the ILO Administrative

³⁵⁸ See report of the Special Committee on Review of Awards of the United Nations Administrative Tribunal, UN DOC.A/2909, GA(X) AI 49; 1ff.

³⁵⁹ See GA Res.957(X). See also, Keith, 37.

³⁶⁰ See ICJ Reports 1956, 77. See also, The UN, 41-2; Singh, 430; Elian, 144-6. The background of this case is similar to that in the 1954 case.

Tribunal and challenge decisions of that Tribunal confirming its own jurisdiction.³⁶¹ When four UNESCO staff members holding fixed term appointments complained of the Director-General's refusal to renew their contracts on expiry, the Tribunal gave judgment in their favour. UNESCO challenged these judgments contending that the staff members concerned had no legal right to such renewal and that the tribunal was competent only to hear complaints alleging non-observance of terms of appointment of staff regulations. Consequently, UNESCO maintained, the Tribunal lacked the requisite jurisdiction.³⁶²

In its advisory opinion of 23 October 1956 the Court said that an administrative memorandum which had announced that all holders of fixed term contracts would, subject to certain conditions, be offered renewals, might reasonably be regarded as binding on the organisation and that it was sufficient to establish the jurisdiction of the Tribunal that the complaints should appear to have a substantial and not merely artificial connection with the terms and provisions invoked. It was the Court's opinion that the Administrative Tribunal had been competent to hear the complaints in question.

Since in this case the opinion was binding under the terms of Article XII of the ILO Administrative Tribunal statute, the executive board took note of the Court's opinion and approved a proposal by the Director-General

³⁶¹ See resolution of the executive board of UNESCO of 25 November 1955.

³⁶² Written statements were submitted by UNESCO, the United States, France, the United Kingdom and China.

regarding payment of the awards granted by the ILO Administrative Tribunal.³⁶³

(iii) The Fasla Case³⁶⁴

On 28 April 1972, the United Nations Administrative Tribunal gave in judgment No.158 its ruling on a complaint by a former United Nations staff member concerning the non-renewal of his fixed term contract. The staff member applied for a review of this ruling to the committee on application for review of Administrative Tribunal judgments which decided that there was a substantial basis for the application and requested the Court to give an advisory opinion on two questions arising from the applicant's contentions.³⁶⁵

In its advisory opinion of 12 July 1973, the Court decided to comply with the committee's request and expressed the opinion that contrary to these contentions, the Tribunal had not failed to exercise the jurisdiction vested in it and had not committed a fundamental error in procedure having occasioned a failure of justice.

³⁶³ See UNESCO, 45 Ex/17 1 November 1956 45 Ex/decisions 14 item 11 doc.1 and 45 Ex/SR9 6 November 1956, 57. See also, Repertory, Supp.2, Article 96, paragraph 10 N8. The United States representative criticised the Court's opinion but agreed not to contest it. UNESCO 45 EX/SR9 6 November 1956, 50. See Pomerance, 354-5; Pratap, 253; Keith, 198, 218.

³⁶⁴ See ICJ Reports 1973, 166. See also, The UN, 43; Singh, 432.

³⁶⁵ Since the Court considered that the United Nations and its member states were likely to be able to furnish information on the question, the Registrar notified the organisation and its member states that the Court would be prepared to receive written statements from them: ICJ Reports 1973, 167. Written statements were submitted by the Secretary-General (including the staff member).

(iv) The Mortished Case³⁶⁶

A former staff member of the United Nations secretariat had challenged the Secretary-General's refusal to pay him a repatriation grant unless he produced evidence of having relocated upon retirement. By a judgment of 15 May 1981, the United Nations Administrative Tribunal had found that the staff member was entitled to receive the grant and therefore to compensation for the injury sustained through its non-payment. The injury had been assessed at the amount of the repatriation grant of which payment was refused. The United States Government addressed an application for review of this judgment to the committee on applications for review of Administrative Tribunal judgments and the committee decided to request an advisory opinion of the Court on the correctness of the decision in question.³⁶⁷

In its advisory opinion of 20 July 1982, the Court, after pointing out that a number of procedural and substantive irregularities had been committed, decided nevertheless, to comply with the committee's request whose wording it interpreted as really seeking a determination as to whether the Administrative Tribunal had erred on a question of law relating to the provisions of the United

³⁶⁶ See ICJ Reports 1982, 325. See also, The UN, 45; Singh, 433-4.

³⁶⁷ The President decided that the United Nations and its member states were to be considered as likely to be able to furnish information on the question. Accordingly, the Registrar notified the organisation and its member states that the Court would be prepared to receive written statements from them. Written statements were filed by France, the United States and the Secretary-General (including the staff member). See ICJ Reports 1982, 327.

Nations Charter or had exceeded its jurisdiction or competence. As to the first point, the Court said that its proper role was not to retry the case already dealt with by the Tribunal and that it need not involve itself in the question of the proper interpretation of United Nations staff regulations and rules further than was strictly necessary in order to judge whether the interpretation adopted by the Tribunal had been in contradiction with the provisions of the Charter. Having noted that the Tribunal had only applied what it had found to be relevant staff regulations and staff rules made under the authority of the General Assembly, the Court found that the Tribunal had not erred on a question of law relating to the provisions of the Charter. As to the second point, the Court considered that the Tribunal's jurisdiction included the scope of staff regulations and rules and that it had not exceeded its jurisdiction or competence.

Following this advisory opinion, the United Nations Secretary-General informed the 5th Committee of the General Assembly that judgment No.273 became final when the Tribunal confirmed it in the light of the advisory opinion and that Mr. Mortished had been paid as ordered by the Tribunal. He also announced his intention to treat similar claims in the same manner as decided by the Tribunal in the Mortished Case.³⁶⁸

After studying the Secretary-General's note, the United Nations Advisory Committee on administrative and budgetary questions reported to the 5th Committee that as

³⁶⁸ See UN Doc. A/C.5/37/26.

a result of its examination of the Secretary-General's note, it had decided not to contest the Secretary-General's conclusion and intention as therein stated.³⁶⁹ In the remainder of the report, the Committee proposed a number of steps designed to enable the Assembly to monitor more effectively the implementation of the staff regulations in order to ensure that in future acquired rights would not be based on applications of the regulations which are contrary to the intent of the General Assembly.³⁷⁰

(v) The Yakimetz Case³⁷¹

Mr. Yakimetz, the applicant, was a Soviet national, employed in the Russian translation service of the United Nations who had applied for asylum in the United States of America, resigned from the service of the Soviet Government and unsuccessfully applied for further extension of his contract or a career appointment with the United Nations. After having failed to secure a reversal of the decision not to extend his fixed term appointment beyond its expiration date of 26 December 1983, Yakimetz filed an application with the UN Administrative Tribunal. Following the rejection of his application, Mr. Yakimetz presented an application for review of the judgment to the Committee on Applications for Review of Administrative Tribunal Judgments in which he asked the Committee to request an advisory opinion on all the grounds set out in Article XI of the Tribunal's statute. The Committee found that there

³⁶⁹ See UN Doc. A/37/675.

³⁷⁰ See ICJYB 1982-3, 128-31.

³⁷¹ See ICJ Reports 1987, 18. See also, Singh, 434-5.

was a substantial basis for the application on two of the grounds advanced, namely that the Tribunal had failed to exercise the jurisdiction vested in it and that it had erred on a question of law relating to the provisions of the UN Charter. The committee therefore decided to seek an advisory opinion on the following questions. 1. In its judgment No.333 of 8 June 1984 did the United Nations Administrative Tribunal fail to exercise the jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the applicant after the expiry of his contract? 2. Did the UN Administrative Tribunal in its judgment No.333 err on questions of law relating to the provisions of the Charter of the United Nations?³⁷²

The Court decided to comply with the request for an advisory opinion and proceeded to find that the United Nations Administrative Tribunal in its judgment No.333 did not fail to exercise the jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the applicant after the expiry of his fixed term contract on 26 December 1983. Secondly, that the United Nations Administrative Tribunal in the same judgment No.333 did not err on any question of law relating to the provisions of

³⁷² The President decided that the United Nations and its member states were to be considered as likely to be able to furnish information on the question. Accordingly, the Deputy Registrar notified the organisation and its member states that the Court would be prepared to receive written statements from them. Written statements were filed by Canada, Italy, the USSR, the United States and the Secretary-General (including the staff member). See ICJ Reports 1987, 20.

the Charter of the United Nations.

The opinion in the first UN Administrative Tribunal case had a constitutional effect in that it clarified the powers of the General Assembly in relation to the Tribunal. The first two opinions also served to establish and protect the judicial character of the two Tribunals. Thus, the employment of the advisory procedure as part of the machinery for judicial review of the decisions of the Administrative Tribunals represents an important contribution towards the creation of an independent international civil service on which the effective functioning of the system of international organisations depends. In reviewing the judgments of Administrative Tribunals, the Court applies international administrative law,³⁷³ i.e. the law governing relations between international organisations and the members of their staff. The Court has thus had the opportunity either by its own findings or by its attitude to the findings of the United Nations Administrative Tribunal in the relevant cases, to contribute to the development of this international administrative law or what may also be termed the employment law of the United Nations. This system of judicial review, notwithstanding its procedural imperfections, affords judicial protection of the rights of staff members of the United Nations and other international

³⁷³ The term "international administrative law" is here used in a narrow sense. It may, however, be employed in a wider sense to refer, for instance, to the common thread that draws together the diverse subjects of international regulation. See generally. D. G. Partan, "International Administrative Law", 75 AJIL (1981), 639-44; Starke, International Law, 256.

organisations. This protection is "essential to ensure the efficient working of the secretariat and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity".³⁷⁴

(h) The IMCO Case³⁷⁵

The IMCO, now the International Maritime Organisation, comprises among other organs an Assembly and a Maritime Safety Committee. Under the terms of Article 28(a) of the convention for the establishment of the organisation, this committee consists of 14 members elected by the Assembly from the members of the organisation having an important interest in maritime safety "of which not less than eight shall be the largest ship-owning nations". At the first meeting of the IMCO Assembly in 1959 the question arose as to whether this phrase meant those nations possessing the largest amount of registered tonnage or those beneficially owning the largest amount of tonnage. Beneath this formal dispute lay the vexed question of "flags of convenience", i.e. the registration of ships in a foreign country usually for purposes of tax relief or for other reasons. If the first interpretation were adopted, Liberia and Panama under whose flags over ten million and over four million tons of merchant shipping respectively were registered at that

³⁷⁴ See Lachs, 275-6; Pratap, 253; Rosenne, The World Court, 179-81; Singh, 163-4; Cheng, 247; de Aréchaga, "Work and Jurisprudence", 7; Greig, International Law, 36-7; Elias, Africa, 77, 78.

³⁷⁵ See ICJ Reports 1960, 150. See also, Rosenne, The World Court, 179-81; Singh, 431; Elian, 146-7; The UN, 42.

time, would have been entitled to be members of the Maritime Safety Committee. When on 15 January 1959, the IMCO Assembly for the first time proceeded to elect the members of the committee, it elected neither Liberia nor Panama although the two states were among the members of the organisation which possessed the largest registered tonnage. Subsequently, the Assembly, recognising that differences of opinion had arisen regarding the correct interpretation of the constitution, unanimously adopted a proposal by Liberia³⁷⁶ to request an advisory opinion on the question whether the Maritime Safety Committee was constituted in accordance with the convention for the establishment of the organisation.³⁷⁷ In its advisory opinion of 8 June 1960, the Court replied to this question in the negative and held that the committee had not been properly constituted and that as the proper criterion was registered tonnage, Liberia and Panama were entitled to be elected.

The opinion in this case was effective in that it was promptly implemented. The previous Maritime Safety Committee was dissolved and replaced by a new one constituted in accordance with Article 28 of the IMCO Convention "as interpreted by the Court in its advisory

³⁷⁶ See Resolution A.12(i) adopted by the Assembly of the IMCO on 19 January 1959.

³⁷⁷ Written statements were presented by Belgium, France, Liberia, the United States, China, Panama, Switzerland, Italy, Denmark, the United Kingdom, Norway, the Netherlands and India. Oral statements were made on behalf of Liberia, the United States, Panama, Italy, the Netherlands, Norway and the United Kingdom.

opinion".³⁷⁸ The significance of this case is that it is the first instance in which the Court has held to be unconstitutional action taken by the plenary organ of an international organisation.³⁷⁹ On the other hand, the advisory opinion makes no attempt to solve the legal problems arising from the existence of the flags of convenience. The Court's opinion was for the most part based on a textual analysis of the relevant clause of the IMO constitution. The question of flags of convenience on the other hand, was left to the political organs. The general topic of the nationality of ships is covered by Article 92 of the 1982 Convention on the Law of the Sea and the United Nations Convention on the Conditions for the Registration of Ships of 1986. By an amendment to the constitution of 1974, in force from 1978, the Maritime Safety Committee now consists of all members of the organisation.³⁸⁰

³⁷⁸ See IMCO Assembly Resolution A.II/Res.21, 6 April 1961. In the same resolution the measures taken by the Maritime Safety Committee from 1959-61 were adopted and confirmed. New elections took place on 13 April 1961. For discussions of the Court's opinion, see IMCO/A.II/SR.4, 6 April 1961. See also, Pomerance, 355; Rosenne, The World Court, 190; Keith, 218; Pratap, 253; Bowett, International Institutions, 363-4. For a penetrating analysis of the post-opinion actions in the IMCO case, see E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organisations", Cambridge Essays in International Law, (London, Stevens and Sons Ltd., 1965), 100-6 (hereinafter "Legal Effect").

³⁷⁹ See Rosenne, *ibid.*; Pratap, *ibid.*, E. Lauterpacht, "Legal Effect", 100.

³⁸⁰ See Rosenne, *ibid.*

(i) The Expenses Case³⁸¹

Article 17, paragraph 2 of the Charter of the United Nations provides that "The expenses of the organisation shall be borne by the members as apportioned by the General Assembly".³⁸² In December 1961, the General Assembly

³⁸¹ See ICJ Reports 1962, 151. For discussions of and references to this case in the legal literature, see for instance, R. Higgins, "Policy Considerations and the International Judicial Process", 17 ICLO (1968), 58 and 80; T.O. Elias, New Horizons in International Law (Alphen Aan den Rijen: Sijthoff & Noordhoff; Dobbs Ferry, New York: Oceana Publications, 1979), 76; Gordon, 59 AJIL (1965), 794, 803, 825; Rosenne, "Non-Use", 1, 42 and 543; E. Lauterpacht, "Law of International Organisation", 384, 405, 410, 411, 415, 419, 435, 439, 447, 451, 453, 454, 455, 458; Friedmann, "Evolution", 313, 314, 319; Jenks, Prospects, 32, 77, 192, 257-8, 277, 285, 482, 487-9, 496, 665, 687; K.R. Simmonds, "The UN Assessments Advisory Opinion", 13 ICLO (1964), 854-898 (hereinafter "Simmonds"); Greig, "Advisory Jurisdiction", 325, n.1, 326, 334, 345-60; R.Y. Jennings, "Notes, International Court of Justice, Advisory Opinion of July 20, 1962, Certain Expenses of the United Nations (Article 17, Para.2 of the Charter)", 11 ICLO (1962), 1169-83 (hereinafter "Advisory Opinion"); S. Slonim, "The Advisory Opinion of the International Court of Justice on Certain Expenses of the United Nations: A Critical Analysis", 10 HLJ (1964), 227-76 (hereinafter "Slonim"); Anand, "International Adjudication", 11; Szasz, 504, 504n, 43, 508; Weissberg, 136, 137, 138, 139, 148, 149, 150. See also, The UN, 42-3; Rosenne, The World Court, 192-3; Singh, 431; Elian, 148-50; D.W. Bowett, United Nations' Forces: A Legal Study of United Nations Practice, published under the auspices of the David Davies Memorial Institute (London: Stevens & Sons, 1964), 95-9; id., International Institutions, 418-21; A. D. Pharand, "Analysis of the Opinion of the International Court of Justice on Certain Expenses of the United Nations", 1 CYIL (1963), 272-97; T.S. Rama Rao, "The Expenses Judgment of the International Court of Justice - A Critique", 12 IYIA (1963), 134-160; G.S. Raju, "The Expenses of the United Nations Organisations", 2 IJIL (1962), 485-90.

³⁸² For a full account of the United Nations' financial history and structure, see J. David Singer, Financing International Organisation: The United Nations Budget Process (The Hague: Martinus Nijhoff, 1961). An excellent short account is given in J. G. Stoessinger, Financing the United Nations (Carnegie Endowment for International Peace, November 1961). See also, e.g. Bowett, International Institutions, 412-21; G.J. Mangone & A.K. Srivastava,

adopted a resolution requesting an advisory opinion on whether the expenditures authorised by it relating to United Nations operations in the Congo (ONUC) and to the operations of the United Nations Emergency Force in the Middle East (UNEF)³⁸³ constituted "expenses of the organisation" within the meaning of the provision of the Charter.³⁸⁴

"Budgeting for the UN", 12 IO (1958), 473; C.W. Jenks, "Some Legal Aspects of the Financing of International Institutions", 38 TGS (1943), 93. Finances of the UN are dealt with in part 1, section 5 of the Yearbooks of the UN (entitled "Administrative and Budgetary Questions").

³⁸³ On UN peacekeeping, see generally, A. Verrier, International Peacekeeping: United Nations Forces in a Troubled World (Harmondsworth: Penguin, 1981); A. James, "UN Action for Peace I. Barrier Forces", 18 WT (1962), 478-86; *id.*, "UN Action for Peace II. Law and Order Forces", *ibid.*, 503-12; *id.*, The Politics of Peacekeeping (London: Chatto and Windus for the Institute of Strategic Studies, 1969); *id.*, Peacekeeping in International Politics (Basingstoke: Macmillan, 1990); B. E. Urquhart, "United Nations Peacekeeping in the Middle East", 36 WT (1980), 88-93; *id.*, "United Nations Peace Forces and the Changing United Nations: An Institutional Perspective", 17 IO (1963), 338-54; L. L. Fabian, "Towards a Peacekeeping Renaissance", 30 *ibid.* (1976), 153-61; L.M. Goodrich and G.E. Rosner, "The United Nations Emergency Force", 11 *ibid.*, (1957), 413-30; L.P. Bloomfield, "Headquarters-Field Relations: Some Notes on the Beginning and End of ONUC", 17 *ibid.* (1963), 377-92. On non-UN peacekeeping, see Ramesh Thakur, "The Olive Branch Brigades: Peacekeeping in the Middle East", 40 WT (1984), 93-101.

³⁸⁴ See GA Res. 1732(XVI) 20 December 1961. For the background to the request for the advisory opinion, see R. Higgins, United Nations Peacekeeping 1946-67. Documents and Commentary. I. The Middle East, issued under the auspices of the Royal Institute of International Affairs (London, New York, Toronto: Oxford University Press, 1969) (hereinafter "1 R. Higgins"), 415-38; *id.*, United Nations Peacekeeping, 1946-67, Documents and Commentary. III. Africa (London, New York, Toronto, Melbourne: Oxford University Press, 1980) (hereinafter "3 R. Higgins"), 274-82; Slonim, 227-9; Greig, "Advisory Jurisdiction", 345-50; Simmons, 858-61. For excerpts from the advisory opinion, see 1 R. Higgins, 438-48; 3 *id.*, 282-94. Since the President considered that the states members of the United Nations were likely to be able to furnish information on the question, the Registrar sent to them the special and direct communication provided for in Article 66(2) of the Statute. Written statements were submitted by

In its advisory opinion of 20 July 1962 the Court replied in the affirmative that these expenditures were expenses of the United Nations. It pointed out that under Article 17, paragraph 2 of the Charter the expenses of the organisation are the amounts paid out to defray the cost of carrying out the purposes of the organisation. After examining the resolutions authorising the expenditures in question, the Court concluded that they were so incurred. The Court also analysed the principal arguments which had been advanced against the conclusion that these expenditures should be considered as expenses of the organisation and found these arguments to be groundless.

The opinion thus made clear that UNEF and ONUC were legally established and that the costs incurred were indeed "Expenses of the Organisation" under Article 17. The implication of the opinion was that states failing to pay their assessed dues for UNEF and ONUC would become liable for the application of Article 19 which stipulates that a member in arrears on its contributions shall lose its vote in the Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the

Australia, Bulgaria, Byelorussia SSR, Canada, Czechoslovakia, Denmark, France, Ireland, Italy, Japan, Mexico, the Netherlands, the Philippines, Poland, Portugal, Rumania, South Africa, Spain, the Ukraine SSR, the USSR, the United Kingdom, the United States and Upper Volta (now Burkina Faso). The Secretary-General submitted a comprehensive introductory note to the documentation. In the oral proceedings statements were made by Australia, Canada, Ireland, Italy, the Netherlands, Norway, the USSR, the United Kingdom and the United States. It is significant to note that the Soviet Union made an unprecedented appearance before the Court. The power of the Court to give the opinion in the terms requested was challenged both in the General Assembly and before the Court. See ICJ Reports 1962, 153.

preceding two years.³⁸⁵ After prolonged debate and negotiation in both the Fifth Committee and Plenary of the 17th session of the Assembly, during which certain states had urged that the Court's opinion be merely "noted",³⁸⁶ on 19 December 1962 the Assembly adopted Resolution 1854(XVII) by which it accepted the opinion of the Court.³⁸⁷ In a separate part of the same resolution³⁸⁸ the Assembly also re-established and enlarged the working group which had been set up in 1961 to study special methods for financing peacekeeping operations involving heavy expenditure.³⁸⁹

³⁸⁵ See 3 R. Higgins, 294; L. Gross, "Expenses of the United Nations for Peace Keeping Operations: The Advisory Opinion of the International Court of Justice", 17 IO (1963), 1-2 and 11-26 (hereinafter "Expenses").

³⁸⁶ It is generally acknowledged that acceptance as opposed to taking note of the opinion implied incorporation of the Court's ruling into the "Law recognised by the United Nations" and such incorporation entailed, as a logical corollary, employment of Article 19 in appropriate circumstances. See Pomerance, 351, n.108. Cf. Singh, 211; Rosenne, The World Court, 233.

³⁸⁷ See 1 R. Higgins, 449; 3 *id.*, 294; *id.*, "United Nations Peacekeeping, Political and Financial Problems", 21 WT (1965), 324, 327 (hereinafter "UN Peacekeeping"); T. Higgins, "The UN Financial Crisis", 21 WT (1965), 92 (hereinafter "Financial Crisis"); *id.*, "The Politics of United Nations Finance", 19 *ibid.* (1963), 380, 387 (hereinafter "UN Finance"); Gross, Expenses, 27; Slonim, 270; Simmonds, 882; Rosenne, The World Court, 193; Pomerance, 351. For the discussion that preceded the adoption of the resolution, see *ibid.*, 361-4; Keith, 213-8.

³⁸⁸ See GA Res.1854b(XVII).

³⁸⁹ The fact that no permanent arrangements exist for defraying the costs of UN peacekeeping operations means that such operations have always had a precarious and insecure financial basis. See R. Higgins, Peace Lecture, 4; T. Higgins, "UN Finance", 380-1; R. Higgins, United Nations Peacekeeping, Documents and Commentary. IV. Europe 1946-79 (Oxford, New York, Toronto, Melbourne: Oxford University Press, 1981),* (hereinafter 4 R. Higgins). In spite of the Court's opinion in the Expenses Case, virtually all of the peacekeeping operations have had

This group was asked to consider such criteria as the

clauses that require funding by rather special provisions because of the failure of some states to comply with the Court's opinion. Although a different procedure from the one applied to meet expenditures of the regular budget is required to meet the cost of UN peacekeeping operations, such expenses are considered expenses of the organisation to be borne by member states in accordance with Article 17(2) of the Charter of the United Nations. Thus, finances for some peacekeeping operations have been raised in ad hoc and special accounts (e.g. UNEF and ONUC. On the financing of UNEF, see 1 R. Higgins, 415ff; cf. ONUC, 3 id., 274ff) and supplemented by voluntary contributions in cash and in the form of services and supplies. This method has been applied to the financing of: the UN Observer Group in Central America, UN.Doc. A/47/847 (1989), the UN Peacekeeping Force in the Middle East: UN Disengagement Observer Force, Report of the 5th Committee (UN.Doc.A/44/887 (1989), 44th session, agenda item 133a). Some peacekeeping operations have been financed out of the regular budget of the United Nations and the assessment of UN members in accordance with their scale of contributions. Such operations have been treated for budgetary purposes as special missions and related activities, or "investigations and enquiries" provision for which falls quite normally within the regular budget, e.g. UNTSO, UNOGIL, UNSCOB. (See 1 R. Higgins, 133ff, 566ff and 4 id., 55ff.) Some operations are financed outside of the UN budget. The Korean enforcement action was financed by bilateral agreements between the United States and other participants. See R. Higgins, United Nations Peacekeeping, Documents and Commentary. II - Asia 1946-67 (London, Bombay, Karachi, Kuala Lumpur: Oxford University Press, 1970), 245ff (hereinafter 2 R. Higgins). Some peacekeeping activities have been financed either by requiring the parties to the dispute to bear all the costs, as happened with UNSF and UNYOM in West Irian and the Yemen (see 2 R. Higgins, 134ff) or by voluntary contributions in addition to payments by the parties most directly involved, as happened with regard to UNFICYP in Cyprus. (See 4 R. Higgins, 286ff; Bowett, International Institutions, 420). On some of the various methods of financing peacekeeping operations, see 1 R. Higgins, 133, n.1; id., "UN Peacekeeping", 325-6. On the financial problems of the UN, see the 1987 Secretary-General's Report on the Work of the Organisation, GAOR 42nd session, Supp.1 A/42/1 4 and 8-9; ibid., 1988, GAOR 43rd session, Supp.1, A/43/1 9-10; ibid. 1989, GAOR 44th session, Supp.1, A/44/1 4-5. A renewed effort is needed by the world community to set aside the jumble of financing arrangements by which peacekeeping operations have been funded in the past, and to establish an agreed system under which all of the UN member states will regularly contribute in proportion to their ability to do so. See F. Lester, "Exploiting the Recent Revival of the United Nations", 9 IR (1989), 419, 429 (hereinafter "Lester").

special financial responsibility of the Security Council; special factors which might be relevant in any particular case; the degree of economic development of each member, and whether or not it was receiving technical assistance from the UN, as well as the collective financial responsibility of UN members.³⁹⁰

The advisory opinion and the resolution accepting it did not lead to a speedy solution of the crisis which was not only financial,³⁹¹ but also political and constitutional in nature.³⁹² Indeed, the opinion probably only served to aggravate it by introducing intractable questions of prestige into the diplomatic scene.³⁹³ While some member states paid their arrears, others, including France and the Soviet Union refused to do so.³⁹⁴ In the course of 1963, the General Assembly passed further resolutions designed to deal with the financial aspect of the crisis.³⁹⁵ Expectations that the advisory opinion and the resolutions would serve as the basis for resolving the

³⁹⁰ See 1 R. Higgins, 450-1; 3 *id.*, 294; Gross, Expenses, 27.

³⁹¹ See Gross, Expenses, 2 and 15, n.39; T. Higgins, "Financial Crisis", 92-5; *id.*, "UN Finance", 380-9.

³⁹² See R. Higgins, "UN Peacekeeping", 324-37.

³⁹³ See Rosenne, The World Court, 193.

³⁹⁴ See 1 R. Higgins, 449-50; 3 *id.*, 294; T. Higgins, "Financial Crisis", 92; *id.*, "UN Finance", 380 and 387; Rosenne, The World Court, *ibid.*; Pratap, 253; Slonim, 247.

³⁹⁵ See GA Resolutions 1863(XVII), 1874-9(S-IV). See 1 R. Higgins, 451; 3 *id.*, 294-7; *id.*, "UN Peacekeeping", 327; T. Higgins, "UN Finance", 388-9; Rosenne, The World Court, *ibid.*

crisis proved unfounded.³⁹⁶

Division among the membership over the financing of these peacekeeping operations persisted and by the beginning of the 19th session the Soviet Union and a number of East European countries had accumulated more than two years arrears and under the terms of Article 19 were, in principle, liable to be deprived of their vote. Both the UK and the US held that Article 19 applied to the Soviet Union as much as to any other state and would operate automatically without the need for the Assembly to vote to apply the sanction.³⁹⁷ The Assembly was postponed until December 1964 in the hope that a solution would be found. "What was ultimately arranged was an undignified but perhaps necessary procedure whereby no voting would be needed".³⁹⁸ Where there was no ready consensus on an issue, members could privately indicate their preference to the President of the Assembly. Final voting was thus avoided. But the scope of the Assembly's work was pathetically reduced by this manner of operation. The Assembly limped into recess in February 1965, by which time France found itself among those who were two years in arrears as regards payment of their assessed dues.³⁹⁹

³⁹⁶ See Rosenne, The World Court, *ibid.*; T. Higgins, "Financial Crisis", 93.

³⁹⁷ On the Secretary-General's position on the application of Article 19 of the Charter, see T. Higgins, "UN Finance", 382 and 387.

³⁹⁸ See R. Higgins, "UN Peacekeeping", 328; T. Higgins, "Financial Crisis", 93; Rosenne, The World Court, 193.

³⁹⁹ See 1 R. Higgins, 453-4; 3 *id.*, 298; *id.*, "UN Peacekeeping", 328; T. Higgins, "Financial Crisis", 94-5; Pratap, 254; Rosenne, The World Court, *ibid.*, where he

Before the beginning of the 20th session, after profound internal and agonising reappraisal, the UN decided that its position was untenable. The US took the opportunity of an August meeting of the special committee on peacekeeping operations to announce a change in policy in time for the forthcoming Assembly session.⁴⁰⁰

Although the constitutional aspect of the crisis was settled, the political and financial aspect remained unresolved. The states in arrears with the payment of their assessed contributions in respect of peacekeeping operations persisted in their refusal to pay up. It is, however, gratifying to note that with the extraordinary improvement in the international climate during the past few years, there has been a new demand and a new enthusiasm for peacekeeping operations. Even more heartening is the fact that peacekeeping operations now have the political support of all the permanent members of the United Nations Security Council. The wide recognition of the value of peacekeeping operations is reflected in the award to the UN Peacekeeping Forces of the well deserved Nobel Peace Prize in 1988.⁴⁰¹ Although the financial support from member

comments that in many respects this session of the General Assembly provided the jumping-off point for the evolution of the concept of "consensus".

⁴⁰⁰ See 1 R. Higgins, 454-6; 3 *id.*, 297-9; Pomerance, 351-2; Pratap, 253-4; Rosenne, The World Court, *ibid.*; Slonim, 271-4; N.J. Padelford, "Financing Peacekeeping: Politics and Crisis", 19/2 IO (1965), 444-53.

⁴⁰¹ See Report of the Secretary-General, 1989, 1 and 4-5; Rosenne, The World Court, *ibid.*; Lester, 429. See also, "1988 Nobel Peace Prize Awarded to UN Peacekeeping Forces", UN Chronicle (December 1988), 4-9; "The Growing Demand for UN Peacekeepers, Stretched to the Limits", The Times, 18 September, 1989.

states is far from adequate, it is to be hoped that now that the political will to address the problem of the financing of such operations appears to exist, a solution may not be far off. In this connection, it may be noted that a direct consequence of the positive Soviet attitude towards the United Nations and its role in world affairs is generated partly by the new political thinking in which it has engaged since the latter part of the last decade, and partly by the improved international political climate now prevailing.⁴⁰² In 1987, the Soviet Union pledged to cooperate actively in overcoming the budget difficulties that have arisen within the United Nations. Subsequently, it settled its outstanding debts to the United Nations, including the expenses of peacekeeping operations, the

⁴⁰² On the implications of the new international political climate for the work of the United Nations, see Report of the Secretary-General, 1987, 1 and 4; ibid., 1988, 5, 9 and 10; ibid., 1989, 1, 4 and 5. See generally Lester, 419-38. On this new Soviet political thinking, the new international climate and their effect on Soviet policy on the United Nations, see "Reality and Safeguards for a Secure World", an article by Mr. Mikhail Gorbachev first published in the Soviet press and later circulated as an official UN document, General Assembly 42nd session, agenda item 73, Comprehensive System of International Peace and Security, (A42/574) the Security Council 42nd year, S/19143 passim, especially 2 and 6-11. See also, his address to the 1988 session of the General Assembly, the United Nations General Assembly, Doc. A/43/pv.72, 43rd session, Provisional verbatim Record of the 72nd meeting, passim, especially 17-26; Ronald Reagan, "The Future of East-West Relations", 44 WT (1988), 135-6; Sir Geoffrey Howe, "Soviet Foreign Policy Under Gorbachev", 45 WT (1989), 40, esp. at 43; R. Higgins, Peace Lecture, 19-21. On attitudes to the UN, see generally, B.S. Wong, "Communist China's Changing Attitudes Toward the United Nations", 20 IO (1966), 677-704; R.H. Cory Jr., "The Role of Public Opinion in United States' Policies Toward the United Nations", 11 ibid. (1957), 220-4; L. P. Bloomfield, "American Policy Toward the UN - Some Bureaucratic Reflections", 12 ibid. (1958), 1-16; A. Dallin, "The Soviet View of the United Nations", 16 ibid. (1962), 145.

payment of which it had so bitterly resisted in the past. Even more significant is the admission by the Soviet Deputy Foreign Minister Petrovsky on 6 July 1988 that "we were wrong not to pay for peacekeeping operations. We are paying up. We were wrong towards international civil servants. Now we accept permanent contracts... We were wrong to oppose an active role for the Secretary-General".⁴⁰³

It has been said that this case and its aftermath are an excellent illustration of the basic problems which can arise when courts are put in a position of answering questions of a political character and that the request for the opinion was an instance of abuse of the General Assembly and the advisory process by some of the great powers which did nothing to enhance the standing of the judicial process in the United Nations.⁴⁰⁴ Although this opinion was not successful in solving the immediate crisis, which prompted consultation of the Court, its long term effect cannot be overestimated. For it was to provide a solid legal basis for the development of the peacekeeping activities of the United Nations in a form not foreseen in the Charter, and thus to avoid the stultification of the United Nations as an organ for the maintenance of international peace and security in the foreseeable future

⁴⁰³ See R. Higgins, *Peace Lecture*, 20.

⁴⁰⁴ See Keith, 213-8; Greig, "Advisory Jurisdiction", 358-60 and 367-8; Cf. Gross, Expenses, 28-30; Rosenne, The World Court, 193.

and perhaps, permanently.⁴⁰⁵

Whatever the practical impact of the opinion, undoubtedly it represents a major contribution to the development of the constitutional law of the United Nations Charter and can truly rank as one of the landmarks in the development of international law and United Nations law by the Court. The Court in its reasoning did not limit itself to a narrow determination of the issue presented, but rather discussed broader organisational issues related to the functioning of the United Nations. Among the more important issues for which the Court's opinion has significant implications are the following: the nature of the Court's advisory function, the Court's independence of the other principal organs, the residual responsibility of the General Assembly for the maintenance of international peace and security, the scope of its apportionment power, the effect of ultra vires acts of United Nations organs, the role of the Secretary-General as an agent of the Security Council and the General Assembly, the significance of travaux préparatoires, the probative value of the practice of a UN organ, and, above all, the principle of effectiveness in Charter interpretation.⁴⁰⁶

⁴⁰⁵ See Rosenne, The World Court, *ibid.*; Jennings, "Advisory Opinion", 1169; Simmonds, 854.

⁴⁰⁶ See Pratap, 253-4 and 263; Slonim, 227; Gross, Expenses, 3-11 and 26-35; Bowett, International Institutions, 363-5.

(j) The Western Sahara Case⁴⁰⁷

In December 1974, the General Assembly requested⁴⁰⁸ an advisory opinion on the following questions:

(i) Was Western Sahara (Rio de Oro and Sakiet el Hamra) at the time of colonisation by Spain a territory belonging to no-one (terra nullius)? If the answer to the first question is in the negative,

(ii) What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?⁴⁰⁹

In its advisory opinion delivered on 16 October 1975, the Court replied to question (i) in the negative. In reply to question (ii), it expressed the opinion that the materials and information presented to it showed the existence at the time of Spanish colonisation, of legal ties of allegiance between the sovereign of Morocco and some of the tribes living in the territory of Western Sahara. They equally showed the existence of rights,

⁴⁰⁷ See ICJ Reports 1975, 6. See also, Singh, 432; Janis, 609-21; M. Shaw, "The Western Sahara Case", 49 BYIL (1978), 119-54; Okere, 296-312; Wooldridge, 86-122; M.A. Smith Jr., "Sovereignty Over Unoccupied Territories - The Western Sahara Decision", 9 CWRJIL (1977), 135-59 (hereinafter "Smith"); Karin Oellers-Framn, "Western Sahara (Advisory Opinion)", in Bernhardt (ed.), EPIL Instalment 2 (1982), 291-3; The UN, 43-4.

⁴⁰⁸ See GA Res.3292(XXIX) of 13 December 1974.

⁴⁰⁹ In this case, the Court decided that the member states of the United Nations were likely to be able to furnish information on the question submitted. Accordingly, the special and direct communication provided for in Article 66(2) of the Statute was addressed to them. Written statements were submitted by Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, France, Guatemala, Honduras, Morocco, Nicaragua, Panama, Spain and the Secretary-General. Oral statements were made on the merits by Algeria, Mauritania, Morocco, Spain and Zaire. See ICJ Reports 1975, 15.

including some rights relating to the land, which constituted legal ties between the Mauritanian entity as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion was that the information presented to it did not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus, the Court did not find any legal ties of such a nature as might affect the application of the General Assembly's 1960 Resolution 1514(XV) containing the declaration on the granting of independence to colonial countries and peoples in the decolonisation of Western Sahara and, in particular, of the principle of self-determination through free and genuine expression of the will of the peoples of the territory.⁴¹⁰

In making this decision, the Court was in effect signalling to the General Assembly that despite the existence of legitimate interests on the part of both Morocco and Mauritania, there was no legal obstacle to the exercise of self-determination by the inhabitants of the area in the form of their accession to independence, i.e. that the territory was neither a priori a part of either Morocco or Mauritania.⁴¹¹

The General Assembly at its 2435th plenary meeting,

⁴¹⁰ See Rosenne, The World Court, 202-4; Herman, 137-42; Blaydes, 354-68. For a discussion of the Court's substantive treatment of the questions posed in the request, see *ibid.*, 361-4.

⁴¹¹ See Rosenne, *ibid.*, 204. For a discussion of the Court's treatment of the principle of self-determination, see Blaydes, 364-7; Byman, 98ff; Janis, 615-21.

adopted Resolutions (A) and (B) 3458(XXX) of 10 December 1975 in which it noted with appreciation the advisory opinion, and requested Spain as the administering power in accordance with the advisory opinion to take immediately all necessary measures in consultation with all the parties concerned and interested so that all indigenous Saharans could exercise freely and fully under United Nations supervision their inalienable right to self-determination. The resolution also requested the Secretary-General in consultation with Spain and the special committee on the situation with regard to the implementation of the declaration on the granting of independence to colonial countries and peoples, to make the necessary arrangements for the supervision of the said act of self-determination, and urged all the parties concerned and interested to exercise the necessary restraint and to desist from any unilateral or other action outside the decisions of the General Assembly on the territory. The other part of the resolution noted the tripartite agreement concluded at Madrid on 14 November 1975 between Mauritania, Morocco and Spain, reaffirmed the inalienable right to self-determination in accordance with General Assembly Resolution 1514(XV) of all the indigenous Saharan populations. It also requested the parties to the Madrid Agreement to ensure respect for the freely expressed aspirations of the Saharan populations and asked the interim administration to take all necessary steps to ensure that all the indigenous Saharan populations would be able to exercise their inalienable right to self-

determination through free consultations organised with the assistance of a representative of the United Nations appointed by the Secretary-General.⁴¹²

Following the publication of the advisory opinion, Morocco decided to march into Western Sahara.⁴¹³ Moroccan troops entered parts of the territory at the end of October 1975, clashing with forces of the Polisario Front.⁴¹⁴ A few days later, on 14 November, in Madrid, Spain signed an agreement with Morocco and Mauritania on the transfer of administrative powers in the territory.⁴¹⁵ Under this agreement, a transitional tripartite administration was set up involving the parties. Spanish administration formally ended on 26 February 1976. While a session of the Djemma⁴¹⁶ voted the same day for integration with Morocco and Mauritania,⁴¹⁷ another body, the pro-Polisario Provisional Saharawi National Council, proclaimed the founding of an independent state, the Saharawi Arab

⁴¹² See ICJYB 1975-6, 125-8. See also, J. Gretton, "The Western Sahara in the International Arena", 36 WT (1980), 343, 345 (hereinafter "Gretton").

⁴¹³ It justified this action in part by citing the Court's finding of legal links between it and Western Sahara.

⁴¹⁴ The Popular Front for the Liberation of Saguiet el Hamra and Rio de Oro (Polisario Front) was founded in 1973 to pursue an armed struggle against Spain for the independence of Western Sahara. See Rosenne, *ibid.*; Blaydes, 368; Byman, 97; Janis, 619; Smith, 136.

⁴¹⁵ See Janis, *ibid.*; Smith, *ibid.*; Gretton, 345.

⁴¹⁶ This is a consultative assembly set up in the territory by the Spanish authorities in 1967.

⁴¹⁷ See Smith, 137; Gretton, 346. The UN Secretary-General refused to give this Moroccan-sponsored kind of self-determination his seal of approval.

Democratic Republic (SADR) on 27 February 1976.⁴¹⁸ Tensions also developed between Morocco and Algeria which, after abandoning its own rival claims to a stake in the Western Sahara, gave its full support to the Polisario Front.⁴¹⁹ Western Sahara was partitioned by Morocco and Mauritania in April 1976.⁴²⁰ However, in 1979, Mauritania signed a peace agreement with the Polisario Front renouncing its territorial claims over Western Sahara.⁴²¹ A few days later, Morocco annexed the former Mauritanian zone. What at first amounted to a partition of the territory by the two pretenders to sovereignty then became a conflict between Morocco and the Polisario Front.

The war in the Western Sahara also became a matter of growing concern for the OAU which had previously considered the issue of the Western Sahara as a question for the UN.⁴²² At its Monrovia summit in July 1979 the OAU adopted the recommendations of its subcommittee by just a two-thirds majority thus committing itself in binding fashion to seeing that the conflict was solved through the exercise of a referendum.⁴²³ In June 1983, an OAU summit conference

⁴¹⁸ See Janis, 619; Gretton, 344 and 346.

⁴¹⁹ See Smith, 137. On the opposed Moroccan and Algerian strategies on the Western Sahara question, see Gretton, 343ff. See also, J. Mercer, "Confrontation in the Western Sahara", 32 WT (1976), 230-9.

⁴²⁰ See Janis, *ibid.*; Smith, 136.

⁴²¹ See Gretton, 349.

⁴²² See Gretton, 345-6.

⁴²³ See Gretton, *ibid.* On developments concerning Western Sahara other than the delivery of the advisory opinion until 1979, see generally Wooldridge, 118-22.

in Addis Ababa adopted Resolution AHG/Res. 104(XIX) which laid down a broad framework for solving the conflict involving direct negotiations between the Polisario Front and Morocco to bring about a ceasefire in order to create conditions for a peaceful and fair referendum. This was subsequently incorporated in resolutions adopted by the UN General Assembly. Resolution 39/40, adopted by the UN General Assembly in December 1984 requested the parties to the conflict, Morocco and the Polisario Front, to undertake direct negotiations with a view to bringing about a ceasefire to create the necessary conditions for a peaceful and fair referendum for self-determination of the people of Western Sahara under the auspices of the OAU and the UN. In December 1985, the General Assembly in Resolution 40/50 invited the Chairman of the OAU and the UN Secretary-General to exert every effort to persuade the parties to the conflict to negotiate in the shortest possible time and in conformity with Resolution AHG/Res. 104(XIX) and the present resolution, the terms of a ceasefire and the modalities for organising the said referendum. Although in 1981 Morocco had announced its acceptance of the holding of a referendum in the Western Sahara it rejected direct negotiations with the Polisario Front. However, in pursuance of the mandate conferred by Resolution 40/50, the UN Secretary-General held frequent consultations with the parties in close cooperation with the OAU. In late 1987, a UN technical mission visited Western Sahara to gather data to assist the joint UN/OAU effort to find a peaceful settlement to the conflict. The Secretary-General's

mediation efforts gathered pace in 1988. Meanwhile, the climate became more propitious for a just and peaceful settlement of the conflict following the restoration of diplomatic relations by Morocco and Algeria in May 1988, ending a diplomatic freeze that began in March 1976 shortly after the outbreak of the war in Western Sahara.

After intensive consultations with the OAU, the parties to the conflict and the leaders of Algeria and Mauritania, a settlement plan designed to find a just and durable solution to the problem, jointly worked out by the UN and the OAU, was accepted by the parties. A special representative of the Secretary-General for Western Sahara was appointed with responsibility for the implementation of the settlement plan. A United Nations technical commission was established to facilitate and accelerate the process of the implementation of the settlement plan. Clarification of the arrangements and modalities for the implementation of this peace plan, which involves a ceasefire and a referendum, is being provided by the United Nations.⁴²⁴ It is to be hoped that with the necessary will on all sides, a final settlement of the problem will be achieved to which the Court's advisory opinion will undoubtedly have made an important contribution.⁴²⁵

⁴²⁴ Meanwhile, it seemed that Morocco was no longer opposed to direct negotiations with the Polisario Front. See The Times, Wednesday 4 January 1989, "Polisario Men Fly to Hassan Talks". On the progress made in respect of the solution of the problem of Western Sahara in recent years, see, e.g., Report of the Secretary-General, 1987, 2; *ibid.*, 1988, 2, and *ibid.*, 1989, 2-3. See further, the Secretary-General's Report on the Question of Western Sahara, UN Doc. A/44/634 (1989).

⁴²⁵ See Janis, 620-1.

While the dénouement of the Western Sahara drama is being awaited, it is well to bear in mind the significance of the Court's opinion to the development of customary international law, especially in the area of decolonisation and self-determination.⁴²⁶

(k) The WHO Case⁴²⁷

As a result of the general hostility felt towards Egypt amongst Arab states after it concluded a peace treaty⁴²⁸ with Israel in 1979, a concerted campaign was mounted, which was designed to isolate Egypt diplomatically from the Arab world. This led to the proposal in the World Health Assembly of 1980 for the removal from Egypt of the Eastern Mediterranean headquarters of the WHO which was based in Alexandria and had operated on the basis of a

⁴²⁶ See Singh, 153-5 and 259; de Aréchaga, "Work and Jurisprudence", 5-6 and 31.

⁴²⁷ See ICJ Reports 1980, 67, 73. See also, The UN, 44; Singh, 433; Rosenne, The World Court, 207.

⁴²⁸ On the various initiatives which culminated in the signing of the Egypt-Israel peace treaty, all of which combine to provide the political background to the request for this advisory opinion, see inter alia, Keith Kyle, "President Sadat's Initiative", 34 WT (1978), 1-4; Yehonnathan Tommer, "Mr Begin's Peace Plan: The Domestic Reaction", *ibid.*, 77-9; A.I. Dawisha, "Syria and the Sadat Initiative", *ibid.*, 192-8; L. L. Whetten, "Changing Perceptions about the Arab-Israeli Conflict and Settlement", *ibid.*, 252-9; P. Mangold, "America, Israel and Middle East Peace: The Limits of Bilateral Influence", *ibid.*, 458-66; Avi Plascov, "The Palestinian Predicament After Camp David", *ibid.*, 467-71. On the peace treaty and its implications, see Patrick Seale, "The Egypt-Israel Treaty and its Implications", 35 *ibid.* (1979), 189-96; M. Akehurst, "The Peace Treaty between Egypt and Israel", 7 IR (1981), 1035-52. On continuing divisions in the Arab world in the aftermath of the treaty and this advisory opinion, see Mohammed Anis Salem, "Arab Schisms in the 1980s: Old Story or New Order?", 38 WT (1982), 175-84.

"host agreement" of 1951 between Egypt and the WHO. This proposal met with strong opposition, and in the end a compromise was reached on the basis of which an advisory opinion was to be requested on the following questions concerning the interpretation of the 1951 host agreement:

(i) Are the negotiations and notice provisions of s.37 of the Agreement of 25 March 1951 between the World Health Organisation and Egypt applicable in the event that either party to the Agreement wishes to have the regional office transferred from the territory of Egypt?

(ii) If so, what would be the legal responsibilities of the World Health Organisation and Egypt with regard to the Regional Office in Alexandria during the two-year period between notice and termination of the Agreement?⁴²⁹

The Court expressed the opinion that in the event of a transfer of the seat of the regional office to another country, the WHO and Egypt were under mutual obligations to consult together in good faith as to the conditions and modalities of a transfer, and to negotiate the various arrangements needed to effect the transfer with the minimum of prejudice to the work of the organisation and to the interest of Egypt. The party wishing to effect the

⁴²⁹ In these proceedings, the President decided that member states of the WHO who were also entitled to appear before the Court, and the Organisation itself, were likely to be able to furnish information on the question. Accordingly, the special and direct communication provided for in Article 66(2) of the Statute was addressed to those states and the WHO. Written statements were filed by the Director-General of the WHO and by Bolivia, Egypt, Iraq, Jordan, Kuwait, Syria, the United Arab Emirates and the United States. Oral statements were made by the WHO, Egypt, Syria, Tunisia, the United Arab Emirates and the United States. See ICJ Reports 1980, 75.

transfer had a duty despite the specific period of notice indicated in the 1951 Agreement to give a reasonable period of notice to the other party and during this period, the legal responsibilities of the WHO and of Egypt would be to fulfil in good faith their mutual obligations as set out above.⁴³⁰

On 18 May 1981 the World Health Assembly at its 34th session held in Geneva adopted by consensus a resolution⁴³¹ in which it accepted the opinion and recommended to all the parties concerned to be guided by it. The Resolution also requested the Director-General to initiate action as contained in the opinion and to report the results to the 69th session of the Executive Board in January 1982 for consideration and recommendation to the 35th World Health Assembly in May 1982, and to continue to take whatever action he considered necessary to ensure the smooth operations of the technical, administrative and managerial programmes of the Regional Office for the Eastern Mediterranean Region during the period of consultation. The Resolution finally asked Egypt to hold consultations with the Director-General.⁴³²

In 1982 the Executive Board at its 69th Session and the 35th World Health Assembly, requested the Director-General and Egypt to continue their consultations in accordance with the advisory opinion. Meetings were held between the representatives of Egypt and of the Director-

⁴³⁰ See Rosenne, The World Court, *ibid.*

⁴³¹ See WHA 34.11.

⁴³² See ICJYB 1980-1, 139-40.

General of WHO in March and November 1982. The 35th World Health Assembly also requested that a comprehensive study on the question be carried out. This study was presented to the 36th World Health Assembly in May 1983.⁴³³

The 36th World Health Assembly in Resolution WHA36.18 thanked the Director-General for his report and asked him to continue the implementation of Resolution WHA 35.13 and to report to the 37th World Health Assembly on the action he had taken in respect thereof.⁴³⁴

The 37th World Health Assembly in Resolution WHA 37.20 thanked the Director-General for his report and asked him to continue the implementation of Res. WHA35.13.⁴³⁵

The Court was well aware of the political background of the question submitted to it but decided to ignore it. It achieved this by deftly interpreting the questions it was required to answer and then proceeding to answer the questions purely as a matter of treaty interpretation, the treaty itself forming one of a whole series of host agreements, the workings of which should not be disturbed. In this way, the tense political situation which faced the World Health Assembly in 1980 became defused and the issue was dropped. This case affords a good example of the prophylactic use of the advisory procedure to depoliticise an awkward political situation confronting a technical

⁴³³ See 35th World Health Assembly, Geneva 3-24 May 1982, "Resolutions and Decisions, Annexes", published by the World Health Organisation, WHO 35/1982/REC/1, 829 (hereinafter "WHA Resolutions").

⁴³⁴ See 36th WHA Resolutions, 16.

⁴³⁵ See 37th WHA Resolutions, 12.

specialised agency.⁴³⁶ The significance of this case lies in the contribution which it has made to the development of the law of treaties. It enabled the Court to contribute to a better understanding of the customary law created by the practice of states surrounding the host agreements concluded with international organisations. This area of law also formed the background the interpretation of the UN Headquarters Agreement Case.⁴³⁷

(1) Interpretation of the United Nations Headquarters Agreement⁴³⁸

In December 1987 the United States Congress enacted anti-terrorism legislation which declared illegal the establishment or maintenance of offices of the Palestine Liberation Organisation (PLO) within the United States, and required the closing of all such offices, including the office of its permanent observer mission to the United Nations in New York. This PLO office had been established in 1974⁴³⁹ when the UN had granted the PLO observer status and had operated without objection from the government of the United States.⁴⁴⁰ The Attorney General indicated that as it was the justice department's duty to enforce United States statutory law, orders would be given for the

⁴³⁶ See Rosenne, The World Court, 207. See also Vol.39 Yearbook of the United Nations (1985), 1308.

⁴³⁷ See Singh, 160-3 passim.

⁴³⁸ See ICJ Reports 1988, 12. See also, Singh, 435-6.

⁴³⁹ See GA Res.3237(XXIX) of 2 November 1974.

⁴⁴⁰ See Rosenne, The World Court, 226; R. Higgins, "Peace Lecture", 14.

shutting of the PLO office. To this end, appropriate proceedings were initiated in the competent Federal Court of New York. In an extraordinary manifestation of a divided government, the State Department let it be known that it regretted the legislation and regarded it as incompatible with the US's obligations under the Headquarters Agreement to allow persons to enter and remain in the United States to carry out their official functions in the UN, and the US delegation to the UN said in terms to that body that it had opposed the legislation in question.⁴⁴¹

The Secretary-General took the view that closure of that office would be a violation of the Headquarters Agreement between the United States and the United Nations of 26 June 1947. Eventually, he formally invoked Article 21 of that Agreement regarding settlement of disputes not resolved by negotiation that envisages an international arbitration.⁴⁴² The General Assembly adopted Resolution 42/210(b) calling upon the host country to abide by its treaty obligations. The United States found this inappropriate and untimely, especially as no immediate steps had in fact yet been taken to close the PLO office. But the call to proceed under s.21 of the Headquarters Agreement was supported by all America's allies. By resolution 42/229B of 2 March 1988 the General Assembly

⁴⁴¹ See R. Higgins, "Peace Lecture", *ibid.*

⁴⁴² The Headquarters Agreement contained a provision in s.21 that any dispute between the UN and the US concerning the invocation or application of the agreement should be resolved by negotiation within the framework of designated dispute settlement procedures.

requested an advisory opinion on the question whether the United States was "under an obligation to enter into arbitration" under the Headquarters Agreement.

The Court immediately assembled to consider the matter, and in a procedural order of 9 March decided that the United Nations and the United States of America were considered likely to be able to furnish information on the question in accordance with Article 66(2) of the Statute. The Court also decided that any other state party to the Statute which desired to do likewise might submit to the Court a written statement on the question.⁴⁴³ Written statements were later submitted by the Secretary-General and by the German Democratic Republic, Syria and the United States. An oral statement was made on behalf of the United Nations. By the same order, the Court decided for the first time to adopt an accelerated procedure as envisaged in Article 103 of the 1978 Rules. This order was unusual in so far as it did not only deal with purely procedural matters, but also called upon the United States to ensure that no action would be taken that would impinge on the current arrangements for the official functions of the PLO mission.⁴⁴⁴ Without referring to that aspect, the United States later informed the General Assembly that no further steps would be taken to close the office until US courts had determined whether the law in question required that

⁴⁴³ See ICJ Reports 1988, 14.

⁴⁴⁴ See Rosenne, *ibid.* This may be seen as a small but significant step in the direction of assimilating the advisory to the contentious procedure as regards interim orders of protection under Article 41 of the Court's Statute.

office to be closed. After accelerated written and oral proceedings, on 26 April, the Court was unanimous in answering the question in the affirmative by finding that the United States was under such an obligation.

In Resolution 42/232 of 13 May 1988, the General Assembly among other things, expressed its appreciation to the Court for having accelerated its procedure, took note of and endorsed the advisory opinion and urged the host country to act consistently with it. The Assembly also requested the Secretary-General to continue his efforts to ensure the constitution of the Arbitral Tribunal provided for under s.21 of the Headquarters Agreement and to report without delay on developments in the matter. It finally decided to keep the matter under active review.⁴⁴⁵

The United States court subsequently determined that the law did not require the closing of the offices of the PLO observer mission to the United Nations if that meant a breach of the Headquarters Agreement.⁴⁴⁶ The conclusion of the district court stated, inter alia, that the anti-terrorism act did not require closure of the PLO Permanent Observer Mission to the United Nations. Nor did its provisions impair the continued exercise of the appropriate functions of that mission as a permanent observer at the United Nations. The district court saw the PLO mission to the United Nations as an invitee of the United Nations whose status is protected by the Headquarters Agreement.

⁴⁴⁵ See ICJYB 1987-8, 154-6; Rosenne, The World Court, *ibid.*

⁴⁴⁶ See Rosenne, The World Court, *ibid.*; R. Higgins, "Peace Lecture", 15.

It considered that the Headquarters Agreement remained a valid and outstanding treaty obligation of the United States which had not been superseded by the anti-terrorism act, a valid enactment of general application.⁴⁴⁷

In a report to the General Assembly on the decision of the United States district judge, the Secretary-General referred to the United States' Department of Justice announcement of 29 August 1988 that the United States had decided not to appeal against the decision of the district court and concluded that the decision by the United States not to appeal was welcomed and that the dispute between the United Nations and its host country concerning the PLO observer mission had come to an end.⁴⁴⁸ This advisory opinion proved useful in helping to find an effective solution to the problem confronting the United Nations and the host state.

Ironically, it was yet another public arm of the US, the New York District Court, that facilitated a resolution of the matter. The United States district court might have been persuaded by the arguments of international law in reaching its decision. Similarly, the Justice Department, no doubt heavily urged by the State Department, decided not to appeal against the District Court's judgment.⁴⁴⁹

⁴⁴⁷ See ICJYB 1987-8, 156-7.

⁴⁴⁸ See ICJYB 1988-9, 168; R. Higgins, "Peace Lecture", *ibid.*

⁴⁴⁹ See R. Higgins, "Peace Lecture", *ibid.*

(m) The Mazilu Case⁴⁵⁰

In 1985, the Subcommittee on the Prevention of Discrimination and Protection of Minorities,⁴⁵¹ an organ of the Commission on Human Rights,⁴⁵² a subsidiary organ of the ECOSOC, requested its special rapporteur, Mr. Dumitru Mazilu, a Romanian national, to prepare a report on human rights and youth. The Romanian authorities denied him permission to travel to the Centre for Human Rights of the UN Secretariat in Geneva for consultations. All efforts by the Centre for Human Rights to contact or locate him proved futile. When contacted by the Secretary-General's office, the Romanian Government took the position that any intervention by the UN Secretariat and any form of investigation would be considered interference in Romania's internal affairs. Eventually, at the instance of the Subcommittee, the Commission recommended that the ECOSOC request an advisory opinion from the Court. The ECOSOC, by resolution 1989/75 of 24 May 1989, concluded that a difference had arisen between the UN and Romania as to the applicability of the Convention on the Privileges and Immunities of the United Nations⁴⁵³ to Mr Mazilu, and requested on a priority basis an advisory opinion on the question of the applicability of Article VI, s.22 of the Convention in the case of Mr. Mazilu. Meanwhile, Mr Mazilu completed the report, which he transmitted to the Centre

⁴⁵⁰ See ICJ Reports 1989, 177.

⁴⁵¹ Hereinafter "the Subcommisson".

⁴⁵² Hereinafter "the Commission".

⁴⁵³ Hereinafter "the Convention".

through various channels, as he could not travel to Geneva either to present it in person or to participate in its consideration.⁴⁵⁴

The Court noted that the question presented to it was a preliminary one relating to the applicability of the Convention in the case of Mr. Mazilu but not to the consequences of what privileges and immunities Mazilu might enjoy as a result of his status and whether or not these had been violated. The Court also took the view that the question was a legal question arising within the scope of the activities of the ECOSOC. The Court unanimously held that Article VI, s.22 of the Convention was applicable in the case of Mr. Mazilu.

⁴⁵⁴ The President decided that the UN and the states parties to the Convention were likely to be able to furnish information on the question in accordance with Article 66(2) of the Statute. The registrar addressed a special and direct communication provided for in that Article to the UN and to these states. Written statements were submitted by Canada, the Federal Republic of Germany, the Socialist Republic of Romania, and the United States. Oral statements were made on behalf of the Secretary-General of the UN and by the United States. Romania challenged the competence of the Court to give the advisory opinion by invoking its reservation to s.30 of the Convention, under which the UN could not without the consent of all the parties, submit a request for an advisory opinion in respect of differences between it and Romania. The Court found that since the request was not made under s.30 of the Convention, but under Article 96 of the UN Charter, it did not need to determine the effect of the Romanian reservation. The Court also rejected the Romanian contention that if it were accepted that disputes concerning the application or interpretation of the Convention could be brought before the Court on a basis other than s.30 of the Convention, that would disrupt the unity of the Convention by separating its substantive provisions from those relating to dispute settlement which would amount to a modification of the content and extent of the obligations entered into by states when they acceded to the Convention. The Court found that the Romanian reservation did not affect its jurisdiction to entertain the request.

At the 14th plenary meeting of its 1990 session, held on 25 May 1990, the ECOSOC in Resolution 1990/43 welcomed with appreciation the Court's opinion⁴⁵⁵ which, under the Convention in question, is binding or decisive of the applicable law.

Barely a week after the delivery of this opinion, the government, whose action had necessitated the request for the opinion, was swept away in a bloody revolution.⁴⁵⁶ The country was administered by a transitional or caretaker government⁴⁵⁷ until May 1990, when the present regime assumed the reins of government as a result of free and fair elections.⁴⁵⁸ One would expect that the present Romanian government would behave differently from its predecessor by reacting favourably to the opinion. Such an attitude would not only help the positive international image which the new administration is seeking to build for itself, but it would also serve to underscore the dramatic political changes that have occurred in that country and in Eastern Europe at large. Above all, such an attitude would

⁴⁵⁵ See ICJYB 1989-90, 165-6. This was the first instance of the exercise by the ECOSOC of its rights to request advisory opinions.

⁴⁵⁶ See generally The Times, 23 December 1989; see also "Ceauscescu are tried and shot", The Times, 26 December, 1989.

⁴⁵⁷ See "Communists named in Salvation Front Government", and "New Prime Minister defends immediate killing of Ceauscescu", The Times, 27 December 1989; "Hint of master plan for Romania uprising", The Times, 3 January 1990. For an interesting account of the immediate post-revolution era, see M. Popham (ed.), The Best of From Our Own Correspondent 1989/90 (Bath: Broadside Books Ltd., 1990), 30-32.

⁴⁵⁸ See George Fodor, "Romania: Why The Front Won", 46 WT (1990), 125-6.

reflect the changed international political climate brought about by the demise of the Cold War.⁴⁵⁹

This case has enabled the Court to contribute to the clarification and development of international law. First, the Court has held that the principle that the consent of states is not a condition precedent to its competence to give advisory opinions applied even when the request for an opinion relates to a legal question pending between the United Nations and a member state. Secondly, the fact that a state makes a reservation to a multilateral treaty or convention in order to avoid the Court's advisory jurisdiction does not prevent that jurisdiction from being engaged on any other basis, especially, Art.96 of the Charter. Although the Court did not find it necessary to determine the effect of the Romanian reservation, it is probably true that such a reservation⁴⁶⁰ would be held to be inapplicable by the Court because of the operation of the principle that the consent of states is not a condition precedent to its competence to give advisory opinions. If this is correct, then such reservations may not be as useful as they may seem at first sight.

⁴⁵⁹ We understand from the legal adviser of the UN in New York that immediately after the revolution Mazilu was allowed to leave Romania and resume his project and has been very much in evidence at the UN since that time. Although this is really attributable to the revolution rather than the advisory opinion, it is reasonable to assume that the advisory opinion will very much have focused the minds of the new government on the issues and facilitated the decision that they probably would have taken in any event.

⁴⁶⁰ A reservation by the terms of which the advisory jurisdiction can be engaged only with the consent of all the parties.

6. Conclusion

The effectiveness of advisory opinions is not infrequently thought to lie in their ability to help in finding speedy solutions to the difficulties which prompted consultation of the Court.⁴⁶¹ Not only does this represent an unrealistic view of the function of advisory opinions which should not be expected to be as effective as judgments,⁴⁶² but it is also an oversimplification of their impact, which has been complex and various. Although the advisory jurisdiction may be used for the peaceful settlement of disputes,⁴⁶³ its primary purpose is to give legal advice to the requesting organ or body.⁴⁶⁴ Besides, the Court is averse to the advisory jurisdiction being used indirectly to settle disputes between states.⁴⁶⁵ At any rate, advisory opinions do not purport to resolve problems but to put the responsible organs in the best shape to deal with such problems.⁴⁶⁶

⁴⁶¹ See Pratap, 247; see generally, Lenefsky, "Advisory Opinions", 525-45; *id.*, "Jurisprudence", 31-71.

⁴⁶² The fact that The Corfu Channel Case (Compensation), ICJ Reports 1949, 244 and the Nicaragua v. United States of America Case (Merits), ICJ Reports 1986, 14 to date remain without effect, shows that noncompliance is not confined to advisory opinions. See Keith, 210 and 220; Rosenne, The World Court, 106; *id.*, The ICJ, 492.

⁴⁶³ Cf. Rosenne, The ICJ, 496 and 497-8.

⁴⁶⁴ See Singh, 26.

⁴⁶⁵ See ICJ Reports 1971, 24, para.32; *ibid.* 1975, 20 and 21, paras.20 and 23. See also, Anand, Compulsory Jurisdiction, 268; Rosenne, The ICJ, 462, n.1 and 496.

⁴⁶⁶ Cf. the view that evaluation of the advisory procedure depends essentially upon whether it has facilitated the solution of legal questions which have faced states. See Rosenne, The ICJ, 496.

Nevertheless, in some cases, advisory opinions have helped in finding solutions to problems confronting the United Nations and the specialised agencies.⁴⁶⁷ In others, they have assisted in deflecting tension into peaceful channels and thus enabled constructive diplomacy to operate. Where they have not been seen to contribute positively to the solution of the root problems, this has not been because the opinions are defective, or because the Court has misused its discretion by rendering an opinion on a political question,⁴⁶⁸ but rather, because some interested states have withheld their cooperation in the implementation of such opinions.⁴⁶⁹ However, the immediate practical effect of the opinion is a political⁴⁷⁰ rather than a legal matter. As regards the long term (or broad) impact of the opinion, it is the latter which counts.

In this connection, it may be noted that the advisory procedure has sometimes been useful in adopting authoritative answers to legal questions of general

⁴⁶⁷ Examples may be seen in the advisory opinions in the Reparations, Reservations, IMCO and WHO Cases, as well as those concerning the review of the judgments of the UN and ILO administrative tribunals. See Pomerance, 364; Lenefsky, "Jurisprudence", 53, n.135; id., "Advisory Opinions", 542-3.

⁴⁶⁸ It would seem that those who accuse the Court of exercising its advisory jurisdiction in political cases often ignore the quasi-political nature of the Court as the judicial arm of the UN in whose activities it is bound to participate. See e.g. ICJ Reports: 1950, 71; 1951, 19; 1971, 27, para.41; 1975, 21 and 24, paras.23 and 31; and 1989, 188-9, para.31. See further, Byman, 116; Janis, 619-21. Anyhow, the determination of the appropriateness of requests is primarily the responsibility of the requesting organs or bodies. See Pomerance, 377.

⁴⁶⁹ See Rosenne, The ICJ, 495

⁴⁷⁰ See Pomerance, 373.

international concern. Illustrations can be seen in the questions about the capacity of the UN to advance international claims in respect of damages it has suffered; about the effect of objections to reservations to multilateral conventions; about the binding character of awards rendered by the administrative tribunals; about the legal obligations arising under Security Council decisions relating to Namibia; about the site of the Eastern Mediterranean regional office of the WHO in a situation of tension in the Middle East; and about the legal basis of UN peacekeeping activities which were not foreseen by the framers of the UN Charter.⁴⁷¹ The various advisory opinions concerning South West Africa and Namibia provided the legal framework within which that territory eventually attained its independence under the auspices of the UN. In its quest for a solution to the problem of Western Sahara, the UN has been guided by the advisory opinion concerning that territory. In this sense, advisory opinions have made a substantial contribution to the clarification and development of relevant international law. They have earned a place in the jurisprudence and are received and expounded in the doctrine.⁴⁷² In this respect also, it may be observed that in terms of their effect on third parties, advisory opinions are hardly distinguishable from judgments. Advisory opinions have also been largely successful in putting the requesting organs or bodies in

⁴⁷¹ See Rosenne, The World Court, 106; *id.*, The ICJ, 496.

⁴⁷² See Gross, "The ICJ and the UN", 419-20; Lenefsky, "Advisory Opinions", 525.

the best position to handle problems which arise in the course of their activities. That the advisory function, whose introduction into the international judicial system was greeted with much opposition has proved an unqualified success is borne out by the ever increasing demands for its expansion and greater use.⁴⁷³

⁴⁷³ See Singh, 26 and 97-8. Also, see generally, L. Gross, "The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order", 65 AJIL (1971), 253-326; Crilly, 215-21; Schwebel, "Advisory Jurisdiction", 335-61; id., "Authorising the Secretary General, 519-29; Szasz, 499-533; L.B. Sohn, "Broadening the Advisory Jurisdiction of the International Court of Justice", 77 AJIL (1983) 124-9. Cf. Pomerance, 378-80.

CHAPTER FIVE

CONCLUDING OBSERVATIONS

The protection which Article 59 of the Statute provides for third parties is a general, formal and technical one. It applies to the res judicata effect of the decision, but not to the place of the judgment in the Court's jurisprudence or indeed, its contribution to the development and clarification of international law. This latter role of judicial decisions is sanctioned by Article 38(1)(d) of the Statute, under whose terms they are a source of international law. This general protection is imperfect and deceptive.

Consequently, the Statute has provided more specific safeguards in the form of intervention, of which there are two kinds. First, under Article 62 a state which considers that its legal interest may be affected by the decision in a case may request to be permitted to intervene therein. The decision on such a request rests with the Court.

The "interest of a legal nature" must relate to a legal interest of its own directly in issue as between it and either or both parties to a case. In the doctrine an "interest of a legal nature" has been variously described as a special interest, a legitimate, relevant and genuine interest. It does not include interests of a purely political, economic or sociological nature. Neither must it be of a remote or hypothetical character. It is thought to exclude the interpretation of domestic law and the recovery of alleged damages or the specific performance of

economic obligations. A state which can show that it has a specific legal interest which it considers to be genuinely threatened or likely to be indirectly affected by the reasoning on which the conclusions and the decision of the Court are based ought to be permitted to intervene. The interest of a legal nature required for discretionary intervention is weaker than that required when the Court is seised of a substantive dispute.

Article 59 deals with the "binding force" of the Court's decision. It refers to the operative provisions of the judgment which carry binding force. The decision creates particular rules for the parties by conferring rights or imposing obligations on them alone. As regards third parties, such a decision is res inter alios acta. Thus, Article 59 cannot protect the interests of third parties from being affected by the reasoning in the judgment. It does not protect third parties from the effect of the natural operation of the persuasive force of judicial precedents. It does not protect third parties from the consequences that flow from the status of the Court's judgments as authoritative holdings of international law. It does not discharge third parties from the general obligation of every state and member of the United Nations to respect the Court's judgments.

Article 62 deals with intervention by a third state to protect its legal interests from being affected by the decision in a case. The Court's view that the rights of a third state would be safeguarded by Article 59 can give little comfort to such a state, especially where a right

erga omnes is at issue in the principal case. Nor can the fears of such a state be allayed by mere assurances from the Court, as it sought to give in the Maltese and Italian Intervention Cases, that it would, proprio motu, in its future judgment, act through its pronouncements to protect the state's interests. The view that a third state may choose either to intervene under Article 62, or to rely on the protection afforded by Article 59 is flawed for a number of reasons. First, it is clear that the object of Article 62 is not the securing of procedural economy of means. To so maintain is to transform a potentially effective third party remedy into an improbable procedural convenience. Secondly, such a view leaves Article 62 without any sphere of application, and therefore, renders it pointless. This could not have been intended, because Article 62 is just as much a part of the Statute as Article 59. Thirdly, it seems to imply that these provisions are mutually exclusive rather than complementary. The protection which Article 59 provides for third states is automatic but imperfect and very limited, covering as it does only the binding force of the decision. Even if the term "decision" in Article 62 is taken to carry the same meaning as it is generally believed to have in Article 59, that is, the dispositif of the judgment, the meaning of the expression "affected by the decision in a case" cannot be "to be subject to the binding force of the decision in a case" in the sense of the latter provision. Therefore, if Article 59 ensures that the rights of a third state can never be affected by a judgment, this must mean that they

can never be affected in the sense of Article 62. In other words, the expression "may be affected by the decision in a case" in Article 62 does not mean "may be subject to the binding force of the decision in a case" within the meaning of Article 59. We submit that third parties may be affected by the decision in a case without being bound in the sense of Article 59. Therefore, if a third party is able to prove that besides the general interest which it shares with all other states in the development of international law, it has a specific legal interest which may be affected by the decision in a pending case, it should be allowed to intervene under the terms of Article 62.

The Court has taken a narrow view of the discretion conferred on it by the Statute and would exclude considerations of policy from the exercise of its discretion in this respect. However, it is difficult to see how the Court, in exercising such discretion, can disregard underlying judicial policies and principles of the administration of justice like considerations of judicial propriety, the need to avoid a cascade of interventions, the sovereign equality of states before the law, fair play and the economy of international justice, due process, as well as the need to win and maintain the confidence of states. Moreover, the Court cannot exercise its discretion without taking the conflicting policies on intervention into account.

In deciding on requests for intervention the Court also considers such other factors as the limits of its

jurisdiction under the Special Agreement submitting the principal case for decision, the claims and submissions of the original parties and of other states, as well as the actual motives of the state seeking to intervene. It also bears in mind the effects of intervention on the original parties. The Court has, however, stated that the opposition of the original parties to an intervention request is, though very important, no more than one element to be taken into account.

That the Court's discretion is much broader than the Court is willing to admit is borne out by the requirements for discretionary intervention embodied in Article 81(2) of the 1978 Rules. Besides the condition relating to an interest of a legal nature the other requirements therein specified are not expressly prescribed by the Statute. The Rules constitute the Court's interpretation of the Statute as guided by judicial policy, a task the accomplishment of which entails the exercise of a large measure of discretion. The same discretion is involved in the application of Article 62 and the relevant Rules to concrete cases.

Read and interpreted in accordance with the ordinary meaning of its text, Article 62(1) does not appear to be as narrow as the Court makes out. It does not provide that if all the conditions therein specified are fulfilled, the intervention request must be granted. The Court's power to decide whether the conditions are satisfied or not, coupled with its power to interpret such concepts as "interest of a legal nature", "may be affected", "proper purpose" etc.,

imply the exercise of a wide measure of discretion.

The Court determines the admissibility of an intervention by reference to the definition of the interest of a legal nature and the object of the intervention. They would presumably enable the Court to assure itself how far the purpose of the intervention is indeed the protection of legal rights which may be affected by the decision and how far this purpose might be involved. Furthermore, the precise object of the intervention would also enable the Court to consider what the state seeking to intervene intends to ask it to do about its legal interests which it apprehends may be affected by the decision. The Court's rejection of the jurisdictional requirement contained in the rules as an essential condition for intervention has gone a long way towards clarifying the law on intervention.

If a third state requests the Court to take account of its rights in a judgment so as to ensure that they are not adversely affected, the intervention which it seeks would be regarded as that contemplated by Article 62. However, the view that discretionary intervention was meant to have a much wider scope is supported by the travaux préparatoires of the Statute and Rules of the Permanent Court, some provisions of Article 38 of the Statute and some individual opinions appended to the Maltese, Italian and Nicaraguan intervention judgments.

It is clear from the jurisprudence and doctrine that a third state need not prove the existence of a jurisdictional link with the original parties in order for its intervention request to be granted. However, where a

state is seeking to intervene as a party, it must be required to demonstrate its jurisdictional links with the original parties. Thus, the discretion vested in the Court is sufficient to enable it to fashion the form or types of discretionary intervention most appropriate to the conflicting demands of international adjudication.

Article 63 of the Statute confers a right of intervention on states whenever the construction of a convention to which they are party is an issue in a case before the Court. The ultimate decision on the admissibility of a declaration of intervention rests solely with the Court which decides whether the conditions have been fulfilled in each particular case. The control which the Court exercises over proceedings concerning this kind of intervention has always been formally recognised by the Rules. This control was also graphically illustrated in the Haya de la Torre Case. The discretion which the Court exercises with regard to intervention under Article 63 means that in spite of the wording of this provision, the right to intervene is, in practice, not unqualified.

The practice regarding the sending of the notification under Article 63(1) has always been somewhat confused, and in doubtful cases, no notification is sent. The state concerned is, however, informed in a manner suggesting that it might file a declaration of intervention whose fate would have to be determined by the Court. There has always been a preference for the cautious as against the bold approach. Any state to which the notification is sent is invited to consider exercising its statutory right of

intervention. Receipt of the notification may also be regarded as a prima facie indication that the recipient might be entitled to intervene. Since 1936 the Rules have provided that a state which considers itself a party to the convention whose construction is in question, to which the statutory notification has not been sent, may, nonetheless, file a declaration of intervention. This Rule enables the court to remedy any oversight which might inadvertently have been committed by the registrar.

The 1978 Rules have changed the character of the sending of the statutory notification from an apparently administrative function to a judicial one. This might lead states which receive the statutory notification into believing their chances of being permitted to intervene to be very high, while those to which the notification has not been sent might rate their chances of being allowed to intervene to be very low and therefore might feel discouraged from seeking to intervene. This change notwithstanding, it remains a procedural requirement for alerting states to their right of intervention under Article 63 and does not and cannot in any way prejudice the admissibility or rejection of any declaration of intervention which may subsequently be filed with the Court. The practice of the Court has been to send the statutory notification during the preliminary objection phase of cases. There is nothing in either the text of Article 63 of the Statute itself, its preparatory work, or the Rules, to suggest that the sending of this notification is restricted to the merits phase of the proceedings. The

sending of the notification is to be distinguished from the determination of the admissibility of the declaration of intervention, which is purely a judicial task. If this distinction is obliterated, receipt of the notification would be erroneously interpreted as an invitation to exercise an absolute right to intervene. The Court would also cease to exercise any discretion in respect of the admissibility of declarations of intervention.

A related issue is the timing of the filing of the declaration of intervention. This may be done after the statutory notification has been sent, but before the commencement of oral proceedings. In exceptional circumstances, a declaration submitted later than this would be admitted. The "exceptional circumstances" rule ought to apply where a convention falls to be construed at a later stage of the proceedings and in the case of a third state which has not received the statutory notification. In this connection, it is necessary to strike a balance between the need to enable third states to exercise their statutory right to intervention and the need for a speedy and efficient administration of justice.

Article 63 refers to such multilateral conventions as the General Act for the Pacific Settlement of International Disputes, the Convention on the Prevention and Punishment of the Crime of Genocide, the Charter of the United Nations and the Statute of the International Court. By an administrative decision taken early in his history, the registrar does not notify states when the Charter is cited in proceedings before the Court, the notification of the

institution of proceedings under Article 40(3) of the Statute being considered sufficient in this respect. This is another example of the Court's restrictive attitude towards the institution of intervention. The two notifications are, however, meant to serve different purposes. We do not understand why intervention as of right should not be applicable in the case of the construction of the Statute. As to the timing of the sending of the notification under Article 63(1), we believe that at whatever stage in the proceedings in a case it becomes clear that the prescribed conditions are satisfied, the states concerned must be notified within a reasonable time, having regard to the object of the institution of intervention, the circumstances of the case, and the speedy and efficient administration of justice.

In theory, the original parties will be bound by the operative provisions of the judgment. The third state which intervenes under the terms of Article 63 will only be bound by the construction of the convention given by the judgment and in future litigation relating to the application of that instrument. In practice, because of the value of judicial decisions both as precedents and an auxiliary source of law, the Court is not likely to disregard the construction which it placed on the convention in an earlier case should the same convention fall to be interpreted in a future litigation involving different parties. In principle, Article 59 seems to restrict the binding force of the operative portions of the judgment to the parties. Article 63(2) seeks to limit the

effect of the interpretation of the convention given by the judgment to the parties and the intervening state. It would therefore seem that a state which intervenes under the terms of Article 63 is not a party within the meaning of Article 59 of the Statute. A significance of Article 63(2) which should not be overlooked is that it furnishes the strongest indication yet that parts of the judgment other than the decision can be binding upon states. It has been argued on the strength of the preparatory work of the Statute that Article 59 complements Article 63(2) by stating directly what the latter provision indirectly expresses. Another view, also based on the preparatory work, holds that Article 59 states directly what Article 63 indirectly admits. Though the Court refused to admit El Salvador's Declaration of Intervention in the jurisdiction and admissibility phase of the Nicaragua/United States Case, it does not seem that such intervention is barred by the text of the Statute and Rules. While we subscribe to the view that intervention as of right should be extended to cover the construction of declarations under the optional clause of the Statute, we suggest the possibility of seeking discretionary intervention in such circumstances.

In exercising its advisory jurisdiction, the Court has been concerned to protect its character as a judicial body, as well as to emphasise the judicial character of the advisory function itself. This has been accomplished largely through the assimilation of the advisory procedure to that followed in contentious cases. As a result of the

judicial procedure followed in performing the advisory function, the opinions rendered are endowed with the authority appropriate to the status of the Court as the world's supreme judicial body.

In theory, advisory opinions lack the binding force attaching to judgments, except in the case of the so-called compulsive opinions, opinions relating to the review of administrative tribunal judgments, those opinions which are binding in a negative sense and opinions which for one reason or another are binding on the parties immediately concerned. In practice, given the authoritative character of advisory opinions, their value both as precedents and as a source of international law, they are considered to have the same legal effect as judgments of the Court.

In conclusion, we should like to make some brief suggestions which would help to clarify the law relating to the various devices enshrined in the Statute to safeguard the rights and interests of third parties and to render such protective remedies more effective and attractive. The present state of affairs in which public international organisations have only limited procedural capacity, and non-governmental international organisations and individuals have no locus standi before the International Court is unsatisfactory. In view of the fact that so much of contemporary international law concerns such organisations and individuals, perhaps the time has come

for Article 34 of the Statute to be amended¹ in order to make them full subjects of international law.

The forms of intervention for which the Statute provides should be made more widely available in order to increase their potential and extend the basis of international adjudication. In this connection, Article 63 might be revised so as to make possible intervention by an international organisation when the construction of its constituent instrument or an international convention adopted thereunder is involved in a case. It is suggested that the idea of extending intervention as of right to cover declarations made under the Optional Clause of the Statute be considered in the event of the revision of Article 63, if this cannot be done through a modification of the Rules and practice of the Court.

Article 62 should also be amended to enable public and non-governmental international organisations and individuals to intervene in most other situations. While the Court could still define more precisely the nature, scope and effect of Article 62, by clarifying its ambiguous phraseology, through modification of its Rules or practice, nevertheless, we suggest that this matter could also form the subject of an amendment of this provision.

Third states and third persons² may be permitted to

¹ On the procedure for amending the Statute, see Articles 69-70 of the Statute. See also E. Schwelb, "The Process of Amending the Statute of the International Court of Justice", 64 AJIL (1970), 880-91.

² The term "third person" is meant to include human persons, juridical persons such as corporations and other entities recognised under domestic law, as well as public

intervene as amici curiae in both contentious and advisory proceedings. This would, no doubt, not only call for a change of attitude by the Court, but also necessitate a modification of the Statute in favour of an extension of the role of the Court in international adjudication. Considering the Court's tendency towards a narrow interpretation of third party participation in pending litigation, the Court may well find this suggestion unacceptable. Nevertheless, its merits cannot be over-emphasised. For instance, the real party in interest, the "interested" employee of the international organisation, the international corporation whose right to do business is under assault and the alien denied equality of treatment, may be afforded an opportunity to make statements and observations in proceedings before the Court. The employees of certain international organisations may be afforded an opportunity to present their views to the Court in disputes with their employing agencies. A multinational corporation might be allowed to intervene to protect its interests in circumstances such as those in Barcelona Traction Case (Merits)³ where no willing state was found competent to represent the shareholders' interests.

The inadequacy of the protection afforded for third party interests by the relative effect of judicial decisions is borne out by the availability of the shield of intervention which is not subject to the constraints of the

and non-governmental international organisations.

³ See ICJ Reports 1970, 4.

consensualism that underlies the Court's jurisdiction. Although the possibility of using intervention as a sword remains open, it may be so employed subject to normal jurisdictional requirements. Ultimately, the effectiveness of the various third party safeguards lies both in a liberal interpretation of the conditions governing their operation and in full participation by interested parties in contentious and advisory proceedings.

BIBLIOGRAPHY

OFFICIAL PUBLICATIONS

League of Nations

Documents Concerning the Action Taken by the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court, Geneva, 1921

Minutes of the Committee of Jurists on the Statute of the Permanent Court of International Justice

Permanent Court of International Justice

ADVISORY COMMITTEE OF JURISTS, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, The Hague, 1920

Series A, Collection of Judgments, Nos.1-24, Leyden, 1922-30

Series B, Collection of Advisory Opinions, Nos.1-8, Leyden, 1922-30

Series A/B, Judgments, Orders and Advisory Opinions, Fascicules Nos.40-80, Leyden, 1931-40.

Series C, Pleadings, Oral Statements and Documents (formerly Series C, Acts and Documents Relating to Judgments and Advisory Opinions Given by the Court), Nos.1-88, Leyden, 1922-39

Series D, Collection of Texts Governing the Jurisdiction of the Court (formerly Series D, Acts and Documents Concerning the Organisation of the Court), Nos.1-6, Leyden, 1922-32.

Series E, Annual Report, Nos.1-16, Leyden, 1922/5-1930-45

United Nations

Documents of the United Nations Conference on International Organisation, San Francisco, 1945. 21 vols, London, 1945-55

GENERAL ASSEMBLY, Official Records, New York (formerly Lake Success, N.Y.), 1946-

The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, New York, 1983

Yearbooks

Survey of International Law in Relation to the Work of the International Law Commission. Memorandum of the Secretary-General of the United Nations, New York, 1949. Document A/CN.4/1/Rev.1

Thirty-Fifth World Health Assembly, "Resolutions, Decisions, Annexes", Geneva 3-14 May 1982, WHA35/1982/REC/1, World Health Organisation

Thirty-Sixth World Health Assembly, "Resolutions and Decisions, Annexes", Geneva, 2-16 May 1983, WHA36/1983/REC/1, World Health Organisation

Thirty-Seventh World Health Assembly, "Resolutions and Decisions, Annexes", Geneva 1984, WHA37/1984/REC/1, World Health Organisation

The International Court of Justice, 9th ed., United Nations Department of Public Information, New York, 1983

Repertory of Practice of U.N. Organs. Vol.V. New York, 1955

International Court of Justice

Pleadings, Oral Arguments, Documents. The Hague (formerly Leyden), 1948-

Reports of Judgments, Advisory Opinions and Orders. Leyden, 1947-

"Resolution Concerning the Internal Judicial Practice of the Court". Reprinted in "Official Documents", American Journal of International Law 70 (1976)

Yearbook. The Hague, 1946/47-

Other Documents

HAGUE PEACE CONFERENCE. Proceedings of the Hague Peace Conferences, "The Conference of 1899", New York, 1920

_____. Proceedings of the Hague Peace Conferences, "The Conference of 1907", New York, 1921

INFORMAL INTER-ALLIED COMMITTEE, Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, U.K. Parliamentary Papers, Miscellaneous No.2. Cmd. 6531, 1944

INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG). "Judgment and

Sentences". Reprinted in "Judicial Decisions", American Journal of International Law 41 (1947)

PERMANENT COURT OF ARBITRATION. The Hague Court Reports. Ed. J.B. Scott, New York, 1916.

_____. The Hague Court Reports, 2nd ser. Ed. J.B. Scott, New York, 1932

BOOKS

AMOS & WALTON's Introduction to French Law. 3rd ed. by F.H. Lawson et al. Oxford: Oxford University Press, 1967

ANAND, Ram Prakesh. Compulsory Jurisdiction of the International Court of Justice, London: Asia Publishing House, under the auspices of the Indian School of International Studies, 1961

_____. Studies in International Adjudication Delhi: Vikas Publications, India, 1969

BARNARD, D.N., The Civil Court in Action London: Butterworths, 1977

BOWETT, D.W., United Nations Forces: A Legal Study of United Nations Practice - Published under the Auspices of the David Davies Memorial Institute, London: Stevens and Sons, 1964

_____. The Law of International Institutions. 4th ed. Published under the Auspices of the London Institute of World Affairs, London: Stevens & Sons, 1982.

BRIERLY, James Leslie, The Law of Nations: An Introduction to the International Law of Peace, 5th ed. New York: Oxford University Press, 1955

BROWNLIE, Ian. Principles of Public International Law. 3rd ed. Oxford: Clarendon Press, 1979

_____. (ed), Basic Documents in International Law. 3rd ed. Oxford: Clarendon Press, 1983

BUTLER, William E. Soviet Law. 2nd ed. London: Butterworths, 1988

CARLSTON, Kenneth Smith. The Process of International Arbitration. Westport, Conn: Greenwood, 1946.

CHENG, Bin. General Principles of Law as Applied by International Courts and Tribunals. Cambridge: Grotius Publications Ltd., 1953

DAVI', Angelo. L'Intervento davanti alla Corte Internazionale di Giustizia. Naples: Casa Editrice Jovene, 1984

DE BUSTAMENTE, Antonio Sanchez. The World Court. New York: Macmillan Co., 1925

DE VISSCHER, Charles. Theory and Reality in Public International Law. 3rd Revised edition, translated from the French by P.E. Corbett. Princeton University Press, 1968

EISEMANN, Pierre Michel, Vincent Coussirat-Coustère and Paul Hur. Petit Manuel de la Jurisprudence de la Cour Internationale de Justice. 2nd ed. Paris: Editions A. Pedone, 1971

ELIAN, George. The International Court of Justice. Leiden: A.W. Sijthoff, 1971

ELIAS, Taslim Olawale. Africa and the Development of International Law. Leyden: A.W. Sijthoff, 1972

_____. New Horizons in International Law. Alphen aan de Rijn: Sijthoff and Noordhoff, 1979; Dobbs Ferry, New York: Oceana Publications, 1979

_____. The International Court of Justice and Some Contemporary Problems: Essays on International Law. The Hague, Boston, London: Martinus Nijhoff Publishers, 1983

ELKIND, Jerome B. Interim Protection, A Functional Approach. The Hague: Martinus Nijhoff Publishers, 1981

_____. Non-Appearance before the International Court of Justice: Functional and Comparative Analysis. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1984

FACHIRI, A.P. The Permanent Court of International Justice. 2nd ed. London: Oxford University Press, Humphrey Mitford, 1932

FARAG, W.M., L'Intervention devant la Cour Permanente de Justice Internationale. Paris: Librairie Générale de Droit International et de Jurisprudence, 1927

FITZMAURICE, Gerald. The Law and Procedure of the International Court of Justice. Vol.2. Cambridge: Grotius Publications Ltd., 1986

GARNER, B.A. A Dictionary of Modern Legal Usage. New York: Oxford University Press, 1987

GILL, Terry D. Litigation Strategy at the International Court - A Case Study of the "Nicaragua v. United States" Dispute. Dordrecht: Martinus Nijhoff Publishers, 1989

GREIG, Donald Westlake. International Law. London: Butterworths, 1970

GUYOMAR, G. Commentaire du Règlement de la Cour Internationale de Justice, Adopté le 14 April 1978: Interprétation et Pratique. Paris: Editions A. Pedone, 1983

HALL, W.E. A Treatise on International Law. 9th ed. Oxford: Peane Higgins, 1924

Halsbury's Laws of England. 4th ed. Vol.37. Editor-in-Chief Lord Hailsham of St. Marylebone. London: Butterworths, 1982

HAMBRO, Edvard M. The Case Law of the International Court. Leyden: A.W. Sijthoff, 1952

HAMMARSKJOLD, Ake Wilhelm Hjalmar. Jurisdiction Internationale. Leyden: Société d'Editions A.W. Sijthoff, 1938

HAND, Learned. The Bill of Rights. The Oliver Wendell Holmes Lecture 1958. Cambridge: Harvard University Press, 1958

HIGGINS, ROSALYN United Nations Peacekeeping 1946-67: Documents and Commentary. 1. The Middle East - Issued under the auspices of the Royal Institute of International Affairs, London, New York, Toronto: Oxford University Press, 1969.

_____. United Nations Peacekeeping 1946-67: Documents and Commentary. II. Asia, London, Bombay, Karachi, Kuala Lumpur: Oxford University Press, 1970

_____. United Nations Peacekeeping 1946-67: Documents and Commentary. III. Africa, Oxford, New York, Toronto, Melbourne: Oxford University Press, 1980

_____. United Nations Peacekeeping: Documents and Commentary. IV. Europe 1946-79, Oxford, New York, Toronto, Melbourne: Oxford University Press, 1981

HUDSON, Manley O. The Permanent Court of International Justice 1920-42: A Treatise. New York: Macmillan Co., 1943

_____. International Tribunals. Studies in the Administration of International Law and Organisations No.2. Washington: Carnegie Endowment for International Peace, 1944

HUGHES, Charles Evans. The Supreme Court of the United States. New York: Columbia University Press, 1928

HUSSAIN, Ijaz. Dissenting and Separate Opinions at the World Court. Dordrecht: Martinus Nijhoff Publishers, 1984

Jackson's Machinery of Justice, 8th ed. Ed. J.R. Spencer.

Cambridge: Cambridge University Press, 1989

JACOB, Sir Jack (ed.). The Supreme Court Practice. Vol.2. London: Sweet and Maxwell Ltd., 1985

JAMES, Alan. The Politics of Peacekeeping. London: Chatto and Windus, London for the Institute of Strategic Studies, 1969

_____. Peacekeeping in International Politics. Basingstoke: Macmillan, in association with the International Institute for Strategic Studies, 1990

JENKS, C. Wilfred. The Prospects of International Adjudication. London: Stevens & Sons Ltd., 1964; Dobbs Ferry, N.Y.: Oceana Publications, 1964

JOWITT, William Allen, Earl, and Clifford Walsh, Jowitt's Dictionary of English Law. 2nd ed. [ed.] John Burke. 2 vols. London: Sweet & Maxwell, 1977

KEITH, K.J. The Extent of the Advisory Jurisdiction of the International Court of Justice. Leyden: A.W. Sijthoff, 1971

KELSEN, Hans. The Law of the United Nations: A Critical Analysis of Its Fundamental Problems. Fourth impression (bound in supplement). London: Stevens & Sons, published under the auspices of the London Institute of World Affairs, 1964.

LANGAN, P. and D.G. Lawrence. Civil Procedure. London: Sweet & Maxwell, 1976

LAUTERPACHT, Elihu. Aspects of the Administration of International Justice. Cambridge: Grotius Publications, 1991

LAUTERPACHT, H. The Function of Law in the International Community. Oxford: Clarendon Press, 1933

LAUTERPACHT, Hersch. The Development of International Law by the International Court. London: Stevens & Sons, 1958

LISSITZYN, Oliver James. The International Court of Justice: Its Role in the Maintenance of International Peace and Security. United Nations Studies No.6. New York: Carnegie Endowment for International Peace, 1951

The Macmillan Encyclopedia, "Cold War". London: Macmillan, 1986

MANI, V.S. International Adjudication: Procedural Aspects. The Hague: Martinus Nijhoff Publishers: 1980

MARTENS, G. Fr. de. Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International. 2nd

ser. Continued by Felix Stoerk. Vol.23. Leipzig: Librairie Dieterich, Theodor Weichler, 1898.

_____. Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International. 3rd ser. Continued by Heinrich Triepel. Vol.3. Leipzig: Librairie Dieterich, Theodor Weicher, 1910

McNAIR, Arnold. The Development of International Justice. Two lectures delivered to the Law Center of New York University, December 1953. New York: New York University Press, distributed by Oceana Publications, 1954

_____. The Law of Treaties. Oxford: Clarendon Press, 1961

MERRILLS, John Graham. International Dispute Settlement. London: Sweet & Maxwell, 1984

MILLER, T.B. and WARD, R. (eds.). Current International Treaties. New York: New York University Press, 1984

MOORE, John Bassett. History and Digest of the International Arbitrations to which the United States has been a Party. Vol.5,. Washington: Government Printing Office, 1898

_____. International law and Some Current Illusions. New York: Macmillan Co., 1924

Moore's Federal Practice: US Supreme Court Practice and Rules. 2nd ed.

NANTWI, E.K. The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law. Leyden: A.W. Sijthoff, 1966

O'CONNELL, D.P. International Law. London: Stevens & Sons, 1965

OPPENHEIM, L.F.L. International Law: A Treatise. 8th ed. Vol.2. Peace. Ed. Hersch Lauterpacht. London/New York/Toronto: Longmans, Green & Co., 1955

PARRY, Clive. The Sources and Evidences of International Law. Manchester: Manchester University Press, 1965

POMERANCE, Michla. The Advisory Function of thhe International Court in the League and UN Eras. London: Johns Hopkins University, 1973

POPHAM, M. (ed.) The Best of From Our Own Correspondent 1989/90, Bath: Broadside Books Ltd., 1990

PRATAP, Dharma. The Advisory Jurisdiction of the International Court. Oxford: Clarendon Press, 1972

RALSTON, Jackson Harvey. International Arbitral Law and Procedure. Boston: Ginn & Co., published for the International School of Peace, 1910

_____. The Law and Procedure of International Tribunals. Rev. ed. California: Stanford University Press, 1926

RASMUSSEN, Hjalte. On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking. Dordrecht: Martinus Nijhoff, 1986

REISMAN, W. Michael. Nullity and Revision: The Review and Enforcement of International Judgments and Awards. New Haven: Yale University Press, 1971

ROSENNE, Shabtai. The International Court of Justice. Leiden: A.W. Sijthoff, 1957

_____. The World Court, 3rd rev. ed. Leiden: A.W. Sijthoff, 1973; Dobby Ferry, New York: Oceana Publications, 1973

_____. The World Court. 4th ed. Dordrecht: Martinus Nijhoff Publishers, 1989

_____. Documents on the International Court of Justice. Leiden: A.W. Sijthoff, 1974

_____. Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice. The Hague, Martinus Nijhoff Publishers, 1983

_____. The Law and Practice of the International Court. 2nd rev. ed. Dordrecht: Martinus Nijhoff Publishers, 1985

SANAGAN, G.D. ed. The Encyclopedia of Words and Phrases - Legal Maxims, Canada 1825-1978. 3rd ed. Toronto: Richard de Boo Ltd., 1979

SCHENK, Berthold Graf von Stauffenberg. Statut et Règlement de la Cour Permanente de Justice Internationale: Elements d'Interpretation. Berlin: Carl Hymanns Verlag, 1934

SCHWARZENBERGER, Georg. International Law as Applied by International Courts and Tribunals, Vol.4, International Judicial Law. London: Stevens & Sons Ltd., 1986

SHIHATA, I.F.I. The Power of the International Court to Determine its Own Jurisdiction. The Hague: Martinus Nijhoff, 1965

SIMONS, W. The Evolution of International Public Law in Europe Since Grotius. New Haven: Yale University Press, 1931

SIMPSON, J.L. and FOX, H. International Arbitration: Law and Practice. London: Stevens, 1959

SINCLAIR, I. The Vienna Convention on the Law of Treaties. 2nd ed. Manchester: Manchester University Press, 1984

SINGER, J. David Financing International Organisation: The United Nations Budget Process, The Hague: Martinus Nijhoff, 1961

SINGH, Nagendra The Role and Record of the International Court of Justice, Dordrecht, Boston, London: Martinus Nijhoff, 1989

SOHN, L.B. Cases on United Nations Law. Brooklyn: The Foundation Press Inc., 1956

STARKE, J.F. Introduction to International Law. 10th ed. London: Butterworths, 1989

STAUFFENBERG, CROSS and DE JANASZ. Statut et Reglement de la CPJI: Elements d'Interpretation. Berlin: Carl Heymanns Verlag, 1934

STOESSINGER, John G. Financing the United Nations, Carnegie Endowment for International Peace, November 1961

TUNKIN, Grigori I. Theory of International Law. London: Allen & Unwin, 1974. Cambridge, Mass.: Harvard University Press, 1974.

USHER, J.A. European Court Practice. London: Sweet & Maxwell, 1983

VALENTINE, Donald G. The Court of Justice of the European Communities. London: Stevens & Sons, 1965

VERRIER, A. International Peacekeeping: United Nations Forces in a Troubled World, Harmondsworth: Penguin, 1981

VERZIJL, J. The Jurisprudence of the World Court: A Case-by-Case Commentary. Vol.2, The International Court of Justice (1947-1965). Leyden: A.W. Sijthoff, 1966

WALKER, David M. The Oxford Companion to Law. Oxford: Clarendon Press, 1980

ZANDER, Michael, the Law-Making Process. 3rd ed. London: Weidenfeld and Nicolson, 1989.

ARTICLES AND OTHER MATERIALS

ADEDE, A.O. "Toward the Formulation of the Rule of Delimitation of Sea Boundaries between States with Adjacent or

Opposite Coastlines". 19 Virginia Journal of International Law (1978-79)

_____. "International Law From a Common Law Perspective: A Second Look". 60 Boston University Law Review (1980)

AKEHURST, M. "The Peace Treaty Between Egypt and Israel". 7 International Relations (1981)

AMERICAN SOCIETY OF INTERNATIONAL LAW. 24 International Legal Materials (1985)

AMOS, M. "The Code Napoléon and the Modern World". 10 Journal of Comparative Legislation and International Law (1928)

ANAND, R.P. "The Role of Individual and Dissenting Opinions in International Adjudication". 14 International and Comparative Law Quarterly (1965)

_____. "Role of International Adjudication", in The Future of the International Court of Justice, ed. Leo Gross. Vol.1. Dobbs Ferry, New York: Oceana Publications, 1976

ANDERSON, D.R. "Reservations to Multilateral Conventions: A Re-examination". 13 International and Comparative Law Quarterly (1964)

ANGELL, E. "The Amicus Curiae: American Development of English Institutions". 16 International and Comparative Law Quarterly (1967)

AUSTIN, R.H.F. "Namibia and Zimbabwe: Decolonisation and the Rule of International Law". 35 Current Legal Problems (1982)

BARBER, J. "South Africa, The Regional Setting". 42 World Today (1986)

BARTOS, Milan. "L'Intervention Yougoslave dans l'Affaire du Détroit de Corfou". 14 Comunicazioni e Studi (1975)

BASTID, Paul. "L' Intervention devant les Jurisdictions Internationales". 36 Revue Politique et Parlementaire (1929)

BERG, A. "Nuclear Tests Cases (Australia v. France; New Zealand v. France)", in: Bernhardt (ed.), Encyclopedia of Public International Law [Instalment 2 (1981)]

BLOOMFIELD, L.P. "American Policy Toward the U.N. - Some Bureaucratic Reflections". 12 International Organization (1958)

_____. "Headquarters-Field Relations: Some Notes on the Beginning and End of ONUC". 17 International Organization (1963)

- BOWEN, W.A. "Dissenting Opinions". 17 Green Bag (1905)
- BOWETT, D.W. "Reservations to Non-Restricted Multilateral Treaties". 48 British Year Book of International Law (1977)
- BLAYDES, L.E. "International Law: International Court of Justice does not find legal ties of such a nature to affect self-determination in the decolonization process of Western Sahara: Advisory Opinion on Western Sahara 1975". 11 Texas International Law Journal (1976)
- BROWN, Preston. "The 1971 I.C.J. Advisory Opinion on South West Africa (Namibia)". 5 Vanderbilt Journal of Transnational Law (1971)
- BROWNLIE, Ian. "The Use of Force in Self-Defence". 37 British Year Book of International Law (1961)
- _____. "The Individual Before Tribunals Exercising ^{International} Jurisdiction". 11 International and Comparative Law Quarterly (1962)
- BYMAN, A. "Student Comments: The March on Spanish Sahara, a Test of International Law", JILP (1976)
- CHATTERJEE, K.S. "The Role of the Ad Hoc Judges in the International Court of Justice". 19 Indian Journal of International Law (1979)
- CHAYES, A. "A Common Lawyer Looks At International Law". 78 Harvard Law Review (1965)
- CHENG, Bin. "The Scope and the Limits of the Advisory Jurisdiction of the International Court of Justice", Parts 1-3. The Solicitor. July, August & September, 1957
- CHINKIN, C.M. "Third Party Intervention Before the International Court of Justice". 80 American Journal of International Law (1986)
- CORBETT, P.E. "The Consent of States and the Sources of the Law of Nations". 6 British Year Book of International Law (1925)
- CORY, Robert H. Jr. "The Role of Public Opinion in United States Policies Toward the United Nations". 11 International Organisation (1957)
- CRAWFORD, J. "The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court", 50 British Year Book of International Law (1979)
- CRILLY, S.R. "A Nascent Proposal for Expanding the Advisory Opinion Jurisdiction of the International Court of Justice",

10 Syracuse Journal of International Law and Commerce (1983)

DAILLIER, Patrick. "L'Intervention du Secretaire General des Nations Unies dans la Procedure Consultative de la Cour Internationale de Justice". 19 Annuaire Francais de Droit International (1973)

DALLIN, Alexander. "The Soviet View of the United Nations". 16 International Organisation (1962)

DAMROSCH, Lori F. "Multilateral Disputes". In The International Court of Justice at the Crossroads. ed. Lori F. Damrosch. Dobbs Ferry, New York: Transnational Publishers, 1987

D'ANGELO, J.R. "Resort to Force by States to Protect Nationals: The US Rescue Mission to Iran and its Legality under International Law". 21 Virginia Journal of International Law (1981)

DAWISHA, A.I. "Syria and the Sadat Initiative". 34 The World Today (1978)

DE ARECHAGA, Eduardo Jimenez. "Judges Ad Hoc in Advisory Proceedings". 31 Zeitschrift fur Auslandsches Offentliches Recht und Volkerrecht (1971)

_____. "The Participation of International Organisations in Advisory Proceedings before the International Court of Justice". 14 Comunicazioni e Studi (1975)

_____. "Intervention under Article 62 of the Statute of the International Court of Justice". In Volkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift fur Hermann Mosler. Berlin: Springer-Verlag, 1983

_____. "The Work and the Jurisprudence of the International Court of Justice, 1947-1986". 58 British Year Book of International Law (1987)

DECAUX, Emmanuel. "L'Arret de la Court Internationale de Justice sur la Requete a fin d'Intervention de Malte dans l'Affaire du Plateau Continental Entre la Tunisie et la Libye". 27 Annuaire Francais de Droit International (1981)

DEL DUCA, Louis F. Review of L'Intervento davanti alla Corte Internazionale di Giustizia, by Angelo Davi'. 81 American Journal of International Law (1987)

DE VISSCHER, Charles. "Les Avis Consultatifs de la Cour Permanente de Justice Internationale". 26 Academie de Droit International Recueil des Cours (1929)

DILLARD, H.C. "The World Court: An Inside View". 67 American

Journal of International Law (1973)

DOUB, George Cochran. "The Unused Potential of the World Court". 40 Foreign Affairs (1961-62)

DOUGLAS, William O. "The Dissent: A Safeguard of Democracy", 32 Journal of the American Judicature Society (1948)

ELIAS, Taslim Olawale. "The Limits of the Right of Intervention in a Case before the International Court of Justice". In Volkerrecht als Rechtsordnung Internationale Gerichtbarkeit Menschenrechte. Festschrift für Hermann Mosler. Berlin: Springer-Verlag, 1983

_____. "How the International Court of Justice Deals with Requests for Advisory Opinions". In Essays in International Law in Honour of Judge Manfred Lachs, ed. Jerzy Makarczyk, The Hague: Martinus Nijhoff Publishers, 1984.

EYAL, Jonathon. "Romania: A Revolution Hijacked or Regained?". 46 The World Today (1990)

FABIAN, Larry L. "Towards a Peacekeeping Renaissance". 30 International Organisation. (1976)

FAWCETT, J.E.S. "The Development of International Law" 46 International Affairs (1970)

FENWICK, C.G. "Editorial Comment: Reservations to Multilateral Treaties". 45 American Journal of International Law (1951)

_____. "Reservations to Multilateral Conventions: The Report of the International Law Commission". 46 American Journal of International Law (1952)

FINCH, G.A. "The Nuremberg Trial and International Law" 41 American Journal of International Law (1947)

FITZMAURICE, Gerald, "The Law and Procedure of the International Court of Justice: General Principles of Substantive Law". 27 British Year Book of International Law (1950)

_____. "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points". 28 British Year Book of International Law (1951)

_____. "The Law and Procedure of the International Court of Justice: International Organisations and Tribunals". 29 British Year Book of International Law (1952)

_____. "The Law and Procedure of the International Court of Justice 1951-54: General Principles and Sources of Law". 30

British Year Book of International Law (1953)

_____. "Reservations to Multilateral Conventions". 2 International and Comparative Law Quarterly (1953)

_____. "The Law and Procedure of the International Court of Justice, 1951-1954: Points of Substantive Law, Part I". 31 British Year Book of International Law (1954)

_____. "The Law and Procedure of the International Court of Justice (1952-4): Treaty Interpretation and Other Treaty Points". 33 British Year Book of International Law (1957)

_____. "Some Problems Regarding the Formal Sources of International Law". in Symbolae Verzijl. The Hague: Martinus Nijhoff Publishers, 1958

_____. "The Law and Procedure of the International Court of Justice, 1951-54: Questions of Jurisdiction, Competence and Procedure". 34 British Year Book of International Law (1958)

_____. "The Law and Procedure of the International Court of Justice, 1954-59: General Principles and Sources of International Law". 35 British Year Book of International Law (1959)

_____. "Hersch Lauterpacht - The Scholar as Judge: Part I". 37 British Year Book of International Law (1961)

_____. "Hersch Lauterpacht - The Scholar as Judge: Part III". 39 British Year Book of International Law (1963)

_____. "Enlargement of the Contentious Jurisdiction of the Court", in Leo Gross (ed.), The Future of the International Court of Justice. Vol.2. Dobbs Ferry, New York: Oceana Publications, 1976

_____. The Problem of the "Non-Appearing Defendant Government". 51 British Year Book of International Law (1980)

FODOR, George. "Romania: Why the Front Won". 46 The World Today (1990)

FRANCK, T.M. "Icy Day at the ICJ". 79 American Journal of International Law (1985)

FRANKFURTER, Felix. "Advisory Opinions of National and International Courts". 37 Harvard Law Review (1923-24)

_____. "A Note on Advisory Opinions". 37 Harvard Law Review (1923-4)

_____. "Advisory Opinions", Encyclopedia of the Social Sciences (1930)

FREY, S. "L'Individu devant les Jurisdictions Internationales". 39 Revue de Droit Int'l. et de Droit Compare (1962)

FRIEDMANN, W. "The International Court of Justice and the Evolution of International Law". 14 Archiv des Volkerrechts (1969-70)

FRIEDMANN, W. and FATOUROS, A. "The United Nations Administrative Tribunal". 11 International Organisation (1957)

GAMBLE, J.K. Jr. "Reservations to Multilateral Treaties: A Macroscopic View of State Practice". 74 The American Journal of International Law (1980)

GOODRICH, Leland Matthew. "The Nature of the Advisory Opinions of the Permanent Court of International Justice", 32 American Journal of International Law (1938)

GOODRICH, L.M. and ROSNER, G.E. "The United Nations Emergency Force". 11 International Organization (1954)

GORDON, E. "The World Court and the Interpretation of Constitutive Treaties". 59 American Journal of International Law (1965)

GORDON, William C. "International Law - International Court of Justice - Advisory Opinions - Admission to Membership in the United Nations". 47 Michigan Law Review (1948-9)

GREIG, Donald Westlake. "The Advisory Jurisdiction of the International Court and the Settlement of Disputes Between States". 15 International and Comparative Law Quarterly (1966)

GRETON, J. "The Western Sahara in the International Arena", 26 World Today (1980)

GROS, André. "Concerning the Advisory Role of the International Court of Justice". In Transnational Law in a Changing Society: Essays in Honor of Philip C. Jessup, ed. Wolfgang Friedmann, Louis Henkin and Oliver James Lissitzyn. New York and London: Columbia University Press, 1972.

GROSS, Leo. "Participation of Individuals in Advisory Proceedings Before the International Court of Justice: Question of Equality Between the Parties". 52 American Journal of International Law (1958)

_____. "Some Observations on the International Court of Justice". 56 American Journal of International Law (1962)

_____. "Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice". 17 International Organization (1963)

_____. "Limitations Upon the Judicial Function". 58 American Journal of International Law (1964)

_____. "The International Court of Justice and the United Nations", 120 Academie de Droit International Recueil des Cours (1967)

_____. "Treaty Interpretation, the Proper Role of an International Tribunal". 62-63 American Society of International Law Proceedings (1968-69)

_____. "The International Court of Justice: consideration of requirements for enhancing its role in the international legal order". 65 American Journal of International Law (1971)

HAMBRO, Edvard M. "Some Observations on the Compulsory Jurisdiction of the International Court of Justice". 23 British Year Book of International Law (1940)

_____. "Individuals before International Tribunals". 35 The Proceedings of 35th Annual Meeting of the American Society of International Law (1941)

_____. "The Jurisdiction of the International Court of Justice". 76 Academie de Droit International Recueil des Cours (1950)

_____. "The Interpretation of Multilateral Treaties by the International Court of Justice". 39 Transactions of the Grotius Society (1953)

_____. "The Authority of the Advisory Opinions of the International Court of Justice". 3 International and Comparative Law Quarterly (1954)

_____. "The Reasons Behind the Decisions of the International Court of Justice". 7 Current Legal Problems (1954)

_____. "Dissenting and Individual Opinions in the International Court of Justice". 17 Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht (1956/7)

_____. "Address to the American Society of International Law". 62 American Society of International Law Proceedings (1968)

_____. "Intervention Under Article 63 of the Statute of the International Court of Justice". 14 Comunicazioni e Studi (1975)

HAMMARSKJOLD, Ake Wilhelm Hjalmar. "Sidelights on the Permanent Court of International Justice". 25 Michigan Law

Review (1926-27)

HARDY, M.J.L. "Claims by International Organisations in Respect of Injuries to Their Agents", 37 British Year Book of International Law (1961)

HARPER, Fowler V. and Edwin D. Etherington. "Lobbyists Before The Court". 101 University of Pennsylvania Law Review (1953)

HERMAN, Lawrence L. "Western Sahara Advisory Opinion, I.C.J. Reports 1975, p.12 - An Analysis of the World*Judgment in the Western Sahara Case". 41 Saskatchewan Law Review (1976-7)

HEVENER, N.K. "The 1971 South West African Opinion - A New International Judicial Philosophy". 24 International and Comparative Law Quarterly (1975)

HIGGINS, Rosalyn. "United Nations Peacekeeping, Political and Financial Problems". 21 The World Today (1965)

_____. "The International Court and South West Africa: The Implications of the Judgment". 42 International Affairs (1966)

_____. "Policy Considerations and the International Judicial Process", 17 International and Comparative Law Quarterly (1968)

_____. "The Advisory Opinion on Namibia: Which UN Resolutions Are Binding Under Article 25 of the Charter?", 21 International and Comparative Law Quarterly (1972)

_____. "The United Nations: Still a Force for Peace?". 1988 Manchester University Peace Lecture (unpublished)

HIGGINS, T. "The Politics of United Nations Finance", 19 The World Today (1963)

_____. "The U.N. Financial Crisis". 21 The World Today (1965)

HIRT, William E. "In the Matter of Dissent Inter Judices De Jure". 31 Pennsylvania Bar Association Quarterly (1959/60)

HOWE, G. Sir. "Soviet Foreign Policy Under Gorbachev". 45 World Today (1989).

HUBBARD, Heidi K. "Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice". 38 Stanford Law Review (1985)

HUDSON, Manley O. "Advisory Opinions of National and International Courts". 37 Harvard Law Review (1924)

_____. "The Effect of Advisory Opinions of the World Court". 42 American Journal of International Law (1948)

_____. "The 27th Year of the World Court". 43 American Journal of International Law (1949)

_____. "The 28th Year of the World Court". 44 American Journal of International Law (1950)

_____. "The Succession of the International Court of Justice to the Permanent Court of International Justice". 51 American Journal of International Law (1957)

HUMBER, P.O. "Admission to the United Nations". 24 British Year Book of International Law (1947)

HUTCHINSON, D.N. "The Concept of Natural Prolongation in the Jurisprudence Concerning Delimitation of Continental Shelf Areas". 55 British Year Book of International Law (1984)

_____. "The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law". 56 British Year Book of International Law (1985)

JAMES, Allan. "U.N. Action for Peace 1. Barrier Forces". 18 The World Today (1962)

_____. "U.N. Action for Peace. II. Law and Order Forces". 18 The World Today (1962)

JANIS, Mark W. "The International Court of Justice: Advisory Opinion on the Western Sahara". 17 Harvard International Law Journal (1976)

JENKS, C. Wilfred. "Some Legal Aspects of the Financing of International Institutions". 38 Transactions of the Grotius Society (1943)

_____. "The Status of International Organisations in Relation to the International Court of Justice". 32 Transactions of the Grotius Society (1946)

JENNINGS, Robert Y. "The International Court's Advisory Opinion on the Voting Procedure on Questions Concerning South West Africa". 42 Transactions of the Grotius Society (1956)

_____. "International Court of Justice: Advisory Opinion of July 20, 1962". 11 International and Comparative Law Quarterly (1962)

_____. "Notes, International Court of Justice, Advisory Opinion of July 20, 1962, Certain Expenses of the United Nations (Article 17, Para.2 of the Charter)". 11 International and Comparative Law Quarterly (1962)

JESCHECK, H.-H. "Nuremberg Trials", in Bernhardt (ed.). Encyclopedia of Public International Law [Instalment 4 (1982)]

JESSUP, P.C. "The Protocol for American Adherence to the Permanent Court". 25 American Journal of International Law (1931)

_____. Editorial Comment. "Intervention in the International Court". 75 American Journal of International Law (1981)

JHABVALA, Farrokh. "Declarations by Judges of the International Court of Justice". 72 American Journal of International Law (1978)

_____. "The Scope of Individual Opinions in the World Court". 13 Netherlands Yearbook of International Law (1982)

JOHNSON, D.H.N. "The Case of the Monetary Gold Removed from Rome in 1943". 4 International and Comparative Law Quarterly (1955)

JONES, G.F. "Termination of Declarations Under the Optional Clause: Military and Paramilitary Activities In and Against Nicaragua". 20 Texas International Law Journal (1985)

JULLY, Laurent. "Arbitration and Judicial Settlement: Recent Trends". 48 American Journal of International Law (1954)

KAIKOBAD, K.H. "The Shatt-al-Arab River Boundary: A Legal Reappraisal". 56 British Year Book of International Law (1985)

KEARNEY, Richard D. "Sources of Law and the International Court of Justice". In The Future of the International Court of Justice, ed. Leo Gross, Vol.2. Dobbs Ferry, New York: Oceana Publications, 1976.

KEARNEY, Richard, and R.E. Dalton. "The Treaty on Treaties". 64 American Journal of International Law (1970)

Keesing's Contemporary Archives. Vol.35. Bristol: Keesing's Publications, 1986.

KHAN, Muhammed Zafrullah. "Address by the President of the International Court of Justice at a Special Sitting of the Court Held on 27 April 1972 to mark the 50th Anniversary of the Inauguration of the International Judicial System". Reprinted in 19 Netherlands International Law Review (1972)

KRISLOV, S. "The Amicus Curiae Brief: From Friendship to Advocacy". 72 Yale Law Journal (1963)

KYLE, Keith. "President Sadat's Initiative". 34 The World

Today (1978)

LACHS, Manfred. "Some Reflections on the Contribution of the International Court of Justice to the Development of International Law". 10 The Syracuse Journal of International Law and Commerce (1983)

LADOR-LEDERER, J.J. "The Individual and his Access to International Jurisdiction". Israeli Reports to Sixth International Congress of Comparative Law, Hebrew University of Jerusalem, Institute for Legislative Research of Comparative Law (1962)

LALIVE, Pierre. "L'Affaire de l'Or Monétaire Albanais". 58 Revue Générale de Droit International Public (1954)

LALONDE, P.V. "The Death of the Eastern Carelia Doctrine: Has Compulsory Jurisdiction Arrived in the World Court?" 37 University of Toronto Faculty of Law Review (1979)

LAUTERPACHT, E. "The Legal Effects of Illegal Acts of International Organisations". Cambridge Essays in International Law. London: Stevens & Sons, 1965

_____. "The Development of the Law of International Organization by the Decisions of International Tribunals". 152 Academie de Droit International Recueil des Cours (1976)

LAUTERPACHT, Hersch. "Decisions of Municipal Courts as a Source of International Law". 10 British Year Book of International Law (1929)

_____. "The So-Called Anglo-American and Continental Schools of Thought in International Law". 12 British Year Book of International Law (1931)

_____. "The Subjects of the Law of Nations: Parts I, II and III". 63 Law Quarterly Review (1947)

_____. "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties". 26 British Year Book of International Law (1949)

_____. "Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law'. In Symbolae Verzijl (1958)

_____. "Freedom of the Seas: Implications of the Norwegian Fisheries Case". Times, London, 8 January.

LEE, Edward T. "Dissenting Opinions". 2 John Marshall Law Quarterly. (1936-37)

LENEFSKY, D. "Advisory Opinions as a Problem Solving Process". 11 Villanova Law Review (1966)

_____. "A Successful Jurisprudence of Advisory Opinions for the International Court of Justice". 15-16 Indian Yearbook of International Affairs (1966-67)

LESTER, A. "Amici Curiae: Third Party Interventions Before the European Court of Human Rights". In Protecting Human Rights, ed. G.J. Wiarda

LESTER, F. "Exploiting the Recent Revival of the United Nations". 9 International Relations (1989)

LICARI, Tanid. "Intervention under Article 62 of the Statute of the ICJ". 8 Brooklyn Journal of International Law (1982)

LISTER, F., "Exploiting the Recent Revival of the United Nations". 9 International Relations (1989)

MANGOLD, Peter. "America, Israel and Middle East Peace: The Limits of Bilateral Influence". 34 The World Today (1978)

MANGONE, G.J. and SRIVASTAVA, A.K. "Budgeting for the UN". 12 International Organisation (1958)

MANI, V.S. "Interim Measures of Protection: Article 41 of the ICJ Statute and Article 94 of the Charter". 10 Indian Journal of International Law (1970)

_____. "A Review of the Functioning of the International Court of Justice". 11 Indian Journal of International Law (1971)

MATHY, Denise. "Un Juge Ad Hoc en Procedure Consultative devant la Cour Internationale de Justice". 12 Revue Belge de Droit International (1976)

MAZRUI, Ali A. "The United Nations and Some African Political Attitudes". 18/2 International Organisation (1964)

MCGINLEY, G.P. "Intervention in the International Court: The Libya/Malta Continental Shelf Case". 34 International and Comparative Law Quarterly (1985)

McNAIR, A.D. "The Council's Request for an Advisory Opinion of the PCIJ". 3 British Year Book of International Law (1926)

McWHINNEY, E. "The Legislative Role of the World Court in an Era of Transition". In Volkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift fur Hermann Mosler. Berlin: Springer-Verlag, 1983.

MERCER, J. "Confrontation in the Western Sahara". 32 World

Today (1976)

MERET, L. "Canada and Namibia". 17 Canadian Yearbook of International Law (1979)

MILLER, John T., Jr. "Intervention in Proceedings Before the International Court of Justice". In The Future of the International Court of Justice, ed. Leo Gross, Vol.2. Dobbs Ferry, New York: Oceana Publications, 1976

MINAGAWA, T. "Operation of Reciprocity Under the Optional Clause". 4 Japanese Annual of International Law (1960)

MOORE, John Bassett. "The Organisation of the Permanent Court of International Justice". 22 Columbia Law Review 22 (1921)

MOORE, James Wm., and Edward H. Levi. "Federal Intervention I: The Right to Intervene and Reorganisation". 45 Yale Law Journal (1935-36)

MOORE, James Wm., and Edward H. Levi. "Federal Intervention II. The Procedure, Status and Federal Jurisdictional Requirements". 47 Yale Law Journal (1937-38)

MOBERLEY, P. Sir. "Towards an Independent Namibia". 45 World Today (1989)

MORELLI, G. "Note sull'Intervento nel Proceno Internazionale", 65 Rivista di Diritto Internazionale (1982)

_____. "Fonction et Objet de l'Intervention dans le Proces International". In Essays in International Law in Honour of Judge Manfred Lachs, ed. Jerzy Makarczyk. The Hague: Martinus Nijhoff Publishers, 1984.

MOSLER, Hermann. "The Area of Justiciability: Some Cases of Agreed Delimitation in the Submissions of Disputes to the International Court of Justice". In Essays in International Law in Honour of Judge Manfred Lachs, ed. Jerzy Makarczyk, The Hague: Martinus Nijhoff Publishers, 1984

MUNCH, I. von. "The Wimbledon", in Bernhardt (ed.), Encyclopedia of Public International Law [Insalment 2 (1981)]

NADELMANN, Kurt H. "The Judicial Dissent: Publication v. Secrecy". 8 American Journal of Comparative Law (1959)

NAWAZ, M.K. "Other Sources of International Law: Are Judicial Decisions of the International Court of Justice A Source of International Law?". 19 Indian Journal of International Law (1979)

NEGULESCO, D. "L'Evolution de la Procédure des Avis Consultatifs de la Cour Permanente de Justice Internationale".

57 Academie de Droit International Recueil des Cours (1936)

ODA, Shigeru. "The Role of the International Court of Justice". 19 Indian Journal of International Law (1979)

_____. "Intervention in the International Court of Justice: Articles 62 and 63 of the Statute". In Volkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte, Festschrift fur Hermann Mosler. Berlin: Springer-Verlag, 1983

_____. "Reservations in the Declarations of Acceptance of the Optional Clause and the Period of Validity of These Declarations: the Effect of the Shultz letter". 59 British Year Book of International Law (1988)

OELLERS-FRAMN, Karin. "Western Sahara (Advisory Opinion)", in Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 2 (1982)

_____. "Anmerkungen zur Intervention Italiens in Verfahren zur Abgrenzung des Festlandsockels zwischen Malta und Libyen". 44 Zeitschrift fur Auslandsches Offentliches Recht und Volkerrecht (1984)

OKERE, B.O. "The Western Sahara Case". 28 International and Comparative Law Quarterly (1979)

OLIVER, C. "Certain Expenses of the United Nations (Article A, Paragraph 2 of the Charter)". 56 American Journal of International Law (1962)

_____. "The Monetary Gold Decision in Perspective", 49 American Journal of International Law (1955)

PADEFORD, N.J. "Financing Peacekeeping: Politics and Crisis". 19/2 International Organisation (1965)

PARTAN, D.G. "International Administrative Law". 75 American Journal of International Law (1981)

PENEGAR, Kenneth Lawing. "Relationship of Advisory Opinions of the International Court of Justice to the Maintenance of World Minimum Order". 113 University of Pennsylvania Law Review (1965)

PHARAND, A.D. "Analysis of the Opinion of the International Court of Justice on Certain Expenses of the United Nations". 1 Canadian Yearbook of International Law (1963) Tome 1

PLASCOV, A. "The Palestinian Predicament After Camp David". 34 World Today (1978).

POLITIS, M. "How the World Court has Functioned". 4 Foreign Affairs (1926)

POMERANCE, M. "The Admission of Judges Ad Hoc in Advisory Proceedings: Some Reflections in the Light of the Namibia Case". 67 American Journal of International Law (1973)

POTTER, P.B. "Intervention en Droit International Modern". 32 Académie de Droit International Recueil des Cours (1930)

POULANTZAS, N.M. "The Individual before International Jurisdictions". 15 Revue Hellenique de Droit International (1962)

PUSTOGAROV, V.V. "The Nuremberg Case and the Development of International Law". Soviet Yearbook of International Law (1986)

RAJU, G.S. "The Expenses of the United Nations Organisations". 2 Indian Journal of International Law (1962)

RAMA-RAO, T.S. "The Expenses Judgment of the International Court of Justice - A Critique". 12 Indian Yearbook of International Affairs (1963)

REAGAN, R. "The Future of East-West Relations". 44 World Today (1988)

REISMAN, W.M. "The Enforcement of International Judgements". ASILP (1968)

RICE, David A. "South West Africa Cases: Parties in Interests". 47 Columbia Journal of Transnational Law (1965)

RICHARDS, H. Erle. "The Jurisdiction of the Permanent Court of International Justice". 2 British Year Book of International Law (1921-22)

RICHARDSON, H.J. II. "Constitutive Questions in the Negotiations for Namibian Independence". 78 American Journal of International Law (1984)

ROGERS, Ralph V. "Intervention at Common Law". 57 Law Quarterly Review (1941)

ROGERS, William D., James A. Beat, and Christopher Wolf, "Application of El Salvador to Intervene in the Jurisdiction and Admissibility Phase of Nicaragua v. United States". 78 American Journal of International Law (1984)

ROSENNE, Shabtai. "Res Judicata: Some Recent Decisions of the International Court of Justice". 28 British Year Book of International Law (1951)

_____. "The Advisory Competence of the International Court of Justice". 30 Revue de Droit International de Sciences Diplomatiques et Politiques (1952)

_____. "Sir Hersch Lauterpacht's Concept of the Task of the International Judge". 55 American Journal of International Law (1961)

_____. "On the Non-Use of the Advisory Competence of the International Court of Justice". 39 British Year Book of International Law (1963)

_____. "The Court and the Judicial Process". 18 International Organisation (1965)

_____. "The Composition of the Court". In The Future of the International Court of Justice, ed. Leo Gross. Vol.1. Dobbs Ferry, New York: Oceana Publications, 1976.

_____. "Some Reflections on Intervention in the International Court of Justice". 34 Netherlands International Law Review (1987)

ROUSSEAU, Charles. "Le Règlement Arbitral et Judiciaire et les Etats Tiers". Melanges Offerts à Henri Rolin - Problèmes de Droit des Gens. Paris: Pedone, 1964

ROVINE, Arthur W. "The National Interest and the World Court". In The Future of the International Court of Justice, ed. Leo Gross. Vol.1. Dobbs Ferry, New York: Oceana Publications, 1976

SACK, A.N. "Punishment of War Criminals and the Defence of Superior Order". 60 Law Quarterly Review (1944)

SALEM, Mohammed Anis. "Arab Schisms in the 1980s: Old Story or New Order?". 38 The World Today (1982)

SANDERS, Joe W. "The Role of Dissenting Opinions in Louisiana". 23 Louisiana Law Review (1963)

SAXENA, J.N. "The Court Without a Case". 12 Journal of the Indian Law Institute (1970)

SCHICK, F.B. "Council and Court of the UN". 9 Modern Law Review (1946)

_____. "The Nuremberg Trial and the International Law of the Future". 41 American Journal of International Law (1947)

SCHWARZENBERGER, G. "The Impacts of East-West Rift on International Law". 36 Transactions of the Grotius Society (1950)

SCHWARTZ, W. "The International Court's Role as an Advisor to the United Nations. A Study in Retrogressive Development". 37 Boston University Law Review (1957)

SCHWEBEL, S.M. "Authorizing the Secretary General of the United Nations to Request Advisory Opinions of the International Court of Justice". In Essays in International Law in Honour of Judge Manfred Lachs, ed. Jerzy Makarczyk. The Hague, Boston, Lancaster: Martinus Nijhoff Publishers, 1984.

_____. "Widening the Advisory Jurisdiction of the International Court of Justice Without Amending its Statute". 33 Catholic University Law Review (1984)

SCHWELB, E. "Crimes Against Humanity". 23 British Year Book of International Law (1946)

SCOTT, J.B. "A Permanent Court of International Justice". 14 American Journal of International Law (1920)

SEALE, Patrick. "The Egypt-Israel Treaty and its Implications". 35 The World Today (1979)

SELIGMAN, Edwin Robert Anderson, and Alvin Saunders Johnson, eds. Encyclopedia of the Social Sciences. New York: Macmillan, 1930-35. S.V. "Advisory Opinions", by Fleix Frankfurter.

SHAPIRO, O.L. "Some Thoughts on Intervention before Courts, Agencies and Arbitrators". 81 Harvard Law Review (1968)

SHAW, M. "The Western Sahara Case". 49 British Year Book of International Law (1978)

SHICK, F.B. "Council and the Court of the UN". 9 Modern Law Review (1946)

SIMMONDS, K.R. "The U.N. Assessments Advisory Opinion". 13 International and Comparative Law Quarterly (1964)

SIMMONS, Robert G. "The Use and Abuse of Dissenting Opinions". 16 Louisiana Law Review (1956)

SKUBISZEWSKI, K. "Remarks on the Interpretation of the United Nations Charter". In Volkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte, Festschrift für Hermann Mosler. Berlin: Springer-Verlag, 1983

SLOAN, F.B. "Advisory Jurisdiction of the International Court of Justice". 38 California Law Review (1950)

SLONIM, S. "The Advisory Opinion of the International Court of Justice on Certain Expenses of the United Nations: A Critical Analysis". 10 Harvard Law Journal (1964)

SMITH, M.A. "Sovereignty Over Unoccupied Territories - The Western Sahara Decision". 9 Case W. Res. Journal of International Law (1977)

SMYRNIADIS, B. "L'Intervention devant la Cour Internationale de Justice", 9 Revue Egyptienne de Droit International (1953)

SOHN, L.B. "Broadening the Advisory Jurisdiction of the International Court of Justice". 77 American Journal of International Law (1983)

SPENCER, J.E. "A Deal for Southern Africa". 45 World Today (1989)

SPICER, M. "Namibia, Elusive Independence". 36 World Today (1980)

[STARKE, J.G.] "International Legal Notes: The Locus Standi of a Third State to Intervene in Contentious Proceedings Before the ICJ". 58 Australian Law Journal (1984)

STONE, H.F. "Dissenting Opinions Are Not Without Value". 26 Journal of the American Judicature Society (1942)

STONE, J. "Non Liqueur and the Function of Law in the International Community". 35 British Year Book of International Law (1959)

SUGIHARA, Takane. "The Advisory Function of the International Court of Justice". 18 Japanese Annual of International Law (1974)

SUH, I.R. "National Judges in Advisory Proceedings of the International Court". 19 Indian Journal of International Law (1979)

SZASZ, Paul C. "Enhancing the Advisory Competence of the World Court". In The Future of the International Court of Justice, ed. Leo Gross, Vol.2. Dobbs Ferry, New York: Oceana Publications, 1976

SZTUCKI, J. "Intervention Under Article 63 of the I.C.J. Statute in the Phase of Preliminary Proceedings: The 'Salvadoran Incident'". 79 American Journal of International Law (1985)

THAKUR, Ramesh. "The Olive Branch Brigades: Peacekeeping in the Middle East". 40 The World Today (1984)

THIRLWAY, H.W.A. "Reciprocity in the Jurisdiction of the International Court". 15 Netherlands Yearbook of International Law (1984)

TOMMER, Yehonathan. "Mr. Begin's Peace Plan: The Domestic Reaction". 34 The World Today (1978)

TORNARITIS, Criton G. "The Review of the Role of the International Court of Justice." 24 Revue Hellenique de Droit

International (1971)

URQUHART, Brian E. "United Nations Peace Forces and the Changing United Nations: An Institutional Perspective". 17 International Organisation (1963)

_____. "United Nations Peacekeeping in the Middle East". 36 The World Today (1980)

VALI, F.A. "The Austro-German Customs Regime Before the Permanent Court with Reference to the Proposed Federation of Danubian States". 18 Transactions of the Grotius Society (1932)

VALLAT, Sir F. "The Function of the International Court of Justice in the World Community". 2 Georgia Journal of International and Comparative Law (1972)

VIRALLY, M. "Sources of International Law". In Manual of Public International Law, ed. M. Sorensen. London: Macmillan & Co., 1968.

VISSCHER, C. de. "Les Avis Consultatifs de la Cour Permanente de Justice Internationale". 26 ADIRC (1929)

VON DER HEYDTE, F.A. "Le Role de l'Individu en Droit Internationale". 107 Academie de Droit International Recueil des Cours (III) (1962)

WALDOCK, Claud Humphrey Meredith. "General Course on Public International Law". 106 Académie de Droit International Recueil des Cours (1962)

WEISS, Edith B. "Reciprocity and the Optional Clause", in Lori F. Damrosch (ed.), The International Court of Justice at a Crossroads. Dobbs Ferry, New York: Transnational Publishers, 1987.

WEISSBERG, G. "Role of the International Court of Justice in the United Nations System: The First Quarter Century". In The Future of the International Court of Justice, ed. Leo Gross. Vol.1, Dobbs Ferry, N.Y.: Oceana Publications, 1976

WENG, Byron S. "Communist China's Changing Attitudes Toward the United Nations". 20 International Organisation (1966)

WHETTEN, Lawrence L. "Changing Perceptions About the Arab-Israeli Conflict and Settlement". 34 The World Today (1978)

WIENER, F.B. "The Supreme Court's New Rules". 68 Harvard Law Review (1954)

WONG, B.S. "Communist China's Changing Attitudes Toward the United Nations". 20 International Organisation (1966)

WOOLDRIDGE, F. "The Advisory Opinion of the International Court of Justice in the Western Sahara Case". 8 Anglo-American Law Review (1979)

WOON, S.C. "Judicial Review of Administrative Tribunal Judgments", in Buergetal (ed. Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn. Kehl, West Germany: Engel, 1984

WRIGHT, Q. "Legal Positivism and the Nuremberg Judgment." 42 American Journal of International Law (1948)

_____. "The Law of the Nuremberg Trial". 41 American Journal of International Law (1947)

WUHLER, N. "Monetary Gold Case", in: Bernhardt (ed.), Encyclopedia of Public International Law [Instalment 2 (1981)]

