RECENT DEVELOPMENTS IN THE INTERNATIONAL COURT OF JUSTICE (1987-1998)

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I. INTRODUCTION: THE INTERNATIONAL COURT OF JUSTICE

This exposé discusses the judicial activity of the International Court of Justice (ICJ) between 1987 and 1998.[1] It starts with a description of the Court as a judicial institution and explains the establishment of ICJ jurisdiction. After highlighting some judicial statistics, the Court's Judgments on the merits of recent cases are discussed, followed by an analysis of its Judgments on jurisdictional issues. Recent Chamber activity is touched upon briefly, followed by a discussion of certain procedural developments. Finally, an overview is given of the five Advisory Opinions that the Court issued between 1987 and 1998.

A. What Is It?

The ICJ is the principal judicial organ of the United Nations.[2] Its seat is at the Peace Palace in The Hague, the Netherlands. The Court is governed by the ICJ Statute, which forms an integral part of, and is annexed to, the United Nations Charter of August 1945. The latter feature constitutes the main difference with its predecessor, the Permanent Court of International Justice (PCIJ), whose Statute entered into force in 1921. Although the PCIJ, the world's first permanent judicial body, was formed under the auspices of the League of Nations, it never became an official part of the League. It was dissolved soon after the end of World War II and was replaced with the ICJ.

The ICJ is composed of 15 "Members" from different countries who are elected to nine-year terms by the General Assembly and Security Council voting simultaneously but separately. Elections are held in New York City every three years for one-third of the 15 seats on the Court. The composition of the Court is meant to reflect the regional distribution of seats on the Security Council, which means that the five permanent members of the United Nations are always represented on the Court. In addition, any state party in proceedings before the Court that has no judge of its nationality represented on the bench has the right to designate a judge *ad hoc* to sit for the purpose of that particular case.[3] This means that the Court may be composed of up to 17 judges.[4]

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1. This contribution is based in large part on my recent book on this topic. *See* PETER H.F. BEKKER (ED.), COMMENTARIES ON WORLD COURT DECISIONS (1987-1996) (Kluwer Law International, ISBN 90-411-0558-1 (1998)).
2. UN CHARTER Art. 92; ICJ STATUTE Art. 1.
3. ICJ STATUTE Art. 31. It was thought that the participation of a "national" judge would assist the Court in assessing the particularities of the legal systems involved in cases before it.
4. For the composition of the Court since 1987, see Bekker, *supra* note 1, at 273-276.

B. What Does It Do?

According to the ICJ Statute, the main instrument to govern the Court's functioning, the ICJ has two functions: contentious and advisory. Under its contentious jurisdiction, the Court has competence to decide in accordance with international law such legal disputes as are submitted to it by sovereign states.[5] Article 38 of the Statute provides that the Court is to decide in accordance with international treaties and conventions in force, international custom as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations, and, as subsidiary means, judicial decisions and the teachings of the most highly qualified scholars. Pursuant to the Court's advisory jurisdiction, it may issue non-binding opinions at the request of any of 20 organs and agencies within the United Nations system.[6]

C. How Does It Get Jurisdiction?

Within the sphere of the Court's contentious jurisdiction, there are two elements of jurisdiction, both of which must be satisfied in order for the Court to have jurisdiction.

First of all, there must be jurisdiction *ratione personae*. This relates to the notion of standing before the Court which is reserved to sovereign states.[7] By means of their membership of the United Nations, all UN member states are *ipso facto* parties to the ICJ Statute and automatically have standing before the Court. In addition, non-member states who become parties to the ICJ Statute have standing.[8] Finally, states may deposit a declaration with the ICJ Registrar accepting the Court's jurisdiction and may thereby gain access to the Court's mechanism of binding third-party dispute settlement.

Second, there must be jurisdiction *ratione materiae*. Given that standing before the Court is restricted to states, to which the fundamental principle of sovereign equality applies, the potential litigants before the Court must manifest their consent to accept its jurisdiction. Such consent may be expressed in several ways.

First, two states may conclude a special *ad hoc* treaty -called "Special Agreement"- by which they submit their dispute to the Court jointly.[9]

Second, hundreds of treaties, both bilateral and multilateral, contain so-called jurisdictional or compromissory clauses whereby any state party to the treaty in question may submit to the Court a dispute with another state party concerning the application or interpretation of any provision of the treaty.

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5. ICJ STATUTE Art. 38.
6. ICJ STATUTE Arts. 65-68; UN CHARTER Art. 96.
7. *Id.* Art. 34.
8. Currently, this applies to Nauru and Switzerland.
9. ICJ STATUTE Art. 36, para. 1.

Third, through the so-called "Optional Clause" system laid down in the ICJ Statute, states may deposit with the UN Secretary-General in New York a declaration whereby they accept the Court's jurisdiction as compulsory in the event of a dispute with another state having submitted a similar declaration.[10] Although this approaches the domestic system of "compulsory" jurisdiction to which the citizens of any state are automatically subject, the principle of reciprocity causes that any state litigant may invoke the reservations attached to such a declaration by the other litigant. Consequently, the protective shield of reservations attached to most Optional Clause declarations has come to diminish the effectiveness of such declarations.

Finally, through the notion of *forum prorogatum* (delayed jurisdiction) the Court may obtain jurisdiction where one state institutes proceedings against another state and the state named as defendant, not having accepted jurisdiction at the time proceedings were instituted against it, subsequently accepts the invitation to be sued. In the history of the Court, this has been attempted several times, but has never worked.

Even if there is jurisdiction *ratione personae* and *ratione materiae*, there is an additional formal requirement that needs to be satisfied in order for the Court to entertain a case, namely that of "seisin." This means that, independently of the basis of jurisdiction invoked by the plaintiff (called "Applicant") against the defendant (called "Respondent"), there must subsequently be a valid procedural act instituting proceedings before the Court.[11] Seisin relates to procedure and dictates the further stages of the proceedings. Seisin may be joint or unilateral. Thus, in cases based on a Special Agreement, proceedings must be instituted by the notification of a Special Agreement describing the subject of the dispute and the parties thereto. In Special Agreement cases, both parties file a Memorial, a Counter-Memorial and sometimes a Reply before the case is ready for hearing. Unilateral seisin is accomplished by filing in the ICJ Registry a document called "Application" that must describe the name of the state against which proceedings are instituted, the subject of the dispute, the basis of jurisdiction and the facts and grounds upon which the Applicant bases its case. This modality of seisin is reserved for cases based on Optional Clause declarations and jurisdictional clauses in bilateral or multilateral treaties. In Application cases, the Applicant files a Memorial, followed by a Counter-Memorial of the Respondent. If the parties so request or if the Court deems it necessary, the Applicant files a Reply and the Respondent files a Rejoinder before the case is ready for hearing.

The issue of the jurisdiction of the Court, which is central in almost all of the proceedings in The Hague, has developed into a technical branch of public international law.

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10. *Id.* Art. 36, para. 2.

11. ICJ STATUTE Art. 40. An exception applies to *forum prorogatum* cases, where jurisdiction follows seisin.

II. RECENT JUDICIAL STATISTICS

Turning to the years 1987-1998, some basic statistics demonstrate how busy the Court has been in comparison with its four prior decades. During this period, 25 cases appeared on the General List of cases, 20 of which were contentious and 5 advisory. The Court's judicial activity resulted in 17 Judgments, 5 Advisory Opinions and 91 Orders disposing of substantive matters (such as requests for the indication of provisional measures of protection) or fixing or extending time limits.

To put this record in its proper historical perspective, some 76 contentious disputes have been brought before the ICJ since 1946. In total, the Court has delivered 66 Judgments and has issued 23 Advisory Opinions since its establishment by the San Francisco Conference in 1945. Twenty-eight (or 37 percent) of the contentious cases have been brought since the 1980s.

1996 is the only year in which the Court issued four decisions, namely 2 contentious (*Genocide* and *Oil Platforms* Cases) and 2 advisory (requests of the World Health Organization and the UN General Assembly). The same is expected to occur in 1998, with the exception that all 1998 decisions will concern Judgments concerning jurisdictional issues in contentious cases (*Libya v. United Kingdom*; *Libya v. United States*; *Cameroon v. Nigeria*; *Spain v. Canada*).

A record of 14 cases appeared on the General List of cases in 1995, with an average of 10 cases between 1987 and 1998. In August 1998, 9 contentious cases and one advisory proceeding were pending.

In 1989 and 1991, a record number of 4 new cases were filed. Only in 1997 were no new cases filed. In 1998, only one contentious case (*Vienna Convention on Consular Relations (Paraguay v. U.S.)*) was filed (on April 3, 1998), followed most recently, on August 10, 1998, by a request for advisory opinion by the Economic and Social Council of the United Nations relating to a difference between the United Nations and Malaysia concerning immunity from legal process of the Special Rapporteur of the UN Commission on Human Rights on the independence of judges and lawyers.

By contrast, during the 1950s, the Court was faced with only 2 or 3 pending cases and with none or one in the 1960s. From mid-1962 to January 1967, in the aftermath of the infamous *South West Africa* cases, where the Court first held that it had jurisdiction, only to dismiss the case in the second phase of the proceedings through the casting vote of President Sir Percy Spender (Australia), no new proceedings were instituted. The same situation applied between early 1967 and late 1971. As of 1972, the number of cases brought before the Court increased steadily. Between 1972 and 1987, new cases averaged from 1 to 3 each year. Between 1979 and 1987, the total number of cases that the Court had to deal with at any particular time stood between 2 and 6.

In total, 34 states parties from all 5 UN "regions" (i.e., Africa, Asia, Eastern Europe, Latin America, and Western European and other states) participated in proceedings before the Court, compared to some 44 states in the

four decades prior to 1987.[12] Most interestingly, fifty percent of the new claimants were first-time litigants, including Eastern European member states of the United Nations (Bosnia-Herzegovina in the *Genocide* case against Yugoslavia, and the *Gabcikovo-Nagymaros Project* case brought jointly by Hungary and Slovakia), Nauru, as a non-member of the United Nations (in the *Phosphates* case against Australia), and Botswana and Namibia in the *Kasikili/Sedudu Island (Botswana/Namibia)* case. In the latter case, there is a happy link with the *South West Africa* episode before the Court, where the Court's pronouncements on the legal status of South West Africa can be said to have contributed to Namibian independence and sovereignty.

Denmark and the United States were the only states that appeared in both capacities of Applicant and Respondent before the Court. Nicaragua had the most appearances as Applicant and the United States was most frequently seen as Respondent in The Hague.

III. RECENT CASES TERMINATED BY A JUDGMENT ON THE MERITS

Between 1987 and 1998, the Court delivered 5 judgments on the merits, of which 2 were rendered by Chambers of the Court.

1. *Elettronica Sicula S.p.A. (United States v. Italy)*[13]

In this first case involving the United States after the *Nicaragua* Judgments,[14] the U.S. filed its unilateral Application on February 6, 1987. The Application alleged violations of the U.S.-Italian Treaty of Friendship, Commerce and Navigation of 1948. The US claimed that the Italian authorities had prevented two U.S. corporations, Raytheon and a subsidiary, from liquidating the assets of their wholly-owned Italian subsidiary ELSI, an electronic components manufacturer in Palermo. The Italian authorities opposed Raytheon's liquidation plan and proceeded to ELSI's requisition. ELSI then went into bankruptcy, which the U.S. alleged was caused by the requisitioning. The U.S. asked $12 million in compensation.

Italy consented to the U.S. request that the case be heard by a five-member chamber.

On July 20, 1989,[15] the Chamber held, 4-1 (U.S. Judge Schwebel dissenting), that no reparations were owed by Italy to the U.S. because Italy had

12. *See* Bekker, *supra* note 1, at 283-285, for an overview of the states parties to cases between 1987 and 1996, divided by region.
13. This case is described by Terry Gill in Bekker, *supra* note 1, at 75.
14. *Military and Paramilitary Activities in and againt Nicaragua (Nicar. v. US)*, Judgment, Jurisdiction and Admissibility, 1984 ICJ Rep. 392 (Nov. 26) and *id.*, Merits, 1986 ICJ Rep. 14 (27 June).
15. 1989 ICJ Rep. 15.

not interfered with Raytheon's right under the FCN Treaty to manage and control its former Italian subsidiary or its right to own immovable property in Italy. The Chamber also held that Italy had not expropriated Raytheon's property in Italy without compensation and that Italy had not acted arbitrarily or discriminatorily toward Raytheon.

2. *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*[16]

This was only the second instance in the Court's history that a state requested the ICJ to overturn an international arbitral award.[17]

This was essentially a case of bad drafting of an arbitration agreement where one party sought to fight the consequences by seeking to overturn the award on technical grounds. Guinea-Bissau sought a declaration, not by way of appeal but as a *recourse en nullité*, that the arbitral award was null and void for lack of a real majority (President Barberis' declaration allegedly contradicted and invalidated his vote) and because the tribunal had failed to answer the second of two questions put to it relating to delimitation of the maritime area as a whole by a single line on a map.

On November 12, 1991, the Chamber ruled that the award was valid and binding on both parties.[18]

3. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)*[19]

This case was decided by a five-judge chamber including President José Sette-Camara (Brazil) and two non-ICJ members.

A Special Agreement of 1986 between El Salvador and Honduras requested: (1) delimitation of six portions of their land frontier; (2) determination of the legal status of certain islands in the Gulf of Fonseca; and (3) determination of the legal status of the waters of the Gulf of Fonseca and related maritime spaces located on the Pacific coast of Central America and bordered by El Salvador, Honduras and Nicaragua, all former members of the Spanish Captaincy-General of Guatemala.

A 100-hour "soccer war" erupted on July 14, 1969, and the OAS was called upon to mediate a cease-fire. The General Treaty of Peace of October 30, 1980, provided for ICJ jurisdiction.

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16. This case is described by Catharine Hartzenbusch in Bekker, *supra* note 1, at 117.
17. The Court first dismissed such a request in 1960 in *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)* (1960 ICJ Rep. 192 (Nov. 18)), the difference being that in 1991 the Court had to actually examine the internal proceedings of the arbitral tribunal.
18. 1991 ICJ Rep. 53.
19. This case is described by Gideon Rottem in Bekker, *supra* note 1, at 141.

In its 400-plus-page decision of September 11, 1992,[20] the Chamber reaffirmed the *uti possidetis juris* principle providing for respect for the territorial boundaries at independence, in this case from Spain in 1821. The Chamber also dealt with the parties' arguments and evidence based on "effectivités," i.e., the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period. The Chamber granted Honduras access to the Pacific Ocean and awarded it two-thirds of the land territory in dispute. Interestingly, it held that its Judgment was not *res judicata* for Nicaragua as intervening non-party.[21]

4. *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*[22]

For the first time in a maritime boundary case, jurisdiction was based on the Court's compulsory jurisdiction in a case involving two parties that had ratified the 1958 Geneva Convention on the Continental Shelf. The Court was faced with the task of carrying out a maritime boundary delimitation between Greenland (part of the Kingdom of Denmark) and the small island of Jan Mayen (part of the Kingdom of Norway).

In its Judgment of June 14, 1993,[23] the Court established a boundary line located between the 200-nautical-mile limit drawn from the coastline of Greenland, corresponding to the Danish claim, and the equidistant or median line claimed by Norway. The Court rejected the equidistant line that it adopted provisionally, given the substantial disparity in length of the relevant coastlines found to be a special circumstance/relevant circumstance that could lead to a manifestly inequitable result under the law of the sea. Only the judge *ad hoc* designated by Denmark dissented.

5. *Territorial Dispute (Libya/Chad)*[24]

This dispute, which the Court treated as a boundary rather than a territorial dispute, was referred to the Court in 1990. It was triggered by Libyan occupation of the oil-rich "Aouzou Strip" in Chad since 1973. Predominantly, this was a case of straightforward treaty interpretation. It constituted the first application of the "Trust Fund to Assist States in the Settlement of Disputes through the

20. 1992 ICJ Rep. 351.
21. According to Art. 59 of the ICJ Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case." Hence, there is no formal rule of *stare decisis*, or binding precedent, in the International Court.
22. This case is described by Jonathan Charney in Bekker, *supra* note 1, at 160.
23. 1993 ICJ Rep. 38.
24. This case is described by Liz Heffernan and Conor McAuliffe in Bekker, *supra* note 1, at 173.

International Court of Justice" established by the UN Secretary-General in 1989.[25]

In its Judgment of February 3, 1994,[26] the Court, by 16 votes to 1 (Judge *ad hoc* Sette-Camara dissenting), acceded almost entirely to Chad's claims and upheld the boundary established by the 1955 Treaty of Friendship and Good Neighbourliness between France and Libya. It also indicated the exact location of the boundary. The Court declined to consider Libya's arguments concerning the rights of indigenous peoples.

This case is a tremendous success from the point of view of voluntary compliance and enforcement of the Court's decision.[27]

IV. RECENT DECISIONS UPHOLDING JURISDICTION

The total number of Optional Clause declarations has increased from 47 out of 159 UN member states in 1987 to 62 out of 185 member states in 1996. This means that currently only about 30 percent of the member states of the United Nations have accepted the Court's Optional Clause jurisdiction. Historically, the bases of jurisdiction in ICJ cases have depended equally on jurisdictional clauses, on Optional Clause declarations and on Special Agreements. However, between 1987 and 1998, most new cases (namely 9) had Optional Clause declarations as their basis of jurisdiction,[28] while 6 were based on jurisdictional clauses[29] and only 4 relied on Special Agreements.[30]

Between 1987 and 1998, the Court delivered 6 Judgments rejecting preliminary objections to the Court's jurisdiction and/or the admissibility of the

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25. *See* Peter H.F.Bekker, *International Legal Aid in Practice: The ICJ Trust Fund*, 87 Am.J.Int'l L. 659 (1993).
26. 1994 ICJ Rep. 6.
27. *See* Bekker, *supra* note 1, at 23.
28. *Elettronica Secula, S.p.A. (ELSI) (United States v. Italy), Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Certain Phosphate Lands in Nauru (Nauru v. Australia), East Timor (Portugal v. Australia), Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal), Passage through the Great Belt (Finland v. Denmark), Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* and *Fisheries Jurisdiction (Spain v. Canada)*.
29. *Aerial Incident of 3 July 1988 (Iran v. United States), Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom) and (Libya v. United States), Oil Platforms (Iran v. United States)*, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*.
30. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Territorial Dispute (Libya/Chad), Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, and *Kasikili/Sedudu Island (Botswana/Namibia)*.

application, thereby upholding its jurisdiction. They are described briefly below.

1. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*[31]

Nauru's Application of May 19, 1989, sought a declaration that Australia was obligated to make restitution or reparation to Nauru for damage suffered as a result of Australia's failure to remedy the environmental damage it had allegedly caused to Nauru in the course of its administration of the island, first under the Mandate System of the League of Nations and, from 1947, under the UN Trusteeship System. Nauru claimed that Australia was obliged to rehabilitate the lands that had been mined under Australia's Administering Authority, based on the UN Charter and principles of self-determination and permanent sovereignty over natural resources.

Nauru is an 8.25 square-mile island located in the western Pacific Ocean off the coast of Australia, containing rich deposits of high-grade phosphate (a fertilizer). After World War I, Australia, New Zealand and the United Kingdom signed the Nauru Island Agreement and formed a board of commissioners, the British Phosphate Commissioners (BPC), in which title to the phosphates was vested. In 1967, Nauru gained control over the phosphate industry and it became independent in 1968.

In its Judgment of June 26, 1992,[32] the Court rejected most of Australia's preliminary objections relating to jurisdiction and admissibility. In particular, the Court held that the Trusteeship Agreement did not preclude the Court from considering the responsibility of any one of the three governments involved as commissioners. A finding that the absent parties (UK and New Zealand) were responsible was not a precondition to the Court's consideration of Australia's responsibility.

It may safely be assumed that the Court's decision of June 30, 1995, formed an inducement for the parties to settle the case one year later, so that it could be removed from the General List of Cases by the Court's Order of September 13, 1993.[33]

2. *Genocide (Bosnia-Herzegovina v. Yugoslavia)*[34]

Bosnia's Application of March 20, 1993, alleged violations by Yugoslavia (Serbia and Montenegro) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in the context of the conflict in the Balkan. Yugoslavia filed several preliminary objections, mainly denying the existence of an international dispute.

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31. This case is described by Antony Anghie in Bekker, *supra* note 1, at 131.
32. 1992 ICJ Rep. 240.
33. 1993 ICJ Rep. 322.
34. This case is described by Peter Bekker and Paul Szasz in Bekker, *supra* note 1, at 253.

The Court's Judgment of July 11, 1996, rejected all of Yugoslavia's objections.[35] The Court found that Bosnia was a party to the Genocide Convention by way of state succession. As to Yugoslavia's argument that there was no international dispute, the Court found that the Genocide Convention includes *erga omnes* obligations. The obligation that each state has to prevent and punish the crime of genocide is not territorially limited. Hence, the Court found that it has jurisdiction over a dispute between two sovereign nations concerning alleged breaches of the Genocide Convention and that the Genocide Convention does not exclude any form of state responsibility.

Interestingly, the Court did not consider the issue of jurisdiction *ratione personae* of whether the Federal Republic of Yugoslavia is a member of the United Nations.

3. *Oil Platforms (Iran v. United States)*[36]

This is the first case in the Court's history where the applicant relied exclusively on a compromissory clause of a bilateral treaty to establish ICJ jurisdiction.

Iran's Application of November 2, 1992, alleged breaches of the 1955 Treaty of Amity, Economic Relations and Consular Rights (featured also in the 1980 *Hostages* Case,[37] in which, incidentally, Iran denied the continued existence of the treaty) through attacks by the U.S. Navy on platforms belonging to the National Iranian Oil Co. in the Persian Gulf in 1987 and 1988.

The U.S. filed preliminary objections, mainly claiming that use of force issues are not justiciable under the 1955 Treaty.

In its Judgment of December 12, 1996,[38] the Court, by 14 votes to 2, upheld its jurisdiction. By holding that the Treaty was still in force, the Court essentially accorded Iran the benefit of a judgment in a prior unrelated case (*Hostages*) successfully brought against Iran by the respondent in this case.

The Court rejected the U.S. defense based on a security interests exclusion clause in the Treaty as being a defense on the merits. It based its rejection primarily on a similar finding in the *Nicaragua* case also involving the United States as respondent. The Court was satisfied that a dispute existed as to the interpretation or application of Article X(1) only of the 1955 Treaty. That provision guarantees freedom of commerce and navigation. In the Court's view, the destruction of goods to be exported, or any act capable of affecting their transport and storage, could adversely affect freedom of commerce (the export trade in Iranian oil) guaranteed by the Treaty. The Court also found that matters relating to the use of force are not per se excluded from the reach of the Treaty inasmuch as they affect the parties' obligations thereunder.

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35. 1996 ICJ Rep. 595.
36. For a summary of this decision, see Bekker, *supra* note 1, at 263.
37. *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment, 1980 ICJ Rep. 3 (24 May).
38. 1996 ICJ Rep. 803.

4. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. United Kingdom)

5. *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Libya v. United Kingdom)

On March 3, 1992, Libya filed two separate applications instituting proceedings against the U.K. and the U.S. asserting claims arising from the sanctions imposed upon Libya by the UN Security Council under the sponsorship of the U.K. and the U.S. in the aftermath of the crash of PanAm flight 103 over Lockerbie, Scotland, on December 21, 1988. Libya asked the Court to declare that the respondents have violated the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention).

On February 27, 1998, almost 6 years after Libya instituted proceedings, the Court ruled, by clear majorities, that it has jurisdiction and that the Libyan Application is admissible in both cases.

The respondents denied the existence of a legal dispute between the parties concerning the interpretation or application of the Montreal Convention, because in their view the case concerns a threat to international peace and security resulting from state-sponsored terrorism. But the Court found that a dispute exists as to whether the destruction of the aircraft is governed by the Montreal Convention. The Security Council resolutions on which the respondents relied were adopted *after* Libya's Application was filed and could, therefore, not block the proceedings. The Court also characterized the argument that intervening Security Council resolutions left the Libyan claims without object as being a preliminary objection that was not "exclusively" preliminary.

The Court has not previously had an opportunity in contentious cases to pass on whether it possesses review power over Security Council decisions, an issue that has come up in connection with these cases --and it is not likely to do so in the present instance.

The cases demonstrate the advantage to Libya of a changed court after 6 years: by its 1992 Orders, the Court found that the circumstances of the case were not such as to require the exercise of its power to indicate provisional measures of protection requested by Libya under Article 41 of the Statute. Five of the 16 judges voted against the operative paragraph and 7 appended opinions in 1992. Half of the 6 judges who still remain on the Court and who voted in favor of the Court's jurisdiction in 1998, dissented in 1992.

6. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*

This case was originally filed by Cameroon in 1994 after a series of border

incidents from Lake Chad to the sea and use of armed force by Nigerian troops in connection with Nigeria's invasion of the Bakassi Peninsula during which lives were lost. Cameroon requested a ruling as to sovereignty over the Bakassi Peninsula, confirmation of the land boundary all the way to Lake Chad, and also asked the Court to draw an all-purpose (continental shelf and exclusive economic zone) maritime boundary between the two countries. Jurisdiction was founded on two unreserved Optional Clause declarations filed by both states with the UN Secretary-General.

The maritime point is particularly difficult because of the complex geographical situation in the Bight of Benin (a crowded geographical setting) and in particular by the presence of a large island (Bioko) appertaining to Equatorial Guinea, a state that is not involved in this litigation.

In preliminary objections filed with the Court in December 1995, Nigeria stated that the Court had no jurisdiction over some of the claims made by Cameroon and that the others were inadmissible. On June 11, 1998, the Court ruled, by 14 votes to 3, that it has jurisdiction and that Cameroon's Application is admissible.[39]

When one looks at the Court's recent record on jurisdiction, it becomes clear that the ICJ has dismissed cases only twice in the past 20 years: the dismissal in the *East Timor (Portugal v. Australia)* case[40] remains the only recent instance since the Court's 1978 Judgment dismissing the case concerning the *Aegean Sea Continental Shelf (Greece v. Turkey)*). Perhaps the case concerning *Fisheries Jurisdiction (Spain v. Canada)* will become the first modern case to be dismissed on Canada's preliminary objections when the Court delivers its Judgment at the end of 1998. The issue to be decided in *Fisheries Jurisdiction* is whether the terms of Canada's acceptance of the Court's compulsory jurisdiction, which specifically excludes disputes relating to "conservation and management measures" undertaken on the high seas, are sufficiently broad so as to block Spain's case against Canada. Spain's complaint alleges illegal use of force on the high seas through the arrest of a Spanish-flagged fishing vessel, as well as the general incapability of Canada to undertake such "measures" in international waters.

Based on this remarkable jurisdictional record of the ICJ, is it warranted to speak of judicial activism? The recent *Qatar v. Bahrain* (1994/95), *Oil Platforms* (1996) and *Lockerbie* (1998) cases leave one to wonder how much doubt is required for the Court to decline jurisdiction after considering the intention of the parties to submit themselves to ICJ jurisdiction. At the same time, the continuing effect on the Members of the Court of the *South West Africa* trauma, which left the Court unemployed for several years, should not be underestimated. In addition, the Court's entire mechanism, and in particular its eagerness to offer itself as a partner in preventive diplomacy, was no doubt

39. For a summary of this decision, see 92 Am.J.Int'l L. 751 (1998).
40. 1995 ICJ Rep. 90 (June 30).

material in the discontinuance of seven cases since 1987.[41]

V. CHAMBERS

Significantly, three *ad hoc* chamber cases were pending in 1987, but none have been brought since 1992.[42] This may indicate that the full Court has regained the trust of the international community of states, who seem to prefer a decision of the full Court over that of an arbitration-like body of limited size. This is a clear shift away from the trend that appeared to establish itself in 1987, when the first slate of Chamber cases emerged that gave the parties the enhanced influence in the judicial process that they had been calling for. Despite the most recent record, the Chamber cases that have come to The Hague have proven to be a successful experiment.

In terms of special chambers, the Court announced in 1993 that it had formed a seven-member Chamber for Environmental Matters. However, no cases have been filed with this Chamber since its establishment. Instead, environmental issues have been raised in contentious and advisory proceedings before the full Court.[43]

VI. RECENT PROCEDURAL DEVELOPMENTS

A. Counter-claims

Most importantly, there has been a recent revival of the instrument of counter-claims in the International Court, providing it with an opportunity to develop its jurisprudence on counter-claims as part of the Court's incidental jurisdiction for the first time since 1952.[44]

Yugoslavia submitted counter-claims in 1997 in the *Genocide* case. By its Order of December 17, 1997, the Court, by 13 votes to 1, upheld the Yugoslav counter-claims over the objection of Bosnia. In what was the first instance of the application of paragraph 3 of Article 80 of the Rules of Court (1978 revised

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41. Namely, in 1987, 1991, 1992 (two times), 1993, 1995, and 1996. *See* Bekker, *supra* note 1, at 279-280.
42. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/U.S.)* (1982); *Frontier Dispute (Burkina Faso/Mali)* (1985), *Elettronica Sicula S.p.A. (U.S. v. Italy)* (1987). The last Chamber case, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)* was decided in 1992.
43. *See*, especially, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, 1992 ICJ Rep. 240 (June 26); *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of Sept. 25, 1997; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226 (July 8).
44. For a detailed discussion, see my contribution in 92 Am.J. Int'l L. 508 (1998).

version), the Court pointed out that Article 80 lays down 3 basic conditions: (1) the counter-claim must be made in the counter-memorial of the party presenting the counterclaim as part of that party's submissions; (2) it must come within the Court's jurisdiction; and (3) it must be directly connected with the subject matter of the other party's claim. The Court explained that a counter-claim cannot be used to introduce claims that exceed the limits of its jurisdiction as recognized by the parties. The *Genocide* case focused on the "direct connection" condition, which the Court found to have been fulfilled both in fact and in law.

By its Order of March 10, 1998, the Court, by 15 votes to 1, upheld the counter-claim that the U.S. filed against Iran in the *Oil Platforms* case in 1997. *Oil Platforms* turned on the connection *and* jurisdiction conditions embodied in Article 80(3) of the Rules of Court, both of which were found to have been satisfied.

The Court's recent jurisprudence on counter-claims indicates that the applicant who is faced with a counter-claim by the respondent may assert both lack of connection and lack of jurisdiction against the counter-claimant, but this can be done only at the preliminary stage of the Order ruling on admissibility of the respondent's counter-claim. The two cases also demonstrate that the Court is not likely to allow the parties to state their views in oral proceedings, but that it seems satisfied with their observations made in writing.

B. Non-party intervention

Intervention by a non-party was permitted for the first time in the Court's history in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening)* by a Chamber, relaxing the full Court's jurisprudence imposing severe restrictions on intervention.[45] Non-party intervention has consistently been denied by the full Court, namely in 1981 in the *Tunisia/Libya* case[46] with regard to Malta and in 1984 in the *Libya/Malta* case[47] with regard to Italy. Significantly, the dissenting judges in these full Court cases formed three-fifths of the Chamber. Through its Application for permission to intervene (as a non-party) of November 17, 1989, Nicaragua expressed its interest in the maritime and island disputes between the parties in the main proceeding, as well as its wish to advise the Chamber of its rights and to protect them in the ongoing case. Despite El Salvador's opposition to Nicaragua's application to intervene, a unanimous Chamber permitted Nicaragua to intervene, on the basis of the existence of a limited legal interest of Nicaragua, namely with regard to the status

45. Art. 62 of the ICJ Statute refers to an "interest of a legal nature which may be affected by the decision in the case." The Chamber's decision is discussed by Steven Ratner in Bekker, *supra* note 1, at 101.

46. *Continental Shelf (Tunisia/Libya), Application for Permission to Intervene*, Judgment, 1981 ICJ Rep. 3 (14 April).

47. *Continental Shelf (Libya/Malta), Application for Permission to Intervene*, Judgment, 1984 ICJ Rep. 3 (21 March).

of the waters of the Gulf of Fonseca.

It remains to be seen whether the full Court will have a chance to deal with the issue of non-party intervention in the *Cameroon v. Nigeria* case, if Chad or Equatorial Guinea decide to file an application for permission to intervene.

C. Joinder

Interestingly, the Court has not ordered a formal joinder of the *Lockerbie* cases filed by the same applicant (Libya) against different respondents. Surely, a joinder would have served judicial economy at a time when the Court has been complaining of financial hardship. Both cases brought by Libya arose out of a single set of facts, rely on the same title of jurisdiction, are directed to the same object and assert identical claims and submissions. The Orders and Judgments rendered and pleadings filed over the past six years in the cases demonstrate how identical they are. At the same time, it is understandable from a political perspective that Libya prefers two decisions instead of one. Moreover, the United Kingdom would probably not want to give up its right to have a British judge *ad hoc* (in this case, former President Sir Robert Jennings) participate in the proceedings; in case of a joinder, both respondents would probably be considered parties in the same interest. Hence, instances of joinder in the International Court remain extremely scarce.[48]

D. Working methods

The Court announced on April 6, 1998, that it had revised its working methods to expedite the examination of contentious cases. According to the Court, this revision was necessary due to the major increase in cases and to the budgetary crisis surrounding the United Nations. The revisions are divided between measures concerning the Court and those affecting the parties.

As regards the proposed measures concerning the Court itself, it announced that it intended to abolish the practice of Notes by individual judges setting out their tentative views in the deliberations phase of the proceedings. The Court intends to proceed without Judges' Notes in the preliminary phase of proceedings on the merits involving objections to the Court's jurisdiction or the admissibility of the application. Moreover, when the Court has to adjudicate on two cases concerning its jurisdiction, it will henceforth hear them "back to back" (i.e., in immediate succession), so that work may then proceed on them concurrently. The Court also announced that it plans to give the parties advance

48. The ICJ has ordered a formal joinder of the proceedings in two cases only: *South West Africa* and *North Sea Continental Shelf*. The arguments that dissenting Judges Forster, Gros, Petrén and Ignacio-Pinto advanced in favor of a formal joinder of the *Nuclear Tests* cases all appear to be applicable here. *See* Nuclear Tests (New Zealand v. France), 1973 ICJ Rep. 135, 148, 149, 159 and 163 (Order of June 22).

notice of the Court's intended schedule for the next 3 cases.

As regards the proposed measures concerning the parties, the Court will permit parties in Special Agreement cases to file their written pleadings consecutively, as opposed to simultaneously. Parties are also to present clearer memorials and strictly selected annexes, supply translations, and keep hearings succinct.

VII. RECENT ADVISORY OPINIONS

Between 1987 and 1997, advisory proceedings were instituted five times and were issued in 1987, 1988, 1989 and, finally, 1996 (the only year besides 1950 and 1956 that the ICJ issued more than one Advisory Opinion in any single year):

1. *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal* ("Yakimetz Case")[49]

This is the last United Nations employment case to have come before the Court through the Committee on Application for Review of Administrative Tribunal Judgements. The Court's jurisdiction was terminated by the UN General Assembly with effect from January 1, 1996. In the *Yakimetz* case, the Court's opined on May 27, 1987, that UNAT had not failed the relevant tests under UNAT's Statute and that UNAT had not erred in the matter.[50]

2. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* ("PLO Mission Case")[51]

The background to this case was formed by the U.S. Anti-Terrorism Act of 1988, which called for the closing of the Observer Mission to the United Nations of the Palestine Liberation Organization (PLO). Subsequent to the filing of the General Assembly's request for an advisory opinion, the U.S. Justice Department, per the U.S. Attorney-General, filed a suit in the District Court for the Southern District of New York to close the PLO Mission.[52] On April 26, 1988,[53] the Court rendered a unanimous opinion in a record time of just 8 weeks, holding that there existed a dispute between the United Nations and the U.S. concerning the application of the Headquarters Agreement and that such dispute had not been settled by negotiations, so that the parties should proceed to arbitration in

49. This case is described by John King Gamble in Bekker, *supra* note 1, at 37.
50. 1987 ICJ Rep. 18.
51. This case is described by Paul Szasz in Bekker, *supra* note 1, at 53.
52. The U.S. district court later found that closing the PLO Mission would violate the Headquarters Agreement. *See* judgment of June 29, 1988, 695 F. Supp. 1456 (1988), 82 ILR 282 (1990).
53. 1988 ICJ Rep. 12.

accordance with Section 21 of the Headquarters Agreement. The Court rejected the U.S. defense that international law was irrelevant to the decision it was intent on taking (its domestic courts permitting).

3. *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* ("Mazilu Case")[54]

These proceedings constituted the first request for advisory opinion by the Economic and Social Council of the United Nations. The background to this case was formed by the circumstance that Mr. Dumitru Mazilu, a Romanian citizen who was a special rapporteur of the UN Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities, did not appear at a meeting in Geneva and did not present his report due to actions by the Romanian Government, consisting of interference with his UN activities and denial of a travel permit.

Romania argued that the 1946 Convention on the Privileges and Immunities of the United Nations does not equate rapporteurs with experts on mission and that, in any event, privileges and immunities do not apply to the country where the expert is permanently resident.

On December 15, 1989,[55] the Court held, unanimously, that Section 22 of the 1946 Convention was applicable to Mr. Mazilu, pointing to the fundamental division between state representatives, UN officials, and experts on mission (including Special Rapporteurs). The Court ruled that matters concerning experts on mission such as Mr. Mazilu are within the sole discretion of the United Nations, not Romania.

Similar issues are likely to be addressed in the recent advisory proceedings instituted on August 10, 1998, by the Economic and Social Council in the case of Mr. Dato' Param Cumaraswamy, a Malaysian jurist who was appointed Special Rapporteur on the independence of judges and lawyers in 1994 by the UN Commission on Human Rights and who faces four lawsuits in Malaysia for public statements made in his official capacity.[56]

4. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[57]

On July 8, 1996,[58] the Court ruled, by eleven votes to three, that it was unable to comply with a request submitted by the World Health Organization on the following question: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?" The Court

54. This case is described by Terry Gill in Bekker, *supra* note 1, at 87.
55. 1989 ICJ Rep. 177.
56. *See* ICJ Communiqué No. 98/26 (Aug. 10).
57. For a summary of this decision, see Bekker, *supra* note 1, at 247.
58. 1996 ICJ Rep. 66.

based its first-ever dismissal of advisory jurisdiction on the consideration that the request did not relate to a question arising within the scope of the activities of the WHO as required by Article 96, paragraph 2, of the UN Charter. In the Court's view, the request related not to the effects of the use of nuclear weapons on health but, rather, to the legality of the use of such weapons in view of their health and environmental effects, which is outside the scope of the WHO's functions described in the WHO Constitution. The Court stated that questions concerning the use of force, the regulation of armaments, and disarmament are within the exclusive competence of the United Nations and outside that of the specialized agencies.

5. *Legality of the Threat or Use of Nuclear Weapons*[59]

On July 8, 1996,[60] the Court issued another advisory opinion in reply to a request from the UN General Assembly relating to the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

The Court found that neither customary nor treaty law prohibits or authorizes the threat or use of nuclear weapons, but it must be compatible with the UN Charter and with the international law applicable in armed conflict. The latter includes compliance with the necessity and proportionality conditions. In this context, the Court also stressed the importance of respect for the environment.

By 8 votes to 7, through the President's casting vote (the first time in advisory proceedings) the Court held that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law, but in view of the current state of international law and the facts before the Court, it found that it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a state would be at stake. Hence, the Court expressed its view as to the applicability of the law relating to nuclear weapons, but avoided a position on the conclusions to be drawn from such applicability.

59. For a summary of this decision, see Bekker, *supra* note 1, at 233.
60. 1996 ICJ Rep. 226.