INTERNATIONAL COURT OF JUSTICE

INTERPRETATION AND APPLICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(THE STATE OF QATAR *v.* THE UNITED ARAB EMIRATES)

WRITTEN STATEMENT OF THE STATE OF QATAR CONCERNING THE PRELIMINARY OBJECTIONS OF THE UNITED ARAB EMIRATES

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VOLUME II

30 AUGUST 2019

VOLUME II

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Annex 7 Human Rights Committee, *General Comment No. 18: Non-discrimination*, document HRI/GEN/1/Rev.9 (10 November 1989)

Annex 8 Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, document E/C.12/GC/29 (2 July 2009)

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Annex 9 CERD Committee, *Summary Record of the Two Hundred and Twelfth Meeting*, document CERD/C/SR.212 (20 August 1974)

Annex 10 CERD Committee, *General Recommendation No. 29 on article 1, paragraph 1, of the Convention (Descent), Sixty-first Session* (2002)

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Annex 11 International Labour Conference, *Discrimination in the field of employment and occupation*, 40th session, Geneva, 1957, Report VII(1)

Annex 12 International Labour Conference, *Discrimination in the field of employment and occupation*, 42nd session, Geneva, 1958, Report IV(2)

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Annex 13 H. Lauterpacht, *The Development of International Law by the International Court* (Frederick A. Praeger, 1958), pp. 158–172

Annex 14 P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), pp. 484–502

Annex 15 P. Palchetti, "Responsibility for breach of provisional measures of the ICJ: between protection of the rights of the parties and respect for the judicial function", *Rivista di Diritto Internazionale* 100 (2017)

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Annex 20 A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), pp. 712–798, 963–1006, 1135–1202, 1617–1650

Other Documents

Annex 21 Chambers Dictionary, Definition of "national", https://chambers.co.uk

Annex 272-A Affidavit, State of Qatar Compensation Claims Committee, dated 21 August 2019 (with certified translation), and Exhibit A

Annex 1

Letter from Abdullah Saad Al-Buainain, Director of the Department of Nationality and Travel Documents, Qatar Ministry of Interior, to the Director of Public Security, *Statistics of Qataris Born in the State of Qatar and Abroad* (15 July 2019) (with certified translation)

Ministry of Interior
Department of Nationality &
Travel Documents

[Department Seal]

Ministry of Interior
Department of Nationality &
Travel Documents

No.: N D/00/688

Date: 11/12/1440H
Corresponding to: 7/15/2019G

To: The Esteemed Director of Public Security
Greetings,

Re: Statistics on Qataris born in the State of Qatar and Abroad

Please note the statistics on Qatari citizens born in the State of Qatar and abroad are taken from the automated system and are valid up to 6/27/2019, are as follows:

Place of Birth	**Percentage**
Inside Qatar	87.39%
Outside Qatar	12.61%

This is for your information, please review.

Sincerely,

[QR code]
Brig. Gen. [signature]
Abdullah Saad Al-Buainain
Director, Department of Nationality & Travel Documents

Annex 1

Ministry of Interior
Dept. of Nationality & Travel Document

وزارة الداخلية
ادارة الجنسية ووثائق السفر

الرقم : ج و/ ٠٠/ ٦٨٨

التاريخ : ١٤٤٠/١١/١٢هـ
الموافق ٢٠١٩/٠٧/١٥م

سعادة / مدير الأمن العام المحترم

السلام عليكم ورحمه الله تعالى وبركاته ...

الموضوع : إحصائية بالقطريين المولودين داخل دولة قطر وخارجها

Statistice Of Qataris Born In State Of Qatar And Abroad

يرجى العلم بان إحصائية المواطنين القطريين المولودين داخل دولة قطر وخارجها ومن واقع النظام الآلي حتى تاريخ ٢٠١٩/٠٦/٢٧م . وهي حسب التالي :

Please Note That The Qatari Citizens Born Inside & Outside Qatar, From The Automated System Until 27/06/2019, As Follows :

مكان الميلاد Place Of Birth	النسبة Percentage
داخل قطر Inside Qatar	87.39 %
خارج قطر Outside Qatar	12.61 %

للتكرم بالاطلاع والعلم .

وتفضلوا بقبول فائق الاحترام والتقدير ...

العميد /
عبدالله سعد البوعينين
مدير إدارة الجنسية ووثائق السفر

هاتف: ٤٤٨٩٠٨٨٨ (٩٧٤+) - فاكس : ٤٤٨٦٣١٥٨ (٩٧٤+) - ٤٤٨٧٣٩٣٢ (٩٧٤+) - ص.ب : ١٢٢ الدوحة - قطر
Fax : (+974) 44863158 - (+974) 44873932 - P.O.

LIONBRIDGE

STATE OF NEW YORK)
)
) ss
COUNTY OF NEW YORK)

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Arabic into English of the attached Letter, dated July 15, 2019.

Laura Musich, Managing Editor
Lionbridge

Sworn to and subscribed before me
this 15th day of August, 2019.

LYNDA GREEN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01GR6205401
Qualified In New York County
My Commission Expires 05-11-2021

Annex 2

United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *First Session, Summary Record of Fifth Meeting*, document E/CN.4/Sub.2/SR.5 (27 November 1947)

UNITED NATIONS | NATIONS UNIES | UNRESTRICTED

ECONOMIC AND SOCIAL COUNCIL | CONSEIL ECONOMIQUE ET SOCIAL

E/CN.4/SUB.2/SR/5
27 November 1947

ORIGINAL: ENGLISH

COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

FIRST SESSION

SUMMARY RECORD OF FIFTH MEETING

held at the Palais des Nations, Geneva, on Thursday, 27 November 1947 at 10 a.m.

Present:

Chairman:	Mr. E.E. Ekstrand	(Sweden)
Vice-Chairman:	Mr. Herard Roy	(Haiti)
Rapporteur:	Mr. Nisot	(Belgium
Members:	Mr. W.M.J. McNamara	(Australia)
	Dr. C.H. Wu	(China)
	Mr. Samuel Spanien	(France)
	Mr. M.R. Masani	(India)
	Mr. Rezazada Shafaq	(Iran)
	Mr. A.P. Borisov	(Union of Soviet Socialist Republics)
	Miss Elizabeth Monroe	(United Kingdom)
	Mr. Jonathan Daniels	(United States of America)
Specialized Agencies:	Mr. Rodolphe Lopes	(International Labour Office)
	Mlle M.L. Barble	(I.R.O.)
Non-governmental Organizations:	Mr. Bienenfeld) Mr. Riegner)	World Jewish Congress
	Mr. A.G. Brotman	Co-ordinating Board of Jewish Organizations for Consultation with the Economic and Social Council.
Secretariat:	(Prof. J.P. Humphrey (Mr. Edward Lawson (Mr. Emile Giraud (Mr. A.H. Hekimi	

RECEIVED
UNITED NATIONS

ITEMS OF THE AGENDA

6. Examination of Terms of Reference
7. Prevention of Discrimination
8. Protection of Minorities.

THE CHAIRMAN referred to the suggestions (E/CN.4/Sub.2/21) submitted by Mr. BORISOV (Union of Soviet Socialist Republics), whom he asked for any further comments.

Mr. BORISOV (Union of Soviet Socialist Republics) said that he would prefer first to hear the remarks of his colleagues.

Mr. SHAFAQ (Iran) asked Mr. BORISOV (Union of Soviet Socialist Republics) whether his suggestion was meant to be included in an Article or in the Preamble. If it was meant to be included in an Article, he felt that most of the points had already been expressed in other Articles, for example Articles 13, 16 and 34.

Mr. BORISOV (Union of Soviet Socialist Republics) said that if this was the only question he had no objection to his text being included in the Preamble.

Miss MONROE (United Kingdom) said that she agreed with Mr. SHAFAQ (Iran) that most points were already covered, for example, the first phrase was already included in Article 5. Paragraph 2 was not quite suitable either for a Preamble or for a Declaration, in her opinion.

Mr. NISOT (Belgium) said that he felt that the substance of Mr. BORISOV's suggestion did not belong to Article 6 but to other Articles, and that it therefore should be studied later.

Mr. MASANI (India) pointed out that the first phrase of Mr. BORISOV's suggestion already appeared in Article 5 of the Drafting Committee's suggestions. He felt that it should not be considered in connection with Article 6.

He agreed with the substance of the second paragraph but felt that it could not be considered in connection with Article 6.

Mr. McNAMARA (Australia) agreed with Mr. MASANI (India) that paragraph 2 was substantially different from paragraph 1. As to paragraph 1, he suggested that the proposal of Mr. DANIELS (United States of America) should be made a motion, i.e. that three new categories be added to Article 6.

Mr. DANIELS (United States of America) said that he would make no motion on this.

Mr. McNAMARA (Australia) said he would make a formal motion himself.

Mr. SPANIEN (France) said that the two paragraphs were quite different. Paragraph 1 dealt with principles; paragraph 2 with the method of their application. As to paragraph 1, he was ready to agree to the expansion of Article 6 as suggested, subject to re-wording. As to paragraph 2, he did not agree with the opinion of Miss MONROE (United Kingdom) as implementation was a duty of the Sub-Commission. Such a clause, however, should not be included either in the Preamble or the Articles of the proposed Declaration but among other safeguards in the Convention.

The CHAIRMAN said that in his opinion the suggestion of Mr. BORISOV (Union of Soviet Socialist Republics) certainly had elements referring to Article 6. He therefore suggested that it be considered at once.

Mr. WU (China) supported the Motion by Mr. McNAMARA (Australia), and suggested that paragraph 1 be altered to read as follows:-

"Everyone is entitled to the rights and freedoms set forth in this Declaration, without distinction of any kind as to race, sex, language, religion, property status, national or social origin, political or other opinion." He was in sympathy with paragraph 2 and suggested that it be discussed subject to the reservation made by Miss MONROE (United Kingdom).

Miss MONROE (United Kingdom) supported the Motion by Mr. McNAMARA (Australia), which had been seconded by Dr. WU (China). As to paragraph 2, she said that Mr. SPANIEN (France) may have misunderstood her. She had said that in her opinion this text should not appear in either the Preamble or Articles of the proposed Declaration but in the proposed Convention.

Mr. SHAFAQ (Iran) supported the joint motion stated by Dr. WU (China) and Mr. McNAMARA (Australia).

Mr. DANIELS (United States of America) also supported their Motion.

The CHAIRMAN suggested that the order of the wording might be changed to read ".... political or other opinion, property status, national or social origin."

Mr. BORISOV (Union of Soviet Socialist Republics) asked if it was considered that the second part of paragraph 1 should go into Article 6. As to the first part he thought that the entire phrase ".... equal rights in the economic, cultural, social and political life" should all be included in the body of the proposed Declaration as well as in the Preamble.

Mr. DANIELS (United States of America) said that in his opinion Article 6 was not the place to establish specific rights, but merely to lay down the entitlement of all persons to general rights.

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Dr. WU (China) asked the Chairman to put the motion of Mr. McNAMARA (Australia) to the vote, and said that Mr. BORISOV (Union of Soviet Socialist Republics) had made a good point but it was covered by Article 2.

The CHAIRMAN said he would put the additions proposed earlier to the vote and then return to proposals made by Mr. BORISOV (Union of Soviet Socialist Republics).

Mr. BORISOV (Union of Soviet Socialist Republics) agreed that the other Articles dealt broadly with the issues but said that there should be a complete and substantial list of human rights in Article 6, as suggested by the Drafting Committee.

Mr. ROY (Haiti) made the new proposal of adding the word "any" before "opinion".

Mr. DANIELS (United States of America) suggested adding the word "all" before "rights and freedoms".

Miss MONROE (United Kingdom) thought that Mr. ROY (Haiti) meant "without distinction of any kind." She agreed with the amendment of Mr. DANIELS (United States of America).

The CHAIRMAN said that he appreciated that Mr. BORISOV (Union of Soviet Socialist Republics) wished the suggestions of the Sub-Commission to be as complete as possible. However, he pointed out that the first words of Mr. BORISOV's text already appeared in Article 5, and that it would be extraordinary if both Articles started in the same way. He suggested that the members vote on the motion made by Mr. McNAMARA (Australia) as seconded by Dr. WU (China) and amended by Mr. ROY (Haiti).

Mr. BORISOV (Union of Soviet Socialist Republics) did not agree with the Chairman. Rights had no meaning, he said, unless they were linked with Law. He agreed that the first

Annex 2

part of his text already appeared in Article 5, but said that in his opinion his revised text was more progressive and went further in describing the fields of full Rights. He added that what the common man needed was equal rights, and that this should be covered by a full formula.

Mr. NISOT (Belgium) said that the proposal by Mr. McNAMARA (Australia) was independent of the first part of the suggestion of Mr. BORISOV, which clearly belonged to Article 5 and not Article 6.

The CHAIRMAN suggested that members vote on the whole of the amendment of Mr. BORISOV (Union of Soviet Socialist Republics).

Mr. ROY (Haiti) asked for a division of the amendment and for a vote to be taken on the first and second halves. Part I, he felt, belonged to Article 5, and part II was covered by the motion of Mr. McNAMARA.

Mr. NISOT (Belgium) said it did not seem to him possible to divide the sentence into two parts.

Mr. BORISOV (Union of Soviet Socialist Republics) proposed that paragraph I be divided into three parts:

1. "All people are equal before the law."
2. "Shall enjoy equal rights in the economic, cultural, social and political life."
3. "Irrespective of their race, sex, language, religion, property status, national or social origin."

There was no objection to such a division.

The CHAIRMAN said that he did not agree with Mr. NISOT (Belgium) that the motion of Mr. McNAMARA (Australia) was independent as he considered it an amendment of Mr. BORISOV's motion. He called for a vote on the motion.

Mr. SPANIEN (France) raised a question of translation of the French text. He suggested omitting the words "national or social" if Mr. BORISOV (Union of Soviet Socialist Republics) agreed. This would leave "origin" to cover everything.

Mr. BORISOV (Union of Soviet Socialist Republics) said that in his opinion "origin" did not necessarily include "national origin". The U.S.S.R. for example had various nationalities of the same origin. As to part II, with the inclusion of "all" as suggested by Mr. DANIELS (United States of America) there appeared substantial agreement by the members. As to part III, he felt that the vote should not be delayed. He felt that the majority of members agreed that it concerned Article 6. He again suggested voting on his text in three parts.

Mr. NISOT (Belgium) asked the exact meaning of "national origin."

Mr. McNAMARA (Australia) replied that in his view it was synonymous with nationality, but that it might also have a wider meaning.

Miss MONROE (United Kingdom) said that she considered the words not synonymous. She felt that the word "origin" must remain.

Mr. DANIELS (United States of America) asked if members would have an opportunity to vote for the joint proposal of Mr. McNAMARA (Australia) and Dr. WU(China).

The CHAIRMAN said that the joint amendment related to part 3 of Mr. BORISOV'S proposal and that the Sub-Commission would deal with parts 1 and 2 first, and then vote on the Australian proposal as amended by Mr. DANIELS (United States of America).

Mr. McNAMARA (Australia) said that he and Dr. WU (China) accepted the addition of the word "all".

The CHAIRMAN put to the vote the proposal that the words: "All people are equal before the law" be inserted in Article 6,

with the understanding that the rejection of this proposal would in no way preclude the insertion of those words in any other Article.

The proposal was rejected by 10 votes to 1.

Mr. McNAMARA (Australia) said that although he had voted against the proposal, he would like it to be noted that if those words should be omitted from Article 5, they should be considered for inclusion in some other Article. Such a procedure, he felt, would allay Mr. BORISOV'S fear that the words might be omitted altogether.

The CHAIRMAN noted Mr. McNAMARA'S remark. He called for a vote on the second part of the first paragraph of Mr. BORISOV'S proposal, as amended by Mr. McNAMARA, Dr. WU and Mr. DANIELS: "Everyone is entitled to all the rights and freedoms set forth in this Declaration."

The proposal was adopted by 10 votes with one abstention.

Mr. NISOT (Belgium) said that he had abstained from voting because he objected to any alteration which did not faithfully conform with the terms of the Charter. He requested that the reason for his abstention be recorded.

The CHAIRMAN read the amendment, drafted jointly by Mr. SPANIEN and Miss MONROE, to the third part of the first paragraph of Mr. BORISOV'S proposal, proposing that the second part of Article 6 read: "without distinction of any kind, whether of race, sex, language, religion, political or other opinion, property status, origin or class."

Mr. BORISOV (Union of Soviet Socialist Republics) objected to the new text. He thought that the Sub-Commission should vote on his original suggestion and that the opinion of Mr. SPANIEN and Miss MONROE as to the interpretation of that text should be noted in the report. He did not consider that the words "or

class" could be used to replace the words "national or social origin."

Miss MONROE (United Kingdom) explained that in the draft she had prepared with Mr. SPANIEN the words "or class" had been proposed as a clearer version of, "or social origin." The word "national" had been omitted because "national origin" was liable to be confused with "nationality."

Mr. BORISOV (Union of Soviet Socialist Republics) agreed that the words "or class" could be used to express "social origin," but he objected to the omission of the word "national." It was important, in his opinion, in the interests of countries where people of different national origins lived together under the same government, that the words "national origin" should be specifically mentioned.

Mr. DANIELS (United States of America) objected to the use of the word "class" because it had some undesirable meanings which in his view made it unsuitable for inclusion in a Declaration of Rights.

Mr. McNAMARA (Australia) agreed with Mr. BORISOV that the original wording should be retained. He considered that the omission of the word "national" made the phrase meaningless. He felt that the idea of nationality, which had been the cause of a great deal of discrimination in the past, should be included.

Mr. NISOT (Belgium) pointed out that there might be a political connotation in the words "property status," since in some countries income was one of the factors considered in determining the right to vote.

Dr. WU (China) agreed with Mr. DANIELS that the word "class" was undesirable, and supported the original wording. In some countries there existed national groups which needed to be protected against discrimination. If the words "national origin"

referred to such national groups, he thought that they should be retained.

Mr. BORISOV (Union of Soviet Socialist Republics) agreed with Dr. WU'S definition of the words "national origin." He had no wish for aliens to be given the right to vote in a foreign country, but he thought that the rights of national groups, living as citizens in a country, should be protected.

The CHAIRMAN called for a vote on the proposal that the words "property status, origin or class" should be added to the text which had been adopted on the previous day. He explained that since, in his opinion, this was the text with the widest meaning, it would have to be voted on first.

The proposal was rejected by 7 votes to 3 with 1 abstention.

The CHAIRMAN called for a vote on the proposal that the words "property status, national or social origin" should be added to the text which had been adopted on the previous day.

Dr. WU (China) suggested that the word "national" should be replaced by "ethnic" to avoid ambiguity.

Mr. ROY (Haiti) suggested that the proposal under consideration should be amended to read "property or social status or national groups."

Mr. BORISOV (Union of Soviet Socialist Republics) agreed with that text and suggested that the phrase might further be extended to read "national groups or minorities." He did not consider that the words "social origin" were synonymous with "social status."

Mr. DANIELS (United States of America) suggested that the Sub-Commission should adjourn so that delegates could have time to consider all the proposals.

The meeting closed at 1.15 p.m.

Annex 3

United Nations, *Official Records of the General Assembly*, *Eighteenth Session*, *Third Committee*, document A/C.3/SR.1218 (2 October 1963)

United Nations
GENERAL ASSEMBLY
EIGHTEENTH SESSION
Official Records

THIRD COMMITTEE, 1218th MEETING

Wednesday, 2 October 1963, at 10.35 a.m.

NEW YORK

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Chairman: Mr. Humberto DIAZ CASANUEVA (Chile).

AGENDA ITEM 43

Draft Declaration on the Elimination of All Forms of Racial Discrimination (A/5459, A/5503, chap. X, sect. II; E/3743, paras. 89-145, A/C.3/L.1065-1067, A/C.3/L.1068/Rev.1, A/C.3/L.1069, A/C.3/L.1071-1073 and Corr.1, A/C.3/L.1074, A/C.3/L.1075/Rev.1, A/C.3/L.1076-1077, A/C.3/L.1079/Rev.1, A/C.3/L.1080, A/C.3/L.1082, A/C.3/L.1084-1090 and Add.1, A/C.3/L.1092-1100 and Add.1, A/C.3/L.1101-1115) (continued)

1. Mr. KULARATNE (Ceylon) said that his idea in submitting his amendment (A/C.3/L.1091) had been that the draft Declaration under consideration (Economic and Social Council resolution 958 E (XXXVI), annex) should as far as possible follow the lines of the Charter of the United Nations. However, to accelerate and facilitate the work of the Committee he agreed to withdraw his amendment.

2. Mrs. LEFLEROVA (Czechoslovakia) said that the essentially negative phenomenon of racial discrimination continued to exist in various parts of the world, despite the universal indignation which it aroused and its condemnation at the Summit Conference of Independent African States, held in Addis Ababa in May 1963. Czechoslovakia, which had by ill fortune experienced the woeful consequences of racism, and whose legislation prohibited and severely punished all acts of racial discrimination, was bound to support the efforts that were being made to wipe off the face of the earth what UNESCO described as the social cancer of modern times.

3. The Czechoslovak delegation had been one of the sponsors of resolution 1780 (XVII), and was happy to see that the Commission on Human Rights had prepared a text which provided a satisfactory basis for discussion though some of its provisions could well be strengthened. Article 9, for example, was not sufficiently strongly worded. To condemn racist propaganda was not enough; it must also be prohibited and persons disobeying the prohibition must be prosecuted; for the example of Hitler Germany and South Africa bore eloquent witness that if it were given free rein it would inevitably lead to genocide. Those considerations had led the Czechoslovak delegation to submit an amendment (A/C.3/L.1069) making explicit reference to fascist and racist theories. Some delegations felt that it might impair freedom of speech. The reply to that was, as article 2 of the draft Convention on Freedom of Information[1] recognized, that no one should be able to use his rights and freedoms to the detriment of another.

4. The Czechoslovak delegation regarded as valuable the amendment of Chile, Nigeria, Ukrainian SSR and Yugoslavia (A/C.3/L.1078), which correctly linked racism and colonialism. It was also in favour of the Soviet Union's proposed new article (A/C.3/L.1067), which repaired a serious omission, and the sub-amendment of the Byelorussian SSR (A/C.3/L.1094). It approved in principle of the United States amendment (A/C.3/L.1079), and would support unreservedly the revised amendment of Algeria, Guinea, Mauritania and Senegal (A/C.3/L.1068/Rev.1), and the amendments submitted by Tunisia (A/C.3/L.1072 and A/C.3/L.1030). It would also vote for the amendments of Poland and Yugoslavia (A/C.3/L.1097) and of Poland (A/C.3/L.1096).

5. In conclusion she hoped that, in accordance with resolution 1780 (XVII), the General Assembly would be able to examine at its nineteenth session a draft convention on the elimination of racial discrimination.

6. Mr. PINHEIRO (Brazil) stated that discrimination was prohibited by the constitution of Brazil and that Brazilian law prescribed heavy penalties of fine and imprisonment for any person guilty of acts of racial discrimination. There had never been any room for discrimination in Brazil's traditions, institutions or policy, or in its people's minds. It was a meeting place for people of diverse origins, races, colours and religions, and was proud that it had given them all a friendly welcome and had by their efforts developed its economy, created truly democratic institutions, abolished slavery, and advanced in every field of activity. All the newcomers had been completely integrated into a multi-racial society, and Brazil would like to see that example of constructive coexistence followed universally, and the principle of non-discrimination, which it had been effectively applying for centuries, receive more than lip-service from other countries.

7. In saying that, he did not mean to undervalue the text before the Committee. He was ready, if delegations withdrew the amendments they had submitted, to support it as it stood, while recognizing that it could be strengthened and its omissions repaired—which was the aim of all the amendments. In particular the Brazilian delegation would have liked the text to be more constructively worded and to stress the positive consequences of non-discrimination and the part to be played by education. It hoped that its wishes could be borne in mind when the convention was drafted. For the time being, and since the United Nations had rarely shown such identity of opinion, it ventured to hope that

[1] See Official Records of the General Assembly, Fifteenth Session, Annexes, agenda item 35, document A/4630, annex.

all States would effectively apply the principles which they proclaimed and eliminate racial discrimination and intolerance. It believed that the text should merely enumerate general principles, and it would support amendments designed to strengthen those principles.

8. In conclusion, the Brazilian delegation suggested that the sponsors of closely-related amendments (the USSR and Czechoslovakia for example), should consult together in order, if possible, to present a single text.

9. Mrs. ARIBOT (Guinea) acknowledged the value of the work done by the Commission on Human Rights, but noted that the draft was so important to all countries that it must be examined thoroughly. It had a number of weaknesses: its scope was narrow, its wording was occasionally too vague, and it did not establish a sufficiently clear connexion between colonialism and racial discrimination. The Guinean delegation had therefore joined with a number of others in submitting amendments, which it was ready to discuss constructively with other representatives but could on no account withdraw. It supported the amendments of Nigeria, Paraguay and Peru (A/C.3/L.1065), and of Australia (A/C.3/L.1066), as well as the new article proposed by the Soviet Union, and would state its position on the others later.

10. Despite those who wished to regard colonialism as nothing more than an evil memory, Africa, thirsting for peace and justice, intended to continue its unremitting fight against colonialism; and as a child of that continent she felt bound to lay stress upon the wretched lot of the black man. In view of the political, social and moral forces at work in the contemporary world, it was impossible not to feel a certain scepticism towards the aim which the Third Committee had set for itself: the elimination of all forms of racial discrimination. Were the most effective solutions to be found in documents and laws? There was reason to doubt it, since for years the United Nations had been studying the problem without being able to agree even on what terminology to use, and had engaged in theoretical discussions while thousands of human beings suffered physical and moral injustice.

11. Guinea, like all the other African countries, refused to exercise caution and diplomacy in condemning colonialism and all the forms of discrimination by which it was accompanied. The African continent had resolutely embarked upon a struggle to free itself from the forces of evil, and trusted its youth, moral strength, political direction and creative will. Africa would fight fiercely and unremittingly against everything connected with colonialism and would denounce its cruelty and injustice and its fatal effects on social evolution, human progress and international peace. Because of the admission of a large number of African States to the United Nations, many problems needed to be approached anew; and those who pleaded diplomatic necessity in order to discourage the efforts of the young countries against colonialism were doomed to failure. To those who sought to stem a revolutionary tide with routine and static texts, Africa would reply with the logic of an oppressed continent. Inequality among men on grounds of colour or ethnic origin no longer had any place in Africa: it had been condemned for good and all by the Charter of the Organization of African Unity, signed on 25 May 1963 in Addis Ababa and would be wiped out no matter what the cost.

12. The Guinean delegation hoped that the amendments which it had put forward together with a number of other delegations would be favourably received by all who were determined to free mankind from the degrading scourge of discrimination.

13. In conclusion, she declared herself in favour of drafting a convention on the elimination of racial discrimination.

14. Mr. ISHDORJ (Mongolia) stressed the importance of the question and the draft Declaration, and recalled that at previous sessions of the General Assembly his delegation had strongly condemned racial discrimination as a shameful practice repugnant to the contemporary conscience. Mongolia, a country whose inhabitants included people of different nationalities, knew nothing of racial discrimination. The revolution of 1921 had in fact ended the exploitation of man by man, which was a source of inequality and discrimination; and the constitution guaranteed equal rights in all matters to all citizens without distinction of sex, race or national origin. All direct and indirect infraction of the rights of citizens on racial grounds was prohibited by law. Racial discrimination was in any case unknown in any of the socialist countries, and he deeply regretted that certain speakers had in that connexion made against the Soviet Union false charges which were certainly of no help to the Committee's work.

15. His delegation had been one of the sponsors of resolution 1780 (XVII) and was glad that the Commission on Human Rights had prepared a text which was on the whole acceptable. It noted with particular gratification article 1; article 5, which specifically condemned apartheid; and article 8, which would require States to take all necessary steps to eliminate racial discrimination and prejudice. Such provisions were by no means otiose, for colonialism had not yet disappeared and South Africa and Portugal still applied racial policies.

16. It would be advisable to mention genocide in the draft, because genocide was the most abominable form of racial discrimination and, like the nazi persecutions of the Jews, was always based on the idea of superiority of one race over another. In conclusion, he said that he would vote for the Cuban amendment (A/C.3/L.1092) as well as for those contained in documents A/C.3/L.1067, A/C.3/L.1069 and A/C.3/L.1097, and support all amendments which seemed to him likely to improve the original text.

17. Mr. COMBAL (France) said that his country's position on racial discrimination was well known and he saw no need to speak on it at length. In fact, as the representative of France on the Security Council had recently recalled[2/] the notion of racial equality had for many years been closely bound up with the history of his country, which in 1789, with the proclamation of the Declaration of the Rights of Man and of the Citizen, had been the first to include that notion in the supreme law of a State. Wherever French law and custom held sway, there was no place for racial discrimination and no regulations were needed to prohibit it.

18. France, which was a member of the Commission on Human Rights, had participated in the Working Group which had drafted the text before the Committee. The text could undoubtedly be improved, but its preparation had been long and difficult and his delegation was anxious about the number of the amendments, which it feared might re-open debate on matters al-

2/ Official Records of the Security Council, Eighteenth Year, 1054th meeting.

ready settled. The first concern must be to preserve the unity of style and composition of the draft, which could not at the present stage be completely rewritten. An effort must be made to preserve its quality as a strict and solemn instrument, and to exclude from it terms and expressions with more emotional content than precise meaning. Nor should its general balance be disturbed by interrupting the logical sequence of ideas or introducing repetitions. Its draftsmen, meaning to make its scope permanent and universal, had cast it in general terms, for they could not list all the forms which racial discrimination had taken in the past, or foresee all that it might take in the future. If the text were made too specific, its scope might be restricted; moreover, references to political or economic systems which, while containing some elements of racial discrimination, were in themselves clearly distinct from the idea itself, might well narrow the necessary condemnation of racial discrimination. The major texts which embodied the principles of the United Nations were not all equally general: the Charter was the foundation of them all; the Universal Declaration proclaimed the loftiest principles of the United Nations; and other instruments, of which the present declaration would be one, restated and developed some of those principles. It would be accordingly rather illogical if the declaration referred to any texts other than the two general ones.

19. In conclusion, he pointed out that it would perhaps have been wiser to approve the draft in the form in which it had been submitted to the Committee, for all the delegations that had so far spoken had considered it acceptable.

20. Mr. DIRKSE VAN SCHALKWYK (South Africa) said he had hoped that his delegation would not have to exercise its right of reply, since the Third Committee had always been regarded as non-political and its deliberations had been marked by objectivity and courtesy. Certain delegations, however, had sought to introduce a bitter political note into the discussion. His delegation rejected the allegations regarding South Africa as unfounded. It had, for instance, been stated that South Africa's policy was imposed on the population by force; and specific reference had been made to defence expenditure. That did not seem to be within the province of the Third Committee. But it should at least be said that the increases in defence expenditure were due entirely to the necessity—and right—of self-defence against aggression, and not, as alleged, to a desire to suppress any population group. He also denied accusations that the South African Government's policies were based on a concept of superiority of one race over others, or on the suppression or oppression of any race.

21. His delegation would deal further at the appropriate time and place with the other allegations which had been made against South Africa in the Third Committee and in other places, and would for the time being merely express regret that some delegations had seen fit to make such allegations and that others did not seem to understand South Africa's position.

22. His delegation had under the circumstances concluded that it was not possible for it to join in a constructive discussion of the draft Declaration although it felt that it could have made an honest and helpful contribution. It also regretted that the declaration had been drafted with one or two specific situations in mind, rather than with a desire to make it universally applicable. The wording of the draft and of some of the proposed amendments would enable certain delegations to use the declaration as a political weapon against some countries including South Africa. For those reasons, and not because it was in favour of racial discrimination, the South African delegation could not participate in the detailed study of the draft Declaration.

23. Mr. MEANS (United States of America) expressed appreciation of the spirit of constructive co-operation in which the discussions had taken place. With regard to the amendments to the preamble and the first operative paragraph, his delegation would support those contained in documents A/C.3/L.1065, A/C.3/L.1066, and A/C.3/L.1068/Rev.1. It would also support the Tunisian amendment (A/C.3/L.1071) but proposed that the phrase "throughout the world" should be inserted after the words "racial discrimination" instead of after "elimination". He had no rooted objection to the amendments by seven Latin American delegations (A/C.3/L.1073 and Corr.1) but they appeared to depart, especially in points 1, 2, 3 and 5, from the terms normally used in United Nations documents; perhaps that was merely a question of translation. His delegation would support the amendment of Guinea, Lebanon and Tunisia (A/C.3/L.1084), but could not endorse that contained in document A/C.3/L.1092, for it was somewhat doubtful about the wording; in any case the United States considered that amendment superfluous, for it merely reiterated the aim of the declaration as a whole. He thanked the representative of Ceylon for withdrawing his amendment. He would support the amendment of Colombia (A/C.3/L.1093) but would have to oppose the Ugandan amendment (A/C.3/L.1095), which might lead Governments to impose censorship; the United States Government was deeply attached to the principles of freedom of the Press, freedom of speech and freedom to disseminate all opinions, even those of which it did not approve. His delegation would also vote against the Polish amendment to the sixth preambular paragraph (A/C.3/L.1096), which reiterated an idea that had been successively rejected by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and by the Commission on Human Rights, both through a working group and in plenary meeting.

24. The amendment submitted by Poland and Yugoslavia to the eighth preambular paragraph (A/C.3/L.1097) did not differ substantially from the Polish amendment to which he had just referred and might confer on the General Assembly prerogatives which Chapter VII of the Charter reserved to the Council; hence his delegation could not support it. It had no objection, however, to the Saudi Arabian amendments (A/C.3/L.1099).

25. His delegation was willing to approve the text in its existing form; he thanked the Brazilian representative for announcing that he was prepared to withdraw his amendment if the sponsors of all the other amendments did likewise.

26. Mr. BAROODY (Saudi Arabia) also thanked the representative of Brazil for the step he had taken; it was to be hoped that all members of the Committee would eventually realize that, despite its few imperfections, it would be difficult to improve on the draft Declaration to any great extent. Furthermore, if the innumerable amendments now before the Committee were maintained, it would be extremely difficult to vote coherently on a final text. He therefore hoped that many representatives would take up the Brazilian representative's suggestion. He himself withdrew

there and then the first of the amendments he had submitted; like the representative of Ceylon, whom he thanked for having withdrawn his proposal, he did not wish to lengthen the text unnecessarily. The only reason why he was not withdrawing his second amendment was that, if the fourth preambular paragraph was framed in the exact terms of General Assembly resolution 1514 (XV) on the granting of independence to colonial countries and peoples, it would in his opinion come closer to meeting the desire really to do away with colonialism than it would if emotional terms like "condemns" were used.

27. Mr. CUEVAS CANCINO (Mexico) said that he had intended to introduce, on behalf of several Latin American delegations, the amendments which they had jointly proposed to various articles of the draft declaration. However, the Brazilian representative's suggestion seemed to him extremely sound, for a Committee of 111 members could not possibly draft coherently, especially through a discussion that was necessarily of limited duration. Since circumstances had not permitted the establishment of a working group to re-examine the text, the Brazilian proposal was all the more important. He would consult the delegations which were his co-sponsors of amendments to the draft articles regarding the possibility of withdrawing them.

28. Mrs. MANTZOULINOS (Greece) said that her delegation had not spoken earlier in the discussion because it had already expressed at the seventeenth session its views on racial discrimination, which it unreservedly condemned in accordance with the underlying principles of Greek law and practice.

29. Her delegation approved the draft declaration before the Committee; the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights were to be congratulated on its preparation. Of the many amendments submitted, she was prepared to approve only those which would genuinely help to strengthen the principles stated in the draft declaration or to make the text more precise. It should not be forgotten that the text under consideration, being a declaration, should aim to state humanitarian principles and rules; to recommend to Governments measures designed to abolish racial discrimination; to focus world attention on discriminatory practices and on the need to eliminate them throughout the world; and to stress the duty of the international community to take action against any violation of human rights and fundamental freedoms. In her opinion, the text proposed fully met those requirements. Nor should it be forgotten that a declaration, unlike a convention, was not a legal instrument for imposing sanctions; her delegation would be glad to study the draft convention on racial discrimination when it was submitted to the Assembly at its twentieth session.

30. Those were the considerations which determined her delegation's attitude to the amendments. She could support the Australian amendment, the Tunisian amendment (A/C.3/L.1071) and the amendment submitted by Nigeria, Paraguay and Peru, with the proviso that, if the last-mentioned amendment was adopted, the word "principle" should be put in the plural, for dignity and equality were two separate principles. She was prepared to adopt the other preambular paragraphs as they stood except for the eighth and ninth paragraphs, which in her opinion would be improved by the amendments submitted by seven Latin American delegations. The fourth paragraph in particular seemed to her preferable in its existing form, which reproduced more accurately than the amendment (A/C.3/L.1068/Rev.1) the terms of the Declaration on the granting of independence to colonial countries and peoples. She could also accept the amendment proposed by Guinea, Lebanon and Tunisia, to insert a new paragraph after the ninth preambular paragraph.

31. So far as the amendments to the articles were concerned, she could support the amendment to article 2 proposed by Austria and Nigeria (A/C.3/L.1074), and also the new article proposed by the Soviet Union, provided that it was amended in accordance with the United States sub-amendment (A/C.3/L.1085), which was in keeping with Greece's constitutional principles concerning freedom of association, of peaceful assembly, of opinion and of expression. Moreover, under Greek law, the measures suggested by the Soviet Union against certain organizations could be taken only by the courts and in cases strictly defined by statute; hence such provisions could properly be included only in a legal instrument such as a convention. Furthermore article 9 as it stood was a sufficient condemnation of the activities of organizations propagandizing racist views or encouraging racial discrimination.

32. With regard to the new article proposed for insertion after article 10, she agreed in principle and in substance with the text proposed by the United States (A/C.3/L.1070) and with that proposed by Chile, Nigeria, the Ukrainian SSR and Yugoslavia, both had been withdrawn with a view to consolidation in a single text, to which her delegation was prepared to give careful consideration.

33. She was convinced that the unanimous desire to eliminate all forms of racial discrimination would enable the Committee to adopt a declaration which would take a creditable place in the record of United Nations achievements in the protection of human rights.

34. Mr. BARBER OROZCO (Cuba) stated that, in keeping with the Charter of the United Nations and with the Universal Declaration of Human Rights, the Government and people of Cuba condemned all manifestations of racial discrimination. Discrimination, which in the past the law had merely deplored, had been effectively banished from Cuba since the revolution, thanks to the economic, political and social changes which had taken place; the principle of equality upheld by modern States and by the so-called representative democracies had been transformed from a dream into a reality. Schools, cinemas, restaurants, beaches and all other public places were open to all men and women without distinction as to race, colour or religion. Persons of mixed blood and coloured persons were no longer denied access to responsible posts. The vast campaign against illiteracy had benefited the entire population. Seventy-three thousand scholarships—3,000 for university studies and 70,000 for secondary, technical or artistic education—had been awarded to students from every social class. Henceforth the people of Cuba, without exception, could effectively exercise their civil and political rights.

35. From the experience gained in his own country, he was convinced that racial prejudice and the hatred it engendered were the direct outcome of a system founded on the exploitation of man by man; discrimination could not be eliminated while such a system prevailed. That was why, fifteen years after the adoption of the Universal Declaration of Human Rights, coun-

tries like South Africa and the United States still practised racial segregation.

36. For all those reasons his delegation, while regretting the vagueness of the draft Declaration drawn up by the Commission on Human Rights, nevertheless considered that it would be a step towards the suppression of racial discrimination. His delegation would consequently support any amendment designed to strengthen the proposed text, and ardently hoped that the Cuban amendment would receive majority support.

37. Mr. VISUDDHIDHAM (Thailand) praised the text of the draft Declaration, which satisfied the deepest aspirations of his country as a champion of the principles of the equality and dignity of all human beings. He was prepared to support any amendments calculated to improve a text which would give hope to all peoples.

38. Mr. GELDERS (Belgium) said his country had always expressed the desire to see human rights triumphant, and had always worked along the lines laid down by the United Nations Charter. On being asked what attitude Belgium would take towards the problems of apartheid, Mr. Spaak, the Belgian Minister for Foreign Affairs, had said that the Belgian delegation had been instructed to condemn that policy and to do everything in its power to improve relations between racial communities.

39. His delegation supported the draft Declaration and warned the Committee to be wary of amendments which might strike at the very principles of the declaration on the problem of racial discrimination. He hoped that those lofty principles would not remain a dead letter but would be put into practice in the countries represented on the Committee.

40. Mr. PINHEIRO (Brazil) announced that Chile, Ceylon, Yugoslavia, Tanganyika, the USSR, Czechoslovakia, Burundi and Mali had applied to join with Brazil in sponsoring the latters amendment to article 9 (A/C.3/L.1090 and Add.1), which would undoubtedly gain the support of the other Latin American countries. Nevertheless, Brazil was prepared to withdraw that amendment and to accept the text of the draft declaration if the other delegations also agreed to withdraw their amendments.

41. Mr. SOLODOVNIKOV (Union of Soviet Socialist Republics) announced that, in his desire to speed up the Committee's work, he was prepared to withdraw the USSR amendment (A/C.3/L.1067) in favour of the amendment sponsored by Brazil and the group of countries just mentioned, on condition that the latter was adopted. He wished to make it plain that, in contrast to the United States representative, he considered it essential to call for the condemnation of fascist and neo-fascist propaganda, which was one of the most dangerous manifestations of racial discrimination; that was the construction he placed on the Brazilian amendment.

42. Mr. RAZGALLAH (Tunisia) explained, for the information of the South African representative, that he had referred to South Africa because racial discrimination was "legal" there; he had referred to its defence expenditure in order to bring out the danger of war which such a policy created.

43. He accepted the United States verbal sub-amendment to the Tunisian amendment (A/C.3/L.1071), placing the words "throughout the world" after the words "racial discrimination". With regard to the Ugandan amendment, he agreed with the United States representative that freedom of opinion must be respected; however, that was no reason for encouraging propaganda for racial discrimination.

44. Mrs. KISOSONKOLE (Uganda) endorsed the United States verbal sub-amendment to the Tunisian amendment (A/C.3/L.1071). She proposed that her delegation's amendment (A/C.3/L.1095) should be incorporated in the amendments submitted by Argentina, Bolivia, Brazil, Ecuador, Mexico, Paraguay and Venezuela (A/C.3/L.1073 and Corr.1).

45. Mr. MEANS (United States of America) explained that the sub-amendment (A/C.3/L.1085) which his delegation had proposed to the USSR amendment (A/C.3/L.1067) now applied to the Brazilian amendment (A/C.3/L.1090 and Add.1).

46. Mr. GOODHART (United Kingdom) said that the reference in the fourth preambular paragraph of the draft Declaration to the Declaration on the granting of independence to colonial countries and peoples was acceptable to his delegation. As the Secretary of State for Foreign Affairs of the United Kingdom had stated once again in the General Assembly (1222nd plenary meeting), it was his country's intention to bring the countries under its administration forward to full independence. However, the United Kingdom could not support the amendments submitted by Algeria, Guinea, Mauritania and Senegal (A/C.3/L.1068/Rev.1) to condemn colonialism in all its forms and manifestations, for that provision went beyond the language of the Declaration itself and was a distortion of present and past realities.

47. Nor all forms and manifestations of colonialism were the same. The eloquent French in which the representatives of Guinea and Senegal had spoken was a manifestation of former French colonialism; again, were not the English and French languages manifestations of Roman colonialism? Some colonial systems had been harsh and brutal, while others had been quite bland. The representative of Ceylon had recalled that racial discrimination had been virtually eliminated in his country during the period of British rule.

48. The United Kingdom, for its part, did not believe that human rights or fundamental freedoms could be sustained in a country governed under a single-party system. Nevertheless, his delegation believed that it would be folly to condemn that form of government—to quote the terms of document A/C.3/L.1068/Rev.1—"in all its forms and manifestations". In drafting such declarations there was a natural temptation to oversimplify, but there were also certain limits which must not be exceeded. His delegation also opposed the Cuban amendment (A/C.3/L.1092), which it considered unscientific.

49. Mr. HACENE (Algeria) observed with surprise that it was no longer the oppressed, but the oppressors, who were defending their cause. It was true that the General Assembly had not explicitly condemned colonialism in resolution 1514 (XV), but it had said that it should be brought to an end. When a United Nations organ made such a declaration, it obviously did so because the state of affairs in question was evil per se. There had been enough victims throughout the world to justify the survivors in calling vigorously for the condemnation of colonialism.

The meeting rose at 12.55 p.m.

Litho in U.N. 77301—February 1964—2,225

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United Nations, *Official Records of the General Assembly*, *Twentieth Session*, *Third Committee*, document A/C.3/SR.1301 (12 October 1965)

United Nations
GENERAL ASSEMBLY
TWENTIETH SESSION
Official Records

THIRD COMMITTEE, 1301st MEETING

Tuesday, 12 October 1965, at 3.10 p.m.

NEW YORK

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Chairman: Mr. Francisco CUEVAS CANCINO (Mexico).

AGENDA ITEM 58

Draft International Convention on the Elimination of All Forms of Racial Discrimination (continued) (A/5803, chap. IX, sect. I; A/5921; A/C.3/L.1208-1212, L.1216-1225, L.1226 and Corr.1, L.1228, L.1230; E/3873, chap. II and annexes I and III)

1. The CHAIRMAN drew the Committee's attention to document A/C.3/L.1228, which contained the list of amendments to the draft Convention adopted by the Commission on Human Rights, submitted by the Economic and Social Council in its resolution 1015 B (XXXVII) and set out as an annex to the note by the Secretary-General (A/5921).

2. In view of the fact that, with the exception of two, the various amendments to article I, were concerned with the need to specify what was meant by racial discrimination, he suggested that the delegations concerned should consult together with a view to preparing a joint text.

3. He reminded the Committee that the meeting would be devoted to consideration of the preamble of the draft Convention.

PREAMBLE (continued)

4. Mr. TAYLOR (New Zealand) said that if, as Poland had proposed in its first amendment (A/C.3/L.1210), the word "nazist" was inserted before the word "practices" in the sixth preambular paragraph, that would give the impression that other racist practices were not "capable of disturbing peace and security among peoples".

5. With reference to the sixteen-Power proposal (A/C.3/L.1226 and Corr.1) that the phrase "and to ensure understanding and respect for the dignity of the human person" should be added at the end of the fourth preambular paragraph, his delegation thought that the sponsors had had in mind operative paragraph 1 of General Assembly resolution 1904 (XVIII) which contained the United Nations Declaration on the Elimination of All Forms of Racial Discrimination; in the resolution the word "securing" had been used whereas the amendment used the word "ensure". He wondered whether it would not be preferable to reproduce exactly the wording of the Assembly resolution.

6. Mr. BELTRAMINO (Argentina) said that the phrase in question had been taken textually from the Spanish version of the resolution adopted by the General Assembly in 1963. He therefore asked that the wording of the resolution should be reproduced exactly in the other versions of the proposal.

7. With regard to the amendment relating to the sixth preambular paragraph of the draft Convention, the sixteen Powers had asked for the deletion of the words "as evil racial doctrine and practices have done in the past", not because they failed to recognize the danger of such racial doctrines and practices, but because they wished to strengthen the paragraph. Since some delegations had requested that the phrase should be retained, the sponsors would reconsider the question carefully.

8. Mr. MACDONALD, speaking as representative of Canada, said that his delegation had warmly welcomed the draft Convention. He congratulated all those who had taken part in the drafting of the text, the study of which was one of the most important tasks before the twentieth session of the Assembly. Human rights activities were an essential part of the work undertaken by the United Nations to maintain peace and to enable all to live in dignity. The long-term aim was to create a society whose scale of values would be based solely on merit. For the present, it was essential to guarantee for all complete freedom of choice. That was why his delegation, which deplored in particular the scourge of anti-Semitism, wished it to be specially mentioned. Some delegations claimed that the draft Convention should either give an exhaustive list of all forms of racial discrimination or avoid listing any. In his view that choice of alternatives was somewhat artificial. Reference to a particularly evil form of discrimination would in no way limit the application of the text.

9. His delegation considered the present preamble a very satisfactory starting point: it summarized the principles, practices and beliefs inherited from the past, offered new prospects for the future and gave all peoples cause for hope. However, one should know how far to go: the Committee could not hope to make the preamble an exhaustive text; in any case, it was its strength and not its length that was important.

10. His delegation had examined the various amendments and had considered with regard to each one whether the text was worded in sufficiently general terms, whether the thought which had inspired it was consistent with the great humanitarian traditions, and whether the proposal was a reasonable one, likely to

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gain wide support, and offering any real improvement. His delegation had also wondered whether the Committee was perhaps not altering the document too much and transforming itself into a drafting committee.

11. After having considered the amendments in that spirit, he had decided to support the third Polish amendment (A/C.3/L.1210) and the first, second and third amendments submitted by Colombia and Senegal (A/C.3/L.1217); he had no fundamental objection to the fourth amendment, but felt that it was perhaps superfluous. His delegation was not opposed to the Romanian amendment (A/C.3/L.1219), but wondered whether it strengthened the text. It would vote in favour of the Lebanese amendments (A/C.3/L.1222) and the first, second and fourth amendments submitted by the sixteen Powers (A/C.3/L.1226 and Corr.1); his delegation did not think that the third amendment was really important, but could nevertheless accept it.

12. Mr. AL-RAWI (Iraq) saw no need to mention the various kinds of discrimination. A convention should be in sufficiently general terms to enable the largest possible number of States to accept it.

13. His delegation would be prepared to adopt the preamble in its present form and could support only the amendments submitted by Romania and Lebanon.

14. Mr. GARCIA (Philippines) said that the preamble succeeded in reconciling different points of view and in maintaining a certain balance between principles and objectives; it was in keeping with the spirit of the Declaration on the Elimination of All Forms of Racial Discrimination, which had already been adopted.

15. His delegation would prefer to see the preamble adopted in its present form but could approve those amendments which did not introduce any very significant changes, such as the Lebanese amendments, the Romanian amendment and the amendments submitted by the sixteen Latin American Powers, with the exception of the third of those amendments; there was no need to change the sixth preambular paragraph which reaffirmed principles that had already been adopted and that should be stated again in the same terms. If that paragraph were amended to include new ideas which had not been previously affirmed by the General Assembly, such as the one contained in the proposal of the sixteen Latin American Powers, it would be necessary to change the word "Reaffirming" at the beginning of the paragraph.

16. With reference to the New Zealand representative's remarks, he too favoured repeating the words used in General Assembly resolution 1904 (XVIII). He could support the amendments submitted by Colombia and Senegal, but wondered whether it was really necessary to introduce new ideas which might not be acceptable to all. For the same reason he asked the representative of Poland not to press his first amendment.

17. The CHAIRMAN said that the comments which had been made concerning the second amendment submitted by the sixteen Powers would be taken into account.

18. Mrs. SEKANINOVA (Czechoslovakia) said that, as she had stated on many occasions, the Czechoslovak Government and people condemned all pseudo-scientific theories which sought to establish the supremacy of any race. They also condemned all manifestations of racial prejudice.

19. Racial discrimination persisted; it had survived colonialism and the defeat of the Nazis. But there were now in existence two documents of cardinal importance: the Declaration on the Granting of Independence to Colonial Countries and Peoples and the United Nations Declaration on the Elimination of All Forms of Racial Discrimination. Both should be mentioned in the preamble. The new international instrument should be clear and concise and should not omit any essential points: nazism was one of the most dangerous forms of racial discrimination and should be expressly condemned. As the representative of Uruguay had recalled, it was the struggle against nazism which had led to the founding of the United Nations and it was therefore natural that the Organization should make special efforts to prevent the rebirth of that scourge, particularly now that Africa, in spite of the many efforts which were being exerted, was experiencing the tragedy of a racist policy which was a form of imperialism. The power of the racist organizations should not be underestimated. They had considerable financial and material resources at their disposal and were sometimes organized on an international scale. They represented a permanent threat to democracy and peace, especially when they enjoyed official support, as was the case of the German revanchist movements.

20. The draft preamble constituted a satisfactory basic text. Her delegation would vote in favour of the first Polish amendment, the Romanian amendment and the first, second and fourth amendments submitted by the sixteen Powers, but it could not support the third of those amendments, since it weakened the text. It supported the Lebanese amendments but thought that the amendments submitted by Colombia and Senegal should be more clearly worded. It was her earnest hope that the Assembly would adopt unanimously, at its present session, the text of a convention condemning racial discrimination.

21. Mr. BECK (Hungary), referring to the third amendment proposed by the sixteen Powers, said that he would like the phrase "as well as the harmonious coexistence of persons even within the same State" to be added to, instead of substituted for, the phrase "as evil racial doctrine and practices have done in the past".

22. On the question of condemnation of nazism, he considered that anti-Semitism should not be regarded as a form of racial discrimination. As Judaism was primarily a religion, it would be more appropriate to refer to anti-Semitism in the context of the discussion of religious intolerance. It was nazism which had made anti-Semitism a political viewpoint and had created the aberrant doctrine according to which the Jews were not the followers of a particular religion but members of a separate racial group. In referring to anti-Semitism it was important to guard against the use of nazi terminology. Hungary had suffered greatly from nazism, which had claimed many victims not only among the Jews but also the Gypsies and the Slavs. As anti-Semitism was but one aspect of nazism, he saw no reason why the Convention should condemn anti-

Semitism and not nazism, the historic importance and horrible consequences of which fully justified a specific reference to it. Moreover, anti-Semitism was probably not the most odious practice at the present time: why should the Convention mention anti-Semitism and say nothing about apartheid?

23. Mr. KOCHMAN (Mauritania) said that he was in favour of the original draft. In his view, the first Polish amendment was of a controversial nature; all racist practices were certainly evil and nazism was a barbarous and shameful doctrine, but to mention the word nazism and not the other forms of racial discrimination would limit the scope of the Convention. His delegation would support the amendments submitted by Colombia and Senegal and fully endorsed the Romanian amendment. It had no objection to the other amendments.

24. Mr. PLAKA (Albania) recalled that his delegation had repeatedly condemned all forms of racial discrimination. He supported all the amendments which improved the draft but thought that the third amendment proposed by the sixteen Powers was not realistic. It had too broad a meaning, and went outside the limits of the question before the Committee.

25. Mr. GHAUS (Afghanistan) said that, generally speaking, he approved the draft Convention. He was willing to support the preamble, which was the result of a compromise and had been drafted most carefully. The first Polish amendment would limit the scope of the Convention. Mankind had undoubtedly suffered terribly from nazism but it had suffered equally from other racist doctrines. Accordingly, all forms of racial discrimination should be condemned without distinction.

26. Mr. A. A. MOHAMMED (Nigeria) said that the draft Convention was one of the most important texts which the United Nations had ever undertaken to prepare. He was quite satisfied with most of the amendments to the preamble, with the exception of the first Polish amendment; he feared that the reference to nazism would lead other delegations to propose specific references to other forms of discrimination, such as fascism, neo-fascism, Zionism or colonialism. Although his delegation was opposed to discrimination based on race, colour or ethnic or national origin, and condemned nazism and anti-Semitism, it did not believe that that particular form of racial discrimination should be singled out for mention and requested the Polish delegation to modify its amendment to read "nazi practices of racial discrimination".

27. Mr. SAKSENA (India), referring to the same amendment, said he feared that an express reference to nazism might weaken the text of the draft Convention. A historic document such as the instrument under consideration should not be narrowly dated, for it would then lose its universality; it should be formulated in quite general terms so that it would be applicable to the entire world. His Government was second to none in detesting nazism and abhorring its dangerous doctrines and practices. However, nazism was only one form of racial discrimination and the text should either mention all forms or none at all.

28. With regard to the first amendment submitted by the delegations of Colombia and Senegal (A/C.3/L.1217), he asked the sponsors exactly what they meant by "racial barriers" and "civilized society". He felt that the insertion of the term "civilized society" without a precise definition might weaken the text, as it could be interpreted that racial discrimination was permissible in a society which interested Powers might dub as uncivilized. Indeed, the practice of racial discrimination should be universally condemned.

29. He supported the Romanian amendment, however, since it would improve the text.

30. With reference to the second amendment submitted by the Lebanese delegation (A/C.3/L.1222), while he appreciated the reasons which had led that delegation to propose the use of the word "Alarmed" in place of the word "Concerned", he thought that it was not the States Parties to the Convention but the countries practising discrimination which should be alarmed; he proposed the expression "Deeply concerned" or "Gravely concerned".

31. Finally, his delegation endorsed the first of the sixteen-Power amendments to the preamble but it had reservations concerning the third amendment, for it did not fully understand what was meant by the term "coexistence". In its opinion, coexistence was a contingent concept; the aim of the draft Convention was co-operation between different races, and not merely their coexistence.

32. Generally speaking, his delegation favoured a clear and brief text which would not be liable to be misunderstood or lend itself to different interpretations.

33. Mrs. BEN-ITO (Israel) welcomed the draft Convention and expressed approval of the text as a whole; the Minister for Foreign Affairs of Israel had observed in the General Assembly (1352nd plenary meeting) that there would be no more appropriate way to commemorate the twentieth anniversary of the defeat of Nazi Germany than to adopt the draft Convention on the Elimination of All Forms of Racial Discrimination.

34. Her delegation approved most of the amendments to the preamble which had been submitted to the Committee. It supported the Romanian amendment and the first of the Colombian and Senegalese amendments but had reservations concerning the second of those amendments.

35. With regard to the suggestions of the sixteen Powers, her delegation endorsed the first, second and fourth amendments, but not the third, because it considered that the original wording was stronger and should be retained.

36. The considerations which had prompted the sponsor to submit the first amendment contained in document A/C.3/L.1210 were readily understandable. The delegation of Israel had frequently stated that, for reasons which she did not need to recall, it could not fail to subscribe to any condemnation of Nazi theories and practices. Nazism was not merely an aberration of the past; it was a scourge which continued to ravage the world and the tragedy to which it had led made it essential that the United Nations should avail itself of every opportunity to condemn it unequivocally. Nazism was not just another form of racial discrimina-

tion and the disaster it had caused should be an example and a warning.

37. The Convention was addressed to future generations, it was true, and its purpose was to enunciate the general principles by which they should be guided, but the present generation, which had known the atrocities of nazism and which had the task of drawing up the Convention, could not fail to refer to nazism. It was tragic in fact, that some could ask, after barely twenty years had elapsed, whether it was necessary to mention and condemn nazism in a convention such as the one before the Committee.

38. With regard to anti-Semitism, which had been mentioned frequently in the course of the discussion, she reserved the right to speak again in due course when the Committee addressed itself specifically to the amendment on that question. However, she wished to state that her delegation associated itself with the lucid and sensible observations made by the representatives of Uruguay and Canada; it was not the time for controversies over the meanings of words, for the problem was too grave and burning an issue to lend itself to such exercises. The Jewish people knew exactly what anti-Semitism was, for it had too long been its victim, whether for racial, religious or other reasons; to those who had suffered from racial discrimination, qualifiers were not important.

39. Mr. COMBAL (France) said that his delegation was among those which regarded the drafting of the Convention on the Elimination of All Forms of Racial Discrimination as one of the most important tasks which the Third Committee had ever had to perform; it involved both a work of humanitarian importance and the preparation of a legal instrument.

40. France would have preferred to see the Committee retain the wording of the preamble adopted by the Commission on Human Rights, which it regarded as satisfactory. While recognizing that the desire to improve or enrich the draft under consideration was legitimate, it shared the view that caution was required in adopting new amendments. His Government had always believed, for reasons of principle, that a legal instrument should be worded in general and abstract terms in order to permit the accession of the greatest possible number of parties and to ensure a universal defence against an evil present in all ages.

41. His delegation would not, of course, base its present stand solely on a concern to vindicate the French Government's traditional attitude. It was fully aware that the abstract concept of racial discrimination could legitimately call to mind one particular manifestation or another, past or present, of racial prejudices, and its greatest concern was the establishment of an effective and applicable text.

42. Nevertheless, with regard to the first Polish amendment, it must be observed that the mention of one particular form of racial discrimination was liable to weaken the scope of the Convention.

43. Miss KING (Jamaica) considered that as a statement of general principles introducing a legally binding instrument, the text of the preamble adopted by the Commission on Human Rights had considerable merit. Her delegation nevertheless welcomed all amendments which could help to clarify and strengthen the text.

44. The Jamaican delegation approved the amendments submitted by Lebanon and Romania and the first, second and fourth amendments of the sixteen-Power proposal but could not support the third amendment; it believed that the proposed words should not replace the words of the original text but should be added to them. With regard to the same sixth preambular paragraph, her delegation could not accept the first Polish amendment, since it saw no reason for mentioning one particular form of racial discrimination to the exclusion of other forms.

45. Her delegation approved in principle the amendments to the preamble submitted by Colombia and Senegal (A/C.3/L.1217) but was not fully satisfied with the term "racial barriers"; she would be happy to hear a somewhat fuller explanation of that term. Jamaica supported the oral amendment made by the Yugoslav representative at the previous meeting to replace the words "to the ideals" by "not only to the ideals but also to the requirements", since it improved the wording of the new paragraph proposed in the first amendment of Colombia and Senegal.

46. Mr. BELTRAMINO (Argentina) said that the sponsors of document A/C.3/L.1226 and Corr.1 were willing to retain the original wording of the sixth preambular paragraph and add the words "as well as the harmonious coexistence of persons even within the same State,".

47. For the benefit of the Indian delegation, he explained that there was a problem of translation in connexion with the word "coexistence"; the Spanish word "convivencia" accurately rendered the sponsors' idea, since it denoted living together in harmony, thus going beyond the word "coexistence". The Spanish version was therefore satisfactory.

48. Miss TABBARA (Lebanon) said that her delegation favoured the amendments which strengthened the text of the preamble. It approved the Romanian amendment, which introduced an important principle that had been stated earlier in the preamble to the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and in article 7 of the Universal Declaration of Human Rights. It therefore endorsed the Romanian proposal but suggested including a statement to the effect that the principle on which the amendment was based was contained in the Universal Declaration of Human Rights and, if necessary, revising the paragraph to accord with the wording adopted in the two Declarations.

49. With regard to the sixteen-Power proposals, the Lebanese delegation welcomed the change made in the amendment to the sixth paragraph, with the reservation that the new expression should be inserted before, not after, the words "as evil racial doctrine and practices have done in the past". She also suggested that in the amendment to the eighth paragraph the proposed expression should be inserted not after the words "Resolved to" but after the words "in order to", so that everything relating to objectives would be grouped in one part of the sentence.

50. With regard to the amendments submitted by Colombia and Senegal (A/C.3/L.1217), her delegation

fully approved the substance of the first amendment but pointed out that it introduced the new concepts of "racial barriers" and "civilized society", which the delegations should have an opportunity to examine in detail before taking a decision. Consequently, her delegation could not support that amendment; moreover, she found it hard to reconcile the second amendment with the fourth sixteen-Power amendment (A/C.3/L.1226 and Corr.1) and she requested the Colombian and Senegalese delegations either to withdraw their second amendment or to consult with the sponsors of document A/C.3/L.1226 and Corr.1 in order to arrive at agreement on the wording of an amendment to the eighth preambular paragraph.

51. In connexion with the first Polish amendment (A/C.3/L.1210), she would repeat that her country forcefully condemned nazism. For reasons of principle, however, her delegation would be opposed to the inclusion of that word in the preamble—the principle involved being its stand against the mention of a single example of racial discrimination. To mention one example would restrict the scope of the text, article II of which condemned all forms of racial discrimination with equal vigour. Moreover, it would be unjust to mention one example without enumerating all the rest and, in the view of her delegation, any enumeration would necessarily be incomplete.

52. She wished to make it clear, in connexion with the second Lebanese amendment, that her delegation had used the word "Alarmed" because the word was stronger and appeared in the text of the Declaration; it therefore stood by the proposal.

53. Mr. SANON (UPPER VOLTA) said that his delegation was satisfied with the text of the preamble adopted by the Commission on Human Rights, though it recognized the merits of the amendments that had been submitted.

54. With regard to the first Polish amendment his delegation believed that the text should remain general in nature and therefore should not mention any particular form of racial discrimination.

55. He welcomed the first and second amendments submitted by the Colombian and Senegalese delegations (A/C.3/L.1217) and suggested merely that the word "idéals" in the French text should be replaced by the word "idéaux".

56. His delegation also supported the Romanian amendment (A/C.3/L.1219), the Lebanese amendments (A/C.3/L.1222) and the third of the sixteen-Power amendments (A/C.3/L.1226 and Corr.1).

57. Lady GAITSKELL (United Kingdom), referring to the Romanian amendment, said that her delegation endorsed the comments of the Lebanese representative; it agreed that the wording of the new paragraph should be modelled on that of article 7 of the Universal Declaration of Human Rights and suggested, to that end, that the words "in their right to be protected by" should be replaced by the words "before the law and are entitled to equal protection of" (A/C.3/L.1230).

58. Mr. WALDRON-RAMSEY (United Republic of Tanzania) expressed surprise that almost all delegations thought it necessary to say that discrimination did not exist in their countries. There were no doubt very few countries in the world whose legislation contained provisions favouring discrimination. But it was surely hardly possible to make the same blanket affirmations when it was no longer the sphere of law and principles that was concerned but that of custom and practice. In any case, it was not the task of members of the Third Committee to report on what was happening in their respective countries.

59. Referring to the sixteen-Power amendments, he took note with satisfaction of the statement by the Argentine representative concerning the sixth preambular paragraph and expressed support of the other changes suggested.

60. He noted that the first Polish amendment, introducing a specific reference to nazism in the sixth preambular paragraph, had been criticized by many delegations which feared that reference to a particular form of discrimination might deprive the text of the general character it should possess. But the sponsor of the amendment no doubt gave the word nazism a very broad meaning; covering all the forms of discrimination resembling nazism and based on the same principle, without regard to time and frontiers, i.e., fascism as well as the discrimination practised in Southern Rhodesia and South Africa. He could well understand that the countries which had suffered from nazism—Israel, in particular—should wish to see a specific reference to that doctrine in the text of the Convention, especially as he himself had similar feelings about apartheid, the form of discrimination of which members of his own race were the victims. Since the draft Convention referred specifically to apartheid it might also refer to nazism; and he was therefore prepared to support the first Polish amendment.

61. Mr. SAKSENA (India) thanked the Argentine representative for his explanation of the word "coexistence". He wondered if the words "harmonious coexistence" should not be replaced by the words "harmonious living" in the English text.

62. Mr. SY (Senegal), replying to the delegations which had requested an explanation of some of the terms used in document A/C.3/L.1217 said that "racial barriers" existed wherever communities were separated from each other on the basis of racial criteria, as was the case in South Africa, where autonomous indigenous communities were being created. For those who were the victims of that form of discrimination the idea of racial barriers was as specific as that of geographical or customs barriers for others.

63. Replying to the United States delegation, he explained that "civilized society" meant any normative society guided by an ethical outlook whose fundamental general principles were laid down in the Universal Declaration of Human Rights; its opposite was savage society, which was dominated by the idea of might is right.

64. With regard to the first Polish amendment, he thought it better not to make specific reference to certain forms of racial discrimination such as nazism, since the draft convention dealt, as its title indicated,

with the elimination of "all forms of racial discrimination".

65. Mr. RESICH (Poland) said he wished to explain once again that in his view nazism should be mentioned in the sixth preambular paragraph because it was the most flagrant manifestation of racial discrimination and provided a perfect example of the racial doctrines and practices which had in the past disturbed peace and security among peoples; moreover, reference to nazism would make it possible to understand the historical circumstances which had led the General Assembly to call for the convention under consideration.

66. In order to allay any fear that the amendment in question would limit the scope of the convention, his delegation would agree to the addition of the words "and other similar practices" after "nazist practices".

67. His delegation was prepared to accept the wording suggested by the Nigerian representative, supplemented by the words "and other similar practices". If that was accepted the other forms of racial discrimination need not be enumerated.

68. Mr. KHANACHET (Kuwait) said that the Committee's debates were on a very high level, and he had followed them with great interest. His delegation was grateful to the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities for completing the draft convention, which Kuwait approved in principle.

69. Turning to the amendments to the preamble proposed by various delegations, he expressed agreement with the comments made by the Lebanese representative on the sixteen-Power amendments and the changes she had proposed. He would also support the Lebanese amendments, which strengthened the text, as well as the Romanian amendment, provided that the comments of the Lebanese delegation were taken into account.

70. With regard to the second amendment submitted by the delegations of Colombia and Senegal (A/C.3/L.1217), he would also suggest that they consult with the representatives of the sixteen Powers concerning their fourth amendment (A/C.3/L.1226 and Corr.1) in order to reach agreement with them on a joint text.

71. Turning to the first Polish amendment, he thanked the sponsor for the explanations he had given, but regretted that he was unable to endorse his argument. An instrument which should be general in scope and addressed to posterity should not be limited in time and space, as reference to an episodic and circumscribed form of racial discrimination would necessarily make it. If reference was made to nazism, it would be necessary to list all forms of racial discrimination, which was of course impossible. In his delegation's view, the text under study should be universal in scope, and he wondered if it would not be appropriate to entitle it "Universal Convention on the Elimination of all Forms of Racial Discrimination". In conclusion, he urged Poland and the delegations which supported its amendment to take the French representative's comments into account and avoid limiting the scope of the draft under discussion.

72. Mr. INCE (Trinidad and Tobago) said that his delegation fully supported the principles laid down in the draft Convention and all the amendments calculated to strengthen the text. It also supported the second Lebanese amendment concerning the seventh preambular paragraph, on the grounds that the manifestations of racial discrimination taking place in certain parts of the world justified the use of the word "alarmed" which, being stronger than the word "concerned", better expressed the deep anxiety which those manifestations aroused in Member States.

73. In spite of the persuasive arguments of the Tanzanian representative, his delegation was opposed to any reference to nazism which might give rise to an endless enumeration. He supported the other changes proposed in the first Polish amendment and would also support the Romanian amendment (A/C.3/L.1219), even if the sub-amendment submitted by the United Kingdom (A/C.3/L.1230) were adopted.

74. His delegation reserved the right to return to the amendments submitted by Colombia and Senegal at a later stage of the discussion.

75. Mr. PONCE DE LEON (Colombia) disagreed with the suggestion that the amendment submitted by his country and Senegal involved unnecessary repetition. With regard to the expression "racial barriers", he was prepared to accept any other expression which would convey the same idea more felicitously.

76. U VUM KO HAU (Burma) supported the Romanian amendment as further amended by the United Kingdom representative.

77. Miss GROZA (Romania) explained that her delegation had submitted an amendment (A/C.3/L.1219) because it felt strongly that everyone had the right to be protected by the law, and that the principle should be enunciated in a text of general scope such as the draft Convention before the Committee. She was prepared to accept the sub-amendment suggested by the United Kingdom (A/C.3/L.1230), which did not affect the substance of the amendment.

78. With regard to the Lebanese representative's suggestions, she considered that since the Universal Declaration of Human Rights was referred to in the second preambular paragraph, after which the Romanian amendment would be inserted, it was unnecessary to refer to the Declaration again.

79. Mr. SHARAF (Jordan) said he hoped that the Polish representative, who had accepted the Nigerian representative's suggestions, would also accept his own proposal that the words "fascist, colonial, tribal, Zionist and other similar practices" should be inserted in the sixth preambular paragraph.

80. Mr. MANGWAZU (Malawi) said that his delegation unreservedly supported the draft Convention and recognized its great importance. Malawi, whose Constitution condemned all forms of racial discrimination, took pride in being one of the countries of East and Central Africa in which profound racial harmony reigned.

81. He shared the fear that a reference to nazism might limit the scope of the draft Convention and give rise to a listing, necessarily incomplete, of all forms

of discrimination. Moreover, it was not impossible that another form of discrimination, perhaps even more dangerous than those of the past, might appear somewhere in the world after the Convention had been approved. To mention one form or another of discrimination might also create misunderstandings between countries and arouse resentment. His delegation had no objection to the other amendments.

The meeting rose at 6.5 p.m.

Annex 5

United Nations, *Official Records of the General Assembly*, *Twentieth Session*, *Third Committee*, document A/C.3/SR.1302 (13 October 1965)

United Nations
GENERAL ASSEMBLY
TWENTIETH SESSION
Official Records

THIRD COMMITTEE, 1302nd MEETING

Wednesday, 13 October 1965, at 10.40 a.m.

NEW YORK

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Chairman: Mr. Francisco CUEVAS CANCINO (Mexico).

AGENDA ITEM 58

Draft International Convention on the Elimination of All Forms of Racial Discrimination (continued) (A/5803, chap. IX, sect. I; A/5921; A/C.3/L.1208-1212, L.1216-1225, L.1226 and Corr.1, L.1228; E/3873, chap. II and annexes I and III)

PREAMBLE (continued)

1. Mr. DAYRELL DE LIMA (Brazil) announced that his delegation had become a co-sponsor of the Colombian-Senegalese amendments (A/C.3/L.1217) to the draft Convention adopted by the Commission on Human Rights, submitted by the Economic and Social Council in its resolution 1015 B (XXXVII) and set out as an annex to the note by the Secretary-General (A/5921). His delegation considered those amendments very useful and pertinent. If racial discrimination was treated on an entirely negative basis and no attempt was made to promote race relations by abolishing the barriers which prevented solidarity between persons within the same community, the Committee's work would not be complete. The term "racial barriers", concerning which some delegations had expressed doubts and which the original sponsors had now agreed should be rendered in the French and Spanish texts respectively as "barrières raciales" and "barreras raciales", related to a phenomenon that had been investigated by a number of sociologists and exerted a considerable effect on peace and harmony among peoples. Although the term had not been used in previous texts, it drew attention to one of the main causes of racial discrimination. In view of the objections which had been raised to the use of the term "any civilized society", the sponsors agreed to substitute the word "human" for "civilized".

2. Mr. ZULOAGA (Venezuela) remarked that, if he had had any hesitation in supporting the first Polish amendment (A/C.3/L.1210), as amended orally at the previous meeting by the representative of Nigeria, it would have been overcome by the statement made at the same meeting by the representative of Tanzania. The representative of France, in his statement also at that same meeting, had appeared to take the view that the Convention should be drafted, so far as possible, in general and abstract terms; yet nothing could be more concrete than racial prejudice. While the wording should be general, in the sense that it should not refer specifically to a given atrocity, it should certainly not be abstract. With respect to the amendments contained in document A/C.3/L.1217, he agreed with the representative of Uruguay that the underlying ideas were not clear. His delegation would support the Romanian amendment (A/C.3/L.1219), as now modified by the United Kingdom sub-amendment (A/C.3/L.1230), and also the Lebanese amendments (A/C.3/L.1222).

3. Mr. CHKHIKVADZE (Union of Soviet Socialist Republics) said that his delegation considered the first Polish amendment to be of fundamental importance. If the Convention was to serve its purpose, it must be so drafted as to satisfy all the peoples of the world, whether or not they were at present represented in the United Nations. In keeping with its title, it must condemn and prohibit all forms of racial discrimination, all of which were equally dangerous; nazism and fascism were quite as dangerous as apartheid, and Zionism as anti-Semitism, and he hoped that, just as his delegation was prepared to support the most radical and varied measures to combat all manifestations of racism, other delegations would remember the horrors inflicted by nazism and fascism on the USSR and other countries of both eastern and western Europe. Nazi racial policies had been directed not only against the Jewish people—although the latter had, of course, experienced incalculable sufferings and losses—but against all peoples considered inferior by the nazis. It might have been possible to speak less harshly if nazism had belonged only to the past, but the truth was that many nazi, neo-nazi and fascist groups and organizations, and even States with a fascist outlook, continued to exist.

4. He appealed to all delegations to understand his country's concern at the possibility of a repetition of the horrors of nazism. Either the draft Convention must confine itself to a general prohibition and condemnation of all forms and manifestations of racial discrimination, or it must enumerate the various forms; if even one other form of racial discrimination was mentioned, his delegation must insist most force-

Annex 5

fully that reference should also be made to nazism and neo-nazism.

5. Mrs. VILLGRATTNER (Austria) said that her delegation was ready to accept the Romanian amendment, as further amended by the United Kingdom, and the amendments submitted by sixteen Latin American countries (A/C.3/L.1226 and Corr.1). While sympathizing with the spirit underlying the amendments submitted in document A/C.3/L.1217, Austria could not support them because of the implications of the wording used, which might be understood to refer to barriers between national and ethnic groups within one country. Such groups were covered by the definition of "racial discrimination" in article I of the draft Convention and were, of course, entitled to freedom from interference in their cultural and linguistic traditions, but the term "racial barriers" was not defined and had not been used previously in any legal instrument. The wording of the amendment was not in harmony with the fundamental rights of national and ethnic minorities, which would be protected by the draft Convention as a whole.

6. Mr. RESICH (Poland) announced that his delegation was prepared, in response to informal requests from a number of delegations, to revise its amendment to the sixth preambular paragraph (A/C.3/L.1210) to read "... insert the words 'such as nazism' after the word 'practices'". That change would make it clear that nazism was cited as simply one example of racist practices.

7. Mrs. BEN-ITO (Israel) observed that a number of references had been made to Zionism, and one representative had even suggested listing Zionism together with such doctrines as nazism. She thought it unnecessary to spell out what Zionism was but would merely state that to mention it in the same context as nazism would be sacrilegious and tantamount to substituting the victims for the persecutors. She reserved her right to revert to the matter if it was raised again.

8. Mr. BELTRAMINO (Argentina) announced that the co-sponsors of the proposals in document A/C.3/L.1226 and Corr.1 wished to revise their fourth amendment which should now call for the insertion of the words "for promoting understanding and comprehension between races and" after the words "adopt all necessary measures".

9. Mr. MURUGESU (Malaysia) said that his country, although multiracial, had no problems of racial discrimination. The Constitution provided for the equality of all citizens, and all citizens did in fact live in peace and harmony with each other. Malaysia was firmly opposed to racial discrimination wherever it might be practised.

10. His delegation fully supported the draft Convention in its present form but would endorse any amendment which would further the Convention's purposes. The words "such as nazism", accepted by the Polish delegation, were certainly not objectionable in themselves, but the danger of referring to particular doctrines had been made clear; he was particularly concerned that their mention might limit the scope of the Convention. He supported the other amendments before the Committee, because he believed they would strengthen and improve the text.

11. Mrs. RAMAHOLIMIHASO (Madagascar) said that she had no difficulty in accepting the draft Convention in its present form and hoped that it would be amended only for purposes of clarification and reinforcement. She could not support any amendment that would weaken the text or restrict its scope. She endorsed the Romanian amendment (A/C.3/L.1219), as amended, but considered that the proposed new paragraph should refer to the Universal Declaration of Human Rights, as did the second preambular paragraph on a related subject. She could not support the first Polish amendment, since any such specific reference would weaken the general impact of the preamble. She supported the amendments in documents A/C.3/L.1226 and Corr.1 and A/C.3/L.1217.

12. Mr. AL-RAWI (Iraq) said that his delegation was opposed to all racist doctrines, including nazism, but it thought it best to avoid examples and enumerations in the draft Convention and to concentrate instead on basic principles. While it might be possible to identify some past practices and doctrines, no one could foresee what new forms of racism might arise in the future.

13. Mrs. IDER (Mongolia) considered that all the amendments, as now formulated, improved the original draft. She particularly endorsed the first Polish amendment, because nazism was the most atrocious form of racial discrimination to have manifested itself in the present age.

14. Mrs. MAKSIMENKO (Ukrainian Soviet Socialist Republic) considered the preamble basically satisfactory but felt that it would be improved by the adoption of the amendments which had been submitted, particularly the first Polish amendment. There were many peoples for whom the crimes of nazism were a matter not of written history but of personal experience. Her own people could never forget the millions killed or deported and the towns and villages destroyed. Unfortunately, nazism had not died with the ending of the Second World War. It was alive today in South Africa and Southern Rhodesia, and various forms of neo-nazism had developed in West Germany and elsewhere. Against that background, the adoption of the first Polish amendment seemed imperative. The Romanian amendment would add a very significant element to the preamble.

15. Miss KENYATTA (Kenya) said that all forms of discrimination were abhorrent and vigorous efforts should be made to end them. She would support all amendments to the preamble and articles of the draft Convention which would serve to strengthen the text. The Kenyan Constitution guarnteed the rights and freedoms of individuals regardless of their race, colour or religion, in keeping with the United Nations Charter and the Universal Declaration of Human Rights. In some parts of Africa, however, racial discrimination and oppression still persisted, and discriminatory practices of various kinds subsisted elsewhere in the world. It was high time that instruments should be adopted and implemented to eliminate all discrimination. Her delegation suggested that once the

draft Convention had been completed it should be circulated to States for further comment.

Mrs. Warzazi (Morocco), Vice-Chairman, took the Chair.

16. Mr. ABDEL-RAHIM (Sudan) said that the Moslem peoples had been remarkably free from racial prejudice, and, if their record in the matter was not absolutely impeccable, it was far better than that of any other civilization or people. It was for that reason that Islam continued to make converts and win the support of increasing numbers of people in all parts of the world. His country's Constitution and laws guaranteed the full and equal freedom of all citizens, irrespective of their race, colour, religion or sex, and it was only natural that the Sudanese people should support the struggle against all forms of racial discrimination. One of the forms of discrimination which was entirely alien to them, and to the Moslem world generally, was anti-Semitism. Indeed, when anti-Semitism had arisen and intensified in Europe, it was in the Moslem countries that Jews had often sought and found refuge. With the founding of the State of Israel, the situation had altered in some respects. It should be realized, however, that the present conflict was not an expression of anti-Semitism in a religious or racial sense, but a dispute between Arabs on the one hand and Zionism as a political movement and Israel as a State on the other. Arabs were opposed, together with many others, including some Jews, to Zionism and Israel, not because they were anti-Semites, but because—like Africans in relation to South Africa and Southern Rhodesia—they were anti-colonialist and anti-imperialist.

17. His delegation endorsed the draft Convention and would support any amendments designed to further its purposes. It would support a condemnation of doctrines such as nazism, fascism, neo-nazism, Zionism, anti-Semitism, and discrimination against Negroes. However, it felt that any such enumeration could never be exhaustive and might detract from the statement of the basic principles which would apply equally to all forms of racial discrimination, whether specified or not. If any forms were to be specified, he believed that they should be apartheid and Zionism, for those doctrines were more brazenly and officially applied than any others at present.

Mr. Cuevas Cancino (Mexico) resumed the Chair.

18. Mr. KHANACHET (Kuwait) expressed his delegation's belief that the draft Convention should state generally accepted principles and refrain from entering into details. It was important that it should be adopted unanimously. He was sure that with goodwill and a spirit of co-operation, unanimity could be achieved. He therefore appealed to all delegations to make concessions in order that a unanimously adopted text might be submitted to Governments for ratification. It was the Committee's duty to see that the text could be ratified without difficulty.

19. In reply to some statements which had been made, he wished to say that, while abhorrence of racial discrimination was a tradition in his country, racial discrimination did exist in some parts of the Arab region of the world, and the Arabs were well aware who were the victims and who were the persecutors.

AGENDA ITEM 62

Elimination of all forms of religious intolerance (continued):*

(a) Draft Declaration on the Elimination of All Forms of Religious Intolerance (continued)* (A/5803, chap. IX, sect. II; A/5925; A/C.3/L.1215, L.1227, L.1229; E/3873, paras. 294, 296. 303· E/3925 and Corr.1 and Add.1-5);

(b) Draft International Convention on the Elimination of All Forms of Religious Intolerance (continued)* (A/5939, A/6003, chap. XIII, sect. I; A/C.3/L.1215, L.1227, L.1229; E/4024, chap. II)

20. Mr. KOCHMAN (Mauritania) referred to his request (1299th meeting) to the co-sponsors of the fourteen-Power draft resolution (A/C.3/L.1215) that operative paragraphs 1 and 3 of the draft should be deleted. He hoped that the co-sponsors would clarify their position on the question of priorities, which had caused difficulties from the outset. His delegation wanted a clear draft resolution which all members could support. Until such a text was achieved, the submission of amendments should be allowed. A premature vote could lead only to discord.

21. Mr. LOPEZ (Philippines) considered that the purpose of the fourteen-Power draft resolution was to stress the importance of the draft Declaration and draft International Convention on the Elimination of All Forms of Religious Intolerance and to impress upon the Commission on Human Rights and the Economic and Social Council the need to conclude the drafting of those instruments as soon as possible. His delegation, as a member of the Commission on Human Rights, felt that the use of the word "regrets" in operative paragraph 1 was inconsistent with the expression of appreciation contained in the fourth preambular paragraph and implied dissatisfaction with the Commission's work. The Commission had devoted twenty-one of the thirty-six meetings of its last session, to the drafting of the two documents. It was solely for lack of time that it had been unable to complete the task. Unlike the draft International Convention on the Elimination of All Forms of Racial Discrimination, in which the issues involved were both literally and figuratively black and white and on which it was easy to take a stand, the instruments on religious intolerance involved serious problems of a conceptual and philosophical nature, some of which were of very long standing indeed. The differences between the many religions existing in the world were often considerable and could not always be bridged. The Commission expected to conclude its work in March 1966 and, since it had taken one religion some hundreds of years to move towards a text on religious freedom, it was hardly surprising that the discussion of that question should take a few years in the United Nations. He therefore urged the sponsors to delete operative paragraph 1.

22. He considered operative paragraph 3 unnecessary. The Commission had already half completed its work on the draft convention, to which it had already given first priority; it was inconceivable that it would interrupt its work on that text to take up another item.

*Resumed from the 1299th meeting.

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23. The Saudi Arabian representative had proposed that further work on the draft International Convention should be postponed. In his view, however, recent historical developments in the field of human rights and religious freedom made it most desirable that the United Nations should complete that instrument as soon as possible. The Commission could conclude its work on the Convention and then commence preparation of the draft declaration. The decision, however, should be left to the Commission itself.

24. Mr. MOMMERSTEEG (Netherlands) said that the draft resolution (A/C.3/L.1215), of which his delegation was a co-sponsor, was fully justified by the history of the item before the Committee and was consistent with the position previously taken by the General Assembly and its subordinate bodies.

25. During its seventeenth session, the General Assembly had devoted equal attention to the evils of racial discrimination and discrimination on grounds of religion and had adopted unanimously two identical resolutions (1780 (XVII) and 1781 (XVII)) in which it had, with equal emphasis, requested the Economic and Social Council, the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to prepare, within the same time-limit, draft declarations and draft international conventions in each of the two fields. That decision was an acknowledgment that, while public opinion had in general been less marshalled against religious intolerance, that evil was just as likely to lead to crimes of hatred and violence as racial discrimination.

26. In 1963, the Sub-Commission had submitted to the Commission on Human Rights only a draft declaration on the elimination of all forms of racial discrimination because, having already prepared and submitted to the Commission a set of draft principles relating to discrimination in the field of religious rights and practices, it had been of the opinion that the Commission had before it all the basic elements it needed for the preparation of a draft declaration on the elimination of all forms of religious intolerance. The equilibrium between the two items had not therefore been broken. However, work on one text being more advanced than on the other, the Commission at its nineteenth session had not surprisingly chosen to tackle that text first. The prolonged discussion on racial discrimination that had taken place at that session had left little time for discussion of the question of religious intolerance. In order to restore equilibrium between the two items, therefore, the Commission had decided that it would give priority at its twentieth session to the preparation of a draft declaration on religious intolerance, a decision which had been confirmed by the Economic and Social Council.

27. The consistently maintained view that racial discrimination and religious intolerance were closely related—both questions had been raised as a reaction to the wave of religious and racial hatred that had occurred in 1959 and 1960—had been abandoned at the eighteenth session of the General Assembly, when, following the adoption of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, the Assembly (resolution 1906 (XVIII)) had decided to request absolute priority for the preparation of a convention on the same subject. That decision had been regretted by a number of delegations, including his own, which had nevertheless loyally joined with other members of the Commission in preparing the draft international convention as requested. Accordingly, the General Assembly now had before it a draft international convention on racial discrimination, but no text on religious intolerance.

28. Although the terms of General Assembly resolutions 1780 (XVII) and 1906 (XVIII), had been fulfilled, resolution 1781 (XVII) had not yet been implemented and the obligation to draft a declaration and a convention on religious intolerance remained. The Assembly's original insistence that the two texts should be prepared in close conjunction was still binding and, although temporarily disregarded, that relationship should now be restored. That had certainly been the Sub-Commission's attitude for, after dealing with racial discrimination, it had immediately turned to the issue of religious intolerance and had already drawn up preliminary texts. That was also the attitude of the Commission on Human Rights, which had, on his delegation's proposal, decided to give absolute priority at its twenty-second session to completing the preparation of the draft convention on religious intolerance.

29. From the foregoing, three facts emerged: firstly, that religious intolerance should be dealt with in close conjunction with racial discrimination and treated in a similar manner; secondly, that the declaration and the convention were so interwoven that they should not be dissociated; and thirdly, that a considerable amount of work had already been done on both.

30. Taking those facts into account, and recalling the General Assembly's unanimous decision in 1962, to assist the victims of religious intolerance on a par with the victims of racial discrimination, his delegation could not understand why it had been suggested that completion of the instruments on religious intolerance should again be postponed. The members who in 1963 had voted unanimously that absolute priority should be given to the question of racial discrimination could scarcely turn a deaf ear now to the sincere proposal that another scar on the face of mankind should be erased as quickly as possible. In its resolutions of 1962 (1780 (XVII) and 1781 (XVII)), the General Assembly had applied only one standard and that standard should again be applied.

31. The draft resolution had indeed been prepared under pressure, not from outside groups, but from the consciences of its sponsors and their sympathy with victims of any form of discrimination. The draft was the logical outcome of their concern.

32. The CHAIRMAN proposed that the list of speakers on the item under consideration should be closed.

It was so decided.

The meeting rose at 1 p.m.

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United Nations, *Official Records of the General Assembly*, *Twentieth Session*, *Third Committee*, document A/C.3/SR.1312 (20 October 1965)

United Nations
GENERAL ASSEMBLY
TWENTIETH SESSION
Official Records

THIRD COMMITTEE, 1312th MEETING

Wednesday, 20 October 1965, at 3.30 p.m.

NEW YORK

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Chairman: Mr. Francisco CUEVAS CANCINO (Mexico).

AGENDA ITEM 58

Draft International Convention on the Elimination of All Forms of Racial Discrimination (continued) (A/5803, chap. IX, sect. I; A/5921; E/3873, chap. II and annexes I and III; A/C.3/L.1208, L.1210, L.1211, L.1217, L.1219 to L.1223, L.1225, L.1226 and Corr.1, A/C.3/L.1228, L.1231 and Corr.1, A/C.3/L.1236, L.1237, L.1239, L.1241 to L.1244)

CONSIDERATION OF DRAFT RESOLUTIONS

1. The CHAIRMAN invited the members of the Committee to consider the draft resolution submitted by the delegations of Greece and Hungary (A/C.3/L.1244).

2. Mr. COMAY (Israel) said that his delegation opposed the draft resolution because it considered it essential that anti-Semitism, with which the entire history and fate of every generation of the Jewish people had been tragically bound up, should be expressly mentioned in the draft Convention.

3. The history of the Jewish people was that of a branch of the human family which had been singled out for cruel hostility and savage persecution. Anti-Semitism, which had assumed at different times religious, racial, economic and cultural aspects, was unfortunately not something which belonged to the remote past, for, after having reached its culminating horror in the twentieth century with the atrocities of the Hitler régime, the declared aim of which was to ensure the "final solution of the Jewish question" by systematically exterminating all Jews in cold blood, anti-Semitism had now become the stock-in-trade of every political group aiming to subvert democratic institutions and freedoms. It was thus precisely because anti-Semitism continued to exist in the world that it must be mentioned expressly in the Convention.

4. In any case, it was difficult to conceive how the Convention could pass over such a monstrous evil in silence when it owed its origin to the manifestations of anti-Semitism which had occurred in a number of countries in 1959 and 1960. When the United Nations had tackled the question of manifestations of anti-Semitism and other forms of racial prejudice and religious intolerance of a similar nature the general consensus had been that anti-Semitism was not a matter of religious intolerance alone and that it was necessary to draft a separate convention dealing with the elimination of all forms of racial discrimination.

5. The Israeli delegation was well aware that a number of delegations opposed the enumeration of the evils engendered by racial prejudice, but it wished to point out that anti-Semitism would not be the only evil to be expressly mentioned in the Convention, for racial segregation and apartheid were referred to in article III, which had been unanimously approved, and there was a reference to colonialism in the preamble. There appeared to be no reason therefore why anti-Semitism should not be treated in the same way. Thus, the Tanzanian representative's arguments in favour of an express reference to nazism applied equally for anti-Semitism, for a phenomenon having such far-reaching social and political consequences surely warranted explicit attention in a convention on racial discrimination. In that connexion, his delegation naturally welcomed the Bolivian amendment (A/C.3/L.1236) which would condemn nazism in all its forms and manifestations.

6. He wished to point out that anti-Semitism had not only been a source of suffering for the Jews, but had frequently been used to distract the attention of the rest of the population from real social evils. The nazi movement, in particular, had exploited anti-Semitism as a way of sapping the resistance of the peoples which it intended to conquer and which it had eventually reduced to slavery after appalling massacres. He was happy to see, in that connexion, that a number of Governments and important Church bodies were striving to put public opinion on its guard against the evils of anti-Semitism; he had in mind particularly the statement in which the Chairman of the Council of Ministers of the USSR had called upon the population to oppose anti-Semitism and the resolution against anti-Semitism which the Ecumenical Council of the Catholic Church was in the process of adopting.

7. As far as the Soviet amendment (A/C.3/L.1231 and Corr.1) was concerned, his delegation considered it totally unacceptable that that amendment should bracket Zionism together with anti-Semitism, nazism and neo-nazism; whether that amendment had been put forward for reasons of political opportunism or in order so to complicate the work of the Committee as to achieve the elimination from the Convention of any reference to anti-Semitism, it was an affront to Israel and to the Jewish people everywhere. Zionism

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was the Jewish national movement which had given birth to the State of Israel, and it was perhaps one of the oldest movements for national self-determination. It had been endorsed by the United Nations in 1947 when the General Assembly (resolution 181 (II)) had voted by an overwhelming majority for the restoration of Jewish independence. It was worth recalling that the Soviet Union had at that time fully associated itself with the majority, thus endorsing Zionism, and it was therefore difficult to understand why the Soviet delegation was now trying to have Zionism condemned in the Convention under consideration. Perhaps the Soviet delegation was trying to deflect international attention from the grave situation in the USSR, where the Jewish population was being persecuted in matters of religion, traditions, language and literature, and was in a serious plight which had distressed world public opinion, including many distinguished personalities who could not be accused of any ill-will towards the Soviet Union. While it was only fair to say that some positive gestures had been made of late, it had to be acknowledged also that the situation of the Jewish community had scarcely improved.

8. The delegation of Israel protested in the strongest terms against the Soviet amendment, which lumped Zionism together with such evil and inhuman forces as anti-Semitism and nazism, of which Jews were the chief victims. It appealed to the Committee to give its overwhelming support to the Bolivian amendment and vote for the deletion of the word "Zionism" from the Soviet proposal. The Committee could not adopt a convention on the elimination of racial discrimination without resolving specifically that enlightened humanity must do everything in its power to eradicate that evil and banish it from its midst forever.

9. Mrs. JIMENEZ (Cuba) said that while her delegation condemned racial discrimination wherever it manifested itself, it considered that the various forms which such discrimination could assume should be combined in some general expression lest some forms be omitted. Her delegation would therefore support unreservedly the draft resolution submitted by Greece and Hungary (A/C.3/L.1244), which satisfied that requirement.

10. Mr. DARMAN (Somalia) also supported the draft resolution because it sought to make the text of the Convention of universal application and that goal might be jeopardized if particular forms of racial discrimination were expressly mentioned.

11. Mr. LAWREY (Australia) said that his delegation would oppose the draft resolution submitted by Greece and Hungary. It was moved by a strong feeling that it would be wrong to allow the vicious and irrational form of discrimination called anti-Semitism to pass without specific condemnation.

12. Anti-Semitic activity was a concrete fact of history. Through the centuries it had manifested itself in many and often terrible forms as had been recalled eloquently by the delegation of Israel. Present times had seen Hitler's attempt not merely to persecute but to exterminate Europe's Jewish communities. Unhappily anti-Semitic attitudes and practices were not absent from the world of 1965, nor were they so insignificant that they could be passed over in silence or condemned merely by implication.

13. There had been some argument about the nature of anti-Semitism. So far as the Australian delegation was concerned it knew very well what anti-Semitism was, it knew that it existed in the world today and it believed that it should be condemned and eradicated. Anti-Semitism was a form of discrimination against —at its worst persecution of—human beings, not because of their acts, but because they had been born Jews. So far as it took the form of banning or limiting the practice of the religion of Judaism it was a manifestation of religious intolerance, which Australia deplored. But anti-Semitism was more than that. It was an ever-present and particularly repugnant form of racial discrimination.

14. The Australian delegation accordingly favoured condemning anti-Semitism and of writing into the draft Convention a provision for combating it.

15. Mr. ABDEL-RAHIM (Sudan) said that he had listened with surprise to the Israel representative's remarks which depicted anti-Semitism as a universal phenomenon, for while anti-Semitism certainly existed, it could not reasonably be claimed that it was rife in all countries of the world. Racial discrimination, and especially anti-Semitism, was virtually unknown in Afro-Asian countries in general and certainly not in the Arab and Moslem countries: a fact which had traditionally been acknowledged even by Jewish historians—at any rate till the rise of Zionism and the State of Israel.

16. Since the birth of Zionism and of Israel, determined attempts had been made to depict the Arab countries as being anti-Semitic, whereas in reality those countries had always been havens for victims of persecution especially during the Middle Ages when both Jews and Muslims were subjected to various forms of persecution in different parts of Europe. Although the traditional pattern of friendship and understanding between Jews and Arabs had recently been modified in certain respects it was important to remember that the present conflict between Jews and Arabs was in no way a manifestation of anti-Semitism but was in fact a war being fought against Zionist imperialism. For the Arabs, Israel was what South Africa was to the African nationalists and Zionism was the equivalent of apartheid.

17. While it was quite true that the term anti-Semitism normally referred to Jews and not to Arabs who formed the great majority of Semites in the world it was important to remember that the term had been used and was still being used by different writers—including some who were themselves Jewish but not Zionist—in different senses and, especially, to indicate, on the one hand, the prejudices which Jews of oriental origin encountered in Israel and, on the other hand, the hostility which existed in Israel towards the Arabs. The Arabs, for their part, opposed Zionism as an ideology and Israel as a State, but they were in no way anti-Semitic.

18. With regard to the origins of the Zionist movement, of which the Israel representative had spoken, he noted that it was religious Zionism which went back to ancient times, not political Zionism, which had begun in the nineteenth century and was a reaction against anti-Semitism in Europe, which like the colour bar was a phenomenon peculiar to European

civilization, and was alien to the African and Asian civilizations. In that connexion, it was interesting to note that the Zionist movement, the object of which was to solve the problem of anti-Semitism by the establishment of a Jewish national home, had not sought to achieve that solution at the expense of the peoples who had tried to wipe the Jews off the face of the earth, but at the expense of other peoples. It was well known that the leaders of the Zionist movement considered the establishment of their proposed Jewish State in East Africa and in South America before they finally decided to focus their attention on Palestine. And when they finally settled for Palestine the Zionists treated the Palestinian Arabs as atrociously as the nazis had treated the Jews. While anti-Semitism was of course to be deplored, the fact of having been persecuted did not give the Jews the right to persecute the Palestinian Arabs or Jews of non-European origin. Israel, incidentally, had been repeatedly censured for acting in violation of United Nations resolutions, and for committing acts of violence against the Palestinian Arabs.

19. His delegation would support unreservedly the draft resolution presented by Greece and Hungary, not only because the Sudan condemned racial discrimination in all its forms, but also because it believed that a listing of the various forms of racial discrimination might weaken the Convention. Such a listing would be unwise not only because it would be difficult to draw up an exhaustive list, but also because there was no guarantee that other forms of racial discrimination might not one day emerge which would be automatically excluded from the scope of the Convention; the absence of the former from the Convention might in fact even give them a kind of implicit sanction. Moreover, as had been pointed out before, the differences of opinion to which any listing would give rise would be so great that the Committee would be unable to achieve unanimity; and unanimity was essential on a text of such importance as the Convention. In any event, in a legal document of that kind, the most important question was that of principle. And on the principle that all forms of racial discrimination must be abolished all the members of the Committee were agreed. The Convention should state unequivocally a universal principle which would apply to all forms of racial discrimination and would be equally valid for the past, the present and the future.

20. Mr. COMAY (Israel) speaking on a point of order, said that, while the conflict between Israel and the Arab countries was unfortunately an undeniable fact of contemporary history, it should not be referred to in the present debate. Hence, although he had felt obliged to explain the nature of Zionism—a question which had been brought up by delegations other than his own—he had carefully avoided any reference to that conflict.

21. Not to exacerbate the discussion, he would refrain from refuting—as he could very easily do—the arguments of the representative of the Sudan, who had hurled accusations against Israel which it was difficult not to answer.

22. Mr. CHAMMAS (Lebanon) observed that the Israel representative, who had asked for the floor on a point of order, was overstepping his rights.

23. Mr. LAMPTEY (Ghana) moved the closure of the debate under rule 118 of the rules of procedure. He believed that to be the only means of preserving the spirit of harmony which was indispensable to the work of the Committee. His delegation was animated by a sincere desire to maintain the objectivity of the debate, and was not in any way seeking to deprive the representatives of sovereign States in the Committee of the right to speak. They would be able to express their views when explaining their vote.

24. The CHAIRMAN said that, in accordance with rule 118, he would give the floor to two speakers opposing the closure.

25. Mr. RODRIGUEZ FABREGAT (Uruguay) drew the attention of the representative of Ghana to the fact that many delegations, including his own, far from wishing to exacerbate the debate, desired only to contribute usefully to it. In fact, as representatives of equal and sovereign States, they believed themselves entitled to take part in the debate.

26. If the representative of Ghana maintained his motion, he would be obliged to vote against it.

27. Mrs. VILLGRATNER (Austria) said that she agreed with the representative of Uruguay and opposed the closure of the debate.

The motion for the closure of the debate was adopted by 57 votes to 24, with 18 abstentions.

28. The CHAIRMAN said that, in accordance with rule 129 of the rules of procedure, representatives would have an opportunity to explain their vote before or after the vote on the draft resolution submitted by Greece and Hungary (A/C.3/L.1244). Out of consideration for the speakers who had been unable to take the floor on account of the closure of the debate, he felt that it would be preferable to decide on the latter alternative.

29. Mrs. VILLGRATNER (Austria) said that she would prefer to speak before the vote.

30. Mr. RODRIGUEZ FABREGAT (Uruguay) said that he too would prefer, as would probably many other delegations, to speak before the vote. The statement which he intended to make was directly related to the question on which the Committee was to vote.

31. Mr. BAROODY (Saudi Arabia) said that he also would have liked to speak before the vote, but he agreed with the Chairman that it would be wiser to postpone the explanations of vote until afterwards. In that way, it would be possible to avoid the delays and last-minute attempts at persuasion, which, although understandable, were nevertheless liable to obscure the issue and delay its solution.

32. The CHAIRMAN proposed that explanations of vote should be given after the balloting.

The Chairman's proposal was adopted by 77 votes to 8, with 12 abstentions.

33. The CHAIRMAN drew the attention of the members of the Committee to the draft resolution submitted by Greece and Hungary. In reply to a question by Mr. RIOS (Panama), he said that, should that draft be adopted, the following proposals would become

redundant: the first Polish amendment (A/C.3/L.1210) and the oral amendment thereto proposed by Jordan at the 1301st meeting; part (b) of the second Czechoslovak amendment (A/C.3/L.1220) and the United States amendment thereto (A/C.3/L.1243); the proposal for a new article submitted by Brazil and the United States (A/C.3/L.1211), the amendment thereto by the Union of Soviet Socialist Republics (A/C.3/L.1231 and Corr.1) and the Bolivian sub-amendment (A/C.3/L.1236).

34. Mrs. SECONINOVA (Czechoslovakia) observed that her delegation's amendment was sufficiently broad in scope to be maintained even in the event of the adoption of the draft resolution A/C.3/L.1244.

35. The CHAIRMAN said that the Czechoslovak delegation itself would have to decide, after the vote on the draft resolution, whether to maintain its amendment in its existing form, or in an amended form.

At the request of the representative of Togo, the vote on the draft resolution of Greece and Hungary (A/C.3/L.1244) was taken by roll-call.

Belgium, having been drawn by lot by the Chairman, was called upon to vote first.

In favour: Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Cameroon, Central African Republic, Ceylon, Chad, Chile, Colombia, Congo (Brazzaville), Congo (Democratic Republic of the), Cuba, Cyprus, Czechoslovakia, Dahomey, Denmark, Ecuador, El Salvador, Ethiopia, Gabon, Ghana, Greece, Guatemala, Guinea, Honduras, Hungary, Iceland, India, Iran, Iraq, Ireland, Jamaica, Japan, Jordan, Kenya, Kuwait, Lebanon, Liberia, Libya, Madagascar, Malawi, Malaysia, Mali, Mauritania, Mongolia, Morocco, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, Spain, Sudan, Sweden, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Upper Volta, Yemen, Yugoslavia, Zambia, Afghanistan, Algeria, Argentina.

Against: Belgium, Bolivia, Brazil, Canada, Israel, Luxembourg, Netherlands, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Australia, Austria.

Abstaining: China, Costa Rica, Dominican Republic, Finland, France, Haiti, Italy, Ivory Coast, Mexico, Venezuela.

The draft resolution of Greece and Hungary (A/C.3/L.1244) was adopted by 82 votes to 12, with 10 abstentions.

36. Mr. CHKHIKVADZE (Union of Soviet Socialist Republics) wished first to thank the African and Asian countries for their tireless efforts to achieve the unanimous adoption of the draft Convention. Indeed, the great majority of the Committee, guided by the Chairman's example, had worked to that end in a remarkably co-operative spirit.

37. He regretted that the Israel representative, untouched by that evident spirit of goodwill, had tried, in the statement he had just made, to impede the adoption of the Convention, although that should represent the crowning of the Committee's work.

38. The Israel delegation had decided to raise once again the question of anti-Semitism, as it, and the delegations which were in league with it, had so often done for various motives during the last fifteen years. In doing so, and, more specifically, in accusing the Soviet Union of anti-Semitism, the Israel representative had had four aims in mind. He had wished, if possible, to distract the Third Committee's attention from its essential aim, which was the adoption of the draft Convention—a task in which his efforts had been facilitated by the attitude of certain Governments which, while giving lip service to the condemnation of discrimination, were not ready to legislate accordingly.

39. Failing that, his intention had been to make the adoption of the Convention more difficult by dividing the Committee. Moreover, by accusing the Soviet Union of anti-Semitism, the Israel representative had hoped to distract the Committee's attention from the acts of racial discrimination committed by certain imperialist and colonialist countries, in particular the United States of America. Finally, the manœuvre had been aimed at helping the monopolies which were now preparing elections.

40. Needless to say, the Soviet Union vigorously condemned those cold-war tactics, which were indulged in not only by the Israel delegation but by all those which supported it. It would be better if those delegations had the courage of their convictions and came out clearly in favour of discrimination instead of resorting to such undermining activities.

41. He vigorously rejected the Israel representative's accusations. The Soviet Union, in its relations with its constituent peoples, based its policy on the ideology of Lenin. In Lenin's view, the Jewish workers were the brothers of all the other inhabitants of the Soviet Union in the struggle against their common enemy, capitalism. The Soviet Union did indeed make a distinction between those brothers in arms and the Zionists, but the Soviet Jews had a place of honour in the great family of peoples of the USSR.

42. Mr. USHER (Ivory Coast) said that he wished to explain his abstention during the three successive votes. He had been unable to support the motion for closing the debate because he had wished to take part in the substantive discussion; out of a spirit of solidarity he had not, however, cast a negative vote. In spite of his wish to express his point of view before the voting, he had found it difficult to vote against the Chairman's proposal and had, for that reason, again abstained. He had abstained from the third vote because he could not approve the political turn which the discussion had taken.

43. He regretted that nazism, which had been the cause of the last world conflagration, was only referred to in circumlocutions, in particular in the sixth preambular paragraph of the draft Convention. As its doctrines still had followers and were still openly based on the same ideologies, there should be no fear of calling things by their proper names.

44. He was convinced that the Convention should have condemned not only the doctrine but also the generally rejected practices of nazism, and regretted that considerations of expediency had prevented all delegations from adopting the same attitude. Some delegations had, indeed, referred to the difficulties that their parliaments would have in ratifying a convention containing the terms nazism and anti-Semitism. Although it wished to support the Afro-Asian countries, his delegation could not act in a way that was contrary to its deep convictions.

45. Mr. ROGERS (United States of America) had voted against the Greek-Hungarian draft resolution because his delegation was firmly convinced that anti-Semitism, which constituted a particularly dangerous form of racial discrimination, deserved special mention just as apartheid did. Thus, in conjunction with Brazil, his delegation had submitted an amendment to include in the Convention an article condemning anti-Semitism. Anti-Semitism was one of the gravest and most persistent problems facing humanity, dating back over 2,000 years. Historically, it had been a barometer of the political health of States: where Jews had been unsafe, other minorities also soon found themselves in danger. That was what had happened in 1939. As a result of the explosion of anti-Semitism which the world had witnessed in 1959, the Sub-Commission on Prevention of Discrimination and Protection of Minorities had called the General Assembly's attention to the need for action. The Assembly had decided to prepare a declaration and a convention on the elimination of all forms of racial discrimination.

46. During the last few months, there had been a degree of relaxation in some of the restrictions previously placed on Jewish life and Jewish worship. However, to suggest that those relaxations were as yet sufficient would be to ignore the fact that one country was still trying to stifle its Jewish population by preventing Jews from living according to their customs, depriving them of their schools, restricting their freedom of expression, forbidding Yiddish and Hebrew, and denying them their right to a nationality. Leading Jewish figures were not allowed to go abroad to take part in international meetings and ordinary Jewish citizens were denied their right to travel and settle in other lands.

47. It was to be hoped that after the stirring message of His Holiness Pope Paul VI, and the recent decision of the Ecumenical Council on the subject of the Jews, the situation of Jews throughout the world would continue to improve. In view of His Holiness's message and the decision of the Ecumenical Council, he regretted that the Committee had failed to take the opportunity offered it to condemn anti-Semitism by an overwhelming majority. However, it was clear that there was a general feeling condemning anti-Semitism and that anti-Semitism was covered by the terms of the Convention. The United States delegation remained attached to the principles of the Convention and would express its views on the plague of anti-Semitism in other United Nations organs.

48. Mr. BARODDY (Saudi Arabia) had voted in favour of closing the discussion, not because he wished to prevent some delegations from expressing their point of view, but in a spirit of conciliation. He wished to exercise his right of reply and at the same time to make clear the meaning of his vote.

49. The term anti-Semitism was a specifically European one and he did not see why Europe should impose its way of thinking on the rest of the world. In Saudi Arabia Jews and Arabs were brothers and had the same customs and the same dietary habits. Africa and Asia had never known pogroms or ghettos: it was thus Europe which was hostile to the Jews. Nor must race be confused with religion: one should speak not of anti-Semitism but of anti-Judaism. Catholicism was also a Semitic religion, just as Islam was, so that anti-Semitism could be understood to mean any hostility to a black Mohammedan or a Scandinavian Christian.

50. Moreover, many Jews were loyal to the countries of which they were nationals and identified themselves not with Israel but with the countries in which they had always lived, just as the 20 million Negroes in the United States of America considered themselves to be Americans and not Africans.

51. He regretted that during the debate problems of a religious nature had served as a pretext for a renewal of the cold war, and considered that the United States had wished to exert pressure on the Soviet Union to allow Jews to leave its territory, when perhaps they did not even wish to do so.

52. He did not see by what right Israel claimed to represent the Jews of the whole world. There was no State which could set itself up as a spokesman for Islam either, as Islam was a religion and not a nationality and each sovereign State spoke in its own name.

53. After reviewing the evolution of the Palestine question during the First World War, he recalled the creation of a Jewish national home and the British Mandate, and described how the United Nations had been seized of the question, how, in the name of the Charter, it had recognized the right of the Jewish people to self-determination, and the circumstances in which it had decided upon the partition of Palestine, a decision which had been taken by a very narrow majority, thanks to the change of attitude of the Philippines and Liberia and, in his opinion, to the influence of certain pressure groups.

54. All States were free to condemn anti-Semitism and to adopt appropriate legislation if they so desired, but that was not the role of an international organization. He regretted that old wounds had been reopened and warned the Committee of the risk of rekindling passions which might again expose Jews who were loyal to their country of origin to becoming victims of racial hatred.

55. Mr. MOMMERSTEEG (Netherlands) had voted against the Greek-Hungarian draft resolution because, although he would have preferred that no form of racial discrimination should be mentioned in the text of the Convention, once article III, which expressly condemned apartheid, had been unanimously adopted, he saw no reason for not making a similar allusion to anti-Semitism. In memory of the 100,000 Netherlanders of Jewish descent who had perished

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during the war, he had considered it his duty to take a firm stand in favour of an explicit condemnation of anti-Semitism. He respected the point of view of those delegations which thought otherwise, but failed to understand why the withdrawal of all the amendments had been linked to the withdrawal of the amendment condemning anti-Semitism and anti-Semitism alone. A vote in favour of the Greek-Hungarian draft resolution might have been interpreted as a refusal to condemn anti-Semitism, or at least as a mark of indifference and therefore, because it did not wish to minimize the magnitude of that scourge, the Netherlands delegation had cast a negative vote.

56. The Netherlands delegation deplored the fact that the substantive debate had been prematurely closed and would at least have liked, like the Uruguayan and Austrian delegations, to have been able to speak before the vote.

57. Mr. ROGERS (United States of America) reserved his right to reply at a later date.

The meeting rose at 6.55 p.m.

Annex 7

Human Rights Committee, *General Comment No. 18: Non-discrimination*, document HRI/GEN/1/Rev.9 (10 November 1989)

HRI/GEN/1/Rev.9 (Vol. I)

OFFICE OF THE HIGH COMMISSIONER
FOR HUMAN RIGHTS

HUMAN RIGHTS COMMITTEE
Thirty-seventh session
Adopted: 10 November 1989

General Comment No. 18

Non-discrimination

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.

4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

6. The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or

help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of constitutions and laws not all the grounds on which discrimination is prohibited, as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Annex 8

Committee on Economic, Social and Cultural Rights,
General Comment No. 20: Non-discrimination in economic, social and cultural rights,
document E/C.12/GC/29 (2 July 2009)

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AND CULTURAL RIGHTS
Forty-second session
Geneva, 4-22 May 2009
Agenda item 3

GENERAL COMMENT No. 20

Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)

I. INTRODUCTION AND BASIC PREMISES

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.

2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

3. The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

4. The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and article 7 includes the "right to equal remuneration for work of equal value" and "equal opportunity for everyone to be promoted" in employment. Article 10 stipulates that, inter alia, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that "primary education shall be compulsory and available free to all" and provides that "higher education shall be made equally accessible to all".

5. The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights,[1] while other treaties require the elimination of discrimination in specific fields, such as employment and education.[2] In addition to the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights, article 26 of the International Covenant on Civil and Political Rights contains an independent guarantee of equal and effective protection before and of the law.[3]

6. In previous general comments, the Committee on Economic, Social and Cultural Rights has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, authors' rights, work and social security.[4]

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[1] See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons with Disabilities.

[2] ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education.

[3] See general comment No. 18 (1989) of the Human Rights Committee on non-discrimination.

[4] The Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 4 (1991): The right to adequate housing; general comment No. 7 (1997): The right to adequate housing: forced evictions (art. 11, para. 1); general comment No. 12 (1999): The right to adequate food; general comment No. 13 (1999): The right to education (art. 13); general comment No. 14 (2000): The right to the highest attainable standard of health (art. 12); general comment No. 15 (2002): The right to water (arts. 11 and 12); general comment No. 17 (2005):

Moreover, general comment No. 16 focuses on State parties' obligations under article 3 of the Covenant to ensure equal rights of men and women to the enjoyment of all Covenant rights, while general comments Nos. 5 and 6 respectively concern the rights of persons with disabilities and older persons.[5] The present general comment aims to clarify the Committee's understanding of the provisions of article 2, paragraph 2, of the Covenant, including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

II. SCOPE OF STATE OBLIGATIONS

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.[6] Discrimination also includes incitement to discriminate and harassment.

8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:[7]

(a) **Formal discrimination**: Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) **Substantive discrimination**: Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2.[8] The effective

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The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15, para. 1 (c); general comment No. 18 (2005): The right to work (art. 6); and general comment No. 19 (2008): The right to social security.

[5] CESCR, general comment No. 5 (1994): Persons with disabilities; and general comment No. 6 (1995): The economic, social and cultural rights of older persons.

[6] For a similar definition see art. 1, ICERD; art. 1, CEDAW; and art. 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The Human Rights Committee comes to a similar interpretation in its general comment No. 18, paragraphs 6 and 7. The Committee has adopted a similar position in previous general comments.

[7] CESCR, general comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

[8] See also CESCR general comment No. 16.

enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

(a) **Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) **Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

Private sphere

11. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.

Systemic discrimination

12. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.

Permissible scope of differential treatment

13. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

14. Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local levels. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

III. PROHIBITED GROUNDS OF DISCRIMINATION

15. Article 2, paragraph 2, lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under "other status" are discussed below. The examples of differential treatment presented in this section are merely illustrative and they are not intended to represent the full scope of possible discriminatory treatment under the relevant prohibited ground, nor a conclusive finding that such differential treatment will amount to discrimination in every situation.

Membership of a group

16. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).

Multiple discrimination[9]

17. Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.

A. Express grounds

18. The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

"Race and colour"

19. Discrimination on the basis of "race and colour", which includes an individual's ethnic origin, is prohibited by the Covenant as well as by other treaties including the International Convention on the Elimination of Racial Discrimination. The use of the term "race" in the Covenant or the present general comment does not imply the acceptance of theories which attempt to determine the existence of separate human races.[10]

Sex

20. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.[11] Since the adoption of the Covenant, the notion of the prohibited ground "sex" has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

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[9] See para. 27 of the present general comment on intersectional discrimination.

[10] See the outcome document of the Durban Review Conference, para. 6: "*Reaffirms* that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races."

[11] See art. 3 of the Covenant, and CESCR general comment No. 16.

Language

21. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by article 15 of the Covenant. Therefore, information about public services and goods, for example, should also be available, as far as possible, in languages spoken by minorities, and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

Religion

22. This prohibited ground of discrimination covers the profession of religion or belief of one's choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.[12] For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

Political or other opinion

23. Political and other opinions are often grounds for discriminatory treatment and include both the holding and not-holding of opinions, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

National or social origin

24. "National origin" refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights. "Social origin" refers to a person's inherited social status, which is discussed more fully below in the context of "property" status, descent-based discrimination under "birth" and "economic and social status".[13]

Property

25. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that

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[12] See also the General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981.

[13] See paras. 25, 26 and 35, of the present general comment.

Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.[14]

Birth

26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status.[15] States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent.

B. Other status[16]

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee's general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

Disability

28. In its general comment No. 5, the Committee defined discrimination against persons with disabilities[17] as "any distinction, exclusion, restriction or preference, or denial of reasonable

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[14] See CESCR general comments Nos. 15 and 4 respectively.

[15] For a comprehensive overview of State obligations in this regard, see general comment No. 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on art. 1, para. 1, regarding descent.

[16] See para. 15 of the present general comment.

[17] For a definition, see CRPD, art. 1: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights".[18] The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.[19] States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,[20] as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

Age

29. Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence.[21] In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

Nationality

30. The ground of nationality should not bar access to Covenant rights,[22] e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[23]

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[18] See CESCR general comment No. 5, para. 15.

[19] See CRPD, art. 2: "'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

[20] See CESCR general comment No. 5, para. 22.

[21] See, further, CESCR general comment No. 6.

[22] This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant, which states: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

[23] See also general comment No. 30 (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens.

Marital and family status

31. Marital and family status may differ between individuals because, inter alia, they are married or unmarried, married under a particular legal regime, in a de facto relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependants or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

Sexual orientation and gender identity

32. "Other status" as recognized in article 2, paragraph 2, includes sexual orientation.[24] States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.[25]

Health status

33. Health status refers to a person's physical or mental health.[26] States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.[27] States parties should also adopt measures to address widespread stigmatization of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to

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[24] See CESCR general comments Nos. 14 and 15.

[25] For definitions, see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

[26] See CESCR general comment No. 14, paras. 12(b), 18, 28 and 29.

[27] See the guidelines published by the Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) (2006), "International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version". Available online at: http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf.

enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

Place of residence

34. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health-care facilities.

Economic and social situation

35. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

IV. NATIONAL IMPLEMENTATION

36. In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice.

Legislation

37. Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

Policies, plans and strategies

38. States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and

private actors in the area of Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, among other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalized groups.

Elimination of systemic discrimination

39. States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

Remedies and accountability

40. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.

Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights.[28]

Monitoring, indicators and benchmarks

41. States parties are obliged to monitor effectively the implementation of measures to comply with article 2, paragraph 2, of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.[29]

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[28] See CESCR general comments Nos. 3 and 9. See also the practice of the Committee in its concluding observations on reports of States parties to the Covenant.

[29] See CESCR general comments Nos. 13, 14, 15, 17 and 19, and its new reporting guidelines (E/C.12/2008/2).

Annex 9

CERD Committee, *Summary Record of the Two Hundred and Twelfth Meeting*, document CERD/C/SR.212 (20 August 1974)

SUMMARY RECORD OF THE TWO HUNDRED AND TWELFTH MEETING

held on Tuesday, 20 August 1974, at 3.20 p.m.

Chairman Mr. HAASTRUP

CONSIDERATION OF REPORTS, COMMENTS AND INFORMATION FROM STATES PARTIES UNDER ARTICLE 9 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (agenda item 3) (continued)

(g) THIRD PERIODIC REPORTS OF STATES PARTIES DUE IN 1974 (continued) (CERD/C/R.70/Add.24, CERD/C/R.70/Add.27)

Federal Republic of Germany (continued)(CERD/C/R.70/Add.24)

Mr. SAFRONCHUK said that the third periodic report of the Federal Republic of Germany (CERD/C/R.70/Add.24) was thorough, detailed and in accordance with article 9 of the Convention. It complemented information already received by the Committee and answered questions that had been asked at the time of consideration of the second periodic report. Altogether, therefore, it was acceptable. As Mr. Sayegh had mentioned (211th meeting), however, the report should be assessed not only on the basis of how it corresponded with article 9 but also on the basis of the substantive information provided. The Committee would like to know whether the administrative, judicial and other measures enacted in pursuance of the Convention were in fact being applied, and whether there were any contradictions between the provisions of the Convention and the Federal Republic's legislation.

Like Mr. Sayegh, he was not satisfied with the position with regard to article 4 (b) of the Convention. Although appropriate legislation to comply with that article had been enacted in the Federal Republic of Germany, the question was whether it was being used effectively. For instance, he could not see how the existence of a fascist, neo-nazi party like the National Democratic Party (NPD) was compatible with the Federal Republic's obligations under the Convention. The author of the report had made no attempt to argue that the NPD was not a racist organization and the reasons given for justifying the decision not to ban it - namely, its electoral failure and political insignificance - were not satisfactory. Consequently, he endorsed the wording proposed by the Rapporteur for the Committee's report to the General Assembly.

As far as article 7 of the Convention was concerned, the report gave little information on what was being done in the sphere of education and culture. Since students at secondary schools were at a crucial stage in the formulation of ideas that would be with them for life, educating them to be tolerant and unprejudiced was very important. Yet the topic had been dismissed in one short paragraph. The German Democratic Republic, for its part, had provided very full information on that point and he hoped that in its next report the Federal Republic of Germany would supply more information on its educational system and on how the media were used to discourage racial discrimination, and possibly also provide a short summary of the contents of the pertinent textbooks.

Although he had noted that the school authorities tried to ensure that the children of foreign workers received instruction in their mother tongue, he felt that there should be firmer guarantees of that. It was important that foreign workers should retain their national roots and he was critical of the Federal Republic's policy of integration.

Referring to paragraph 4 in section II of the report, on the subject of reimbursement of pension contributions, he said that it was illogical, unfair and discriminatory to reimburse to foreign workers only 50 per cent of what they had paid into the statutory pension fund. It was also discriminatory to grant less freedom of movement to foreign workers who did not come from States of the European Economic Community and he disagreed altogether with the last sentence of paragraph 5 in section II. Another point which he did not consider adequately dealt with was the ethnic composition of the Federal Republic of Germany; the Committee should be told whether or not there were minority ethnic groups and whether there was any discrimination against them. Workers from six countries were referred to in paragraph 1 of section II, but there were surely others from other parts of the world. There appeared to be textual discrimination against them in the report.

With regard to the Federal Republic's relations with southern Africa, he pointed out that, since it had become a full Member of the United Nations, the Federal Republic was pledged to implement United Nations resolutions scrupulously. The Committee would like to know how, for instance, the Federal Republic was implementing the resolution concerning sanctions.

He strongly objected to the use of the words "German state report" in paragraph 2 of section I of the report and the words "Statutory German pension insurance scheme" in paragraph 4 of section II; the author appeared to have lost sight of the existence of the German Democratic Republic, a Member State of the United Nations recognized in international law and having diplomatic relations with most other countries. If that was merely a typographical error, it should be corrected and not allowed to recur.

Mr. TOMKO considered the third periodic report of the Federal Republic of Germany comparatively successful, as a complement to its previous reports and an answer to the questions that had been raised when the Committee had considered the second periodic report. However, his own question about the banning of neo-nazi organizations had been only partially answered. He did not consider the explanation for the failure to ban the National Democratic Party satisfactory. In accordance with article 4 of the Convention and on the basis of existing legislation in the Federal Republic of Germany, that Party, which despite its electoral failure had a certain influence on the population, should be banned. He therefore endorsed the wording proposed by the Rapporteur for the Committee's report to the General Assembly.

He felt that the report had not provided enough information on the application of article 7 of the Convention; he hoped that there would be more details in the next report. Nor had the Committee been informed whether the Federal Republic of Germany had severed diplomatic and trade relations with South Africa and was implementing the pertinent resolutions of the Security Council and the General

Assembly. Perhaps the representative of the Federal Republic of Germany could answer those points. He fully agreed with Mr. Safronchuk's remarks about the use of wording which implied that the German Democratic Republic did not exist and that the Federal Republic was the only German State. A similar error had been noted when the second periodic report had been discussed and it was one that should not be repeated.

Mr. KAPTEYN said that, considering the volume of material already supplied in the previous reports, the third periodic report submitted by the Federal Republic of Germany was very ample and the gaps were minimal. He was glad to note that the Federal Republic had ratified the International Covenants on Human Rights but would like to know whether it had also ratified the Optional Protocol to the International Covenant on Civil and Political Rights.

With regard to the implementation of article 4 of the Convention, the Federal Republic had complied with the provisions while endeavouring to strike a balance between that article and fundamental rights and freedoms. He did not consider, however, that the arguments put forward for not banning the National Democratic Party were sufficient to absolve the Government from its obligations under article 4. The failure to ban that party might have been acceptable if there had been no evidence, or not sufficient evidence, of racial discrimination, since the Committee certainly did not wish the NPD to benefit from winning a badly prepared case in the Federal Constitutional Court He had some reservations, however, about the wording proposed by the Rapporteur and felt that the Committee should take care not to give the National Democratic Party publicity that it urgently needed to recover from its electoral failure.

With regard to Mr. Safronchuk's view that the European Economic Community rules concerning the free movement of labour were discriminatory against foreign workers from third States, he said that the Treaty instituting the Community aimed at creating a common citizenship in the sphere of economic activities and that all economic unions of States were ipso facto discriminatory towards non-members, but that it had obviously not been the intention of those who had drafted the Convention to prevent such unions. Consequently, although he could see that there might be grounds for political or economic objections to the Community rules, he could not conceive of any legal objections derived from the Convention.

Mr. SOLER said that the third periodic report presented by the Federal Republic of Germany was highly satisfactory and informative. Difficulties regarding article 4 of the Convention were not new to the Committee, but paragraphs 1 (c) and 3 of section 1 of the report required some elucidation, since they seemed unintelligible when read in conjunction with articles 18 and 21 of the Basic Law, particularly with regard to the question whether or not the National Democratic Party should be banned. Either the Basic Law was a mere general declaration or it was an internally operative instrument. The extent to which a democratic republc could tolerate certain types of idea was, of course, always a major problem, but after Germany's experience it should surely be clear that nazism should be regarded as an offence from the beginning. The question of illegal association, which had both administrative and penal aspects, was not dealt with clearly in the report. Its administrative aspect was governed by general administrative laws whereby political parties were required by law to act on the basis of authorization. It could

be presumed, therefore, that the idea of banning certain types of association should be considered from the standpoint of administrative law. Yet the Committee had observed more than once that article 4 (b) of the Convention implied that nations should be committed to making simple association for illicit purposes - and those included discrimination - a punishable offence under the penal code. The problem therefore had nothing to do with administrative law.

There were three superimposed problems involved. The first was a political one of fidelity to the principles of the Constitution, whereby it was unlawful to make any exception on the grounds of the small numbers involved in a given association. The second problem concerned administrative law, which in all States regulated the granting of legal personality or the deprivation of personality already granted. Thirdly, compliance with article 4 of the Convention required the introduction in penal legislation of specific penalties for illicit associations whose aim was to conduct racial or discriminatory activities or propaganda.

Mr. DAYAL said that it had been an interesting coincidence that the Committee should examine the reports of the two German States on two consecutive days, because it helped to highlight the different ways in which they dealt with the problem of racial discrimination. At the 209th meeting, the Committee had been told that the policy of the German Democratic Republic was determined by its socialist system; and at the current meeting it was informed that the policy of the Federal Republic of Germany was based on the purposes and principles of the United Nations. In that connexion, it might be of interest to Mr. Soler that even Argentina had stated that its policy was founded on its own form of republicanism. The importance of ascertaining the principles governing State policy in the matter was evident from the manner in which the two German States treated the problem. It might be said that the Committee had spent too much time considering the reports of the Federal Republic of Germany and the initial report of the German Democratic Republic. It should, however, be borne in mind that those reports arose out of lessons learnt from a terrible past, since it had been in the territory of those States that morally wicked and spiritually perverse racial doctrines had arisen. The experiences of the last war had directly resulted in the United Nations Charter, the Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Elimination of All Forms of Racial Discrimination.

He agreed that the report before the Committee provided much useful information, bearing witness to the fact that the Federal Republic of Germany was extremely sensitive to the problem and was anxious to meet fully its obligations under the Convention. But it was the Committee's duty to examine the report for any lacunae and to make suggestions for further improvements. Members' remarks should therefore be taken in the spirit of the common endeavour in which the Committee was engaged together with the Federal Republic of Germany.

Earlier speakers had made particular reference to the Federal Republic's compliance with article 4 (a) and (b) of the Convention. In his view, the country's legislation amply covered the requirements of article 4 (a). In particular, section 131 of the Penal Code quoted in annex I of the report, was extremely comprehensive; indeed, the prohibition of "literature, sound or picture recordings, illustrations or representations which show acts of violence against people in a cruel or otherwise inhuman manner and this in order to glorify or to seek to minimize the cruelty of such acts of violence or to incite raciat hatred" appeared in no other report that the Committee had considered. On the other hand, the question of measures under article 4 (b) had given rise to some doubts. The Committee was informed that the Federal Republic of Germany had banned 21 organizations. Two of them were specifically mentioned: the Socialist Reich Party (SRP) and the Federation of German National Socialists. They were banned on grounds of racial discrimination. The other organizations, unspecified, were prohibited on grounds of unconstitutionality and illegality. In paragraph 3 of section I, however, the Federal Government gave its reasons for desisting from applying for a ban on the National Democratic Party (NPD). It was implicit that the Government of the Federal Republic regarded the NPD with suspicion, since it had been singled out for mention in the context of a report dealing with the problem of racial discrimination. It might be argued that the NPD was not openly discriminatory in character, but it might well be that its overt activities were relatively innocuous, whereas its underground activities were clandestine and racialist in outlook. The decline in membership of the Party from 28,000 members in 1969 to 12,000 in 1973 might be regarded as encouraging, but for a party which was regarded as potentially dangerous and controversial a membership of 12,000 was by no means negligible. Perhaps the security forces of the Federal Republic had more information on the activities of the NPD, both overt and covert.

The Committee had adopted the view that the provisions of article 4 (b) of the Convention were mandatory. Accordingly, since the Federal Republic of Germany claimed to base its policies on the Charter and other relevant instruments of the United Nations, he would have thought that it would proceed to implement article 4 (b) by imposing a ban on the NPD. A perusal of the reports of the two German States showed that the policy of the German Democratic Republic was to destroy the plant of racial discrimination root and branch, whereas that of the Federal Republic of Germany was to allow the plant to wither away. Yet in the case of such a noxious weed as racial discrimination, it was perhaps better to eradicate it than to risk the possibility of its revival.

Turning to section II of the report, he observed that the annual increase in the number of foreign workers in the Federal Republic of Germany was approximately 500,000. Since those workers made a considerable contribution to the economic advancement of the country, it was to be hoped that they shared in the benefits of that advancement. It was encouraging to read the guidelines approved by the Federal Government to strengthen the employment position of foreign workers, while doing justice to social requirements. Although the information given in paragraph 3 of section II was encouraging, he shared Mr. Safronchuk's doubts concerning the reimbursement of only half the contributions paid into the statutory pension fund, referred to in paragraph 4.

With regard to the question of freedom of movement for nationals of the States members of the European Economic Community vis-à-vis other workers, he felt that the system had elements of discrimination. For example, he wondered whether, in the hypothetical case of there being an obviously discriminatory clause in the Treaties of Rome, the Federal Republic of Germany could claim that it was bound by those clauses rather than by the Convention. Lastly, it would be interesting to have more information under article 7 of the Convention, concerning education and training, since it was of fundamental importance to instruct the young concerning the inherent equality of all human beings and to discourage all racial and national exclusiveness.

Mr. ČALOVSKI observed that the Federal Republic of Germany had again submitted an interesting, informative and well-prepared report. It was particularly gratifying that the Committee's discussion of the second periodic report had been taken into account and that new developments had been described and additional qualifications provided: the Federal Republic was to be congratulated on its ratification of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. He also welcomed the reaffirmation of the Federal Republic's policy made by Mr. Brandt, the then Chancellor, in his speech before the General Assembly on the occasion of the admission of the Federal Republic of Germany to the United Nations.

The authors of the report had rightly concentrated their attention on the broad issues of the implementation of article 4 of the Convention and the situation of foreign workers. While it was not easy to study all the data supplied concerning the application of article 4 because of their volume and interdependence, it might be concluded that the judicial and administrative authorities concerned were in a position to deal efficiently with the problems raised in article 4. Nevertheless, two further clarifications should be made. In the first place, the Federal Government stated in section I, paragraph 1 (c), of the report that it started from the assumption that the obligations pursuant to article 4 should, as the provision expressly stated, be fulfilled "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention". He wished to know whether that statement denoted a reservation concerning all the elements of article 4 or the interpretation that not all those provisions were mandatory in the light of the content of the Universal Declaration of Human Rights and of article 5 of the Convention. Secondly, in section I, paragraph 3, the Federal Government explained why it had not applied for a ban on the NPD, although article 4 unequivocally declared organizations promoting racial hatred and discrimination to be illegal and prohibited them; if the NPD was indeed such an organization, it should be banned.

He was aware of the Federal Republic's policy in the matter of foreign workers and knew that the Government was doing its best in that connexion. It had been stressed (207th and 208th meetings) during the debate on the report submitted by France that foreign workers had a part to play in the country in which they lived, since they contributed as much to the welfare of the State as did its citizens; that statement was particularly relevant to countries where there were large numbers of foreign workers. The question was not so much one of government assistance; that paternalistic approach was unacceptable and could only have negative consequences.

The society and Government of the country were bound to create conditions in which foreign workers would have the same standard of living as nationals, would never be treated as second-class citizens, would be able freely to develop their native culture, traditions and language and would maintain close contacts with their country of origin. As was stated in section II, paragraph 6, of the report, some concern had been expressed during the discussion of the second periodic report that the integration of foreign workers in the Federal Republic of Germany might prove to be detrimental to their cultural and ethnic traditions.

Paragraphs 1 and 2 of section II provided no information about workers coming from such countries as France and the Netherlands or from African countries; the numbers of foreign workers from those countries might be small, but it would be desirable to have more detailed information in the next report.

With regard to paragraph 5 of section II, it should be borne in mind that the condemnation of all forms of racial discrimination was universal and that any agreements, whether bilateral, regional or world-wide, which discriminated against anyone on grounds of race or ehtnic origin were contrary to the Convention. Furthermore, the report failed to give any statistics on the demographic composition of the population. It would be interesting to have some factual information on the status of certain ethnic minorities; for example, there was a bilateral agreement between Denmark and the Federal Republic of Germany concerning the citizens of both countries living in each other's territories.

Finally, he wished to have an explanation of the term "geographical sphere of application" used in a number of sections of the Penal Code, extracts from which were given in annex 1 to the report.

The CHAIRMAN, summing up the debate, said that more members regarded the report as informative and well organized and had welcomed the additional explanations given in pursuance of the discussion of the second periodic report. It had been pointed out, however, that the report gave no demographic data and no information on whether, since its admission to membership of the United Nations, the Federal Republic of German had been implementing United Nations resolutions concerning the racist régimes of southern Africa.

With regard to the application of article 4 (b) of the Convention, members had questioned the Federal Government's failure to ban the NPD merely on the grounds that that Party's influence had diminished, that it had obtained few votes in the most recent election and that it was represented neither in the Bundestag nor in the state parliaments, although adequate legislative provisions existed for the imposition of such a ban. The question of the interpretation of article 4 (b) in the light of the introductory paragraph of article 4 of the Convention had been raised and it had been argued that under article 2, paragraph 1 (a), it was not contrary to the principles of the United Nations to limit the right of freedom of assembly in certain circumstances, particularly since Article 1, paragraph 3, of the United Nations Charter expressly provided for the combating of racial discrimination.

Further information on the application of article 7 of the Convention had been requested. Questions had been raised concerning the quotas and national breakdown of foreign workers and further information had been requested concerning the reimbursement of only half of the contributions paid into the statutory pension fund. Another member had enquired into the status of ethnic minorities in the Federal Republic and had asked whether there had been any changes in its attitudes since it had become a Member of the United Nations. Another member had taken exception to the use of the adjective "German" in the Federal Republic's report. Mr. Sayegh had proposed, in connexion with article 4 (b) of the Convention, that the General Assembly's attention should be drawn to the fact that, for the first time, a State party to the Convention was failing to fulfil its obligations under the Convention with regard to one particular organization. The problem there was whether the Party in question was indeed racist; it had been suggested that while it might not be overtly discriminatory, the elements of racism might exist. He requested subsequent speakers to confine their remarks to points which had not yet been raised, so as to enable the Committee to consider a further report while the representative of the Federal Republic of Germany was preparing his replies.

Mr. ABOUL-NASR said that, although he considered that the report complied with the Committee's guidelines, he wished to have specific information on two points. The first was that of the Federal Republic's attitude towards the racist régimes of southern Africa. Although it was encouraging to note from the message of the Federal Minister for Foreign Affairs to the Secretary-General of the United Nations, reproduced in annex 2 to the report, that the Federal Republic of Germany condemned racism as inhuman and intended to support United Nations resolutions aimed at eliminating the vestiges of colonialism, more information should be provided to substantiate that statement; United Nations statistics showed that the Federal Republic of Germany was one of the most important trading partners of the racist régimes in question, and the Committee should be informed of any steps that had been taken to implement United Nations decisions on that subject.

With regard to the question of freedom of movement, he had asked during the consideration of the second periodic report whether there were different provisions concerning people of different races or nationalities who applied for entry visas and residence forms - apart from nationals of countries of the European Economic Community, for whom special arrangements existed. In particular, he wished to know whether there were any restrictions on entry visas for Arabs. The regrettable incidents which were the presumed cause of those restrictions had, after all, taken place two years previously and the ban should have been abolished by now.

Mrs. WARZAZI said that, as Special Rapporteur on the question of migrant workers for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, she would confine her remarks to the situation of foreign workers. The part of the report dealing with that question was satisfactory and comprehensive; nevertheless, the statistics in paragraphs 1 and 2 of section II were somewhat confusing and would be improved by the addition of figures concerning non-European workers. Unlike other members of the Committee, she had no objection to the use of the term "integration" and thought that the concern of those members arose from the fact that they were confusing that term with the word "assimilation", with its derogatory connotations. On the other hand, the wording of the third guideline in

paragraph 3 was somewhat disquieting; it was to be hoped that the financing of integration assistance from surplus fees paid by employers to secure foreign workers denoted the provision of social services for foreign workers and their families arriving in the Federal Republic of Germany. In the last part of paragraph 3 it was stated that the ban on the recruitment of foreign labour did not represent any departure from the policy described in the foregoing paragraphs. Yet the expulsion of foreign workers as the result of the national economic crisis might indeed detract from the humanitarianism of that policy.

Finally, although she agreed with Mr. Kapteyn that all States had the right to form regional groups, her concern was with the discrimination between European and non-European workers; it would indeed be regrettable if compliance with the Treaties of Rome could lead to such discrimination, which would be all the more reprehensible in the light of the considerable contribution made by non-European workers to the economies of the countries in which they lived.

Mr. MACDONALD said that the report before the Committee was a detailed and well-presented document and that the statement by the representative of the Federal Republic of Germany (211th meeting) had provided further information concerning his Government's policy on racial discrimination. Information with respect to article 7 of the Convention had been given in earlier reports and appeared also in the present report.

Referring to the decision not to invoke the relevant legislation under article 4 of the Convention with respect to the NPD, he expressed the view that the inclusion of the words "with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention" in article 4 of the Convention had probably been intended to cover individuals rather than political parties. He would therefore like to have further information on the legal arguments before reaching any final conclusion on the matter.

The Committee should stress the positive nature of the report submitted by the Federal Republic of Germany, which was continuing to co-operate fully with the Committee.

Mr. LAMPTEY said that the Committee could only reach a decision in the matter of the NPD if it had an unambiguous statement whether or not the Federal Republic of Germany considered that body to be a racist organization.

Mr. Schober withdrew.

Panama (CERD/C/R.70/Add.27)

At the invitation of the Chairman, Mr. Villamonte (Panama) took a place at the Committee table.

Mr. SAYEGH, speaking as Rapporteur, recalled that, during the discussion of the second periodic report submitted by Panama[33], the representative of Panama

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33/ CERD/C/R.30/Add.21.

had informed the Committee (139th meeting) that since the submission of that report a new Constitution embodying considerable improvements with regard to human rights had been promulgated and a new Labour Code enacted. He had assured the Committee that the third periodic report of his Government would be fuller, would conform to the requirements of the Convention to the greatest possible extent and would take into account the comments made by members of the Committee. Unfortunately, the laconic report now before the Committee fulfilled neither the requirements of article 9 of the Convention nor the pledge given by the representative of Panama. It referred to only one article of the new Constitution and provided no information on the provisions which had been described as embodying considerable improvements with regard to human rights. Despite the enactment of the new Labour Code, it was stated in paragraph 2 of the third periodic report (CERD/C/R.70/Add.27) that no specific penal provision had been promulgated. The reason given - that there was no problem of racial discrimination - was not acceptable as a reason for failing to meet the mandatory requirements of the Convention.

The initial report submitted by Panama[34/] had contained information concerning practices of racial discrimination in one part of Panamanian territory, namely the Canal Zone. In the second periodic report, the Government of Panama had stated that racial discrimination did not exist in Panama in any form, and it had been explained by the representative of Panama that his Government was reporting only on the territory under its effective jurisdiction. The report before the Committee again made no reference to those practices.

Mr. PARTSCH, speaking on a point of order, said that reporting States had the right to include or omit whatever material they wished and the fact that certain material had been included in an earlier report did not entitle the Committee to question its subsequent omission.

The CHAIRMAN ruled that the point raised by Mr. Sayegh was in order, since the same question had arisen during the discussion of the second periodic report and had not been considered in any way improper.

Mr. SAYEGH, continuing his statement, said that the Government of Panama had responded, in paragraph 3 of the report before the Committee, to only one of the questions raised during the discussion of the second periodic report, and even that reply was negative. The report as a whole was inadequate and it was to be hoped that the representative of the reporting State would rectify its omissions, particularly concerning Panama's relations with the racist régimes in southern Africa.

Mr. VILLAMONTE (Panama) said that his country had no cultural, diplomatic or any other relations with the racist régimes in southern Africa. Racial discrimination continued to be practised in the Canal Zone, but his Government had again confined its report to the territory under its effective jurisdiction. He stated, in addition, that any person who considered that racial discrimination had been practised against him and that he had been harmed thereby could, under article 19 of the Constitution, lodge a complaint of unconstitutionality with the Supreme Court of Justice.

34/ CERD/C/R.3/Add.9 and CERD/C/R.3/Add.52.

He would inform his Government of the comments made by members of the Committee and request it to make its next report more complete.

Mr. ABOUL-NASR suggested that the Committee should send a letter to the Government of Panama drawing its attention to the fact that its reports did not comply with the requirements of article 9 of the Convention. With respect to the situation in the Canal Zone, the drafting group preparing a text on the report of the Syrian Arab Republic could be asked to draft a recommendation for consideration by the Committee.

Mr. SAYEGH pointed out that letters were normally sent to Governments only in cases where their representatives had not been present in the Committee. In his view, no action was necessary on the question of the Canal Zone, since no request to that effect had been received from the State party whose territory was involved.

Mr. MACDONALD agreed with Mr. Sayegh's view concerning the Canal Zone. The Government of Panama no doubt had its own reasons for not including information on that part of its territory.

Mr. ABOUL-NASR said that he would not press his second suggestion, although he did not agree that the Committee should adopt decisions only at the request of States parties to the Convention.

Mr. SAFRONCHUK asked for further information concerning the absence of any specific penal provision concerning racial discrimination in Panama. In view of the mandatory nature of article 4 of the Convention, the Government of Panama should specify the legal and penal provisions which corresponded to that article and the manner in which they could be invoked in order to implement its provisions.

Mr. DAYAL welcomed the statement that Panama had no relations with the racist régimes of southern Africa. With regard to the situation in the Canal Zone, the Committee, which had previously adopted a decision in the matter, should at least express in its report its continuing concern at the racial discrimination said to be practised in a part of Panamanian territory.

Mr. ČALOVSKI, noting that the Constitution of Panama had been promulgated after the adoption of the Convention, asked why article 19, which corresponded to article 1 of the Convention, made no mention of discrimination on grounds of colour or of national or ethnic origin. He considered that information should be submitted on the situation in the Canal Zone and that the Committee should mention its continued interest in that matter in its report to the General Assembly.

Mr. PARTSCH said that the Committee should explain in its report that the Government of Panama had restricted its third periodic report to the territory under its effective jurisdiction.

The CHAIRMAN agreed that the Committee should mention its continued interest in the situation in the Canal Zone and its hope that the reporting State would be in a position in future to report an improvement in that situation.

Mr. VILLAMONTE (Panama) recalled that, at the 139th meeting of the Committee, the representative of Panama had made a statement on the situation in the Canal Zone and also read the statement made during the series of Security Council meetings held in Panama in March 1973, bringing the discriminatory situation in the Panamanian Canal Zone to the attention of that organ of the United Nations. The Government of Panama had not referred to that question in its third periodic report for that reason and also because negotiations on the question were at present being held with the United States Government.

The CHAIRMAN, summing up the discussion, said that the Committee noted that the third periodic report submitted by Panama covered only the territory under its effective jurisdiction. The Committee's report should reflect its expectation that the Government of Panama would, in its next report, fulfil its pledge to provide fuller information and that it would answer the points raised by members of the Committee.

The meeting rose at 6.25 p.m.

Annex 10

CERD Committee, *General Recommendation No. 29 on article 1, paragraph 1, of the Convention (Descent)*, *Sixty-first Session* (2002)

Sixty-first session (2002)

General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent)

The Committee on the Elimination of Racial Discrimination,

Recalling the terms of the Universal Declaration of Human Rights according to which all human beings are born free and equal in dignity and rights and are entitled to the rights and freedoms therein without distinction of any kind, including race, colour, sex, language, religion, social origin, birth or other status,

Recalling also the terms of the Vienna Declaration and Programme of Action of the World Conference on Human Rights according to which it is the duty of States, regardless of political, economic and cultural system, to promote and protect all human rights and fundamental freedoms,

Reaffirming its general recommendation XXVIII in which the Committee expresses wholehearted support for the Durban Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance,

Reaffirming also the condemnation of discrimination against persons of Asian and African descent and indigenous and other forms of descent in the Durban Declaration and Programme of Action,

Basing its action on the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination which seeks to eliminate discrimination based on race, colour, descent, or national or ethnic origin,

Confirming the consistent view of the Committee that the term "descent" in article 1, paragraph 1, the Convention does not solely refer to "race" and has a meaning and application which complement the other prohibited grounds of discrimination,

Strongly reaffirming that discrimination based on "descent" includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights,

Noting that the existence of such discrimination has become evident from the Committee's examination of reports of a number of States parties to the Convention,

Having organized a thematic discussion on descent-based discrimination and received the contributions of members of the Committee, as well as contributions from some Governments and members of other United Nations bodies, notably experts of the Sub-Commission for the Promotion and Protection of Human Rights,

Having received contributions from a great number of concerned non-governmental organizations and individuals, orally and through written information, providing the Committee with further evidence of the extent and persistence of descent-based discrimination in different regions of the world,

Concluding that fresh efforts need to be made as well as existing efforts intensified at the level of domestic law and practice to eliminate the scourge of descent-based discrimination and empower communities affected by it,

Commending the efforts of those States that have taken measures to eliminate descent-based discrimination and remedy its consequences,

Strongly encouraging those affected States that have yet to recognize and address this phenomenon to take steps to do so,

Recalling the positive spirit in which the dialogues between the Committee and Governments have been conducted on the question of descent-based discrimination and anticipating further such constructive dialogues,

Attaching the highest importance to its ongoing work in combating all forms of descent-based discrimination,

Strongly condemning descent-based discrimination, such as discrimination on the basis of caste and analogous systems of inherited status, as a violation of the Convention,

Recommends that the States parties, as appropriate for their particular circumstances, adopt some or all of the following measures:

1. Measures of a general nature

(a) Steps to identify those descent-based communities under their jurisdiction who suffer from discrimination, especially on the basis of caste and analogous systems of inherited status, and whose existence may be recognized on the basis of various factors including some or all of the following: inability or restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in housing and education, access to public spaces, places of worship and public sources of food and water; limitation of freedom to renounce inherited occupations or degrading or hazardous work; subjection to debt bondage; subjection to dehumanizing discourses referring to pollution or untouchability; and generalized lack of respect for their human dignity and equality;

(b) Consider the incorporation of an explicit prohibition of descent-based discrimination in the national constitution;

(c) Review and enact or amend legislation in order to outlaw all forms of discrimination based on descent in accordance with the Convention;

(d) Resolutely implement legislation and other measures already in force;

(e) Formulate and put into action a comprehensive national strategy with the participation of members of affected communities, including special measures in accordance with articles 1 and 2 of the Convention, in order to eliminate discrimination against members of descent-based groups;

(f) Adopt special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education;

(g) Establish statutory mechanisms, through the strengthening of existing institutions or the creation of specialized institutions, to promote respect for the equal human rights of members of descent-based communities;

(h) Educate the general public on the importance of affirmative action programmes to address the situation of victims of descent-based discrimination;

(i) Encourage dialogue between members of descent-based communities and members of other social groups;

(j) Conduct periodic surveys on the reality of descent-based discrimination and provide disaggregated information in their reports to the Committee on the geographical distribution and economic and social conditions of descent-based communities, including a gender perspective;

2. Multiple discrimination against women members of descent-based communities

(k) Take into account, in all programmes and projects planned and implemented and in measures adopted, the situation of women members of the communities, as victims of multiple discrimination, sexual exploitation and forced prostitution;

(l) Take all measures necessary in order to eliminate multiple discrimination including descent-based discrimination against women, particularly in the areas of personal security, employment and education;

(m) Provide disaggregated data for the situation of women affected by descent-based discrimination;

3. Segregation

(n) Monitor and report on trends which give rise to the segregation of descent-based communities and work for the eradication of the negative consequences resulting from such segregation;

(o) Undertake to prevent, prohibit and eliminate practices of segregation directed against members of descent-based communities including in housing, education and employment;

(p) Secure for everyone the right of access on an equal and non-discriminatory basis to any place or service intended for use by the general public;

(q) Take steps to promote mixed communities in which members of affected communities are integrated with other elements of society and ensure that services to such settlements are accessible on an equal basis for all;

4. Dissemination of hate speech including through the mass media and the Internet

(r) Take measures against any dissemination of ideas of caste superiority and inferiority or which attempt to justify violence, hatred or discrimination against descent-based communities;

(s) Take strict measures against any incitement to discrimination or violence against the communities, including through the Internet;

(t) Take measures to raise awareness among media professionals of the nature and incidence of descent-based discrimination;

5. Administration of justice

(u) Take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including by providing legal aid, facilitating of group claims and encouraging non-governmental organizations to defend community rights;

(v) Ensure, where relevant, that judicial decisions and official actions take the prohibition of descent-based discrimination fully into account;

(w) Ensure the prosecution of persons who commit crimes against members of descent-based communities and the provision of adequate compensation for the victims of such crimes;

(x) Encourage the recruitment of members of descent-based communities into the police and other law enforcement agencies;

(y) Organize training programmes for public officials and law enforcement agencies with a view to preventing injustices based on prejudice against descent-based communities;

(z) Encourage and facilitate constructive dialogue between the police and other law enforcement agencies and members of the communities;

6. Civil and political rights

(aa) Ensure that authorities at all levels in the country concerned involve members of descent-based communities in decisions which affect them;

(bb) Take special and concrete measures to guarantee to members of descent-based communities the right to participate in elections, to vote and stand for election on the basis of equal and universal suffrage, and to have due representation in Government and legislative bodies;

(cc) Promote awareness among members of the communities of the importance of their active participation in public and political life, and eliminate obstacles to such participation;

(dd) Organize training programmes to improve the political policy-making and public administration skills of public officials and political representatives who belong to descent-based communities;

(ee) Take steps to identify areas prone to descent-based violence in order to prevent the recurrence of such violence;

(ff) Take resolute measures to secure rights of marriage for members of descent-based communities who wish to marry outside the community;

7. Economic and social rights

(gg) Elaborate, adopt and implement plans and programmes of economic and social development on an equal and non-discriminatory basis;

(hh) Take substantial and effective measures to eradicate poverty among descent-based communities and combat their social exclusion or marginalization;

(ii) Work with intergovernmental organizations, including international financial institutions, to ensure that development or assistance projects which they support take into account the economic and social situation of members of descent-based communities;

(jj) Take special measures to promote the employment of members of affected communities in the public and private sectors;

(kk) Develop or refine legislation and practice specifically prohibiting all discriminatory practices based on descent in employment and the labour market;

(ll) Take measures against public bodies, private companies and other associations that investigate the descent background of applicants for employment;

(mm) Take measures against discriminatory practices of local authorities or private owners with regard to residence and access to adequate housing for members of affected communities;

(nn) Ensure equal access to health care and social security services for members of descent-based communities;

(oo) Involve affected communities in designing and implementing health programmes and projects;

(pp) Take measures to address the special vulnerability of children of descent-based communities to exploitative child labour;

(qq) Take resolute measures to eliminate debt bondage and degrading conditions of labour associated with descent-based discrimination;

8. Right to education

(rr) Ensure that public and private education systems include children of all communities and do not exclude any children on the basis of descent;

(ss) Reduce school drop-out rates for children of all communities, in particular for children of affected communities, with special attention to the situation of girls;

(tt) Combat discrimination by public or private bodies and any harassment of students who are members of descent-based communities;

(uu) Take necessary measures in cooperation with civil society to educate the population as a whole in a spirit of non-discrimination and respect for the communities subject to descent-based discrimination;

(vv) Review all language in textbooks which conveys stereotyped or demeaning images, references, names or opinions concerning descent-based communities and replace it by images, references, names and opinions which convey the message of the inherent dignity of all human beings and their equality of human rights.

Annex 11

International Labour Conference, *Discrimination in the field of employment and occupation*, 40th session, Geneva, 1957, Report VII(1)

REPORT VII (1)

International Labour Conference

FORTIETH SESSION
1957

Seventh Item on the Agenda:

Discrimination in the Field of Employment and Occupation



GENEVA
International Labour Office
1956

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Annex 11

INTRODUCTION

The possibility of placing the subject of discrimination in the field of employment and occupation on the agenda of the International Labour Conference was first considered by the Governing Body of the International Labour Office at its 127th Session (Rome, November 1954). It decided that the study of the subject should be pursued and in coming to this decision it took into account the invitation extended to the Organisation by the United Nations Economic and Social Council to undertake a study in this field (Resolution 545 C (XVIII) adopted at the Council's 820th plenary meeting, 29 July 1954).

The Governing Body reconsidered the matter on the basis of fuller information at its 129th Session (Geneva, May-June 1955) and again at its 130th Session (Geneva, November 1955), when it decided to place the subject of discrimination in the field of employment and occupation on the agenda of the 40th (1957) Session of the International Labour Conference. It expressed the view that the documents submitted to the Conference should deal with discrimination on all the grounds listed in article 2 (1) of the Universal Declaration of Human Rights and this view has been taken into consideration in the preparation of this report.

The report is divided into five chapters, followed by a questionnaire and an appendix. In Chapter I the general background is discussed; Chapter II contains a clarification of concepts and explains the scope of the subject; in Chapter III grounds of distinction and types of discrimination are analysed; Chapter IV refers to national action and international standards directed towards the prevention of discrimination; and in Chapter V the Conclusions arrived at are linked with the individual points on which the governments' views are sought in the questionnaire. The appendix gives extracts from various international labour Conventions and Recommendations containing non-discrimination provisions not referred to elsewhere in the report.

This report will be followed by a second report based on the replies of the governments to the questionnaire and indicating the principal points arising under the item which require consideration by the Conference.

In accordance with the Standing Orders of the Conference the report is being circulated so as to reach governments not less than 12 months before the opening of the 40th Session of the International Labour Conference on 5 June 1957.

The Standing Orders contain the following provision (article 39, paragraph 2) with regard to the replies of the governments :

The replies of the governments should reach the Office as soon as possible and not less than eight months before the opening of the session of the Conference at which the question is to be discussed. In the case of federal countries and countries where it is necessary to translate questionnaires into the national language the period of four months allowed for the preparation of replies shall be extended to five months if the government concerned so requests.

In order, therefore, that the Office may have time to examine the replies and prepare and despatch the second report to reach governments early enough for the proper consideration of the proposals contained therein, it is requested that the replies to the questionnaire (with an indication of the reasons for them) should reach the International Labour Office in Geneva not later than 5 October 1956.

CHAPTER I

GENERAL BACKGROUND

Recognition of the fundamental principle of the equality of rights of all human beings has been basic to the activities of the International Labour Organisation since its creation and has inspired many of the decisions of the International Labour Conference. One of the guiding principles laid down for the Organisation in its 1919 Constitution was that " the standard set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers lawfully resident therein ". [1] This principle found specific expression in a number of Conventions and Recommendations adopted between 1919 and 1939 and a considerable contribution to its fulfilment was made by the adoption of the general standards contained in these instruments and the extension of their application over many parts of the world to all workers without distinction.

The events preceding and arising during the Second World War revealed the need for a specific restatement of the principle. Accordingly, in 1944, the Conference, in adopting the Declaration of Philadelphia, affirmed, *inter alia*, that " all human beings irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ". It also recognised the obligation of the Organisation to further among the nations of the world programmes which would achieve, *inter alia*, " the assurance of equality of educational and vocational opportunity ".

In the post-war period the Conference has sought to apply this principle in the various fields to which it has turned its attention—for example social policy in non-metropolitan territories, employment organisation and vocational training, freedom of association, minimum standards of social security and protection of migrant workers.

The question of the prevention of discrimination in employment is therefore by no means a new subject to the Conference. However, Conference decisions aimed at the elimination of discrimination have affected specific areas of policy. Other areas have been left untouched.

The time now appears to be appropriate to consider the means by

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[1] Cf. I.L.O. : *The International Labour Code 1951*, Vol. I : *Code* (Geneva, 1952), p. 25.

which a greater equality of rights might be achieved in the major fields of labour policy with which the Organisation is concerned. Work is proceeding along these lines in other fields. Within the United Nations, the Commission on Human Rights, together with its Sub-Commission on Prevention of Discrimination and Protection of Minorities, is following a programme designed to lead to a fuller implementation of the Universal Declaration of Human Rights. The Sub-Commission has itself undertaken a study of discrimination in education and the Economic and Social Council at its XVIII Session (1954) adopted Resolution 545 C (XVIII), inviting the I.L.O. to undertake a similar study in the field of employment and occupation. Moreover there are factors lending urgency to the question, such as the growing consciousness of human rights in many parts of the world, the rapid evolution of ethnic groups of previously inferior status, and the emergence of new countries, often of heterogeneous population, which have to face particularly difficult problems of inter-group relations. Guidance on the standards which might be applied in the various fields of social policy would undoubtedly help in a more rational approach to the solution of these problems.

CHAPTER II

CLARIFICATION OF CONCEPTS AND SCOPE OF THE SUBJECT

Meaning of " Discrimination "

Consideration of the conclusions arrived at by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities is helpful in clarifying the concept of " discrimination ". The word is used by the Sub-Commission not as referring to all distinctions but only to distinctions which operate to the detriment of individuals belonging to particular groups, and " prevention of discrimination " has been taken as meaning " the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish ".

In a memorandum on the subject the Secretary-General of the United Nations suggested certain further clarifications of the ideas embraced by the word " discrimination " :

> . . . discrimination includes any conduct based on a distinction made on grounds of natural or social categories, which have no relation either to individual capacities or merits, or to the concrete behaviour of the individual person.[1]
>
> Discrimination might be described as unequal and unfavourable treatment, either by denying rights or social advantage to members of a particular social category ; or by imposing special burdens on them ; or by granting favours exclusively to the members of another category, creating in this way inequality between those who belong to the privileged category and the others.[2]
>
> Discrimination might be defined as a detrimental distinction based on grounds which may not be attributed to the individual and which have no justified consequences in social, political or legal relations (colour, race, sex, etc.), or on grounds of membership in social categories (cultural, language, religious, political or other opinion, national circle, social origin, social class, property, birth or other status).[3]

In the same memorandum, the Secretary-General suggested that the following criteria might be found useful in any attempt to determine whether practices are discriminatory or not :

> Discriminatory practices are those detrimental distinctions which do not take account of the particular characteristics of an individual as such, but take

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[1] United Nations—Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities : *The Main Types and Causes of Discrimination*, E/CN.4/Sub.2/40/Rev.1 (Lake Success, New York, 1949), p. 9.

[2] Ibid., p. 10.

[3] Ibid., p. 26.

into account only collective qualifications deriving from his membership in a certain social or other group ;

Certain distinctions, which do not constitute discrimination, are justified. These include : (1) differences of conduct imputable or attributable to an individual, that is to say, controlled by him (i.e. industriousness, idleness ; carefulness, carelessness ; decency, indecency ; merit, demerit ; lawfulness, delinquency) ; and (2) differences in individual qualities not imputable to the person, but having a social value (physical or mental capacity).[1]

In regard to the types of " natural or social category " which may give rise to discriminatory treatment, it will be remembered that the Declaration of Philadelphia speaks of the rights of all human beings " irrespective of race, creed, or sex ". The Universal Declaration of Human Rights goes further and affirms the principle of equal entitlement to rights " without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status " (article 2 (1)). Certain of the distinctions specifically named may have less relevance in connection with employment than they have in connection with rights in other fields, while, within the expression " or other status ", there may be distinctions of special importance in the employment field.

Points in the Employment Process at Which Distinctions May Occur

Access to and Tenure of Employment

It is necessary to examine not only the position at the stage of engagement for employment itself—though this is of the greatest importance—but also the position at the point of entry to any vocational training which is an essential preparation for such employment, the degree of security with which employment once obtained is held, and the possibilities of advancement from it to better employment. Inequalities can arise at all these points.

It seems helpful to distinguish between access to public employment and access to private employment. Equality of access to the former may be considered to be of greater importance on principle ; it may also be easier to put into effect. In regard to private employment, greater difficulty attaches both to the analysis of the situation and the proposal of remedies. It is not so easy to say in any particular instance whether selection is discriminatory or not ; there is no unanimity of opinion on the extent to which it is desirable for a State to control discriminatory selection ; and where such a control is decided upon, it is not easy to put into force.

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[1] *The Main Types and Causes of Discrimination*, op. cit. p. 26.

The reason behind discriminatory selection may be the employers' own preference or prejudice, but it may also happen that, though personally disposed to engagement on merit, he adopts another course to comply with government policy or to avoid trouble with workers already in his employ.

Where freedom to engage in employment on one's own account or to practise in a professional capacity is conditional on possession of a licence or title granted at the discretion of the national authorities or of autonomous professional bodies, there may be complaints that complete objectivity is not observed as regards varying professional qualifications; this may be particularly so in the case of the recognition of professional qualifications acquired in foreign countries.

Over and above these there may be a discriminatory element in the special restrictions which apply to the employment of aliens.

With regard to security of tenure of employment, some groups may be more vulnerable to discharge than others and, where the normal channel of access to higher-paid employment is promotion from below, it may be more difficult for one group than for another to climb from the lower ranks to the higher.

The Terms under Which Employment Is Carried Out

Discrimination in remuneration is taken as meaning distinctions between members of different groups performing work of equal value. In considering complaints of discrimination, care must be taken to check whether the work performed by differently remunerated groups is in fact work of equal value. While doubt may remain in many cases, there do exist other cases where differential rates of remuneration are clearly paid for work of equal value.

It is also necessary to consider any divergences in terms of contracts of employment applying to different groups. Even though there may be little *prima facie* evidence of discriminatory terms in regard to hours of work, rest periods, annual holidays with pay, superannuation arrangements, social security provisions connected with employment, etc., the possibility of distinctions arising in such connections must not be overlooked. Nor should health and safety precautions be left out of consideration.

Welfare facilities provided by the employer also require careful examination, particularly those concerned with meals, housing and recreation.

Freedom of Association and the Right to Organise

Equality in the right to join or to form trade unions, to engage in lawful trade union activities and to conclude collective agreements with

employers is of the utmost importance. Denial of any of the advantages of trade union membership may result in handicaps in the defence of the workers' interests vis-à-vis the State, employers and fellow-workers.

Special Difficulties in Applying the Concept of Non-Discrimination to the Field of Employment

Certain special complications arise in dealing with this subject which would not arise in dealing with discrimination in some other fields. According to the suggestions put forward in the United Nations memorandum already referred to, distinctions made on the grounds of a person's merit or ability would be justified. This certainly holds true in relation to access to employment and to remuneration, where merit and ability quite properly affect the individual's position; on the other hand, it would seem to be wrong to take an individual's merit or ability into consideration in safety or health precautions or in welfare provisions. Seniority is another factor which it would be proper to take into consideration in some connections—selection of workers for discharge, promotion, remuneration—but not in others.

Moreover the field of employment is full of other inequalities not due to discriminatory causes but arising from such factors as differences in upbringing, in area of residence, in economic status or in attitude to employment. In certain cases it is by no means easy to determine the extent to which observed differences are caused by these natural factors and the extent to which they are contributed to by artificial and discriminatory factors.

CHAPTER III

ANALYSIS OF GROUNDS OF DISTINCTION AND FORMS OF DISCRIMINATION

This chapter contains an analysis of the grounds on which adverse distinctions are made and the various forms of discrimination that are found to occur with respect to each category. The grounds of distinction are those included in the Universal Declaration of Human Rights, in addition to certain other forms of status which may give rise to adverse distinctions. They are as follows : race and colour ; sex ; language ; religion ; political and other opinion ; national origin ; social origin ; property ; birth ; age, disablement ; and trade union affiliation. These grounds are treated separately below in relation to the degree to which they give rise to discrimination in employment, generally, and in relation to the various forms that discrimination may take in the employment process, i.e. access to and tenure of employment, the terms under which employment is carried out and freedom of association.

Race and Colour

It is suggested that race and colour can be considered together, since colour difference is just one, albeit the most visible, of the ethnic differences occurring in mankind.

The causes of friction between races are deep and their study forms an extensive branch of sociology.[1] Reference is made in the ensuing paragraphs only to certain factors which appear to be of special importance in consideration of discrimination in employment.

It was at one time believed that there might be inherent differences in intellectual capacity between different races, but scientific research has revealed no basis for this belief. That is not to say that in a given situation one ethnic group may not on the whole have employment capacities much inferior to another group. Where such a situation exists, however, the explanation must be sought, not in ethnic differences, but in other factors such as cultural background, opportunity for self-development, unfamiliarity with wage-earning employment or general state of health. Any distinctions which are imposed solely on the basis of race without

[1] For treatment of certain of the aspects of this subject cf. the pamphlets published by U.N.E.S.C.O. in the three series entitled " The Race Question in Modern Science ," " Race and Society " and " The Race Question and Modern Thought ".

regard to the extent to which the individual may have overcome these environmental handicaps must be held to be discriminatory.

Where historical circumstances have brought such groups of different racial origins together they have seldom been groups at the same stage of social evolution and this has fundamentally affected relations between them. Thus relations between persons of European stock and African stock in the American Continent have been conditioned by the fact that the former have been mostly the descendants of free migrants with a relatively high standard of social evolution while the latter have been mostly the descendants of the freed slave population. In the African Continent relations between the European and the indigenous African have been conditioned by the gulf in the standard of evolution between the two peoples at the time of their earlier contacts; and the same holds true to a greater or less extent wherever wage-earning employment was introduced among indigenous peoples by different ethnic groups. Distinctions which today follow racial lines may originally have been determined by quite other factors. It would appear logical in situations of this kind for such distinctions to fall away as soon as the gulf in evolution is spanned. That is indeed what happens in certain cases but in others there are forces working for the *status quo*.

These include prejudices and emotional reactions, and in some cases conflicts of interest, since persons who have enjoyed privileges by reason of their race may be reluctant to surrender them. There is also in some countries the apprehension that economic equality may lead through social and political equality to miscegenation and the submergence of an entire ethnic group.

Where this latter apprehension exists and a policy is pursued of providing as far as possible for the separate development of the races, there may be labour legislation which prescribes or seeks to encourage different treatment of workers according to their race. Instances also still remain in certain non-metropolitan territories of different legislation for indigenous and non-indigenous workers.

In general, however, unequal treatment on racial grounds does not stem from legislation, but from practices often rooted in long established custom. Thus training institutions may have admission practices, written or unwritten, which exclude certain races. Thus also in the engagement of workers there may be a conventional demarcation between the types of employment considered suitable for the respective races, with the result that an individual finds his choice of employment limited to a range of jobs which includes mostly the heavier, more unpleasant and lower-paid work. In particular he may find he cannot obtain jobs in which he would have supervision over workers of another race. Where trade unions are organised on a racial basis a group which benefits from such practices may seek to maintain them. In other areas particular types of employ-

ment may have tended for historical reasons to be concentrated in the hands of members of particular races and there is resistance to a change which would open up occupations to all races.

Within the limits imposed by custom there is naturally a wide variety of practice depending on the outlook of the particular person who is responsible for decisions on the engagement, promotion, or discharge of workers. The attitude of workers in the establishments and their readiness to accept persons of other races as equals may also vary from establishment to establishment, depending to a large degree on whether or not they feel their own economic or social position is threatened by the introduction of other races.

Differential rates of remuneration for equal work according to the race of the worker appear to be far less common today both in public and private employment than they were, say, a quarter of a century ago. The establishment of standard rates of pay, whether by official wage-fixing machinery or by collective bargaining, has made a major contribution to this development, as has also a change in government policy in many areas. In non-metropolitan territories earlier distinctions between the salary scales of indigenous and non-indigenous personnel are gradually disappearing, and the tendency is towards fixing salary scales for each post irrespective of whether it is occupied by an indigenous or non-indigenous person ; any special inducements needed to attract qualified personnel from outside to fill posts for which trained indigenous personnel are not available are provided by means of " expatriation " or other allowances.

In areas where segregation of the races is most marked there may be a separate establishment for public officials of the different races, and holders of posts performing not identical but very similar duties may be paid on different scales. Similarly, in industry, workers of different races performing similar but not identical work in segregated establishments may be placed in separate occupational categories carrying different rates of pay. It is not possible to say without a comparative evaluation whether the difference in remuneration is commensurate with the differences in responsibilities or output, or whether the situation does not reflect an artificially high supply of manpower of one race resulting from restriction on its access to employment in other fields. It should, however, be borne in mind that sometimes there is such a wide gap between the average productivity of workers of the different racial groups that provision of separate occupational categories carrying lower remuneration has been the only way of opening up access to employment for the less productive group.

In non-metropolitan territories and other underdeveloped territories there are often divergent provisions governing contracts of employment for indigenous and non-indigenous workers. Many of these divergent

practices evolved as protective measures for the weaker groups and are still justified by the widely differing habits and social and family organisation of the persons to whom they apply ; for instance, provisions for deferred pay in the case of migrant workers appear still to be desirable. In the gradual process of integration of the indigenous inhabitants into modern types of wage-earning economies resentment, however, sometimes may be caused by the continuation of differences of treatment in these matters.

Adverse distinctions on grounds of race do not appear to arise in connection with hours of work or the application of safety and health precautions.

In areas where social segregation of the races is the normal practice outside the workplace it may also be followed within the factory, resulting in the provision of separate canteen, toilet or recreational facilities.

In regard to trade union rights, different regulations may exist governing the industrial relations of indigenous and non-indigenous workers, with the result that the former do not enjoy equality of rights in the full processes of industrial negotiation. Independently of any legislative provisions, unions themselves may have developed along racial lines and their constitutions or admission practices may exclude certain races ; or members of different races may be admitted to membership subject, however, to being organised in separate branches. In general, however, discriminatory practices of this kind are declining and the tendency is towards full interracial organisation.

Sex

In view of the importance which the International Labour Conference has always attached to the protection of women workers, it is necessary to emphasise at the outset that special legislation, determined by the particular needs of women workers and aimed at reducing the various handicaps which affect them in employment, is not discrimination in the sense used in this report.

The employment position of women is closely bound up with their general status in society. Where women enjoy equality or near-equality of status with men, the adverse distinctions to which they are subject in access to employment are few. Where, on the other hand, their status is markedly inferior to that of men, the probability is that women are either barred by custom from many types of employment outside the home or are restricted to the more menial work.

In the latter situation improvement of their employment status would seem to have to await improvement of their status generally. Admittedly in some circumstances advances can be made in the employment field first—in times of manpower shortage (e.g. in certain of the countries involved in the two world wars) women have been given greater employ-

ment opportunity which has, in turn, by proving their equal ability and giving them greater responsibility and financial independence, improved their status generally. But these circumstances seldom apply in countries where the status of women is low; precisely in such countries there are often insufficient employment opportunities to occupy the male population of working age.

There is in every country a range of jobs commonly regarded as exclusive to men, either because the work, although not classified by law as heavy or dangerous work, requires physical effort in excess of that suitable for women, or because women are considered to lack the aptitude required. The extent of preconceived ideas about the aptitudes of women workers varies widely from country to country, but the dependence of modern industry on highly technical devices requiring aptitudes traditionally regarded as " male " bars a large number of skilled jobs to women. The situation in this respect is changing and conditions in the employment market have resulted in the opening of fresh occupations to women, and their acceptance in these occupations.

A special facet of the question is the position of married women. There are several factors which operate to the disadvantage of married women in regard to employment opportunity. One is the view that the protection of family life requires that no encouragement should be given to married women to enter or continue in employment outside the home. Another is the view, in conditions of unemployment, that married women who can be supported by their husbands should not take jobs which could provide support for heads of families and for unmarried persons who are dependent on their own earnings. A third is the belief that married women workers as a group are unstable members of the labour force owing to the conflicting claims on them of their domestic commitments. Clearly particular circumstances may justify distinctions against certain married women as individuals, but such distinctions must be regarded as discriminatory if they are applied solely because of sex and marital status and without regard to the individual married woman's capacity to perform the employment in question.

Married women are not accepted in the established civil services of certain countries or, if accepted, may be debarred from certain functions, such as posts in the Foreign Service. In private employment the personnel policies of some employers provide that married women will not be engaged, or that the employment contracts of single women will be terminated on marriage.

Limitations on the contractual capacity of married women may restrict their opportunities to enter business or professions on their own account, and in some countries married women require the express or implied authority of their husbands to enter paid employment.

Differences of remuneration on grounds of sex are still common in a

number of countries. In the areas of employment where remuneration is determined by the State, the principle of equal remuneration for men and women is gaining progressively fuller acceptance. Where rates are fixed by collective bargaining this position has not yet been reached, but there is a tendency either for equal remuneration clauses to be included in agreements or for the gap between men's and women's rates to be reduced.[1]

Language

Language difference is a potential source of considerable inter-group hostility. However, in many plurilingual countries it has been found possible to introduce safeguards which ensure scrupulous fairness among the different linguistic groups. An important factor, particularly in relation to public employment, is the recognition of different languages as official languages enjoying parity of status; another is the provision of vocational training facilities in the different languages.

There are practical difficulties in ensuring full equality in training facilities in different languages, particularly in training for the professions and in respect of languages spoken by a small minority only. These may include difficulty in finding qualified teachers capable of teaching through the medium of the language concerned, absence of text books in that language or even the lack in some languages of the essential basic technical vocabulary. Furthermore, it may in certain circumstances be more conducive to equality of opportunity if, following basic education in their own languages, all students receive higher education in a majority or official language; this not only makes them eligible for a wider choice of posts but may equip them better to exchange views with their professional colleagues and to keep abreast of the latest developments. Therefore, although lack of training facilities in certain languages may sometimes be due to lack of concern for the rights of a linguistic minority or to a deliberate policy of extending the use of the majority language, it cannot be regarded in itself as evidence of discrimination.

In regard to access to jobs, fluency in a particular language or combination of languages may be a bona fide occupational requirement for a particular position. The question of discrimination only arises if the worker's language is irrelevant to the employment. Even where an employer gives preference to an applicant of his own language when he is engaging the worker, it can be argued that this applicant is *ipso facto* more suitable for the position owing to the greater ease of communication with the employer. As with individual employers' preferences based

[1] For recent statements regarding the position in a number of member countries see I.L.O.: *Summary of Reports on Unratified Conventions and on Recommendations (Article 19 of the Constitution)*, Report III (Part II), International Labour Conference, 39th Session, Geneva, 1956 (Geneva, 1956).

on applicants' religious beliefs, the discriminatory effect is largely proportionate to the extent to which such action closes avenues of employment to members of a given group.

Religion

Where religious differences occur, unaccentuated by political differences, a spirit of mutual tolerance has in most cases developed, which extends to the field of employment. In fact, it is generally recognised that unless tolerance extends to the economic field there can be no complete freedom of religion.

Where the State attaches particular importance to maintaining the secular nature of public education, there may be a bias against the employment as teachers in state schools of persons who are members of religious orders or who have received their training in confessional institutions. It is suggested, however, that the issues involved in such cases are primarily ones of religious freedom outside the competence of the I.L.O.

Employers may, in certain circumstances, give preference to members of their own faith when they engage workers or accept apprentices; such cases occur more frequently in establishments employing few workers. In principle, this is discriminatory, but the results of such practices by employers of different faiths may tend to even themselves out and in general they do not seem to give rise to much protest.

Discrimination against Jews has special aspects in that it has most frequently been provoked by prejudices, based less on the difference of religion than on false racial ideas or dislike of the different customs of Jewish immigrants. In the past, including quite recent history, there have been severe obstacles hindering the equal access of Jews to many forms of employment and activity; today these are fortunately fewer, and in so far as they continue to exist they are concealed rather than overt.

There may be occasions when there are bona fide reasons for exercising a preference in the engagement of a worker for members of a certain faith; for instance, where private schools are administered by religious authorities it might generally be acceptable for preference to be given to teachers professing the religion concerned. Conversely, applicants of a given religion might be genuinely unsuitable for a given position by reason of their inability to work on a day of the week when such work is essential for the proper execution of the functions of the post.

In countries where trade unions are organised on a confessional basis a worker may be either unable or unwilling because of his religious beliefs to join a particular union; however, in such circumstances there is normally a parallel union giving comparable services which he can join and

as a result he is not subject to any marked disadvantage except where the former union enjoys distinct privileges resulting from a position of monopoly.

Political or Other Opinion

Freedom from discrimination in employment on grounds of political opinion has been achieved in many countries where there is no major difference of opinion between the leading political parties on the basic human rights and where the reins of government pass from one party or group of parties to another as a result of democratic processes. The principle has in most democracies been established that adherents of the group in power should not thereby enjoy privileges in public employment. This principle may not always be fully observed in practice; there are, for instance, in many countries allegations from time to time that provincial and local authorities exercise favour in making public appointments.

Also there are instances where governments maintain their right to nominate to key public posts persons whom they consider they can trust to carry out their policies and where in practice this may lead to the appointment of persons not on merit but in accordance with their political affiliation. More particularly where normal democratic processes do not have free play and a change of government takes place by *coup d'état*, there may well be cases of dismissal of public servants too closely identified with the displaced régime and their replacement by supporters of the *coup d'état*.

In a country where no political opposition exists, or where little latitude is allowed for differences in political opinion, or where the machine of a single political party has an assigned function to perform in the administration, it can result that a range of executive posts is filled by party members; individuals known to have opinions opposed to those of the party may not be retained in responsible posts or posts may be open only to persons who take an oath of loyalty to the régime. There may be a tendency to take assumptions as to the individual's political reliability into consideration and outspoken criticism may result in dismissal without compensation.

In admission to vocational education the " social attitude " of the applicant may be taken into consideration; while this may relate to extra-academic merit as shown by the applicant's social activities, it may also be interpreted to cover his political reliability. Students may lose their scholarships or be expelled for their hostile attitude to the Government.

In countries where there are parallel trade union movements based on differences of political outlook there may clearly be discrimination in admission to, and participation in the affairs of, a particular union;

but, as with unions organised on a confessional basis, the situation does not appear to lead to practical discrimination at the place of work unless a particular union enjoys exclusive privileges.

National Origin

It is necessary to distinguish two elements in the concept of national origin; one is the natural distinction of foreign ancestry, the other is the juridical distinction of nationality. Both affect migrant workers and their descendants, but in different ways.

Foreign ancestry can affect the position of individuals in much the same way as differences of race, language or religion, that is through the operation of prejudice on the part of private individuals. There may also be discrimination as between groups of persons of differing foreign origins.

Distinctions of nationality lead to restrictions prescribed by law affecting access to employment. It is a widespread custom for statutory restrictions to be applied to aliens during the initial period of residence and these are generally regarded as justified. However, continuation of such restrictions for an unreasonable period and after immigrants have established themselves in the country may well be discriminatory.

Nationality is a distinction which widely affects access to almost all forms of employment. There are often provisions laying down that public employment is open only to nationals of the country concerned, or that foreigners may be accepted in official posts only if nationals are not available. Such provisions are normally insisted upon by public opinion in order to ensure the maintenance of the national character of the administration.

In regard to access to private employment, provisions vary widely from country to country, depending on the degree to which full employment has been achieved, the demographic interests of the country in encouraging or discouraging immigration and the extent to which the country is apprehensive of foreign influence. They may be applied differently to persons entering as temporary workers and those entering as prospective settlers. The two main forms of regulation of the employment of foreigners are the permit system and the *numerus clausus* system.

Under the permit system the foreign worker is restricted to a particular post or sector of employment and he may change his employment only with the permission of the competent authorities. One purpose of this system is to enable the authorities to ensure that he does not occupy a post which could be filled by an unemployed citizen or long-resident foreigner; another is to prevent the undercutting of the wage level through the employment of foreigners at less than standard rates of pay. The latter purpose incidentally gives the foreign worker a guarantee against

discrimination in remuneration. This system facilitates manpower movements across frontiers which might otherwise not occur, and does not seem to give rise to serious objection so long as it is confined to the initial period of a foreign worker's stay.

Under the *numerus clausus* system, which is usually alternative, but may occasionally be additional, to the permit system, there is no personal employment restriction on the foreign worker. The restriction applies to the employer, who is required to employ a certain percentage of nationals or to pay to nationals a stated percentage of the total of wages and salaries. This is prompted to some extent by the desire to avoid the development of any form of foreign monopoly over certain undertakings, trades or occupations. While in principle it is a restriction on the access to work of individual non-nationals, it is doubtful whether in practice it can be said to have an unduly restrictive effect, except where a quota is freshly imposed and certain employers seeking to comply with it have to close engagement to non-nationals over a period.

It is usual to lift restrictions on foreign workers and their families after a certain period of residence and to place them thenceforward on a general footing of equality with citizens in employment matters. The standard set in the Migration for Employment Recommendation (Revised), 1949 (Paragraph 16 (2)), is as follows :

> In countries in which the employment of migrants is subject to restrictions, these restrictions should as far as possible—
>
> *(a)* cease to be applied to migrants who have regularly resided in the country for a period, the length of which should not, as a rule, exceed five years ; and
>
> *(b)* cease to be applied to the wife and children of an age to work who have been authorised to accompany or join the migrant, at the same time as they cease to apply to the migrant.

This is a standard as yet applied by relatively few countries.

Foreign workers may be subject to other disabilities. For instance, they may be more liable to discharge on retrenchment. Although freely admitted to membership of trade unions they may be prevented from holding office.

In Chapter II it was suggested that distinctions were discriminatory only if they were based on characteristics over which individuals have no control. In many countries foreign workers can, after a given period of residence, obtain naturalisation with facility, and it is clear that any employment restrictions on long-term foreign residents have a less rigid discriminatory effect if they can be overcome by the acquisition of the nationality of the reception country.

Social Origin

There appears to be a tendency in all societies to social stratification, which is reflected in the employment field as a tendency for sons to be employed at the same occupational level as their fathers. The opposing tendency—social mobility—that is the extent to which persons move from one class to another, may be measured by the proportion of cases in which sons engage in occupations at a different level from their fathers. While measurement of social mobility is at best approximate, it seems clear that the rate of mobility varies from one country to another. One factor in a low rate of mobility may be preferential selection in access to professional training or employment, but there are many other factors to be considered. For instance, a country developing at a slow rate will present fewer opportunities for mobility than a country in a state of rapid economic development. Moreover, there are natural factors which favour the son or daughter of a professional worker in preparing for a professional career, such as cultural environment, and moral and economic support during study.

In the extreme form of social stratification—caste society—there are rigid traditions which have the effect of confining the lower castes to the more menial jobs and reserving to higher castes those jobs in highest respect. In a class society with less rigid traditions it is not easy to discern any arbitrary distinctions in the employment field which are directly traceable to the class origin of individuals. In the nineteenth century in some European countries class origin was undoubtedly an element taken into consideration in admitting individuals to certain employments. Today there appears to remain little more than an occasional preference determined by subtle factors such as an individual's family name or manner of speech, or the educational establishment which he attended.

In some countries there have been conscious attempts to create a new intelligentsia from persons of worker or peasant origin; these have involved adverse distinctions against persons originating from other classes. However, the tendency appears to be for preference on the basis of social origin to give way to competitive selection.

Property

Ownership of property or family wealth undoubtedly can give an individual certain advantages in access to or success in training or in employment but no evidence has come to light in studying this subject of any arbitrary distinctions whereby access to employment is expressly open only to persons possessing a stated amount of property or a stated private income.

Birth

Disabilities resulting from parentage have been considered primarily under the headings already discussed, such as race, religion and social origin. There is, however, the practice of limiting entry to apprenticeship in certain trades to the children of craftsmen in those trades. The restriction does not usually amount to an absolute ban but preferential treatment for family members is often sufficiently marked to constitute a discrimination against others.

Other Status

Among other forms of status which may give rise to adverse distinctions in employment are differences of age, disablement and trade union affiliation.

Age

In the more industrialised countries there is an increasing volume of complaints from older workers, both men and women, that they are not considered for vacancies on their merit. The markedly higher incidence of long-term unemployment among men and women over 40 or 45 years of age in some countries indicates the seriousness of the problem. Their poorer employment prospects may have some basis in factors of lower suitability for employment and there may be serious difficulties in relation to superannuation schemes and maintenance of an age structure permitting fluid promotion for younger workers.[1] However, the rejection of an applicant on account of his date of birth alone without regard to his working capacity would come within the meaning of " discrimination " suggested in Chapter II. This occurs in many countries and in many types of employment, public and private. It frequently takes the form of setting an upper age limit in the job specification; elsewhere, applications are considered from persons of all ages but preference is given to the younger person.

Young workers may also encounter distinctions determined solely by their age; not generally, however, in access to employment but in remuneration. Differential rates for young workers exist in many countries. These are based on custom or on presumed lack of experience and skill or low level of output, and are sometimes influenced by a relatively higher rate of turnover among juvenile workers. In cases, however, where the wages paid to the young workers are not commensurate with the work performed the risk exists that such workers will be used

[1] See " The Problem of the Employment of Older Workers ", in *International Labour Review* (Geneva, I.L.O.), Vol. LXIX, No. 6, June 1954, pp. 594-618; and " The Employment of Older Women ", in ibid., Vol. LXXII, No. 1, pp. 61-77.

as a reservoir of cheap labour. This may lead to abuses such as the discharge of young workers when they reach the age at which they would qualify for adult rates of pay and their continued replacement by younger workers still within the age group receiving lower wages, a practice which is especially to be found in countries where apprenticeship is not adequately regulated.

Disablement

Owing to prejudices on the part of employers and workers disabled workers may have undue difficulty in obtaining employment in types of work which they could do as well as able-bodied workers. This situation has begun to be corrected in recent years, but the process of education of the public in its attitude to disabled workers and the development of rehabilitation facilities still have a long way to go.

Trade Union Affiliation

The development of trade unionism as a major factor in the promotion of industrial relations is now recognised in all industrially advanced countries, but earlier prejudices against trade unionism nevertheless persist in a number of places. These may result in discriminatory acts against trade union members.[1] The principle of the protection of workers against such acts is established in the Right to Organise and Collective Bargaining Convention, 1949.

On the other hand, where trade unionism is well established, union members may not only be protected against discriminatory acts; they may be the beneficiaries of exclusive privileges negotiated for them by their unions. They may for instance benefit from a union security clause in a collective agreement signed with an employer by which the employer agrees to engage or retain only persons who are members or are willing to become members of the union concerned; or they may benefit from an agreement whereby certain advantages in remuneration are restricted to members of the union signing the agreement. The view has been advanced that such exclusive agreements are discriminatory in their effect on non-members; such agreements are in fact prohibited by legislation in certain countries. However, this view is by no means generally conceded and in other countries union security agreements are not only permitted but encouraged. The public attitude on this question is largely determined by the national background and the way in which trade unions have developed.

Clearly, if the admission practices of a union which is party to such an

[1] Cf. I.L.O.: *Freedom of Association and Industrial Relations*, Report VII, International Labour Conference, 30th Session, Geneva, 1947 (Geneva, 1947), pp. 54-55.

agreement are themselves discriminatory, or if certain groups are excluded by legislation from union membership, then such arrangements can have a consequential discriminatory effect. To guard against this in countries where union security arrangements are permitted, the law frequently provides that unions may not include in their rules unreasonable discriminatory or oppressive conditions barring persons from membership.[1]

The justification of union security arrangements in themselves, that is where there is no complication arising from discrimination in admission, remains a subject on which there is acute difference of opinion.

Their purpose is not discriminatory; it is to strengthen union solidarity vis-à-vis the employer. Generally, too, there is the honest belief that it is unfair for workers either to take advantage of benefits won by a trade union without joining and supporting the union, or to be permitted to work on inferior terms as non-members, so that an employer may be able to avoid engaging union labour on terms provided for in collective agreements. Also agreements normally include certain obligations on the part of the workers, and unions maintain that they can undertake obligations only on behalf of their own members.

On the other hand it is asserted that, whatever the intention of union security agreements, their practical effect can be to make access to certain types of employment contingent upon the worker belonging to an association, with whose policies he may be in disagreement.

There is an evident conflict of freedoms here, and it is doubtful whether there is any prospect of substantial international agreement on the way in which the conflict should be resolved. It was shown during the discussion by the International Labour Conference at its 32nd Session in 1949 leading to the adoption of the Right to Organise and Collective Bargaining Convention that there were two irreconcilable schools of thought on this issue. It is suggested therefore that the Conference, while noting the existence of the problem, might prefer not to attempt to seek an international solution to it in the context of the prevention of discrimination; if the problem is to be discussed it would appear to be essential to discuss it in the context of the whole complex of problems relating to freedom of association and collective bargaining.

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[1] See I.L.O.: *Industrial Relations*, Report VIII (1), International Labour Conference, 31st Session, San Francisco, 1948 (Geneva, 1947), p. 21.

CHAPTER IV

NATIONAL ACTION AND INTERNATIONAL STANDARDS DIRECTED TOWARDS PREVENTION OF DISCRIMINATION IN EMPLOYMENT

National Action

Constitutional Provisions

The Constitutions of most countries contain some safeguards of a general nature against discrimination. These may take various forms, such as a declaration regarding equality of opportunity, prohibition of any distinction between individuals and of any privileges, or prohibition of distinctions or privileges based on certain specified grounds (for instance, race, religion, birth, social status, language, political opinion). In addition certain Constitutions make specific mention of equality in employment, either generally or in public employment only.

Constitutional provisions are valuable in making residents aware of their rights, as a statement of principle to guide the actions of public authorities, non-governmental organisations and individuals (whether as employers or workers) and as provisions which can be invoked in a court of law by an aggrieved person who considers he is being discriminated against.

There are wide differences in the effectiveness of such provisions in ensuring equality of rights to the individual. Where individuals are able to form associations for their group defence which can give members legal aid in bringing actions, particularly in test cases, not only against private persons but also against public authorities, then the degree of protection which such provisions afford to different groups of society may in the long run be considerable. Even so, carrying an action through to a supreme court may take time and may not afford immediate relief to individuals affected by discriminatory practices; also the procedure may be too cumbersome to deal with day-to-day manifestations of discrimination. For this reason a number of countries, in addition to constitutional provisions, have introduced specific measures directed against discrimination in employment, partly legislative and partly administrative.

Specific Government Measures

The commonest form which direct government action against discrimination in employment takes is the inclusion in laws or regulations governing admission to public employment of provisions barring distinctions on one or more of the following grounds : religion, race, sex, political opinion, national origin. Special measures may also be taken to ensure that these regulations are observed by government departments. In Brazil under article 6 of Act No. 1390 of 3 July 1951 the penalty of dismissal after due investigation is prescribed for officials in charge of departments responsible for receiving applications of candidates who deny access to any post in the public service owing to prejudice based on race or colour. In the United States the federal Government has set up administrative machinery to ensure uniformity of practice in its departments and agencies in observance of its policy of equal opportunity for all qualified persons without discrimination because of race, colour, religion or national origin. (The latest rules are contained in Presidential Executive Order 10590 of 18 January 1955.) Within each department special officers independent of their personnel divisions are charged with the observance of the policy, and all complainants have the right to have their cases reviewed by the President's Committee on Government Employment Policy. In India positive administrative measures have been taken not only to see that no disabilities in public employment are applied to members of scheduled castes and scheduled tribes but also to increase the participation of members of these castes and tribes in public employment.

A further step adopted by some countries consists of measures to ensure that the principle of non-discrimination is followed in all employment resulting from the expenditure of public money. In the United States since 1941 private employers executing federal government contracts have been under an obligation not to discriminate against workers or applicants for employment because of race, religion, colour or national origin. Currently all federal contracts of over $10,000 involving the employment of labour contain the following clauses :

> In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, colour, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination ; rates of pay, or other forms of compensation ; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause.
>
> The contractor further agrees to insert the foregoing provisions in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

There is machinery for following up the observance of these conditions and for investigating complaints; if the contractor does not keep to his promise his contract can be terminated. Similarly in Canada an Order in Council No. 4138 (Statutory Orders and Regulations No. 19, 1952) provides that in the hiring and employment of labour for the execution of a government contract the contractor must not refuse to employ or otherwise discriminate against any person because of race, national origin, colour or religion.

Over and above this, measures have been taken in some countries to extend the observance of a non-discriminatory policy to all major areas of private employment. In Brazil under article 7 of Act No. 1390 of 3 July 1951 it has been declared a punishable offence to deny employment or work to anyone in an independent undertaking, mixed undertaking, public service or private enterprise owing to prejudice based on race or colour. In India the Untouchability (Offences) Act, No. 22 of 1955, prescribes penalties for the practice of untouchability in connection, *inter alia*, with the practice of any profession or the carrying on of any occupation, trade or business, and in Japan the Labour Standard Law, No. 49 of 1947, provides that " no person shall discriminate against or for any worker by reason of nationality, creed or social status in wages, working hours and other working conditions ". In the U.S.S.R. managements of undertakings are not permitted to refuse admission to employment on grounds of social origin, past criminal record, the conviction of relatives and similar considerations except in so far as provision is made for this in special laws. (Ordinance of the Soviet Control Committee of the Council of People's Commissars of the U.S.S.R. respecting the examination of workers' grievances (Collection of Laws of the U.S.S.R., 1936, No. 31, article 276).)

In the United States, state and local " fair employment practice " legislation is in force in 15 states and 25 municipalities.[1] Certain of the main provisions of the New York State Law Against Discrimination of 1945 may be given as examples of this type of legislation.

This Law asserts that opportunity to obtain employment without discrimination on the basis of race, creed, colour or national origin is a civic right and declares that any discrimination on these grounds is a matter of state concern. It declares certain types of discrimination, if based on these grounds, to be " unlawful employment practices "; these may be summarised as follows :

(a) refusal by an employer to employ an individual;

(b) discrimination against an employee in pay or terms of employment;

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[1] See W. Brooke GRAVES : *Fair Employment Practice Legislation in the United States : Federal-State-Municipal* (Washington, Library of Congress Legislative Reference Service, 1951).

(c) exclusion of an individual from membership by a labour organisation or discrimination by it against any of its members or against any employer or any individual because he is employed by a given employer ;

(d) the issue by an employer or an employment agency of any statement or application form or the making of an inquiry in connection with prospective employment indicating any limitation as to race, creed, colour or national origin unless based on a bona fide occupational qualification.

Establishments with fewer than six workers are excluded, as are certain clubs, charitable, educational and religious associations not organised for private profit.

The Law is administered by an independent commission. Its method of operation is for one of its members to investigate complaints of violation of the Law in the first instance ; if he finds that a prima facie unlawful employment practice exists, he attempts to secure its elimination by persuasion. If this fails, the person against whom the allegation is made is summoned to a hearing before the Commission ; if, after the hearing, the Commission finds that the Law has been violated, it states its findings of fact and serves on him an order requiring him to " cease and desist from such unlawful employment practice " and to " take such affirmative action, including (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership in any respondent labour organisation as in the judgment of the Commission, will effectuate the purposes " of the Law. There are provisions for the judicial review of this order and penalties for persons wilfully violating it.

In Canada anti-discrimination legislation has been enacted at both federal and provincial levels. At the federal level the Canadian Fair Employment Practices Act, which is applicable to works and undertakings within the legislative jurisdiction of the Parliament of Canada, prohibits discrimination in employment based on race, colour, religion or national origin, whether practised by employer or trade unions. More specifically it prohibits positive acts of discrimination and the use of discriminatory employment inquiries, application forms, advertisements or agencies. The Industrial Relations Branch of the Department of Labour is responsible for the day-to-day administration of the Act, in which to date it has encountered no serious enforcement problems. Provincial legislation follows lines somewhat similar both to the federal Act and state legislation in the United States.

Public employment services are also used as an instrument in furthering non-discriminatory practice, particularly in regard to access to employment. The principle affirmed in the Employment Service Recom-

mendation, 1948, that " the employment service should not, in referring workers to employment, itself discriminate against applicants on grounds of race, colour, sex or belief ", is widely applied. In certain countries the service has additional functions in preventing or discouraging discrimination in selection. In Cuba, where in principle the employer is required to engage his workers through either the employment service or the trade unions, the service is prohibited from mentioning an applicant's race or colour in referring his application; failure to employ a suitable worker from those so referred, on grounds of race or colour, by exclusion of one race or by giving preference to another, is declared to be a punishable offence. The United States Employment Service is required to seek to persuade employers to base their hiring specifications exclusively on job performance factors and special officers are appointed to promote the employment of minority groups on the basis of their skills and abilities. In Great Britain, if a vacancy notified to the employment service by an employer discriminates on grounds of race, colour, sex or belief, and suitable workers of the type discriminated against are available, efforts are made to persuade the employer to consider such workers equally with other suitable workers.

In the United States and Canada, federal, state and provincial governments have undertaken considerable educational work among the public both with a view to seeking the voluntary acceptance of the policy of non-discrimination and also with a view to ensuring that the measures used to implement it are widely known. In the United States there is also state legislation prohibiting private educational institutions, including business and trade schools, from exercising discrimination in admission on grounds of race, colour, religion or national origin and setting up machinery to promote the observance of the policy of non-discrimination in education.

In many countries also the authorities take measures aimed at assisting groups which would otherwise be at a disadvantage in relation to equality of opportunity and there are special services for older workers, disabled workers, immigrants, etc.

Non-Governmental Action

The basic philosophy of trade unionism is that workers everywhere have a community of interest which transcends any distinction of race, sex, religion, etc. Although here and there sections of the trade union movement pursue sectional interests which conflict with this philosophy it may be said that the trade union movement as a whole not only gives strong support to state action against discrimination wherever it is taken but plays an active role itself. National federations frequently have machinery to promote a non-discrimination policy among their affiliated

unions; many unions follow strong anti-discrimination policies and non-discrimination clauses are sometimes written into collective agreements.

On the employers' side, too, there is a readiness not only to agree to such clauses but in some instances to take the initiative in instituting a non-discrimination policy in their employment.

Voluntary associations of many different kinds also play an important part. Firstly, there are organisations set up by groups liable to be subject to discrimination—women's organisations, coloured people's associations, religious defence associations, etc.—which can conduct inquiries, help their members with employment advice, intervene with employers or unions and present complaints to the authorities. Secondly, there are reconciliatory bodies—inter-racial associations, inter-religious associations—which aim more at the roots of the problem by lowering inter-group tension, by helping minority groups to overcome some of their social disabilities and by educating the public generally on questions of equality of human rights.

International Standards Already Determined by the Conference

Many of the instruments adopted by the International Labour Conference contain one or more provisions relating to equality of treatment in the particular field with which each is concerned. The Appendix to this report contains extracts of the major provisions of this kind which have not already been mentioned in the text. These have been grouped according to the subject matter or grounds of discrimination dealt with. There are also extensive provisions in a number of instruments which deal with the social security status of non-national workers. The fullest expression of non-discriminatory principles is found in the instruments dealing with social policy in non-metropolitan territories and the protection of migrant workers in underdeveloped countries and territories. In the other instruments provisions are directed chiefly against adverse distinctions on grounds of sex and nationality; disabled workers have received special consideration in the Vocational Rehabilitation (Disabled) Recommendation, 1955. There have been no specific provisions directed against discrimination on grounds of language, political opinion or social origin.

CHAPTER V

CONCLUSIONS

It is possible to discern in the years since 1944 a trend towards a fuller implementation of the principle of equal opportunity for " all human beings irrespective of race, creed or sex ". This reflects to a large extent an evolution in public opinion but the process has undoubtedly been facilitated by the more favourable employment situation which has existed in many countries and areas. With more jobs available there has been less feeling of competition between groups and increased demands for manpower have opened up fresh avenues of employment to groups not hitherto fully utilised. Even where discrimination in access to jobs has not been eliminated the line at which it applies has shifted and groups of workers previously confined to unskilled work have found admittance to semi-skilled and skilled occupations. The achievement and maintenance of full employment is therefore one of the greatest contributions which can be made towards equality of employment opportunity.

There is, however, scope for specific and positive measures directed towards eradicating discrimination where it exists and promoting more complete equality of opportunity and treatment in the field of employment generally.

The basic need would appear to be for maximum acceptance by everyone—governments, employers and workers alike—of the fundamental principle that each individual has a right to equality of opportunity and treatment in employment matters and that it is morally wrong to take any action which limits this right because of characteristics affecting the individual which are not relevant to his employment—race, sex, language, political opinion, national origin, social origin, etc. In most countries governments, employers and workers would go a long way towards accepting this principle but reservations of one sort or another frequently remain ; if progress is to be made it is precisely these reservations which have to be attacked. Clearly the national situation varies so widely from country to country in respect of the composition of the population and the magnitude and complexity of the problems which this creates, the fundamental political outlook and the stage of social and economic evolution reached, that any international instrument would have to be conceived in the most flexible terms.

In drafting an instrument to deal with the subject it is first necessary to arrive at a definition of " discrimination ". A tentative definition for present purposes is put forward in the questionnaire attached to this report. Despite the fact that there has been as yet no national precedent for such action, it is suggested that the instrument should attempt to deal with adverse distinctions made on all the grounds listed in article 2 (1) of the Universal Declaration of Human Rights. The distinctions named and the order in which they are listed may not be those which would have emerged from a study of the needs in the employment field alone, but it seems desirable to adhere to a text which has already been adopted internationally. However, it may be held either that it would be impracticable to deal uniformly with all the distinctions listed, or that the list is incomplete. The views of governments are sought in *question 3.*

One of the first points raised in any discussion on discrimination relates to distinctions made on the grounds listed, but with a favourable intention. One example of this is special legislation for women workers; another is the granting of temporary privileges to indigenous workers to assist in their integration into the community. In principle, the definition of discrimination suggested should make it clear that beneficial distinctions of this type are not affected; however the point is sufficiently important for governments to be asked whether they consider it desirable to indicate specifically that such special measures would not be affected *(question 4).*

The first step would appear to be for governments to establish a public policy aimed at the elimination of any existing discrimination and at the promotion of equality of opportunity and treatment in employment matters for all persons. It would seem possible for the instrument to define certain broad common principles applicable to each major area in the employment field on which national policy might be based. Suggestions as to what these principles might be are contained in *question 5.* These suggestions will not be elaborated here except to mention that in clause *(f)* the definition of " remuneration " has been taken from the Equal Remuneration Convention, 1951, and that, in regard to the principle applicable in respect of trade union rights (clause *(h)*), it is realised that there might be complications in countries having unions constituted on a confessional or political basis.

Great importance attaches to the methods which might be used to promote acceptance and observance of the policy. There are certain immediate steps which it appears open to the national authorities to take. One is to ensure that the policy is strictly applied in all spheres of employment and training coming under their direct control, that is primarily in the civil service and in state training establishments; another is to modify any discriminatory legislation which may exist *(question 6).*

It seems, however, necessary to make exceptions to allow for the continuation of restrictions on the access of non-nationals to employment. As has been seen, it is a common practice for governments to withhold complete equality with nationals in access to employment from alien immigrants for a certain period following their arrival in a country ; it is also a widespread practice to exclude from certain posts in public employment persons who, however long their residence in a country, have not become naturalised. It might, however, be considered desirable to include a limit to the period during which the alien immigrant is subject to the former restrictions and it seems logical that the same limit should be set as in the Migration for Employment Recommendation (Revised), 1949, namely a period " the length of which should not as a rule exceed five years " *(question 7)*.

A further step might be to insist that the policy is observed in employment which, though not directly under the national authorities, nevertheless results from the expenditure of public money ; this could be done by restricting public contracts to employers prepared to apply the policy *(question 8)*. For similar reasons, subsidies for educational establishments giving vocational training might be restricted to institutions prepared to apply the policy in respect of admission of students *(question 9)*. Where there is control over private employment agencies such control might be used to ensure that the policy is observed by these agencies *(question 10)*.

Encouragement could be given to provincial and local authorities to apply the policy to all spheres of employment coming under their control *(question 11)*.

The support of employers' organisations and trade unions would clearly be essential for the introduction of a policy of non-discrimination in employment, and it is suggested that they should be encouraged to accept and apply the policy in respect of their own activities, to further its acceptance by their members, to have regard to it in matters of industrial relations generally, and to establish the necessary internal machinery to put the policy into effect *(question 12)*.

It would seem necessary to have specific administrative machinery charged with the responsibility for promoting the observance of the policy, as is the case in certain countries ; according to national circumstances existing machinery might be used or it might be considered desirable to establish special agencies to deal with the matter on a national, provincial or local basis *(question 13)*. In view of the complexity of the considerations arising, there would appear to be need for advisory machinery to assist in the interpretation and promotion of the policy. A particularly important function would be the defining of those acts (for instance the publication of discriminatory advertisements or the inclusion of discriminatory questions in employment application forms) which are regarded as contrary to the policy *(question 14)*.

The successful application of the policy depends to a very great extent on its being understood and accepted by the general public. It is therefore suggested that one of the main functions of the machinery would be to carry out or to stimulate comprehensive and sustained education programmes designed to make the general public aware of the unfair nature of discriminatory practices and to combat prejudices generally *(question 15)*. In this connection use might well be made of existing voluntary organisations *(question 16)*.

If the policy is to safeguard the rights of groups and individuals effectively, it is essential for the latter to be able to bring any complaints of non-observance to notice. As is the case in certain countries, one of the functions of the administrative machinery should therefore be to receive and examine complaints and to seek to settle by informal negotiation any problems which these complaints may bring to light. One point for consideration here is whether powers of investigation would be necessary to make such steps effective *(question 17)*.

Methods of informal negotiation might, however, not always be successful in settling the problems revealed, and one course might be to arrange for an independent and impartial commission to consider any cases not disposed of by negotiation and to issue findings as to the manner in which it considers any discriminatory practice revealed should be corrected *(question 18)*. Governments are asked in *question 19* whether they consider that any other methods of enforcement are necessary.

Finally, it is suggested that the agencies referred to in question 13 should not lose sight of the fact that the prevention of discrimination in employment is linked with the prevention of discrimination in other fields and that they should maintain close and regular collaboration with the authorities concerned with these other fields *(question 20)*.

QUESTIONNAIRE

Governments are requested to send their replies to the following questionnaire, stating their reasons for them, so as to reach the Office in Geneva by 5 October 1956.

I. Form of the International Instrument

1. *Do you consider that the International Labour Conference should adopt an international instrument concerning the prevention of discrimination and the promotion of equality of opportunity and treatment in employment?*

2. *What form do you consider the instrument should take?*

II. Definition and Scope

3. (1) *Do you consider that for the purposes of the instrument " discrimination " might be defined as any adverse distinction which deprives a person of equality of treatment and which is made solely on the basis of—*

(a) *race;*
(b) *colour;*
(c) *sex;*
(d) *language;*
(e) *religion;*
(f) *political or other opinion;*
(g) *national origin;*
(h) *social origin;*
(i) *property;*
(j) *birth;*
(k) *other status.*

(2) *Do you consider that in addition to referring to " other status " the instrument should enumerate any further bases of distinction (e.g. age or disablement) ?*

(3) *Do you consider that any basis of distinction should be specifically excluded from the definition ?*

4. *Do you consider it desirable to indicate specifically that action against discrimination in employment should not override any special measures designed to meet the particular needs of women or young workers or disabled persons in so far as such measures are in accordance with the appropriate international instruments, and that it should not override any special temporary measures taken in the interest of peoples of less developed social, economic or cultural status pending their integration into the national community ?*

III. Establishment of Public Policy

5. *Do you consider it desirable that the competent authority, after consultation with employers' and workers' organisations, should establish, by procedures appropriate to national conditions, a public policy directed towards the eradication of discrimination of all kinds in the field of employment and towards the promotion of equality of opportunity and treatment therein based on the following principles:*

(a) *all persons should have equal opportunity of access to employment of their own choice on the basis of their individual fitness for such employment whether in the public service or otherwise and whether under contract of employment or on their own account;*

(b) *vocational guidance and employment service placement facilities should be open equally to all persons with a view to assisting them in the free choice of suitable training and employment;*

(c) *in order to ensure equal opportunity of access to types of employment for which preliminary training is necessary, there should be no discriminatory barriers to, or discriminatory selection for, admission to vocational schools, vocational training courses or apprenticeship, or to any other training facilities at all levels;*

(d) *all workers should have equal opportunity to advance in employment according to their character, ability and diligence;*

(e) *there should be no discrimination in respect of security of tenure of employment or, in the event of retrenchment, in the selection of workers to be discharged;*

(f) *remuneration should be established without regard to any of the factors specified in question 3, the term " remuneration " to include the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or kind, by the employer to the worker and arising out of the worker's employment;*

(g) *there should be equal treatment for all workers in the same employment in matters affecting hours of work, rest periods, annual holidays*

with pay, occupational safety and health provisions, welfare facilities and social security provisions connected with such employment;

(h) *there should be no discrimination in connection with the right to establish or to join trade unions, to participate in trade union activities, including the holding of office, or to participate in collective bargaining ?*

IV. Promotion of the Acceptance and Observance of the Policy

6. *Do you consider that the competent authorities should ensure that the policy of eradicating discrimination and of promoting equality of opportunity and treatment in the field of employment is strictly applied in all spheres of employment and training coming under their direct control and that they should modify any existing legislation which prescribes or authorises such discrimination ?*

7. *Do you consider, however, that this should not affect—*

(a) *regulations restricting the choice of employment open to non-nationals during an initial period of residence, the length of which should not as a rule exceed five years; or*

(b) *restriction to nationals of access to certain posts in public employment ?*

8. *Do you consider that the competent authorities should arrange for the insertion in all contracts which involve the expenditure of public funds of clauses making such contracts dependent upon the observance of the policy by the contractor ?*

9. *Do you consider that, where subsidies are paid to private educational establishments giving vocational training, such subsidies should be made dependent upon observance of the policy in respect of admission practices ?*

10. *Do you consider that, where private employment agencies are subject to supervision by the competent authorities, licences or authorisations should be made dependent upon the observance of the policy by the agency concerned in respect of acceptance of applications for employment and referral of applicants to employment ?*

11. *Do you consider that provincial and local authorities and independent public corporations should be encouraged by all possible means to apply the policy in all spheres of employment coming under their control ?*

12. *Do you consider that employers' organisations and trade unions should be encouraged by all possible means—*

(a) *to accept and apply the policy in respect of their own activities;*

(b) *to further the acceptance of the policy by their members;*

(c) *to have regard to the policy in all collective agreements and industrial relations at all levels; and*

(d) *to establish such internal machinery as may be necessary to give effective implementation to the policy ?*

13. *Do you consider that national, provincial or local agencies, either existing or specially established, should be designated to assume responsibility for promoting observance of the policy ?*

14. (1) *Do you consider that these agencies should be assisted where appropriate in the interpretation and promotion of the policy by advisory committees which should include representatives of employers' and workers' organisations and of associations concerned with the prevention of discrimination, particularly those representative of groups most liable to be subject to discriminatory practices ?*

(2) *Do you consider that such advisory committees should assist the agencies, in particular, in specifying those acts which are regarded as discriminatory and contrary to the policy ?*

15. (1) *Do you consider that one of the functions of these agencies should be to carry out or to stimulate comprehensive and sustained public education programmes designed to make the general public aware of the unfair nature of discriminatory practices with a view to securing the maximum possible voluntary adherence to the policy ?*

(2) *Do you consider that such programmes should include study and research and the publication of the results of such study and research with a view to correcting any mistaken impressions as to the relative working capacity of different groups or the ability of different groups to work together harmoniously, and other measures designed to combat prejudices which have the effect of creating distinctions among workers and impeding the achievement of equality of opportunity and treatment in employment ?*

16. *Do you consider that the special role of voluntary organisations in educating public opinion and in otherwise improving inter-group relations should be recognised and that their activities should be encouraged ?*

17. (1) *Do you consider that the agencies referred to in question 13 should be empowered to receive and examine complaints that the policy is not being observed by any national, provincial or local authority, independent public corporation, contractor, private educational establishment, private employer, employers' organisation or trade union, and, if necessary, to attempt, by informal negotiation, to secure the correction of any practices regarded as in conflict with the policy ?*

(2) *Do you consider that the agencies should have powers of investigation ?*

18. *Do you consider that an independent and impartial commission should be appointed to consider any complaints which cannot be effectively*

settled by informal negotiation and to issue decisions concerning the manner in which it considers any discriminatory practices revealed should be corrected ?

19. *Do you consider that any other methods of enforcement should be provided for the implementation of the policy ?*

V. Collaboration in the Prevention of Discrimination in Other Fields

20. *Do you consider that the agencies referred to in question 13 should, in elaborating their programmes of action, have regard to action being taken to prevent discrimination in other fields, and should maintain close and regular collaboration with the authorities concerned in any educational or ameliorative measures taken to reduce the impact of discrimination and to promote equality of opportunity and treatment generally ?*

APPENDIX

EXCERPTS FROM VARIOUS INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS CONTAINING THE MORE IMPORTANT NON-DISCRIMINATION PROVISIONS

I. Non-Metropolitan Territories

SOCIAL POLICY IN DEPENDENT TERRITORIES RECOMMENDATION, 1944

Annex, Article 41

. . . . . .

2. Discrimination directed against workers for reason of race, colour, confession or tribal association, as regards their admission to public or private employment, shall be prohibited.

. . . . . .

SOCIAL POLICY IN DEPENDENT TERRITORIES (SUPPLEMENTARY PROVISIONS) RECOMMENDATION, 1945

Annex, Article 6

1. It shall be an aim of policy effectively to establish the principle of equal wages for work of equal value in the same operation and undertaking and to prevent discrimination directed against workers by reason of their race, religion or sex in respect of opportunities for employment and promotion and in respect of wage rates.

2. All practical measures shall be taken to lessen any existing differences in wage rates which are due to discrimination by reason of race, religion or sex by raising the rates applicable to the lower paid workers.

. . . . . .

SOCIAL POLICY (NON-METROPOLITAN TERRITORIES) CONVENTION, 1947

Article 18

1. It shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation in respect of—

(a) labour legislation and agreements which shall afford equitable economic treatment to all those lawfully resident or working in the territory;

(b) admission to public or private employment;

(c) conditions of engagement and promotion;

(d) opportunities for vocational training;

(e) conditions of work;

(f) health, safety and welfare measures;

(g) discipline ;

(h) participation in the negotiation of collective agreements ;

(i) wage rates, which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking to the extent to which recognition of this principle is accorded in the metropolitan territory.

2. Subject to the provisions of subparagraph *(i)* of the preceding paragraph, all practicable measures shall be taken to lessen, by raising the rates applicable to the lower paid workers, any existing differences in wage rates due to discrimination by reason of race, colour, sex, belief, tribal association or trade union affiliation.

3. Workers from one territory engaged for employment in another territory may be granted in addition to their wages benefits in cash or in kind to meet any reasonable personal or family expenses resulting from employment away from their homes.

4. The foregoing provisions of this Article shall be without prejudice to such measures as the competent authority may think it necessary or desirable to take for the safeguarding of motherhood and for ensuring the health, safety and welfare of women workers.

II. Protection of Migrant Workers in Underdeveloped Countries and Territories

Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955

. . . . . .

5. Any discrimination against migrant workers should be eliminated.

. . . . . .

37. The principle of equal opportunity for all sections of the population, including migrant workers, should be accepted.

38. Subject to the application of national immigration laws, and of special laws concerning the employment of foreigners in the public service, any barriers preventing or restricting, on account of national origin, race, colour, belief, tribal association or trade union affiliation, access of any section of the population, including migrant workers, to particular types of job or employment should be deemed contrary to public policy and the principle of the abolition of any such barriers should be accepted.

39. Measures should be taken immediately to secure in practice the realisation of the principles set out in Paragraphs 37 and 38 of this Recommendation and to facilitate the performance of an increasing share of skilled work by the least favoured grades of workers.

40. Such measures should specifically include—

(a) in all countries and territories, provision of equal access for all workers to technical and vocational training facilities and equal possibilities of access for all workers to employment opportunities in new industrial enterprises ;

(b) in countries or territories where separate classes distinguished by race or origin have already been permanently formed, the introduction of facilities enabling workers of the least favoured class to be admitted to semi-skilled and skilled jobs ;

(c) in countries or territories where separate classes distinguished by race or

origin have not been permanently formed, the opening of equal opportunities for all qualified workers to jobs requiring specified skills.

. . . . . .

45. The steps to be taken for migrant workers should in any case include in the first instance appropriate arrangements, without discrimination on grounds of nationality, race or religion, for workmen's compensation, medical care for workers and their families, industrial hygiene and prevention of accidents and occupational diseases.

III. Penal Sanctions for Breaches of Contract of Employment

Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955

Article 5

With a view to abolishing discrimination between indigenous and non indigenous workers, penal sanctions for breaches of contracts of employment not covered by Article 1 of this Convention which do not apply to non-indigenous workers shall be abolished for indigenous workers.

IV. Vocational Training

Vocational Training Recommendation, 1939

. . . . . .

10. (1) Workers of both sexes should have equal rights of admission to all technical and vocational schools, provided that women and girls are not required to engage continuously on work which on grounds of health they are legally prohibited from performing, a short period on such work for the purpose of training being, however, permissible.

. . . . . .

16. (3) Persons of both sexes should have equal rights to obtain the same certificates and diplomas on completion of the same studies.

V. Equal Remuneration

Equal Remuneration Convention, 1951 [1]

Article 2

1. Each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

. . . . . .

[1] Special reference is made to this provision of the Convention, but it is pointed out that the Convention and the Equal Remuneration Recommendation, 1951, are relevant in their entirety to the problem under discussion.

VI. Foreign Workers

MIGRATION FOR EMPLOYMENT CONVENTION (REVISED), 1949

Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities—

(i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;

(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

(iii) accommodation.

. . . . . .

VII. Freedom of Association

FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION, 1948

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

VIII. Shipowners' Liability

SHIPOWNERS' LIABILITY (SICK AND INJURED SEAMEN) CONVENTION, 1936

Article 11

This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race.

IX. Vocational Rehabilitation of the Disabled

VOCATIONAL REHABILITATION (DISABLED) RECOMMENDATION, 1955

. . . . . .

25. Disabled persons (including those in receipt of disability pensions) should not as a result of their disability be discriminated against in respect of wages and other conditions of employment if their work is equal to that of non-disabled persons.

. . . . . .

28. Measures should be taken, in close co-operation with employers' and workers' organisations, to promote maximum opportunities for disabled persons to secure and retain suitable employment.

29. Such measures should be based on the following principles :

(a) disabled persons should be afforded an equal opportunity with the non-disabled to perform work for which they are qualified ;

. . . . . .

41. (1) Vocational rehabilitation services should be adapted to the particular needs and circumstances of each country and should be developed progressively in the light of these needs and circumstances and in accordance with the principles laid down in this Recommendation.

(2) The main objectives of this progressive development should be—

. . . . . .

(c) to overcome, in respect of training or employment, discrimination against disabled persons on account of their disability.

Annex 12

International Labour Conference, *Discrimination in the field of employment and occupation*, 42nd session, Geneva, 1958, Report IV(2)

REPORT IV (2)

International Labour Conference

FORTY-SECOND SESSION
GENEVA, 1958

Fourth Item on the Agenda:

DISCRIMINATION IN THE FIELD OF EMPLOYMENT AND OCCUPATION



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INTRODUCTION

In accordance with article 39 of the Standing Orders of the International Labour Conference, the International Labour Office prepared and sent to governments of Members a report containing the texts of a proposed Convention and a proposed Recommendation concerning discrimination in respect of employment and occupation.[1] These texts were based on the Conclusions adopted by the International Labour Conference at its 40th Session (Geneva, June 1957).

The governments were requested to send any amendments or comments in time to reach the Office not later than 27 November 1957 or to inform the Office by the same date whether they considered that the proposed texts formed a suitable basis for discussion at the 42nd Session of the Conference. The attention of governments was drawn particularly to two points which had given rise to considerable discussion at the 40th Session : following a request by the Conference Committee on Discrimination, governments were asked to give full consideration to a possible Article relating to Non-Metropolitan Territories which appeared at the end of the proposed Convention ; and in view of the doubts which had arisen concerning the significance of the term " occupation " an Appendix was attached to Report IV (1) giving the internationally accepted meanings of certain terms in this connection, in the hope that this might assist governments in their consideration of the matter.

At the time of drafting this report the governments of the following 47 countries had replied to the request for amendments or comments or for acceptance of the proposed texts as a basis for discussion : Afghanistan, Austria, Burma, Byelorussia, Canada, Ceylon, Chile, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, Finland, Federal Republic of Germany, Greece, Honduras, India, Indonesia, Iran, Ireland, Israel, Japan, Lebanon, Mexico, Morocco, New Zealand, Nicaragua, Norway, Pakistan, Philippines, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, United Kingdom, United States, Uruguay, Viet-Nam, Yugoslavia.

The report summarises and analyses briefly the replies of the governments. It also contains the English and French versions of the proposed texts which, if the Conference so decides, will constitute the basis for the second discussion, at the 42nd Session of the Conference, of the question of discrimination in the field of employment and occupation.

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[1] I.L.O.: *Discrimination in the Field of Employment and Occupation*, Report IV (1), International Labour Conference, 42nd Session, 1958 (Geneva, 1957).

SUMMARY AND ANALYSIS OF THE REPLIES OF GOVERNMENTS

A summary and a brief analysis are given hereunder of the replies received from governments on the subject of the proposed texts of a Convention and a Recommendation concerning discrimination in respect of employment and occupation.

The following 24 governments merely stated that they had no comments to make or amendments to suggest at this stage, or that, in their opinion, the proposed texts constituted a suitable basis for discussion by the Conference at its 42nd Session: those of Afghanistan, Burma, Chile, Cuba, Dominican Republic, Ecuador, Greece, Honduras, Indonesia, Iran, Japan, Lebanon, Mexico, Morocco, Nicaragua, Philippines, Portugal, Spain, Syria, Thailand, Tunisia, Turkey, Uruguay and Viet-Nam. The Governments of Colombia and Mexico stated that the proposed texts were in harmony with the Constitutions and other legislative provisions of these countries, the former adding that they were also in harmony with the Declaration of Philadelphia and the Universal Declaration of Human Rights.

The Governments of Ecuador, Iran, Spain and Viet-Nam made no observations, but reserved the right to bring forward suggestions for amendments or revision of the proposed texts at the Conference. The Governments of Canada and Switzerland, which made certain observations in their reply, reserved the same right.

The Government of Denmark included in its reply the views of the Danish Employers' Confederation. The Governments of Finland and of the Federal Republic of Germany referred to the observations made respectively by the Finnish Employers' Confederation and by the German workers' organisations.

General Observations

Byelorussia

The Government, in accepting the proposed texts as an adequate basis for discussion by the Conference, considers that they should include provisions concerning their application both in metropolitan and in non-metropolitan territories, as well as provisions for the prohibition of discrimination by legislative measures and for the determination of appropriate penal sanctions in case of any infringement of this prohibition.

Morocco

The Government points out that there is no discrimination in Morocco based on any of the grounds listed in the proposed texts. Moroccan legislation is very liberal,

notably with respect to religious holidays for people of different faiths. A certain number of aliens are employed in public posts. The only regulations concerning foreign workers apply to immigrant workers who must have an approved labour contract. However, aliens of any nationality may obtain such contracts for work in any employment or occupation for which local manpower is not available.

SWITZERLAND

The Government has certain reservations on points which would need to be altered to enable Switzerland to ratify the Convention. In the first place, the objectives of the Convention, and in particular its scope, should be more clearly defined. Moreover, relationships to other Conventions should be better delineated. Finally the provisions of the Convention and of the Recommendation should be in greater conformity on certain points.

UNITED KINGDOM

The Government repeats its previously expressed opinion that discrimination in employment can be effectively eliminated only by the education of public opinion towards eradication of prejudice. It considers, therefore, that in order to ensure the widest possible ratification any Convention which may be adopted should confine itself to broad principles which are generally acceptable. More detailed matters which vary according to the national law and practice in each member State should be dealt with in the Recommendation.

Observations concerning the Form of the Proposed International Instruments

The Government of Rumania considers that there should be a Convention on discrimination. The Government of the United Kingdom refers to its earlier view that the subject should be dealt with by a Reccommendation only, but does not press it in view of the decision of the Conference that there should be a Convention supplemented by a Recommendation. The Government of the United States stresses the fact that it submits comments on various points of the two instruments in order to express its views on them and that this should not be construed as indicating approval of their form.

All other governments which replied either expressly stated or tacitly agreed that the proposed instruments should take the form of a Convention supplemented by a Recommendation. The Government of Finland, which shares this view, indicates however that, while the Confederation of Finnish Trade Unions is in agreement with the Conference's decision, the Finnish Employers' Confederation still feels that there should be only a Recommendation incorporating in a suitable form also the provisions of the proposed Convention.

Observations on the Proposed Convention [1]

Preamble

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-second Session on June 1958, and

Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity,

adopts this day of June of the year one thousand nine hundred and fifty-eight the following Convention, which may be cited as the Discrimination (Employment and Occupation) Convention, 1958.

Observation on the Preamble.

Rumania. Reference should be made also to the Universal Declaration of Human Rights.

It would seem desirable to leave it to the Conference to decide whether such a reference should be included in the Preamble.

Article 1

1. For the purpose of this Convention—

(a) the term " discrimination " includes—

(i) any adverse distinction made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which deprives a person of equality of opportunity or treatment in employment or occupation; and

(ii) such other adverse distinctions affecting a person's employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations;

(b) distinctions in respect of access to a particular employment based on the inherent requirements thereof shall not be deemed to be " discrimination ".

2. For the purpose of this Convention the terms " employment " and " occupation " include access to vocational training, access to employment and to particular occupations and terms and conditions of employment.

Observations on Article 1.

Some of the governments which have made observations on this Article specify that these observations apply also to Paragraph 1 of the proposed Recommendation (Austria, Costa Rica, Federal Republic of Germany, India, Israel, Norway, Pakistan, Poland, Switzerland, United Kingdom, United States). Others did not expressly say so.

[1] The observations on the Preamble and on each Article of the Convention are preceded by the text as it appeared in the proposed Convention in Report IV (1).

Austria: The proposed definition of the terms " employment and occupation " in paragraph 2 applies to the terms as a whole, and no quotation marks should be used following the word " employment " and preceding the word " occupation ".

Costa Rica: The meaning of the words " national extraction " in paragraph 1 *(a)* (i) should be clarified. The Government assumes that their inclusion was intended to cover cases where adverse distinctions are made against workers of certain nationalities, not cases where it is sought to protect national workers, since this is a fair and logical policy which does not involve discrimination against a particular group of workers by reason of its nationality.

Federal Republic of Germany: Although the discussions have amply shown that foreign nationality is not to be covered by the words " national extraction " in paragraph 1 *(a)* (i), this should be made clear in an appropriate way in the text of the Convention in order to facilitate its later application. The same applies to the corresponding Paragraph of the Recommendation, although the latter instrument includes special reference to " foreign nationality " in Paragraph 6. Moreover, a suggestion was made on the workers' side that discrimination on ground of age should also be covered by the instruments. Although the Government is aware of the difficulties which stand in the way of settling the problem of older workers through standard-setting machinery, it submits this suggestion, which in its view might be dealt with through the inclusion of a special clause in the proposed Recommendation.

Regarding paragraph 1 *(b)*, a slight change in the wording of the German text is suggested so as to bring it into accord with the English text. Further, it might be desirable to use the terms " employment and occupation " here as in other parts of the proposed Convention. Finally, regarding the meaning of the word " occupation " (paragraph 2), the Government has taken note of the explanations given on pages 34 and 35 of Report IV (1), and assumes that there will be further discussion on this point at the Conference. The scope of the Convention should be as clearly defined as possible.

India: Paragraph 1 *(a)* (ii) does not take into account the absence, in certain countries or areas, of employers' and workers' organisations. The text should be amended to provide that where there are no such organisations the government concerned may draw up the list of additional adverse distinctions leading to discrimination.

Israel: The decision of the International Conference of Labour Statisticians concerning the meaning of the terms " persons in employment " and " occupation ", referred to in the Appendix to Report IV (1), may hold good for purposes of economic statistics but does not correspond to the general terminology used in international labour Conventions and in national legislation. The term " employment " generally connotes a master-and-servant relationship, whereas " occupation " has a wider meaning and includes the self-employed. In order to avoid any doubt, the definition of " discrimination " should clearly indicate that the self-employed

are covered by the Convention and for this purpose the words " whether as an employed or self-employed person " should be added after the words " treatment in employment or occupation " appearing in paragraph 1 *(a)* (i).

In paragraph 2 the word " particular " should be deleted as limiting the application to occupations ; on the other hand it should be made clear that the words " terms and conditions " refer to employed persons and not to the self-employed.

Norway : The Government feels that it is doubtful whether the term " national extraction " should be retained in paragraph 1 *(a)* (i), but will not oppose its retention if it is understood that it does not imply a prohibition against differential treatment on the basis of national or alien citizenship.

Pakistan : The following should be inserted as subparagraph *(b)* (ii) of paragraph 1 :

— distinction in respect of giving adequate representation to a particular area or class in the services shall not be deemed to be " discrimination ".

Poland : The proposal to transfer to the definition of " discrimination " the clause now appearing as paragraph 1 *(b)* should be accepted. I.L.O. action should aim at eliminating all forms of discrimination, whatever may be the employment status of the persons affected. Although the I.L.O.'s primary objective is to defend the rights and interests of wage earners, its competence undoubtedly extends also to independent workers, e.g. members of the liberal professions, peasants, artisans and migrants for settlement. As in the case of wage earners, all these groups are frequently exposed to discriminatory measures and there would be no justification for excluding them from a Convention aimed at eliminating discrimination against workers in all fields of economic activity. The text of paragraph 2 should therefore be accepted as drafted.

Sweden : In paragraph 1 *(b)*, the phrase " inherent requirements " is too vague and can lead to abuse. It should be defined more precisely.

If, by reason of the definition of the terms " employment " and " occupation " in paragraph 2, the Convention were to apply also to workers on own account, this might make ratification difficult for Sweden in view of the existence of special regulations restricting the right of aliens to acquire property, to carry on mining activities, to engage in commerce or other business, to participate in a commercial undertaking, to give public performances, etc.

Switzerland : The proposed Convention should not affect the internal structure of a State. In Switzerland the political position of women differs from that of men, and this affects conditions of engagement of female workers in the administration. Moreover, a State cannot be compelled to employ aliens in its service. Like the State, the Church is also subject to special conditions. For example, there are no female priests in the Catholic Church. Consequently, the text of paragraph 1 *(b)* should be modified as follows :

(b) The following shall not be deemed to be discrimination :

(i) distinctions made in respect of a particular employment based on the inherent requirements thereof ;

(ii) distinctions in respect of access to posts in the administration of the State or in the service of the Church.

As regards paragraph 2, the meaning of the word " occupation " should be clearly understood. The Government considers that independent workers in the professions, e.g. doctors and lawyers, should be excluded from the scope of the proposed Convention. Undoubtedly, in its opinion, it would be a deplorable injustice not to admit a particular category of persons in, say, the medical schools. Moreover, in the medical profession as in many others, there are serious obstacles to the employment of aliens. Nevertheless, the Government considers that because of its tripartite structure, the I.L.O. is not competent to deal with the liberal professions in general.

United Kingdom: The inclusion of sex as a basis of distinction in paragraph 1 *(a)* (i) was the subject of much discussion at the Conference and it was then made clear that even with a limited application this would raise difficulties for many countries. The proposal in Article 6 might facilitate wider ratification of the Convention, but would not remove the difficulties for all countries.

In the same clause, it is understood that the phrase " national extraction " is intended to exclude nationality as a basis of discrimination. Such exclusion is obviously right, but the position should be made clear beyond any possibility of doubt.

Paragraph 1 *(b)* should be modified to accord with Point 3 of the Conclusions adopted by the Conference at its 40th Session. It might read—

(b) distinctions in respect of employment or occupation, based on the inherent requirements thereof, shall not be deemed to be " discrimination ".

No specific proposal is made by the United Kingdom Government regarding the word " sex " in the list of grounds of discrimination in paragraph 1 *(a)* (i), and no change has been introduced in the proposed text.

The Governments of Costa Rica, the Federal Republic of Germany, Norway, Switzerland and the United Kingdom feel that the words "national extraction " in the same paragraph might be taken to cover also foreign nationality. However, it will be recalled [1] that these words had been used in preference to " national origin " in order to make it clear that nationality was not covered. It is therefore obvious that it was not intended in this paragraph to deal with nationality, and it will be for the Conference to decide if there is any ambiguity in the phrase that requires clarification.

The possibility of including " age " amongst the grounds of discrimination as suggested on the workers' side in the Federal Republic of Germany, has already been considered [2], and a proposal to that effect was rejected by the Conference Committee by 109 votes to 206, with 67 abstentions. It is pointed out that paragraph 1 *(a)* (ii) would make it possible for any Member to determine that distinc-

[1] Cf. I.L.O. : *Discrimination in the Field of Employment and Occupation,* Report VII (2), International Labour Conference, 40th Session, Geneva, 1957 (Geneva, 1957), pp. 104-105.

[2] Ibid., p. 105.

tions made on the basis of age are "discrimination" and should therefore be eliminated. It would seem necessary for the Conference to decide whether it wishes to reverse its earlier decision and to make specific mention of age amongst the grounds of discrimination, or whether it considers that the problem of older workers should be dealt with in any other manner, e.g. in the Recommendation, as suggested by the Government of the Federal Republic of Germany.

The comment of the Government of India appears well founded and accordingly the words "where such exist" have been added in paragraph 1 *(a)* (ii) after the words "employers' and workers' organisations".

In paragraph 1 *(b)* the suggestion of the United Kingdom Government to replace the words "distinction in respect of access to a particular employment" by "distinctions in respect of employment or occupation" would have the effect of widening considerably the scope of this clause (the Government of the Federal Republic of Germany also proposes that reference be made to "occupation" as well as "employment"). It is true that Point 3 of the Conclusions adopted by the Conference did not specifically refer to "access" and was therefore less restrictive than the proposed paragraph 1 *(b)*[1], and the Conference may wish to give attention to this point. On the other hand the words "employment or occupation" would seem to cover a much wider field than the word "job" used in that Point. The proposal would therefore introduce a new concept which has not been considered in the stages leading up to the second discussion and it would seem appropriate to leave it to the Conference to decide the matter.

The words "inherent requirements" to which the Swedish Government raises an objection appeared in an amendment adopted by the Conference Committee by 207 votes to 157, with 9 abstentions. It would therefore seem to be for the Conference to consider this point and to determine whether a more specific wording should be found to eliminate any possibility of abuse.

Two governments suggest additional clauses to be inserted in paragraph 1 *(b)*. As regards the proposal from the Government of Pakistan concerning the grant of adequate representation in the services to particular areas or classes, it would seem that the clause concerning special measures designed to meet the particular requirements of persons who need special protection or assistance (cf. under Article 5) already covers the cases which the Government has in mind. The Swiss Government's proposal would have the effect of excluding posts in the administration of the State or in the service of the Church from the application of the non-discrimination policy, and would therefore seem to be in contradiction in particular with Article 3 *(d)*. For these reasons no change has been introduced in the proposed text on the basis of either of these observations.

Several governments have observations regarding the definition of the terms "employment" and "occupation" in paragraph 2. That of the Federal Republic of Germany feels that the scope of the Convention should be as clearly defined as possible. Those of Sweden and Switzerland consider that workers on own account

[1] The text as adopted by the Conference read as follows: "... distinctions determined by the inherent requirements of the job are not to be considered as discrimination."

or members of the liberal professions should not be covered by the Convention, and refer to special regulations applying to aliens in these occupations. It would seem that this objection would be largely met by the fact that " nationality " is not intended to be covered by the words " national extraction " in the list of grounds of discrimination. On the other hand, the Governments of Israel and Poland feel that the Convention should apply to all workers, whatever may be their employment status, and, while the latter supports the text as drafted, the former suggests that in order to make the position quite clear the words " whether as an employed or self-employed person " should be added after " occupation " at the end of paragraph 1 *(a)* (i), and two drafting changes should be made in paragraph 2. No change is proposed in the text either to exclude or to include specifically the self-employed, and it would seem to be for the Conference to decide whether it wishes to follow either course in this matter.

The Austrian Government suggests the deletion of the quotation marks after the word " employment " and preceding the word " occupation ". Quotation marks, however, had been used because the words were used sometimes with " and ", sometimes with " or ", and sometimes in isolation. Further, the Government of Israel proposes the deletion of the word " particular " before " occupations ", which in its view is too restrictive. Since these proposals have both been made by one government only, no change has been introduced in the text.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Observations on Article 2.

Ceylon. Provision should be made to restrict equality of employment opportunity to nationals of the country who do not have plural nationality. This suggestion applies also to Paragraph 2 of the proposed Recommendation.

Egypt. Replace the word " thereof " by " of " and add the following thereafter :

(a) access to training and employment of their own choice on the basis of individual suitability for such training and employment ;

(b) access to vocational guidance and placement facilities ;

(c) advancement in accordance with their individual character, ability, experience and diligence ;

(d) security of tenure of employment, including abolition of compulsory repatriation wherever it exists as regards migrant workers ;

(e) conditions of work, including hours of work, remuneration for work of equal value, rest periods, paid holidays, occupational safety, occupational health and social-security measures ;

(f) use of restaurants, canteens, rest-rooms and other welfare facilities provided in connection with employment, including means of transport to and from places of work, and abolition of segregation wherever it exists as regards such facilities and services.

New Zealand. The words " to declare " appear unnecessary. Ratification of the Convention would in itself be a binding declaration of intention to pursue a national policy designed to promote the equality described in this Article. Since there are many types of declaration, e.g. a statement by a Minister or a statutory enactment, retention of these words would create a loose proviso whose meaning was not clear.

Poland. The policy designed to eliminate discrimination with respect to employment and occupation should be implemented in the first place through legislative measures. Only such measures can effectively ensure the equality of workers before the law and constitute a solid basis for an educational and propaganda action against discrimination. The words " by legislation and " should therefore be added before " by methods ".

United Kingdom. The precise nature and extent of the obligations imposed by this Article in the case of countries in which wages and other conditions of employment are normally settled by voluntary collective bargaining require to be clarified. It would not be possible for the United Kingdom Government, for example, to accept any obligation which involved intervention in the process of collective bargaining.

The United Kingdom Government makes a general observation that the obligations imposed on governments by this Article should be defined more clearly. It would seem that the Conference had intentionally left considerable latitude to individual countries to determine the most appropriate methods, under national conditions and practice, to promote equality of opportunity and treatment. The Conference may, however, wish to give further attention to this point.

The Government of Ceylon suggests that both this Article and Paragraph 2 of the proposed Recommendation should restrict equality of employment opportunity to persons who do not have plural nationality. This would, however, introduce a new concept, and since no other similar suggestions were received, no change has been introduced in the text.

The Government of New Zealand suggests deletion of the words " to declare ", on the grounds that they are unnecessary and that their meaning is not clear. It would seem appropriate to leave it to the Conference to determine whether these words should be retained.

The Polish Government proposes to insert the words " by legislation and " before the words " by methods ". The suggestion that legislation should be adopted to prohibit discrimination was contained in two amendments submitted to the Conference Committee by the Czechoslovak and the Israeli Government members respectively.[1] Although both these amendments were rejected, by 73 votes to 266, with 25 abstentions, and by 181 votes to 211, respectively, it should be pointed out that they were broader in scope than the present proposal. However, no change has been made in the proposed text.

[1] Cf. Report IV (1), op. cit., pp. 7 and 12-13.

Finally, the Egyptian Government suggests that Article 2 should list various matters in respect of which equality of opportunity and treatment should be promoted. These matters include those listed in Paragraph 2 *(b)* (i) to (vi) of the proposed Recommendation, and certain others. In view of the far-reaching nature of this proposal, which is put forward by one government only, the text has not been changed and it has been left for the Conference to decide whether any effect should be given to it.

Proposal for the Insertion of a New Article

Egypt. The following new Article should be inserted after Article 2 :

The fulfilment of such a policy as indicated in Article 2 is a matter of public concern, with a view to ensuring that :

(a) all government and public agencies should apply fair and non-discriminatory employment policies in all phases of their work ;

(b) employers and private agencies should not countenance or practise any methods of engaging, training or advancing which may be considered as contradictory to such policies ;

(c) trade unions should not countenance or practise discrimination in respect of admission to trade unions or retention of trade union membership or participation in union affairs ;

(d) collective agreements provisions in respect of employment and terms and conditions of work should in all cases be consistent with such policies.

This proposed new Article is broadly based on Point 4 (1), (3), (4), (5) and (6) of the Proposed Conclusions directed towards a Recommendation, adopted by the Conference at its 40th Session, with some slight changes both in substance and in drafting. Since no other proposals of a similar nature were received, no change has been made in the text.

Article 3

Each Member for which this Convention is in force undertakes—

(a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy ;

(b) to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy ;

(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy ;

(d) to pursue the policy in respect of employment under the direct control of a national authority ;

(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority ; and

(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Observations on Article 3.

Denmark. The Government refers to its observation on question 3 (1) *(c)* of the questionnaire [1], concerning equal remuneration for men and women workers. In

[1] See Report VII (2), op. cit., p. 19.

view of the fact that the scope of Article 3 *(d)* is limited to employment under the direct control of a national authority, this provision can be accepted, it being understood that it should be interpreted in the light of Article 2 of the proposed Convention, according to which the principles laid down in the Convention shall be applied by methods appropriate to national conditions and practice, and provided it does not imply any legislative or administrative intervention in fields which in Denmark are left to the decision of the employers and workers themselves.

Israel. Subparagraph *(c)* should come before subparagraph *(a)*, being of a more basic character. With respect to subparagraph *(d)* the word " pursue " should be replaced by " ensure ", as in Paragraph 3 *(a)* of the proposed Recommendation. Moreover, the words " national authority " are too vague ; the wording of Point 6 of the Proposed Conclusions directed towards a Convention adopted by the Conference would be preferable. In any case, the same adjective should precede the word " authority " in this subparagraph and in Paragraph 3 *(a)* of the proposed Recommendation.

Poland. The proposed definition of " discrimination ", which covers distinctions based on " national extraction ", implicitly authorises discrimination against workers of foreign nationality. There is no doubt that a large number of discriminatory measures are aimed at these workers, and that a serious gap would remain in the Convention if it did not cover their case. It is therefore suggested that a new subparagraph be added as follows :

— to ensure application of the policy to foreign workers lawfully admitted as workers, subject to special provisions governing access to certain posts in public employment.

Such a clause would take into account legal provisions governing access of foreign workers to employment in many countries, as well as certain observations which were made during the discussion on this question in the Conference Committee.

Sweden. The proposed Convention does not indicate sufficiently clearly what would be the obligations of a Government in attempting to eliminate discriminatory practices such as those referred to in Paragraph 2 *(d)*, *(e)* and *(f)* of the proposed Recommendation, particularly in case of failure of its efforts to obtain the abandonment of such practices through " co-operation with employers' and workers' organisations ", as prescribed in Article 3 *(a)*. This question should be clarified in the new report to be prepared for the Conference.

Switzerland. Although the federal Constitution guarantees the equality of all citizens before the law, it does so only with respect to relations between the legislative, administrative or judiciary authorities and the citizens, but not in respect of relations between private persons. Under those conditions, an employer, for some reason or other, may engage one worker in preference to another. However futile the reason, this would under the Convention constitute a discriminatory act. However, one cannot envisage requesting States to modify their private law or to adopt new provisions to meet such cases. In Switzerland at least, instances of

discrimination between private persons are as a rule too unimportant to be worthy of special attention, and any abuses could be corrected by the competent authority. Unless the Convention contains only a few essential and clearly worded principles, certain States may be prevented from ratifying it. Accordingly, the Government suggests the following redraft of subparagraph *(c)*:

(c) to repeal any statutory provisions and modify any administrative instructions or practices which justify discrimination.

United Kingdom. The Government repeats its general observation concerning the desirability of confining the Convention to broad principles which are generally acceptable.

United States. The extent to which States would be in a position to implement subparagraph *(c)* would presumably be a question each would consider in relation to ratification of the Convention. In federal States such as the United States, where legislation and administration in the labour field are the responsibility of state governments as well as of the federal government, this provision would not fit into accepted legal procedure and therefore would not facilitate any adjustments at the state level which might be thought advisable. The Constitution of the United States provides important guarantees of individual rights. The XIVth Amendment of the Constitution forbids states to enact or enforce laws which would result in denial of equal protection of the laws or denial of due process of law.

In view of the variations between States, including federal States, in legislative and judicial procedure, this provision may prove a barrier to ratification and compliance. It will be recalled that the Committee vote was very close and this may be further indication of difficulty in obtaining ratification. In view of the provisions in Article 2, paragraph *(c)* of Article 3 appears unnecessary and might better be omitted.

The United Kingdom Government's observation applies to the whole of Article 3, but no specific change is suggested. This would seem to be a matter for the Conference to consider.

The Swedish Government requests that the present report should clarify the responsibilities of governments in case of non-compliance with the non-discrimination policy, particularly if the procedure suggested in subparagraph *(a)* for obtaining acceptance and observance of the policy through co-operation with employers' and workers' organisations should fail. No authoritative view can, of course, be given on this point before the text of the proposed Convention has been finalised and the question might usefully be raised for discussion at the Conference. With the text as it stands at present, this matter would seemingly be left for each Member to settle " by methods appropriate to national conditions and practice ", as provided for in the proposed Article 2.

The Government of Israel is of the opinion that subparagraph *(c)* should precede subparagraph *(a)*. The Conference might well decide the order in which the various subparagraphs should appear. The Swiss Government suggests replacing the words " which are inconsistent with the policy " by " which justify discrimina-

tion". This would have the effect of narrowing the scope of the provisions to which this clause refers. Since no other government makes this suggestion, no change has been introduced in the text. The United States Government suggests deletion of the clause and feels that the close margin by which a similar proposal was rejected by the Conference Committee may be an indication of difficulties which may be experienced in obtaining ratification of the Convention should the clause be maintained. It has been left for the Conference to decide whether it wishes to reconsider this point.

The observation of the Danish Government does not call for any change in subparagraph *(d)*. The point raised is analogous to that of the Swedish Government, discussed above. The Government of Israel feels that the verb "to pursue" should be replaced by "to ensure" (presumably to be followed by "application of"). It would seem appropriate to let the Conference consider whether this change is desirable. This Government adds that the clause as drafted is too vague, that it would be preferable to revert to the wording adopted by the Conference in Point 6 of the Conclusions directed towards a Convention, and that at any rate the same adjective should precede the word "authority" in this clause and in Paragraph 3 *(a)* of the proposed Recommendation. Regarding the reasons which led to the splitting up of Point 6 into subparagraphs *(d)* and *(e)* as well as changes in wording in these two clauses, reference should be made to Report IV (1).[1] Moreover, while Paragraph 3 of the proposed Recommendation distinguishes between the responsibilities of Members as regards "employment under the direct control of a central authority" (subparagraph *(a)* (i)) and employment under "state, provincial or local government departments or agencies", etc. (subparagraph *(b)* (i)), it was intended that Article 3 *(d)* of the proposed Convention should cover "employment under the direct control of a national authority" whatever might be the administrative levels or the agencies over which such an authority might exercise direct control in various countries.

The Polish Government suggests the insertion of a new subparagraph concerning application of the non-discrimination policy to foreign workers. A similar proposal was rejected by the Conference Committee by 162 votes to 180, with 32 abstentions. It would seem to be for the Conference to determine whether it wishes to reconsider its earlier decision.

Article 4

Nothing in this Convention shall affect any statutory provision or administrative regulation which relates to the national security of a Member.

Observations on Article 4.

Austria. The present wording goes too far and might nullify the whole Convention. It allows each State to judge for itself whether the provisions of the Convention affect the statutory or administrative regulations applying in matters of security, so that a member State might not regard itself bound in any way to give effect to the Convention.

[1] Op. cit., pp. 26-27.

Egypt. The words "any statutory provision or administrative regulation" should be replaced by "any national legislation".

Poland. This article should be deleted. Its inclusion would countenance all kinds of legislative, administrative or police measures applied under the pretence of protecting national security, but aimed in fact against freedom of political opinion. It would, it is feared, destroy the effect of Articles 1 and 2, which aim at protecting workers against discrimination based, *inter alia,* on political opinion.

Rumania. This article should be deleted.

Sweden. While this provision is perhaps justified, it should be more carefully drafted and it would be desirable to refer to an individual's right to have any decision to exclude him from employment examined by a legal procedure, if such decision was based on considerations of national security.

Switzerland. Since Articles 4 and 5 supplement Article 1, they should be merged with it.

Yugoslavia. The present text of this article is somewhat broad. The reference to administrative regulations should be deleted, as such regulations may give rise to abuse.

Six Governments have objections to this article. Those of Poland and Rumania suggest that it should be deleted. Those of Egypt and Yugoslavia are of the opinion that there should be no reference to "administrative regulations", which the Yugoslav Government feels may give rise to abuse. In addition, the Egyptian Government would like the words "statutory provision" to be replaced by "national legislation". The Government of Austria considers that the present wording of the article is too sweeping and the Government of Sweden suggests that it should be more carefully drafted and that the rights of the individual to legal protection against arbitrary decisions should be guaranteed. It will be remembered that the Conference Committee had adopted this point by 228 votes to 114, with 23 abstentions, but that several speakers, both in the Committee and in the plenary sitting of the Conference, had expressed the feeling that the point as drafted was dangerous and might lead to abuse. Although no change has been made in the text, it would seem to be for the Conference to decide whether it wishes to reconsider this article in the light of the observations that have been made.

The Government of Switzerland considers that this article as well as Article 5 should be merged with Article 1. This has been left for the Conference to decide in the final drafting of the instrument.

Article 5

Any Member may, after consultation with representative employers' and workers' organisations, determine that the following shall not be deemed to be discrimination:

(a) special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference;

(b) other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or cultural status, are generally recognised to require special protection or assistance.

Observations on Article 5.

Austria. In paragraph *(b)* " social status " should be added to the other reasons justifying special measures for particular groups.

India. The words " where such exist " should be inserted after " organisations " in the introductory paragraph. Moreover, it is suggested that unless there are special reasons for keeping it in, paragraph *(a)* might be deleted, since special measures of protection or assistance provided for in other Conventions and Recommendations would not appear to be negatived by the proposed Convention.

Ireland. The following subparagraph should be added :

(c) the reservation, for cogent social and/or economic reasons, of certain occupations or classes of occupations to men, unmarried women and widows.

Sweden. Regarding paragraph *(b)* it is obviously desirable that measures designed, e.g., to provide suitable employment for disabled persons, should not be regarded as discrimination against other groups. On the other hand, the proposed wording could be misconstrued, leaving room, for example, for an active segregation policy based on the " cultural status " of a given group. This article should therefore be redrafted to prevent any such interpretation.

United Kingdom. While it should be made clear that action against discrimination should not override any special measures which are designed and necessary to meet the needs of particular classes of workers, the procedure suggested here seems unnecessarily cumbersome, e.g. in requiring consultation with employers' and workers' organisations before deciding that the measures in *(a)* and *(b)* are not discrimination. It would be preferable to replace this article by some general statement on the lines of Paragraph 5 of the proposed Recommendation.

United States. The definition contained in Article 1 does not specifically include special measures of protection or assistance designed to meet the particular requirements of persons who, because of age, sex, disablement or family responsibilities, require this aid. Article 5, however, requires specific consultation and affirmative action on the part of any Member before such Member may determine that special conditions imposed for these reasons, or special measures provided for in other Conventions or Recommendations adopted by the International Labour Conference, are not discrimination. Thus, in the absence of such consultation, the status of such special conditions where they exist would appear to be open to doubt under the provisions of the proposed Convention. Since special conditions are in many circumstances imposed by legislation—federal and state—the practicability and the advisability of the requirements of Article 5 in the light of the situation as it obtains in the United States is highly questionable. The Government, therefore, favours the deletion of the present Article 5 and the substitution of language similar to that employed in Paragraph 5 of the proposed Recommendation.

Two Governments, those of the United Kingdom and the United States, feel that the procedure outlined in this article to determine that certain measures are

not to be considered as discrimination is not satisfactory, particularly as regards previous consultation with employers' and workers' organisations. The Government of India considers that this procedure is unnecessary with respect to measures provided for in other Conventions and Recommendations. The article has been redrafted to eliminate the need for consultation in respect of the latter measures (paragraph 1). Moreover, the words " where such exist " have been introduced after " employers' and workers' organisations " following a suggestion by the Government of India, and " social status " has been added to the list of reasons justifying special measures for certain categories of persons, as proposed by the Austrian Government (paragraph 2).

The Swedish Government expresses concern lest the wording of *(b)* be misconstrued, leaving room for an active segregation policy. It would seem to be for the Conference to decide whether this provision (paragraph 2 of the proposed text) might lead to abuse and should be modified.

The Government of Ireland suggests the insertion of a new subparagraph concerning the reservation, for social and for economic reasons, of certain occupations to men, unmarried women and widows. It would seem that such cases are covered in paragraph 2 of the proposed text, which contains the additional safeguard of requiring previous consultation with employers' and workers' organisations. No change is proposed in the text.

Article 6

Equal remuneration for men and women workers for work of equal value is dealt with in the Equal Remuneration Convention, 1951, and is therefore not dealt with in this Convention.

Observations on Article 6.

Austria. This provision cannot legally be regarded as a standard and should therefore be deleted.

New Zealand. The Government understands that this article has the effect of modifying the definition in Article 1, 1 *(a)* (i) in its reference to " sex ", i.e. Article 1, 1 *(a)* (i) is understood to mean " sex (but not in respect of equal remuneration) ".

Poland. This article should be deleted. Its insertion is not based on any decision of the Conference Committee or of the Conference itself, but is in contradiction with the decisions of both bodies. As indicated in Report IV (1), pages 5-6, the Committee rejected with a strong majority a proposal of the Canadian Government member to delete the word " sex " from the list of grounds of discrimination. This amendment had been justified by its author on the ground that " the subject of distinctions based on sex should be dealt with in special instruments rather than in a general instrument on discrimination ". Although the Committee rejected this amendment and the argument on which it was based, the proposed Convention takes up the same idea and justifies the suggestion to leave aside the question of equal remuneration for men and women workers on the ground that this subject is covered in another international Convention.

Switzerland. Article 1 (1) *(a)* (i) mentions " national extraction " among the grounds of discrimination. Migrant workers are therefore covered by this provision. However, the question of immigrant workers, which has already been dealt with in another international Convention, should be excluded from the scope of the present Convention, as has been done with respect to equality of remuneration. If this were not done, it might be a serious obstacle to ratification by Switzerland, in view of the special conditions which result in that country from its legislation, bilateral agreements and O.E.E.C. provisions. It is therefore suggested that a second paragraph be added as follows :

2. The question of immigrant workers of foreign nationality and the members of their families is dealt with in the Migration for Employment Convention (Revised), 1949, and is therefore not dealt with in this Convention.

United Kingdom. The Government supports the inclusion of this article.

While one Government, that of the United Kingdom, specifically expresses approval of this article, two oppose it. The Austrian Government considers that it is not a standard and should be eliminated, and the Polish Government feels that it is in contradiction with a decision of the Conference Committee not to delete the word " sex " from the list of grounds of discrimination in Article 1. However, it should be pointed out that such deletion would have had more far-reaching consequences than the introduction of the proposed Article 6. While the former proposal would have had the effect of eliminating any discrimination based on sex from the coverage of the Convention, with the latter proposal discrimination based on sex affecting access to training and employment and conditions of employment other than remuneration would continue to be covered by the proposed Convention, and only equal remuneration, which is dealt with in the Equal Remuneration Convention, 1951, would be excluded from its scope. It would seem to be for the Conference to decide whether it wishes to maintain the exception provided for in this article.

The Swiss Government suggests the insertion of a second paragraph specifically to exclude immigrant workers of foreign nationality from the scope of the Convention, since that question is dealt with in the Migration for Employment Convention (Revised), 1949. It would seem that this point would have to be decided by the Conference in the light of any action it may take concerning the words " national extraction " in Article 1 (1) *(a)*.

Possible Article relating to Non-Metropolitan Territories [1]

1. Each Member which ratifies this Convention undertakes to apply it to the non-metropolitan territories, so far as it has the right to accept obligations affecting matters of internal jurisdiction.

[1] Concerning this provision, the Conference Committee had made the following remarks :
" The Committee wish to indicate that [this] point... represents the majority view of the Committee although there is some doubt about the validity of the decision owing to the procedure followed at the time. Because of this, and in view of the advice given to the Committee by the Legal Adviser to the Conference that the point might be doubtfully in

2. Concerning the territories for which the Member which has ratified the Convention has not the right to accept obligations affecting matters of internal jurisdiction, the Member shall immediately bring the Convention to the notice of the government of the territory asking it to indicate if it accepts the obligations of the Convention.

3. Thereafter, the Member shall communicate to the Director-General of the International Labour Office all declarations established in agreement with the government of the concerned territory.

4. Such Member which may desire to take advantage of the provisions of article 35 of the Constitution of the International Labour Organisation shall append to its ratification a declaration stating:

(a) the territories to which it intends to apply the provisions of this Convention without modification;

(b) the territories to which it intends to apply the provisions of this Convention with modifications, together with details of the said modifications;

(c) the territories in respect of which it reserves its decision.

Observations on the Possible Article relating to Non-Metropolitan Territories.

Byelorussia. Reference should be made to the Government's general observation, stating that the proposed texts should include provisions concerning their application in metropolitan and non-metropolitan territories.

Canada. This article should not be included in the proposed Convention. If it is intended that it override the provisions of article 35 of the I.L.O. Constitution, its inclusion is unconstitutional because the basic law of the Organisation cannot be amended in this manner. If it is intended that it be governed by article 35 of the Constitution or that it repeat the provisions of that article, its inclusion serves no useful purpose.

Colombia. Any decision in this matter should be based on the interpretation of article 35 of the I.L.O. Constitution, which should be modified following the procedure outlined in article 36 if the report requested by the Resolutions Committee from the Director-General should indicate that it adversely affects the attainment of the proposed objectives.

Denmark. The Government, which has no observation to make on this provision, refers to the view of the Danish Employers' Confederation that provisions regarding the application of the Convention in dependent territories should be deleted, since their adoption would in its view amount to amending article 35 of the Constitution of the I.L.O. without observing the procedure laid down in article 36 for that purpose.

Egypt. This provision is both valid and constitutional and should appear in the proposed Convention.

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accordance with article 35 of the I.L.O. Constitution; in view further of the resolution unanimously adopted by the Resolutions Committee recently asking the Governing Body to request the Director-General to prepare a report on the influence of article 35 on the application of Conventions in non-metropolitan territories, the Committee asks that before discussion of this question next year full consideration be given to it by the I.L.O. and the governments concerned so that a conclusion may more easily be reached then."

India. The Government reserves its position with regard to this article at this stage. Its attitude will be indicated when the matter comes up for discussion before the Conference.

Israel. A final solution of the problem of application of Conventions to non-metropolitan territories should be sought in the light of the action taken by the Governing Body as a result of the resolution passed by the Conference at its 40th Session in connection with article 35 of the Constitution. This problem is of general and vital importance, and should not be solved with regard to one particular Convention only. Since it is at least doubtful whether the proposed article is compatible with the I.L.O. Constitution, no practical results would be achieved by including it in the Convention.

New Zealand. The Government agrees with the comments of the Legal Adviser to the Conference (cf. page 13 of Report IV (1)), and sees no merit in including in the proposed Convention an article which would be redundant. In addition, since the possible article does not repeat all the provisions of article 35 of the Constitution, it would appear to be in conflict with that article and would impose different obligations on member States, and would therefore seem undesirable.

Norway. This article should not be included in the proposed Convention, though it is realised that these questions are of great importance both to metropolitan and non-metropolitan territories. As regards the latter, article 35 of the Constitution lays down the obligations of metropolitan countries with respect to the application of Conventions in those territories. The inclusion in the proposed Convention of the " Possible Article " would not be an effective step towards the application in non-metropolitan territories of the substantive provisions of the Convention, as it might in some cases constitute an obstacle to ratification by metropolitan countries. An alternative and possibly more effective method might consist of the establishment of a special body within the I.L.O. for the examination of complaints relating to discrimination in employment and occupation, both in metropolitan and in non-metropolitan territories. In this way a procedure similar to that which is already in operation in the case of breaches of the principle of freedom of association would be established. The question whether it would be more appropriate to include such a provision in the Convention or in a resolution addressed to the Governing Body could be decided later on.

Poland. This article as drafted does not give full satisfaction to those who demand a complete and unrestricted application of the Convention to non-metropolitan territories. However, it is a compromise solution reached by the Conference Committee after long debates and should be incorporated in the Convention without change.

Rumania. The Convention should include the principle of its strict application in non-metropolitan territories.

Sweden. It is, of course, desirable that member States should apply any Convention on discrimination in the territories which they administer, and nothing

should prevent provisions to that effect being introduced in the Convention. However, such provisions should not differ from the corresponding provisions in the I.L.O. Constitution; on the other hand, if they are identical in wording to these provisions, they are purposeless and might better be left out. In either case, it would seem appropriate to await the result of the examination of the whole question of the application of Conventions in non-metropolitan territories following the resolution adopted by the Conference at its last session.

United Kingdom. The proposed article is inconsistent with article 35 of the Constitution and its inclusion in the Convention would be tantamount to an attempt to amend the Constitution by means of a Convention. The Constitution can be amended only by the procedure laid down in article 36. There would be no objection of principle to the inclusion of an article or articles dealing, in a manner consistent with the Constitution, with the action to be taken in making declarations under article 35, as was done, for example, in Articles 14 and 15 of the Holidays with Pay (Agriculture) Convention, 1952, and in other Conventions. But this would appear to be unnecessary.

United States. The Government appreciates the considerations giving rise to the proposals resulting in the language of this possible article, but at the same time doubts the need for, or desirability of, including such a provision, and questions its constitutionality in view of article 35 of the Constitution of the I.L.O.

The remarks made by the Conference Committee concerning this provision are reproduced on pages 18 and 19 above.

Of the Governments which express views on the "Possible Article", six (those of Canada, Israel, New Zealand, Norway, the United Kingdom and the United States) consider that it should not appear in the proposed Convention, while four (those of Byelorussia, Egypt, Poland and Rumania) are in favour of its inclusion. The Government of Norway has an alternative proposal, i.e. the establishment of a special body within the I.L.O. for the examination of complaints relating to discrimination in employment and occupation. This proposal, however, is completely new and would have far-reaching implications. In these circumstances, the Conference may wish to consider whether any action should be taken to follow it through.

Two Governments (those of Colombia and Sweden) feel that a decision respecting the proposed article should be deferred until the results of the study requested of the Director-General concerning the influence of article 35 of the Constitution on the application of Conventions in non-metropolitan territories are known. However, this study may not be completed in time to be available to the Conference for its second discussion of the proposed Convention and Recommendation.

The article as drafted differs in several respects from article 35 of the Constitution, a fact which might for some governments constitute an obstacle to ratification, thus limiting the chances of general acceptance of so important a Convention.

Quite apart from any constitutional difficulties which such divergencies may involve, it would seem that they are not such as to promote the effective application of the Convention in non-metropolitan territories. In one respect in particular, the article is less favourable to such application than the procedure outlined in article 35 of the Constitution : under paragraphs 2 and 3 of the proposed article, which describe the procedure to be followed when the subject-matter of a Convention is within the self-governing powers of a non-metropolitan territory, a declaration accepting the obligations of the Convention, established in agreement with and on behalf of the government of that territory, could only be communicated by the Member concerned if that Member had ratified the Convention. On the other hand, paragraph 4 of article 35 of the Constitution makes it possible to communicate such a declaration even if the Member responsible for the international relations of the territory concerned has not ratified the Convention. In view of the fact that the matters dealt with in the proposed Convention fall increasingly within the self-governing powers of non-metropolitan territories, it might therefore be a significant disadvantage to have the provision in the Convention.

It will be remembered that one I.L.O. Convention applying to non-metropolitan territories, the Social Policy (Non-Metropolitan Territories) Convention, 1947, already calls for the abolition of discrimination. Article 18 of that Convention reads as follows :

1. It shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation in respect of—

(a) labour legislation and agreements which shall afford equitable economic treatment to all those lawfully resident or working in the territory ;

(b) admission to public or private employment ;

(c) conditions of engagement and promotion ;

(d) opportunities for vocational training ;

(e) conditions of work ;

(f) health, safety and welfare measures ;

(g) discipline ;

(h) participation in the negotiation of collective agreements ;

(i) wage rates, which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking to the extent to which recognition of this principle is accorded in the metropolitan territory.

2. Subject to the provisions of subparagraph *(i)* of the preceding paragraph, all practicable measures shall be taken to lessen, by raising the rates applicable to the lower-paid workers, any existing differences in wage rates due to discrimination by reason of race, colour, sex, belief, tribal association or trade union affiliation.

3. Workers from one territory engaged for employment in another territory may be granted in addition to their wages benefits in cash or in kind to meet any reasonable personal or family expenses resulting from employment away from their homes.

4. The foregoing provisions of this Article shall be without prejudice to such measures as the competent authority may think it necessary or desirable to take for the safeguarding of motherhood and for ensuring the health, safety and welfare of women workers.

The countries which have ratified this Convention include Belgium, France and the United Kingdom.

In the circumstances it would appear that the inclusion of the "Possible Article" may not be advisable, even in the interest of securing wider application of the Convention in non-metropolitan territories. Since, however, a number of governments feel strongly that international action is required to promote non-discrimination policies in non-metropolitan territories, it is suggested that a more effective course might be the adoption by the Conference of a resolution urging the governments of the Members concerned to give early consideration to the measures required to promote full application of the Convention in non-metropolitan territories, and requesting the Governing Body to survey the position from time to time and to inform the Conference Committee on the Application of Conventions and Recommendations of progress made.

Observations on the Proposed Recommendation [1]

Preamble

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-second Session on June 1958, and

Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Discrimination (Employment and Occupation) Convention, 1958,

adopts this day of June of the year one thousand nine hundred and fifty-eight the following Recommendation, which may be cited as the Discrimination (Employment and Occupation) Recommendation, 1958:

The Conference recommends that each Member should apply the following provisions:

No observations were made on the proposed Preamble.

I. Definitions

1. (1) For the purpose of this Recommendation—

(a) the term "discrimination" includes—

(i) any adverse distinction made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which deprives a person of equality of opportunity or treatment in employment or occupation; and

(ii) such other adverse distinctions affecting a person's employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations;

(b) distinctions in respect of access to a particular employment based on the inherent requirements thereof shall not be deemed to be "discrimination".

(2) For the purpose of this Recommendation the terms "employment" and "occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

[1] The observations on each paragraph are preceded by the text as it appeared in the proposed Recommendation in Report IV (1).

Observations on Paragraph 1.

Switzerland. Since the Recommendation is intended to supplement the Convention, it would not seem absolutely necessary to repeat the definitions appearing in Article 1 of the Convention. Should there be a special reason for this, then the text should be modified as suggested under Article 1 of the proposed Convention.

Although the Recommendation is to supplement the Convention, it appears desirable that each instrument should stand on its own, and therefore that the definitions should appear in both in identical terms.

Reference should also be made to the observations and commentary appearing under Article 1 of the proposed Convention. Although not all governments specified that their suggestions referred also to Paragraph 1 of the proposed Recommendation, it may be assumed that this was their intention. Consequently it is suggested that this Paragraph be amended in the same way as Article 1 of the proposed Convention.

II. Formulation of Policy

2. Each Member should, by means of legislative measures, collective agreements between representative employers' and workers' organisations or in any other manner consistent with national conditions and practice, formulate a national policy for the prevention of discrimination in employment and occupation, having full regard to the following principles:

(a) the promotion of equality of opportunity and treatment in employment and occupation is a matter of public concern;

(b) all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of—

(i) access to vocational guidance and placement services;

(ii) access to training and employment of their own choice on the basis of individual suitability of such training or employment;

(iii) advancement in accordance with their individual character, experience, ability and diligence;

(iv) security of tenure of employment;

(v) remuneration for work of equal value;

(vi) conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities provided in connection with employment;

(c) government agencies should apply fair and non-discriminatory employment policies in all their activities;

(d) employers should not countenance or practise discrimination in engaging or training any person for employment, in advancing or retaining such person in employment, or in fixing terms and conditions of employment;

(e) in collective negotiations and industrial relations, the parties should respect the principle of equality of opportunity and treatment in employment and occupation, and should ensure that collective agreements contain no provisions of a discriminatory character in respect of access to, training for, advancement in or retention of employment or in respect of the terms and conditions of employment;

(f) industrial organisations should not countenance or practise discrimination in respect of admission thereto, retention of membership therein, or participation in their affairs.

Observations on Paragraph 2.

Canada. The term " industrial organisations " appears to be too general. Inasmuch as the term, unless defined, might be considered to apply to industrial organisations not concerned with employment and occupation, it might be replaced with " industrial organisations concerned with employment and occupation ".

Ceylon. Provision should be made restricting equality of employment opportunity to nationals of the country who do not have plural nationality.

Denmark. The Government conveys the view of the Danish Employers' Confederation that the words " industrial organisations " in Paragraph 2 *(f)* should be replaced by the words " trade unions ", which appear in Point 4 (5) of the proposed Conclusions directed towards a Recommendation, on which this paragraph is based.

Finland. With respect to subparagraph *(b)* (iv), the Government repeats its previous observation that when circumstances make it necessary to give notice to some workers, taking into consideration the duration of employment should not be interpreted as discrimination in the sense of the proposed Recommendation, since it is fair that in those circumstances undertakings should endeavour to keep in employment those workers who have spent the longest time in their service. This is true also of the practice of giving preference in respect of security of tenure of employment to workers who have family responsibilities. It seems, however, that under Paragraph 5 of the Recommendation these practices should be acceptable. With respect to subparagraph *(b)* (v) the Government feels that since the question of equality of remuneration for men and women workers for work of equal value has been excluded explicitly from the scope of the proposed Convention, the same should be done with respect to the proposed Recommendation, since a separate Recommendation on the subject was adopted in 1951. The Finnish Employers' Confederation has suggested the deletion of the latter part of subparagraph *(e)*, beginning with the words " and should ensure that . . . ".

Sweden. Subparagraph *(b)* (iv) refers to " security of tenure of employment ". It must be stated that nothing corresponding to this exists in Sweden. Subparagraph *(b)* (vi) refers to a number of social benefits which for the most part are dealt with through collective bargaining in Sweden. Such material differences which have arisen in the past or may arise in future for different groups of workers as a result of different treatment under collective bargaining should of course not be regarded as discrimination.

In Sweden the matters dealt with in subparagraphs *(d)*, *(e)* and *(f)* are all considered to be the sole business of the parties concerned. Although situations which might be regarded as discriminatory did not arise on the private employment market in the past, and although conditions in Sweden should not make it

impossible to adhere to the proposal, it should be mentioned that the greatest freedom of action exists in the country for industrial organisations to manage their own internal affairs, independently of any government statutory regulations. With special reference to subparagraph *(f)*, it should be stressed that obviously one cannot regard as discrimination the refusal of an organisation to admit to membership a person whose reported behaviour would under the statutes of the organisation cause his expulsion (e.g. the exercise or support of an activity which is incompatible with the objectives of the organisation).

United Kingdom. Many of the matters dealt with in subparagraphs *(a)* to *(f)* are, in the United Kingdom, the concern of the parties, and government intervention in them is not appropriate. The Government therefore could not accept any obligations which would or might involve such intervention. While not wishing to make any specific suggestion at this stage for the amendment of the text, the Government takes the view that the form and content of Paragraph 2 should receive further consideration by the Conference with a view to making it as widely acceptable as possible.

The observation of the United Kingdom Government, which relates to the whole of Paragraph 2, does not call for any special change in the text at this point, and is referred to the Conference for consideration. The same applies to the remarks of the Swedish Government concerning subparagraphs *(b)* (iv) and (vi), *(d)*, *(e)* and *(f)*, and to those of the Finnish Government concerning subparagraph *(b)* (iv).

In addition, the Finnish Government suggests the deletion of clause (v) of subparagraph *(b)*, and points out that the question of equality of remuneration for men and women workers has been excluded from the proposed Convention and is covered in a separate Recommendation. However, it should be noted that the clause was intended to cover other forms of discrimination which might affect remuneration (e.g. discrimination based on race, colour, etc.) in addition to differential remuneration for men and women workers. Reference should be made in this connection to the observations of the United Kingdom Government and of the Danish Employers' Confederation, both of which suggest the inclusion in the Recommendation of an additional paragraph carrying the same exclusion as Article 6 of the proposed Convention.[1] However, the exclusion of equality of remuneration for men and women workers from the scope of the proposed Recommendation would seem to be a matter that might best be referred to the Conference for decision.

The Finnish Employers' Confederation suggests the deletion of the latter part of subparagraph *(e)*, starting with the words " and should ensure ". Since no other suggestion for such a deletion has been received, the text has not been changed.

The proposal of the Government of Ceylon has been dealt with under Article 2 of the proposed Convention.

[1] See below, p. 30.

The observations of the Canadian Government and of the Danish Employers' Confederation show that there is some doubt as to the meaning of the words "industrial organisations" in subparagraph *(f)*. These have consequently been changed to "employers' and workers' organisations".

A small drafting change has been introduced in subparagraphs *(d)* and *(f)* to put the words "practise" and "countenance" in a more logical order.

III. Application of Policy

3. Each Member should—

(a) ensure application of the principles of non-discrimination—

(i) in respect of employment under the direct control of a central authority;
(ii) in the activities of vocational guidance, vocational training and placement services under the direction of a central authority;

(b) promote their observance, where practicable and necessary, in respect of other employment and other vocational guidance, vocational training and placement services by such methods as—

(i) encouraging state, provincial or local government departments or agencies and industries and undertakings operated under public ownership or control to ensure the application of the principles;
(ii) making eligibility for contracts involving the expenditure of public funds dependent on observance of the principles;
(iii) making eligibility for grants to training establishments and for a licence to operate a private employment agency or a private vocational guidance office dependent on observance of the principles.

Observations on Paragraph 3.

Israel. See above, the Government's observation under Article 3 *(d)* of the proposed Convention regarding the use of the same adjective to precede the word "authority" in that article and in Paragraph 3 *(a)* (i) of the proposed Recommendation.

United Kingdom. While in sympathy with the general objective of Paragraph 3 *(b)*, the Government refers to its objection raised at the 40th Session of the Conference to the inclusion of the examples of suggested action in subparagraphs (i) to (iii), and suggests that the paragraph might be more widely acceptable if the word "such" (line 3) were replaced by the words "all appropriate", and the paragraph ended at the word "methods".

With respect to the observation by the Government of Israel, reference should be made to the explanation submitted under Article 3 of the proposed Convention.

An amendment similar to the proposal of the United Kingdom Government had been submitted by the United Kingdom Government member in the Conference Committee, and rejected by 171 votes to 202, with 15 abstentions. In those circumstances, it would appear to be for the Conference to decide whether it wishes to reconsider its earlier decision.

4. Each Member should repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy.

Observations on Paragraph 4.

Switzerland. The Government refers to its observation under Article 3 *(c)* of the proposed Convention.

United Kingdom. The necessity for incorporating in the Recommendation the exclusions of Articles 4 and 6 of the proposed Convention has special relevance to this provision if it is to be widely acceptable.[1]

United States. The comment made in relation to subparagraph *(c)* of Article 3 of the proposed Convention is equally applicable here.

The observations of the Governments of Switzerland and the United States have been considered above, under Article 3 of the proposed Convention. The United Kingdom Government's observation does not involve any change in the text of the present paragraph.

5. Application of the policy should not adversely affect special measures designed to meet the particular needs of persons who, for such reasons as sex, age, disablement, family responsibilities or cultural status are generally recognised to require special protection or assistance.

No observation was made on Paragraph 5. As in Article 5 of the proposed Convention, the words " or social " have been introduced between the words " responsibilities " and " or cultural status ".

6. With respect to immigrant workers of foreign nationality and the members of their families, regard should be had to the provisions of the Migration for Employment Convention (Revised), 1949, relating to equality of treatment and to the provisions in the Migration for Employment Recommendation (Revised), 1949, relating to the lifting of restrictions on access to employment.

Observation on Paragraph 6.

Switzerland. The same text should appear here as that suggested as paragraph 2 of Article 6 of the proposed Convention. Moreover, considerable confusion might be created by linking the provisions of a Recommendation with those of a Convention which is open to ratification.

The Swiss Government's proposal has been considered in connection with Article 6 of the proposed Convention. It has been left to the Conference to decide whether difficulties might in fact result from the linking of the provisions of the Recommendation to those of the Migration for Employment Convention (Revised), 1949.

7. There should be continuing co-operation between the competent authorities, representatives of employers and workers and appropriate bodies in taking all practicable measures to foster public understanding and observance of the principles of non-discrimination and in considering what further positive measures may be necessary in national conditions to put the principles into effect.

Observation on Paragraph 7.

United Kingdom. There is no objection to co-operation between the bodies listed, but the implications in the phrase " further positive measures " are not clear.

[1] See below, under " Proposals for the Insertion of New Paragraphs ", p. 30.

It would seem to be for the Conference to decide whether the terms referred to should be changed.

IV. Co-ordination of Measures for the Prevention of Discrimination in All Fields

8. The authorities responsible for action against discrimination in employment and occupation should co-operate closely and continuously with the authorities responsible for action against discrimination in other fields in order that measures taken in all fields may be co-ordinated.

Observation on Paragraph 8.

United Kingdom. The Government repeats its view that it is not a matter for government intervention or for legislation but a matter of educating public opinion through all the means available.

This observation does not call for any change in the text, which has been left as it stood.

Proposals for the Insertion of New Paragraphs

Denmark. The Government conveys the view of the Danish Employers' Confederation, which would appreciate the inclusion in the Recommendation of a provision corresponding to Article 6 of the proposed Convention.

Federal Republic of Germany. See observation under Article 1 of the proposed Convention concerning the possibility of dealing with discrimination on grounds of age through the insertion of a special clause in the Recommendation.

United Kingdom. The exclusions in Articles 4 and 6 of the proposed Convention should also be incorporated in the proposed Recommendation, as otherwise the two instruments, which are intended to be complementary, will be based on different premises.

The proposal of the Government of the Federal Republic of Germany has been considered in connection with Article 1 of the proposed Convention. It would seem to be for the Conference to decide whether it wishes to deal with the problem of discrimination on grounds of age in either of the two instruments.

The proposal of the United Kingdom Government to incorporate the exclusion specified in Article 4 of the proposed Convention in the Recommendation introduces a new idea which it appears desirable to refer to the Conference for decision.

Similarly, it would seem to be for the Conference to decide what effect should be given to the proposal put forward by that Government and by the Danish Employers' Confederation that the Recommendation should include a provision corresponding to Article 6 of the proposed Convention.[1]

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[1] See also above, under Paragraph 2, p. 27.

PROPOSED TEXTS

PROPOSED TEXTS

(English Version)

The English texts are given below of (A) the proposed Convention and (B) the proposed Recommendation submitted as a basis for the second discussion, at the 42nd Session of the Conference, of the question of discrimination in the field of employment and occupation, and (C) a draft resolution concerning application of the Discrimination (Employment and Occupation) Convention, 1958, in non-metropolitan territories.

A. Proposed Convention concerning Discrimination in Respect of Employment and Occupation

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Forty-second Session on 4 June 1958, and

Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention, and

Considering that the Declaration of Philadelphia affirms that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity,

adopts this day of June of the year one thousand nine hundred and fifty-eight the following Convention, which may be cited as the Discrimination (Employment and Occupation) Convention, 1958 :

PROPOSED TEXTS

(French Version)

The French texts are given below of (A) the proposed Convention and (B) the proposed Recommendation submitted as a basis for the second discussion, at the 42nd Session of the Conference, of the question of discrimination in the field of employment and occupation, and (C) a draft resolution concerning application of the Discrimination (Employment and Occupation) Convention, 1958, in non-metropolitan territories.

A. Projet de convention concernant la discrimination en matière d'emploi et de profession

La Conférence générale de l'Organisation internationale du Travail,

Convoquée à Genève par le Conseil d'administration du Bureau international du Travail, et s'y étant réunie le 4 juin 1958, en sa quarante-deuxième session ;

Après avoir décidé d'adopter diverses propositions relatives à la discrimination en matière d'emploi et de profession, question qui constitue le quatrième point à l'ordre du jour de la session ;

Après avoir décidé que ces propositions prendraient la forme d'une convention internationale ;

Considérant que la Déclaration de Philadelphie affirme que tous les êtres humains, quels que soient leur race, leur croyance ou leur sexe, ont le droit de poursuivre leur progrès matériel et leur développement spirituel dans la liberté et la dignité, dans la sécurité économique et avec des chances égales,

adopte, ce jour de juin mil neuf cent cinquante-huit, la convention ci-après, qui sera dénommée Convention sur la discrimination (emploi et profession), 1958.

Article 1

1. For the purpose of this Convention the term " discrimination " includes—

(a) any adverse distinction made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which deprives a person of equality of opportunity or treatment in employment or occupation ; and

(b) such other adverse distinctions affecting a person's employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations where such exist.

2. Distinctions in respect of access to a particular employment based on the inherent requirements thereof shall not be deemed to be " discrimination ".

3. For the purpose of this Convention the terms " employment " and " occupation " include access to vocational training, access to employment and to particular occupations and terms and conditions of employment.

Article 2

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

Article 3

Each Member for which this Convention is in force undertakes—

(a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy ;

(b) to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy ;

(c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy ;

Article 1

1. Aux fins de la présente convention, le terme « discrimination » comprend :

a) toute distinction fondée sur la race, la couleur, le sexe, la religion, l'opinion politique, l'ascendance nationale ou l'origine sociale, qui s'exerce au détriment d'un individu et lui dénie l'égalité de chances ou de traitement en matière d'emploi ou de profession ;

b) toute autre distinction s'exerçant au détriment d'un individu en matière d'emploi ou de profession, qui pourra être spécifiée par le Membre intéressé après consultation des organisations représentatives d'employeurs et de travailleurs, là où de telles organisations existent.

2. Les distinctions faites en ce qui concerne l'accès à un emploi déterminé et qui résultent nécessairement des qualifications exigées par l'emploi ne sont pas considérées comme des discriminations.

3. Aux fins de la présente convention, les mots « emploi » et « profession » recouvrent l'accès à la formation professionnelle, l'accès à l'emploi et aux différentes professions, ainsi que les conditions d'emploi.

Article 2

Tout Membre pour lequel la présente convention est en vigueur s'engage à formuler et à appliquer une politique nationale visant à promouvoir, par des méthodes adaptées aux circonstances et aux usages nationaux, l'égalité de chances et de traitement en matière d'emploi et de profession, afin d'éliminer toute discrimination en cette matière.

Article 3

Tout Membre pour lequel la présente convention est en vigueur doit :

a) s'efforcer d'obtenir la collaboration des organisations d'employeurs et de travailleurs et d'autres organismes appropriés pour favoriser l'acceptation et l'application de cette politique ;

b) encourager des programmes d'éducation propres à assurer cette acceptation et cette application ;

c) abroger toute disposition législative et modifier toute disposition ou pratique administrative qui sont incompatibles avec ladite politique ;

(d) to pursue the policy in respect of employment under the direct control of a national authority ;

(e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority ;

(f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

Article 4

Nothing in this Convention shall affect any statutory provision or administrative regulation which relates to the national security of a Member.

Article 5

1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be " discrimination ".

2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

Article 6

Equal remuneration for men and women workers for work of equal value is dealt with in the Equal Remuneration Convention, 1951, and is therefore not dealt with in this Convention.

B. Proposed Recommendation concerning Discrimination in Respect of Employment and Occupation

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International

d) suivre ladite politique en ce qui concerne les emplois soumis au contrôle direct d'une autorité nationale ;

e) assurer l'application de ladite politique dans les activités des services d'orientation professionnelle, de formation professionnelle et de placement soumis au contrôle d'une autorité nationale ;

f) indiquer, dans ses rapports annuels sur l'application de la convention, les mesures prises conformément à cette politique et les résultats obtenus.

Article 4

Les dispositions de la présente convention n'affectent en rien les dispositions législatives ou réglementations administratives relatives à la sécurité nationale d'un Membre.

Article 5

1. Les mesures spéciales de protection ou d'assistance prévues dans d'autres conventions ou recommandations adoptées par la Conférence internationale du Travail ne sont pas considérées comme des discriminations.

2. Tout Membre peut, après consultation, là où elles existent, des organisations représentatives d'employeurs et de travailleurs, décider de ne pas considérer comme des discriminations toutes autres mesures spéciales destinées à tenir compte des besoins particuliers de personnes à l'égard desquelles une protection ou une assistance spéciale est, d'une façon générale, reconnue nécessaire pour des raisons telles que le sexe, l'âge, l'invalidité, les charges de famille ou le niveau social ou culturel.

Article 6

La question de l'égalité de rémunération entre la main-d'œuvre masculine et la main-d'œuvre féminine pour un travail de valeur égale fait l'objet de la convention sur l'égalité de rémunération, 1951, et n'est donc pas visée dans la présente convention.

B. Projet de recommandation concernant la discrimination en matière d'emploi et de profession

La Conférence générale de l'Organisation internationale du Travail,

Convoquée à Genève par le Conseil d'administration du Bureau international

Labour Office, and having met in its Forty-second Session on 4 June 1958, and

Having decided upon the adoption of certain proposals with regard to discrimination in the field of employment and occupation, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation supplementing the Discrimination (Employment and Occupation) Convention, 1958,

adopts this day of June of the year one thousand nine hundred and fifty-eight the following Recommendation, which may be cited as the Discrimination (Employment and Occupation) Recommendation, 1958 :

The Conference recommends that each Member should apply the following provisions :

I. Definitions

1. (1) For the purpose of this Recommendation the term " discrimination " includes—

(a) any adverse distinction made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which deprives a person of equality of opportunity or treatment in employment or occupation ; and

(b) such other adverse distinctions affecting a person's employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations where such exist ;

(2) Distinctions in respect of access to a particular employment based on the inherent requirements thereof shall not be deemed to be " discrimination " ;

(3) For the purpose of this Recommendation the terms " employment " and " occupation " include access to vocational training, access to employment and to particular occupations and terms and conditions of employment.

II. Formulation of Policy

2. Each Member should, by means of legislative measures, collective agreements between representative employers' and workers' organisations or in any

du Travail, et s'y étant réunie le 4 juin 1958, en sa quarante-deuxième session ;

Après avoir décidé d'adopter diverses propositions relatives à la discrimination en matière d'emploi et de profession, question qui constitue le quatrième point à l'ordre du jour de la session ;

Après avoir décidé que ces propositions prendraient la forme d'une recommandation complétant la convention sur la discrimination (emploi et profession), 1958,

adopte, ce jour de juin mil neuf cent cinquante-huit, la recommandation ci-après, qui sera dénommée Recommandation sur la discrimination (emploi et profession), 1958 :

La Conférence recommande aux Membres d'appliquer les dispositions suivantes :

I. Définitions

1. (1) Aux fins de la présente recommandation, le terme « discrimination » comprend :

a) toute distinction fondée sur la race, la couleur, le sexe, la religion, l'opinion politique, l'ascendance nationale ou l'origine sociale, qui s'exerce au détriment d'un individu et lui dénie l'égalité de chances ou de traitement en matière d'emploi ou de profession ;

b) toute autre distinction s'exerçant au détriment d'un individu en matière d'emploi ou de profession qui pourra être spécifiée par le Membre intéressé après consultation des organisations représentatives d'employeurs et de travailleurs, là où de telles organisations existent.

(2) Les distinctions faites en ce qui concerne l'accès à un emploi déterminé et qui résultent nécessairement des qualifications exigées par l'emploi ne sont pas considérées comme des discriminations.

(3) Aux fins de la présente recommandation, les mots « emploi » et « profession » recouvrent l'accès à la formation professionnelle, l'accès à l'emploi et aux différentes professions, ainsi que les conditions d'emploi.

II. Politique a suivre

2. Tout Membre devrait, par voie de dispositions législatives, de conventions collectives entre organisations représentatives d'employeurs et de travailleurs ou

other manner consistent with national conditions and practice, formulate a national policy for the prevention of discrimination in employment and occupation, having full regard to the following principles :

(a) the promotion of equality of opportunity and treatment in employment and occupation is a matter of public concern ;

(b) all persons should, without discrimination, enjoy equality of opportunity and treatment in respect of—

(i) access to vocational guidance and placement services ;

(ii) access to training and employment of their own choice on the basis of individual suitability for such training or employment ;

(iii) advancement in accordance with their individual character, experience, ability and diligence ;

(iv) security of tenure of employment ;

(v) remuneration for work of equal value ;

(vi) conditions of work including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities provided in connection with employment ;

(c) government agencies should apply fair and non-discriminatory employment policies in all their activities ;

(d) employers should not practise or countenance discrimination in engaging or training any person for employment, in advancing or retaining such person in employment, or in fixing terms and conditions of employment ;

(e) in collective negotiations and industrial relations, the parties should respect the principle of equality of opportunity and treatment in employment and occupation, and should ensure that collective agreements contain no provisions of a discriminatory character in respect of access to, training for, advancement in or retention of employment or in respect of the terms and conditions of employment ;

(f) employers' and workers' organisations should not practise or countenance discrimination in respect of admission, retention of membership or participation in their affairs.

III. Application of Policy

3. Each Member should—

de toute autre manière conforme aux circonstances et aux usages nationaux, formuler une politique visant à empêcher la discrimination en matière d'emploi et de profession, en tenant pleinement compte des principes suivants :

a) les mesures destinées à promouvoir l'égalité de chances et de traitement en matière d'emploi et de profession constituent une question d'intérêt public ;

b) tout individu devrait jouir, sans discrimination, de l'égalité de chances et de traitement en ce qui concerne :

i) l'accès aux services d'orientation professionnelle et de placement ;

ii) l'accès à la formation professionnelle et à l'emploi de son choix, selon ses aptitudes personnelles pour cette formation ou cet emploi ;

iii) la promotion, selon ses qualités personnelles, son expérience, ses aptitudes et son application au travail ;

iv) la sécurité de l'emploi ;

v) la rémunération pour un travail de valeur égale ;

vi) les conditions de travail, y compris la durée du travail, les périodes de repos, les congés annuels payés, les mesures de sécurité et d'hygiène du travail, ainsi que les mesures de sécurité sociale et les services sociaux en rapport avec l'emploi ;

c) les organismes gouvernementaux devraient eux-mêmes appliquer dans toutes leurs activités une politique d'emploi équitable et sans aucune discrimination ;

d) les employeurs ne devraient pratiquer ou tolérer aucune discrimination à l'égard de qui que ce soit en ce qui concerne l'engagement, la formation, la promotion, le maintien en emploi ou les conditions d'emploi ;

e) dans les négociations collectives et les relations professionnelles, les parties devraient respecter le principe de l'égalité de chances et de traitement en matière d'emploi et de profession et veiller à ce que les conventions collectives ne contiennent aucune disposition de nature discriminatoire en ce qui concerne l'accès à l'emploi, la formation, la promotion, le maintien en emploi ou les conditions d'emploi ;

f) les organisations d'employeurs et de travailleurs ne devraient pratiquer ou tolérer aucune discrimination en ce qui concerne l'admission des membres, le maintien de la qualité de membre ou la participation aux affaires syndicales.

III. Mise en application de la politique

3. Tout Membre devrait :

(a) ensure application of the principles of non-discrimination—

(i) in respect of employment under the direct control of a central authority;

(ii) in the activities of vocational guidance, vocational training and placement services under the direction of a central authority;

(b) promote their observance, where practicable and necessary, in respect of other employment and other vocational guidance, vocational training and placement services by such methods as—

(i) encouraging state, provincial or local government departments or agencies and industries and undertakings operated under public ownership or control to ensure the application of the principles;

(ii) making eligibility for contracts involving the expenditure of public funds dependent on observance of the principles;

(iii) making eligibility for grants to training establishments and for a licence to operate a private employment agency or a private vocational guidance office dependent on observance of the principles.

4. Each Member should repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy.

5. Application of the policy should not adversely affect special measures designed to meet the particular needs of persons who, for such reasons as sex, age, disablement, family responsibilities or social or cultural status are generally recognised to require special protection or assistance.

6. With respect to immigrant workers of foreign nationality and the members of their families, regard should be had to the provisions of the Migration for Employment Convention (Revised), 1949, relating to equality of treatment and to the provisions of the Migration for Employment Recommendation (Revised), 1949, relating to the lifting of restrictions on access to employment.

7. There should be continuing co-operation between the competent authorities, representatives of employers and workers and appropriate bodies in taking all practicable measures to foster public understanding and observance of the principles of non-discrimination and in considering what further positive measures may be necessary in national conditions to put the principles into effect.

a) assurer l'application des principes de non-discrimination :

i) en ce qui concerne les emplois soumis au contrôle direct d'une autorité centrale ;

ii) dans les activités des services d'orientation professionnelle, de formation professionnelle et de placement soumis au contrôle d'une autorité centrale ;

b) pour autant que cela est possible et nécessaire, favoriser l'application de ces principes en ce qui concerne les autres emplois et les autres services d'orientation professionnelle, de formation professionnelle et de placement, notamment :

i) en encourageant l'application desdits principes par les services et organismes des administrations des Etats constituants ou des provinces d'un Etat fédératif, ainsi que des administrations locales, et par les industries et entreprises de propriété publique ou soumises au contrôle d'une autorité publique ;

ii) en subordonnant l'octroi de contrats entraînant des dépenses publiques à l'application desdits principes ;

iii) en subordonnant l'octroi de subventions aux établissements d'enseignement professionnel et de licences aux bureaux privés de placement et d'orientation professionnelle à l'application desdits principes.

4. Tout Membre devrait abroger toute disposition législative et modifier toute disposition ou pratique administratives contraires à la politique de non-discrimination.

5. L'application de cette politique ne devrait pas avoir d'effet préjudiciable sur les mesures destinées à tenir compte des besoins particuliers des personnes à l'égard desquelles la nécessité d'une protection ou d'une assistance spéciale est généralement reconnue pour des raisons telles que le sexe, l'âge, l'invalidité, les charges de famille ou le niveau social ou culturel.

6. En ce qui concerne les travailleurs immigrants de nationalité étrangère, ainsi que les membres de leur famille, il y aurait lieu de tenir compte des dispositions de la convention sur les travailleurs migrants (revisée), 1949, qui visent l'égalité de traitement, et de celles de la recommandation sur les travailleurs migrants (revisée), 1949, qui visent la suppression des restrictions à l'emploi.

7. Une collaboration permanente devrait s'instaurer entre les autorités compétentes, les représentants des employeurs et des travailleurs et les organismes intéressés en vue de l'adoption de toute mesure de nature à favoriser l'acceptation et l'observation des principes de non-discrimination par le public et en vue de l'examen des autres mesures positives qui, selon les circonstances nationales, peuvent être nécessaires pour assurer l'application de ces principes.

IV. Co-ordination of Measures for the Prevention of Discrimination in All Fields

8. The authorities responsible for action against discrimination in employment and occupation should co-operate closely and continuously with the authorities responsible for action against discrimination in other fields in order that measures taken in all fields may be co-ordinated.

C. Draft Resolution concerning Application of the Discrimination (Employment and Occupation) Convention, 1958, in Non-Metropolitan Territories

The General Conference of the International Labour Organisation,

Having adopted the Discrimination (Employment and Occupation) Convention, 1958,

Desiring to emphasise the desirability of the Convention being generally applied to non-metropolitan territories,

Noting that the Social Policy (Non-Metropolitan Territories) Convention, 1947, which provides that it shall be an aim of policy to abolish all discrimination among workers, is already in force for Belgian, British and French non-metropolitan territories,

Noting that the subject-matter of the Discrimination (Employment and Occupation) Convention, 1958, falls increasingly within the self-governing powers of non-metropolitan territories and that the acceptance of the obligations of the Convention is therefore primarily a matter for decision by the territories concerned,

Invites the attention of the governments of the Members concerned to the desirability of giving urgent consideration to the measures necessary in accordance with their respective constitutional systems and in agreement with the governments of the territories concerned to secure the full application of the provisions of the Convention in non-metropolitan territories, and

Requests the Governing Body of the International Labour Office to survey the position from time to time and inform the Conference Committee on the Application of Conventions and Recommendations of the progress made.

IV. Coordination des mesures contre la discrimination dans tous les domaines

8. Les autorités chargées de lutter contre la discrimination en matière d'emploi et de profession devraient collaborer étroitement et de manière continue avec les autorités qui sont chargées de lutter contre la discrimination dans d'autres domaines, afin d'assurer la coordination de toutes les mesures prises à cet égard.

C. Projet de résolution concernant l'application de la convention sur la discrimination (emploi et profession), 1958, dans les territoires non métropolitains

La Conférence générale de l'Organisation internationale du Travail,

Ayant adopté la convention sur la discrimination (emploi et profession), 1958 ;

Désireuse de souligner qu'il est souhaitable que ladite convention soit généralement appliquée dans les territoires non métropolitains ;

Notant que la convention sur la politique sociale (territoires non métropolitains), 1947, qui prévoit que ce devra être l'un des buts de la politique sociale de supprimer toute discrimination entre les travailleurs, est déjà en vigueur pour les territoires non métropolitains belges, britanniques et français ;

Notant que les questions traitées par la convention sur la discrimination (emploi et profession), 1958, entrent de plus en plus dans le cadre de la compétence propre des autorités des territoires non métropolitains et que l'acceptation des obligations de ladite convention est donc principalement du ressort des territoires intéressés,

Attire l'attention des gouvernements des Membres intéressés sur l'opportunité d'envisager, dès maintenant, les mesures nécessaires, conformément à leurs systèmes constitutionnels respectifs et en accord avec les gouvernements des territoires intéressés, pour assurer la pleine application des dispositions de la convention dans les territoires non métropolitains ;

Prie le Conseil d'administration du Bureau international du Travail d'examiner de temps à autre la situation à cet égard et de tenir la Commission de l'application des conventions et recommandations de la Conférence au courant des progrès accomplis.

Annex 13

H. Lauterpacht, *The Development of International Law by the International Court* (Frederick A. Praeger, 1958), pp. 158–172

THE DEVELOPMENT

OF

INTERNATIONAL LAW

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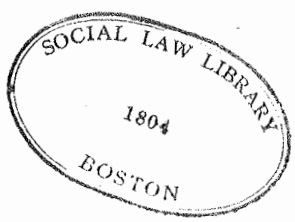
THE INTERNATIONAL COURT

BEING A REVISED EDITION OF
" THE DEVELOPMENT OF INTERNATIONAL LAW BY
THE PERMANENT COURT OF INTERNATIONAL JUSTICE " (1934)

By

SIR HERSCH LAUTERPACHT
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Institute of International Law



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Annex 13

BOOKS THAT MATTER

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CHAPTER 9

JUDICIAL LEGISLATION THROUGH APPLICATION OF GENERAL PRINCIPLES OF LAW

49. *The Principle* nemo judex in re sua

International law, being an immature legal system, departs in some ways from principles of law as generally recognised. Thus, as stated, traditional international law—though not, probably, international law of today—disregards the vitiating influence of duress in the conclusion of treaties. When such departures from the normal rule as recognised by civilised States are clear and unambiguous, the judge has no option but to act upon them. However, there are cases in which the application of a general principle of law, though in the nature of an apparent novelty (and therefore seemingly partaking of the character of legislation), is somehow grounded in an existing principle of international law and to that extent contrives to dispel the appearance of drastic judicial legislation. The Twelfth Advisory Opinion, relating to the dispute between Great Britain and Turkey in the matter of the Iraq Boundary and involving an interpretation of the Covenant of the League of Nations, illustrates clearly this aspect of the activity of the Court.

No rule is more firmly embedded in the practice of modern international law than the principle that States are not bound, in the absence of an agreement to the contrary, to submit their disputes with other States to final adjudication by a third party. The Court itself has repeatedly treated this rule as one of unchallenged authority.[1] And yet the question arises, and it was answered by the Court in the Advisory Opinion referred to above, as to how far that principle is compatible with a legal organisation of States established, among others, for the purpose of the pacific settlement of

[1] See, for instance, Series B, No. 5 (1923) (*Eastern Carelia* case), p. 27; Series A, No. 2 (1924) (*Mavrommatis Palestine Concessions*), p. 16; and see above, p. 91, and below, pp. 338 *et seq.* And see the *Ambatielos* case, *I.C.J. Reports* 1953, p. 19, for a broad statement of the principle that "a State may not be compelled to submit its disputes to arbitration without its consent."

international disputes. There were, it would seem, embodied in the Covenant of the League of Nations two principles which could not be easily reconciled. One was the abolition, in regard to disputes likely to lead to a breach of the peace, of the principle that every State is judge in its own cause. There was a duty to submit such disputes either to a legal decision or to inquiry and report by the Council or the Assembly. The other, equally general, principle was the overriding requirement of unanimity except in the cases expressly provided for in the Covenant. The two principles were irreconcilable in a number of ways, unless an attempt were made to make a general principle of law bear upon the interpretation of the Covenant. Thus while the Covenant imposed under Articles 10, 11, 13 and 16 certain duties upon the Members of the League in regard to the enforcement of the obligation of pacific settlement, the effective fulfilment of these duties might have become impossible if the rule of unanimity was adhered to. It might have become impossible for the Council to find that there had taken place aggression under Article 10; or, under Article 13, to propose what steps be taken to give effect to an award or decision with which a Member had failed to comply; or, under Article 16, to recommend measures of a military character against the Covenant-breaking State. The provision of Article 11 to the effect that the League "shall take any action that may be deemed wise and effectual to safeguard the peace of the world" might have been rendered impossible of fulfilment if that Article was interpreted so as to make action under it conditional upon absolute unanimity. The question, therefore, was bound to arise whether the rigid provisions of Article 5 of the Covenant relating to the requirement of unanimity ought not, as a matter of law, to be interpreted subject to general legal principles such as the principle that no one may be judge in his own cause.

In its Twelfth Advisory Opinion relating to the *Interpretation of the Treaty of Lausanne* (*Iraq Boundary*) the Court had occasion to pronounce on this matter. It had to answer the question whether the Council of the League of Nations, in deciding a dispute submitted to it by virtue not of Article 15 of the Covenant but of a Treaty concluded between the parties, could take a valid decision by a vote other than the unanimous vote of all the States sitting at the Council table. Could the Council lay down the frontier of Iraq by a vote other than a unanimous vote including that of Great

Britain and Turkey? If the letter of the Covenant was to be adopted as the sole guide, then a negative answer to that question was the only one possible: "Except where otherwise expressly provided in this Covenant . . . decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting" (Art. 5). Nothing could be more explicit. The Court, disregarding the letter of the Covenant, held that Article 5 "does not specially contemplate the case of an actual dispute which has been laid before the Council."[2] The letter of Article 5 seemed to cover all contingencies under the Covenant. However, the Court was of the opinion that to the case of an actual dispute brought before the Council there applied by analogy the principle of paragraphs 6 and 7 of Article 15 and paragraph 4 of Article 16, which, while requiring unanimity, excluded from this requirement the votes of the parties to the dispute. This meant in fact the application of analogy to cases in regard to which Article 5 seemed to have excluded resort to this method. The Court effected that bold piece of judicial legislation by reference to the principle that no one can be judge in his own cause.

There was nothing in the Treaty of Lausanne expressly authorising the Court to depart from the letter of the Covenant. The Treaty was silent on the matter except in so far as it entrusted the Council with the task of laying down the frontier, which task the Court conceived as intimating that the Council's decision must be effective and not liable to stultification by the vote of one of the parties.[3] A considerable part of the reasoning of the Court was devoted to showing that the manner in which the Council must decide the dispute was governed entirely by the provisions of the Covenant, including the general requirement of unanimity.[4] But the Court's vindication of the unanimity rule stopped short of disregarding altogether the general principle of law that no one may be judge in his own cause.

The Opinion was of unusual importance. If it was correct—and it is submitted that it was—then, as the result, there was justification for holding, for instance, that the votes of the parties to the dispute need not affect the validity of the resolutions of the Council under

[2] Series B, No. 12 (1925), p. 31.
[3] *Ibid.*
[4] See in particular *ibid.*, p. 29.

Article 11 of the Covenant when interpreting the obligations of the Covenant or acting in pursuance of such interpretation adopted by it.[5] This was not the view which the Council of the League adopted in the dispute brought before it in 1931 by China in consequence of the invasion of her territory by Japan. But it was a view which, following the authoritative Opinion of the Court in the *Iraq Boundary* case, it could have adopted had it been intent upon ensuring the effectiveness of the Covenant. For—and here lies the crux of the problem—this apparent example of judicial legislation must be regarded as a determined effort to see the purpose of the Covenant fulfilled. If the Covenant was a legal—rather than a political—document, then it had to be interpreted so as to be effective unless the contrary clearly appeared from its context or from the otherwise ascertained intention of the parties. In many cases judicial legislation amounts, in fact, not to a change of the law, but to the fulfilment of its purpose—a consideration which suggests that the border-line between judicial legislation and the application of the existing law may be less rigid than appears at first sight.

For reasons which are external to the present discussion, that Opinion of the Court failed to secure the attention and recognition to which it was entitled. No attempt was made to generalise its implications. In particular, it was not resorted to—as it well could have been—in the discussions concerning the question, which then gave rise to much controversy, whether a unanimous vote of the Council of the League was required for a request for an Advisory Opinion of the Court or whether, on the analogy of the principle adopted in the Advisory Opinion concerning the *Iraq Boundary*, the vote of the interested parties did not count for the purpose of ascertaining unanimity.[6]

[5] That Article provided as follows: "Any war or threat of war . . . is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." There may be noted in this connection the observation of the Court in the case of the *Peter Pázmány University* to the effect that the Report submitted by Sir Austen Chamberlain and aiming at the settlement of a particular dispute under Art. 11 of the Covenant "was not unanimously accepted by the Council, Hungary, which sat on the Council in accordance with Art. 4 of the Covenant, having refused her consent" (Series A/B, No. 61 (1933), p. 243). The observation seems to lend support to the view expressed in the text above to the effect that the limitation of the rule of unanimity by reference to the principle *nemo judex in re sua* could properly apply only in cases in which the Council, acting under Art. 11, was concerned with the interpretation of the obligations of the Covenant or the consequences of such interpretation.

[6] But see the statement of Sir Cecil Hurst at the Conference of States Signatories of the Statute convened in 1929 in connection with the proposed adherence of the United

50. *The Doctrine of Abuse of Rights*

Another instance of judicial legislation by way of an application of a general principle of law is the manner in which the Court, in resorting to the doctrine of abuse of rights, lent its authority to the creation of a new source of international responsibility. Prior to its appearance in the Judgments and Opinions of the Court, the substance of the doctrine of abuse of rights had been recognised by a number of writers and in some arbitral decisions.[7] But it could not be said that it had been authoritatively recognised as part of international law. An attempt has been made elsewhere to show[8] that, regardless of terminology, the principle in question figures in the administration of justice of most of the modern systems of law. It is only at a rudimentary stage of legal development that society permits the unchecked use of rights without regard to its social consequences. The determination of the point at which the exercise of a legal right has degenerated into abuse of a right is a question which cannot be decided by an abstract legislative rule, but only by the activity of courts drawing the line in each particular case. The exercise of such activity—which, in relation to any new set of circumstances, may assume the complexion of judicial legislation—is particularly important in the international society in which the legislative process by regular organs is practically non-existent.

It is therefore of particular interest to note that the Court has not hesitated to associate itself—although not conspicuously or directly—with the doctrine of abuse of rights. In the Judgment given in May 1926 concerning *Certain German Interests in Polish Upper Silesia* the Court found that in the period from the coming into force of the Peace Treaty until the transfer of sovereignty over Upper Silesia Germany retained the right to dispose of State property situated there. But the Court added a rider to the effect that " only a misuse of this right could endow any act of alienation

States to the Court. In this statement Sir Cecil Hurst claimed—correctly, it is submitted—that the Advisory Opinion in the matter of the Iraq Boundary could be adduced as an authority for the view that the vote of the Council in requesting an Advisory Opinion could not be affected by the dissent of the parties to the dispute (*Minutes*, p. 24).

[7] See Lauterpacht, *The Function of Law in the International Community* (1933), pp. 286–306.

[8] *Ibid.* See also Gutteridge in *Cambridge Law Journal*, V (1933), pp. 22–45, and Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp. 121–136.

with the character of a breach " of Germany's international obligations in the matter. " Such misuse," the Court added, " cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement." [9] The Court then examined the question whether the Polish contention that there had taken place an abuse of right was justified. The Court held that it was not. It found that the German acts of alienation did not overstep the limits of the normal administration of public property, and that they were not designed to procure for Germany an illicit advantage and to deprive Poland of a right to which she was entitled.[10]

Four years later, in the *Free Zones* case, the Court was confronted with another aspect of the doctrine of abuse of rights. In that case Switzerland contended that the obligation imposed upon France by the Treaty of 1815 to withdraw her customs frontier implied not only the prohibition to levy duties on the importation and exportation of goods, but also the obligation not to levy other duties and taxes. The Court did not accept that view. It pointed out that French fiscal legislation applied in the territory of the Free Zones as in any other part of French territory. But, the Court added, " a reservation must be made as regards the case of abuse of a right, an abuse which, however, cannot be presumed by the Court." [11] The same form of words was used in the final Judgment in the same case in June 1932.[12]

There was possibly an implied reference to the principle of abuse of rights in the Judgment in the *Anglo-Norwegian Fisheries* case, where the Court in applying the principle of the general direction of the coast for the purpose of determining the base-line of territorial waters stated that " one cannot confine oneself to examining one sector of the coast only, except in a case of manifest abuse." [13] Moreover, it is possible to see an indirect approach to the principle prohibiting abuse of rights in the frequent affirmation of the duty of States to act in good faith in the exercise of their rights. Thus in the case concerning *Conditions of Admission to Membership in the United Nations*, after rejecting the view that the conditions laid down in Article 4 of the Charter represented an indispensable

[9] Series A, No. 7 (1926), p. 30.
[10] *Ibid.*, p. 38.
[11] Series A, No. 24 (1930), p. 12.
[12] Series A/B, No. 46 (1932), p. 167.
[13] *I.C.J. Reports* 1951, p. 142.

minimum in the sense that political considerations could be superimposed upon them, the Court proceeded to hold that Article 4 does not forbid the taking into account " of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article." [14] It is also in this connection that the doctrine of abuse of rights has been invoked by individual Judges.[15]

These are but modest beginnings of a doctrine which is full of potentialities and which places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal. There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint. This is so although there is no cogent reason for accepting the view expressed by Judge Anzilotti, in the case of the *Electricity Company of Sofia*,[16] that the contrary rule *qui jure suo utitur neminem laedit* is in complete harmony with the spirit of international law. In that case the suggestion was apparently made by Belgium that Bulgaria denounced a treaty of compulsory judicial settlement for the reason that Belgium was about to submit an application to the Court under that Treaty and that the action taken by Bulgaria constituted therefore an abuse of the power of denunciation. The Court did not consider that point. Judge Anzilotti in his Separate Opinion, after making the general observation referred to above, said: " The theory of abuse of rights is an extremely delicate one, and I should hesitate long before applying

[14] *I.C.J. Reports* 1948, p. 63. See also the Judgment in the case concerning *Rights of Nationals of the United States of America in Morocco*, where the Court, in laying down the principles governing the fixing of valuation of import goods for customs purposes, stated that while the power of making the valuation rested with the customs authorities, " it is a power which must be exercised reasonably and in good faith " (*I.C.J. Reports* 1952, p. 212).

[15] See the Individual Opinion of Judge Azevedo in the matter of *Conditions of Admission of a State to Membership in the United Nations* (*I.C.J. Reports* 1948, pp. 79, 80), and the Dissenting Opinion of Judge Alvarez in the matter of the *Competence of the General Assembly for the Admission of a State to the United Nations* (*I.C.J. Reports* 1950, p. 15). See, in particular, the Joint Dissenting Opinion, in the former case, of four of the Judges who, while holding that legally any relevant political consideration is admissible in giving or refusing consent to the admission of a new Member of the United Nations, added that in the exercise of their discretion in the matter, Members are legally bound to have regard, *inter alia*, to the principles of good faith (at p. 92). And see Fitzmaurice in *B.Y.*, 27 (1950), pp. 12–14.

[16] Series A/B, No. 77 (1939), p. 98.

it to such a question as the compulsory jurisdiction of the Court. . . . The Bulgarian Government was entitled to denounce the Treaty and was sole judge of the expediency or necessity of doing so." It is difficult to dissent from these propositions which, however, hardly require the support of the broader and more controversial assertion. The power to apply some such principle as that embodied in the prohibition of abuse of rights must exist in the background in any system of administration of justice in which courts are not purely mechanical agencies.[17]

51. *The Completeness of International Law and the Legislative Application of General Principles of Law*

It might be suggested that whenever the Court appears to approach international legislation by way of applying general principles of law, it does so in reliance on its Statute which authorises it to do so and that there is therefore in such cases no question of judicial legislation. The answer to any such suggestion is probably that Article 38 of the Statute prescribes recourse to general principles of law only if conventional and customary rules of international law provide no solution. However, it is probable that that answer unduly simplifies the situation which is of some latent complexity. Can it be said that if there is no rule of customary or conventional law bearing expressly on the case international law is silent on the subject? Or is it not rather the case that in such contingencies resort must be had to the overriding rule of presumptive freedom of action of States and that there is no room for the application of a general principle of law restrictive of that freedom of action? On the other hand, there is force in the view that in practice the situation is not that of simple absence or simple presence of rules of customary or conventional international law; that in practice these rules are often obscure or controversial; that, as the result, the question is not one of displacing them but of interpreting them against the background or in the light of general principles of

[17] It is clear that organs which, unlike the Court, are charged with the task of both formulating and developing international law enjoy greater latitude in relying on the doctrine of abuse of rights. Thus the International Law Commission in adopting in 1953, *de lege ferenda*, an article on Fisheries which provided that States shall be under a duty to accept regulations prescribed by an international authority as essential for the purpose of protecting fishing resources against waste or extermination was influenced by the view that "the prohibition of abuse of rights is supported by judicial and other authority and is germane to the situation covered by these articles." *Report of the Commission, Fifth Session*, Doc. A/CN.4/76, p. 51.

law; and that the difference between disregarding a rule of international law in deference to a general principle of law and interpreting it (possibly out of existence) in the light of a general principle of law may be but a play on words. These, inconclusive, considerations may help to draw attention to the vast potentialities of that source of the law which the Court is authorised to apply and the application of which must be tempered by the knowledge that the primary—though not the exclusive—function of the Court is the application of the existing law. On the realisation of that fact depends in the last resort the usefulness and the authority of the Court. For the same reason, although it has been here deemed convenient to discuss the " general principles of law " of Article 38 within the framework of a chapter on judicial legislation, it would be a mistake to assume that this has been their typical application.

These considerations explain also why the sphere of application of Article 38 (3) of the Statute referring to " general principles of law as recognised by civilised States " has in fact been kept within a limited compass in the jurisprudence of the Court. Its importance as a source of international law and as an ultimate safeguard against the possibility of a *non liquet* remains unaffected by the relative infrequency of or lack of articulation in its use. Experience has shown that the main function of " general principles of law " has been that of a safety-valve to be kept in reserve rather than a source of law of frequent application. As a rule, the two primary sources of law enumerated in Article 38—treaty and custom—have provided a sufficient basis for decision. The very comprehensiveness of the power inherent in the authorisation to resort to " general principles of law " has counselled moderation in its use. This is so in particular having regard to the fact that while in the municipal sphere the consequences of having recourse to general principles of law are limited for the reason that, on the whole, the law does not, in that sphere, depart from the general sense of legal propriety,[18] this is not always so in the realm of international law.[19] This is far from signifying that wherever the Court has had recourse to general principles of law its action amounted to judicial legislation. On the contrary, normally it has constituted no more than an interpretation

[18] See on this aspect of the question Meier-Hayoz, *Der Richter als Gesetzgeber* (1951), where the author gives an account of the application by Swiss courts of the provision of Art. 1 (2) of the Swiss Code which authorises the judge, in case of a lacuna in the law, to act as if he were the legislator.

[19] See above, p. 155.

of existing conventional and customary law by reference to common sense and the canons of good faith.

52. *The Form and Substance of Reliance upon General Principles of Law*

The relative infrequency of express recourse to "general principles of law" as authorised and enjoined by the Statute of the Court has been accentuated by the fact that in those cases in which the Court has actually applied them it has, perhaps not unnaturally, refrained from resorting to them *eo nomine* and by way of express reference to Article 38 (3).[20] Thus in the *Chorzów Factory* case it used the following language: "The Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[21] Elsewhere it refers to "principles generally accepted in regard to litispendence."[22] In another case it based its Opinion on "accepted principles of law" according to which the individual members of an organisation constituted as a corporate body cannot take action of any kind outside the sphere of proceedings within that organisation.[23] In the Order concerning provisional measures in the case of the *Electricity Company of Sofia and Bulgaria* it invoked "the principle universally accepted by international

[20] Individual judges have from time to time, largely by reference to Art. 38 of the Statute, invoked general principles of law recognised by civilised States. See, *e.g.*, Judge Hudson in the *Electricity Company* case in support of the view that a subsequent expression of intention prevails over the earlier (Series A/B, No. 77 (1939), p. 125); the same Judge in the *Diversion of Waters* case in reliance on the proposition that equity is part of international law (Series A/B, No. 70 (1937), p. 76); Judge Anzilotti in the same case to the effect that a party which has failed to execute a treaty cannot rely on it (*inadimplenti non est adimplendum*) (*ibid.*, p. 50); Judge McNair in the *Status of South-West Africa* case in the matter of private law analogies generally (*I.C.J. Reports* 1950, p. 148); Judge Read in the same case with regard to the termination of a legal relationship by all those interested in it (*ibid.*, p. 167). In his Dissenting Opinion in the case concerning the *Interpretation of Judgments Nos. 7 and 8* Judge Anzilotti stated expressly that in basing himself on the rule that "under a generally accepted rule which is derived from the very conception of *res judicata*, decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the Parties' claims (*incidenter tantum*) are not binding in another case," he relied upon principles obtaining in civil procedure (Series A, No. 13 (1927), p. 27). This, he stated, was particularly appropriate seeing that when the Committee of Jurists who drafted the Statute of the Court elaborated the expression "general principles of law as recognised by civilised States" specific reference was made to the principle of "*res judicata*."

[21] Series A, No. 17 (1928) (*Chorzów Factory*. Indemnity; Merits), p. 29.

[22] Series A, No. 6 (1925) (*German Interests in Polish Upper Silesia*), p. 20.

[23] Series B, No. 16 (1928) (*Interpretation of the Greco-Turkish Agreement*), p. 25.

tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given." [24] In the Judgment concerning *Certain German Interests in Polish Upper Silesia* the Court stated that nothing, either in the Statute or the Rules which govern the Court's activities or in the general principles of law, prevents it from considering certain aspects of a preliminary objection before proceeding with the examination of the case on the merits.[25] In the *Corfu Channel* case the Court invoked certain " general and well-recognised principles " including " elementary considerations of humanity, even more exacting in peace than in war " [26] as substantiating the obligation of Albania to give notification of the existence of a minefield in Albanian territorial waters. In the same case, in allowing indirect and circumstantial evidence in favour of a State which had been the victim of a breach of international law in the territory of another State, the Court observed that " this indirect evidence is admitted in all systems of law." [27] In the Advisory Opinion in the *Jaworzina* case the Court invoked " the traditional principle: *ejus est interpretare legem cujus condere* "—a principle which " must be respected by all "—in support of the interpretation given by the Conference of Ambassadors in the matter of the disputed boundary.[28] In the Advisory Opinion on the *Effect of Awards of the United Nations Administrative Tribunal* the Court relied on the " well-established and generally recognised principle of law " according to which " a judgment rendered by a judicial body is *res judicata* and has binding force between the parties to the dispute." [29] In the case concerning the *Interpretation of the Greco-Turkish Agreement* the Court rejected as " contrary to an accepted principle of law " the contention that it is possible to accord to individual members of a corporate body the right of independent outside action in matters affecting the organisation.[30]

The Court relied on a number of occasions on the " principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts," to the effect that " one Party cannot

[24] Series A/B, No. 79 (1939), p. 199.
[25] Series A, No. 6 (1925), p. 19.
[26] *I.C.J. Reports* 1949, p. 22.
[27] *Ibid.*, p. 18.
[28] Series B, No. 8 (1923), p. 37.
[29] *I.C.J. Reports* 1954, p. 53.
[30] Series B, No. 16 (1928), p. 25.

avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." [31] A State is estopped from relying on it own non-fulfilment of an international obligation. This impatience of evasion and the insistence on holding States to the attitude previously adopted by them show themselves in the way in which the Court on a number of occasions was prepared to recognise the operation of the principle of estoppel—which, although it referred to it as a principle known in "Anglo-Saxon law," it considered apparently to be a general principle of law. Thus in the *Serbian Loans* case it examined in detail whether as the result of a clear and unequivocal representation of one party to the dispute, on which the other party was entitled to rely and actually relied, the latter's position had undergone a substantial change.[32] It is possible, having regard to the language used by the Court, that it applied the same principle in the case of *Eastern Greenland* where, after pointing out that "Norway reaffirmed that she recognised the whole of Greenland as Danish," the Court stated that "thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland." [33] In the same case the Court denied that Denmark was estopped (*empêché*) by her conduct from claiming that she "possessed an old-established sovereignty over all Greenland." [34] In the Advisory Opinion on the *Jurisdiction of the European Commission of the Danube* the Court discussed the argument which relied on the alleged inconsistency of the Treaty of Versailles with the provisions of the Definitive Statute of the Danube. The Court rejected that argument. It said: "As all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Conference under Article 349 of the Treaty of Versailles." [35] In the case of the *Société commerciale de Belgique* the Court stated that as the

[31] Series A, No. 9 (1927) (*Chorzów Factory*. Indemnity; Jurisdiction), p. 31; Series B, No. 15 (1928) (*Danzig Railway Officials*), p. 27.
[32] Series A, No. 20 (1929), p. 39.
[33] Series A/B, No. 53 (1933), at p. 69.
[34] At p. 53.
[35] Series B, No. 14 (1927), p. 23.

Greek Government expressly recognised the arbitral awards in question as possessing the force of *res judicata* it could not " without contradicting itself " contest the relevant submission of the Belgian Government.[36]

It does not much matter whether, in considering the parties to be bound by their own conduct, the Court resorts to the terminology of the doctrine of estoppel or not. This applies, for instance, to cases in which the Court accepted jurisdiction as the result of the conduct of the parties[37] or when it interpreted a legal text by reference to the declarations of the Government in question. Thus in the Advisory Opinion on the *International Status of South-West Africa* the Court held that certain declarations made by the Government of the Union of South Africa constituted a recognition on its part of its obligation to submit to continued supervision in accordance with the Mandate and not merely an indication of its future conduct. The Court said: " Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument." [38] It is a question of emphasis whether reliance on the conduct of the parties to a treaty subsequent to its conclusion is treated from the point of view of the doctrine of estoppel preventing a party from asserting an interpretation inconsistent with its conduct or whether it is considered as a legitimate factor in the process of interpretation in the sense that subsequent conduct throws light upon the intentions of the parties at the time of the conclusion of the Treaty. Both represent, in substance, a general principle of law.[39]

[36] Series A/B, No. 78 (1939), p. 176.

[37] See above, p. 103. And see below, pp. 201 *et seq.*

[38] *I.C.J. Reports* 1950, p. 136.

[39] Yet there may be an element of artificiality in both unless care is taken to circumscribe their operation. Clearly, a party cannot improve its position by relying on conduct which is, wittingly or otherwise, in violation of the apparent purpose of the treaty as expressed in its language or, in some cases, as deduced from surrounding circumstances. Neither may it always be accurate to say that when a party seems by its conduct to acknowledge obligations such acknowledgment is conclusive upon it inasmuch as it throws light upon its true intentions at the time of the conclusion of the treaty. For such acknowledgment may be due to a lack of appreciation of its true position under a treaty; or it may be due to an attitude of accommodation going outside the obligations undertaken in the treaty. It would therefore appear that, when considered from the point of view of estoppel, the conduct of one party can be invoked in favour of the other only when, as the result of such conduct, the position of the latter has altered for the worse—a factor which is of the essence of the doctrine of estoppel in its primary connotation. When considered from the point of view of interpretation, conduct by one party may occasionally, but not invariably, throw light upon its intention when concluding

Similarly, in the Advisory Opinion concerning the *Competence of the International Labour Organisation* the Court, in affirming the competence of the latter in that respect, attached importance to the fact that for a period of two years after the signature of the Treaty none of the Contracting Parties raised the question whether agricultural labour fell within the competence of the International Labour Organisation. " All this might suffice to turn the scale in favour of the inclusion of agriculture, if there were any ambiguity." [40] In the Advisory Opinion on the *Competence of the General Assembly regarding Admission to the United Nations* the Court, in interpreting Article 4 of the Charter, attached importance to the fact that the organs of the United Nations to which the Charter entrusts the judgment of the Organisation had consistently interpreted the text in the way in which the Court interpreted it by reference to the language of the Article in question and other considerations.[41] It would thus appear that the Court equated with " subsequent conduct " the uniform practice pursued by the organs of the Organisation established by the authors of the Charter and acquiesced in by them.

While it may be difficult to classify these and similar statements as coming within the orbit of some of the technical aspects of the doctrine of estoppel, they seem to correspond to what is its essential

a treaty. On the other hand, there is considerable probative force in the concurrent conduct of *both* parties. In either case, the practice of the Court has tended to attach importance to conduct as a factor ancillary to interpretation reached by other methods. (For a more emphatic statement of the principle of " subsequent conduct " as an element of interpretation see Fitzmaurice in *B.Y.*, 28 (1951), pp. 9, 20–22.) In the Advisory Opinion in the case concerning the *Interpretation of the Treaty of Lausanne* the Court considered as relevant the facts subsequent to the conclusion of the Treaty " in so far as they are calculated to throw light on the intention of the parties at the time of the conclusion of that Treaty." From that point of view the Court attached importance to the fact that both the British and Turkish representatives at the Council of the League voted in support of a Resolution affirming the definitive and binding character of the decision or recommendation to be made by the Council; this showed that " there was no disagreement between the Parties as regards their obligation " under the crucial Article of the Treaty—a result which " may therefore be regarded as confirming the interpretation which, in the Court's opinion, flows from the actual wording of the Article." (Series B, No. 12 (1925), p. 24.) See also, on the relation between acquiescence and estoppel, MacGibbon in *B.Y.*, 31 (1954), pp. 144–152.

[40] Series B, No. 2 (1922), p. 41.

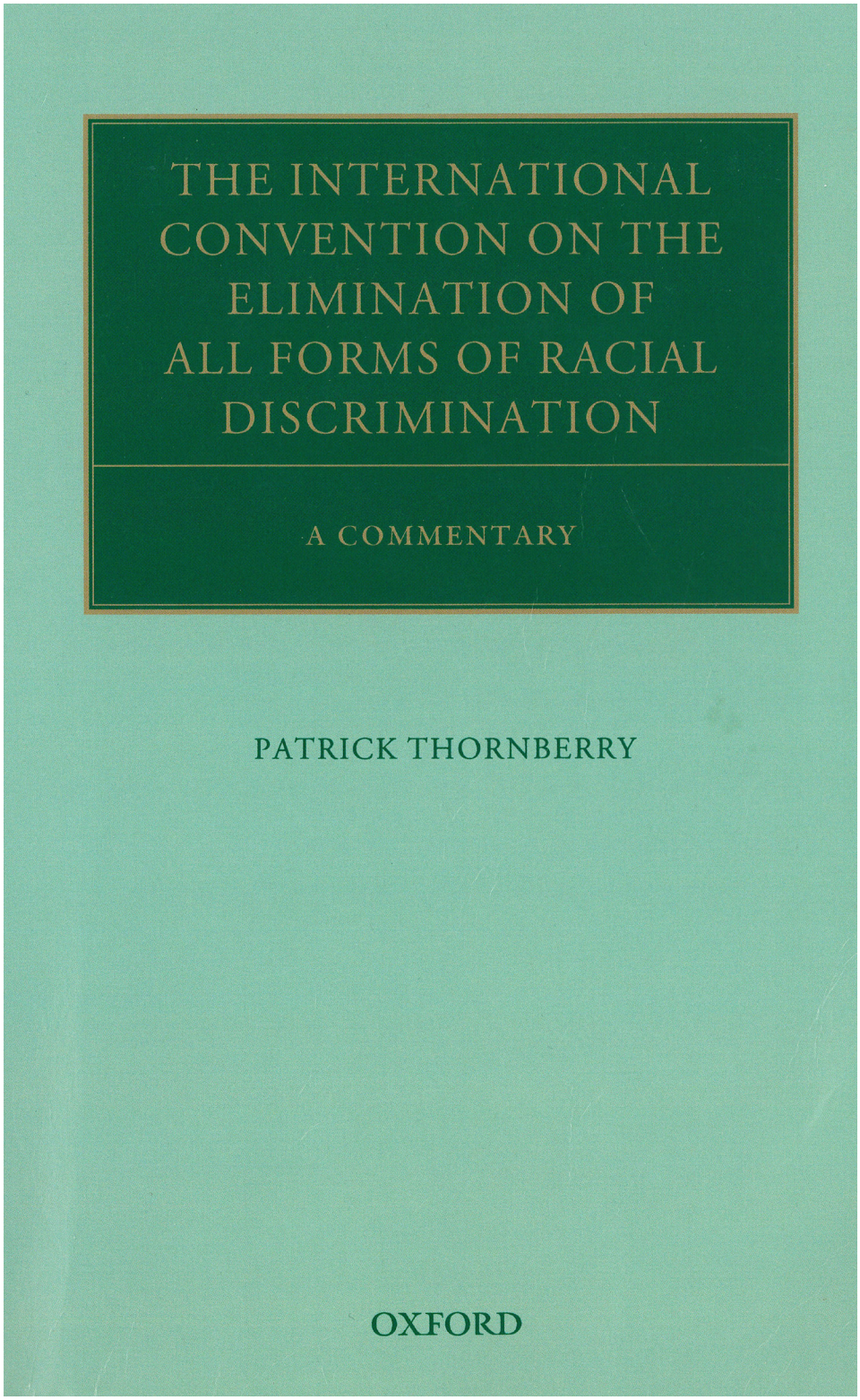
[41] *I.C.J. Reports* 1950, p. 9. See also, for extensive reliance on " subsequent practice," the Separate Opinion of Judge Basdevant in the *Minquiers* case (*I.C.J. Reports* 1953, p. 82). In the case concerning *Rights of the Nationals of the United States in Morocco* the Court, in the circumstances before it, declined to interpret the fact of the continuing exercise of a measure of consular jurisdiction by the United States as showing that the termination, by the Treaty of 1837, of consular jurisdiction in Morocco did not affect the rights of the United States: *I.C.J. Reports* 1952, p. 200.

feature, namely, that a person may—having regard to the obligation to act in good faith and the corresponding right of others to rely on his conduct—be bound by his own act. This may fairly be regarded as a general principle of law which, once more, is merely an affirmation of the moral duty to act in good faith. Like law as a whole, so also " general principles of law " are, in substance, an expression of what has been described as socially realisable morality. In legal history, courts—as distinguished from formal legislation—have been mainly responsible for the infusion of morals into law.[42] While in the international sphere judicial empiricism must—because of the limited and precarious character of international jurisdiction—proceed with greater caution, this aspect of the contribution of the Court provides one of the not least significant features of its activity.

[42] See, as to England and the United States of America, Pound, *The Spirit of the Common Law* (1921), p. 184.

Annex 14

P. Thornberry, *The International Convention on the Elimination of all Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), pp. 484–502


THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION
A COMMENTARY
PATRICK THORNBERRY
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20. The Convention on the Elimination of All Forms of Racial Discrimination

A Summits), Reflection

A. General

On 26 November 2015, the Committee on the. Elimination of Racial Discrimination hosted a commemoration of the fiftieth anniversary of the Convention, one of many such events likely to mark the passage of time.' Sessions were held on lessons learned and good practices, and on current challenges and ways forward. Invited panellists made their presentations, and engaged in summary dialogue with States parties and other stakeholders. Participants signalled their support for the principles of the Convention and the work of the Committee. The event, as the session titles suggest, looked back on the history of the Conv9tion—and at the forty-five years'of the operation of the Committee—attempting also to understand the challenges emanating from the early twenty-first-century environment as the principal guide to future developments. The Convention transmits and further defines the humanitarian message of the UN Charter and the UN Declaration of Human Rights (UDHR) and stands secure in the firmament of UN human rights instruments. The principles of the Convention are widely accepted as representing conduct prohibited by customary international law and even, at least in gross or systematic forms, *jus cogens.*[2]

[1] See 'Celebrating the 50th Anniversary of CERD': <http://www2.ohchr.org/englishh (November/December 2015).

[2] See Opinion of Judge Tanaka, *South-West Africa cases,* ICJ Rep 1966, pp. 3, 293: 'the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law'. The treatment of racial discrimination throughout the canon of human rights in the age of the UN Charter and the UDHR, including Article 55 and 56 of the Charter, Articles 2 and 7 of the UDHR, and the placement of the prohibition in the Covenants on Human Rights is treated as cementing the claim. According to the Restatement of Foreign Relations Law of the United States, a State violates international law when 'as a matter of policy, it practices, encourages, or condones any of the following... (f) systematic racial discrimination': *I Restatement,* para. 702 (1987). For academic support for the claim that racial discrimination—and nor only systematic racial discrimination—is prohibited under customary international law, see W.A. McKean, *Equality and Discrimination under International Law* (Clarendon Press, 1983), Chapters XIV and XV; for Meron, 'respect for and observance of human rights and fundamental freedoms for all, without distinction as to race' is `by now accepted into the corpus of customary international law': T. Meron, The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination', *AJIL* 79 (1985), 283-318, 283; E. Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter', *AJIL 66* (1971), 337-51, 351; P. Thornberry, *International Law and the Rights ofMinorities* (Clarendon Press, 1991), Chapters 35-7 [henceforth *Rights of Minorities].* With regard to *jus* cogens—peremptory norms of general international law under Articles 53 and 64 of the VCLT—the International Law Commission lists the prohibition of racial discrimination and apartheid as among the most frequently cited candidates *for jus cogens* status: *ILC Report of the Study group on the Fragmentation of International Law,* A/CN.4/L.682 (2006), para. 374; Brownlie argues that the 'least controversial examples' *of jus cogens* were provided by the prohibition on genocide, and discrimination based on race, religion, and sex: I. Brownlie, *Principles of Public International Law* (4th edn, Oxford University Press, 1990), p. 513; see also McKean, *Equality and Non-Discrirnination,* p. 283, for a critique, *see* Thornberry, *Rights of Minorities,* pp. 326-8. In the estimation of the Committee on the Elimination of Racial Discrimination, the prohibition of racial discrimination 'is a peremptory norm of international law from which no derogation is permitted': Statement on Racial Discrimination and Measures

Beyond the general statements condemning racial discrimination and supporting the work of the Committee on the Elimination of Racial Discrimination (CERD), the Convention was described by more than one participant as a living instrument,[3] an appreciation endorsed in the practice of the Committee. The biological tenor of 'living instrument' suggests an organism making responsive adaptations to changes in the ecosystem in which it operates and contributing to such changes. As has been intimated at many points in the present study, the environment of the 1960s differs in key respects from the present, while the Convention remains as it was, unamended.[4] The result has been an evolution in the interpretation and application of the text by the Committee through taking positions that have, for the most part, have not elicited reactions from States parties. 'Convergence' between the opinions of the Committee and States parties is not, however, a given, but rather, in light of the limited 'powers' of the Committee, a desideratum achievable only through ongoing, persistent, and patient dialogue[5] The content and form of the State-Committee dialogues have moved through a series of phases, not sharply defined, the results of which are analysed in earlier chapters and summarily recalled here.

B. The Adoption of the Convention

Following the adoption of the Convention, the air was filled with talk of landmarks and resounding victories, of 'hymns of reconciliation',[6] but also with cautious assessments. The stirring remarks of Verret, the representative of Haiti, quoted in Chapter 2, included a less stirring reference to the fledgling Convention as only 'reasonably reassuring'.[7] Delivering a peroration that ranged from Magna Carta through the human rights documents of the French and American revolutions to the Universal Declaration of

to Combat Terrorism, A/57/18, pp. 106-7, para. 4. See also *Barcelona Traction, Light and Power Company (Belgium v Spain)* ICJ Rep 1970, 3, which referred to obligations *erga omnes* in contemporary international law, including protection from slavery and racial discrimination'. For a general treatment, see E. de Wet, Its Cogens and Obligations Erga Omnes', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2015), pp. 541-61; A. Bianchi, 'Human Rights and the Magic of Jus Cogens', *EJIL* 19 (2008), 491-508.

[3] *Hagan v Australia,* CERD/C/62/D/26/2002 (2003), para. 7.3; for further comment, see Chapter 5; also G. Letsas, The ECHR as a Living Instrument: Its Meaning and its Legitimacy': <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836> (2012).

[4] See in particular, Chapters 3, 5, and 10. The Ad Hoc Committee on the Elaboration of Complementary Standards was established in 2006 to advance the implementation of the Durban Declaration and Programme of Action, with a mandate to `elaborate, *as* a matter of priority and necessity, complementary standards in the form of either a convention or additional protocol(s) to the Convention on the Elimination of All Forms of Racial Discrimination': Human Rights Council decision 3/103, 8 December 2006. No additional protocols or other comparable texts have emerged, despite a wealth of discussion on issues regarding race, religion, xenophobia, etc, *see* A/HRC/AC.1/2/2, 26 August 2009, prepared by the Chairperson-Rapporteur of the Ad Hoc Committee, for a summary of submissions received; a succinct account of the work referred to here is included in S. Berry, `Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination—Square Peg in a Round Hole?', *Human Rights Law Review* 11 (2011), 433-50, 436-9.

[5] For challenges from States parties with regard to, eg, the Committee's interpretation of the criterion of `descent', see Chapter 6; themaintenance of reservations to key norms of the Convention—such as Article 4—is a further example of `non-convergence', see Chapter 18; the Committee constantly urges narrowing or withdrawal of such reservations.

[6] Verret, the representative of Haiti: A/PV/1406, paras 79-87.

[7] Verret, *ibid.*

Human Rights, Lamprey, the representative of Ghana, expressed a mixture of disillusion and satisfaction with the emergence of the Convention, stating that many delegates had hoped for better 'but realism dictated that we take an 'infant step', adding that it 'was Santayana who remarked that he who does not know the past is doomed to repeat it. In taking this first step in providing the nations of the world with a multilateral treaty ... capable of enforcement, we have demonstrated our capacity not to forget.'[8] That delegates should express a great variety of sentiments, with some hesitating to confine themselves to merely optimistic conclusions regarding the instrument adopted and its future prospects, is not altogether surprising. The Convention emerged in the midst of a conflicted process of decolonization. Sensitivities about newly won sovereignties were at their sharpest, while peoples were still struggling to gain their freedom. By the mid-1960s, the full effects of General Assembly resolution1514 (XV) had still not become fully apparent,[9] and apartheid appeared solid and embedded. The Convention was treated by some delegates as a protraction of decolonization and anti-apartheid struggles, by others as a protraction of the Cold War.'

The anti-colonial stance of many drafting contributions is notable, becoming more pronounced as the drafting moved from the body of experts in the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the political bodies of the United Nations—the Human Rights Commission and (principally) the Third Committee of the General Assembly, as well as the Plenary of the Assembly. The anti-colonial positions centred on the principle of self-determination, the unity of newly independent States and colonial territories, and the intrinsic connection between racial discrimination, colonialism, and apartheid." The disconnect between the focus on 'externalities' such as the principle of self-determination,[12] and the development of 'introvert' norms on the treatment of ethnic and racial groups, was resolved for many delegates by imagining that racial discrimination occurred only or primarily in (Western) colonial systems, and under apartheid.[13]

Any such 'resolution' of tensions sits uneasily with the language of the Convention. The definition of discrimination in Article 1 and the import of the substantive articles of the

[8] *ibid.,* paras *93* and 94.

[9] The United Nations had 122 members in 1965, compared to its current (2015) membership of 193; for a chronology of the growth of membership and the 'surges' occasioned by the decolonization of Western Empires, the ending of the USSR and Yugoslavia, see the listing at: <http://www.un.org/en/members/growth.shtml>; see also, *inter alia,* General Assembly resolution 2105 (XX) of 20 December, 1965, *The Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,* adopted on the day before the adoetion of the Convention on the Elimination of All Forms of Racial Discrimination.

See Chapters 3, 5, and 11 in particular.

[11] See Chapter 5 on the Convention's Title and Preamble.

[12] The paradigm case of self-determination in the mid-1960s was the achievement of independence from the yoke of the colonial powers, *as* expressed the 'Colonial Declaration', General Assembly 1514 (XV) of 1960: see discussions in Chapters 5 and 13. For a classic treatment, see A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995); also N. Ghanea and A. Xanthaki (eds), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Martinus Nijhoff, 2005); C. Tomuschat (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993). Concepts of 'internal' self-determination were at most *in statu nascendi;* self-determination of indigenous peoples was a very distant prospect: ILO Convention 107 of 1957 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries did not envisage self-determination for such 'populations', nor it may be added, does the later Convention 169 on Indigenous and Tribal Peoples, which does not address the matter, but leaves it to the wider UN framework. For CERD's stance on self-determination, see Chapters 5 and 13 in particular.

[13] Or on account of segregation practices in the US.

Convention present an unrestricted prospectus in political terms. The rhetoric of some of those who participated in drafting the Convention, suggesting political or geographical limitations on its scope, did not match the reality of what they had agreed. The confident assertions of limitations did not lead to the eclipse of alternative drafting inputs that emphasized the potential ubiquity of racial discrimination, while the inclusion of a specific reference to apartheid and the exclusion of an equivalent on anti-Semitism did not prospectively confine the Convention to a unidirectional anti-colonial path. The drafting of an article on apartheid—then a contemporary State policy—was much to be expected, while anti-Semitism is clearly within the boundaries of racial discrimination, of which it remains a paradigmatic example,[14] a 'light sleeper', easily awoken and aroused into action.[15]

C. External Developments

Any purported identification of racial discrimination with specific political systems did not survive serious examination by the Committee, and fractured over the life of the Convention, which has, in the succeeding half-century, been witness to geopolitical changes and game-changing mutations in the framework of human rights. Developments in the overall rights matrix include the emergence of the Covenants on Human Rights, of a sister instrument to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and a raft of UN 'core' treaties, along with key regional human rights developments, notably those in Africa, the Americas, the Arab world—the Americas and Europe having paved the way earlier with the American Declaration on the Rights and Duties of Man, and the European Convention on Human Rights (ECHR). The holding of world conferences on human rights and on racial discrimination and related forms of intolerance has also affected the work of the Committee, with current concluding observations of CERD consistently rehearsing the mantra of the indivisibility and interdependence of human rights, and recommending States parties to give effect to the Durban Declaration and Programme of Action of 2001 and the outcome document of the Durban Review Conference in 2009.[16] The work of

[14] Concluding observations of the Committee continue to evoke the spectre of anti-Semitism: on Belgium, CERD/C/BEL/CO/16-19, para. 10; Moldova, CERD/C/MDA/CO/8-9, para. 10; Monaco, CERD/C/MCO/CO/6, para.10; Poland, CERD/C/POL/CO/19, para 7, and CERD/C/POL/CO/20-21, para. 14. The last observation, which recalled 'the tragic experience of the Jewish community in Poland' and 'its virtual extermination' in the period of the Second World War was the subject of a vigorous rebuttal by Poland, underlining that this 'was neither orchestrated nor executed by the Polish authorities', that 'between 1939 and 1945 Poland was occupied by the foreign powers, namely Nazi Germany and Soviet Union': A/69/18, Annex VII B. See also concluding observations on Slovakia, CERD/C/SYK/C0/6-8, para 12; Yemen, CERD/VC/YEM/CO/17-18, para. 16; see also GR 35, para. 6, includes hate speech of an anti-semitic and Islamophobic nature under the rubric of racist hate speech.

[15] *A Very Light Sleeper;• The Persistence and Dangers ofAnti-Semitism* (Runnymede Trust, 1994), available at: <http://www.runnymedetrustorg/uploads/publications/pdfs/AVeryLightSleeper-1994.PDF>; the phrase 'a light sleeper' appears in C.C. O'Brien, *The Siege: The Saga ofisrael and Anti-Semitism* (Faber and Faber, 1986).

[16] The Committee's endorsement of the Durban process, recalled through many concluding observations and the inclusion of a chapter on Durban and Durban Review 'follow-up' in annual reports to the General Assembly, finds initial expression in GR 28 on the Follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, A/57/18, ch. XI, E; see also GR 33, *Follow-up to the Durban Review Conference,* A/64/18, Annex VIII; *Statement on the Commemoration of the Tenth Anniversary Of the Adoption of the Durban Declaration and Programme of Action,* A/6^{6}/$_{1}$8, ch. X.

the Committee is increasingly integrated with UN and regional human rights mechanisms and procedures. In the' reporting and early warning procedures in particular, members of the Committee are systematically informed of developments in related human rights bodies and mechanisms, including the universal periodic review (UPR), which shed light on the reports of States parties.[17]

The decolonization phase gradually petered out with the collapse of the Western empires. Apartheid took longer to dismantle, and eventually South Africa became a `normal' member of the family of the United Nations and a State party to the Convention—its first repcirt was examined by the Committee in 2006.[18] The ending of the Soviet Union and the dissolution of Yugoslavia were further key 'external' events associated with the inauguration of a phase of 'identity politics', associated with the emergence of group-based instruments or individual provisions therein, validating the rights of minorities and indigenous peoples, including Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 30 of the Convention on the Rights of the Child (CRC), International Labour Organization (ILO) Convention 169 of 1989, the United Nations Declaration on Minorities (UNDM) 1992, the UNDRIP 2007, as well as the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) in 1995, are among instruments the principles of which have helped to shape the application of the Convention.[19] The application of the Convention has also responded to developments in the field of migration through a multiplicity of concluding observations and general recommendations on non-citizens and refugees; the Committee is increasingly aware of human rights issues stemming from migration.

The passage of geopolitical events and the growth of complementary human rights standards continue to influence the application of the Convention. That events and standards impact on the interpretation of human rights conventions is not a truth confined to CERD. Human rights bodies characteristically borrow concepts that did not originate with their constituent instruments and build the insights they derive from the reception activity into their normative frame; bodies also export concepts into the broader stream of human rights. On the other hand, as noted particularly in Chapter 15, ICERD is a relatively porous instrument in its delineation of protected rights that does not, with a few exceptions, define its terms with great precision.[20] The structure of Article 5 best demonstrates the ICERD characteristic of being open-textured in that many of the rights it explicitly seeks to protect are normative sketches derived largely from the UDHR, compounded together without expressions of limits or provision for derogation and in practice receptive to the importation of unlisted rights. The construction of ICERD raises difficult questions regarding the employment of interpretative techniques and the assignment of boundaries to a human rights instrument conceived as a discrete entity; the development of `intersectionalities' has the capacity to stretch the boundaries farther. '

[17] See Chapter 6.

[18] CERD/C/461/Add.3; referred to in Chapter 10.

[19] See in particular, Chapters 6, 13, 14, and 15.

[20] The provisions of Articles 2 and 4 constitute something of an exception, and it may also be argued that the definition of racial discrimination in Article 1 is also relatively precise. The 'porosity' attaches principally to the listing of rights in Article 5, and the general provisions of Artides 6 and 7.

D. Emblematic Developments in the Life of the Convention

I. Approach to Interpretation

As Sinclair noted, there 'are few topics in international law which have given rise to such extensive doctrinal dispute as the topic of treaty interpretation',[21] a caution that applies equally or *a fortiori* to the interpretation of human rights treaties,[22] which 'presents itself to many as an insoluble Gordian knot'.[23] The basic scheme of interpretation of treaties in the Vienna Convention on the Law of Treaties (VCLT) is well known. Articles 31–33 of the VCLT combine analytical literalism, intention of the parties, and teleology in a synthesis that is commonly taken to represent customary international law.[24] The basic rule in Article 31(1) states that a treaty should be interpreted 'in good faith in accordance with the ordinary meaning to be given to their terms of the treaty in their context and in the light of its object and purpose'. 'Context' includes, *inter alia,* the preamble and annexes,[25] and the role of subsequent practice is also accounted for;[26] the *travaux* are deemed to have a supplementary role where other routes to a conclusion deliver only ambiguities or manifestly absurd or unreasonable conclusions.[27] There is also a significant body of opinion that stresses the special qualities of human rights interpretation in light of their protective, vertical, and sovereignty-challenging nature, and their moral dimension.[28] The wide use of abstract terms is another feature of human rights conventions. To these general qualities of human rights may be added the complex growth of 'categories' of rights, the increased gravity and pervasiveness of human rights discourse,[29] its strands integrated into networks of interdependence and indivisibility, capable of reaching down to the capillaries of society.[30] All of which reflections on the character, substance, and context in which human rights treaties operate, suggests that a one-size-fits-all approach to their interpretation is unlikely to assist the process of divining results or explaining them retrospectively.

[21] I. Sindair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1973), p. 69, who also, *ibid.,* quotes Julius Stone for the suggestion that interpretatiogis an exercise in ex post facto rationalization of a conclusion reached on other grounds or as a cover for judicial creativity: 'Fictional Elements in Treaty Interpretation', *Sydney Law Review* 1 (1955), 3[44]–[68].

[22] On interpretation of human rights treaties, see G. Letsas, *A Theo?), of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007); B. Schlagen 'Aspects of Human Rights Interpretation by Treaty Bodies' [henceforth 'Aspects of Human Rights Interpretation'], in H. Keller and G. Ulfitein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012), pp. 261-319; J. Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation', *Harvard Human Rights journal 23* (2010), 1-50.

[23] Schlagen 'Aspects of Human Rights Interpretation', p. 263.

[24] See the brief summary of the principles of interpretation in general international law in M. Shaw, *International Law* (6th edn, Cambridge University Press, 2008), pp. 932-8.

[25] Article 31(2).

[26] Article 31(3) provides: There shall be taken into account, together with the context (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.'

[27] Article 32.

[28] Schlagen 'Aspects of Human Rights Interpretation', pp. 263-6.

[25] See in general S. Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).

[30] In the case of ICERD, generating concern with 'everyday discrimination': T. Makkonen, *Equal in Law, Unequal in Fact: Racial and Ethnic Discrimination and the Response Thereto in Europe* (Martinus Nijhoff Publishers, 2012) Chapter 8.

With regard to ICERD, while interpretation that takes the text at face value represents the first principle of interpretation, it may not carry the interpreter very far. ICERD was drafted swiftly, in part on the basis of political and diplomatic compromises in addition to expert input, and does not consistently exhibit the virtues of coherence and consistency throughout its text.[31] In order to read the convention in contemporary contexts, the whole 'race' vocabulary stands to be interrogated, explained, and put to work, together with broad signifiers such as 'discrimination', 'segregation', 'dignity', 'equality', 'public', and a lexicon of qualifiers such as 'nullify or impair', 'appropriate', 'effective',' adequate', etc. Analysis of a technical nature—etymology, syntax, parsing of terms, juxtaposing articles, paragraphs and sub-paragraphs—is undeniably important and necessary, even if it may not supply immediate answers to all questions: reason has short wings.[32] The Committee's approach was expressed in concise form in response to Israel's contention that its duties under the Convention did not extend to the Occupied Territories: 'The Committee recommends that the State party review its approach and interpret its obligations under the Convention in good faith, in accordance with the ordinary meaning to be given to its terms in their context, and in the light of its object and purpose.'[33] The broadest characterization of the interpretative approach employed by the Committee appears from General Recommendation (GR) 32 on special measures:

> The Convention ... is a living instrument that must be interpreted and applied taking into account the circumstances of contemporary society. This approach makes it imperative to read its text in a context-sensitive manner. The context ... includes, in addition to the full text of the Convention including its title, preamble and operative articles, the range of universal human rights standards ... Context-sensitive interpretation also includes taking into account the particular circumstances of States parties without prejudice to the universal quality of the norms of the Convention. The nature of the Convention and the broad scope of the Convention's provisions imply that, while the conscientious application of Convention principles will produce variations in outcome among States parties, such variations must be fully justified in the light of the principles of the Convention.[34]

In terms of interpretative techniques, and so as not `to elevate formalism over substance',[35] the Committee has arrived at distinctive stances weighted towards the aims and objectives of the Convention, utilizing the principle of effectiveness in the interpretation of treaties and an emphasis on evolving practice, together with markedly less emphasis on the *travaux pre'paratoires,*[36] a positional contrast with the importance given to the *travaux* by the ICJ in *Georgia v Russian Federation* to the interpretation of Article 22.[37]

ICERD stands as a key articulation of the meaning of human rights in the UN Charter, takes its place among the core international human rights conventions, and is a prime mover in the human rights system. Interpretative practice should not be understood as a

[31] See Chapters 5, 6, 13, and 16 in particular.

[32] From Dante, *Paradiso,* Canto II: 'poi dietro ai sensi, vedi the la ragione ha corte Pali'; English translation by H.W. Longfellow, available online at: <https://en.wikisource.org/wiki/The_Divine_Comedy/Paradiso/Canto_II>.

[33] CERD/C/ISR/CO/13, para. 32.

[34] GR 32, para. 5.

[35] L.R, *v Slovakia,* CERD/C/66/D/31/2003 (2005), para. 10.7.

[36] References to the travaux make occasional appearances nonetheless: for example in GR 32 on special measures, para. 24; *P.S.N. v Denmark,* CERD/C/71/D/3$^{6}/_{2}$006 (2007), para. 6.3, discussed in the present work under Article 4.

[37] Discussed in Chapter 19.

matter only of importation of concepts from 'outside', as if the Convention were simply parasitic on systemic developments elsewhere or a straight derivation therefrom. In light of the principle of the indivisibility and interdependence of human rights, practice under the Convention enlarges the understanding of the human rights addressed in its remit.[38]

II. Procedures

The developments in the procedures of the Committee, discussed principally in Chapter 4, have resulted in a remarkable broadening in the scope of its work. As noted, the ebb and flow of its procedures parallels changes in the external context of the Convention. While the decolonization procedure under Article 15 has for some time been treated as largely formulaic, and the inter-State procedure inoperative or dormant, the procedures under Article 9 have developed significantly to become the mainstay of the Convention, including the early warning and urgent action procedure. The last-named procedure also shows the influence of identity politics in that, over decades, the focus has shifted significantly towards the protection of specific groups of peoples in Convention practice, though events on the grand scale affecting whole nations continue to be addressed. Massive ethnic conflicts in Africa and the former Yugoslavia have provoked responses by-the Committee through, *inter alia,* the issuance of statements and recommendations,[39] and the adoption of a declaration on the prevention of genocide.[40] Article 9 procedures enjoy a constantly increasing level of input from civil society, to which the Committee has steadily become more receptive since the caution of the Cold War era.

The optional communications procedure under Article 14, on the other hand, has not made the impact that might have been expected in terms of the number of States parties `opting in', despite constant urging by the Committee. Residues of the reluctance shown in the drafting stages towards a supranational monitoring body with sharp edges may still inhibit the acceptance of the communications procedure. Perhaps especially for States in the vanguard of the decolonization movement, the fact that the procedure may lead to findings of violations of the Convention as opposed to the more dialogic approaches and expressions of concern under Article 9 is another possible factor in controlling its uptake, as is the existence of alternative `judicialized' complaints procedures, both global and regional.[41] It remains to be seen whether the Article 14 procedure will gain greater momentum.[42]

[38] See Chapter 15.

[39] Examples include the 1999 Statement on Africa that subsumed earlier statements on Burundi, the DRC, Rwanda, and Sudan: A/54/18, ch. II; the report was notable for a raft of statements on crises including Decisions 1(54) on Yugoslavia; 3(54) on Rwanda; 4(54) and 3(55) on the DRC; 5(54) on Sudan, and 1(55) on Kosovo. Among other examples see Decision 1(62) on Cote D'Ivoire, A58/18, ch. II; Decision 2(66) on Darfur, A/60/18, ch. II; Decision 1(76) on Nigeria, A165/18, ch. II, and 1(77) on Kyrgyzstan, *ibid.* See also Decision 1(85) on Iraq, A/70/18, ch. II.

[40] A/60/18, ch. XL

[41] See S.M. Garcia and B. Cali (eds), *The Legalization of International Law: Multidisciplinary Perspectives on Human Rights and Human Rights Law* (Routiedge, 2006), R. Hirschl, `The Judicialization of Mega-Politics and the Rise of Political Courts': <hrtp://papers.ssm.com/so13/papers.cfm?abstract_id=1138008>; P. Sands, `Developments in Geopolitics—The End(s) of Judicialization': <http://vvww.jus.uio.no/pluricourts/english/news-and-events/events/2015 fesil-2015-en/video-and-streamingl final-lecture.html>

[42] T. van Boven, `CERD and Article 14: The Unfulfilled Promise', in G. Alfredsson, J. Grimheden, B. Ramcharan, and A. De Zayas, *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Muller* (Martinus Nijhoff Publishers, 2001), pp. 153-66.

III. Discrimination

As regards the concept of racial discrimination, the fundamental definitional statement in Article 1 of the Convention has undergone a distinctive practical evolution. The application of the non-discrimination standard has moved outwards from anti-colonial paradigms, from claims of 'no discrimination here' and approaches to negative equality, towards an understanding of the range of human rights to be protected from discrimination that accepts and recognizes the multi-ethnic and multicultural character of States.[43] The expansion of the modalities of discrimination—from the intention/effect coupling in Article 1 of the Convention, towards direct and indirect discrimination, and structural or institutional discrimination, etc—is a notable development.[44] Allied with the treatment of the Convention as an instrument that expresses 'positive' obligations not confined to `special measures', the expansion of the modalities of anti-discrimination policy places heavy legislative and policy burdens on States parties, obligated to move in an increasingly interventionist direction. Critics have also pointed to the temptations of 'conceptual inflation' whereby differences in, for example, educational or employment attainments or outcomes are characteristically attributed to discrimination[45] (though not necessarily unfairly),[46] a temptation that may converge particularly on indirect and structural discrimination, where the facts of discrimination are disconnected from motivation.

On the other hand, the expanding palette of discrimination encourages the growth of proactive approaches by States parties to tackle racial discrimination with renewed vigour. The Committee's explorations and complex recommendations on the many modalities of discrimination motivate mindful reflection on the negative possibilities flowing from legal and institutional practices that were crafted with limited awareness of their discriminatory potential. As may be gathered from the analyses in Chapter *6,* the Committee has not fully elaborated its understanding of the discrimination terminology currently employed, nor exhaustively refined the scope and limits of discrimination. Concepts of discrimination and equality have nonetheless been stretched and amplified in Committee practice, with the elimination of *de facto* discrimination and *de facto* equality in the enjoyinent of human rights granted pride of place among the elevating goals of the Convention.

Discussions of discrimination characteristically focus on the use of comparators to measure advantage and disadvantage. Equally, analyses of discrimination by the Committee may function in the context of comparators applied or insinuated in practical contexts, notably through the communications procedure under Article 14. However, taking the Convention as a whole—the range of its procedures and the breadth of the substantive norms—the Committee is generally less concerned with comparative treatment of groups than with group oppression as such. When ethnic and other groups within the purview of the Convention groups are targeted, neglected, forcibly segregated, have

[43] See particularly Chapters 13 and 14. For a short commentary on the Committee's stance on multiculturalism, see P. Thomberry, 'Multiculturalism, Minority Rights, and the Committee on the Elimination of Racial Discrimination (CERD)', in D. Thurer and Z. Kgdzia (eds), *Managing Diversity, Protection of Minorities in International Law* (Schukhess, 2009), pp. 79-94.

[44] See Chapter 6.

[45] M. Bell, *Racism and Equality in the European Union* (Oxford University Press, 2008), p. 12, citing R. Miles and M. Brown, *Racism* (2nd edn, Routledge, 2003), p. 58.

[46] Lack of proportional representation of ethnic groups in government, or the police, or employment, may be a sign that something is wrong and needs investigating: S. Fredman, *Discrimination Law* (2nd edn, Oxford University Press, 2011), p. 181.

their languages and cultures suppressed, their economies marginalized, their defenders imprisoned or killed, their lands and waters despoiled, their place in the nation 'erased' to the point of physical displacement or even elimination, the notion of comparison adds little or nothing to the analysis of their plight: equality concerns equality in the enjoyment of rights, not equality in deprivation. Much of Convention practice is about 'discrimination' in this profound, larger sense. This is discrimination as group-directed oppression or violence, which takes cases over and beyond filigreed distinctions between one individual or group and another.[47] While even 'racial discrimination' may be an inadequate term to capture the grosser violations of human rights, the targeting of groups noted in CERD practice is properly brought under the rubric of racial discrimination as a necessary baseline description. Stripping away racial contexts and reading oppressive conduct as a violation of human rights *simpliciter is* to misread the character of the activity and misread the necessary remedies.[48] Racial discrimination in the Convention is directed at individuals on account of their actual or purported membership of ethnic and other groups and is also directed at groups as such; it encompasses both large-scale oppression and smaller scale disadvantage, and all the gradations in between.

N. Grounds of Discrimination

Regarding the grounds of discrimination, it is notable that the concept of 'race', broadly accepted by many among the drafters of the Convention and deeply embedded in the Convention as a whole, is under challenge from (some) States parties, while the Committee's application of the ground of 'descent' is resisted strongly by other States,[49] particularly India and Japan. The ground of 'national origin', on the other hand, heavily contested in the drafting, is more generally accepted as a partner concept to ethnic origin. The listing of national and ethnic origin among the grounds has, despite the ambiguities attaching to 'national', facilitated the shift in focus from race and colour to ethnicity and ethnic minorities—Vandenhole observes that CERD treats discrimination against minorities as a specific theme, 'regardless of which prohibited grounds are involved'.[50] The substantive Convention basis for this ethnicization of discrimination is extensive: 'ethnic origin' is referred to in the preamble and Articles 1, 4, and 5, while Article *7* refers to `ethnical groups', to which it may be recalled that the dominant application of 'national origin' in the Convention relates to ethnicity rather than citizenship. In light of the practical emphasis on self-identification, the focus on ethnicity need not imply a reification of cultures and works against cultural determinism—where persons are assigned to

[47] 'The oppression of violence consists not only in direct victimization, but in the daily knowledge shared by all members of oppressed groups that they are liable to violation, solely on account of their group identity': I.M. Young, *Justice and the Politics of Difference* (Princeton University Press, 1990), Chapter 2 'Five Faces of Oppression', p. 62.

[48] The European Court of Human Rights (ECHR) has sometimes shown reluctance to engage the issue of discrimination through invoking Article 14 of the ECHR, preferring to base its judgments on individual substantive norms: for a short critique, see J. Goldston, 'The Struggle thr Roma Rights: Arguments that have Worked', *Human Rights Quarterly* 32/2 (2010), 311-25, at 321-5. The analysis in the present chapter is not designed to endorse such an approach, but merely to highlight that race-based 'discrimination' functions up to the level of gross violations of human rights, even if other legal terminology also contributes to shaping the legal categorization of discriminatory conduct.

[49] See discussion in Chapter 6.

[50] W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005), p. 95.

membership of an ethnic group irrespective of their consent." As noted earlier,[52] translated into the vocabulary of racism, ICERD is significantly and even predominantly concerned with what may be termed 'cultural' or 'difference' racism: 'racial discrimination' subsumes and transcends discrimination based on `race'.[53]

The serious engagement by the Committee with the grounds of discrimination argues against treating the Convention into a straightforward equality instrument, that is, if the conceptual difference between the two ideal types is taken to mean that, while an anti-discrimination paradigm implies that what is not prohibited is allowed, an equality text mandates equality subject to exceptions. The continuing attention paid to the grounds of discrimination weighs against describing ICERD simply as an equality-based text, even as the grounds lose some of their purchase in cases of indirect, structural, or institutional discrimination, when group-based discrimination is alluded to without specification of any ground, and the scope of the equality norms expressed in the Convention is constantly expanded. On the other hand, any assumption that non-discrimination is associated with formal equality and an equality text with positive action do not work well in the case of ICERD: the demand for positive action runs through the text as a whole and is expressed in the settled practice of the Committee.

V. Intersectionality Challenged

As observed in earlier chapters, the understanding of the grounds of discrimination has been enlarged through the use of the conceptual device of `intersectionality'.[54] The concept is forcefully expressed in relation to gender, less so in regard to religion, while other potential identity 'intersections' have been observed but hardly developed. In the case of religion, apart from questioning the appropriateness of the intersection metaphor in cases where 'religion' and 'ethnicity' are largely coterminous,[55] the 'split' at the United

[51] In this last respect, CERD aligns the Convention with the principle of non-compulsion expressed in Article 3(2) of the UNDM: 'No disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration', commentary by P. Thornberry, The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations, and an Update', in A. Rosas and A. Phillips (eds), *Universal Minority Rights* (Abo Akademi, 1995), pp. 13-76; and the Council of Europe's Framework Convention on the Protection of National Minorities: 'Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice', commentary by H.J. Heintze, in M. Weller (ed.), *The Rights of Minorities in Europe, A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, 2005), pp. 107-37.

[52] Chapter 5.

[53] 'While biological racism in the antipathy, exclusion and unequal treatment of people on the basis of their physical appearance or other imputed physical differences ... cultural racism builds on biological racism a further discourse which evokes cultural differences from and alleged... "civilized" norm to vilify, maginalize or demand cultural assimilation': T. Modood, '"Difference": Cultural Racism and Anti-Racism', in B. Boxill (ed.), *Race and Racism* (Oxford University Press, 2001), pp. 238-56, p. 239. Also E. Balibar, 'Is there a: Neo-Racismr, in E. Balibar and I. Wallerstein, *Race, Nation, Class: Ambiguous Identities* (Verso, 1991), 17-28; J. Blaut, The Theory of Cultural Racism', *Antipode* 23 (1992), 289-99; R. Miles and M. Brown, Racism; A. Giddens and P. Sutton, *Sociology* (7th edn, Polity Press, 2013), Chapter 16, 'Race, Ethnicity and Migration'. Bell comments that one of `the limitations in the culturalist vision of racism is its emphasis on individual prejudice as a cause of racism ... a behavioural aberration which should fade away with the passage of time': Bell, *Racism and Equality in the European Union,* pp. 10-11. This is not the meaning intended here, bearing in mind the attention paid by CERD to 'structural' and other manifestations of racism and racial discrimination: see Chapter 6; see also Chapter 5.

[54] See particularly Chapters 6 and 13.

[55] *See* Chapter 13.

Nations between work on religious discrimination and work on race remains influential.[56] While there is evidence of more liberal CERD practice in course of development through the recognition of hybrid terms such as 'ethno-religious' in GR 35 and elsewhere, practice on the race/religion intersection reflects caution with regard to the boundaries of the Convention and the mandate of the Committee. With regard to intersectionality, a fundamental challenge to the *modus operandi* of the Committee with respect to intersectionality emerges from comment by the Holy See. In unequivocal terms, the Holy See reported its views on treaty interpretation to the Committee in an `originalise spirit, concentrating on understandings of the Convention at the time of drafting, signalling that

> Committee proposals that add new terminology or create new obligations depart from the original spirit of the CERD and would constitute an unforeseen and fundamental change of circumstances, which in turn, would have the effect of 'radically' transforming the extent of the Holy See's obligations still to be performed under the treaty within the meaning of Article 62 (1) (b), VCLT the Holy See would, as a result, be permitted to invoke such a fundamental change of circumstances as a ground for 'terminating or withdrawing' from the treaty or ... 'suspending the operation of the same'.[57]

At first glance, the interpretation of the Convention by the Holy See appears to depart fundamentally from the evolutionary approach taken by the Cominittee, devoted to malting the Convention an effective presence in light of the ambitious goals that characterize the title and preamble. Where the State party sees 'radical change of circumstances', the Committee sees necessary adaptation in response to situations that did not present themselves to the drafters.[58] The import of the statement by the Holy See is,

[56] See Chapter 3 for the divergence in UN work, see, among other commentaries, N. Lerner, 'Freedom of Expression and Advocacy of Group Hatred: Incitement to Hate Crimes and Religious Hatred', *Religion and Human Rights* 5 (2010), 137-45.

[57] CERD/C/VAT/16-23, para. 3. Article 62(1) of the VCLT provides that 'a fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which *was* not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential *basis* of the consent of the parties to be bound by the treaty . . . and (b) the effect of the change is radically to transform the extent of obligations still to be performed'. The ICJ stated that for change of circumstances to be invoked, it should 'have resulted in a radical transformation of the extent of the obligations to be petformed' [and] 'must have increased the burden of the obligations to be executed to the extent of rendering the performance essentially different from that originally undertaken': *Fisheries Jurisdiction* (United Kingdom v Iceland), ICJ Rep 4 [1973], para. 43. Article 65 VCLT sets out procedural requirements for the application of the doctrine. Commenting on Article 65, Fitzmaurice observes that it signals a shift from 'subjective auto-interpretation to the possibility of a more objective legal ruling': M. Fitzmaurice, 'Exceptional Circumstances and Treaty Commitments', in D. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press, 2012), pp. 605-33, p. 623.

[58] In the sphere of human rights, the most outstanding example of the use of 'radical change of circumstances' was applied to the post-First World War engagements on the treatment of minorities by the *Study of the Legal Validity of the Undertakings Concerning Minorities,* UN Doc E/CN.$^{4}/_{367}$, undertaken by the UN Secretariat in 1950, which concluded that between 1939 and 1947 circumstances as a whole changed to such an extent that, generally speaking, the system should be considered as having ceased to exist; the view was based not on ordinary causes of extinction such as implicit abrogation or population transfers and movements, but in effect on the *clausula rebus sic stantibus:* fundamental change of circumstances. For comment on the Study, see P. Thomberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991) Chapters 4 and 9; N. Feinberg, The Legal Validity of the Undertakings regarding Minorities and the *Clausula Rebus Sic Stantibus, Studies in Law, Scripta Hierosolymitana* 5 (1958), 95-131; S. Rosenne, *'Rebus Sic Stantibus* and the Minority Treaties: An Afterword', *Israel Yearbook of Human Rights* 12 (1982), 330-3. Even in the face of the momentous changes indicated in the study, the use of the concept of *Rebus Sic Stantibus* by the UN Secretariat *was* strongly criticized by the authors cited above. In the present case, the position of the Holy See is difficult to

however, perhaps narrower in that it relates primarily to the insertion of gender intersectionality into the discourse of the Committee, rather than `intersectionality' in general;[59] this appears to be the only 'innovation' specifically at issue, a position that somewhat undercuts the generality of the objections. The Holy See has not attached a reservation to ICERD.[60]

The contemporary stress on intersectionality also prompts questions on the limits of the individual human rights instruments in addressing the complexities of personal and group identity. The application of the grounds of discrimination tends, on one perspective, towards a fragmentation of identity into 'essentialized' categories. International human rights law, however, places considerable stress on self-definition to mitigate an assumed 'essentialization' and avoid cultural determinism. While access to categories of rights may assist in the 'construction' of specific identifications, the categories have also served to empower oppressed and neglected groups by focusing attention on their particular grievances through culture-sensitive perspectives. In the case of CERD and other human rights bodies, the characteristics alluded to in the list of grounds have been transmuted in practice into a spectrum of identifiable groups, uncovering the human faces of abstract 'victims';[61] thus the 'universal' becomes particularized.

VI. The Non-Citizen 'Gap'

Integrated into the general understanding of discrimination in the Convention, the ungenerous Article 1(2) on citizens and non-citizens has, on the basis of assertive interpretation by the Committee, been largely deprived of a determining role in limiting the enjoyment of equality and freedom from discrimination to the citizenry of States parties. Constitutions and other legal provisions that sharply distinguish the human rights of citizens from those of non-citizens in any but the narrowest political spheres are treated as matters of concern by the Committee, and rectification of the legal situation under scrutiny will inevitably be recommended.[62] While the need expressed during the drafting of the Convention by the representatives of new sovereignties to build up loyal, citizen-based bureaucratic structures may have abated over time,[63] citizen/non-citizen distinctions in public service continue to resonate in State practice, notably along with distinctions in the fields of citizenship and employment—two areas which have significant gender dimensions. The citizen/non-citizen gap in human rights protection has been appreciably narrowed but

reconcile with the fact that CERD issues 'proposals of a non-binding nature' under Article 9(2), 'which could not create new obligations': remarks by CERD member Vazquez, CERD/C/SFL2394, para. 10; also comments by members Bossuyt, Kemal, and Diaconu, *ibid.,* paras 34, 37, and 40; the points are adverted to in the concluding observations of the Committee, CERD/C/VAT/CO/16-23, paras 6 and 7.

[59] CERD/C/VAT/16-23, para. 5(a). In discussions with the Committee, the Holy See explained that it 'was less concerned about the idea of intersectionality per se than it was about the possibility that an admission of that concept could pave the way for . .. other concepts that it would find unacceptable': CERD/C/SR/2395, para, 5. With regard to intersectionality between race and religion, the view of the Holy See was that this 'should probably be addressed on a case-by-case basis so that religion would become a force for ... equality': CERD/C/SR.2395, para. 40.

[60] The Holy See 'was concerned that enlarging the scope of the Convention could interfere with... work under other international human rights instruments or entail the addition of substantive obligations that had not been accepted by States parties': CERD/C/SR.2395, para. 5. The delegation placed considerable emphasis on one 'intersection': that between racism and poverty.

[61] See Chapter 15.

[62] See particularly Chapters 7 and 13.

[63] See Chapters 3, 6, 7, and 13.

not closed. If current migration crises are taken as a guide to likely future developments, Committee concern with migration and non-citizens appears destined to increase in the foreseeable future.[64]

VII. On Legal Infrastructures

The Committee's insistence on the potential ubiquity of racial discrimination has meant that all reporting States are, without exception, expected to have the necessary legislation and policy structures in place. The Committee has recalled the need for legislation against racial discrimination to be as specific and comprehensive as possible throughout the branches of law, criminal, civil, and administrative law, with the burden of proof in civil cases adjusted to advance the possibility of taking claims to a successful conclusion.[65] As noted principally in connection with Articles 2 and *6,* the Committee sets forth requirements on the necessary infrastructures to support the application of the primary rules, including rules on 'reparation or satisfaction', in the various legislative branches.[66]

Further, the absence of cases on racial discrimination, is not treated as evidence of an enviable situation in the State party concerned but rather as evidence of a defective implementation of the necessary rules, whether because of lack of confidence in the judiciary, or inadequate publicity accorded to the cases, or limited public awareness of discrimination and how to counter it. Adjustments to legislation are persistently called for by the Committee, and in this respect, it would appear that intentional or direct discriminatory legislation on the part of the State is much rarer than at the time of drafting.[67] The focus of discriminatory activity across the span of States is therefore as likely to concern responsibility for the acts of individuals as that for the actions of organs of State. In the *case* of applications of Article 2, the concentration on private bodies is a notable feature of practice, including private bodies acting extraterritorially.[68] The most dramatic change of focus from public to private (the 'privatization' of racial discrimination) relates to Article 3, for which, as GR 19 makes clear, State-sponsored segregation is treated as less of a contemporary challenge than segregation resulting from the acts of private bodies.[69] At the same time, allegations of 'apartheid'—the most egregious form of State-directed segregation—are treated with reserve by the Comtnittee.[70]

VIII. On Criminal Law

In the legislative and judicial structures promoted by the Committee, it occasionally appears as if the treatment of racial discrimination as a matter of criminal law represented a *summum bonum* in the normative legal spectrum. The preference for the use of criminal law as the ideal correctional instrument in the field of racial discrimination reached a kind

[64] Committee on the Elimination of Racial Discrimination, *Statement on Current Migrant Crises,* A/70/18, Chapter II.

[6] See Chapters 8 and 16.

[66] Chapter 16.

[67] A change doubtless stimulated by the continual pressing of States parties by the Committee on the basic question of anti-discrimination legislation, as well as the efforts of the raft of human rights bodies addressing `race' as a ground of discrimination within their constituent instruments.

[68] Chapters 8 and 10.

[69] Discussed in Chapter 10; see also Chapter 5.

[70] See Chapter 10.

of apogee in the Committee's treatment of Article 4, as represented in GR 15.[71] The declaration of offences 'punishable by law' required by the article has been interpreted almost exclusively as signifying the declaration (creation) of criminal offences, to be effectively applied in practice. Addressing hate speech though the medium of criminal law in relation to serious matters of incitement or violence is of course entirely appropriate; however, to elevate the model of Article 4 to the status of paragon in addressing the gamut of racial discrimination is to exaggerate. It is characteristic of the fresh thinking in GR 35 that, while the criminal mode is firmly anchored in the normative arsenal of the Convention, and is elaborated with appropriate precision, counter-speech and education are also allotted prominent roles in the methodological repertoire for combating racist hate speech, and the use of criminal law advocated for only the more serious cases. As with hate speech, so also with the application of the Convention as a whole, witnessing a gradual movement towards recognizing a stronger role for education on the Convention and human rights, and on the need for inter-ethnic understanding, tolerance, and friendship, in anti-discrimination strategies. As indicated in Chapter *17,* the full potential of Article 7 beyond its role in combating hate speech has still to be explored.

IX. Culture and Collective Rights

As noted particularly in Chapters 14 and 15, the understanding of rights in Committee practice has become increasingly embedded in cultural understandings, a feature of human rights law that leads one author to write of the `culturalization' of human rights, signifying, *inter alia,* that the practice is not confined to CERD but reaches out to the full spectrum of human rights bodies, as well as other bodies, including those concerned with the application of humanitarian, environmental, and trade law.[72]

Sensitivity in CERD practice to culture extends to multiple aspects of its work, commencing with the definition of racial discrimination, understood as open to cultural contexts and the notion of human dignity; in cultural understandings of special measures; in the concepts of segregation and separation; in justice process and reparations; in cultural and other contexts in the matter of racist hate speech; in the interpretation and application of civil and political, economic, social, and cultural rights; in the field of self-determination; and in the basic notions of human rights education and disseminating the message of the Convention under the inspiration of Article 7. The cultural vision in the application of rights represents a distance travelled from the period of drafting the Convention and the distance understood by many delegates between the protection of minorities and the prevention of discrimination.[73] The Committee has been receptive to currents deriving from parallel instruments devised for the protection of identifiable groups as well as a notable contributor to the `culturalise stream of discourse. Its cultural applications of the Convention include but are not confined to concerns with indigenous peoples, but extend to its treatment of the rights of ethnic and other minorities, Afro-descendant peoples, and non-citizens, in principle to any group that potentially comes under the protective embrace of the Convention.

[71] Discussed in Chapter 11.

[72] F. Lenzerini, *The Culturalization of Human Rights Law* (Oxford University Press, 2008); see also Chayter 5.

[73] Se in particular Chapters 2, 3, 5, and 6.

Although the cultural interpretation of Convention principles is not exclusively concerned with questions of collective and individual rights, issues regarding the relationship between these evocations of human rights have surfaced in practice. Parallel with its exploration of cultural nuances in the rights and obligations under the Convention, CERD has made its own contribution to the widening of the vision of the Convention concerning collective rights.[74] The term 'collective rights' is ambiguous in that it conceals a distinction between rights invested in individuals to be exercised collectively, such as language, religion, and 'culture', and rights invested in the community as such. In addition to calls through a series of concluding observations to respect and protect the collective rights of indigenous peoples,[75] GR 23 is clear in its affirmation that the provisions of the Convention apply to the peoples,[76] including their rights to 'control, use, etc, their communal lands, territories, and resources.[77] The language of the recommendation differentiates individual rights—rights of members—from the collective rights of indigenous peoples; both are to be respected. Elsewhere the Committee has referred to `communal ownership' or the rights of a named people, including `Saami rights'.[78] In general, it may be said that in addition to the question of inter-individual equality, a characteristic concern of the Convention is with what MacNaughton terms 'bloc' equality'[79] or bloc discrimination, in the sense that the invocation of discrimination and equality is not simply inter-individual but is strongly linked to particular groups.

Rights conflicts in the context of ICERD and elsewhere are not necessarily confined to tensions between individual and collective rights—recall the strained relationship in the Convention between proscribed 'hate speech' (Article 4) and the validation of freedom of opinion and expression (Article 5).[8°] However, as with the claims of 'culture' more generally, the endorsement of collective rights, particularly in the 'harder' sense of the group as the primary holder of rights, has clear potential to raise challenges regarding the protection of individual rights. In the case of Fiji, the State party was invited to explain how the enjoyment of indigenous rights affected the enjoyment of rights by others in the State, bearing in mind the dominant position enjoyed by the indigenous majority. Referring to ILO Convention 169, on which the questions of some CERD Committee members were based, the representative of Fiji expressed awareness that the term 'peoples' under that Convention was not to be interpreted in a manner that would undermine the rights of individuals.[81] Endorsement of the UNDRIP raises its own questions on the

[74] From a vast literature, see P. Jones, 'Human Rights, Group Rights, and Peoples' Rights', *HRQ* 21 (1999), 80-107; M. JovartoviC, *Collective Rights: A Legal Theory* (Cambridge University Press, 2012), and 'Recognizing Minority Identities Through Collective Rights', *HRQ* 27 (2005), 625-51; W. Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Clarendon Press, 1995), Chapter 3; W. Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford University Press, 2005); C. Tavani, *Collective Rights and the Cultural Identity of the Roma: A Case Study of Italy* (Martinus Nijhoff Publishers, 2012, esp. Chapter 4 'Individual v Collective Rights'; P. Thomberry, *Indigenous Peoples and Human Rights.* (Manchester University Press, 2002).

[75] See particularly Chapters 13 and 14,

[7°] GR 23, paras 1 and 2.

[77] *Ibid.,* para. 5.

[78] P. Thornberry, 'Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice', in S. Allen and A. Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011), pp. 61-91, p. 88 [henceforth *Indigenous Peoples in CERD Practice].*

[79] G. MacNaughton, 'Untangling Equality and Non-Discrimination to Promote the Right to Health Care for All', *Health and Human Rights* 11.2. (2009), 47-63.

[80] See Chapters 11 and 13.

[81] CERD/C/SR/1850, para. 3.

individual/collective rights relationship, including that stemming from Article 35, according to which 'indigenous peoples have the right to determine the responsibilities of individuals to their communities'; this and other puzzles supplement larger questions regarding the relationship between self-determination, collective rights, and individual rights.[82]

X. Cultural Practices

Addo writes regarding CERD that an apparent bias in the Committee towards upholding rather than challenging minority cultural practices may lead to cases where 'opportunities to address harms within minority culture can easily be overlooked or missed'.[83] On the other hand, over-concentration on intra-group, 'internal' discrimination has a downside in that highlighting negative practices in minority communities may go in tandem with neglecting similar practices in the population at large, as well as potentially contributing to the denigration of groups under the protection of the Convention. Challenges to cultural practices are part of the standard Committee repertoire and characteristically attempt to tread a line between rejection of the harm while avoiding the stigmatization of whole communities." In this respect, the dialogic, educational approach of the Committee under Article 9 may serve purposes of accommodation or reconciliation rather better than the 'quasi-judicial' approach under Article 14. In one example, practices 'within some ethnic groups, particularly regarding inheritance and early marriage', elicited a recommendation to take account in public policies 'of the need to address discriminatory customs, primarily through education and other culturally sensitive strategies'.[85]

In normative terms, the oft-cited participation and community self-determination rights should also play a role in attempting to resolve contradictions of principle. In order to meet the challenge of potential tensions stemming from its simultaneous endorsements of individual and collective rights, CERD may need to sharpen its conceptual tools through the elaboration of a general recommendation or by other means.[86] In particular, the raft of CERD practice on the rights of women, in tandem with the practice of sister bodies such as CEDAW, can materially assist in developing such a recommendation, though the issues involved are wider and go to the heart of the human rights enterprise.[87]

[82] Discussion by Thornberry, *Indigenous Peoples in CERD Practice,* pp. 86-8.

[83] M. Addo, 'Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights', *Human Rights Quarterly* 32 (2010), 601-64; at 654,658.

[84] Conceptual tools suggested to distinguishing the limits of cultural interventions include that between external and internal protections of ethnic groups: that groups require external protections from oppression from the outside world but individuals in such groups require internal protections, W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995); that human rights interventions should protect the 'core values' of communities and not attempt to export 'complete ways of life or conceptions of the good': A Hurrell, 'Power, Principles and Prudence: Protecting Human Rights in a Deeply Divided World', in T. Dunne and N.J. Wheeler (eds), *Human Rights in Global Politics* (Cambridge University Press, 1999), pp. 277-302, pp. 281-2; that rights have been presented to many communities 'according to a cultural scheme extraneous to that of the communities concerned, which were therefore unable to perceive them properly and translate them into practice', resulting in 'the artificial imposition of rules which could not find concrete application within many human societies' hence the need for rights to be 'culturally adjustable in light of the different needs of diverse human communities': Lenzerini, *The Culturalization of Human Rights Law,* pp. 245-6; *see* also P. Thornberry, *Indigenous Peoples* and Human Rights, Chapter 17.

[85] Concluding observations on the Lao People's Democratic Republic, CERD/C/LAO/CO/16-18, para. 15.

[86] Thornberry, *Indigenous Peoples in CERD Practice,* p. 85.

[87] See discussion in Chapter 14 of the Committee's approach to customs particularly as they affect women.

The text of the Convention is compatible with the endorsement of both particularism and universalism, of collective and individual visions of rights. Oscillation between endorsement of individual rights and endorsement of collective rights is not unique to CERD. A universal vision of rights is necessarily plural, open to a variety of cultural contributions. In this sense the principle of non-discrimination may serve as an anti-fragmentation device that treats communities within the States parties as equal in dignity, without hierarchy or condescension. The task of the Committee and the States parties should be to seek a productive synthesis between the two polarities, guided by the text and teleology of the Convention.

E. Coda

The adoption of the Convention in 1965 represented the outcome of a series of interconnected developments since the UN Charter that gave explicit legal grounding to norms of a humanitarian character and to expediting the disappearance of colonialism along with its integral racial manifestations. The text, carrying to fruition the ethic of the Declaration on Racial Discrimination by means of a legally binding instrument, provided a fresh normative and institutional synthesis that combined universal human rights with the rejection of theories of racial superiority, but not entirely of the infrastructure of racial differentiation—the work of UNESCO in 'deconstructing' race was subjected to divergent interpretations by delegates.[88] The Declaration and the Convention stood, and continue to stand, as Janus-faced statements looking backwards at the hopeful demise of an era of racial discrimination, and projecting forward to concerted international action against it.[89] Through the Convention, the United Nations reinvigorated its human rights mission. ICERD was the first of the UN 'core' human rights treaties, and inaugurated an international monitoring body—the Committee on the Elimination of Racial Discrimination—designed to move the instrument from complacent 'virtue signalling' towards its practical application in the service of humanity.[9°]

The present and previous chapters have endeavoured to appraise the principal conceptual and practical developments in the life of the Convention over the half-century. The primary focus has been on the work of the Committee on, the Elimination of Racial Discrimination, the body charged by the international community with the task of monitoring its progress, though critical observations by States parties are also accounted for, including resistances to Committee stances, and obdurate refusals to 'converge' with its views. The present work is not as such a history of the Convention, and while transitions in the understanding and application of the Convention are accounted for, heavy emphasis is placed on more recent developments as the principal guide to the form and content of future State—Committee dialogues. The distinctive rights culture developed by the Committee over the course of time has inspired many, and made an enormous contribution to the solidification of principle that brands racial discrimination as unacceptable State practice. Racial discrimination by design is now regarded as

[88] See discussion in Chapter 3.

[89] Janus-faced, not as hypocritical or deceitful, but in the image of a god (Janus) that looks both ways, to the future and the past, to beginning, passages, and endings.

[9°] Virtue signalling refers to activities intended to indicate a person's virtuousness to an audience: chap://www.collinsdictionary.com/submission/16361/virtue%20signalling>, a concept that can be extended appropriately to States and governments.

indefensible, while discrimination through accident or negligence is treated as culpable. A finding of racial discrimination merits the full weight of moral opprobrium from the international community. The work of the Committee, in conjunction with other human rights organizations, and with States and civil society, has profiled the relevant legal and moral baselines with an impressive clarity of principle, even if the finer details are open to contestation and reconstruction.

The chapters have also outlined a broad range of conceptual and practical challenges in the field of racial discrimination on the basis of an article by article analysis of the principal strands of ICERD. The tasks mandated by the Convention to the States parties are immense. Despite the switch in emphasis in current crises away from ethnicity to the clashes of civilizations and religious intolerance and worse,[91] the archive of practice distilled in the chapters of the present work should sufficiently demonstrate the continuing force of ethnic identification, inter-ethnic rivalry, competition, and hostility in human affairs, and oppression on the basis of ethnic affiliation. In this sense the Convention appears to pit Gramscian optimism of the will against pessimism of the intellect,[92] as to which Banton's characterization of the promise of the Convention to eliminate racial discrimination as a noble lie may be recalled.[93] However, history also demonstrates possibilities of living together on the basis of tolerance and friendship, of mutuality of respect and inter-ethnic harmony. Embedding the prohibition of racial discrimination in State constitutions, laws, plans, and policies makes a further contribution to peaceful possibilities, even if law and planning, etc, are first steps, if more than the 'infant step' glimpsed by Lamptey on the adoption of ICERD.

The World is Everything that is the Case

If racial discrimination is unlikely to be eliminated for all, it can be eliminated for some; its prohibition can make a difference in reaching down to the capillaries of human existence, recognizing and restoring dignity, helping to repair damaged human beings.[94] Prohibition of reprehensible forms of conduct is important but not enough, nor is anti-discrimination a complete policy, however far-reaching. Besides the effective implementation of normative promises accounted for in the present work, anti-discrimination is only one strategy, and one in largely negative mode—a *via negativa—that* constructs a binary of victim and perpetrator, and even in some instances an unhelpful culture of blame. In an ideal theatre of human rights, the rights would be sustained for all and enjoyed on an equal basis without the need for victims and a spectrum of oppressors. Anti-discrimination in this sense is a beginning, a methodological step towards an egalitarian future of multicultural self-assurance that seeks to remove impediments to the full enjoyment of rights. While the anti-discrimination ethic is in itself less than salvation, it nonetheless addresses the truth of what is the case, and traces an upward path towards a better, more dignified ordering of human affairs.

[91] S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schuster, 1996); P. Thornberry, 'Minority and Indigenous Rights at "the End of History"', *Ethnicities* 2 (2002), 515-37.

[92] A. Gramsci, *Letter from Prison,* 19 December 1929: see W.J. Morgan, The Pedagogical Politics of Antonio Gramsci—"Pessimism of the Intellect, Optimism of the Will"', *International Journal of Lifelong Education* 6 (2006), 295-308.

[93] M. Banton, *International Action against Racial Discrimination* (Clarendon Press, 1996), pp. 50 and 305.

[94] Derek Mahon, Tractatus', *New Collected Poems* (The Gallery Press, 2012), after Wittgenstein.

Annex 15

P. Palchetti, "Responsibility for breach of provisional measures of the ICJ: between protection of the rights of the parties and respect for the judicial function", *Rivista di Diritto Internazionale* 100 (2017)

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RESPONSIBILITY FOR BREACH OF PROVISIONAL MEASURES OF THE ICJ: BETWEEN PROTECTION OF THE RIGHTS OF THE PARTIES AND RESPECT FOR THE JUDICIAL FUNCTION

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RESPONSIBILITY FOR BREACH OF PROVISIONAL MEASURES OF THE ICJ: BETWEEN PROTECTION OF THE RIGHTS OF THE PARTIES AND RESPECT FOR THE JUDICIAL FUNCTION

SUMMARY: 1. Introduction. — 2. The Court's power to determine non-compliance on its own motion. — 3. The Court's power to determine non-compliance in the absence of jurisdiction on the merits. — 4. The responsibility of a non-complying party towards the other party. — 5. The Court's power to impose sanctions against a non-complying party. — 6. Concluding remarks.

1. When a State party to a dispute before the International Court of Justice breaches provisional measures, its conduct amounts to an internationally wrongful act. The consequences that arise by virtue of this wrongful conduct involve in the first place the relations between the State party responsible for the breach and the other State party — or States party — to the case. As provisional measures are taken "to preserve the respective rights of either party" (1), a breach of such measures by one party may be regarded as affecting the rights of the other party (2). The injured party would therefore be entitled to invoke responsibility for such conduct.

However, it seems reductive to regard lack of compliance with provisional measures as a matter exclusively affecting the rights and interests of the contending parties. The Court itself has an interest in ensuring respect for provisional measures. In order to justify its conclusion that provisional measures have binding force, the Court noted that "[t]he context in which Article 41 has to be seen within the Statute is to prevent the Court *from being hampered in the exercise of its functions* because the respective rights of the parties to a dispute before

(1) According to Article 41 of the Statute, "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".

(2) As suggested by GUGGENHEIM, *Les mesures conservatoires dans la procédure arbitrale et judiciaire*, *Recueil des cours*, vol. 40 (1932-II), p. 115, a party has a "droit d'exiger l'exécution des mesures conservatoires".

the Court are not preserved" (3). Failure to comply with obligations laid down in provisional measures not only offends against the authority of the Court; it undermines the effective administration of justice in a particular case. To borrow from the Court's language in *United States Diplomatic and Consular Staff in Tehran*, such conduct "is of a kind calculated to undermine respect for the judicial process in international relations" (4).

It might be argued that in the judicial process before the Court the "institutional dimension" can hardly be disentangled from the "interstate dimension" and that the fact that the injured party is offered the possibility of invoking the responsibility of the other party is in itself an adequate and sufficient means for vindicating the Court's institutional interest in ensuring respect for the judicial process (5). No doubt, there is merit in this view. The application of the general regime of responsibility to the relations between the parties may be regarded as both a sanction and a deterrent. In this respect, by contributing to the effectiveness of the Court's power to indicate provisional measures, it performs a wider function than that of simply restoring the legal relations between the parties. Yet, it may be asked whether, in addition to the interstate dynamics based on the general regime of responsibility, there is also scope for a more proactive role of the Court itself in responding to breaches of provisional measures. Two issues appear to be particularly significant in this respect. The first concerns the Court's power to determine lack of compliance with provisional measures irrespective of the claims of the parties. While the general rules on State responsibility leave to the injured party the right to invoke responsibility, the question is whether the Court may determine by its own initiative whether provisional measures have been complied with, possibly also in the absence of jurisdiction on the merits of the dispute. The other issue relates to the consequences of a breach of provisional measures. In particular, one may ask whether the legal consequences

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(3) *I.C.J. Reports*, 2001, p. 503, para. 102 (italics added).

(4) *I.C.J. Reports*, 1980, p. 43, para. 93. Interestingly, in censuring the United States' conduct, the Court also noted that such conduct amounted to a breach of the provisional measures indicated in the order of 15 December 1979.

(5) On this dual dimension inherent in the regime of responsibility for breach of provisional measures, see MENDELSON, *State Responsibility for Breach of Interim Protection Orders of the International Court of Justice*, in: *Issues of State Responsibility before International Judicial Institutions* (Fitzmaurice and Sarooshi, eds), Oxford, 2004, p. 42, and MAROTTI, *"Plausibilità" dei diritti e autonomia del regime di responsabilità nella recente giurisprudenza della Corte internazionale di giustizia in tema di misure cautelari*, *Rivista*, vol. 97 (2014), pp. 777-778.

provided under the general rules on State responsibility exhaust the range of legal consequences available against the responsible party.

It is on these two issues — the Court's power to determine non-compliance with provisional measures and the legal consequences stemming from non-compliance — that the next paragraphs will focus. By taking stock of the Court's case law after the *LaGrand* judgment, the purpose is, more comprehensively, to identify the main features of the legal regime of responsibility for breaches of provisional measures.

2. The question of non-compliance with provisional measures is generally brought to the Court's attention at the request of one of the parties. In particular, in all cases since the *LaGrand* judgment in which the Court has addressed non-compliance, this issue was raised by a party through a specific claim included in its submissions. This practice should not be taken as implying that an independent judicial action would not be admissible. The fact that the parties have not included the issue of non-compliance in their submissions would not prevent the Court from addressing it on its own motion. While the jurisdiction of the Court on the merits of the dispute is limited by the *ne ultra petita* rule, this rule does not apply in relation to provisional measures (6). In this area, considerations based on the need to protect the effectiveness and integrity of the judicial function plead in favour of a greater role of the Court. Significantly, the power of the Court to indicate provisional measures under Article 41 of the Statute is not dependent upon a request from one of the parties. Moreover, Article 75, para. 1, of the Rules provides that the Court "may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures"; Article 75, para. 2, adds that "the Court may indicate measures that are in whole or in part other than those requested". It is submitted that the same considerations of effectiveness and integrity of the judicial function come into play in relation to the Court's power to determine a party's breach of provisional measures (7). This the more so if one considers that provisional

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(6) As observed by D'Argent, *Juge ou policier: les mesures conservatoires dans l'affaire du* Temple de Préah Vihear, *Annuaire français de droit int.*, vol. 57 (2011), p. 161, "ainsi que le rappelle l'article 75 du règlement, le contentieux de l'urgence n'est pas régi par le principe dispositif qui domine le contentieux sur le fond en cas de différend au sens de l'article 36 du statut". See also Kolb, *General Principles of Procedural Law*, in: *The Statute of the International Court of Justice: A Commentary* (Zimmermann, Tomuschat and Oellers-Frahm, eds), 2nd ed., Oxford, 2012, p. 899.

(7) This view has been defended by some Judges. According to Judge Cançado Trindade "contemporary international tribunals have, in my understanding, an inher-

measures are indicated while the case is pending before the Court: it seems quite reasonable that the Court, when it is seized of a case, is also empowered to determine whether the parties are complying with binding orders indicating provisional measures (8).

So far, the Court has not taken a position on the possibility of raising *proprio motu* the issue of non-compliance with provisional measures. In its judgment in *LaGrand*, the Court emphasized the importance of a party's claim for indemnification as a condition for the Court to rule upon such issue. In particular, it refrained from considering whether Germany had the right to be indemnified by noting that, while Germany had asked the Court to ascertain the breach of provisional measures, it had not included a claim for indemnification in its submissions (9). The Court's refusal to address the issue of indemnification can hardly be taken as a denial of its power to determine *proprio motu* a party's lack of compliance with provisional measures. A distinction is to be drawn between the Court's power to determine a party's right to obtain redress and its power to determine non-compliance with provisional measures. It is for the party seeking redress to include a claim for reparation in its submissions (10). In the

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ent power or *faculté* to order provisional measures of protection, whenever needed, and to determine, *ex officio*, the occurrence of a breach of provisional measures, with its legal consequences". See his separate opinion attached to the Court's judgment in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, para. 36. According to Judge *ad hoc* Verhoeven, since non-compliance with provisional measures "is in effect a challenge to the authority of the Court", it is "understandable that the Court should condemn, even *proprio motu* where appropriate, violations of ordered measures evidenced by acts within its cognizance". *I.C.J. Reports*, 2005, p. 358. See also Kolb, *The International Court of Justice*, 2012, p. 649. For a contrary view, see Rosenne, *The Law and Practice of the International Court, 1920-2005*, The Hague, p. 206 ("non-compliance with a decision indicating provisional measures of protection, although itself an internationally wrongful act occasioning the international responsibility of the recalcitrant State, does not enable the Court to impose sanctions *proprio motu*").

(8) It might be objected that, since Article 76 of the Rules provides that the Court may revoke or modify provisional measures "at the request of a party", the same restriction would apply to the Court's power to determine non-compliance with provisional measures. However, it seems excessive to infer from this provision a more general limitation. Moreover, as noted by Gaja, *Requesting the ICJ to Revoke or Modify Provisional Measures*, *The Law and Practice of International Courts and Tribunals*, vol. 14 (2015), pp. 2-3, despite the letter of Article 76, "the Court must be considered to be entitled also to modify or revoke on its own motion the measures it has indicated".

(9) *I.C.J. Reports*, 2001, p. 508, para. 116.

(10) With regard to the possibility that a request of indemnification is submitted by the respondent party, the Court has clarified that "the question of compliance by both Parties with the provisional measures indicated in this case may be considered by the Court in the principal proceedings, irrespective of whether or not the respondent State raised that issue by way of a counter-claim". See the order of 18 April 2013 in

absence of such claim, the *ne ultra petita* rule seems to prevent the Court from ruling upon the party's right to be indemnified (11). By contrast, such rule does not limit the Court's competence to determine *proprio motu* a party's non-compliance with provisional measures.

Admittedly, when confronted with the possibility of raising the issue of non-compliance *proprio motu*, the Court refrained from making such step. In *Armed Activities in the Territory of the Congo (DRC v. Uganda)*, while provisional measures had been addressed to both parties, only the DRC asked the Court to ascertain that Uganda had breached such measures. In its judgment the Court, after finding that Uganda had not complied with such measures, took care to stress that its finding on Uganda's non-compliance was "without prejudice to the question as to whether the DRC did not also fail to comply with the provisional measures indicated by the Court" (12). This "without prejudice" statement is rather unfortunate. Instead of alluding to the possibility that the DRC itself could have breached the provisional measures, the Court should have addressed directly such issue in its judgment (13).

One of difficulties that the Court may face in raising *proprio motu* the question of non-compliance is that of proving that a breach had occurred without the assistance of the parties. The assessment of a party's compliance may require an in-depth investigation of complex factual situations. In *Land and Maritime Boundary between Cameroon and Nigeria*, the Court did not uphold Cameroon's claim that Nigeria had breached provisional measures, finding that Cameroon had not put forward evidence demonstrating Nigeria's lack of compliance. The Court placed particular emphasis on the parties' duties in this respect; it observed that "in the present case it is for Cameroon to show that Nigeria acted in violation of the provisional measures indicated in the Order of 15 March 1996" (14). This statement must be read in context.

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the joined cases *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, *I.C.J. Reports*, 2013, p. 215, para. 40. On the possible implications of this statement, see MAROTTI, *op. cit.*, p. 785.

(11) See OELLERS FRAHM, *Article 41*, in: *The Statute of the International Court of Justice: A Commentary* (Zimmermann, Tomuschat and Oellers-Frahm, eds), 2nd ed., Oxford, 2012, p. 1068.

(12) *I.C.J. Reports*, 2005, p. 259, para. 265.

(13) In his dissenting opinion, Judge *ad hoc* Kateka maintained that the DRC had committed grave violations of human rights and international humanitarian law amounting to a breach of the provisional measures indicated by the Court. *I.C.J. Reports*, 2005, p. 379, para. 61.

(14) *I.C.J. Reports*, 2002, p. 453, para. 321.

It is clear that the parties bear the burden of proving their claims. At the same time, however, the Court is free to rely on facts within its own knowledge in order to rule upon the question of compliance with provisional measures (15). For the determination of the relevant facts, the Court may also ask for the parties' assistance, for instance by addressing questions from the bench (16).

Should the Court find that a party failed to comply with provisional measures, the problem may be raised whether such finding is to be reported in the operative part of the judgment or in its reasons. The practice of the Court after *LaGrand* has been to include such finding in the operative part (17). As we have seen, this practice refers to cases where the Court was called upon to give an answer to a specific claim included in the submission of one of the parties. There is no reason why the same solution should not be followed also in cases where the Court raises the issue of compliance with provisional measures on its own motion. The fact that the issue is not raised by the parties in their submission should not preclude this possibility, as the Court enjoys a certain discretion in formulating the operative part (18). By recording a party's non-compliance in the operative part, the Court would put greater emphasis on its finding; it would also allow individual judges to express their views on this issue (19).

3. As the Court has repeatedly stated, the indication of provisional measures is not conditional upon the prior determination of the Court's jurisdiction over the case. It is sufficient that the requesting

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(15) In *Armed Activities in the Territory of the Congo (DRC v. Uganda)* the Court noted that "the DRC put forward no specific evidence demonstrating" a breach of the provisional measures. However, the Court, by relying on other findings made in the judgment, was able to conclude that Uganda had not complied with its obligations under the provisional measures. *I.C.J. Reports*, 2005, pp. 258-259, para. 264.

(16) On the importance of this practice in cases where the Court raises issues *ex officio*, see Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?*, Heidelberg, 2014, p. 162.

(17) In the case law prior to *LaGrand* the Court had sometimes included a reference to a party's non-compliance in the reasons. For an overview, see Stein, *Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt*, *American Journal of Int. Law*, vol. 76 (1982), p. 528.

(18) See Brown, *Article 59*, in: *The Statute of the International Court of Justice: A Commentary* (Zimmermann, Tomuschat and Oellers-Frahm, eds), 2nd ed., Oxford, 2012, p. 1431.

(19) For the implications of addressing a certain finding in the operative part rather than in the reasons see the declaration of Judge Gaja, annexed to the Court's order of 7 December 2016 in *Immunities and criminal proceedings (Equatorial Guinea v. France)*.

party shows the existence of a *prima facie* jurisdiction. If, after having indicated provisional measures, the Court finds that it has no jurisdiction, the question arises as to whether the Court would in any case be empowered to decide upon a party's lack of compliance with such measures.

The Court has not yet taken a clear view on this question. In its judgment in *LaGrand* it observed that "[w]here the Court has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with" (20). This appears to suggest that the basis of the Court's jurisdiction to determine non-compliance with provisional measures is the same basis upon which the Court relies for exercising its jurisdiction over the merits of the dispute. If this is the case, it would follow that, if the Court does not have jurisdiction to adjudicate a case, it would also lack jurisdiction to decide upon a party's non-compliance. In a subsequent judgment, however, the Court seems to have taken a different view. In *Request for Interpretation of the* Avena *Judgment*, although on the principal issue it found that there was no dispute between the parties, it determined that the United States had breached its obligations under the provisional measures. By a unanimous vote, it included its finding on this issue in the operative part of its judgment. According to the Court, "[t]he Court's competence under Article 60 necessarily entails its incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures", and "[t]hat is still so even when the Court decides, upon examination of the Request for interpretation, [...] not to exercise its jurisdiction to proceed under Article 60" (21). Since Article 60 of the Statute provides jurisdiction only on disputes over the interpretation of a judgment, it is noteworthy that the Court, while deciding not to exercise its jurisdiction to interpret the *Avena* judgment, relied upon its incidental jurisdiction for ruling upon the United States' non-compliance with provisional measures. By this decision the Court appears to recognize that its incidental jurisdiction, even if based only on a *prima facie* assessment of its jurisdiction on the merits of the dispute, is sufficient to justify its power to determine non-compliance with provisional measures (22).

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(20) *I.C.J. Reports*, 2001, p. 484, para. 45.

(21) *I.C.J. Reports*, 2008, p. 19, para. 51.

(22) According to Thirlway, *The International Court of Justice 1989-2009: At the Heart of the Dispute Settlement System?*, *Netherlands Int. Law Review*, vol. 57 (2010),

Following the Court's approach in *Request for Interpretation of the* Avena *Judgment*, it is submitted that the Court's jurisdiction to make findings about breaches of provisional measures is to be regarded as being implicit in its incidental jurisdiction to indicate such measures under Article 41 of the Statute (23). This view relies on the distinction between jurisdiction in relation to provisional measures, which is based on Article 41 of the Statute, and jurisdiction over the merits of the dispute, which is based on the consent of the parties. Article 41 would not only justify the Court's power to indicate binding provisional measures; it would also provide a basis for the Court's power to determine non-compliance with such measures. As provisional measures produce effects until the principal judicial proceedings are terminated, the Court would be empowered to include a finding of non-compliance in the judgment establishing its lack of jurisdiction or the non-admissibility of the claim. It is only with that judgment that provisional measures cease to be operative (24).

While this approach is based on a wide interpretation of the Court's power under Article 41, there are sound reasons supporting it. The breach of a binding order of the Court causes damage to the authority of the Court irrespective of whether the Court could later find that it has no jurisdiction over the case. If the Court were denied the possibility of censoring such conduct by including a finding of non-compliance in its judgment, there would be no response against the non-complying State. It would be tantamount to considering that provisional measures cease to produce effect retroactively, from the moment they were indicated, and, as a consequence, that no wrongful act had been committed. Such a solution risks to undermine the effec-

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p. 385, the indication that one should draw from this precedent is that provisional measures "must be complied with, at least during the currency of the proceedings, even if the claim on the merits turns out to be unsubstantiated, and even if it proves that the Court has in fact no jurisdiction over the merits". This view is shared by Lee-Iwamoto, *The Repercussions of the* LaGrand *Judgment: Recent ICJ Jurisprudence on Provisional Measures*, *Japanese Yearbook of Int. Law*, vol. 55 (2012), p. 258, and by Tranchant, *L'arrêt rendu par la Cour internationale de Justice sur la Demande en interprétation de l'arrêt* Avena *(Mexique c. États-Unis d'Amérique)*, *Annuaire français de droit int.*, vol. 55 (2009), p. 216.

(23) For this view, see Mendelson, *op. cit.*, p. 45, and Tranchant, *op. cit.*, p. 217. *Contra* Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989 (Part Twelve)*, *British Yearbook of Int. Law*, vol. 72 (2001), p. 124.

(24) See *Anglo-Iranian Oil Company Case*, *I.C.J. Reports*, 1952, p. 114.

tiveness of provisional measures pending the Court's judgment on jurisdiction and admissibility (25).

While the Court's jurisdiction to make findings of non-compliance with provisional measures may be based on Article 41, it is more doubtful whether the power granted by Article 41 also provides jurisdiction to rule over claims for reparation for non-compliance put forward by a party (26). When a party invokes the responsibility of the other party for breaches of provisional measures, its claims are an integral part of the dispute that the Court is called upon to adjudicate. Lack of jurisdiction over the merits of the dispute seems to prevent the Court from ruling upon these claims. This limitation would also alleviate the concern about the risk of undermining the principle of consensual jurisdiction. This principle prevents the Court from ruling upon a dispute, and assessing the respective claims of the parties, in the absence of specific consent. It does not prevent the Court from assessing the parties' conduct in the judicial process.

4. The primary consequence of a breach of provisional measures is the possibility for the injured party to claim the responsibility of the non-complying party. Such responsibility entails in the first place that the injured party may ask the Court to ascertain its right to obtain reparation for the injury suffered. It is more doubtful whether it also entails the entitlement to take countermeasures against the responsible party.

Resort to countermeasures appears to be scarcely compatible with the principle — frequently reasserted by the Court also through the indication of provisional measures — according to which "the parties to a case must [...] not allow any step of any kind to be taken which might aggravate or extend the dispute" (27). Moreover, Article 52,

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(25) On this risk, see Leonhardsen, *Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures when non-Compliance Is to Be Expected*, *Journal of Int. Dispute Settlement*, vol. 5 (2014), p. 322.

(26) See also D'Argent, *op. cit.*, p. 160, note 74, and Tranchant, *op. cit.*, p. 217.

(27) *Electricity Company of Sofia and Bulgaria*, Series A/B, No. 79, p. 199. According to Oellers Frahm, *op. cit.*, p. 1068, it is "questionable whether States may take reprisals although admissible under general international law, because this may contravene the duties of a party *pendente lite*". See also Frowein, *Provisional Measures by the International Court of Justice - The* LaGrand *Case*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 62 (2002), p. 60. For an examination of the Court's practice with regard to the indication of non-aggravation measures, see Palchetti, *The Power of the International Court of Justice to Indicate Provisional Measures to Prevent the Aggravation of a Dispute*, *Leiden Journal of Int. Law*, 2008, pp. 623-642.

paragraph 3, of the Articles on State responsibility provides that countermeasures may not be taken if "the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties". It is to be noted, however, that the Articles do not rule out entirely the possibility of resorting to countermeasure in this kind of situation. Article 52, paragraph 4, specifies that "[p]aragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith". In its commentary, the International Law Commission refers to "non-compliance with a provisional measures order" as a ground justifying the non-application of this limitation to the taking of countermeasures (28). If one follows this view, it cannot be excluded that, under certain circumstances, the injured party is entitled to resort to countermeasures (29). The real issue then becomes that of determining the conditions under which resort to countermeasures may be regarded as being justified. In this respect, two remarks are in order. First, failure to comply with provisional measures does not, as such, give rise to the entitlement to take countermeasures; what matters is the lack of good faith of a party in complying with the dispute settlement procedure, an element which must be assessed by taking into account more comprehensively the conduct of the responsible party during the proceedings. Moreover, the determination of the breach of provisional measures cannot be left entirely to the subjective assessment of a party; before reacting unilaterally, the injured party should at least bring the issue of non-compliance to the Court, for instance through a new request for provisional measures.

As regards reparation for the injury caused by the breach of provisional measures, the only form of reparation so far granted is a declaration of non-compliance included in the operative part of the judgment. The Court treated this declaration as a form of satisfaction for the non-material injury suffered on this account (30). When the

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(28) *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), p. 137.

(29) STEIN, *op. cit.*, p. 517, argued that "a prohibition on countermeasures even in the face of disregard of an interim measures order would impose so grossly unfair a burden on an applicant state that resort to judicial remedies would itself be discouraged".

(30) See, for instance, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports*, 2007, p. 236, para. 469: "The Court will however include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures". See also the judgment in the joined cases *Certain activities carried out by*

breach of provisional measures causes material harm, the injured party has the right to restitution or compensation (31). In a few cases, requests for compensation had also been advanced. While in principle recognizing the possibility of awarding such form of reparation, the Court, for different reasons, invariably rejected these requests.

In cases of material harm, it may at times be difficult to separate the damages ensuing from the breach of provisional measures and those ensuing from the breach of the substantive obligations on the merits. This is so, in particular, when, as it frequently happens (32), the obligations under the provisional measures have substantially the same content as the obligations to be examined in the judgment on the merits. In its judgment in *Bosnian genocide*, the Court was confronted with a situation of this kind. In addressing a request for compensation relating to Serbia's breach of provisional measures, it approached the matter by considering that, "for purposes of reparation, the Respondent's non-compliance with the provisional measures ordered is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention" (33). This approach appears to be justified. In this situation, if the injured party receives compensation for the material harm caused by the breach of the substantive obligation, it would be inappropriate to award compensation also for the breach of provisional measures. The injured party would otherwise obtain double recovery.

It has been noted that this "merging" approach reduces the significance to be attached to the binding effect of provisional measures: if damages are awarded only in respect to the breach of the substantive obligations considered on the merits, it would make little

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Nicaragua in the border area and *Construction of a road in Costa Rica along the San Juan river*, para. 139: "The declaration by the Court that Nicaragua breached the territorial sovereignty of Costa Rica by excavating three *caños* and establishing a military presence in the disputed territory provides adequate satisfaction for the non-material injury suffered on this account. The same applies to the declaration of the breach of the obligations under the Court's Order of 8 March 2011 on provisional measures".

(31) As noted by Marotti, *op. cit.*, p. 778, the possibility of awarding restitution appears highly unlikely.

(32) For an overview, see Eisemann, *Quelques observations sur les mesures conservatoires indiquées par la Cour de La Haye*, in: *International Courts and the Development of International Law. Essays in Honour of Tullio Treves* (Boschiero *et al.*, eds), The Hague, 2013, p. 121 ss.

(33) *I.C.J. Reports*, 2007, p. 236, para. 469. The Court also observed that "the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention". *Ibid.*, p. 231, para. 458.

difference that provisional measures had been disregarded (34). Admittedly, if one attaches importance exclusively to the possibility of obtaining compensation, the consequences flowing from the breach of provisional measures appear to be limited in this kind of cases. However, there may be other consequences. In particular, it cannot be excluded that such breach may indirectly have an impact on the amount of compensation to be awarded for the breach of the substantive obligations on the merit. A breach of provisional measures may reveal wilful intent or gross negligence, which the Court may take into account when assessing the extent of the reparation to be due for the breach of the substantive obligations (35). Indeed, as observed by the International Law Commission, the quantification of the amount of compensation depends, *inter alia*, on "an evaluation of the respective behaviour of the parties" (36). The Court itself appears to take into account the conduct of the parties during the judicial proceedings for the purposes of assessing the amount of compensation. In its judgement in *LaGrand*, when considering the consequences stemming from the United States' breach of the provisional measures, the Court recognized that "the United States was under great time pressure in this case, due to the circumstances in which Germany had instituted the proceedings", finding that it would have taken this factor into consideration "had Germany's submission included a claim for indemnification" (37). Apart from its impact on the amount of compensation to be awarded, non-compliance with provisional measures may also be relevant for assessing whether other consequences are appropriate, such as, for instance, the offering of assurances and guarantees of non-repetition (38).

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(34) MENDELSON, *op. cit.*, p. 52; LEE-IWAMOTO, *op. cit.*, p. 256.

(35) This possible implication of the breach of provisional measures was highlighted by BARILE, *Osservazioni sulla indicazione di misure cautelari nei procedimenti davanti alla Corte internazionale di giustizia*, *Comunicazioni e studi*, vol. 4 (1952), p. 154, and by VILLANI, *In tema di indicazione di misure cautelari da parte della Corte internazionale di giustizia*, *Rivista*, vol. 57 (1974), pp. 676-677. Similarly, LAUTERPACHT, *The Development of International Law by the International Court*, Cambridge, 1957, p. 254, observed that "a party disregarding an Order indicating provisional measures acts at its peril and that the Order must be regarded at least as a warning estopping a party from denying knowledge of any probable consequences of its action".

(36) *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), p. 100.

(37) *I.C.J. Reports*, 2001, p. 508, para. 116.

(38) See the judgment in the joined cases *Certain activities carried out by Nicaragua in the border area* and *Construction of a road in Costa Rica along the San Juan river*, para. 141.

In case of non-compliance with provisional measures, the non-complying party remains under a duty to provide reparation even if it ultimately prevails on the merits. However, it may be expected that the Court will take this circumstance into account when considering the form and extent of reparation. This the more so when the rights that the provisional measures aimed at protecting were later discovered to be non-existent. When the non-complying party is awarded compensation for the injury caused by the breach of the substantive obligations on the merits, the Court may consider to "merge" the opposing claims of the parties. In particular, it may assess whether, by not complying with the provisional measures, the party may have materially contributed to the damage it suffered (39).

5. The party which breaches provisional measures might face adverse consequences outside the sphere of State responsibility. In particular, being the guardian of its judicial integrity, the Court itself may have an interest in sanctioning the conduct of the non-complying party, irrespective of the claim for reparation of the injured party.

The Statute offers little in terms of measures available to the Court to protect the judicial process against the harmful conduct of the contending States. In the absence of an explicit basis in the Statute, the possibility of levying penalties or awarding punitive damages is to be ruled out (40). It has been suggested that in case of grave breaches of provisional measures by the applicant State, withholding the judgment could be an appropriate remedy (41). In principle, a response of this kind would not be precluded to the Court. Particularly when the breach of provisional measures seriously undermines the orderly administration of justice in the case, the Court might find that judicial propriety requires it to refrain from exercising its jurisdiction over the claims of the applicant. As it observed in its judgment in *Northern Cameroons*, " [i]f the Court is satisfied, whatever the nature of the relief

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(39) Article 39 of the Articles on State responsibility provides that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or of any person or entity in relation to whom reparation is sought".

(40) See MENDELSON, *op. cit.*, p. 42. However, according to SCHACHTER, *International law in theory and practice: general course in public international law*, *Recueil des cours*, vol. 178 (1982), p. 223, the Court has the authority to levy damages against the non-complying State. See also STEIN, *op. cit.*, p. 527. According to KOLB, *op. cit.*, p. 649, "[f]rom the legal point of view, it [the Court] would even have the right to require reparation to be made to the Court itself".

(41) SCHACHTER, *op. cit.*, p. 223.

claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so" (42). However, while it cannot be excluded that the breach of provisional measures may give rise to an issue of propriety, this could be regarded as a possible remedy only in very exceptional circumstances. In principle, the need to sanction the non-complying party should not divert the Court from its primary function, namely to decide the dispute in accordance with international law. Moreover, even if admissible, this form of sanction appears of little practical utility, if one considers that normally it is the respondent party who breaches provisional measures: in this case, it would make no sense for the Court not to exercise its jurisdiction as this would only affect the applicant party.

As it has already been mentioned, in its case law after *LaGrand* the ordinary remedy for breaches of provisional measures has taken the form of a finding of non-compliance recorded in the operative part of the judgment. This remedy seems to have a dual function. On the one hand, it amounts to a form of reparation, by way of satisfaction, for the non-material injury caused to the other party. On the other hand, it also expresses the Court's censure of the non-complying conduct and may therefore be regarded as a form of sanction for the harm caused to the judicial process. This also justifies that the Court may make such finding irrespective of any specific request to that effect by the injured party.

A finding of non-compliance recorded in the operative part of the judgment may appear as a rather mild response to a breach of provisional measures. To a certain extent, this reflects the particular environment in which the Court operates. For a Court whose jurisdiction is based on the consent of the parties and whose judgments are not backed by effective mechanisms of enforcement, in most cases it would be difficult to go beyond expressing its censure of the non-complying conduct. Moreover, the effectiveness of this sanction should not be underestimated, as it inflicts significant reputational costs on the responsible party (43).

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(42) *I.C.J. Reports*, 1963, p. 37.

(43) See STEIN, *op. cit.*, p. 524, who maintained that "[i]n a context where rectitude is the primary value at stake, censure by the Court is a significant sanction". See also LEONHARDSEN, *op. cit.*, p. 325 ff. *Contra* ZYBERY, *Provisional Measures of the International Court of Justice in Armed Conflict Situations*, *Leiden Journal of Int. Law*, vol. 23 (2010), p. 581, who maintained that a finding of non-compliance "does not seem to address properly the damage caused to the Court's own standing by a lack of compliance with its provisional measures orders". However, this author does not indicate what remedy the Court should order to address the damage to its authority,

In its judgment in the joined cases *Certain activities carried out by Nicaragua in the border area* and *Construction of a road in Costa Rica along the San Juan river*, the Court observed that "[t]he judgment on the merits is the appropriate place for the Court to assess compliance with the provisional measures" (44). When a breach of provisional measures occurs at an early stage of the proceedings, a significant length of time may pass between the breach and the final determination of the Court. Pending the principal proceedings, the Court could address a situation of non-compliance by means of a new order on provisional measures (45). This is what the Court did in *Certain activities carried out by Nicaragua in the border area.* In its order on provisional measures of 22 November 2013, the Court, while not stating it expressly, recognized that Nicaragua's conduct was not in compliance with the provisional measures indicated in its order of 8 March 2011. A finding of non-compliance made at the provisional measures stage, while in principle "only instrumental in ensuring the protection of the rights of the Parties during the judicial proceedings" (46), may serve the purpose of warning the responsible party of the legal consequences stemming from its conduct. It may also justify the adoption of a more severe sanction at the stage of the merits should the party persist in its conduct.

Among these more severe sanctions, the imposition of costs, or part of costs, relating to the proceedings should be taken into consideration (47). The Statute does not rule out the possibility of using the award of costs as a form of sanction against the non-complying party. Article 64 provides that the general rule, according to which each party shall bear its own costs, is to be applied "[u]nless otherwise decided by

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limiting himself to indicate measures that the Court should indicate to repair the harm caused by the non-complying party to the other party.

(44) Para. 126 of the judgment.

(45) For the view that the Court, pending the principal judicial proceedings, should proceed promptly, and even *proprio motu* to assess compliance with provisional measures by means of another order of provisional measures, see Judge Cançado Trindade, separate opinion attached to the Court's judgment in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River*, paras 34-46. According to Lando, *Compliance with Provisional Measures Indicated by the International Court of Justice*, *Journal of Int. Dispute Settlement*, vol. 8 (2017) (forthcoming), the Court should consider to create an expedite procedure through which it could establish non-compliance with provisional measures by way of a decision having the form of a judgment.

(46) Para. 126 of the judgment.

(47) In the past, this possibility was advocated by some commentators. See for instance Barile, *op. cit.*, p. 154.

the Court". In the abovementioned joined cases between Costa Rica and Nicaragua, Costa Rica included in its submission a request aimed at imposing on Nicaragua all costs and expenses incurred by Costa Rica in requesting and obtaining the order on provisional measures of 22 November 2013. Significantly, Costa Rica justified its request by relying on the existence of a causal link between Nicaragua's failure to comply with the provisional measures indicated in 2011 and the incidental proceedings which led to the 2013 order. "[T]aking into account the overall circumstances of the case", the Court found that "an award of costs [...] would not be appropriate" (48). In a joint declaration, four judges held the view that the "exceptional circumstances" of the case warranted the exercise by the Court of its power under Article 64 of the Statute. In particular, they emphasized that the costs incurred by Costa Rica "were a direct consequence of Nicaragua's breach of the obligations imposed by the 2011 Order" (49).

In the context of an interstate dispute, the award of the costs of the proceedings may have adverse implications, as it may hinder the acceptance of the final judgment, as well as its implementation, by the affected party. For this reason, it seems justified to confine this measure only to serious cases of non-compliance with provisional measures. This does not mean that it should be resorted to only when non-compliance has led the injured party to request new provisional measures. More broadly, there seem to be no reasons for requiring a causal link between the non-complying conduct of one party and the costs incurred by the other party (50). The imposition of costs relating to the proceedings should not be regarded as a form of compensation for the additional costs incurred by the injured party. It should rather be used as a means for sanctioning grave cases of non-compliance. The fact that levying costs against the non-complying party benefits the other party does not deprive this measure of its preeminently punitive character and deterrent purpose. Moreover, since it is intended to sanction the non-complying party, the Court is to be regarded as being empowered to take it irrespective of a request to that effect by the injured party.

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(48) Para. 144 of the judgment.

(49) Joint declaration of Judges Tomka, Greenwood, Sebutinde and Judge *ad hoc* Dugard, para. 7.

(50) See Lando, *The Road along the San Juan River is paved with Good Intentions: Provisional Measures and the Quest for Compliance in the* Costa Rica/Nicaragua *Joined Cases*, *Rivista*, vol. 99 (2016), p. 182.

6. In its judgment in *LaGrand* the Court, while devoting ample attention to the question of the binding effect of provisional measures, said little about the principles governing the responsibility in case of non-compliance. Its case law after that judgment does not provide greater clarity about this issue. When confronted with the question of non-compliance, the Court's approach has been characterized by a narrow focus on the specific problems raised in each case. Given the limited and fragmented indications coming from the Court, it is hard to define the principles at work in this area by elaborating a coherent system which is capable to shed light on some unresolved questions.

In an attempt to systematize the regime of responsibility for breaches of provisional measures, the distinction between the "institutional dimension" and the "interstate dimension" may provide a useful analytical tool for assessing the content and scope of the Court's power in this field. On the one hand, there are the powers conferred upon the Court by its Statute. On the other, there is the Court's power based on the jurisdiction conferred upon it by the parties. Relying on its Statute, the Court can determine non-compliance with provisional measures, possibly also *proprio motu* or in the absence of jurisdiction over the merits; it can also impose certain forms of sanction on the non-complying party. Basing itself on the jurisdiction conferred by the parties, it can assess the claims of responsibility advanced by the injured party, as well as awarding reparation for the injuries eventually caused to that party.

Admittedly, in practice the "interstate dimension" appears to be largely prevailing. The Court has been very cautious about exercising the powers that appear to be implicit in Article 41 or in other provisions of the Statute, the sole exception being perhaps its bold affirmation of jurisdiction in *Request for Interpretation of the* Avena *Judgment.* Its findings in cases of non-compliance have been generally prompted by the specific request of a party. It might well be that the Court's cautious attitude is partly dictated by the need to attenuate the impact of the very innovative stance taken in 2001, and that in the future the Court might be more willing to take a proactive role in this area (51). More probably, however, the prevalence of the "interstate dimension" is destined to remain a distinctive feature of this regime of responsibility, being more in keeping with the Court's function as an instrument for securing the settlement of disputes between the parties.

PAOLO PALCHETTI

(51) For this observation see MENDELSON, *op. cit.*, p. 47.

Abstract. — After its judgment in *LaGrand*, the Court has had several occasions to deal with cases where one of the parties had breached provisional measures indicated on the basis of Article 41 of the Statute. While recognizing that this conduct entails the responsibility of the non-complying party, so far the Court has said little about the principles governing such responsibility. The main purpose of this article is to attempt to systematize the regime of responsibility for breaches of provisional measures. The point of departure is the consideration that non-compliance with provisional measures is not a matter exclusively affecting the rights and interests of the contending parties and that the Court itself has a distinct and autonomous interest in ensuring respect for provisional measures. This distinction between an "institutional dimension" — involving the relations between the non-complying party and the Court — and an "interstate dimension" — involving the relations between the non-complying party and the other party — is then used as an analytical tool for assessing the content and scope of the Court's power in this field. In particular, it is used to assess two main issues. The first is whether the Court may determine by its own initiative whether provisional measures have been complied with, possibly also in the absence of jurisdiction on the merits of the dispute. The other is whether the legal consequences provided under the general rules on State responsibility exhaust the range of legal consequences available against the responsible party. The article's main conclusions are that: (*a*) Relying on its Statute, the Court can determine non-compliance with provisional measures, possibly also *proprio motu* or in the absence of jurisdiction over the merits; (*b*) the Court can also impose certain forms of sanction on the non-complying party, even if, in practice, the only sanction available to the Court seems to be that of expressing its censure of the non-complying conduct; (*c*) basing itself on the jurisdiction conferred by the parties, the Court can assess the claims of responsibility advanced by the injured party, as well as award reparation for the injuries eventually caused to that party.

Annex 16

J. Gambrell, "Emirati diplomat to AP: 'Nothing to negotiate' with Qatar", *Associated Press* (7 June 2017), https://apnews.com/3a69bad153e24102a4dd23a6111613ab

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Emirati diplomat to AP: 'Nothing to negotiate' with Qatar

By JON GAMBRELL June 7, 2017

AP NEWS

DUBAI, United Arab Emirates (AP) — A top Emirati diplomat said Wednesday “there’s nothing to negotiate” with Qatar over a growing diplomatic dispute about the energy-rich nation’s alleged funding of terror groups, signaling Arab countries now isolating it have no plans to back down.

Speaking in a rare interview, Emirati Minister of State for Foreign Affairs Anwar Gargash told The Associated Press that Qatar has “chosen to ride the tiger of extremism and terrorism” and now needed to pay the price, despite Qatar long denying the allegation.

Gargash said Qatar “definitely” should expel members of Hamas, stop its support of terror groups “with al-Qaida DNA” around the world and rein in the many media outlets it funds, chief among them the Doha-based satellite news network Al-Jazeera.

While applauding a Kuwaiti effort to mediate the crisis, Gargash said Emirati and Saudi officials planned to concede nothing to Qatar, home to some 10,000 American troops at a major U.S. military base and the host of the 2022 FIFA World Cup.

Their “fingerprints are all over the place” in terror funding, Gargash said. “Enough is enough.”

Qatari officials declined to immediately comment on Gargash’s comments. Its foreign minister has struck a defiant tone in interviews, even after worried residents emptied grocery stores in its capital of Doha as Saudi Arabia has blocked trucks carrying food from entering the country.

Its flag carrier Qatar Airways now flies increasingly over Iran and Turkey after being blocked elsewhere in the Middle East. Emirati officials also shut down the airline’s offices in the UAE on Wednesday. Al-Jazeera offices also have been shut down by authorities in Saudi Arabia and

Jordan. Meanwhile, Turkey's parliament approved sending troops to an existing Turkish base in Qatar as a sign of support.

The international agency Standard and Poors announced Wednesday that it lowered its rating on Qatar's long-term debt to AA-minus because of the country's dispute with its neighbors. S&P said those countries' severing of diplomatic and business links "will exacerbate Qatar's external vulnerabilities and could put pressure on economic growth and fiscal" stability.

Speaking to the AP from a Foreign Ministry office in Dubai, Gargash listed a number of terror groups he alleged Qatar had funded, including al-Qaida's branches in Syria and Somalia, militants in Egypt's Sinai Peninsula and other group's with "al-Qaida-type organizations" in Libya. He offered no documents to support his claim, but Western officials long have accused Qatar's government of allowing or even encouraging funding of some Sunni extremists.

Gargash particularly pointed out the tens of millions of dollars paid to Shiite militias and others to free dozens of Qatari ruling family members and others in Iraq after 16 months in captivity.

Asked for specifics about what Arab nations wanted from Qatar, Gargash said expelling members of Hamas and other groups like the Muslim Brotherhood from Qatar was important. Gaza's Islamic Hamas rulers, a major recipient of Qatari aid, have called Saudi Arabia's call for Qatar to cut ties with the Palestinian militant group "regrettable" and said it contradicts traditional Arab support for the Palestinian cause.

In Germany, Saudi Foreign Minister Adel al-Jubeir said he wants to see a response from Qatar to the Arab countries' demands "soon."

Both al-Jubeir and Gargash in their comments suggested their complaints about Qatar go back years, likely implying that their grievances are focused on the policies of Sheikh Hamad bin Khalifa Al Thani. Sheikh

AP NEWS

Hamad became emir through a palace coup in 1995 and expanded his nation's presence on the international scene through negotiating hostage releases, briefly flirting with diplomatic ties to Israel, hosting a Taliban office and creating Al-Jazeera.

Sheikh Tamim bin Hamad Al Thani, his son, became Qatar's ruling emir in 2013, but Sheikh Hamad still looms large in the tight, insular world of Qatari ruling family politics.

U.S. President Donald Trump, who tweeted Tuesday about Qatar funding extremists, called Sheikh Tamim on Wednesday and offered to host leaders at the White House to resolve the crisis.

Qatar faced a similar crisis in 2014 that saw multiple Arab nations pull their ambassadors from the country. That crisis ended eight months later, but the roots of it are clearly seen in the latest dispute. Kuwait's emir, trying to mediate this latest crisis, flew to Dubai on Wednesday and met with Emirati leaders.

An outspoken Emirati ruling family member, the writer and political analyst Sultan Sooud Al Qassemi, even raised the prospect of Qatar's leadership changing.

"Qataris are questioning whether this is going to end up in seeing a change in leadership itself in Qatar," Al Qassemi told the AP in his office in Sharjah, near Dubai. "So it is a very serious issue. Again, this is Qataris speaking to international media wondering whether this is possible at all."

The Gulf countries have ordered their citizens out of Qatar and gave Qataris abroad 14 days to return home. The countries also said they would eject Qatar's diplomats.

"Doha now is completely isolated," Al Qassemi said. "Doha now needs to take serious steps very rapidly to placate not only their neighbors but also their allies around the world."

His comments took on further strength as the UAE's Justice Ministry warned social media users that they can face three to 15 years in prison time and fines starting from 500,000 dirhams ($136,000) for offering sympathy for Qatar. The ministry quoted UAE Attorney General Hamad Saif al-Shamsi on social media making the warning, saying it came over Qatar's "hostile and reckless policy."

While liberal compared to much of the Middle East, the UAE has tough cybercrime and slander laws under which people can be arrested, imprisoned and deported for taking photographs without the consent of those shown.

The crisis began in part over what the Qataris described as a false news report planted during a hack of its state-run news agency in late May. Russia denied Wednesday it hacked the agency after a CNN report quoted anonymous U.S. officials saying they suspected Russian hackers. FBI agents are assisting Qatar in its investigation, said Meshal bin Hamad Al Thani, Qatar's ambassador to the U.S.

The UAE did not hack the Qatari news agency, Gargash said. However, he did acknowledge the authenticity of recently leaked emails from Emirati Ambassador Yousef al-Otaiba in Washington, which several media outlets described as including criticism of Qatar.

"That hack showed the UAE's real concerns and that what we really say in our private emails is what we say publicly," Gargash said.

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Associated Press writers Geir Moulson in Berlin, Karin Laub in Amman, Jordan, Josh Lederman in Washington and Fay Abuelgasim contributed to this report.

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Follow Jon Gambrell on Twitter at www.twitter.com/jongambrellap. His work can be found at http://apne.ws/2galNpz.

Annex 17

"Qatar condemns Saudi refusal to negotiate over demands", *BBC* (28 June 2017), https://www.bbc.com/news/world-middle-east-40428947

Qatar condemns Saudi refusal to negotiate over demands

28 June 2017

Qatar crisis



Qatar's foreign minister has condemned its Gulf neighbours for refusing to negotiate over their demands for restoring air, sea and land links.

Sheikh Mohammed al-Thani said the stance was "contrary to the principles" of international relations.

Saudi Arabia, the United Arab Emirates, Bahrain and Egypt accuse Qatar of aiding terrorism - a charge it denies.

It has been presented with a list of demands that the Saudi foreign minister on Tuesday called "non-negotiable".

The restrictions have caused turmoil in Qatar, an oil- and gas-rich nation that is dependent on imports to meet the basic needs of its population of 2.7 million.

- **Qatar 'facing indefinite isolation'**
- **Qatar crisis deepens as Gulf sides stand their ground**

On Friday, Qatar was given 10 days to comply with a **13-point list of demands** to end the crisis that included shutting down the Al Jazeera news network, closing a Turkish military base, cutting ties with the Muslim Brotherhood, and curbing diplomatic relations with Iran.



US Secretary of State Rex Tillerson, who has sought to resolve the crisis, acknowledged that some elements would "be very difficult for Qatar to meet", but that there were "significant areas which provide a basis for ongoing dialogue".

But after holding talks with Mr Tillerson in Washington on Tuesday, Saudi Foreign Minister Adel al-Jubeir was asked by journalists if the demands were non-negotiable. He replied: "Yes."

"It's very simple. We made our point. We took our steps and it's up to the Qataris to amend their behaviour. Once they do, things will be worked out. But if they don't, they will remain isolated," he **said**.

"If Qatar wants to come back into the [Gulf Co-operation Council] pool, they know what they have to do."



Mr Jubeir stressed that the decision to sever ties with Qatar was made after taking into account the history of its behaviour, which he alleged included harbouring known terrorists and funding extremist groups throughout the region.

Qatar's foreign minister, who met Mr Tillerson at the state department later on Tuesday, called the Saudi position "unacceptable".

- **Why Qatar is the focus of terrorism claims**
- **All you need to know about Qatar**

"This is contrary to the principles that govern international relations because you can't just present lists of demands and refuse to negotiate," Sheikh Mohammed was quoted as saying in a ministry **statement**.

Sheikh Mohammed said the US agreed the demands had to be "reasonable and actionable", and that the allegations against Qatar also needed to be discussed.

"We agree that the State of Qatar will engage in a constructive dialogue with the parties concerned if they want to reach a solution and overcome this crisis."





The UAE ambassador to Russia **told** the Guardian newspaper on Wednesday that the Gulf Arab states were considering fresh economic sanctions on Qatar.

"One possibility would be to impose conditions on our own trading partners and say you want to work with us then you have got to make a commercial choice," Omar Ghobash said.

Meanwhile, UN Special Rapporteur on freedom of expression David Kay said the closure of Al Jazeera would "strike a major blow against media pluralism in a region already suffering from severe restrictions on reporting and media of all kinds".

Related Topics

Qatar crisis **United Arab Emirates** **Qatar** **Saudi Arabia**

Annex 18

N. Al Wasmi, "UAE and Saudi put pressure on Qatar ahead of demands deadline", *The National* (28 June 2017), https://www.thenational.ae/world/uae-and-saudi-put-pressure-on-qatar-ahead-of-demands-deadline-1.92119

The National

UAE and Saudi put pressure on Qatar ahead of demands deadline

'The moment of truth is drawing near. We call on our brother to choose his element, to choose honesty and transparency in his dealings,' urged the UAE's Minister of State for Foreign Affairs Dr Anwar Gargash.



Naser Al Wasmi
June 28, 2017

Abu Dhabi // The UAE and Saudi Arabia increased pressure on Qatar on Wednesday, warning “the moment of truth is drawing near” for Doha to make a decision on the 13 demands delivered by Gulf states and Egypt last week.

Dr Anwar Gargash, Minister of State for Foreign Affairs, described the situation for Qatar as “dire” as the Monday deadline for the demands to be met looms.

“The moment of truth is drawing near. We call on our brother to choose his element, to choose honesty and transparency in his dealings, and to realise that media clamor and ideological heroism are short-lived,” he said.

Earlier on Wednesday, Qatari foreign minister Sheikh Mohammed bin Abdulrahman Al Thani condemned Riyadh’s refusal to negotiate the list of demands sent to Doha last week with a 10-day deadline.

“Our demands on Qatar are non-negotiable. It’s now up to Qatar to end its support for extremism and terrorism,” tweeted Saudi foreign minister Adel Al Jubeir, apparently in response to Sheikh Mohammed’s comments.

Mr Al Jubeir, who is currently visiting Washington, confirmed that his country will not ease the trade embargo imposed on Qatar until all demands are met.

The demands sent to Qatar last week by the UAE, Saudi Arabia, Bahrain and Egypt include the scaling down of its relationship with Iran and the closure of its Al Jazeera news network. The four countries are also demanding that Qatar agree to monthly audits on government finances and end its alleged funding of terrorist organisations around the Middle East.

On Friday last week, Dr Gargash threatened Doha with “divorce” from the GCC if the demands were not met.

Another option being considered are fresh sanctions on Qatar, the UAE ambassador to Russia said. The UAE and Saudi Arabia could ask their trading partners to choose between working with them or Doha, Omar Ghobash said in an interview with The Guardian newspaper.

“There are certain economic sanctions that we can take which are being considered right now,” he said. “One possibility would be to impose conditions on our own trading partners and say you want to work with us then you have got to make a commercial choice,” he said.

He said the expulsion of Qatar from the GCC was “not the only sanction available”.

Mr Ghobash also told CNN that Gulf countries had been bold in pinpointing extremist figures in Qatar in a list published earlier this month.

The Qatari foreign minister is also in Washington where he held talks with Mr Tillerson on Tuesday, shortly before the US secretary of state met with Kuwaiti minister of state for cabinet affairs Sheikh Mohammad Abdullah Al Sabah whose country has taken on the role of mediator in the dispute.

The list of demands “is contrary to the principles that govern international relations because you can’t just present lists of demands and refuse to negotiate”, the Qatari foreign minister said on Wednesday.

But Dr Gargash stood firm in his comments on Twitter.

“We have long suffered [Qatar’s] conspiracy against our stability and witnessed its support for ideologies that aim to sow chaos in the Arab world. Enough. Return to reason,” he wrote.

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* with additional reporting by Agence France-Presse

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Annex 19

O. Dörr & K. Schmalenbach, eds., *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018), pp. 559–624

Oliver Dörr • Kirsten Schmalenbach
Editors

Vienna Convention on the Law of Treaties

A Commentary

Second Edition

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Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

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Annex 19

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A. Purpose and Function

1 No legal text drafted by man can possibly be perfect in a way that it never gives rise to any doubt as to its scope or actual meaning. That is why every legal text, on the international as well as on the national level, needs to be interpreted by those working with it. The application of a legal rule in practice presupposes that the person applying it has got a certain understanding of its scope, contents and relevance, thus **interpretation is indispensable** not only for understanding a rule, but also for the process of applying or implementing it. Since the most important rules of international law are today laid down in treaties, the interpretation of treaties has become of utmost significance for the practice of international law.

2 Interpretation is the process of **establishing the true meaning** of a treaty. The VCLT rules on interpretation, it is rightly said, reflect an attempt to designate the elements to be taken into account in that process, and to assess their relative weight in it, rather than to describe, let alone prescribe, the process of interpretation itself.[1] Art 31 in laying down the so-called general rule of interpretation formulates a couple of generally accepted principles on the elements and means of treaty interpretation. These principles are mostly drawn from international judicial and arbitral practice, as it had developed since the late nineteenth century, and they were adopted by the ILC as a pragmatic compromise avoiding to follow one particular doctrine or theory of treaty interpretation. Also, since it considered the interpretation of documents to be to some extent an art, not an exact science, the Commission disavowed the idea of proposing an elaborate code or canon of interpretation, but deliberately confined itself to **some fundamental rules** recourse to which is, moreover, discretionary rather than obligatory.[2]

3 The task of interpretation is, as *McNair* put it, "giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances."[3] If thus interpretation is always directed at bringing to bear the intention of the parties, it can only do so to the extent that that intention has found adequate expression in the text of the treaty. Also, the other way round, the wording of a treaty has in the **textual approach** followed by Art 31 para 1 the prime role in interpretation because it is presumed to be an authentic expression of the intention of the parties.[4] This is confirmed in the ICJ practice when the Court points out that interpretation must be based "above all upon

[1] *Sinclair* (1984), p. 117.

[2] *Cf* Final Draft, Introductory Commentary to Arts 27–28, 218, para 4.

[3] *McNair* (1961), p. 365 (emphasis omitted).

[4] Final Draft, Commentary to Art 27, 220, para 11.

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the text of the treaty".[5] To be ascertained by interpretation is thus the intention in the sense of the true meaning of the treaty rather than the intention of the parties distinct from it.[6]

4 On the other hand, the text of a treaty as it stands since the time of its conclusion is not all that matters for an interpretation *lege artis*. Art 31 para 3 requires taking account of subsequent developments, agreements between the parties and practice in applying the treaty, and thus seems to focus on the **current consensus of the parties** in understanding the treaty. That consensus, which exists at the time of interpretation, may in some cases even override the original understanding of the text of the treaty, which prior to the subsequent developments may have appeared perfectly clear.

5 In order to structure the process of interpretation, Art 31 is designated to contain 'the general rule' of treaty interpretation. The singular mode emphasizes that the provision **contains one single rule**, that contained in para 1, and that its three main elements, wording, context and object and purpose, as well as the guiding principle of good faith, constitute integral parts of that rule and have to be applied in a single combined operation.[7] Art 31 paras 2 and 3 specify what is meant by "context" and are thus closely linked to para 1. Both provisions may appear to draw a distinction between intrinsic and extrinsic means of interpretation: para 2 sets out certain integral elements of the context rule, as it lists what is "comprised" by the context, whereas para 3, rather than designating yet other elements of context, lists interpretative means to be used along with the context. However, despite that different wording, both paragraphs are designed to incorporate the elements of interpretation set out therein into the general rule contained in para 1.[8] Art 31 para 4 contains an exception to para 1 for cases where the parties have agreed, even implicitly, to replace the ordinary meaning of a term contained in a treaty provision by a special meaning.

6 It is by now generally recognized that the provisions on treaty interpretation contained in Arts 31 and 32 **reflect pre-existing customary international law**. For many years now, the ICJ has applied the rules of interpretation laid down in the Convention as codified custom to virtually every treaty that came before it.[9] The first explicit endorsement of the customary character by the Court seems to have been in the 1991 judgment on the *Arbitral Award of 31 July 1989* (*Guinea Bissau v Senegal)*, where the Court stated that the pre-existing principles of treaty interpretation

> "are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point."[10]

[5] *Cf eg* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279, para 100.

[6] *Gardiner* (2015), p. 6.

[7] Thus Final Draft, Commentary to Arts 27–28, 219–220, para 8.

[8] Final Draft, Commentary to Arts 27–28, 220, para 8.

[9] This process of growing acceptance was already aptly described by *Torres Bernárdez* (1998), p. 721 *et seq*.

[10] ICJ *Arbitral Award (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53, para 48.

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Affirmations to the same effect can be found throughout the subsequent jurisprudence of the Court, with the words becoming more sweeping in more recent cases.[11] Despite the hesitation seemingly expressed in the quoted phrase of 1991 ("in many respects"), the ICJ never attempted to differentiate between rules contained in Arts 31 and 32 that are and those that are not binding customary law. While in practice, the Court often relied only on the first paragraph of Art 31, it also had the opportunity to confirm the customary law character of para 3[12] and even that of para 3 lit c[13] of that article. Although, at first, it hardly ever mentioned Art 33 in this context, the Court occasionally applied the rules laid down in that provision as equally reflecting customary international law.[14] The view of the ICJ that the Vienna rules of interpretation are without any distinction universally binding as customary international law is **widely shared by other international courts**, such as ITLOS,[15] the ECtHR,[16] the ECJ[17] and the dispute settlement bodies

[11] *See eg* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 18; *LaGrand* [2001] ICJ Rep 466, para 99; *Avena Case* [2004] ICJ Rep 12, para 83; *Construction of a Wall* [2004] ICJ Rep 136, para 94; *Genocide Case* [2007] ICJ Rep 43, para 160; *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 47; *Pulp Mills* [2010] ICJ Rep 14, para 65; *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3, para 57; *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, para 33; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 63.

[12] *Cf* ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 48; *Sovereignty over Pulau Ligitan and Pulau Sipadan* [2002] ICJ Rep 625, para 37; *Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, para 112.

[13] *Cf* ICJ *Oil Platforms* (Merits) [2003] ICJ Rep 161, para 41.

[14] *Cf* ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 25; *LaGrand* [2001] ICJ Rep 466, para 101.

[15] ITLOS (Seabed Disputes Chamber) *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, para 57.

[16] For the first time in ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 29 (1975); later *eg* in *Loizidou v Turkey* (GC) (Merits) App No 15318/89, ECHR 1996-VI, para 43; *Litwa v Poland* App No 26629/95, ECHR 2000-III, para 57; *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 55; *Mamatkulov and Askarov v Turkey* (GC) App No 46827/99 and 46951/99, ECHR 2005-I, para 111. In more recent decisions the Court simply, and explicitly, draws on Arts 31 to 33 VCLT in interpreting the European Convention, thereby necessarily implying the customary character of the former, *cf Saadi v United Kingdom* (GC) App No 13229/03, 29 January 2008, paras 61–62; *Demir and Baykara v Turkey* (GC) App No 34503/97, 12 November 2008, para 65; *Al-Saadoon and Mufdhi v United Kingdom* App No 61498/08, 2 March 2010, para 126; *Hirsi Jamaa et al v Italy (GC)* App No 27765/09, ECHR 2012-II, para 170; *Hassan v United Kingdom (GC)* App No 29750/09, ECHR 2014-VI, para 100.

[17] The ECJ usually refers to the rules of Vienna Convention when it interprets agreements of the European Community/Union, *cf* ECJ *Opinion 1/91* [1991] ECR I-6079, para 14; *Metalsa* C-312/91 [1993] ECR I-3751, para 12; *El-Yassini* C-416/96 [1999] ECR I-1209, para 47; *Jany* C-268/99 [2001] ECR I-8615, para 35; *Brita* C-386/08 [2010] ECR I-1289, paras 41–42. Explicitly labelling Art 31 a codification of general international law ECJ *Axel Walz* C-63/09 [2010] ECR I-4239, para 23.

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of the WTO,[18] as well as by many arbitral institutions[19] and some national courts.[20] Finally, the customary character of the Vienna rules has by now found expression in treaty practice itself.

> *Eg* in Art 14.16 of the Free Trade Agreement concluded on 16 October 2010 between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, directs the arbitration panel, that is to be established in case of disputes, to interpret the Agreement "in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties".[21] Similarly, with tiny, but significant alterations, Art 317 of the Trade Agreement between the EU and its Member States and Colombia and Peru (26 June 2012) directs the panel to "the customary rules of interpretation of public international law included in the Vienna Convention on the Law of Treaties".[22]

Therefore, if the rules laid down in Arts 31–33 reflect universal custom, they can in principle be **applied to all treaties outside the scope of the Convention**. This concerns, first, treaties concluded before the Convention entered into force (1980),[23] and, second, treaties between States that are not all parties to the **7**

[18] *Cf* the WTO Appellate Body *eg* in *Japan–Alcoholic Beverages* WT/DS 8, 10–11/AB/R, Part D, 10–12 (1996); *US–Hot-Rolled Steel* WT/DS184/AB/R, para 57 (2001); *US–Gambling* WT/DS 285/AB/R, para 159 (2005); *US–Stainless Steel (Mexico)* WT/DS344/AB/R, para 76 (2008); *China–Auto Parts* WT/DS339, 340, 342/AB/R, para 145 (2008); *China–Publications and Audio-visual Products* WT/DS363/AB/R, para 348 (2009); *US–Clove Cigarettes* WT/DS406/AB/R, para 258 (2012).

[19] *Cf eg* the *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, para 45; *Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands v France)* (2004) 25 RIAA 267, paras 58–62; Iran-United States Claims Tribunal *United States, Federal Reserve Bank of New York v Iran, Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 53; *Young Loan Arbitration on German External Debts (Belgium, France, Switzerland, United Kingdom and United States v Germany)* (1980) 59 ILR 494, para 16.

[20] *Eg* House of Lords (UK) *Fothergill v Monarch Airlines Ltd* [1980] UKHL 6, [1981] AC 251, 282 (Lord Diplock); *R (Adan) v Secretary of State for the Home Department* [2002] UKHL 67, [2001] 2 AC 477, 516 (Lord Steyn); Federal Constitutional Court of Germany (Chamber) [2015] NVwZ 361, para 37; for Australia and New Zealand Federal Court *Qenos Pty Ltd v Ship 'APL Sydney'* [2009] 187 FCR 282, para 11 (Finkelstein J); Court of Appeal *Lena-Jane Punter v Secretary for Justice* [2004] 2 NZLR 28, para 61 (Glazebrook J).

[21] [2011] OJ L 127, 6, at 68.

[22] [2012] OJ L 354, 3, at 93.

[23] *Cf eg* ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 20 (interpretation of treaty of 1890); *LaGrand* [2001] ICJ Rep 466, para 99 (ICJ Statute); *Avena Case* [2004] ICJ Rep 12, para 83 (Vienna Convention on Consular Relations); *Construction of a Wall Opinion* [2004] ICJ Rep 136, para 95 (Geneva Convention IV); *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 47 (treaty of 1885); *Pulp Mills* [2010] ICJ Rep 14, para 65 (treaty of 1975); *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3, para 57 (treaty of 1952); ITLOS (Seabed Disputes Chamber) *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, para 58 (UNCLOS).

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Convention,[24] which is also acknowledged by third States not parties to the Convention, such as the United States or France: the diplomatic practice of the US administration, as well as the overwhelming part of US court practice, reflect the view that the Arts 31–33 VCLT do express binding customary norms.[25] France has acknowledged the same at the occasion of arbitral proceedings.[26] Third, the Convention rules on interpretation can as customary rules be applied to instruments that due to their character fall outside the scope of the Convention, such as unwritten treaties or treaties between States and other entities treated as subjects of international law.

B. Historical Background and Negotiating History

8 Since interpretation is an indispensable operation in applying and implementing treaties, the problem of treaty interpretation has been part of international law for as long as treaties have been concluded between entities as subjects of international law. It is generally said that it was with *Grotius*, *Pufendorf* and *Vattel* in the seventeenth and eighteenth centuries that the **first efforts** were made to identify detailed rules for treaty interpretation and to shape them into codes.[27] Increasing resort to arbitration from the late nineteenth century onwards resulted in a growing repository of decisions interpreting treaties, while interpretative practice on the universal level gained momentum with the **case law of the PCIJ**. Its approach to treaty interpretation foreshadowed several elements of what later became the rules of the VCLT. Those elements included, *eg*, the natural meaning of terms reflecting their ordinary usage,[28] taking into account as context other provisions of the same treaty and provisions of similar treaties,[29] considering the manner in which a treaty has been applied,[30] the historical development of the particular area of law,[31] the nature and purpose of treaty clauses,[32]

[24] *Cf* explicitly ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 18; *Sovereignty over Pulau Ligitan and Pulau Sipadan* [2002] ICJ Rep 625, para 37; *Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, para 112.

[25] *Cf* the references given by *Criddle* (2004), pp. 443–447.

[26] *Cf Audit of Accounts Between the Netherlands and France in Application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976 (Netherlands v France)* (2004) 25 RIAA 267, para 57.

[27] *Gardiner* (2015), p. 58.

[28] *For example,* PCIJ *Exchange of Greek and Turkish Populations* PCIJ Ser B No 10, 20 (1925); *Polish Postal Service in Danzig* PCIJ Ser B No 11, 37 (1925); *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 49 (1933).

[29] *Cf eg* PCIJ *Competence of the ILO in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* PCIJ Ser B No 2, 23 (1922); *SS 'Wimbledon'* PCIJ Ser A No 1, 23 and 25–28 (1923).

[30] *Cf* PCIJ *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Have Passed into the Polish Service, Against the Polish Railways Administration)* PCIJ Ser B No 15, 18 (1928).

[31] *Cf* PCIJ *The Factory at Chorzów (Indemnities)* (Jurisdiction) PCIJ Ser A No 9, 24 (1927).

[32] *Ibid* 24–25.

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the supplementary value of preparatory work[33] or the harmonization of different language versions of a treaty.[34]

9 One of the first well-known efforts in codifying the law of treaties was undertaken under the auspices of the Harvard Law School and resulted in the **Harvard Draft Convention** on the Law of Treaties published in 1935.[35] It contained not only proposed provisions on interpretation but also detailed commentaries expounding and analyzing legal literature and case law on the subject.[36] Its provision on interpretation (Art 19) was based on a rigorous teleological approach in that it placed major emphasis on achieving the "general purpose which the treaty is tended to serve".[37] In order to determine that purpose, several elements were to be considered, such as the "historical background of the treaty, *travaux préparatoires*", "the circumstances of the parties at the time the treaty was entered into", "the subsequent conduct of the parties" in applying the treaty and "the conditions prevailing at the time interpretation is being made".

10 Under the UN Charter, the **ICJ in its early years** developed its techniques of treaty interpretation mainly by building on the jurisprudence of the PCIJ, but at the same time extending and refining the main principles. In his famous analysis *Fitzmaurice* deduced **six major principles** from the Court's case law during the 1950s[38]: according to the *principle of actuality or textuality,* treaties are to be interpreted as they stand, and on the basis of their actual texts. This maxim is as fundamental as the *principle of the natural and ordinary meaning* which the Court formulated for the first time in the *Competence of Admission* case:

> "The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur."[39]

This preference for the natural and ordinary meaning of the terms of a treaty can be found in several of the Court's early cases.[40] In the quoted passage, the ICJ, by pointing to the context of the treaty, also underlined the *principle of integration*, *ie* that a treaty must always be read as a whole. The *principle of effectiveness* according to which treaties are to be interpreted with reference to their declared or apparent objects and purposes, was applied by the Court at many occasions, among the first being the *Corfu Channel* and the *Reparation for Injuries* cases. While in the former, the Court, referring to the case law of the PCIJ, held quite generally that

[33] *Cf eg* PCIJ *'Lotus'* PCIJ Ser A No 10, 16–17 (1927).

[34] *Cf* PCIJ *Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 19 (1924).

[35] *Cf* Harvard Draft (1935) 29 AJIL Supp, 657 *et seq*.

[36] Harvard Draft 937–977.

[37] Harvard Draft 661.

[38] *Cf Fitzmaurice* (1951), pp. 9–22; *Fitzmaurice* (1957), pp. 210–227.

[39] ICJ *Second Admissions Case* [1950] ICJ Rep 4, 8.

[40] *Cf eg* ICJ *Interpretation of Peace Treaties (Second Phase)* [1950] ICJ Rep 221, 227; *Asylum Case* [1950] ICJ Rep 266, 279.

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> "[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect,"[41]

in the latter, it inferred a certain status and capacity of the United Nations Organization from the fact that without them, it could not discharge the functions it was clearly intended to have.[42] That object and purpose rule was affirmed and applied in several other of those early cases.[43] A further principle clearly applied very early by the ICJ is that of *subsequent practice*, *ie* the Court looked at the way in which a treaty has actually been applied or operated by its parties[44] or by organs authorized to do so.[45] The sixth principle which *Fitzmaurice* proposed to extract from the Court's early case law was that of *contemporaneity*, *ie* that treaty terms must be interpreted according to the meaning which they possessed at the time of its conclusion. It had been applied rather prominently in the *Morocco* case.[46]

11 The formulation of these six principles had considerable influence on the later work of the ILC on the law of treaties, as **SR *Waldock,*** the first and only of the four Special Rapporteurs on the law of treaties who in this function took up the subject of interpretation, considered them as an important source of inspiration and introduced them in his work on the topic.[47] The provisions on treaty interpretation, which he **proposed in 1964,** corresponded to a large extent to the principles formulated by *Fitzmaurice*. *Waldock*'s Draft Art 70 para 1 combined four principles in one rule, those of ordinary meaning, context, contemporaneity and of good faith. As subsidiary means of interpretation, *Waldock* proposed recourse to the object and purpose of the treaty, the preparatory work and the subsequent practice of the parties.[48] Instruments drawn up in connexion with the conclusion of the treaty were to be considered part of the context, rather than mere preparatory work (Draft Art 71 para 1). The rule of effectiveness was laid down in a separate provision (Draft Art 72) as being subject to the ordinary meaning and the object and purpose of a treaty, thus indicating its proper limits, or, as *Waldock* pointed out in his commentary, containing it "within the four corners of the treaty", still leaving room for some legitimate measure of teleological interpretation.[49] Finally, *Waldock* drafted a separate provision (Draft Art 73) to the effect that treaty interpretation must "take

[41] ICJ *Corfu Channel* [1949] ICJ Rep 4, 24.

[42] *Cf* ICJ *Reparation for Injuries* [1949] ICJ Rep 174, 179 *et seq*.

[43] *Cf eg* ICJ *Genocide Convention Opinion* [1951] ICJ Rep 15, 24; *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 196.

[44] *Cf eg* ICJ *South West Africa Opinion* [1950] ICJ Rep 128, 135–136; *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 210–211.

[45] *Cf eg* ICJ *Second Admissions Case* [1950] ICJ Rep 4, 9; *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 160 and 165.

[46] *Cf* ICJ *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 189.

[47] *Cf Waldock* III 55–56, para 12.

[48] *Waldock* III 52 (Draft Art 70, para 2, Draft Art 71, para 2).

[49] *Waldock* III 61, para 30.

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account" (not more than that!) of possible alterations in the legal relations between the parties.

Although in the view of SR *Waldock,* the inter-temporal aspect of interpretation (contemporaneity) was simply one of the conditions for determining the natural and ordinary meaning,[50] and indeed a matter of common sense,[51] it was deleted from the draft during the **discussion in the ILC**, as it was thought that the correct application of the temporal element would normally be indicated by the interpretation in good faith.[52] Also, the rule of effectiveness was dropped as a separate article, as the majority in the Commission considered it to be included in the principle of good faith and the object and purpose rule.[53] In reaction to certain comments by governments, the Commission emphasized that it considered the process of interpretation a unity and that laying down various rules on interpretation did not mean establishing any legal hierarchy among them.[54] **12**

The **Vienna Conference** adopted the ILC's proposals on treaty interpretation with only minor changes of drafting and one of substance, which was inserting what is now Art 33 para 4. There was considerable debate in the Committee of the Whole on proposals to amalgamate the general rule of interpretation and that on supplementary means into a single provision, but those proposals gained little support.[55] **13**

C. General Issues of Treaty Interpretation

I. Interpretation Is Always Required

Every treaty needs interpretation and is open to it. Even if its scope and the meaning of its terms may appear evident and clear, this is a result of an interpretative operation. Interpretation is thus **not a secondary process**, which only comes into play when it is impossible to make sense of the plain terms of a treaty,[56] and it is not superfluous only because the relevant words in their natural and ordinary meaning seem to make sense in their context.[57] This argument, even if it goes back to a famous dictum of *Emer de Vattel*,[58] is circular, because to know whether the wording is clear or 'makes sense' presupposes a process of interpretation and **14**

[50] *Waldock* III 56, para 15.

[51] *Waldock* VI 94, 96, para 7.

[52] *Cf Waldock* VI 94, 97, para 13; Final Draft, Commentary to Art 27, 222, para 16.

[53] *Cf* the debate in [1954-I] YbILC 275, 288–291.

[54] *Cf* Final Draft, Commentary Arts 27–28, 219–220, paras 8–9.

[55] UNCLOT I 191–193; *Gardiner* (2015), pp. 78–79.

[56] This was the view of *McNair* (1961), p. 365, n 1.

[57] Referring to the well-known phrase in ICJ *Second Admissions Case* [1950] ICJ Rep 4, 8: "If the relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter".

[58] *de Vattel* (1758), § 263: "La première maxime générale sur l'interprétation est qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation."

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cannot, therefore, preclude that operation. Whenever a subject of international law invokes, applies or goes about implementing a treaty, it can only do so on the basis of a certain understanding of its terms, *ergo* on the basis of an interpretation. As *Schwarzenberger* rightly said:

> "Any application of a treaty, including its execution, presupposes [...] a preceding conscious or subconscious interpretation of the treaty."[59]

II. The Points of Reference for Interpretation

15 The search for the true meaning of a treaty can have very different objects. Considering the questions that can in practice arise with regard to the legal effects of a treaty, we might *grosso modo* distinguish **four points of reference** for the process of treaty interpretation: interpretation can be directed at establishing the treaty-character of a document, the scope and the contents of a treaty and its effects in the internal law of its parties. Since neither the Convention rules nor customary international law appears to contain any distinction in this respect, the same rules and methods apply to all those angles of interpretation.

16 First, it may be established through interpretation whether a document is a treaty in the sense of the VCLT at all, *eg* whether the common will expressed is meant by the parties to be binding (→ Art 2 MN 30–34). Secondly, the scope of a treaty can be ascertained by applying the rules of interpretation, that is to whom, to what situations and from which moment in time are its provisions meant to apply. Thirdly, the normative substance of a treaty, *ie* the rights and obligations of its parties, or the rules of the objective regime set up by the treaty, can be determined through interpretation. Fourthly and finally, we may enquire whether treaty provisions are suited to be directly applicable in the legal order of the parties to the treaty, and whether they demand a certain rank in that internal legal order. If the treaty can in the end develop direct effect, preference must, of course, be determined according to the rules of that internal order itself.

III. Who Is Competent to Interpret a Treaty?

17 The question of who is competent to interpret a treaty is not dealt with by the VCLT, although the issue had been raised in the ILC's discussion on the topic.[60] It had not been taken up by the Commission, probably because the answer is all too obvious: since interpretation is necessarily implied in any act of applying or implementing a treaty (→ MN 14), **every person or organ concerned with a treaty** is by necessity competent to interpret it. Since the international legal order is

[59] *Schwarzenberger* (1968), p. 8. Similarly *Sorel and Boré* (2011), Art 31 MN 3.

[60] *Cf Tsuruoka* [1964-I] YbILC 280, para 72.

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in principle still a decentralized system[61] that allows every subject of law to apply the relevant norms of international law pertaining to it, it is also an open system of treaty interpreters. The latter will very often be national courts and authorities, since due to their specific contents, many treaties are likely to be applied—and thus interpreted—chiefly within national legal systems.[62] Treaties concluded as constituent instruments of international organizations or within such organizations will regularly be applied—and thus interpreted—by the competent organs of those organizations.

Quite a few treaties provide that disputes about their interpretation or application may be referred to settlement before an international court or tribunal. Some treaties establish a **permanent body other than a tribunal** with the (explicit or implicit) power to interpret the treaty. **18**

Eg the International Convention on the Harmonized System, adopted within the World Customs Organization in 1983 (as amended in 1986),[63] provides for "Explanatory Notes, Classification Opinions or other advice as guides to the interpretation of the Harmonized System" (Art 7) and for "recommendations to secure uniformity in the interpretation and application of the Harmonized System" (Art 8) to be prepared by the Committee and to be approved by the Council. Pursuant to Art 56 of the 1985 Convention Establishing the Multinational Investment Guarantee Agency (MIGA)[64], any question of interpretation of the provisions of the Convention shall be submitted to the Board for its decision and to the Council for final decision. The 1989 European Transfrontier Television Convention empowers in Art 21 lit c the Standing Committee to "examine, at the request of one or more parties, questions concerning the interpretation of the Convention."[65] Art 45 of the Agreement on the New Development Bank, concluded between the BRICS countries on 15 July 2014,[66] provides that "any question of interpretation … shall be submitted to the Board of Directors for decision": any interpretative decision may be submitted to the Board of Governors whose decision shall be final. Art 26.1 of the Comprehensive Economic and Trade Agreement (CETA), concluded between the EU and its Member States and Canada in 2016, establishes a Joint Committee which is supposed to decide on "any issue relating to the interpretation of the agreement".

In much strikter terms Art IX para 2 of the 1994 WTO Agreement[67] provides that "the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements". However, as the Appellate Body held in *US–Clove Cigarettes*, the pervasive legal effect of those multilateral interpretations presupposes that their adoption complies with certain

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[61] *Cf Malanczuk* (1997), pp. 3–7.

[62] Obvious examples are private law conventions, but also treaties engaging domestic procedures such as those on extradition, double taxation or State immunity. On treaty interpretation in national legal systems, see *Gardiner* (2015), pp. 143–157.

[63] To be found at www.wcoomd.org. Accessed 22 November 2017.

[64] To be found at www.miga.org. Accessed 22 November 2017.

[65] UNTS 265.

[66] To be found at www.ndb.int. Accessed 22 November 2017.

[67] Agreement Establishing the World Trade Organization 1867 UNTS 154.

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> procedural requirements, such as that they must be adopted on the basis of a recommendation from the relevant Council.[68]

Those organs then regularly assume an authoritative role in determining the actual meaning of the treaty provisions, the more so when their decisions concerning the interpretation are given binding force in the treaty itself.[69] The consistent jurisprudence of an authorized tribunal or the practice of other organs in interpreting the treaty may in turn be considered subsequent practice for the purpose of interpretation.[70] In its decision in the *Diallo* case the ICJ explicitly acknowledged the weight which the jurisprudence of independent treaty bodies carries with regard to the interpretation of the treaties under which they are established, when it held:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question."[71]

19 Even if a separate treaty organ is set up with the power to interpret the treaty, it is merely the parties to a treaty themselves which can give an **authoritative or authentic interpretation** to the treaty. As the PCIJ pointed out in its *Jaworzina* opinion of 1923:

> "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body which has the power to modify or suppress it."[72]

Thus, as a consequence of their continuing right to modify the treaty by consent (→ Art 39 MN 1), the parties can always override any interpretation given by a treaty organ established for that purpose. The parties acting in consensus remain the masters of their treaty and can, therefore, determine its meaning with binding force.[73] This is why issues over treaty interpretation are commonly a matter for

[68] WTO Appellate Body *US–Clove Cigarettes* WT/DS406/AB/R, paras 250–255 (2012), reprinted at 51 ILM 759.

[69] As, for example, does Art 50 para 3 of the 2008 Protocol on the Statute of the African Court of Justice and Human Rights 48 ILM 317. Art 1131 para 2 of the North American Free Trade Agreement declares the interpretation by the Free Trade Commission of a provision of the Agreement to be binding on a tribunal established under its chapter 11.

[70] For the purpose of interpreting the UN Charter the ICJ regularly puts major emphasis on the practice of UN organs under it, → MN 86.

[71] ICJ *Diallo* [2010] ICJ Rep 639, paras 66–67.

[72] PCIJ *Question of Jaworzina (Polish–Czechoslovakian Frontier)* PCIJ Ser B No 8, 37 (1923).

[73] *Villiger* (2009), Art 31 MN 16.

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discussion, negotiation and agreement between the parties, and why subsequent practice and subsequent agreements among the latter is of utmost importance in establishing the true (current) meaning of a treaty. In some instances, it may be difficult to distinguish then between an agreed interpretation of a treaty and an (implicit) treaty amendment by agreement among the parties.

Resolutions of the UN Security Council raise particular issues of interpretation, since when adopted pursuant to Chapter VII of the UN Charter, they have a mandatory character and are binding upon all UN Member States (*cf* Arts 25 and 48 UN Charter). Does this mean that the Council is, as part of its function to maintain international peace and security, empowered to interpret the Charter with an authoritative effect, thus binding on the Member States and other UN organs? The text and concept of the Charter do not seem to corroborate such an understanding, since the Security Council is merely authorized to adopt binding 'decisions', *ie* measures in an individual case or situation, and not interpretative guidelines of a binding character. Nor does the mandate of the Security Council cover the authoritative interpretation of other treaties than the UN Charter. However, the interpretation which necessarily underlies every decision adopted under Chapter VII will always carry special weight for understanding the Charter because of the binding force of those decisions. **20**

Apart from their interpretative value, Security Council resolutions themselves are very often **the object of interpretation**. While in legal doctrine, it is usually thought to be convenient to basically interpret them in accordance with the rules of the VCLT,[74] international practice has been quite diverse on this point.[75] The ICJ accepted in its *Kosovo* opinion that Arts 31, 32 VCLT "may provide guidance" in this respect, but at the same time pointed to decisive differences between UNSC resolutions and treaties, which, in the Court's view, mean that the interpretation of those resolutions "require that other factors to be taken into account". In particular, the Court held that the interpretation of UNSC resolutions may require **21**

> "to analyse statements of representatives of SC members made at the time of their adoption, other resolutions of the SC on the same issue, as well as the subsequent practice of relevant UN organs and of States affected by those given resolutions."[76]

Other practical examples of SC resolutions being the object of interpretation are, of course, the **statutes of ICTY and ICTR**, both being contained in annexes to SC resolutions and both being interpreted by the Tribunals with explicit reference to Art 31 VCLT.[77] Also other secondary legal instruments, such as the Regulations

[74] *Gardiner* (2015), p. 128; *Wood* (1998), pp. 85–86; *Orakhelashvili* (2010), pp. 825–826. *Contra Papastravidis* (2007), pp. 89–94.

[75] See *eg* the account by *Brandl* (2015), p. 290 *et seq*.

[76] ICJ *Kosovo Opinion* [2010] ICJ Rep 403, para 94.

[77] *Cf eg* ICTY *Prosecutor v Aleksovski* (Appeals Chamber) IT-95-14/1-A, 24 March 2000, para 98; ICTR *Prosecutor v Bagosora et al* (Appeals Chamber) ICTR-98-37-A, 8 June 1998, paras 28–29.

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adopted by the Deep Seabed Authority under UNCLOS, are interpreted by the relevant instances according to the Vienna rules.[78]

IV. The Temporal Element of Interpretation

22 One of the most important general questions of treaty interpretation is to what moment in time the process of interpretation refers, *ie* the meaning of treaty provisions at what time it is trying to establish. Two different approaches can be distinguished in this respect: The **static approach** asks for the meaning of treaty provisions and the circumstances prevailing at the time of the conclusion of the treaty. It is also called the **principle of contemporaneity**, according to which the terms of a treaty are to be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded.[79] Opposed to that is the **dynamic approach**, very often also labelled 'evolutionary' interpretation, which seeks to establish the meaning of a treaty at the time of its interpretation. The temporal aspect of interpretation was discussed in the ILC but finally omitted from the adopted text (→ MN 13), so that Arts 31–33 VCLT do not address the issue explicitly.

23 Both temporal concepts can be found in international judicial practice, which, on the whole, seems to follow the **static approach as a basic rule** and as a particular application of the doctrine of inter-temporal law. As such, it has been applied by the ICJ at several occasions, *eg* when the Court looked into linguistic usages at the time when the treaty was concluded[80] or into the intention of the parties at that same moment in time.[81] Moreover, the approach figures very prominently in several arbitration cases.

> Thus, the **Eritrea-Ethiopia Boundary Commission** followed in its decision regarding delimitation of the border between the two countries the 'doctrine of contemporaneity', which it described as requiring "that a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded. This involves giving expressions (including names) used in the treaty the meaning that they would have possessed at that time."[82]

[78] Thus explicitly ITLOS (Seabed Disputes Chamber) *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, 1 February 2011, paras 59–60.

[79] Thus formulated by SR *Fitzmaurice* in his six principles (→ MN 11), reported in *Waldock* III 55, para 12.

[80] ICJ *Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 189; *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, paras 55–56.

[81] ICJ *Boundary Between Cameroon and Nigeria* [2002] ICJ Rep 303, para 59. See also *Namibia Opinion* [1971] ICJ Rep 16, para 53 (at the beginning).

[82] Eritrea–Ethiopia Boundary Commission *Delimitation of the Border Between Eritrea and Ethiopia* (*Eritrea v Ethiopia*) (2002) 25 RIAA 83, 110.

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In the words of SR *Waldock*, the requirement to interpret a treaty basically by reference to the linguistic usage current at the time of its conclusion is one both of common sense and good faith.[83] Similarly, the ICJ in its more recent decision on the *Dispute Regarding Navigational and Related Rights* pointed out that

> "[i]t is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention."[84]

24 As an exception to that rule, the **dynamic approach** is being used **for interpreting generic terms**, *ie* terms in a treaty whose content the Parties expected would change through time and which they, therefore, presumably intended to be given its meaning in light of the circumstances prevailing at the time of interpretation. This approach was for the first time applied by the ICJ in the *Namibia* opinion to the phrase "sacred trust of civilisation"[85] and in the *Aegean Sea Continental Shelf* case to the formula 'territorial status'.[86] Also, judicial practice in the WTO adopted the evolutionary method for interpreting concepts such as 'natural resources'[87] or 'sound recording' and 'distribution'.[88] More recently, the ICJ applied the dynamic method to the Spanish term 'comercio' and in a general statement underlined that

> "where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."[89]

In such instances, it is indeed in order to respect the common will of the parties that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.[90]

25 Viewed in the light of those examples, dynamic or evolutionary treaty interpretation appears in fact to be a **two-tier process**: first, it is to be established whether a term is meant by the parties to be interpreted in a dynamic manner. If no particular intention to this effect has been expressed, this must be taken to be the case if a concept is embodied in the treaty that is, from the outset, evolutive or dynamic. Apart from that, the determination that an evolutive interpretation is called for must

[83] *Waldock* VI 96, para 7.

[84] ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 63.

[85] ICJ *Namibia Opinion* [1971] ICJ Rep 16, para 53.

[86] ICJ *Aegean Sea Continental Shelf* [1978] ICJ Rep 3, para 77.

[87] *Cf* WTO Appellate Body *US–Shrimp* WT/DS58/AB/R, para 130 (1998).

[88] WTO Appellate Body *China–Publications and Audiovisual Products* WT/DS363/AB/R, para 369 (2009).

[89] ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 66. Confirmed in ICJ *Pulp Mills* [2010] ICJ Rep 14, para 204.

[90] *Ibid* para 64.

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result from the ordinary process of treaty interpretation on a case-by-case basis. Second, the term in question must be given the meaning, which it possesses at the time of interpretation, considering the development of linguistic usage, international law and other relevant circumstances up to that moment.

26 A particular application of the dynamic approach lies at the heart of the established jurisprudence of the ECtHR to consider **the ECHR a 'living instrument'** and, as a consequence, to interpret it "in the light of present-day conditions".[91] Here, the dynamic approach to treaty interpretation, rather than being founded on—and confined to—a certain category of terms used in the treaty, follows from the quasi-constitutional character of the ECHR and the need to receive directions from it for effectively implementing human rights guarantees in a modern world.[92] However, the Court also acknowledged that this approach to the Convention and its Protocols has its limits, because it "cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset".[93]

27 The dynamic approach to the interpretation of treaties must be distinguished from the **use of dynamic means of interpretation**. Some of the methods provided for in Art 31 are *per se* dynamic, such as subsequent agreements (para 3 lit a) or subsequent practice (para 3 lit b), but they do not as such determine to what moment in time the interpretation in question refers. The practice of the ICJ shows that dynamic means of interpretation can also be used for applying the static approach, *ie* to establish the meaning of treaty provisions at the time of their conclusion. For example, in the *Corfu Channel* case, the Court held that:

> "The subsequent attitude of the Parties shows that it was not their intention [. . .]."[94]

Also, in the *Kasikili/Sedudu Island* case, the ICJ applied the static approach by using dynamic means, when it established the historical intentions of the parties to a treaty concluded in 1890 by "taking into account the present-day state of scientific knowledge".[95] Thus, the interpretative means used do not in principle prejudice the temporal point of reference of the process of interpretation.

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[91] *For example,* ECtHR *Tyrer v United Kingdom* App No 5856/72, Ser A 26, para 31 (1978); *Marckx v Belgium* App No 6833/74, Ser A 32, para 41 (1979); *Loizidou v Turkey* (Preliminary Objections) App No 15318/89, Ser A 310, para 71 (1995); *Öcalan v Turkey* App No 46221/99, 12 March 2003, para 193; *Mamatkulov and Askarov v Turkey* (GC) App No 46827/99 and 46951/99, ECHR 2005-I, para 121; *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, para 68; *Hirsi Jamaa et al v Italy* (GC) App No 27765/09, ECHR 2012-II, para 175; *X et al v Austria* (GC) App No 19010/07, ECHR 2013-II, para 139.

[92] On the dynamic interpretation of the ECHR *cf Cremer* (2013), paras 35–118.

[93] ECtHR *Johnston et al v Ireland* App No 9697/82, Ser A 112, para 53 (1986); *Emonet et al v Switzerland* App No 39051/03, 13 December 2007, para 66.

[94] ICJ *Corfu Channel* [1949] ICJ Rep 4, 25.

[95] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 20.

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V. Does One Size Fit All?

Every treaty needs interpretation, but do the same rules of interpretation apply to all types of treaties? Or are there **special rules for certain kinds** of them? Although Arts 31–33 do not contain any hint to this effect, it is often argued that the general rules of interpretation undergo some modifications when they are applied to certain types of treaties.[96] If, for example, States assume obligations in relation to one another, but the beneficiaries, or even the true addressees, of the treaty provisions are individuals (**human rights treaties**), that special feature and the latter's interests must be taken into account in the process of interpretation.[97] However, it is submitted that this does not require different rules, but simply a reasonable understanding of the "object and purpose" of the respective treaty when applying the general rule laid down in Art 31.[98] **28**

Differing rules may be applicable to treaties operating as the **constituent instrument of an international organization** or concluded within such an organization. Art 5 VCLT offers some flexibility in this respect, as it holds the rules of the Convention to be applicable to those kinds of treaties "without prejudice to any relevant rules of the organization". As the ICJ pointed out in its *Nuclear Weapons (WHO)* opinion: **29**

> "Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret constituent treaties."[99]

Nevertheless, as a matter of principle, the general rule of interpretation applies to constituent treaties, subject perhaps to three modifications that have arisen in practice:[100] first, in interpreting the constituent document of an international organization, the effective fulfillment of the organization's functions is of major importance; thus the **object and purpose rule** will in these cases be geared almost exclusively towards the effective performance of the organization and its organs. This became apparent, for example, in the ICJ's jurisprudence with regard to the powers of UN organs,[101] and it also lies at the bottom of the case law of the ECJ **30**

[96] *Gardiner* (2015), p. 22.

[97] The ECtHR regularly points out that, when interpreting the ECHR, "the Court must be mindful of the Convention's special character as a human rights treaty", but so far no real consequences seem to follow from that, *cf eg* ECtHR *Loizidou v Turkey* (GC) (Merits) App No 15318/89, ECHR 1996-VI, para 43; *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 55.

[98] In a similar vein *Çali* (2012).

[99] ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 19.

[100] See also *Brölmann* (2012).

[101] *Cf* ICJ *Reparation for Injuries* [1949] ICJ Rep 174, 182–183; *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 168.

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concerning the functioning of the European Union (*effet utile*).[102] Second, the **subsequent practice of the organization** itself, rather than that of its Member States, in applying the constituent treaties usually proves to be of critical importance for the latter's interpretation. In some cases, the result reached by the interpreting court even seems to be exclusively based on that practice, especially when it tends to deviate from the wording of the treaty. Examples for this can be found in the *Namibia* and the *Construction of a Wall in the Occupied Palestinian Territory* opinions of the ICJ.[103] Thirdly and finally, if an organ has been empowered to interpret the constituent treaty of the organization, it usually tends to emphasize the need for an **autonomous interpretation**, *ie* one that is independent from national legal concepts, traditions and terminologies. A prime example for this approach to treaty interpretation is, of course, the jurisprudence of the ECJ[104] which in recent years seems to regard the autonomous interpretation of the European Union treaties as a constitutional principle of the Union itself.[105]

31 Finally, it is submitted that the general rule of interpretation in principle also applies to the **interpretation of interpretation clauses**, *ie* to treaty provisions that stipulate themselves rules for the interpretation of the treaty they are contained in.

> An example is Art 2 of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)[106] which underlines that in the interpretation of the Convention regard must be had to its international character, to the need of its uniform application and to the observance of good faith in international trade.

Depending upon the exact contents of the provision in question, it may in certain cases be taken to be *lex specialis* vis-à-vis the rules of the VCLT, and thus effectively prevent the latter from applying to the treaty in question. But in order to establish just that, every interpretation clause would need to be interpreted, thus be subjected to the application of the rules laid down in Arts 31–33 VCLT. Also, treaty provisions which explicitly lay down the purpose of their treaty[107] can be

[102] *Cf Brown and Kennedy* (2000), p. 343. *Hartley* (2010), p. 72 calls this approach "decision-making on the basis of judicial policy".

[103] ICJ *Namibia* [1971] ICJ Rep 16, para 22; *Construction of a Wall* [2004] ICJ Rep 136, paras 27–28. With a contrary result, the ICJ based in *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 27 the denial of an extensive interpretation, *inter alia,* on a "consideration of the practice of the WHO".

[104] *Barents* (2004), p. 289.

[105] *Cf eg* ECJ *Linster* C-287/98 [2000] ECR I-6917, para 43; *Jaeger* C-151/02 [2003] ECR I-8389, para 58; *Opinion 1/09 (European Patents Court)* [2011] ECR I-1137 paras 67 and 76; *Opinion 2/13 (Accession to ECHR)* ECLI:EU:C:2014:2454, paras 183-186; CFI *Hosman-Chevalier v Commission* T-72/04 [2005] ECR II-3265, para 40; EU Civil Service Tribunal *Klein v Commission* F-32/08 [2009] FP-I-A-1-5, FP-II-A-1-1320, paras 35–36.

[106] Adopted by UNGA Res 63/122, 11 December 2008, UN Doc A/C.6/63/L.6.

[107] Such as Art II of the 1975 Convention for the Establishment of a European Space Agency 1297 UNTS 186; Art 1 of the 2000 UN Convention Against Transnational Organized Crime 2225 UNTS 209; Art 1 of the 2003 UN Convention Against Corruption 2349 UNTS 41; Art 1 para 1 of the 2006 UN Convention on the Rights of Persons with Disabilities, UNGA Res 61/106, 13 December 2006, UN Doc A/Res/61/106.

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interpreted in accordance with the general rules, although in this case, the object and purpose test would probably be rather meaningless. In any case, such a **purpose clause** cannot prevent the treaty interpreter from establishing, by applying the general rule of interpretation, whether the purpose of the treaty has been laid down accurately and what exactly the stipulated purpose means.

VI. Rules of Interpretation Outside the VCLT?

There are much more rules of treaty interpretation applied in international practice and diplomacy than are codified in Arts 31–33 VCLT. The Convention's rules of interpretation are **not exclusive** in a way that they prevent the interpreter from applying other principles compatible with the general rule laid down in Art 31. It is thus in his or her discretion to have recourse to established customary interpretation rules or at least to the wealth of material on treaty interpretation, which preceded the Convention.[108] The question seems in many cases to be whether the proposed rule of interpretation is in fact one that lies outside the Convention's system or whether it is encompassed by the latter's provisions. **32**

One of the traditional *formulae* of treaty interpretation is the principle ***in dubio mitius***, also called the **principle of restrictive interpretation**, according to which treaties are to be interpreted in favor of State sovereignty: where a treaty's provisions are open to doubt, the interpretation that entails the lesser obligation for sovereign States should be selected, and if an obligation is not clearly expressed, its less onerous extent is to be preferred.[109] The PCIJ applied that principle explicitly in the *'Wimbledon'* and *Free Zone* cases, when it interpreted limitations on sovereignty restrictively, and that only because of their limiting effect.[110] In the *River Oder* case, the Permanent Court was already much more reluctant and applied *in dubio mitius* as a subsidiary principle when it pointed out that **33**

> "it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favorable to the freedom of States."[111]

Traces of that approach can still be found in the case law of the WTO.[112] The ICJ, however, never adopted it, and also the PCIJ in *'Wimbledon'* emphasized clear limits to restrictive interpretation, when it felt "obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the

[108] *Gardiner* (2015), p. 57.

[109] *Cf* the explanation and references given by *Lauterpacht* (1949), p. 48 *et seq*.

[110] *Cf* PCIJ *SS 'Wimbledon'* PCIJ Ser A No 1, 24 (1923); *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A/B No 46, 167 (1932).

[111] PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* PCIJ Ser A No 23, 26 (1929).

[112] *Cf* WTO Appellate Body *EC–Hormones* WT/DS26 and DS48/AB/R, para 165 (1998); much more reluctant *China–Publications and Audiovisual Products* WT/DS363/AB/R, para 411 (2009).

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article and would destroy what has been clearly granted". Moreover, in a more recent decision, the ICJ made it very clear that a treaty provision, which has the purpose of limiting the sovereign powers of a State, must be interpreted like any other provision of a treaty,[113] thus there can be no such principle as *in dubio mitius* in treaty interpretation. It is not only of little value for treaty interpretation itself,[114] but, above all, does not constitute a rule of customary international law.

34 Another unwritten *topos* of interpretation that figures rather prominently in international practice is the **rule of effectiveness**, in view of its Latin origin also phrased as *ut res magis valeat quam pereat*. It says that treaty provisions are to be interpreted so as to give them their fullest weight and effect and in such a way that a reason and a meaning can be attributed to every part of the text.[115] The principle was applied already in the early jurisprudence of PCIJ[116] and ICJ[117] and has, according to the latter in *Fisheries Jurisdiction* (1998), "an important role in the law of treaties".[118] In its *CERD* case concerning Georgia and Russia, the ICJ applied the "well-established principle in treaty interpretation that words ought to be given appropriate effect" to the phrase "which is not settled" in Art 22 of the Convention and discarded a reading of that phrase which would render it meaningless and devoid of any effect.[119] In the judicial practice of the WTO, the principle is usually taken to prohibit the adoption of a reading of WTO provisions "that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[120]

> Note, however, that the rule of effectiveness does not carry much weight with regard to **declaratory treaty provisions**, which the parties adopted simply for the avoidance of doubt and not because they thought them to be necessary.[121]

However, effectiveness as an interpretative topos is not an isolated goal or concept, but is closely linked to the object and purpose of the treaty in question[122]:

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[113] ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 48.

[114] To this effect, *cf* also *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, para 53; Iran-United States Claims Tribunal *Federal Reserve Bank of New York v Iran, Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 67; *Bernhardt* (1999), p. 14.

[115] Thus described by *Fitzmaurice* in his six principles of interpretation (→ MN 10), reprinted in *Waldock* III 55, para 12.

[116] *Cf* PCIJ *Mavrommatis Palestine Concessions* PCIJ Ser A No 2, 34 (1924); *Free Zones of Upper Savoy and the District of Gex* PCIJ Ser A No 22, 13 (1929).

[117] → MN 10. *Cf* also ICJ *Anglo-Iranian Oil* [1952] ICJ Rep 93, 105; *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 160.

[118] ICJ *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, para 52.

[119] ICJ *Racial Discrimination Convention* (Preliminary Objections) [2011] ICJ Rep 70, paras 133–34.

[120] *For example* WTO Appellate Body *US–Gasoline* WT/DS2/AB/R, 21 (1996); Panel *Chile–Price Band System* WT/DS207/R, para 7.71 (2002).

[121] ICJ *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, para 41.

[122] See *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, para 49.

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it is the latter's fulfillment which is to be made possible or effectuated through interpretation. Thus, the principle of effectiveness is in fact but a specific application of the object and purpose test and the good faith rule and, therefore, an **integral part of the general rule of interpretation** laid down in Art 31.[123] As such, the principle has been applied by the ICJ, *eg*, in the *LaGrand* case when the Court determined the object and purpose of Art 41 ICJ Statute to be

> "to prevent the Court from being hampered in the exercise of its functions [. . .]."[124]

The same is true for the alleged rule that **exceptions** to a general rule have, for the reason alone of being an exception, **to be interpreted restrictively**. This interpretative *topos* can already be found in early international jurisprudence,[125] and is still being applied today.[126] Since the principle is meant to enhance the implementation, and thus the effectiveness of the general rule to which exceptions are being made in the treaty, it also constitutes a particular application of the object and purpose rule, relating to the *telos* of the general rule.[127] **35**

The ICJ in the *Fisheries Jurisdiction* case thought it possible that the ***contra proferentem*** **rule** "may have a role to play in the interpretation of contractual provisions", but denied its application to declarations of acceptance of the Court and reservations made thereto.[128] However, the rule according to which a text that is ambiguous must be construed against the party who drafted it (*verba ambigua accipiuntur contra proferentem)*, has not been very prominent in international practice[129] and in relation to treaties indeed does not appear to be very persuasive: treaties are usually the result of a common effort and the product of negotiations, they do not originate from drafts imposed by one party,[130] so there is no proper reason for holding the ambiguity of one of its elements against the party who introduced it into the negotiation process. **36**

D. Elements of Art 31

I. The General Rule (Para 1)

The general rule of treaty interpretation contained in Art 31 para 1 is **based on the textual approach**, *ie* on the view that the text must be presumed to be the authentic **37**

[123] *Cf* Final Draft, Introductory Commentary to Arts 27–28, 219, para 6.
[124] ICJ *LaGrand* [2001] ICJ Rep 466, para 102.
[125] *Cf* PCIJ *Nationality Decrees Issued in Tunis and Morocco* PCIJ Ser B No 4 25 (1923).
[126] *Cf* ECtHR *Litwa v Poland* App No 26629/95, ECHR 2000-III, para 59.
[127] *Heintschel von Heinegg* (2014), § 12 MN 19.
[128] ICJ *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432, para 51.
[129] The PCIJ relied on it once, but with regard to an instrument that was not an international treaty, *cf Payment in Gold of Brazilian Federal Loans Contracted in France* PCIJ Ser A No 21, 114 (1929).
[130] *Lauterpacht* (1949), p. 64.

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expression of the intentions of the parties. Consequently, the starting point of every interpretation is the elucidation of the meaning of the text,[131] rather than of any external will of the parties.

38 Art 31 para 1 contains **three separate principles** and combines them in one single rule of interpretation. The first, interpretation in good faith, flows directly from the rule *pacta sunt servanda* (Art 26). The second requires every interpretation to have recourse to the ordinary, as opposed to a special, meaning of the terms used in the treaty, and the third principle is that the ordinary meaning is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.[132] The general rule of interpretation does not describe some hierarchical or chronological order in which those principles are to be applied, but sets the stage for a **single combined operation** taking account of all named elements simultaneously (→ MN 5). As *Gardiner* aptly describes it:

> Any treaty provision "is to be read selecting the ordinary meaning for the words used. But finding the ordinary meaning typically requires making a choice from a range of possible meanings. The immediate and more remote context is the next textual guide, with good faith and the treaty's object and purpose as further aids to this phase of an exercise in interpretation."[133]

To the same effect, the WTO Appellate Body described the process of treaty interpretation as

> "an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise."[134]

1. Ordinary Meaning of the Terms

39 The first element of the general rule of interpretation requires giving an ordinary meaning to the "**terms of the treaty**". Considering the textual approach underlying the whole operation (→ MN 37), it seems quite natural that the "terms" to which the meaning is to be given refer to what has been written down by the parties, *ie* the words and phrases used in the treaty, rather than the bargain struck by the parties.[135] This is confirmed by Art 31 para 4 and Art 33 para 3 where "term(s)" is clearly being used with reference to the meaning of written language. Therefore, as the ICJ underlines in its jurisprudence, interpretation must be based "above all" upon the text of the treaty.[136]

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[131] Final Draft, Commentary to Art 27, 220, para 11.

[132] *Ibid* 221, para 12.

[133] *Gardiner* (2015), p. 222.

[134] WTO Appellate Body *China–Publications and Audiovisual Products* WT/DS363/AB/R, para 399 (2009).

[135] *Gardiner* (2015), p. 183.

[136] *Cf eg* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 41; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* [2004] ICJ Rep 279, para 100.

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The point of departure in the process of interpretation is the linguistic and grammatical analysis of the text of the treaty, looking for the **ordinary meaning**, *ie* the meaning that is "regular, normal or customary".[137] In this respect, account can be taken of the kind of treaty involved, thus the test is not so much any layman's understanding, but what a person reasonably informed on the subject matter of the treaty would make of the terms used. In order to establish that kind of meaning, international judicial bodies quite often turn to **dictionaries**, general or more specialized ones,[138] even though those typically aim to catalogue *all*—and not just the ordinary—meanings of words.[139] **40**

A consideration of the **grammatical form** of a treaty term encompasses the tense in which a specific provision has been phrased. Thus, the WTO Appellate Body has underlined the relevance of the use of present perfect tense: **41**

> "We agree with Chile that Article 4.2 of the Agreement on Agriculture should be interpreted in a way that gives meaning to the use of the present perfect tense in that provision – particularly in the light of the fact the most of the other obligations in the Agreement on Agriculture and in the other covered agreements are expressed in the present, and not in the present perfect, tense. In general, requirements expressed in the present perfect tense impose obligations that came into being in the past, but may continue to apply at present."[140]

In the *CERD case* (*Georgia v Russia*) the ICJ had to interpret the phrase "which is not settled" and, among others, referred to its grammatical form in the French version:

> "The Court also observes that, in its French version, the above-mentioned expression employs the future perfect sense, whereas the simple present tense is used in the English version. The Court notes that the use of the future perfect tense further reinforces the idea that a previous action (an attempt to settle the dispute) must have taken place before another action (referral to the Court) can be pursued."[141]

In determining the ordinary meaning of terms, two connected aspects, which have been mentioned earlier, must be taken into account: the **temporal aspect** of the ordinary meaning test refers to the question of static or dynamic interpretation (→ MN 22); except where the parties have used a generic term, interpretation must look for the ordinary meaning at the time the treaty was concluded. The **language aspect** follows from Art 33: each authentic treaty language has to be consulted for **42**

[137] *Gardiner* (2015), pp. 183–184.

[138] *Cf eg* ICJ *Oil Platforms* (Preliminary Objection) [1996] ICJ Rep 803, para 45; *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 30; ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 32 (1975); *Luedicke, Belkacem and Koç v Germany* App No 6210/73, 6877/75, 7132/75, Ser A 29, para 40 (1978); WTO Appellate Body in *Canada–Aircraft* WT/DS70/AB/R, para 153 (1999); *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R para 658 (2011).

[139] Critical, therefore, as to that approach the DS 2O Appellate Body in *US–Gambling* WT/DS285/AB/R, paras 164–167 (2005); *China–Publications and Audiovisual Products* WT/DS363/AB/R, para 348 (2009).

[140] WTO Appellate Body *Chile–Price Band System* WT/DS207/AB/R, para 206 (2002) (footnote omitted).

[141] ICJ *Racial Discrimination Convention* (Preliminary Objections) [2011] ICJ Rep 70, para 135.

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the ordinary meaning of the term at issue and each of them is of equal value, since in every authentic language, the term must in principle be considered to have the same meaning.

2. Context

43 The process of treaty interpretation is, of course, not a pure grammatical exercise. The general rule of interpretation laid down in Art 31 para 1 does not allow establishing an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted. Instead, the terms of a treaty have to be interpreted "in their context", which means that the interpreter of any phrase in a treaty has to look at the treaty as a whole and, as Art 31 paras 2 and 3 demonstrate, even beyond that. The systematic structure of a treaty is thus **of equal importance** to the ordinary linguistic meaning of the words used, in order to determine its true meaning, since, as the PCIJ had already pointed out, words obtain their meaning from the context in which they are used.[142]

44 The entire text of the treaty is **to be taken into account** as "context", including title, preamble and annexes (*cf* the chapeau of para 2) and any protocol to it, and the systematic position of the phrase in question within that ensemble. Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure or scheme of the treaty.

45 The relevance of the **title of a treaty** is demonstrated, for example, by the ICJ's reasoning in the *Oil Platforms* case:

> "For the meaning of the word 'commerce' in a bilateral treaty concluded by Iran and the US, the Court turned, *inter alia*, to the actual title of treaty which referred rather broadly to 'economic relations' and thereby suggested a wider reading of the term."[143]

46 The importance of **punctuation and syntax** can be seen in the *Aegean Sea Continental Shelf* case, where the ICJ had to deal with the French phrase "et, notamment," and explicitly pointed to the commas used.[144] The **structure of the sentence** was also relevant in *Land, Island and Maritime Frontier Dispute*, when an ICJ Chamber had to decide on its authority to delimit disputed maritime boundaries and, for that purpose, to interpret the phrase "to determine the legal situation". The Chamber held:

> "No doubt the word 'determine' in English (and, as the Chamber is informed, the verb 'determinar' in Spanish) can be used to convey the idea of setting limits, so that, if applied directly to the 'maritime spaces' its 'ordinary meaning' might be taken to include

[142] *Cf* PCIJ *Competence of the ILO* PCIJ Ser B No 2, 23 (1922). Adopted by the ICJ in *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 158.

[143] ICJ *Oil Platforms* (Preliminary Objection) [1996] ICJ Rep 803, para 47; also used as an example by *Gardiner* (2015), pp. 200–201.

[144] *Cf* ICJ *Aegean Sea Continental Shelf* [1978] ICJ Rep 3, para 53.

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> delimitation of those spaces. But the word must be read in its context; the object of the verb 'determine' is not the maritime spaces themselves but the legal situation of these spaces. No indication of a common intention to obtain a delimitation by the Chamber can therefore be derived from this text as it stands."[145]

47 The treaty as a whole is considered when the interpreter compares the **use of the same term elsewhere in the treaty** or **different phrases of the same treaty** dealing with the same issue in different wordings. The latter is what the Chamber did in the said decision when it pointed out:

> "The question must be why, if delimitation of the maritime spaces was intended, the Special Agreement used the wording 'to delimit the boundary line [. . .]' ('Que delimite la linea fronteriza [. . .]') regarding the land frontier, while confining the task of the Chamber as it relates to the islands and maritime spaces to 'determine [their] legal situation [. . .]' ('Que determine la situacion juridica [. . .]')."[146]

48 The treaty as a whole is also taken account of when it is established that other provisions of the same treaty have as a **necessary consequence or implication** a certain reading of the disputed term. The ICJ chose that line of argument in *Dispute Regarding Navigational and Related Rights* when it held that Costa Rica's right to the navigational use of the river included a minimal right of navigation in the villages along the river, including the use by official vessels, and concluded that from other provisions of the treaty than those on navigational rights.[147] Similarly, in *Questions of Mutual Assistance* the interpretation of Art 3 of the 1986 Convention on Mutual Assistance in Criminal Matters entailed that the provision be read in conjunction with Arts 1 and 2 of that Convention, which revealed that there may be exceptions in which the requested assistance may legitimately be refused.[148]

49 The **preamble** to a treaty, usually consisting of a set of recitals, may assist in determining the object and purpose of the treaty, for it is the normal place where the parties would embody an explicit statement to that effect. By stating the aims and objectives of a treaty, a preamble can thus be of both contextual and teleological significance. There are many examples in international jurisprudence of reference being made to the preamble of a treaty in order to elucidate the meaning of a particular provision.[149]

50 To take account of the position of a term or phrase in a treaty provisions means also that **considerations of textual logic** apply in establishing the ordinary

[145] ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1992] ICJ Rep 351, para 373.

[146] *Ibidem* para 374.

[147] ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, paras 77–79 and 84.

[148] ICJ *Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, para 123.

[149] *Cf eg* ICJ *Asylum Case* [1950] ICJ Rep 266, 282*; Rights of US Nationals in Morocco* [1952] ICJ Rep 176, 196; *Sovereignty over Pulau Ligitan and Pulau Sipadan* [2002] ICJ Rep 625, para 51; ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 34 (1975); WTO Appellate Body *US–Shrimp* WT/DS58/AB/R, para 129 (1998); *Chile–Price Band System* WT/DS207/AB/R, paras 196–197 (2002).

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meaning: thus, the ICJ considered it decisive in this regard if only one of several proposed readings allows the entire sentence in a treaty provision to be given a coherent meaning.[150] Whether or not a treaty provision can be given an ***a contrario* reading**, may also be determined by the context, for example if only one possible reading of the provision is reconcilable with the terms of another provision.[151]

51 Also, comparing the term in question with the **analogous wording of a related treaty** may assist in the contextual interpretation. The latter is aptly illustrated by the Chamber decision referred to above:

> "The same contrast of wording can be observed in Article 18 of the General Treaty of Peace, which, in paragraph 2, asks the Joint Frontier Commission to 'delimit the frontier line in the areas not described in Article 16 of this Treaty', while providing in paragraph 4, that 'it shall determine the legal situation of the islands and maritime spaces'. Honduras itself recognizes that the islands dispute is not a conflict of delimitation but of attribution of sovereignty over a detached territory. It is difficult to accept that the same wording 'to determine the legal situation', used for both the islands and the maritime spaces, would have a completely different meaning regarding the islands and regarding maritime spaces."[152]

Also in a recent maritime delimitation case the Court drew conclusions from "the similarity of wording" between the treaty concerned and a related agreement, UNCLOS in that case.[153] By thus extending systematic considerations beyond the frame of the specific treaty in question, the role of extrinsic material in the process of interpretation comes into play, which is effectively governed by Art 31 paras 2 and 3 (→ MN 61 and 69).

3. Object and Purpose

52 The final words of Art 31 para 1 introduce the **teleological or functional element** into the general rule of interpretation and, by doing so, bring the principle of effectiveness into that rule: the terms of a treaty are to be interpreted in a way that advances the latter's aims. Any interpretation that would render parts of the treaty superfluous or diminish their practical effects is to be avoided (→ MN 34).[154]

53 The introduction of the **composite** "**object and purpose"** into the work of the ILC drafts was apparently influenced by the French version of the ICJ opinion on *Reservations to the Genocide Convention*. There, the Court ruled on the

[150] *Cf* ICJ *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213, para 52.

[151] *Cf* ICJ *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, paras 35–38.

[152] ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)* [1992] ICJ Rep 351, para 374.

[153] ICJ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 91.

[154] *Cf eg* ICJ *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 160–161 and 166.

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admissibility of reservations to treaties according to "l'objet et le but" of the latter, which appeared in the English version as "object and purpose".[155]

> This incidentally leads to the conclusion that the object and purpose test laid down in Art 19 VCLT for the purpose of determining the compatibility of a reservation and closely modelled after the *Reservations* opinion, is in fact just an application of the teleological approach to interpretation: that compatibility can be decided on only after the object and purpose of the treaty has been determined through interpretation (→ Art 19 MN 75).

Taken literally, "l'objet" would seem to describe the substantive content of a treaty, *ie* the rights and obligations created by it, while "le but" refers to the general result, which the parties want to achieve through the treaty.[156] However, in practice and doctrine, both elements are usually amalgamated into one single test[157] applying the *telos* of the treaty, or of one of its provisions, to a proposed interpretation of its terms.

54 Although many treaties have in fact a variety of different, and possibly conflicting, purposes, Art 31 para 1 uses **the singular form** "object and purpose", as do other provisions of the VCLT. Thus, the general rule of interpretation clearly means to refer as a single overarching notion to the *telos* of the treaty as a whole,[158] as does expressly Art 41 para 1 lit b cl ii. Since, however, in practice, the object of interpretation is always a specific provision, or a part of such, rather than the treaty as a whole, this global view is bound to diminish the value of teleological interpretation. Therefore, in the case of multi-purpose treaties all goals that are expressed in the terms of the treaty are to be taken into account, and in the end that which conforms best with the grammatical and systematic considerations on the term in question will prevail in the process of interpretation.

55 There are various ways of **determining the object and purpose** of a treaty. Some treaties contain general clauses specifically stating their purposes, Art 1 UN Charter being the obvious example.[159] Also, recourse to the title of the treaty may be helpful.[160] Moreover, the preamble of a treaty is regularly a place where the parties list the purposes they want to pursue through their agreement (→ MN 49). In other cases the type of treaty may itself attract an assumption of a particular object and purpose, such as boundary treaties (final and stable fixing of frontiers).[161] Generally, however, a reading of the whole treaty, *ie* of all its substantive provisions, will be required to establish the object and purpose with some certainty. Also,

[155] ICJ *Genocide Convention Opinion* [1951] ICJ Rep 15, 24. On the previous page of the opinion, however, the English "objects" is used to translate the French "fins", which could imply that "object" was meant to have a purely teleological meaning.

[156] *Buffard and Zemanek* (1998), p. 326.

[157] *Cf Klabbers* (1997), pp. 144–148.

[158] *Klabbers* (2008), MN 6–7; *Klabbers* (1997), pp. 151–155.

[159] For more examples *cf* n 107.

[160] Explicitly emphasized in ICJ *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, para 39; *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 70.

[161] *Gardiner* (2015), p. 213.

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contrasting the treaty in question with relevant treaties of the same kind can assist in establishing the *telos* of the former.

> That is what the ICJ did, for example, in the *Oil Platform* case, when it compared the Treaty of Friendship between Iran and the United States with other types of treaties of friendship and thereby determined the objective of the treaty before it.[162]

In general, intuition and common sense may provide useful indicators in identifying the object and purpose,[163] with the rule of good faith preventing that aims and objectives are introduced through the back door, which the drafters of the treaty rejected to insert into its terms.

56 Considerations of **effectiveness** play a predominant role in interpreting treaties that set up international organs or organizations and empower them with certain functions and powers. Here, the teleological element of interpretation could lead to **unwritten ('implied') powers** being read into the text in order to enable the organ concerned to fulfil its task under the treaty. In the ICJ's case-law examples of different versions of that approach can be found: while in its *Reparation for Injuries* opinion the Court referred for implied competences of the UN to the powers explicitly laid down in the Charter:

> "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication – as being essential for the performance of its duties,"[164]

in the *Certain Expenses* case, only a couple of years later, it derived unwritten powers simply from the purposes of the UN:

> "But when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization."[165]

Over the years, the concept of implied powers seems to have been very attractive, even seductive to those who wanted to see founding treaties of international bodies to be interpreted according to the principle of *effet utile*. However, it may be that the doctrine has in the meantime lost quite a bit of its appeal and interpretation in practice now favors a stricter approach to the attribution of powers to international organs.[166]

57 The consideration of object and purpose finds its **limits in the ordinary meaning of the text** of the treaty. It may only be used to bring one of the possible

[162] ICJ *Oil Platforms* (Preliminary Objection) [1996] ICJ Rep 803, para 27.

[163] *Klabbers* (1997), p. 155.

[164] ICJ *Reparation for Injuries* [1949] ICJ Rep 174, 182. See also the dissenting opinion of *Judge Hackworth* [1949] ICJ Rep 196, 198 who found the Court's approach too wide and wanted to have implied powers limited to "those that are 'necessary' to the exercise of powers expressly granted."

[165] ICJ *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 168.

[166] See *Klabbers* (2009), pp. 59–73. A telling example seems to be ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 25, where the Court upheld the "principle of speciality" *vis-à-vis* alleged implied powers of the Organization.

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ordinary meanings of the terms to prevail and cannot establish a reading that clearly cannot be expressed with the words used in the text.[167] As the Iran-US Claims Tribunal once pointed out:

> "Even when one is dealing with the object and purpose of a treaty, which is the most important part of the treaty's context, the object and purpose does not constitute an element independent of that context. The object and purpose is not to be considered in isolation from the terms of the treaty; it is intrinsic to its text. It follows that, under Article 31 of the Vienna Convention, a treaty's object and purpose is to be used only to clarify the text, not to provide independent sources of meaning that contradict the clear text."[168]

58 Furthermore, determining the object and purpose of a treaty, or of one of its provisions, must, for practical as well as theoretical reasons, **be distinguished from** having recourse to the "**circumstances of the conclusion**" of the treaty. The latter may only be taken into account under the conditions of Art 32, *ie* as a supplementary means of interpretation. As the decision in *Land, Island and Maritime Frontier Dispute* demonstrates, to point to certain behavior of a State Party in order to develop views on the treaty's purpose from it may end up as being taken merely as part of those "circumstances", and thus being given a much lesser importance in the process of interpretation.[169] The result is, again, that object and purpose of a treaty must primarily be established by reading the latter as a whole, and not so much by recurring to external factors.

4. In Good Faith

59 Art 31 para 1 requires every treaty to be interpreted "in good faith" and thereby establishes the general idea embodied in that well-known phrase as some kind of umbrella covering the whole process of interpretation. Embodied in the opening words of the general rule of interpretation, that idea sets the tone and directs the undertaking as a whole. According to the most fundamental rule of the law of treaties, every treaty must be performed "in good faith" (Art 26). Since interpreting a treaty is a necessary element of its performance, logic requires that good faith be applied to the interpretation of treaties. Good faith must be used **during the entire process of interpretation**, *ie* when examining the ordinary meaning of the text, the context, object and purpose, the subsequent practice of the parties, *etc*. In addition, the result of the interpretative operation must be appreciated in good faith as well.[170]

60 Although it is difficult to give precise content to the concept in general, the bottom line of it appears to be a **fundamental requirement of reasonableness** qualifying the dogmatism that can result from purely verbal or, for that purpose,

[167] Concurring *Villiger* (2009), Art 31 MN 14.

[168] Iran-United States Claims Tribunal *Federal Reserve Bank of New York v Bank Markazi* Case A 28 (2000) 36 Iran-US Claims Tribunal Reports 5, para 58.

[169] *Cf* ICJ *Land, Island and Maritime Frontier (El Salvador v Honduras)* [1992] ICJ Rep 351, para 376.

[170] *Sinclair* (1984), p. 120.

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excessively teleological analysis.[171] This is also the understanding in which the concept of good faith is at least hinted at in the rules of interpretation themselves, albeit only as an obligation of result: what is to be avoided by applying the principle of good faith is set out in Art 32 lit b, *ie* that interpretation of a treaty should lead to a result, which is manifestly absurd or unreasonable. Thus, the ordinary meaning, if established in its context, must always be submitted to the test of reasonableness. If applying the words of a treaty in their ordinary meaning would seem to lead to a result, which would be manifestly absurd or unreasonable, another interpretation must be sought.

> Thus, to adopt the example given by *Aust*, the reference in Art 23 para 1 of the UN Charter to the "Republic of China" and the "Union of Soviet Socialist Republics" must today reasonably be taken to refer to the People's Republic of China and to the Russian Federation, respectively.[172] Any other approach, which might be in accordance with the ordinary meaning of those names, would be contrary to good faith.

II. Certain Elements of 'Context' (Para 2)

61 Art 31 para 2 designates two types of documents that are regarded as forming part of the "context" within the meaning of para 1 and, thus, to be used for the purpose of arriving at the ordinary meaning of the terms of the treaty. The provision is based on the principle that a unilateral document cannot as such be regarded as part of the "context" but has, in order to attain that status, to receive some kind of acceptance on part of the other parties.[173]

62 The documents referred to in para 2 are **extrinsic to the treaty**, they are not integral parts of it. Whether a document set up with regard to the conclusion of a treaty constitutes an actual part of that treaty depends on the intention of the parties in each individual case.[174]

> If the parties adopt certain 'understandings' and formally annex them to their treaty, they obviously want them to form part of their treaty consensus, and not material external to it.[175] This also applies to treaties which contain explicit clauses with regard to their own interpretation or which refer to attached documents dealing with their interpretation, such as, *eg*, Art 9 of the Rome Statute on the ICC introducing "Elements of Crimes" that "shall

[171] *Cf Gardiner* (2015), pp. 171 and 176. See also *Jennings and Watts* (1992), p. 1272.

[172] *Aust* (2013), p. 209.

[173] Final Draft, Commentary to Art 27, 221, para 13.

[174] *Cf* ICJ *Ambatielos Case* [1952] ICJ Rep 28, 42–43; taken up by the ILC in Final Draft Commentary to Art 27, 221, para 13.

[175] *Eg* the 1961 Appendix to the European Social Charter ETS 35, and the 1996 Revised European Social Charter ETS163; the "Understandings with respect to certain provisions of the Convention" annexed to the UN Convention on the Jurisdictional Immunities of States and Their Property (2004), Text annexed to UNGA Res 59/38, 16 December 2004, UN Doc A/RES/59/38.

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assist the Court in the interpretation and application" of Arts 6–8 *bis* of the Statute. Those "elements", which can be, and indeed are, amended by decisions of the States Parties, may not be an integral part of the original document of the Statute, but they are certainly part of the treaty consensus of the parties and not extrinsic material within the meaning of para 2.

Interpretation clauses may become part of the treaty consensus only at later date, for example through a subsequent accession or amendment treaty. Such was envisaged, *eg*, in Art 5 of the negotiated Agreement of the Accession of the European Union to the ECHR[176], which the ECJ thwarted through its Opinion 2/13 in late 2014[177]: The provision was meant to include into the treaty consensus explicit understandings on certain terms used in Arts 35 para 2 and 55 of the Convention.

If a document is part of the actual treaty consensus, it is an object and not, as part of the treaty "context", an instrument of interpretation. The provision in para 2 makes documents outside the treaty consensus, but related to its development, fully-fledged interpretative instruments.

On the other hand, documents within the meaning of para 2 are to be **distinguished from mere *travaux préparatoires***, since they form part of the "context" and are thus to be treated as an element of the general rule of interpretation, and not as supplementary means according to Art 32. However, it is left unclear in both norms, how the distinction between extrinsic context (Art 31 para 2) and the preparatory works of a treaty (Art 32) can be drawn in a given case. It is submitted that the distinction hangs in the phrase "in connexion with the conclusion of the treaty" contained in both alternatives of para 2. Documents that are connected with the act of concluding the treaty, not so much with the treaty itself, leave the preparatory stage behind them and refer to the actual existence of the treaty consensus. The distinction between "preparation" and "connexion" can be best drawn by taking objective factors (*eg* the time taken in making the document) and the intention of the actors into account. Treaty-related material that does not fulfill the conditions for being "context" according to Art 31 para 2 may still be considered as *travaux* within the meaning of Art 32. **63**

In *Maritime Dispute (Peru v Chile)*, the ICJ distinguished material falling under para 2 (a) from *travaux préparatoires* by pointing out that the material in question, the minutes of a conference of the parties, "summarize the discussions leading to the adoption of the 1952 Santiago Declaration (the treaty in question, O.D.), rather than record an agreement of the negotiating States", which is why the Court characterized them as preparatory works.[178]

A good example for material within the meaning of Art 31 para 2 is to be found in the declarations adopted by the EU Member States as **part of the final act** which is drawn up at Member State conferences amending the basic treaties of the EU, *eg* the Final Act attached to the Treaty of Lisbon.[179]

[176] As published in the Final report of the negotiating parties to the Comité directeur pour les Droits de l'Homme, Doc 47+1(2013)008rev2 (10 June 2013).

[177] ECJ *Opinion 2/13 (Accession to ECHR)* ECLI:EU:2014:2454.

[178] ICJ *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3, para 65.

[179] [2007] OJ C 306/231, 249 *et seq*.

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64 Since the extrinsic context recognized in para 2 is an expression of the consensus of the parties and since the latter, acting in consensus, are the 'masters' of their treaty, para 2 provides **a method of authentic interpretation** (→ MN 19) of the treaty. In this case, all parties to a treaty agree on interpretative instruments relating to the treaty and thereby on its interpretation by means extrinsic to the treaty itself. The material accepted as relating to the conclusion of the treaty may help to determine which of the various ordinary meanings of its terms shall prevail.

65 Art 31 para 2 sets out **four conditions** for related material to become extrinsic context of a treaty:

- The document in question must be drawn up either by all parties together or, if drawn up only by one or several parties, must be accepted by the other parties. In order to be considered extrinsic context, it must be the object of a **general consensus** of all parties.
- That consensus must be borne by all "**parties**", which are, in accordance with Art 1 para 1 lit g, only those States that have consented to be bound by the treaty and for which the treaty is in force. Taken literally, this would mean (a) that there can be no extrinsic context in this sense before the treaty has actually entered into force, and (b) that acts, views and instruments of States that may have participated in the negotiations but in the end are not party to the treaty must not be considered.
- The material must **"relate**" to the substance of the treaty, *eg* by specifying or clarifying certain concepts used therein or limiting its field of application. That relation must be one of substance, but it must also be encompassed by the parties' consensus.
- The provision does not say **at what moment in time** the consensus, either in the form of "agreement" or of "acceptance", must have been established. In lit a, Art 31 para 2 requires that the agreement was made "in connexion with" the conclusion of the treaty, which does not necessarily require a temporal coincidence, since "connexion" implies a nexus in purpose and substance, not necessarily in time. Lit b does not give any hint as to a temporal requirement. However, the general design of Art 31, which deals with acts and agreements subsequent to the conclusion of the treaty in para 3, would seem to imply that "agreement" and "acceptance" within the meaning of para 2 refer to a consensus established **in a certain temporal proximity** to the process of conclusion. Usually, agreements of this sort are made at the occasion of adopting the text of the treaty, while unilateral documents may very well be presented by individual parties when signing or ratifying a treaty and, therefore, require a reaction by the other parties at that later date.

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But also agreements on interpretation are in practice made **subsequent to the adoption** of the text: For example, the common interpretative declaration of the parties to the ESM-Treaty, which itself had been signed on 2 February 2012, was adopted by them on 27 September 2012, the date of the entry into force of the Treaty.[180] With that kind of timing the common declaration may be considered having the required temporal proximity to the conclusion of the treaty, thus being an "agreement" under para 2a), rather than a "subsequent agreement" under para 3a). Moreover, the parties explicitly pointed out in the declaration that its elements "constitute an essential basis for the consent of the contracting States to be bound by the provisions of the Treaty", thus underlining the close connexion with the conclusion of the treaty.

Art 31 para 2 lit a defines "**agreements relating to the treaty**" as "context", provided they were made between all parties in connexion with the conclusion of the treaty. Since the term "agreement" is obviously wider than the notion of "treaty", as defined in Art 2 para 1 lit a, it also covers an unwritten consensus.[181] However, in common treaty practice, those "agreements" regularly take on the form of final acts, protocols of signature, understandings, commentaries or explanatory reports, which are agreed upon by the governmental experts drawing up the text of the treaty and adopted simultaneously with that text. **66**

Eg the "Understandings" agreed upon together with the text of the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)[182]; the "Commentaries" on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997;[183] or the Explanatory Report adopted by the Committee of Ministers of the Council of Europe when it agreed on the text of the Criminal Law Convention on Corruption.[184]

The latter example demonstrates that "agreements" between the parties to the treaty may also come in the form of resolutions of an international organization, if the treaty has been drafted under the auspices of that organization. Rather unusual, but, of course, also relevant for lit a are agreements **explicitly** setting out guidance on the interpretation of the treaty.

See *eg* the 1973 Protocol on the Interpretation of Art 69 of the European Patent Convention (revised in 2000), adopted simultaneously with the Convention itself,[185] and the mentioned interpretative declaration to the ESM-Treaty of 2012 (→ MN 65 *in fine*).

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[180] For the German version *cf* [2012-II] BGBl 1086. In English in Irish Treaty Series 2013, No 14, *in fine*.

[181] *Villiger* (2009), Art 31 MN 18.

[182] Understandings not printed in 1108 UNTS 151, but included in the Report of the Conference of the Committee on Disarmament Vol I, GAOR, 31st Session, Supp No 27 (1976) UN Doc A/31/27, 91–92.

[183] See *OECD* (ed) (2010) Convention on combating bribery of foreign public officials in international business transactions and related documents, pp. 13–18.

[184] ETS 173.

[185] UNTS 199, 509.

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Probably the most prominent example in this respect is the 1994 Agreement Relating to the Implementation of Part XI of UNCLOS[186] which in its Art 2 para 1 expressly sets out that its provisions and Part XI of the Convention "shall be interpreted and applied together as a single instrument".

In case of bilateral treaties the parties often include details on interpretation or application of the treaty in agreed minutes or an exchange of letters.

See *eg* the exchange of interpretative letters accompanying the 1977 UK-US Air Services Agreement.[187]

67 Art 31 para 2 lit b refers to unilateral or plurilateral "**instruments related to the treaty**" that are accepted as such by all the other parties. These can be statements made by individual parties before the conclusion of the treaty or accompanying their expression of consent to be bound, but encompassed are also unilateral interpretative declarations which a State presents at the time of agreeing to the treaty and which regularly share the outer characteristics of reservations to the treaty.[188] Unlike a reservation, an interpretative declaration simply states that the declarant considers or understands provision X to mean Y. By making such a declaration a State is taking the opportunity to influence in advance the subsequent interpretation of the treaty, the extent of that influence being dependent on the reaction of the other parties to the declaration.[189]

It is, for example, common practice in the European Union, as it was in the European Community, to add declarations of one or more Member States to the final acts drawn up at Member States conferences amending the basic treaties of the EU, the texts of those declarations having been taken note of by the other Member States at the end of the negotiations.[190]

68 As Art 31 para 2 lit b does not stipulate any formal requirement, the "**acceptance**" by the other parties can also be given informally or tacitly. Because, however, there is no provision in Art 31 para 2, as there is for objections to reservations in Art 20 para 5, to the effect that non-objection amounts to acceptance, a party advocating a certain interpretation on the basis of extrinsic context under lit b will always have to show that the other parties actually accepted the interpretation advanced.

III. Interpretative Means Additional to the Context (Para 3)

69 Art 31 para 3 introduces two rather different things as means of interpretation, the common feature of which seems to be that they relate to **the practice of the parties**

[186] UNTS 41; 33 ILM 1309.

[187] UNTS 21, cited by *Aust* (2013), p. 211 in n 28.

[188] *Cf McRae* (1978), p. 155 *et seq; Cameron* (2008). See also → Art 19 MN 3.

[189] *McRae* (1978), p. 170.

[190] *Cf eg* the declarations contained in the Final Act attached to the Treaty of Lisbon (2007), [2007] OJ C 306, 231, 267 *et seq*.

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to the treaty in question, either with regard to the specific treaty or in their international legal relations in general: lit a and b allow material to be used that relates to the implementation of the treaty by its parties, while lit c directs the view of the interpreter to other rules of international law, independent of the specific treaty, and thereby introduces the systemic approach into treaty interpretation.

Despite an obvious difference in the wording, the material mentioned in para 3 is meant to have the same interpretative value as that listed in para 2 (→ MN 5), the essential difference being that para 2 refers to the process of conclusion of the treaty, while para 3 deals with evidence that arises independently from that process. However, both kinds of material are supposed to be used in order to establish the true meaning of the relevant terms of the treaty by applying the general rule of interpretation. **70**

The issues addressed in Art 31 para 3 are currently **under consideration by the International Law Commission**. After first having established a Study Group on the topic of "Treaties over time" in 2009, the Commission decided in 2012 to appoint a Special Rapporteur for the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (*Georg Nolte*) and to include the re-formulated topic in its programme of work. In 2016, the Commission adopted a set of 13 draft conclusions on the topic on first reading and the respective commentaries.[191] The draft conclusions were transmitted to Governments for comments and observations until the beginning of 2018. **71**

1. Subsequent Agreements (lit a)

The "subsequent agreements" referred to in para 3 lit a bear a **close resemblance to the agreements mentioned in para 2 lit a**, the only two apparent differences being that the agreements here are made "subsequently", *ie* with a certain time lag after the conclusion of the treaty, and that they relate specifically to "the interpretation of the treaty or the application of its provisions", and not simply to the treaty. However, there does not seem to be any practical difference between both types of agreement: if they are sufficiently clear, they will have a comparable effect on establishing the meaning of the terms of the treaty; as *Gardiner* points out, whether elucidation of the treaty provisions is provided by the parties at the time of conclusion of the treaty or later seems of little importance.[192] What has been said with regard to "agreements" under para 2 (→ MN 66) is, thus, equally applicable here. **72**

However, it appears from judicial practice in the WTO that one important qualification has to be made: a subsequent agreement cannot be one "regarding the interpretation or application" of the treaty, if the agreement itself is, in the case of a conflict with the treaty, supposed to follow the latter or to adjust to it, thus if the agreement is considered by its parties to be **of lower rank than the treaty** under **73**

[191] ILC Report, 68th Session (2016) UN Doc A/71/10, ch VI.

[192] *Gardiner* (2015), p. 230.

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interpretation. The external means of interpretation must therefore be of equal rank as the object of interpretation.

> Thus, in *Chile–Price Band System* the WTO Panel, which had to interpret the WTO Agreement on Agriculture, did not accept an Economic Complementarity Agreement between Chile and MERCOSUR as a "subsequent agreement" within the meaning of Art 31 para 2 lit a, because in its preamble it explicitly stated that its provisions "shall adjust" to the WTO Agreements.[193]

74 Since authors of the agreements referred to in para 3 lit a can only be the "parties" to the treaty, acting in consensus, these agreements are also a **means of an authentic interpretation** of the treaty concerned (→ MN 19) and must therefore be read into the latter for purposes of its interpretation.[194] Being the masters of their treaty, the parties are, in principle, not limited in making subsequent understandings or agreements. If the latter's content would not come within the bounds of an ordinary meaning of the terms, they would amount to an amendment of the treaty by implicit agreement.

> This is why in *Territorial Dispute (Libya v Chad)* the ICJ considered it irrelevant to categorize an Anglo-French Convention of 1919, which was supposedly concluded to interpret a declaration between the two States of 1899, either as a confirmation or modification of the declaration. In any case, because the parties dealt with their own treaty consensus, the later agreement constituted the correct and binding interpretation of the earlier declaration.[195]

75 Again, since para 3 lit a does not contain any formal requirement, it would seem that the "agreements" can very well be made informally. They **do not have to be in treaty form** but must be such as to show that the parties intended their understanding to be the basis for an agreed interpretation.[196] The proven fact, not the form, of an agreement is what counts under lit a.

> This also seems to be the position of the ICJ in the *Kasikili/Sedudu Island* case, when the Court reviewed the various dealings between the local authorities involved in the border dispute and concluded that there had been no agreement between them, so that para 3 lit a could not apply.[197]

If informal agreements or understandings fall under lit a, this would also mean that there is a **potential overlap with the concept of "subsequent practice** establishing agreement of the parties" within the meaning of lit b. One might even say that the less formal the subsequent agreement, the greater is the significance of subsequent practice confirming it for the purpose of establishing the meaning of a treaty provision.

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[193] WTO Panel *Chile–Price Band System* WT/DS207/R, paras 7.83–84 (2002).

[194] Final Draft, Commentary to Art 27, 221, para 14. Draft conclusion 3 para 2 of the ILC in 2016 (n 191); in its commentary the Commission pointed out that this interpretation, although being authentic, is not necessarily conclusive or legally binding (para 4).

[195] *Cf* ICJ *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, para 60.

[196] *Gardiner* (2015), p. 245.

[197] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 63.

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Since the external appearances of the "agreement" under lit a are irrelevant, it might also take on the form of a **decision of a treaty organ**, provided that it was taken unanimously by all States parties to the treaty or that parties that did not vote can at last be taken to have implicitly accepted the decision made. **76**

> This was explicitly held by the WTO Appellate Body with regard to the Doha Ministerial Decision, a decision on the interpretation of the WTO Agreements adopted by all WTO Members meeting in the form of the Ministerial Conference.[198]
>
> Moreover, the regime of navigation on the river Rhine under the Convention of 1868 ("Acte de Mannheim")[199] contains various Principles of Interpretation of the Convention which were adopted unanimously by the Central Commission, where all five Member States are represented and have one vote each.[200]
>
> With regard to the Convention for the Regulation of Whaling the ICJ referred to non-binding recommendations by the International Whaling Commission, an organ established by that Convention, and held that, when those recommendations are adopted by consensus or unanimous vote, "they may be relevant for the interpretation of the Convention or its Schedule".[201] However, the Court also pointed out that resolutions adopted by the Commission "without the support of all States parties to the Convention and, in particular, without the concurrence of Japan", cannot be regarded as falling under Art 31 para 3 VCLT.[202]

2. Subsequent Practice (lit b)

The subsequent practice of the parties in implementing the treaty constitutes objective evidence of their understanding as to the meaning of the latter and is, therefore, of utmost importance for its interpretation. This particular value of subsequent practice had already been pointed out by the arbitral tribunal in the *Russian Indemnity* case of 1912 when it held that: **77**

> "l'exécution des engagements est, entre Etats comme entre particuliers, le plus sûr commentaire du sens de ces engagements."[203]

From there, it is only a small step to recognize that, because the parties are the masters of their treaty, a meaning derived from subsequent practice, which is consistent and embraces all parties of a treaty, constitutes an **authentic interpretation** established by agreement, not only overlapping with agreements under lit a (→ MN 74), but also blurring the line between interpretation and amendment of a

[198] *US–Clove Cigarettes* WT/DS406/AB/R, paras 258–268 (2012), reprinted at 51 ILM 759.

[199] Documented at www.ccr-zkr.org. Accessed on 22 November 2017.

[200] *Eg* the decision 2003-II-10 on Principles of Interpretation of the Mannheim Act, or the decision on the common interpretation of Additional Protocol No 6 of 21 October 1999.

[201] ICJ *Whaling in the Antarctic* [2014] ICJ Rep 226, para 46.

[202] *Ibid* para 83.

[203] *Russian Claim for Interest on Indemnities (Russia v Turkey)* (1912) 11 RIAA 421, 433.

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treaty.[204] Since the parties, acting collectively through their concordant practice, are the masters of their treaty, they cannot only take interpretation further than could a body charged with the role of independent interpretation, but also bring about an implicit treaty amendment by practice.[205]

> This was probably what the ECJ had in mind when, mis-interpreting the ICJ's dictum in *Temple of Preah Vihear*, it held: "In that regard, as is clear from the case-law of the International Court of Justice, the subsequent practice followed in the application of a treaty may override the clear terms of that treaty if that practice reflects the parties' agreement (ICJ, Case concerning the Temple of Preah Vihear (Cambodia v Thailand), judgment of 15 June 1962, ICJ Reports 1962, p. 6)".[206] Critical as to that approach, but in a similar vein as to the general point was recently Advocate General *Wathelet* in the *Polisario* case, who would only accept as treaty amendment "practice, which is known to and accepted by the parties and is sufficiently widespread and sufficiently long-term to constitute a new agreement in itself".[207]

78 Subsequent practice as an element of treaty interpretation is nowadays **well-established in the practice** of international courts and tribunals,[208] and it was an important element of it even in the early days of international jurisprudence: Already in 1922, the PCIJ pointed out in its second advisory opinion:

> "If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the treaty."[209]

The limits of referring to subsequent practice were also fairly clearly set by the Court when it held in *Land, Island and Maritime Frontier Dispute* that consideration of that element cannot make it read into the text of a treaty a competence that is not specifically mentioned there.[210]

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[204] This was already pointed out by *Waldock* III 60, para 25.

[205] *Gardiner* (2015), pp. 274–278. This was also the view of the ILC which in Art 38 of its Final Draft had explicitly provided for the possibility that a treaty "may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions" (Final Draft 236). The fact that this article was the only one that was not adopted, but discarded altogether at the Vienna Conference, was mostly based on its specific drafting or on grounds of legal policy and cannot be taken to mean that the concept of implicit modification of a treaty by its parties, acting in agreement, was rejected by the States, *cf Karl* (1983), pp. 288–295.

[206] ECJ *Oberto and O'Leary* Joint C-464/13, C-465/13 ECLI:EU:C:2015:163, para 61.

[207] In ECJ *Council v Front Polisario* C-104/16 P (Opinion AG *Wathelet)* ECLI:EU:C:2016:677, para 96.

[208] For the jurisprudence of the ICJ, *cf* the references given by the Court itself in *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 50. For the ECJ see the recent decision of its Grand Chamber in ECJ *Council v Front Polisario* C-104/16 P ECLI:EU:C:2016:973, para 120.

[209] PCIJ *Competence of the ILO* PCIJ Ser B No 2, 39 (1922). *Cf* also *Payment in Gold of Brazilian Federal Loans Contracted in France* PCIJ Ser A No 21, 93, 119 (1929); ICJ *Corfu Channel* [1949] ICJ Rep 4, 25: "The subsequent attitude of the Parties shows [. . .]."

[210] ICJ *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras, Nicaragua intervening)* [1992] ICJ Rep 351, para 380.

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Which **elements of practice** are to be taken into account under lit b will vary according to the subject matter of the treaty concerned. In principle, any action, or even inaction, of parties with a view to implementing the treaty will have to be considered. Just as in the process of developing customary law (Art 38 para 1 lit b ICJ Statute), the notion of "practice" comprises any external behavior of a subject of international law, here insofar as it is potentially revealing of what the party accepts as the meaning of a particular treaty provision. **No particular form** is required, so that official statements or manuals, diplomatic correspondence, press releases, transactions, votes on resolutions in international organizations are just as relevant as national acts of legislation or judicial decisions. In fact, "practice" in this respect is not limited to the central government authorities of States, rather any public body acting in an official capacity can contribute to demonstrating the state's position towards its treaty commitments. **79**

The **relevance of national legislation** in this respect is, *eg*, emphasized in the jurisprudence of the ECtHR on the question if capital punishment was as such compatible with Art 3 of the ECHR. In its *Soering* judgment of 1989, the Court pointed out that Art 3 must be construed in harmony with Art 2 and could not, therefore, be taken to include a general prohibition of the death penalty, but continued: "Subsequent practice in national penal policy, in the form of a generalized abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Art 2 § 1 and hence to remove a textual limit on the scope for evolutive interpretation of Art 3."[211] Many years later, in its first *Öcalan* judgment of 2003, the ECtHR reiterated that in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of Art 3 "it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field", and it observed that "the legal position as regards the death penalty has undergone a considerable evolution since the *Soering* case was decided", in that forty-three contracting States had by then *de jure* abolished that penalty.[212] The Court concluded that though their practice the States had agreed to modify Art 2 § 1 of the Convention and that against this background it could be argued "that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Art 3."[213] Again some years later, this interpretation of Art 3 of the Convention has become generally accepted case-law of the ECtHR, as the Court confirmed in *Al-Saadoon and Mufdhi*.[214]

The ECtHR adopted a similar approach with regard to the applicability of Art 9 ECHR (freedom of conscience and religion) to conscientious objectors in the *Bayatyan* case: While the ECommHR still had denied that the conscientious objection to military service was covered by the Convention, the Court discovered "an obvious trend among

[211] ECtHR *Soering v United Kingdom* App No 14038/88, Ser A 161, para 103 (1989).

[212] ECtHR *Öcalan v Turkey* App No 46221/99, 12 March 2003, paras 194–195.

[213] *Ibid* para 198.

[214] ECtHR *Al-Saadoon and Mufdhi v United Kingdom* (GC) App No 61498/08, 2 March 2010, para 120.

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> European countries to recognize the right to conscientious objection" and established that "the domestic law of the overwhelming majority of Council of Europe Member States, along with relevant international instruments, has evolved to the effect that at the material time there was already a virtually general consensus on the question in Europe and beyond". Consequently it held, that the matter today falls under Art 9 ECHR.[215]

80 In order to become relevant under lit b, State conduct must constitute **a sequence of acts or pronouncements**, since "practice" cannot be established by one isolated incident. The interpretative value of that practice will always depend on the extent to which it is concordant, common and consistent and thus sufficient to establish a discernable pattern of behaviour.[216]

81 Practice of the parties is only relevant under lit b if it occurs "**in the application**" of the treaty, which plainly indicates that, just as for the development of international customary law, a subjective link is required under lit b: the parties whose practice is under consideration must regard their conduct to fall within the scope of application of the treaty concerned and in principle to be required under that treaty. They must act the way they do for the purpose of fulfilling their treaty obligations, *ie* their subsequent conduct must be motivated by the treaty obligation. Or, as the ILC recently put it:

> "The identification of subsequent agreements or subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or practice, have taken a position regarding the interpretation of the treaty."[217]

On the other hand, the conduct of the parties does not have to bear a special reference to a particular provision of the treaty, but can relate to the treaty as a whole or to other parts of it than the one under scrutiny.

82 Subsequent practice may also serve as a means to determine the scope of application of a treaty, and then even to establish that the latter does not apply. Thus, under lit b the interpreter may just as well consider the practice of parties in the "**non-application of the treaty**", *ie* draw conclusions from the fact that the parties did not apply their treaty when treaty provisions might have been thought to be applicable.[218] This was the approach, for example, of the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, when the Court referred to State practice in order to determine whether various treaties applied to the use of nuclear weapons:

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[215] ECtHR *Bayatyan v Armenia* (GC) App No 23459/03, 7 July 2011, paras 101–109.

[216] *Sinclair* (1984), p. 137. Adopted by the WTO Appellate Body in *Japan–Alcoholic Beverages* WT/DS 8, 10–11/AB/R, 13 (1996); and the Panel in *Chile–Price Band System* WT/DS207/R, para 7.78–79 (2002).

[217] ILC Draft conclusion 6 para 1, first sentence, in Report 2016 (n 191).

[218] *Gardiner* (2015), pp. 262–264.

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> "The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by 'poison or poisoned weapons' and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term 'analogous materials or devices'. The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol [. . .]."[219]

83 Although the wording of lit b does not say so explicitly, the subsequent practice considered relevant for the purpose of interpretation must be practice of the parties, *ie* **attributable to parties** to the treaty concerned.[220] Thus, acts or pronouncements of non-parties or non-State actors, that are not attributable to the States Parties according to the general rules of attribution, can in principle not be taken into account. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.[221] Again, "parties" refers, in accordance with Art 1 para 1 lit g, only to those States that have consented to be bound by the treaty and for which the treaty is in force.

84 Even though lit b requires the practice to establish the agreement of "the parties", meaning all the parties, that does **not mean that every party** must have individually engaged in practice. The ILC omitted the word "all", which had been contained in an earlier draft, from this phrase precisely in order to avoid the misconception that the practice must be actively performed by all the parties.[222] It suffices, therefore, that inactive parties should have accepted the practice set by other parties. Although it is, thus, possible that only some of the parties participate in the subsequent practice, lit b does not allow a certain interpretation to be established only among those participating States with binding force '*inter se*', as opposed to the other parties to the treaty: if some of the parties wanted to modify the treaty only between themselves, they would have to pursue the means provided for in Art 41 VCLT, *ie* to conclude an agreement to that effect and notify the other parties of it.[223] As the ILC summarized recently:

> "The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of

[219] ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, paras 55–56.

[220] *Gardiner* (2015), p. 266. ILC Draft conclusion 5 para 1 in Report 2016 (n 191).

[221] ILC Draft conclusion 5 para 2 in Report 2016 (n 191). As examples for "assessing", the ILC commentary refers to initiating, identifying and reflecting subsequent practice of the parties.

[222] *Cf* Final Draft, Commentary to Art 27, 222, para 15.

[223] Concurring *Gardiner* (2015), pp. 267–268.

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> one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction."[224]

85 As lit b does not explicitly say whose practice is to be considered, there is room for other actors that have been given a role in the implementation of a treaty to set relevant practice. Thus, where States by treaty entrust performance of activities under that treaty to an **international organ or organization**, the fulfillment of those functions is not only attributable to the parties (→ MN 83), but can also in itself constitute "subsequent practice" under the treaty. This is of particular relevance with regard to constituent treaties of international organizations, and here especially for interpreting the provisions dealing with the competences and procedures of the organs created. While the ILC Special Rapporteur has explicitly declined to deal with the practice of organs,[225] the ICJ underlined its importance with great emphasis:

> "the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, *as well as its own practice*, are all elements which may deserve special attention when the time comes to interpret these constituent treaties."[226]

In its recent conclusions, the ILC distinguished subsequent practice of States parties to a treaty under Art 31 para 3 which "may arise from, or be expressed in, the practice of an international organization in the application of its constituent instrument", from practice of an international organization itself in the application of its constituent instrument which "may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32".[227] Since the pronouncements of **expert treaty bodies**, *ie* those consisting of persons serving in their personal capacity, are, in the view of the ILC, not attributable to the States parties to the respective treaty, they cannot as such constitute subsequent practice under Art 31 para 3b.[228]

86 That "subsequent practice" can also be **practice of the organization** concerned has for a long time been a permanent feature of international jurisprudence. Above all, the ICJ refers to practice of the UN organs in almost every case where it has to interpret one of its constituent treaties.

> Thus, in its *Namibia* opinion the Court acknowledged that in view of the longstanding practice in the UN Security Council the phrase "concurring votes" in Art 27 para 3 UN Charter does not actually require, as the wording might suggest, that all permanent members must vote in favor of a resolution, but that the requirement is also fulfilled by abstention or absence. To reach that conclusion, it referred to "the proceedings of the

[224] ILC Draft conclusion 10 (9) para 2 in Report 2016 (n 191).

[225] *Waldock* III 52, 59–60, para 24a.

[226] ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 19 (emphasis added).

[227] ILC Draft conclusion 12 (11) paras 2 and 3, in Report 2016 (n 191).

[228] *Cf* ILC Draft conclusion 13 (12), para 3, in Report 2016 (n 191), and the respective commentary, in particular para 10.

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Security Council extending over a long period", especially presidential rulings and the positions taken by members of the Council, and it held that this procedure "has been generally accepted by Members of the United Nations and evidences a general practice of that Organization".[229]

In its opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ pointed to a change in the practice of the General Assembly for the purpose of interpreting Art 12 UN Charter to the effect that it precludes recommendations of the Assembly only when the Security Council is actually exercising its functions at that moment.[230]

In the IMCO case the Court, in order to interpret Art 28 lit a IMCO Convention, took into account the actual practice followed by the organization's Assembly in giving effect to the provision, such as the electoral practice and the apportionment of the expenses of the Organization, as well as a working paper prepared by the Secretary-General. Moreover, the interpretation was chosen which was "most consonant with international practice and with maritime usage".[231]

In its *Nuclear Weapons (WHO)* opinion the ICJ considered "the practice of the WHO", in order to establish whether the legality of the use of nuclear weapons belongs to the scope of activities of that Organization. In particular, the Court referred to reports and resolutions adopted by the WHO organs and held that a single resolution, "adopted not without opposition, could not be taken to [...] amount on its own to a practice establishing an agreement between the members of the Organization" which would be relevant for the interpretation of its constituent treaty.[232]

For the purpose of interpretation, the Court considered as relevant practice, *inter alia*, the rules of procedure of UN organs[233] and the Organization's budgetary practice.[234]

Subsequent practice of parties is only relevant for treaty interpretation if it "**establishes the agreement of the parties**". In setting up this second subjective requirement, lit b underlines the value of subsequent practice as an instrument of authentic interpretation: the practice, even if only some parties participated in it, must be accepted by all the parties, *ie* the parties as a whole.[235] Again, if not every party has participated in the practice, there must be at least good evidence that the other, inactive parties have endorsed it. If the subsequent practice consists of the **87**

[229] ICJ *Namibia* [1971] ICJ Rep 16, para 22.

[230] ICJ *Construction of a Wall* [2004] ICJ Rep 136, paras 27–28.

[231] ICJ *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 168–170.

[232] ICJ *Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, para 27.

[233] ICJ *Second Admissions Case* [1950] ICJ Rep 4, 9.

[234] ICJ *Certain Expenses of the United Nations* [1962] ICJ Rep 151, 160.

[235] *Cf* Final Draft, Commentary to Art 27, 222, para 15.

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conduct of organs of an international organization, it is only relevant if it is not counteracted by acts or representations of the parties to the treaty in question.

88 What exactly "**agreement**" within the meaning of lit b means is not clear. In the *Kasikili/Sedudu Island* case, the ICJ seems to have considered the concept to mean less than "agreement" in lit a, since it concluded *a fortiori* from the latter when it held:

> "From all of the foregoing, the Court concludes that the abovementioned events [. . .] demonstrate the absence of agreement between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute 'subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation' (1969 Vienna Convention on the Law of Treaties, Art 31, para 3 (b)). *A fortiori*, they cannot have given rise to an 'agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (*ibid*, Art 31, para 3 (a))."[236]

Thus, agreement in lit b would in essence seem to mean **acceptance**, even tacit, and is at the very minimum evidenced by the absence of any disagreement.[237] Such acceptance cannot be taken to exist if the parties concluded a separate treaty whose provisions take up the problem that was supposed to be addressed by the meaning established by way of interpretation under para 3 lit b.

> Thus, in its *Soering* judgment (→ MN 79) the ECtHR refused to interpret Art 3 ECHR, because of the development in national policies, in a way as to prohibit the death penalty *per se*, because the contracting States to the Convention had concluded Protocol No 6 to the Convention which provided for the abolition of the death penalty in time of peace. According to the Court "Protocol 6, as a subsequent written agreement, shows that the intention of the Contracting Parties [. . .] was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions [. . .] Art 3 cannot be interpreted as generally prohibiting the death penalty."[238]

When the "agreement" of the States parties is supposed to be expressed through instruments adopted by a treaty organ (→ MN 76), recent ICJ jurisprudence would seem to require that those instruments have been adopted by consensus or unanimous vote, at least it must be made sure that they had the support of all States parties.[239]

89 What is more, "agreement" presupposes, as the ICJ has also pointed out, the **knowledge or awareness** of other parties of a certain practice: internal documents or

[236] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 63.

[237] Concurring *Villiger* (2009), Art 31 MN 22. However, in *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100, para 44, the ICJ was unable to read into the absence of any objection on the part of the other parties to the treaty in question an "agreement" within the meaning of para 3 lit b.

[238] ECtHR *Soering v United Kingdom* App No 14038/88, Ser A 161, para 103 (1989).

[239] ICJ *Whaling in the Antarctic* [2014] ICJ Rep 226, paras 46 and 83.

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acts that have never been made known to the other parties cannot qualify under lit b.[240] Rather, the subjective element contained in that provision requires that a party acts under a treaty in the belief of a certain meaning of its terms and that the other parties were aware of that understanding and accepted it as what the treaty stipulates.[241]

Subsequent practice by the parties that does not establish an agreement between them, may be **relevant as a supplementary means** of interpretation under Art 32, since that provision does not list those means in an exhaustive manner (→ Art 32 MN 25). This has been recognized by international practice[242] and in legal doctrine[243], and was recently taken up by the ILC in its work on subsequent practice[244]. To be relevant under Art 32, however, conduct by one or more parties must occur in the application of the treaty.[245] **90**

From its wording and systematic position within para 3, it would follow that "subsequent practice" under lit b refers to an empirical exercise (was there objective practice by the parties or not?), which requires a normative interpretation only when it comes to establishing "agreement" among the parties. Especially the position of lit b right before lit c would seem to suggest that the former does **not require the subsequent practice**, in order to be material relevant for interpretation, **to be in conformity with other rules of international law**. In this perspective, those other rules only come into play under lit c. **91**

> "However, in the *Polisario* case the ECJ seems, on the contrary, to have combined the two approaches, by refusing to accept a purported subsequent practice for treaty interpretation, because it "would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principles of self-determination and of the relative effect of treaties . . . Such implementation would necessarily be incompatible with the principle that Treaty obligations must be performed in good faith, which nevertheless constitutes a binding principle of general international law . . ."[246]

3. Relevant Rules of International Law: The Systemic Approach (lit c)

Art 31 para 3 lit c includes yet other material extrinsic to the treaty in question into the process of its interpretation. It refers to **the international legal system as a whole as part of the context** of every treaty concluded under international law and thereby lays the foundation for the systemic approach to treaty interpretation: **92**

[240] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, para 55.

[241] *Ibid* para 74.

[242] ICJ *Kasikili/Sedudu Island* [1999] ICJ Rep 1045, paras 79–80; ECtHR *Loizidou v Turkey* (Preliminary Objections) App No 15318/89, Ser A 310, paras 79–82 (1995); WTO Appellate Body *EC–Computer Equipment* WT/DS 62, 67 and 68/AB/R, para 90 (1998). More references given in the ILC commentary (n 191), Conclusion 4 paras 26–35.

[243] *Sinclair* (1984), p. 138; *Torres Bernardez* (1998), pp. 726, 727; *Villiger* (2009), Art 31 MN 22.

[244] Draft conclusion 2 (1) para 4 in Report 2016 (n 191).

[245] ILC Draft conclusion 6 para 3 in Report 2016 (n 191).

[246] ECJ (GC) *Council v Front Polisario* C-104/16 P ECLI:EU:C:2016:973, paras 123–124.

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whatever their subject matter, treaties are a creation of the international legal system and their operation is based upon that fact. In a much more restricted form the rule had already been applied in early international jurisprudence, for example when the PCIJ looked at treaties and other documents having the same object as the treaty under consideration.[247] Later the ICJ formulated it in its *Namibia* opinion, under the impression of the debate in the ILC and the adoption of the VCLT, in a rather broad and general manner:

> "An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[248]

93 Moreover, the rule laid down in lit c has a firm **basis in the principle of good faith**, since according to that principle, every party to a treaty must in principle be presumed to intend to keep its treaty obligation in conformity with its other obligations under international law. As the ICJ pointed out in the *Right of Passage* case:

> "It is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it."[249]

The French-Mexican Claims Commission, through Professor *Verzijl*, had produced the same thought much earlier in its *Georges Pinson* decision of 1928:

> "Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente."[250]

94 The interpretative approach laid down in lit c views the international legal order as one single system and allows drawing conclusions from that perspective. It has, therefore, great potential to be one of the means to mitigate the effects of the much-described **fragmentation of international law**, since treaty interpretation can on the basis of this rule transgress the borders of specialized subregimes of international law, such as environmental law, trade law, law of the sea, international criminal or human rights law, and try to find a meaning for the terms in question that reflects the common basis of legal rules in an integrated system of international law. Thus, lit c highlights systemic integration as a function of treaty interpretation.[251]

95 The provision refers to "**relevant rules of international law**" as a means to interpret treaty provisions. Since no restrictions are contained in that phrase,[252] and

[247] PCIJ *SS 'Wimbledon'* PCIJ Ser A No 1, 25–28 (1923).

[248] ICJ *Namibia Opinion* [1971] ICJ Rep 16, para 53.

[249] ICJ *Right of Passage* (Preliminary Objections) [1957] ICJ Rep 125, 142.

[250] *Georges Pinson (France v Mexico)* (1928) 5 RIAA 327, para 50 subpara 4.

[251] *Cf* the report of the ILC Study Group on "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (2006), UN Doc A/CN.4/L.702, in its conclusions 17–21. In the same context also *Thiele* (2008), pp. 24–28.

[252] In an earlier draft the word "general" had been included as qualifying "international law", but it was deleted during the discussion in the ILC, in order to allow specific and regional rules to be used, *cf Gardiner* (2015), pp. 300–301.

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its meaning is even widened by the word "any", it must be taken to refer to all recognized sources of international law the emanations of which can in principle be of assistance in the process of interpretation. The implicit reference is, of course, to Art 38 para 1 ICJ Statute.

Thus, the terms of a treaty can, first, be interpreted in the light of those of **another treaty**, especially where the latter deals with a similar object or addresses the same legal situation. **96**

For example, the **ECtHR** uses, for the purpose of interpreting provisions of the ECHR, to take into account other human rights treaties, such as the International Covenant on Civil and Political Rights, the UN Convention Against Torture, the UN Convention on the Rights of the Child, the European Social Charter or conventions concluded under the auspices of ILO,[253] as well as the interpretation of those instruments by competent organs. In the *Rantsev* case the Court, after explicitly referring to Art 31 para 3 VCLT, turned to a UN Protocol and to the Anti-Trafficking Convention of the Council of Europe, in order to establish that trafficking in persons falls within the scope of Art 4 ECHR.[254] In *Hassan v United Kingdom* the grounds of permitted deprivation of liberty under Art 5 ECHR were interpreted in the light of the Third and Fourth Geneva Convention on the laws of war relating to internment, with the Court pointing out that the former "should be accommodated, as far as possible" with the taking of prisoners of war and the detention of civilians under the latter.[255]

Also the **Inter-American Court of Human Rights** refers to other human rights treaties, in order to establish the meaning of provisions of the American Convention on Human Rights. Thus, in the *Street Children* case the Court pointed out that "[b]oth the American Convention and the Convention on the Rights of the Child form part of a very comprehensive international *corpus juris* for the protection of the child that should help this Court establish the content and scope of the general provision established in Art 19 of the American Convention".[256]

In a recent maritime delimitation case the **ICJ** explicitly referred to UNCLOS as containing "relevant rules" within the meaning of lit c.[257]

[253] *Eg,* ECtHR *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 60; *Pini et al v Romania* ECHR 2004-V, para 139; *Sidabras and Džiautas v Lithuania* App Nos 55480/00, 59330/00, ECHR 2004-VIII, para 47; *Siliadin v France* App No 73316/01, ECHR 2005-VII, paras 85–87; *Sørensen and Rasmussen v Denmark* (GC) App Nos 52562/99 and 52620/99, ECHR 2006-I, para 72; *ASLEF v United Kingdom* App No 11002/05, 27 February 2007, para 38; *Emonet et al v Switzerland* App No 39051/03, 13 December 2007, para 65; *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, paras 69–73.

[254] ECtHR *Rantsev v Cyprus and Russia* App No 25965/04, 7 January 2010, paras 273–282.

[255] ECtHR *Hassan v United Kingdom* (GC) App No 29750/09, ECHR 2014-VI, paras 102–111.

[256] IACtHR *'Street Children' (Villagran-Morales et al) v Guatemala*, 19 November 1999, para 194.

[257] ICJ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 89.

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Lit c also applies to **bilateral treaties** in force between two parties to a dispute on the interpretation of a multilateral treaty.

Thus, in *Questions of Mutual Assistance* the ICJ pointed out that the general clauses contained in the earlier Treaty of Friendship and Co-operation between Djibouti and France "does have a certain bearing on the interpretation and application" of the 1986 Convention on Mutual Assistance in Criminal Matters between them.[258]

97 Since they are derived from the provisions of the UN Charter, basically a multilateral treaty, binding **resolutions of the UN Security Council** may also play an important role in the process of treaty interpretation.

Thus, the ECtHR in its *Loizidou* case referred to Security Council resolutions relating to the situation in Northern Cyprus when it interpreted the ECHR with regard to the taking of property there.[259]

98 Secondly, the general rules of **customary international law** may serve to set the background of a treaty provision and, thus, contain important guidance as to its interpretation.

This is, for example, what the **ICJ** did in the *Oil Platforms* case when it interpreted a clause contained in the bilateral treaty of friendship between Iran and the United States, which allowed for measures "necessary to protect the essential security interests" of either party, in the light of the general rules of international law on the use of force and the right to self-defence. The Court underlined that "the application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court [. . .]."[260]

Also the **ECtHR** referred to international customary law in its well-known *Al-Adsani* case: "The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity." The Court interpreted the right of access to court granted in Art 6 para 1 ECHR in the light of the inherent restrictions arising from the customary rules of State immunity.[261] In a subsequent case, the Court referred to the 2004 UN Convention on State immunity, which had not yet entered into force and was, thus, not binding on the State in question, as enshrining customary international law and, in that capacity, took it into account in interpreting the right of access to a court.[262] In the *Banković* case, when the ECtHR had to interpret the phrase "within its jurisdiction" in Art 1 ECHR, the Court found that that "must also take into account any relevant rules of international law when

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[258] ICJ *Mutual Assistance in Criminal Matters* [2008] ICJ Rep 177, paras 112–114.

[259] ECtHR *Loizidou v Turkey* (GC) (Merits) App No 15318/89, ECHR 1996-VI, paras 42–47.

[260] ICJ *Oil Platforms* (Merits) [2003] ICJ Rep 161, paras 40–41.

[261] ECtHR *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, paras 55–56. To the same effect ECtHR *Cudak v Lithuania* (GC) App No 15869/02, ECHR 2010-III, para 56; *Sabeh El Leil v France* (GC) App No 34869/05, 29 June 2011, para 48.

[262] ECtHR *Sabeh El Leil v France* (GC) App No 34869/05, 29 June 2011, paras 48–67.

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examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law",[263] but in the end did not derive any assistance from external material. In *Marguš v Croatia* the Court, referring to Art 31 para 3 lit c) VCLT, turned to the "general principles of international law" for the purpose of interpreting Art 4 Protocol No 7 (*ne bis in idem*), and, since it discovered "a growing tendency in international law to see such amnesties as unacceptable because they are incompatible with the unanimously recognized obligation of States to prosecute and punish grave breaches of fundamental human rights", held that the *ne bis in idem* rule did not apply to such breaches.[264]

The **ECJ** in the *Brita* case, where it was to interpret the EC-Israel Association Agreement, applied "the general international law principle of the relative effect of treaties [. . .] ('*pacta tertiis nec nocent nec prosunt*')" and referred in that respect explicitly to the 'relevant rules' clause of Art 31 VCLT.[265] In *Axel Walz* the Court, for the purpose of interpreting the Montreal Convention on the International Carriage in Air, referred to the ILC Articles on State Responsibility[266] as endorsing "a concept of damage which [. . .] is common to all the international law sub-systems".[267] In the *Polisario* case, the Grand Chamber of the ECJ referred under Art 31 para 3 c) VCT, among others, to the customary principle of self-determination and used it to interpret the scope of the Association Agreement between the EU and Morocco.[268]

The **Iran-US Claims Tribunal**, when it had to interpret the word "national" contained in the bilateral Claims Settlement Declaration, considered relevant the customary rule of effective nationality which it saw as having been developed in precedents and legal doctrine.[269] Similarly, in the *Iron Rhine* **arbitration** the tribunal took into consideration the general rules of international environmental law, in order to interpret the treaty before it.[270] In the arbitration concerning plain tobacco packaging (*Philip Morris v Uruguay*) the tribunal, when interpreting the specific investment treaty, turned to the development of the customary "fair and equitable treatment" standard.[271]

[263] ECtHR *Banković et al v Belgium et al* (GC) App No 52207/99, ECHR 2001-XII, para 57.

[264] ECtHR *Marguš v Croatia* (GC) App No 4455/10, ECHR 2014-III, paras 129–141.

[265] ECJ (CJ) *Brita* C-386/08 [2010] ECR I-1289, paras 43–44; confirmed in ECJ (GC) *Council v Front Polisario* Case C-104/16 P, 21 December 2016, ECLI:EU:C:2016:973, para 100.

[266] Articles on Responsibility of States for Internationally Wrongful Acts, Annex to UNGA Res 56/83, 12 December 2001, UN Doc A/RES/56/83.

[267] ECJ (CJ) *Axel Walz* C-63/09 [2010] ECR I-4239, para 27.

[268] ECJ (GC) *Council v Front Polisario* C-104/16 P ECLI:EU:C:2016:973, paras 86–92.

[269] Iran-United States Claims Tribunal *Iran v United States* Case A/18 (1984) 75 ILR 175, 188–194.

[270] *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, paras 58–59.

[271] ICSID *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* ARB/10/7, 8 July 2016, paras 317–324.

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99 Although of minor practical relevance, para 3 lit c would even allow reference to **general principles of law** within the meaning of Art 38 para 1 lit c ICJ Statute in the context of interpreting a treaty provision.

A famous example is the decision of the ECtHR in the *Golder* case where the Court held: "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para 1 must be read in the light of these principles."[272]

In its decision *US–Shrimp* the WTO Appellate Body referred to the principle of good faith as being, at once, a general principle of law and a general principle of international law and, under explicit reference to Art 31 para 3 lit c, sought guidance from it for the interpretation of Art XX GATT.[273] In the *EC–Biotech* case the WTO Panel was prepared to take into account the precautionary principle of international environmental law, if it were established that it had achieved the status of a general principle of law (which, it found, it had not).[274] In *EC–Large Civil Aircraft* the WTO Appellate Body considered the principle of non-retroactivity reflected in Art 28 VCLT a general principle of law, which is relevant to the interpretation of the WTO covered agreements.[275]

100 Notwithstanding the fact that "rules" would imply that only legally binding instruments can play a role under lit c, parts of international judicial practice seem to apply this condition somewhat less restrictively and also consider **non-binding documents** as material relevant for interpretation.

For example, the **ECtHR** turns, for the purpose of interpreting the ECHR, to non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly or reports by various independent commissions,[276] the UN General Assembly's Universal Declaration on Human Rights,[277] Guidelines and "Conclusions" published by the UN High Commissioner on Refugees,[278] and even the (then) non-binding EU Charter of Fundamental Rights.[279] The **ECJ** referred in the context of interpreting the Montreal Convention to the ILC Articles on State Responsibility.[280]

[272] ECtHR *Golder v United Kingdom* App No 4451/70, Ser A 18, para 35 (1975).

[273] WTO Appellate Body *US–Shrimp* WT/DS58/AB/R, para 158 and n 157 (1998).

[274] WTO Panel *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, paras 7.76–7.89 (2006).

[275] WTO Appellate Body *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R, para 672 (2011).

[276] *Cf* ECtHR *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, paras 74–75; *Bayatyan v Armenia (GC)* App No 23459/03, 7 July 2011, para 107.

[277] *Eg* ECtHR *Al-Adsani v United Kingdom* (GC) App No 35763/97, ECHR 2001-XI, para 60.

[278] ECtHR *Saadi v United Kingdom* (GC) App No 13229/03, 29 January 2008, para 65.

[279] ECtHR *Goodwin v United Kingdom* (GC) App No 28957/95, ECHR 2002-VI, para 100; *Sørensen and Rasmussen v Denmark* (GC) App Nos 52562/99 and 52620/99, ECHR 2006-I, para 72; *Eskelinen et al v Finland* (GC) App No 63235/00, 19 April 2007, para 60 *in fine*.

[280] ECJ *Axel Walz* C-63/09 [2010] ECR I-4239, para 27.

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Even broader is apparently the approach taken by the **Inter-American Commission on Human Rights** which considers that "in interpreting and applying the American Declaration [on Human Rights], it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the instrument was first adopted and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the American Declaration are properly lodged."[281]

101 In cases where the provision to be interpreted relates to the competences or procedures of international organs, the interpretation might seek guidance in similar provisions in other treaty regimes and, above all, in their **application by competent organs**. In such cases, it is not so much the external (parallel) "rules", but the practice under them which is being used as a means of interpretation.

This can be aptly shown in the *Mamatkulov and Askarov* case of the ECtHR where the Court had to decide on the binding character of interim measures adopted under Art 34 ECHR. In the process of interpreting the Convention norm and after explicitly referring to Art 31 para 3 lit c it basically reviewed the practice under other individual petition procedures, *eg* in the UN and the Inter-American system, and concluded from that: "The Court observes that the International Court of Justice, the Inter-American Court of Human Rights, the Human Rights Committee and the Committee against Torture of the United Nations, although operating under different treaty provisions to those of the Court, have confirmed in their reasoning in recent decisions that the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law."[282]

In the *Bayatyan* case, the ECtHR interpreted Art 9 ECHR to cover conscientious objection to military service and, as one of the reasons beside a trend in national legislation of European States, referred to "the equally important developments concerning recognition of the right to conscientious objection in various international fora", the most notable being the interpretation by the UN Human Rights Committee of the corresponding provisions of the ICCPR.[283]

The ICJ in its *CERD case* (*Georgia v Russia*) referred, for the purpose of interpreting the compromissory clause in the Convention, to its own jurisprudence concerning comparable clauses in other treaties.[284]

102 Art 31 para 3 lit c requires the rules of international law, which are supposed to be looked at for the purpose of interpretation, to be "**relevant**". This, of course, is a rather vague condition, which leaves the interpreter much room in the selection of

[281] IACHR *Mossville Environmental Action Now v United States,* Report No 43/10, 17 March 2010, para 43.

[282] ECtHR *Mamatkulov and Askarov v Turkey* (GC) App No 46827/99 and 46951/99, ECHR 2005-I, para 124.

[283] ECtHR *Bayatyan v Armenia (*GC) App No 23459/03, 7 July 2011, para 105.

[284] ICJ *Racial Discrimination Convention* (Preliminary Objections) [2011] ICJ Rep 70, paras 136–140.

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pertinent extrinsic material. It seems that the "relevance" of other treaties or customary rules can be seen to follow from various grounds: it is fairly obvious when those rules relate to the same subject matter as the treaty provision under interpretation.[285]

> For example, the exact scope of privileges of family members of diplomatic agents, which is described in Art 37 para 1 of the Vienna Convention on Diplomatic Relations with the words "forming part of his household", may be determined by looking at the provision addressing the same issue in the Vienna Convention on Consular Relations (Art 49 para 1). Even if in this case the English texts of both provisions do not reveal any significant differences in wording that would assist in the interpretation, the other authentic language versions in fact do.

Moreover, external rules, regardless of their subject matter, can be relevant when they are created to solve the same or similar factual, legal or technical problems. Again, another treaty cannot be "relevant" in this sense, if it is intended by its parties to be **of lower rank** than the treaty under interpretation (→ MN 73). An agreement that "shall adjust" to the latter or shall leave its provisions unaffected (*etc*) does not, therefore, qualify as a means of interpretation under para 3 lit c.[286]

103 Finally, para 3 lit c only allows those rules to be used for the purpose of interpretation that are "**applicable in the relations between the parties**". Since the word "parties" is defined in Art 2 para 1 lit g, its meaning seems, on the face of it, clear, *ie* States for whom the treaty under interpretation is in force. However, this does not settle the question, of whether the norm requires *all* the parties of that treaty to be bound by the "rules" in question, or whether it suffices that the latter apply only to some of the parties, *eg* those having an immediate interest in the interpretation or being involved in a dispute over it. While the comparison with para 2 lit a, where "all" is included before "the parties", might point to the latter, less restrictive reading, the definite wording "the" parties strongly suggests the former, restrictive reading.[287] This is confirmed by the immediate context of the norm, that is by para 3 lit b: it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law that are not applicable between all parties to the treaty, but not by a subsequent practice, which does not establish the agreement of all parties regarding the meaning of that treaty (→ MN 86).[288]

104 It is admitted that this restrictive approach severely limits the relevance of para 3 lit c for the interpretation of multilateral treaties with a wide, even universal participation.[289] However, on proper construction, it may allow for an exception,

[285] The WTO Appellate Body confined the concept of "relevant" to this meaning in *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R para 846 (2011). Similarly, ICJ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya) (Preliminary Objections),* 2 February 2017, para 89.

[286] Thus, the WTO Panel in *Chile–Price Band System* WT/DS207/R, para 7.85 (2002).

[287] In favor of the restrictive reading, also *Villiger* (2009), Art 31 MN 25; *Thiele* (2008), pp. 26–27.

[288] This was held by the WTO Panel in *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, para 7.68, n 243 *in fine* (2006).

[289] Favoring a less restrictive reading for practical reasons *French* (2006), p. 307.

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and that is if the treaty obligation in question, even if contained in a multilateral treaty, is in fact owed in a synallagmatic way between pairs of parties, rather than *erga omnes partes*: in those **cases of a bilateral implementation structure,** the treaty obligation may very well be considered in the light of other obligations applying bilaterally between those two parties only.[290]

The restrictive approach was applied by the WTO Panel in the *EC–Biotech* case when it held that other rules of international law, in that case the Convention on Biological Diversity and the Biosafety Protocol, cannot be taken into account for the interpretation of the WTO agreements, unless all WTO Members are bound by them.[291] The fact that the United States had signed, but not ratified the former Convention meant that it was not "applicable" to them and that Art 31 para 3 lit c did not apply.[292] The WTO Appellate Body was confronted with the issue in another case, but avoided to give an opinion on it.[293]

The less restrictive approach, which allows external rules to be used even if they are not binding on all the parties to the treaty, receives considerable support from the **practice of the ECtHR**: while in some cases it emphasized the fact that the other treaties referred to for the purpose of interpretation were at least binding upon the respondent State, the Court admitted itself in *Demir and Baykara v Turkey* that in searching for common ground among the European Convention and other norms of international law it had not always distinguished between sources of law according to whether or not they had been ratified by all States Parties to the Convention, or even by the respondent State.[294]

That the external rules are "**applicable**" in the relations between the parties presupposes that the latter are legally bound by those rules, either because they have given their consent to them as treaty rules, or because they are addressed by them as binding customary rules or general principles, or because they are bound for other reasons, such as acquiescence or unilateral declaration. Secondly, even if the external rules may have in principle binding effect on "the parties", their applicability between them must not be excluded for reasons of estoppel or through admissible reservations to a treaty. **105**

In practice, it is sometimes considered possible that rules extrinsic to the treaty under interpretation which do not qualify for consideration under lit c, either because they are not binding on all parties to the treaty, or because they face restrictions of application, may under certain circumstances nevertheless become relevant for the interpretation of the same treaty. **106**

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[290] *McLachlan* (2005), p. 315.

[291] WTO Panel *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, paras 7.68–7.71 (2006).

[292] *Ibid* para 7.74.

[293] *Cf* WTO Appellate Body *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R, paras 844–846 (2011).

[294] ECtHR *Demir and Baykara v Turkey* (GC) App No 34503/97, ECHR 2008-V, para 78, with examples given in paras 79–84.

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Annex 19

For example, the WTO Panel in the *EC–Biotech* case, after having followed the restrictive approach mentioned above (→ MN 103), thought it possible to consider the external rules, excluded under that approach, "because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do. They would be considered for their informative character."[295] The Appellate Body skirted the issue in *EC Large Civil Aircraft*, but was in the further course of its reasoning apparently prepared to consider the external agreement referred to as "part of the facts".[296]

Although the difference is, of course, that a treaty interpreter would this way be free to rely on the external rules, while under para 3 lit c he or she is bound to take them into account, the argument appears very much like a sleight-of-hand, since it reintroduces interpretative material through the backdoor that has been excluded following a strict reading of the rule of interpretation. It seems hardly compatible with the overall structure of Art 31. However the fact that this 'backdoor approach' has been thought necessary in practice, may be considered a practical argument against the restrictive approach to the phrase "applicable in the relations between the parties".

107 Even though it is not recognizable in the text of para 3 lit c, the provision has an important **temporal element**: to the state of the law **at what moment in time** does the rule relate, the time of the conclusion of the treaty or that of interpretation? The (inter) temporal aspect was contained in earlier drafts of the provision, it had even been the reason for designing it in the first place, but was later omitted[297]: the provisional ILC draft of 1964 had referred to the general rules of international law "in force at the time of its conclusion"; after re-considering the article, the ILC deleted the time element because it thought it was "unsatisfactory". The Commission considered that "the correct application of the temporal element would normally be indicated by interpretation of the term in good faith",[298] thus, it left the issue decidedly undecided.

108 Since the consideration of external rules for the purpose of interpretation is not *per se* either static or dynamic, *ie* it can be used both ways, it is submitted that the correct use of the rule contained in para 3 lit c **depends on whether the static or the dynamic approach applies** to the term in question. As has been shown earlier (→ MN 22–27), this depends upon the intentions of the parties, but if they have used generic terms in their treaty, the meaning of which necessarily evolves over time, they usually must be presumed to have intended a dynamic interpretation. In that case, the "relevant rules" to be considered under para 3 lit c must be those applicable at the time of interpretation.

This is also how the ICJ applied the rule in its *Namibia* opinion, when it introduced the dynamic approach of treaty interpretation and added: "an international instrument has to be interpreted and applied within the framework of the entire legal system *prevailing at the time of the interpretation*".[299]

[295] WTO Panel *EC–Approval and Marketing of Biotech Products* WT/DS291-3/R, para 7.92 (2006). Similarly, *McLachlan* (2005), p. 315.

[296] WTO Appellate Body *EC and Certain Member States–Large Civil Aircraft* WT/DS316/AB/R, paras 852–853 (2011).

[297] *Cf Sinclair* (1984), pp. 138–139; *Gardiner* (2015), pp. 295–298.

[298] Final Draft, Commentary to Art 27, 222, para 16.

[299] ICJ *Namibia Opinion* [1971] ICJ Rep 16, (emphasis added).

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> Similarly, in the *Iron Rhine Railway* arbitration the tribunal considered modern principles of international environmental law relevant for the interpretation of bilateral treaties concluded by Belgium and the Netherlands in 1839 and 1873.[300]

IV. Special Instead of Ordinary Meaning (Para 4)

Art 31 para 4 contains an **exception to para 1** for cases where the parties have agreed, even implicitly, to replace the ordinary meaning of a term contained in a treaty provision by a special meaning. However, the notion of "special meaning" refers to two different kinds of cases, which are both covered by para 4. **109**

First, it may be that the terms of a treaty have a technical or "special meaning" due to the particular field the treaty covers. In this case, the particular meaning may already appear from the context and object and purpose of the treaty, it is essentially the **ordinary meaning in the particular context**.[301] It is this reading of the concept of "special meaning" which lends itself to explaining the practice of autonomous interpretation applied in particular legal regimes, such as the ECHR or the European Union: the autonomous meaning given by the European Courts to the European Convention and the EU treaties, respectively, represents their ordinary meaning in the particular setting of their legal regime.[302]

In the second case, the meaning of terms of a treaty is "special" because the parties are using it in a way **different from the more common meaning**. It is this category which para 4 is especially aiming at, and in this understanding, the provision entails the only element in the process of treaty interpretation which explicitly looks to the intention of the parties, rather than to its emanation in the text, in order to establish their very own understanding of a term which they used.

The main reason why the ILC decided to include an express provision on the point into its draft was to emphasize that the **burden of proof** lies on the party invoking the special meaning of the term, and the strictness of the proof required.[303] That point had already been made by the PCIJ in the *Eastern Greenland* case, when it held: **110**

> "The geographical meaning of the word 'Greenland', *ie* the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention."[304]

[300] *Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands)* (2005) 27 RIAA 35, paras 57–60.

[301] *Gardiner* (2015), p. 334.

[302] Art 31 para 4 is applied to both regimes by *Sorel and Boré* (2011), Art 31 MN 50.

[303] *Cf* Final Draft, Commentary to Art 27, 222, para 17.

[304] PCIJ *Legal Status of Eastern Greenland* PCIJ Ser A/B No 53, 49 (1933). Confirmed by the ICJ in *Western Sahara Opinion* [1975] ICJ Rep 12, para 116.

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Also, in *Conditions of Admission,* the ICJ pointed out that "a decisive reason would be required" in order to displace the natural meaning of the terms used,[305] and the arbitral tribunal in the *Rhine Chlorides* arbitration of 2004 applied a very similar standard when it required the party invoking a particular meaning "to make a convincing case for it".[306] In view of the general design of Art 31, the **standard of proof** required to establish a "special meaning" is, thus, fairly high: it is not enough that one party simply uses the particular term in a particular way, but it must show that such a usage reflects the common intention of the parties.

111 However, Art 31 para 4 does not say **what kind of evidence** may be used to establish that intention. Since Art 31 contains no restriction in this respect, it seems plausible that all the evidence available to the proponent of a "special meaning" may play a role in showing that a "special meaning" was intended and what that meaning is. The most common way in which the parties could indicate a particular meaning would be, of course, to include an explicit definition article in the treaty. If a definition is lacking, the *travaux préparatoires* and the actual, and consented, practice of the parties may in most cases be useful. Moreover, para 4 does not exclude that the parties could agree on special interpretative principles, which differ from the general rule laid down in Art 31, or which place a different weight on some of the elements of interpretation.[307]

E. Treaties of International Organizations (VCLT II)[308]

112 The provisions on treaty interpretation in the 1986 Vienna Convention are **identical** to those in the 1969 Convention, as in the ILC and at the 1986 Conference the established rules were simply replicated and inserted into the text of the VCLT II without debate.[309]

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[306] *Convention on the Protection of the Rhine* (n 19) para 67.

[307] *Gardiner* (2015), p. 341.

[308] For the treaty text see p. 1486 *et seq*.

[309] *Cf* [1982-I] YbILC 22 and 260; UNCLOTIO I 15–16.

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Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

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A. Purpose and Function

Art 32 deals with the use of supplementary means in the process of treaty interpretation and with the relationship of that use to the general rule of interpretation laid down in Art 31. The provision therefore basically determines the circumstances under which such means may be invoked in treaty interpretation, what weight is to be given to them and how they relate to the other rules of interpretation. The core issue is what **information and material outside the text of a treaty** can be brought into the process of interpreting it, and how this is done *lege artis*.[1] In this respect, Art 32 corresponds to Art 31 paras 2 and 3, which also refers to extrinsic material in order to include them into the context of the treaty, whereas here the identified material is given a lesser value as being merely supplementary. **1**

This **distinction of primary and supplementary means** of interpretation is based on their proximity to the (presumed) intentions of the parties, to their "agreement": the text is presumed to be the authentic expression of their consent, extrinsic means like subsequent agreements and practice are only included among the primary means in so far as they express "agreement" among the parties (Art 31 **2**

[1] *Gardiner* (2015), p. 348.

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para 3). Art 32 does not require any such agreement, which is why the means of interpretation assembled here are considered to be considerably less reliable.[2]

3 The most commonly used and most controversial of those means is, of course, the **preparatory work** of a treaty, which is commonly referred to in its French version as "*travaux préparatoires*". The restrictive purpose of Art 32 relates above all to that interpretative *topos*, it is labelled a supplementary means of interpretation in order to ensure that recourse to preparatory work is not used as an alternative, autonomous method of interpretation, distinct from the general rule.[3] The main practical reason for this general scepticism as to the interpretative value of *travaux* seems to be that they are usually seen as being often incomplete and misleading, thus by their nature less authentic than the other elements of interpretation.[4]

4 The foremost purpose of Art 32 is, therefore, to make clear that preparatory work in principle has but **a supporting role** in treaty interpretation. It is supposed to assume its interpretative function only after the application of the general rule, *ie* after the application of the whole of Art 31. Since the role which preparatory material can play in the process of interpretation marks the essential difference between the textual and the "intentions" approaches to treaty interpretation, the restrictive design of Art 32 characterize the provision as a further confirmation of the fact that the Vienna rules of interpretation are clearly based on the textual approach (→ Art 31 MN 3 and 37). This supplementary value of preparatory work is usually taken to be **part of the customary law character** of the Vienna rules of interpretation (→ Art 31 MN 6).[5]

5 As part of treaty and customary law, the rule laid down in Art 32 is a **dispositive norm**, so that the parties to a given treaty, acting in consent, may opt to decide otherwise and agree that for the interpretation of their treaty the use of preparatory work is, for example, to play a more important role. Such can also be stipulated in a multilateral convention, as is done, for example, in Art 14 para 1 lit d VCLT, which binds the valid treaty consent of a State to an intention "expressed during the negotiation".

B. Historical Background and Negotiating History

6 The restrictive use of *travaux préparatoires* in treaty interpretation has a long history in the practice of international law. One of the most prominent *dicta* in this respect can be found in the *Lotus* judgment of the PCIJ where the Court **established the merely subsidiary value** of the preparatory work by holding that

[2] *Berner* (2016), p. 75; *Linderfalk* (2007), p. 153.

[3] *Sinclair* (1984), p. 116.

[4] *Aust* (2013), p. 219 *in fine;* various reasons are given by *Le Bouthillier* (2011), Art 32 MN 32–38. The traditional doctrinal controversy on the use of *travaux préparatoires* is described *eg* by *Mehrish* (1971), pp. 39–57.

[5] *Le Bouthillier* (2011), Art 32 MN para 7.

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"there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."[6] The ICJ in its early case law explicitly referred to that restrictive approach and adopted it.[7] The early international jurisprudence further described the threshold which must be reached before preparatory work can be taken into account. In its opinion on the *Polish Postal Service in Danzig*, the PCIJ held that

> "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, *unless such interpretation would lead to something unreasonable or absurd*."[8]

Again, that view was adopted by the ICJ, which applied it at a very early stage of its practice to the interpretative use of *travaux préparatoires*.[9] Nevertheless, the state of the law seemed very unclear in those days, which led an important voice in legal doctrine opining that:

> "[i]t is not possible to state any rules of law governing the question whether, and, if so, to what extent international courts and tribunals [. . .] are entitled to look at 'preparatory work' [. . .]."[10]

7 The restrictive approach to preparatory work was also very much present in the **work of the ILC** on the law of treaties. Thus, SR *Waldock* pointed out that some caution is needed in the use of *travaux*, because they are simply evidence of the intentions of some of the parties, and their cogency depends on the extent to which they furnish proof of the *common* understanding of the parties as to the meaning of the terms of the treaty.[11] The provision on preparatory work exposed some difference in approach to treaty interpretation among members of the ILC, especially regarding the precise way in which recourse to *travaux préparatoires* should be related to the textual approach to interpretation.[12] In view of those differences and despite critical comments on the part of some governments indicating a preference for allowing a larger role to preparatory work, SR *Waldock* thought the rule he had formulated was carefully balanced in reconciling the principle of the primacy of the text with the frequent and quite normal recourse to *travaux préparatoires* in practice.[13]

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[6] PCIJ *'Lotus'* PCIJ Ser A No 10, 16 (1927). To the same effect *cf Payment of Various Serbian Loans Issued in France* PCIJ Ser A No 20, 30 (1929).

[7] *Cf eg* ICJ *First Admissions Case* [1948] ICJ Rep 57, 63; *Ambatielos Case* [1952] ICJ Rep 28, 45; *Constitution of the Maritime Safety Committee* [1960] ICJ Rep 150, 159–160.

[8] PCIJ *Polish Postal Service in Danzig* PCIJ Ser B No 11, 39 (1925) (emphasis added).

[9] ICJ *Second Admissions Case* [1950] ICJ Rep 4, 8.

[10] *McNair* (1961), p. 411.

[11] *Waldock* III 58, para 21.

[12] *Cf Waldock* VI 99, para 20.

[13] *Cf Waldock* VI 99, para 20.

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8 In its commentary on the **Final Draft,** the ILC itself basically gave two distinct explanations on why the preparatory work should play a less prominent role in treaty interpretation: first, the elements of interpretation contained in the general rule of interpretation (today Art 31) all related to the agreement between the parties at the time when or after it received authentic expression in the text, while this is not the case with preparatory work, which could not therefore, in the view of the Commission's majority, have the same authentic character as an element of interpretation. Second, the Commission pointed out that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion should be exercised in determining their value as an element of interpretation.[14]

9 The provision on preparatory work was the only part of the rules on interpretation on which there was a substantial debate at the **Vienna Conference** in the first session. The differences arising can in essence be described to have existed between those who asserted the primacy of the text of a treaty as revealing the parties' commitments and those who saw the interpretative quest as primarily investigating the intentions of the parties, with aid in that task being sought from wherever it could be found.[15] In the end, the attempts, especially undertaken by the US delegation, to have the rule on the use of preparatory work and the general rule on interpretation combined in one provision and, thus, put on the same footing[16], failed.

C. Elements of Art 32

I. Supplementary Means of Interpretation

10 Art 32 refers as supplementary means of treaty interpretation explicitly to the preparatory work of the treaty and to the circumstances of its conclusion, but at the same time indicates, by using the word "including", that these are meant to be examples, rather than an exclusive list. The provision implies, therefore, that other material may play a—supplementary—role in the interpretation of a treaty.

1. Preparatory Work of the Treaty

11 There is no recognized definition in international law of *travaux préparatoires*, nor is there a clear rule on what kind of material can be taken into account in this respect

[14] Final Draft, Commentary to Arts 27 and 28, 220, para 10. The work of the ILC with regard to *travaux* is captured by *Mortenson* (2013), pp. 790–808, who demonstrates that the drafters were by no means hostile to its interpretive use.

[15] *Gardiner* (2015), p. 348; *Le Bouthillier* (2011), Art 32 MN 2.

[16] The debate on the US proposal is summarized *eg* by *Mehrish* (1971), pp. 58–60 and *Gardiner* (2015), pp. 349–350. *Mortenson* (2013), pp. 808–820 argues that the prominence of that debate laid the ground for the conventional wisdom that Art 32 prescribes the restrictive use of *travaux préparatoires*.

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or how far back in the history of the treaty the interpreter may go to look for guidance. As *Gardiner* puts it, courts and tribunals tend to seize on anything that looks helpful.[17] Since the purpose of the use of preparatory work in this context is to discover the true meaning of what the parties agreed to in their treaty, **several conditions** must be fulfilled before the material in question can be considered *travaux préparatoires*.

12 First, only material and processes **that can be objectively assessed** by an interpreter can qualify as preparatory work. They must be part of the outside world, so that people can take cognizance of them. Thus, individual thoughts, plans, recollections and memoirs in principle do not qualify; also, oral statements are difficult to evaluate, as long as they are not written down or cannot be corroborated by other evidence.[18]

13 Thus, preparatory work includes **all documents relevant** to the forthcoming treaty and generated by the negotiating states during the preparation of the treaty up to its conclusion, for example drafts, memoranda, commentaries and other statements and observations by governments transmitted to each other or to a drafting body, diplomatic exchanges between the negotiating parties, negotiation or conference records, minutes of commission and plenary proceedings. Beside the documents themselves, preparatory work includes the **processes** they underwent during the negotiations, *eg* changes in texts under negotiation, but also the refusal to change a text. The course of a discussion or of a diplomatic exchange may be important, as well as individual contributions by negotiators or delegations.[19]

14 Second, the material considered must be apt to **illuminate a common understanding** of the negotiating parties as to the meaning of the treaty provisions.[20] Thus, the material in question can only qualify as preparatory work proper if it was, at one stage at least, present in the negotiating process and **available to the negotiators** collectively.

15 This *caveat* applies, above all, to **documents from a unilateral source**, such as statements of individual governments or State representatives outside the treaty negotiations, national legislative documents, explanations given to a legislative body as part of a national ratification process. Those materials can only be taken into account if they were at some point introduced into the negotiation process, at least brought to the knowledge of other participants in the negotiations, and did not remain unilateral hopes, inclinations or opinions.

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[17] *Gardiner* (2015), p. 112.

[18] *Le Bouthillier* (2011), Art 32 MN 28 refers, *eg*, to videotaped sessions of a negotiating committee.

[19] For example, the ICJ considered in *Namibia* [1971] ICJ Rep 16, para 69, the course of the debate in the UN Preparatory Commission. The bilateral exchange between the parties was considered inconclusive in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility) [1995] ICJ Rep 6, para 41.

[20] *Cf Iron Rhine ('Ijzeren Rhin') Railway Arbitration (Belgium v Netherlands),* (2005) 27 RIAA 35, para 45.

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In the *Oil Platforms* case, the ICJ did admit and consider unilateral documents of the US administration (a memorandum sent by the State Department to the US embassy in China, and a message of the Secretary of State transmitting several treaties to the US Senate for consent to ratification) in order to confirm an interpretation of the bilateral treaty of friendship with Iran which it had found before.[21] From the sequence of argument of the Court it can be deduced that it admitted the documents under Art 32,[22] although it did not explicitly characterize them as preparatory work (which they clearly were not).

In a recent delimitation dispute between Somalia and Kenya, the Court considered as *travaux* a note sent by the UN-Mission of Norway to the UN-Secretariat, since Norway had been involved by giving administrative assistance to Somalia.[23]

16 The question arises then as to whether material can be banned from being considered if it was **not equally available to all parties** to the treaty. In this respect, the PCIJ in the *River Oder* case had followed a very restrictive approach, when it refused to take the record of the conference which prepared the Treaty of Versailles into account as *travaux*, simply because some of the parties to the dispute before the Court had not participated in that conference.[24] It is doubtful, however, if that ruling represents the actual practice in regard to multilateral treaties open to accession by States that did not attend the conference at which they were drawn up.[25] A state acceding to a treaty in the drafting of which it did not participate may usually ask to see the *travaux* before acceding. Moreover, the restriction applied by the PCIJ would be practically inconvenient, having regard to the great number of multilateral treaties open generally to accession: accession to and interpretation of those treaties would be made much more difficult, if the preparatory work could only be used as between parties that took part in their drafting. Therefore, the ICJ in its early jurisprudence tacitly rescinded the *River Oder* approach of the PCIJ,[26] and the ILC explicitly refused to adopt it.[27]

17 Thus, preparatory work of multilateral treaties may also be considered in disputes on interpretation in which non-negotiating states are involved, as long as the *travaux* are published or unpublished, but accessible.[28] This last *caveat*, made by the ILC, **excludes confidential documents** from being used for the purpose of treaty interpretation, which were not accessible to other participants in the negotiations, let alone to acceding states. The questions remains, however, if in a given case the test for reliance on the *travaux* tends to be a more formal one, referring to the publication of the material in question, or a substantive one of genuine

[21] ICJ *Oil Platforms (Iran v United States)* (Preliminary Objection) [1996] ICJ Rep 803, para 29.

[22] *Gardiner* (2015), p. 120.

[23] ICJ *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections), 2 February 2017, para 104.

[24] PCIJ *Territorial Jurisdiction of the International Commission of the River Oder* (Order of 20 August 1929) Ser A No 23, 41, 42.

[25] *Waldock* III 58, para 21.

[26] *Cf Rosenne* (1963), pp. 1380–1381.

[27] Final Draft, Commentary to Art 27, 223, para 20.

[28] *Ibidem*. Concurring *Sinclair* (1984), p. 144.

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accessibility, or a combination of both—all three approaches, it is submitted, can be found in practice.[29]

The principle that material can only qualify as preparatory work if it was present in the negotiating process, also applies to drafting material and discussion processes in **independent bodies**, such as expert committees or even the ILC itself. In practice, ILC records are on occasion referred to as preparatory work of multilateral conventions that had their origins in the Commission's work. **18**

> Thus, in its *Continental Shelf Case* the ICJ referred explicitly to "the records of the International Law Commission *and other travaux préparatoires* of the 1958 Geneva Convention on the Continental Shelf".[30] In later decisions, the Court used ILC material to describe "the genesis of the text" of a provision of the 1958 Convention on the Territorial Sea and the Contiguous Zone[31] and quoted comments of the ILC and its Special Rapporteur as part of the *travaux* of that Convention.[32] Similarly, when the Court interprets the rules of the VCLT itself, it refers to ILC documents and to the views expressed in them.[33]

While the liberal use that is made of the ILC material may seem justified by the fact that in essence its work is usually the main substantive source, or at least the predominant inspiration, of the later convention, this can, in a formal sense, only be correct under the head of *travaux préparatoires* insofar as the material had been introduced into the negotiations by the parties or their representatives. Other than that, it would seem that the relevant ILC records, or in fact material of equivalent organs, may be taken into account as other "supplementary means" under Art 32.[34]

Third, in order to be relevant as *travaux*, the material must directly **relate to the treaty under consideration**, it must be part of its negotiation process and purport to shed light on its substance. In practice, however, interpreters sometimes refer to material leading up to an identical predecessor treaty and even to similar treaties and apply that material as if it were preparatory work to the treaty under consideration. **19**

> That is what the ICJ did in the *La Grand* case, when it interpreted Art 41 of its Statute in the light of the drafting history of the identical provision in the PCIJ Statute, which included an earlier bilateral treaty between the United States and Sweden.[35] Also in the various *Legality of Force* cases the Court found it necessary, in order to interpret Art 35 para 2 of its Statute, to examine the drafting history of both the PCIJ and the present Statute.[36]

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[29] *Cf Merkouris* (2010), pp. 81–82.

[30] ICJ *Continental Shelf (Tunisia v Libya)* [1982] ICJ Rep 18, para 41 (emphasis added).

[31] ICJ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* [2007] ICJ Rep 659, para 280.

[32] ICJ *Maritime Delimitation in the Black Sea* [2009] ICJ Rep 61, para 134.

[33] *Eg,* in ICJ *Boundary between Cameroon and Nigeria* (Preliminary Objections) [1998] ICJ Rep 275, para 31; *Kasikili/Sedudu Island* [1999] Rep 1045, para 49.

[34] Concurring *Le Bouthillier* (2011), Art 32 MN 25.

[35] ICJ *LaGrand* [2001] ICJ Rep 466, paras 105–107.

[36] *Eg,* ICJ *Legality of the Use of Force (Serbia and Montenegro v Germany)* [2004] ICJ Rep 720, paras 101–111.

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It is submitted that material relating to earlier or similar treaties is not *stricto sensu* preparatory work, but may, again, be considered other supplementary means under Art 32.

20 The collected material qualifying as preparatory work will necessarily be quite heterogeneous, and its **interpretative value will depend** on its cogency, its accessibility, its direct relevance for the treaty terms at issue, the consistency with other the means of interpretation, but also on the number of parties involved in the evolution of the particular material. Moreover, the more the material actually reflects a growing agreement, even a common intention of the negotiating parties, the higher its interpretative value will be. This may, among others, depend on the moment in time the material comes into existence: documents from the negotiations that were drawn up immediately before the text of the treaty was adopted will probably deserve particular attention as being very "close" to the agreement of the parties,[37] unless, however, they form part of the latter and are, therefore, to be considered extrinsic context under Art 31 para 2.

21 It becomes evident from the structure of Arts 31 and 32 that preparatory work must be **distinguished from extrinsic context,** which is covered by Art 31 para 2. As pointed out earlier (→ Art 31 MN 63), this distinction is far from easy to draw and probably best made according to whether the material in question was relevant in preparing the text of the treaty (*travaux*) or in underlining the treaty consensus present at the time of conclusion (context). Naturally, only material set out before the adoption or conclusion of the treaty can become part of its preparatory work, but if the time-lag between the material in question receiving the agreement of the parties and the adoption of the text of the treaty itself becomes too small, the material might qualify as extrinsic context under para 2 lit b or c, rather than as *travaux*.

2. Circumstances of Conclusion

22 Along with the preparatory work, Art 32 allows the circumstances of the conclusion of a treaty to be taken into account as a supplementary means of interpretation. According to SR *Waldock*, this formula is meant to cover both the contemporary circumstances and the historical context in which the treaty was concluded.[38] Thus, reference is made to **factual circumstances** present at the time of conclusion and the historical background of the treaty, which is supposed to have been present in the minds of those who concluded it. Above all, the knowledge of those facts may help to identify the motives of the parties and, thus, the object and purpose of the treaty,[39] but the factual background may be relevant beyond that.

[37] *Le Bouthillier* (2011), Art 32 MN 27.

[38] *Waldock* III 59, para 22.

[39] This was apparently the reason why the ICJ in *Barcelona Traction* referred to the historical background of Art 37 ICJ Statute, before actually going about to interpret that provision, *cf Barcelona Traction* (Preliminary Objections) [1964] ICJ Rep 6, 31–32.

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Annex 20

A. Zimmerman et al., eds., *The Statute of the International Court of Justice: A Commentary* (Oxford University, 2019), pp. 712–798, 963–1006, 1135–1202, 1617–1650

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A Commentary

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Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

1. La compétence de la Cour s'étend à toutes les affaires que les parties lui soumettront, ainsi qu'à tous les cas spécialement prévus dans la Charte des Nations Unies ou dans les traités et conventions en vigueur.

2. Les Etats parties au présent Statut pourront, à n'importe quel moment, déclarer reconnaître comme obligatoire de plein droit et sans convention spéciale, à l'égard de tout autre Etat acceptant la même obligation, la juridiction de la Cour sur tous les différends d'ordre juridique ayant pour objet:

a. l'interprétation d'un traité;

b. tout point de droit international;

c. la réalité de tout fait qui, s'il était établi, constituerait la violation d'un engagement international;

d. la nature ou l'étendue de la réparation due pour la rupture d'un engagement international.

3. Les déclarations ci-dessus visées pourront être faites purement et simplement ou sous condition de réciprocité de la part de plusieurs ou de certains Etats, ou pour un délai déterminé.

4. Ces déclarations seront remises au Secrétaire général des Nations Unies qui en transmettra copie aux parties au présent Statut ainsi qu'au Greffier de la Cour.

5. Les déclarations faites en application de l'Article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes.

6. En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide.

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A. Historical Development

1 The key issue concerning the adjudication of international disputes between States is under what conditions States may be subject to the jurisdiction of any potentially competent judicial body. At the height of the era of unfettered State sovereignty, from the middle of the nineteenth century to the outbreak of the First World War, there could be no doubt at all that any adjudication of inter-State disputes required the consent of the litigant parties. A formal reflection of this doctrine can be found in the 1907 Hague Convention for the Pacific Settlement of International Disputes (Article 38):

> In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognised by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.[1]

This cautious approach could, on the one hand, be hailed as progress in legal thinking, since arbitration was acknowledged as the method best suited to resolve disputes having a legal background. On the other hand, however, it still confirmed the supremacy of sovereign political decisions in this field.

I. The PCIJ

After the First World War, it was generally realized that any peaceful modality of settling international disputes was indeed better than war. Judicial settlement was viewed more favourably than a few years earlier at the two Hague Peace Conferences of 1899 and 1907.[2] Thus, the Members of the newly established League of Nations formally declared their readiness to resort to judicial settlement of their differences. Article 12, para. 1 of the Covenant of the League provided: 2

> The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement ...

This statement was confirmed and corroborated by the propositions enunciated in Article 13, para. 1 and para. 2 of the Covenant:

> The Members of the League agree that, whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration or judicial settlement, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.
>
> Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

Notwithstanding these expressions of preference to be given to adjudication, it was still fairly open whether Articles 12 and 13 of the Covenant of the League contained any binding and enforceable obligations or whether the pertinent words constituted no more than a recommendation, to be executed in any single instance by the parties concerned through the conclusion of a *compromis* (or special agreement), which would in turn specify the precise modalities of submission of a given dispute to judicial determination. Decisive arguments militated in favour of the latter since in any event the States concerned had to make a choice between arbitration and judicial settlement.

The Committee of Jurists, entrusted by the Council of the League of Nations with drawing up a first draft for the establishment of a Permanent Court of International Justice,[3] recommended providing the Court with 'compulsory jurisdiction'. States were to be free to adhere to the instrument governing the future judicial body, but acceptance of 3

[1] Hague Convention No. 1 for the Pacific Settlement of International Disputes, 18 October 1907, UKTS 6 (1907), 1 Bevans 577, 205 CTS 233, Art. 38.

[2] *Cf.* Eyffinger, *The 1899 Peace Conference: 'The Parliament of Man, the Federation of the World'* (1999), pp. 353 *et seq.*; Baker, 'Hague Peace Conferences (1899 and 1907)', *EPIL IV*, pp. 689–98, 696.

[3] *Cf.* Hudson, *PCIJ*, pp. 114–5.

that instrument was to be conceived as acceptance of the determination of any emerging dispute by judicial decision. Article 33 of the Committee's Draft Scheme was framed as follows:

> Lorsqu'un différend surgit entre Etats, qu'il n'a pu être réglé par la voie diplomatique et que l'on n'est pas convenu de choisir une autre juridiction, la Partie qui se prétend lésée peut en saisir la Cour. La Cour, après avoir décidé s'il est satisfait aux prescriptions précédentes, statue sous les conditions et limitations déterminées par l'article suivant.

This suggestion was rejected by the Council of the League of Nations. Likewise in the ensuing deliberations of the Assembly the proposals of the Committee of Jurists did not meet with approval.[4] The opinion prevailed that acceptance of the jurisdiction of the PCIJ should be encouraged but that States should have some discretion in restricting their submission to judicial settlement.[5] The end product of the discussion process in the different bodies of the League of Nations was Article 36 of the Statute of the PCIJ, a provision largely similar to the current text of Article 36 of the Statute:

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.
>
> The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:
>
> (a) The interpretation of a Treaty.
> (b) Any question of International Law.
> (c) The existence of any fact which, if established, would constitute a breach of an international obligation.
> (d) The nature or extent of the reparation to be made for the breach of an international obligation.
>
> The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.
>
> In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

4 Technically, it was not the Statute itself that constituted the focal point of signature and ratification but a Protocol of Signature with the Statute as an annex.[6] Curiously enough, declarations under Article 36, para. 2 of the Statute were not to be made directly under this provision but by accepting an 'Optional Clause' that was appended to the Protocol of Signature. This Optional Clause ran as follows:

> The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the

[4] *Cf.* for more details Spiermann, Historical Introduction, MN 11–17.

[5] *Cf.* Fachiri, *The Permanent Court of International Justice* (2nd edn., 1932), pp. 2–9; von Stauffenberg, pp. 247–55; Waldock, *BYIL* (1955–1956), p. 244.

[6] *Cf. Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 399, para. 15. *Cf.* Spiermann, Historical Introduction, MN 22.

jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions.[7]

II. The Drafting of the Statute of the ICJ

When after the Second World War the establishment of a new world organization was envisioned, consideration had also to be given to complementing the organizational structure by a judicial body. The choice was between continuing the PCIJ and creating a new court. Very soon, the decision was made to opt for a fresh start, but on the basis of the experiences gathered from the operation of the PCIJ.[8] Once again, the pivotal issue was whether the jurisdiction of the new court should be compulsory or whether some optional elements should be included in the scheme. A Committee of Jurists, entrusted with carrying out preparatory work before the convening of the San Francisco Conference (the 'Washington' Committee of Jurists, named after its venue), proposed in its Draft of an International Court of Justice[9] two versions of a new Article 36, which was to be again the provision governing jurisdiction. While the first version followed more or less the model of the PCIJ Statute, the second version opted bluntly for the general submission of States to the jurisdiction of the planned court. It provided (para. 2): 5

> The Members of The United Nations and States parties to the present Statute recognise as among themselves the jurisdiction of the Court as compulsory *ipso facto* and without special agreement in any legal dispute concerning [then followed the well-known list].[10]

There was no additional para. 3 acknowledging the right of States to modify this commitment by reservations. However, in the commentary thereto—which acknowledged that this formula might be 'too simple'—it was recognized that some further elaboration might be necessary, permitting, for instance, some reservations *ratione temporis* or reservations excluding the occurrences of the recent war.[11]

At the San Francisco Conference, consideration of Article 36 was entrusted to Committee IV/1, which again established a Subcommittee for that purpose (IV/1/D). This latter body had to decide which draft it should take as the basis of its work. It had the choice between the two proposals submitted by the Washington Committee of Jurists and a draft submitted by New Zealand, which was also founded on a strict concept of compulsory jurisdiction (para. 2): 6

> Save as hereinafter excepted the court shall in particular have jurisdiction to hear and determine, and the parties to this Statute agree to submit to it, any legal dispute concerning . . .[12]

New Zealand was not totally against excluding some classes of disputes from this clause, but in principle it favoured a comprehensive approach with almost no flexibility for States. The Subcommittee decided, however, to follow the traditional path (version 1 of the Washington Committee of Jurists draft),[13] although in reality most of the delegates

[7] Reproduced in Hudson, *PCIJ*, p. 681.
[8] *Cf.* Chesterman/Gowlland-Debbas on Art. 1 MN 6–9, 26–34; Chesterman/Oellers-Frahm on Art. 92 UN Charter MN 12–16.
[9] UNCIO XIV, p. 821.
[10] *Ibid.*, p. 842.
[11] *Ibid.*, p. 841.
[12] UNCIO XIII, p. 561.
[13] *Ibid.*, p. 558: vote of eight against three.

favoured compulsory jurisdiction. From a realistic perspective it was feared that too rigid a scheme would become an obstacle to obtaining agreement on the text of both the Statute and the Charter.[14] In fact, it had clearly emerged in the discussions held in the plenary Committee that, in particular, the United States and the Soviet Union were staunch opponents of compulsory jurisdiction as suggested by the second version of the Washington proposals and the New Zealand proposal.[15] Eventually, the draft submitted by the Subcommittee[16] was approved by a broad majority of thirty-one to fourteen, following the logic of *realpolitik*. In sum, only two substantial changes had been made to Article 36 of the PCIJ Statute. The phrase 'or any of the classes' in Article 36, para. 2 was deleted, and a new para. 5 dealing with declarations made with regard to the PCIJ was added.

B. Main Features of the Jurisdictional Scheme under Article 36

I. Jurisdiction

7 The concept of jurisdiction as employed in Article 36, para. 1 denotes the authority of the ICJ to make binding determinations by adjudicating disputes between States.[17] Although this provision does not place the Court to a hierarchically superior position compared to other adjudicatory bodies in international law, the Court 'remains the pre-eminent standing tribunal for the adjudication' of such disputes.[18] As provided for under Article 34, the ICJ is not vested with authority to decide on disputes with or among other subjects of international law, which may appear as an anachronism at a time when in particular the European Union is increasingly admitted as a party to multilateral conventions. In the practice of the ICJ, no difficulties have arisen as to the meaning of the term jurisdiction. Generally, the ICJ has taken great care in interpreting the substantive scope of jurisdiction conferred upon it by the parties. In recent years, the interpretation of the scope *ratione materiae* of jurisdictional clauses has increasingly given rise to difficulties. However, the authority of the decisions handed down by the Court has rarely been challenged, since it directly derives from Article 94, para. 1 UN Charter.[19]

[14] *Ibid.*, p. 559.
[15] *Ibid.*, p. 226.
[16] *Ibid.*, p. 560.
[17] *Cf. Third Restatement of the Law: The Foreign Relations Law of the United States*, vol. 1 (American Law Institute, ed., 1987), p. 230. Generally, the words 'jurisdiction' and 'competence' have the same meaning, but see for nuances: Shaw, *Rosenne's Law and Practice*, vol. II, p. 544.
[18] Akande, *JIDS* (2016), p. 323; see also Shaw, *Rosenne's Law and Practice*, vol. II, p. 538.
[19] The most famous departure from this lesson of experience is the refusal of the United States to accept the Court's judgment in the *Nicaragua* case, Merits, ICJ Reports (1986), pp. 14 *et seq.* In the Security Council, the United States vetoed a draft resolution calling for full compliance with that judgment: see UN Doc. S/PV.2704 (1986). Factual disregard of a judgment is another matter. Thus, it took many years before Nigeria complied with the judgment of the Court of 10 October 2002 in the *Land and Maritime Boundary* case, Merits, ICJ Reports (2002), pp. 303 *et seq.*, with regard to the Bakassi peninsula, see message of Secretary-General Ban Ki-Moon of 14 August 2008, UN Doc. SG/SM/11745-AFR 1737. In the case of *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99 *et seq.*, the implementation of the orders issued by the ICJ was blocked by the Italian Constitutional Court that held the operation of the rule of immunity as enunciated by the ICJ in its judgment to be incompatible with the right to a remedy guaranteed under the Italian Constitution, see Judgment No. 238, 22 October 2014, *ILM* 54 (2015), pp. 474–506.

II. Disputes

The jurisdiction of the ICJ in inter-State relationships is of an adversarial nature; it extends only to disputes.[20] This specification, which appears not only in Article 36, para. 2 but also Articles 38, para. 1 and 40, para. 1, applies to the whole of Article 36, as well as to cases brought before the Court under a conventional instrument, either by way of a *compromis* or in accordance with a compromissory clause in a bilateral or multilateral treaty. Non-contentious proceedings, *i.e.*, proceedings aimed at obtaining from the ICJ an advisory opinion, may only be instituted pursuant to Article 96 UN Charter. Individual States are not entitled to request an advisory opinion. It is obvious that to open advisory proceedings to States too would burden the ICJ with an unmanageable workload, in particular at a time when the membership of the United Nations has risen to 193 States. 8

In one of its first judgments in 1924, *The Mavrommatis Palestine Concessions*, the PCIJ elaborated a definition of the term 'dispute' which has been maintained by its successor without any significant modification as to its terms: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.'[21] Indeed, in recent decisions rendered by the ICJ in the *Certain Property* case,[22] in *Armed Activities (New Application: 2002)* (DRC v. Rwanda),[23] as well as more recently in the *Marshall Islands* cases,[24] the *Mavrommatis* judgment was again referenced. It is evidently considered as a determinative precedent the validity of which remains unaffected by the passage of more than eight decades,[25] although technically it does not seem to be entirely correct: a conflict of interests, which might be based on political grounds, would not satisfy the requirements which the Court itself has upheld in its later decisions.[26] Implicitly, at least, the Court has consistently proceeded from the assumption that an applicant must advance a legal claim. Except for this limitation, however, the concept of dispute has always been interpreted in a truly broad sense. In only one instance (comprising three cases) has the Court determined that no dispute existed between the parties because the applicant, *i.e.*, the Marshall Islands, had not sufficiently specified that by requesting nuclear disarmament it was in fact pursuing a genuine legal claim against the 9

[20] Art. 34 provides that the ICJ's authority is confined to inter-State disputes; *cf.* generally Dupuy/Hoss on Art. 34 MN 1–5.

[21] *The Mavrommatis Palestine Concessions*, Jurisdiction, PCIJ, Series A, No. 2, pp. 6, 11.

[22] *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 18, para. 24.

[23] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Judgment, ICJ Reports (2006), pp. 6, 40, para. 90.

[24] *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 269, para. 34; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 566, para. 34; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833, 849, para. 37.

[25] *Cf. Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 27; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 13, para. 31; *Obligation to Arbitrate*, Advisory Opinion, ICJ Reports (1988), pp. 12, 27, para. 35; *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 99–100, para. 22; *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 614–5, para. 29; *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 17, para. 22 and pp. 115, 122–3, para. 21; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 314–5, para. 87; *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 13, para. 27; *Avena*, Provisional Measures, ICJ Reports (2003), pp. 77, 88, para. 46; *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 84–5, para. 30; *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 442, para. 46; *Caribbean Sea*, Preliminary Objections, ICJ Reports (2016), pp. 3, 26–7, para. 50; *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 115, para. 22.

[26] For a critical assessment *cf.* Gordon, in Damrosch, *ICJ at a Crossroads*, pp. 200–1; Kolb, *ICJ*, p. 327.

respondents: India, Pakistan, and the United Kingdom. The grounds relied upon by the Court were less than convincing, which led to a split vote of eight against eight among the judges, the vote of the President becoming determinative for rejecting the claims as not coming within the jurisdiction of the Court.[27] Notwithstanding this broad conception of the term, the jurisprudence of the ICJ has particularized the general proposition by adding some elements which give it somewhat clearer contours. Thus, in the *South West Africa* cases, the ICJ stated that it must be shown that 'the claim of one party is positively opposed by the other',[28] a formula which reappears in the *Northern Cameroons* case embodied in the requirement that the existence of a dispute presupposes 'opposing views' as to the interpretation and application of a legal rule.[29] In this case, the Court also made a general statement about the relevance of the concept of dispute within the Statute's system of adjudication:

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.[30]

It has also been emphasized that the presence of a dispute is a matter for objective determination:[31] it is 'not sufficient for one party to assert that there is a dispute'.[32] None of these additional components has brought about any significant substantive change to the original *Mavrommatis* formula: they have clarified the requirement of 'dispute', but have not granted it with a new meaning.

However, as already hinted earlier, in the *Marshall Islands* cases the ICJ has introduced a new criterion that had never been applied before. According to the Court, the respondent party must have become aware prior to the application for judicial settlement of the fact that its position was actually opposed by the applicant.[33] It may well be that this new element will soon be surpassed since it does not seem to serve any useful purpose. It also seems to be incompatible with the proposition that the existence of a dispute is a matter for objective determination by the ICJ.[34] In any event, it is clear that the intention to seise the Court does not have to be brought to the opponent's knowledge by a formal

[27] *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255 *et seq.*; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552 *et seq.*; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833 *et seq.*

[28] *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319, 328.

[29] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 27; *cf.* also *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 614–5, para. 29; *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 442, para. 46; *Caribbean Sea*, Preliminary Objections, ICJ Reports (2016), pp. 3, 26–7, para. 50; *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 115, para. 22.

[30] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 33–4.

[31] *Interpretation of Peace Treaties*, First Phase, Advisory Opinion, ICJ Reports (1950), pp. 65, 74.

[32] *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 270–1, para. 55 and pp. 457, 476, para. 58.

[33] *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 271, para. 38; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 568, para. 38; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833, 850–1, para. 41.

[34] *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 84–5, para. 30; *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 442, para. 46; *Caribbean Sea*, Preliminary Objections, ICJ Reports (2016), pp. 3, 26–7, para. 50; *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 270–1, para. 36; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 567, para. 36; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833, 849–50, para. 39.

notification, nor is it a general requirement that prior negotiations must have taken place before a dispute in the legal sense emerges.[35]

Controversies have arisen concerning the question as to whether a dispute must exist at the time of the filing of the application or whether the requirement of a dispute can be understood in a more flexible way as being susceptible of crystallizing at a later stage during the course of the proceedings. In the *Marshall Islands* cases the ICJ determined that indeed the institution of proceedings is the relevant date;[36] on the contrary, in its preceding jurisprudence it had shown greater flexibility, holding that through the subsequent procedural acts of a party the issue in question may attain the character of an inter-State dispute.[37] Specifically on this matter the judges in the *Marshall Islands* cases were deeply divided.

Additionally, it is of no significance, according to the Court, whether the claims brought forward by the applicant party are asserted 'rightly or wrongly'.[38] No matter how self-evident this statement seems to be, inasmuch as at the stage of ruling on jurisdiction and admissibility the ICJ cannot pronounce on the merits of a case, it raises some problems if a State makes claims which are devoid of any substantiation. Thus, in the *Certain Property* case, Liechtenstein claimed compensation for the loss of assets that had been confiscated by Czechoslovakia at the end of the Second World War in 1945 and which had never been interfered with by Germany. It is doubtful whether in such circumstances, where a claim is predicated on an artificial legal construction unsupported by any facts, the refusal of the respondent to accede to the demands of the claimant is capable of engendering a true legal dispute.[39] Following the logic resorted to by the ICJ in the *Certain Property* case, a dispute could be 'invented' at any time against any State. Yet, the dispute requirement serves to protect States from having to answer frivolous claims brought against them. It should not be overlooked that conducting proceedings before the ICJ entails considerable expenditures.[40] 10

III. Difference of Opinion

In some compromissory clauses, the term 'difference of opinion' may be used. In its judgment in the *Certain German Interests* case, the PCIJ had to construe that expression, 11

[35] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 297, para. 39, 321–2, para. 109. The obligation to undertake prior negotiations may be provided for in a compromissory clause, such as Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 7 March 1966, 660 UNTS 1, as in *Georgia v. Russia*, Judgment, ICJ Reports (2011), pp. 70, 80–1, para. 20, or in Article 30 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 10 December 1984, 1465 UNTS 85, ('CAT'), as in *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 448, para. 62.

[36] *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 271–2, para. 42; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 568, para. 39; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833, 851, para. 42.

[37] See *The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 34; *Certain German Interests*, Judgment, PCIJ, Series A, No. 6, pp. 4, 14; *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 613–4, para. 26; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 315–6, para. 91 and p. 317, para. 93; *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 18–9, para. 25; *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 442, para. 87.

[38] *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 99–100, para. 22.

[39] *Cf.* the declaration by Judge *ad hoc* Fleischhauer in the *Certain Property* case, Preliminary Objections, ICJ Reports (2005), pp. 69 *et seq.*

[40] An alleged dispute must be a real one, *cf.* Quintana, *ICJ Litigation*, p. 58.

which defined its jurisdiction under a German–Polish convention of 1922. It found that 'a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views'.[41] Thus, the threshold is lower than that required for the existence of a dispute.[42] It suffices that one of the parties disagrees with a position taken by the other, there being no need for that disagreement to have been translated into an open conflict with the opponent.

IV. Legal Disputes

12 The jurisdiction of the ICJ is confined to legal disputes as opposed to political ones, although according to the text of Article 36 a difference seems to exist between para. 1 and para. 2: only the latter refers explicitly to 'legal disputes'. Such differentiation would, however, run counter to the philosophy of Article 36. In the high time of the sovereign State, before the outbreak of the First World War, great efforts were spent on distinguishing between the two classes of disputes.[43] A formula largely in use excluded from arbitration disputes affecting 'national honour, vital interests or independence'.[44] Still, in the 1920s and 1930s, the classification scheme gave rise to heated discussions. During that epoch, the debate was stimulated by the regime of the 1928 General Act for the Pacific Settlement of International Disputes. Under Article 28 of the Act,[45] non-legal disputes, *i.e.*, political disputes, were to be referred to an arbitration tribunal.

13 It is clear that the ICJ would be unable to adjudicate a case if the applicant did not invoke any legal rules in support of its submissions. This, however, is a remote eventuality that has never occurred. Rightly, therefore, legal doctrine has ceased focusing on the issue. In fact, the legal position has undergone dramatic changes since the coming into force of the Statute of the PCIJ. The network of rules of international law has become so tight in the contemporary world, in particular through the inclusion of human rights in the body of international law, that there exists hardly any matter to date that would be totally removed from the realm of international law.[46] Only once has the Court had the opportunity to state what it understands by a legal dispute, namely a dispute 'capable of being settled by the application of principles and rules of international law'.[47] In the *Aegean Sea Continental Shelf* case, the Court concluded that it was manifest that 'legal rights' lay at the root of the dispute that divided the two litigant parties, Greece and Turkey.[48]

[41] *Certain German Interests*, Preliminary Objections, PCIJ, Series A. No. 6, pp. 4, 14.

[42] *Cf. Marshall Islands v. UK*, Preliminary Objections, Sep. Op. Owada, ICJ Reports (2016), pp. 877, 879, para. 6.

[43] *Cf.* Gordon, in Damrosch, *ICJ at a Crossroads*, pp. 183, 207 *et seq.*

[44] *Ibid.*, p. 209.

[45] General Act for the Pacific Settlement of International Disputes, 26 September 1928, 93 LNTS 343, Art. 28: 'If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.'

[46] *Cf.* also Art. 1 of the resolution entitled 'Classification des Conflits Justiciables' adopted by the *Institut de droit international* at its Grenoble session in 1922, *Annu. de l'Inst. de Droit Internat.* 29 (1922), p. 258 (also reprinted in *Tableau général des résolutions* (Institut de droit international, ed., 1957), p. 7): 'Tous les conflits, quels qu'en soient l'origine et le caractère, sont en règle générale, et sous les réserves indiquées ci-après, susceptibles d'un règlement judiciaire ou d'une solution arbitrale.'

[47] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 91, para. 52; later confirmed in *Application of the Interim Accord of 13 September 1995*, Judgment, ICJ Reports (2011), pp. 644, 664, para. 58.

[48] *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 13, para. 31.

Annex 20

V. Political Disputes

It is a different question altogether whether a dispute may become unsuitable for adjudication on account of the political context in which it is embedded. By their very essence, disputes between States are permeated by political considerations. Consequently, it would be fatal for the ICJ to deny its jurisdiction solely on the ground that inevitably its decision will contribute to shaping the political circumstances from which it arose. When in the Tehran hostage crisis, the request of the United States to indicate provisional measures was countered by Iran with the argument that the hostage issue formed 'only "a marginal and secondary aspect of an overall problem" involving the activities of the United States in Iran over a period of more than 25 years',[49] the Court emphasized that: 14

> no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.[50]

This statement was confirmed in the judgment on the merits:

> never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them.[51]

This was the basis on which the ICJ also rejected challenges against its jurisdiction in the *Nicaragua* case[52] and the case between Nicaragua and Honduras, where it also specified that any possible 'political motivation' of an application is irrelevant for the discharge of its judicial function.[53] This would seem to be the final word of the ICJ on the issue. The Court would emasculate itself if it refrained from agreeing to clarify the legal position in disputes of great importance for the peace and security of the world. Concerning advisory proceedings, the Court has also firmly insisted that the political character of a question submitted to it does not affect its jurisdiction.[54] Rightly, the ICJ views itself as part and parcel of the machinery established by the UN Charter with the foremost task of promoting the purposes and principles of the Charter over their entire breadth. Neither any act-of-State doctrine nor any political-question doctrine[55] hampers the discharge of its functions.

During its time of existence, the PCIJ was rather reluctant to accept as coming within its jurisdictional mandate tasks of a substantially non-legal character which went beyond saying whether the conduct of one (or both) of the parties was lawful. Thus, in the *Free Zones* case, 15

[49] *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 15, para. 22.
[50] *Ibid.*, p. 15, para. 24.
[51] *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 20, para. 37.
[52] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 434–5, para. 95, 439–40, para. 105; Merits, ICJ Reports (1986), pp. 14, 26–7, para. 33.
[53] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 91–2, paras. 52–4.
[54] *Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996), pp. 226, 233–4, para. 13; *Wall*, Advisory Opinion, ICJ Reports (2004), pp. 136, 155–6, para. 41. *Cf.* d'Argent on Art. 65 MN 21–26; see also Higgins *et al.*, *Oppenheim's International Law: United Nations* (2017), pp. 1167–8.
[55] Both of these doctrines exist in the law of the United States, *cf.* US Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416–39 (1964) for the act-of-state doctrine and US Supreme Court, *Baker v. Carr*, 369 U.S. 186, 208–37 (1962) for the political question issue. For similar limitations on justiciability under English law, *cf.* House of Lords, *Buttes v. Hammer*, [1981] 3 *All ER* 616 (per Lord Wilberforce); Court of Appeal, *R (Abbasi and Juma) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, [2002] EWCA Civ 1598 (*per* Lord Phillips of Worth Matravers MR).

the Court denied that it could settle all the questions involved in the execution of Article 435, para. 2 of the Treaty of Versailles, a provision suggesting a new legal framework for the specific customs regime in the free zones in the vicinity of the city of Geneva inherited from the Vienna Peace Conference of 1815. It held that its adjudicatory competence was confined to legal issues and that it could not deal with questions that had to be decided on the basis of economic considerations.[56] A few years later, in the *Socobel* case,[57] it came to the conclusion that it could not compel the parties before it (Belgium and Greece) to enter into an arrangement which would be adjusted to the budgetary and monetary capacity of Greece.[58] Today, the Court would probably have fewer hesitations in making pronouncements on such issues that lie at the borderline between law and fact, given the much less hermetic separation between international and domestic law. In its time, the PCIJ also seems to have overlooked that in any event it was entitled, with the consent of the parties concerned, to render decisions *ex aequo et bono*. For such decisions, it is imperative not to limit the elements to be taken into account to legal grounds, but to assess the wider context that comprises both factual data and political considerations.

VI. The ICJ and the Security Council

16 The UN Charter does not contain any rules on the relationship between proceedings before the ICJ and parallel proceedings before the Security Council.[59] Only the relationship between the two main political organs, the General Assembly and the Security Council, has been regulated in Article 11, para. 2 and Article 12 UN Charter. According to these provisions, the Security Council enjoys precedence in matters of international peace and security. In the absence of any similar rule, the ICJ has denied any subordination to the Security Council.[60] In the *Nicaragua* case, it stressed that according to Article 24 UN Charter the Security Council is vested with primary, but not exclusive responsibility for the maintenance of international peace and security, adding:

> The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.[61]

This proposition has been confirmed in all later cases, where alongside the Court the Security Council had also been seised of the same situation.[62] In particular, the adoption by the Council of resolutions on the same matter cannot deprive the Court of its

[56] *Free Zones*, Order of 6 December 1930, PCIJ, Series A, No. 24, pp. 4, 15; Judgment, PCIJ, Series A/B, No. 46, pp. 96, 160–3.

[57] *Socobel*, Judgment, PCIJ, Series A/B, No. 78, pp. 160 *et seq.*

[58] *Ibid.*, p. 177.

[59] On the relationship between the two institutions *cf.* the Security Council Research Report, 'The Rule of Law: Can the Security Council make better use of the International Court of Justice?', 20 December 2016, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_5_rule_of_law_2016.pdf>. See also Higgins *et al.*, *supra*, fn. 54, pp. 57–61.

[60] *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 21–2, para. 40; implicitly the same idea can be found in the *Aegean Sea Continental Shelf* case, Provisional Measures, ICJ Reports (1976), pp. 3, 12–3, paras. 36–41.

[61] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 434–5, para. 95.

[62] *Bosnian Genocide* case, Provisional Measures, ICJ Reports (1993), pp. 3, 18–9, para. 33; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 126–7, para. 36.

jurisdiction once a dispute has been submitted to it.[63] From a political viewpoint, the underlying philosophy of cooperation between the ICJ and the Security Council should be unconditionally welcomed.[64]

Once the Security Council has made decisions under Chapter VII of the UN Charter, the obligations deriving therefrom prevail over any obligations which the parties concerned may bear under other international agreements (Article 103 UN Charter).[65] The legal effects produced by such Security Council decisions will hence also have to be taken into account by the ICJ.[66] The ICJ may not issue orders that contradict binding resolutions of the Security Council. However, in the *Lockerbie* cases, where the Court indeed showed such respect for the Security Council, the handling of the matter gave rise to serious doubts concerning whether SC Res. 748 (1992) had been adopted with a view to frustrating the pending proceedings before the Court.[67] 17

VII. Disputes Unsuitable for Judicial Settlement

Only in a single instance has the ICJ refused to entertain a dispute as being unsuitable for judicial settlement, namely in the *Northern Cameroons* case.[68] The Republic of Cameroon was of the view that the United Kingdom, as the Trusteeship Authority for the Northern Cameroons, had not complied with its obligations resulting from the Trusteeship Agreement of 1946 to separate the administration of that specific territorial unit from the administration of Nigeria. Because of that, the results of a plebiscite held on 11 and 12 February 1961, in which the population of Northern Cameroons had opted to become independent by joining Nigeria, had been vitiated. Cameroon sought a declaratory judgment from the Court, being aware of the fact that the General Assembly had approved the plebiscite and that just two days after the filing of the application (30 May 1961) Northern Cameroons had joined Nigeria (1 June 1961). Given these circumstances, the Court obviously felt that the developments as they had in fact taken place could not be reversed and that any adjudication would be 'devoid of purpose'.[69] It held: 18

> There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[70]

[63] *Lockerbie* (Libya v. UK; Libya v. US), Preliminary Objections, ICJ Reports (1998), pp. 9, 23–4, para. 38 and pp. 115, 129, para. 37.

[64] *Cf.* also Gowland-Debbas/Forteau on Art. 7 UN Charter MN 27–46.

[65] *Cf.* Oellers-Frahm/Zimmermann on Art. 41 MN 119.

[66] Although not listed in Art. 38 of the Statute, the secondary law of international organization pertains to the body of international law the ICJ is mandated to apply. *Cf.* Pellet/Mueller on Art. 38 MN 99 *et seq.*

[67] *Cf. Lockerbie* (Libya v. UK; Libya v. US), Provisional Measures, ICJ Reports (1992), pp. 3, 15, para. 39 and pp. 114, 126, para. 42; for critical comments see Skubiszewski, 'The International Court of Justice and the Security Council', in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Lowe/Fitzmaurice, eds., 1996), pp. 606–29, 615–9.

[68] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15 *et seq.* The *Haya de la Torre* case between Colombia and Peru, Judgment, ICJ Reports (1951), pp. 71, 81, where the Court refused to provide 'positive assistance' to the prosecution of a political refugee, does not seem to fall into this category although the reasons given were far from clear.

[69] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 38.

[70] *Ibid.*, p. 29.

This judgment sits uncomfortably between a doctrine insisting on the propriety of the judicial function and an alternative explanation that views the case simply as having lost its object. In the *Frontier Dispute* between Burkina Faso and Niger the same *ratio decidendi* was resorted to in a case where the Court had been requested to 'place on record' the parties' agreement on the delimitation of the frontier between the two countries. For the Court, whose function it is to adjudicate disputes, such a task resembling that of a notary public lies beyond its jurisdiction.[71] In the *Marshall Islands* case the United Kingdom forcefully argued that the controversy about the obligation to enter into negotiations concerning nuclear disarmament was unfit for adjudication. Rejecting the Marshall Islands application because of the absence of an actual dispute, the ICJ did not address that particular objection. Yet, the UK's position was shared by the Chinese judge,[72] while two other judges emphasized that the objection would have deserved careful examination.[73]

VIII. Consent

19 Article 36 is consistently founded on the principle of consent. Thirlway calls it 'a truism that international judicial jurisdiction is based on and derives from the consent of States'.[74] At the present juncture, according to the prevailing view in legal doctrine,[75] no State can be compelled to accept the jurisdiction of the ICJ. Article 33, para. 1 UN Charter explicitly sets forth that the parties to any dispute have the right to resort to methods of settlement 'of their own choice'. Although the UN Charter characterizes the ICJ as the 'principal judicial organ of the United Nations' (Article 92), admission as a member to the World Organization—and thereby as a party to the Statute—does not amount to automatic submission to the jurisdiction of the Court. For its part, consent may be expressed in various forms. Article 36, para. 1 deals with instances where the agreement of the parties concerned is expressed in conventional form, either in a *compromis* (special agreement) or in a compromissory clause in a pre-existing international agreement, while Article 36, para. 2 governs unilateral declarations which States are free to make under the optional clause. The Court has invariably upheld the principle of consent in its jurisprudence.[76] The absolute freedom of States either to accept or to reject judicial settlement of their disputes may at first glance appear to be anachronistic in the world of today where so many supranational regimes have come into existence, the most prominent among them being the sophisticated regime of the European Union with the broad compulsory jurisdiction of the European Court of Justice. However, it is still true that at world level, the chances of voluntary compliance are slim. If States were forced to submit their disputes to the jurisdiction of the Court, the record of actual compliance with judgments

[71] *Frontier Dispute* (Burkina Faso/Niger), Judgment, ICJ Reports (2013), pp. 44, 69–70, paras. 45–6.

[72] *Marshall Islands v. UK*, Preliminary Objections, Decl. Xue, ICJ Reports (2016), pp. 1029, 1033, para. 16.

[73] *Marshall Islands v. UK*, Preliminary Objections, Sep. Op. Bhandari, ICJ Reports (2016), pp. 1057, 1062, paras. 23–4; *Marshall Islands v. UK*, Preliminary Objections, Diss. Op. Yusuf, ICJ Reports (2016), pp. 861, 863–4, paras. 10–3.

[74] Thirlway, *ICJ Law and Procedure*, p. 690.

[75] But *cf. infra*, MN 47 regarding the power of the Security Council to enjoin States to seek judicial settlement of a dispute.

[76] *Cf. The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 16; *Minority Schools (Silesia)*, Judgment, PCIJ, Series A, No. 15, pp. 4, 22; *Interpretation of Peace Treaties*, First Phase, Advisory Opinion, ICJ Reports (1950), pp. 65, 71; *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93, 103; *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 32; *Aerial Incident of 27 July 1955* (Israel v. Bulgaria),

rendered would be abysmal. It is therefore unavoidable that developments should take place cautiously, step by step.

If during ongoing proceedings a State disintegrates, the consent given will not be automatically inherited by the successor States. In the *Bosnian Genocide* case, the Court held that the case could be pursued against the Republic of Serbia, which continued the personality of the former State of Serbia and Montenegro. By contrast, Montenegro, which was generally recognized as a new State, could not be deemed to remain involved as a second respondent to the proceedings since it had not specifically given its consent to the jurisdiction of the Court.[77] 20

IX. Indispensable Third Party

1. *The Principle*

Since the adjudication of the *Monetary Gold* dispute,[78] it is acknowledged that in certain instances the Court is unable to entertain the merits of a case if a third party, whose presence is indispensable for a thorough examination of the case at hand, has not given its consent to the proceedings and is not present before the Court. In that dispute between Italy, on the one hand, and France, the United Kingdom, and the United States on the other, the Court was requested to determine, *inter alia*, whether certain quantities of gold, rightfully owned by Albania, were to be given back to Albania or should instead be delivered to Italy as compensation for damage allegedly caused to Italy by an Albanian law. Although it was the applicant, Italy raised a preliminary objection on account of the absence of Albania from the proceedings. Responding to this objection, the Court held: 21

> In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania … Where … the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.[79]

It is not easy to determine when these conditions are fulfilled. In the *Nicaragua* case the Court rejected a rather unsubstantiated reference of the United States to the rights and

Preliminary Objections, ICJ Reports (1959), pp. 127, 142; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 431, para. 88; *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 32, para. 44; *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 260, para. 53; *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 101, para. 26; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 324, para. 116; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 132, para. 20; *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 241, para. 57; *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 32, para. 65; *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 200–1, para. 48.

[77] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 76, paras. 76–7.

[78] *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19 *et seq.* *Cf.* also Thienel, 'Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle', *GYIL* 57 (2014), pp. 321–52; Zimmermann, 'Die Zuständigkeit des Internationalen Gerichtshofes zur Entscheidung über Ansprüche gegen am Verfahren nicht beteiligte Staaten: Anmerkungen aus Anlaß der Entscheidung des IGH im Streitfall zwischen Portugal und Australien betreffend Ost-Timor', *ZaöRV* 55 (1995), pp. 1051–76.

[79] *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 32–3. *Cf.* also the comments on that judgment in the *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 114–5, para. 54.

interests of some other Central American States (Costa Rica, El Salvador, Honduras) as being irrelevant for the adjudication of the submissions before it.[80] In the *Nauru* case, the key issue was whether the responsibility of Australia for the unlawful exploitation of Nauru's natural resources, as alleged by Nauru, could be determined independently of the responsibility of the United Kingdom and New Zealand. All three governments had acted jointly as Administering Authority, first under a League of Nations Mandate and later under a Trusteeship granted by the United Nations. Australia contended that the Court could not pass judgment upon its responsibility without adjudicating upon the responsibility of the other two States. The Court pointed out that normally third States are protected by the provision of Article 59, according to which a judgment is binding only between the parties and in respect of the particular case decided. In that case, the determination of the responsibility of New Zealand and the United Kingdom was not a prerequisite for the determination of the responsibility of Australia, although any finding might well have had implications for the legal situation of those two States.[81] In the *Armed Activities* case (DRC v. Uganda) the Court followed this precedent by arguing that certain interests of Rwanda, which had also been involved in hostilities with Uganda on the territory of the Congo, did not constitute 'the very subject-matter' of the decision to be rendered.[82] By contrast, in *East Timor*, where the subject-matter was constituted by an agreement between Australia and Indonesia about the delimitation of the continental shelf in the Timor Gap, the Court refused to exercise its jurisdiction. It stressed that by necessity it would have had to determine whether the occupation of East Timor by Indonesia was wrongful under international law:

> the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf.[83]

In the *Certain Property* case, the Court refrained from ruling on a preliminary objection raised by Germany according to which any decision on the compensation claims made by Liechtenstein regarding Liechtenstein assets confiscated by Czechoslovakia in 1945 would presuppose a determination of the lawfulness of the Czechoslovak measures.[84] In one of the *Marshall Islands* cases the issue was raised whether an injunction against the United Kingdom to engage actively in negotiations for nuclear disarmament could produce any real effects since a positive outcome could only be reached by agreement between all the parties to the Non-Proliferation Agreement.[85] The ICJ avoided this delicate issue by rejecting the application on the ground of absence of a dispute.

22 The *Monetary Gold* rule does not apply to instances where an incidental assessment of the conduct of UN institutions (for instance, conduct of the personnel of a peacekeeping

[80] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 431, para. 88.

[81] *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 261–2, para. 55.

[82] *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 238, para. 204.

[83] *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 102, para. 28.

[84] *Certain Property*, Preliminary Objections, Diss. Op. Owada, ICJ Reports (2005), pp. 47, 65–6, paras. 52–6. In the case concerning the *Application of the Interim Accord of 13 September 1995* it was clear that Greece's responsibility could be determined without assessing the lawfulness of the conduct of the other NATO States involved, Judgment, ICJ Reports (2011), pp. 644, 664, para. 57.

[85] *Marshall Islands v. UK*, Preliminary Objections, Sep. Op. Tomka, ICJ Reports (2016), pp. 885, 896–9, paras. 33–41.

mission) may have to be conducted. The United Nations is not a sovereign entity. Institutionally, since the Court is one of its own organs, it must be deemed to be debarred from arguing that no judicial determination on its rights and obligations may be carried out in its absence. Under no circumstances can the United Nations assume the role of a party in a contentious proceeding (Article 34, para. 1). Furthermore, given that the United Nations is today almost invariably involved in some way or another in any grave international crisis situation, resort to the doctrine of the indispensable third party could result in serious damage to the judicial function of the Court. If the Secretary-General is of the view that in a contentious proceeding the rights and interests of the United Nations might be adversely affected, he or she is free to provide the relevant information under Article 34, para. 2.

2. *Boundary Disputes*

Boundary disputes constitute a special class of disputes where the rights or interests of a third party may be adversely affected. On a number of occasions, it has been argued by the respondent in such a dispute that a boundary could not be determined in the absence of a neighbouring State that might also have legitimate claims to the territory or maritime area concerned. In such circumstances, the Court has to consider whether an absent third party is sufficiently protected by the provision of Article 59 according to which a decision 'has no binding force except between the parties', and by the opportunities provided to it under Article 62 to intervene in a proceeding taking place between two other States.[86] Additionally, it must under its own responsibility see to it that it does not encroach upon the basic principle that for any judicial pronouncement the consent of the State concerned is necessary. 23

a) Maritime Boundaries

On the one hand, regarding delimitation of the territorial sea, the exclusive economic zone or the continental shelf, the Court has shown great reluctance in making determinations in areas claimed or that may potentially be claimed by a third State. In the *Continental Shelf* case between Libya and Malta, it abstained from pronouncing on the delimitation between the two litigant parties in those sectors where Italy had maintained that it was the holder of the rights concerned.[87] One of the reasons lying behind this caution was the perception that Italy's claims were not 'obviously unreasonable'.[88] In the *Land and Maritime Boundary* case,[89] the Court held that the rights of both Equatorial Guinea and Sao Tomé and Principe had to be taken into account,[90] notwithstanding the fact that Equatorial Guinea had chosen not to intervene in the proceedings between Cameroon and Nigeria. Essentially, in concretizing this approach, it proceeded from the equidistance principle as laid down in UNCLOS.[91] Therefore, it pronounced on the lateral delimitation of the exclusive economic zones between Cameroon and Nigeria only up to a certain point which was clearly out of the reach of any legitimate claim of the two potentially affected neighbouring 24

[86] In the *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 122, para. 73, the Court held that the threshold conditions for intervention are lower than the *Monetary Gold* criteria. *Cf.* Miron/Chinkin on Art. 62 MN 32.

[87] *Continental Shelf* (Libya/Malta), Judgment, ICJ Reports (1985), pp. 13, 24–8, paras. 20–3.

[88] *Ibid.*, p. 28, para. 23.

[89] *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303 *et seq.*

[90] *Ibid.*, p. 426, para. 254.

[91] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Arts. 74 and 83.

countries.[92] The same approach was followed in denying Costa Rica the right to intervene in the proceedings between Nicaragua and Colombia over the delimitation of the two countries' maritime zones in the Caribbean Sea. In that case, the Court observed that the interests of Costa Rica were sufficiently protected by Article 59 of the Statute which defines and restricts *res judicata* to the parties involved in the case at hand.[93]

b) Land Boundaries

25 As far as land boundary disputes are concerned, the Court has never felt prevented from adjudicating the issues brought before it. In the *Frontier Dispute* case between Burkina Faso and Mali, where Mali argued that the frontier line could not be determined to its full length, *i.e.*, as far as the point of intersection with the boundary of Niger, the Court rightly held that no claims had been made by Niger to the disputed area and that in any event Niger was protected by Article 59 of the Statute.[94] Likewise, in the *Territorial Dispute* between Libya and Chad[95] it was clear beyond any doubt that, because of its geographical location, the boundary line the Court was requested to determine could not affect any third State; nonetheless, in order to allay any possible concerns, the Court emphasized again that the interests of Niger would be safeguarded by the limited *ratione personae* effect of its judgment.[96] Finally, in the *Land and Maritime Boundary* dispute between Cameroon and Nigeria,[97] the preliminary objection raised against Cameroon's application was of a totally theoretical nature, the frontier line between Cameroon and Chad up to the tripoint in Lake Chad never having been contested by Chad.[98] In other words, the Court has never had to deal with a case where two States would have attempted to obtain by adjudication sectors of a territory which according to plausible evidence belonged to a third State. One may assume that in such an instance the Court would indeed rely on the *Monetary Gold* principle. Therefore, it should not be concluded that there is any determinative distinctive feature between land and maritime boundary disputes, as in none of the land boundary cases hitherto adjudicated by the Court could any real or possible interference with the rights of a third State be perceived. By contrast, in the maritime cases as set out previously it was obvious that by going beyond certain geographical points the Court might have indeed encroached upon the rights of other States.

X. *Jus cogens*

26 The jurisprudence of the Court has clarified that allegations of a breach of *jus cogens* or *erga omnes* rules[99] do not provide a special title of jurisdiction, independently of the

[92] *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303, 448, para. 307.

[93] *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Judgment, ICJ Reports (2011), pp. 348, 372–3, paras. 87–90; *cf.* also *Maritime Delimitation in the Black Sea*, Judgment, ICJ Reports (2009), pp. 61, 100, para. 112. *Cf.* generally on the issue Pellet, 'Land and Maritime Tripoints in International Jurisprudence', in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Hestermeyer *et al.*, eds., 2012), vol. I, pp. 245–63, 255.

[94] *Frontier Dispute* (Burkina Faso/Republic of Mali), Judgment, ICJ Reports (1986), pp. 554, 576–80, paras. 44–50.

[95] *Territorial Dispute*, Judgment, ICJ Reports (1994), pp. 6 *et seq.*

[96] *Ibid.*, p. 33–4, para. 63.

[97] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275 *et seq.*

[98] *Ibid.*, p. 311–2, para. 79.

[99] It is well known that for many years the Court shied away from resorting in its case law to the notion of *jus cogens*, due, in particular, to French resistance to that notion. Instead, the notion of 'intransgressible

provisions of Article 36. In the *East Timor* case, Portugal attempted to overcome the *Monetary Gold* obstacle by contending—in consonance with the Court—that the right of self-determination of peoples, which was at issue in the proceedings, should be balanced against Indonesia's sovereignty, *i.e.*, the object safeguarded by the *Monetary Gold* rule, and should be given precedence. The Court flatly rejected this submission:

> Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[100]

With slightly different words, this *dictum* was repeated in the provisional measures phase of the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case, where the Democratic Republic of the Congo invoked a number of rules which do indeed form the core of a world order based on peace and respect of human rights: 'whereas it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute'.[101] The determination on jurisdiction and admissibility followed the same lines, this time, however, by adding explicitly that invocation of *jus cogens* norms did not change the legal position.[102] Significantly enough, when ruling on Bosnia-Herzegovina's application against Serbia with respect to allegations of genocide,[103] the Court focused exclusively on the jurisdictional clause in Article IX of the Genocide Convention and refrained from even considering that jurisdiction could automatically flow from the breach of a *jus cogens* rule.[104] On the other hand, in the genocide case brought by Croatia against Serbia the ICJ confirmed explicitly that neither the invocation of an *erga omnes* obligation nor of a *jus cogens* rule could affect its jurisdiction.[105] Unfortunately, the Court is absolutely right in this finding. If any infringement of *jus cogens* or *erga omnes* rules provided access to the Court, any armed conflict could be submitted to adjudication inasmuch as the principle of non-use of force is deemed to belong to that class of legal norms. This would overstretch the capacities of the Court. To date, the 'constitutionalisation' of public international law has not reached a point where it is generally acknowledged that at least the most basic principles upon which the legal order is found would be automatically enforceable by judicial means.[106]

principles of international customary law' made its way into the jurisprudence: *Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996), pp. 226, 257, para. 79. Since the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case, Judgment, ICJ Reports (2006), pp. 6, 31–2, para. 64, this reluctance has been overcome. The Court dealt at length with arguments concerning *jus cogens* in *Jurisdictional Immunities of the State*, Judgment, ICJ Reports 2012, pp. 99, 140–2, paras. 92–7. For a detailed review of the Court's jurisprudence *cf.* Sep. Op. Dugard in the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case, Judgment, ICJ Reports (2006), pp. 86–91.

[100] *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 102, para. 29.

[101] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 245, para. 71; reiterated in the judgment on the jurisdiction of the Court and the admissibility of the application, *ibid.*, Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 31–2, para. 64 and p. 35, para. 78. *Cf.* Zimmermann on Art. 35 MN 85, fn. 166.

[102] *Cf. supra*, fn. 99.

[103] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43 *et seq.*

[104] Only in one short sentence did it mention the irrelevance of peremptory norms or obligations *erga omnes* for the purposes of jurisdiction, *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 104, para. 147.

[105] *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 47–8, para. 88.

[106] *Cf.* in particular *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 140–2, paras. 92–7.

27 Hence it is also perfectly permissible to enter a reservation to a compromissory clause or to restrict the scope of a unilateral declaration of acceptance of the jurisdiction of the Court with regard to activities which openly contradict, or in any event are susceptible of contradicting, *jus cogens* or *erga omnes* rules.[107] Excluding a judicial remedy does not, in principle, affect the substantive rule as such. The special authority of *jus cogens* norms does not also encompass secondary rules relating to procedure.[108] It is precisely with regard to such eventualities that States wish to be free to choose the best-suited method of peaceful settlement. The legitimacy of this concern cannot be denied. Indeed, it would be difficult to argue that, with regard to instances of armed conflict, settlement by judicial pronouncement is the most appropriate course. Generally, judges are unable to deal successfully with entire periods of history, given the procedural meticulousness they are required to apply in identifying and appraising the relevant facts. It is significant in this regard that the relevant instruments of international humanitarian law do not contain any compromissory clauses.

XI. Reciprocity

28 The term 'reciprocity' appears solely in Article 36, para. 3, but it permeates the provision on the jurisdiction of the Court in its entirety.[109] Whenever a compromissory clause is contained in an international agreement ('treaties and conventions in force') in accordance with Article 36, para. 1, it applies obviously to all the parties concerned in a like manner, provided that the parties have not opted for a different formula. Thus, compromissory clauses ensure equality with regard to access to the Court (principle of 'mutuality'). Alternatively, if States make a unilateral declaration pursuant to Article 36, para. 2, that declaration extends its effects to 'any other state accepting the same obligation'. In other words, such declarations may only be invoked by States that on their part have accepted the jurisdiction of the Court ('consensual bond'). If it were otherwise, if any State could *ad hoc* institute proceedings against States subject to the jurisdiction of the Court, the so-called sitting duck phenomenon would be produced: those States having made a declaration under Article 36, para. 2 would remain unprotected. They would not reap any benefit from their willingness to support the rule of law in international relations. Reciprocity is a device suitable to entice them to make use of the optional clause. By submitting to the jurisdiction of the Court, they not only become possible targets of applications directed against them but also they acquire at the same time the right to sue all of those States which have also chosen to entrust their legal disputes to judicial settlement by the Court.[110]

29 Reciprocity governs not only the relationship *ratione personae* between the different States concerned ('mutuality'), but determines also the scope *ratione materiae* of the

[107] *Cf. Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 455–6, para. 54; *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 32–3, paras. 67–8. *Cf.* also *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 768–72, paras. 21–33; *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, pp. 916, 923–4, paras. 21–5.

[108] Confirmed in *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 140, para. 93.

[109] *Cf.* Torres Bernárdez, in Bello/Ajibola (1992), *passim*.

[110] According to the words of D'Amato, *AJIL* (1985), p. 386, a declaration under Art. 36, para. 2 'is as much an offensive weapon against the international legal delicts of other states as it is a defensive weapon; it is a sword as well as a shield'.

jurisdiction of the Court. This is self-evident in that under Article 36, para. 1 States subscribe to the same compromissory clause. As far as unilateral declarations according to Article 36, para. 2 are concerned, there is of course no guarantee that they all cover the same ground, given that Article 36, para. 3 explicitly permits reservations. To submit to the jurisdiction of the Court, to keep aloof from it, or to embark on a middle course by modifying the declaration through reservations belongs to the sovereign rights of every State. However, in order to maintain a condition of equality among all of the parties having accepted the optional clause, it is necessary also to apply the principle of reciprocity as regards subject-matter. The jurisdiction of the Court exists only to the extent that the commitments of the two sides coincide.[111] This means that the lowest common denominator is the determining parameter. On the other hand, the exact wording of the relevant declarations does not matter; they only need to match one another regarding their substantive scope. Reciprocity furthermore entails an entitlement for each of the litigant parties to invoke not only its own reservations but also the reservations entered by its opponent. Thus, in the *Norwegian Loans* case,[112] Norway relied on the French declaration of acceptance of the jurisdiction of the Court which, following the US declaration with the famous *Connally* Reservation, read as follows: 'The declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.'[113] On that ground, the Court had to dismiss the French application.

Another famous example is provided by the time clause Yugoslavia inserted in its declaration of acceptance of the jurisdiction of the Court of 26 April 1999. By excluding all disputes that had arisen before that date, it forwent the right to bring to the cognizance of the Court the air attacks by NATO States on its territory in the Kosovo conflict, since those bombings had started on 24 March 1999 and were considered by the Court to constitute a unity that could not be dissected into different conflicts on a daily basis.[114] In the *Whaling in the Antarctic* case, Japan denied the jurisdiction of the ICJ on the basis of the reservation Australia had appended to its declaration under Article 36, para. 2, eventually without success as Australia's reservation was related to delimitation issues and whaling was considered a matter of a different nature.[115] In other words, reciprocity pervades Article 36 as a whole, although with some limitations.[116] It is not relevant only for para. 3. Indeed, reciprocity ensures fairness relating to the conditions of access and subjection to the Court. It may thus be viewed as a particularization of Article 2, para. 1 UN Charter, reflecting also the requirement of good faith which is enshrined in Article 2, para. 2 UN Charter.

[111] *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93, 103; *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 23; *cf.* also *Phosphates in Morocco*, Preliminary Objections, PCIJ, Series A/B, No. 74, pp. 10, 23; *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction, ICJ Reports (1998), pp. 432, 452–3, para. 44; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 135, para. 30; *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 770–1, para. 25; *Legality of Use of Force* (Serbia and Montenegro v. UK), Provisional Measures, ICJ Reports (1999), pp. 826, 835–6, para. 25.

[112] *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9 *et seq.*

[113] *Ibid.*, p. 21.

[114] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 134–5, paras. 28–30.

[115] *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226 *et seq.*

[116] *Cf. infra*, MN 79 concerning clauses governing the applicability *ratione temporis* of declarations under Art. 36, para. 2.

XII. Issues to be Raised *ex officio* or *proprio motu* by the Court

30 Jurisdiction belongs to the issues which the Court must examine *ex officio* or *proprio motu*. It cannot entertain the merits of a case brought before it without having determined that it is entitled to do so.[117] Certainly, a respondent State is free implicitly to accept the jurisdiction of the Court, even if the relevant application has not been able to identify any title of jurisdiction, by answering the application and the supporting memorial without raising any preliminary objections (*forum prorogatum*, Article 38, para. 5 of the Rules). Moreover, if a State deliberately refrains from asserting a jurisdictional defence, as did the United States in the *Nicaragua* case, where it deliberately abstained from invoking the *Connally* reservation in order not to suffer a severe defeat (as it is hardly a plausible argument that the violation of Nicaraguan territory would come under the domestic jurisdiction of the United States),[118] there is no ground for the Court to step in as 'guardian' of the respondent. However, as soon as the respondent party objects to its jurisdiction, the Court must ascertain whether it is in fact entitled to rule on the substance of the requests before it.[119] Thus, for instance, in the *Tehran Hostages* case, the Court examined on its own initiative whether the fact that the United States had referred its dispute with Iran to the Security Council affected in any manner its right to discharge its judicial functions[120]—which it found not to be the case.[121] In the *Legality of Use of Force* cases, the Court originally made the time clause in the Yugoslav declaration of acceptance the pivotal issue, concluding that it lacked jurisdiction to indicate provisional measures,[122] although at least one of the respondents (Belgium)[123] had not invoked that clause as an obstacle barring Yugoslavia's request.[124] Furthermore, in the same case the Court has clarified that in a given proceeding the parties are not entitled retroactively to make determinations on the right of the applicant to seise the Court in accordance with the rules governing its jurisdiction. The question whether a State has access to the Court as a party to the Statute or under the conditions specified in Article 35, para. 2 of the Statute lies outside the matters the parties can dispose of:

> The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus mandatory

[117] *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 52, para. 13; *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 117–8, para. 40.

[118] *Cf. Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 421–2, para. 67.

[119] *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 52, para. 13; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 295, para. 36; *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 91–2, para. 118 and p. 94, para. 122; *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 117–8, para. 40.

[120] *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 20–4, paras. 39–44.

[121] *Cf. supra*, MN 16.

[122] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 132–5, paras. 20–30.

[123] As far as Portugal is concerned, the Order contains no explicit indications, *cf. Legality of Use of Force* (Serbia and Montenegro v. Portugal), Provisional Measures, ICJ Reports (1999), pp. 656, 666, para. 25.

[124] *Cf.* Obata, 'The Relevance of Jurisdiction to Deal with the Merits to the Power to Indicate Interim Measures: A Critique of the Recent Practice of the International Court of Justice', in *Liber Amicorum Judge Shigeru Oda* (Ando *et al.*, eds., 2002), pp. 451–62, 461.

upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent.[125]

In the *Bosnian Genocide* case between Bosnia and Herzegovina and Yugoslavia (Serbia and Montenegro), the Court unfortunately did not live up to its own standards. It did not examine *ex officio* whether a claim could validly be brought against Yugoslavia (Serbia and Montenegro), confining itself to scrutinizing the preliminary objections raised by the Yugoslav government.[126] None of the two litigant parties was at that time interested in drawing the attention of the Court to the issues arising under Article 35 of the Statute. Bosnia and Herzegovina did not wish to imperil its own application, and the 'new' non-socialist Yugoslavia (Federal Republic of Yugoslavia, FRY) firmly maintained its assertion that the demise of the socialist State (Socialist Federal Republic of Yugoslavia, SFRY) through dissolution had not affected its identity. In the *Legality of Use of Force* cases, the Court eventually had to acknowledge that continuity of UN membership (beyond 27 April 1992, the day of the establishment of the 'new' Yugoslavia) could not be upheld.[127] When eventually the Court had to rule on the merits of the charges of genocide brought by Bosnia-Herzegovina against Serbia[128] and, in the analogous case of Croatia against Serbia to assess its jurisdiction,[129] it went into a lengthy discussion of the meandering of its jurisprudence without being able to afford a plausible explanation. By that time, in any event, Serbia had invoked the inapplicability of the compromissory clause of Article IX of the Genocide Convention.

On the other hand, it is not the task of the Court to search for titles of jurisdiction which 31
the applicant itself has not invoked.[130] It may be quite difficult, in a given case, to know on what basis the Court might be competent to adjudicate on the merits of a dispute. In that regard, the Court must be able to rely on the submissions brought before it. It falls to the parties to prepare their case thoroughly as required by the circumstances. Essentially, the existence of jurisdiction is a legal question, but one that may be related to specific factual circumstances so that, exceptionally, the rules on the distribution of burden of proof might come into operation.[131]

It follows from the specific character of jurisdiction as a prerequisite for lawful proceedings 32
on the merits that the Court must make sure that it is competent to hear the case if the respondent chooses not to make an appearance. In such situations, governed by Article 53, the Court inquires *ex officio* whether a legitimate title of jurisdiction exists.[132]

[125] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 295, para. 36 (emphasis in original).

[126] *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 609 *et seq.* In *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 311, para. 82, the Court explicitly acknowledged that 'it saw no reason' to examine the status of Yugoslavia under Art. 35.

[127] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 314–5, para. 91.

[128] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43 *et seq.*

[129] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412 *et seq.* The tortuous lines of reasoning of the Court appear explicitly in the title of the criticism by Blum, 'Consistently Inconsistent: The International Court of Justice and the Former Yugoslavia (Croatia/Serbia)', *AJIL* 103 (2009), pp. 264–71; for a more friendly commentary see Rosenne, 'Capacity to Litigate in the International Court of Justice: Reflections on Yugoslavia in the Court', *BYIL* 80 (2009), pp. 217–43.

[130] *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 38, para. 93.

[131] *Cf. Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 75–6, para. 16.

[132] *Cf.* von Mangoldt/Zimmermann on Art. 53 MN 54–57.

XIII. Incidental Jurisdiction

33 Some classes of disputes are ancillary to a principal dispute and do not require any specific acceptance of the Court's jurisdiction. In all cases brought to its cognizance, the Court is vested with the power not only to adjudicate the merits constituting the subject-matter proper of an application but also to make determinations on requests for the indication of provisional measures (Article 41),[133] for interpretation of a judgment (Article 60),[134] and for revision of a judgment (Article 61).[135] Some of these procedures are listed in Part III, Section D (Articles 73–89) of the Rules. Additionally, Article 48 of the Statute confers on the Court all the requisite powers for the good conduct of the case.[136]

C. Detailed Analysis of Article 36

I. Article 36, paras. 1 and 2—Common Characteristics

34 Article 36 is designed to facilitate access to the ICJ in the best possible way. While in para. 1 provision is made for referrals by mutual agreement, para. 2 allows for unilateral declarations as an offer that can be accepted by any other State willing also to submit to the Court's jurisdiction under the same terms.[137] While originally high hopes were placed in the optional clause system, it has emerged that in practice the application of Article 36, para. 1 is more effective. When a case is brought before the Court by virtue of a special agreement, normally no preliminary objections are raised. On the other hand, more and more cases are brought to the Court on the basis of compromissory clauses in multilateral treaties, more than 50 per cent of the agenda in the last decade.[138]

1. Interpretation of Compromissory Clauses and Optional Clause Declarations

35 States that wish to have their disputes settled by the ICJ must express their consent either in accordance with Article 36, para. 1, *i.e.*, by entering into a conventional agreement, or pursuant to Article 36, para. 2, by submitting to the jurisdiction of the Court by virtue of a unilateral declaration. Obviously, an application can be based on several different heads of jurisdiction. On the other hand, the Court is required to assess every claim according to its specific characteristics.[139] On the interpretation and application of Article 36, para. 1 no formalism is to be exercised. States can express their consent to the jurisdiction of the Court also in two separate and successive acts, provided that their desire to accept judicial settlement of the case at hand is clear and unequivocal.[140] The Court has even

[133] *Cf.* Oellers-Frahm/Zimmermann on Art. 41 MN 28–29.
[134] *Cf.* Zimmermann/Thienel on Art. 60 MN 50–51.
[135] *Cf.* Zimmermann/Geiss on Art. 61 MN 29–32.
[136] *Cf.* Torres Bernárdez/Mbengue on Art. 48, *passim*.
[137] By May 2018, 73 States had made declarations under Art. 36, para. 2 recognising the jurisdiction of the Court as compulsory. For the texts of these declarations see <http://www.icj-cij.org/en/declarations>.
[138] Owada, Introductory Remarks at the Seminar in the Contentious Jurisdiction of the International Court of Justice, p. 2. For a pessimistic view on the suitability of the system of compulsory jurisdiction under Art. 36, para. 2, *cf.* Oda, *ICLQ* (2000), pp. 252 *et seq.*; *contra* Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', *EJIL* 18 (2007), pp. 815–52.
[139] *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 860, paras. 83–5.
[140] *Corfu Channel*, Preliminary Objection, ICJ Reports (1948), pp. 15, 27; *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Judgment, ICJ Reports (2006), pp. 6, 18–9, para. 21; *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 204, para. 62.

taken the view that its jurisdiction may be established by acquiescence.[141] In this regard, the PCIJ had already paved the way in its jurisprudence by suggesting that its jurisdiction may be inferred from acts 'conclusively establishing it'.[142] Whatever method they choose, and leaving aside those instances where a party articulates its agreement only implicitly, the relevant instrument will invariably be in need of interpretation. The Court will have to determine, in particular, whether the dispute referred to it comes within the scope *ratione materiae* of the instrument. The question then arises whether the acceptance of jurisdiction should be interpreted broadly or restrictively. Although the Court has always emphasized that declarations under Article 36, para. 2 are unilateral acts and thus differ from conventional arrangements under Article 36, para. 1,[143] with the consequence that it is the will of the declarant State that enjoys primacy as means to be relied upon,[144] it has refrained from elaborating, on that basis, a doctrine of restrictive interpretation. In fact, in a number of cases it has explicitly rejected suggestions that it should resort to this method.[145] Nor has it applied this doctrine to compromissory clauses. Its predecessor, the PCIJ, had already rejected the thesis that in case of doubt jurisdiction should be declined.[146] In the *Corfu Channel* case,[147] the ICJ cited with approval the *dictum* of the PCIJ in the *Free Zones* case according to which 'the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects'.[148] In fact, since the classical opinion that international treaties should be interpreted restrictively[149] has not survived the coming into force of the VCLT, where no trace of it can be found, there is no reason to resort to that doctrine with respect to jurisdictional clauses.[150] To agree to judicial settlement is not a unilateral sacrifice, but a well-calculated step which carries with it not only negative aspects, but also many advantages, precisely on account of the pervading principle of reciprocity. Therefore, the general rules on interpretation should be applied as they are laid down in the VCLT, reflecting the established position under customary law. The Court has consistently embraced this position.[151]

[141] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 85, para. 102.

[142] *Minority Schools (Silesia)*, Judgment, PCIJ, Series A, No. 15, pp. 4, 24.

[143] *Cf. infra*, MN 71.

[144] *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93, 104: 'having due regard to the intention of the Government of Iran'; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 29, para. 69: 'regard must be paid to the intention of the Greek Government'; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 454, para. 48: 'the Court has not hesitated to place a certain emphasis on the intention of the depositing State'; *cf.* also *Aerial Incident of 10 August 1999* (Pakistan v. India), Judgment, ICJ Reports (2000), pp. 12, 30–1, paras. 42–4. In his dissenting opinion. In the *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 582, 639 *et seq.*, Judge *ad hoc* Torres Bernárdez resolutely attacked the way in which the Court construed Canada's new reservation to its declaration under Art. 36, para. 2 as not being in line with the general rules of interpretation in international law. Yet the ICJ has maintained its view that 'a certain emphasis may be placed on the intention' of the State author of the relevant declaration; see also *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 244, para. 36.

[145] *Preah Vihear*, Preliminary Objections, ICJ Reports (1961), pp. 17, 32: 'the Court must apply its normal canons of interpretation'; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 28–32, paras. 69–76; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 452–3, para. 44.

[146] *Factory at Chorzów (Indemnity)*, Jurisdiction, PCIJ, Series A, No. 9, pp. 4, 32.

[147] *Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 24.

[148] *Free Zones*, Order of 19 August 1929, PCIJ, Series A, No. 22, pp. 5, 13.

[149] On that issue *cf., e.g.*, Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *Rec. des Cours* 281 (1999), pp. 9–438, 170–2.

[150] This is also the result of the careful analysis conducted by Charney, *AJIL* (1987), p. 883.

[151] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1995), pp. 6, 18, para. 33; *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 109–10,

2. Application of Domestic Law

36 The ICJ has had to take cognizance of legal issues that are governed by domestic law on many occasions. The nationality of an individual on whose behalf the home State claims reparation, the legal existence of a corporate body, the conduct of judicial proceedings before national criminal courts, these are all primarily placed under the authority of municipal law, and yet they may be determinative for a proceeding where the conduct of the State concerned will be tested against the yardstick of rules of international law. It stands to reason that the instruments conferring jurisdiction on the Court do not specifically mention such issues as being included in their scope. Nevertheless, such incidental issues of a preliminary character are generally deemed to be included in the purview of the relevant conventional clauses or optional declarations. The PCIJ did not hesitate to affirm its jurisdiction in such instances,[152] and the ICJ has followed that line.[153] Otherwise, the Court would not be able properly to discharge its function in full knowledge of all the relevant facts of a case before it. In any event, however, the essence of the dispute must still be governed by rules of international law. It is not the function of the Court to see to it that domestic law be correctly applied. In the instances discussed here, domestic law just furnishes elements of information to the Court.

3. Application of General Rules of International Responsibility

37 An even more important question relates to the authority of the Court to adjudge upon requests by an applicant seeking to obtain a judicial determination on reparation for internationally wrongful acts. Generally, compromissory clauses or optional declarations specify the subject-matter on which the Court is permitted or invited to pronounce, but they do not touch upon the relevant remedies. If the Court were confined to delivering declaratory decisions that would not touch upon the appropriate remedies to make good the harm suffered by the victim State, its real impact in the process of conflict resolution would be greatly diminished. In one of its first judgments, the PCIJ dismissed such a restrictive reading of a general compromissory clause.[154] In the *LaGrand* case, the United States argued that in any event the Court was prevented from pronouncing on the German request for assurances and guarantees of non-repetition, contending that these remedies were conceptually different from reparation. This argument was not accepted by the Court, however: 'Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation.'[155] Proceeding from this basis, the Court made a finding which enjoined the United States to grant reparation in a carefully specified manner:

para. 160. *Cf.* also Sep. Op. of Judge Higgins in the *Oil Platforms* case, Preliminary Objections, ICJ Reports (1996), pp. 847, 857, para. 35.

[152] *The Mavrommatis Jerusalem Concessions*, Judgment, PCIJ, Series A, No. 5, pp. 6, 29; *Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 18.

[153] *Cf.* for instance the *Nottebohm* case, Second Phase, ICJ Reports (1955), pp. 4, 13–4, and the *Barcelona Traction* case, Second Phase, Judgment, ICJ Reports (1970), pp. 3, 33–4, para. 38; *Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 605–7; *Diallo*, Merits, ICJ Reports (2010), pp. 639, 674–9, paras. 103–13.

[154] *Factory at Chorzów (Indemnity)*, Jurisdiction, PCIJ, Series A, No. 9, pp. 4, 22.

[155] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 485, para. 48; *cf.* also earlier statement in *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, ICJ Reports (1974), pp. 175, 203, para. 72.

Finds that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the [Consular] Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violations of the rights set forth in the Convention.[156]

In the later *Avena* case, the Court first confirmed its earlier holding.[157] Concluding its consideration of the case, it again specified in particularized terms what the United States had to do in order to comply with the judgment rendered against it:

Finds that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to ... above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment.[158]

In the *Jurisdictional Immunities of the State* case, the ICJ ordered Italy to ensure that

by enacting appropriate legislation, or by resorting to other methods of its choosing ... the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.[159]

Against the backdrop of these judgments, it is now firmly established that the Court is empowered to make precise determinations on reparation owed to a State victim of a breach of international law. Support for this proposition can also be found in Article 36, para. 2 (d). By listing 'the nature or extent of the reparation to be made for the breach of an international obligation' as one of the possible items of a legal dispute, the Statute underlines the close connection which exists between the level of primary rules of conduct and the level of secondary rules which deal with the legal consequences of a breach of a primary rule. This conclusion stands in perfect harmony with the authority of the Court to apply the relevant rules of general international law, no matter how specifically the subject-matter of a dispute has been delineated (see MN 58).[160]

4. Multiplicity of Titles of Jurisdiction

In introducing an action an applicant may rely either on one particular or several different jurisdictional clauses, in a conventional instrument, and on declarations under the Optional Clause of Article 36, para. 2.[161] The different titles of jurisdiction are generally meant to have a cumulative effect.[162] It is then the task of the Court to ascertain the scope of its jurisdiction with regard to each one of the claims that have been brought before it for adjudication. In principle, such clauses are independent of one another, not subject to the *lex posterior* principle if no intention to that effect has been 38

[156] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 516, para. 128 (7).
[157] *Avena*, Judgment, ICJ Reports (2004), pp. 12, 33, para. 34.
[158] *Ibid.*, p. 72, para. 153 (9); *cf.* also p. 73, para. 153 (11).
[159] *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 155, para. 139 (4).
[160] *Cf.* also Kawano, 'Decisions of the International Court of Justice on Disputes Concerning Internal Law', in Gaja/Grote (2012), pp. 119–37.
[161] *Electricity Company of Sofia and Bulgaria*, Preliminary Objection, PCIJ, Series A/B, No. 77, pp. 64, 76.
[162] *Cf.* also Kolb (2014), pp. 202–3; Shaw, *Rosenne's Law and Practice*, vol. II, pp. 945–52; Thirlway, *ICJ Law and Procedure*, pp. 762–6.

stipulated.[163] A restriction contained in one of them cannot *ipso facto* be applied to the others.[164]

II. Article 36, para. 1

39 The first paragraph of Article 36 deals with situations where a dispute is referred to the ICJ on the basis of a conventional instrument.[165] There are deep-seated differences, however, between the various situations contemplated in this provision.[166] First of all, the parties to an actual dispute can jointly come to the conclusion that it would be the wisest solution to seek judicial settlement of their dispute by the Court. In such case, they will conclude a special agreement (*compromis*) which determines in detail the questions which the Court is requested to adjudicate. On the other hand, States may be prepared to insert in a bilateral or multilateral treaty a compromissory clause providing for the jurisdiction of the Court if they feel that in the specific field regulated by the treaty concerned judicial settlement would in general constitute the most appropriate mode of dispute settlement. Before accepting such a clause, the risks inherent in submitting to the authority of the ICJ are generally considered with great care. This notwithstanding, compromissory clauses apply to disputes as they may arise in the future, the precise contours of which can never be predicted with absolute certainty. In fact, sometimes the actual use made of a compromissory clause can place a party before rather unexpected circumstances. Thus, NATO countries were taken by complete surprise when Yugoslavia, in reaction to NATO's airstrikes during the Kosovo crisis, invoked Article IX of the Genocide Convention as the alleged basis of the jurisdiction of the Court, albeit with no success.[167] Similarly, the Russian Federation did not expect that the circumstances surrounding the armed hostilities in, and at the borders of, Georgia might be brought to the cognizance of the Court under Article 22 CERD. In this case the application failed not on account of the limited extent of the scope of that clause, but on procedural grounds.[168] In any event, however, in the Kosovo case the States having subscribed to the compromissory clause of the Genocide Convention had to defend themselves before the Court in a proceeding which lasted more than five years.

Because of the risks inherent in compromissory clauses a tendency has emerged in recent years to omit from new multilateral treaties such clauses providing for the jurisdiction of the ICJ.[169] It must be noted, however, that the ICJ has consistently endeavoured to resist transforming such clauses into a 'trap', because of which States would have to endure the exercise of international adjudication against their will.[170]

[163] *Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 24.

[164] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 426, para. 77; *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 90, para. 48; *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 872, para. 132.

[165] *Cf.* generally Morrison, in Damrosch, *ICJ at a Crossroads*, pp. 58 *et seq.*

[166] Rightly emphasized by Morrison, *ibid.*, p. 59.

[167] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279 *et seq.* The key issue, namely the substantive scope of Art. IX of the Genocide Convention, was not resolved by that judgment.

[168] *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 140, para. 184.

[169] At UN level, from 2006 to 2016 only one multilateral treaty was adopted with a compromissory clause, see Abraham, *JIDS* (2016), p. 299; Akande, *JIDS* (2016), p. 324.

[170] *Cf.* observations by Abraham, *JIDS* (2016), p. 300: the interpretation should be 'neither too extensive nor too restrictive'.

1. *Special Agreement* (Compromis)

a) Different Modalities of Seising the Court

The Statute (Article 40, para. 1) proceeds from the assumption that a *compromis* will be jointly notified to the Court by the parties. However, for the purposes of the present classification it matters little whether after the conclusion of a special agreement the parties take that procedural course or whether on that basis one of the parties unilaterally institutes proceedings.[171] The determinative feature is the *ad hoc* nature of the *compromis* pursuant to which and in view of a dispute that has already arisen the parties opt for judicial settlement. The Rules of Court also provide for configurations which do not conform to the usual method. Article 39, para. 1 of the Rules states that 'the notification may be effected by the parties jointly or by any one or more of them'. In any event, nothing changes if such instances are classified as cases brought to the Court under 'treaties and conventions in force'. 40

b) *Forum prorogatum*

Finally, to the first category of cases referred by the parties to the Court also pertain those situations where one of the parties files an application with the Court before having established the requisite bases of jurisdiction *ratione personae* and where the respondent, after the seisin of the Court, declares its consent to the proceeding (*forum prorogatum*). This has happened only three times in the history of the ICJ. In the *Corfu Channel* case[172] between the United Kingdom and Albania, the former heeded the recommendation of the Security Council of 9 April 1947 to the effect that both governments should 'immediately' take their dispute to the Court,[173] by unilaterally filing an application on 22 May 1947. The Albanian government objected to this course of action, arguing that both sides should have instituted proceedings jointly on the basis of a special agreement. However, in the same letter of protest it declared that it was nonetheless prepared 'to appear before the Court'.[174] This phrase was rightly interpreted by the Court as expressing Albania's consent to the jurisdiction of the Court. In the *Certain Criminal Proceedings in France* case (Republic of the Congo v. France),[175] it was a developing country that filed an application without any pre-existing jurisdictional clause. For whatever reasons, France did not regard this application as an unjustified attempt to force it into the position of respondent, but agreed to the exercise of jurisdiction by the Court.[176] Djibouti took this case as a model and also filed an application against France without having beforehand secured the requisite jurisdictional basis. Again, France accepted the jurisdiction of the 41

[171] *Cf.* the cases concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, Judgment, ICJ Reports (1960), pp. 192, 194, and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112 *et seq.*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1995), pp. 6, 18–20, paras. 35–6. Essentially, the *Monetary Gold* case also belongs to this category, Judgment, ICJ Reports (1954), pp. 19, 21–2.

[172] *Corfu Channel*, Preliminary Objection, ICJ Reports (1948), pp. 15 *et seq.*

[173] SC Res. 22 (1947). *Cf.* also Giegerich on Art. 36 UN Charter MN 62–74.

[174] *Corfu Channel*, Preliminary Objection, ICJ Reports (1948), pp. 15, 19.

[175] By Order of the Court of 16 November 2010, ICJ Reports (2010), p. 635, the case was removed from the List after the Democratic Republic of the Congo had withdrawn its application by a letter of 5 November 2010.

[176] Letter of the French Minister for Foreign Affairs of 8 April 2003 accepting the jurisdiction of the Court, *cf.* Order of 11 July 2003, ICJ Reports (2003), p. 143.

Court, probably in order to show that it had perfectly complied with the rule of law.[177] *Forum prorogatum* may also be established if an applicant's submissions go beyond the scope of the relevant title of jurisdiction and if nonetheless the respondent does not object to that extension *ratione materiae*. In sum, no requirements as to formalities need to be observed. What matters is the actual agreement of the parties to have recourse to the Court.[178] However, if the State against which the application is directed refrains from giving its consent, the case may not be entered in the General List of cases (Article 38, para. 5 of the Rules). At that stage, no provisional measures may be ordered either.[179]

c) Advantages and Shortcomings of Special Agreement

42 The legal literature unanimously agrees on the advantages inherent in seising the Court by way of *compromis* (or special agreement).[180] Indeed, as already hinted at, under such circumstances no unpleasant surprises can arise. The parties are able to gauge beforehand the risk which they might incur by submitting their dispute to judicial settlement. Recourse to the Court may also permit them to disentangle acrimonious internal controversies. It is well known that boundary disputes are particularly susceptible of unleashing waves of nationalistic sentiment. Any government that makes concessions to its opponent in such a dispute could be in danger of being toppled even though it may have valid grounds to distance itself from its own position. In such a situation, referral to the Court as an objective and impartial body may be more acceptable to the domestic public. All these factors also have the advantage that in such instances, as a rule, no preliminary objections are raised,[181] given that both parties are genuinely interested in obtaining a determination on the controversial issues by the Court. Finally, one can generally expect that a judgment based on a *compromis* will be faithfully complied with by the parties, including the losing State.

43 In the *Liber Amicorum Judge Shigeru Oda*, Peter Tomka gave an almost complete list of the cases submitted to the Court on the basis of a special agreement, excluding, however, those cases where, in departure from Article 40, para. 1, proceedings were instituted not by notification of that agreement, but unilaterally by one of the parties.[182] It emerges from the list that, notwithstanding their importance, the disputes concerned had a limited scope and most of them were of a territorial character. None of the great political conflicts which the Court had to rule upon—the *Anglo-Iranian Oil Co.* case,[183] the *Nuclear Tests* cases,[184] the *Tehran Hostages* case,[185] the dispute between the United States

[177] *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 181, para. 4.

[178] See above MN 19.

[179] For further details *cf.* Quintana, *ICJ Litigation*, pp. 122–4.

[180] Already perceived by von Stauffenberg, p. 256. From the more recent literature, *cf.* Oda, *ICLQ* (2000), p. 262; Tomka, in Ando *et al.* (2002), pp. 553 *et seq.*; *cf.* also Steinberger, 'The International Court of Justice', in MPI, *Judicial Settlement*, pp. 193–283, 252. Detailed analysis of special agreements also by Quintana, *ICJ Litigation*, pp. 80–95.

[181] From the more recent past see *Frontier Dispute* (Benin/Niger), Judgment, ICJ Reports (2005), pp. 90, 94–5, para. 1; *Pedra Branca*, Judgment, ICJ Reports (2008), pp. 12, 17, para. 1; *Frontier Dispute* (Burkina Faso/Niger), Judgment, ICJ Reports (2013), pp. 44 *et seq.* An exception to this rule of thumb was the *Monetary Gold* case, Judgment, ICJ Reports (1954), pp. 19 *et seq.*

[182] Tomka, in Ando *et al.* (2002), pp. 553–65.

[183] *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93 *et seq.*

[184] *Nuclear Tests* (Australia v. France; New Zealand v. France), Orders of 22 June 1973, ICJ Reports (1973), pp. 99 *et seq.* and pp. 135 *et seq.*; Judgment, ICJ Reports (1974), pp. 253 *et seq.* and pp. 457 *et seq.*

[185] *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.*; Judgment, ICJ Reports (1980), pp. 3 *et seq.*

and Nicaragua,[186] the *Legality of Use of Force* cases,[187] the *Bosnian* and *Croatian Genocide* cases[188]—found their way to the Court through a *compromis*. The conclusion therefore seems to be inescapable that the *compromis*, in spite of its obvious advantages, has rightly been recognized as only one of the possible titles upon which the jurisdiction of the Court may be based. The role of the Court as an element of the world system of governance set up by the UN Charter would be considerably diminished if it did not have other sources providing it with jurisdiction.[189]

d) Necessity of Binding Commitment

Both parties have to manifest their will unequivocally to have a specific dispute adjudi- 44
cated by the Court. Any relevant declaration must constitute an 'unequivocal indication' of the will to accept the Court's jurisdiction in a 'voluntary and indisputable manner'.[190] In this regard, three cases presented particularly difficult problems of construction. In the *Aegean Sea Continental Shelf* dispute between Greece and Turkey, Greece relied, *inter alia*, on a communiqué issued to the press immediately after a meeting of the two Prime Ministers in Brussels on 31 May 1975. The relevant passage read:

> In the course of their meeting the two Prime Ministers had an opportunity to give consideration to the problems which led to the existing situation as regards relations between their countries.
>
> They decided [*ont décidé*] that those problems should be resolved [*doivent être résolus*] peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague. They defined the general lines on the basis of which the forthcoming meetings of the representatives of the two Governments would take place.[191]

Rightly, after careful analysis of this text, the Court held that the communiqué was not intended to, and did not, constitute an 'immediate commitment' by the two countries to accept unconditionally the unilateral submission of the dispute on the delimitation of the continental shelf in the Aegean Sea to the Court.[192] In fact, there should be a general presumption against hastily drafted press communiqués as sources of truly binding international obligations, notwithstanding the rejection of such a presumption by the Court.[193] Likewise, in the *Bosnian Genocide* case, the Court refused to acknowledge a common letter signed by the Presidents of Bosnia and Herzegovina and the Federal Republic of Yugoslavia (Serbia and Montenegro), where it was suggested that all the

[186] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392 *et seq.*; Merits, ICJ Reports (1986), pp. 14 *et seq.*

[187] *Legality of Use of Force* cases (Serbia and Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, United States of America), Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.*, 259 *et seq.*, 363 *et seq.*, 422 *et seq.*, 481 *et seq.*, 542 *et seq.*, 656 *et seq.*, 761 *et seq.*, 826 *et seq.*, 916 *et seq.*; *Legality of Use of Force* cases (Serbia and Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom), Preliminary Objections, ICJ Reports (2004), pp. 279 *et seq.*, 429 *et seq.*, 575 *et seq.*, 720 *et seq.*, 865 *et seq.*, 1011 *et seq.*, 1160 *et seq.*, 1307 *et seq.*

[188] *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595 *et seq.*; *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412 *et seq.*

[189] The appraisal by Scott/Carr, *AJIL* (1987), p. 74, that 'compulsory jurisdiction of the Court under Article 36 (2) hinders the evolving efficacy of the Court' can therefore not be shared. Nor should one speak of 'abuse' of the ICJ in cases involving use of force, as suggested by Gray, *EJIL* (2003), pp. 867–905. For a well-balanced view *cf.* Schachter, 'Disputes Involving the Use of Force', in Damrosch, *ICJ at a Crossroads*, pp. 223–41.

[190] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 18–9, para. 21.

[191] *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 39–40, para. 97.

[192] *Ibid.*, p. 44, para. 107.

[193] *Ibid.*, p. 39, para. 96.

issues arising in the context of the disintegration of the Socialist Federal Republic of Yugoslavia should be referred to the ICJ, as the expression of 'an immediate commitment by the two Presidents, binding on Yugoslavia, to accept unconditionally the unilateral submission to the Court of a wide range of legal disputes'.[194] Given the political background of that letter, this was certainly the correct interpretation.

45 On the other hand, in the dispute between Qatar and Bahrain the heart of the matter was a text called 'Minutes' (25 December 1990) which the Foreign Ministers of Bahrain and Qatar—and Saudi Arabia—had signed after protracted negotiations. The text explicitly said that 'The following was agreed', and one of those propositions agreed upon was recourse to the ICJ should the good offices of the King of Saudi Arabia not succeed in bringing about a settlement of the territorial (and maritime) dispute between the two countries by a specific date: 'After the end of this period, the parties may submit the matter to the International Court of Justice'.[195] While Bahrain maintained that this was 'a simple record of negotiations', not to be classified as an international agreement, the Court held that in view of the solemnity surrounding the signature of the text, the 'Minutes' constituted in fact a binding international agreement, capable of justifying recourse to the ICJ:

> the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.[196]

It is only natural that the usual methods of treaty interpretation are resorted to in such instances. The fact that an agreement providing for the submission of an international dispute to the ICJ is at issue does not entail any specificities.

46 In accordance with Article 102 UN Charter, any special agreement must be notified to the UN Secretary-General for registration. Otherwise, it could not be invoked before any organ of the United Nations, including, pursuant to the text of Article 102, the Court. The practice of the Court in that respect, however, lacks consistency. In the *Aegean Sea Continental Shelf* case, the Court discussed at length whether a press release could qualify as a treaty conferring jurisdiction upon it without raising the issue of registration.[197] In the *Maritime Delimitation and Territorial Questions* case, by contrast, it insisted on the necessity of compliance with Article 102 UN Charter.[198] Consequently, discordant voices can be identified in legal literature.[199] Whatever may be the right answer, the Court has generally shown a considerable measure of generosity with regard to formalities. There is no cut-off date. Consequently, registration should provide a foundation for the jurisdiction of the Court even after the applicant has instituted proceedings.

[194] *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 618–19, para. 37; *cf.* also *ibid.*, Provisional Measures, ICJ Reports (1993), pp. 3, 18, para. 31.

[195] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112, 118–19, para. 19.

[196] *Ibid.*, p. 121, para. 25.

[197] *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 38–44, paras. 94–108.

[198] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112, 122, para. 29.

[199] For a strict view *cf.* Tomka, in Ando *et al.* (2002), pp. 564–5, for a liberal assessment Morrison, in Damrosch, *ICJ at a Crossroads*, pp. 58, 70. *Cf.* also Martens, in Simma, *UN Charter*, Art. 102 MN 56.

2. *Charter of the United Nations*

The most curious instance dealt with in Article 36, para. 1 are cases 'provided for in the Charter of the United Nations'. The origin of this phrase can be traced back to a proposal made by the United States during the meeting of the Washington Committee of Jurists.[200] It was included in both drafts submitted by that Committee. No further discussions took place at the San Francisco Conference.[201] In fact, during the deliberations held by the Committee of Jurists, nobody could foresee whether the future UN Charter would provide for instances of compulsory jurisdiction by the Court, for which only a blueprint had been devised. The drafters of the Charter did not follow that course. They abstained from conferring any kind of compulsory jurisdiction on the Court which they created. In fact, the Court has confirmed that the Charter contains no specific provision to that effect.[202] 47

Nonetheless, in the light of the development of the Charter in the six decades since its entry into force, reasonable use could be made of this seemingly 'idle' title of jurisdiction. According to Article 36, para. 3 UN Charter, the Security Council has the power to recommend to the parties to any dispute to refer that dispute to the ICJ.[203] This provision, however, is without prejudice to the powers of the Security Council under Chapter VII of the Charter. There seems to be no serious reason militating against decisions of the Security Council that would enjoin States confronting one another about issues affecting international peace and security, to bring their disputes before the Court.[204] Such an injunction would become the point of departure for a mode of settlement infinitely more appropriate than a decision of the Security Council making binding determinations.[205] Before the Security Council, nations which are not members of the Council are not always guaranteed a fair hearing. Before the Court, they could plead their case on the strength of any available legal arguments, enjoying all safeguards which the Statute provides to the parties. Thus, from the viewpoint of proportionality as a modern principle of international law, referral of disputes to the ICJ by the Security Council has many advantages. The Council should be encouraged to avail itself of this window of opportunity. Evidently, no State can be compelled to defend its case competently or even vigorously, 48

[200] UNCIO XIV, p. 325.

[201] *Cf.* also Shaw, *Rosenne's Law and Practice*, vol. II, p. 664.

[202] *Aerial Incident of 10 August 1999* (Pakistan v. India), Judgment, ICJ Reports (2000), pp. 12, 32, para. 48.

[203] The Security Council has done so in just two cases, first in the British–Albanian dispute over the incidents in the Corfu Channel, SC Res. 22 (1947), and later in the Greek–Turkish dispute over the Aegean Sea, SC Res. 395 (1976), para. 4. It stands to reason that a pure recommendation cannot provide a basis for the jurisdiction of the Court; *cf.* in this regard *Corfu Channel*, Preliminary Objections, Sep. Op. Basdevant, Alvarez, Winiarski, Zoričič, De Visscher, Badawi Pasha, and Krylov, ICJ Reports (1948), pp. 31 *et seq.* and, for a summary of their reasoning, Chesterman/Oellers-Frahm on Art. 92 UN Charter MN 38. *Cf.* also Giegerich on Art. 36 UN Charter MN 52–61.

[204] Ruffert, 'Special Jurisdiction of the ICJ in the Case of Infringements of Fundamental Rules of the International Legal Order?', in *The Fundamental Rules of the International Legal Order: Jus cogens and Obligations Erga Omnes* (Tomuschat/Thouvenin, eds., 2006), pp. 295–310, 307. Against such deviation from the consent rule *cf.* Krari-Lahya, 'Cooperation and Competition between the International Court of Justice and the Security Council', in Gaja/Grote (2012), pp. 47–61, 52; Quintana, *ICJ Litigation*, p. 47; Spijkers, 'What's Wrong with the Relationship between the International Court of Justice and the Security Council?', in *What's Wrong with International Law* (Ryngaert *et al.*, eds, 2015), pp. 347–64, 349. Zimmermann, 'Organic Links between the International Court of Justice and the other Principal Organs of the United Nations', in *Liber Amicorum Torsten Stein* (Calliess, ed., 2015), pp. 393–400, reserves his position.

[205] In this regard, the settlement of the war between Iraq and Kuwait by SC Res. 687 (1991) went way too far.

as required by the circumstances. However, invariably one of the litigant parties will have most to win from a defence of its claims in accordance with the rule of law. That State, at least, will institute proceedings. If, then, its opponent as respondent does not make an appearance, the general principles about non-appearance (Article 53) will apply. Once the Court has rendered its judgment, its findings will become binding in accordance with Article 94, para. 1 UN Charter. It will then again be incumbent upon the Security Council to take the necessary measures under Article 94, para. 2 UN Charter for the enforcement of the Court's judgment.

3. Treaties and Conventions in Force

49 It is neither possible nor convenient to provide, in this commentary, a complete list of all the compromissory clauses enshrined in treaties and conventions in force. The Court provides such a list on its website, albeit with a disclaimer to the effect that '[t]he fact that a treaty is or is not included in this section is without prejudice to its possible application by the Court in a particular case'. Compromissory clauses can be contained in bilateral[206] or multilateral agreements. It is striking that the list fails to mention the 1928 General Act for the Pacific Settlement of International Disputes, a legal instrument which has been often invoked by applicants seeking to find legal support for the jurisdiction of the Court,[207] but never actually applied by the Court in that sense.[208] It thus remains open whether the 1928 General Act has survived the demise of the PCIJ in accordance with Article 37 of the Statute. The Court has deliberately avoided taking a stance on this issue. The phrase 'in force' does not refer back to any historical point in time but is open for interpretation, encompassing any legal instrument in force at the decisive time of institution of proceedings.

a) General Treaties and Conventions Providing for Dispute Settlement by the ICJ

50 Among the many multilateral treaties containing compromissory clauses, those providing for the general referral of disputes to the Court are of the greatest importance. Such instruments exist at the regional level. In Europe, the 1957 European Convention for the Peaceful Settlement of Disputes[209] sets forth in its Article 1 that '[t]he High Contracting Parties shall submit to the judgment of the International Court of Justice all international legal disputes which may arise between them'. This formulation clearly amounts to comprehensive compulsory jurisdiction, something which at world level could hardly ever be attained and which may only be explained by the high degree of confidence that exists among the members of the Council of Europe. Clearly, however, many States have

[206] A prominent example of a bilateral agreement is provided by the *Application of the Interim Accord of 13 September 1995* between the Former Yugoslav Republic of Macedonia and Greece, see Judgment, ICJ Reports (2011), pp. 644 *et seq.*

[207] *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 25 (the Act had been mentioned by France, but, according to the Court, it was not actually invoked); *Preah Vihear*, Preliminary Objections, ICJ Reports (1961), pp. 17, 21; *Nuclear Tests* (Australia v. France; New Zealand v. France), Orders of 22 June 1973, ICJ Reports (1973), pp. 99, 102–3, paras. 16, 19, and pp. 135, 139, para. 20; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 38, paras. 91–3; *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 23–5, paras. 26–8. For further analysis *cf.* Simma/Richemond-Barak on Art. 37, especially MN 15 and 20.

[208] For a discussion of the legal position *cf.* Tomuschat, 'The 1928 General Act for the Pacific Settlement of Disputes Revisited', in *Liber Amicorum Judge Shigeru Oda* (Ando *et al.*, eds., 2002), pp. 977–94; Shaw, *Rosenne's Law and Practice*, vol. II, pp. 673–4.

[209] 29 April 1957, 320 UNTS 243, ETS No. 23.

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misgivings about the breadth of the jurisdiction thus conferred on the ICJ. Although the Convention was signed almost fifty years ago, to date it has received no more than fourteen ratifications—clearly a rather meagre record.[210] In the Americas, Article XXXI of the Pact of Bogotá[211] provides:

> In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning [follows the list of Article 36, para. 2 of the Statute].

In the *Border and Transborder Armed Actions* case between Nicaragua and Honduras, the Court discussed the meaning of this formula. It can either be interpreted as a treaty provision conferring jurisdiction upon the Court in accordance with Article 36, para. 1 or as a collective declaration of acceptance of compulsory jurisdiction under Article 36, para. 2. Taking the view that in any event it constitutes acceptance of jurisdiction, the Court chose not to pursue the matter further.[212] In fact, a precise classification seems to be only of academic interest. However, as in the case of its European counterpart, the Pact has weak foundations. It counts only fourteen States parties.[213] On the positive side, one may note that some of the dominant nations in Latin America, namely Brazil, Chile, and Mexico, have ratified it. Among the great absentees is the United States. Ample use has been made of Article XXXI of the Pact of Bogotá.[214] El Salvador (1973) and Colombia (2012) have denounced it specifically because of its comprehensive compromissory clause. Currently (December 2018), three cases are pending before the Court where the applicants rely on that clause.[215]

b) Specialized Multilateral Treaties and Conventions with Compromissory Clauses

aa) Optional Protocols to the Diplomatic and Consular Conventions

Among specialized multilateral treaties, which provide for jurisdiction of the ICJ to 51
settle disputes between States parties, three have come to prominence in recent years. First of all, the compromissory clauses in the two Optional Protocols concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations[216] and the Vienna Convention on Consular Relations[217] enabled the United

[210] It provided the foundation of the jurisdiction of the Court only twice, in the *Certain Property* case between Liechtenstein and Germany, Preliminary Objections, ICJ Reports (2005), pp. 6 *et seq.*, and in *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99 *et seq.*

[211] American Treaty on Pacific Settlement (Pact of Bogotá), 30 April 1948, 30 UNTS 55.

[212] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 84, paras. 32–4.

[213] <http://www.oas.org>.

[214] Latest merits judgments: *Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624 *et seq.*; *Maritime Dispute*, Judgment, ICJ Reports (2014), pp. 3 *et seq.*; *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Judgment, ICJ Reports (2015), pp. 665 *et seq.*; *Certain Activities carried out by Nicaragua in the Border Area*, Compensation, Judgment of 2 February 2018; *Caribbean Sea Delimitation* and *Islas Portillos*, Judgment of 2 February 2018; *Obligation to Negotiate Access to the Pacific Ocean*, Merits, Judgment of 1 October 2018.

[215] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* between Nicaragua and Colombia; *Caribbean Sea* between Nicaragua and Colombia; *Silala Waters* between Chile and Bolivia.

[216] 18 April 1961, 500 UNTS 223, Art. I.

[217] 24 April 1963, 596 UNTS 469, Art. I.

States to institute proceedings against Iran[218] in the Tehran hostages crisis.[219] More recently, the United States was the respondent in disputes brought against it on account of allegations that its domestic authorities had not lived up to their duty to inform the consular posts of foreign States about the arrest and trial of their nationals in US territory, and also those persons themselves about their right to consular assistance. In the first of these cases (*Breard*), Paraguay did not pursue its claims to the end, but informed the Court that, despite the fact that it had filed a Memorial on the merits of the case, it did not wish to go on with the proceedings and requested that the case be removed from the Court's List.[220] Germany, on the other hand, in the *LaGrand* case did not abandon its efforts after the LaGrand brothers had both been executed, and eventually obtained a finding of the Court to the effect that the United States had breached its obligations under the Vienna Convention on Consular Relations.[221] Likewise, Mexico was successful with its application in the *Avena* case. In its judgment of 31 March 2004, the Court found that the United States had infringed its commitments under that same Convention.[222] To escape from the jurisdiction of the Court with regard to cases of arrests of foreign nationals, the United States denounced the Optional Protocol thereafter in March 2005, notwithstanding the absence of a denunciation clause in that instrument.[223] In the recent *Jadhav Case* India, the applicant, invoked the jurisdiction of the Court under the Optional Protocol since its declaration under Article 36, para. 2, is framed in such a restrictive manner that Pakistan, the respondent, could have easily availed itself of those restrictions by invocation of the principle of reciprocity.[224] Finally, on 28 September 2018 Palestine filed an application instituting proceedings before the Court against the United States with respect to the relocation of the US Embassy from Tel Aviv to Jerusalem under the Optional Protocol to the Vienna Convention on Diplomatic Relations, to which both Palestine and the US are parties.[225] Although concerns have already been raised with respect to the potential for success of Palestine's application,[226]

[218] The text of both Optional Protocols is identical (Art. I): 'Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol.'

[219] *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 24, para. 45.

[220] *Cf. Breard*, Order of 10 November 1998, ICJ Reports (1998), pp. 426 *et seq. Cf.* also Wegen, Discontinuance and Withdrawal, MN 2.

[221] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 482–3, para. 42.

[222] *Avena*, Judgment, ICJ Reports (2004), pp. 12, 71–2, para. 153(4)–(8).

[223] Letter of Secretary of State Condoleezza Rice of 7 March 2005, *AJIL* 99 (2005), p. 490. Commented on approvingly by Reisman/Arsanjani, 'No Exit? A Preliminary Examination of the Legal Consequences of United States' Notification of Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations', in *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Lucius Caflisch* (Kohen, ed., 2007), pp. 897–926. Assessment from the viewpoint of international relations by Helfer, 'Exiting Treaties', *Va. L. Rev.* 91 (2005), pp. 1579–648, 1628–9.

[224] *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 237–8, para. 22.

[225] *Relocation of the United States Embassy to Jerusalem*, Application Instituting Proceedings, 28 September 2018; ICJ Press Release No. 2018/47 of 28 September 2018. Palestine, on 4 July 2018, deposited a declaration to the Court recognizing its jurisdiction as compulsory 'for the settlement of all disputes that may arise or that have already arisen covered by Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations', see <https://www.icj-cij.org/en/states-not-parties>.

[226] See for a short commentary Milanovic, 'Palestine Sues the United States in the ICJ re Jerusalem Embassy', EJIL:*Talk!*, 30 September 2018, available at <https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-embassy/>; *cf.* Miron, 'Palestine's Application the ICJ, neither Groundless, nor

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the United States on 3 October 2018 announced its withdrawal from the Optional Protocol.[227]

bb) 1971 Montreal Convention

In the *Lockerbie* cases, the controversy centred on the question as to whether the application filed by Libya against the United Kingdom and the United States could be founded on Article 14, para. 1[228] of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[229] Both respondents contended that the dispute did not exist specifically between them as individual States and Libya, but related to a general threat to international peace and security resulting from Libya's involvement in acts of terrorism. This argument was dismissed by the Court. It held that, as shown by the submissions of the respondents, both sides differed as to the legal regime applicable to the Lockerbie incident. Consequently, it found its jurisdiction established.[230] 52

cc) Genocide Convention

Finally, specific mention should be made of the Convention on the Prevention and Suppression of the Crime of Genocide.[231] Article IX of this Convention provides: 53

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Originally, it was felt that after the horrors of the Nazi regime in Europe genocide was just a very remote theoretical construct. However, it turned into a horrific reality in the second half of the twentieth century and became the object of several cases before the Court. First, Bosnia and Herzegovina instituted proceedings against 'Yugoslavia'.[232] 'Yugoslavia' objected to the jurisdiction of the Court by arguing that Article IX covered only:

> the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.[233]

Rightly, this objection was rejected by the Court since it finds no support in the text of the clause.[234] In the course of these proceedings, 'Yugoslavia' as the respondent also requested the Court to indicate provisional measures, a request to which the Court

Hopeless. A Reply to Marko Milanovic', EJIL: *Talk!*, 8 October 2018, available at https://www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic/>.

[227] See <https://www.reuters.com/article/us-usa-diplomacy-treaty-idUSKCN1MD2CP>.

[228] 'Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months of the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.'

[229] 23 September 1971, 974 UNTS 177.

[230] *Lockerbie* (Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 115, 123, para. 24.

[231] 9 December 1948, 78 UNTS 277.

[232] *Cf.* the judgment on the preliminary objections raised by 'Yugoslavia', *Bosnian Genocide* case, Preliminary Objections, ICJ Reports (1996), pp. 595 *et seq.*

[233] *Ibid.*, p. 616, para. 32.

[234] *Ibid.*, p. 616–7, paras. 32, 33. This line of reasoning was pursued in the decision on the merits, Judgment, ICJ Reports (2007), pp. 43, 118–9, para. 179.

responded positively to a limited extent.[235] Finally, in 1999 Croatia brought an application against 'Yugoslavia', alleging that Yugoslav armed forces had committed acts of genocide in the territory of Croatia. After sixteen years, the Court finally handed down its final judgment in that case[236] following the dismissal of preliminary objections raised by the respondent.[237]

54 It is all too obvious that the ICJ, which essentially is not a trial court, experienced great difficulties in being compelled to inquire into the merits of all the allegations of genocide that were made by the different parties involved. The Court simply lacks the infrastructure which would be essential for a comprehensive process of fact-finding on the ground. In fact, the Court relied to a large extent on the findings of the ICTY on matters of fact.[238]

55 Article IX of the Genocide Convention was also one of the main jurisdictional bases for the proceedings which 'Yugoslavia' brought against ten NATO countries a few weeks after the Kosovo war had started.[239] It alleged that the armed activities against its territory, in particular the use of ammunition containing depleted uranium, met the criteria of genocide as defined by the Convention. The Court, however, did not accept this line of reasoning. It emphasized that the intent to destroy a group constitutes the essential characteristic of genocide; the threat or use of force alone could not constitute an act of genocide.[240] In the judgment on the preliminary objections raised by the ten States,[241] the Court did not deal with the issue since it denied its jurisdiction inasmuch as 'Yugoslavia' having been transformed into Serbia and Montenegro, lacked a right of access to the Court (Article 35).[242]

c) Gaps in the Network of Compromissory Clauses

56 Recent case law has confirmed that the compromissory clauses found in multilateral conventions provide scant meaningful judicial protection against violations of the principle of non-use of force and of international humanitarian law. In May 2002, the Democratic Republic of the Congo, allegedly victim of incursions by Rwandan troops into its territory, attempted to institute proceedings against Rwanda, invoking a whole series of international agreements, but without avail because all of those instruments lacked a clause providing for the jurisdiction of the ICJ.[243] One can hardly expect that this state of affairs will change in the near future. Generally, as far as occurrences involving threats to international peace and security are concerned, the Security Council would seem to be the

[235] *Ibid.*, Provisional Measures, ICJ Reports (1993), pp. 3, 24–5, para. 52 B.

[236] *Croatian Genocide* case, Judgment, ICJ Reports (2015), pp. 3 *et seq.*

[237] *Croatian Genocide* case, Preliminary Objections, ICJ Reports (2008), pp. 412 *et seq.*

[238] *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 134, para. 223; for a comment see Higgins *et al.*, *supra*, fn. 54, pp. 1205–6.

[239] *Cf. supra*, fn. 187.

[240] *Cf. e.g., Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 138, para. 40.

[241] *Legality of Use of Force* case (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279 *et seq.*

[242] *Cf.* Zimmermann on Art. 35 MN 46, 80–85 and Oellers-Frahm/Zimmermann on Art. 93 UN Charter MN 11–13.

[243] No fewer than eleven jurisdictional clauses were invoked by the Democratic Republic of the Congo, but none of them covered the dispute, *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Judgment, ICJ Reports (2006), pp. 6 *et seq.* Beforehand, a request by the applicant to the Court to order provisional measures had failed on the same grounds, Provisional Measures, ICJ Reports (2002), pp. 219 *et seq.*

most appropriate organ to be seized with these situations on behalf of the international community.

d) Determination of Scope of Compromissory Clauses

The compromissory clauses contained in bilateral or multilateral treaties must always be construed in connection with the substantive provisions of the treaty concerned (jurisdiction *ratione materiae*). Whenever appropriate, the Court painstakingly examines whether and to what extent the complaints brought by the applicant are susceptible of coming within the purview of those provisions. In this regard, the *Oil Platforms* case, where the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran was at issue, constitutes an outstanding example. In its judgment on the preliminary objections raised by the United States, the Court, taking as its starting point Article XXI, para. 2 of that Treaty, went through the relevant provisions one by one, rejecting Article I as a pure objective which did not set forth truly binding international obligations, specifying that Article IV, para. 1 as an economic guarantee of fair treatment did not come into play in respect of military acts of force, and finally concluding that Article X, para. 1, which dealt with freedom of commerce and navigation, could have been affected by the United States' attacks against the two oil platforms.[244] In this case, a major role was also played by Article XX, para. 1 (d) of the Treaty, according to which the Treaty did not preclude the application of measures 'necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'. The United States contended that this provision set forth a substantive limitation of the jurisdiction of the Court, while according to Iran, which relied on the judgment of the Court in the *Nicaragua* case,[245] this was a simple defence on the merits. Clearly, the United States was interested in not having its attacks on the platforms discussed at all by the Court, while the construction preferred by Iran would have led the Court first to consider those activities before examining whether they could be justified on that exceptional head. After a lengthy discussion, the Court opted for the construction suggested by Iran.[246] 57

In a similar fashion, the Court devoted meticulous attention to the scope *ratione materiae* of the compromissory clause in some other prominent cases. In the *Bosnian Genocide* case, the key issue was whether the Genocide Convention is confined to the criminal responsibility of individuals or whether issues of general international responsibility of States are also encompassed.[247] In the case concerning *Mutual Assistance in Criminal Matters* between Djibouti and France, a case of *forum prorogatum*, the Court had to determine which occurrences were covered by France's acceptance of having the application filed by Djibouti adjudicated by the Court,[248] and in the *Pulp Mills* case, the meaning of pollution had to be assessed: the Court excluded noise and visual pollution as well as 'bad odours', restricting the scope of the relevant jurisdictional clause to pollution 58

[244] *Oil Platforms*, Preliminary Objections, ICJ Reports (1996), pp. 803, 810 *et seq.*

[245] *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 117, para. 225.

[246] *Oil Platforms*, Preliminary Objections, ICJ Reports (1996), pp. 803, 811, para. 20; *cf.* also the judgment on the Merits, ICJ Reports (2003), pp. 161, 178–84, paras 31–45.

[247] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 106–7, para. 152, 114, paras. 167–8, and 118–9, para. 179.

[248] *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 206 *et seq.*, paras. 65 *et seq.*

of, and harm to, the Uruguay River proper, its waters, and the organisms living therein.[249] In the dispute between Georgia and the Russian Federation, the Court had to ascertain whether the Russian attacks carried out on Georgian territory came within the scope of Article 22 CERD, which covers instances of racial discrimination only.[250]

59 A particularly delicate treaty condition is the requirement that judicial proceedings may be initiated only after negotiations have proved to be of no avail. The Court had to deal with this issue both in the case between Georgia and the Russian Federation, where Article 22 CERD, and in the case between Belgium and Senegal, where Article 30 CAT had to be construed. The proposition stated in the former case that negotiations are more demanding than an exchange of claims and directly opposed counter-claims, requiring a genuine attempt by one disputing party to engage in discussions with the other disputing party, with a view to resolving the dispute, was also maintained in the latter case.[251] Obviously, negotiations cannot be extended *ad infinitum*. It must be accepted that they may be interrupted if they are deadlocked or have become futile.

60 It should be emphasized that the confinement of a given compromissory clause to the legal rules enunciated in a specific treaty does not exclude the applicability to the dispute of the rules of general international law.[252] This does not derive solely from the provision of Article 31, para. 3 (c) VCLT,[253] but follows from the conceptual unity of international law. Without any exception, particular treaty regimes are based on the foundations of general international law. The Court expressed this seemingly trivial but crucial proposition in the *Bosnian Genocide* case, where the rules on treaty interpretation and on responsibility of States for internationally wrongful acts were classified as 'general international law',[254] as well as in the *Pulp Mills* case, where the duty to carry out an environmental impact assessment was derived from general international law.[255] However, where the claims of a breach of international law brought against the respondent party are based on a conventional compromissory clause, they remain confined to the provisions of the treaty concerned and cannot be extended to a parallel customary rule.[256]

e) Challenges to the Validity of Treaties and Conventions

61 It hardly needs to be stressed that a treaty clause providing for the jurisdiction of the Court does not lose its applicability as soon as one of the parties concerned challenges the validity of the treaty. The *raison d'être* of compromissory clauses is to provide judicial relief in case a dispute arises. It would be too easy to dispose of judicial settlement regimes carefully designed, if it sufficed to invoke any grounds allegedly vitiating the treaty as a

[249] *Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 41–2, para. 52.

[250] *Georgia v. Russia*, Judgment, ICJ Reports (2011), pp. 70, 120, para. 113.

[251] *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 445–6, para. 57. Recently reconfirmed in the *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 120–1, para. 43.

[252] See Tomuschat, 'What is General International Law?', in *Guerra y Paz: 1945–2009. Obra homenaje al Dr. Santiago Torres Bernárdez* (2010), pp. 329–48. Critical assessment by the ILC's Special Rapporteur Wood, First report on formation and evidence of customary international law, UN Doc. A/CN.4/663 (2013), para. 42.

[253] *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 182, para. 41.

[254] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 105, para. 149; confirmed in the *Croatian Genocide* case, Judgment, ICJ Reports (2015), pp. 3, 56–7, para. 115.

[255] *Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 82–4, paras. 204–5.

[256] *Cf. Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 96, para. 179; *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 47–8, paras. 88–9.

whole. In the *ICAO Council* case, the Court took a decisive stance against such attempts to overthrow compromissory clauses:

> If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative—*i.e.*, whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting.[257]

In the *Tehran Hostages* case, the Court reiterated that it was precisely when difficulties arose because of the alleged violation of a treaty that compromissory clauses assumed their greatest importance: such difficulties could not have the effect of precluding the parties concerned from invoking those clauses inasmuch as they provided for the pacific settlement of the dispute.[258] This judicial *dictum* applies irrespective of the grounds which a party relies on to call into question the validity of a compromissory clause. In the *Fisheries Jurisdiction* cases, Iceland contended that by way of change of circumstances the clause contained in Exchanges of Notes which had taken place with the Federal Republic of Germany and the United Kingdom in 1961 had become obsolete. The Court dismissed this argument outright.[259] Assessing Nicaragua's claim that a border treaty concluded in 1928 with Colombia, which defined the jurisdictional clause contained in Article VI of the Pact of Bogotá, was invalid, the Court stressed that for more than fifty years no such challenge had been advanced by Nicaragua. Thus, Nicaragua could not successfully invoke that defence today.[260]

f) Appropriate Wording of Compromissory Clauses

62 The text of compromissory clauses can be framed in different terms. The wording of some clauses leaves no room for any doubts as to whether it grants direct access to the ICJ. Thus, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provides that disputes shall be submitted to the Court 'at the request of any of the parties to the dispute'. Article I of the two Optional Protocols to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations specifies, too, that 'any party' may seise the Court. Other clauses are drafted in a less felicitous way. In the *Tehran Hostages* case, the Court was confronted, in addition to the two Optional Protocols just mentioned, with Article XXI, para. 2 of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. This provision reads:

> Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.[261]

[257] *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 53–4, para. 16 (b).

[258] *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 27–8, paras. 53–4.

[259] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Jurisdiction, ICJ Reports (1973), pp. 3, 19–21, paras. 40–3 and pp. 49, 64–5, paras. 40–3 respectively. By contrast, for a forceful pleading in favour of taking into account a fundamental change of circumstances *cf.* Diss. Op. Judge Schwebel in the *Nicaragua* case, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 558, 621–2, para. 100.

[260] *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 859, paras. 79–80.

[261] *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 27, para. 51.

The formula employed here could be interpreted to mean that the Parties undertake to establish, between them, a special agreement for the submission of the dispute to the Court. The process would then go through two stages. First, the special agreement would have to be concluded, and thereafter the ICJ could be seised, either by notification of that agreement or by unilateral application. The Court dismissed such restrictive understanding of Article XXI, para. 2 of the 1955 Treaty:

> While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident ... that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement.[262]

The inference drawn by the Court, which was confirmed with regard to a similar clause contained in the Treaty of Friendship, Commerce and Navigation concluded by the United States with Nicaragua,[263] is to be welcomed. Indeed, if it has not been possible to resolve a controversy by diplomatic means, it would be futile to trust the ability of the parties concerned to hammer out a special agreement that would open the gates to the ICJ. Endorsing the restrictive interpretation would thus amount to depriving the relevant clauses of any real meaning inasmuch as the party opposed to adjudication would simply attempt to frustrate the obligation incumbent upon it by dragging out the negotiations on the special agreement *ad infinitum*.

63 In other instances, the jurisdictional clauses have been clearly framed as *pacta de contrahendo* only. Thus, Article XI, para. 2 of the Antarctic Treaty specifies that any dispute not resolved by negotiation or other methods of peaceful settlement 'shall, with the consent, in each case, of all parties to the dispute, be referred to the International Court of Justice'. Such clauses constitute no more than a reminder of the obligation with which in any event States must comply under Article 33 UN Charter.

g) Compromissory Clauses Referring to Substance of Dispute

64 Compromissory clauses may sometimes be particularly difficult to handle because they establish a close connection with the merits of the dispute. Thus, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provides for the jurisdiction of the Court with regard to disputes relating to the interpretation, application or fulfilment of that Convention, *i.e.*, to acts of genocide. Yet, at the initial stage of a proceeding no certainty exists as to whether in fact genocide may have been perpetrated. It is the objective of such a proceeding to investigate the allegations and then, on the basis of the available evidence, draw the requisite conclusions. Therefore, at that moment the Court is confronted with no more than contentions by the party that wishes to base its application on Article IX. It is also clear that not every unsubstantiated allegation can be deemed to provide a basis for the Court to exercise its jurisdiction. Logically, some middle way must be devised.

65 To date, the jurisprudence of the Court has not been able to provide a precise definition of the criteria which it applies in such instances. The 'sufficiency of subject-matter connection' is a matter of degree, where different formulae have been thrust into the

[262] *Ibid.*, p. 27, para. 52; *cf.* also *Oil Platforms*, Preliminary Objections, ICJ Reports (1996), pp. 803, 809, para. 15.

[263] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 427–8, para. 81.

debate. In the first relevant case it had to deal with in 1923 in the form of an advisory opinion, the PCIJ held that it should content itself with drawing a 'provisional conclusion'.[264] One year later, however, in the *Mavrommatis* case, it proceeded to an exhaustive examination of the legal aspects of jurisdiction (without investigating the factual side), not afraid of intruding into the merits.[265] It continued this latter line of reasoning in the *Certain German Interests* case,[266] where it argued from the opposite position that an objection raised by the respondent could not deprive it of its jurisdiction.

The relevant case law of the ICJ began in the *Ambatielos* case with a reference to the 66
necessity of a 'sufficiently plausible character' of the invocation of a ground of jurisdiction.[267] In *Interhandel*, by confining itself to a 'provisional conclusion', the Court took its inspiration from the advisory opinion in *Nationality Decrees Issued in Tunis and Morocco*.[268] By contrast, in the *ICAO Council* case, without formulating a general proposition regarding the proper method to be followed, it considered a number of legal points which were also relevant for the merits in order to establish whether it had jurisdiction in accordance with Article 84 of the Chicago International Civil Aviation Convention of 1944.[269] A more benevolent approach for the applicant was followed in the *Nicaragua* case, where the Court defined the relevant test as the establishment of a 'reasonable connection' between the compromissory clause concerned and the claims submitted to it.[270] Obviously conscious of the fact that this threshold was fairly low, in the *Oil Platforms* case the Court adopted another formula, which may be considered a return to the *Mavrommatis* test:

> the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.[271]

It follows from the further considerations developed in this judgment that the examination carried out by the Court is a purely legal one. The Court sought to establish that, assuming the allegations advanced by the applicant correspond to reality, they would constitute a breach coming within the purview of the compromissory clause. It noted that the destruction of the oil platforms was 'capable' of having an adverse effect upon the export trade in Iranian oil and consequently upon the freedom of commerce guaranteed by the 1955 Treaty between the United States and Iran.[272] In two separate opinions to this judgment, it is explained that a 'reasonable connection', as suggested by the 1984 decision in the *Nicaragua* case, is not enough. Judge Ranjeva favoured a 'probability' test, which he seems to equate with 'plausibility',[273] while Judge Higgins rejected plausibility, arguing, in agreement with the majority opinion, that the legal analysis must definitively establish whether, on the basis of the applicant's claims, a violation would have to be

[264] *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, PCIJ, Series B, No. 4, pp. 7, 26.
[265] *The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 16 *et seq.*, 23.
[266] *Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 15.
[267] *Ambatielos*, Judgment, ICJ Reports (1953), pp. 10, 18.
[268] *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 24.
[269] *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 61–9, paras. 27–43.
[270] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 427–8, para. 81.
[271] *Oil Platforms*, Preliminary Objection, ICJ Reports (1996), pp. 803, 809–10, para. 16.
[272] *Ibid.*, p. 820, para. 51.
[273] *Ibid.*, Sep. Op. Ranjeva, ICJ Reports (1996), pp. 842, 844.

found.[274] It was against the backdrop of this legal reasoning that, in the *Legality of Use of Force* cases, the Court stated that it could not confine itself to noting that Yugoslavia maintained the applicability of Article IX of the Genocide Convention; rather, it had to ascertain whether the breaches alleged were 'capable of falling' within the scope of that provision. Since genocide required specific intent to destroy an ethnic or other group, the Court concluded that 'the threat or use of force against a State cannot in itself constitute an act of genocide'.[275] On that basis, it dismissed Yugoslavia's request to indicate provisional measures but did not refuse it the opportunity to argue its case again under the conditions of the normal procedure.

67 The *Legality of Use of Force* cases provide at the same time an example of a configuration where there was not the slightest chance that the jurisdictional clause invoked by Yugoslavia would have been capable of serving as the basis of the Court's jurisdiction. Vis-à-vis the United States, Yugoslavia invoked Article IX of the Genocide Convention although the United States had made a reservation concerning that provision, specifying that before any dispute could be submitted to the Court, its 'specific consent' was necessary. Given this reservation, the validity of which could not be challenged, the Court not only declined to indicate provisional measures, but also ordered the removal of the case from its List.[276] In sum, it may be concluded that concerning the legal aspects of a compromissory clause, the Court will proceed to an exhaustive examination. As far as the factual aspects are concerned, the Court will generally abstain from ascertaining the accuracy of the facts invoked. On the other hand, it will not blindly follow allegations which are clearly at variance with reality.

h) Reservations to Compromissory Clauses

68 In its early advisory opinion on *Reservations to the Genocide Convention*[277] the Court had to struggle with the permissibility of reservations to the relevant jurisdictional clause, Article IX of that Convention. It came to the conclusion that in departure from the earlier regime of reservations, according to which the consent of all State parties to the treaty was required, States were free to make reservations to a treaty provision, provided that the reservation concerned did not run counter to the 'object and purpose' of the treaty concerned.[278] This formula is now reflected in Article 19 (c) VCLT.[279] It did not, however, provide a specific answer to the question as to whether States should be granted the right to evade the jurisdictional review of their contractual commitments. Still in the *Legality of Use of Force* cases, the Court did not devote any specific attention to the question as to whether reservations to the jurisdictional clause in an instrument embodying *jus cogens* rules might be considered invalid.[280]

[274] *Ibid.*, Sep. Op. Higgins, ICJ Reports (1996), pp. 847, 856, para. 32.

[275] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 137–8, paras. 38–40.

[276] *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, ICJ Reports (1999), pp. 916, 923–6, paras. 21–34. *Cf.* generally *infra*, MN 141–143.

[277] *Reservations to the Genocide Convention*, Advisory Opinion, ICJ Reports (1951), pp. 15 *et seq.*

[278] *Ibid.*, pp. 24–5.

[279] Article 19 of the VCLT, 23 May 1969, 1155 UNTS 331, reads: 'A State may when signing, ratifying, accepting approving or acceding to a treaty, formulate reservations unless: … (*c*) in cases not failing under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.'

[280] *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 772, para. 32; *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, ICJ Reports (1999), pp. 916, 924, paras. 24–5.

Only recently did the Court state explicitly that judicial enforcement mechanisms did not pertain to the substantive core of a treaty and that accordingly reservations to such provisions were not incompatible with its object and purpose.[281] This view was harshly criticized in a joint separate opinion in the *Armed Activities* case (DRC v. Rwanda).[282] It stands to reason, in particular, that in respect of certain treaties of a mainly procedural character, reservations to the relevant jurisdictional clauses might exceptionally be susceptible of infringing their object and purpose.[283] Thus, in a parallel configuration reservations to the competence of the Human Rights Committee to examine State reports would obliterate the core element of the monitoring system of the International Covenant on Civil and Political Rights and would without any doubt run against its basic philosophy.

According to the procedural rules laid down in the VCLT, the appraisal of reservations shall be entrusted to the other States parties. In the field of human rights, both the Human Rights Committee[284] and the ECtHR,[285] as well as the IACtHR,[286] have successfully asserted their competence to assess the lawfulness of any reservations.[287] In *Armed Activities (New Application: 2002)*, the Court, at least implicitly, manifested its intention to exercise that kind of review too.[288] However, compromissory clauses as a procedural complement to the substantive clauses of a treaty will only rarely pertain to the object and purpose of the treaty as such. 69

III. Article 36, para. 2

1. The Optional Clause and Its Importance Today

Article 36, para. 2 is traditionally called the 'Optional clause', a more felicitous expression than the equivalent term 'compulsory jurisdiction', which seemingly calls into question the basic concept of freedom of choice in respect of methods of dispute settlement. States are free, and they are even invited, to subscribe to that clause by making the unilateral declaration provided for therein. Article 36, para. 2 reflects the basic philosophy of the system of judicial settlement established by the UN Charter. The States members of the United Nations did not opt for comprehensive jurisdiction of the Court in respect of all classes of legal disputes, but preferred to leave it to each individual State to decide whether and to what extent it wishes to submit to that jurisdiction. Nonetheless, judicial settlement remains the preferred method for all legal disputes (Article 36, para. 3 UN Charter). 70

[281] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 245–6, para. 72; Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 32, para. 67.

[282] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, Sep. Op. Higgins, Kooijmans, Elaraby, Owada, Simma, ICJ Reports (2006), pp. 65 *et seq.* Hernández (2014), p. 48, calls the stance of the Court 'formalistic'.

[283] See, in particular, Owada, Introductory Remarks at the Seminar on the Contentious Jurisdiction of the International Court of Justice, p. 5.

[284] General Comment No. 24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 18.

[285] *Cf.*, in particular, *Belilos v. Switzerland*, Appl. No. 10328/83, ECtHR, Series A, vol. 132, para. 50.

[286] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion, OC-3/83, 24 September 1983, Series A No. 3, para. 45; *Hilaire v. Trinidad and Tobago*, Preliminary Objections, Judgment, 1 September 2001, Series C No. 80, paras. 78 *et seq.*

[287] *Cf.* critical comments by the ILC Special Rapporteur Alain Pellet, Second Report on reservations to treaties, UN Doc. A/CN.4/477 (1996), paras. 234–40; For the outcome of the work of the ILC *cf.* Guide to Practice on Reservations to Treaties, *ILC Yearbook* (2011), vol. II (2), paras. 3.2.1–3.2.5 on the competence of treaty monitoring bodies to assess the permissibility of reservations.

[288] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 32, para. 67.

71 At the PCIJ's inception, it was hoped that through individual declarations under Article 36, para. 2 a tight network would be established among all of the States of the world so that, on a voluntary basis, any legal dispute would be susceptible of being brought to judicial settlement. This hope did not materialize during the epoch of the League of Nations, and it has not come true under the aegis of the United Nations either, notwithstanding appeals by the General Assembly to States to make the requisite declarations.[289] Of the permanent members of the Security Council, only the United Kingdom still recognizes the compulsory jurisdiction of the ICJ under Article 36, para. 2. France withdrew its acceptance after the Court indicated provisional measures in the *Nuclear Tests* cases,[290] and the United States followed suit after the Court had declared admissible the application brought against it by Nicaragua.[291] Russia (formerly the Soviet Union) and China have never submitted to the compulsory jurisdiction of the ICJ under Article 36, para. 2; however, Russia has accepted a number of compromissory clauses in multilateral treaties by withdrawing the reservations which the Soviet Union had made with regard to those clauses.[292]

72 Currently (December 2018), the total number of States having made the declaration under Article 36, para. 2 stands at 73, which is slightly more than one-third of the members of the United Nations. It is an encouraging sign that quite a number of former socialist States, which in the past resolutely refused to accept the jurisdiction of the Court, have reversed their attitude (Bulgaria, 1992; Hungary, 1992; Georgia, 1995; Poland, 1996; Slovakia, 2004; Romania, 2015). As already pointed out, of the permanent members of the Security Council only the United Kingdom remains subject to the Court's jurisdiction. Since the first and second editions of this Commentary, Japan (July 2007) and Germany (April 2008) have joined that group of States. While former Yugoslavia had submitted to the jurisdiction of the Court in 1999, none of its successor States has followed suit. On the whole, only a few of the seventy-three States have submitted purely and simply to the jurisdiction by following the wording of Article 36, para. 2.[293] In most instances, the declarations have been modified by reservations. However, nowhere has

[289] *Cf.* GA Res. 57/26 (2002), operative para. 9: '*Reminds* States that have not yet done so that they may at any time make a declaration under Article 36, paragraph 2, of the Statute of the International Court of Justice with regard to its compulsory jurisdiction in relation to any other State accepting the same obligation, and encourages them to consider doing so.' In his report 'In Larger Freedom: towards development, security and human rights for all' (UN Doc. A/59/2005 (2005), para. 139), Secretary-General Kofi Annan also invited States to 'consider recognizing the compulsory jurisdiction of the Court'. More recently the appeal to recognize the jurisdiction of the Court was reiterated in the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, GA Res. 67/1 (2012), para. 31.

[290] Letter of 10 January 1974, reproduced in *AFDI* 20 (1974), pp. 1052–4.

[291] Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, 7 October 1985, reproduced in *ILM* 24 (1985), pp. 1742–5.

[292] Letter of 28 February 1989 from Soviet Minister for Foreign Affairs Eduard A. Shevardnadze to UN Secretary-General Javier Pérez de Guéllar, reproduced in *AJIL* 83 (1989), p. 457. In particular, the Soviet Union withdrew its original reservations concerning Article Art. IX Genocide Convention, Art. 22 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 31 March 1950, 96 UNTS 271, Art. IX of the Convention on the Political Rights of Women, 21 March 1953, 193 UNTS 135, Art. 22 CERD, Art. 29, para. 1 of the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 1, and Art. 30, para. 1 CAT. It is on the basis of Art. 22 CERD that Georgia was able to institute proceedings against Russia, *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70 *et seq.*

[293] From the new declarations made after 1945: Cameroon, Costa Rica, Democratic Republic of the Congo, Denmark, Commonwealth of Dominica, Georgia, Guinea-Bissau, Timor-Leste, Togo, and Uganda.

the quantity and density of reservations reached the same level as in the case of India, which has succeeded in shaping an instrument that will certainly prevent any attempt ever to bring an application against it, thus converting the act of acceptance into a barely veiled act of non-acceptance. Because it would have to suffer by way of reciprocity from the restrictions built into its own declaration under Article 36, para. 2, in the *Jadhav Case*, where the unlawful arrest, trial, conviction, and sentencing of one of the members of a consular mission in Pakistan was at issue, India relied exclusively on the Optional Protocol to the Vienna Convention on Consular Relations as the basis to establish the Court's jurisdiction.[294]

2. *Declarations under the Optional Clause as Unilateral Acts*

Declarations of acceptance of the jurisdiction of the Court under Article 36, para. 2 73
are by essence unilateral acts, issued under the authority of State sovereignty.[295] In the *Nicaragua* case, the Court summarized the legal position as follows: 'Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements that States are absolutely free to make or not to make.'[296] This holds true notwithstanding the aim pursued by Article 36, para. 2, which seeks to promote a system of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction; at the same time, this system is a 'standing offer' to other States which have not yet made a declaration.[297] To the extent that the declarations coincide, a consensual bond is formed between the States concerned which fulfils the general requirement for the exercise of jurisdiction by the Court. The Court has characterized the network thus engendered as a 'series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations, and time-limit clauses are taken into consideration'.[298] Thus, through uncoordinated unilateral declarations a system emerges which resembles to some extent a multilateral treaty, but does not provide the same expectations of stability and reliability since it is not placed under the proposition *pacta sunt servanda* or *declaratio est servanda*.

3. *Interpretation*

It has already been pointed out that the Court has not developed any specific doctrine of 74
restrictive interpretation regarding declarations under Article 36, para. 2.[299] The Court proceeds, however, from the assumption that the will of the declarant State must be duly taken into account. Any intention, in order to become determinative, must be reflected in the text of the declaration itself.[300] The Court will take the text together with the

[294] *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 237–8, para. 22.

[295] *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 29; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 418, para. 60; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 453, para. 46.

[296] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 418, para. 59.

[297] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 291, para. 25; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 453, para. 46.

[298] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 418, para. 60. *Cf.* also *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 291, para. 25; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 453, para. 46.

[299] *Cf. supra*, MN 35.

[300] *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 31, para. 44.

reservations attached to it 'as it stands'.[301] The relevant words are to be interpreted in a 'natural and reasonable way'.[302] Thus, if there is any departure from the general rules of treaty interpretation in international law, the distance can only be slight.

4. Withdrawal

75 The most delicate question in this connection is whether and under what conditions a State is entitled to withdraw its acceptance of the jurisdiction of the Court. Following the doctrine of *actus contrarius*, one might conclude that, just as States are free at any time to submit to the jurisdiction of the Court, they should also be free to repeal their engagement at their free will without any restriction in point of time. However, such a line of reasoning would overlook the fact that the growth of a network of consensual bonds constitutes a confidence-building process. Through its acceptance of the jurisdiction of the Court, every State creates legitimate expectations. The conditions to join the network are not therefore identical to those to withdraw from it.[303]

76 In the first place, the text of the declaration itself is determinative. If a State specifies explicitly that it reserves the right to withdraw its declaration at any time with immediate effect, no legitimate expectations can come into existence. Thus, Slovakia, one of the latest States to make a declaration under Article 36, para. 2, formulated its denunciation clause as follows:

> The Slovak Republic reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the date of receipt of such notification, to amend or withdraw this declaration.[304]

Germany recognized the jurisdiction of the Court:

> until such time as notice may be given to the Secretary-General of the United Nations withdrawing the declaration and with effect as from the moment of such notification.

Such a stipulation, which has by now become a recurrent proviso, must be heeded by the Court. It cannot disregard it simply because it makes the regime of the optional clause highly unstable. To be sure, clauses of that type are regrettable in that they enable States to terminate their acceptance of the Court's jurisdiction as soon as they sense that an undesirable application might be forthcoming. However, this seems to be the price to be paid in order to induce adherence by States to the optional clause, and it corresponds to the logic of a jurisdictional system which is still largely based on unfettered sovereignty. For the Court, it would be extremely difficult to ignore the expression of the will of a State that wishes to be able to regain its freedom of choice as regards dispute settlement at any point. A reasonable time limit can only be required if a State has failed to specify under what conditions it may terminate its submission to the Court's jurisdiction. It remains the case, however, that once proceedings have been instituted by the filing of an application the respondent is bound to assume the role the Statute assigns to it.[305]

[301] *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 27.
[302] *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 454, para. 49; *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 244, para. 36.
[303] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 295, para. 34.
[304] Similar declarations were made in 2015 by Bulgaria and Romania.
[305] *Cf. infra*, MN 79.

77 In the *Nicaragua* case, the United States attempted to withdraw its declaration, which it had made in 1946, after being informed that Nicaragua would file an application against it. In fact, it succeeded in depositing the withdrawal of the declaration with the Secretary-General of the United Nations on 6 April 1984, three days before Nicaragua's application reached the Court on 9 April 1984. However, this manoeuvre did not attain its objective. The text of the US declaration specified that it would 'remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration'.[306] The Court held that the United States was bound by this act of self-commitment:

> Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.[307]

This holding would seem to be absolutely unobjectionable. Otherwise, the text of a declaration which the declarant State has formulated itself would be devoid of any real meaning. In other words, the conditions of a notice of termination as specified in the relevant declaration are binding and cannot be departed from.

78 Second, the question arose whether, by virtue of the principle of reciprocity, the United States could rely on the termination modalities of the Nicaraguan declaration. This declaration was silent on how it could possibly be denounced. The Court denied a right for the United States to invoke in its favour the particular modalities for the exercise of Nicaragua's right of denunciation.[308] Continuing its reasoning on a hypothetical basis, it stated:

> the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirement of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.[309]

Intense debate has followed this pronouncement.[310] In any event, however, the users of the Court cannot but take note of the position the Court has embraced.[311] This position should be well understood. It concerns solely declarations which either contain no rules on their termination or declarations by which a State has simply manifested its will to terminate the applicability of its declaration by a unilateral decision, without specifying the relevant modalities. In the legal literature, it has been suggested that a period of between three months and one year would in any event constitute sufficient notice.[312] As a consequence, quite a number of States revised their declarations under

[306] *Cf. Nicaragua*, Jurisdiction and Admissibility, Judgment, ICJ Reports (1984), pp. 392, 398, para. 13.
[307] *Ibid.*, p. 419, para. 61.
[308] *Cf. infra*, MN 87.
[309] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 419–20, para. 63.
[310] For a comprehensive study of the issue *cf.* Brown Weiss, in Damrosch, *ICJ at a Crossroads*, pp. 82 *et seq.*; critical comments by Orrego Vicuña, in Ando *et al.* (2002), pp. 463, 478; approval by Briggs, 'Nicaragua v. United States: Jurisdiction and Admissibility', *AJIL* 79 (1985), pp. 373–8, 376–8: Franck, 'Icy Day at the ICJ', *AJIL* 79 (1985), pp. 379–84, 383.
[311] Confirmation of the jurisprudence in *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 295, para. 33.
[312] Quintana, *Leiden JIL* (1998), p. 118.

Article 36, para. 2, making it unambiguously clear that, if need be, they wished to be able to shed their obligations under the optional clause with immediate effect.[313]

5. Irrelevance of Later Events

79 Once a proceeding has been instituted, any later developments do not affect the jurisdiction of the Court, with the exception of instances where a case is deprived of its object. Even if the temporal validity of a declaration lapses two days after an application has been filed, the respondent cannot raise any objection. Given that, as just mentioned, many States reserve the right to terminate their declaration with immediate effect, proceedings could be easily frustrated if such termination puts an end to the authority of the Court to entertain a case. In this regard, the Court has been absolutely consistent over many decades.[314]

6. Direct and Immediate Effect of Deposit of Declaration

80 The words '*ipso facto*' denote the direct effect that a declaration under the optional clause will produce. No additional step is required. Indeed, it is the specificity of the optional clause that it offers an alternative to Article 36, para. 1 which provides for the jurisdiction of the Court through the conclusion of agreements, either a special agreement (*compromis*) or a bilateral or multilateral treaty complemented by a compromissory clause. Going through the seventy-three declarations which are currently in operation, one very clearly perceives that the governments concerned are well aware of the legal significance of the commitment entered into by a declaration under the optional clause.

81 The words '*ipso facto*' also mean that the legal effect which a declaration is intended to produce takes place immediately vis-à-vis all the other States which have likewise subscribed to the optional clause. In several cases, at a time when electronic communication did not yet exist or was less well developed than today, applicants surprised the respondents by filing an application a short while after accepting the jurisdiction of the Court. However, both in *Right of Passage*,[315] where Portugal brought an application against India only three days after having deposited its declaration, and in *Land and Maritime Boundary*,[316] where the time distance between the two (Cameroonian) acts amounted to twenty-six days, the Court rejected all the arguments advanced by the respondent against such procedural conduct. Distinguishing between the denunciation of a declaration and the filing of a new one, it emphasized that a State which has submitted to the jurisdiction of the Court enjoys no legitimate interest in not being confronted with an application since accepting the optional clause amounts to making a standing offer to all other States in the same position to settle their dispute by judicial means. It was also right in pointing

[313] Australia, 22 March 2002; Cyprus, 3 September 2002; Guinea, 11 November 1998; Nigeria, 30 April 1998; Peru, 7 July 2003; Slovakia, 11 May 2004; United Kingdom, 5 July 2004; Germany, 30 April 2008; later: Greece, 14 January 2015; Italy, 25 November 2014; Japan, 6 October 2015; Marshall Islands, 24 April 2013; Netherlands, 21 February 2017; Pakistan, 29 March 2017; Romania, 23 June 2015; United Kingdom, 22 February 2017.

[314] *Nottebohm*, Preliminary Objection, ICJ Reports (1953), pp. 111, 123; *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 142; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 416, para. 54; *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 28–29, para. 36; Merrills, in Ando *et al.* (2002), p. 438.

[315] *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 145–8.

[316] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 290–6, paras. 21–35.

out that to allow the requirement for a reasonable time to elapse would be 'to introduce an element of uncertainty into the operation of the optional clause system'. Finally, also in the *Legality of Use of Force* cases, where Yugoslavia filed its application on 29 April 1999 after having deposited its declaration on 26 April 1999, an accurate reflection of the dispute between Portugal and India in the *Right of Passage* case, the Court implicitly confirmed its earlier decisions.[317] Taking into consideration the means of electronic communication as they exist today, the complaints raised by India in its case against Portugal have lost even more in persuasiveness. Thus, one can easily dispose of fears previously articulated about the 'sitting duck' or the 'hit-and-run' phenomenon.

7. Mutuality ratione personae and Reciprocity

It has already been pointed out that the phrase 'in relation to any other state accepting the same obligation' reflects the principle of reciprocity, which pervades the entire Article 36.[318] Mutuality *ratione personae* was originally intended to permit States to accede to the jurisdiction of the PCIJ on the condition that some of the leading nations also subscribed to the optional clause.[319] In the early days of international adjudication by a permanent court, it was necessary, as felt by the proponents of the clause, to make sure that those who first embraced the clause were not treated as 'guinea pigs'.[320] At the present time, it has lost this specific meaning in practice, although a couple of States from the former British Commonwealth, today the Commonwealth of Nations, still exclude disputes with other Commonwealth countries from the jurisdiction of the Court, apparently assuming that among brotherly nations there exist better methods for the settlement of disputes.[321] This clause was tested in the *Aerial Incident* case and found by the Court to be unobjectionable.[322] 82

8. List of Specific Subject-Matters

The list of subject-matters which Article 36, para. 2 enunciates, which was taken from Article 13, para. 2 of the Covenant of the League of Nations,[323] has never played any role in practice.[324] This is certainly due to the extremely wide scope of the four items on the list and the overlap which exists between them. The item 'any question of international 83

[317] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 133–4, paras. 24–5.

[318] *Cf. supra*, MN 28–29.

[319] *Cf.* Waldock, *BYIL* (1955–1956), p. 255.

[320] Brazil explicitly availed itself of the clause under the regime of the PCIJ by stating that its declaration of acceptance of the Court's jurisdiction would become applicable only if and as soon as 'it has likewise been recognised as such by two at least of the Powers permanently represented on the Council of the League of Nations', *cf.* Hudson, *PCIJ*, p. 684.

[321] Barbados, Canada, Gambia, India, Kenya, Malta, Mauritius, United Kingdom.

[322] *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 29–30, paras. 35–40.

[323] *Cf. supra*, MN 2. It was already observed in 1934 by von Stauffenberg, 'Die Zuständigkeit des Ständigen Internationalen Gerichtshofs für die sogenannten politischen Streitigkeiten', *Deutsche Juristen-Zeitung* 39 (1934), pp. 1325–30, 1325, that the description of the relevant subject matters was certainly not felicitous.

[324] *Cf.* Torres Bernárdez, in Bello/Ajibola (1992), p. 299. In the *Norwegian Loans* case, Judgment, ICJ Reports (1957), pp. 9, 21, the Norwegian government argued that the subject-matter of the dispute 'did not fall within any of the categories of disputes enumerated in Article 36, paragraph 2, of the Statute', but the Court did not take up that argument. Likewise, the dispute concerning the *Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Judgment, ICJ Reports (1959), pp. 127, 133, where Bulgaria maintained that none of the categories of Art. 36, para. 2 was applicable, was decided on other grounds.

law' encompasses just about anything that can legitimately be submitted to the Court as a legal dispute. The 'interpretation of a treaty' must be classified as a sub-item of b. There is hence no point in trying to elucidate the exact meaning of the various subject-matters.[325] Any legal dispute that is susceptible of being decided on the basis of international law falls *ratione materiae* within the scope of Article 36, para. 2.[326]

IV. Exceptional Title of Jurisdiction outside Article 36, paras. 1 and 2?

84 In the *Nuclear Tests* cases the Court, after stating that the dispute had lost its object following the official French declarations that France would henceforth refrain from any atmospheric nuclear tests, added that, if the basis of its judgment 'were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute'.[327] When in 1995 New Zealand, availing itself of this formulation, filed in the Registry a 'Request for an Examination of the Situation',[328] the meaning of the ominous sentence had to be clarified. While New Zealand contended that obviously the Court had not closed the proceedings by its judgment of 20 December 1974 and that accordingly it was entitled to resume the 1973 proceedings even after twenty-one years, France was of the view that the case was definitively closed. The Court found that in its earlier judgment it could not have intended to just refer to the proceedings which are in any event open to a State (filing of a new application, request for interpretation or request for revision), but that it had opened up a new special procedure (textually: 'did not exclude a special procedure').[329] Apparently, when putting an end to the *Nuclear Tests* cases, the Court had not been sure that its interpretation of the statements made by a number of high-ranking French officials was correct; if France had continued its atmospheric testing of nuclear devices, the case would not have become moot. Yet, whatever motivations may have prompted the Court to include the controversial sentence in its judgment, in the commentator's view its position would appear to be wrong, as was rightly pointed out by Judge Shahabuddeen in his separate opinion.[330] The Court has no power to ensure the execution of its judgments or to act in any other manner as a monitoring mechanism of follow-up. In each case, the requirements of jurisdiction as specified by Article 36, paras. 1 and 2 must be met. The Court cannot extend its judicial authority by inserting monitoring clauses in judgments which bring a case to its close.[331] Thus, the request by New Zealand simply had to be interpreted as a new application subject to the ordinary conditions of jurisdiction and admissibility.

[325] For a careful analysis against the backdrop of the jurisprudence of the PCIJ *cf.* Hudson, *PCIJ*, pp. 460 *et seq.*

[326] *Cf.* also Shaw, *Rosenne's Law and Practice*, vol. II, p. 741; Vukas, 'Some Provisions of the Statute of the International Court of Justice which Deserve Amendments', in *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Yee/Morin, eds, 2009), pp. 277–84, 279. This was already the opinion of Hudson, *PCIJ*, p. 459.

[327] *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 272, para. 60 and pp. 457, 477, para. 63.

[328] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, ICJ Reports (1995), pp. 288 *et seq.*

[329] *Ibid.*, p. 303, paras. 52–3.

[330] *Ibid.*, Sep. Op. Shahabuddeen, ICJ Reports (1995), pp. 312, 315.

[331] Conclusion also reached by Thirlway, 'Law and Procedure, Part Thirteen', *BYIL* 74 (2003), p. 23. But *cf.* Zimmermann/Geiss on Art. 61 MN 19–22.

V. Article 36, para. 3

1. Sovereign Freedom to Make Reservations

Article 36, para. 3 makes clear that States are allowed to modify their declarations of acceptance of the jurisdiction of the Court under the optional clause by reservations. Relying solely on the text of Article 36, para. 3, a reader could be led into the erroneous belief that only the reservations explicitly mentioned there are permissible. The two World Courts have never taken such a restrictive view. From the early days of the PCIJ, States engaged in a practice of carefully defined reservations suiting their individual needs, as perceived by them.[332] At the San Francisco Conference, as the *travaux préparatoires* reveal, the right to make reservations was deemed to be firmly established, not requiring any explicit recognition.[333] Since the ICJ views the acceptance of its jurisdiction as a sovereign act, it had logically to come to the conclusion that States are entitled to make any reservations in accordance with their political discretion. In the *Nicaragua* case it held: 85

> In making the declaration a State is ... free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it.[334]

Similar formulations can be found in the judgment in the *Fisheries Jurisdiction* case between Spain and Canada,[335] where Spain had suggested that reservations running against general rules of international law are unlawful and hence must be discarded. The Court dismissed this argument, drawing attention to the fact that a State may enter a reservation precisely because it feels vulnerable regarding the lawfulness of its position or policy.[336] In such instances, although remaining bound by the applicable substantive rules, a State may prefer methods of peaceful settlement other than adjudication. This is perfectly in accordance with the principle of free choice of means.[337] Since States are free to submit to the jurisdiction of the ICJ *vel non*, they cannot be prevented from restricting their acceptance, even in instances where the subject-matter concerned is governed by rules of *jus cogens*.[338] In sum, the freedom of States to confine the scope of their declarations under Article 36, para. 2 by reservations may perhaps have certain outer limitations, but such limitations are no more than a theoretical construct, lacking any relevance in practice. A wise formula has been devised by the Inter-American Court of Human Rights. When ruling on a far-reaching reservation entered by Trinidad and Tobago, it held:

> The declaration formulated by the State of Trinidad and Tobago would allow it to decide in each specific case the extent of its own acceptance of the Court's compulsory jurisdiction to the detriment of this Tribunal's compulsory functions. In addition, it would give the State the discretional

[332] For references *cf. Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 29, paras. 36–7.
[333] UNCIO XIII, p. 559.
[334] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 418, para. 59.
[335] *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 452–3, para. 44.
[336] *Ibid.*, p. 455–6, para. 54.
[337] *Cf.* also *Aerial Incident of 10 August 1999* (Pakistan v. India), Judgment, ICJ Reports (2000), pp. 12, 29–30, paras. 34–9.
[338] *Cf. Armed Activities (New Application: 2002)* (DRC v. Rwanda), Judgment, ICJ Reports (2006), pp. 6, 33, para. 69.

power to decide which matters the Court could hear, thus depriving the exercise of the Court's compulsory jurisdiction of all efficacy.[339]

It is clear that such a reservation would totally obliterate the substance of the relevant declaration concerning the Court's jurisdiction and would thus have to be assessed as being contrary to the object and purpose of the Statute.

2. Classes of Reservations

a) Reciprocity

86 The condition of reciprocity is routinely copied in many declarations. Strictly speaking, this is a superfluous specification. The whole system of the optional clause is founded upon reciprocity. Reciprocity operates therefore whether or not a State has mentioned it as a condition of its acceptance of the jurisdiction of the Court.

87 According to the Court's holding in the *Nicaragua* case, reciprocity applies only to the scope and substance of the commitments entered into under a declaration of acceptance of the Court's jurisdiction, but not to the 'formal conditions of their creation, duration, or extinction'.[340] Such conditions are not recognized as susceptible of reciprocity. One may have serious doubts as to whether this distinction is entirely appropriate inasmuch as the time element constitutes an essential element of the balance of mutual obligations.[341] In any event, reciprocity is measured at the moment when proceedings are instituted. The fact that an applicant has reserved the right to denounce its own declaration with immediate effect cannot be invoked by the respondent after the seisin of the Court. The Court has also denied, contrary to a doctrine developed half a century ago by Waldock,[342] the right for a State to base itself on the rule of reciprocity in the time before a case has been brought before it. Thus, in the *Nicaragua* case, it considered that the letter of 6 April 1984, by which the United States entered a new reservation regarding disputes with Central American countries three days before Nicaragua's application reached the Court, produced no legal effect: it held that the United States was bound by its own declaration which provided for a six-month notice of termination, notwithstanding the fact that Nicaragua's declaration contained no such restriction.[343] In sum, once the Court has been validly seised on the basis of consent expressed by the two parties in whatever form, any further conditions attached to that manifestation of consent become irrelevant and cannot be relied upon any longer under the guise of reciprocity.

b) Time Clauses

88 Time clauses, which are explicitly referred to by Article 36, para. 3, may be divided into three classes. First of all, a State has a choice to make a declaration for a fixed term or for an indefinite period of time. Second, it must be clarified as from which point in time, and

[339] *Supra*, fn. 286, MN 69.

[340] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 419, para. 62; for an extensive comment *cf.* Brown Weiss, in Damrosch, *ICJ at a Crossroads*, pp. 82 *et seq.*; Kolb (2014), pp. 193–4.

[341] *Cf. Nicaragua*, Jurisdiction and Admissibility, Sep. Op. Mosler, ICJ Reports (1984), pp. 461, 466. There seems to exist a certain degree of contradiction between paras. 60 and 62 of the judgment as far as the formulation is concerned.

[342] Waldock, *BYIL* (1955–56), pp. 278–9.

[343] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 419–20, paras. 62–3, a holding criticized as unfair by Quintana, *ICJ Litigation*, p. 108. However, a declaration made without specifying the way in which it may be terminated cannot be withdrawn with immediate effect, considerations of good faith standing in the way of such surprise moves, *cf. supra*, MN 75–78.

for which occurrences, the declaration becomes operational. Finally, a State may specify how it should be able to denounce or withdraw its declaration.

aa) Fixed Term or Indefinite Period of Time

Declarations made for a fixed-term period are presently fairly rare. There was a certain habit in earlier decades to limit the validity of a declaration to a few years, adding that after the expiry of that period it will remain in force until notice of its withdrawal has been given,[344] or to specify that the period of validity will be tacitly renewed for the same number of years unless notice of denunciation is given.[345] Such provisos serve no useful purpose if the declarant State reserves the right to withdraw its declaration at any time. Among the formerly listed declarations there was only one which was given for a limited period of time and has not been renewed since, namely the declaration by Nauru.[346] Apparently, Nauru had made the declaration in order to be able to file its application against Australia.[347] After that was done, Nauru, the smallest of the Member States of the United Nations, does not seem to have seen any advantage in being subject to the compulsory jurisdiction of the Court. 89

bb) Denunciation

The importance of denunciation clauses has already been stressed.[348] It should be reiterated that withdrawal will not have an immediate effect if a State has confined itself to stating in general terms that it reserves the right to give notice of termination.[349] In such instances, the jurisprudence developed by the Court in the *Nicaragua* case applies: a notice of termination will deploy its effects only after the lapse of a 'reasonable' period of time.[350] 90

cc) Protection against Retroactive Application

The most important of all the time clauses is designed to identify the disputes covered by a declaration. Many declarations do not contain such a clause, and one State, Suriname, even explicitly states that its declaration encompasses disputes arising out of events both prior and subsequent to their acceptance of the jurisdiction of the Court. However, a considerable number of States wish on legitimate grounds to exclude any retroactive effect of their declarations. This can be done in two ways. A simple formulation specifies that the declaration covers only disputes arising after the declaration has been made.[351] This limitation has almost no relevance any longer in the case of declarations made many decades ago under the regime of the PCIJ (Luxembourg, 1930). Additionally, the protective effect of that clause for the declarant State is rather modest. As in particular the 91

[344] Currently, such a clause can be found in the declarations of Austria, Belgium, Bulgaria, Cambodia, Cameroon, Liberia, Mexico, New Zealand, Suriname.

[345] Examples are Costa Rica, Denmark, Finland, Luxemburg, Norway, Sweden.

[346] Period of five years as from 29 January 1993; an earlier declaration, also covering five years, had been made with effect as from 29 January 1988. Regarding Djibouti, the website of the ICJ indicates that its jurisdiction was recognized for five years as from 18 July 2005.

[347] Application of 19 May 1989, *cf. Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 242, para. 1.

[348] *Cf. supra*, MN 75–78.

[349] The Belgian declaration may serve as an example in this respect.

[350] *Cf. supra*, MN 77.

[351] Declarations by Barbados, Egypt, Paraguay, Philippines, Senegal. The Netherlands has introduced a formula according to which disputes dating back more than 100 years are excluded—presumably in order to not be held accountable for its colonial past.

case *Certain Property* between Liechtenstein and Germany[352] has shown, it is extremely easy to base new claims on facts dating back to a remote past so that all of a sudden a new dispute can emerge.

92 Therefore, if a State wishes to be able to trust that certain events in its past are not susceptible of being brought before the Court, it should employ the 'Belgian formula', which confines the jurisdiction of the Court to disputes arising after the date of the declaration and concerning situations or facts subsequent to that date.
This formula has attained its highest degree of sophistication in the Indian declaration of 18 September 1974, which excludes:

> disputes prior to the date of this declaration, including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter.

Obviously, India was intent on recouping by this extensive description its defeat against Portugal in the *Right of Passage* case.[353] Because of the complexity of the issue, the President of the Court has indeed called upon governments to specify with great care the time limits that should demarcate their acceptance of the Court's jurisdiction.[354]

93 Given that any judicial proceeding has a factual background which is by necessity rooted in events of the past, it is of great importance to understand and apply the two criteria correctly—emergence of dispute and relatedness to facts prior or subsequent to the making of the declaration concerned—to the occurrences constituting the subject-matter of a dispute. The first question is when a dispute arises. Here, the jurisprudence has given a straightforward answer. The critical date is the time when a request was made and that request was rejected[355] or the time when an alleged actual violation of the rights claimed by one of the parties occurred, which in the *Right of Passage* case was the placing of obstacles by India impeding the exercise of the right of passage by Portugal.[356] In the *Legality of Use of Force*, the dispute arose when NATO, on 24 March 1999, commenced its air attacks on Yugoslav territory, *i.e.*, prior to 25 April 1999, the date on which Yugoslavia's declaration became operational; consequently, the Court, complying with the principle of reciprocity, could not recognize that declaration as a basis for its jurisdiction. Rightly, it rejected the Yugoslav contention that each air attack after 25 April 1999 gave rise to a new dispute.[357]

94 It is more difficult to determine which facts are to be classified as prior or subsequent to the deposit of a declaration of acceptance of the jurisdiction of the Court. In a wider sense, everything is related to everything else, and the causal chain linking events of the present to the past never ends. Hence, some evaluation has to take place; the requisite classification is not a question of pure logic. In two cases, where the Court's jurisdiction was founded upon declarations employing the double formula, the PCIJ had to specify the meaning of 'situations or facts subsequent' to a declaration under Article 36, para. 2

[352] *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6 *et seq.*
[353] *Right of Passage over Indian Territory*, Merits, ICJ Reports (1960), pp. 6, 33–6.
[354] Owada, Introductory Remarks at the Seminar on the Contentious Jurisdiction of the International Court of Justice, p. 8.
[355] *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 21.
[356] *Right of Passage over Indian Territory*, Merits, ICJ Reports (1960), p. 6, 35.
[357] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 134–5, paras. 28–9.

of its Statute. Consistently, it held in both judgments, *Phosphates in Morocco*[358] and *Electricity Company of Sofia and Bulgaria*,[359] that what mattered were the facts which constituted the source, the 'real cause' of the dispute. Thus, factors only remotely related to the dispute are discarded, and continuing effects of a measure taken before the critical date are not to be taken into account. Neither does it matter what are the foundations of the rights a party asserts, since the key criterion is the dispute itself. This latter particularization of the time clause came to prominence in the *Right of Passage* case, where the ICJ followed the path demarcated by its predecessor. Obviously, the controversial Portuguese right of passage over Indian territory must have had its roots far back in history, but it was the measures taken by India to prevent Portugal from exercising that right which gave rise to the dispute in 1954 and which were indeed subsequent to India's declaration of acceptance of 1930.[360] In the *Legality of Use of Force*, both the dispute and the relevant facts—the bombing of Yugoslav territory—traced their origin to a date prior to Yugoslavia's declaration.[361]

It stands to reason that time clauses give rise to identical issues both in the case of 95
compromissory clauses and of declarations under Article 36, para. 2. Invariably, the 'real cause' of the dispute must be identified. In the case between Liechtenstein and Germany concerning *Certain Property*, a case brought under Article 36, para. 1, the dispute, according to the findings of the Court, arose after the entry into force of the European Convention for the Pacific Settlement of Disputes as between the litigant parties, but it had its real source in the confiscation measures taken by Czechoslovakia in 1945.[362] It came to a similar conclusion in an Order of 6 July 2010 in *Jurisdictional Immunities of the State*,[363] which dismissed a counter-claim brought by Italy against Germany for the violations of international humanitarian law committed during the Second World War by German authorities. Here, however, the Court took the view that those violations could not be regarded as the 'real cause' of the dispute underlying the counter-claim. It was the legal regime established in the aftermath of the Second World War for the reparation of war damages, an ensemble of facts and situations centering on the Italian Peace Treaty of 1947, which had come into existence prior to the entry into force of the European Convention for both parties, that constituted that 'real cause'.[364] It is not easy to understand the rationale of that decision.

Another time clause became attractive after the 'surprise attack' of Portugal against 96
India in the *Right of Passage* case. The fact that India's argument to the effect that the proceedings had not been instituted in an orderly fashion in accordance with the Statute was not accepted by the Court[365] led many governments to modify their declarations under Article 36, para. 2.[366] The model became the clause introduced by the United Kingdom, which in its current version of 22 February 2017 excludes:

[358] *Phosphates in Morocco*, Judgment, PCIJ, Series A/B, No. 74, pp. 10, 23–4.
[359] *The Electricity Company of Sofia and Bulgaria*, Preliminary Objections, PCIJ, Series A/B, No. 77, pp. 64, 82.
[360] *Right of Passage over Indian Territory*, Merits, ICJ Reports (1960), pp. 6, 35.
[361] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 134–5, paras. 28–9.
[362] *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 26–7, para. 52.
[363] *Jurisdictional Immunities of the State*, Order of 6 July 2010, ICJ Reports (2010), pp. 310 *et seq.*
[364] *Ibid.*, p. 320, para. 27.
[365] *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 145–8.
[366] On the other hand, in the Case concerning the *Arbitral Award of 31 July 1989*, where Guinea-Bissau, after having deposited its declaration on 7 August 1989, filed its application on 23 August 1989, the issue of

any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

Same or a similar clauses can now be found in no fewer than twenty-four declarations.[367] Nigeria, which did not include such a clause in its declaration still in 1994, could therefore be sued by Cameroon which, after having deposited its declaration on 3 March 1994, filed an application against its neighbour on 29 March 1994. Eventually, Nigeria modified its declaration in line with the UK clause in April 1998. In the *Legality of Use of Force* cases, the new wording effectively prevented Spain and the United Kingdom from being sued by Yugoslavia on account of their declarations under Article 36, para. 2.[368]

c) Domestic Jurisdiction

97 One of the traditional reservations specifies that matters within domestic jurisdiction remain excluded from the jurisdiction of the Court.[369] Currently, almost half of the declarant States have thought it useful to opt for this regime. Yet, no real advantage can be expected from a clause to this effect even where reference is made to disputes 'essentially' under domestic jurisdiction (a formulation derived from Article 2, para. 7 UN Charter)[370] and not to matters 'exclusively' under national jurisdiction (derived from Article 15, para. 8 of the Covenant of the League of Nations). It need not be stressed that the Court can adjudicate cases solely on the basis of international law as determined by Article 38. Whenever recourse may be had to a rule of international law for the settlement of a dispute, that dispute ceases to be one under domestic law. In its advisory opinion on the *Nationality Decrees in Tunis and Morocco*, the PCIJ stated that this is an 'essentially relative question' which depends upon the development of international relations.[371] In fact, the irrelevance of the argument of domestic jurisdiction has been amply confirmed in the jurisprudence of the ICJ. In the advisory opinion concerning the *Interpretation of Peace Treaties* the relevant objection remained unsuccessful,[372] and in the *Right of Passage*,[373] the *Interhandel*,[374] the *Aegean Sea Continental Shelf*,[375] and the *Tehran Hostages* cases,[376] where the different respondents attempted to portray the respective dispute as falling under

an allegedly abusive jurisdictional attack was not raised by the respondent, Senegal, *cf. Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 61 *et seq.*, paras. 22 *et seq.*

[367] Australia, Bulgaria, Cyprus, Germany, Greece, Hungary, India, Italy, Japan, Lithuania, Malta, Marshall Islands, Mauritius, New Zealand, Nigeria, Pakistan, Philippines, Poland, Portugal, Romania, Slovakia, Somalia, Spain, United Kingdom.

[368] *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 770–1, para. 25; *Legality of Use of Force* (Serbia and Montenegro v. United Kingdom), Provisional Measures, ICJ Reports (1999), pp. 826, 835–6, para. 25.

[369] For a detailed study *cf.* Arangio-Ruiz, in Lowe/Fitzmaurice (1996), pp. 440 *et seq.* According to him, the plea of domestic jurisdiction is essentially a plea to the merits (p. 448). *Cf.* also generally as to the concept of domestic jurisdiction see Nolte, in Simma, *UN Charter*, Art. 2, para. 7, *passim*.

[370] Botswana, India, Liberia, Niger, Swaziland.

[371] *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, PCIJ, Series B, No. 4, pp. 7, 24.

[372] *Interpretation of Peace Treaties*, First Phase, Advisory Opinion, ICJ Reports (1950), pp. 65, 70.

[373] *Right of Passage over Indian Territory*, Merits, ICJ Reports (1960), pp. 6, 32–3.

[374] *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 23–5.

[375] *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 21–7, paras. 48–62.

[376] *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 15–6, para. 25. This was a case under Art. 36, para. 1.

their exclusive national authority, they invariably failed to convince the Court. At a time when the concept of national sovereignty, unfettered by any rule of international law, has shrunk to a *quantité négligeable*, domestic jurisdiction has lost any real significance as a defence against becoming the victim of illegitimate claims asserted by other States.

d) *Connally* **Reservation**

Through its declaration of 1946, the United States hoped to reach absolute immunity against any unwelcome applications by defining the concept of domestic jurisdiction as depending on its own evaluation. The so-called *Connally* Reservation, named after Texan Senator Connally, specifies that the jurisdiction of the Court does not extend to matters under domestic jurisdiction 'as determined by the United States of America'. Currently, this or a similar formulation can still be found in a number of declarations, although very few.[377] Indeed, practice has shown that this reservation is not very helpful for a State appending it to its declaration. In the very first case where it had to be applied by the Court,[378] the *Norwegian Loans* case between France and Norway, the Court was seemingly debarred from ruling on the merits because Norway could invoke the relevant reservation in France's recognition of the Court's jurisdiction. The Court did not question the lawfulness of the reservation as such, which was challenged by Judge Lauterpacht in a forceful separate opinion,[379] because in any event the application would have had to be dismissed if the French declaration, on account of an unlawful reservation, had been found to be invalid. The outcome of this proceeding made it abundantly clear that, by virtue of the principle of reciprocity, the reservation works both ways, for and against the applicant and the respondent.[380] Neither has it been beneficial for the United States itself. In the *Interhandel* case, the Court simply stated that the alleged confiscation of the assets of nationals of a neutral country was a matter governed by international law and had to be decided 'in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war'.[381] In the *Nicaragua* case, the United States did not even refer to the *Connally* amendment,[382] obviously worried about contending openly that activities such as the mining of the ports of a Central American country were a matter under the domestic jurisdiction of the United States. Given the treatment of the issue in the *Interhandel* case, it can be said with certainty that the *Connally* reservation can be helpful for the declarant State only in borderline situations where legitimate doubts may be entertained as to the precise classification of the subject-matter of a dispute. On the contrary, one may even conclude that it is a respondent 'non-*Connally* State' which derives the greatest benefits from the reservation. 98

[377] Malawi, Mexico, Philippines, Sudan.

[378] In *U.S. Nationals in Morocco*, the United States had originally filed preliminary objections, which it withdrew after having reached an understanding with the French government on the scope of the application, *cf. U.S. Nationals in Morocco*, Judgment, ICJ Reports (1952), pp. 176, 179.

[379] *Norwegian Loans*, Judgment, Sep. Op. Lauterpacht, ICJ Reports (1957), pp. 34, 42 *et seq.*, especially p. 49: 'an undertaking in which the applicant party reserves for itself the exclusive right to determine the extent or the very existence of its obligation is not a legal undertaking'. As the *Nicaragua* case has shown, Lauterpacht was wrong in his assumption.

[380] D'Amato, *AJIL* (1985), p. 392, speaks of the 'Connally Trap'.

[381] *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 25.

[382] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 421–2, para. 67.

e) *Vandenberg* Reservation

99 It was also the United States which introduced one of the most complex reservations, the so-called multilateral treaty reservation or *Vandenberg* reservation, thereby excluding the jurisdiction of the ICJ unless, in the case of a multilateral treaty, 'all parties to the treaty affected by the decision are also parties to the case before the Court'. Currently, five other States have opted for similar language in their declarations.[383] In the *Nicaragua* case, the reservation prevented the Court from applying, in particular, the UN Charter. Instead, the Court resorted to the rules of customary law that run parallel to the conventional rules: the principle of non-use of force, the principle of non-intervention, and the right to self-defence. Thus, the reservation had no practical effect. According to the view taken by the Court, the reservation had 'some obscure aspects'.[384] Indeed, first of all it was not even clear whether the word 'affected' related to 'parties' or to 'treaty'; second, it was most nebulous what 'affected' could mean; and third, it is common knowledge that proceedings which involve entire groups of States never take place in practice. Thus, the *Vandenberg* reservation may generally serve as a definite brake on any consideration of the merits of a case by the Court. It is significant that India, in addition to all the other reservations it has made, has also chosen the *Vandenberg* reservation in its most abrasive form[385] to protect itself—thereby making it also impossible for it ever to bring an application against a foreign State.[386] No State may be advised to formulate such a far-reaching reservation if it is seriously committed to accepting dispute settlement by the Court.

f) Other Reservations

100 In practice, many other types of reservations are used by States. They will only be briefly noted here. The most 'popular' clause is the clause according to which other mechanisms of dispute settlement as agreed between the parties concerned prevail over the general jurisdiction of the Court. Special arrangements will obtain such precedence in any event, irrespective of any reference to them in a declaration under Article 36, para. 2, depending on the interpretation to be given to such clauses. In *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya) the Court observed that such reservations do not preclude its jurisdiction by conferring precedence on the system of dispute settlement under Section 2 of Part XV of UNCLOS since Article 282 UNCLOS evinces a clear intention of ensuring access to the procedure under the Statute founded on optional clause declarations, a reliable and effective international remedy.[387] A number of States exclude any territorial disputes from the scope of their acceptance,[388] and a similar reservation can fairly often be found concerning maritime disputes, including those concerned with the territorial

[383] India, Djibouti, Malta, Pakistan, Philippines.

[384] *Nicaragua*, Jurisdiction and Admissibility, Judgment, ICJ Reports (1984), pp. 392, 424, para. 72.

[385] India's reservation excludes disputes concerning the interpretation or application of a multilateral treaty 'unless all the parties to the treaty are also parties to the case before the Court'.

[386] As pointed out earlier (MN 51), in the *Jadhav Case* India relied in its application against Pakistan on the Optional Protocol to the Convention on Consular Relations, see *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231 *et seq.*

[387] Preliminary Objections, ICJ Reports (2017), pp. 3, 49–50, paras. 129–33; see also case comment by Bonafé, *AJIL* 111 (2017), pp. 725–31; for a comment see Serdy, 'Article 282: Obligations under general, regional and bilateral agreements', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 1825–9.

[388] *E.g.*, Djibouti, India, Nigeria, Philippines, Poland, Portugal, Surinam.

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sea.[389] Other States take care not to submit to the jurisdiction of the Court disputes potentially relating to any activities of their armed forces.[390] Environmental protection is another field which some States wish to reserve to their own discretion.[391] Finally, one may also mention those instances where the jurisdiction of the Court is excluded in instances where no diplomatic relations exist between the litigant parties.[392]

3. Difference between the Regime of Reservations under the Optional Clause and the Regime of Reservations to Multilateral Treaties under the VCLT

In concluding the comments on reservations, it should be emphasized again that the 101
Court has never declared any reservation unlawful and therefore invalid. Indeed, the regime of reservations to declarations accepting the jurisdiction of the Court is essentially different from the regime governing reservations to multilateral treaties according to Articles 19–22 VCLT. In the case of a multilateral treaty, a State wishing to derogate from the text agreed upon by the parties is faced with a legal instrument that has already been negotiated and finely tuned to take into account the interests of all States involved. Unilateral departures from the negotiated text disturb this carefully established equilibrium. In the case of Article 36, there is no expectation pre-dating the final act of acceptance which produces a legally binding effect. States are entirely free to stay aloof from the jurisdiction of the Court, they may bind themselves over the whole breadth of their conduct or they may choose any intermediate formula. Solely with regard to withdrawal of a declaration under Article 36, para. 2 has the Court relied to some extent on an analogy with a rule set forth in the VCLT, namely Article 56, para. 2,[393] since withdrawal or termination does indeed affect legitimate expectations. Things would be different from the moment that there existed any obligation to accept, in principle, judicial settlement, which is not the case in view of the principle of free choice of means as laid down in Article 33, para. 1 UN Charter. On the other hand, the acceptance of the jurisdiction of the Court is a legal device governed by Article 36. In that regard, by definition, it must be placed under some restrictions. Yet, realistically speaking, the outer limits are hardly recognizable. As already pointed out, even the 'automatic reservation' (*Connally* reservation) introduced by the United States has not led to invalidating the jurisdictional bond which it was intended at the same time to engender and to reduce to insignificance.[394]

4. Disadvantages of Far-Reaching Declarations for Declarant State

Finally, it should again be recalled that any reservation which restricts the scope of a dec- 102
laration under Article 36, para. 2 cannot only be invoked by a declarant State target of an application but also by the respondent in a proceeding brought by a declarant State.[395] Consequently, a State which makes far-reaching reservations not only protects itself against any undesired involvement in a judicial proceeding but also at the same time seriously

[389] *E.g.*, Australia, Barbados, Bulgaria, Canada, Djibouti, Greece, Japan, Honduras, India, Malta, New Zealand, Nigeria, Norway, Pakistan, Philippines.
[390] *E.g.*, Djibouti, Germany, Greece, Honduras, Hungary, India, Kenya, Lithuania, Malawi, Malta, Mauritius, Nigeria, Pakistan, Romania, Sudan.
[391] *E.g.*, Poland, Romania, Slovakia.
[392] *E.g.*, India, Nigeria.
[393] *Cf. supra*, MN 79.
[394] *Cf. supra*, MN 99.
[395] *Cf. supra*, MN 29.

weakens its own opportunities to bring a case against another State in a dispute which, it feels, should be adjudicated by the Court. Reciprocity thus has a most healthful influence, as borne out by the progressive disappearance of the *Connally* clause and the *Vandenberg* clause, rightly found by governments to be most damaging to their own interests.

VI. Article 36, para. 4

1. Duties of States

103 Article 36, para. 4 regulates the modalities for the deposit of declarations under Article 36, paras. 2 and 3 and the way in which such declarations shall be processed. It is incumbent upon States wishing to submit to the jurisdiction of the Court to deposit the corresponding declaration with the Secretary-General of the United Nations, not with the Court itself. What applies to a declaration applies also to its modification by amendment or to its withdrawal. No provision on that issue was included in the Statute of the PCIJ or in the Protocol of Signature of the Optional Clause. Therefore, the most varied procedures were resorted to by governments.[396] In order to bring about legal certainty and clarity, it was felt at the San Francisco Conference that it would be convenient to draft a specific rule.[397]

104 It is the deposit of the declaration itself which produces the intended legal effect: as from that date, a State has the right to bring an application against another State; conversely, it is from that same date that it can be made the target of an application. It has already been pointed out that the Court has resisted any arguments claiming that some adequate span of time must elapse between the deposit of a declaration and the institution of proceedings by the declarant State.[398] Nor does the Court view the legal effect of declarations as dependent on their being brought to the notice of the other States subject to Article 36, para. 2. The two rules which Article 36, para. 4 enunciates are considered by it to be independent from one another.[399] Consequently, if States are afraid that they might be 'attacked' by surprise applications, they should insert into their own declarations the type of reservation which the United Kingdom has introduced into international practice (at least twelve months must elapse between the two dates).

2. Duties of the Secretary-General

105 It is the task of the Secretary-General to transmit copies of declarations under Article 36, para. 2 to the (other) parties to the Statute and to the Registrar of the Court. It is obvious that the deposit of such declarations cannot remain confidential since it affects, in particular, all the States which for their part are subject to the jurisdiction of the Court under the same provision. In earlier decades, transmission of the relevant information, which was effected by ordinary diplomatic channels, could take a fairly lengthy time. Thus, in the *Right of Passage* case, Portugal deposited its declaration on 19 December 1955, of which India received a copy unofficially from the Court through its Embassy at The Hague on 30 December 1955. However, it was no earlier than one month later, on 19 January 1956, that the Secretary-General of the

[396] *Cf.* Hudson, *PCIJ*, p. 453.
[397] *Cf.* UNCIO XIII, p. 284.
[398] *Cf. supra*, MN 81.
[399] *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146; *Preah Vihear*, Preliminary Objections, ICJ Reports (1961), pp. 17, 31; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 412, para. 45; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 292, para. 27.

United Nations transmitted a copy to the Indian government in compliance with Article 36, para. 4.[400] Apparently, the services of the UN Secretariat did not always live up to what may legitimately be expected of them. According to the submissions of Nigeria in the *Land and Maritime Boundary* case, the Secretary-General transmitted copies of the Cameroonian declaration of 3 March 1994 no less than eleven-and-a half months later to it although Cameroon had already filed its application on 29 March 1994. In New York, the deposit of any declaration is immediately announced in the Official Journal of the United Nations.[401] This is certainly not enough. To date, no practice seems to exist as yet according to which the Court would issue a press release as soon as it has been officially informed of the deposit of a new or modified declaration under Article 36, para. 2. Such a practice might be helpful in view of the fact that all those declarations are eventually reproduced on the Court's website.

VII. Article 36, para. 5

Article 36, para. 5 is a transitional provision which has sought to ensure that declarations made under the PCIJ Statute would remain in force, obviating the need for States to declare explicitly that they were likewise prepared to accept the jurisdiction of the new Court established under the auspices of the United Nations. As such, Article 36, para. 5 is the most telling sign that there exists a high degree of continuity between the PCIJ and the ICJ.[402] In 2018, only a few of the declarations made in the 1920s and 1930s remained in force by virtue of Article 36, para. 5.[403] Many legal departments have thought it wise to amend declarations which had been made without taking any precautions in order to establish defences against applications for cases not deemed to be amenable to judicial settlement. 106

1. *The* Aerial Incident *case between Israel and Bulgaria*

In the *Aerial Incident* case between Israel and Bulgaria,[404] Israel relied on Article 36, para. 5 vis-à-vis Bulgaria, which had accepted the jurisdiction of the PCIJ in 1921. However, the Court refused to entertain the case, holding—on persuasive grounds, by relying in particular on the *travaux préparatoires*—that Article 36, para. 5 was meant to apply solely to original members of the United Nations and signatories of the Statute that were present at the San Francisco Conference.[405] Bulgaria became a member of the United Nations no earlier than 1955. Consequently, the Court had to deny its jurisdiction.[406] 107

2. *The* Temple of Preah Vihear *case between Cambodia and Thailand*

In the *Temple of Preah Vihear* case,[407] Thailand sought to evade the jurisdiction of the Court by alleging that the declaration which it had made in 1950 renewing its 1940 declaration regarding the jurisdiction of the PCIJ had missed its aim and hence could not be 108

[400] *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146.
[401] *Cf.* Shaw, *Rosenne's Law and Practice*, vol. II, p. 754.
[402] *Cf.* Chesterman/Gowlland-Debbas on Art. 1 MN 26 *et seq.*
[403] With the exception of the declaration of Luxembourg, they are all declarations of Latin American States: the Dominican Republic, Haiti, Panama, Uruguay.
[404] *Aerial Incident of 27 July 1955*, Judgment, ICJ Reports (1959), pp. 127 *et seq.*
[405] But *cf. ibid.*, Joint Diss. Op. by Judges Hersch Lauterpacht, Wellington Koo, and Percy Spender, pp. 156–94. Regarding compromissory clauses in conventional instruments, governed by Art. 37, the Court itself has chosen—on hardly convincing grounds—a different interpretation: *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 31; *cf.* Thirlway, 'Law and Procedure, Part Nine', p. 82. *Cf.* also Simma/Richemond-Barak on Art. 37 MN 5–6.
[406] *Aerial Incident of 27 July 1955*, Preliminary Objections, ICJ Reports (1959), pp. 127, 136 *et seq.*
[407] *Preah Vihear*, Preliminary Objections, ICJ Reports (1961), pp. 17 *et seq.*

deemed to have conferred jurisdiction on the Court. Thailand argued that in the light of the *Aerial Incident* case it was now clear that its own declaration had lapsed in April 1946 when the PCIJ had ceased to exist, since it did not belong to the original members of the United Nations. Consequently, in 1950 it could not 'renew' its declaration of acceptance of the jurisdiction of the Court. Rightly, the Court found this line of reasoning too sophisticated to be convincing. In fact, Thailand had made its declaration '[i]n accordance with the provisions of Article 36, paragraph 4, of the Statute of the International Court of Justice'.[408] On the basis of general rules of interpretation, the declaration had to be understood as being directed to the ICJ, its somewhat infelicitous wording being irrelevant in consideration of the clear intention manifested in it.[409]

3. *The* Nicaragua *case*

109 The discussion on Article 36, para. 5 reached its climax when Nicaragua based its claim against the United States in the *Nicaragua* case on a declaration of 24 September 1929 which had been made in connection with the Protocol of Signature of the Statute of the PCIJ, both approved by the competent governmental institutions domestically in 1935, but apparently never sent to Geneva to the seat of the League of Nations. Notwithstanding this obvious lacuna in the constitutive legal process designed to produce the intended legal result, the Court was of the view that Nicaragua could invoke its declaration of acceptance, given the fact that for more than a decade Nicaragua had been listed in the official reports of the Court as a State having made the declaration under Article 36, para. 2 of the Statute of the PCIJ:

> Nicaragua was placed in an exceptional position, since the international organs empowered to handle such declarations declared that the formality in question had been accomplished by Nicaragua. The Court finds that this exceptional situation cannot be without effect on the requirements obtaining as regards the formalities that are indispensable for the consent of a State to its compulsory jurisdiction to have been validly given. It considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of the State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and that accordingly Nicaragua is, vis-à-vis the United States, a State accepting 'the same obligation' under that Article.[410]

Notwithstanding the passage of time, one may still entertain doubts as to the correctness of this argument. To be sure, Nicaragua could not have called into question the jurisdiction of the Court if an application had been brought against it. Under the rule of acquiescence, it could not have objected to a legal assertion which it never cared to reject. The question is, however, whether a State can derive rights from its own negligence and ambiguity. On that point, the opposite conclusion could also have been reached.[411]

110 For many years now, the former controversies have been reduced to issues of legal history. None of the four remaining declarations pre-dating the establishment of the United

[408] *Ibid.*, p. 24.

[409] *Ibid.*, p. 34. On 28 April 2011, Cambodia filed an application requesting interpretation of the judgment in the *Preah Vihear* case, requesting at the same time the urgent indication of provisional measures, *cf. Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281 *et seq.*, where the Court confined itself to reminding Thailand of its obligation to respect the determinations made in the earlier judgment by withdrawing its troops from the territory adjudicated as belonging to Cambodia.

[410] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 412–3, para. 47.

[411] *Cf. Nicaragua*, Jurisdiction and Admissibility, Sep. Op. Mosler, ICJ Reports (1984), pp. 461, 465.

Nations is in any way in doubt. Article 36, para. 5 has discharged its function and will no longer give rise to legal difficulties in future disputes.

VIII. Article 36, para. 6

1. The Principle of Kompetenz-Kompetenz

It is a rule generally encountered in the statutes of international courts and tribunals that the judicial body concerned decides on its own jurisdiction should any doubt arise. It enjoys *Kompetenz-Kompetenz*. Were it otherwise, the authority of the eventual judicial findings would be gravely compromised. Only if a judicial body is empowered to make binding determinations on all the issues which arise during a proceeding brought before it, is it able to issue an unchallengeable judicial ruling. In the *Nottebohm* case, the Court traced the tradition of the principle *Kompetenz-Kompetenz* back to the *Alabama* case.[412] There has indeed been a number of statutory rules since then to that effect. The 1907 Hague Convention for the Pacific Settlement of International Disputes (Article 73) acknowledges such a power, which has also found expression in the statutes of all of the important international courts of our time (*e.g.*, IACtHR, Rules of Procedure, Article 27;[413] ECtHR, ECHR, Article 32, para. 2;[414] ITLOS, UNCLOS, Article 288, para. 4[415]). The *Kompetenz-Kompetenz* principle is vested in the Court even in cases where one of the parties argues that its seisin is marred by grave defects.[416] 111

2. The Applicable Regime under the Rules of Court

There may be instances where no basis of jurisdiction can reasonably be asserted. On the one hand, a State may openly acknowledge that it has filed its application outside any consensual arrangement with the respondent State. Under such circumstances, the case will not be entered in the General List (Article 26, para. 1 (b) Rules of Court) unless and until the State concerned 'consents to the Court's jurisdiction for the purposes of the case' (Article 38, para. 5 Rules of Court). Failing such grant of consent, the potential respondent may request that the case either not be included in the General List or that it should be removed therefrom if the registration has already taken place.[417] 112

Details of the procedure to be followed under regular circumstances where a respondent challenges the jurisdiction of the Court and objects to the admissibility of the application are governed, in particular, by Article 79 of the Rules of Court.[418] This provision sets forth: 113

1. Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested

[412] *Nottebohm*, Preliminary Objections, ICJ Reports (1953), pp. 111, 119.

[413] IACtHR Rules of Procedure of 2009, available at <https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm#_ftn1>.

[414] European Convention on Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5.

[415] 10 December 1982, 1833 UNTS 3. For a comment see Treves, 'Article 288: Jurisdiction', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 1857–63, 1862–3.

[416] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 441–2, paras. 85–6.

[417] For more details *cf. infra*, MN 141–143.

[418] Art. 79 of the Rules can be traced back to Art. 62 of the 1936 Rules of the PCIJ, Series D, third addendum to No. 2, pp. 2, 28, 49. *Cf.* generally Mačák on Art. 43 MN 176–208.

before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time limit fixed for the delivery of that party's first pleading.

2. Notwithstanding paragraph 1, following the submission of the application and after the President has met and consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined separately.
3. Where the Court so decides, the parties shall submit any pleadings as to jurisdiction and admissibility within the time limits fixed by the Court and in the order determined by it, notwithstanding Article 45, paragraph 1.
4. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached.
5. Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time limit within which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.
6. Unless otherwise decided by the Court, the further proceedings shall be oral.
7. The statements of facts and law in the pleadings referred to in paragraphs 4 and 5 of this Article, and the statements and evidence presented at the hearings contemplated by paragraph 6, shall be confined to those matters that are relevant to the objection.
8. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue.
9. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time limits for the further proceedings.
10. Any agreement between the parties that an objection submitted under paragraph 1 of this Article be heard and determined within the framework of the merits shall be given effect by the Court.

114 Paragraph 1 of Article 79 of the Rules was adopted by the Court on 5 December 2000 and entered into force on 1 February 2001. Under the 1978 Rules, a party objecting to the jurisdiction of the Court could do so within the time limits set for the delivery of the counter-memorial. In quite a number of cases, this time frame was used to its full extent even for fairly futile preliminary objections. In that way, a party desirous to drag out the case could win precious time. The reform of 2000/2001 constitutes a welcome attempt to prevent such abuses. Now, the time for the raising of preliminary objections is fairly limited (maximum: three months). Since preliminary objections are essentially based on legal grounds and do not require any lengthy factual investigations, the period of three months does not appear to be excessively short. It helps to keep within reasonable limits the duration of proceedings before the Court. Under the new regime, if a preliminary objection is raised only in the memorial of the respondent party after the expiry of the

three-month period, the special legal effects provided for by Article 79 of the Rules will not be triggered.

The main legal effect of the raising of preliminary objections in accordance with Article 79 of the Rules is the suspension of the proceedings on the merits. An incidental proceeding will follow, focused exclusively on the relevant issues of jurisdiction and admissibility. The applicant will be provided with the opportunity to respond to the arguments put forward by the respondent. No second round of written pleadings is provided for, but the Court will hold oral hearings. Many disputes never get beyond this preliminary stage. At the end of this stage the Court shall either dismiss the objections raised by the respondent and thereafter proceed to the examination of the merits, uphold the objections and consequently dismiss the application *in toto* or partially, or declare that the objection does not possess an 'exclusively preliminary character' (Article 79 Rules, para. 9).[419] The Court is thus prevented from joining an objection to jurisdiction and admissibility to the merits of the case at its own discretion as it was permitted under the previous versions of the Rules. 115

a) Concept of 'Application'

There can be no doubt that the term 'application' in Article 79, para. 1 of the Rules has to be understood in a broad sense as referring to the claim of the applicant as detailed not only in the application but also the ensuing memorial and possibly also during the oral hearings.[420] Although at such later stages of the case the scope of the application may be particularized and clarified, and to some extent also broadened, such 'development' of an application may not be used to introduce 'new' claims. A dispute cannot be transformed into another one different in character.[421] It will always be difficult to trace the precise boundary between substantiation and explanation of a pending claim, on the one hand, and addition of new items, on the other. 116

b) Scope *ratione personae* of Right to Raise Preliminary Objections

It should be noted that Article 79, para. 1 of the Rules grants the right to raise preliminary objections not only to the respondent but also to parties other than the respondent. This second clause of Article 79, para. 1 of the Rules refers in particular to those instances where proceedings are instituted by notification of the special agreement in accordance with Article 40, para. 1 where there is technically no applicant and no respondent. But an applicant can also have valid grounds—in exceptional situations like the *Monetary Gold* case[422]—to question the jurisdiction of the Court or the admissibility of its own application.[423] As a rule, however, preliminary objections are raised by the respondent where the jurisdiction of the Court is founded on a compromissory clause or an optional clause declaration under Article 36, para. 2. 117

[419] For two examples of the classification of an objection as not possessing an exclusively preliminary character see the *Lockerbie* case (Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 115, 133–4, para. 49 and the *Croatian Genocide* case, Preliminary Objections, ICJ Report (2008), pp. 412, 456–60, paras. 120–9.

[420] *Cf.*, in this regard, *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 262, para. 58.

[421] *Socobel*, Judgment, PCIJ, Series A/B, No. 78, pp. 160, 173; *Preah Vihear*, Merits, ICJ Reports (1962), pp. 6, 36; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, ICJ Reports (1974), pp. 175, 203, para. 72; *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 266, para. 67; *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction, ICJ Reports (1998), pp. 432, 453, para. 46; *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 213–4, para. 117.

[422] *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 30–3.

[423] Similar case: *Borchgrave* case, Preliminary Objections, PCIJ, Series A/B, No. 72, pp. 158 *et seq.*

c) Meaning of Ninety-Day Time Limit

118 If a respondent does not raise preliminary objections during the ninety-day period prescribed in Article 79 of the Rules, it does not forfeit its right to advance at any later stage of the proceedings preliminary objections that it may not have thought of during the initial stage of a proceeding. However, if the special procedure under Rule 79 is not resorted to, the effects set forth in para. 5—suspension of the proceedings on the merits—do not take place. The preliminary objections raised will then be dealt with in the framework of the consideration of the merits.[424] In other words, a respondent remains free to set forth its preliminary objections in its counter-memorial. This alternative strategy has the advantage of saving time. No separate incidental proceedings, which necessarily entail a delay of many months as a minimum, will then take place. Once a respondent has filed its counter-memorial without raising preliminary objections, it will in any event be deemed to have acquiesced to the jurisdiction of the Court.[425]

d) Raising Preliminary Objections ahead of Receipt of Memorial?

119 A discussion has taken place on the question whether a respondent is entitled to raise preliminary objections even before the applicant has submitted its memorial or whether it may immediately take that procedural step after having taken note of the application, which normally is fairly succinct. The Court, following its general line of distancing itself from unnecessary formalism, has seen no obstacle to the respondent voicing its defence at the earliest possible stage of a proceeding:

> Whereas, in accordance with article 79, paragraph 1, of the Rules of Court, while a respondent which wishes to submit a preliminary objection is entitled before doing so to be informed as to the nature of the claim by the submission of a Memorial by the Applicant, it may nevertheless file its objection earlier.[426]

It is submitted that this is the correct solution.[427] A respondent cannot be prohibited from putting forward its counter-arguments of any kind at the point in time it judges to be the most appropriate. There can be no custodianship by the Court in this regard. On the other hand, the Court, on its part, can obviously not be bound to rule on the preliminary objections raised before it has been fully informed about the relevant facts through the submission of the applicant's memorial.

e) Invocation of New Grounds of Jurisdiction by Applicant

120 On the other hand, an applicant is also entitled to adduce new grounds of jurisdiction even after having filed its application and the supplementary memorial.[428] It stands to reason that, when such new legal foundations susceptible of supporting the application are introduced after the respondent has filed its counter-memorial, the special procedure under Article 79, para. 1 of the Rules will not—or not again—be available to the respondent. Although Article 79 of the Rules is designed to protect the interests of the

[424] *Avena*, Judgment, ICJ Reports (2004), pp. 12, 28–9, para. 24.
[425] *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 52, para. 13.
[426] *Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. USA), Order of 13 December 1989, ICJ Reports (1989), pp. 132, 134. For the earlier practice *cf.* Guyomar, *Commentaire*, p. 508.
[427] *Cf.* also the lengthy discussion of the issue in the Separate Opinions of Judges Schwebel and Shahabuddeen, *Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. USA), Order of 13 December 1989, ICJ Reports (1989), pp. 136 *et seq.* and pp. 145 *et seq.* respectively.
[428] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 426–7, para. 80; *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 338–9, para. 28.

respondent, which should not be forced into the merits of a dispute if there exists no genuine basis of jurisdiction, the liberal jurisprudence of the Court has not given rise to any real difficulties in practice.

f) Jurisdiction and Admissibility

While Article 36 confines itself to addressing the issue of jurisdiction, Article 79 of the Rules explicitly deals at the same time with jurisdiction and admissibility. Article 62 of the 1936 Rules of the PCIJ[429] referred simply to the concept of 'preliminary objection', without specifying what kind of legal points could be raised by means of such an objection. However, by that time it was recognized that the provision encompassed any obstacles which might prevent the PCIJ from considering the merits of a case pending before it.[430] Jurisdiction is geared to the basic requirement of consent by the litigant parties, whereas admissibility touches upon other requirements which may result either from the application of general rules of international law (*e.g.*, exhaustion of local remedies for the exercise of diplomatic protection) or from specific agreements between the parties concerned (*e.g.*, referral of a particular class of disputes to arbitration).[431] Additionally, Article 79, para. 1 of the Rules mentions—without any real need for such precaution[432]—a third category of objections 'the decision upon which is requested before any further proceedings on the merits'. This last phrase captures quite well the essential characteristics of preliminary requirements.[433] For the Court, jurisdiction and admissibility must both be present for a case to be susceptible of adjudication on its merits. Generally, it can be said that jurisdiction must positively be shown to exist, while admissibility, if jurisdiction is established, will generally be lacking only on account of exceptional circumstances. While, as pointed out previously, the Court feels obligated to examine its jurisdiction *ex officio* or *proprio motu*, it has never maintained that it is under a similar obligation to raise issues of admissibility on its own initiative. The only exception to this rule developed in practice are issues of judicial propriety as they have emerged in the *Northern Cameroons* case,[434] where both parties were desirous of the Court delivering a judgment.[435] 121

aa) Distinction between the Two Classes of Preliminary Objections

Although in theory it may be easy to draw a distinction between jurisdiction and admissibility, in practice it may prove extremely difficult to identify a precise boundary.[436] 122

[429] PCIJ, Series D, third addendum to No. 2, pp. 2, 28, 49.

[430] *Panevezys–Saldutiskis Railway*, Judgment, PCIJ, Series A/B, No. 76, pp. 4, 16.

[431] On the essence of requirements of admissibility, see *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 456–7, para. 120; *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 177, para. 29; *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 123, para. 48.

[432] The Court is of the view that this third category covers instances in which external events have rendered a case without object, *cf. Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 26–7, para. 47 and pp. 115, 131–2, para. 46. In the legal literature, reference is likewise made to the *U.S. Nationals in Morocco* case, Judgment, ICJ Reports (1952), pp. 176 *et seq.*, where the United States as the respondent sought certain clarification about the parties on whose behalf the proceedings had been instituted, *cf.* Guyomar, *Commentaire*, p. 513; de Aréchaga, 'The Amendments to the Rules of Procedure of the International Court of Justice', *AJIL* 67 (1973), pp. 1–22, 18.

[433] It is not always clear whether a given argument pertains to admissibility or to the merits, *cf.* the judgment in the *South West Africa* cases, Second Phase, ICJ Reports (1966), pp. 6, 42–3, paras. 74–6.

[434] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 36–8.

[435] *Cf.* Thirlway, 'Law and Procedure, Part Eleven', *BYIL* 71 (2000), p. 157.

[436] *Cf.* also *ibid.*, pp. 73–83; Shaw, *Rosenne's Law and Practice*, vol. II, p. 873.

Thus, an agreement between the parties to refer disputes arising in a specific field solely to arbitration or to use another exclusive method of dispute settlement will have to be classified as an objection to admissibility, while the same rule, if inserted in a declaration under the optional clause, would become relevant as a defence against jurisdiction. In the *Northern Cameroons* case the Court, apparently overwhelmed by the inventiveness of the respondent in suggesting that the case was either without any basis of jurisdiction or lacked admissibility, abstained from determining whether all of the arguments raised were objections to jurisdiction or to admissibility or based on other grounds. It noted that during the course of the oral hearing 'little distinction if any' was made by the parties themselves between jurisdiction and admissibility.[437] In the *Land and Maritime Boundary* case, where Nigeria had raised no fewer than eight preliminary objections, the Court acknowledged that the first and the fourth objections related to jurisdiction,[438] but then renounced classifying the other six as falling within the first or the second basket. In the *Croatian Genocide* case, the Court attempted to introduce a clear conceptual distinction between objections to jurisdiction and objections to admissibility: jurisdiction centres on consent, whereas admissibility relates to a more disparate range of other grounds due to which, notwithstanding the existence of jurisdiction, the Court should not hear the case.[439] These episodes show how wisely the Court acted as legislator in addressing preliminary objections *in toto* in one provision, namely Article 79 of the Rules. The Court has made clear that it does not have to follow a schematic course in examining preliminary objections. It is free to rely on those that provide the most direct and conclusive answer to whether its jurisdiction is established and whether it should exercise it in any given case.[440] While objections related to jurisdiction have some logical priority, the Court may even, on grounds of procedural economy, reject an application for lack of admissibility before having considered all the issues relating to jurisdiction.[441]

bb) Jurisdiction

123 The jurisdiction of the Court is delineated by Articles 34, 35, and 36. Concerning Article 34, no real difficulty has ever arisen, although almost continually private individuals or non-governmental organizations have sent 'applications' to the Court, either out of ignorance or as a means to manifest their opposition to the political regime in a given country. In such instances, the Registrar provides an answer, informing the author of the communication that his/her concerns cannot be addressed by the Court.[442] In contrast, the requirements of Article 35 played a determinative role in the *Legality of Use of Force* cases. After Yugoslavia had been excluded from any participation in the work of the United Nations,[443] it was doubtful whether it could still be counted as a member of the World Organization. While originally the Court saw no obstacle in recognizing that

[437] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 27.

[438] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 290, para. 21 and pp. 311–2, para. 79.

[439] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 456–7, para. 120.

[440] *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 25; *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 23–4, para. 26; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298–9, para. 46.

[441] Shaw, *Rosenne's Law and Practice*, vol. II, p. 897, recognizes that the logical hierarchy suggested by him is not a binding rule of procedural law under the Statute.

[442] *Cf.* Dupuy/Hoss on Art. 34 MN 4.

[443] SC Res. 777 (1992); GA Res. 47/1 (1992).

applications could be brought against the 'new' non-socialist Yugoslavia,[444] it eventually determined in the *Legality of Use of Force* cases that this new Yugoslavia, comprising only Serbia and Montenegro, was not identical to the former socialist Yugoslavia and that at the time it instituted proceedings against the NATO States participating in the Kosovo war (April 1999) it was not a member of the United Nations and hence not a party to the Statute, lacking the right to resort to the Court.[445]

The logical consequence of the findings in the *Legality of Use of Force* cases would 124
have been to conclude that the applications brought by Bosnia and Herzegovina against Serbia in 1993 and by Croatia against Serbia in 1999 lacked a basic requirement of jurisdiction *ratione personae*, namely Serbia's quality as party to the Court's Statute. However, the Court did not come to that conclusion. In the *Bosnian Genocide* case, it felt bound by its 1999 judgment in which it had rejected the preliminary objections raised by the respondent against the application.[446] Thus, a clear inconsistency emerged: Serbia was denied the right to defend its rights that had allegedly been infringed by the NATO members during the airstrikes campaign in Kosovo, but no legal obstacle was deemed to exist for it to be sued before the Court. In the *Croatian Genocide* case, on the other hand, the Court departed from the proposition that the conditions of jurisdiction must be fulfilled at the time of the filing of the application, given the short time that had passed between that date and the full regularization of the legal position of Serbia and Montenegro.[447]

g) In particular: Admissibility

aa) Diplomatic Protection: Nationality Rule and Exhaustion of Local Remedies

Among the inadmissibility grounds, one finds in the first place those connected to the 125
exercise of diplomatic protection by the home State in favour of a person who has suffered injury at the hands of the respondent State. According to traditional rules, a State can only endorse the cause of its own nationals.[448] Additionally, in the *Nottebohm* case the Court held that for the purposes of diplomatic protection, nationality presupposes a genuine link between the person concerned and the State to which he or she is related through the bond of nationality, adding thus the criterion of effectiveness.[449] In cases of dual nationality, no claim can be brought against the second home State of the victim,[450] except where one of the two nationalities is the absolutely dominant one.[451] In sum, the

[444] *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 609 *et seq*, paras. 16 *et seq*.

[445] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 314–5, para. 91. *Cf.* also Zimmermann on Art. 35 MN 46 and Oellers-Frahm/Zimmermann on Art. 93 UN Charter MN 4–5.

[446] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 89–102, paras. 114–40.

[447] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 437–44, paras. 77–92.

[448] *Panevezys–Saldutiskis Railway*, Judgment, PCIJ, Series A/B, No. 76, pp. 4, 16; *Nottebohm*, Second Phase, ICJ Reports (1955), pp. 4, 21, 24; *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 44; *Barcelona Traction*, Judgment, ICJ Reports (1970), pp. 3, 32–3, para. 35; *Avena*, Judgment, ICJ Reports (2004), pp. 12, 36–7, para. 42; *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 276, para. 333; *Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 599, para. 39; ILC, Draft Articles on Diplomatic Protection, Report of the ILC on its 58th session, UN Doc. A/61/10 (2006), p. 16, Draft Art. 1.

[449] *Nottebohm*, Second phase, ICJ Reports (1955), pp. 4, 23.

[450] In the *Avena* case, Judgment, ICJ Reports (2004), pp. 12, 36–7, para. 42, the Court treated the issue of nationality as falling within the merits, as Mexico had also invoked a violation of its own rights under the Vienna Convention on Consular Relations.

[451] ILC Draft Articles on Diplomatic Protection, *supra*, fn. 448, Draft Art. 7.

question whether a State has standing to defend the rights of private persons or companies is to be considered within the scope of the concept of admissibility.

126 Likewise, in accordance with the rules governing diplomatic protection, State action to defend the cause of one of its nationals requires that the person concerned has beforehand exhausted any available domestic remedies of the respondent State. This rule, which has been repeatedly confirmed by the Court,[452] only applies to cases where the applicant State relies exclusively on a violation of the rights of its national. If it additionally invokes a direct violation of its own sovereign rights, it is under no obligation to wait until domestic proceedings have been completed by the injured person.[453] Nor is exhaustion of local remedies a compulsory requirement of diplomatic protection if the respondent State has failed to inform the injured individual about the available remedies as required under international law.[454] The current commentary is not the place for dealing in detail with the doctrine of diplomatic protection.[455] It suffices to recall that the Court has indeed felt bound by the traditional rules which are applicable also before any formalized inter-State dispute settlement mechanism, with the exception of the organs of the United Nations.

bb) Substantiation of Subject-Matter of Application

127 In particularization of Article 40, para. 1 of the Statute, Article 38, para. 2 of the Rules sets forth the requirements with which any application must comply:

> The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.

Failure to live up to these requirements may be a ground of inadmissibility. Although lack of sufficient substantiation of the application has often been advanced as an argument from the respondent, the Court has invariably shown a high degree of generosity in accepting applications which, even after having been supplemented by the subsequent memorial, were still significantly marred by a lack of clarity, being thus susceptible of compromising the defence of the respondent concerned.[456] In that respect, although an application filed by a State with its many human resources will never be totally baseless, it is advisable to not show too much leniency. In inter-State relations, a considerable degree of professionalism may be expected. In the case of *Certain Property*, lack of substantiation had been strongly criticized by Germany, although eventually the argument proved irrelevant as the Court dismissed the application on grounds *ratione temporis*.[457]

[452] *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 27; *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 46; *ELSI*, Judgment, ICJ Reports (1989), pp. 15, 44, para. 55; *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 276, para. 333; *Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 599, para. 40.

[453] *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 17–8, para. 40; *Avena*, Judgment, ICJ Reports (2004), pp. 12, 35–6, para. 40.

[454] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 488, para. 60.

[455] Reference is made to the ILC Draft Articles on Diplomatic Protection, *supra*, fn. 448.

[456] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 92, paras. 55–7; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 318–9, paras. 98–102; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 447–8, para. 29; *Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31, 38, para. 15.

[457] *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 22 *et seq.*

cc) Agreement on Other Method of Pacific Settlement

Considerable importance attaches also in practice to the objection that, notwithstanding the general consent of the parties to the jurisdiction of the Court, some other method of dispute settlement enjoys priority in view of the specific case at hand.[458] Among the clauses providing for other dispute settlement mechanisms are Articles 55 of the ECHR[459] and 344 of the TFEU.[460] To date, no conflicts between the jurisdiction of the ICJ and the Court of Justice of the European Union have arisen.[461] As far as diplomatic negotiations are concerned, on the other hand, the Court and its predecessor have discarded as unfounded objections that under general international law access to its judicial resources is conditioned upon the prior exhaustion of such negotiations.[462] Even in cases when the relevant compromissory clause makes recourse to diplomatic means a precondition for the institution of judicial proceedings, the Court refrains from any excessive demands. It contents itself with noting that indeed the parties had been unable to find common ground before the application was filed.[463] This approach had already been taken by the PCIJ in *The Mavrommatis Palestine Concessions* case: 128

> Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation.*[464]

A clear departure from this perception of the requirement of prior negotiations occurred in the judgment of the Court in the *Georgia v. Russia* case. In that case, the demands placed on the applicant party were extremely high,[465] an approach certainly not unrelated to the highly political character of the dispute.

[458] For a comment on the relationship of the ICJ with other international courts and tribunals see Gaja, Relationship of the ICJ with other International Courts and Tribunals, *passim*; also, Higgins *et al.*, *supra*, fn. 54, pp. 1203–6.

[459] Art. 55 reads: 'The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purposes of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.'

[460] Treaty on the Functioning of the European Union, Consolidated texts, OJ 2016 C 202, pp. 47, 194, Art. 344 reads: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

[461] *Cf.*, however, the *Mox Plant* dispute, *European Commission v. Ireland*, Case C-459/03 (2006), (2006) ECR I-04635.

[462] *Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 14; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 302–3, para. 56; *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 210–1, para. 107. Nor does the Court accept the argument that ongoing diplomatic negotiations are an obstacle to having recourse to judicial settlement, *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 12, para. 29; *Application of the Interim Accord of 13 September 1995*, Judgment, ICJ Reports 2011, pp. 644, 664, para. 57.

[463] *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319, 344–6; *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 27, para. 51; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 428–9, para. 83; *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 210–1, para. 107.

[464] *The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 14 (emphasis added).

[465] The formula used ('a genuine attempt by one of the disputing parties to engage in discussion with the other disputing party, with a view to resolving the issue', see *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 132, para. 157) does not fully reflect the actual inferences drawn from its application.

129 The usual flexibility is, by contrast, applied to other methods of settlement. In the view of the Court, no formal conclusion of a proceeding which was initiated before the seisin of the Court is necessary for the latter to exercise its jurisdiction: 'It is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed.'[466] In view of this finding, it was not necessary for the Court to formally decide whether the *Contadora* process initiated by some OAS Member States with a view to restoring peace in Central America should have been classified as a 'special procedure' or a 'pacific procedure' under Articles II and IV of the Pact of Bogotá, *i.e.*, as a procedure which would have enjoyed precedence over any procedure before organs of the international community at universal level.[467] In the *Nauru* case, the Court rejected the relevant objection raised by Australia, simply noting that no agreement providing for dispute settlement had been concluded between Australia and Nauru.[468] In that respect, an alternative dispute settlement mechanism must first of all exist in legal terms and must also be effective as a matter of fact. Litispendence of the same dispute before another international tribunal constitutes a sub-category of the same configuration, which is however rarely encountered in practice.[469] International procedures differ so widely that most times it can hardly be contended that the claims pursued by the parties are identical.[470] *Res judicata* may also be raised as an objection to admissibility but will rarely become relevant if the subject-matter of the two proceedings is clearly distinct.[471]

dd) Delay

130 Other preliminary objections that have been regularly raised against the admissibility of a case relate to delays in bringing a claim, to abuse of process, to the power of representation of the State organ that has ordered the filing of the application, or to waiver of the right to have recourse to judicial settlement. None of these arguments has been successful in practice. In the *Ambatielos* case, the Court almost summarily dismissed the argument advanced by the United Kingdom that in introducing in April 1951 an application regarding events that referred back to a commercial contract concluded by a Greek citizen with British authorities in 1919, Greece, the applicant, was acting improperly.[472] In *Nauru*, the Court embraced *in abstracto* the proposition that delay by a claimant State could make the application inadmissible, given that such delay could prejudice the respondent with regard to both the establishment of the facts and the determination of the

[466] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 100, para. 80.

[467] *Ibid.*, p. 105, para. 93.

[468] *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 246–7, para. 11.

[469] *Cf. Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 20, where the objection was held to be unfounded. For the issue, see generally, McLachlan, *Lis Pendens in International Litigation* (2009).

[470] But *cf.*, in particular, Art. 5, para. 2 (a) of the Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement'), which applies to proceedings before the European Court of Human Rights.

[471] *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 123, para. 49 and 132, paras. 85–8.

[472] *Ambatielos*, Merits, ICJ Reports (1953), pp. 10, 23.

applicable law, but in the case at hand, it found that no such delay existed.[473] Similarly in the *Armed Activities* case (DRC v. Uganda), it gave short shrift to Uganda's defence that the Democratic Republic of the Congo had waited too long before raising certain occurrences dating way back into the past.[474] While in both these cases the applicants had delayed excessively before coming to the Court, in *LaGrand* a further complication arose as Germany had instituted proceedings less than two days before the date scheduled for the execution of Karl LaGrand. Yet, even in this case the Court rejected the objection that the filing of the application was too late.[475] Likewise in *Avena* any risk of prejudice against the United States as the respondent State was denied by the Court.[476]

ee) Abuse of Process, Infringement of Good Faith, Obstacle of Clean Hands

Abuse of process is a defence which can be raised easily when the respondent has no better argument at its disposal. In the case of the *Arbitral Award*,[477] in *Nauru*,[478] as well as in the *Land and Maritime Boundary*, where the objection was termed an infringement of the principle of good faith,[479] the Court recognized that abuse of process or infringement of good faith was relevant in assessing the admissibility of an application, but made no great case of it. Indeed, when the requirements of jurisdiction in accordance with Article 36 are met, the States concerned do have the right to bring a dispute before the Court, and judicial settlement will generally be considered the most appropriate methods of peaceful dispute settlement. Therefore, the objection can be successful only under extreme circumstances which have never been considered present in any of the cases decided by either the PCIJ or the ICJ. The clean hands doctrine, on the other hand, is best situated within the realm of the substantive rules of diplomatic protection. It has never been recognized as an inadmissibility ground.[480] 131

ff) Power of Representation

In borderline cases, the Court may have to examine whether the State organ that authorized the relevant procedural acts is entitled to represent the State in its international relations. Here, by analogy, the VCLT rules provide an appropriate yardstick.[481] When in February 2017 the former representatives of Bosnia and Herzegovina sent a document to the Court requesting revision of the judgment of 26 February 2007 in the *Bosnian Genocide* case, the President of the Court responded by issuing a press release noting that the authors of the document had not been duly authorized by the government of their country to perform that procedural act.[482] 132

gg) Waiver

In theory, a State as a sovereign entity is free to waive its right to seise the Court. However, solid evidence must be adduced to show that such was the intent in a specific case. In the 133

[473] *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 253, para. 32, 255, para. 36.
[474] *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 267, para. 295.
[475] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 487, para. 57.
[476] *Avena*, Judgment, ICJ Reports (2004), pp. 12, 37–8, para. 44.
[477] *Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 63, para. 27.
[478] *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 255, para. 38.
[479] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 296–7, paras. 38–9.
[480] *Cf.* Kolb, General Principles of Procedural Law, MN 57.
[481] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3, 11, para. 13; Preliminary Objections, ICJ Reports (1996), pp. 595, 621–2, para. 44.
[482] ICJ Press Release No. 2017/12 of 9 March 2017.

Nauru case, the Court was not convinced that the Nauruan authorities had waived their substantive rights together with the attendant procedural rights as Australia argued,[483] and in the *Legality of Use of Force* cases it likewise abstained from interpreting the submissions put forward by Serbia and Montenegro as a renunciation of its procedural rights, despite the fact that at least implicitly the respondent, by affirming that at the relevant time in April 1999 it was not a party to the Genocide Convention, had refuted the basis of jurisdiction originally invoked by it.[484]

hh) Lack of locus standi

134 *Locus standi*, defined as the 'right of appearance in a court of justice',[485] is a secondary concept which does not indicate the real cause of the procedural status of a party before the Court. It was at the centre of the *South West Africa* cases where the Court, in its first judgment,[486] treated it as a preliminary matter,[487] whereas in the second judgment[488] it took the view that it belonged to the merits of the dispute, stating that the applicants:

> did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust'.[489]

Under normal conditions, the question whether an alleged right exists pertains to the merits of the case. If, by contrast, a State invokes rights which are derived from a multilateral treaty, a treaty concluded among other parties or rights established under general international law, two different interpretations are possible. On the one hand, the treaty may provide for a purely procedural position, confined to the State asserting the rights of a third party,[490] or it may set forth true substantive rights for a third party in the sense contemplated by Article 36 VCLT. In the case between Belgium and Senegal concerning the prosecution of the former Chadian dictator, Hissène Habré, the ICJ found that CAT (Article 5) conferred upon all States parties the right to demand that the obligations under the Convention be fulfilled. It recognized thus the right of Belgium to bring an application for that purpose. In the *Marshall Islands* cases the ICJ did not reach the stage of ruling on issues of admissibility, as it denied that it had jurisdiction to entertain the applications brought by the Marshall Islands against India, Pakistan, and the United Kingdom. In the *Barcelona Traction* case, standing was eventually denied to Belgium since, according to the Court, there is no right of a State to endorse the claim of the shareholders of a company which has the nationality of a third country.[491] In this

[483] *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 247–50, paras. 12–21.
[484] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, para. 43. *Cf.* also Wegen, Discontinuance and Withdrawal, MN 29.
[485] *Black's Law Dictionary* (6th edn., 1990), p. 941.
[486] *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319 *et seq.*
[487] *Ibid.*, pp. 335–42.
[488] *South West Africa* cases, Second Phase, ICJ Reports (1966), p. 6 *et seq.*
[489] *Ibid.*, pp. 18, para. 4, and 28–9, para. 33.
[490] In the case of Art. 33 ECHR a substantive and a procedural position seem to go hand in hand.
[491] *Barcelona Traction*, Second Phase, ICJ Reports (1970), pp. 3, 32 *et seq.*, paras. 32 *et seq.*

case, lack of standing resulted from the application of the general rules on diplomatic protection.

The ILC ASR[492] have considerably broadened the scope of *jus standi* in light of the 135
adoption of Article 48. It is precisely the *Barcelona Traction* case with its distinction between 'ordinary' obligations under international law and 'obligations *erga omnes*',[493] which may be seen as the juridical source of Article 48 ASR. To date, this new procedural device has not played a significant role in international law.[494] The most pertinent case is the dispute between Belgium and Senegal about the extradition of the Chadian dictator, Hissène Habré, to Belgium.[495] In that case, Belgium did not claim that it was the direct victim of an injurious act committed by Senegal, but rather that it acted on the basis of universal jurisdiction as provided under CAT, with a view to enforcing international law vis-à-vis a political leader who allegedly had committed serious breaches of international humanitarian and human rights law. The ICJ accepted that claim, holding that any State party to the Convention has a legal interest entitling it to bring a judicial action against any other State party for violation of its obligations flowing therefrom.[496] This case has thereby set a precedent that may be invoked many times in the future whenever a State is intent on acting as defender and prosecutor of the common values enshrined in the CAT or other treaties for the protection of human rights.

3. No Forfeiture of the Right to Seise the Court

Rightly, the Court has rejected on principle the argument that a State which has not on 136
its part abided by the obligations that it has sought to enforce against another State has forfeited its right to seise the Court,[497] as it is most essential to have the Court monitor intricate situations where wrongful acts and countermeasures are so tightly interwoven that it is difficult to disentangle the web of claims and counter-claims. As already pointed out,[498] occurrences at the level of substantive law do not, in general, affect the procedural regime set forth by Article 36. Thus, if States wish to be able to escape judicial proceedings on highly politicized and delicate matters, they have to frame their declarations under paras. 2 and 3 accordingly.

[492] Taken note of by GA Res. 56/83 (2001).

[493] *Barcelona Traction*, Second Phase, ICJ Reports (1970), pp. 3, 32, para. 33.

[494] *Cf.* Crawford, 'Responsibility for Breaches of Communitarian Norms: an Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts', in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Fastenrath *et al.*, eds., 2011), pp. 224 *et seq.*

[495] *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422 *et seq.*

[496] *Ibid.*, pp. 449–50, paras. 66–70.

[497] *Avena*, Judgment, ICJ Reports (2004), pp. 12, 38, para. 47. In *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, paras. 42–3, the respondent's arguments that the applicant had forfeited its right to seise the Court were dismissed outright by the judges.

[498] *Cf. supra*, MN 10.

4. Critical Date

137 The 'critical date' for determining the admissibility of an application is the date on which the application is filed.[499] Consequently, in principle later events have no impact on the power of the Court to entertain the merits of a case. However, under specific circumstances it may appear exceedingly formalistic to dismiss an application on procedural grounds, in particular if shortly after the filing of the application the defects were cured or where immediately afterwards the applicant could again institute proceedings against the respondent that would be held admissible.[500] On the other hand, it may occur that in the course of the proceedings a case is deprived of its object. In that case, the Court does not continue with the examination of the matter. According to its own words, in such instances it is 'not called upon to give a decision'.[501] In the *Nuclear Tests* cases, affirming that the dispute had become moot, it was relieved from the duty to acknowledge that, although it had indicated provisional measures under Article 41, it in fact lacked jurisdiction. In all the other cases where the issue has been discussed, the Court has declined to uphold the objection.[502]

5. Decision on Preliminary Objections

138 Article 79, para. 9 of the Rules determines how preliminary objections should be dealt with after having been considered. In any event, the Court is required to hand down its decision in the form of a judgment. The legal position is straightforward either when it finds a preliminary objection unfounded, in which case it will be rejected, or well-founded, in which case it will be upheld. If a party—the potential respondent—does not appear before the Court, in which case jurisdiction and admissibility will be examined *ex officio* without any objection having been raised, the Court is bound to find, in case the requisite requirements are met, that it has jurisdiction.[503] In many instances, however, arguments pertaining to jurisdiction and admissibility are interwoven with the merits of the dispute. The Rules which were applicable until 1972 conferred upon the Court a great measure of discretion in that respect. In case of doubt, the Court was authorized to

[499] *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319, 344; *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 95, para. 66; *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 26, para. 44 and pp. 115, 130–1, para. 43; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 318–9, para. 99; *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 17–8, para. 40; *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 148–9, para. 46.

[500] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 438 *et seq.*, paras. 81 *et seq.*

[501] *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 272–4, para. 62 and pp. 457, 478, para. 65.

[502] *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 26–9, paras. 46–51 and pp. 115, 131–4, paras. 45–50; *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 14–5, para. 32; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, para. 43.

[503] This happened in the *Fisheries Jurisdiction* cases between the United Kingdom and Germany, on the one hand, and Iceland, on the other, *cf. Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Jurisdiction, ICJ Reports (1973), pp. 3, 22, para. 46 and pp. 49, 66, para. 46. For the risks inherent in such a finding *cf.* Thirlway, *Non-Appearance before the International Court of Justice* (1985), pp. 172–3. *Cf.* also von Mangoldt/Zimmermann on Art. 53 MN 54–57.

join a preliminary objection to the merits.[504] Thus, an issue which had been extensively discussed in a first round at the preliminary stage of the proceedings could come up for discussion a second time.[505] This discretion was curtailed by the reform of the Rules in 1972.[506] Now consideration of a preliminary objection can be reserved for the merits stage only if the objection does not have an 'exclusively preliminary character' (Article 79, para. 9). In other words, if such exclusively preliminary character exists, the Court must deal with the objection immediately, until it has come to a clear conclusion, without being able to postpone a final determination until the very end of the proceedings. On the other hand, if an objection lacks an exclusively preliminary character, it will indeed have to be considered along with the merits.

In the application of the new version of the Rules, the Court has in a number of pro- 139
ceedings declared that a given objection does not possess an exclusively preliminary character. The first relevant case was the dispute between Nicaragua and the United States. Here, the multilateral treaty reservation (*Vandenberg* clause) was considered to be so closely related to the substance of the dispute that it could not be exhaustively dealt with at a preliminary stage.[507] This finding, however, did not appear in the *dispositif* of the relevant judgment but was solely expressed in its legal grounds. This was reversed in the *Lockerbie* cases, where the Court had to determine whether the claims brought forward by Libya had lost their object as a result of the two resolutions adopted by the Security Council on the incident.[508] In this case, a finding was made also in the *dispositif* that the objection raised by the United Kingdom and the United States did not have an exclusively preliminary character—and would thus have to be addressed at the merits stage.[509] A few months later, the Court ruled in the dispute between Cameroon and Nigeria[510] that the eighth preliminary objection by Nigeria to the effect that any pronouncement on the maritime boundary between the two countries affected the rights and interests of third countries was so intimately bound to the merits that it could not be adjudicated upon at the preliminary stage of the proceedings. This finding was reflected both in the legal considerations as well as in the *dispositif* of the judgment.[511] Essentially, a declaration that an objection does not have an exclusively preliminary character is nothing more than its joining to the merits as under the old system of the Rules. The sole difference lies

[504] 1946 Rules of Court, Art. 62, para. 5: 'After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings.'

[505] Prominent examples are the *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 149 *et seq.*, where the fifth and the sixth preliminary objection (domestic jurisdiction and time limit) were joined to the merits to be considered again in the final judgment, ICJ Reports (1960), pp. 6, 32–6, and the *Barcelona Traction* case, with two stages: Preliminary Objections, ICJ Reports (1964), pp. 6, 41 *et seq.* and Second Phase, Judgment, ICJ Reports (1970), pp. 3, 32 *et seq.*, where the right of diplomatic protection in favour of shareholders in a juristic person incorporated in another State was at issue.

[506] *Cf.* de Aréchaga, *supra*, fn. 429, pp. 1–11 *et seq.*, as well as the comments by the Court itself in *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 29–31.

[507] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 425–6, para. 76, and p. 442, para. 113 (1) (a); Merits, ICJ Reports (1986), pp. 14, 31–8, paras. 42–56.

[508] SC Res. 748 (1992) and 883 (1993).

[509] *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 28–9, para. 50, p. 31, para. 53 (3) and pp. 115, 133–4, para. 49, p. 136, para. 53 (3).

[510] *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275 *et seq.*

[511] *Ibid.*, pp. 322–5, paras. 112–7, and 326, para. 118 (2).

in the changed requirements for ordering the postponement of its consideration to the merits stage.

140 The Court is free to choose the grounds on which to dismiss a case either for lack of jurisdiction or as being inadmissible. It does not have to follow a specific order nor is there any rule making it compulsory to adjudge first issues of jurisdiction before proceeding admissibility.[512] The Court generally bases its decision on the ground which in its view is 'more direct and conclusive'. In pure legal logic, it would seem inescapable that the Court would have to rule first by order of priority on objections to jurisdiction.[513] However, such a strict procedural regime would be all the more infelicitous since the boundary between the two classes of preliminary objections is to some extent dependent on subjective appreciation.[514] The Court therefore chooses the ground which is best suited to dispose of the case ('direct and conclusive'). Thus, in *Certain Property* it examined only two of the preliminary objections raised by Germany.[515] It has departed, however, from this general proposition with regard to the right of a party to have access to the Court in accordance with Article 35. In the view of the Court, this objection assumes precedence over all others.[516] In any event, the Court has emphasized that in principle a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings.[517]

6. Applications Lacking any Jurisdictional Basis

141 There may be cases where the applicant acknowledges that the respondent it has identified has not accepted the jurisdiction of the Court or where lack of jurisdiction is so obvious that it might amount to a violation of the rights of the defence to register such applications as ordinary cases in the General List held by the Court (Article 26, para. 1 (b) of the Rules). Regarding the former group of instances, Article 38, para. 5 of the Rules provides:

> When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

In fact, if the respondent does not consent to the jurisdiction of the Court when the application is brought to its knowledge, the case cannot proceed. In such cases, it is not even necessary to make a formal determination to that effect. Under the 1946 Rules, where even such 'phoney' cases were registered, the Court made a formal order to remove

[512] *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 25; *cf. Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Preliminary Objections, ICJ Reports (1959), pp. 127, 146; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 16–7, paras. 39–40; *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 23–4, para. 26; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298–9, para. 46.

[513] This was the position taken by Hersch Lauterpacht and Gerald Fitzmaurice, *cf.* Fitzmaurice, 'Hersch Lauterpacht—The Scholar as Judge: Part II', *BYIL* 38 (1962), pp. 1–83, 56–7.

[514] *Cf.* also Sep. Op. Bhandari in the *Marshall Islands v. UK* case, Preliminary Objections, ICJ Reports (2016), pp. 1057, 1059, para. 10.

[515] *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 27, para. 53.

[516] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298, para. 45; *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 85, paras. 102–3.

[517] *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 852, para. 51.

the case from its List.[518] In recent years, France was twice targeted by applications in which it was openly stated that the respondent had not (yet) accepted the jurisdiction of the Court but that the requisite acceptance was expected. In both instances, *Certain Criminal Proceedings in France* (Republic of the Congo v. France)[519] and *Mutual Assistance in Criminal Matters* (Djibouti v. France),[520] the respondent did indeed inform the Court that the French government accepted the jurisdiction of the Court for the purposes of those disputes, apparently in an attempt to show that the withdrawal of its declaration under Article 36, para. 2 in 1974 after its negative experience in the *Nuclear Tests* cases[521] did not amount to a definite rejection of the Court.

A middle-ground situation emerged when New Zealand in 1995 submitted a *Request* 142
for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case.[522] While New Zealand relied on the relevant paragraph in the earlier judgment, France was of the opinion that this judgment could not provide a basis of jurisdiction and that, as a logical result, the case could not be registered in the General List. In order to sort out the contradictory submissions of the two parties, the Court considered it necessary to hold oral hearings. Eventually, France consented to this procedure while maintaining that its objections did not amount to truly 'preliminary objections'—since the case did not exist in legal terms so that any consideration was 'anterior' to a genuine examination of jurisdiction and admissibility.[523]

The question is what treatment should be given to cases where the indications fur- 143
nished by the applicant as to the alleged basis of jurisdiction are so tenuous that *prima facie* jurisdiction seems to be non-existent. Notwithstanding the similarities with the group of cases just referred to, it would appear to be obvious that different rules apply to 'weak' or 'flimsy' cases registered in the General List, as long as the applicant provides some indications as to the bases of jurisdiction allegedly supporting the application. In the *Legality of Use of Force* cases, the Court decided to remove Yugoslavia's applications against Spain and the United States from the General List even at the stage of provisional measures, without an oral hearing. In the case of Spain, the Court relied on the fact that on account of the time clause limiting Spain's declaration under Article 36, para. 2, as well as due to Spain's reservation to Article IX of the Genocide Convention, its jurisdiction was 'manifestly' lacking. In the case of the United States, the matter hinged on its reservation to the compromissory clause of the Genocide Convention (Article IX). As a result of this manifest lack of jurisdiction, the Court found that:

[518] *Treatment in Hungary of Aircraft and Crew of the United States of America* (USA v. Hungary; USA v. USSR), Orders of 12 July 1954, ICJ Reports (1954), pp. 99, 101 and pp. 103, 105; *Antarctica* (UK v. Argentina; UK v. Chile), Orders of 16 March 1956, ICJ Reports (1956), pp. 12 *et seq.* and pp. 15 *et seq.*; *Aerial Incident of 4 September 1954* (USA v. USSR), Order of 9 December 1958, ICJ Reports (1958), pp. 158, 161; *Aerial Incident of 7 November 1954* (USA v. USSR), Order of 7 October 1959, ICJ Reports (1959), pp. 276, 278.

[519] *Certain Criminal Proceedings in France*, Provisional Measures, ICJ Reports (2003), pp. 102, 103, para. 6.

[520] *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 181, para. 4.

[521] *Nuclear Tests* (Australia v. France; New Zealand v. France), Orders of 22 June 1973, ICJ Reports (1973), pp. 99 *et seq.* and 135 *et seq.*

[522] For details of that proceeding *cf. supra*, MN 85.

[523] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, ICJ Reports (1995), pp. 288, 295, paras. 23–4 and pp. 300–1, paras. 40–1.

within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice.[524]

In the *dispositif* of the two judgments, an order was included to remove the cases from the General List.[525] In the *Fisheries Jurisdiction* case between Spain and Canada, the respondent had first sought to obtain a pre-preliminary rejection by the Court of the Spanish application, given the newly introduced reservation to its declaration of acceptance of the Court's jurisdiction. Its original response to the application was a letter of just a single page in which it flatly pointed out that the Court 'manifestly' lacked jurisdiction. However, in a meeting between the President of the Court and the representatives of the parties it was agreed to follow the normal course of procedure.[526] In a recent case, where the respondent also attempted to obtain the removal of cases brought against it from the List, the Court showed a greater degree of caution. In the case of *Armed Activities on the Territory of the Congo (New Application: 2002)* (DRC v. Rwanda), where the Democratic Republic of the Congo sought interim relief against Rwanda, the Court came to the conclusion, after having carefully reviewed all of the possible bases of jurisdiction invoked by the applicant, that *prima facie* it lacked jurisdiction to indicate provisional measures. Nonetheless, it did not draw the conclusion from this finding that the case should be removed from the General List, which meant that the Democratic Republic of the Congo was given the opportunity to substantiate its case in a special hearing on jurisdiction, notwithstanding the almost hopeless situation of the applicant.[527] In the *Legality of Use of Force* cases, regarding the respondents other than Spain and the United States, a choice might have been open to the Court to remove the cases from its List, given the ambiguous attitude of Serbia and Montenegro on jurisdiction. Some governments had firmly requested that the case be dealt with in the most informal manner.[528] But the Court went the more prudent way in delivering a formal judgment, emphasizing that Serbia and Montenegro had neither foregone nor renounced its claims and had explicitly requested a determination by the Court on the issue of jurisdiction.[529] Hence, removal from the General List is an option available only in instances where either the existence of a jurisdictional link cannot even be alleged or where a time clause is so crystal-clear that the case at hand cannot possibly be covered by the relevant declaration of acceptance. The Court has now clarified that only in cases of 'manifest' lack of jurisdiction a case may be removed from the List.[530]

[524] *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 773, para. 35; *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, ICJ Reports (1999), pp. 916, 925, para. 29. This was a novelty, *cf.* Dominicé, in Ando *et al.* (2002), pp. 383, 385.

[525] *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 774, para. 40 (2); *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, ICJ Reports (1999), pp. 916, 926, para. 34 (2).

[526] *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 435, paras. 3–4.

[527] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 249, para. 91. The final judgment came, not surprisingly, to the conclusion that none of the alleged bases of jurisdiction was applicable, *ibid.*, Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6 *et seq.*

[528] *Cf.*, in particular, *Legality of Use of Force* (Serbia and Montenegro v. France), Preliminary Objections, ICJ Reports (2004), pp. 575, 586, para. 23. *Cf.* also the *Nuclear Tests* (Australia v. France; New Zealand v. France), Orders of 22 June 1973, ICJ Reports (1973), pp. 99, 105, para. 32 and pp. 135, 141–2, para. 33.

[529] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, para. 43. *Cf.* also Wegen, Discontinuance and Withdrawal, MN 29.

[530] *Immunities and Criminal Proceedings*, Provisional Measures, ICJ Reports (2016), pp. 1148, 1165, para. 70.

IX. Jurisdiction in Instances of Provisional Measures under Article 41

In proceedings instituted with a request for the indication of provisional measures, the Court is unable to undertake an exhaustive examination of the issue of jurisdiction. By necessity, such requests are made in circumstances where there is urgent need for a judicial order. Therefore, the Court must satisfy itself with some provisional assessment. After some hesitation,[531] it has developed a standard formula which can now be found in all relevant decisions. In the *Legality of Use of Force* cases, for instance, that formula was framed as follows: 144

> Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established.[532]

D. Evaluation

In a comparative assessment, the consensual regime as it is reflected in Article 36 of the Statute may appear to belong to the remnants of a past when the sovereign State was the centrepiece of the world order, out of step with the current tendencies towards a new system of universal governance under the auspices of peace and human rights. Some international tribunals have indeed been vested with compulsory jurisdiction over the whole breadth of their field of competence. At world level, reference can be made in the first place to the International Tribunal for the Law of the Sea and the Dispute Settlement Body of the WTO within the framework of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The latter is very close to a genuine judicial system, inasmuch as the reports of the panels at first instance and the standing Appellate Body at second instance can only be reversed by a unanimous ('consensus') decision of all the members of the Dispute Settlement Body—which will never be the case. Within regional frameworks, the European Court of Human Rights and the Court of Justice of the European Union stand out in that their jurisdiction is firmly connected to the treaties they are called upon to monitor: every State which ratifies the European Convention on Human Rights or which becomes a member of the European Union is automatically subject to the jurisdiction of the respective competent tribunals. However, compulsory jurisdiction has been conferred only with regard to specific subject-matters, never without any limitations *ratione materiae*. It is significant, in this regard, that the Member States of the European Union have refrained from entrusting the Court of Justice of the European Union with judicial powers when it comes to common foreign 145

[531] *Cf.* Sep. Op. Higgins in the *Legality of Use of Force* case (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 161–70.

[532] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, pp. 124, 132, para. 21; *Pulp Mills*, Provisional Measures, Order of 23 January 2007, ICJ Reports (2007), pp. 3, 10, para. 24; *Certain Criminal Proceedings in France*, Provisional Measures, ICJ Reports (2003), pp. 102, 106, para. 20; *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 147, para. 40; *Certain Activities Carried out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 17–8, para. 49; *Certain Documents and Data*, Provisional Measures, ICJ Reports (2014), pp. 147, 151, para. 18; *Immunities and Criminal Proceedings*, Provisional Measures, ICJ Reports (2016), pp. 1148, 1155, para 31; *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 114, para. 17; *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 236, para. 15.

and security policy. Evidently, neither is the time ripe for a comprehensive system of judicial settlement nor would it necessarily be the best solution to assign all disputes to an international judge. Our age has become aware of the strengths and weaknesses of the different methods of dispute settlement. In a globalized world, the international community is dependent on loyal cooperation between different bodies with different qualifications to ensure international peace and security. While international judges have an important role to play, they cannot claim a monopoly for themselves.

CHRISTIAN TOMUSCHAT

General Principles of Procedural Law

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A. Introduction

1 The existence of general principles of procedural law in the sphere of activity of international tribunals has sometimes been disputed.[1] However, there is no doubt that since the Jay Arbitrations at the end of the eighteenth century, there has been a growing body of judicial case law which progressively established a series of rules and general propositions about the arbitral or judicial handling of disputes. Thus, *e.g.*, the extent to which a decision has to state the reasons upon which it is based is a point on which no rule existed at the inception; since the Hague Convention for the Pacific Settlement of International Disputes of 1907, however, the rule has been undisputed.[2] At this juncture, two issues arise: the distinctive features of 'general principles' of procedure with respect to simple juridical rules and maxims pertaining to that field need to be addressed; moreover, the notion of 'procedure' must to some degree be clarified. On these definitional points, there is no general consensus. Neither the true nature of principles, nor the proper scope of the notion of 'procedure' (with respect to jurisdiction and to substance) have ever been completely defined. Indeed, it is not possible to reach any clear-cut definition, since both concepts, 'principles' and 'procedure', are open-ended notions of an overarching nature. They are replete with so many subtle ramifications permeating the whole body of law that any 'isolation' of them (such an 'isolation' being a precondition for a clear-cut definition) proves elusive if not useless. However, a general idea of these concepts can and must be given.

I. 'Principles' and 'Rules'

2 A 'principle' of law is a general normative proposition considered to be expressive of the *ratio* of a series of more detailed rules.[3] The principle is thus a sort of 'constitutional' proposition of a legal order: it expresses an important or general legal value, or it is the hallmark of a legal idea that permeates different questions of law. It covers an important or even unlimited segment of the legal reality, without, however, spelling out in a precise way the conditions of its application or its legal effects. A series of 'concretizations' of a principle can ordinarily be grouped around it; they are treated as its derivatives or otherwise as related concepts. Hence, the principle of good faith can be broken down into further principles or rules such as, *e.g.*, *pacta sunt servanda*, estoppel, normative acquiescence (*qui tacet consentire videtur si loqui potuisset ac debuisset*), nobody can reap advantages

[1] On this point, *cf.* Thirlway, 'Procedure of International Courts and Tribunals', *EPIL* III, pp. 1128–33, 1128.
[2] *Cf.* Delbez, *Les principes généraux du contentieux international* (1962), p. 124.
[3] For a more detailed discussion *cf.* Kolb, 'Les maximes juridiques en droit international public: questions historiques et théoriques', *RBDI* 32 (1999), pp. 407–34.

from his own wrong (*nemo ex propria turpitudine commodum capere potest*), prohibition of abuse of rights, abuse of discretion, abuse of procedure, responsibility for appearances deliberately created. Principles, not being cast into limits as precise as rules proper, display distinctive functions in the legal system. They have an important role in smoothing the application of the law in a given case and have a sort of adapting or equitable function. Moreover, they play a major role in the development of the law, sometimes by allowing new rules to be shaped.[4] A simple 'rule' of law does not possess such a constitutional role. It is narrower, more limited in its reach; its scope of application and its effects are spelled out much more clearly.

As can be grasped, there is no clear-cut distinction between principles and rules, but at least a grey area exists: a rule can be quite general and thus eventually qualify as a principle; a principle can be narrow, but qualify as such on account of its importance. Thus, *e.g.*, the proposition *audiatur et altera pars in judicio* can be seen either as a rule or as a principle; on account of its constitutive procedural value it is more properly considered as a principle.

II. The Notion of 'Procedure'

The proper definition of 'procedure' is another difficult matter. In its widest and generic sense, the term covers (i) all devices devoted to the enforcement of the rules of substantive law and (ii) the rules determining the organization, the competence, and the functioning of the organs existing to achieve that goal. In the context of judicial proceedings,[5] the term 'procedure' *lato sensu* covers all rules relating to international judicial action. These include the rules governing the composition of the court, questions of competence and admissibility, the objective and subjective conditions for bringing a claim, as well as the modalities according to which the case will be dealt with. 3

In its narrowest sense, the term 'judicial procedure' relates only to that last element. It then comprises all rules and principles regulating the manner in which the proceedings (*le procès*) are conducted. Procedure in this narrow sense concerns the way in which the parties' requests are dealt with by the court, from the institution of proceedings until the

[4] One could envision principles of law, especially the great principles, as filled with normative energy, constituting a middle-ground category between norms and sources: they are 'norm-sources'. That is to say that they are not simple rules, where the element of application prevails quite neatly, nor simple 'legal ideas', where the legislative element is predominant, but a combination of both. Their specific role in the formative stage of new rules (at the legislative level) and their dynamic function in the application of the law indeed allows them to be seen as a type of source of law which goes far beyond the idea of a subsidiary filling of *lacunae*, as envisaged, at the time of the drafting of the Statute of the PCIJ, in Art. 38, para. 1 (c), (or para. 3, as it then was). Each of these great principles is thus in itself (and not only in the formal category as 'general principle of law') a type of source of the law, *i.e.*, a 'norm-source': it does not essentially deal with the *fixed* meaning of rules to be applied, but with the *adaptation* of rules to constitutional necessities, to new developments and needs, to conformity with basic value-ideas, namely to justice, *etc.* General principles first and foremost concern legal dynamics. Their function is constitutional, and not administrative; and that very fact endows them with an element of source-power. For example: when a need to that effect was felt, the principle of good faith has been broadened from the simple notion of 'bindingness' of a previously agreed word (*pacta sunt servanda* and *fides cum hostis servanda est*) to encompass the idea that all legitimate expectations, relevant in a legal relationship, should be protected (a form of 'inductive accretion' to the principle). Thus, when in 1974 the ICJ was faced with the necessity to justify the binding nature of unilateral declarations, it found support in the concept of legitimate expectations. In order to ground this concept in the legal order, the Court had recourse to the principle of good faith: *cf. Nuclear Tests* (Australia v. France), Judgment, ICJ Reports (1974), pp. 253, 268, para. 46. This is a form of deductive reasoning from the principle, developing the reach of international law.

[5] *Cf.* Witenberg/Desrioux, *L'organisation judiciaire, la procédure et la sentence internationales* (1937), p. 110.

moment of the final decision (and including subsequent requests for the interpretation or revision of judgments, *etc.*). It will be noted that the term 'rules of procedure' can thus have a multiplicity of meanings. Therefore, *e.g.*, rules relating to the election of ICJ judges (Articles 2 *et seq.*) are rules of procedure, but these rules do not refer to proceedings in a contentious case (*procès*) and are consequently not included in the rules of the procedure in that narrowest sense just described.

As far as the ICJ is concerned, five spheres of legal action can be distinguished:

- First, there are the rules of organization of the Court itself (composition, seat, deliberation of judges, *etc.*), which are independent of any specific proceedings.
- Second, there are rules touching upon the jurisdiction of the Court (existence of a dispute of legal nature, actuality of the dispute, existence of a consensual bond, *etc.*).
- Third, there are rules on admissibility of a particular request (*e.g.*, time-bar, litispendence, absence of *locus standi in judicio*, absence of conditions such as exhaustion of local remedies, *etc.*). In extremely simplified terms, the rules on jurisdiction concern defaults as to the propriety of the organ seised, whereas rules on admissibility concern defaults as to the propriety of the particular request.
- Fourth, there are rules as to the merits of the case, if the Court proceeds to the substance of the dispute.
- Fifth, there are rules of procedure, *e.g.*, rules governing the handling of all questions arising in the four previously mentioned phases, and especially in the phases of establishment of jurisdiction, of admissibility, and of the merits. These also include the different incidental proceedings, such as, *e.g.*, the indication of provisional measures in accordance with Article 41. Rules of procedure thus extend over all phases of judicial action mentioned previously.

Finally, what has been said about the five spheres of legal action applies equally to contentious and to advisory cases. Simply stated, in advisory proceedings the questions of competence and admissibility are as yet somewhat less developed than in contentious cases.

5 The distinction between procedure in the narrow sense and questions of jurisdiction or admissibility is not always simple. To the same extent that the merits and the competence are often interwoven, so that a question of substance can be addressed at the preliminary stage of competence (or the reverse),[6] a series of questions can also be viewed as relating to either competence or procedure. As one example, one may refer to the maxim *ne ultra petita* (*ne eat iudex ultra petita partium*), which will be addressed more fully later.[7] According to that principle, the judge cannot exceed what the parties in their submissions have requested. The principle can be viewed as one of procedure: to the extent that the court proceeds to the merits, it will have to take account of that limitation when it grants some remedy, relief or compensation. Thus, to the same extent that it may not refuse to hear the other party because of the procedural principle *audi et altera pars*, it will not be entitled to exceed the limits of the parties' submissions. However, the rule *ne ultra petita* can also be seen as having a jurisdictional aspect: according to that view, the principle is

[6] There is in most cases no neat distinction between jurisdiction and merits. The question is one of judicial convenience, *e.g.*, of the transfer of some questions to a provisional stage in order to realize some procedural economy. On the proximity of jurisdictional questions and merits, *cf.* the case law reported in Thirlway, 'Law and Procedure, Part Nine', pp. 13 *et seq.* *Cf.* also Abi-Saab (1967), pp. 179 *et seq.*

[7] *Cf. infra*, MN 33 *et seq.*

a direct consequence of the consent requirement for establishing jurisdiction.[8] Hence, following this understanding, the correct view would be to say that the court lacks jurisdiction to grant any remedy, relief, or compensation not covered by the submissions of the parties. According to the first approach, the principle is seen as a modality of what the court must do (or refrain from doing) when awarding rights and titles in the *dispositif*. According to the second, it is seen as a limit on the jurisdictional competence of the Court, thereby assuming a higher level of eminence. Both views can be defended.

III. General Principles

The present comment addresses '*general* principles of procedural law'. Such principles 6
exist at different levels of generality, and thus something must be said about the level that will be chosen here. In the most generic sense, the notion of 'general principles of procedural law' in the context of adjudication covers all types of judicial, arbitral, and possibly also quasi-judicial proceedings. The principles common to the ICJ, international arbitrations (inter-State and possibly also commercial), standing international tribunals (*e.g.*, the ITLOS, the ECHR, *etc.*), and possibly also bodies such as the Human Rights Committee under the International Covenant on Civil and Political Rights, could qualify. The present comment will, however, refer only to the general principles of procedure applicable in proceedings before the ICJ. It is not thereby suggested that the principles to be discussed do not apply also to proceedings before the other bodies mentioned, but they do not necessarily apply exactly to the same extent. Indeed, there are some important differences between the different forms of adjudication, especially between *ad hoc* arbitration on the one hand, and institutionalized adjudication before the ICJ on the other. As a consequence, there may be a series of more or less concentric circles of general principles of procedural law which do not necessarily have the same scope and extent. Being the most institutionalized form of international adjudication, the ICJ (together with such bodies as the ECtHR) can be expected to possess a body of procedural principles that is among the most developed. Thus, the principles to be discussed in the present comment do not necessarily lend themselves to automatic extension to other tribunals or bodies.

IV. Adjudication and Arbitration

The main difference between *ad hoc* (non-institutionalized) arbitration and institutional- 7
ized adjudication lies in the extent to which the proceedings defer to the will of the parties in dispute.[9] In *ad hoc* arbitration, the parties are the unlimited masters of the proceedings; they are *domini negotii*. Thus, they decide about the object of the dispute, they select the arbitrators, they decide on the procedure as they see fit, and, further, determine all questions pertaining to the handling of the case. The arbitrator(s) is (are) nothing more than their common agent(s); he or she decides in their name and not in the name of any collectivity; he or she exists uniquely because of the consent of the individual parties and acquires no independence with respect to them.[10]

[8] *Cf. e.g.*, Fitzmaurice, *Law and Procedure*, vol. II (1986), pp. 524, 529.

[9] *Cf.* Kolb (2001), pp. 212 *et seq.* As Abi-Saab has rightly observed: 'le rôle prédominant des parties qui contrôlent la composition de l'organe arbitral et le déroulement du processus du début jusqu'à la fin, se réservant des échappatoires qu'elles peuvent utiliser à n'importe quel moment' ('Cours général de droit international public', *Rec. des Cours* 207 (1987-VII), pp. 9–464, 246).

[10] As a consequence, the special agreement to arbitrate has been called the 'loi de l'arbitrage' or the 'charter' of the arbitrator: *ibid.*, p. 215.

Conversely, the judge elected in an institutional framework such as that of the ICJ, being the principal judicial organ of the United Nations, is not the common agent of the litigant parties. He or she does not decide in their name but applies a set of objective rules laid down in the constitutive instrument of the Court.[11] These rules are at the disposal only of all the parties to that instrument (through a revision of it) and not of the litigants.[12] There is thus a much greater autonomy of the judge with respect to the States in dispute. It is manifest in the fact that the Court may, and sometimes will, bring to the fore considerations concerning general interests of the entire conventional community (and of the international community at large). Consequently, it will, *e.g.*, introduce considerations as to the 'proper administration of justice' ('bonne administration de la justice'), rather alien to the *ad hoc* arbitrator.

In short, the *ad hoc* arbitrator pursues a *utilitas singulorum* of the parties electing him as their agent, whereas the ICJ also, and sometimes mainly, pursues a *utilitas publica* pertaining to the whole community of parties to the Statute.[13] From the objective nature of the judicial function just described flow a series of imperative rules of procedure, which are binding on the Court by virtue of the Statute—whereas such rules do not exist, at least as mandatory rules, for the arbitrator. This does not mean that an arbitrator will avoid following the same procedural principles as are applied by the ICJ: States most often take no exception to them, nor do they ordinarily reject them. However, it may sometimes be easier to affirm some principles of objective law in the Court's *utilitas publica* context than in the *ad hoc* arbitration's *utilitas singulorum* context.

V. Survey of the Procedural Principles Addressed

8 At this point, it may be useful to give a general overview of the procedural principles at the level of the ICJ.[14] They are grouped into three circles.

[11] In the words of Borel, *Les problèmes actuels dans le domaine du développement de la justice internationale* (1928), p. 12: '[La juridiction permanente] n'est plus l'œuvre des Parties comparaissant devant elle; elle n'est plus un simple Organe cré par les Etats en litige. Elle est, par excellence, le pouvoir judiciaire international institué par la communauté juridique des Etats réunis dans la Société des Nations … Par sa constitution, elle est placée virtuellement en dehors des Parties.'

[12] *Cf.* Schwarzenberger, *International Judicial Law*, p. 723: 'individual parties to cases before the Court have but a limited choice: they may take the Statute as they find it or leave it'. For a similar observation *cf.* de Bustamante, *La Cour permanente de justice internationale* (1925), p. 152. 'le juge ou le tribunal, établi d'avance, [est] soumis à des règles … antérieures et supérieures à la volonté de chaque plaideur … Le judiciaire n'est pas la création concrète et spéciale de tous les plaideurs, mais il existe avant eux et au-dessus d'eux et s'exerce de haut en bas'. From the jurisprudence, *cf.* also *Nottebohm*, Preliminary Objections, ICJ Reports (1953), pp. 111, 118–9; *Serbian Loans*, Judgment, Diss. Op. Pessôa, PCIJ, Series A, No. 20, pp. 62, 65; *ibid.*, Diss. Op. Novacovitch, *ibid.*, pp. 76, 80; Judge Pessôa's observation appended to the order in the *Free Zones*, Order of 19 August 1929, PCIJ, Series A, No. 22, pp. 48, 49; or Judge Kellogg's observation appended to the judgment of the *Free Zones*, Order of 6 September 1930, PCIJ, Series A, No. 24, pp. 29, 32–3.

[13] This can be seen, for example, in the consideration given to precedent. The arbitrator will not ignore relevant precedents and perhaps he or she will attempt to remain within the mainstream of the jurisprudence. But his or her task is mainly to settle the dispute at hand in such a way as to apply the law while satisfying the wishes of the parties as expressed in their special agreement. The ICJ, on its part, must give greater weight to considerations of principle, to the development of international law, to the respect for evolving case law, and the like, since its function is not limited to solve a particular dispute but also to be the organ of the UN and of general international law. On the role of precedent at the ICJ, see *e.g.*, Shahabuddeen, *Precedent in the World Court* (1996).

[14] *Cf.* also the list given by Sereni (1965), p. 1714.

Annex 20

- First, there are structural and constitutional principles, such as (i) the equality of the parties (including the principle *audiatur et altera pars*), or (ii) the principle of the proper administration of justice. There is additionally the principle of 'inherent powers' of international tribunals, which is strongly linked to the principle of the proper administration of justice. For this reason, and for reasons of space, it shall not be treated separately in this contribution.[15]
- Second, there are procedural principles *stricto sensu*: these relate to the division of work between the parties and the Court. They regulate questions such as 'who does what' and 'who must do what', or 'what is the matter for the judge, what is the matter for the parties'. The principles at stake are the burden of proof, *jura novit curia*, free choice of evidence presented, *ne ultra petita*, free assessment of the evidence by the judge.
- Third, there are substantive principles relating to the proceedings. In this respect, two sub-circles can be distinguished. Some principles of substance directly concern the pronouncements of the Court, such as, *e.g.*, the principle of *res judicata* and the duty to state the reasons upon which the decision is based. In addition, there are some substantive principles of general international law applicable also to procedural aspects. These principles describe the fundamental behaviour expected of the parties. They are founded upon the principle of loyalty between the parties and include, *e.g.*, the prohibition of abuse of procedure, estoppel, *nemo commodum capere potest de sua propria injuria*. These principles flow from the general duty of good faith the parties owe to one another when engaging in judicial proceedings.

B. Structural and Constitutional Principles

I. Equality of the Parties

1. General Considerations

The principle of equality of the parties is a fundamental principle of judicial proceedings.[16] 9
It is not confined to the procedure before the ICJ but is of universal reach, applying to all types of judicial and arbitral proceedings. It defines the structure of the proceedings, which must be adversarial (equality of arms): the same rights must be granted to all parties, and there must be a constant drive to equalize eventual unevenness among the parties to the extent that it may influence the possibility of a fair outcome of the trial. This equality is inherent in judicial proceedings, but it also flows from general international law, from the sovereign equality of States, and from the principle of free consent to jurisdiction of which it is a particular reflection. The principle of equality is also substantive, not only structural. It is rooted in the fundamental aim of material justice. In effect, conceptual reflection as well as practical experience show that no fair outcome can be expected from a trial where the two parties did not have the same possibilities to plead and present their case. The principle of equality *in judicio* is so evident and indispensable for

[15] On inherent powers, see Brown (2007), pp. 55 *et seq.*

[16] *Cf.* Sereni (1955), pp. 67 *et seq.*; Del Vecchio (1975), pp. 173 *et seq.*; Negri (2002), pp. 117 *et seq.*; Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1079–83; Thirlway, 'Law and Procedure, Part Eleven', pp. 128 *et seq.*; and further Cheng (1953), pp. 290 *et seq.* For specific treatments of the maxim '*audi alteram pattern*' *cf.* Mani, 'Audi et alteram pattern', *IJIL* 9 (1969), pp. 381–411; Hamacher, *Die Maxime audiatur et altera pars im Völkerrecht* (1986); Ruiz-Fabri/Sorel (eds.), *Le principe du contradictoire devant les juridictions internationales* (2004).

modern legal thinking that it could well be termed a principle of 'natural law of judicial proceedings'.

10 That, however, does not mean that the principle is necessarily to be considered peremptory in all its aspects. Some inequality may be acceptable to the extent that the parties have expressly and clearly provided for it in a special agreement freely entered into. However, in this respect there may be some difference depending on the organ seised. An arbitrator would be more inclined to accept such an agreement, whereas the ICJ, having regard to its Statute and the integrity of its proceedings, would be more reluctant to accept such terms. It could be expected that the ICJ considers the principle of equality to a much larger extent as being *jus cogens*, and that it would thus strike down contrary agreements. The problem just described has so far not arisen in any contentious case, but some elements of it appear in the jurisprudence and will be referred to in due course.

It may at this juncture be recalled that, in the advisory opinion on *Complaints Made against UNESCO*, the Court observed that 'the principle of equality of the parties follows from the requirements of good administration of justice'.[17] This finding was repeated in the *Nicaragua* case (1986)[18] in the context of the non-appearance of one party. In addition, it was stated that 'the equality of the parties to the dispute must remain the basic principle for the Court'.[19] Moreover, Article 35, para. 2, dealing with the conditions under which the Court shall be open to States not parties to the Statute, puts a strongly worded limit on the (to some extent, discretionary) conditions the Security Council may set. The provision clarifies that 'in no case shall such conditions place the parties in a position of inequality before the Court'.[20] The words 'in no case' show that the limitation was considered to be peremptory. Equality before the Court is therefore of an objective character, and the Court could not ignore it or impeach on its distinctive content. The exact point at which an alteration of the relative positions of the parties becomes a sanctionable inequality is a matter on which no abstract answer can be given; the point is one of axiological interpretation, under the guise of the principle of 'proper administration of justice'.

11 As to its content, the principle of equality can be split into three main aspects. First, the principle provides for equal opportunities within the proceedings. Second, the principle has a more fundamental constitutional aspect, sometimes requiring a departure from, or softening of, specific provisions in order to ensure equality. Third, the principle also covers relative equality, implemented notably through the mechanisms of reciprocity.

2. Equality as a Principle of Procedure

12 First, the principle has a procedural aspect. It requires that the same remedies be available equally to both parties; *e.g.*, that both parties are given the same time to elaborate their written pleadings (memorials, counter-memorials, rejoinders, *etc.*),[21] that they are given the possibility to present the same number of written or oral pleadings, or that any new argument gives rise to the grant of a proper time for responding. The law does not require that each party avail itself of these possibilities. In this respect, equality is formal only in the sense that the parties are given equal opportunities, but they are free to renounce

[17] *Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports (1956), pp. 77, 86.
[18] *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 39–40, para. 59.
[19] *Ibid.*, p. 26, para. 31.
[20] For a more detailed interpretation of the provision *cf.* Zimmermann on Art. 35 MN 52–94.
[21] For further details on the time limits *cf.* Mačák on Art. 43 MN 52 *et seq.*

filing a counter-memorial, or not to exhaust the whole speaking time allotted to them. Several provisions of the Statute and of the Rules give expression to such procedural equality: *cf. e.g.*, Article 31 (judges *ad hoc*), Article 36, para. 2 (reciprocity), Article 40 (communications to the parties), Article 42 (representation by agents), Article 43 (communication of the written pleadings) of the Statute, and many provisions of the Rules (especially Articles 32 *et seq.*).

In practice, this aspect of the principle does not normally give rise to severe problems. 13
The distribution of speaking time and the order of written pleadings are ordinarily agreed between the parties and the Court in pre-trial meetings, following Article 31 of the Rules. There, the Court, through its president, will be anxious to secure equal opportunities. Thus, in the *Nuclear Tests (Request for Examination)* case, the Court said that:

> it was agreed [in a meeting with the President of the Court] that the Court would hold three public sittings on the above-mentioned question, each State being allotted equal speaking time and the opportunity to present a brief reply.[22]

The Court will seek to enforce respect for the rules of debate in order to prevent parties from obtaining any improper advantage. Thus, in an order of 15 August 1929 in the *River Oder* case, the PCIJ enforced the procedural equality principle as against an inequality from the point of view of the timing. The Polish government had not substantively developed all its contentions in its counter-memorial, simply reserving a series of points for later stages. Thus, an inequality could ensue, the opponent parties not being able to address at that stage the Polish arguments. The Court addressed this matter in the following terms:

> Whereas, however, in a case submitted to the Court by Special Agreement and in which therefore there is neither Applicant nor Respondent, the Parties must have an equal opportunity reciprocally to discuss their respective contentions; as this is the reason for the provision laying down that in cases submitted in this way, the written documents are to be filed simultaneously by both Parties; Whereas, accordingly, the Six Governments must be enabled to discuss, in their first oral argument and not only in their reply, any alternative submissions made by the Polish Government; Invites the Agent of the Polish Government to file with the Registry by midday on Saturday, August 17th at latest, any alternative submissions as to the second of the two questions submitted to the Court.[23]

Thus, it can be seen that the Court possesses (and has applied) the power, which is in any case to be implied, to give a proper sanction to the principle of procedural equality.[24] It has not only the power but also a duty to do so. If to no other norm, this power/duty can be attached directly to the principle of equality, or, alternatively, to that of the proper administration of justice.

[22] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995, ICJ Reports (1995), pp. 288, 296, para. 28.

[23] *Territorial Jurisdiction of the International Commission of the River Oder*, Order of 15 August 1929 (Submissions), PCIJ, Series A, No. 23, pp. 45–6. On the late presentation of claims, see more recently the *Diallo* case, Merits, ICJ Reports (2010), pp. 639, 653 *et seq.*, paras. 27 *et seq.*; and the *Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624, 662 *et seq.*, paras. 104 *et seq.*

[24] Sometimes, certain counsel manifested difficulties in respecting the time allotted to them for speech, and the court had to intervene precisely to safeguard procedural equality while respecting the schedule which had been adopted. See Bedjaoui, 'L'égalité des Etats dans le procès international, un mythe?', in *Essays in Honour of J. P. Cot* (2009), p. 26, concerning Vergès.

14 At the provisional measures stage, the Court has shown somewhat more leniency. Thus, in the *Bosnian Genocide* case, the Court accepted a series of documents filed by Bosnia-Herzegovina at a late stage of proceedings. Taking into account the urgency of the matter and 'other particular circumstances' (which were not spelled out), the Court decided to receive the filed documents as 'observations' relating to the indication of the measures. On the other hand, the Court acknowledged that the late filing of the documents 'is difficult to reconcile with an orderly progress of the procedure before the Court, and with respect for the principle of equality of the Parties'.[25] This exceptional course is replete with dangers, even at the provisional measures stage. It thus should be used by the Court only with utmost care, in situations of real urgency, especially when the delay in filing was hardly avoidable. By accepting such late filing the Court in effect curtails the factual possibility of the other party to respond properly to the documents so filed, and infringes the principle of procedural equality. Furthermore, the Court has also shown some leniency where the additions did not contain anything other than developments of previously stated points, as the judgment in the *Nuclear Tests* case shows.[26]

There are other fields where the principle of procedural equality is relevant. Thus, if more than one party brings a case against another State (*e.g.*, three related applicants against one respondent), particular problems of equality may arise, concerning, *e.g.*, the composition of the bench with respect to the role of the national judges, the election of judges *ad hoc*,[27] the proper balancing of the written pleadings allowed, and the time of oral presentations.[28] The *Legality of Use of Force* cases brought by Yugoslavia against ten NATO States are an example of such problems.[29] These proceedings show that the relevant law is not yet sufficiently developed or assured.

15 To the foregoing it can be added that the application of the procedural rules of the Statute and of the Rules of Court smoothens, and progressively neutralizes, any possible disadvantage of a party at any given time. Consequently, not only must the rules be enforced vis-à-vis the parties when they depart from them but the application of the rules themselves will in any case tend to produce the result of equality desired. Thus, at the preliminary objections stage of the *Barcelona Traction* case, the Court allowed Belgium to file a claim which it had previously discontinued in order to take up direct negotiations with Spain. When the negotiations failed and Belgium brought its claim again, Spain objected to that course. It considered itself disadvantaged to the extent that Belgium had already had cognizance of the Spanish arguments and could thus frame its request with that knowledge. The Court considered that disadvantage to be too slight. In any case, Belgium

[25] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 336–7, para. 21. For a more general treatment of the late production of evidence *cf.* Tams on Art. 52 MN 4 *et seq.*

[26] *Nuclear Tests* (Australia v. France), Judgment, ICJ Reports (1974), pp. 253, 265, para. 33: 'Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram pattern*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar.'

[27] For comment *cf.* Kooijmans/Bordin on Art. 31 MN 22 *et seq*; see also, Higgins *et al.*, *Oppenheim's International Law: United Nations* (2017), pp. 1153–7. Note also that according to *ibid.*, pp. 1143–4 the institution of the judge *ad hoc* was established precisely to alleviate concerns regarding the equality of the parties in those cases that the bench contained a judge of the nationality of one of the Parties to the proceedings but not of the other.

[28] *Cf.* Mačák on Art. 43 MN 23, 107–108 and 111.

[29] *Cf.* Puoti, 'Causa comune e principio di uguaglianza processuale delle parti nei casi relativi alia liceità dell'uso della forza', *Comun. e Stud.* 22 (2002), pp. 801 *et seq.*

could have modified its conclusions, even in the original proceedings, in order to meet the Spanish arguments. Moreover, Spain could still raise all of its preliminary objections in the new proceedings. The Court added: 'The scope of the Court's process is however such as, in the long run, to neutralise any initial advantage that might be obtained by either side.'[30] There is here some prophylactic virtue of the rules of the Court and that is quite understandable, since the very existence of rules applicable equally to all parties tends to foster equality at the cost of arbitrariness.

3. Equality as a Constitutional Principle

Second, the principle of equality of the parties is a constitutional principle of procedure. 16
It is not limited to the question of enforcement of procedural rules providing equal opportunities. Sometimes, it may indeed require a departure from (or a softening of) the rules contained in the constitutive instruments, which would, if applied formally, create an improper inequality and affect the fairness of proceedings. In this sense, the principle of equality is overriding and hierarchically superior. It is so fundamental that it must also be sometimes enforced against specific provisions. If such provisions are not at the disposal of the Court (*e.g.*, if they are based on the Statute), they will not be abrogated, for the Court has no such power and the requirements of justice do not warrant such a general abrogation; but the provisions at stake will not be applied in the given situation, with the result that there is legally a suspension in the context of a single case.[31] The best example of such a course is to be found in the 'appeals' cases from the judgments of the administrative tribunals (ILOAT and UNAT).[32]

The issue first arose in the advisory opinion on *Complaints made against UNESCO*.[33] 17
In that opinion, the Court began by recalling that the essential modalities of its functioning in advisory cases are analogous to those in contentious cases. In particular, the Court 'is a judicial body', which in the exercise of its advisory functions 'is bound to remain faithful to the requirements of its judicial character'.[34] The Court found that the situations presented to it suffered from an inequality between the parties. Only the organization (UNESCO) could have recourse to the Court by requesting an advisory opinion; not the other party, the civil servants. Moreover, there was no equality among the parties as to their ability to present their case to the Court. Indeed, the organization could appear to address the judges directly whereas the civil servants could not. This course was contrary to the fundamental principle of equality of the parties. However, the Court found that the service it could give by answering the questions posed to it was greater than the service it would give by declining to answer: it balanced the interests protected by the principle of equality with those of rendering a legal opinion settling the matter. It

[30] *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 25.

[31] See also Higgins *et al.*, *supra*, fn. 27, p. 1246 and fn. 485. Conversely, if the disputed provisions flow from the Rules or Practice Directions, the Court is free to initiate a revision of those texts in order to bring them in line with the requirements of equality of the parties according to judicial experience.

[32] For a long time, an international organization or an international civil servant dissatisfied with the judgment rendered by the UNAT or the ILOAT could apply for leave to 'appeal' to the ICJ. As there was no direct possibility of appeal, the problem was solved by way of a request for an advisory opinion by the organization concerned (*e.g.*, the ILO) or by a specially created Committee on Applications for Review of Administrative Tribunal Judgments. The civil servant could apply to this body to 'appeal' to the ICJ. *Cf.* Thirlway, *supra* fn. 16, pp. 128 *et seq.*; as well as d'Argent on Art. 65 MN 51, and Chesterman/Oellers-Frahm on Art. 92 UN Charter MN 39–41 for comment on the subsequent abolition of the review procedure of the UNAT and the ILOAT.

[33] *Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports (1956), pp. 77, 84 *et seq.*

[34] *Ibid.*, p. 84.

thus continued by saying that the inequality was more theoretical than practical, the civil servants having won their case at the administrative tribunal and being thus in a stronger position. As to the possibility to submit their arguments, it was true that the civil servants could not address the Court directly, whereas the opposing party, the organization, could do so. But UNESCO, without any interference on substance, had transmitted the views of the civil servants; the civil servants did not raise any objection to that course. Overall, in actual fact, the equality of the parties had not been sufficiently affected for the Court to be compelled to decline to render the advisory opinion. By choosing that course, the Court could strike down the arguments presented against the administrative judgments and affirm their validity to the benefit of the civil servants.

But the Court also gave a more direct sanction to the principle of equality. It refused to grant the organization the possibility of presenting oral arguments, to which it would ordinarily have been entitled under Article 66 and the related provisions of the Rules.[35] By refusing to hear the organization[36]—to which the organization sometimes agreed but sometimes did not agree[37]—it re-established some equilibrium between the parties: not 'positively', by adding to the rights of the civil servants (which it could not do because of the peremptory limits of its Statute), but 'negatively', by taking away some rights of the organization. The principle of equality thus played a truly constitutional role, limiting the reach of specific provisions of the Court's Rules and practice. It has authoritatively been suggested that should that re-equilibration of procedure for some reason not be possible in an advisory procedure, the Court would refuse to deliver the opinion in order to avoid the otherwise inescapable inequality.[38] It was due to criticism of the Court on the point of equality that the Committee on Applications for Review of Administrative Tribunal Judgments had finally been created. The opinion of the Court thus had a seminal function, leading to legislative action.

The issue of equality between the Organization and its staff members re-emerged in the *Judgement No. 158 (Review)*;[39] in the *Judgement No. 273 (Review)*;[40] and most importantly in the *ILO Administrative Tribunal Judgment No. 2867*.[41] In the two latter opinions, the Court insisted that what mattered was not theoretical equality or inequality (which could not be satisfied in such appeal cases) but whether the proceedings ensured effective equality. Such effective equality must be secured by the Court, *e.g.*, by renouncing oral proceedings, notwithstanding their utility in terms of information. In the *ILO Administrative Tribunal Judgment No. 2867* opinion, this stance was strongly linked to the duty of a good administration of justice. Thus, the same 'constitutional approach' was upheld until the abolition of these appeals cases as far as the UNAT is concerned. One of the reasons for the reform was precisely the dissatisfaction of the Court at being confronted with cases in which such equality could not be perfectly secured. The principle of equality

[35] For an analysis of the right of international organizations to appear before the Court in advisory proceedings *cf.* Paulus on Art. 66 MN 16–18.

[36] *Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports (1956), pp. 77, 80, 86.

[37] In 2012, the Court indeed refused to grant an organization an oral hearing even when the organization did not agree to forfeit its right to be orally heard: *ILO Administrative Tribunal Judgment No. 2867*, Advisory Opinion, ICJ Reports (2012), pp. 10, 25 *et seq.*, paras. 35 *et seq.*, p. 30, para. 45.

[38] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Diss. Op. Anzilotti, PCIJ, Series A/B, No. 65, p. 65.

[39] *Judgement No. 158 (Review)*, Advisory Opinion, ICJ Reports (1973), pp. 166, 178 *et seq.*, paras. 32 *et seq.*

[40] *Judgement No. 273 (Review)*, Advisory Opinion, ICJ Reports (1982), pp. 325, 332 *et seq.*, paras. 17 *et seq.*

[41] ICJ Reports (2012), pp. 25 *et seq.*, paras. 35 *et seq.*

produced a constant pressure for legislative reform, *e.g.*, for the abolition of a procedure considered to be, *inter alia*, not entirely compatible with its requirements. These considerations testify to the powerfulness of the concept of equality as a constitutional principle. The procedure was subsequently also abolished with respect to the ILOAT in 2016.

It is questionable whether such a stance could be applied also to contentious proceed- 18
ings. It seems difficult to imagine situations where the parties could fall into procedural inequality, since the Statute and the Rules are specifically designed to avoid such a result. Since no provision in the Statute, Rules, or Practice Directions suffers from the defect of creating direct inequality between the parties, the point will rather consist in interpreting rules *in favorem aequalitatis*, in filling a gap by ensuring equality, or in developing the applicable law bearing in mind that requirement. In any event, the Court does possess the inherent powers necessary to redress any situation that might hamper equality (Article 30, para. 1, of the Statute). There is therefore no cogent reason to refuse to decide a case submitted according to regular procedure on account of inequalities, lest the Court engages in an unwarranted *déni de justice*.

As can be seen, the Court upheld and underlined the fundamental nature of the principle of equality, while showing some flexibility in order to accommodate precisely those to whose benefit the principle worked.

4. Equality as Reciprocity

Third, the principle of equality presents itself as relative and shifting equality: it then takes 19
the form of reciprocity. Examples of reciprocity can be found in rules of procedural law *stricto sensu*.[42] Thus, if the time for filing a memorial is prolonged for one party, the other will be entitled to benefit from the same amount of prolongation.[43] But the main field of application of reciprocity is that of the jurisdiction of the Court. As this aspect is commented upon elsewhere,[44] only some brief remarks will be made here.

When a State brings a contentious case to the Court under the optional clause system, 20
the respondent is allowed to raise any reservation contained in the declaration of the applicant even if it does not appear in its own declaration. That State then raises the reservation by way of reciprocity. The effect of this reciprocity is to equalize the relative position of the parties; it thus flows from the principle of equality. If there was no reciprocity, each State could rely only on the reservations made in its own declaration; the State having made more reservations could strike down jurisdiction on more matters than the State having entered fewer reservations:[45] applicant (A), having made more reservations, files a claim against a respondent (B) having entered fewer reservations; the respondent would then be bound to accept the jurisdiction of the Court on all matters on which he did not himself reserve, but on which the applicant reserved. But if the former respondent State (B) decided to bring a case against the former applicant (A) on the same matter, the Court would not have competence, precisely because the former applicant could raise the broader reservations contained in its declaration. The consequence would be an imbalance. The State having carved out from the jurisdiction of the Court a greater number of questions and matters would benefit from that course, whereas the State having accepted the jurisdiction of the Court in a broader way would be penalized. This would

[42] On the use of terminology *cf. supra*, MN 3–5.
[43] On the practice of the Court *cf.* Guyomar, *Commentaire*, pp. 290 *et seq.*
[44] *Cf.* Tomuschat on Art. 36, especially MN 28–29 and 70 *et seq.*
[45] For more on this aspect *cf. ibid.*, MN 28.

be contrary to the essential aim of the optional clause system, which is to favour and to expand jurisdiction. It is upon this policy reason (not to incite States to make more reservations, contrary to the essential aim of the optional clause) and the principle of equality that the principle of reciprocity is based.

21 The principle of reciprocity in the context of jurisdiction has been constantly applied. A classical example is the *Norwegian Loans* case where Norway invoked a 'domestic jurisdiction clause' of a self-judging nature contained in its opponent's declaration, namely in the French declaration.[46] In the *Nicaragua* case, the ICJ clarified the reach of the reciprocity principle further. It limited its scope by saying that reciprocity applied only to the scope and substance of the commitments entered into and not to the formal conditions of their creation, duration, or extinction.[47] In this case, the United States had relied on Nicaragua's purported right to denounce its jurisdictional commitment at any time. The US declaration, on the contrary, contained a six-month notice clause for denunciation. The United States thus claimed to be able to avail itself of the Nicaraguan declaration and to denounce its commitments with immediate effect.[48] The Court declined to widen the scope of reciprocity to such situations. It recalled that reciprocity applied at the moment of the seisin of the Court and not to pre-seisin matters such as denunciation of the declaration.[49] And it made the previously mentioned statement limiting reciprocity to substantive matters. The Court moreover recalled an important principle which it had stated in a previous case:

> reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other party, Switzerland, has not included in its own declaration.[50]

This statement shows that the matter is controlled by the principle of equality, and by the policy principle of not putting at any disadvantage the State having shown more deference to the compulsory jurisdiction of the Court. Finally, it can be stressed that the distinction between substantive matters regarding commitments and formal conditions of creation, duration, or extinction of the declaration is not always easy to draw. Thus, *e.g.*, if a reservation contains a resolutory condition for the jurisdiction of the Court, *e.g.*, a condition linked to the occurrence of a specific fact, would that be analysed as partaking of the substance of the obligation, or is it a formal condition of duration? It seems that in case of doubt the question must be regarded as one of substance open to reciprocity. Much depends also on the procedural situation, *e.g.*, on whether the State invoking that reservation is the one having a wider acceptance of the jurisdiction or not.

[46] *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 22 *et seq.*, 24. *Cf.* Tomuschat on Art. 36 MN 29 and (with respect to the reservation in question) MN 97–98; for general perspectives on reciprocity *cf.* also Spatafora, *La reciprocità nella giurisdizione obbligatoria della Corte internazionale di Giustizia* (2001).

[47] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 419, para. 62. For further details on issues of reciprocity arising in the *Nicaragua* case *cf.* Tomuschat on Art. 36 MN 75–78 and 86–87.

[48] The Court did not accept that the Nicaraguan declaration gave a right of termination of the declaration with immediate effect. Quite to the contrary, it applied the principle of a reasonable period of notice: *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 420, para. 63.

[49] *Ibid.*, p. 420, para. 64.

[50] *Interhandel*, Preliminary Objections, ICJ Reports (1959), pp. 6, 23; and *cf. Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 419, para. 62.

Annex 20

The same considerations apply *mutatis mutandis* to reservations contained in compromissory or other jurisdictional clauses under Article 36, para. 1, of the Statute.

II. The Principle of Proper Administration of Justice

The Court often repeats, in differing contexts, that it is bound to ensure a 'proper administration of justice', a 'good administration of justice', or a 'better administration of justice' ('une bonne administration de la justice'). There is no action by the Court, be it normative, administrative, or decisional, which would not be profoundly influenced by considerations relating to the proper administration of justice. So far, this principle or maxim seems not to have been the object of significant doctrinal analysis.[51] It plays distinctive roles either as specific consideration in particular contexts, or as a general consideration with a residual function. 22

Looking at its functions with a bird's-eye view, one may discover four main applications of the principle. First, it serves as a (sometimes decisive) criterion in a balancing-up process concerning divergent interests. The aim is to find the best possible equilibrium with regard to justice and procedural necessities. Second, it grants the Court a power to act or to ascertain that one or another condition of a fair and satisfactory process has been, or is, more or less strictly respected. Third, it may display the role of a polar star in a legislative process, when the Court adopts new rules, in its Rules or Practice Directions. Fourth, it is sometimes invoked as simple support or explanation for a provision in the Rules or in the Statute whose aim is to secure a proper unfolding of procedure. These aspects are handled in the context of different situations requiring a proper administration of justice. In the following lines, some of these most distinctive concrete roles of the principle or maxim are discussed.

Equality of the parties. Often the Court mentions this principle in parallel with the consideration that it has to ensure the equality of the parties to the proceedings: 23

(1) Thus, in the opinion on the *Complaints made against UNESCO*, the Court said that 'the principle of equality of the parties follows from the requirements of good administration of justice'.[52] That statement was repeated in the other administrative tribunal cases.[53] We have already seen that this case law addressed, among other things, the problem arising from the lack of *locus standi* of the individual civil servant in advisory proceedings, while the organization could in principle directly appear before the Court, thus creating a manifest procedural inequality.
(2) The principle was emphatically restated in the context of proceedings with the non-appearance of one party in the *Nicaragua* case:

> The provisions of the Statute and Rules of Court concerning the presentation of the pleadings and evidence are designed to secure a proper administration of justice and a fair and equal opportunity

[51] See Kolb, 'La maxime de la "bonne administration de la justice" dans la jurisprudence internationale', *L'Observateur des Nations Unies* 27 (2009), pp. 5 *et seq.*; Lelarge, 'L'émergence d'un principe de bonne administration de la justice internationale dans la jurisprudence internationale antérieure à 1945', *ibid.*, pp. 23 *et seq.*

[52] *Complaints made against UNESCO*, Advisory Opinion, ICJ Reports (1956), pp. 77, 86.

[53] *Cf. e.g., Judgement No. 273 (Review)*, Advisory Opinion, ICJ Reports (1982), pp. 325, 334, para. 23 ('requirements of the judicial process', 'exigences d'une bonne justice'). *Cf.* also the *ILO Administrative Tribunal Judgement No. 2867*, Advisory Opinion, ICJ Reports (2012), pp. 10, 25 *et seq.*, paras. 35 *et seq.* See in another context the *Barcelona Traction*, Preliminary Objections, Diss. Op. Armand-Ugon, ICJ Reports (1964), pp. 116, 122.

for each party to comment on its opponent's contentions. The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule. The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.[54]

(3) An issue of equality had also been at stake when there was discontinuance of the proceedings with subsequent reintroduction of the original claim, after the direct negotiations had not proved to be successful. The Court has been at pains to ensure to the maximum feasible extent that no inequality between the parties ensues from this fact. It stressed that its procedure, predicated on equality, would quickly equalize the initial advantage of the claimant consisting in its ability to reintroduce its claim already knowing the main arguments of the respondent, which had been ventilated in the first procedure, before discontinuance. The Court was hence satisfied, in the *Barcelona Traction* case,[55] that the reintroduction of the claim had not jeopardized in any tangible sense the requirement of a proper administration of justice.

(4) The late invocation of new arguments or new pieces of evidence poses graver problems for equality between the parties and a greater threat to the proper administration of justice. Equality is here jeopardized because the opposed party would not be given a proper opportunity to respond to the lately invoked arguments or pieces. Moreover, such a stance would be at odds with procedural celerity: it would slow down the procedure and multiply procedural incidents. The Court has thus addressed this problem under the umbrella of the proper administration of justice principle (*qua* equality), for instance in its *Legality of the Use of Force* cases.[56]

24 *Proper unfolding of the procedure*. The principle or maxim of the 'proper administration of justice' can also be invoked in seeking the most convenient method for the functioning of the Court itself. The gist of the matter here is not to ensure practical equality between the parties but rather to guarantee that the Court disposes all relevant elements enabling it to decide the case; that it is in possession of these elements at the most relevant times; that it is possible to avoid useless procedural lengths; or to fill in gaps in the rules applicable to the procedure; *etc*. The principle or maxim here plays the role of a guardian of a proper procedure. Herewith are some examples of this type of function:

(1) The principle or maxim has, for example, been invoked in the context of the joinder of a preliminary objection to the merits of the case.[57] In an order in the *Panevezys–Saldutiskis Railway* case, the Court said that '[it] may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it'.[58] The most obvious situation in which such a course would be favoured is the one in which the Court is not in possession of all the necessary elements to make a decision at the preliminary stage. It is then bound to hear the arguments

[54] *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 26, para. 31.

[55] *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 25.

[56] See *e.g.*, *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 325, para. 116. See also the *Diallo*, Merits, ICJ Reports (2010), pp. 639, 656, para. 38.

[57] In today's terminology: the declaration that an objection does not possess, in the circumstances of the case, an exclusively preliminary character, Art. 79, para. 7, of the 1978 Rules of Court.

[58] *Panevezys–Saldutiskis Railway*, Preliminary Objections, PCIJ, Series A/B, No. 75, pp. 52, 56.

on the merits before deciding the purportedly 'preliminary' point. In the previously mentioned case, the Court moreover postulated its power to push back to the merits stage other arguments, if the 'proper administration of justice' so requires. It thereby granted itself a certain power of appreciation and hence of flexibility in order to suit the peculiarities of individual situations. The mentioned statement of the PCIJ was recalled and endorsed by the present Court in the *Barcelona Traction* case.[59] In this latter instance, it added that in such cases there exists a potential conflict within the principle of the proper administration of justice. In order to have all the elements of decision at its disposal, it might be wise for the Court to join the objections to the merits; but in such a case, the respondent will be obliged to defend a case on the merits although the Court may not possess jurisdiction over it. The Court thus stressed that it must equally safeguard the rights of the respondent State, this being also 'an essential part of the proper administration of justice'.[60]

(2) The Court again had recourse to the principle in the context of counter-claims. In this context, when appreciating the connection between a claim and a counter-claim, it has to strike a balance between the interests of procedural economy and the (initial) applicant's right to have its claims expeditiously decided. Such a 'direct connection' is required for admitting a counter-claim. When such a connection is accepted, the Court is able to hear the whole case in a single set of proceedings and to balance the respective claims better.[61] This is in the interest of expeditious proceedings[62] and also of the proper administration of justice. Thus, in the *Bosnian Genocide* case, the Court held that counter-claims as incidental proceedings serve the 'better administration of justice', the idea being 'essentially to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently'.[63] Conversely, the party bringing a counter-claim does not have complete discretion to force its counter-claims on the initial applicant, since this would risk 'infringing the Applicant's rights and ... compromising the proper administration of justice';[64] therefore, to be precise, an element of connexity is required by the Statute. In 1998, the Court recalled this reasoning in its order in the *Oil Platforms* case.[65] Indeed, if a respondent were allowed to 'pollute' the original proceedings with claims only remotely connected with the principal object of contention, this would open up those proceedings to dilatory manoeuvres, to a severe delaying of justice, and to a significant disincentive to bring claims to the Court, the procedural risk being then distinctively too high. It is essentially in the context-bound interpretation of what is a sufficient 'connection' that the margin of appreciation of the Court

[59] *Barcelona Traction,* Preliminary Objections, ICJ Reports (1964), pp. 6, 42. *Cf.* also *ibid.*, Sep. Op. Wellington Koo, pp. 51, 53–4.

[60] *Ibid.*, p. 43.

[61] *Cf.* Salerno, 'La demande reconventionnelle dans la procédure de la Cour internationale de Justice', *RGDIP* 103 (1999), pp. 360 *et seq.*

[62] The principle of procedural economy is a further general principle of procedure (Sereni (1955), p. 89). It can be taken as part of the more general principle of the proper administration of justice.

[63] *Bosnian Genocide*, Order of 17 December 1997, ICJ Reports (1997), pp. 243, 257, para. 30.

[64] *Ibid.*, pp. 257–8, para. 31.

[65] *Oil Platforms*, Order of 10 March 1998, ICJ Reports (1998), pp. 190, 203, para. 33, and 205, para. 43, where it is said that the Court must not lose sight of the interest of the applicant to have its claims decided within a reasonable period of time, a risk that is increased as soon as a counter-claim is admitted.

and its orientation towards the requirements of a proper administration of justice (balancing-up process) are most apparent.

(3) The principle or maxim has also been mentioned in the context of provisional measures. Such measures, which are binding unless the Court states the opposite,[66] significantly hamper the freedom of action of the aggrieved State *pendente lite*. It is hence natural that the Court will indicate such measures only if it can be confident of possessing *prima facie* jurisdiction over the merits. Otherwise, a claimant might bring claims to a manifestly incompetent Court with the sole or main aim of demanding binding provisional measures to the detriment of the respondent.[67] Moreover, the claimant would then seek to maintain these measures for as long as possible, being hence incited to have recourse to dilatory tactics with regard to the advancement of the proceedings. The Court thus very understandably considers that a lack of effort on its part to ascertain its (*prima facie*) jurisdiction would be contrary to the principle of the proper administration of justice.[68] The maxim here requires a balancing-up of the interests of the claimant and the respondent, as well as the securing of the objective interests of a proper functioning of the Court.

(4) The Court attempts to ensure that the object of the contention is indicated with the maximum of precision in the application instituting proceedings (Article 40, para. 1, of the Statute and Article 38, para. 2, of the Rules). The main aim of these provisions is to allow the Court, and in particular the respondent, to know to what they have to answer. The Court has often indicated that this was an essential requirement of legal certainty and proper administration of justice.[69] Otherwise, if the object of the dispute is not fixed in a sufficiently precise manner, the claimant could blow hot and cold by constantly modifying its contentions and arguments. The equality of the parties, but also the proper unfolding of the procedure, would be heavily strained.

(5) The principle or maxim has been often mentioned in the overriding context of procedural economy.[70] A proceeding is proper if, while taking account of the needs of expression of the parties, it remains short and non-cumbersome. Factors, such as the multiplication of acts and incidents, the plethora of documents, the explosion in numbers of secondary, subordinate or irrelevant arguments, and the extension in time, among others, do harm to the lucidity of the actors and hence the quality of the result. Consequently, the maxim of procedural economy is linked with that of the proper administration of justice. Hence, in the *Territorial and Maritime Dispute* case the Court took position, in the preliminary stage, on an argument relating to the merits (*i.e.*, the nullity of a treaty), rejecting it.[71] This particular way of treating that argument was due to the straightforwardness of the question: for the Court it was obvious that the argument on nullity was deprived of all merit; it thus decided to reject it preliminarily in order to avoid the parties wasting time and energy on arguing

[66] *Cf.* Torres Bernárdez/Mbengue on Art. 48 MN 42.

[67] See Le Floch, *L'urgence devant les juridictions internationales* (2008), pp. 261 *et seq.*

[68] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 20, para. 25.

[69] *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 267, para. 69.

[70] See Sereni (1955), p. 89; Jennings, 'Proper Work and Purposes of the International Court of Justice', in Muller *et al.*, *ICJ*, pp. 33 *et seq.* The WTO appeals organ has stressed that an only partial settlement of the claim constituted an error of law and is contrary to the principle of procedural economy.

[71] *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 851, para. 50; 857, paras. 73 *et seq.*

the point on the merits when this course appeared utterly useless. The principle of economy of procedure, placed under the guise of the proper administration of justice, was the essential aspect of this decision. The Court expressly mentioned the latter principle in this context.[72]

The same lines of argument played a decisive role when the Court decided to apply the *Mavrommatis* rule (holding that there is no necessity to introduce a new application in order to cure some defects of the older one, when the possibility of such a new application exists). The Court did stress that this rule is predicated upon the economy of procedure and hence on the idea of a proper administration of justice.[73]

Filling in gaps in the applicable rules. The principle or maxim of the 'proper administra- 25
tion of justice' has also helped the Court, when necessary, to invoke an inherent power to fill some gaps in the rules applicable to its procedure. The Court had, for instance, done this when it 'invented' the preliminary objections incidental procedure, at a time when the relevant rules were silent on this aspect. Not accidentally, it had here expressly mentioned for the first time the idea of a 'proper administration of justice' and the necessities flowing from it.[74] More recently, the Court invoked our principle again in the context of the question as to whether it can of itself terminate proceedings pending before it.[75] The Practice Directions also mention the principle, in the context of newly extended personal incompatibilities (see Practice Directions VII and VIII). They concern judges *ad hoc* being or having recently been counsel; and higher staff members of the Court displaying counsel functions soon after having left the Court. These personal incompatibilities are presented as flowing from the interests of a proper administration of justice.

Finally, in other contexts, the Court has gone a long way towards the application of the principle, but without mentioning it expressly, *cf. e.g.*, the *Northern Cameroons* case[76] or the *Nuclear Test* cases.[77]

It must then be asked what the essential content of the principle is. First, it must be 26
noted that it is one of the flexible standards of which no legal order can divest itself. It leaves a certain margin of discretion to the Court and lends itself to application in the most different matters of procedural law. This ubiquity of the principle is essential to its function, which is to perform the task of a flexible 'fire brigade' which the judge can invoke whenever he feels it is necessary, especially in circumstances when there is no specific rule in the applicable instruments, namely the Statute and the Rules of Court,

[72] *Ibid.*, p. 851, para. 50.

[73] *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 442, para. 89. The question whether this rule should be applied to the crystallization of a dispute (crystallized after the seising of the Court) has been extremely debated in the *Marshall Islands v. United Kingdom*, Preliminary Objections, ICJ Reports (2016), pp. 833, 846, paras. 26 *et seq.*, mainly in the dissenting opinions. Conversely, the rule has been applied to questions of jurisdiction *ratione personae, i.e.*, concerning membership to the UN and thus participation to the Court's Statute: *Croatian Genocide* case, Preliminary Objections, ICJ Reports (2008), pp. 412, 435 *et seq.*, paras. 73 *et seq.*, with the dissent, on this point, *e.g.*, of Judges Ranjeva, Shi, Koroma and Parra-Arranguren in their Joint Declaration, *ibid.*, pp. 472 *et seq.*

[74] *The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 16.

[75] *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 294, para. 33.

[76] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 29–30, in a context where a real dispute (as opposed to a moot question) existed.

[77] *Nuclear Tests* (Australia v. France), Judgment, ICJ Reports (1974), pp. 253, 259 *et seq.*, paras. 23 *et seq.*; *Nuclear Tests* (New Zealand v. France), Judgment, ICJ Reports (1974), pp. 457, 463 *et seq.*, paras. 23 *et seq.*, in the context of an objective determination of the existence and of the scope of a dispute.

to address a lingering problem. The content of the principle is of a general nature: it is essentially linked to the related concepts of 'judicial propriety' or the 'judicial integrity of the Court',[78] and to its ability and inherent powers of proper action.

There is a negative and a positive aspect of the matter: first, negatively, the principle is intended to secure the judicial integrity of the Court; second, positively, the principle is geared towards the balancing-up of competing interests. These two aspects will be addressed in turn.

27 First, there are (negative) limitations on the action the Court may take.[79] The ICJ is a court of justice, not an all-competent constituent or political organ. Thus, there are certain limitations upon what it may do, even if there is a joint request of the parties to indulge in some action. Strictly speaking, this is not a matter of discretion. The Court must decline to act in a certain way if it finds that its judicial integrity is incompatible with the course of action requested. Conversely, there is a certain margin of appreciation as to the proper interpretation of the concept of 'judicial propriety'. At this point, there is indeed room for some manoeuvring, allowing the Court to adapt its procedural law and its actions/practice constantly to the changing needs of international society. There are various such limitations acknowledged by the Court. The ICJ is, *e.g.*, debarred from answering moot questions, not having practical and actual legal consequences.[80] Outside advisory proceedings, it is debarred from giving a non-executory opinion to States, other than a binding judgment or an order.[81] It is furthermore debarred from engaging in a course of action which would entail an (excessive) inequality of the parties, according to what has been discussed previously.[82] The most classical formulation of such 'inherent' limitations is to be found in the *Northern Cameroons* case (1963). The Court there explained that:

> There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[83]

Consequently, because of its nature as a judicial body representing a community of States parties to the Statute, the Court is limited in its field of admissible actions. In other words, the nature of such a judicial body entails a series of limitations or incompatibilities, precisely because some actions would not represent a 'proper administration of justice'. This is nothing more than a sanction of the general requirement to respect the judicial integrity of the Court.

28 Second, there are (positive) duties which the Court faces under the guise of the principle of the 'proper administration of justice'. That principle allows (and requires) the Court to seek a constantly novel and constantly readjusted balance between the rights

[78] A field which an eminent author has partially discussed under the title 'La recevabilité générale d'une demande': *cf.* Abi-Saab (1967), pp. 146 *et seq.* See also Giuffrida, *La ricevibilità generale nella giurisprudenza della Corte internazionale di Giustizia* (1995).

[79] *Cf. ibid.*; and further Kolb (2001), pp. 211 *et seq.*

[80] *Cf. Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 31 *et seq.*

[81] *Cf.* the *Interpretation of the Greco-Bulgarian Agreement of 9 December 1927*, Advisory Opinion, PCIJ, Series A/B, No. 45, pp. 68, 87.

[82] *Cf. supra*, MN 9 *et seq.*

[83] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 29. See also the *ILO Administrative Tribunal Judgement No. 2867*, Advisory Opinion, ICJ Reports (2012), pp. 10, 25, para. 34.

of the parties and the interests of justice. Thus, when joining preliminary matters to the merits (or now declaring that a matter is not exclusively preliminary in nature), or when allowing a counter-claim—to limit the discussion to some examples already given—the Court is faced with competing interests. On the one hand there is the desire to handle a case more rationally, *e.g.*, by postponing a point which is difficult to decide at a certain stage because of lack of the full range of possible arguments, which are to come in later stages, especially at the merits stage; or to bundle different questions by hearing them in a coordinated and concentrated way instead of having them separated in different proceedings. On the other hand, there are opposing interests of justice, *e.g.*, that a respondent should not have to face a costly and undesired defence on the merits when the Court finally (possibly or probably) lacks jurisdiction; that a proceeding should not be protracted on points joined with the merits when the case then is still doomed to fail;[84] or, in the case of counter-claims, that the original applicant should not have to face a significant delay in the handling of his case because a counter-claim is admitted. The Court constantly has to strike a balance between these competing interests, so as to find the most just equilibrium. The polar star of that balancing exercise[85] are the requirements of justice, propriety, and efficacy. It is for that very reason that the different considerations which may be taken into account are conveniently captured under the general heading of the 'proper administration of justice'. They cannot be described in a more detailed way once and forever. The category remains open-ended in order to serve the constantly evolving needs and situations with which the Court is faced and which require it to give a proper answer in solving conflicts of interests of procedure and of justice. In that sense, the principle essentially means that the Court has the ultimate power and responsibility to ensure that the justice it renders abides by the highest standards of judicial procedure and that at the same time it takes duly into account the legitimate concerns of all the parties to the proceedings.

C. Procedural Principles *stricto sensu*

I. General Considerations

An important field of general principles of procedure relates to the proper sharing of work between the Court and the parties. There are in this area two ideal types of judicial proceedings. One is the 'private law' type of process; the other is the 'public law' type of process. The words employed should not mislead. A private law type of process can perfectly well be used in the area of public law questions, such as some criminal procedures where only minor private interests are at stake and where the proceedings are largely adversarial; and a public law type of process could perfectly well be used in some private law matters, *e.g.*, some questions of family law such as the fate of children at the moment of divorce. Moreover, the two types of process must not be realized purely in any concrete 29

[84] A problem illustrated, *e.g.*, by the fate of the *Barcelona Traction* case (1964–1970).

[85] The balancing of competing interests is a typical function of bodies applying public law prescriptions, notably national constitutional law or administrative law. It is most visible in areas such as human rights law. On the process of balancing *cf.* Schlink, *Abwägung im Verfassungsrecht* (1976); Ladeur, *'Abwägung'—Ein neues Paradigma des Verwaltungsrechts* (1984); Aleinikoff, 'Constitutional Law in the Age of Balancing', *Yale L. J.* 96 (1987), pp. 943 *et seq.*; Enderlein, *Abwägung in Recht und Moral* (1992); Buergisser, *La pesée des intérêts comme méthode: bref aperçu historique* (1996); Leisner, *Der Abwägungsstaat: Verhältnismäßigkeit als Gerechtigkeit?* (1997). In the field of international law *cf.* Hector, *Das völkerrechtliche Abwägungsgebot* (1992).

proceeding. They are ideal types which can be mixed and thus give rise to a series of intermediary types.

30 The private law type of process is devoted to questions of private interest (*utilitas singulorum*, 'Privatautonomie'). It is based on the pre-eminence of the litigating parties in a double sense. First, the parties shape and determine the object of the dispute. They define the object to be decided and decide on the extent to which they recognize the claim of the counterpart or to which they abandon their own claim ('Dispositionsmaxime'). Second, it is up to the parties to bring before the Court the relevant evidence. The parties alone possess the relevant information about their dealings, which the judge is not bound to know. Thus, it is up to them to bring to his or her knowledge all the facts (and eventually also some relevant specific law) he or she needs in order to be able to decide the case ('Verhandlungsmaxime', 'burden of evidence'). The prototype of such proceedings is private law litigation on contracts or any other private matter.

31 The public law type of process is devoted to questions of public, or collective, interest (*utilitas publica*, 'öffentliches Interesse'). It is based on the pre-eminence of the judge as the agent of the State. Thus, first, the disposal on the object of the proceedings is taken away from the parties and vested with some public organ. It is this organ which will act *ex officio* and objectively, when the conditions set up in the law for putting in motion its action are met ('Offizialmaxime'). Second, it is not up to the parties to prove the relevant facts. This task is entrusted to a public organ, which has to collect and to present the facts to the judge ('Untersuchungsmaxime'). The prototype of this category is the inquisitorial criminal proceedings in civil law jurisdictions.

32 The proceedings of the ICJ deal substantively with public law matters, international law being to a large extent what Montesquieu called 'la loi politique des nations'.[86] However, the procedure of the Court is largely of a private law type: the States confront themselves on a plane of equality, reflecting their 'sovereign equality';[87] and there is a requirement of consent in order to establish jurisdiction. Under this lens, the States can be compared to private citizens confronting a civil judge. It is the States parties to a dispute which, to an overwhelming extent, decide on the object of the dispute, on its maintenance or on its discontinuance, and thus on the degree to which the judge will decide on the matter. It is their submissions which shape the object of dispute. Moreover, the parties have to prove the relevant facts, the judge being expected only to know the general norms of international law. These aspects need some further refinement.

In more detail, the procedure of the Court (which rests always permeable to the great principles of the legal order, since its aim is to secure the proper implementation of the substantive law) is situated at a particular point in each of the following spectrums:

- *Written/oral procedures.* The procedure at the ICJ is essentially written,[88] but it has its oral phase[89] (where, however, written texts are read out). It is thus from this point of view a mixed procedure.

[86] *Cf. De l'Esprit des lois* (1748), book X, chapter I.

[87] It may be said that international law is unique precisely because it combines a public character as far as its substance is concerned (political, public interest questions) with a private character with respect to structure (sovereign equality of its main subjects).

[88] Arts. 44 *et seq.* of the Rules.

[89] Arts. 54 *et seq.* of the Rules.

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- *Publicity/secrecy.* There exist procedures open to the public and others closed. Publicity may concern access to the process of the parties to it, or access by the public at large. In the first case, the point is essentially the access of parties (or intervening third parties) to the documents of the proceedings. In the second case, the point is concentrated on the access of the general or specially defined public to the presentation of the parties' arguments, eventually to the Court's deliberations, and potentially to the documents of the process. Proceedings at the ICJ have again a mixed character in terms of these aspects. The parties (but not the intervening State) have access to all documents at all times (Article 43, para. 4 of the Statute); they present their pieces themselves and are present at the oral hearings. However, the deliberation of the judges is secret (Article 54, para. 3 of the Statute). The aim of this rule is to shield the judges from undue (national or other) pressure. The general public normally has access to parts of the proceedings and to the oral pleadings (Article 46 of the Statute). It has no access to the deliberations of the judges.
- *Immediacy/mediacy.* Procedures dominated by the principle of immediacy are those where the essential acts of the process, and especially the presentation of evidence, must be performed in front of the Court *in corpore* ('in open Court'). This is the type of procedure at the ICJ. This principle has as its main aim to allow the judges to evaluate the evidence and all the procedurally relevant acts by themselves, and not on account of other, indirect, sources. The principle of mediacy, where a delegation of the tribunal or a judge rapporteur are charged with collecting the evidence and reporting thereafter to the tribunal, often applicable in municipal administrative proceedings, is thus not relevant for the ICJ.
- *Concentration/non-concentration.* The procedure at the ICJ is dominated by the principle of concentration. This means that the parties can invoke their offensive or defensive arguments only in a concentrated way, in the phase of procedure foreseen to that effect in the relevant rules. They cannot rectify omissions in presentation in later phases of the proceedings. Hence, subsidiary or secondary arguments have to be indicated from the beginning (Article 44 of the Rules). This principle intends to secure an orderly and accelerated unfolding of the procedure. Justice would be gravely hampered if it were necessary to reopen debates and consultations on new aspects instilled in the process at all possible junctures. This would be particularly burdensome taking into consideration the highly complex objects of contention the ICJ has to deal with. Moreover, a different stance on this question would invite abuse and dilatory tactics. Conversely, there are some proceedings, such as in boundary demarcation and settlement commissions, which are not strictly judicial and where the principle of concentration of arguments does not apply.
- *Procedural economy.* As we have already seen, the procedure of the Court is based on the principle of procedural economy. This is a flexible tool in the hands of the judge when directing the proceedings. The principle requires from the judge that he or she attempts—within the four corners of the Statute, the Rules and the ordinary ways of dealing with susceptible sovereign States—to move towards the end of the procedure through the most direct, simple, practical, and time-sparing paths at disposal. The judge should always remain sensitive to a reasonable proportion between the effort invested and the aim to be attained. Hence, he or she should be at pains to join the claims where appropriate; not to require a new application if the defect can be easily cured within the old application; not to prolong the debates about irrelevant arguments;

not to refer to the merits stage aspects which can, and thus should, be decided at the preliminary stage; to use the orders and interlocutory decisions in a useful way; *etc.* Whatever the importance of the procedural economy principle may be, it is, however, difficult to overshadow the fact of its limitations in the context of international procedures, when compared to municipal ones. Within the State, the tribunals are placed in a position of superior authority with respect to the parties. The judge can thus more easily assume a directive role in the process. In international law, the parties to proceedings are mainly States, and at the ICJ only States. They are jealous of their sovereignty and invested with significant power. Thus, the judge has to be more deferential in their regard. He or she must allow the States to have their debates on all aspects of the dispute they think to be important, without interfering too heavily in such choices. The judge has, moreover, often to follow a somewhat more formalistic and ceremonial procedure. He or she has to always give the impression that they are not pressed for time. The international judge has to motivate the judgments in a closer and somewhat more prolix fashion. Finally, it may happen that the Court has to develop the law in place of an absent or inactive legislator. This needs a longer time of reflection and a motivation of the judgment flowing from a much higher stance of intellectual and legal-political labour. However, these obstacles to the celerity of the procedure do not mean that the judge should not keep in highest esteem the principle of procedural economy. Conversely, they do mean that he or she will have to insert this principle carefully into the realm of international adjudication, which has its peculiarities.

II. The Definition of the Object of the Dispute: The Rule *'ne eat judex ultra petita partium'*

1. Content and Scope of the Principle

33 The principle *ne ultra petita* signifies that the object of the dispute on which the judge may confer executory rights is confined on the one hand by the claims of the applicant (maximum) and on the other by the claims of the respondent (minimum).[90] This is typical for 'private law proceedings'. The principle has been applied for a long time in the arbitral practice of the nineteenth and twentieth centuries. The sanction for any trespass of the principle by the judge had then been the voidness of the award for 'excès de pouvoir'.[91] The arbitrator being nothing more than the common organ of the parties in dispute, a particularly strict application of the principle was warranted: *extra compromissum, arbiter nihil facere potest.* The rule was maintained by the World Court. The ICJ affirmed it in eloquent terms in the *Asylum (Request for Interpretation)* case: 'one must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions'.[92] The principle was reaffirmed in the *Continental Shelf* case: 'The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must ... exercise that jurisdiction to its full extent.'[93]

[90] *Cf.* Thirlway, *ICJ Law and Procedure*, pp. 771 *et seq.*; Negri (2002), pp. 102 *et seq.*; Kolb, *ICJ*, pp. 919 *et seq.*; Forlati (2014), pp. 155 *et seq.*

[91] *Cf.* Castberg, 'L'excès de pouvoir dans la justice internationale', *Rec. des Cours* 35 (1931-I), pp. 353–472.

[92] *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395, 402.

[93] *Continental Shelf* (Libya/Malta), Judgment, ICJ Reports (1985), pp. 13, 23, para. 19.

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As already posited, the principle *ne ultra petita* means that the object of the dispute on which the judge can award executory rights is limited by the submissions of the applicant (maximum) and of the respondent (minimum). The applicant can demand less than he or she would be entitled to. In this case, the judge will not be allowed to award more than was asked for (even if he or she had been prepared to do so); and he or she cannot award anything different from what was demanded either. This means that applicants are *domini negotii* and that they are perfectly entitled to claim only the partial satisfaction of their rights. Conversely, the judge cannot award less than has been conceded by the respondent either. If the respondent has conceded certain remedies, there is an agreement with the claimant on these points and the judge must enforce it. The principle thus works both ways: it is relevant for the request of the applicant, but also for that of the respondent. The principle places a double frontier: at maximum what is demanded, at minimum what is conceded. In this way, the principle indicated the boundaries and hence the space within which the judgment will be able to move. If a case is brought to the Court by special agreement (*compromis*) there is no applicant or respondent in the formal sense. The rule then applies to the joint submission of the parties, *i.e.*, to the requests as contained in that special agreement[94] and to the claims individually made by each party in the context of the proceedings in order to sustain its case. The *Minquiers and Ecrehos* case[95] illustrates this position.[96] The principle thus fixes in advance the limits or the bounds of the judgment to be rendered.[97] 34

The *ne ultra petita* principle leans towards a concept of formal justice (justice as discretionarily demanded) rather than towards a concept of material justice (justice according to the full extent of the law). An excellent example of what has been said can be found in the award of compensation in the *Corfu Channel* case. The United Kingdom had claimed a total sum of damages of £843,947 from Albania, which had been found internationally responsible by the Court.[98] The Court nominated an expert in order to assess the damages independently from the submissions of the United Kingdom. The expert appointed came to the conclusion that the true damage suffered was higher than had been claimed by the United Kingdom. He was ready to admit some supplementary £16,000. The Court, however, responded that it 'cannot award more than the amount claimed in the submissions of the United Kingdom Government'.[99] The point was restated in the *Barcelona Traction* case, albeit in a context where further doubts[100] may arise: 35

> The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claims as formulated by the Belgian Government and it will not pursue its examination of this point any further.[101]

[94] See for instance *Minquiers and Ecrehos*, Judgment, ICJ Reports (1953), pp. 47 *et seq.*
[95] *Ibid.*, pp. 47 *et seq.*
[96] *Cf.* Fitzmaurice, *Law and Procedure*, vol. II, pp. 525 *et seq.*
[97] *Ibid.*, p. 579.
[98] *Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 36 (point one of the *dispositif*).
[99] *Ibid.*, Assessment of the Amount of Compensation due from the People's Republic of Albania, ICJ Reports (1949), pp. 244, 249. *Cf.* also Shaw, *Rosenne's Law and Practice*, vol. II, pp. 598–9.
[100] These doubts concerned the question whether the aspect dealt with was a true submission in itself or merely an argument made to sustain the principal submission (of Spain's responsibility).
[101] *Barcelona Traction*, Second Phase, ICJ Reports (1970), pp. 3, 37, para. 49.

The principle was also recalled in the 2007 *Bosnian Genocide* case between Bosnia and Serbia, where apparently Bosnia had not asked for more extensive remedies, but only for satisfaction.[102]

36 If the respondent hypothetically conceded more than the applicant demanded, the *petitum* is determined by the more limited demand of the applicant. However, the applicant could accept the offer of the respondent, settle the whole dispute in the favourable terms offered, and then withdraw its application. Again, the principle *ne ultra petita* is thus relevant in two senses: it determines the position of the Court in relation to the applicant, but also in relation to the respondent.

37 The *ne ultra petita* principle can be envisioned as a principle of procedure, as a principle linked to the merits of the case or as a principle engrafted upon the jurisdiction of the Court.[103] To some extent, it can be called both procedural and jurisdictional at the same time.[104] From the perspective of procedure, it is possible to hold that the principle directs the concrete action of the judge in the phase of decision. He or she will have to keep the decisional action within the *petitum* of the parties as it emerges from the applicable texts and from the concessions of the parties during the proceedings. In short terms, the principle guides the proceedings. From the perspective of jurisdiction, the principle can be seen as a direct outflow of the principle of consent, which determines the jurisdictional reach of the Court. Hence, the Court will be devoid of jurisdiction to grant certain rights or certain reparation if these claims are not covered by the *petitum*. The progressive definition of the object of the demand through the web of interactions of the parties in the proceedings, by constant demands and concessions, would thus retro-act on the jurisdiction of the Court by shaping its outer edges. Finally, from the point of view of the merits, it is possible to say that the principle concerns the determination of the substantive rights and obligations of the parties in the context of a specific case. If a party does not claim a right, this is tantamount to treating this right as inexistent for the purposes of these proceedings.

It seems unnecessary to take a definite stance on these doctrinal questions. The reality seems to be that the principle can take all the three complexions mentioned, according to context. The principle tends to operate at a post-preliminary stage, since it is linked to the allocation of rights and duties to the parties and it thus pertains to the merits. It directs the action of the Court (procedural aspect) on the merits (substantive aspect). In certain situations, the Court might, however, be interested to situate the principle on the jurisdictional plane in order to deny jurisdiction. This could be the case, *e.g.*, if the excess with regard to the *petitum* is doubled by a narrow title of jurisdiction. The Court might then hold that it cannot act in a certain way at once because of the principle *ne eat judex ultra petita partium* and because of the lack of jurisdiction. The Court can also use the principle at the jurisdictional stage in order to cut down unnecessarily lengthy legal arguments, mindful of the principle of procedural economy. Thereby, the Court could, moreover, signal to the parties that it is prepared to entertain a certain point if the parties agree to enlarge the *petitum*, but that it cannot entertain/consider it under the jurisdictional situation as it currently prevails. The choice between a procedural or jurisdictional

[102] See Gattini, 'Breach of Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', *EJIL* 18 (2007), pp. 711 *et seq.*; and Milanović, 'State Responsibility for Genocide: A Follow-Up', *EJIL* 18 (2007), pp. 692 *et seq.* *Contra*: Tomuschat, 'Reparations in Cases of Genocide', *JICJ* 5 (2007), pp. 908 *et seq.*

[103] *Supra*, MN 5.

[104] *Cf.* Shaw, *Rosenne's Law and Practice*, vol. II, p. 599.

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construction of the principle can thus sometimes be dependent upon a certain judicial policy.

The principle *ne ultra petita* in its strict sense must be held to apply only to contentious 38
proceedings.[105] A *petitum* in the proper sense of the term exists only in such proceedings. The parties are there the only *domini negotii* and the Court is subordinated to their will. Contrariwise, the Court is not to the same extent subordinate to the requesting organ in the context of advisory proceedings. It considers that it has inherent jurisdiction to contribute to some limited extent to the clarification of the true issue behind the question posed. Justice is here sometimes administered in a certain sense through a 'four hands' interaction, the request being in certain cases clarified and streamlined. This responsibility vests principally in the requesting organ, but secondarily possibly also in the Court itself. On the other hand, the Court does not feel entitled to upset the economy of the question posed. The *Kosovo* advisory opinion of 2010 shows graphically that the Court constrained itself to answer the narrow question that the General Assembly had asked, even if that question touched only upon a small segment of the legal issues pending in that context. In this perspective, there is a sort of *petitum* even in the advisory proceedings.[106] The Court feels inherently empowered to clarify (and thereby to incidentally develop to some degree) the question posed, but it does not consider itself free to alter the question to a point where it would turn into a legally and politically different request. This course must be commended. The formulation of the question is a political matter. It is thus not for the court to alter it. The Court must be concerned only with the clarity of the question, the true intention of the requesting organ, and the respect for its judicial integrity. Policy issues are not its domain. Hence, the conclusion is that the principle *ne ultra petita* applies formally only to contentious proceedings, but that it permeates, to some extent and materially, also advisory proceedings.

Conversely, the *ne ultra petita* rule formally applies to requests for the interpretation of judgments according to Article 60 of the ICJ Statute. For the interpretation the Court is asked to perform, the conclusions and demands of the parties in the previous judgments are relevant and binding. The Court can interpret the judgment concerned only within the four corners of what the parties had requested in the original proceedings. This was forcefully recalled in the *Preah Vihear* (*Request for Interpretation*) case.[107] Thus, for the purposes of Article 60 of the Statute, the *ne ultra petita* rule has a forward-reaching effect. The parties are not entitled to request from the Court to do more than to interpret its judgment (or to revise it under Article 61 of the Statute), *i.e.*, to modify that judgment. In this sense, the original *petita* are frozen. The reason is that the Court is not entitled to modify one of its judgments even if the parties jointly so demand. The Statute makes no provision for such a power of the Court, and thus the latter does not possess it.

[105] Contrary to what was erroneously maintained by this author in the first edition of the present commentary, at MN 34 of the present entry. The quote of the *Judgement No. 158 (Review)*, Advisory Opinion, ICJ Reports (1973), pp. 166 *et seq.* there made is taken out of context, and if read carefully in context, not at all relevant on the point at issue.

[106] The Court there reformulated the question posed (and recalled its case law on that point) but refused to enlarge the circle of questions to be addressed: Advisory Opinion, ICJ Reports (2010), pp. 403, 423 *et seq.*, paras. 49 *et seq.*

[107] Judgment, ICJ Reports (2013), pp. 281, 307, para. 71, with references to the previous case law. The Court says: 'The Court in 1962 [original judgment] necessarily made an assessment of the scope of the *petitum* before it; Article 60 of the Statute does not give the Court the power today to substitute a different assessment for that made at the time of the Judgment.'

An agreement of the parties, applicable under Article 38, para. 1 (a) of the Statute, could not prevail over this state of affairs: the Statute is a particular type of *jus cogens* for the Court, which the latter cannot depart from. The parties can however in most cases agree how to implement—or not—the judgment of the Court by altering the law applicable between them (as the Court had determined it) through subsequent agreements. In such a case, the *lex posterior* rule applies.

2. Limitations on the Principle

39 It remains to be seen what are the limitations of the principle and what is its proper scope of application.[108] First of all, according to the overwhelming view held in the literature, the principle applies only to the submissions of the parties, *i.e.*, to the determination of the object of the dispute. It does not apply to the arguments of the parties, to questions of evidence, or to aspects of jurisdiction.[109]

40 It is accepted that the Court is free to base its decision on whatever legal and factual grounds it chooses.[110] It is not bound by the legal arguments of the parties: *jura novit curia*; the law is a matter for the Court. In effect, the Court has sometimes had recourse to arguments quite different from those proposed by the parties in order to resolve the case. An example of this practice is furnished by the *North Sea Continental Shelf* cases,[111] where the Court shaped a doctrine on the legal handling of continental shelf delimitations which went largely beyond what the parties had in effect pleaded. Moreover, the Court may in any case take points of fact or of law on the merits *proprio motu*. By the same token, the judge is not bound by the evidence furnished by the parties, but can inquire further, nominate an expert, or make a 'descente sur les lieux'.[112]

41 Moreover, the principle does not apply to jurisdictional matters and to admissibility. There, the proper administration of justice is at stake, since the Court can act on the merits only if certain objective and peremptory conditions are met. It therefore has to ascertain itself whether the required conditions are met.[113] These represent inherent limitations upon its field of action, limitations of which the Court alone is the guardian. Thus, the Court must, for example, objectively satisfy itself that there is a dispute, that this dispute is not moot and that it is legal in nature, that the parties appearing are States (as required by Article 34), and that there is no litispendence.[114] These questions do not

[108] *Cf.* Fitzmaurice, *Law and Procedure*, vol. II (1986), pp. 529–31; Kazazi (1996), pp. 42 *et seq.*

[109] *Cf.* Fitzmaurice, *Law and Procedure*, vol. II (1986), pp. 529 *et seq.* Conversely, Shihata (1965), p. 219 seems prepared to apply the principle to matters of jurisdiction.

[110] *Cf.* Sereni (1965), p. 1714 with fn. 3; Fitzmaurice, *Law and Procedure*, vol. II (1986), p. 531. As to the case law, *cf. Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298–9, para. 46 (with further references).

[111] *North Sea Continental Shelf*, Judgment, ICJ Reports (1969), pp. 3 *et seq.* For brief comment on the Court's decision *cf.* Jennings/Higgins/Tomka, General Introduction, MN 84–87.

[112] For more details on the Court's power to obtain evidence *cf.* Tams/Devaney on Art. 50, especially MN 1–7; and Walter on Art. 44 MN 6–24 respectively. On site visits *cf.* further Bedjaoui, 'La "descente sur les lieux" dans la pratique de la Cour internationale de Justice et de sa devancière', in *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (1998), pp. 1 *et seq.*; Rosenne, 'Visit to the Site by the International Court', in *Liber Amicorum Judge M. Bedjaoui* (1999), pp. 461 *et seq.*

[113] For more on this point *cf.* Tomuschat on Art. 36 MN 30–32.

[114] This point was clearly affirmed in paras. 33 *et seq.* of the judgment in the *Legality of Use of Force* case (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 294. In that case, the Court also clearly affirmed that, even if the parties happened to agree, it was not bound by their views on the matter (*ibid.*, pp. 296, para. 36).

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depend on the consent of the States parties to the dispute, but on objective conditions of the Statute ('objektive Prozessvoraussetzungen'). In the words of McNair, the Court 'cannot regard a question of jurisdiction solely as a question *inter partes*'.[115] There are inherent limitations of the type discussed in the *Northern Cameroons* case;[116] and hence, the submissions of the parties and the principle of consent cannot determine the action of the Court in that field. As the Court very aptly recalled, the 'seising of the Court is one thing, the administration of justice is another. The latter is governed by the Statute, and by the Rules.'[117] Consent and party autonomy govern the first, compulsory rules on the functioning of the Court govern the second.

The Court, in its practice, has always acted on that basis. It departed from the submissions and pleadings of the parties in a great series of jurisdictional decisions, such as, *inter alia*, the *Monetary Gold, Nottebohm*, or *Aerial Incident of 27 July 1955* cases,[118] as well as the *Barcelona Traction, Nuclear Tests*, or *Nicaragua* cases. The *Nuclear Tests* cases offer a telling example. There, the French government declined to appear and argued that the Court manifestly lacked jurisdiction. Conversely, the applicant States took the view that the Court was competent and (on the basis of several arguments) that France had breached international law. The applicants did not raise the issue of the binding nature of the French unilateral declarations, but rather denied it. However, the Court spoke of an 'inherent power' to assess the true scope of the dispute and to raise a 'question which it finds essentially preliminary, namely the existence of a dispute'.[119] It then interpreted the submissions of the applicants[120] as primarily aimed at securing the cessation of the atmospheric nuclear tests, putting aside claims of reparation for the injuries suffered.[121] On the basis of this interpretation, the Court felt free to find that the application had already been satisfied by various declarations of the French government whereby it had engaged itself (according to the Court through binding unilateral declarations) not to continue such atmospheric tests. As a consequence, there was no dispute subsisting at the moment of the decision. Consequently, the claim no longer had any object.[122] This chain of reasoning completely departed from the submissions of the parties. The Court did not do less or more than had been requested; it did something different from what had been requested. Neither France nor the applicants had ever considered that the unilateral declarations at stake were legally binding; and yet, the Court based its findings essentially on that holding. It is not suggested that this course of conduct violated the *ne ultra petita* principle. For that principle specifically does not apply to jurisdictional matters.

However, it is necessary to ask whether the exclusion of jurisdictional points from the 42
reach of the *ne ultra petita* rule is absolute. It could indeed be argued that the exclusion must cover all the inherent jurisdictional limitations, of which the Court is the sole guardian (*i.e.*, the Statute's *jus cogens* as described earlier).[123] Conversely, it could be said

[115] *Anglo-Iranian Oil Co.*, Judgment, Ind. Op McNair, ICJ Reports (1952), pp. 116 *et seq.*
[116] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15 *et seq.*; and *cf. supra*, MN 27.
[117] *Nottebohm*, Preliminary Objection, ICJ Reports (1953), pp. 111, 122.
[118] On the cases thus quoted *cf.* Shihata (1965), pp. 221–2.
[119] *Nuclear Tests* (Australia v. France), Judgment, ICJ Reports (1974), pp. 253, 260, para. 24.
[120] *Ibid.*, p. 262, para. 29: 'It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions.'
[121] *Ibid.*, paras. 25 *et seq.* For the opposite solution *cf.* the convincing Joint Diss. Op. Onyeama, Dillard, Jiménez de Aréchaga, and Waldock, *ibid.*, pp. 312 *et seq.*
[122] *Ibid.*, pp. 270–2.
[123] *Cf. supra*, MN 10.

that the exclusion need not necessarily cover all the other jurisdictional points, where the consent of the parties is paramount and where we are thrown back on a 'private law' type of relation. The exclusion thus certainly covers all the previously mentioned objective conditions of the proceedings ('objektive Prozessvoraussetzungen'), conditions which the Statute puts beyond the disposal of the parties.[124] But other aspects of jurisdiction are indeed left to the parties, such is the case for the existence of consent necessary to establish the competence of the Court. It is well known that the Court will not necessarily search for such consent to the extent that the respondent does not raise the matter in the form of an objection, whether formal or informal (*forum prorogatum*).[125] If there is no further (objective) problem of jurisdiction, the Court will not be entitled to decline its competence on account of the fact that, formally, consent had not been given although materially it had to be held to have been given. The procedure at the Court is not formalistic and the maxim *boni judias est ampliare jurisdictionem* applies. But is the point truly relevant for the *ne ultra petita* principle? As far as the *forum prorogatum* rule is concerned, the point is merely one of possessing jurisdiction or not. One party necessarily argues that the Court has jurisdiction over a point or a dispute in general. With respect to such a submission, the Court cannot in any way accord an *aliud*. The *forum prorogatum* principle allows it only to affirm jurisdiction and nothing more. Thus, it will necessarily stay within the realm of the submission of the applicant.[126] The principle will therefore not be infringed in any case. Consequently, even in such non-peremptory matters of jurisdiction, the *ne ultra petita* rule remains relevant, but in another sense: it is inherently respected.

43 As a second limitation of the *ne ultra petita* principle, it must be stressed that the principle does not apply to incidental proceedings. Thus, in the area of provisional measures according to Article 41 of the ICJ Statute, the Court has stressed on many occasions that it can indicate such measures *proprio motu*.[127] Provisional measures indicated independently by the Court may go beyond what the applicant had demanded.[128] The aim of the *proprio motu* measures is indeed different from the measures requested by one party. If the applicant State requests provisional measures, it will normally do so in order to protect and safeguard its own rights from being irreparably infringed by the other party. Conversely, when the Court leans towards indicating provisional measures *proprio motu*, it aims at preventing any escalation of the dispute which would be prejudicial to the efficacy of the peaceful settlement and at keeping proper relations among the parties.[129] The perspective is thus broader and the aim searched for is more akin to a public interest. Hence, in this area of independent judicial action, the submissions of

[124] *Cf. supra*, MN 41.

[125] On *forum prorogatum cf.* Tomuschat on Art. 36 MN 41 and Yee on Art. 40 MN 115–133; and further Shaw, *Rosenne's Law and Practice*, vol. II, pp. 724 *et seq.*, Rosenne, *Law and Procedure of the International Court*, vol. I (1965), pp. 344 *et seq.*; Kolb (2000), pp. 628 *et seq.* (with further references).

[126] Or exceptionally the respondent: *cf. Monetary Gold*, Preliminary Question, ICJ Reports (1954), pp. 19 *et seq.*

[127] On the case law *cf.* Oellers-Frahm/Zimmermann on Art. 41 MN 67–69 as well as Thirlway, 'Law and Procedure, Part Twelve', pp. 107 *et seq.* From the Court's jurisprudence *cf.* notably *Land and Maritime Boundary*, Provisional Measures, ICJ Reports (1996), pp. 13, 22–3, para. 41; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 128, para. 44. The legal basis for this power is in Art. 75, para. 1, of the Rules of Court (1978).

[128] Art. 75, para. 2, of the Rules of Court (1978).

[129] *Cf.* further Oellers-Frahm/Zimmermann on Art. 41 MN 18 *et seq.*, especially MN 22.

the parties cannot limit the autonomy of the Court. Indicating provisional measures *proprio motu* is an inherent right of the Court, which is part of its general power to ensure a proper handling of proceedings and to safeguard the integrity of the judicial function.

There is a third practically important and theoretically inherent 'limitation' to the 44
ne ultra petita rule. Indeed, the Court first has to ascertain what the true *petitum* of the parties is, as that is not necessarily clear. The principle *ne ultra petita* supposes the *petitum* to be established, but in practice it must thus first be ascertained. This first step is to be taken through an interpretation of the submissions.[130] The Court has affirmed its right to interpret the submissions of the parties in order to discover their true scope. Thus, in the *Nuclear Test* case, it bluntly emphasized: 'It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions.'[131] The Court had recourse to an elaborated interpretation of the *compromis* in the *Minquiers and Ecrehos* case.[132] A perusal of practice shows that it has gone into more or less extensive interpretations of the special agreements in almost all cases concerning territorial and maritime delimitations, which involve difficult points in the interplay between the submissions of the parties and the application of the law. One may recall the difficulties encountered in the *Gulf of Maine* case.[133] To some extent, the interpretation performed by the Court is always a creative act, since there is no understanding of a text without some elements of legal creativity. Therefore, the Court, through the device of interpretation, may in some way reshape *the petitum* of the parties more or less infinitesimally, or even more or less boldly. There is normally no harm in such a judicial action; it is inherent in the application of legal norms through a third person.[134] Obviously, the interpretation should not be so bold as to engage openly in a revision of the text. But to the extent that it does not go that far, the course is perfectly proper and qualifies the true scope of the *ne ultra petita* principle.

The principle *ne ultra petita* is not a peremptory norm. It can be derogated from by 45
common consent of the parties. Thus, the parties can give the Court the freedom to award rights *ultra petita*. The possibility or usefulness of a derogation can obviously be questioned on the basis of logic. Indeed, to some extent, by granting to the Court discretion on what it will award, the parties already agree to receive whatever the Court decides, and therefore include this very point in their *petitum*. Technically, it could thus be said that what the Court will in such a case award will by definition be within the scope of the *petitum*. Moreover, the principle *ne ultra petita* understood in this way could be called non-derogable logically, because by purportedly derogating from it, one indeed applies

[130] *Cf.* Shihata (1965), p. 219.

[131] *Nuclear Tests* (Australia v. France), Judgment, ICJ Reports (1974), pp. 253, 262, para. 29.

[132] *Cf.* Fitzmaurice, *Law and Procedure*, vol. II, pp. 528–9.

[133] *Cf. Gulf of Maine*, Judgment, ICJ Reports (1984), pp. 246, 252 *et seq.* (especially with respect to the triangle in which, according to the wishes of the parties, the final boundary point was to be located). For further analysis *cf.* also Kolb (2001), pp. 282 *et seq.*

[134] This has been shown by modern legal hermeneutics. *Cf. e.g.*, Kriele, *Theorie der Rechtsgewinnung* (1967), pp. 67 *et seq.*; Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (1970); Perelman, *Justice, Law and Argument* (1980), pp. 125 *et seq.*; Hassemer (ed.), *Dimensionen der Hermeneutik* (1984); Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn., 1991), pp. 11 *et seq.*, 283 *et seq.*, 312 *et seq.*, 366 *et seq.*; Kaufmann, *Beiträge zur juristischen Hermeneutik* (2nd edn., 1993).

it in a larger way. Thus, *e.g.*, if the United Kingdom in the already quoted *Corfu Channel* case[135] had not claimed a specific sum of damages but asked the Court to award damages 'to its discretion', the Court could have taken up that claim. The Statute does not oblige a party to claim a specific amount of damages. And in any event, the *petitum* would have covered any sum awarded.

Is the Court free to take up such a sweeping invitation of the parties? If there is nothing in the request which contravenes the judicial integrity of the Court, the answer must be in the affirmative. In effect, the Court could perfectly well go beyond specific *petita*, if the parties so wish, without infringing its role as a court of justice. The Court will certainly not be able to award extra-legal positions. But the objective law applicable furnishes a sufficient array of remedies to which the Court could stick in such cases. It could thus (at its discretion) award the full legal consequences attached by the applicable legal norms to the facts it has established to its satisfaction. Moreover, if the Court is allowed to adjudicate *ex aequo et bono* on the basis of the consent of the parties[136]—*e.g.*, outside the strict law (but not contrary to justice)—it must be all the more able to adjudicate in strict law but with some discretion as to the rights awarded. This aspect constitutes a further limitation on the material reach of the *ne ultra petita* principle. The submissions can accordingly be generic and indeed quite unlimited, allowing the judge to award legal remedies and rights with a certain degree of discretion.

3. Action infra petita

46 Finally, it needs to be assessed whether the Court may decide *infra petita* or whether in some cases, it has to remain *infra petita*.[137] It is obvious that the Court may decide *infra petita* if it finds that the submissions of a party are not entirely proved or not entirely justifiable in law. The Court is not obliged to grant either the full amount of rights claimed or nothing at all; it can grant less (but not something different) than demanded. It will still then be within the reach of the submission. However, there are cases where the Court may be obliged (and not simply entitled) to refuse to grant the full *petitum*. This is the case when the rights of third States are affected to the extent that they are made the very object of the submissions of the parties. Here, the so-called *Monetary Gold* principle applies.[138] The Court will decline to exercise jurisdiction properly conferred if it must thereby assess and adjudge, preliminarily, the rights of third States that have not consented to the Court's jurisdiction.[139] In its more recent jurisprudence, the Court has distinguished from this case situations where the determination of the rights of the litigating parties implies that the position of a third State

[135] *Cf. supra*, MN 35.

[136] *Cf.* Art. 38, para. 2; and Pellet/Müller on Art. 38 MN 157–175 for comment.

[137] *Cf.* Forlati (2014), pp. 113 *et seq.*

[138] For a more detailed treatment *cf.* Tomuschat on Art. 36 MN 21–25; Brown on Art. 59 MN 64–67 and Miron/Chinkin on Art. 62 MN 30–33.

[139] *Cf.* the *Monetary Gold*, Preliminary Question, ICJ Reports (1954), pp. 19, 32:

> The first Submission in the Application centres on a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether it is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions—questions which relate to the lawful or unlawful character of

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will simultaneously (or consequently) be affected, *e.g.*, because of a solidarity of rights. Here, the rights of the third State need not be scrutinized *before* the Court is able to assess those of the parties. In such a case, the Court will not decline to exercise its jurisdiction and to adjudge the rights of the parties to the full extent of the *petitum*, if it finds this to be warranted.[140]

Furthermore, some intervention cases also prompt interesting insights into the question of the relevant *petitum* and the rights of third States. For a long time, the Court has been highly deferential regarding the consent of the main parties to the proceedings and has refrained from forcing upon them any type of intervention by a third State against their wishes.[141] Thus, in the *Continental Shelf* case (Libya/Malta), Italy asked for leave to intervene pursuant to Article 62 in order to safeguard its legal interests. The Court refused to allow the intervention since it found that such an intervention would have required the consent of Libya and Malta, which, however, declined to give it.[142] When the case came to the merits stage, the Court found it impossible to delimit the continental shelf in all areas covered by the *petitum* of the parties as formulated in their special agreement. It held that the special agreement had to be interpreted as meaning that the parties wanted the Court to adjudge only areas that would definitively belong to one of the two parties. Thus, it should exclude all the areas in which a third State could claim rights, since such areas could not be definitively adjudged in the absence of the concerned third State to the proceedings.

certain actions of Albania vis-à-vis Italy—only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania.

The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given its consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without its 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.

[140] *Cf. Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 260–1, para. 55: 'In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim. Australia, moreover, recognizes that in this case there would not be a determination of the possible responsibility of New Zealand and the United Kingdom *previous* to the determination of Australia's responsibility. It nonetheless asserts that there would be a *simultaneous* determination of the responsibility of all three States and argues that, so far as concerns New Zealand and the United Kingdom, such a determination would be equally precluded by the fundamental reasons underlying the *Monetary Gold* decision. The Court cannot accept this contention. In the *Monetary Gold* case the link between, on the one hand, the necessary findings regarding Albania's alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical; as the Court explained, "In order ... to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her" (ICJ Reports (1954), p. 32.) In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.' (empasis in original).

[141] *Cf.* further Miron/Chinkin on Art. 62, especially at MN 25 *et seq.* It should be noted that the Court changed its jurisprudence in the *Land, Island and Maritime Frontier Dispute*, Application to Intervene, ICJ Reports (1990), pp. 92, 131 *et seq.*, paras. 93 *et seq.*

[142] *Cf. Continental Shelf* (Libya/Malta), Application to Intervene, ICJ Reports (1984), pp. 3, 18 *et seq.*, paras. 28 *et seq.* and the much more convincing dissent by Judge Schwebel, *ibid.*, pp. 131 *et seq.*, paras. 3 *et seq.*

Hence the Court limited itself to a small area where Italy claimed no rights.[143] This course can be seen as a simple question of interpretation of the special agreement. It may be said that the *petitum* of the parties was indeed so limited. But a more realistic approach cannot by any stretch of the imagination hold that the parties had contemplated such a truncation of the area to be delimited. Rather, it was the interest of protecting the rights of the third party which eventually prevailed—albeit in a flawed way.[144] The Court thus in effect ruled *infra petita*, by reason of third parties' rights or interests. The Court chose an analogous course of conduct in the more recent *Land and Maritime Boundary* case.[145] In a still different situation, the Court held that it could not definitively decide on the sovereignty over a low-tide elevation (South Ledge), since it had not been given the power to delimit the territorial waters of the contending States.[146] Only if it had delimited these waters could it have determined in the waters of which State the low-tide elevation fell and which State hence possessed sovereignty over it. Justified or not, this course was tantamount to pronouncing *infra petita*, and to do so for legal reasons.

Sometimes, the Court is not legally bound to apply the *infra petita* approach, but natural facts can strongly suggest its application. Hence, in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, the ICJ refrained from issuing a finding on an island situated near the estuary of the Coco River, giving as a reason the constant change in the insular formations in that alluvial zone.[147] This can be seen as an application of an *infra petita* approach commanded by natural facts.

Conversely, the Court is not bound to decline to exercise the full range of its powers if that exercise may have implications or consequences for another case which is pending before it. This aspect was affirmed clearly in the eight *Legality of Use of Force* cases between Serbia and NATO Member States.[148] It would indeed not be warranted that the Court should refrain from exercising a jurisdiction properly conferred upon it because of the fortuitous fact that another case is pending before it on which the present one could have some indirect effects. If that were the case, the way would be paved for different abusive and dilatory tactics. It could thus be sufficient to seise the Court of a new case in order to hamper its decision in an already pending case. No legal reason compels the Court to open the door to such unfortunate consequences.

Can action *infra petita* in some cases be considered as a negative excess of power? If two States subject a dispute to the ICJ, to another judge or arbitrator, or to some other adjudication organ, could the omission of the organ seised to entertain certain matters or to respond to certain questions constitute an 'excess of mandate'? This was pleaded in the *Delimitation of the Abyei Area* arbitration (2009).[149] In interpreting the arbitration agreement the Tribunal found that the parties had agreed to review only excesses of mandate

[143] *Continental Shelf* (Libya/Malta), Judgment, ICJ Reports (1985), pp. 13, 25–8, paras. 21–3.
[144] *Cf.* again Diss. Op. Schwebel, *ibid.*, pp. 172 *et seq.*
[145] *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303, 421, para. 238.
[146] *Pedra Branca*, Judgment, ICJ Reports (2008), pp. 12, 101, paras. 298–9.
[147] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, Judgment, ICJ Reports (2007), pp. 659, 704, para. 145.
[148] *Cf. e.g.*, *Legality of Use of Force* case (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 296, para. 40.
[149] RIAA, vol. XXX, pp. 218 *et seq.*

by action *ultra petita*;[150] moreover, it found that the substantive excesses of power concerned only the failure to state sufficient reasons for some of the relevant findings.[151] A possibly *infra petita* omission by the legal operator to address some question asked in the special agreement (or analogously in the application of the claimant) should be distinguished from a *non liquet*. This latter notion concerns the impossibility to decide on the merits either because of insufficient information as to facts (although in many cases the judge will be entitled in such cases to reject the claim for non-satisfaction of the burden of proof) or because of absence of clarity as to the applicable law. In these cases, the judge considers that he or she cannot decide without infringing the rules regulating his or her function, *i.e.*, without breaching the law. In our context, the issue was conversely framed as an omission which did not seem, a priori, to be motivated by such reasons, all the more since the judge did not state them at all in the judgment. The answer to the question posed must start by a careful interpretation of the judgment. If it turns out that the judge, expressly or impliedly, addressed the question but rejected the claim, or considered that the question did not need to be decided in the light of other pronouncements in the judgment, or considered that he or she was unable to decide for some of the reasons stated above in this section, *cadit quaestio*. If, conversely, the judge failed to address the relevant issues without any apparent motive, perhaps by simple inadvertence, the judgment is defective. The matter ought to be brought back to that judge under the original title of jurisdiction, or to be submitted to some other organ (or alternatively solved by negotiation). By the nature of things, such situations of defective *infra petita* action are rare in general international law. They occur with some more frequency within the framework of annulment proceedings of ICSID awards: there, the annulment committees have treated failure to exercise jurisdiction as an excess of power.[152]

For a commentary on matters of *evidence, burden of proof*, and *handling of facts*, reference should be made to a separate contribution in the present volume.[153]

D. Substantive Principles Related to the Proceedings

I. General Classification

There are two different types of substantive principles relevant to the procedural law of international tribunals such as the ICJ. The first class comprises principles of substance directly linked to the pronouncements of the Court, namely the principle of *res judicata* and the duty to state the reasons for its decision. These principles are the object of specific provisions of the Statute (Articles 59 and 56 respectively) and will be addressed in the contributions dealing with these provisions.[154] The second class of substantive principles flows from the principle of loyalty between the parties; it includes the prohibition of 47

[150] *Ibid.*, p. 313, para. 440.

[151] *Ibid.*, pp. 384 *et seq.*

[152] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 86; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, 16 April 2009, para. 80.

[153] See Benzing, Evidentiary Issues. For the position of the present author on these issues, MN 43 *et seq.* of the first edition of this commentary could still be consulted.

[154] *Cf.* Brown on Art. 59 MN 30 *et seq.*; and Damrosch on Art. 56 MN 1–26 respectively.

abuse of procedure, estoppel, and the maxim *nemo commodum capere potest de sua propria injuria*. All of these principles rest upon the general principle of good faith.

II. The General Duty of Loyalty between the Parties (Principle of Good Faith)

48 The most fundamental principle of substantive law applicable to judicial proceedings in general is the proposition that, by engaging in proceedings before an international tribunal, the parties enter into a legal relationship characterized by mutual trust and confidence. Thus, the parties are bound by a general commitment of loyalty among themselves and towards the Court.[155] This duty flows from the principle of good faith recognized in general international law and stipulated also in Article 2, para. 2 UN Charter as a general duty of the Member States.[156] The principle of good faith has a series of 'concretizations' in the field of procedural law.[157]

First, it requires the parties not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings. As has already been said, the proceedings are also characterized by their adversarial nature and the opposing claims of the parties. Thus, it is perfectly open to a party to further its own interests even at the expense of the other party. But this selfishness has some limits. It cannot disregard requirements of a proper functioning of the procedure as such.[158] Thus, a party may not deliberately present false or forged pieces of evidence.[159] It may not impede the production of evidence by the other party by having recourse to pressure or any other equivalent device either. Second, the principle forms the basis of the more specific rule on the prohibition of abuse of procedure.[160] Third, it is the basis for the application of procedural estoppel or of the maxim *nemo commodum capere potest de sua propria turpitudine*. The last two propositions can be applied to evidentiary issues. To that extent, they can be said to govern the proceedings of international tribunals. It is proposed to focus here on the three aspects of abuse of procedure, estoppel, and *nemo commodum*.

1. The Prohibition of Abuse of Procedure

49 Abuse of procedure is a special application of the prohibition of abuse of rights, which is a general principle applicable in international law as well as in municipal law.[161] It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established, especially for a fraudulent, procrastinatory, or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process, or for purposes of pure propaganda. To these situations, action with a malevolent intent or with bad faith can be added. In a synthetic definition, it can be said that abuse of procedure consists in the use of procedural instruments and

[155] *Cf.* Sereni (1955), p. 1714.
[156] On this provision, see Kolb, in Simma, *UN Charter*, Art. 2, para. 2, *passim*.
[157] *Cf.* the detailed analysis in Kolb (2000), pp. 579 *et seq.*
[158] *Cf. ibid.*, pp. 587 *et seq.* (in the context of negotiation).
[159] See Reisman/Skinner, *Fraudulent Evidence before Public International Tribunals* (2014).
[160] *Cf. infra*, MN 49 *et seq.*
[161] Kolb (2000), pp. 429 *et seq.* There is no room here to venture into a description of the various contents of the principle.

entitlements with a fraudulent, malevolent, dilatory, vexatious, or frivolous intent, with the aim to harm another or to secure an undue advantage to oneself, with the intent to deprive the proceedings (or some other related proceedings) of their proper object and purpose or outcome, or with the intent to use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted (*e.g.*, pure propaganda).[162] The existence of such an abuse is not easily to be assumed; it must be rigorously proven. The concept of abuse of procedure cannot be caught completely in the abstract, since it can relate to a variety of different situations.

The case law of the ICJ is replete with instances where the principle of abuse of procedure has been invoked. The Court, however, has never found the conditions for an application of the principle to be fulfilled. But it did not reject the concept as such; it merely affirmed that its application was not warranted in the cases under consideration. In each case, its analysis seems to have been correct. 50

The contentious cases in which the principle has so far been invoked are the following:[163]

- *Ambatielos* (claim of abuse of procedure by excessive delay in presentation of a claim);[164]
- *Right of Passage over Indian Territory* (claim of abuse of procedure by application in too short a time span after deposit of an optional declaration, 'surprise attack');[165]
- *Barcelona Traction* (claim of abuse of procedure by a new application with the same arguments after having discontinued a case);[166]
- *Nicaragua* (claim of futility and political propaganda intent by request of provisional measures);[167]
- *Border and Transborder Armed Actions* (claim of abuse of procedure by institution of judicial proceedings in parallel with the Contadora Process; claim of abuse by the political inspiration of the request and by its artificiality);[168]
- *Arbitral Award of 31 July 1989* (claim of abuse of procedure by invoking a declaration of the president of the arbitral tribunal in order to cast doubt on the validity of the award);[169]
- *Certain Phosphate Lands in Nauru* (claim of abuse of procedure to the extent that Nauru demanded from the respondent an attitude which it did not itself display);[170]
- *Application of the Genocide Convention* (claim of abuse of procedure by the request for provisional measures due to political motives and repetition of the request);[171]

[162] Gestri, 'Considerazioni sulla teoria dell'abuso del diritto alla luce della prassi internazionale', *RDI* 77 (1994), pp. 27 *et seq.*, 43 *et seq.* As has been said by the Australian High Court in the *Csr Ltd. v. Cigna Insurance Australia Ltd.* case, *ILR* 118 (1997), pp. 409–10: 'The counterpart of a court's power to prevent its process being abused is its power to protect the integrity of those processes once set in motion.'

[163] *Cf. ibid.*, pp. 640 *et seq.*

[164] *Ambatielos*, Merits, ICJ Reports (1953), pp. 10, 23.

[165] *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146–7.

[166] *Barcelona Traction*, Preliminary Objection, ICJ Reports (1964), pp. 6, 24–5.

[167] *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169, 178–9, paras. 21–5.

[168] *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 91–2, paras. 51 *et seq.*, pp. 105–6, para. 94.

[169] *Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 63, paras. 26–7.

[170] *Nauru*, Judgment, ICJ Reports (1992), pp. 240, 255, paras. 37–8.

[171] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 336, para. 19; *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 622, para. 46.

- *Aerial Incident of 10 August 1999* (claim of abuse of procedure by invocation of a reservation to an optional declaration whose content was purportedly directed only against Pakistan, thus being discriminatory);[172]
- *Avena* (claim of abuse of procedure by delay in the presentation of the request).[173]

The conclusion to be drawn from these precedents is not that abuse of procedure is an unrecognized principle, for, as it will be shown in the following paragraphs, it has been applied by other international tribunals. It is rather that the threshold for admitting an abuse is quite high, and possibly exacting. Moreover, in most ICJ cases, the claims that there had been an abuse of procedure were made in a rather unconvincing way, as an appendix to other, more compelling arguments.

To the contrary, rules on abuse of procedure have developed with particular strength in certain branches of international law. Thus, in human rights law, petitions and communications are declared inadmissible when there is an abuse of procedure. This has been the case, for example, under the mandate system of the League of Nations and under the UN trusteeship system,[174] and later under ancient Article 27, para. 2, of the ECHR, now Article 35, para. 3, ECHR (1950),[175] Rule 96, cl. c, of the Rules of Procedure of the Human Rights Committee under the CCPR (2012),[176] Article 56, para. 3 of the African Charter on Human Rights (requests written in disparaging or insulting language),[177] or Article 22, para. 2, of the Convention against Torture

[172] *Aerial Incident of 10 August 1999*, Judgment, ICJ Reports (2000), pp. 12, 30, para. 40.

[173] *Avena*, Judgment, ICJ Reports (2004), pp. 12, 37–8, para. 44.

[174] Schwelb, 'The Abuse of the Right of Petition', *Revue des droits de l'homme* 3 (1970), pp. 313 *et seq.*, 324-6.

[175] Convention on the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5, Art. 35, para. 3: 'The Court shall declare inadmissible any individual application … with it considers … an abuse of the right of application.' See *e.g.*, Appanah, 'À la recherche posthume de l'intention du requérant: l'identification délicate de la requête abusive au sens de la Convention', *Revue trimestrielle des droits de l'homme* 26 (2015), pp. 1053 *et seq.*; Jungwiert, 'Sur la requête abusive devant la Cour européenne des droits de l'homme', in *Essays in Honor of J. P. Costa* (2011), pp. 329 *et seq.*; Flauss, 'L'abus de droit dans le cadre de la Convention européenne des droits de l'homme', *Revue universelle des droits de l'homme* 4 (1992), pp. 461 *et seq.*; Hottelier, 'La requête abusive au sens de l'article 27, 2 de la Convention européenne des droits de l'homme', *Revue trimestrielle des droits de l'homme* 2 (1991), pp. 301 *et seq.*; Spielmann/Spielmann, 'La notion d'abus des droits de l'homme à la lumière de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales', in *L'abus de droit et les concepts équivalents: Principe et applications actuelles* (Council of Europe, ed., 1990), pp. 60 *et seq.*; Palmieri, 'L'abuso del diritto di ricorso individuale dinanzi alla Commissione europea dei diritti dell'uomo', in *Essays in Honor of G. Sperduti* (1984), pp. 623 *et seq.*; Monconduit, 'L'abus du droit de recours individuel devant la Commission européenne des droits de l'homme', *AFDI* 17 (1971), pp. 347 *et seq.* The interpretation is restrictive: *Aydin v. Turkey*, Appl. No 23178/94, ECHR 1997-VI, paras. 59–61; *Andronicou and Constantinou v. Cyprus*, Appl. No 25052/94, ECHR 1997-VI, paras. 163–5; *Assenov and Others v. Bulgaria*, Appl. No. 24760/94, ECHR 1998-VIII, paras. 87–9; *Buscarini and Others v. San Marino*, Appl. No. 24645/94, ECHR 1999-I, pp. 605, 613, paras. 20–1. In the more recent case law, see *Saba v. Italy*, Appl. No. 36629/10, 1 July 2014, paras. 49 *et seq.*; *Flores Quiros v. Spain*, Appl. No. 75183/10, 19 July 2016, para. 21; *Bagdonavicius e.a. v. Russia*, Appl. No. 19841/06, 11 October 2016, para. 64; *Kanaginis v. Greece*, Appl. No 27662/09, 27 October 2016, paras. 23–4.

[176] Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev.10 (2012), Art. 96, cl. c; Gestri, *supra*, fn. 162, p. 31; Cassese, 'The Admissibility of Communications to the United Nations on Human Rights Violations', *Revue des droits de l'homme* 5 (1972), pp. 375 *et seq.* See *K. L. v. Denmark* (1980), in: *Human Rights Committee, Selected Decisions under Optional Protocol* (1985) (CCPR/C/OP/I, p. 26).

[177] African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217, Art. 56, para. 3; Palmieri, 'Aperçu du règlement intérieur de la Commission africaine des droits de l'homme et des peuples', in *La Charte africaine des droits de l'homme et des peuples* (Palmieri, ed., 1990), p. 128.

(1984).[178] There is manifestly a non-negligible danger that private individuals will abuse human rights remedies for frivolous or quixotic causes; and hence the screening under this heading has been established. International administrative law and the case law of the administrative tribunals is replete with references to misuse of authority, including on the procedural plane.[179]

The same is true for investment arbitration.[180] Thus, a claim may be declared inadmissible if certain facts have been forged and falsified, since this is a breach of good faith (*i.e.*, a sort of clean hands doctrine).[181] By the same token, if an investment was acquired in violation of municipal law or in bad faith, it is not to be considered a 'protected investment' and the arbitration clause may not be applied. This leads to a lack of jurisdiction of the arbitral tribunal.[182] The same occurs when no real investment was made at all; or if the investment was purchased with the sole aim of commencing arbitral procedures.[183] Further, the principle of abuse of procedure applies to the cases where the investor restructures his assets—*e.g.*, by the creation of new corporations, by acquiring a new corporate nationality which allows the application of a BIT[184]—with the sole aim to get access to arbitration. If a purportedly new claim is substantially the same as a previous one and is resubmitted under some circumventing legal construction (*e.g.*, transfer of the claim to another entity), it will be dismissed under the rule on abuse of procedure.[185] The rule on abuse of procedure plays further a residual role for a series of other situations, *e.g.*, the plea that proceedings are misused solely for the purpose to put political pressure on the State so as to have it abandon some criminal proceedings.[186]

Finally, within the law of the sea, Article 294 UNCLOS[187] gives the tribunal chosen by the parties to decide their dispute the power to scrutinize whether the claimant's request related to the coastal State's exercise of its sovereign rights under Article 297 constitutes an abuse of procedure and to declare it inadmissible *in limine litis*.[188]

[178] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 112, Art. 22, para. 2; Gestri, *supra*, fn. 162, p. 32–3.

[179] See Kolb, *Good Faith in International Law* (2017), pp. 169 et seq. See already Amerasinghe, 'Détournement de pouvoir in International Administrative Law', *ZaöRV* 44 (1984), pp. 439 *et seq.*

[180] De Brabandère, '"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims', *JIDS* 3 (2012), pp. 609 *et seq.*

[181] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 226 *et seq.*

[182] *Ibid.*, para. 208.

[183] *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, para. 174 and *Cementownia 'Nowa Huta' S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 13 September 2009, para. 159. False statements were also the issue here.

[184] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 106 *et seq.*; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, paras. 134 *et seq.*, with the piercing of the corporate veil; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, paras. 2.99 *et seq.*

[185] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Award, 2 June 2000, paras. 49-50.

[186] The plea was finally withdrawn during the pleadings: *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, paras. 111 *et seq.*

[187] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, Art. 294.

[188] Ferrara, 'Article 298: Preliminary Proceedings', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 1896–9; Nordquist (ed.), *United Nations Convention on the Law of the*

51 An interesting situation possibly giving rise to an abuse of procedure would present itself if a State that had lost a case before the ICJ were to move to the political organs of the United Nations in order to evade or to delay the execution of the judgment. Since the competences of political and judicial organs are different, there is no reason to conclude automatically that there has been an abuse of procedure if a political organ is seised after a judicial procedure.[189] For there may be many valid reasons to seek a more complete solution of the dispute than the one offered by a judicial institution when important political aspects are at stake. But if there was evidence suggesting that the State in question merely sought to delay the execution of the judgment, or to escape the obligations flowing from it, the political organ could find *in limine* that an abuse of procedure had been established and that the case thus could not be heard.[190] This aspect does not relate directly to the procedure of the Court, but it indirectly touches upon it, since it concerns the efficacy of the Court's rulings.

Many other instances of abuse of procedure could be envisaged, *e.g.*, the 'flooding' of the Court with procedural objections of any type, in order to frustrate the efficacy of the proceedings; the late invocation of bases of competence if there is a disadvantage to the other party;[191] the raising of a new request in the course of proceedings if it is prejudicial to the procedural position (equality) of the other party (*alternativa petitio non est audienda*).[192] Often, such questions are addressed by the constitutive texts of the tribunals. Thus the Statute and the Rules of Court provide for the timing in the presentation of arguments.[193] The content of these provisions can also be read as a sanction of the principle on prohibition of abuse of procedure, because it is essentially for that reason that they have been drafted.

2. *The Principle of Estoppel*

52 The principle of estoppel (or of the prohibition of *venire contra factum proprium*)[194] 'operates on the assumption that one party has been induced to act in reliance on the assurances or other conduct of another party, in such a way that it would be prejudiced were the other party later to change its position'.[195] Thus, under certain restrictive conditions,[196] the law does not permit the first party to change its position to the detriment of the second; or, if it changes its position, it will become liable for the damage caused

Sea 1982, A Commentary, vol. V (1989), pp. 75 *et seq.* See also Cannone, *Il tribunale internazionale del diritto del mare* (1991), pp. 134 *et seq.*; Rosenne, 'Settlement of Fisheries Disputes in the Exclusive Economic Zone', *AJIL* 73 (1979), pp. 100 *et seq.*; Caflisch, 'Le règlement judiciaire et arbitral des différends dans le nouveau droit international de la mer', in *Essays in Honor of Bindschedler* (1980), pp. 355–6.

[189] For a more general treatment of the interrelation between the Court and the political organs of the United Nations, *cf.* Gowland-Debbas/Forteau on Art. 7 UN Charter MN 20–52.

[190] *Cf.* already Salvioli, 'Les règles générales de la paix', *Rec. des Cours* 46 (1933-IV), pp. 9–163, 138–9. *Cf.* also the more reserved position of Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (1975), p. 139.

[191] *Cf.* paras. 42–4 of the interim orders in the *Legality of Use of Force* (Yugoslavia v. Belgium; Yugoslavia v. Netherlands), Order of 2 June 1999, ICJ Reports (1999), pp. 124 *et seq.*, 542 *et seq.*

[192] *Cf.* Kolb (2000), pp. 646–9.

[193] *Cf. e.g.*, Arts. 48 *et seq.* of the Rules.

[194] On this principle *cf.* Kolb (2000), pp. 357 *et seq.* (with many references), and also McGibbon, 'Estoppel in International Law', *ICLQ* 7 (1958), pp. 468 *et seq.*; Martin, *L'estoppel en droit international public* (1979).

[195] Mosler, 'General Course on Public International Law', *Rec. des Cours* 140 (1974-IV), pp. 1–320, 147.

[196] These conditions would seem to be the following: (1) a free, clear, and unequivocal initial conduct by one party, legally imputable to it; (2) an effective and *bona fide* reliance by another party on that conduct, inciting it to adopt a certain conduct on its part; (3) damage suffered by that second party resulting from its reliance on

thereby to the second party. The first party is bound by the confidence (or the appearance) it deliberately created.

In international law, there are two slightly different applications of the principle of estoppel. The principle can operate on the level of substantive law, but it can also operate procedurally. Substantive estoppel governs the creation, modification, and extinction of subjective rights; it is a source of obligations. Thus, if a party by conduct creates a legitimate expectation of renunciation to a certain part of territory, it will not be able to claim that part of territory in court in a delimitation or territorial dispute. In this situation, the loss of the right concerns the merits of the dispute: it is the territory at stake which is forfeited. Estoppel thereby governs the extinction of the title, not simply the evidence which may or may not be presented.[197] Such a form of estoppel would be applicable also outside a judicial proceeding. On the other hand, there can also be a procedural form of estoppel. If a party has created a legitimate expectation of the other party about certain facts, it may not be able to raise contrary facts in evidence in legal proceedings. The rule of estoppel here concerns matters of the evidence: if a certain state of fact was represented, the party liable for it will be debarred from proving the material truth or an otherwise divergent state of affairs to the judge, because it will be bound by the principle of procedural estoppel. If it chooses to do so, the judge will ignore the evidence presented, and will do so on account of estoppel.[198] 53

This form of estoppel has appeared quite often in international proceedings, arbitral and judicial.[199] It may be added that the principle of procedural estoppel (in contrast to the principle of substantive estoppel) can operate independently from any specific damage (detrimental reliance) suffered by the other party. Alternatively, it could be said that the damage would result automatically from the admissibility of the piece of evidence in opposition to previous conduct or assurances, and hence, the piece of evidence shall not be admissible.

The question remains whether the principle of procedural estoppel may also apply to a point of law (possibly only if that point must be raised by one party in order to be taken up by the Court). The question came to the fore in the *River Oder* case: there, the six governments facing Poland argued that Poland, after the conclusion of the written pleadings, could not raise an argument relating to the ratification of a Convention that had not been produced in the Memorial and Counter-Memorial, but was then taken up at the stage of oral proceedings. However, the Court rejected the plea by affirming first that 'the matter is purely one of law such as the Court could and should examine *ex officio*'.[200] Moreover, Poland had apparently never expressed its intention to abandon the argument in question, and the six applicant governments thus could not rely on any representation of such an abandonment by Poland.[201] This second argument goes 54

the position taken by the first party (provided that that first party was free to change its position), or a relative change in the position of the parties, the first party improving its position (detrimental reliance). For a more detailed analysis *cf.* Kolb (2000), pp. 359 *et seq.*

[197] *Cf. e.g., Preah Vihear*, Merits, ICJ Reports (1962), pp. 6, 32.

[198] *Cf.* Martin, *supra*, fn. 194, p. 306: 'l'estoppel est une règle de la procédure probatoire en vertu de laquelle une Partie qui a déterminé chez son adversaire une certaine conception des faits ne peut ensuite administrer la preuve que *ces* faits ont une matérialité différente, est juridiquement empêchée d'essayer d'établir une "vérité" différente'.

[199] For an extremely thorough review of the case law until the 1970s *cf.* Martin, *supra*, fn. 194, pp. 65 *et seq.*

[200] *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment, PCIJ, Series A, No. 23, pp. 4, 19.

[201] *Ibid.*

to the conditions under which procedural estoppel may be invoked, which in the view of the Court had not been fulfilled *in casu*. The first argument concerns the question as to whether estoppel is applicable to a question of law at all, when this question must be examined *ex officio* by the Court. The Court affirmed that it is not: the objective and peremptory conditions of the Statute governing the proceedings take precedence over the principle of estoppel which is concerned only with the purely bilateral adjustment of rights between the parties. But it is not excluded that procedural estoppel could apply to certain sources of particular international law, which do not fall under the *jura novit curia* limb and which the parties must raise in Court somewhat like a fact when they want to have the rights and obligations flowing therefrom applied.[202] The same is true for municipal law, which the Court traditionally treats as a fact[203] (a position sometimes criticized in legal doctrine).

3. *The Maxim* nemo ex propria turpitudine commodum capere potest

55 The maxim *nemo ex propria turpitudine commodum capere potest* flows from the re-elaboration of Roman Law in the Middle Ages.[204] It operates, similarly to the principle of estoppel, either on the level of substantive law or on the level of procedural law. In this last area, it is close to the principle of estoppel. It indeed applies along the same lines: a party claiming a certain fact or a certain legal point will not be admitted to benefit from it because of a previous fault committed in the context of the argument in question. A particular damage need not be shown, since the point is essentially to sanction a fault by not allowing a party to reap the benefits of its previous misconduct. The fault relevant to our maxim ordinarily involves an illegal act, but sometimes it simply consists of morally reprehensible conduct, or of negligence.

56 The maxim has been applied in a wide array of situations in international law, and it has also loomed quite large in the procedure of international tribunals. A classical application is to be found in the *Factory at Chorzów* case:

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.[205]

The effect of the principle is that the Court will *in limine* put aside the plea thus vitiated.

Another application of the maxim in question is to be found in the *Jurisdiction of the Courts of Danzig* case. In that case, the Court recalled that Poland could not be heard when invoking the incompetence of its municipal tribunals if this incompetence resulted from Poland's failure diligently to transform the provisions of an international treaty into internal law. The point is that a State cannot plead an objection which would be

[202] Such sources would include promises, acquiescence, bilateral agreements of an informal nature, regional/local customary rules.

[203] *Certain German Interests*, Merits, PCIJ, Series A, No. 7, p. 19.

[204] On this maxim, *cf.* Kolb (2000), pp. 487 *et seq.* (with further references); as well as *ibid.*, 'La maxime "nemo ex propria turpitudine commodum capere potest" (nul ne peut profiter de son propre tort) en droit international public', *RBDI* 33 (2000), pp. 84–136; Cheng (1953), pp. 149 *et seq.*

[205] *Factory at Chorzów (Indemnity)*, Jurisdiction, PCIJ, Series A, No. 9, pp. 3, 31. That principle was taken up again in *Interpretation of Peace Treaties*, Second Phase, Advisory Opinion, Diss. Op. Judge Read, ICJ Reports (1950), pp. 221, 244; *cf.* also *ibid.*, Diss. Op. Azevedo, ICJ Reports (1950), pp. 248, 252–4.

tantamount to pleading the non-execution of one of its international obligations. The Court expressed itself in the following terms:

> the Court would have to observe that, at any rate, Poland could not avail herself of an objection which, according to the construction placed upon the *Beamtenabkommen* by the Court, would amount to relying upon the non-fulfilment of an obligation imposed upon her by an international agreement.[206]

The doctrine of clean hands also rests on this maxim. In the words of the *Black's Law* 57
Dictionary of 1979: 'Under clean hands doctrine, equity will not grant relief to a party, who as actor, seeks to set judicial machinery in motion and obtain some remedy, if such party in its prior conduct has violated conscience or good faith or other equitable principle.'[207] The matter is plainly one of good faith: *ex dolo malo/delicto non oritur actio; nemo ex propria turpitudine commodum capare potest*; prohibition of abuse of rights; estoppel. This doctrine of clean hands has been applied mainly to cases of diplomatic protection. It can then be applied at three different stages: (i) the policy decision to grant or not to grant diplomatic protection, which is normally a discretionary act; (ii) the phase of admissibility of an international claim at some tribunal; and (iii) the fixing of the compensation due on the merits.

There is, however, no general rule on clean hands in the law of international responsibility or in the procedural law of international tribunals. The reason is that a concurring fault by one person cannot absolve *de plano* another from his own torts or illegal conduct (*tu quoque*).[208] Moreover, in case of concurring faults, the inadmissibility of one claim would lead to an inequitable result: one party would be completely sanctioned for its fault while the other would suffer no consequences for his own fault; the better course is manifestly to adjust the faults on the merits, notably in the phase of the calculation of the indemnity.[209]

However, clean hands may sometimes lead to an inadmissibility of a claim. This will be the case if the judge considers that the fault of the claimant is so considerable or overwhelming that the fault of the defendant is thereby rendered completely negligible and that procedural economy is better served if the judicial debate is closed from the very beginning. The same may be true if the two faults are roughly equivalent but even in such a case the merits approach is the better course if there is a counterclaim, since the judge will then be able to reject both claims with substantive *res judicata* effect.

The ICJ has for itself refused to apply this doctrine outside the context of diplomatic protection, for example when the United States claimed that the case brought by Nicaragua and leading to the two judgments of 1984 and 1986 should have been

[206] *Jurisdiction of the Court of Danzig*, Advisory Opinion, PCIJ, Series B, No. 15, pp. 3, 26–7.

[207] *Black's Law Dictionary* (1979), p. 227.

[208] As has been rightly said: 'jamais la conduite irrégulière de la victime ne devrait dégager un Etat de l'obligation qu'il a de respecter un certain standard minimum de justice'. See *cf.* Visscher, 'Cours général de droit international public', *Rec. des Cours* 136 (1972), pp. 176–7. See also the clear statement of the ICJ in the *Barcelona Traction*, Judgment, ICJ Reports (1970), p. 51.

[209] An apportionment of the indemnities in view of the faults committed by each side was achieved in the *I'm Alone Case* (1935), RIAA, vol. III, pp. 1609 *et seq.* See Fitzmaurice, 'The Case of the I'm Alone', *BYIL* 17 (1936), pp. 82 *et seq.*; Hyde, 'The Adjustment of the I'm Alone Case', *AJIL* 29 (1935), pp. 296 *et seq.*; Friede, 'Der Fall I'm Alone', *ZaöRV* 5 (1935), pp. 658 *et seq.*

declared inadmissible on account of the 'dirty hands' or 'unclean hands' of Nicaragua.[210] It followed the same path in the *Oil Platforms* case, when the United States raised the argument against Iran. The Court held that the United States did not frame that argument as a question of admissibility but rather demanded that the claims of Iran be rejected on the merits.[211] In international relations, few States have completely clean hands, and it is not for the Court to enter into assessments situated in such political minefields. This notwithstanding, however, international practice shows that the doctrine may in some particular cases lead to an inadmissibility of claims.[212]

The foregoing analysis shows that the maxim *nemo ex propria turpitudine commodum capere potest* is applicable to procedural law. It lends itself to a rich array of applications and is characterized by that flexibility which is inherent in the general principles and maxims of the law.

ROBERT KOLB

[210] As is known, Judge Schwebel, of the United States, took up and developed this argument in his Diss. Op. to the *Nicaragua*, Merits, ICJ Reports (1986), pp. 392 *et seq.*

[211] *Oil Platforms*, Judgment, ICJ Reports (2003), pp. 161, 176-8, paras. 27–30.

[212] See Kolb, *Good Faith in International Law* (2017), pp. 190 *et seq.*

Article 41

1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

1. La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.

2. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

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A. Historical Development

In the context of international jurisdiction, provisions concerning interim measures of protection were unknown until the beginning of the twentieth century.[1] Not even the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes nor the 1907 project of a Permanent Court of Arbitration contained a provision concerning provisional measures. 1

A first provision which comes close to provisional measures is Article XVIII of the Convention for the Establishment of a Central American Court of Justice of 20 December 1907 which provided: 2

> From the moment in which any suit is instituted against any one or more governments up to that in which a final decision has been pronounced, the court may at the solicitation of any one of the Parties fix the situation in which the contending Parties must remain, to the end that the difficulty shall not be aggravated and that things shall be conserved in *statu quo* pending a final decision.[2]

This provision spelled out what was considered as a general principle of law, well known in municipal law, namely that while a dispute is pending before an international court or tribunal the parties shall refrain from any act which could aggravate the situation

The Bryan Treaties concluded between the United States and France, Sweden and China, respectively, were more precise in that they empowered the relevant judicial body to indicate specific provisional measures. Their common provision read: 3

> In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Commission shall as soon as possible indicate what measures to preserve the rights of each party ought in its opinion to be taken provisionally and pending the delivery of its report.[3]

Although this provision applied to a Commission, not a court, it served as basis for what became Article 41 of the Statute of the PCIJ.

I. Drafting of Article 41 of the PCIJ Statute

When the Advisory Committee of Jurists, which was appointed by the Council of the League of Nations pursuant to Article 14 of the Covenant, elaborated the Statute of the PCIJ, it did not provide for provisional measures in its initial draft. Only in the very 4

[1] *Cf.* von Stauffenberg, pp. 309 *et seq.*, *cf.* also Miles, *ZaöRV* (2013), *passim*.
[2] (1907) 2 FRUS 697, 206 CTS 78, *AJIL* 2 (Suppl. 1908), pp. 231, 238.
[3] This provision is identical in the three treaties, for the English text *cf.* Art. 4, para. 2, of the Treaty concluded on 15 September 1914 between the United States and France, reprinted in Oellers-Frahm/Zimmermann (eds.), *Dispute Settlement in Public International Law: Texts and Materials* (2nd edn., 2001), p. 289; for the French text *cf.* von Stauffenberg, p. 309.

last days of the work of the Committee did the Brazilian jurist Raul Fernandes propose inserting a text adapted from the relevant articles of the Bryan Treaties into the Statute. He suggested the following wording:

> In case the cause of the dispute should consist of certain acts already committed or about to be committed, the Court may, provisionally and with the least possible delay, *order* appropriate protective measures pending the final judgment of the Court.[4]

Mr Fernandes also proposed that the provisional measures should be supported by effective penalties, a view which, however, was not shared by the majority of the Committee which also was not ready to take over the term 'order' with a view to the fact that the Court lacked the means to execute its decisions.[5]

5 The article which the Drafting Committee finally adopted (as Article 39) was a slightly amended version which read as follows:

> If the dispute arises out of an act which has already taken place or which is imminent, the Court shall have the power to suggest, if it considers that circumstances so require, the provisional measures that should be taken to preserve the respective rights of either party.
>
> Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.[6]

When the Sub-Commission of the Third Commission of the first session of the Assembly of the League examined the project, it decided to replace, in the English version, the term 'suggest' with the term 'indicate', which was a closer equivalent to the French 'indiquer' and which was considered to be stronger than the English word 'suggest'. For the same reasons, in the passage 'measures which should be taken' the word 'should' was replaced by the words 'ought to'.[7]

6 In the final version, the words 'acts already committed or about to be committed' were also deleted in order to comprise all possible alternatives, including an omission, which might endanger the rights of the party concerned. Thus, the provision which became Article 41 in the Statute of the PCIJ took its final shape.

When, in 1929, discussions took place with regard to a revision of the Statute, the Committee decided not to change Article 41, in particular with a view to the fact that this article had been taken over into a number of important international treaties[8] and that international treaties referred to the PCIJ for the settlement of disputes arising under the treaty so that an amendment of Article 41 of the Statute would not be without consequences for those treaties.[9]

[4] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 609 (emphasis added).

[5] *Ibid.*, p. 588.

[6] The French text read as follows: 'Dans le cas où la cause du différend consiste en un acte effectué ou sur le point de l'être, la Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement transmise aux Parties et au Conseil', Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 735; *cf.* also *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 504 *et seq.*, paras. 105 *et seq.*

[7] Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant (1921), p. 103; it should also be noted that the preparatory work on Art. 41 of the Statute was done in French. *Cf.* also Sztucki (1983), pp. 23 *et seq.*

[8] For an overview over these treaties *cf.* Sztucki (1983), pp. 4 *et seq.*

[9] Minutes of the Committee of Jurists on the Statute of the Permanent Court of International Justice (1929), pp. 63–4.

II. Establishment of the ICJ

In 1945, when it was decided at the Yalta Conference to convene the UN Conference on International Organization at San Francisco, an advisory committee composed of representatives of 44 States was instructed to elaborate a Draft Statute.[10] The draft largely followed the Statute of the PCIJ. In particular, the matters falling under Chapter III of the Statute ('Procedure') were regarded as mostly non-controversial. On 11 May 1945, 'the Committee unanimously approved, without discussion, Articles 39–64 *en bloc*'.[11] Article 41 of the ICJ Statute differs from the original text only in that the old printing error in the English version—namely 'reserve' instead of 'preserve' the respective rights of either party—was rectified and that, in para. 2, the word 'Council' was replaced by 'Security Council' as the organ to be informed of the measures, and finally the two paragraphs of Article 41 are now numbered.[12] Until today, no further change has been made to Article 41. 7

III. The Rules of Court Concerning Provisional Measures

According to Article 30 of the Statute, the Court is authorized to lay down its own rules of procedure. Only the first rules of 1922 may be considered as really innovative because no comparable rules and no practice existed. Since then, all amendments have been the product of experience. This is in particular true with regard to provisional measures. 8

The Rules of 1922 contained only one provision on provisional measures, namely Article 57 which provided that the President may indicate 'any measures for the preservation ... of the respective rights of the parties' when the Court is not sitting, and that a refusal to conform with the 'suggestion of the Court or the President' shall be placed on record.[13] As the PCIJ lacked any experience with provisional measures when the Rules were amended in 1926, the provision remained unchanged. Under the Rules of 1926,[14] the PCIJ had to deal with provisional measures on two occasions,[15] which raised in particular the problem of the power of the President. 9

When a revision of the Rules was initiated in 1931, Article 57 of the Rules was discussed thoroughly with regard to four questions: (i) the right to delegate the powers under Article 41 to the President; (ii) the right of the Court to indicate provisional measures *proprio motu*; (iii) the appropriateness of an action *ex parte*; and (iv) the legal effects of provisional measures.[16] The amended Article 57 of the Rules adopted on 21 February 1931 read as follows: 10

> An application made to the Court by one or both of the parties, for the indication of interim measures of protection, shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency, and if the Court is not sitting it shall be convened without delay by the President for the purpose.

[10] *Cf.* Spiermann, Historical Introduction, MN 50.

[11] UNCIO XIII, pp. 59 and 170; *cf.* also Hudson, 'The Twenty-Fourth Year of the World Court', *AJIL* 40 (1946), pp. 1–52, 37; Shaw, *Rosenne's Law and Practice*, vol. I, p. 59.

[12] UNCIO XIV, pp. 494 and 845.

[13] Rules of Court, PCIJ, Series D, No. 2, pp. 560, 572. For the drafting history *cf.* PCIJ, Series D, No. 2.

[14] Revised Rules of Court, PCIJ, Series D, No. 1, 1st edn., pp. 33 *et seq.*

[15] *Sino-Belgian Treaty*, Order of 8 January 1927, PCIJ, Series A, No. 8, pp. 6 *et seq.*; *Factory at Chorzów (Indemnity)*, Request for an Interim Measure of Protection of 14 October 1927, PCIJ, Series A, No. 12, pp. 4 *et seq.*

[16] *Cf.* PCIJ, Series D, second addendum to No. 2, pp. 181–200, 289, and 297.

If no application is made, and if the Court is not sitting, the President may convene the Court to submit to it the question whether such measures are expedient.

In all cases, the Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject.[17]

Under these rules, three requests for interim protection were filed.[18]

11 In 1936, a more general revision of the Rules of Court was adopted which came out with a completely new arrangement of the articles. The new Article 61 of the Rules comprised in nine paragraphs the rules on interim measures which now also addressed the question of urgency, the indication of measures *proprio motu* by the Court and its power to revoke or modify measures already indicated, the provision of an oral hearing, and the participation of a judge *ad hoc*.[19] Only one case came before the PCIJ under these Rules.[20]

12 When the ICJ adopted its first Rules on 6 May 1946, it left Article 61 largely intact: it only deleted para. 9 which referred to the question of the judge *ad hoc*. Four cases with requests for provisional measures came to the Court under these Rules.[21]

13 In the second half of the 1960s, the ICJ embarked on a systematic revision of the Rules in their entirety, leading to a first revision in 1972 which, however, did not yet include a revision of the provision on interim protection, which simply became Article 66. Under these Rules the ICJ dealt with four requests for provisional measures.[22]

14 The Committee on the Revision of the Rules of Court continued its work after the revision of 1972 and adopted, on 14 April 1978, the new, entirely revised Rules. In Part III of these Rules ('Proceedings in Contentious Cases'), sect. D ('Incidental Proceedings'), sub-sect. I is concerned with 'Interim Protection' in Articles 73–78.[23] These rules contain some substantial modifications of and additions to the Rules in force since 1936[24] as a consequence of problems which had arisen in cases the Court had to deal with and which will be treated later in the respective context. Furthermore, the wording of the Rules was brought in line with the wording of Article 41 in that it used the term 'provisional measures' instead of 'interim measures of protection' found in the Rules of the PCIJ and the ICJ's 1946 Rules.

15 The Committee on Revision of the Rules is permanently concerned with revising the Rules, primarily in order to make the procedure more stringent; however, no amendments concerning the rules on provisional measures are currently on the agenda. As a matter of fact, the latest amendments to the Rules date from 2005, which amendments did not, however, concern the rules on provisional measures.

[17] Rules of Court, PCIJ, Series D, No. 1, 2nd edn., pp. 23, 42.

[18] *South-Eastern Greenland*, Order of 3 August 1932, PCIJ, Series A/B, No. 48, pp. 277 *et seq.*; *Administration of the Prince von Pless*, Order of 11 May 1933, PCIJ, Series A/B, No. 54, pp. 150 *et seq.*; *Polish Agrarian Reform and the German Minority*, Order of 29 July 1933, PCIJ, Series A/B, No. 58, pp. 175 *et seq.*

[19] Rules of Court, PCIJ, Series D, No. 1, 3rd edn., pp. 28, 48.

[20] *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, PCIJ, Series A/B, No. 79, pp. 194 *et seq.*

[21] *Anglo-Iranian Oil Co.*, Provisional Measures, ICJ Reports (1951), pp. 89 *et seq.*; *Interhandel*, Provisional Measures, ICJ Reports (1957), pp. 105 *et seq.*; *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12 *et seq.* and pp. 30 *et seq.*

[22] *Nuclear Tests* (Australia v. France; New Zealand v. France), Provisional Measures, ICJ Reports (1973), pp. 99 *et seq.* and pp. 135 *et seq.*; *Pakistani POW*, Provisional Measures, ICJ Reports (1973), pp. 328 *et seq.*; *Aegean Sea Continental Shelf*, Provisional Measures, ICJ Reports (1976), pp. 3 *et seq.*

[23] ICJ, Acts and Documents, No. 4, pp. 139 *et seq.*

[24] Rosenne, *ICJ Documents*, p. 437.

IV. Similar Provisions in Other International Treaties

The power to indicate provisional measures is vested in the ICJ not only under Article 41 of the Statute but results also from all those treaties which refer the settlement of disputes to the ICJ.[25] 16

Furthermore, Article 41 of the PCIJ/ICJ Statute was the model for identical or similar provisions in the Statutes or Rules of Procedure of numerous international courts, tribunals, arbitral tribunals and committees created after the Second World War, the most important of which are: the Commission of Investigation and Conciliation founded by the Pact of Bogotá of 1948;[26] the Arbitration Tribunal established by the Convention on Relations between the Three Powers and the Federal Republic of Germany and the Supreme Restitution Court after the Second World War;[27] the ITLOS;[28] and the OSCE Court of Arbitration.[29] In the field of human rights protection the following bodies may be cited: the ECtHR;[30] the IACtHR;[31] the African Commission on Human and Peoples' Rights as well as the African Court on Human and Peoples' Rights.[32] Also the Committees created under several human rights instruments in order to hear 'communications' from individuals are empowered to grant interim protection, *e.g.*, the Committee on the Elimination of All Forms of Racial Discrimination (1966);[33] the Human Rights Committee established according to Part IV of the ICCPR (1966);[34] the Committee of the ICESCR;[35] the Committee on the Elimination of Discrimination Against Women;[36] the Committee against Torture;[37] the Committee of the Rights of the 17

[25] The latest Report of the International Court of Justice, 1 August 2015-31 July 2016, UN Doc. A/71/4 (2016) refers to more than 300 such bilateral and multilateral treaties, *ibid.*, p. 14, para. 53. An updated list of these treaties is published on the ICJ homepage under the heading 'Jurisdiction'.

[26] 30 April 1948, 30 UNTS 55, Art. XVI.

[27] Rule 28 of the Rules of Practice and Procedure of the Second Division of the Supreme Restitution Court, Art. 15 of the Rules of Procedure of the Arbitral Tribunal and the Mixed Commission, reprinted in Oellers-Frahm/Zimmermann, *supra*, fn. 3, pp. 1669 and 1691, respectively.

[28] Art. 290 UNCLOS and Art. 25 ITLOS Statute, Annex VI to UNCLOS, 10 December 1982, 1833 UNTS 3, and Arts. 89–95 of the Rules of the Tribunal, ITLOS/8, 25 September 2018.

[29] Arts. 16, para. 3, and 26, para. 4, of the Convention on Conciliation and Arbitration within the Conference on Security and Cooperation in Europe, 15 December 1992, 1842 UNTS 121, Art. 28 of the Rules, 1 February 1997, reprinted in Oellers-Frahm/Zimmermann, *supra*, fn. 3, pp. 177 and 199.

[30] Rule 39 of the Rules of Court of 1998, reprinted in Oellers-Frahm/Zimmermann, *supra*, fn. 3, p. 468. Under the system in force until 1998, both the Commission and the Court were empowered to *indicate* interim measures: Rule 36 of the Rules of Court and Rule 36 of the Rules of the Commission; text in *Dispute Settlement in Public International Law* (Cellers-Frahm/Wühler, eds., 1st edn., 1984), pp. 248 and 265.

[31] Art. 63, para. 2 of the American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, OASTS No. 36, and Art. 25 of the Rules of Court; Art. 76 of the Rules of the Commission, reprinted in Oellers-Frahm/Zimmermann, *supra*, fn. 3, pp. 529, 575, and 560.

[32] Rule 98 of the Rules of Procedure of the Commission (10 May 2010, 47th ordinary session), Art. 35 of the Protocol Instituting the African Court on Human and People's Rights, 10 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III). The Protocol entered into force on 25 January 2004, when the required fifteen ratifications had been deposited.

[33] Rules of procedure of the Committee on the Elimination of Racial Discrimination, UN Doc. CERD/C/35/Rev.3 (1986) as amended, Rule 94, para. 3.

[34] Rules of procedure of the Human Rights Committee, UN Doc. CCPR/C/3/Rev.10 (2012), Rule 92.

[35] Provisional Rules of procedure under the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, 12-30 November 2012, UN Doc. E/C.12/49/3 (2013).

[36] Rules of procedure of the Committee on the Elimination of Discrimination Against Women, UN Doc. A/56/38 (SUPP) (2001) as amended, Rule 63.

[37] Rule 114 of the Rules of procedure, UN Doc. CAT/C/3/Rev.6 (2014).

Child;[38] the Committee of the International Convention on the Rights of Persons with Disabilities;[39] the Committee on Enforced Disappearances.[40] In addition, most of the courts and tribunals established in the framework of economic integration systems are also empowered to grant interim protection.[41] The same holds true for arbitral tribunals instituted in the context of investment and commercial arbitrations.[42]

Finally, there is a widely held view according to which the power to order/indicate interim measures of protection exists irrespective of an explicit provision as an implied power of any international tribunal or as a general principle of law.[43]

B. Substantive Aspects of Article 41

I. General Remarks

18 Provisional measures are aimed at preserving the respective rights of the Parties pending a decision of the Court in order to avoid irreparable damage being caused to rights which are the subject of the dispute. Although the ICJ has discretionary power to indicate provisional measures, as evident from the terms 'if it considers that circumstances so require', the good administration of justice *requires* the indication of provisional measures if the preconditions are fulfilled. The practice of the Court supports this view.[44]

19 Article 41 is placed in Chapter III of the Statute which deals with the procedure of the Court. Thus, from a mere formalistic point of view, interim protection may be perceived as a mere procedural matter, rather than as a matter of competence. This is confirmed by the fact that nearly all statutes of international tribunals provide for interim protection in the chapter concerning procedure and that some institutions provide for interim protection solely in their respective rules of procedure.[45] This view has the advantage of leaving aside complicated jurisdictional questions;[46] however, it is only one side of the coin, which disregards the fact that provisional measures concern the extra-processual conduct of the parties. In international litigation, this constitutes a matter of competence rather than procedure since it 'entail[s] the limitation of sovereign powers'.[47] Thus, interim protection in international litigation possesses a dual character, which constitutes the source of the difficulties surrounding this subject-matter.

[38] Rule 7 of the Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, UN Doc. CRC/C/62/3 (2013).

[39] Rule 64 of the Rules of procedure, UN Doc. CRPD/C/1/Rev.1 (2016).

[40] Rule 70 of the Rules of procedure, UN Doc. CED/C/1 (2012).

[41] *E.g.*, the European Court of Justice, Oellers-Frahm/Zimmermann, *supra*, fn. 3, p. 714 *et seq.*; the Benelux Arbitral College, *ibid.*, p. 857; the Arbitral Tribunal of MERCOSUR, *ibid.*, p. 959; the ECOWAS Court, *ibid.*, p. 1029; the Arab Maghreb Union, *ibid.*, p. 1037; the Common Market for Eastern and Southern Africa, *ibid.*, p. 1048.

[42] *Cf.* Miles (2017), pp. 106 *et seq.*

[43] Oellers-Frahm (1975), pp. 122 *et seq.*; Sztucki (1983), pp. 61 *et seq.*; Collins, 'Provisional and Protective Measures in International Litigation', *Rec. des Cours* 234 (1992–III), pp. 9–238, 23, and 214; Tzanakopoulos, *RHDI* (2004), *passim*.

[44] Miles, *JIDS* (2015), *passim*.

[45] *E.g.*, ECtHR, Rule 39 of the 1998 Rules of Court.

[46] Bernhardt, 'The Provisional Measures Procedure of the International Court of Justice through U.S. Staff in Tehran: Fiat iustitia, pereat curia?', *Va. JIL* 20 (1980), pp. 557–613, 559 *et seq.*

[47] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 735; *cf.* also Guggenheim, *Rec. des Cours* (1932), pp. 694–5; Oellers-Frahm, *GLJ* (2011), *passim*.

II. Preservation of Rights

The essential purpose of provisional measures is clearly stated in Article 41, namely 'to preserve the respective rights of either party' pending the Court's final decision. The rights concerned are the rights of both parties and therefore it is vital for the Court to consider what action is called for in order to ensure that none of the parties is put at a disadvantage,[48] or that the provisional measures would not cause irreparable prejudice to rights of the other party,[49] and that any impression of bias is avoided. In order to guarantee the equal treatment of both parties, the Court often indicates provisional measures to both sides although mostly in a general form calling for the prevention of any aggravation of the situation.[50] In general, one side only seeks interim protection and the other opposes the request. It is, however, also possible that both sides might make a request, as in the *Frontier Dispute* case (Burkina Faso/Republic of Mali) and in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, or that a counter-claim for provisional measures is filed, as in the *Bosnian Genocide* case. In these cases, the danger of unequal treatment is fairly small. 20

The preservation of rights means, as the Court has stated in almost identical words constantly in its jurisprudence, 'that irreparable prejudice should not be caused to rights which are the subject of the dispute in judicial proceedings'.[51] As has been rightly pointed out, the term 'right' in this context is not very fortunate because the 'right' remains in existence even if it is infringed.[52] Thus, what is to be preserved is the subject-matter of the right, the factual use of the right which would be impossible if the subject-matter was irreparably destroyed. This may include the preservation of evidence, as the Court stated in the *Frontier Dispute* case, although orders explicitly including measures concerning the preservation of evidence are the exception.[53] 21

1. Non-Aggravation of the Dispute

While the first provision concerning interim protection, namely Article XVIII of the 1907 Washington Convention creating the Central American Court, aimed only at non-aggravation of the situation and conservation of the status quo, Article 41 seems to 22

[48] *Cf.* on this aspect in particular Greig, *Australian YIL* (1991), *passim*.

[49] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*, Provisional Measures, Order of 3 October 2018, para. 94.

[50] *Cf. infra*, MN 22.

[51] *Cf. e.g.*, *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, pp. 12, 16, para. 21 and pp. 30, 34, para. 22; *Great Belt*, Provisional Measures, ICJ Reports (1991), pp. 12, 16, para. 16; *Breard*, Provisional Measures, ICJ Reports (1998), pp. 248, 257, para. 35; *Land and Maritime Boundary*, Provisional Measures, ICJ Reports (1996), pp. 13, 21–2, para. 35; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 127, para. 39; *Arrest Warrant of 11 April 2000*, Provisional Measures, ICJ Reports (2000), pp. 182, 201, para. 69; *Pulp Mills*, Provisional Measures, ICJ Reports (2006), pp. 113, 129, para. 61; *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 18, para. 53; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, para. 60; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*, Provisional Measures, Order of 3 October 2018, para. 53.

[52] Thirlway, in Bernhardt (1994), p. 7.

[53] *Frontier Dispute* (Burkina Faso/Republic of Mali), Provisional Measures, ICJ Reports (1986), pp. 3, 11–2, para. 32; *Land and Maritime Boundary*, Provisional Measures, ICJ Reports (1996), pp. 13, 25, para. 49. *Cf.* also Garcia, 'Les mesures conservatoires rendues par la Cour internationale de Justice, le 15 Mars 1996, dans le différend frontalière entre le Cameroun et le Nigéria', *AFDI* 42 (1996), pp. 409–27, 422 *et seq.*

require more, *i.e.*, the preservation of rights. Thus, the question arises whether the indication of provisional measures exclusively in order to avoid an aggravation of the dispute, without prejudicing the rights at stake, is admissible under Article 41. Although the PCIJ in indicating provisional measures already regularly called upon the parties to a case, *inter alia*, to 'ensure that no step of any kind is taken capable ... of aggravating or extending the dispute submitted to the Court',[54] it was never fully clear whether this power constitutes an aspect of the Court's basic power to preserve the rights of either party, or whether instead it is a separate power.[55] While this question was raised but not conclusively resolved in the *Aegean Sea Continental Shelf* case,[56] a first indication of the Court's position was provided in the *Frontier Dispute* case,[57] which was later confirmed and clarified in the *Land and Maritime Boundary* case, where the ICJ unequivocally stated that 'independently of the request for the indication of provisional measures submitted by the Parties to preserve specific rights, *the Court possesses by virtue of Article 41 the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require*'.[58] These terms support what seems evident, namely that the Court has the power to indicate any provisional measure it considers necessary, and is hence not limited to those requested by one or more of the parties. This view is confirmed by the power of the Court to indicate provisional measures *proprio motu* (Article 75, para. 1 of the Rules) and to 'indicate measures that are in whole or in part other than those requested' (Article 75, para. 2 of the Rules). The ICJ has thus almost routinely indicated provisional measures designed to avoid aggravating or extending the dispute in a number of cases.[59] This was criticized because action undertaken by the Court under Article 41 in the sense of *general prevention* might be considered coming

[54] *Cf. Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, PCIJ, Series A/B, No. 79, pp. 194, 199.

[55] Thirlway, in Bernhardt (1994), pp. 14–5; Sztucki (1983), pp. 74 *et seq.* and pp. 127 *et seq.*

[56] *Aegean Sea Continental Shelf*, Provisional Measures, ICJ Reports (1976), pp. 3, 12, paras. 36 *et seq.*

[57] *Frontier Dispute* (Burkina Faso/Republic of Mali), Provisional Measures, ICJ Reports (1986), pp. 3, 9, para. 18; for a commentary *cf.* Gross, 'Some Observations on Provisional Measures', in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dinstein/Tabory, eds., 1989), pp. 307–23, 308–11.

[58] *Land and Maritime Boundary*, Provisional Measures, ICJ Reports (1996), pp. 13, 22–3, para. 41 (emphasis added); this position was reaffirmed in *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 128, para. 43; *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3, 24, para. 52 B; *Land and Maritime Boundary*, Provisional Measures, ICJ Reports (1996), pp. 13, 24, para. 49 (1). In the *Lockerbie* case, most of the dissenting judges strongly argued in favour of indicating provisional measures exclusively in order to prevent the aggravation of the situation: *Lockerbie* (Libya v. USA), Provisional Measures, Sep. Op. Shahabuddeen, ICJ Reports (1992), pp. 140–2, Diss. Op. Bedjaoui, ICJ Reports (1992), pp. 143, 158, para. 31, Diss. Op. Weeramantry, ICJ Reports (1992), pp. 160, 163 *et seq.*; only Higgins, then Counsel for the United Kingdom, denied such a competence of the Court, *cf.* CR 92/3, 26 March 1992, pp. 65–8; *cf.* also Kaikobad, *Australian YIL* (1996), pp. 93 *et seq.*

[59] *Nuclear Tests* (Australia v. France; New Zealand v. France), Provisional Measures, ICJ Reports (1973), pp. 99, 106 and pp. 135, 142; *Frontier Dispute* (Burkina Faso/Republic of Mali), Provisional Measures, ICJ Reports (1986), pp. 3, 9, 11–2, paras. 18, 32 (1) (A); *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3, 23, 24, paras. 48, 52 (B) and Further Request for the Indication of Provisional Measures, ICJ Reports (1993), pp. 325, 348–9, 350, paras. 57, 61 (3); *Land and Maritime Boundary*, Provisional Measures, ICJ Reports (1996), pp. 13, 22–3, 24, paras. 41, 49 (1); *cf.* also Kaikobad, *Australian YIL* (1996), pp. 152 *et seq*; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 129, para. 47 (1); *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 21, para. 62; *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 555–6, para. 69 B (4); *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 139, para. 103; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, para. 76.

close even to Security Council action under Chapter VII of the UN Charter, and would no longer be restricted to the preservation of rights *sub judice*.[60] It is not clear, but it may be supposed that it was with a view to this concern that the Court found in the *Pulp Mills* case that provisional measures directing the parties not to take actions which may aggravate or extend the dispute can only be indicated when also other concrete measures for the prevention of irreparable prejudice to the rights at stake are indicated.[61] Given that in the said case there was no imminent risk of irreparable prejudice to the rights of Uruguay in dispute, the Court declined to indicate provisional measures aiming merely at the non-aggravation of the dispute. Whether this finding had to be understood as a rule excluding provisional measures exclusively aiming at the non-aggravation of the dispute, or whether instead this was justified by the particular situation in the case at stake was not clear and had formed the subject of heated discussion, with strong arguments on both sides laid out in various separate and dissenting opinions. It seems that the issue has been further developed in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*. In these cases, both Parties had requested the modification of the previous order of 8 March 2011 indicating provisional measures.[62] Although the Court found that there had been a change in the situation, it dismissed the request as the circumstances were not such as to require the modification of the measures indicated in its previous order. Nevertheless, the Court 'reaffirmed' the provisional measures indicated in that earlier order, 'in particular the requirement that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve" '. The very fact that the Court linked this general non-aggravation measure to a general reaffirmation of all its previous provisional measures, and namely the specific ones, as already indicated in its 2011 order provides support to the view that non-aggravation measures may only be ordered in addition to concrete provisional measures, and hence confirms the approach already taken by the Court in the *Pulp Mills* case.

With a view to the wording of Article 41 of the Statute and the relevant Rules of 23
Procedure (in particular its Article 75) it seems uncontroversial that at least theoretically the Court may issue non-aggravation measures without at the same time ordering specific measures provided such non-aggravation measures solely refer to the protection of the rights of the Parties in dispute, as only these rights are at stake in the interim protection phase.[63] The situation is, however, different if the Court does not order a 'measure', but instead only expresses a general exhortation, as it usually does, reminding the Parties of their obligation existing under general international law not to aggravate the dispute pending before the Court. Such exhortation cannot be considered to constitute a 'measure' within the meaning of Article 41 as it only repeats a general pre-existing legal obligation. Were it otherwise, any concern of non-aggravation would render any request for provisional protection admissible. If, therefore, no specific measure is required because

[60] Sztucki, 'Case Concerning Land and Maritime Boundary (Cameroon v. Nigeria): Provisional Measures, Order of 15 March 1996', *Leiden JIL* 10 (1997), pp. 341–58, 357–8.

[61] *Pulp Mills*, Provisional Measures, ICJ Reports (2007), pp. 3, 16, paras. 49–50; *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 139, para. 103; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, para. 76; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights*, Provisional Measures, Order of 3 October 2018, para. 99.

[62] As to the possibility of such modifications see *infra*, MN 85–88.

[63] Miles (2017), pp. 213 *et seq*.

the legal rights at stake in the case are not at risk, the order dismissing the request may still remind the parties of their obligation not to aggravate the situation, which reminder does not constitute a 'measure' under Article 41 Statute, and is hence not subject to its jurisdictional requirements, and thus does not gain binding force. If the Court, on the other side, indicates concrete measures to be taken by one or more of the parties, even an additional mere reminder of the obligation not to aggravate the dispute gains legal relevance when inserted in the operative part of the order as then sharing its binding effect, although it does not add anything to the general pre-existing substantive obligation not to aggravate the dispute. It has, however, to be underlined that general non-aggravation measures lay at the borderline with the function of preserving international peace and security, which under Article 24 of the Charter of the United Nations is primarily vested in the Security Council. Yet, where no action is taken by the Security Council, in particular due to the exercise of the veto power by one or more of its permanent members, the involvement of the ICJ is used increasingly as a way out of such impasse. Although the different functions of the ICJ on the one hand and that of the Security Council on the other have rightly been stressed in this context,[64] the ICJ, as all UN organs, also has to serve the maintenance of international peace and security. In fulfilling this function it has, however, to keep within the limits of its power to order provisional measures, namely the preservation of the rights of the parties that are at stake in the merits of the case.

24 A peculiar issue of non-aggravation measures came up in the *Preah Vihear (Request for Interpretation)* case,[65] where provisional measures, including also 'measures to avoid aggravation of the dispute', were requested in the context of interpretation proceedings under Article 60.[66] In this case, the Court referred to its previous case law where it had indicated non-aggravation measures, in order to justify its decision imposing on both Parties, besides other specific measures, the obligation to 'refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve'.[67] There, the Court did not address the issue of the difference between a dispute arising under Article 36 and a dispute/contestation with regard to the scope of the judgment to be interpreted arising under Article 60.[68] Accordingly, the Court did not address the question whether in an interpretation procedure the question of the aggravation of the dispute may be relevant at all, which seems to be rather questionable and would, in any case, be limited to very specific situations. In the *Preah Vihear (Request for Interpretation)* case, the non-aggravation measures in fact related rather to a new dispute or to the revival of the original dispute between the parties than to an aggravation of the dispute/contestation concerning the interpretation of the 1962 judgment. It was Judge Donoghue that raised this issue when stating that 'the conduct of the Parties in the border region would not "aggravate" the narrow and limited dispute about the meaning or scope of the words in a judgment'.[69] In this sense, the request for interpretation seems to have

[64] *Cf. Land and Maritime Boundary*, Provisional Measures, Decl. Ranjeva, ICJ Reports (1996), p. 29, and *Preah Vihear (Request for Interpretation)*, Provisional Measures, Diss. Op. Owada, ICJ Reports (2011), pp. 557, 560, para. 11; *cf.* also Gaja, in Gaja/Grote Stoutenburg (2014), p. 89; Thirlway, in Gaja/Grote Stoutenburg (2014), *passim*.

[65] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537 *et seq.*

[66] *Cf.* also *infra*, Zimmermann/Thienel on Art. 60 MN 50.

[67] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 555–6, para. 69 (B) (4).

[68] For further details, *cf.* Zimmermann/Thienel on Art. 60 MN 50.

[69] *Preah Vihear (Request for Interpretation)*, Provisional Measures, Diss. Op. Donoghue, ICJ Reports (2011), pp. 613, 623, para. 26.

been used as a means to bring before the Court the aggravation or revival of the old conflict decided in 1962 which otherwise could not be decided by the Court due to the lack of a jurisdictional basis.[70] This precedent stands as an example that in interpretation cases the question of interim protection as such, and in particular the issue of non-aggravation measures, has to be submitted to a very strict scrutiny and in principle would justify no more than a standard exhortation to the parties to respect their international obligations.

2. *Non-Anticipation of the Judgment*

As the term already indicates, measures indicated under Article 41 are provisional in character and should neither amount to an interim judgment[71] nor prejudice the decision on the merits.[72] It is, however, not clear what exactly this means. On the one hand, it is evident that the Court is not bound by its preliminary view of the dispute and that the parties are free to bring any argument against the provisional finding of the Court.[73] It is also clear that the mere fact that provisional measures are indicated does not, as such, constitute an 'obvious implication that questionable rights are presumed to exist' as has been advanced by Judge Padilla Nervo in his dissenting opinion in the *Fisheries Jurisdiction* cases.[74] On the other hand, there are cases where the requested provisional measures do in fact coincide totally or in part with the main submissions so that the 'non-prejudice rule' would seem to be violated. 25

The most evident cases of this category were, *e.g.*, the *Nuclear Tests* cases,[75] the *Tehran Hostages* case,[76] the *Bosnian Genocide* case,[77] the *Breard* case,[78] the *LaGrand* case,[79] the *Avena* case,[80] and, most recently, the *Jadhav Case*.[81] The order to stop the nuclear tests, to release the hostages, to terminate armed activities, and to guarantee the non-execution of the death penalty in these cases were, however, although identical with the main submissions, *conservatory*, not *anticipatory* measures in that they merely aimed at protecting the substantive rights in dispute which still subsequently could be adjudged by the Court to belong either to the applicant or to the respondent. These measures were thus in conformity with the nature of interim measures because they were the only means 'to preserve the substance of the rights ... *pendente lite*'.[82] In particular, in the *Breard* and later again 26

[70] *Cf.* for more details *infra*, MN 80–81; Oellers-Frahm, in Jalloh/Elias (2015), pp. 61 *et seq.*; Ghantous, *Canadian YIL* (2012), pp. 51 *et seq.*; Rylatt, *Leeds Journal of Law & Criminology* (2013), pp. 60 *et seq.*; Lee-Iwamotu, in Byrnes *et al.* (2013), pp. 74 *et seq.*

[71] The leading case in this respect was the *Factory at Chorzów (Indemnity)* case, Request for an Interim Measure of Protection of 14 October 1927, PCIJ, Series A, No. 12, pp. 4, 10. The Court found that the advance payment of a certain sum which was not controversial constituted a partial satisfaction of the principal claim and thus could not be regarded as covered by the provision on provisional measures; *cf.* also Sztucki (1983), pp. 93–102; Merrills, *LCLQ* (1995), pp. 90, 104–6.

[72] Since the indication of provisional measures by the PCIJ in the case concerning the *Administration of the Prince von Pless*, Order of 11 May 1933, PCIJ, Series A/B, No. 54, pp. 150, 153, both Courts used to reiterate that their orders on provisional measures were without prejudice to the merits of the case.

[73] Dumbauld (1932), p. 23, fn. 3.

[74] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, Diss. Op. Nervo, ICJ Reports (1972), pp. 20, 25 and pp. 37, 42 respectively.

[75] *Nuclear Tests* (Australia v. France; New Zealand v. France), Provisional Measures, ICJ Reports (1973), pp. 99 *et seq.* and pp. 135 *et seq.* respectively.

[76] *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.*

[77] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3 *et seq.*

[78] *Breard*, Provisional Measures, ICJ Reports (1998), pp. 248 *et seq.*

[79] *LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9 *et seq.*

[80] *Avena*, Provisional Measures, ICJ Reports (2003), pp. 77 *et seq.*

[81] *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231 *et seq.*

[82] *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 16, para. 28.

in the *LaGrand*, the *Avena*, and the *Jadhav* cases, the Court, in response to the argument of the United States (and respectively Pakistan) that the indication of provisional measures would prejudice the merits of the case, underlined that 'a stay of execution would necessarily be provisional in nature and would not in any way prejudice findings the Court might make on the merits [and that] ... the measures indicated would preserve the respective rights of Paraguay and of the United States'.[83] Thus, the requirement that provisional measures shall not anticipate or prejudice the final judgment cannot be assessed according to formal aspects, namely whether the requested provisional measures and the submissions on the merits coincide,[84] but on a case-by-case basis, and only according as to whether the measures requested are necessary in order to preserve the substance of the rights *pendente lite*.[85]

C. Conditions for the Indication of Provisional Measures

27 Article 41 provides in general terms that provisional measures may be indicated if 'circumstances so require'. Thus, it may be concluded that all conditions that have to be fulfilled before provisional measures may be indicated, are part of these 'circumstances'.[86] However, the term may also be understood in a narrower sense, namely that the risk of irreparable damage and the urgency of the matter are the main circumstances to be considered. Due to the ambiguity of the term 'circumstances', it seems preferable to treat in one section all the conditions which must be fulfilled before provisional measures can be indicated without distinguishing between 'circumstances' and other prerequisites.

I. Jurisdiction

1. General Remarks

28 One of the most intricate aspects of interim protection concerns requests for the indication of provisional measures when the Court's jurisdiction is not established or is challenged,[87] a problem that did not occur squarely in the PCIJ, which never had to indicate provisional measures against explicit objections to its jurisdiction.[88] The issue of

[83] *Breard*, Provisional Measures, ICJ Reports (1998), pp. 248, 257–8, para. 40; *LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 15, para. 27; *cf.* also *Avena*, Provisional Measures, ICJ Reports (2003), pp. 77, 91, para. 58; *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 245, para. 60, and Duxbury, 'Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights', *Calif. W Int'l L. J.* 31 (2000), pp. 141–76; Iwamoto Lee, 'The Protection of Human Life Through Provisional Measures Indicated by the International Court of Justice', *Leiden JIL* 15 (2002), pp. 345–66; Rieter, 'Interim Measures by the World Court to Suspend the Execution of an Individual: the Breard Case', *NYIL* 16 (1998), pp. 475–94.

[84] This was, however, the opinion of Judge Gros in *Nuclear Tests* (Australia v. France; New Zealand v. France), Provisional Measures, Diss. Op. Gros, ICJ Reports (1973), pp. 115, 123 and pp. 149, 158 respectively.

[85] *Cf.* Dumbauld (1932), who rightly stated as early as 1932 that, in particular in cases where the principal relief sought is simply repressive, interim measures of protection will coincide with the main request without already therefore constituting an interim judgment, pp. 163–4.

[86] *Cf.* Sztucki (1983), p. 103.

[87] The literature on this question is abundant; reference is therefore made only to Sztucki (1983), p. 127; Oellers-Frahm, *EPIL* II, pp. 1027, 1034; and Miles (2017), pp. 488 *et seq.*

[88] It is interesting to see that von Stauffenberg in his commentary on the PCIJ Statute does not even mention the question of jurisdiction. However, it should be mentioned that in two out of the six cases on provisional measures dealt with by the PCIJ, objections to jurisdiction were raised: in the *Chorzów Factory* case, the objection to jurisdiction was dismissed, Request for an Interim Measure of Protection of 14 October 1927, PCIJ, Series A, No. 9, pp. 4 *et seq.*; in the *Electricity Company of Sofia and Bulgaria* case, Order of 5 December

jurisdiction which is almost always bound up with the issue of admissibility of the application,[89] is raised in general only in cases introduced unilaterally—and in particular against an unwilling respondent—and not in cases brought jointly by the parties on the basis of a special agreement.

The jurisdiction addressed here is the jurisdiction to decide on the merits of the case, 29
which has to be distinguished from the Court's 'power' to indicate provisional measures which derives 'from the special provisions contained in Article 41 of the Statute'[90] and differs entirely from the general rules relating to jurisdiction under Article 36 of the Statute. As interim protection is an incidental proceeding, it can only be exercised if the prerequisites for the main proceedings are present. However, the findings in case of contested jurisdiction, *e.g.*, preliminary objections, generally take some time so that a balance has to be struck between the urgency of preserving the substantive rights and the requirement of consent of the parties to the Court's jurisdiction. Although it would theoretically be possible for the Court to dismiss a request for provisional measures because the 'circumstances' of the case—namely urgency or irreparable damage—do not require interim protection without addressing at all the question of substantive jurisdiction,[91] it has never done so, but in all cases of interim protection it has considered first of all the question of jurisdiction,[92] although attaching different weight to it. This may be understood as a confirmation of the opinion according to which, in the words of Judge Mosler in the *Aegean Sea Continental Shelf* case, 'provisional affirmation of jurisdiction is ... not a "circumstance" contributing to the necessity of provisional measures in the sense of Article 41, but a precondition of the examination whether such "circumstances" exist'.[93]

2. *Extent of Certainty as to Substantive Jurisdiction*

As already mentioned, in most cases where the Court's jurisdiction is disputed, the ur- 30
gency of indicating provisional measures does not allow the Court first to decide definitively on that very question. While this view was always generally accepted, the question of the extent to which jurisdiction over the merits must be established was heavily disputed. The spectrum of degrees of certainty on jurisdiction reached from certain jurisdiction, quasi-certain jurisdiction, *prima facie* existing jurisdiction to *prima facie* lacking jurisdiction, doubtful jurisdiction, manifestly lacking jurisdiction, impossible jurisdiction, *etc.*[94] Today, this question has been settled in the Court's jurisprudence and need

1939, PCIJ, Series A/B, No. 79, pp. 194 *et seq.*, the Belgian government, only after having withdrawn its request for interim measures, later presented a preliminary objection to the Court's jurisdiction which was partly upheld.

[89] Questions of admissibility are implicitly also examined in the context of whether a *prima facie* case exists; *cf.* in this context Kaikobad, *Australian YIL* (1996), pp. 132 *et seq.*

[90] *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93, 102.

[91] This view is supported, *e.g.*, by Thirlway, in Bernhardt (1994), pp. 21–2.

[92] Even in cases where it declined the request, the Court first addressed the question of its substantive jurisdiction: *cf. Interhandel*, Provisional Measures, ICJ Reports (1957), pp. 105, 110; *Great Belt*, Provisional Measures, ICJ Reports (1991), pp. 12 *et seq.* and more recently *Pulp Mills*, Provisional Measures, ICJ Reports (2006), pp. 113, 128–9, paras. 57–9, and Provisional Measures, ICJ Reports (2007), pp. 3, 10–1, paras. 24–30; *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 147–51, paras. 40–55.

[93] *Aegean Sea Continental Shelf*, Provisional Measures, Sep. Op. Mosler, ICJ Reports (1976), pp. 26–7; *cf.* also *ibid.*, Sep. Op. Morozov, pp. 22–3, Sep. Op. Ruda, p. 24, and Diss. Op. Stassinopoulos, pp. 37 *et seq.*

[94] The most pertinent publication in this respect is the article by Mendelson, *BYIL* (1972–1973), pp. 259–322.

not be retraced in detail.[95] Since the *Fisheries Jurisdiction* cases, the Court's jurisprudence has been constant in requiring that the instrument(s) invoked by the parties conferring jurisdiction 'appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded'.[96] Prior to this decision, the ICJ had not always explicitly taken a position on the extent to which the substantive jurisdiction must be established in order to allow the indication of provisional measures, but had repeated only what the PCIJ had also underlined when indicating provisional measures, namely that they 'in no way prejudge[d] the question of the jurisdiction of the Court to deal with the merits of the case'.[97]

3. Case Law

31 The question was for the first time discussed to some extent in the joint dissenting opinion of Judges Winiarski and Badawi in the *Anglo-Iranian Oil Co.* case, where they found

> it difficult to accept the view that if *prima facie* the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection. This approach ... appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed: if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated.[98]

32 The Court seemed to follow this approach in the *Interhandel* case, where its jurisdiction was based on the acceptance of the compulsory jurisdiction according to Article 36, para. 2. However, the United States invoked its subjective domestic jurisdiction reservation (*Connally* reservation) while Switzerland contested the legality of this reservation.[99] The Court found that at that stage of the proceedings it did not have to examine the preliminary objection because interim protection followed special rules, namely the 'Occasional Rules' laid down in Article 61 of the then Rules, while for preliminary objections there was a special rule laid down in Article 62.[100] These findings of the Court were heavily criticized in the dissenting opinions which all argued that the reservation should have been considered at that stage of the proceedings.[101] The approach, as expressed by

[95] But *cf.* Miles, in Adenas/Bjorge (2015), pp. 231 *et seq.*

[96] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12, 16, para. 17 and pp. 30, 34, para. 18. But *cf.* the Separate Opinion of ad hoc Judge Sur in the *Questions relating to the Obligation to Prosecute or Extradite* case, Provisional Measures, ICJ Reports (2009), pp. 201 *et seq.*, who pleaded for applying the parameter of 'manifest lack of jurisdiction' which would be more consistent in cases where finally the jurisdiction is denied. In the view of the authors, this opinion raises concern in particular with a view to the binding character of provisional measures, *cf.* Oellers-Frahm, *GLJ* (2011), *passim*.

[97] *Sino-Belgian Treaty*, Order of 8 January 1927, PCIJ, Series A, No. 8, pp. 6, 7; *Interhandel*, Provisional Measures, ICJ Reports (1957), pp. 105, 110–11.

[98] *Anglo-Iranian Oil Co.*, Provisional Measures, Diss. Op. Winiarski and Badawi Pasha, ICJ Reports (1951), pp. 96, 97.

[99] *Cf.* Tomuschat on Art. 36 MN 98.

[100] *Interhandel*, Provisional Measures, ICJ Reports (1957), pp. 105, 111; *cf.* also Chan-Gonzaga, 'Provisional Remedies in the World Court: the ICJ in the 21st Century', *Ateneo Law Journal* 45 (2001), pp. 129–62, 155.

[101] *Cf. Interhandel*, Provisional Measures, Sep. Op. Wellington Koo, ICJ Reports (1957), pp. 113 *et seq.*, Sep. Op. Klaestad, *ibid.*, pp. 115 *et seq.*, Sep. Op. Lauterpacht, *ibid.*, pp. 117 *et seq.*; *cf.* also Oellers-Frahm (1975), pp. 61 *et seq.*

Annex 20

Judge Lauterpacht in the *Interhandel* case,[102] has been maintained by the Court ever since, according to which:

> The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservation *obviously* excluding its jurisdiction.[103]

If the jurisdictional basis invoked does not result from the Optional Clause but from a compromissory clause in a bilateral or multilateral treaty (Article 36, para. 1 of the Statute), the Court has to look more closely also to the requirements conditioning the application of the clause. Thus, in the three cases based on the CERD, namely *Georgia v. Russia*, the *ICSFT and CERD* case, and the *Qatar v. United Arab Emirates* case, the Court had to assess whether the prerequisites laid down in Article 22 CERD, namely that the dispute is not settled by negotiation or by the procedures expressly provided for in the Convention, were fulfilled. In all three cases, the Court found that *prima facie* the procedural conditions of Article 22 CERD had been complied with and ordered provisional measures. In the case *Georgia v. Russia* deciding on the preliminary objections, the Court then found, however, that the preconditions set out in Article 22 CERD had not been met and dismissed the case.[104] When the question of the fulfilment of the conditions of Article 22 CERD was raised anew in the *ICSFT and CERD* case and in the *Qatar v. United Arab Emirates* case, the Court again found in the provisional measures phase that the controversial question, namely whether the preconditions set out in Article 22 CERD are alternative or cumulative in nature, need not be decided at the stage of preliminary protection since at least one of the preconditions, namely negotiations, had taken place.[105] The Court thus confirmed that *prima facie* jurisdiction is present if there is an instrument conferring jurisdiction upon the Court which is binding upon both parties.

Further requisites, in particular subjective conditions, *e.g.*, intent or knowledge, are 33
not examined by the Court in the context of its *prima facie* jurisdiction, but rather in the context of the plausibility of the request.[106] Thus, in the *Legality of Use of Force* cases,[107] the Court declined to indicate provisional measures not for lack of *prima facie* jurisdiction, but because the special intent to commit genocide did not, at the present stage of the proceedings, appear to exist.[108] For the same reasons, the Court, after finding in favour of *prima facie* jurisdiction,[109] dismissed the request for provisional measures in the *ICSFT and CERD* case with regard to the International Convention for the Suppression

[102] *Interhandel*, Provisional Measures, Sep. Op. Lauterpacht, ICJ Reports (1957), pp. 117, 119.

[103] *Nuclear Tests* (Australia v. France; New Zealand v. France), Provisional Measures, ICJ Reports (1973), pp. 99 *et seq.* and pp. 135 *et seq.*, respectively (emphasis added), which was criticized by Judge Nagendra Singh and Judge Forster, *ibid.*, Decl. Singh, pp. 108, 109–10 and Diss. Op. Forster, pp. 111, 113, respectively; *Arbitral Award of 31 July 1989*, Provisional Measures, ICJ Reports (1990), pp. 64, 68–9, para. 20.

[104] *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 140, para. 184.

[105] *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 125–6, paras. 59–61; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, paras. 36-40

[106] *Cf. infra*, MN 46.

[107] *Legality of Use of Force* cases, Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.*

[108] *Cf.* the *dictum* in the case against Belgium which is repeated in identical terms in the other cases: *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 138, para. 40.

[109] *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 123–4, para. 54.

of the Financing of Terrorism (ICSFT). In the context of its assessment of the plausibility of the claim, the Court found that the elements of intention or knowledge, qualifying the respective offences under the Convention, were not established because Ukraine 'had not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present'.[110] This jurisprudence confirms the approach of the Court to require the mere existence of a jurisdictional basis as evidence for jurisdiction *prima facie*, and to complement this finding on *prima facie* jurisdiction by its appreciation of other, in particular subjective requirements, in the context of examining the plausibility of the claim.

34 In filing a request for provisional measures, the requesting party always informs the Court of the basis or bases of jurisdiction on which it attempts to rely, although the Rules of Court do not contain a respective provision to this end (Article 73 of the Rules of Court). As, however, interim measures are requested in the context of proceedings brought before the Court, the indication of a basis of jurisdiction results from the requirements concerning the institution of proceedings laid down in Article 38, para. 2 of the Rules of Court. The indication of provisional measures was denied for lack of *prima facie* jurisdiction in several cases,[111] the most interesting of which was the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*.[112] In that case, the jurisdiction of the Court was based on the statement in para. 63 of the Court's decision of 1974, according to which the jurisdiction of the Court existing in 1974 for deciding the *Nuclear Tests* cases was declared to subsist notwithstanding the denunciation by France of the General Act for the Pacific Settlement of International Disputes.[113] In 1974, the Court had dismissed the application on the basis of a commitment by France not to carry out further atmospheric nuclear tests in the South Pacific area, which had rendered the case moot. It added, however, in the famous para. 63 that 'if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute'.[114] In the case brought in 1995, the Court dismissed the request for provisional measures, as well as at the same time the application for lack of jurisdiction since para. 63 could only be invoked as a basis for jurisdiction in case of *atmospheric* nuclear tests, while in 1995 the nuclear tests of France in the South Pacific were *underground* tests.[115]

35 If the lack of jurisdiction is absolutely manifest at the stage of provisional measures, the Court may order the removal of the case from the General List in the order dismissing the request for provisional measures. However, the Court is very reluctant to go so far. Apart from the case already mentioned in the preceding paragraph, only

[110] *Ibid.*, para. 75.

[111] *Cf. Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219 *et seq.* and the ten *Legality of Use of Force* cases, Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.*

[112] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Provisional Measures, ICJ Reports (1995), pp. 288 *et seq.*

[113] *Cf.* for criticism of this concept of 'monitoring clauses' Tomuschat on Art. 36 MN 84 and, on the other hand, Zimmermann/Geiss on Art. 61 MN 19–22.

[114] *Nuclear Tests* (New Zealand v. France), Judgment, ICJ Reports (1974), pp. 457, 477, para. 63.

[115] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Provisional Measures, ICJ Reports (1995), pp. 288, 306, para. 63.

the *Legality of Use of Force* cases can be mentioned in this context. In its orders refusing to indicate provisional measures,[116] the Court removed two of the ten cases—the one against Spain and that against the United States—from the General List for evident lack of jurisdiction. After finding that the bases of jurisdiction invoked by Yugoslavia, namely the optional clause and the Genocide Convention in the case against Spain and only the latter one in the case of the United States, did not confer jurisdiction upon the Court,[117] the Court stated that

> within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice.[118]

In the operative part of the Order, the Court consequently not only rejected the request for provisional measures but also ordered that the case be removed from the General List. That the Court removes a case only where its jurisdiction is evidently lacking was demonstrated in the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case. Since Rwanda had not made a declaration under the optional clause, the Congo invoked eight international treaties as bases for the Court's jurisdiction, while Rwanda contended that none of these treaties could come anywhere near affording even a *prima facie* basis for jurisdiction and that the Court should remove the case from the List.[119] The Court, in fact, dismissed the request for lack of a sufficient jurisdictional basis; it did not, however, order the removal of the case from the General List because it found that there was manifest lack of jurisdiction only with regard to six of the instruments invoked, while two treaties which required negotiations prior to seising the Court might have been a basis for jurisdiction if the negotiations had failed.

4. Possible Interference with State Sovereignty

The fact that the Court exercises its power to indicate provisional measures when the substantive jurisdiction exists on a *prima facie* basis without being definitively certain makes it possible that provisional measures are indicated in a case where finally the Court determines that it lacks jurisdiction. It has been generally accepted that the interference with the sovereignty of States may thus be the price to be paid for preserving the substantive rights if need be. To keep this risk as low as possible, the Court gives jurisdiction over the merits 'fullest consideration compatible with the requirement of urgency'.[120] In fact, only in three cases did the Court decline its jurisdiction on the merits after having indicated provisional measures.[121] 36

Whether the question of the extent of certainty as to the jurisdiction on the merits needs to be reconsidered with reference to the aspect of non-interference with the sovereignty of 37

[116] *Cf.* Provisional Measures, ICJ Reports (1999), pp. 124 *et seq*; *cf.* Boisson de Chazournes, L., 'La Cour internationale de Justice aux prises avec la crise du Kosovo: A propos de la demande en mesures conservatoires de la République Fédérale de Yougoslavie', *AFDI* 45 (1999), pp. 452–71, 456 *et seq.*

[117] *Legality of Use of Force* (Yugoslavia v. Spain; Yugoslavia v. United States of America), Provisional Measures, ICJ Reports (1999), pp. 761, 769 *et seq.*, paras. 22 *et seq.* and pp. 916, 923, para. 19, respectively.

[118] *Ibid.*, p. 773, para. 35 and p. 925, para. 29, respectively.

[119] *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 231–4, paras. 33 *et seq.*

[120] *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169, 179–80, para. 25.

[121] *Anglo-Iranian Oil Co.*, Preliminary Objections, ICJ Reports (1952), pp. 93 *et seq.*; *Georgia v. Russia*, Provisional Measures, ICJ Reports (2008), pp. 353 *et seq.*, and Preliminary Objections, ICJ Reports (2011), pp. 70 *et seq.*; *Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 21–2, para. 61(1).

States for the reason that the Court found in the *LaGrand* case that provisional measures are binding upon the parties,[122] will be examined in that context.[123]

II. Existence of a *Prima Facie* Case/Plausibility of the Case

38 Provisional measures are designed to preserve the rights which might be adjudged on the merits; thus, as there must be at least a *prima facie* basis for substantive jurisdiction, there must also be some prospect of success on the merits of the case, for otherwise there would not be any necessity to indicate provisional measures.[124]

39 The aspect concerning the prospect of success of the application did, for a rather long time, not play an important role in the practice of the Court because inter-State disputes are usually complex so that the prospects of success cannot easily be evaluated. However, there are cases where this question was raised. Thus, in the *Nuclear Tests* cases, Judges Forster, Petrén, and Ignacio-Pinto relied in their dissenting opinions on grave doubts as to the legal foundation of the substantive claims.[125] The Court addressed this question explicitly for the first time in the *Great Belt* case,[126] where Denmark argued 'that not even a *prima facie* case exists in favour of the Finnish contention'.[127] The Court found, however, that the right claimed by Finland, namely the right of passage through the Great Belt, existed and that only the extent of the right was disputed so that there was a case to decide upon.[128]

40 As in the case of substantive jurisdiction, the question is again how far the success on the merits of the case has to be considered at the stage of interim protection without anticipating the judgment on the merits. The Court did not have to take a position on this item in the *Great Belt* case, but Judge Shahabuddeen analysed the question in detail in his separate opinion.[129] He argued that the State requesting interim measures 'is required to establish the possible existence of the rights sought to be protected'.[130] A case which comes close to a denial by the Court of provisional measures for lack of a prospect of success on the merits is the *Legality of Use of Force* case,[131] where the Court declined to indicate provisional measures because the special intent to commit genocide did not, at that stage of the proceedings, appear to exist.[132] Since the Genocide Convention was invoked as the basis of jurisdiction, this case lies at the borderline between the denial of interim protection for lack of substantive jurisdiction or lack of prospect of success.[133]

[122] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 506, para. 109.

[123] *Cf. infra*, MN 108–114.

[124] Dumbauld (1932), p. 165. But *cf.* Rosenne (2005), p. 72, who argues that the Court cannot speculate as to the merits of the case at the stage of provisional measures (citing the ICSID arbitration *Maffezini v. Kingdom of Spain*, Procedural Order No. 2, *ILR* 124 (2003), pp. 6, 8, paras. 16–21); *cf.* also Saccucci, *RGDIP* (2008), *passim*.

[125] *Nuclear Tests* (Australia v. France; New Zealand v. France), Provisional Measures, Diss. Op. Forster, ICJ Reports (1973), pp. 111, 114, Diss. Op. Petrén, pp. 124, 126, Diss. Op. Ignacio-Pinto, pp. 128, 131.

[126] *Great Belt*, Provisional Measures, ICJ Reports (1991), pp. 12, 17, para. 21.

[127] *Ibid.*

[128] As to further details *cf.* Bhattacharya, *Yale JIL* (2013), pp. 519 *et seq.*

[129] *Great Belt*, Provisional Measures, ICJ Reports (1991), Sep. Op. Shahabuddeen, pp. 28 *et seq.*

[130] *Ibid.*, pp. 28, 36.

[131] *Legality of Use of Force* cases, Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.*

[132] *Cf.* the *dictum* in the case against Belgium which is repeated in identical terms in the other cases: Provisional Measures, ICJ Reports (1999), pp. 124, 138, para. 40.

[133] *Cf.* also already *supra*, MN 32.

41 The practice of the Court to attribute rather marginal importance to the issue of the prospect of success of the case on the merits was, however, changed, all of a sudden as it seems, beginning with the *Questions relating to the Obligation to Prosecute or Extradite* case and was confirmed explicitly in two further cases,[134] before it became a standard step in examining a request for the indication of provisional measures. In the *Questions relating to the Obligation to Prosecute or Extradite* case the Court introduced as a new parameter a 'plausibility test', meaning that the indication of provisional measures presupposes that the Court is satisfied 'that the rights asserted by a party are at least plausible',[135] without, however, providing any definition of this term or referring to the *fumus boni juris* requisite applied by other courts.

42 On the one hand the concept of 'plausibility', which is not a legal term, might appear, at least to a German lawyer, as a tentative translation of the German legal term of *Schlüssigkeit* ('conclusiveness'), meaning that a claim is already 'plausible' (*schlüssig*) if the rights asserted by a party may be found to belong to it provided the alleged facts, *as claimed by the applicant*, exist and that the jurisdictional basis invoked governs the claimed rights. This might have been the approach chosen by the Court in the *Questions relating to the Obligation to Prosecute or Extradite* case, where the Court found that the rights asserted by Belgium were plausible since they were 'grounded in a possible interpretation of the Convention against Torture'.[136] Yet, it ought to be noted that in the said case no evidentiary issues had arisen anyhow.

43 On the other hand and more recently, however, the Court seems to have clarified that the plausibility test does not amount solely to such a test of conclusiveness (*Schlüssigkeit*), but that it also encompasses evidentiary issues. Thus, in the *ICSFT and CERD* case the Court denied the existence of a plausible case with regard to the ICSFT for lack of sufficient evidence. After having found that *prima facie* the ICSFT constituted a jurisdictional basis in the case at hand,[137] it still denied the plausibility of the claim with regard to the elements of intent or knowledge qualifying the respective offences under the Convention, because Ukraine 'had not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present'.[138] In the same vein, in the *Jadhav Case* the Court took into account both 'the legal arguments and [the] evidence presented' by India in order to find its claim to be plausible,[139] and in the *Qatar v. United Arab Emirates*

[134] *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 151–2, paras. 56–61; *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 18–20, paras. 53–9; *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 545, para. 33.

[135] *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 151, para. 57; *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 18, para. 53. The term 'plausible case' was first introduced in the separate opinion of Judge Abraham in the *Pulp Mills* case (ICJ Reports (2006), pp. 113, 137 *et seq.*) who rightly stated that after the confirmation that provisional measures are binding any obligation imposed on a party must rest on solid legal grounds, especially when the party in question is a sovereign State. Judge Abraham considered 'plausibility' as equivalent to the requisite of *fumus boni juris* applied, *e.g.*, by the Court of Justice of the European Union; *cf.* also the separate opinion of Judge Bennouna, *ibid.*, pp. 142 *et seq.*

[136] *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 152, para. 60.

[137] *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 123–4, para. 54.

[138] *Ibid.*, pp. 131–2, para. 75; *cf.* also *supra*, MN 32.

[139] *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 242–3, para. 45.

case it found 'at least some of the rights asserted by Qatar' to be plausible 'on the basis of the evidence presented'.[140] It thus seems that, in order for a claim to be 'plausible' and thus satisfy this recently reinterpreted requirement for provisional measures to be indicated, the party requesting such measures must also provide some level of evidence supporting its allegations rather than its allegations merely being conclusive.

44 The Court has not yet fully clarified what is meant by the necessary *degree* of plausibility. It did find, however, that a right was already plausible provided it was 'grounded in a *possible* interpretation' of the underlying treaty instrument, the violation of which is alleged,[141] respectively that alleged specific violations of international law '*might* be derived' from certain more general principles of customary international law.[142] Most recently, it found that it suffices that there are 'sufficient reasons for considering' that the alleged violations of international law are present in order for such claim to be plausible.[143]

In the *Certain Activities Carried Out by Nicaragua in the Border Area* case the Court found that the 'title to sovereignty claimed by Costa Rica [the Applicant] ... is plausible' and then made it clear that it was 'not called upon to rule on the plausibility of the title to sovereignty over the disputed territory advanced by Nicaragua [the defendant]'.[144] Yet, as rightly stated by Judge Owada in his Separate Opinion in the *ICSFT and CERD* case analysing a prior decision of the Court 'if "plausibility" were to imply a degree of certainty greater than fifty per cent, then [such] a finding that Costa Rica's claim was plausible would necessarily imply that Nicaragua's claim was not plausible'.[145] Accordingly, it seems that the Court considers 'that "plausibility" could be a certainty of fifty per cent or less' provided, as members of the Court put it, 'the arguments are sufficiently serious on the merits'[146] or that they at least 'have *some* prospect of success'.[147]

45 In its jurisprudence the Court has introduced a graded standard of proof when it comes to the merits of a case depending on the gravity of the charges brought against a State.[148] That raises the issue whether *mutatis mutandis* the same principle should also apply as far as the plausibility standard at the provisional measures stage of a case is concerned since otherwise a given applicant could, be it only for purposes of an

[140] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, para. 54.

[141] *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 152, para. 60 (emphasis added). Albeit not expressly stated, the Court seems to have followed this approach also in the *Qatar v. United Arab Emirates* case when it first decided that at this stage of the proceedings it was not yet necessary to decide which interpretation of Article 1, para. 1 CERD suggested by the parties was correct and then found that 'some of the acts of which Qatar complains may constitute acts of racial discrimination as defined by the Convention'. *Cf. Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, paras. 53, 54; *cf. also Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights*, Provisional Measures, Order of 3 October 2018, paras. 53, 54, 67, and 68.

[142] *Certain Documents and Data*, Provisional Measures, ICJ Reports (2014), pp. 147, 153, para. 27 (emphasis added).

[143] *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 131–2, para. 75.

[144] *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 19–20, paras. 58–9.

[145] *ICSFT and CERD* case, Provisional Measures, Sep. Op. Owada, ICJ Reports (2017), pp. 142, 147, para. 19.

[146] *Pulp Mills*, Provisional Measures, ICJ Reports (2006), Sep. Op. Abraham, pp. 137, 140–1, para. 10.

[147] *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, Decl. Greenwood, ICJ Reports (2011), pp. 46, 47, para. 4 (emphasis added).

[148] For details *cf.* Benzing, Evidentiary Issues, MN 109 *et seq.*

order on provisional measures, circumvent such otherwise applicable strict evidentiary standard.[149]

There has been some discussion concerning the additional value of the 'plausibility test' for the indication of provisional measures. Judge Koroma, for instance, stated in his Separate Opinion in the *Certain Activities Carried out by Nicaragua in the Border Area* case that '[t]he criterion seems to have appeared [in the *Belgium v. Senegal* case] out of nowhere. The Court in that case cited no precedent supporting the existence of a "plausibility" standard, nor did it explain why it was establishing such a standard' and, moreover, in his view, 'the most problematic aspect of the plausibility standard is its vagueness'.[150] Although this concern is not without merit, it has to be stated that the plausibility test is not a novelty, but is 'simply spelling out the implications of the general principle that provisional measures exist to protect the rights which might be adjudged to belong to one of the parties'.[151] The term 'plausibility test' replaces simply what until then was assessed by the Court under the issue of 'prospect of success' of the case on the merits, what was a somehow misleading expression. The term 'plausibility' is more neutral; it does not imply a 'promising note' as does the term 'success', although it concerns exactly the same aspect, namely to prevent the indication of provisional measures in cases where adjudication on the merits seems unsuccessful already at this stage of the proceedings because the rights at stake are not governed by the respective jurisdictional basis or appear to be absurd.[152] Therefore, the plausibility test does not constitute a novelty in the procedure on interim protection. Rather, what was new was the fact that beginning with the *Belgium v. Senegal* case it became a standard issue of examination in the Court's procedure on interim protection. 46

III. Relationship/Link between the Measures Requested and the Main Claim

Closely related to the aspect of the *prima facie* existence of a case respectively the plausibility of the claim is the question of the required link between the measures requested and the substantive claim, a link which is distinct of the plausibility of the claim requirement, and which meanwhile is regularly assessed by the Court after the plausibility test. This question was relevant in numerous cases before the PCIJ[153] and the ICJ[154] and can, as a 47

[149] The issue was argued, albeit succinctly only, in the *ICSFT and CERD* case (see CR 2017/2, 7 March 2017, p. 23, para. 6 (Wordsworth)), but the Court did not address it in its subsequent order on provisional measures.

[150] *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, Sep. Op. Koroma, ICJ Reports (2011), pp. 30–1, paras. 6–7.

[151] *Ibid.*, Decl. Greenwood, ICJ Reports (2011), pp. 47–8, para. 5, Sep. Op. Sepúlveda-Amor, ICJ Reports (2011), pp. 35, 38, para. 16, Sep. Op. Dugard, ICJ Reports (2011), pp. 60, 61, para. 2.

[152] *Cf.* Uchkunova, *LPICT* (2013), pp. 407 *et seq*; Ghantous, *Canadian YIL* (2012), pp. 35 *et seq.*, pp. 43 *et seq.*; Lee-Iwamoto, *Japanese YIL* (2013), pp. 242 *et seq.* and Lee-Iwamotu, in Byrnes *et al.* (2013), pp. 85 *et seq.*

[153] *South-Eastern Greenland*, Order of 3 August 1932, PCIJ, Series A/B, No. 48, pp. 277 *et seq.*; *Polish Agrarian Reform and the German Minority*, Order of 29 July 1933, PCIJ, Series A/B, No. 58, pp. 175 *et seq.*

[154] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12, 15, para. 12, and pp. 30, 33, para. 12, respectively; in the *Aegean Sea Continental Shelf* case the Court dismissed one of the claims as not submitted to the Court in the application, Provisional Measures, ICJ Reports (1976), pp. 3, 11, para. 34; in the *Arbitral Award of 31 July 1989* case, Provisional Measures, ICJ Reports (1990), pp. 64, 69–70, paras. 25–7, the Court dismissed the request for provisional measures for lack of relationship between the substantive claim—nullity of the award—and the request for provisional measures which aimed at the prohibition of any action in the disputed maritime area; in the *Bosnian Genocide* case the Court confined the measures to those which fell within the scope of the Genocide

matter of fact, only be decided on a case-by-case basis. However, although the principle is uncontroversial, there may be differences as to what exactly is the subject-matter of a certain dispute, as was shown in the *Polish Agrarian Reform and the German Minority* case.[155] This case may be thought to be the reason for the respective amendment of the Rules in 1936[156] which then provided in Article 61, para. 1 that the parties were to formulate the rights they wished to be protected. This provision, which aimed at facilitating the identification of the issues at stake, was maintained in the Rules until 1978, when Article 73, para. 2 of the Rules deleted these terms, requesting the parties instead to specify the reasons for a request of provisional measures, the possible consequences if this request is not granted, and the measures requested. This amendment seems to be the consequence of the fact that formalistic definitions are not always helpful and that the Court has to assess the indication of provisional measures from the point of view of the substance of the dispute as a whole.

48 In the *Preah Vihear (Request for Interpretation)* case this question became particularly relevant because interim protection was sought in the context of an interpretation case, and hence a case brought under Article 60 rather than under Article 36 of the Statute so that the substance of the dispute played a particular role. The Court, however, did not attribute much value to the different jurisdictional bases of the underlying dispute but instead ordered, *inter alia*, the establishment of a demilitarized zone and the withdrawal of troops and personnel, as well as non-aggravation measures.[157] Apart from some more general criticism with regard to the content of this Order,[158] it raises in particular the question concerning its link with the substance of the claim, namely the interpretation of the Court's underlying 1962 judgment. This aspect was discussed extensively, in particular by Judge Donoghue, who rightly underlined the inherent limitation of jurisdiction under Article 60 of the Statute.[159] This case provides an example that even where a claim may be plausible, the required link to the merits might still be missing. Such a situation may realize itself in particular in proceedings such as interpretation or revision of a judgment, where the jurisdiction of the Court is limited in scope and does not encompass the underlying dispute as such.[160]

IV. Irreparable Prejudice

49 The power conferred upon the Court under Article 41 is intended to 'preserve the respective rights of either party'. In examining whether prejudice is in prospect, the Court has to consider both the probability of a certain event occurring, as well as the consequences to be expected if it does. With regard to future events, it is evident that a probability of its occurrence is sufficient.[161] However, in most cases, the events that prompted

Convention which was the only *prima facie* basis of jurisdiction, dismissing therefore all requests concerning, *e.g.*, self-defence: Provisional Measures, ICJ Reports (1993), pp. 3, 18–9. para. 33; *Land and Maritime Boundary*, Provisional Measures, ICJ Reports (1996), pp. 13, 21–2, para. 35; *Georgia v. Russia*, Provisional Measures, ICJ Reports (2008), pp. 353, 388–9, para. 118.

[155] Order of 29 July 1933, PCIJ, Series A/B, No. 58, pp. 175, 181, 185–6.

[156] The preparatory works do not contain any explanation in this sense; *cf.* Sztucki (1983), p. 91.

[157] *Cf.* also *supra*, MN 22.

[158] *Cf. inter alia* Oellers-Frahm, in Jalloh/Elias (2015), p. 70.

[159] *Preah Vihear (Request for Interpretation)*, Provisional Measures, Diss. Op. Donoghue, ICJ Reports (2011), pp. 613, 623, para. 26.

[160] *Cf.* also Zimmermann/Thienel on Art. 60 MN 45–51.

[161] *Cf. e.g.*, *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12, 16, para. 20, and pp. 30, 34, para. 21, respectively; *Nuclear Tests*

Annex 20

the request had already occurred or were occurring so that the Court only had to satisfy itself that interim protection was needed in order to prevent irreparable damage.

One wonders, however, what is meant by 'irreparable prejudice'.[162] In the *Sino-Belgian Treaty* case, the PCIJ stated that a prejudice is irreparable if it 'could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form'.[163] This criterion of 'absolute irreparability *in law*' was invoked in nearly all cases of interim protection before the PCIJ[164] and also sometimes before the ICJ, although the ICJ itself did not reiterate this understanding of irreparable prejudice.[165] In the *South-Eastern Greenland* case, the criterion concerning irreparability was considerably broadened in that the PCIJ stated that provisional measures are required when 'the damage threatening [the rights in dispute] would be irreparable *in fact or* in law'.[166] In other cases, the Court only pointed out that it was concerned to preserve the rights which may be subsequently adjudged.[167] The question of whether the prejudice could be made good simply by the payment of an indemnity or by compensation or restitution was not raised in these cases. 50

Since the *Fisheries Jurisdiction* cases, the Court has reiterated in each case that its power under Article 41 'presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings'.[168] This *dictum* is sometimes followed by a statement on the reasoning behind its finding as to why, in the case at hand, irreparable prejudice was or was not imminent. However, not surprisingly, the Court's motivations reveal a variety of approaches to what is 'irreparable prejudice' depending on the actual situation. 51

The factor of 'irreparable prejudice' needs no detailed explication in cases like the *Breard*, the *LaGrand*, the *Avena*, and the *Jadhav* cases, where the imminent execution of a convicted person is at stake; the same is true for cases involving armed activities (DRC) or genocide (Yugoslavia) and has recently been confirmed also with regard to a risk of bodily injury or death due to incidents in a particular situation, namely certain activities by civilian or military personnel on the territory disputed between Costa Rica and 52

(Australia v. France; New Zealand v. France), Provisional Measures, ICJ Reports (1973), pp. 99, 105, para. 29 and pp. 135, 141, para. 30, respectively; *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 20, para. 44; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 128, para. 42 *et seq.*; *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 24, para. 75.

[162] This question is rather scarcely treated in doctrine; but *cf.* Sztucki (1983), pp. 104 *et seq.*; Oellers-Frahm (1975), pp. 48 *et seq.*; *cf.* also for criticism Thirlway, in Bernhardt (1994), pp. 8 *et seq.*

[163] *Sino-Belgian Treaty*, Application Instituting Proceedings, PCIJ, Series A, No. 8, pp. 3, 7.

[164] *Factory at Chorzów (Indemnity)*, Request for an Interim Measure of Protection of 14 October 1927, PCIJ, Series A, No. 12, pp. 3, 6; *Administration of the Prince von Pless*, Application by the German Government for the Indication of Provisional Measures, Series C, No. 70, p. 202; *Polish Agrarian Reform and the German Minority*, Application by the German Government for the Indication of Provisional Measures, Series C, No. 71, p. 13.

[165] *Anglo-Iranian Oil Co.*, Pleadings, p. 93; *Fisheries Jurisdiction* (UK v. Iceland), Pleadings, vol. I, p. 72 and (Federal Republic of Germany v. Iceland), Pleadings, vol. II, pp. 23–4; *Nuclear Tests*, Pleadings, vol. I, p. 44 and vol. II, p. 56; *Pakistani POW*, Pleadings, p. 45; *Aegean Sea Continental Shelf*, Pleadings, p. 64.

[166] *South-Eastern Greenland*, Order of 3 August 1932, PCIJ, Series A/B, No. 48, pp. 277, 284 (emphasis added).

[167] *Anglo-Iranian Oil Co.*, Provisional Measures, ICJ Reports (1951), pp. 89, 93, and *Interhandel*, Provisional Measures, ICJ Reports (1957), pp. 105, 111; *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3, 19, para. 34; *Land and Maritime Boundary*, ICJ Reports (1996), pp. 13, 21–2, para. 35; *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 328, para. 65.

[168] *Fisheries Jurisdiction* (UK v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12, 16, para. 21.

Nicaragua.[169] Thus, irreparable damage is broadly recognized where the life or physical integrity of human beings is at stake. However, in the cases concerning possible violations of the CERD a risk of irreparable prejudice has been broadly recognized also in relation to other political, civil, economic, social, and cultural rights, thus in the absence of a direct threat to life or physical integrity. While the Court's repeated statement that several of the rights protected under Article 5 CERD 'are of such a nature that prejudice to them is capable of causing irreparable harm'[170] can be approved in general it has been criticized that the Court refrained from examining the actual existence of a real risk of irreparable harm more precisely on the basis of the respective case's facts.[171] More explanation is also needed in cases like the *Aegean Sea Continental Shelf* case, where the 'exclusivity of the rights … to acquire information concerning the natural resources of the area of the continental shelf' was at stake, which was found by the Court to be capable of reparation,[172] or the *Pulp Mills* case, where a breach of procedural environmental obligations would, according to the Court, not be incapable of being remedied at the merits stage.[173] In the same case a further request for provisional measures was raised by Uruguay, the defendant, concerning roadblocks organized by Argentinian citizens that, in the eyes of Uruguay, would cause irreparable economic damage. The Court found that even if the blockages might cause damage to the Uruguayan economy they were not such as to risk irreparable damage,[174] thus supporting the view that merely financial damage will usually not be considered as an irreparable damage. Thus, there is no generally applicable test for establishing what is 'irreparable prejudice'; however, the requirement of absolute irreparability in law has been abandoned and replaced by enlarging the margin of appreciation with a view to all the circumstances of the case. The Court's case law does not show

[169] *Cf.* in this context in particular the dissenting opinion of Judge Cançado Trindade in the *Questions relating to the Obligation to Prosecute or Extradite* case, who pleads for a more generous interpretation of urgency and irreparable damage where human rights violations are at stake, Provisional Measures, ICJ Reports (2009), pp. 165, 182–88, paras. 46–64. In the *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights* case, Provisional measures, Order of 3 October 2018, paras. 99 *et seq.*, the Court found that irreparable damage can be considered to exist 'when the persons concerned are exposed to danger to health and life'.

[170] *Georgia v. Russia*, Provisional Measures, ICJ Reports (2008), pp. 353, 396, para. 142; *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 138, para. 96; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, para. 67.

[171] Joint Diss. Op. Al-Khasawneh, Ranjeva, Shi, Koroma, Tomka, Bennouna, Skotnikov, ICJ Reports (2008), pp. 400, 405, para. 21; Sep. Op. Skotnikov, *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 222–3, paras. 2, 3; Dec. Tomka, *ibid.*, pp. 150, 153, para. 8; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Provisional Measures, Diss. Op. Crawford, Order of 23 July 2018, para. 14 *et seq.*; Diss. Op. Bhandari, *ibid.*, para. 8; Diss. Op. Cot, *ibid.*, para. 1, 17 *et. seq.*

[172] *Aegean Sea Continental Shelf*, Provisional Measures, ICJ Reports (1976), pp. 3, 10, para. 33.

[173] *Pulp Mills*, Provisional Measures, ICJ Reports (2006), pp. 113, 131, para. 70, and 132, paras. 74–6. In this case, the requested provisional measures concerned substantive and procedural environmental issues. While Argentina had not persuaded the Court of the imminent harm to the substantive rights, the violation of procedural rights was considered to be not such as to be irreparable. In this context it may be interesting to refer to comparable cases before the ITLOS, which in fact did grant provisional protection to merely general procedural environmental obligations even in cases where it denied urgency. *Cf.* Oellers-Frahm, in Hestermeyer (2011), point D.; Mensah, 'Provisional Measures in the International Tribunal for the Law of the Sea (ITLOS)', *ZaöRV* 62 (2002), pp. 43–54, 45 *et seq.*; Treves, in Jean-Pierre Cot (2009), *passim*; *cf.* also Gros Espiell, *Anuario Hispano-Luso-Americano de Derecho Internacional* (2007), *passim*; also, Treves, 'Article 290: Provisional Measures', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 1866–79, esp. pp. 1872–3.

[174] *Pulp Mills*, Provisional Measures, ICJ Reports (2007), pp. 3, 13, para. 41.

detailed or consistent examination of the question of irreparability, but rather reveals that provisional measures are granted when an obvious and flagrant violation of the rights claimed on the merits cannot be tolerated until the delivery of the final judgment, which was particularly evident in recent times when the Court was often concerned with cases involving armed activities.

In two recent cases the Court explicitly referred to the criterion of the restoration of the *status quo ante*. In the *Certain Documents and Data* case concerning the seizure by Australia of documents and other property of Timor-Leste which were allegedly relevant in a pending *Arbitration under the Timor Sea Treaty of 20 May 2002*, the Court found that 'there could be a very serious *detrimental effect* on Timor-Leste's position in the Timor Sea Treaty Arbitration ... should the seized material be divulged to any person or persons involved or likely to be involved in that arbitration or in negotiations on behalf of Australia'.[175] It further stated that '[a]ny breach of confidentiality may not be capable of remedy or reparation as it might not be possible to revert to the *status quo ante* following the disclosure of the confidential information'.[176] *Mutatis mutandis* the same wording was used in the *Immunities and Criminal Proceedings* case where the Court found that there was an imminent and irreparable risk of prejudice since any infringement of the inviolability of diplomatic premises 'may not be capable of remedy, since it might not be possible to restore the situation to the *status quo ante*'.[177] These findings reflect the Court's view that where the action causing a risk of irreparable prejudice has not yet occurred, the *status quo ante* should be maintained, while it is evident that in cases where provisional measures are indicated because the *irreparable damage* has already occurred, there is no question of restoration of the *status quo ante*, an aspect that is relevant in particular with regard to the issue of reparations in case of non-compliance with provisional measures ordered by the Court.[178]

V. Urgency

The requirement of urgency underlies and justifies any interim protection measures. It has substantive as well as procedural aspects which cannot strictly be separated and therefore both will be treated in this section. 53

1. Substantive Aspects

Under the substantive aspect, urgency is closely linked to the requirement of imminent irreparable prejudice, for if no irreparable prejudice is imminent there is no urgency. This was clearly underlined in the *Avena* case,[179] which was, like the *Breard*, the *LaGrand*, and the *Jadhav* cases, concerned with death sentences handed down against fifty-four Mexican nationals by US courts without respecting the obligations flowing from Article 36, para. 1 (b) of the Vienna Convention on Consular Relations.[180] In its request for provisional measures, Mexico aimed at suspending the execution of its nationals pending the decision on the merits. In its order, the Court found that urgency to act was only given 54

[175] *Certain Documents and Data*, Provisional Measures, ICJ Reports (2014), pp. 147, 157–8, para. 42 (emphasis added).
[176] *Ibid.*
[177] Provisional Measures, ICJ Reports (2016), pp. 1148, 1169, para. 90.
[178] See *infra*, MN 108 *et seq.*
[179] Provisional Measures, ICJ Reports (2003), pp. 77 *et seq.*
[180] 24 April 1963, 596 UNTS 261.

for three of the Mexican nationals who were at risk of execution in the coming months or even weeks, whereas this was not the case for the other individuals. Therefore the Court indicated as provisional measures that the United States 'shall take all measures necessary to ensure that ... [the names of these three persons follow] are not executed pending final judgment in these proceedings'.[181] For the same reasons *mutatis mutandis* the condition of urgency was found to exist in all cases concerning genocide or ethnic cleansing, thus all cases where irreparable damage resulted from the risk to human life on a large scale,[182] but also where the life of individuals not on a large scale in a particular situation was at stake.[183]

55 The link between irreparable prejudice and urgency also played a particular role in the joined cases concerning *Construction of a Road in Costa Rica along the San Juan River* and *Certain Activities Carried Out by Nicaragua in the Border Area* as far as the request for provisional measures introduced by Nicaragua was concerned. The Court found in its Order of 13 December 2013 that Nicaragua had not adduced the necessary evidence to any long-term detrimental effect of Costa Rica's behaviour and had not shown 'that there is any real imminent risk of irreparable prejudice to the rights it invokes' and accordingly dismissed the request.[184]

56 In the *Pakistani POW* case, the applicant itself had asked the Court to postpone consideration of Pakistan's request for the indication of interim measures of protection in order to facilitate negotiations,[185] which led the Court to consider that it was no longer seised with a request for provisional measures since 'it is of the essence of a request for interim measures of protection that it asks for a decision by the Court as a matter of urgency'.[186] In the *Great Belt* case, the Court found that there was no urgency to indicate provisional measures since the obstruction of passage would not become relevant before the end of 1994 and 'the proceedings on the merits in the present case would, in the normal course, be completed before that time'.[187] Also, in the *Arrest Warrant of 11 April 2000* case, the Court dismissed the request for provisional measures for lack of urgency as the person concerned in the disputed arrest warrant, Mr Yerodia, no longer exercised the functions of Minister of Foreign Affairs so that foreign travels had become less frequent.[188] In the *Questions relating to the Obligation to Prosecute or Extradite* case the Court found that, with a view to assurances given by Senegal not to allow Mr Habré to leave Senegal while the case was pending, there was no urgency for the indication of provisional measures.[189] Consequently, urgency in its substantive aspect justifying the indication of provisional

[181] *Avena*, Provisional Measures, ICJ Reports (2003) pp. 77, 91–2, para. 59, *cf.* also *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 328–9, 330, paras. 66 and 72–3.

[182] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325 *et seq.*; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111 *et seq.*; *Georgia v. Russia*, Provisional Measures, ICJ Reports (2008), pp. 353, 396, para. 143.

[183] *Supra*, MN 52. *Cf. Breard*, *LaGrand*, *Avena* cases and *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6 *et seq.*

[184] *Construction of a Road in Costa Rica along the San Juan River* and *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2013), pp. 398, 407, para. 35.

[185] *Pakistani POW*, Pleadings, p. 160.

[186] *Ibid.*, Order of 19 July 1973, ICJ Reports (1973), pp. 328, 330, para. 13.

[187] *Great Belt*, Provisional Measures, ICJ Reports (1991), pp. 12, 18, para. 27.

[188] *Arrest Warrant of 11 April 2000*, Provisional Measures, ICJ Reports (2000), pp. 182, 201, para. 72.

[189] *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 155, para. 72; but *cf.* in this context the dissenting opinion of Judge Cançado Trindade, who pleads for determining urgency in relation to the 'legitimate expectations of the subjects of originally violated rights' (*ibid.*, Diss. Op. Cançado Trindade, ICJ Reports (2009), pp. 65, 184, para. 52), namely that in cases of

measures contains a time factor and is to be understood in the sense 'that action prejudicial to the rights of either party is likely to be taken before such final decision is given'.[190] However, the time factor is not the only element related to urgency, which depends also on circumstances such as the conduct of the requesting party, relating, *e.g.*, to delays caused by it.

Under the aspect of urgency, it is not relevant whether the situation complained of had already existed for a considerable time when the request was filed, for what is important is only the imminence of action prejudicial to the rights at stake. This was shown in a dramatic manner in the *LaGrand* case, where the violation of Article 36, para. 1 (b) of the Convention on Consular Relations had been known to the German government since 1992, or at least, according to the German argument, since 24 February 1999, when it became fully aware of the facts. However, the application in the case and the request for provisional measures were filed only on 2 March 1999, while the execution of Walter LaGrand was scheduled for 3 March 1999. The Court granted the requested measures notwithstanding the late filing of the request and moreover, for the first time, indicated the measures without holding oral hearings due to the extreme urgency of the case.[191] Furthermore, this case holds the record in time needed for the indication of provisional measures. While in general, the decision on a request for provisional measures took, at that time, between four and six weeks (since then they take rather between four and fifteen weeks), in this case it took only twenty-three hours[192] and would have been unmanageable without the new means of communication which have contributed quite generally to reducing the time for proceedings before the Court related to provisional measures. 57

In the assessment of urgency, the fact that the parties to the dispute are actively pursuing a solution through other procedures, and namely diplomatic ones or in the framework of the United Nations, may also play a role. However, as these procedures are political in character there is, in general, no obstacle to resorting also to legal means of dispute settlement; the case law of the Court, in particular in the *Nicaragua*, the *Lockerbie*, the *Frontier Dispute*, and the *Bosnian Genocide* cases, where the dispute was also under review by a regional organization or the Security Council, supports this view. The simultaneous seising of political and legal instances is thus not per se an obstacle to the consideration of a case under Article 41.[193] 58

2. *Procedural Aspects*

The urgency of action claimed by the party requesting provisional measures also has consequences for the procedure, because notwithstanding the caseload, the Court, in order 59

violations of human beings 'urgency' increases with the passing of time, so that the 'right to the realization of justice' becomes more urgent than in inter-State relations.

[190] *Avena*, Provisional Measures, ICJ Reports (2003), pp. 77, 90, para. 50, referring to the *Great Belt* case, Provisional Measures, ICJ Reports (1991), pp. 12, 17, para. 23.

[191] *LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 14, para. 21; *cf.* also *infra*, MN 59–61, 67–69.

[192] For a timetable including all cases until 2015 *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1464 *et seq.* The cases brought since then took nine weeks in the *Immunities and Criminal Proceedings*, Provisional Measures, ICJ Reports (2016), pp. 1148 *et seq.*; three months for the Order of 19 April 2017 in the *ICSFT and CERD* case; ten days for the Order of 18 May 2017 in the *Jadhav Case*; six weeks for the Order of 23 July 2018 in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case; and ten weeks in the *Alleged Violations of the 1955 Treaty* case.

[193] *Cf.* Merrills, *ICLQ* (1995), pp. 90, 125 *et seq.*; *cf.* also *infra*, MN 116–119.

effectively to preserve the rights at stake, has to give priority to such requests. Although this may be self-evident, the Rules of Court have since 1931 contained special provisions in that regard. While in the Rules of 1922, the urgency of action was reflected only in the provision that the President of the Court could indicate provisional measures if the Court was not sitting, the Rules of 1931 provided not only that a request for provisional measures 'shall have priority over all other cases', but also that the decision on an application for provisional measures 'shall be treated as a matter of urgency'.[194] The Rules of 1936–1972 contained nearly identical provisions. The 1978 Rules approach the question slightly differently, providing in Article 74, para. 2 that the Court shall be convened immediately for the purpose of proceeding to a decision on the request 'as a matter of urgency'. Accordingly, Article 54, para. 2 of the Rules provides that in fixing the time limits for oral proceedings 'the Court shall have regard to the priority required by Article 74 of these Rules and to any other special circumstances, including the urgency of a particular case'.

60 The urgency of action is also reflected in the procedure which is less formal than in general, in that it does not require a written and an oral phase. According to Article 74, para. 3 of the Rules, the Court will hear the parties and 'accept any observations presented before the closure of the oral proceedings'. Thus, it was common opinion[195] that oral proceedings had to be held when interim protection was requested. However, in the *LaGrand* case, the Court, for the first time, delivered its order without having held oral hearings. It based this decision not on Article 74 of the Rules, but on Article 75, para. 1, according to which the Court 'may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures' and that it may proceed in this manner 'irrespective of whether or not it has been seised by the parties of a request for the indication of provisional measures'.[196]

61 This interpretation of Article 75, para. 1 is legally correct since this rule provides that the Court may *at any time* examine *proprio motu* the indication of interim measures and that includes the time when a request is made. Furthermore, this understanding of Article 75, para. 1 is supported by the provision in Article 75, para. 2, according to which the Court is not bound by the requested provisional measures but 'may indicate measures that are in whole or in part other than those requested'. This underlines the purpose of the provision, namely that whenever the Court becomes aware of an imminent action prejudicial to the rights at stake on the merits, it has the power to indicate provisional measures in order to preserve the effectiveness of its jurisdictional function.

The fact that requests for provisional measures take priority over all other cases may also provide an incentive for bringing such claims as a means of litigation strategy in order to reach a short-term tactical advantage even in 'the absence of any good faith legal basis'.[197] Such strategy may play a role in particular in the context of cases concerning armed activities and the use of force such as the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) or the *Legality of Use of Force* cases,[198] and may thus raise issues of the

[194] *Supra*, fn. 17.

[195] *Cf.*, however, Guyomar, *Commentaire*, p. 485, who is of the opposite view.

[196] *LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 14, para. 21; *cf. ibid.* p. 13, para. 12, where the objections of the United States to such a procedure are expressed and Sep. Op. Schwebel, *ibid.*, pp. 21–2, where Judge Schwebel holds the view that oral hearings are mandatory in case of a request for provisional measures.

[197] Bhattacharya, *Yale JIL* (2013), p. 511; Thirlway, in Bernhardt (1994), p. 27.

[198] *Cf.* Oellers-Frahm, in Hestermeyer (2011), pp. 1686 *et seq.*; *cf.* also *infra*, MN 124.

delimitation between the judicial function of the Court as opposed to the political function of the Security Council.[199]

D. Procedure

I. General Remarks

The Rules concerning interim protection are part of section D of the Rules of Court concerning Incidental Proceedings and thus form an incident of a case and a separate phase of proceedings in that case. The proceedings on provisional measures follow special rules, *i.e.*, Articles 73–78 of the Rules of Court, and are terminated by a separate decision taken in the form of an order. Judges who took part in the proceedings on provisional measures and who are replaced because their term of office has expired or for other reasons, do not sit in the subsequent phases of the case. However, when the case is brought before a chamber, according to Article 26, para. 2, the members of the chamber continue to sit in all phases of the case (Article 17, para. 4 of the Rules).[200] As chambers under Article 26, para. 2 of the Statute are instituted at the request of the parties, *e.g.*, on the basis of a special agreement, it was considered rather hypothetical that interim protection would be requested.[201] Nevertheless, in one of the cases brought before a chamber,[202] interim protection was requested.[203] Burkina Faso and Mali had jointly brought the *Frontier Dispute* case before a chamber of the Court in 1983. When at the end of 1985, armed incidents in the frontier region took place, both parties separately requested the chamber to indicate provisional measures. In its order, the chamber, after underlining that in a case brought by special agreement its jurisdiction was manifestly established, addressed both parties equally in indicating provisional measures. 62

II. Filing a Request

Article 73, para. 1 of the Rules provides that: 'A written request ... may be made by a party at any time during the course of the proceedings in the case in connection with which the request was made.' Similar provisions have existed since 1936 which, however, did not provide for a *written* request, although an oral request has never been made. Furthermore, the request 'may be made *at any time* during the course of the proceedings', which means the period beginning with the valid institution of proceedings and ending with the delivery of the final decision. Therefore, submitting a case to the Court as a 63

[199] As to this latter question *cf. infra*, MN 116.

[200] *Cf.* Palchetti on Art. 26 MN 8–9.

[201] *Cf.* Sztucki (1983), p. 148.

[202] The following cases were brought before a chamber: *Gulf of Maine*, Order of 20 January 1982, ICJ Reports (1982), pp. 3 *et seq.*; Judgment, ICJ Reports (1984), pp. 246 *et seq.*; *Frontier Dispute* (Burkina Faso/Republic of Mali), Order of 3 April 1985, ICJ Reports (1985), pp. 6 *et seq.*; Provisional Measures, ICJ Reports (1986), pp. 3 *et seq.*; *ELSI*, Order of 2 March 1987, ICJ Reports (1987), pp. 3 *et seq.*; Judgment, ICJ Reports (1989), pp. 15 *et seq.*; *Land, Island and Maritime Frontier Dispute*, Order of 8 May 1987, ICJ Reports (1987), pp. 10 *et seq.*; Judgment, ICJ Reports (1992), pp. 351 *et seq.*; a new chamber was formed in the *Land, Island and Maritime Frontier Dispute (Revision)* case, Order of 27 November 2002, ICJ Reports (2002), pp. 618 *et seq.*; and in the *Frontier Dispute* case (Benin/Niger), the Court, at the request of the parties, formed a special chamber by an Order of 27 November 2002, ICJ Reports (2002), pp. 613 *et seq.*; Judgment, ICJ Reports (2005), pp. 90 *et seq.*

[203] *Frontier Dispute* (Burkina Faso/Republic of Mali), Provisional Measures, ICJ Reports (1986), pp. 3 *et seq.*

forum prorogatum, *e.g.*, in expectation of the consent of the other party to the Court's jurisdiction, does not institute proceedings since according to Article 38, para. 5 of the Rules such application shall not be entered in the General List and no action may be taken in the proceedings until the other party consents to the Court's jurisdiction.[204] Accordingly, in the *Certain Criminal Proceedings in France* case, which had been brought by the Republic of the Congo against France by way of *forum prorogatum*, and in the *Certain Questions of Mutual Assistance in Criminal Matters* case, which had been brought by Djibouti against France, which are the only cases where the 'respondent' consented to the jurisdiction of the Court, no action was taken until France had informed the Court of its consent.[205]

64 Although there are no legal time limits for making a request for provisional measures, there may be practical time limits to a reasonable request. There is no practice of the Court as to requests for provisional measures brought at a very late stage, such as after the announcement of the date for the delivery of the judgment. In such a situation, the Court, according to Article 74, para. 1 of the Rules, would have to give priority to the request; it would, however, probably dismiss the request, either because it was not submitted 'in good time',[206] or for lack of urgency due to the imminent delivery of the judgment on the merits.

65 According to Article 73, para. 2 of the Rules, the request must contain the reasons for the request, the possible consequences if it is not granted, and the measures requested. The request is transmitted by the Registrar to the other party, as is quite evident and as was the consistent practice of the Court, although this provision was entered into the Rules only in 1978. In practice, the request for provisional measures is circulated in the same manner as an application under Article 40,[207] *i.e.*, it is circulated to the Security Council, the members of the United Nations and other States entitled to appear before the Court and of course the judges, and a press communiqué is issued announcing that a request for provisional measures has been filed.

66 According to Article 75, para. 3 of the Rules, the rejection of a request for provisional measures does not prevent the parties 'from making a fresh request in the same case based on new facts'. Parties only rarely made use of this provision and when they did so, the fresh request was not the consequence of the rejection of the first request, but aimed at the indication of additional measures.[208] In the *Bosnian Genocide* case, the Court stated that such an additional request had to satisfy the same criteria as a fresh request under Article 75, para. 3, namely that it must be based on new facts, which have to be shown by the applicant. In that case, however, the Court found that the 'perilous situation demands

[204] Yee, 'Forum Prorogatum and the Indication of Provisional Measures in the International Court of Justice', in *The Reality of International Law: Essays in Honour of Ian Brownlie* (Goodwin-Gill/Talmon, eds., 1999), pp. 565–84.

[205] *Certain Criminal Proceedings in France*, Provisional Measures, ICJ Reports (2003), pp. 102, 103–4, paras. 3–7; *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 181, para. 4.

[206] In the *LaGrand* case, Provisional Measures, ICJ Reports (1999), pp. 9, 14, para. 19, the Court stated that 'the sound administration of justice requires that a request for the indication of provisional measures ... be submitted in good time'.

[207] Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1434 and 1214 *et seq.*

[208] *Cf. Electricity Company of Sofia and Bulgaria*, noted in the Sixteenth Report, PCIJ, Series E, No. 16, p. 175, where Belgium withdrew its first request for provisional measures and later, after the preliminary objection phase, made a fresh one which was granted, PCIJ, Series A/B, No. 79, pp. 193 *et seq.*; *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 144, para. 287, where the second request after the issuance of a first order was postponed until the phase on preliminary objections was decided. Nicaragua did not revert to that question.

Annex 20

not an indication of provisional measures additional to those indicated by the Court's Order of 8 April, ... but immediate and effective implementation of those measures'.[209]

III. Action of the Court *proprio motu*

The Rules of Court have provided since 1931 that provisional measures may be indicated by the Court even in the absence of a request by one or both of the parties. The introduction of this provision was rather disputed for reasons of compatibility with the *non ultra petita* rule,[210] and questions of procedure such as hearing of the parties.[211] However, the wording of Article 41 did not pose an obstacle to the *proprio motu* action of the Court and also the procedural problems were solved by the Rules of 1978 which divided the subsection of interim protection into six articles, providing for observations and hearings of the parties only in Article 74, para. 3, dealing with the consideration of requests and without making reference to observations or hearing of the parties in Article 75, para. 1, concerning the *proprio motu* action of the Court. 67

Although the Court recalled on several occasions that it had the power to indicate provisional measures *proprio motu*,[212] it did so only once. In the *LaGrand* case,[213] the Court relied on Article 75, para. 1, although a request for provisional measures had been filed. As, however, due to the extreme urgency, there was no time in this case for an oral hearing pursuant to Article 74, para. 3, the Court relied on Article 75, para. 1, which allows for the indication of provisional measures without oral proceedings.[214] This case shows that the Court rightly makes use of its power under Article 75, para. 1 only in rather exceptional cases which justify, for the sake of effectiveness of the decision on the merits, the deviation from the *non ultra petita* rule. 68

While the Court may indicate provisional measures *proprio motu*, it seems that it may not modify or revoke them *proprio motu* as Article 76, para. 1 explicitly requires a request 69

[209] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 349, para. 59; *cf.* also O'Connell, 'The Failure to Observe Provisional Measures of Protection in the Case of Bosnia v. Yugoslavia', *Schriftenreihe des Walther-Schücking-Kollegs* 15 (1994); Wiebalck, 'Genocide in Bosnia and Herzegovina? Exploring the Parameters of Interim Measures of Protection at the ICJ', *CILSA* 28 (1995), pp. 83–106, 97 *et seq.*

In the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River* new provisional measures were requested by Costa Rica after requests of both parties, Costa Rica and Nicaragua, for the modification of the Order of 8 March 2011 indicating provisional measures had been dismissed (Order of 16 July 2013, ICJ Reports (2013), pp. 230 *et seq.*). The Court found that since its Order of 16 July 2013, dismissing a request for the modification of its provisional measures (Order of 8 March 2011, ICJ Reports (2011), pp. 6 *et seq.*), there had been a change in the situation. After having examined whether the new situation presented all the circumstances required for the adoption of provisional measures, it ordered a series of new provisional measures, reaffirming, however, also once more the provisional measures indicated in its Order of 8 March 2011 (see Order of 22 November 2013, ICJ Reports (2013), pp. 354, 369–70, para. 59). With regard to the request for new provisional measures brought by Nicaragua in the same case shortly after the Order 22 November 2013, the Court found that the circumstances did not require the indication of provisional measures (Order of 13 December 2013, ICJ Reports (2013), pp. 398, 408, para. 59).

[210] *Cf.* Kolb, General Principles of Procedural Law, MN 33–46.

[211] For details *cf.* Sztucki (1983), pp. 154 *et seq.*; Guyomar, *Commentaire*, pp. 487–8.

[212] *Cf. South-Eastern Greenland*, Order of 3 August 1932, PCIJ, Series A/B, No. 48, pp. 277, 284, 287–8, and the Ninth Annual Report, Series E, No. 9, pp. 110–1; *Polish Agrarian Reform and the German Minority*, Order of 29 July 1933, PCIJ, Series A/B, No. 58, pp. 178–9; *Anglo-Iranian Oil Co.*, Provisional Measures, ICJ Reports (1951), pp. 89, 93.

[213] *Cf. supra*, MN 60–61.

[214] In his Sep. Op., Judge Schwebel contested that Art. 75, para. 1, is applicable when a request has been made, *cf. LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 21 *et seq.*

to this effect. However, there would be no obstacle for the Court to indicate *proprio motu* new provisional measures if circumstances so required, although in practice this will be the case only under extreme circumstances, for otherwise the Court will have the possibility to hear the parties and to urge them to make a request in this sense.[215]

A particular case concerning the power of the Court to indicate provisional measures *proprio motu* was the *Construction of a Road in Costa Rica along the San Juan River* case. When filing its Memorial in that case, Nicaragua requested the Court, *inter alia*, to 'examine *proprio motu* whether the circumstances of the case require[d] the indication of provisional measures'. By letters addressed to the parties of the case, the Court informed Nicaragua and Costa Rica that 'the circumstances of the case, as they presented themselves to it at that time, were not such as to require the exercise of its power under Article 75 of the Rules of Court to indicate provisional measures *proprio motu*'.[216] This somewhat peculiar request of Nicaragua thus invited the Court to exercise powers conferred upon it anyhow, which the Court is supposed to do and does in fact in any event. Accordingly, this request has to be instead understood as an invitation to the Court to determine what specific provisional measures could be ordered, which determination would be rather part of a party's task when requesting provisional measures.

IV. Powers of the President

70 Article 41 provides that 'the Court' has the power to indicate provisional measures. However, the Rules of 1922 provided that 'When the Court is not sitting, any measures for the preservation in the meantime of the respective rights of the parties shall be indicated by the President', and in fact, the President indicated provisional measures in the *Sino-Belgian Treaty* case.[217] Measures indicated by the President did not even have to be confirmed by the Court since this power was vested, by Article 57 of the 1922 Rules of Court, in the President. This provision was clearly aimed at satisfying the urgency of the matter; however, it was not consonant with Article 41 of the Statute, and therefore the 1931 Rules reduced the powers of the President to the purely procedural function of convening the Court.[218]

71 However, in the *Administration of the Prince von Pless* case, it became evident that the extreme urgency of the case meant that the applicant could not wait until the Court was convened. Therefore President Adatci asked the respondent State by telegram to suspend the action envisaged against the Prince until a decision of the Court on the request for provisional measures was taken.[219] This action was successful and may be considered as the reason for a further amendment of the Rules empowering the President, pending the meeting of the Court, to 'take such measures as may appear to him necessary in order to enable the Court to give an effective decision'.[220] Article 74, para. 4 of the 1978 Rules restricted the power of the President in this respect in that he only 'may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects'. Apart from the power of the

[215] *Cf. infra*, MN 85.

[216] *Construction of a Road in Costa Rica along the San Juan River* and *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, Order of 13 December 2013, ICJ Reports (2013), pp. 398, 399, para. 3.

[217] PCIJ, Series A, No. 8, pp. 3, 6–8.

[218] *Cf.* von Stauffenberg, pp. 312–3.

[219] *Administration of the Prince von Pless*, Correspondence, PCIJ, Series C, No. 70, p. 430.

[220] Art. 66, para. 3 of the 1972 Rules of Court.

President to convene the Court if it is not sitting and to fix a date for the hearing (Article 74, paras. 2 and 3 Rules of Court), the power under Article 74, para. 4 constitutes the most important and delicate one and has been repeatedly exercised by the Presidents,[221] not always with the desired result.[222]

72 In three recent cases (*Immunities and Criminal Proceedings*, *Certain Documents and Data*, and the *Jadhav Case*), the applicant filed a particular request asking the President to exercise his powers under Article 74, para. 4 of the Rules of Court. In these cases the President acted accordingly; in the *Immunities and Criminal Proceedings* case and the *Certain Documents and Data* case by addressing a *letter* to France and Australia respectively, and in the *Jadhav Case* by addressing an *urgent communication* to Pakistan, calling upon the respective Governments 'to act in such a way as will enable any order the Court may make on this Request to have its appropriate effects'.[223]

Given that the wording of Article 74, para. 4 of the Rules of Court is rather vague, it has to be asked what is the character of any act of the President under this provision. Since the aim of Article 74, para. 4 of the Rules is to guarantee the efficiency of any provisional measure the Court may take, and further, given that provisional measures are recognized since 2001 to have binding character,[224] any action of the President under Article 74, para. 4 of the Rules might implicitly also possess binding force.[225] This would mean that non-compliance with a President's letter or urgent communication would in itself constitute a breach of an international obligation,[226] notwithstanding the vagueness of its content and the fact that it does not constitute a 'measure' in the sense of Article 41 of the Statute. Such legal obligation not to act in contrast to an action taken by the President under Article 74, para. 4 of the Rules can in any case also be deduced from the general obligation of the parties to a dispute pending before a court or tribunal not to interfere in the proceedings and not to prejudice the outcome of the decision.

De facto, the question of the consequences of non-compliance with an action of the President will, however, only become relevant where such action is disregarded and where the Court later dismisses the request for provisional measures. Otherwise, if provisional measures are indicated, any possible disregard of the President's action will by the same token also constitute non-compliance with the subsequent order indicating provisional measures. In sum, non-respect of the President's action under Article 74, para. 4 of the Rules is governed by the same rules as non-compliance with an order indicating provisional measures.

V. Participation of a Judge *ad hoc*

73 According to Article 31, para. 6, judges *ad hoc* 'take part in the decision on terms of complete equality with their colleagues'. This provision does not, however, imply that proceedings on provisional measures may not be held in the absence of a judge *ad hoc*. This was

[221] *Cf. e.g.*, the most recent urgent communication from the President of the Court to the United States of America in the *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* case, ICJ Press Release No. 2018/37 of 25 July 2018.

[222] *Cf.* Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1438–9; Rosenne (2005), pp. 168–70; Sztucki (1983), pp. 160 *et seq.*; *cf.* also Kaikobad, *Australian YIL* (1996), pp. 110 *et seq.*

[223] Provisional Measures, ICJ Reports (2017), pp. 231, 234, para. 8 and ICJ Press Release No. 2017/17 of 10 May 2017.

[224] *Cf. infra*, MN 93–115.

[225] But *cf.* Forlati, in Forlati (2014), p. 86.

[226] On the issue of non-compliance with provisional measures *cf. infra*, MN 108 *et seq.*

explicitly stated in the 1936 Rules according to which judges *ad hoc* 'shall be convened if their presence can be assured at the date fixed by the President for hearing the parties'.[227]

74 In the context of the elaboration of the Rules of 1936, it had also been discussed whether a 'provisional' judge *ad hoc* only for the proceedings on provisional measures could be appointed, in order to overcome difficulties in finding definitively a judge *ad hoc*. Such a provision was not adopted; however, as the *Pakistani POW* case shows, a judge *ad hoc* may resign at any time, and thus the same effect may be achieved.[228] In the same case, the Court made it clear that the right to assign a judge *ad hoc* is dependent on the urgency of the case, for the Court made its decision without a judge *ad hoc* of Pakistan although Pakistan wanted to appoint a judge *ad hoc*.[229] The Court thus acted in accordance with what the PCIJ had already stated, namely that the presence of judges *ad hoc* is admitted if this is consistent with the urgent nature of interim protection.[230] Therefore, the parties have the right to appoint a judge *ad hoc* in accordance with the provisions of Article 31, but the presence of a judge *ad hoc* is not mandatory, in particular for considerations of urgency. In the most recent cases the parties made regular use of their right to nominate a judge *ad hoc*. Thus, judges *ad hoc* for each or one of the parties participated in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, in the *Certain Documents and Data* case, in the *Immunities and Criminal Proceedings* case (for Equatorial Guinea only since a French Judge was already sitting on the bench), as well as in the *ICSFT and CERD* case for both parties (after the Russian judge on the bench had excused himself from participating in the case). Finally, in the most recent *Qatar v. United Arab Emirates* case both Qatar and the United Arab Emirates each chose a judge *ad hoc*, as did Iran and the United States in the *Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights* case. Only in the *Jadhav Case*, while India had a judge on the bench, Pakistan who had none did not nominate a judge *ad hoc*, apparently for reasons of urgency, as the case was brought before the Court on 8 May 2017 and the Order on provisional measures was adopted on 18 May 2017. While the participation of a judge *ad hoc* in ICJ proceedings has from time to time been criticized,[231] a judge *ad hoc* may be of particular importance during the provisional protection phase with its inherent urgency by providing the Court with necessary details on the background of the case and the arguments of the party concerned.

VI. Proceedings

1. General Questions

75 The procedure for the indication of provisional measures is necessarily rather flexible and the Rules contain only general provisions. If the Court is not sitting, it is convened by the President for the purpose of deciding on the request as a matter of urgency. A request for provisional measures has priority over all other cases (Article 74, para. 1) and hearings in other cases will be interrupted or postponed to enable the Court to deal immediately with a request for provisional measures (Article 54, para. 2). The Court, or, if the Court is not

[227] Art. 61, para. 9 of the 1936 Rules of Court, Series D, No. 1, 3rd edn., p. 49.
[228] *Cf. Pakistani POW*, Pleadings, p. 156.
[229] *Cf. Pakistani POW*, Provisional Measures, ICJ Reports (1973), pp. 328, 329, para. 2.
[230] *South-Eastern Greenland*, Order of 3 August 1932, PCIJ, Series A/B, No. 48, pp. 277, 280. *Cf.* also Kooijmans/Bordin on Art. 31 MN 11; Rosenne (2005), p. 168.
[231] *Cf.* Kooijmans/Bordin on Art. 31 MN 45.

sitting, the President, shall fix a date for the oral hearing and the Court shall 'receive and take into account any observations that may be presented to it before the closure of the oral proceedings' (Article 74, para. 3, cl. 2). The oral proceedings follow the normal rules and are often the only opportunity for the parties to present their argument because urgency does not always leave enough time for formal written observations.

2. *Proceedings in Cases of Default*

The provision in Article 74, para. 3, cl. 2 of the Rules, according to which the Court takes into consideration any observation of the parties, also covers the situation where the respondent does not appear but makes his position known through other means. In these cases, the Court never referred to Article 53 of the Statute, because the requirements set out there, namely that the Court must *satisfy* itself that it has jurisdiction and that the claim is well founded in fact and in law, were not conceived to apply in the phase of interim protection,[232] but are aimed at safeguarding as far as possible the substantive and procedural rights of the defaulting party.[233] As otherwise in the phase of interim protection, the urgency of action prevails, allowing the Court to indicate measures even if its jurisdiction is found to exist only *prima facie*; it would indeed be inconsistent if in the case that a party chooses not to take part, the aspect of urgency would lose priority.[234] 76

In the *Anglo-Iranian Oil Co.* case, the Court did not even comment on the non-appearance of the respondent.[235] In the *Fisheries Jurisdiction* cases, the Court explicitly stated, with reference to the practice of the PCIJ, that 'the non-appearance of one of the parties cannot by itself constitute an obstacle to the indication of provisional measures, provided the parties have been given an opportunity of presenting their observations on the subject'.[236] In accordance with this principle, the Court took account of any observation made by the parties,[237] in one case even those having been made during the oral proceedings.[238] 77

[232] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), pp. 739–40.

[233] *Cf.*, however, the dissenting opinions expressed in particular by Judge Padilla Nervo, Petrén, and Gros in the *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland) cases, Provisional Measures, Diss. Op. Padilla Nervo, ICJ Reports (1972), pp. 20, 26 and pp. 37, 42; Provisional Measures, Diss. Op. Gros, ICJ Reports (1973), pp. 306 *et seq.*, Diss. Op. Petrén, ICJ Reports (1973), pp. 310 *et seq.*; and of Judge Gros in the *Nuclear Tests* (Australia v. France; New Zealand v. France) cases, Provisional Measures, Diss. Op. Gros, ICJ Reports (1973), pp. 115 *et seq.* and pp. 149 *et seq.*, respectively. These judges were of the opinion that in case of non-appearance, Art. 53 applied also in the phase of interim protection. *Cf.* also von Mangoldt/Zimmermann on Art. 53 MN 40–43 and Guyomar, *Le défault des parties à un différend devant les juridictions internationales* (1960), pp. 185 *et seq.*; Elkind, *Non-appearance before the International Court of Justice* (1984), pp. 103 *et seq.*, and Eisemann, 'Les effets de la non-comparution devant la Cour Internationale de Justice', *AFDI* 18 (1973), pp. 351–75, 356.

[234] *Cf. Nuclear Tests* (Australia v. France), Judgment, Diss. Op. Barwick, ICJ Reports (1974), pp. 391, 399.

[235] *Anglo-Iranian Oil Co.*, Provisional Measures, ICJ Reports (1951), pp. 89 *et seq.*

[236] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12, 15, para. 11, and pp. 30, 32–3, para. 11, respectively; this statement was taken up again in the *Aegean Sea Continental Shelf* case, Provisional Measures, ICJ Reports (1976), pp. 3, 6, paras. 13 *et seq.*, and the *Tehran Hostages* case, Provisional Measures, ICJ Reports (1979), pp. 7, 13, para. 13.

[237] In the following cases, interim protection proceedings were held in the absence of the respondent: *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, PCIJ, Series A/B, No. 79, pp. 194 *et seq.*; *Anglo-Iranian Oil Co.*, Provisional Measures, ICJ Reports (1951), pp. 89 *et seq.*; *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12 *et seq.* and pp. 30 *et seq.*; *Nuclear Tests* (Australia v. France; New Zealand v. France), Provisional Measures, ICJ Reports (1973), pp. 99 *et seq.* and pp. 134 *et seq.*; *Pakistani POW*, Provisional Measures, ICJ Reports (1973), pp. 328 *et seq.*; *Aegean Sea Continental Shelf*, Provisional Measures, ICJ Reports (1976), pp. 3 *et seq.*; *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.*

[238] *Bosnian Genocide*, Further Request for the Indication of Provisional Measures, ICJ Reports (1993), pp. 325, 336, para. 20.

3. Provisional Measures and Intervention

78 There are only two cases in which an application for permission to intervene was filed in the interim protection phase.[239] Fiji's application to intervene in the *Nuclear Tests* case was filed shortly after the request for the indication of provisional measures. The Court fixed time limits for the written observations of Fiji concerning its application to intervene without having regard to the pending request on provisional measures, for which the oral hearing had already been fixed for a date earlier than that provided for the written observations in the intervention application. The fact that the application to intervene was made during the interim protection phase was not mentioned at all in the orders of the Court granting provisional measures, which may be taken as an indication that intervention under Article 62 is not admissible at this stage. This view is supported by the fact that the examination of the application for intervention in that case was even postponed until the decision on preliminary objections was taken, a position which the Court confirmed with regard to El Salvador's application to intervene in the *Nicaragua* case, although in that case the application was based on Article 63.[240] No further cases of this kind have come before the Court and it may be concluded that intervention has no place in the interim protection phase since no material decision is taken which would be capable of affecting the rights of a third party even with regard to the fact that provisional measures have binding character.

79 Nevertheless, it is interesting to note that the practice of the Court concerning notification according to Article 63, para. 2 is not consistent.[241] In some cases, notice of the institution of proceedings was sent to the parties to the treaty at stake during the interim protection phase,[242] in others not.[243] With regard to the previous discussion, the practice of notification under Article 63, para. 2 at the stage of interim protection cannot be interpreted as supporting the admissibility of intervention during this stage of the procedure.

4. Provisional Measures and Interpretation Cases

80 In two recent cases concerning the interpretation of a judgment[244] the request for interpretation was accompanied by a request for 'the urgent indication of provisional measures'. While in such cases the question of the Court's jurisdiction is unproblematic insofar as it is not preconditioned by the existence of any other basis of jurisdiction than the one existing between the parties to the original case, even if the basis of jurisdiction in the original case has meanwhile lapsed,[245] the indication of the measures depends upon the admissibility of the request for interpretation which requires in particular the existence

[239] *Nuclear Tests* cases, Permission to Intervene, ICJ Reports (1973), pp. 320 *et seq.* and pp. 324 *et seq.*, respectively.

[240] *Nicaragua*, Declaration of Intervention, ICJ Reports (1984), pp. 215 *et seq.*; *cf.* in particular the separate and dissenting opinions, *ibid.*, pp. 218 *et seq.*, in which the Court is criticized primarily for not having even granted El Salvador an opportunity to be heard, while they mostly agree on the outcome that in this stage of the proceedings there is no room for intervention. *Cf.* also Miron/Chinkin on Art. 63 MN 33, 45–8.

[241] *Cf.* also Miron/Chinkin on Art. 63 MN 33.

[242] *Cf. Tehran Hostages*, Pleadings, p. 498; *Lockerbie* (Libya v. UK; Libya v. USA), Provisional Measures, ICJ Reports (1992), pp. 3, 8, para. 14 and pp. 114, 119, para. 15; *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3, 8, para. 6.

[243] *Cf.* in this context Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1435–6.

[244] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311 *et seq.* and *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537 *et seq.*

[245] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 323, para. 44 and *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 542, para. 21.

of a 'dispute as to the meaning and scope of the judgment'.[246] Furthermore, of course, the usual preconditions for the indication of provisional measures must be present. In the *Avena (Request for Interpretation)* case the Court found in favour of the admissibility of the request although reasonable doubts existed with regard to the presence of a 'dispute' concerning the meaning of para.153 (9) of the 2004 Judgment,[247] namely whether the obligation of the United States to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals, was an obligation of result. The request of Mexico resulted from the fact that the execution of some Mexican nationals was imminent, although they had not been accorded review or reconsideration of their sentences by the Texas Court of Criminal Appeals. After having found that a 'difference of opinion' existed, the Court considered the circumstances required for the indication of provisional measures. In accordance with its prior practice it indicated the measures requested because the execution of the Mexican nationals concerned would cause irreparable harm to the rights claimed.[248] In his dissent Judge Buergenthal rightly stated that these provisional measures repeated precisely what the Court had decided in the *Avena* Judgment which continues to be binding with the consequence that the United States would be in breach of its international obligations if any one of the named Mexicans were to be executed without having been provided with the review and reconsideration mandated in the *Avena* Judgment.[249] The provisional measures requested by Mexico could thus have no other effect than to reinforce the obligation resulting for the United States already from the Judgment without adding anything to that obligation. This situation is similar to that in the *Bosnian Genocide* case, where Bosnia-Herzegovina, after a first request for provisional measures, which was granted on 8 April 1993,[250] shortly after the delivery of that order brought a further request for provisional measures. In its Order of 13 September 1993 the Court found that the 'perilous situation demands, not an indication of provisional measures additional to those indicated by the Court's Order of 8 April 1993, ... but immediate and effective implementation of those measures'.[251] As in the *Avena (Request for Interpretation)* case, the measures requested were identical to the obligation mandated with regard to the United States in a binding judgment of the Court, the indication of the requested measures was not only problematic, in particular with a view to the findings of the Court on the second request for provisional measures in the *Bosnian Genocide* case, but may furthermore constitute a dangerous precedent with regard to requests for interpretation which may be (ab)used in order to re-activate the Court in cases of non-implementation of a judgment.[252]

[246] Art. 60 ICJ Statute; *cf.* Zimmermann/Thienel on Art. 60, in particular MN 45–51 concerning the question of provisional measures in interpretation proceedings.

[247] *Cf.* Zimmermann/Thienel on Art. 60 MN 64, *cf.* also the dissenting opinion of Judge Buergenthal, ICJ Reports (2008), p. 333 *et seq.*, the joint dissenting opinion of Judges Owada, Tomka, and Keith, *ibid.* pp. 341 *et seq.* and the dissenting opinion of Judge Skotnikov, *ibid.*, pp. 349 *et seq.*

[248] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 330, para. 72.

[249] *Ibid.*, Diss. Op. Buergenthal, pp. 333, 334, paras. 4–6.

[250] *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3 *et seq.*

[251] *Ibid.*, Further Request for the Indication of Provisional Measures, ICJ Reports (1993), pp. 325, 349, para. 59; *cf.* also, *supra*, MN 66.

[252] This concern is in particular supported by the fact that in the *Avena (Request for Interpretation)* case the Court dismissed the Request for Interpretation of Mexico on the merits because there was no dispute on the meaning of the judgment (Judgment, ICJ Reports (2009), pp. 3 *et seq.*). In its judgment it stated, however, that the United States was in breach of the 2008 Order of provisional measures because it had executed one of

81 This concern seems justified with regard to the *Preah Vihear (Request for Interpretation)* case. Although a request for interpretation is not, as distinct from an application for revision, submitted to any time limit,[253] a request for interpretation nearly fifty years after the delivery of the judgment may at least raise concern with regard to the question of the 'timeliness' of a request for provisional measures.[254] In this case border incidents had occurred between Thailand and Cambodia on Cambodian territory which, however, seemed to constitute a breach of the judgment rather than being a consequence of a dispute regarding the meaning of the judgment. Also in this case, the Court not only found that there was a dispute as to the meaning of the Judgment of 1962,[255] but furthermore ordered several provisional measures concerning, *inter alia*, the withdrawal of military personnel by both parties from a 'provisional demilitarized zone' defined and established by the Court in para. 62 of that Order as well as the obligation to refrain from any action which might aggravate or extend the dispute.[256] In particular, the establishment of the 'provisional demilitarized zone' met the dissent of five judges,[257] who criticized the lack of a 'plausible link' of this measure to the subject-matter of the request, namely the meaning of the judgment of 1962. Furthermore, the dissenters raised the question whether in a request for the interpretation of a judgment there may be any room for a measure obliging the parties to refrain from any act that may aggravate the dispute. Such measure may rather be required with regard to the underlying dispute as such, not a request for interpretation. The most categorical position was taken by the American Judge Donoghue, who had 'doubts that the Statute contemplates the use of Article 41 procedures in an interpretation case', admitting, however, that the Statute does not preclude such procedure.[258] She rightly stressed that the recent practice of the Court concerning the adoption of provisional measures in interpretation cases may be used as a new tool for (ab)using the interpretation proceedings in cases of non-compliance with a judgment, in particular in order to protect human lives or property. Such practice may, as she stressed, be understandable, but may at the same time make States 'unwilling to expose themselves to that jurisdiction'.[259] Both decisions raise concern with reference to the Court's understanding of its jurisdiction regarding the indication of provisional measures in interpretation cases, but not only in interpretation cases: they reflect the different positions within the Court between those judges (the majority) who are frustrated by the consent-based system of jurisdiction and those who stick to the principle

the persons without review or reconsideration of the sentence. Although such situation lies in the logic of provisional protection, it underlines the requirement of strict scrutiny of the conditions for ordering provisional measures of protection. It was probably no accident that the American Judge at the ICJ, Joan Donoghue (who was not yet in the Court when the provisional measures were adopted in the *Avena (Request for Interpretation)* case), in her dissenting opinion in the *Preah Vihear (Request for Interpretation)* case, referred to the adverse effects that such situations may have on the willingness of States to submit to the Court's jurisdiction (*ibid.*, Diss. Op. Donoghue, ICJ Reports (2011), pp. 613, 623–4, para. 28).

[253] *Cf.* Zimmermann/Geiß on Art. 61 MN 71–72.

[254] *Cf. LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 14, para. 19; Ghantous, *Canadian YIL* (2012), pp. 59 *et seq*; Zimmermann/Thienel on Art. 60 MN 45–51.

[255] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 544, para. 31.

[256] *Ibid.*, p. 555, para. 69.

[257] *Cf.* the dissenting opinions of President Owada, ICJ Reports (2011), pp. 557 *et seq.*, and Judges Al-Khasawneh (*ibid.*, pp. 564–5), Xue (*ibid.*, pp. 608 *et seq.*), and Donoghue (*ibid.*, pp. 613 *et seq.*) as well as that of Judge ad hoc Cot (*ibid.*, pp. 627 *et seq.*)

[258] *Ibid.*, Diss. Op. Donoghue, ICJ Reports (2011), pp. 613, 616, para. 10.

[259] *Ibid.*, pp. 623–4, para. 28.

of consent. Although it may be understandable that the Court, as the World Court, is willing to take any occasion to make its voice heard, in particular in situations involving the protection of human beings, it should, however, nevertheless not overstep the mark.[260] The well-reasoned criticisms in the *Preah Vihear (Request for Interpretation)* case make it clear that situations may be imaginable, where provisional measures fulfil their original aim also in interpretation procedures, but that such situations are probably rare provided the preconditions for interpretation procedures are taken seriously in order to avoid any misuse of this instrument.[261]

5. *Decision of the Court*

a) Form of the Decision

The Court's decision granting or rejecting a request for provisional measures is taken in the form of an order although neither the Statute nor the Rules contain any provision concerning the form of the decision. The PCIJ commented on this in the *South-Eastern Greenland* case, stating that: 82

> the reason for the Court's decision to employ the form of an order appears to be that measures of protection are essentially provisional in character, whereas judgments are final decisions: again, measures of protection may be indicated by the Court *proprio motu*, whereas this would not be possible in the case of a judgment.[262]

The order is read in open court and contains the same information as a judgment according to Article 95 of the Rules. Separate opinions may be attached to the order. The form of order does not, however, imply any indication as to the binding or non-binding character of the decision.[263]

b) Contents of the Decision

The Court is not bound by the measures requested by the parties, but may 'indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request' (Article 75, para. 2 of the Rules). This power follows logically from the competence to indicate provisional measures *proprio motu*, and the Court frequently makes use of it, sometimes even in cooperation with the parties.[264] The modifications with regard to the provisional measures requested consist either in indicating measures more general than those requested,[265] or granting interim protection only in part,[266] or limited 83

[260] *Cf. supra*, MN 22, and *cf.* also Thirlway, in Gaja/Grote Stoutenburg (2014), *passim*.

[261] *Cf.* Ghantous, *Canadian YIL* (2012), pp. 50 *et seq.*; Oellers-Frahm, in Jalloh/Elias (2015), *passim*.

[262] Ninth Annual Report, PCIJ, Series E, No. 9, p. 212.

[263] *Cf. infra*, MN 93–115.

[264] *Cf. e.g.*, *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Pleadings, vol. II, pp. 391–2.

[265] *Cf. Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, PCIJ, Series A/B, No. 79, pp. 194, 196 and 199, where instead of one specific measure requested only a general indication of restraint *pendente lite* was indicated; *Anglo-Iranian Oil Co.*, Pleadings, pp. 51–2 and Provisional Measures, ICJ Reports (1951), pp. 89, 93–4; *Fisheries Jurisdiction* (UK v. Iceland), Pleadings, vol. I, pp. 77–8 and (Federal Republic of Germany v. Iceland), Pleadings, vol. II, pp. 30–1; Provisional Measures, ICJ Reports (1972), pp. 12, 17 and pp. 30, 35, respectively.

[266] *Sino-Belgian Treaty*, Application Instituting Proceedings, PCIJ, Series A, No. 8, pp. 3, 7–8, and Series C, No. 16/1, pp. 23–4, where the President did not grant the requested protection with regard to customs matters; *Anglo-Iranian Oil Co.*, Provisional Measures, ICJ Reports (1951), pp. 89, 93–4, where the requested measures concerning anti-British propaganda were not granted.

in scope.[267] Sometimes the Court indicates measures in addition to those requested, which mostly means that the Court indicates general restraint *pendente lite*, in particular to prevent any action aggravating the dispute, to the respondent only or to both parties, as is regularly the case when armed action is at issue.[268]

84 According to Article 78 of the Rules, which was a new provision in the 1978 Rules, the Court may request information from the parties concerning the implementation of provisional measures. In several instances, the Court has made such a request in the order indicating provisional measures,[269] although the Rules leave open the possibility of requesting such information later. In the *Fisheries Jurisdiction* cases, the Court asked for any relevant information concerning the control and regulation of fish catches in the area concerned. The information was submitted in the memorials.[270] Other orders which contained a request for information on any implementation measures were not followed by the party or parties concerned, which was not even always picked up by the Court in the merits phase.[271] The consequences of the failure to comply with a request for information are unclear; the Court may take note of it in the merits phase in the same way as of non-compliance with an interim order as such.[272]

c) Modification and Revocation of Provisional Measures

85 Since 1936, the Rules have explicitly provided that '[t]he Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification' (Article 76, para. 1 of the Rules). This provision, which was maintained until the amendment of the Rules in 1978, was completely in line with the power of the Court 'to examine *proprio motu* whether the circumstances of the case require the indication of

[267] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12, 17, para. 26, and pp. 30, 34–5, para. 27, respectively, where the catch-limitation figures were lower than those requested; *Nuclear Tests* (Australia v. France; New Zealand v. France), Provisional Measures, ICJ Reports (1973), pp. 99, 106, and 134, 142, respectively, where the provisional measures were restricted to the territories of the applicants.

[268] *E.g.*, *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 12, 20–1, paras. 12, 47; *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169, 186–7, para. 41; *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3, 24, para. 52; *Land and Maritime Boundary*, Provisional Measures, ICJ Reports (1996), pp. 13, 17, 24–5, paras. 17 *et seq.*, 49; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 129, para. 47; *Georgia v. Russia*, Provisional Measures, ICJ Reports (2008), pp. 353, 399, para. 149 (C); *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 27, para. 86 (3), *supra*, MN 22.

[269] For the most recent cases *cf. Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 27–8, para. 86 (4) and Provisional Measures, ICJ Reports (2013), pp. 354, 370, para. 59–3; *Georgia v. Russia*, Provisional Measures, ICJ Reports (2008), pp. 353, 399, para.149 (D); *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 332, para. 80 II (b); *Preah Vihear (Request for the Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 556, para. 69 (B) (4); *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 246, para. 61–I.

[270] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1972), pp. 12, 18, para. I (f) and pp. 30, 35, para. I (f); *Fisheries Jurisdiction* (UK v. Iceland), Judgment, ICJ Reports (1974), pp. 3, 15, para. 32 and Diss. Op. Gros, pp. 126, 138.

[271] *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 21, para. 47; *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169, 186–7, para. 41; here the question was picked up in the merits phase, ICJ Reports (1986), pp. 14, 144, para. 287; *Frontier Dispute* (Burkina Faso/Republic of Mali), Provisional Measures, ICJ Reports (1986), pp. 3, 11, para. 1 (B); *Breard*, Provisional Measures, ICJ Reports (1998), pp. 248, 258, para. 41; *LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 16, para. 29; *Avena*, Provisional Measures, ICJ Reports (2003), pp. 77, 91–2, para. 59; in this case the reaction of the United States was referred to in para. 3 of the Judgment of 31 March 2004, ICJ Reports (2004), pp. 12, 17.

[272] For further details *cf. infra*, MN 108 *et seq.*

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provisional measures which ought to be taken or complied with by any or all of the parties' (Article 75, para. 1 of the Rules). In 1978, however, Article 76, para. 1 of the Rules was amended adding the words: 'At the request of a party the Court may ... revoke or modify any decision concerning provisional measures',[273] that could be understood as preventing the Court from acting *proprio motu*, and hence making its action conditional on a request by one or more of the parties.[274] Such understanding seems, however, not to be consistent with Article 41 of the Statute and Article 75, para. 2 of the Rules as it would limit the meaning of Article 75, according to which the Court is empowered to act 'at any time', a power that cannot be considered to no longer exist once some measures have been indicated.[275] This understanding is also consistent with a statement to be found repeatedly in the orders on provisional measures beginning with the *Tehran Hostages* case, namely that the Court, until it delivers its final judgment 'will keep the matters covered by this Order continuously under review'.[276] This formula may be understood as confirming the Court's power to act *proprio motu* or in coordination with either party if circumstances so require.[277] Thus, the amendment of Article 76, para. 1 of the Rules should be understood as inviting the parties to the case to cooperate with the Court and draw its attention to any relevant change in the situation, rather than as restricting the power of the Court which is the 'master of its own procedure', in particular with a view to guaranteeing the efficiency of its judgment on the merits.

Revocation or modification of provisional measures did not play a relevant role before and after 1978. It was, however, agreed that on the basis of the statements of the PCIJ 'revocation' concerns the entire decision on provisional measures, while a revocation in part would be considered as a 'modification'.[278]

Modification or revocation requires that there has been a change in the situation (now Article 76, para. 2 of the Rules) which before 1978 had to constitute the motivation for the Court's action, but since then has to be specified by the party requesting the modification or revocation.

[273] For the history of Art. 76 of the Rules *cf.* Guyomar, *Commentaire*, pp. 490 *et seq.*

[274] *Cf.* Lamus, 'Revocation and Modification of Provisional Measures Orders in the International Court of Justice: The Court's Order Regarding Certain Activities Carried out by Nicaragua in the Border Area and the Case Concerning Construction of a Road in Costa Rica along the San Juan River Joint Proceedings', *LPICT* 12 (2013), pp. 463–74, 473–4; Forlati, in Forlati (2014), p. 92.

[275] *Cf.* for this proposition also Gaja, *LPICT* (2015), p. 1; *cf.* also *Certain Documents and Data*, Provisional Measures, Order of 22 April 2015, Sep. Op. Cançado Trindade, ICJ Reports (2015), pp. 562 *et seq.*

[276] *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 21, para. 47 (2). A similar passage was included in the *Nicaragua* case, Provisional Measures, ICJ Reports (1984), pp. 169, 186–7, para. 41; in the *Frontier Dispute* case (Burkina Faso/Republic of Mali), Provisional Measures, ICJ Reports (1986), pp. 3, 11, para. 32; the *Breard* case, Provisional Measures, ICJ Reports (1998), pp. 248, 258, para. 41 (II); the *LaGrand* case, Provisional Measures, ICJ Reports (1999), pp. 9, 16, para. 29; the *Avena* case, Provisional Measures, ICJ Reports (2003), pp. 77, 91–2, para. 59; the *Avena (Request for Interpretation)* case, Provisional Measures, ICJ Reports (2008), pp. 311, 332, para. 80 III; the *Georgia v. Russia* case, Provisional Measures, ICJ Reports (2008), pp. 353, 399, para. 149 D; the *Certain Activities Carried Out by Nicaragua in the Border Area* case, Provisional Measures, ICJ Reports (2011), pp. 6, 27, para. 86 and Provisional Measures, ICJ Reports (2013), pp. 354, 370, para. 59–3; the *Preah Vihear (Request for Interpretation)* case, Provisional Measures, para. 69 (D) and the *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 246, para. 61 I.

[277] But *cf.* however Forlati, 'Il potere della Corte internazionale di giustizia di modificare misure cautelari precedentemente adottati: quali limiti all'esercizio della funzione giudiziaria internazionale?', *Riv. di Diritto Internaz.* 98 (2015), pp. 897–903, 902, who denies that power of the Court in light of Art. 76, para. 1 of the Rules.

[278] *Sino-Belgian Treaty*, Application Instituting Proceedings, PCIJ, Series A, No. 8, pp. 3, 10–11; *cf.* also Sztucki (1983), pp. 197 *et seq.*

86 As already mentioned, the practice of the present Court concerning modification or revocation of provisional measures is limited. There are only two cases (until mid-2018) where the modification of the provisional measures was requested, and which clarified that any modification of provisional measures due to a change in the underlying situation requires that the conditions laid down in Article 41 are met with regard to that new situation. In the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Costa Rica requested the modification of the Order on provisional measures of 8 March 2011. Although the Court found that there had been a change in the situation it nevertheless dismissed the request because there was no risk of irreparable harm and even if such risk were present there was no urgency requiring action by the Court. In this case the Court did, however, explicitly reaffirm in the operative part of the Order the provisional measures indicated in the original Order. As a follow-up to this Order, Costa Rica requested *new* provisional measures (24 September 2013) due to new facts discovered since July 2013 and the Court ruled in favour of Costa Rica on 22 November 2013. Nicaragua too brought a request for new provisional measures on 11 October 2013 which was, however, dismissed on 13 December 2013.[279]

87 In the *Certain Documents and Data* case, which concerned the seizure by Australia of material belonging to Timor-Leste and relating to an *Arbitration under the Timor Sea Treaty of 20 May 2002* pending before an arbitral tribunal, the Court, in its Order of 3 March 2014 indicated three different provisional measures concerning the integrity of the documents. When in March 2015, Australia indicated that 'it wished to return the materials removed ... which are the subject of the present proceedings', it accordingly requested the modification of the relevant provisional measure and Timor-Leste stated that it 'would have no objection to an appropriate modification of the second provisional measure'. The Court found that there had been a change of the situation which, after the return of the documents, justified the modification of the Order of 3 March 2014. This case is rather close to the termination of a provisional measure or a new provisional measure than to the modification because until the return nothing would have changed, but after the return the measure would become moot. After the return of the documents the parties agreed on the discontinuance of the case as the purpose of the claim concerning the subject-matter had been achieved.[280]

88 As to the procedural aspects Article 76, para. 3 of the Rules provides an opportunity for the parties to present observations on the subject, an issue that became relevant in the *Fisheries* cases. These cases were special in that the Court, in its first orders of 17 August 1972, had invited the parties to request a review of the orders before 15 August 1973 if the final judgment had not been delivered by then. Both applicants requested the continuance of the measures, while the respondent protested. In this context, the government of the United Kingdom informed the Court that it did not consider that it was necessary to make observations; the Court then took its decision without having received observations. This practice allows the conclusion that in fact it is sufficient that the parties are *offered* an opportunity to make observations, but that the Court may decide without such observations if the parties do not want to make use of this opportunity.[281]

[279] *Supra*, MN 66.

[280] *Certain Documents and Data*, Order of 11 June 2015, ICJ Reports (2015), pp. 572 *et seq.*

[281] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Provisional Measures, ICJ Reports (1973), pp. 302, 304 and pp. 313, 315, respectively. *Cf.* also Sztucki (1983), pp. 196 *et seq.*

d) Termination of Provisional Measures

An order indicating provisional measures remains in force until the final decision in the case has been rendered, unless it is revoked or otherwise terminated earlier by the Court. Although this is inherent in the concept of provisional measures, the Court has underlined this particularly when it found that it could not entertain the case.[282] Otherwise, its practice is not consistent in that it sometimes—but not always—makes reference to the duration of interim measures,[283] thus not providing support to the view that statements of this kind are merely declaratory of the automatic legal effect of final decisions on prior provisional measures. 89

E. Provisional Measures and Advisory Opinions

The question whether provisional measures could also be indicated in advisory proceedings came up in the context of the revision of the Rules in 1936, when it was proposed that it should be mentioned explicitly in those articles of the Rules dealing with contentious cases whether they were deemed to be also applicable to advisory proceedings. The Commission accordingly proposed the following draft of Article 57, para. 1 of the Rules: 90

> Une demande en indication de mesures conservatoires peut être présentée à tout moment au cours de la procédure dans l'affaire contentieuse *ou consultative* par rapport à laquelle elle est introduite.[284]

The Court did not, however, approve this proposal, not because it considered provisional measures inappropriate in advisory proceedings, but because it was against the method of referring to the advisory procedure in every article conceivably applicable thereto.[285] The background for the proposal to provide for provisional measures in advisory proceedings is also to be seen in Article 14 of the Covenant of the League, which in the last sentence made a distinction between advisory opinions on 'disputes' and advisory opinions on 'questions'. In fact, the majority of advisory opinions requested from the PCIJ were related to 'disputes', because States considered the advisory procedure as a convenient alternative to the contentious procedure.[286] In no case, however, was a request filed for provisional measures.

[282] *Anglo-Iranian Oil Co.*, Preliminary Objections, ICJ Reports (1952), pp. 93, 124; *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 272, para. 61 and pp. 457, 477–8, para. 64, respectively; *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 140, para. 186. It may, however, be of interest in this context that in the Inter-American Court of Human Rights provisional measures do not as a principle terminate with the delivery of the judgment on the merits. This Court increasingly maintains or even extends interim measures after the adoption of the judgment; *cf.* Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* (2010), and Oellers-Frahm, in Hestermeyer (2011), point C, I.

[283] *Cf. e.g.*, *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 442, para. 112, where the Court stressed that the provisional measures indicated remain operative until the delivery of the final judgment in the case; *cf.* also the *Avena* case where the Court explicitly stated that 'the Order was effective pending final judgment, and that the obligations of the United States in that respect are replaced by those declared in this Judgment', Judgment, ICJ Reports (2004), pp. 12, 70, para. 152.

[284] PCIJ, Series D, third addendum to No. 2, pp. 801 and 875.

[285] *Ibid.*, p. 40.

[286] *Cf.* Goodrich, 'The Nature of the Advisory Opinions of the Permanent Court of International Justice', *AJIL* 32 (1938), pp. 738–58, who found that seventeen out of twenty-one advisory opinions rendered by the PCIJ related to pending disputes. *Cf.* also Kaufmann, *Die Gutachten des Ständigen Internationalen Gerichtshofs als Mittel zwischenstaatlicher Streitschlichtung* (1939).

91 The question was not taken up in the context of the creation of the ICJ, where the Rules were left the same as before, but where Article 96 of the Charter, in distinction to Article 14 of the Covenant, authorizes the Court only to give advisory opinions 'on any legal question'. The Court itself did not adopt a position on the issue. In the only case where the question of provisional measures was raised in the context of an advisory opinion,[287] reference to Article 41 of the Statute was only made in GA Res. 42/229 B (1988) by which the General Assembly requested the ICJ to give an advisory opinion.[288] The Court stated that no formal request was made and that therefore it did not have 'to consider whether or not provisional measures may be indicated in proceedings on a request for advisory opinion'.[289]

92 The question thus remains unresolved. It seems, however, that provisional measures have no place in the advisory procedure for three reasons: first, Article 41 refers to the preservation of the rights 'of either party', and there are no 'parties' in the strict sense of this term in the advisory procedure; second, advisory opinions do not provide for a final settlement of the underlying dispute, and thus, third, advisory opinions do not have binding force. The final settlement lies with the requesting organ and therefore it would be for that organ[290] to require some conservatory action within the limits of its powers.[291]

F. Binding Effect of Provisional Measures

I. Introductory Remarks

93 Perhaps the most controversial question concerning provisional measures had for a very long time been whether an order indicating provisional measures had binding effect upon the parties. As interim protection requires urgent action and as, therefore, the Court need not satisfy itself that it has jurisdiction to decide the case but may indicate such measures if there is a *prima facie* basis for its jurisdiction, it may be possible that it later finds that jurisdiction is lacking.[292] If provisional measures were binding, this would—it was argued—mean that States may be bound by an order without having consented to the Court's jurisdiction, which would constitute an interference with State sovereignty. If interim orders were, however, not binding, the effectiveness—so the argument of the supporters of the binding character—of the final decision might be jeopardized.

94 Until the *LaGrand* case, neither the PCIJ nor the ICJ ever touched upon this intricate question. The clearest statements until that time, which, however, did not support the binding effect of provisional measures, are to be found in the *Nicaragua* case, where the Court stated that when it is of the opinion that the situation requires that provisional

[287] *Obligation to Arbitrate*, Order of 9 March 1988, ICJ Reports (1988), pp. 3 *et seq.*

[288] This resolution indicated in its preambular paragraphs that 'the constraints of time require the immediate implementation of the dispute settlement procedure in accordance with section 21 of the Agreement' and that account should be taken of 'the provisions of the Statute of the International Court of Justice, in particular Articles 41 and 68 thereof', *ibid.*, p. 4.

[289] *Ibid.*

[290] In connection with the *Question concerning the Acquisition of Polish Nationality*, the Council of the League adopted, prior to its request for advisory opinion, a resolution with the nature of provisional measures, *cf.* PCIJ, Series B, No. 7, pp. 5, 10.

[291] *Cf.* in this context Sztucki (1983), pp. 136 *et seq.*; Hudson, *PCIJ*, p. 453; Jenks, *The Prospects of International Adjudication* (1964), p. 215.

[292] *Cf. supra*, MN 36.

measures should be taken, 'it is incumbent on each party to take the Court's indications seriously into account, and not to direct its conduct solely by reference to what it believes to be its rights'.[293] The Court was somewhat more explicit in its Order indicating provisional measures in the *LaGrand* case, where it underlined in the reasoning that the Governor of Arizona 'is under the obligation to act in conformity with the international undertakings of the United States'.[294] This statement, however, concerned only the general international responsibility of a State and its territorial entities, but not the legal effect of provisional measures.[295] The question was finally decided in the *LaGrand* case in the judgment on the merits so that, with regard to the development of the issue, it will be sufficient to retrace briefly the preparatory work on Article 41, the jurisprudence of the Court and the arguments for and against the binding character of provisional measures advanced in legal literature before considering the reasoning of the Court in the *LaGrand* case.[296]

II. Relevant Provisions and Preparatory Work

The main argument against the binding force of provisional measures referred to the terms of Article 41, where the French version reads 'pouvoir *d'indiquer* ... quelles mesures conservatoires ... *doivent être prises* à titre provisoire', while the English version uses the words 'power to *indicate* ... provisional measures which *ought to be taken*'.[297] 95

The preparatory work, which was done in French, underlines the non-binding effect of provisional measures since the proposal to use the term 'ordonner' instead of 'indiquer' was deliberately dismissed.[298] The explanation for this was twofold: on the one hand, it was argued that 'great care must be exercised in any matter entailing the limitation of sovereign powers'[299] and on the other, it was underlined that the Court did not have the means to assure execution, equating thus binding character and execution. The significance of the following terms, namely measures which 'doivent être prises'/'ought to be taken' was not given particular weight as the term 'indiquer'/'indicate' was considered decisive.[300] Thus, the preparatory work rather supports the view that provisional measures were not intended to be binding upon the parties.

The Rules were also strictly kept in the frame set by Article 41. Although proposals had been made again in the context of the revision of the Rules in 1931 to replace the term 'indicate' by 'prescribe' or 'order', the Court was of the opinion that this would transgress the powers accorded to it under Article 41.[301] 96

In a similar manner, reference to Article 94, para. 1 of the Charter, which contains the obligation 'to comply with the *decision* of the International Court of Justice'[302] was 97

[293] *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 144, para. 289.
[294] *LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9, 16, para. 28.
[295] *Cf.* also Tams on Art. 94 UN Charter MN 19.
[296] In this context, the Memorial of Germany, Part four, paras. 4.121–4.176, as well as the oral argument presented by Dupuy are worth reading.
[297] Emphasis added.
[298] The preparatory work on Art. 41 was done in French; Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 609; *cf.* Sztucki (1983), pp. 263 *et seq.*
[299] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 735; *cf.* also Hudson, *PCIJ*, p. 423.
[300] *Cf.* Manouvel, *RGDIP* (2002), pp. 114 *et seq.*
[301] von Stauffenberg, pp. 313–4; for the drafting history *cf.* also Sztucki (1983), pp. 267 *et seq.*
[302] Emphasis added.

considered as an argument against the binding effect of provisional measures because the term 'the decision' in para. 1 was understood as synonymous with the term 'judgment' in para. 2.[303] This view is, however, not altogether convincing, since 'orders' are, in fact, 'decisions' of the ICJ, although they are not judgments, which alone may be the object of recourse to the Security Council in order to reach performance of the obligations resulting therefrom.[304] The term 'decision', used in Article 94, para. 1 of the Charter, was said simply to repeat the language of Article 59 of the Statute, which also has generally been understood as referring only to final decisions, namely judgments. But also Article 59 need not necessarily be seen in this way, although the surrounding Articles 56–61 are a strong argument in this sense.[305] However, there are decisions other than judgments which have binding force, as, *e.g.*, procedural orders of the Court under Article 48, as otherwise the Court could not work efficiently.[306]

98 Article 78 of the Rules, which was introduced by the 1978 amendment, providing that the Court 'may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated', suggested rather that provisional measures have to be complied with and are, thus, binding, although it remains questionable whether non-compliance with a request under Article 78 of the Rules may lead to any consequences at all.[307]

III. The Jurisprudence of the Court

99 The jurisprudence of the Court up to the *LaGrand* case lead no further than the drafting history of the relevant provisions.[308] The Court never made a clear statement concerning the legal effect of provisional measures,[309] but it took positive note of the implementation of its orders in the *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland) cases,[310] and explicitly cited the letter addressed by Australia to the Court in the *Nuclear Tests* cases reproaching a breach of the provisional measures by France.[311] The statements of the Court in the *Tehran Hostages* case are inconclusive as well, since the Court only expressed its disapproval of the parties' conduct, in particular the rescue action by the United States, without touching on the question of the legal effect of provisional measures.[312] The most explicit statement was the one made in the *Nicaragua* case cited earlier,[313] according to which 'it is incumbent on each party to take the Court's indication seriously into account'.[314] Dissenting judges did, however, plead emphatically

[303] Sztucki (1983), pp. 285 *et seq.*, in particular p. 289.

[304] *Cf.* Tams on Art. 94 UN Charter MN 14–15, 52; Shaw, *Rosenne's Law and Practice*, vol. I, p. 204.

[305] *Cf.* Brown on Art. 59 MN 35–40 and Tams on Art. 94 UN Charter MN 2.

[306] *Cf.* Torres Bernárdez/Mbengue on Art. 48 MN 6–7, and also Brown on Art. 59 MN 36.

[307] *Cf. supra*, MN 84.

[308] For an overview *cf.* Sztucki (1983), pp. 270 *et seq.*, and Szabó, 'Provisional Measures in the World Court: Binding or Bound to be Ineffective?', *Leiden JIL* 10 (1997), pp. 475–89, pp. 481 *et seq.*

[309] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 501, para. 98.

[310] *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Merits, ICJ Reports (1974), pp. 3, 17–8, para. 33 and pp. 175, 188, para. 32, respectively.

[311] *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 258–9, para. 19 and pp. 457, 462, para. 19, respectively.

[312] *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 34, para. 75, and 42, para. 93.

[313] *Supra*, MN 94; *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 144, para. 289, cited in the *Bosnian Genocide* case, Provisional Measures, ICJ Reports (1993), pp. 325, 349, para. 58.

[314] This statement was repeated in later cases, *cf. e.g.*, *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 349, para. 58.

for the binding effect of provisional measures, the most impressive and comprehensive opinion being the dissenting opinion of Judge Weeramantry in the *Bosnian Genocide* case.[315]

IV. Doctrine

Legal writers have always been divided on the question of the binding effect of provisional measures. The different lines of opinion are summarized very roughly in the following remarks.[316] Those who denied that provisional measures are binding relied strongly on the texts of the drafting history and were rather reluctant to restrict the sovereignty of States in the absence of specific consent.[317] Furthermore, these writers referred to the fact that Article 41 is part of Chapter III of the Statute dealing with the procedure before the Court.[318] However, this argument seems rather weak because Chapter III contains not only provisions for procedural orders of the Court—which, by the way, are binding upon the parties[319]—but also the central provision on binding decisions, namely Article 59. 100

Those writers who argued that provisional measures are binding started from a functional approach. They argued on the one hand with the prestige of the Court stating that: 101

> It cannot be lightly assumed that the Statute of the Court—a legal instrument—contains provisions relating to any merely moral obligations of States and that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties.[320]

On the other hand, these authors referred in particular to a general principle of law, according to which interim protection is inherent in the judicial function[321] and to the theory of institutional effectiveness.[322] The latter view in particular has gained increasing support.

V. State Practice

Even if provisional measures are binding this would not imply that States would always act accordingly and therefore State practice may only be taken into account as an 102

[315] *Ibid.*, Sep. Op. Weeramantry, ICJ Reports (1993), pp. 370, 373 *et seq.* with an overview of the Court's jurisprudence and doctrinal opinions; *cf.* also Sztucki (1983), pp. 272 *et seq.*

[316] For a more detailed analysis *cf.* Oellers-Frahm (1975), pp. 107 *et seq.*; Sztucki (1983), pp. 272 *et seq.*; Elkind (1981), pp. 153 *et seq.*

[317] *Cf.* as an example Hammarskjöld, 'Quelques aspects de la question des mesures conservatoires en droit international positif', *ZaöRV* 5 (1935), pp. 5–33; Hudson, *The Permanent Court of International Justice: A Treatise* (1934), p. 415, who changed his view, however, in the 1943 edition of his Treatise (Hudson, *PCIJ*, pp. 425–6); Lauterpacht, *The Function of Law in the International Community* (1966), p. 208; Mendelson, 'Interim Measures of Protection and the Use of Force by States', in *The Current Legal Regulation of the Use of Force* (Cassese, ed., 1986), pp. 337–60, 343; Gross, *supra*, fn. 57, *passim*; Goldsworthy, 'Interim Measures of Protection', *AJIL* 68 (1974), pp. 258–77, 274.

[318] *E.g.*, Hammarskjöld, *supra*, fn. 317, pp. 25–7.

[319] *Cf. LaGrand*, German Memorial, para. 4.126.

[320] Lauterpacht, *The Development of International Law by the International Court* (1958), p. 254; Niemeyer (1932), p. 41; Hambro, 'The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice', in *Rechtsfragen der Internationalen Organisation, Festschrift für Hans Wehberg zu seinem 70. Geburtstag* (Schätzel/Schlochauer, eds., 1956), pp. 152–71, 165.

[321] Collier/Lowe, *Settlement of Disputes*, p. 175; Elkind (1981), p. 162; Oxman, 'Jurisdiction and the Power to Indicate Provisional Measures', in Damrosch, *ICJ at a Crossroads*, pp. 323–54, 332; Mani, 'Interim Measures of Protection; Article 41 of the ICJ Statute and Article 94 of the UN Charter', *IJIL* 10 (1970), pp. 359–72, 367.

[322] Fitzmaurice (1958), p. 122; Oellers-Frahm (1975), p. 110; Dubisson, *CIJ*, pp. 228–9.

additional, however not as the decisive, element.[323] Since the *Anglo-Iranian Oil Co.* case, compliance with provisional measures has been rather unsatisfactory.[324] Only where both parties to a case favoured the judicial settlement of their dispute was compliance with provisional measures probable; however, interim protection is only rarely requested in such cases and in exceptional circumstances.[325] In cases brought by unilateral application and mostly against an unwilling State, the record of compliance is poor, what might rather support the non-binding effect of provisional measures, although non-compliance and binding effect are two completely different aspects of international jurisdiction. In particular in cases involving armed activities[326] and the imminent execution of persons,[327] non-compliance with provisional measures can undermine the effectivity of the Court's decision on the merits, which might be seen as one of the reasons for the Court to take the opportunity in the *LaGrand* case to decide the question, although it could have rejected a decision on that request with good reason. Although compliance with provisional measures would not be guaranteed by reason of the binding character of the measures, this would at least entail state responsibility in case of non-compliance.[328]

VI. The Judgment in the *LaGrand* Case

103 In its application in the *LaGrand* case Germany had explicitly requested the Court to adjudge and declare that 'the United States ... violated its international legal obligation to comply with the Order ... of 3 March 1999'.[329] The United States countered by stating that 'it would be anomalous—to say the least—for the Court to construe this Order as a source of binding legal obligations'.[330] In deciding this question, the Court had to interpret Article 41 according to 'customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties'.[331] With a view to the differing terms of Article 41 in the French version ('quelles mesures *doivent* être prises') and in the English one ('measures which *ought* to be taken')[332] the Court applied Article 33, para. 4 of the Vienna Convention on the Law of Treaties. The Court stated that the object and purpose of Article 41 is to preserve the Court's ability to fulfil its function of judicial settlement of international disputes. This implied that provisional measures:

> should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.[333]

[323] *Cf.* also Elkind (1981), p. 164.
[324] *Cf.* Manouvel, *RGDIP* (2002), pp. 127 *et seq.*
[325] *Frontier Dispute* (Burkina Faso/Republic of Mali), Judgment, ICJ Reports (1986), pp. 554 *et seq.*
[326] *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.*; *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169 *et seq.*; *Bosnian Genocide*, Orders of 8 April 1993 and 13 September 1993 (Provisional Measures), ICJ Reports (1993), pp. 3, 24 *et seq.*, and 325 *et seq.*
[327] *Breard*, Provisional Measures, ICJ Reports (1998), pp. 248 *et seq.*; *LaGrand*, Provisional Measures, ICJ Reports (1999), pp. 9 *et seq.*; *Avena*, Provisional Measures, ICJ Reports (2003), pp. 77 *et seq. Cf.* also Szabó, *supra*, fn. 304, pp. 475, 485–6.
[328] *Cf. infra*, MN 108 *et seq.*
[329] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 473–4, para. 12.
[330] *Ibid.*, p. 501. para. 97.
[331] *Ibid.*, para. 99.
[332] Emphasis added.
[333] *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, p. 503, para. 102.

The Court found that this decision was also confirmed by the preparatory work of Article 41 which did not preclude the conclusion that provisional measures are binding, because the term 'indiquer' instead of 'ordonner' had been chosen with regard to the fact 'that the Court did not have the means to assure the execution of its decisions. However, the lack of means of execution and the lack of binding force are two different matters.'[334] 104

Finally, the Court tested its findings with regard to Article 94 of the Charter, finding that, whether the term 'decision' in para. 1 included orders indicating provisional measures or not, it would in any case not preclude the binding effect of provisional measures. 105

This decision of the Court[335] which terminated the long-lasting discussion on the binding effect of provisional measures was, however, surprising in its unambiguous clarity, as it plainly stated that provisional measures are binding without even mentioning at all the question of jurisdiction. Whether this meant that provisional measures are binding in any case irrespective of whether the jurisdiction on the merits was contested or not, was not clear. According to Article 59, the judgment in the *LaGrand* case, as any judgment, has binding force only between the parties and in respect of that particular case, and in that case the jurisdiction of the Court on the merits was not in question. However, this seems to be a weak argument because in practice the interpretation of a treaty provision given by the Court in a particular case has de facto, although not *de jure*, *erga omnes* effect, although it could, of course, be overruled in a later decision.[336] Therefore, concern has been advanced that the statement on the binding effect of provisional measures could lead States to withdraw their acceptance of the Court's jurisdiction.[337] But it cannot be supposed that the Court was not aware of the problem concerning jurisdiction, all the more because Germany in its Memorial pleading for the binding effect of provisional measures argued on the basis of established jurisdiction on the merits.[338] The findings on the binding character of provisional measures do not, in any case, prevent the Court from *recommending* provisional measures in a concrete case with contested jurisdiction, following the example of the ITLOS in the *M/V 'Saiga'* case.[339] 106

The task of the Court in indicating provisional measures has not become easier following the statement of their binding effect, because the question of jurisdiction remained and with it the danger of imposing binding provisional measures in cases where, eventually, a lack of jurisdiction has to be stated. In contrast to other international courts and tribunals which have the power to indicate provisional measures with binding effect, *e.g.*, in particular 107

[334] Ibid., p. 505. para. 107.

[335] For comments on the decision *cf.* Kammerhofer, 'The Binding Nature of Provisional Measures of the International Court of Justice: the "Settlement" of the Issue in the LaGrand Case', *Leiden JIL* 16 (2003), pp. 67–83; Manouvel, *RGDIP* (2002), *passim*; Spiermann, 'The LaGrand Case and the Individual as a Subject of International Law', *Zeitschrift für Öffentliches Recht* 58 (2003), pp. 197–221; Frowein, 'Provisional Measures by the International Court of Justice—The LaGrand Case', *ZaöRV* 62 (2002), pp. 55–60; Tams/Mennecke, 'The LaGrand Case (Germany v United States of America)', *ICLQ* 51 (2002), pp. 449–55; Oellers-Frahm, 'Die Entscheidung des IGH im Fall LaGrand—Eine Stärkung der internationalen Gerichtsbarkeit und der Rolle des Individuums im Völkerrecht', *EuGRZ* 28 (2001), pp. 265–72; Rosenne, 'The International Court of Justice: The New Form of the Operative Clause of an Order Indicating Provisional Measures', *LPICT* 2 (2003), pp. 201–3; Ben Hammadi, 'La question du caractère obligatoire des mesures conservatoires devant la Cour Internationale de Justice, L'arrêt LaGrand (Allemagne c. Etats-Unis d' Amérique) du 27 Juin 2001', *Revue québécoise de droit international* 114 (2001), pp. 53–81.

[336] *Cf.* Brown on Art. 59 MN 71, 81–87; Miron/Chinkin on Art. 63 MN 4.

[337] Manouvel, *RGDIP* (2002), p. 135.

[338] *LaGrand*, German Memorial, para. 4.129.

[339] *M/V 'Saiga' (No. 2)* (Saint Vincent and the Grenadines v. Guinea), ITLOS Reports (1998), pp. 24 *et seq.*; *cf.* on this issue in particular Oellers-Frahm, *GLJ* (2011), *passim*.

the ITLOS or the CJEU, but also, after the decision in *Mamatkulov and Abdurasulovic v. Turkey*,[340] the ECtHR, the question of jurisdiction is more complicated for the ICJ.

The reason is that these other courts or tribunals, in contrast to the ICJ, have compulsory jurisdiction (ECtHR, CJEU) or provide, like the UNCLOS, for mandatory judicial settlement of disputes even if not necessarily by the ITLOS itself.[341] It may, therefore, be supposed that the fact that newly created international courts and tribunals, and in particular the ITLOS, have the power to *prescribe* provisional measures, but not the principal judicial organ of the United Nations, was a reason for the ICJ to decide as it did in the *LaGrand* case.[342]

In practice, the jurisprudence of the ICJ ever since the *LaGrand* case confirms that the Court considers that any provisional measures ordered by it are binding independent of whether the jurisdiction was contested or not. This view is completely in line with the distinction between jurisdiction in relation to provisional measures which is based on Article 41 of the Statute, and jurisdiction over the merits of the dispute, which is based on the consent of the parties, namely Article 36, para. 1 or para. 2 of the Statute. Although the Court did not make an explicit statement in this context, its position can *inter alia* be deduced from its arguments made with regard to the non-compliance with provisional measures in the *Avena (Request for Interpretation)* case[343] which supports the view that the phase of provisional measures is governed by an autonomous legal regime.

VII. Consequences of Non-Compliance with Provisional Measures

108 In assessing the legal consequences of non-compliance with provisional measures a distinction has to be drawn between the power conferred upon the Court by the parties, *i.e.*, the inter-State level, on the one hand, and the institutional power conferred upon the Court by its Statute, *i.e.*, the institutional level, on the other.

1. Inter-State level

109 On the inter State level the fact that provisional measures possess binding character signifies that any instance of non-compliance with such measures constitutes a breach of

[340] Appl. Nos. 46827/99 and 46951/99, Judgment of the First Section of 6 February 2003, affirmed by the Grand Chamber on 4 February 2005 *sub nom. Mamatkulov and Askarov v. Turkey* (it appears that the First Section had misunderstood the second applicant's last name), ECtHR 2005-I; *cf.* Tams, 'Interim Orders by the European Court of Human Rights—Comments on Mamatkulov and Abdurasulovic v. Turkey', *ZaöRV* 63 (2003), pp. 681–92. As the ECtHR had missed the opportunity to prescribe the binding force of provisional measures in the context of Protocol 11, it must be welcomed that it followed the findings of the ICJ in the *LaGrand* case. That the provision on interim measures was not amended when the new Rules were adopted is all the more astonishing because problems of contested jurisdiction cannot arise after the entry into force of Protocol No. 11. *Cf.* also Oellers-Frahm, 'Verbindlichkeit einstweiliger Maßnahmen: Der EGMR vollzieht—endlich—die erforderliche Wende in seiner Rechtsprechung', *EuGRZ* 30 (2003), pp. 689–92 and Oellers-Frahm, 'Verbindlichkeit einstweiliger Andordnungen des EGMR—Epilog', *EuGRZ* 32 (2005), pp. 347–50, with reference to the statements of the UN Human Rights Committee, which cannot even take binding final decisions, in the case of *Dante Piandiong et al. v. the Philippines*, UN Doc. CCPR/C/70/D/869/1999 (2000), paras. 5.1 *et seq.* *Cf.* furthermore in favour of the binding character of provisional measures the—non-binding—decision of the UN Committee against Torture in the case of *Mafhoud Brada v. France*, UN Doc. CAT/C/34/D/195/2002 (2005), para. 13.4.

[341] *Cf.* Part XV UNCLOS. In particular, the fact that the ICJ, which is one of the dispute settlement organs to be chosen under Part XV UNCLOS, could not give binding provisional measures while ITLOS could, was certainly felt to be unacceptable.

[342] *Cf.* Frowein, *supra*, fn. 335, p. 60; *cf.* also Orrego Vicuña, in Ballesteros/Arias (2010), *passim*.

[343] Judgment, ICJ Reports (2009), pp. 3, 18, para. 51

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an international obligation entailing the international responsibility of the State not abiding by such order. It is, however, not clear what are the concrete consequences following therefrom. A first issue is whether States may take countermeasures, while a case is pending before the Court, since this may contravene the duties of a party *pendente lite*. Such duties were defined by the PCIJ in the *Electricity Company of Sofia and Bulgaria* case, where it found that Article 41:

> applies the principle universally accepted by international tribunals and likewise laid down in many conventions ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.[344]

According to this statement, the taking of countermeasures could be problematic and a State, party to a case might have to leave a decision on the consequences of non-compliance with provisional measures to the Court, which may take such non-compliance into account in the judgment on the merits as indicated in the *LaGrand* case.[345] Such attitude would be in line with Article 52, para. 2 of the ILC ASR which provides that countermeasures may not be taken if 'the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties'. Nevertheless, countermeasures in case of non-compliance with provisional measures would be justified if the prerequisites set out in Article 52, para. 4 of the ILC ASR are met, namely if the responsible State fails to implement the dispute settlement procedures in good faith.[346] This raises the issue whether such an assessment of a lack of good faith of the party in complying with the order on provisional measures should or could be made by the Court itself. In any case, countermeasures have so far not played any practical role.[347]

As the Court had emphasized in the *LaGrand* case, however, the injured party may 110
ask for redress by bringing a claim for indemnification. That is not to say that the Court may not *proprio motu* react to non-compliance;[348] yet reparation can only be granted if a claim to this effect is made, since otherwise the Court would be in breach of the *non ultra petita* rule.[349] This raises the question whether material compensation or only symbolic reparation, *i.e.*, satisfaction, can be imposed by the ICJ, given that restoration of the *status quo ante* is not possible with regard to irreparable damage inherent in the very concept of provisional measures at the first place. As regards material compensation the Court stated that 'the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations'.[350] This approach seems to constitute the only viable

[344] *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, PCIJ, Series A/B, No. 79, pp. 194, 199.
[345] Judgment, ICJ Reports (2001), pp. 466, 508, para. 116.
[346] *Cf. ILC Yearbook* (2001-II), Part Two, p. 137, where the ILC explicitly referred to non-compliance with provisional measures.
[347] *Cf.* Lando, *JIDS* (2017), pp. 22 *et seq.*, 28–9.
[348] *Cf. infra*, MN 113.
[349] *Cf.* also Al-Qahtani, 'The Role of the International Court of Justice in the Enforcement of its Judicial Decisions', *Leiden JIL* 15 (2002), pp. 781–804, 788.
[350] *Cf. Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 231, para. 458.

attitude, because it will be difficult to identify what difference it makes that, apart from the violation of the underlying substantive obligation, interim measures have also been disregarded.[351]

So far, findings by the Court as to non-compliance with provisional measures orders were always included in the operative part of the respective judgment putting greater emphasis on such findings of non-compliance and furthermore allowing judges to express their personal view in separate or dissenting opinions.[352]

111 The question whether non-compliance with provisional measures may also be sanctioned in form of a decision on the costs of the proceedings was raised in the joined cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*. There, Costa Rica had asked the Court to impose on Nicaragua all costs and expenses incurred by Costa Rica in requesting and obtaining an order on provisional measures of 22 November 2013 which Nicaragua had disregarded. The Court, however, dismissed this request finding that 'an award of costs ... would not be appropriate',[353] while several judges underlined that the exceptional circumstances of the case should have warranted a decision by the Court under Article 64.[354]

2. Institutional Level

112 Although since the *LaGrand* case the issue of non-compliance of provisional measures was always raised by a party through a specific claim included in its submissions, the Court is not prevented from addressing the matter *proprio motu* thereby sanctioning the disregard of its judicial function by the non-complying party.[355] The Court seems to have confirmed this inherent power when stating that 'the question of compliance by both Parties with the provisional measures indicated in this case may be considered by the Court in the principal proceedings'.[356] While the Court may thus *proprio motu* raise the issue of non-compliance, it is disputed whether the Court may only determine the occurrence of a breach of provisional measures as such, or whether it may even *proprio motu* impose sanctions.[357] Yet, in line with the principle of *ne ultra petita*, if the party is seeking redress it has to include a formal claim for reparation in its submissions. In any case, until now the Court did not raise the issue of non-compliance *proprio motu* and it may be supposed that it would be reluctant to make use of this power because it

[351] Mendelson, in Fitzmaurice/Sarooshi (2004), p. 52; Lee-Iwamoto, *Japanese YIL* (2013), pp. 251 *et seq.*

[352] *Cf.* in this context *Immunities and Criminal Proceedings*, Provisional Measures, Decl. Gaja, ICJ Reports (2016), pp. 1175 *et seq.*

[353] *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Judgment, ICJ Reports (2015), pp. 665, 718, para. 144.

[354] *Ibid.*, Joint Decl. Tomka, Greenwood, Sebutinde, and Dugard.

[355] Palchetti, *Riv. di Diritto Internaz.* (2017), p. 17.

[356] *Cf. Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Provisional Measures, Order of 22 November 2013, ICJ Reports (2013), pp. 354, 368–9, para. 57.

[357] *Cf.* on the one hand Judge Cançado Trindade, who seems to support that the Court may also determine the legal consequences of non-compliance with provisional measures (*ibid.*, Judgment, Sep. Op. Cançado Trindade, ICJ Reports (2015), pp. 665 *et seq.*, para. 36), while Judge ad hoc Verhoeven only confirmed the Court's power to '*condemn*, even *proprio motu* where appropriate, violations of ordered measures' (*Armed Activities* (DRC v. Uganda), Judgment, Decl. Verhoeven, ICJ Reports (2005), pp. 355, 358 (emphasis added)).

Cf. also Shaw, *Rosenne's Law and Practice*, vol. I, p. 204, denying such possibility, as well as Mendelson, in Fitzmaurice/Sarooshi (2004), p. 42.

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might be difficult for the Court to prove non-compliance without the assistance of the parties.[358]

3. Autonomy of the Legal Regime on Non-Compliance with Provisional Measures

The Court may make a finding on non-compliance with an order on provisional measures regardless of the outcome of the main case. 113

Thus, for example, in the *Bosnian Genocide* case the Court despite the dismissal of the main requests of the party nevertheless included in the operative part of its judgment a declaration on non-compliance with its provisional measures.[359] This confirms the autonomous character of responsibility for non-compliance with provisional measures. Shortly afterwards, in the *Avena (Request for Interpretation)* case, the Court even censured non-compliance with provisional measures although it by the same token dismissed the claim on the merits for lack of jurisdiction.[360] This position stands in line with the Court's inherent jurisdiction under Article 41 which implies the possibility of a finding on non-compliance even in a judgment establishing the lack of jurisdiction, and the Court's jurisdiction over the merits of the case under Article 36. Accordingly, as provisional measures are binding upon the parties until the judgment has been delivered, non-compliance with such measures entails the responsibility of the non-complying party even if *ex post facto* the Court finds that it lacks subject-matter jurisdiction.[361]

4. Security Council and Non-Compliance with Provisional Measures

The fact that provisional measures are binding, but not delivered in the form of a judgment, makes it clear that the State concerned has to comply with them (Article 94, para. 1 UN Charter), but that recourse to the Security Council in case of failure to perform the obligations resulting from the decision according to Article 94, para. 2 UN Charter is not possible as such recourse is limited to non-compliance with judgments only.[362] Redress under Article 94, para. 2 was, however, sought in two cases of non-compliance with provisional measures even at a time when the Court had not yet confirmed that provisional measures are binding. In the *Anglo-Iranian Oil Co.* case,[363] the United Kingdom referred the issue of non-compliance with the provisional measures to the Security Council which did, however, not take a position on the question.[364] In the *Bosnian Genocide* case Bosnia had sent a letter to the Security Council requesting it to take measures under Chapter VII of the Charter *inter alia* in order to enforce the provisional measures order of the Court.[365] The Security Council then passed a resolution relying in particular on the Chapter VII aspects of the situation, mentioning the provisional measures issue only in the preamble 114

[358] Palchetti, *Riv. di Diritto Internaz.* (2017), p. 9, referring to the *Land and Maritime Boundary* case, Judgment, ICJ Reports (2002), pp. 303, 453, para. 321.

[359] Judgment, ICJ Reports (2007), pp. 43, 238, para. 471 (7), operative part.

[360] *Cf. Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 21, para. 61 (2); *cf.* also Marotti, *Riv. di Diritto Internaz.* (2014), p. 780.

[361] *Cf.* Leonhardsen, *JIDS* (2014), p. 322; d'Argent, *AFDI* (2011), p. 160 and Tranchant, *AFDI* (2009), pp. 216, 217.

[362] *Cf.* Oellers-Frahm, in Simma, *UN Charter*, Art. 94 MN 20; *cf.* also Lando, *JIDS* (2017), p. 29.

[363] ICJ Reports (1951), pp. 81, 93.

[364] *Cf.* Schachter, 'The Enforcement of International Judicial and Arbitral Decisions', *AJIL* 54 (1960), pp. 1–24, 23; *cf.* also Shaw, *Rosenne's Law and Practice*, vol. I, pp. 252 *et seq.*; Oellers-Frahm, in Simma, *UN Charter*, Art. 94 MN 17 *et seq.*

[365] *Cf.* UN Doc. S/25616 (1993).

of Res. 819 (1993). This practice confirms that Article 94, para. 2 UN Charter cannot be invoked in case of non-compliance with provisional measures.[366] As a matter of fact, provisional measures are indicated in the form of an order, not a judgment to which Article 94, para. 2 UN Charter explicitly refers. The term 'judgment' implies that the Security Council should be involved only if *final* decisions are not complied with. Thus, the Security Council can play a role with regard to the implementation of an order on provisional measures provided non-compliance with such an order were to constitute a threat to international peace and security. Yet, any such action by the Security Council would then not constitute action under Article 94, para. 2 UN Charter.

115 Another consequence flowing from the binding character of provisional measures is that the effect of provisional measures in cases of armed conflict ordering the immediate end to any armed action would be the same—at least for the parties to the case—as that of a Security Council Resolution under Chapter VII of the Charter,[367] although with a different underlying motivation: political in the Security Council and legal in the ICJ. This aspect was highly relevant in the *Preah Vihear (Request for Interpretation)* case where the request for interpretation combined with a request for provisional measures might be considered to have aimed rather at reaching the stopping of armed activities than an interpretation of the 1962 Judgment. [368]

G. The Role of the Security Council

I. Parallel Seisin of the Security Council and the ICJ

116 There is, in principle, no obstacle to the simultaneous seisin of the Security Council and the ICJ, because dispute settlement through political and legal bodies are complementary, not exclusive processes, unless special rules provide otherwise.[369] Thus, a State is entitled not only to bring a case to the Court but also to ask for interim protection, at the same time as other means of dispute settlement are explored; this is demonstrated by a number of precedents of the ICJ.[370] In the phase of interim protection, the parallel

[366] *Cf.* Mani, *supra*, fn. 321, pp. 359, 367 *et seq.*; Oellers-Frahm, 'Souveräne Gleichheit der Staaten in der internationalen gerichtlichen Streitbeilegung? Überlegungen zu Art. 94 Abs. 2 und Art. 27 UN-Charta', in *Verhandeln für den Frieden—Negotiating for Peace, Liber Amicorum Tono Eitel* (Frowein *et al.*, eds., 2003), pp. 169–91 with further bibliographical indications.

[367] Cf. Frowein, *supra*, fn. 335, p. 59.

[368] *Cf. supra*, MN 22.

[369] Klein, 'Paralleles Tätigwerden von Sicherheitsrat und Internationalem Gerichtshof bei friedensbedrohenden Streitigkeiten', in *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift für Hermann Mosler* (Bernhardt *et al.*, eds., 1983), pp. 467–91; Eisen, *Litispendence between the International Court of Justice and the Security Council* (1988); Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', *AJIL* 88 (1994), pp. 643–77; Ciobanu, 'Litispendence between the I.C.J. and the Political Organs of the U.N.', in Gross, *The Future of the ICJ*, vol. I, pp. 209–75; Rosenne (2005), pp. 196–201; Kaikobad, *Australian YIL* (1996). pp. 152 *et seq.*; Papa, *I rapporti tra la Corte Internazionale di Giustizia e il Consiglio di Sicurezza* (2006); *cf.* also Gowland-Debbas/Forteau on Art. 7 UN Charter MN 51–56; Gaja, in Gaja/Grote Stoutenburg (2014), *passim*.

[370] *Anglo-Iranian Oil Co.*, Provisional Measures, ICJ Reports (1951), pp. 89 *et seq.*; *Aegean Sea Continental Shelf*, Provisional Measures, ICJ Reports (1976), pp. 3, 11–2, paras. 36–41; *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.*; *Nicaragua*, Provisional Measures, ICJ Reports (1984), pp. 169 *et seq.*; *Lockerbie* (Libya v. UK; Libya v. USA), Provisional Measures, ICJ Reports (1992), pp. 3 *et seq.* and pp. 114 *et seq.*; *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3 *et seq.* and pp. 325 *et seq.*; and *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111 *et seq.*; *Certain Activities Carried Out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6 *et seq.*

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activity of a political organ of the United Nations, the Security Council, and its judicial organ, the ICJ, may, however, become relevant with regard to the 'circumstances' in relation to Article 41, in that the action of the Security Council may affect the urgency or the 'irreparable damage' required for granting interim relief. However, the ICJ has never to date dismissed a request for provisional measures for reasons relating to the simultaneous seisin of the Security Council or another political body, such as regional organizations, but has rather confirmed the necessity of its action under Article 41.[371]

Where the Security Council is acting under Chapter VI of the Charter, the parties are 117
bound only by the Court's order on provisional measures. If the Security Council has taken a resolution under Chapter VII of the Charter, that is a binding resolution, the parties are facing two parallel binding obligations under Article 103 UN Charter given that the Statute forms an integral part of the Charter. So far, both the Court and the Security Council have attempted to avoid any friction between orders under Article 41 and action taken by the Security Council. On the one hand, the Court has so far always refrained from indicating provisional measures with regard to the action taken by the Security Council,[372] In the context of the *Bosnian Genocide* case the Security Council vice-versa took note in the preamble of its Resolution 819 (1993) of the action of the ICJ while adding some more specific measures. In the *Preah Vihear (Request for Interpretation)* case the Security Council in its resolution only 'called upon the two sides to display maximum restraint and avoid action that may aggravate the situation'.[373]

A particular situation regarding the practice just outlined was, however, present in the 118
Lockerbie case, where the parallel seisin of the ICJ and the Security Council led to 'competing' action of both organs. In this matter, a resolution under Chapter VI was taken by the Security Council before the case was brought before the Court,[374] which was not complied with by Libya, so that it became probable that the Security Council would take action under Chapter VII. In order to prevent such further action of the Security Council, Libya instituted proceedings in the ICJ against the United States and the United Kingdom in separate applications and, on the same day, 3 March 1992, requested the indication of provisional measures, asking the Court to enjoin the United States and the United Kingdom from taking any action against Libya in order to compel or coerce it to surrender the accused individuals to any jurisdiction outside Libya. After the hearing on the request for provisional measures was closed and while the Court was deliberating, the Security Council adopted Res. 748 (1992) under Chapter VII of the Charter, imposing a series of sanctions against Libya including the surrender for trial of those accused of having committed the terrorist attack on the aircraft. As Security Council resolutions under Chapter VII prevail over obligations of Member States under any other international agreement,[375] the Court only stated in its orders on provisional measures that 'the rights claimed by Libya under the Montreal Convention cannot now be regarded

[371] *Cf. Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 127–8, paras. 39 *et seq.*; *cf.* also Savadogo, 'Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): The Court's Provisional Measures Order of 1 July 2000', *BYIL* 72 (2002), pp. 357–412, 365 *et seq.*; Merrills, *ICLQ* (1995), pp. 90, 125 *et seq.*

[372] *Aegean Sea Continental Shelf*, Provisional Measures, ICJ Reports (1976), pp. 3, 11–2; *Armed Activity* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111 *et seq.*; *cf.* Gaja, in Gaja/Grote Stoutenburg (2014), p. 89 *et seq.*

[373] *Cf.* UN Doc. SC/10174 (2011).

[374] SC Res. 731 (1992).

[375] Art. 103 UN Charter.

as appropriate for protection by the indication of provisional measures'.[376] The highly controversial question whether the Court, in its final judgment, would comment on the action of the Security Council with regard to its compatibility with Article 36, para. 3 of the Charter according to which the Security Council 'should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice' as well as on the aspect of the legality of Resolution 748 had become moot, since on 9 September 2003 all parties notified the Court that they had agreed 'to discontinue with prejudice the proceedings'.[377]

119 These examples show that an enhanced cooperation between the Security Council and the ICJ might be helpful, as was proposed by the President of the ICJ in the *Preah Vihear (Request for Interpretation)* case,[378] in particular as far as the increasing number of cases involving questions of peace and security are concerned. Whether such cooperation would then take the form of an inter-organic agreement or arrangement or whether the Rules of Court should be amended in order to give the Security Council an opportunity to request reconsideration of those aspects of an Order that relate to the maintenance of peace and security remains an open question. There is, however, a need to enhance the cooperation between these two organs as the Court is increasingly seized with cases involving questions of international peace and security.

II. The Security Council and Provisional Measures

120 According to Article 41, para. 2, notice of the provisional measures indicated has to be given to the Security Council. Article 77 of the Rules, which is a new provision adopted in 1978, further specifies this obligation according to the established practice. What is striking is that according to Article 77 of the Rules, provisional measures indicated by the Court *proprio motu* under Article 75, para. 1 of the Rules are not mentioned. However, since Article 41, para. 2 speaks of provisional measures in general without differentiating whether they had been requested or made *proprio motu* by the Court, transmission to the Security Council via the Secretary-General is always required.[379]

[376] *Lockerbie* (Libya v. UK; Libya v. USA), Provisional Measures, ICJ Reports (1992), pp. 3, 15, para. 40 and pp. 114, 126–7, para. 43, respectively; *cf.* also Gowlland-Debbas, *supra*, fn. 369, *passim*; Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences', *Max Planck UNYB* 1 (1997), pp. 91–109; Franck, 'The "Power of Appreciation": Who is the Ultimate Guardian of UN Legality?', *AJIL* 86 (1992), pp. 519–23; Watson, 'Constitutionalism, Judicial Review and the World Court', *Harv. ILJ* 34 (1995), pp. 1–45; Greenwood, 'The Impact of Decisions and Resolutions of the Security Council on the International Court of Justice', in *International Law and The Hague's 750th Anniversary* (Heere, ed., 1999), pp. 81–6; *cf.* also the literature cited by Chesterman/Oellers-Frahm on Art. 92 UN Charter MN 21, fn. 14. The five dissenting judges in the *Lockerbie* (Libya v. UK; Libya v. USA) cases, considered that the Court could have used its power to indicate provisional measures *proprio motu* to prevent an aggravation or extension of the dispute; Diss. Op. Bedjaoui, ICJ Reports (1992), pp. 33, 48, para. 31, Diss. Op. Weeramantry, ICJ Reports (1992), pp. 50, 65–66, Diss. Op. Ranjeva, ICJ Reports (1992), pp. 72, 73, para. 7, Diss. Op. Ajibola, ICJ Reports (1992), pp. 78, 87–8, Diss. Op. El-Kosheri, pp. 94, 97–100, paras. 10 *et seq.*; *cf.* also Merrills, *ICLQ* (1995), pp. 90, 130.

[377] *Lockerbie* (Libya v. UK; Libya v. USA), Orders of 10 September 2003, ICJ Reports (2003), pp. 149, 150 and pp. 152, 153, respectively; *cf.*, however, in this context Diss. Op. Weeramantry to the order dismissing the request for provisional measures, ICJ Reports (1992), pp. 160, 163 *et seq.* and Kaikobad, *Australian YIL* (1996), pp. 93 *et seq.*

[378] *Cf.* Statement by Judge Owada, President of the International Court of Justice, to the Security Council of 25 October 2011; further details in Gaja, Gaja/Grote Stoutenburg (2014), p. 92.

[379] In the only case where the Court based its order on Art. 75, para. 1 of the Rules, the *LaGrand* case, Provisional Measures, ICJ Reports (1999), pp. 9 *et seq.*, the procedure of transmission was followed as usual.

The transmission to the Security Council does not automatically imply any action of the Security Council. The Security Council will take action according to its Rules of Procedure, namely if it considers that international peace or security is threatened or if a State brings a dispute to the attention of the Security Council. It did so in connection with the provisional measures indicated in the *Anglo-Iranian Oil Co.* case, where it was seised by a complaint, not under Article 94, para. 2 of the Charter, but under Articles 34 and 35 of the Charter, and where its action was rather reluctant.[380] In the *Bosnian Genocide* case the Security Council was also addressed, and acted not on the basis of Article 94, para. 2, but on the basis of Chapter VII, although Bosnia had also relied on the non-compliance with the provisional measures.[381] 121

In the case that provisional measures are indicated in a dispute relating to a matter already on the agenda of the Security Council, the Council may adopt a resolution urging, *inter alia*, compliance with the order of the Court, which occurred in several cases[382] and which constitutes an important example of the cooperation between the Security Council and the ICJ. 122

Furthermore, it is undisputed that the Security Council may act in case of non-compliance with provisional measures whenever a threat to the peace or the security results therefrom. In such situations, the Security Council may be called upon or may act *proprio motu* under Chapter VI or Chapter VII of the Charter, but not under Article 94, para. 2 of the Charter.[383] 123

H. Evaluation

The institution of provisional measures has undergone a significant development in the two World Courts during their nearly 100 years of existence. The provision in Article 41 of the Statute which needed precision with regard to several fundamental aspects, *e.g.*, the question of jurisdiction on the merits, the irreparability of the damage and the effect of the decision, has been fleshed out so that States are now better able to assess requests for provisional measures. This state of affairs is certainly a reason for the increasing use of provisional protection. However, the fact that compliance with the measures indicated by the Court is still not the rule gives rise to the question as to why States more frequently than ever before have recourse to provisional protection. There are certainly several reasons, one of the most important of which seems to be what has been called 'litigation strategy'.[384] There is little doubt that States make use or sometimes rather abuse of the interim protection procedure for tactical reasons: be it in order to have a kind of psychological advantage in the litigation, be it to reach some first stage in the procedure which can take a long time, or be it, and this seems clearly to be an abuse of interim protection, to instrumentalize the Court as a forum to advance a State's opinions on a disputed situation even if it is evident that the Court is not competent to decide the case 124

[380] *Cf.* in more detail Shaw, *Rosenne's Law and Practice*, vol. I, pp. 252 *et seq.*; *cf. supra*, MN 114.
[381] *Cf. supra*, MN 114.
[382] *Tehran Hostages*, SC Res. 461 (1979); *Bosnian Genocide*, SC Res. 819 (1993); *Land and Maritime Boundary*, UN Doc. S/1996/391 (1996).
[383] *Cf. supra*, MN 114.
[384] *Cf.* Gill, *Litigation Strategy at the International Court: A Case Study of the Nicaragua v. United States Dispute* (1989).

on the merits for lack of jurisdiction.[385] However, misuse or even abuse of international procedures—and these are not restricted to provisional measures—should not lead one to call into question the whole instrument or the advantages it implies. It is for the Court to react to such abuses as it has done, *e.g.*, in striking off the list cases already in its order dismissing provisional measures or in applying the limits set by the Statute and the Rules with utmost strictness, and as it has done with regard to very strict time limits for the oral arguments on provisional measures.[386] Possibly, the Court could be even more strict in reacting to misuses,[387] but in general, the increase in the use of interim protection and the development of this instrument by the Court can be evaluated in a more positive manner, namely as reflecting the development of international law in general and the status and acceptance of international jurisdiction in particular.

125 There is, however, a further aspect to be considered in evaluating interim protection, which refers to the fact of using interim protection as a factor in maintaining or restoring international peace. In cases such as the *Tehran Hostages* case,[388] the *Nicaragua* case,[389] the *Bosnian Genocide* case,[390] the *Legality of Use of Force* cases,[391] the *Armed Activities* case (DRC v. Uganda),[392] the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case,[393] and the *Georgia v. Russia* case,[394] and, to a certain extent, also the *Preah Vihear (Request for Interpretation)* case,[395] the subject-matter of interim protection did not merely concern the preservation of a right claimed by a party to the case, but related to the maintenance or restoration of international peace. In these cases, the Court was invoked to act in parallel to the Security Council, which is, in principle, not problematic,[396] but requires the Court to be careful not to trespass on the authority of the Security Council and to keep within the limits of Article 41 of the Statute. As the Court is one of the principal organs of the United Nations, it is also called upon to contribute to the maintenance and restoration of international peace and security. In this respect, the indication of interim measures of protection has become an important instrument since States increasingly submit to the Court cases involving questions of peace and security. As the Court only has to be satisfied that there is a *prima facie* basis for its jurisdiction and as orders indicating provisional measures have binding force, it is by the indication of provisional measures that the Court is able essentially to contribute to the maintenance of international peace and security,[397] perhaps

[385] *E.g.*, in the *Legality of Use of Force* cases, Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.*; *cf.* in this context the critical remarks by several participants of the discussion in *Les procédures incidentes devant la Cour internationale de Justice: Exercice ou abus de droits?* (Sorel/Poirat, eds., 2000), pp. 38–44 and pp. 63–84 ('mesures conservatoires'), and Oellers-Frahm, in Hestermeyer (2011), point B; *cf.* also Leonhardsen, *JIDS* (2014), *passim*.

[386] In this context reference has to be made to Practice Direction XI which reminds the parties to limit their oral pleadings to what is strictly necessary for the indication of provisional measures; *cf.* Shaw, *Rosenne's Law and Practice*, vol. III, p. 1463.

[387] Remark by Pellet, in Sorel/Poirat, *supra*, fn. 385, pp. 70–1.

[388] Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.*

[389] Provisional Measures, ICJ Reports (1984), pp. 169 *et seq.*

[390] Provisional Measures, ICJ Reports (1993), pp. 3 *et seq.*, 325 *et seq.*

[391] *Legality of Use of Force*, Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.*

[392] Provisional Measures, ICJ Reports (2000), pp. 111 *et seq.*

[393] Provisional Measures, ICJ Reports (2002), pp. 219 *et seq.*

[394] Provisional Measures, ICJ Reports (2008), pp. 353 *et seq.*

[395] Provisional Measures, ICJ Reports (2011), pp. 537 *et seq.*

[396] *Supra*, MN 116–119.

[397] Rosenne (2005), pp. 224–5; Oellers-Frahm, in Hestermeyer (2011), point B; Oellers-Frahm, in Jalloh/Elias (2015); Lee-Iwamotu, in Byrnes *et al.* (2013), pp. 89 *et seq.*

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sometimes even more effectively than the Security Council, namely in situations where the Security Council would be prevented from acting by the exercise of the veto power. Thus, by indicating interim measures of protection in such borderline cases—and by using its broad discretion with regard to the assessment of the 'circumstances' requiring the indication of provisional measures—the ICJ is able not only to contribute to the peaceful settlement of international disputes but also to the maintenance of international peace and security, thus strengthening its position as a principal organ of the United Nations as well as the United Nation's prime objective, which is the maintenance of international peace and security.

Finally, it is also worth mentioning that not only the text of the Statute, but also the very institution and procedure of provisional measures, as developed by the PCIJ, and in particular by the ICJ, have been successfully transposed to almost all other international courts, tribunals and dispute settlement organs, so that interim protection may by now be considered as an example of uniformity of international law which otherwise is often criticized—rightly or wrongly—as suffering from fragmentation.[398]

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[398] *Cf.* Miles, in Adenas/Bjorge (2015), *passim*.

I. Annex:

Requests for Provisional Measures 1926–2018

Case and Date of Request for Provisional Measures	Date of Order(s) of the Court	Measures granted: Yes/No
A. Permanent Court of International Justice		
1. *Denunciation of the Treaty of 2 November 1865 between China and Belgium* Request of 25 November 1926	Order of 8 January and Order of 18 June 1927, PCIJ, Series A, No. 8, pp. 6 *et seq.*	Yes (cessation of provisional measures)
2. *Factory at Chorzów (Indemnities)* Request of 14 October 1927	Order of 21 November 1927, PCIJ, Series A, No. 12, pp. 3 *et seq.*	No
3. *Legal Status of the South-Eastern Territory of Greenland* Request of 18 July 1932	Order of 3 August 1932, PCIJ, Series A/B, No. 48, pp. 276 *et seq.*	No
4. *Administration of the Prince von Pless* Request of 3 May 1933	Order of 11 May 1933, PCIJ, Series A/B, No. 54, pp. 150 *et seq.*	No
5. *Polish Agrarian Reform and the German Minority* Request of 3 July 1933	Order of 2 December 1933, PCIJ, Series A/B, No. 58, pp. 174 *et seq.*	No
6. *Electricity Company of Sofia and Bulgaria* Request of 4 July 1938	Order of 5 December 1939, PCIJ, Series A/B, No. 79, pp. 194 *et seq.*	Yes
B. International Court of Justice		
1. *Anglo-Iranian Oil Co.* (United Kingdom v. Iran) Request of 22 June 1951	Order of 5 July 1951, ICJ Reports (1951), pp. 89 *et seq.*	Yes
2. *Interhandel* (Switzerland v. United States of America) Request of 3 October 1957	Order of 24 October 1957, ICJ Reports (1957), pp. 105 *et seq.*	No
3. *Fisheries Jurisdiction* (United Kingdom v. Iceland) (Federal Republic of Germany v. Iceland) Request of the United Kingdom: 19 July 1972	Order of 17 August 1972, ICJ Reports (1972), pp. 12 *et seq.* and pp. 30 *et seq.*	Yes
Request of the Federal Republic: 21 July 1972 Request of both applicants for review according to the Order of 1972: 26 June 1973	Orders of 12 July 1973, ICJ Reports (1973), pp. 302 *et seq.* and pp. 313 *et seq.*	Confirmation of first Orders
4. *Nuclear Test* (Australia v. France) (New Zealand v. France) Request of Australia of 9 May 1973 Request of New Zealand of 14 May 1973	Orders of 22 June 1973, ICJ Reports (1973), pp. 99 *et seq.* and pp. 135 *et seq.*	Yes
5. *Trial of Pakistani Prisoners of War* (Pakistan v. India) Request of 11 May 1973	Order of 13 July 1973, ICJ Reports (1973), pp. 328 *et seq.*	No (request for postponement by Pakistan)

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Case and Date of Request for Provisional Measures	Date of Order(s) of the Court	Measures granted: Yes/No
6. *Aegean Sea Continental Shelf* (Greece v. Turkey) Request of 10 August 1976	Order of 11 September 1976, ICJ Reports (1976), pp. 3 *et seq.*	No
7. *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran) Request of 29 November 1979	Order of 15 December 1979, ICJ Reports (1979), pp. 7 *et seq.*	Yes
8. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) Request of 9 April 1984	Order of 10 May 1984, ICJ Reports (1984), pp. 169 *et seq.*	Yes
9. *Frontier Dispute* (Burkina Faso/Republic of Mali) Request of Burkina Faso of 2 January 1986 Request of Mali of 6 January 1986	Order of 10 January 1986, ICJ Reports (1986), pp. 3 *et seq.*	Yes
10. *Border and Transborder Armed Actions* (Nicaragua v. Honduras) Request of 21 March 1988	Order of 31 March 1988, ICJ Reports (1988), pp. 9 *et seq.*	Withdrawal of request on 31 March 1988
11. *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal) Request of 23 August 1989	Order of 2 March 1990, ICJ Reports (1990), pp. 64 *et seq.*	No
12. *Passage through the Great Belt* (Finland v. Denmark) Request of 23 May 1991	Order of 29 July 1991, ICJ Reports (1991), pp. 12 *et seq.*	No
13. *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America) Requests of 3 March 1992	Orders of 14 April 1992, ICJ Reports (1992), pp. 3 *et seq.* and pp. 114 *et seq.*	No
14. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia) 1. Request made by Bosnia and Herzegovina on 20 March 1992 2. Second request made by Bosnia and Herzegovina on 27 July 1993 3. Request made by Yugoslavia on 10 August 1993	1. Request: Order of 8 April 1993, ICJ Reports (1993), pp. 3 *et seq.* and 2. Request: Order of 13 September 1993, ICJ Reports (1993), pp. 325 *et seq.*	Yes (reaffirmation of Order made on 8 April 1993)
15. *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) *Case* Request of 21 August 1995	Order of 22 September 1995, ICJ Reports (1995), pp. 288 *et seq.*	No

Case and Date of Request for Provisional Measures	Date of Order(s) of the Court	Measures granted: Yes/No
16. *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria) Request of 12 February 1996	Order of 15 March 1996, ICJ Reports (1996), pp. 13 *et seq.*	Yes
17. *Vienna Convention on Consular Relations* (Paraguay v. United States of America) Request of 3 April 1998	Order of 9 April 1998, ICJ Reports (1998), pp. 248 *et seq.*	Yes
18. *LaGrand* (Germany v. United States of America) Request of 2 March 1999	Order of 3 March 1999, ICJ Reports (1999), pp. 9 *et seq.*	Yes
19. *Legality of Use of Force* 1. (Yugoslavia v. Belgium) 2. (Yugoslavia v. Canada) 3. (Yugoslavia v. France) 4. (Yugoslavia v. Germany) 5. (Yugoslavia v. Italy) 6. (Yugoslavia v. Netherlands) 7. (Yugoslavia v. Portugal) 8. (Yugoslavia v. Spain) 9. (Yugoslavia v. United Kingdom) 10. (Yugoslavia v. United States of America) Requests of 29 April 1999	Orders of 2 June 1999, ICJ Reports (1999) 1. pp. 124 *et seq.* 2. pp. 259 *et seq.* 3. pp. 363 *et seq.* 4. pp. 422 *et seq.* 5. pp. 481 *et seq.* 6. pp. 542 *et seq.* 7. pp. 656 *et seq.* 8. pp. 761 *et seq.* 9. pp. 826 *et seq.* 10. pp. 916 *et seq.*	No (Nos. 8 and 10 were ordered to be removed from the List for manifestly lacking jurisdiction)
20. *Armed Activities in the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) Request of 19 June 2000	Order of 1 July 2000, ICJ Reports (2000), pp. 111 *et seq.*	Yes
21. *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) Request of 17 October 2000	Order of 8 December 2000, ICJ Reports (2000), pp. 182 *et seq.*	No
22. *Armed Activities in the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda) Request of 28 May 2002	Order of 10 July 2002, ICJ Reports (2002), pp. 219 *et seq.*	No
23. *Avena and Other Mexican Nationals* (Mexico v. United States of America) Request of 9 January 2003	Order of 5 February 2003, ICJ Reports (2003), pp. 11 *et seq.*	Yes
24. *Certain Criminal Proceedings in France* (Republic of the Congo v. France) Request of 9 December 2002		No
25. *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) Request of 4 May 2006 Request of 29 November 2006	Order of 13 July 2006, ICJ Reports (2006), pp. 113 *et seq.* Order of 23 January 2007, ICJ Reports (2007), pp. 3 *et seq.*	No No

Annex 20

Case and Date of Request for Provisional Measures	Date of Order(s) of the Court	Measures granted: Yes/No
26. *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (Mexico v. United States of America) Request of 5 June 2008	Order of 16 July 2008, ICJ Reports (2008), pp. 311 *et seq.*	Yes
27. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation) Request of 14 August 2008	Order of 15 October 2008, ICJ Reports (2008), pp. 353 *et seq.*	Yes
28. *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal) Request of 19 February 2009	Order of 28 May 2009, ICJ Reports (2009), pp. 139 *et seq.*	No
29. *Certain Activities Carried Out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River* (Costa Rica v. Nicaragua) 1. Request of 18 November 2010 2. Request for the modification of the Court's order of 8 March 2011 3. Request of 24 September 2013 for the indication of new provisional measures 4. Request of 11 October 2013	1. Request: Order of 8 March 2011, ICJ Reports (2011), pp. 6 *et seq.* 2. Request: Order of 16 July 2013, ICJ Reports (2013), pp. 230 *et seq.* 3. Request: Order of 22 November 2013, ICJ Reports (2013), pp. 354 *et seq.* 4. Request Order of 13 December 2013, ICJ Reports (2013), pp. 398 *et seq.*	Yes No (reaffirmation of the previous order) Yes (plus reaffirmation of previous order No
30. *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia v. Thailand) Request of 28 April 2011	Order of 18 July 2011, ICJ Reports (2011), pp. 537 *et seq.*	Yes
31. *Questions relating to the Seizure and Detention of Certain Documents and Data* (TimorLeste v. Australia) 1. Request of 17 December 2013 2. Request for the modification of the Order indicating Provisional Measures of 3 March 2014	1. Request: Order of 3 March 2014, ICJ Reports (2014), pp. 147 *et seq.* 2.Request: Order of 22 April 2015, ICJ Reports (2015), pp. 556 *et seq.*	Yes Yes (cessation of 2nd prov. measure; confirmation of 2nd and 3rd prov. measure
32. *Immunities and Criminal Proceedings* (Equatorial Guinea v. France) Request of 29 September 2016	Order of 7 December 2016, ICJ Reports (2016), pp. 1148 *et seq.*	Yes
33. *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination* (Ukraine v. Russian Federation) Request of 16 January 2017	Order of 19 April 2017, ICJ Reports (2017), pp. 104 *et seq.*	Yes

Case and Date of Request for Provisional Measures	Date of Order(s) of the Court	Measures granted: Yes/No
34. *Jadhav Case* (India v. Pakistan) Request of 8 May 2017	Order of 18 May 2017, ICJ Reports (2017), pp. 231 *et seq.*	Yes
35. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates) Request of 11 June 2018	Order of 23 July 2018	Yes
36. *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (Islamic Republic of Iran v. United States of America) Request of 16 July 2018	Order of 3 October 2018	Yes

Article 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

L'arrêt est définitif et sans recours. En cas de contestation sur le sens et la portée de l'arrêt, il appartient à la Cour de l'interpréter, à la demande de toute partie.

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A. Article 60 and the Principle of *res judicata*

I. *Res judicata*

Article 60, cl. 1, read with Articles 59 and 61 of the Statute, is a manifestation of the principle of *res judicata* of judicial decisions.[1] Article 60, cl. 1, of the Statute expresses in the clearest possible terms the basic meaning of *res judicata*, which is the finality of a judgment. Article 59 of the Statute concerns the personal and material limits of *res judicata*. Finally, Article 61 of the Statute buttresses the finality of judgments by providing for an exclusive and strictly circumscribed way for a party to obtain its release from the obligations imposed by a judgment. The consequence of *res judicata* is that the disposition effected by a judgment is to be accepted as true in fact and in law (*res judicata pro veritate habetur*).[2] It follows that a new application seeking to relitigate the same case is inadmissible. It also follows that an issue covered by *res judicata*, which reappears as an incidental question in a later case, remains determined by *res judicata* and cannot be reopened.[3] These are the negative consequences of *res judicata*. The positive consequence of *res judicata* is that a successful party may rely on the judgment as affirming its rights or denying its obligations with final effect.[4] 1

Beyond the Statute, the principle of the finality of judicial decisions (*res judicata*) is also a general principle of law.[5] This is not to say that the material limits to and exceptions from the finality of judgments are the same across jurisdictions; they are not.[6] However, the basic principle is of universal application. Its purpose is also broadly the same everywhere. First, the finality of a judgment is in the objective public interest; as the Court has explained, 'the stability of legal relations requires that litigation come to an end'[7] (*interest rei publicae ut finis sit litium*).[8] Second, there is a substantial specific (or 2

[1] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 90, para. 115; Brown on Art. 59 MN 32; Kolb, *ICJ*, p. 762; Rosenne (2007), p. 43.

[2] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 92–3, para. 120.

[3] *Cf. ibid.*

[4] Limburg, 'L'autorité de la chose jugée des décisions des juridictions internationales', *Rec. des Cours* 30 (1929-V), pp. 523–617, 527; Skomerska-Muchowska, '*Res judicata* as a Principle of International Law: An Effective Solution to the Problem of Competing Jurisdictions?', in *Jurisdictional Competition of International Courts and Tribunals* (Krzan, ed., 2012), pp. 63–94, 73. The effect of *res judicata* is also sometimes understood as including the obligatory effect of a judgment, as distinct from its finality; consequently, Art. 94, para. 1 UN Charter is also cited as an aspect of the principle: *cf., e.g.*, Rosenne, '*Res Judicata:* Some Recent Decisions of the International Court of Justice', *BYIL* 28 (1951), pp. 365–71, 365–6. This is a matter of terminology only. The distinction between Art. 60, cl. 1 of the Statute with regard to finality, and Art. 94, para. 1 UN Charter with regard to the obligations that may arise from a judgment, suggests that the narrower terminology is more appropriate. However, the fact that Art. 59 of the Statute does not specifically refer to one or to the other kind of 'binding force' lends some support to the broader view.

[5] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, Diss. Op. Anzilotti, PCIJ, Series A, No. 13, pp. 23, 27; Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 335 (Lord Phillimore); Brant (2003), p. 22; Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 336; Finke, *Die Parallelität internationaler Streitbeilegungsmechanismen* (2004), p. 342; Kulick, *Leiden JIL* (2015), p. 81, fn. 62; Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (1927), pp. 206–7; Thienel (2016), p. 128; Wittich, 'Permissible Derogation from Mandatory Rules? The Problem of Party Status in the *Genocide* Case', *EJIL* 18 (2007), pp. 591–618, 599.

[6] *Cf.* Scobbie, '*Res judicata*, Precedent and the International Court: A Preliminary Sketch', *Australian YIL* 20 (1999), pp. 299–317, 301; Thienel (2016), pp. 215–7; Wittich, *supra*, fn. 5, p. 607.

[7] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 90, para. 116. For this and the following, *cf.* also Kulick, *Leiden JIL* (2015), pp. 79–80.

[8] See also U.S. Supreme Court, *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401–2 (1981); House of Lords, *Arthur J.S. Hall & Co. v. Simons* [2000] 3 All ER 673, 701 (Lord Hoffmann); Bowett, 'Estoppel before International Tribunals and its Relation to Acquiescence', *BYIL* 33 (1957), pp. 176–202, 177; Kolb, *ICJ*, p. 762.

subjective) interest at play; as the Court has also pointed out, 'it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again'[9] (*nemo debet bis vexari pro una et eadem causa*).[10]

3 There is some debate as to whether the parties may *jointly* depart from the solution arrived at in a judgment of the Court or submit the case to another court (or resubmit it to the Court), thus waiving *res judicata* and any rights arising from the judgment. This power of the parties is frequently upheld.[11] Yet this view is contested.[12] The Court has said that the parties 'may of course still reach mutual agreement … that does not correspond to [the Court's] decision'.[13] More recently, the Court might have suggested otherwise when stating that a final decision 'cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose'.[14] However, despite the phrase 'by the parties', the Court probably had in mind only the reopening of an issue by *either* of the parties. Admittedly, the objective public interest referred to above (*interest rei publicae ut finis sit litium*)[15] may counsel even against re-litigation at the behest of *both* parties. But inasmuch as this public interest relates to the stability of legal relations, its object as such is at the disposal of the parties to those legal relations.[16] Moreover, the principle that a successful party should not have to reargue its case (*nemo debet bis vexari pro una et eadem causa*)[17] clearly can be waived by the successful party.

4 The importance of the principle of *res judicata* can hardly be overestimated. The Court has treated the finality of decisions as one of the defining features of a judicial body:

> According to a well-established and generally recognized principle of law, a judgment rendered by … a judicial body is *res judicata* and has binding force between the parties to the dispute.[18]

[9] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 90–1, para. 116.

[10] *Cf.* the cases cited *supra*, in fn. 8.

[11] Thouvenin, 'Article 94', in *La Charte des Nations Unies, Commentaire article par article* (Cot *et al.*, eds., 3rd edn. 2005), pp. 2133–47, 2135, fn. 3; *cf.* Kolb, *ICJ*, p. 85; Rosenne, 'L'exécution et la mise en vigueur des décisions de la Cour internationale de Justice', *RGDIP* 57 (1953), pp. 532–83, 548; Rosenne, 'Article 59 of the Statute of the International Court of Justice Revisited', in *El derecho internacional en un mundo de transformación, Le droit international dans un monde en mutation, International Law in an Evolving World, Liber Amicorum Eduardo Jiménez de Aréchaga* (Rama-Montaldo, ed., 1994), vol. II, pp. 1129–59, 1159; Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), p. 249; Thirlway, 'Judgments of International Courts and Tribunals', *Max Planck EPIL*, MN 15–6.

[12] *Cf.* Gattini, 'Domestic Judicial Compliance with International Judicial Decisions: Some Paradoxes', in *From Bilateralism to Community Interest, Essays in Honour of Judge Bruno Simma* (Fastenrath *et al.*, eds., 2011), pp. 1168–88, 1171. Thirlway, *supra*, fn. 11, para. 15, suggests that while the parties can depart from *res judicata* as between themselves, they cannot affect the Court's fidelity to *res judicata* and therefore cannot resubmit their case to the Court.

[13] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 218–9, para. 48.

[14] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 90, para. 115.

[15] *Supra*, fn. 8.

[16] This is so, from a procedural perspective, even if the legal relations are really between the respondent State and a private person from the applicant State because the applicant has brought a case by way of diplomatic protection with respect to a citizen's human or otherwise personal rights under international law (*cf. LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 482–3, para. 42; *Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 599, para. 39). The decisive role of the *litigant* party for the purposes of *res judicata* is merely another aspect of the fact that the private person in diplomatic protection cases has only an indirect role in the proceedings and that his or her position as the beneficiary and holder of the relevant rights is, for the purposes of the case, taken by his or her State.

[17] *Supra*, fn. 10.

[18] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports (1954), pp. 47, 53; *cf.* also Boisson de Chazournes, 'The Principle of Compétence de la Compétence

Accordingly, the Court itself is a judicial body not only because its name (not least in Article 7 UN Charter) and Article 92, cl. 1 UN Charter, as well as Article 1 of the Statute so announce, but also, substantively, because its judgments are *res judicata.* Indeed, this aspect of the judicial character of the Court has played a role in the Court declining to deliver a judgment that would be without object in the *Northern Cameroons* case.[19] This serves to underline the close connection between the principle of *res judicata* and the mission of the Court in its contentious jurisdiction. That mission is to effect (not merely contribute to) the settlement of the disputes submitted to the Court (*cf.* Article 33, para. 1 UN Charter). Whereas in most methods of peaceful dispute settlement, the success of a settlement is assessed by the parties, individually or jointly, the settlement of a dispute submitted to the Court is determined objectively by the presence of *res judicata.*[20]

It is therefore no exaggeration to say that the purpose of the Court in its contentious jurisdiction is to produce *res judicata* for the parties. Accordingly, the principle of *res judicata* is also fundamental to the jurisdictional and procedural regime of the Statute. If the concept of jurisdiction denotes the authority of the Court to make a binding determination,[21] *i.e.*, to create *res judicata,* consent to the Court's jurisdiction is only necessary within the confines of the *res judicata* that the parties desire. Because third States are not bound by the *res judicata* of a judgment, the basic principle of consensual jurisdiction therefore does not require their consent[22]—although the *Monetary Gold* principle[23] may operate as an extension and protection of the basic principle.[24] Moreover, the limitations of *res judicata* act as a bar on the incidental jurisdiction of the Court; in particular, because the final judgment cannot bind a third State, provisional measures likewise cannot be indicated against a third State.[25] This might equally be explained by the relativity of the seisin, which as a relationship in procedural law exists only between the parties and

in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals', in *Looking to the Future, Essays in Honor of W. Michael Reisman* (Arsanjani *et al.*, eds., 2011), pp. 1027–64, 1038; Brant (2003), pp. 195 *et seq.*; Condorelli, 'L'autorité de la décision des juridictions internationales permanentes'. in SFDI, *Juridiction internationale,* pp. 277–313, 290; Couvreur, 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes', in Muller *et al.*, *ICJ*, pp. 83–116, 100; Kolb, *ICJ*, p. 69.

[19] *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 38.

[20] This is subject to the parties *jointly* departing from the *res judicata; cf. supra*, MN 3.

[21] Tomuschat on Art. 36 MN 7; *cf. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports (1954), pp. 47, 53 (quoted *supra*, in MN 4); Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal', *LPICT* 2 (2003), pp. 501–50, 503; Philip/de Cara, 'Nature et évolution de la juridiction internationale', in SFDI, *Juridiction internationale*, pp. 3–43, 10; Shaw, *Rosenne's Law and Practice*, vol. II, p. 545.

[22] Orakhelashvili, 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from *Monetary Gold* to *East Timor* and Beyond', *JIDS* 2 (2011), pp. 373–92, 389, 391; Thienel (2016), pp. 130–2; Thienel, 'Third States and the Jurisdiction of the International Court of Justice: The *Monetary Gold* Principle', *GYIL* 57 (2014), pp. 321–52, 330–4; Thirlway, 'Law and Procedure, Part Nine', p. 52.

[23] *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 32 *et seq.*; *cf.* generally Brown on Art. 59 MN 64–67; Tomuschat on Art. 36 MN 21–25.

[24] *Cf.* Lowe, 'The International Court in a Timorous Mood', *Cambridge L. J.* 54 (1995), pp. 484–6, 485; Thienel, *supra*, fn. 22, p. 335; *contra* Orakhelashvili, *supra*, fn. 22, pp. 389, 391.

[25] *Bosnian Genocide*, Provisional Measures, Order of 13 September 1993, ICJ Reports (1993), pp. 325, 344, para. 40; Lagrange, 'Le tiers à l'instance devant les juridictions internationales à vocation universelles (CIJ et TDIM)', in *Le tiers à l'instance devant les juridictions internationales* (Ruiz Fabri/Sorel, eds., 2005), pp. 9–72, pp. 33–4; Rosenne, *supra*, fn. 11, pp. 1146–7.

the Court.[26] However, this again is linked to the principle of *res judicata*: because the judgment will only be effective *inter partes*, an instrument that institutes proceedings and seeks a judgment can only create a procedural relationship that is equally relative. The principle of *res judicata* therefore already informs the underlying relationship in procedural law from which *res judicata* ultimately arises. The principle of *res judicata*, then, is a fundamental and structural principle of procedural law.

II. Interpretation and *res judicata*

6 The language and structure of Article 60 reflect the primacy of the principle of *res judicata*.[27] Accordingly, interpretation proceedings may not be used to impair the finality or to delay the implementation of judgments of the Court.[28] Thus, and even if a provision equivalent to Article 61, para. 3 is missing with regard to interpretation proceedings, a request for interpretation might be considered inadmissible if made with the intention to circumvent the obligations arising under Article 94, para. 1 UN Charter or if otherwise constituting an *abus de droit*. This case might conceivably arise if a dispute as to the meaning or scope of the obligations deriving from a judgment was quite far-fetched and was disingenuously invoked to delay the implementation of the original judgment, particularly if it is critical for the judgment to be implemented before a certain date.

7 On the other hand, interpretation proceedings under Article 60 may neither be used in an attempt to enforce the original judgment nor to have the Court make a finding on a lack of implementation of the original judgment by one of the parties.[29]

III. Exclusion of Appeal

8 While the general principle of *res judicata* does not as such rule out the existence of appellate procedures—if they exist, final effect attaches to a judgment only later, after the expiry of the time limit for an appeal, or it attaches only to the judgment on appeal—the opening clause of Article 60 is already clear in saying that it is (all) the judgments of the Court that are final. The added clause by which the judgments are also 'without appeal' is therefore more of a declaratory nature. It merely underlines that every judgment is final from the very moment of its delivery in open court.[30]

9 Interpretation proceedings are therefore to be distinguished from any form of appeal: while the notion of appeal denotes the re-examination of a decision with full opportunities accorded to the parties to argue their case,[31] the procedure under Article 60 in sharp contrast thereto limits the Court to a pure construction of its prior judgment. Thus, neither are the parties in a position to re-argue the case fully, nor is the Court empowered to question its prior holding. The Court may only clarify the content of the earlier judgment.

[26] *Bosnian Genocide*, Counter-Claims, Decl. Kreća, ICJ Reports (1997), pp. 262 *et seq.*; Jouannet, 'Quelques perspectives théoriques: Incertitudes sur le tiers et désordres de la justice internationale', in Ruiz Fabri/Sorel, *supra*, fn. 25, pp. 255–63, 257.

[27] *Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31, 36–7, para. 12.

[28] *Ibid.*

[29] *Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 20, para. 56.

[30] *Cf.* Khan on Art. 58 MN 1, 32 *et seq.*

[31] Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (1971), p. 212.

III. *Excursus*: Special References to the Court under Article 87 of the Rules

Under Article 87 of the Rules, a contentious case can be brought before the Court concerning a matter that has already formed the subject of proceedings before some other international body and namely some other tribunal. Until 1936, the Rules did not contain such a provision.[32] Article 67 as it stood in 1936 then remained basically unchanged in substance in 1946, 1972, and 1978, as well as in 2000. 10

However, in 1932 Czechoslovakia had already brought an appeal against certain judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal;[33] it did so again in 1933 in the *University Peter Pázmány* case, where the PCIJ acknowledged that States may, by agreement, recognize the jurisdiction of the Court in cases of disputes between them relating to judgments of other international tribunals.[34] In 1971, India challenged the validity of a decision of the ICAO Council under Article 84 of the Chicago International Civil Aviation Convention and Article 2, section 2 of the related International Air Services Transit Agreement of 1944, both of which provided that an appeal may be brought against any such decision to the PCIJ.[35] 11

In order to be covered by Article 87 of the Rules, the appeal must be provided for in a treaty or convention in force, thus referring to Article 36, para. 1,[36] and the subject-matter of the case must already have been decided/brought before some other international body, be it some other international (arbitral) tribunal, be it a non-judicial decision-making body. In such a case, the regular rules governing contentious cases apply. 12

In addition, States may also agree *ad hoc* to submit a dispute as to the validity or the content of such a decision to the Court,[37] in which case the extent of the Court's jurisdiction will accordingly be delimited by the terms of the instrument granting it jurisdiction.[38] In the case concerning the *Arbitral Award of 31 July 1989*,[39] the Court left open whether under the system of Article 36, para. 2, the Court might deal with an application for appeal or revision against an award previously rendered by an arbitral tribunal,[40] but found that it could (at least) decide upon the validity of the award as such.[41] 13

Proceedings under Article 87 of the Rules, given their contentious character, are fundamentally different from requests for advisory opinions where the Court may be 14

[32] For the drafting history of Art. 67 of the 1936 Rules *cf.* Hudson, *PCIJ*, pp. 430–3.

[33] *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, Order of 12 May 1933, PCIJ, Series A/B, No. 56, pp. 160 *et seq.*; the case was later discontinued.

[34] *Peter Pázmány University*, Judgment, PCIJ, Series A/B, No. 61, pp. 207, 221.

[35] *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46 *et seq.*

[36] For details *cf.* Tomuschat on Art. 36 MN 39–69.

[37] *Cf. Arbitral Award made by the King of Spain on 23 December 1906*, Judgment, ICJ Reports (1960), pp. 192 *et seq.*

[38] *Cf. ibid.*, p. 214, where the Court found that it was not empowered to act as a court of appeal vis-à-vis the award made by the King of Spain on 23 December 1906.

[39] *Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53 *et seq.*

[40] But *cf. ibid.*, Decl. Mbaye, ICJ Reports (1991), p. 80, where Judge Mbaye took the position that the Court would not have such a power under Art. 36, para. 2; *cf.* also Borel, 'Les voies de recours contre les sentences arbitrales', *Rec. des Cours* 52 (1935), pp. 1–104, 75.

[41] *Ibid.*, p. 62.

asked to review decisions of international administrative tribunals such as the ILOAT (previously)[42] or (also previously)[43] the UNAT.[44]

B. Historical Development of Interpretation Proceedings in International Adjudication/Dispute Settlement

I. Until the Hague Peace Conferences

15 The issue of the interpretation of judgments had arisen even before international (arbitral) tribunals in the modern sense were created. Thus, *inter alia*, the arbitration treaty concerning a dispute between the Duke of Burgundy and the Count of Nevers reserved for the arbitrator Philip III, the King of France, the power to correct and to interpret the award which he had made,[45] a right which in 1285 was exercised by the son of King Philip III.[46] An analogous treaty had existed in relation to a dispute between the Duke of Brabant and the Count of Gueldve, where the interpreting award was rendered in 1289.[47]

16 In the 1868 Portendick Arbitration by the King of Prussia between Great Britain and France, the declaration by which the parties had agreed to submit the dispute to an arbitration by the King of Prussia did not contain any clause relating to a possible interpretation procedure. However, after the award had been rendered, a dispute arose and the British government asked the King of Prussia to clarify certain points. The request was rejected by the Prussian Secretary of State, given that the arbitrator had not been called upon by a collective request of the two governments and that he accordingly had no jurisdiction and could not render an authentic interpretation of the decision.

17 Finally, in the case of *E. G. Montano*, the mixed claims commission established under the 1863 Convention between the United States and Peru[48] dealt with a request for interpretation notwithstanding the fact that the convention did not contain any clause relating to the interpretation of awards.[49]

[42] *Cf.* Art. XII of the ILOAT Statute (9 October 1946, as amended) provided for the review procedure but was deleted in a 2016 amendment of the Statute by the International Labour Conference; *cf.* also in that regard *Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports (1956), pp. 77 *et seq.*; and Dupuy/Hoss on Art. 34 MN 28–33; d'Argent on Art. 65 MN 51.

[43] By GA Res. 50 (54) (1995), the General Assembly decided to abolish the Committee on Applications for Review of Administrative Tribunal Judgments until that time provided for in Art. 11 of the Statute of UNAT (GA Res. 63/253 (2008), as amended); *cf.* also Chesterman/Oellers-Frahm on Art. 92 UN Charter MN 39–40.

[44] *Judgement No. 158 (Review)*, Advisory Opinion, ICJ Reports (1973), pp. 166 *et seq.*; *Judgement No. 273 (Review)*, Advisory Opinion, ICJ Reports (1982), pp. 325 *et seq.*; and *Judgement No. 333 (Review)*, ICJ Reports (1987), Advisory Opinion, pp. 18 *et seq.*; *cf.* also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports (1954), pp. 47 *et seq.*

[45] Grzybowski, *AJIL* (1941), p. 483; Novacovitch, *Les compromis et les arbitrages internationaux du XIIe au XVe siècle* (1905), p. 108.

[46] *Cf.* Dumont, *Corps universel diplomatique*, vol. I (1) (1726), p. 239.

[47] *Ibid.*, p. 268.

[48] For the text of the Convention *cf.* de Lapradelle/Politis, *Recueil des arbitrages internationaux*, vol. II (1923), pp. 252–4.

[49] *Ibid.*, p. 601; Delbez, *Les principes généraux du contentieux international* (1962), p. 209. For contributions of the Institut de Droit International to the drafting of regulations for the interpretation of international arbitral awards during the 1870s *cf.* Rosenne (2007), pp. 7 *et seq.*

II. Interpretation Proceedings at the Hague Peace Conferences 1899/1907

During the first Hague Peace Conference, the problem of interpretation never became relevant. Article 55 of the 1899 Convention therefore only contains a provision relating to the problem of *revision* of arbitral awards.[50] However, during the 1907 conference, the Italian delegation proposed introducing a new Article 54(a) (which later became Article 82), which provided for the settlement of disputes concerning either the interpretation or the execution of the arbitral award.[51] The drafters, due to the British opposition to the proposal,[52] thought it necessary to except the situation where the *compromis* excluded this recourse. Finally it was agreed that, if the question is not determined by the *compromis*, it is not within the scope of the arbitral tribunal to pass upon the application for interpretation.[53] The exact meaning and scope of application of Article 82 of the 1907 Convention has never been elucidated by practice.[54] 18

III. PCIJ

1. Drafting of Article 60 of the PCIJ Statute

In elaborating the article circumscribing the Court's jurisdiction,[55] the Committee of Jurists included among the 'legal disputes' which were intended to fall within the Court's compulsory jurisdiction the 'interpretation of a sentence passed by the Court'.[56] In addition, the draft proposal presented by the Committee to the Assembly of the League of Nations contained yet another stipulation bearing upon the same subject which provided that '[i]n the event of uncertainty[57] as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party'.[58] This appeared to be a duplication. On a motion of the delegation of Panama, the draft was altered in such a manner that the enumeration of the jurisdiction of the Court no longer included the interpretation of the Court's judgments.[59] Also, the term 'uncertainty' was changed to 'dispute'.[60] 19

[50] Hague Convention No. I for the Pacific Settlement of International Disputes, 29 July 1899, 1 Bevans 230, 187 CTS 410. *Cf.* Rosenne (2007), pp. 10 *et seq.*

[51] Hague Convention No. I for the Pacific Settlement of International Disputes, 18 October 1907, UKTS 6 (1907), 1 Bevans 577, 205 CTS 233. For the text of the original proposal *cf.* Deuxième Conférence Internationale de la Paix, Actes et Documents, vol. II, Deuxième Commission, p. 733.

[52] 'Un nouveau différend exige un nouveau compromis', *ibid.*; *cf.* also the contrary opinion of Mr Lange, *ibid.*

[53] Scott, *The Reports to the Hague Conferences of 1899 and 1907* (1917), p. 350; Rosenne (2007), p. 14.

[54] Hill, *Georgetown L. J.* (1933–1934), p. 539. The Statute of the Central American Court of Justice (Convention for the Establishment of a Central American Court of Justice, 20 December 1907, (1907) 2 FRUS 697, 206 CTS 78, *AJIL* 2 (Suppl. 1908), pp. 231 *et seq.*), Art. XXIV, established almost at the same time contained a parallel provision according to which 'once they [the decisions] have been notified, they cannot be altered on any account; but at the request of any of the parties, the Tribunal may declare the interpretation which must be given to its judgments'. During its existence from 1907 to 1917, the Court had to deal with only five cases, none of which was related to the interpretation procedure.

[55] *Cf.* generally as to the development of the PCIJ Statute: Spiermann, Historical Introduction, *passim*.

[56] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), pp. 252–3; the word 'sentence' appears in the original English text.

[57] '[D]oute' in the French text; von Stauffenberg, p. 424.

[58] Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), p. 684.

[59] Hill, *Georgetown L. J.* (1933–1934), p. 541, fn. 16.

[60] '[C]ontestation' in the French text; von Stauffenberg, p. 424.

2. Drafting of the Rules of the PCIJ[61]

20 The 1922 Rules of Court did not contain any provisions as to the interpretation of judgments.[62] Therefore, some uncertainty existed as to the procedure to be followed in the case of a request for interpretation.[63] These problems concerned in particular the question of whether the jurisdiction conferred by Article 60 was genuinely compulsory, whether the ordinary procedure had to be followed, and what the composition of the Court in such proceedings would be.[64]

3. Practice of the Court

21 The PCIJ had to deal twice with requests for interpretation, namely in the case concerning the *Interpretation of Judgment No. 3 (Treaty of Neuilly, Article 179, Annex, para. 4)*,[65] and when dealing with the *Request for an Interpretation of Judgments Nos. 7 and 8 (Chorzów Factory)*.[66]

22 With regard to the first of the two requests, the PCIJ in September 1924, sitting for the first time as a Chamber of Summary Procedure, decided a dispute as to the interpretation of para. 4 of the Annex to section IV, part IX of the Peace Treaty of Neuilly between Greece and Bulgaria. Two months later, the Greek government unilaterally asked for an interpretation of this judgment. Since Bulgaria did not dispute the Court's jurisdiction to give such an interpretation, there was no need for the PCIJ to consider whether its jurisdiction could be based exclusively on the unilateral request of one party.[67] However, the Court held that the original agreement entrusted the Court only with deciding upon the *basis* and the *extent* of the obligations mentioned in the clause while the *applicability* of the clause—which was challenged by Greece in its request for interpretation—had not as such been questioned in both submissions.[68] Thus, the request was rejected.[69]

23 In the *Request for Interpretation of Judgments No. 7 and 8 (Chorzów Factory)* case,[70] some important questions were raised as to the nature and extent of the Court's jurisdiction under Article 60. In *Certain German Interests*, the PCIJ had decided that Poland was unable to delete the name of the Oberschlesische Company from the land register as owner of the factory and to replace it by the Polish State. Based on that judgment, both States endeavoured to come to a settlement. After the failure of negotiations, Germany instituted proceedings for compensation before the Court. Poland objected to the Court's jurisdiction. In *Factory at Chorzów (Indemnity)*, the Court acknowledged its jurisdiction and

[61] *Cf.* generally as to the drafting of the Rules of the PCIJ relating to Art. 60 of the PCIJ's Statute Rosenne (2007), pp. 50 *et seq.*

[62] Rules of Court, PCIJ, Series D, No. 2, pp. 560 *et seq.*

[63] Remark of the President of the PCIJ, Revision of the Rules of Court, PCIJ, Series D, addendum to No. 2, p. 174.

[64] During the drafting of the 1936 rules, there occurred only one problem in that respect, referring to a situation where one party had been ordered to pay the other party's costs. Judge van Eysinga proposed that in such a case Art. 60 would be applicable (PCIJ, Series D, third addendum to No. 2, p. 273); the large majority of the members of the Court agreed, however, that Art. 60 did not have in view a dispute as to the amount of costs (*cf. e.g.*, the statements of Judge Schücking, *ibid.*, and of Judge Anzilotti, *ibid.*, p. 275).

[65] *Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation)*, Judgment, PCIJ, Series A, No. 3, pp. 3 *et seq.*

[66] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13.

[67] *Treaty of Neuilly (Interpretation of Judgment No. 3)*, Judgment, PCIJ, Series A, No. 4, pp. 3, 6.

[68] *Ibid.*

[69] *Ibid.*, p. 7.

[70] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3 *et seq.*

determined that Poland was under an obligation to pay indemnities. Notwithstanding these judgments, the Polish government in its own domestic courts successfully claimed that the property belonged to the Polish Treasury. Germany, with its application for interpretation, contended that the Polish interpretation of the judgments, allowing for its action in the Polish courts, was erroneous. Thus, the Court essentially had to deal with two important points, *i.e.*, the meaning of the term 'dispute', as used in Article 60,[71] and how to define the phrase 'meaning or scope of the judgment' in this provision.[72]

IV. ICJ

1. Drafting of the Statute and Rules of the ICJ

When the Statute of the ICJ was drafted, Article 60 of the PCIJ Statute remained unchanged and became Article 60 of the ICJ Statute. During the drafting process, no modifications were submitted except for a (rejected) Cuban proposal that the interpretation should be rendered by way of an order of the Court.[73] 24

There was also no significant change to the Rules of Court. Article 79 of the 1936 Rules became without changes part of the 1946 Rules and later Article 84 of the 1972 Rules. The basic change in the 1978 Rules—apart from the renumbering—was that it clarified that each party may demand an interpretation regardless of whether or not the original proceedings had been introduced by way of *compromis* or by way of unilateral application.[74] 25

2. Practice of the Court

The Court has so far dealt with applications for an interpretation of a judgment in five cases: in the *Asylum* case,[75] in the *Continental Shelf* case between Tunisia and Libya,[76] in the *Land and Maritime Boundary* case,[77] in the *Avena* case,[78] and in the *Preah Vihear* case.[79] Malaysia also filed a request for the interpretation of the judgment in the *Pedra Branca* case,[80] as well as a separate application for a revision of the same judgment,[81] but it subsequently withdrew both requests.[82] 26

In the *Request for Interpretation of the Judgment in the Asylum Case*, Colombia, immediately after the delivery of the judgment, requested in particular clarification of the question whether Mr Haya de la Torre should be surrendered. In a very short judgment,[83] 27

[71] *Cf. infra*, MN 64–70.

[72] *Cf. infra*, MN 71–76.

[73] UNCIO III, p. 522; this proposal was not even seriously discussed.

[74] The amendments to the Rules of 5 December 2000 did not deal with interpretation proceedings. Generally, as to the drafting of the Rules of the ICJ relating to Art. 60 of the Statute *cf.* Rosenne (2007), pp. 62 *et seq.*

[75] *Request for Interpretation of the Judgment of 20 November 1960 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395 *et seq.*

[76] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192 *et seq.*

[77] *Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31 *et seq.*

[78] *Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3 *et seq.*

[79] *Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281 *et seq.*

[80] ICJ Press Release No. 2017/28 of 30 June 2017.

[81] See Zimmermann/Geiss on Art. 61 MN 13. ICJ Press Release No. 2017/6 of 3 February 2017.

[82] See Orders of 29 May 2018.

[83] It consists of only nine pages, *Request for Interpretation of the Judgment of 20 November 1960 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395–404.

the Court first denied the existence of a dispute between the parties[84] and then found that the requested interpretation would go beyond the limits of the original judgment and was thus inadmissible.[85]

28 In the *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)* case, the Court was faced with a combined request for a rectification, interpretation and revision of two sectors of the continental shelf borderline between Tunisia and Libya. Regarding the motion for interpretation, the Court first inquired whether such a procedure had not been excluded by the original *compromis*, according to which in case of a dispute 'the parties come *together* back to the Court'.[86] By arguing that it is not lightly to be presumed that a State would renounce its rights under Article 60, the Court reached the result that Article 3 of the *compromis* did not prevent Tunisia from unilaterally seeking an interpretation. By the same token, the Court avoided deciding upon the compatibility of Article 3 of the Special Agreement with the Statute.[87] The Court then found the request for interpretation to be partially admissible.

29 When dealing with the Nigerian *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*,[88] the Court found that a judgment on preliminary objections, too, may form the object of a request for interpretation. It also stressed that any such interpretation could only relate to the operative part of a judgment, as well as to those parts of the reasoning that are inseparable from the decision itself,[89] *i.e.*, which form part of the *ratio decidendi*.

30 In 2008 Mexico submitted a *Request for Interpretation of the Judgment of 21 March 2004 in the Case concerning Avena and Other Mexican Nationals*, claiming that a dispute had arisen as to the obligation under the 2004 judgment notwithstanding the fact that the United States had in the meantime withdrawn from the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations which had provided for the Court's jurisdiction in the original case. Moreover, and for the first time ever, Mexico requested provisional measures as part of proceedings under Article 60, which were granted by an order dated 16 July 2008.[90] Yet, in its later judgment of 19 January 2009,[91] the Court found that the matters claimed by Mexico to have been at issue between the Parties, requiring an interpretation under Article 60 of the Statute, were not matters which have been decided by the Court in its original judgment and could thus not give rise to the interpretation requested.

31 In 2011, Cambodia filed an application requesting interpretation of the judgment the Court had rendered already in 1962 in the *Preah Vihear* case. Cambodia simultaneously asked for the indication of provisional measures, a request which was, once again, successful,[92] despite the fact that the original title of jurisdiction had, just like in the *Avena*

[84] *Ibid.*, p. 403; *cf.* also *infra*, MN 62–66.

[85] *Request for Interpretation of the Judgment of 20 November 1960 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395, 403; *cf.* also *infra*, MN 70–75.

[86] *Continental Shelf* (Tunisia/Libya), Pleadings, vol. I, p. 10 (emphasis added).

[87] This may be due to the fact that the Court in 1982 had already avoided deciding upon the admissibility and legality of Art. 3 of the special agreement, *cf. Continental Shelf* (Tunisia/Libya), Judgment, ICJ Reports (1982), pp. 18, 40–1, para. 31.

[88] *Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31, 35, para. 10.

[89] *Ibid.*

[90] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311 *et seq.*

[91] *Ibid.*, Judgment, ICJ Reports (2009), pp. 3 *et seq.*

[92] *Cf. Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537 *et seq.*

case, by that point lapsed. The Court also affirmed its jurisdiction, as well as the admissibility of the request for an interpretation, in its judgment in 2013. It proceeded to interpret the 1962 judgment and found that the pronouncement as to the 'vicinity' of the temple of Preah Vihear extended only to the promontory of the temple.[93]

On 2 February 2017, Malaysia filed an application for revision of the judgment of 23 May 2008 in the *Pedra Branca* case. On 30 June 2017, Malaysia additionally requested an interpretation of the same judgment.[94] Both applications were later withdrawn.[95] 32

C. Distinguishing Interpretation Proceedings from Revision Proceedings

The distinction between *interpretation* and *revision*, when applied to a judgment with the force of *res judicata* is subtle and sometimes even perplexing.[96] Even so, there is remarkably little international jurisprudence on what is really meant by interpretation of an international judgment with regard to its relationship to revision. Still, it was as early as 1923 that the PCIJ in its advisory opinion on *Jaworzina*[97] had occasion to determine the relationship between interpretation and revision. Stating that the decision of the Conference of Ambassadors can be compared to the powers of an arbitrator, the Court went on to state that an arbitrator, in the absence of an express agreement, 'is not competent to interpret, still less modify his award by revising it'.[98] Thus, the Court seems to have implied that the very notion of interpretation excludes a modification of a decision of an international tribunal.[99] Accordingly, interpretation is clearly related to the *res judicata* 33

[93] *Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281 *et seq.* For a discussion of the judgment, *cf.* Chesterman, 'The International Court of Justice in Asia: Interpreting the Temple of Preah Vihear Case', *Asian JIL* 5 (2015), pp. 1–6; Ciorciari, 'Request for Interpretation of the Judgment of 15 June 1962 in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Cambodia v. Thailand)', *AJIL* 108 (2014), pp. 288–95; Kulick, *Leiden JIL* (2015), pp. 73–89; Peat, 'Interpreting Reasons: The Interpretation of the 1962 *Temple of Preah Vihear* Judgment', *Hague Yearbook of International Law* 26 (2013), pp. 201–15; Riesenberg, 'Introductory Note to Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear', *ILM* 54 (2015), pp. 53–6; Yee, 'Notes on the International Court of Justice (Part 5): *Temple of Preah Vihear (Interpretation)* (2013)', *Chinese JIL* 14 (2015), pp. 655–63. Particularly for the facts of the case and the issues of the protection of cultural property, *cf.* Chechi, 'The 2013 Judgment of the ICJ in the *Temple of Preah Vihear* Case and the Protection of World Cultural Heritage Sites in Wartime', *Asian Journal of International Law* 6 (2016), pp. 353–78.

[94] For the background, *cf.* Chesterman, *supra*, fn. 93, p. 5.

[95] *Cf. Pedra Branca (Revision)* and *Request for Interpretation of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Orders of 29 May 2018.

[96] Rosenne, in Manner/Hakapää (1979), p. 108; Zoller, *AFDI* (1978), p. 349; Hernández, *The International Court of Justice and the Judicial Function* (2014), p. 60. Some authors even submit that both procedures are means of amending an award and that the scope of application of interpretation and revision overlap; *cf. e.g.*, Reisman, *supra*, fn. 35, p. 212; but *cf.* also Delbez, *supra*, fn. 53, p. 139. These difficulties were encountered in particular by the United Kingdom-France Arbitral Tribunal in the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Decision of 14 March 1978, RIAA, vol. XVIII, pp. 271, 296. The arbitral tribunal acknowledged that, where the request for interpretation must, if upheld, entail some adjustment, the task of defining whether the remedy sought falls within the ambit of interpretation or amounts to a demand for revision may be a difficult one.

[97] *Jaworzina*, Advisory Opinion, PCIJ, Series B, No. 8, pp. 6 *et seq.*

[98] *Ibid.*, p. 38 (emphasis added); for a general discussion of this advisory opinion *cf.* Weil, 'Jaworzina (Advisory Opinion)', *EPIL* III (1997), pp. 3–4. De Vineul, 'L'Affaire de Jaworzina devant la CPJI', *Rev. de droit intern. et de lég. comp.* 5 (1924), pp. 130–42, 137, is somewhat unclear when he writes that 'la Conférence peut interpréter cette décision, mais pas d'une manière qui en altère le sens'.

[99] *Cf.* also Rosenne, in Manner/Hakapää (1979), pp. 103, fn. 10.

of the original judgment. In the same vein, in the very first proceedings dealing with a request for interpretation *stricto sensu*, the PCIJ found that an interpretation cannot go beyond the limits of that judgment itself.[100] This means that the function of Article 60 can only be to explain, but not to change what the Court had already settled with binding force.[101] This view was confirmed by the Eritrea–Ethiopia Boundary Commission, set up under the Algiers Peace Agreement[102] between the two States concerned, which held in its decision of 24 June 2002 concerning the 'Request for Interpretation, Correction and Consultation' submitted by Ethiopia that 'the concept of interpretation does not open up the possibility of appeal against a decision or the reopening of matters clearly settled by a decision'[103] and that accordingly any request for interpretation may not allow for substantive amendment.[104] Similarly, in the *Avena (Request for Interpretation)* case the Court found that the original judgment in that case had not decided upon the direct enforceability, under domestic law, of the relevant international obligation in question, and therefore the issue could not be submitted for interpretation under Article 60.[105] However, the jurisdiction of the ICJ under Article 60 certainly extends to establishing whether a particular point has or has not been decided with binding force.[106]

34 Since the Court is therefore bound by the limits of its previous judgment, it can neither take into account facts not discussed in the original proceedings nor any development that took place after the original judgment.[107] Due to the fact that the Court can only act within the limits of the *res judicata* of the original judgment, it is also precluded from taking any further steps. Thus, the Court in the 1985 proceedings did not find itself free to order an expert survey while the duty to nominate such an expert belonged to the parties under the 1982 judgment.[108]

35 The real problem, however, is to find out whether an error made by the Court may lead to interpretation or whether the discovery of such an error may be considered as a *new fact*. In its 1985 application for interpretation, Tunisia was able to show that there was a contradiction between the reasoning of the Court on the one side and the determination of the boundary line. This was due to the fact that the ICJ had failed to notice a certain overlapping between Tunisian and Libyan oil concessions. The Court admitted this error and nevertheless did not exclude the possibility of an interpretation in that respect.[109] In their respective dissenting opinions, Judges Oda and Bastid denied such a possibility. Since, in their view, the application of the Tunisian method would have led

[100] *Treaty of Neuilly (Interpretation of Judgment No. 3)*, Judgment, PCIJ, Series A, No. 4, pp. 3, 7; confirmed in *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 11, 21; and in the *Request for Interpretation of the Judgment of 20 November 1960 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395, 403; *cf.* also *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 217 *et seq.*

[101] Rosenne, in Manner/Hakapää (1979), p. 107.

[102] *Cf.* UN Doc. S/2000/1183 (2000), Annex.

[103] UN Doc. S/2002/732 (2002), p. 6.

[104] *Ibid.*

[105] *Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 17, para. 45.

[106] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 11; Rosenne, *The Law and Practice of the International Court* (2nd edn., 1985), p. 429; this power is based on the Court's general power to determine its own jurisdiction under Art. 36—otherwise an interpretation beyond the limits of the original judgment would be *ultra vires*.

[107] *Cf. infra*, MN 74 *et seq.*

[108] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 228.

[109] *Ibid.*, p. 220.

to the application of entirely different methods and would have created a new border line, the only logical place for such a request would have been in the submissions on the merits of a claim of revision.[110] To solve this problem, it must be recalled that the issue of an interpretation is *not* what the decision ought to have been in the light of fresh facts and arguments.[111] Still, it is the Court's duty to tell the parties how to solve any contradiction between different parts of the judgment. Otherwise, the Court would not be able to solve the dispute between the parties. However, the Court cannot—as demonstrated—go beyond the previous *res judicata*. Thus, the Court has no power to alter its previous judgment. But it must be understood that the real meaning of the judgment—while hidden—was already contained in the original judgment. Therefore, by clarifying a contradiction and erasing an error, the Court is still acting within the scope of its interpretative jurisdiction. Thus, the ICJ was right when it admitted the Tunisian application for interpretation.

In the light of the previous findings, a gap may be said to exist between Article 60 on 36
the one hand, and Article 61 on the other: since on the one hand interpretation cannot consider new facts which already existed at the time of the judgment, but which were unknown to the Court and the respective party, and since on the other, revision can only be based on new facts *of a decisive nature*, any other new facts not of such a nature will not lead to any consequences. Moreover, a gap is apparent on the face of Article 61 of the Statute: if a decisive new fact within the meaning of Article 61 was known to the respective party, or was known to the Court, but erroneously does not feature in the judgment, there can be no revision,[112] and an interpretation may also be impossible if there are no contradictions within the judgment as it stands. There may therefore be cases in which a judgment is in error, but must remain *res judicata*. This only serves to underline the strength of the principle of *res judicata*; Article 61 of the Statute by design rules out revision if the supposed error in the prior judgment is the requesting party's own fault or if the error corresponds to a litigant's general risk of losing the case although the Court is fully informed.[113]

D. Specific Procedural Situations

I. Joint Interpretation of Several Judgments

If separate applications for the interpretation of several judgments are filed, the Court 37
may, under its broad powers under Article 47 of the Rules, join the proceedings, whenever the interests of good administration of justice so require.[114] However, in its application for the interpretation of judgments Nos. 7 and 8, the German government had submitted to the PCIJ a combined request for an interpretation of both judgments. Still, the Court did not see any necessity for a joinder; accordingly, only one file on the docket

[110] *Ibid.*, Sep. Op. Oda, ICJ Reports (1985), pp. 236, 241, and 245; Sep. Op. Bastid, pp. 247, 248, and 251. Judge Oda, however, seems not to distinguish clearly between the admissibility of the plea for revision on the one side (existence of a new fact?) and the procedure on the merits.

[111] *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Decision of 14 March 1978, RIAA, vol. XVIII, pp. 271, 296, 318.

[112] Zimmermann/Geiss on Art. 61 MN 64.

[113] Thienel (2016), p. 97.

[114] *Panevezys–Saldutiskis Railway*, Preliminary Objections, PCIJ, Series A/B, No. 75, pp. 52, 56; this power also relates to situations where the original proceedings did not have the same parties.

was opened.[115] As a matter of fact and due to the fact that the two judgments were clearly interrelated, the Court dealt with the application without raising any procedural issues in that respect. Furthermore, the Court interpreted judgment No. 7 in the light of judgment No. 8.[116]

II. Joint Applications for Interpretation and Revision

38 In its application dated 17 July 1984, Tunisia instituted proceedings relying not only on Article 60, but also on Article 61, thereby simultaneously requesting interpretation and revision of the judgment delivered by the Court on 24 February 1982.[117] The Court held that no provision in either the Statute or the Rules operated as a bar to such a procedure and accordingly saw no reason why the first stage judgment on the admissibility of the request of revision, should not, in 'appropriate circumstances' deal with other requests made in the same application instituting proceedings.[118] Still, this approach of the Court led to certain anomalies in the proceedings: having denied the existence of a new fact not due to negligence on the part of Tunisia, the Court nevertheless went on to analyse whether the alleged new fact would have been of a decisive nature,[119] the Court relying on its freedom to select the ground on which it will base its judgment.[120]

39 In the recent applications for revision of the judgment of 23 May 2008 in the *Pedra Branca* case filed by Malaysia on 2 February 2017 and the subsequent request for an interpretation of the same judgment[121] filed on 30 June 2017, Malaysia expressly stated that the said application for interpretation was 'separate and autonomous' from the application of revision of the same judgment.[122]

III. Judgments on Jurisdiction and Admissibility as Possible Instruments to be Construed

40 With regard to the question whether judgments on jurisdiction and admissibility may be subject to the procedure contemplated in Article 60, one must distinguish several possibilities.

[115] *Cf.* generally as to the Court's General List Yee on Art. 40 MN 72–78.

[116] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 19, and 20. In its final findings, the Court only dealt with the meaning of judgment no. 7, *ibid.*, p. 22.

[117] *Continental Shelf* (Tunisia/Libya), Judgment, ICJ Reports (1982), pp. 18 *et seq.* Tunisia also requested the correction of an error in the 1982 judgment. The Court pointed out that there is no provision in the Statute or the Rules governing such a request, but admitted that 'of course' it had the power to correct 'any mistakes which might be described as "erreurs matérielles"': *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 197–8, paras. 7, 8, 10, quotations from p. 198, para. 10. By this, the Court appears to have had in mind minor, perhaps only clerical, but not substantive errors (*ibid.*, contrasting 'erreurs matérielles' with an 'error of a more substantive kind'). The Court left undecided whether it had a broader power to correct errors (*ibid.*, p. 221 (para. 52); *cf.* Hernández, *supra*, fn. 96, pp. 60–1). It appears that it does not (*cf. supra*, MN 36).

[118] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 197–8, para. 10. For criticism *cf.* Schwarzenberger, *International Judicial Law*, p. 690.

[119] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 207, para. 29.

[120] *Ibid.*, citing *Guardianship of Infants*, Judgment, ICJ Reports (1958), pp. 55, 62; but *cf.* also *ibid.*, Sep. Op. Bastid, pp. 247–8, paras. 3–4; Décaux, *AFDI* (1985), p. 335.

[121] For the background, *cf.* Chesterman, *supra*, fn. 93, p. 5.

[122] ICJ Press Release 2017/28 of 30 June 2017; see also Zimmermann/Geiss on Art. 61 MN 23.

If the Court has previously found that an objection to its jurisdiction or the admissibility of the case did *not* possess an exclusively preliminary character and accordingly proceeded to the merits, no separate problem under Article 60 arises and the final judgment will then obviously be open for interpretation under the regular conditions. 41

If the Court has instead refused to assume jurisdiction or has rejected the application on other grounds, the legal effect of the judgment was to terminate the current proceedings; such a judgment therefore approximates to a final judgment on the merits and is also subject to interpretation within the limits of the Court's Statute.[123] 42

Where the Court has previously accepted its jurisdiction but where it has become clear in the meantime that it did and does not have jurisdiction, it has been argued that the application of the principle of *res judicata* under Article 60 could lead to an absurd decision, given that the Court could be obliged to pronounce an *ultra vires* decision in full knowledge of the fact that it is lacking jurisdiction.[124] The Court itself did not deal with the issue in the *South West Africa* cases (Second Phase), where 'the Court [found] it unnecessary to pronounce on various issues such as whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term—whether it ranks as final within the meaning of Article 60'.[125] Two judges, however, in their dissenting opinions, found that even judgments acknowledging jurisdiction are within the scope of Article 60[126] and would thus be subject to interpretation. More recently, when dealing with the Nigerian *Land and Maritime Boundary (Request for Interpretation)* case,[127] the Court found that even 'a judgment on preliminary objections, just as well as a judgment on the merits, can be the object of a request for interpretation'.[128] This approach, according to which even judgments assuming jurisdiction are within the realm of Article 60, is mainly supported by the argument that Article 60 makes no distinction as to the type of judgment concerned.[129] Moreover, as the Court has recently held, there is in reality no risk of the Court knowingly giving judgment *ultra vires*, as a judgment upholding jurisdiction with the force of *res judicata* in fact *establishes* such jurisdiction as a matter of law between the parties and the Court.[130] Therefore, Article 60 applies also to decisions that accept jurisdiction in proceedings related to preliminary objections, and these decisions are accordingly also subject to an interpretation by the Court.[131] 43

[123] Guggenheim, 'Die vorgängigen prozessualen Einreden im Verfahren vor dem Internationalen Gerichtshof', *ZaöRV* 18 (1958), pp. 131–40, 137; since the claimant State remains free to institute new proceedings (Schwarzenberger, *International Judicial Law*, p. 448), the sole practical purpose of interpretation proceedings could be where the judgment on jurisdiction may also have substantive impacts (*e.g.*, the question of the continuing validity of the mandates system of the League of Nations, creating the jurisdiction of the PCIJ/ICJ, as well as substantive obligations for the parties).

[124] Bos, *Les conditions du procès en droit international public* (1957), p. 321.

[125] *South West Africa* cases, Second Phase, ICJ Reports (1966), pp. 6, 36–7, para. 58.

[126] *Ibid.*, Diss. Op. Koretsky, pp. 239, 240; Diss. Op. Jessup, pp. 325, 332 and 337.

[127] *Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31 *et seq.*

[128] *Ibid.*, p. 35, para. 10.

[129] *Ibid.*; *cf.* also Art. 78, para. 7 of the Rules.

[130] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 101, para. 138.

[131] *Cf.* already Schwarzenberger, *International Judicial Law*, p. 448, who states that the provisions in the Statute and the Rules on final judgments 'are likely to provide useful analogies' in that respect. As to the question whether an advisory opinion can be subject to interpretation *cf.* Pinto, 'Cour internationale de Justice', in *Jurisclasseur de Droit International Public*, Fasc. 216, no. 20. In the advisory opinion on the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, ICJ Reports (1956), pp. 23 *et seq.*, the Court was asked to answer the question whether a granting of oral hearings was compatible with the former opinion of 1950 concerning the status of South West Africa (*International Status of South West Africa*, Advisory Opinion, ICJ Reports (1950), pp. 128 *et seq.*).

IV. Other Instruments to be Construed?

44 In the *Bosnian Genocide* case the respondent at one point submitted to the Court a document entitled 'Application for the Interpretation of the Decision of the Court on the Pendency of the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)' requesting an interpretation of a decision of the Court not to hold hearings in the near future, the background being an attempt by the member of the Bosnian Presidency from the Republic of Srpska to discontinue the case.[132] The respondent based this application squarely on Article 60. However, given that Article 60 expressly allows only for the interpretation of judgments, it fell to the Registrar to inform the Agent of the FRY that the above-mentioned document could not constitute a request for interpretation and had not been entered on the Court's General List.[133] Most recently, on 24 April 2018, Ukraine requested the Court to interpret its provisional measures order in the *ICSFT and CERD* case.[134] However, the Court merely reaffirmed the binding nature of its previous Order rather than interpret it.[135]

V. Interpretation Proceedings and Requests for Provisional Measures

45 In two recent applications for interpretation of previous judgments, namely the *Avena* and the *Preah Vihear* cases, the respective applicant simultaneously requested the Court to also order provisional measures.[136] The Court has in both cases rendered such orders and has thus accepted such possibility without further detailed discussion, with only one judge challenging this approach.[137]

46 Any such request must fulfil two sets of requirements, one under Article 60 and one under Article 41: the regular conditions laid down by Article 60 (and in particular the required 'dispute' as to the meaning or scope of the original judgment[138]) must *prima*

[132] *Cf.* also Berman/Hernández on Art. 42 MN 23 and Wegen, Discontinuance and Withdrawal, MN 41, fn. 101.

[133] *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 53–4, para. 22. On the practice of dealing only administratively with formally defective applications see Shaw, *Rosenne's Law and Practice*, vol. III, pp. 1213–4; Thirlway, 'Law and Procedure, Part Twelve', pp. 37, 63. Thirlway, *ICJ*, p. 189, considers whether orders on provisional measures, which are binding (*cf.* Oellers-Frahm/Zimmermann on Art. 41 MN 93–115), may be subject to interpretation by the Court and finds that they ought to be. The wording of Art. 60 seems to preclude this. Moreover, orders on provisional measures are not *res judicata*, or as Art. 60, cl. 1 puts it, 'final and without appeal'; therefore, Art. 60, cl. 2 cannot apply (Rosenne, *Provisional Measures in International Law* (2005), p. 43). However, the absence of *res judicata* might also point to the solution to the problem of interpretation. The Court might *in effect* allow a party to request an interpretation by means of a request under Art. 76 of the Rules or by means of a suggestion to the Court to revisit the matter under Art. 75, para. 1 of the Rules.

[134] *Cf.* Letter dated 26 April 2018 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, UN Doc. A/72/846–S/2018/395 (2018), Annex.

[135] *Cf.* Press Statement by the Ukrainian Ministry of Foreign Affairs of 19 July 2018, available at <https://mfa.gov.ua/en/press-center/comments/9129-statement-of-the-ministry-of-foreign-affairs-of-ukraine-on-the-reaction-of-the-international-court-of-justice-on-ukraines-request-to-interpret-its-order-on-the-provisional-measures>.

[136] See also for an extensive discussion Oellers-Frahm/Zimmermann on Art. 41 MN 80–81.

[137] *Preah Vihear (Request for Interpretation)*, Provisional Measures, Diss. Op. Donoghue, ICJ Reports (2011), pp. 613, 613–4, para. 3. The argument based on a comparison of Art. 98 (dealing with the procedure applicable to interpretation proceedings and providing for a single round of written observations only) with Art. 74 of the Rules (dealing with requests for provisional measures and requiring an oral hearing) seems to be not fully convincing since Art. 98 explicitly provides for the possibility for the Court to decide upon additional proceedings (including an oral hearing) in interpretation proceedings.

[138] For details *cf. infra*, MN 63–69 and 70–75.

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facie appear to be satisfied,[139] and the regular preconditions for provisional measures to be ordered must also be present.[140]

47 The requirement that the regular conditions of Article 60 must appear *prima facie* to be satisfied follows from the general requirement of *prima facie* jurisdiction arising under Article 41, because in interpretation proceedings it is Article 60 which provides the Court with jurisdiction.

48 Also under Article 41, the rights to be protected by the requested provisional measures must be plausible. In the context of the limited jurisdiction of the Court in Article 60 proceedings, the rights to be protected must therefore plausibly be derivable from the original judgment.[141]

49 Finally, there must be a link between the measures sought and the alleged rights, which again in Article 60 proceedings may only be rights said to have been established with the force of *res judicata* in the original judgment.[142]

50 As to the possible provisional measures to be imposed in Article 60 proceedings, the Court has most recently also adopted measures aimed at the non-aggravation of the 'dispute'. It has done so 'in order to protect the rights which are at issue in these [Article 60] proceedings'.[143] Yet one has to carefully consider, given that provisional measures may only be adopted for the purpose of preserving the rights at issue in the case *pendente lite*, whether they truly aim in Article 60 proceedings at the non-aggravation of the dispute/contestation over the interpretation that is before the Court or whether they rather aim at the non-aggravation of the underlying dispute/*différend* that may exist between the parties.[144] In that regard, it is worth noting that the Court in the French version of its recent order on the matter referred not to the danger of aggravation of the 'contestation' (which is the French equivalent of the word 'dispute' in Article 60[145]) but rather to the danger of aggravation of the 'différend' (which is the French term used in Article 36 and in the Court's general jurisprudence) which somewhat hints at a broader understanding, by the Court, of its powers arising by the combined effect of Articles 41 and 60.

51 Where the Court, having ordered provisional measures in Article 60 proceedings, later finds in its Article 60 judgment that it may not exercise its jurisdiction under this provision for lack of its requirements being fulfilled, it may still make findings about alleged breaches of the Order indicating provisional measures as part of its incidental jurisdiction arising under Article 60 read with Article 41.[146]

[139] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 323, para. 45; as well as *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 541–2, paras. 19, 21.

[140] For an overview as to these preconditions *cf.* Oellers-Frahm/Zimmermann on Art. 41 MN 80–81.

[141] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 545, para. 33.

[142] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 326–7, para. 58; *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 545, para. 34.

[143] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 552, para. 61.

[144] *Ibid.*, Diss. Op. Donoghue, ICJ Reports (2011), pp. 613, 622, para. 24.

[145] See *infra*, MN 62–66.

[146] *Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 19, para. 51.

E. Jurisdictional Prerequisites for Interpretation Proceedings

I. Possibility of Unilateral Applications

52 The wording of Article 60, according to which 'the Court shall construe it upon the request *of any party*'[147] implies that the jurisdiction of the Court to construe its judgments is obligatory.[148] Still, prior to 1926, some uncertainty existed as to whether the jurisdiction conferred by Article 60 was genuinely compulsory. This was in particular due to the fact that the Council of the League of Nations had, during the drafting of the PCIJ Statute, insisted that the Committee of Jurists had exceeded its authority in providing the Court with some form of compulsory jurisdiction.[149]

53 However, the very first case dealing with interpretation was based on a unilateral request by Greece,[150] but given that Bulgaria submitted observations without disputing the Court's jurisdiction to give such interpretation, the Court, in applying the principle of *forum prorogatum*,[151] saw no need to consider whether the jurisdiction of the Court under Article 60 could be based exclusively on that provision.[152]

54 In 1926, on the occasion of the revision of the Rules, Judge Moore argued that Article 60 should not be construed as having conferred compulsory jurisdiction.[153] The prevailing view of the majority of the bench was, however, to the opposite effect.[154] Accordingly, Article 66, para. 2 of the 1926 Rules provided that '[a] request ... to construe a judgment ... may be made either by the notification of a special agreement between all the parties or by an application by one or more of the parties'.[155]

55 When dealing with the German request for interpretation of judgments Nos. 7 and 8, the Court and the parties took for granted the right of Germany to request an interpretation by unilateral application.[156] The same is true for the *Asylum* case, as well as for the *Land and Maritime Boundary* case, where the Court only dealt with the other requirements under Article 60 and particularly with the question whether a judgment on jurisdiction is subject to interpretation.[157] Finally, in the 1985 *Continental Shelf (Tunisia/Libya)* case, both parties and the Court agreed that, notwithstanding any specific reservation to the contrary,[158] a unilateral request for interpretation would be sufficient.[159] This

[147] Emphasis added.

[148] Grzybowski, *AJIL* (1941), p. 492.

[149] Hill, *Georgetown L. J.* (1933–1934), p. 542; *cf.* resolution of the Council to the effect that the proposal for compulsory jurisdiction would not be in harmony with Art. 12 of the Covenant; Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant (1921), p. 45. *Cf.* also Spiermann, Historical Introduction, MN 11–17.

[150] *Treaty of Neuilly (Interpretation of Judgment No. 3)*, Judgment, PCIJ, Series A, No. 4, pp. 3 *et seq.*

[151] *Cf.* generally as to the notion of *forum prorogatum* Tomuschat on Art. 36 MN 41; Yee on Art. 40 MN 115–133.

[152] *Treaty of Neuilly (Interpretation of Judgment No. 3)*, Judgment, PCIJ, Series A, No. 4, pp. 3, 6.

[153] Modification of the Rules, PCIJ, Series D, second addendum to No. 2, pp. 176–7.

[154] *Ibid.*, Anzilotti, p. 176; *ibid.*, Lord Finlay, p. 177; *ibid.*, de Bustamante, p. 178.

[155] Revised Rules of Court, PCIJ, Series D, No. 1, pp. 33, 60.

[156] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 5–7; only Judge Anzilotti in his Diss. Op. confirmed the compulsory character of the Court's jurisdiction (*ibid.*, p. 23). Art. 66, para. 2 remained basically unchanged in the revision of the Rules in 1931, 1936/46 and 1972/78.

[157] *Cf. supra*, MN 39–42.

[158] *Cf. infra*, MN 58–60.

[159] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 214–6, paras. 41 *et seq.*

approach is further in line with the current wording of the Rules, which in Article 98, para. 1 provide that a request for interpretation may always be made by way of an application, regardless of whether the original proceedings were begun by an application or by the notification of a special agreement, which is in line with the fact that the Court's exercise of its jurisdiction under Article 60 is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case.[160]

II. Interpretation Proceedings and Lapse of the Title of Jurisdiction

It might have been doubtful whether the Court may exercise its powers under Article 60 even where the title of jurisdiction between the parties has lapsed. At first glance, the earlier practice of the Court might have implied that continued jurisdiction *ratione temporis* was a necessary prerequisite, given that a new number in the General List has been regularly used by the Court[161] and that a new official name is given to the case.[162] 56

Despite this, the Court may exercise its jurisdiction under Article 60 even where the title of jurisdiction has lapsed. First, as outlined earlier,[163] the Court may interpret its own judgment upon a unilateral request, even where the original case was introduced by special agreement. Thus, the Court has the power to interpret its judgment, its jurisdiction being based solely on Article 60 and *not* upon the jurisdiction conferred by a *compromis* or compromissory clause.[164] Similar considerations apply even where the jurisdiction of the Court was based upon declarations made under Article 36, para. 2 and where such declarations have lapsed, given that the interpretation of a judgment under Article 60 has to be considered as an expression of the incidental jurisdiction of the Court.[165] Accordingly, a valid seisin of the Court—while it cannot provide the Court with jurisdiction as to the merits of a case—provides the Court with the incidental jurisdiction under its Statute to interpret its own prior judgments under Article 60.[166] 57

[160] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 323, para. 44.

[161] *Treaty of Neuilly*: original judgment: Folio no. 11/interpretation: Folio no. 14; *Chorzów Factory*: Folio nos. 18 and 26/Folio no. 30; *Asylum*: Folio no. 7/Folio no. 13; *Continental Shelf* (Tunisia/Libya): Folio no. 63/Folio no. 71.

[162] The lack of jurisdiction may be particularly critical if the original case was brought to the Court under declarations made under Art. 36, para. 2. Situations may be foreseeable where the lapse of such a declaration takes place after the original judgment has been rendered, but before the Court is validly seised with an application for interpretation (*Preah Vihear (Request for Interpretation)*). According to Rosenne, such a lapse of the title of jurisdiction removes all foundation for the exercise of jurisdiction by the Court on the basis of the lapsed title in respect to proceedings not instituted prior to the effective lapse, Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice* (1960), p. 28.

[163] *Cf. supra*, MN 54.

[164] *Cf. supra*, MN 51.

[165] Art. 60, cl. 2 is also a case of derivative jurisdiction, in that it depends on the existence of a previous judgment: Torres Bernárdez, 'The New Theory of "Indispensable Parties" under the Statute of the International Court of Justice', in *International Law: Theory and Practice, Essays in Honour of Eric Suy* (Wellens, ed., 1998), pp. 737–50, p. 742; Thienel (2016), p. 96.

[166] Briggs, in von der Heydte (1960), p. 90; *cf.* also the statement of the Court in the *Nottebohm* case: 'once the Court has been regularly seised, the Court must exercise its powers, as these are determined in the Statute, whenever it has not been shown on some other ground that it lacks jurisdiction or that the claim is inadmissible', *Nottebohm*, Preliminary Objections, ICJ Reports (1953), pp. 111, 122; confirmed by Fitzmaurice in his Sep. Op. to the *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 97, 104. Other forms of incidental jurisdiction do not even require a valid seisin. Under Art. 36, para. 6 of the Statute, even an invalid seisin merely giving an appearance of validity allows the Court to decide whether it has been validly seised: *cf. Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, Sep. Op. Kreća, ICJ Reports (2004), pp. 371, 380–1, para. 16; Amerasinghe, *Jurisdiction of International Tribunals* (2003), p. 67; Thienel (2016), p. 89. On applications not even giving such an appearance, *cf. supra*, fn. 132. Similarly, but

58 This view was formally confirmed by the Court in both the *Avena* and the *Preah Vihear* interpretation cases where the United States and Thailand, respectively, had not even challenged the Court's jurisdiction as such despite the fact that the original titles of jurisdiction in both cases had lapsed. The United States had since the delivery of the original judgment terminated the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes,[167] and Thailand's declaration under Article 36, para. 2 was no longer in force when the Court was seised with the request for an interpretation.[168]

III. Exclusion of Interpretation Proceedings by Way of Reservation or Agreement by the Parties?

59 It is generally acknowledged that, as far as declarations under Article 36, para. 2 are concerned, States have the right to make reservations to their acceptance of the Court's jurisdiction beyond the ones expressly mentioned in Article 36, para. 3.[169] *A fortiori*, the same is true where the case is brought to the Court by way of a special agreement that circumscribes the extent of the Court's jurisdiction.[170] In the 1985 *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)* case, the question arose whether the parties may also exclude disputes as to the meaning and scope of judgments under Article 60 from the Court's jurisdiction, given that Article 3 of the underlying special agreement had stipulated, *inter alia*, that if the parties could not agree as to the concrete application of the rules and principles of delimitation to be laid down by the Court in its judgment, the parties 'shall *together* go back to the Court and request any explanations or clarifications which would facilitate the task'.[171] In 1985, when faced with the Tunisian application for interpretation, the Court again avoided the problem of whether Article 60 constituted a free-standing title of jurisdiction. Libya contended that the Court did not possess the requisite jurisdiction to admit the Tunisian request, a joint request being a necessary condition in order to return to the Court.[172] However, Libya later chose not to rely on that 'technical bar', but preferred to oppose the request on the merits.[173] Therefore, the Court—after first determining that by becoming parties to the Statute, the parties had

on a stricter standard, a seisin that is only valid *prima facie* suffices for the purposes of Art. 41 of the Statute; the validity of the seisin is part of the question of *prima facie* jurisdiction (as to which see Oellers-Frahm/Zimmermann on Art. 41 MN 30–46).

[167] 24 April 1963, 596 UNTS 487.

[168] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 323, para. 44; *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 542, para. 21; *ibid.*, Judgment, ICJ Reports (2013), pp. 281, 295, para. 32.

[169] This was already confirmed by the PCIJ in the *Phosphates in Morocco* case, Preliminary Objections, Series A/B, No. 74, pp. 9, 23: 'jurisdiction only exists within the limits within which it has been accepted.' For further details, *cf.* Tomuschat on Art. 36 MN 85–102.

[170] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 216.

[171] *Continental Shelf* (Tunisia/Libya), Pleadings, p. 9 (emphasis added). In 1982, during the original proceedings, the Court qualified the problem as a (then) purely academic one, which would be only relevant in case of an application for interpretation; *ibid.*, ICJ Reports (1982), pp. 18, 40–1, para. 26; but *cf.* also the Diss. Op. Gros, *ibid.*, pp. 143, 146–7, who expressed doubts about the lawfulness of Art. 3 of the *compromis*.

[172] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 215.

[173] *Ibid.*, p. 216.

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consented to that jurisdiction without pre-condition—then went on and found that the Tunisian request was not affected by Article 3 of the *compromis*.[174]

Notwithstanding the fact that the Court did not pronounce itself on the question, it 60
seems that the power of the Court to render an interpretative judgment under Article 60 cannot be impaired by a condition or reservation which purports to deprive the Court of that power or to make it dependent on the existence of conditions beyond the ones referred to in Article 60.[175] This is principally because the Court may not—even upon the joint request of both parties—deviate from binding norms and rules of the Charter and the Statute,[176] since it is commanded by Article 92 UN Charter and by Article 1 of its Statute to 'function in accordance with the provisions' of said Statute. Furthermore, since the Statute forms an integral part of the Charter, obligations under the Statute may—if they are not subject to modification by the parties—prevail over obligations arising out of any such international agreements according to Article 103 UN Charter.[177] The Court itself also seems to have adopted this position in the *Nicaragua* case, where it found that the membership in a regional organization or adherence to a treaty may not impede the Court's jurisdiction and that 'all regional, bilateral ... arrangements, touching on the issue of ... the jurisdiction of the International Court of Justice, must be always subject to the provisions of Article 103 of the Charter'.[178] Moreover, the protection afforded by Article 94, para. 2 UN Charter would in effect be set aside, should it not be possible for one party alone to go back to the Court,[179] since the concrete obligations arising under the original judgment, as contemplated in Article 94, para. 2 UN Charter, may be doubtful and Article 94, para. 2 UN Charter might thus remain not fully operable.

Finally, the dispute-settling function of the interpretation procedure could be 61
substantially hampered if one party was put in a position—either by a reservation or by a power granted in the special agreement—to effectively block the rendering of an interpretative decision. Accordingly, the parties may not, either in their *compromis* or in declarations made under Article 36, para. 2 exclude the Court's inherent jurisdiction arising under Article 60 to interpret its own judgments. If a reservation to this effect was made

[174] *Ibid.*; *cf.* for criticism *ibid.*, Diss. Op. Ruda, pp. 234–5; Décaux, *AFDI* (1985), p. 338.

[175] Grzybowski, *AJIL* (1941), p. 493; Scerni, 'La procédure de la Cour Permanente de Justice Internationale', *Rec. des Cours* 65 (1938-III), pp. 561–681, 671 (on Art. 61); Thirlway, *ICJ*, pp. 189–90; *cf. Norwegian Loans*, Judgment, Sep. Op. Lauterpacht, ICJ Reports (1957), pp. 34, 46 *et seq.*, for the parallel case of incidental jurisdiction under Art. 36, para. 6; that does not prevent the Court from modifying its procedural rules for the interpretation upon joint request of the parties, *cf.* Art. 101 of the Rules.

[176] *Corfu Channel*, Preliminary Objections, ICJ Reports (1948), pp. 15, 26; *Nottebohm*, Preliminary Objections, ICJ Reports (1953), pp. 111, 122; *Free Zones*, Order of 19 August 1922, PCIJ, Series A, No. 22, pp. 4, 12; *ibid.*, Third Phase, PCIJ, Series A/B, No. 46, pp. 95, 161; *Eastern Carelia*, Advisory Opinion, PCIJ, Series B, No. 5, pp. 7, 29; the PCIJ acted that way, although at that time it was not bound by the express provisions of the Covenant and the Statute requiring it to act in accordance with its Statute, *cf. Norwegian Loans*, Judgment, Sep. Op. Lauterpacht, ICJ Reports (1957), pp. 34, 45.

[177] Crawford, 'The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court', *BYIL* 50 (1979), pp. 63–86, 69. Note, however, that Judge Ruda in his 1985 separate opinion argued that there was no conflict of obligations but that the States, as parties to the *compromis*, had waived a right under the Statute, *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 232, 235. In effect, Art. 103 UN Charter only supplements the argument, because if the Statute left the parties with the option of excluding the Court's interpretation jurisdiction, there would be no obligation that could prevail under Art. 103.

[178] *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 440, para. 107; Flory, 'Article 103', in *La Charte des Nations Unies, Commentaire article par article* (Cot/Pellet, eds., 2nd edn., 1991), pp. 1381–9, 1384–5.

[179] *Continental Shelf* (Tunisia/Libya), Judgment, Diss. Op. Gros, ICJ Reports (1982), pp. 143, 146.

in a declaration under Article 36, para. 2 of the Statute, the old question whether an impermissible reservation vitiates the entire declaration or is only ineffective in itself[180] does not arise in relation to the jurisdiction to interpret a judgment, because such jurisdiction rests exclusively on Article 60, cl. 2 of the Statute and does not depend on any declaration under Article 36, para. 2.[181] The question also should not arise at any earlier stage because the reservation does not pertain to the Court's jurisdiction on the merits at all.[182]

F. Participation of Third Parties in Interpretation Proceedings

62 Under Article 60, only the *parties* may request an interpretation of a previous judgment. The question therefore arises whether a State which had previously been granted the right under Article 62 to intervene might have the possibility to request interpretation of the judgment, provided its request for interpretation relates to that part of the judgment in regard to which that State had been granted the right to intervene.[183] Where the State had been granted the right to intervene as a non-party,[184] it seems that such a possibility is excluded by the very wording of Article 60, even more so since the Court has so far denied intervening States the right to appoint a judge *ad hoc*.[185] The rights to appoint a judge *ad hoc* and to request an interpretation or a revision are aspects of the position of the parties as *domini litis;* this position belongs to the parties because they are going to be bound by the judgment.[186] A non-party not bound by the eventual judgment, conversely, is not a *dominus litis* and would be interfering in the legal relationship of the parties if it exercised the procedural faculties that are geared towards affecting the content or effect of the judgment. If one envisages, however, the possibility of an intervention as a party, provided a relevant jurisdictional link exists,[187] and if one further takes into account the fact that such an intervening State would also be bound (albeit only in part) by the judgment,[188] which therefore is *res judicata* also for that State within the meaning of Article 60, then that intervener must also have the right to request interpretation.[189]

63 Given that a State intervening under Article 63 of the Statute is not considered as a third party to the litigation[190] and further given that the object of the intervention under

[180] *Cf.* Tomuschat on Art. 36 MN 98.

[181] *Cf. supra*, MN 51 *et seq.*

[182] The fact that the Court's interpretation jurisdiction constitutes a case of derivative jurisdiction, depending on the existence of a prior judgment (*cf. supra*, fn. 163), may militate against this conclusion. A State objecting to the Court's interpretation jurisdiction might conceivably decline to allow for the existence of a judgment that in turn might trigger that jurisdiction. However, this seems far-fetched. Moreover, such an argument would disregard the balance struck by the Statute between the incidental jurisdiction of the Court, from which no reservations may be or have been made (*cf.* Fastenrath, in Simma, *UN Charter*, Art. 4 MN 22; Witschel, *ibid.*, Art. 108 MN 25), and the merits jurisdiction depending on more specific consent.

[183] *Cf.* Chinkin/Miron on Art. 62 MN 121 *et seq.*

[184] *Cf. ibid.*

[185] *Cf.* Kooijmans/Bordin on Art. 31 MN 37–41 and Chinkin/Miron on Art. 62 MN 133–134.

[186] Thienel (2016), p. 353; Thienel, *supra*, fn. 22, p. 347.

[187] *Cf.* Chinkin/Miron on Art. 62 MN 91–102, 121–128.

[188] *Cf.* for a more thorough discussion of this issue Chinkin/Miron on Art. 62 MN 121–128. *Cf.* also Brown on Art. 59 MN 60, 62–63 for the proposition that also non-party interveners are bound by the judgment.

[189] *Cf.* also Fritzemeyer (1984), p. 121 and Friede, 'Die Intervention im Verfahren vor dem Ständigen Internationalen Gerichtshof', *ZaöRV* 3 (1933), pp. 1–67, 26–7.

[190] *Cf.* Chinkin/Miron on Art. 63 MN 66.

Article 63 is not necessarily connected with the claims of the original parties[191] and that besides, the binding construction of the convention in question will generally not be found in the operative part of the judgment, such a State ought not to be considered as possessing the right to request an interpretation under Article 60.[192]

G. Substantive Requirements for a Request under Article 60 to be Admissible

I. Existence of a 'dispute'/'contestation'/'desacuerdo'

Article 60, cl. 2 provides that, in the event of a *dispute* as to the meaning or scope of the judgment, the Court shall construe it. While the Statute seems to use the word 'dispute' interchangeably in the English version of Articles 60, 36, para. 6 and 38, para. 1, the French text uses 'différend' in Article 38, para. 1, while using the term 'contestation' in both Article 36, para. 6 and Article 60 of the Statute; finally, in Spanish, the wording used is 'desacuerdo' in Article 60, 'disputa' in Article 36, para. 6 and 'controversia' in Article 38, para. 1. It may therefore be questionable whether the general concept of a dispute as developed by the Court—according to which a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests[193]—is also applicable in the context of Article 60.[194] 64

While a mere divergence of views may exist even if a dispute has not (yet) arisen,[195] a 'contestation'/'dispute' within the meaning of Article 60 of the Statute seems somewhat closer to the traditional notion of 'différend'/'dispute'. According to the Court in the *Chorzów Factory* case *(Interpretation of Judgments Nos. 7 and 8)*, a 'contestation' is to be understood as a divergence of views, which became concrete as to specific points of the judgment in question: '[I]t should be sufficient if the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court.'[196] After citing this statement, the Court in its 1985 judgment then went on to state that the existence of the dispute under Article 60 depends on: 65

[191] These claims determine the meaning and scope of the judgment, *cf.* Oda, 'Intervention in the International Court of Justice. Articles 62 and 63 of the Statute', in *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift für Hermann Mosler* (Bernhardt *et al.*, eds., 1983), pp. 629–48, 644.

[192] Also, a situation might arise where a third State, which had previously been admitted as an intervening State, may again try to intervene in the proceedings for interpretation under Art. 60. Under Art. 62, this renewed request for intervention will be sustained, if—apart from the regular conditions for an intervention—the dispute under Art. 60 relates to the subject-matter for which the third State had been admitted in the original proceedings, since otherwise no interest of a legal nature could be affected; Fritzemeyer (1984), p. 121. On the other hand, a request for intervention during the interpretation phase by a third State which had not participated at all in the original proceedings is inadmissible, a view that seems to have been confirmed, if only indirectly, by the Court in the *Haya de la Torre* case, where it stated that 'the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions, which the Judgment of November 20th, 1950 had already decided with the authority of *res judicata*, and that to that extent, it does not satisfy the conditions of a genuine intervention' (ICJ Reports (1951), pp. 71, 77).

[193] *Cf.* already *The Mavrommatis Palestine Concessions*, Jurisdiction, PCIJ, Series A, No. 2, pp. 6, 11; *Continental Shelf* (Tunisia/Libya), Judgment, ICJ Reports (1982), pp. 18, 27; *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 82–85, paras. 26–30; for further details *cf.* Tomuschat on Art. 36 MN 8–10.

[194] Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour Internationale de Justice* (1967), p. 121.

[195] *Cf. e.g. Memel Statute*, Preliminary Objections, Diss. Op. Baron Rolin-Jaequemyns, PCIJ, Series A/B, No. 47, pp. 241, 258; *Northern Cameroons*, Preliminary Objections Sep. Op. Fitzmaurice, ICJ Reports (1963), pp. 97, 109.

[196] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 10–1.

whether the difference of views ['désaccord' in the French version of the judgment] between the parties manifested itself before the Court is 'a difference of opinion between the parties as to those points in question in the judgment which have been decided with binding force'.[197]

66 In the *Avena (Request for Interpretation)* case the Court found that the notion of a 'contestation' (as used in Article 60) is wider in scope than the term 'différend' (as used in Article 36) and does not require the same degree of opposition, being also more flexible in its application to a particular situation.[198]

67 In the *Preah Vihear (Request for Interpretation)* case the Court consolidated this jurisprudence by now referring to:

> a difference of opinion or views … ['une divergence d'opinions ou de vues' in the French versions of the order and judgment] as to the meaning or scope of a judgment … not requir[ing] the same criteria to be fulfilled as those determining the existence of a dispute under Article 36, paragraph 2, of the Statute.[199]

68 However, while this does not require that the 'dispute' should have manifested itself in a formal way,[200] it is *not* sufficient in the Court's view that one party finds the judgment obscure, whereas the other considers it to be perfectly clear.[201] Furthermore, disputes which arose even before the proceedings in the principal case may not give rise to a request for interpretation to be admitted.[202]

69 Finally, a certain minimum time must elapse after the rendering of the original judgment in order to furnish the opportunity for a 'dispute' to even arise. Thus, a request for interpretation transmitted to the Court on the very day of the reading of the judgment was considered to be inadmissible.[203]

70 On the other hand such dispute may even arise, as the *Preah Vihear (Request for Interpretation)* case confirms, a very significant period of time after the original judgment was rendered,[204] even more so since Article 60—unlike Article 61, para. 5—does

[197] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 217–8, para. 46, citing *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 11; *Northern Cameroons*, Preliminary Objections, Sep. Op. Morelli, ICJ Reports (1963), pp. 131, 134; *cf.* also Art. 98, para. 2 of the Rules, which provides that the 'precise points in dispute shall be indicated' in the request for interpretation.

[198] *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 325, para. 53; *cf.* Kolb, *The Elgar Companion to the International Court of Justice* (2014), pp. 368–9.

[199] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 542, para. 22; *ibid.*, Judgment, ICJ Reports (2013), pp. 281, 295–6, para. 33.

[200] *E.g.*, through the failure of negotiations, *cf. Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192, 217–8, para. 46.

[201] *Request for Interpretation of the Judgment of 20 November 1960 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395, 403.

[202] *Ibid.*, p. 402.

[203] *Ibid.*, p. 403: the judgment was read on 20 November 1950 at 9.00 a.m. (ICJ Press Release 50/42); and the Government of Colombia deposited its request on the same day, *ibid.*; *cf.* also Art. 94, para. 2 of the Rules: 'judgment shall become binding on the parties on the day of the reading.' *Cf.* Khan on Art. 58 MN 32, 35. *Cf.* also Oellers-Frahm, *Max Planck EPIL*, MN 13. In the case concerning *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, it was doubtful whether the 'rendering of the decision' in the *compromis* referred to the reading in court or to the time it is communicated to the parties, Decision of 14 March 1978, RIAA, vol. XVIII, pp. 271, 285–6.

[204] In the *Preah Vihear (Request for Interpretation)*, case the request for interpretation was brought before the Court almost 50 years after the judgment in the original case.

not, as the Court had opportunity to stress, contain any time limit on requests for interpretation.[205]

II. '... as to the meaning or scope of the judgment'

71 The existence of the interpretation procedure, whose function is not to put into question the *res judicata* of the principal judgment, but rather to confirm it, necessitates an exact appreciation of what are the limits of said *res judicata*. Thus the interpretative decision must keep within the limits of the original judgment:

> The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to answer questions not so decided.[206]

72 Therefore, the crucial question is what has been settled with binding force in the judgment, *i.e.*, only the *dispositif* or also the Court's reasoning. As a starting point, only the *dispositif* of the judgment has binding force.[207] As the Court has held:

> [A] dispute within the meaning of Article 60 of the Statute must relate to the operative clause of the judgment in question and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative clause.[208]

The Court has not fully explained its proviso about the 'inseparable' reasons. This has recently led to some debate within the Court. In the *Preah Vihear* case, the Court suggested that these 'inseparable' reasons were what the PCIJ had called the 'condition[s] essential to the Court's decision'.[209] Judges Owada, Bennouna, and Gaja disagreed. In their view, reasons were inseparable 'when the operative part of the Judgment is not self-standing and contains an express or implicit reference to these reasons'; essential reasons, however, were those on which the *dispositif* is based and which 'may sustain the operative part of the judgment even if this is self-standing'.[210] These definitions have in common that neither 'inseparable' nor 'necessary' reasons become part of the *res judicata* of the judgment as such. Both categories of reasons are only taken into account to 'elucidate' or 'sustain' the *res judicata*.[211] In that sense, the dispute within the meaning of Article 60 of the

[205] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 546, para. 37; *cf.* also Kulick, *Leiden JIL* (2015), p. 75. A time limit in the case of interpretation is indeed not necessary as the interpretation does not affect the *res judicata* of a judgment, *cf.* Oellers-Frahm, *Max Planck EPIL*, MN 16.

[206] *Request for Interpretation of the Judgment of 20 November 1960 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395, 402; *Treaty of Neuilly (Interpretation of Judgment No. 3)*, Judgment, PCIJ, Series A, No. 4, pp. 3, 7: 'cannot go beyond the limits of that judgment itself'; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 11; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, Decision of 14 March 1978, RIAA, vol. XVIII, pp. 271, 295.

[207] For details *cf.* Brown on Art. 59 MN 41–49.

[208] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 542, para. 21; *ibid.*, Judgment, ICJ Reports (2013), pp. 281, 296, para. 34; *cf. Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31, 35, para. 10; *Avena (Request for Interpretation)*, Provisional Measures, ICJ Reports (2008), pp. 311, 323, para. 47.

[209] *Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281, 296, para. 34, citing *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 20. Ciorciari, *supra*, fn. 93, p. 291, appears to agree.

[210] *Preah Vihear (Request for Interpretation)*, Judgment, Decl. Owada, Bennouna, and Gaja, ICJ Reports (2013), p. 320. Kulick, *Leiden JIL* (2015), p. 88, agrees.

[211] *Cf. ibid.*, as well as Kolb, *supra*, fn. 199, p. 370. Judge Cançado Trindade's insistence that '*motifs* and *dispositif* form an organic, inseparable whole' appears to be to the same effect: *Preah Vihear (Request for*

Statute may relate to these reasons only because of their relationship with the *dispositif*, but not because they contain anything in and of themselves.

73 It seems that the 'condition[s] essential to the Court's decision' in the *Chorzów Factory* case went well beyond this. The 'condition essential to the Court's decision' or 'condition absolue de la decision de la Cour' in the original *Chorzów Factory* judgment (No. 7) was that the factory in question belonged, in terms of municipal law, to the Oberschlesische Stickstoffwerke AG.[212] This was because no rule of international law had invalidated those domestic rights, and had the consequence that the rights of the 'Oberschlesische' were immune from expropriation by Poland as constituting rights of German nationals or of companies controlled by German nationals—as opposed to rights of the German State—within the meaning of Article 6, cl. 2 of the German-Polish Convention on Upper Silesia.[213] The rights of the 'Oberschlesische' under domestic law were therefore a condition precedent to the conclusion in the *dispositif* of Judgment No. 7, which found a breach of Articles 6 *et seq.* of the German-Polish Convention.[214] The finding of the Court in relation to those rights was held to have been binding on that basis.[215] It therefore seems that the 'condition[s] essential' in *Chorzów Factory* terms are incidental findings that amount to *res judicata* themselves and are not merely aids to the construction of the *dispositif*.[216] Thus, to illustrate the point, even if the *dispositif* in a territorial dispute—unusually—only enjoined the losing party to vacate the relevant area, the *res judicata* would nevertheless extend to the incidental holding that the other party had title to that territory. However, this would only apply to such incidental findings about legal relations between the parties that are decisive for the conclusion in the operative part of the judgment. The Court's other reasoning, by contrast, is not binding on the parties.[217] However,

Interpretation), Judgment, Sep. Op. Cançado Trindade, ICJ Reports (2013), pp. 322, 341, para. 55. As much was already recognized by the PCIJ: *Polish Postal Service in Danzig*, Advisory Opinion, PCIJ, Series B, No. 11, pp. 6, 30.

[212] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 20.

[213] *Cf. Certain German Interests*, Judgment, PCIJ, Series A, No. 7, pp. 4, 36 *et seq.* Art. 6 of the German-Polish Convention is set out at p. 21 of the judgment.

[214] *Cf. ibid.*, p. 81, para. 2 (a) of the *dispositif*.

[215] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 20, 22.

[216] *Cf.* also *The Pious Fund Case*, RIAA, vol. IX, pp. 1, 12 *et seq.* (as explained by Lammasch, *Die Rechtskraft internationaler Schiedssprüche* (1913), 92 *et seq.*); *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, RIAA, vol. XVIII, pp. 271, 295; see also Ajibola, 'The International Court of Justice and Absent Third States', *African Yearbook of International Law* 4 (1996), pp. 85–102, 93; Forlati, '"Interesse di natura giuridica" ed effetti per gli Stati terzi delle sentenze della Corte internazionale de Giustizia', *Riv. di Diritto Internaz.* 85 (2002), pp. 99–138, 110; Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (1927), p. 246; Peat, *supra*, fn. 93, pp. 212–5; Simpson/Fox, *International Arbitration* (1959), pp. 229–30; Thienel (2016), pp. 217 *et seq.*; Thienel, *supra*, fn. 22, pp. 339 *et seq.*; Thirlway, *supra*, fn. 11, para. 15; but see for the contrary view *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, Diss. Op. Anzilotti, PCIJ, Series A, No. 13, pp. 23, 26; Gaja, 'Considerazioni sugli effetti delle sentenze di merito della Corte internazionale di giustizia', *Comun. e Stud.* 14 (1975), pp. 313–35, 318 *et seq.*; Morelli, 'La théorie générale du procès international', *Rec. des Cours* 61 (1938-III), pp. 257–373, 319. In a similar, if not quite the same sense, the Court in the *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 98 *et seq.*, paras. 132 *et seq.*, even found an issue to have been finally decided that, while logically anterior to the Court's decision in the earlier judgment, had not been given any express treatment there. This has come in for considerable criticism not least on the grounds that an unreasoned, merely implicit, decision was incompatible with Art. 56, para. 1 of the Statute: *ibid.*, Joint Diss. Op. Ranjeva, Shi and Koroma, pp. 266, 267, para. 3, *ibid.*, Decl. Skotnikov, pp. 366, 367; Wittich, *supra*, fn. 5, pp. 606 *et seq.* This criticism obviously does not apply to incidental findings that are explicit and fully reasoned.

[217] *Polish Postal Service in Danzig*, Advisory Opinion, PCIJ, Series B, No. 11, pp. 6, 29–30.

recourse will quite naturally—even necessarily—be had to the reasoning of the Court in order to elucidate the meaning and scope of the *dispositif*.[218] In that sense, the reasoning is subject to interpretation inasmuch as it is inseparable from the operative clause of the judgment,[219] even if it is not interpreted 'in its own right' but rather on account of its close connection with the *dispositif*.

74 The Court's power under Article 60 also includes the ability to decide whether or not a given question has been decided with binding force,[220] a power based on the Court's *compétence de la compétence*.

75 Since the original judgment was rendered at a given point in time, it could only take into account facts which had taken place previously. Given that the interpretation only has to deal with the previous judgment, the Court 'refrains from any examination of facts other than those which it has considered in the judgment under interpretation, and consequently all facts subsequent to that judgment'.[221] Moreover, while the dispute leading to the request for interpretation may obviously arise from facts subsequent to the delivery of that judgment,[222] the Court will not interpret its judgment by reference to any understanding at which the parties may have arrived in their attempts to execute the judgment.[223] That, however, is not so much because the Court is confined by Article 60 to the *res judicata* of its previous judgment. It is rather because any joint understanding of the judgment by the parties is immaterial to the proper interpretation of its content, Article 31, para. 3 (b) VCLT being inapplicable because the judgment is the creation of the Court, not of the free will of the parties.[224]

76 The fact that the Court is limited to the *res judicata* of the original judgment does not entail that it cannot reaffirm the continued validity of that judgment or take note of efforts to implement it, even in the operative part of the judgment on the request for interpretation.[225] No *res judicata* is created by such formulae, even if they appear in the *dispositif*. Things are different, however, where the Court is requested to find violations of the judgment that it has been called upon to interpret; Article 60 does not give the Court jurisdiction to make such a finding.[226]

[218] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 14; *ibid.*, Diss. Op. Anzilotti, pp. 23, 24; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, RIAA, vol. XVIII, pp. 271, 295; Lock, *Das Verhältnis zwischen dem EuGH und internationalen Gerichten* (2010), p. 115; Salvioli, 'Problèmes de procédure dans la jurisprudence internationale', *Rec. des Cours* 91 (1957-I), pp. 553–617, 578 *et seq.*; De Visscher (1963), pp. 258 *et seq.*; see also *Polish Postal Service in Danzig*, Advisory Opinion, PCIJ, Series B, No. 11, pp. 6, 29–30.

[219] *Cf. supra*, fn. 209.

[220] *Chorzów Factory (Interpretation of Judgments Nos. 7 and 8)*, Judgment, PCIJ, Series A, No. 13, pp. 3, 14; *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 544, para. 31; *ibid.*, Judgment, ICJ Reports (2013), pp. 281, 296, para. 34; Hill, *Georgetown L. J.* (1933–1934), p. 548.

[221] *Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281, 307–8, para. 75; *cf.* De Visscher (1963), p. 256; Hudson, *PCIJ*, p. 591.

[222] *Preah Vihear (Request for Interpretation)*, Provisional Measures, ICJ Reports (2011), pp. 537, 546, para. 37.

[223] *Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281, 307–8, para. 75; De Visscher (1963), p. 256; Yee, *supra*, fn. 93, p. 659, expresses some reservations.

[224] *Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281, 307–8, para. 75; Chesterman, *supra*, fn. 93, p. 3.

[225] *Cf. Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 21, para. 61 (3); but see also *ibid.*, Decl. Abraham, pp. 27 *et seq.*; as well as Hoppe, *HRLR* (2009), p. 463.

[226] *Avena (Request for Interpretation)*, Judgment, ICJ Reports (2009), pp. 3, 20; see also Tranchant, *AFDI* (2009), p. 218.

H. Composition of the Bench in Interpretation Proceedings

I. Judges who are no Longer Members of the Court

77 Under Article 13, para. 3, judges shall—even though their term has expired—finish any cases which they may have begun. This raises the question whether this provision also applies once a request for interpretation has been made.[227] In that regard, it has to be noted first that interpretation proceedings have—ever since the creation of the PCIJ—been considered in the practice of the Court as constituting distinct cases, as can be seen from both their numbering in the Court's General List and their respective case names.[228]

78 As to the Rules, it is worth mentioning that while the 1922 Rules did not contain *any* provisions on the interpretation procedure, Article 66 of those Rules stipulated that Article 13 of the PCIJ Statute shall apply in the case of a *revision*. According to the drafters of the 1922 Rules, the effect of the provision was that judges who had already ceased to perform their duties would have been called upon to sit again.[229] The Court applied this provision by analogy when dealing with the 1924 request for interpretation in the *Treaty of Neuilly* case, which was dealt with by the Court's chamber of summary procedure, given that the original judgment had been rendered by the same chamber. Thus, under Article 14 of the 1922 Rules, the President of the PCIJ should have *ex officio* presided over the chamber. Despite this provision, Judge Loder, Vice-President of the Court, presided over the chamber, while Judge Huber, the President of the PCIJ, only acted as vice-president of the chamber. This was justified by the fact that Judge Loder had been President of the PCIJ at the time the chamber had rendered the original judgment and the Court later held that this rule would also apply to other judges, who had been members of the chamber.[230]

79 In view of these experiences, Article 66 of the Rules was amended so that Article 13 PCIJ Statute would also apply in cases of interpretation.[231] Accordingly, when dealing with the German request for an interpretation of judgments Nos. 7 and 8, the question arose whether all the judges who had participated in these judgments had to sit again. The Court decided, however, that the deputy-judges who had participated in the judgments in question had no right to sit again, since Article 13 of the PCIJ Statute only concerned judges who were no longer members of the Court at all. Furthermore, the Court observed that the procedure in interpretation cases was a summary procedure, distinct from the original proceedings.

80 During the drafting of the 1936 Rules, the application of Article 13 of the PCIJ Statute in cases of interpretation or revision was discussed once again. Since such an application may give rise to complications or might even be impossible to apply, the provision in question was deleted.[232] The Rules of Court from 1946 onwards have not contained any provisions as to the application of Article 13 in interpretation proceedings. Therefore, the *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)* case was handled by a

[227] *Cf.* also Dugard on Art. 13 MN 11–16.

[228] *Cf.* the numbering of the General List and Guyomar, *Commentaire*, p. 20, fn. 7*bis*; *ICJ Yearbook* (1984–1985), p. 177.

[229] Preparation of the Rules of Court of January 30th, 1922, PCIJ, Series D, No. 2, p. 218: question of Mr Altamira, confirmed by Mr Weiss and not challenged by the Court.

[230] Fourth Annual Report, PCIJ, Series E, No. 4, pp. 288–9.

[231] Art. 66, para. 3 of the 1926 Rules, *supra*, fn. 152, p. 61.

[232] Elaboration of the Rules of Court of March 11th, 1936, PCIJ, Series D, third addendum to No. 2, p. 334.

substantially different bench as compared to the original proceedings, since only seven judges participated in both the 1982 and the 1985 proceedings.[233] The same is true, *mutatis mutandis*, with regard to the *Land, Island and Maritime Frontier Dispute (Revision)* case, where only Judge *ad hoc* Torres Bernárdez was a member of both the original *ad hoc* chamber and the chamber dealing with the request for revision.[234]

Finally, in the *Preah Vihear (Request for Interpretation)* case, brought before the Court almost fifty years after the original judgment, obviously none of the then judges were still present, or indeed still alive.[235] 81

II. Judges *ad hoc*

The practice of the Court shows that judges *ad hoc*, who participated in the original proceedings, do not *ipso facto* retain their right to participate in the interpretation procedure, seeing as they have to make new solemn declarations.[236] However, the Registrar has on several occasions reminded the parties of their choice in the original proceedings, which seems to imply the Court's position in favour of having the same judges *ad hoc* participate in the interpretation procedure,[237] a wish the parties have so far abided by as much as possible.[238] 82

III. Interpretation and (*ad hoc*) Chambers

Under Article 100, para. 1, cl. 2 of the current Rules, a request for the interpretation of a judgment given by a chamber shall be dealt with by that chamber. This approach is in line with the practice already developed by the PCIJ in the *Treaty of Neuilly* case, where the request for interpretation was handled by the Chamber for Summary Procedure, which had dealt with the main proceedings.[239] 83

[233] These were the Judges Elias, Singh, Lachs, Oda, Ago, Sette-Camara, and Schwebel. Judges Forster, Gros, Morozov, Mosler, and El-Khani only participated in the 1982 judgment, Judges de Lacharière, Ruda, Mbaye, Bedjaoui, and Ni only in the 1985 proceedings. On the other hand, the composition in the *Land and Maritime Boundary (Request for Interpretation)* case, Judgment, ICJ Reports (1999), pp. 31 *et seq.*, was identical to that in the original *Land and Maritime Boundary* case, Preliminary Objections, ICJ Reports (1998), pp. 275 *et seq.*, except that Judge Rezek, although still a member of the Court, did not take part in the decision. As to specific questions related to chamber proceedings *cf. infra*, MN 82–85.

[234] *Cf. Land, Island and Maritime Frontier Dispute*, Composition of Chamber, ICJ Reports (1989), pp. 162 *et seq.* and *Land, Island and Maritime Frontier Dispute (Revision)*, Order of 27 November 2002, ICJ Reports (2002), pp. 618 *et seq.*

[235] The last two judges who had participated in the *Preah Vihear* case both passed away in 1989; *cf.* CR 2011/14, 30 May 2011, p. 33.

[236] *Cf. e.g.*, CR 99/3, 17 February 1999 (solemn declaration by Judges *ad hoc* Mbaye and Ajibola in *Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31 *et seq.*; and for the practice of the PCIJ, *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, PCIJ, Series C, No. 13 V, p. 11; *Cf.* also Guyomar, *Commentaire*, p. 39. This practice is further consistent as interpretation proceedings open a new case with a new number on the General List, *cf.* Oellers-Frahm, *Max Planck EPIL*, MN 18.

[237] *Cf. e.g., Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, PCIJ, Series C, No. 13 V, p. 71.

[238] The only two exceptions are the Tunisian nomination of Ms Bastid, which was due to the fact that the Tunisian judge *ad hoc* of 1982, Judge Evensen, had meanwhile been elected as a regular member of the bench and who during the 1985 proceedings renounced sitting because of that fact; and the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* case, where Poland had been represented by two different judges in judgment no. 7 (Judge Rostworowski) and no. 8 (Judge Ehrlich, who became judge *ad hoc* in the interpretation procedure). For the similar question in revision proceedings *cf.* Zimmermann/Geiss on Art. 61 MN 81.

[239] But *cf.* Oellers-Frahm, 'Die Bildung einer ad hoc Kammer des Internationalen Gerichtshofs gemäß Art. 26 Abs. 2 des Statuts: Anmerkungen zum Beschluss des IGH vom 20. Januar 1982', *ArchivVR* 21 (1983), pp. 316–25, 324; and Ostrihansky, 'Chambers of the International Court of Justice', *ICLQ* 37 (1988), pp. 30–52,

84 Indeed, even arbitral tribunals may be empowered—depending upon the terms of the respective *compromis*—to render interpretative awards.[240] This is confirmed by the International Law Commission's Model Rules on Arbitral Procedure according to which '[a] dispute [regarding interpretation] may be submitted to the tribunal which rendered the award'.[241] This result is further confirmed by the practice in the case concerning the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, where the request for interpretation was submitted to the court of arbitration three months after its final judgment; still the tribunal did not consider itself *functus officio*.[242] In the same vein, the special agreement submitting the *Gulf of Maine* case to an *ad hoc* chamber of the ICJ provided that in the case of a dispute regarding an *extension* of the maritime boundary seaward as determined by the chamber of the ICJ, 'either party may submit the question ... to the chamber of five judges constituted in accordance with this special agreement'.[243] This seems to confirm that the parties considered the chamber as not *functus officio* after the delivery of the judgment, but as continuing to exist for the purposes of the instrument granting jurisdiction.[244] Furthermore, it was the *ad hoc* chamber itself, which in the *Frontier Dispute* case nominated experts on 9 April 1987—as had been provided in Article IV of the Special Agreement between Burkina Faso and Mali—although the *ad hoc* chamber had already rendered its judgment in December 1986.[245] Thus, the practice of the Court itself seems to indicate that an *ad hoc* chamber does not *ipso facto* become *functus officio* with the rendering of the judgment, even more so since the jurisdiction of the chamber to deliver an interpretation is compulsory under Article 60, without the need to have this power expressly referred to in the *compromis*.

85 It has to be noted, however, that in the *Land, Island and Maritime Frontier Dispute (Revision)* case,[246] the Court decided upon the request of both parties to *form* a special chamber of five judges to deal with the request, instead of reconstituting, albeit with changes as to its composition, the original chamber, as Article 100 of the Rules would

46, who both argue that an *ad hoc* chamber automatically becomes *functus officio* and is *ipso facto* dissolved once the final judgment has been delivered. *Cf.* also Palchetti on Art. 26 MN 8–9.

[240] Carlston, *The Process of International Arbitration* (1946), p. 224.

[241] Art. 35, para. 1 of the Model Rules, *ILC Yearbook* (1958-II), pp. 1, 11. Under Art. 35, para. 2 of the Model Rules, the parties could only refer the dispute to a tribunal other than the original tribunal only if it were impossible to submit the dispute to that arbitral tribunal. The ILC referred in this regard to the old principle *ejus est interpretari cujus est condere*.

[242] *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic*, RIAA, vol. XVIII, pp. 271, 272; *cf.* also the *Sabotage* cases before the German-American Mixed Commissions, where the umpire stated that the commission after rendering its decision has not become *functus officio*, Mixed Claims Commissions, United States and Germany, Administr. Decisions (1933–1939), p. 1127 (cited in Carlston, *supra*, fn. 240, p. 227); the commission had to deal with a large group of cases and may be thus regarded as semi-permanent; *cf.* for the relevance of this distinction Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd edn., 1945), p. 1628.

[243] Art. VII, para. 3 of the Special Agreement, quoted in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984), pp. 246, 255, para. 5.

[244] Zoller, 'La première constitution d'une chambre spéciale par la Cour internationale de justice: Observations sur l'Ordonnance du 20 janvier 1982', *RGDIP* 86 (1982), pp. 305–24, 317; *contra:* Oellers-Frahm, *supra*, fn. 239, pp. 316, 324.

[245] *Frontier Dispute* (Burkina Faso/Mali), Order of 9 April 1987, ICJ Reports (1987), pp. 7 *et seq.*

[246] *Land, Island and Maritime Frontier Dispute (Revision)*, Order of 27 November 2002, ICJ Reports (2002), pp. 618 *et seq.*

have suggested, seeing as it provides that a request for an interpretation or revision shall be dealt with by *that* chamber (*i.e.*, the Chamber that had rendered the original decision).

Given that no time limit at all is found in the Statute for requesting interpretation,[247] the term of office of a member of an *ad hoc* chamber may have expired. Since Articles 33 and 17 of the Rules do not cover this problem,[248] he or she is not entitled to remain in the Chamber and neither may he or she be re-elected to the Chamber.[249] Thus, in order to cope with the problem, such vacancies should be filled in accordance with Article 17, paras. 2 and 3 of the Rules, given that Article 17, para. 3 of the Rules refers to *any* vacancies to be filled. Generally speaking, it is thought to be advisable that the composition of the chamber dealing with the request for interpretation should include—to the greatest extent possible and in line with similar considerations applicable in the case of revision[250]—those members of the Court who had already participated in the original judgment and who are still on the bench when the request for interpretation is being made.[251] 86

I. Procedural Issues

While Article 60 does not contain any specific rules as to the procedure to be followed in interpretation proceedings, Article 98, paras. 3 and 4 of the Rules provide that where the request is made by way of a notification of a special agreement, this agreement shall indicate those parts of the judgment in regard to which the parties are in dispute as to their meaning and scope. Where the request is made by way of a unilateral application, the requesting party's application shall set out its contentions, in which case the other party is then entitled to file written observations within a time limit to be set by the Court. 87

As to the remainder of the procedure, Article 98, para. 4 of the Rules simply provides that the Court may decide whether it considers further written or oral explanations to be necessary, which grants the Court an almost unfettered freedom on how to proceed.[252] Taking into account the complexity of each case, the Court has therefore in the past either limited the proceedings to written pleadings[253] or has also held oral hearings.[254] 88

[247] *Cf.* also Dugard on Art. 13 MN 11.

[248] *Cf. supra*, MN 75–80.

[249] Ostrihansky, *supra*, fn. 239, pp. 30, 46.

[250] *Cf.* Zimmermann/Geiss on Art. 61 MN 82.

[251] *Ibid.*

[252] *Land and Maritime Boundary (Request for Interpretation)*, Judgment, Diss. Op. Ajibola, ICJ Reports (1999), pp. 56 *et seq.*

[253] In the *Treaty of Neuilly (Interpretation of Judgment No. 3)* case, Judgment, PCIJ, Series A, No. 4, pp. 3, 5, and when dealing with the *Land and Maritime Boundary (Request for Interpretation)* case, Judgment, ICJ Reports (1999), pp. 31, 33, para. 5, there was only one round of written pleadings. In the *Request for Interpretation of the Judgment of 20 November 1960 in the Asylum Case*, Judgment, ICJ Reports (1950), pp. 395, 397–401, there was only a brief exchange of letters between the parties *via* the Court: the Colombian request was communicated to the Peruvian agent, whose reply was in turn forwarded to Colombia, which then filed further observations.

[254] When dealing with the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* case (PCIJ, Series A, No. 13) and the *Preah Vihear (Request for Interpretation)* case, Provisional Measures, ICJ Reports (2011), pp. 537 *et seq.*, respectively, the Court granted the parties the right of both furnishing further (written and/or) oral explanations. In *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, Judgment, ICJ Reports (1985), pp. 192 *et seq.*, the Court also held oral hearings.

J. Evaluation

89 The right to request an interpretation, which is to be found in almost all instruments providing for the judicial settlement of inter-State disputes,[255] forms an important part of the scheme of rights conferred on litigants by the Statute of the Court, given that obscurities of the operative provisions of the judgment may cause delay or prevent compliance with a party's basic obligation under Article 94, para. 1 UN Charter.[256] By clarifying the content of the Court's ruling, proceedings under Article 60 play an important role, since they deny a party unwilling to execute a judgment the possibility of relying on the pretext of a (supposedly) ambiguous *dispositif*.[257]

90 Moreover, as recent practice shows, Article 60 continues to be employed relatively frequently, and indeed even sometimes in contexts where for decades the situation seemed to have been settled for good by the original judgment.

ANDREAS ZIMMERMANN TOBIAS THIENEL

[255] *Cf., inter alia*, Art. 31, para. 3 of the Convention on Conciliation and Arbitration within the CSCE, Annex 2 to Decision on Peaceful Settlement of Disputes, 15 December 1992, *ILM* 32 (1993), pp. 551 *et seq.*; Art. XV of the Pact of Bogotá, 30 April 1948, 30 UNTS 55; Art. 33, para. 3 of the Statute of ITLOS, Art. 126 ITLOS Rules of Procedure, ITLOS/8, 25 September 2018, and Art. 12 of Annex VII to UNCLOS, 10 December 1982, 1833 UNTS 3. For a comment see Lekkas/Staker, 'Annex VI. Article 33: Finality and binding force of decisions', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 2439–51, esp. pp. 2448–9; Burke, 'Annex VII. Article 12: Interpretation or Implementation of Award', in *ibid.*, pp. 2487–9,

[256] Schwarzenberger, *International Judicial Law*, p. 680.

[257] Witenberg, *L'organisation judiciaire internationale: La procédure et la sentence internationale* (1937), p. 362; De Visscher (1963), p. 253; Cavaré, *ZaöRV* (1954), pp. 482, 497.

Annex 21

Chambers Dictionary, Definition of “national”,
https://chambers.co.uk

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Annex 272-A

Affidavit, State of Qatar Compensation Claims Committee,
dated 21 August 2019 (with certified translation),
and Exhibit A

Compensation Claims Committee [emblem:] State of Qatar

AFFIDAVIT OF AHMAD MOHAMMED AL-MANA, WORKING GROUP MEMBER, STATE OF QATAR COMPENSATION CLAIMS COMMITTEE

I. INTRODUCTION

I, Ahmad Mohammed Al-Mana, attest that:

1. My full name is Ahmad Mohammed Yousef Abdulrahman Al-Mana. I have been employed by the State of Qatar since 15/4/2000. I am a member of a working group that oversees Qatar's Compensation Claims Committee ("***CCC***"). I was appointed to the CCC in August 2017 by H.E. Dr. Ali Bin Fetais Al-Marri, the Attorney General of Qatar.

2. On 25 April 2019, in connection with the case *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, I submitted a statement to explain the role of the CCC in collecting, maintaining, and analyzing complaints filed by Qataris who have been detrimentally impacted by the measures imposed against Qatar by the United Arab Emirates ("***UAE***") on 5 June 2017 (the "***Discriminatory Measures***"). Attached as Exhibit B to that statement was a portion of the CCC Claims Database related to the UAE ("***CCC Claims Database***"). The statement, together with its exhibits, was submitted as Annex 272 to Qatar's Memorial.

3. I provide this second statement in my official capacity, to supplement the CCC Claims Database with updated data that has become available since 25 April 2019.

4. The facts and matters set out in this statement are within my own knowledge and are true to the best of my knowledge and belief.

5. In support of this statement, and as referred to below, I attach the following documents:

    a) Updated CCC Claims Database [**Exhibit A**].

II. UPDATED DATA

6. As explained in my previous statement, the CCC received 1,548 complaints related to the Discriminatory Measures by the UAE. Of these 1,548 complaints, the CCC verified 975 complaints that state claims by Qataris for violations of the CERD, which are reflected on the CCC Claims Database (Exhibit B to my previous statement).

7. Since 25 April 2019, the CCC has received additional information about the Qatari claimants represented in the CCC Claims Database relating to their place of birth as well as their parents' place of birth where this data was previously marked as "Unknown." An updated CCC Claims Database that incorporates the additional data collected since 25 April 2019 is attached as **Exhibit A** to this statement ("***Updated CCC Claims Database***").

8. As demonstrated in the Updated CCC Claims Database, of the 975 individuals who submitted complaints that have been verified by the CCC, a total of 891 (91%) were born in Qatar. Of those 891 individuals, 815 (84% of verified complaints) were born to parents who were also both born in Qatar.

[signature]

Ahmed Mohammed Yusuf Abdulrahman Al Mana

August 21, 2019

Doha, Qatar

[stamp:]
Compensation Claims Committee

تصريح الشاهد أحمد محمد المانع، عضو فريق عمل، لجنة المطالبة بالتعويضات في دولة قطر

أولا: مقدمة

أنا، أحمد محمد يوسف عبد الرحمن المانع، أُقر وأشهد على النحو التالي:

١. اسمي الكامل هو: أحمد محمد يوسف عبد الرحمن المانع. أعمل لدى دولة قطر منذ تاريخ ٢٠٠٠/٤/١٥. وأنا عضو في فريق عمل لجنة المطالبة بالتعويضات ("**اللجنة**"). وقد تم تعييني في اللجنة في شهر أغسطس من عام ٢٠١٧ من قبل سعادة الدكتور علي بن فطيس المري، النائب العام لدولة قطر.

٢. بتاريخ ٢٥ أبريل ٢٠١٩، وفيما يتعلق بقضية *تطبيق الاتفاقية الدولية للقضاء على جميع أشكال التمييز العنصري (قطر ضد الإمارات العربية المتحدة)*، قمت بتقديم إفادة توضح دور لجنة المطالبة بالتعويضات في جمع وحفظ وتحليل الشكاوى التي تم تقديمها من قِبل المواطنين القطريين الذين تضرروا من تأثير التدابير التي تم فرضها ضد قطر من قبل دولة الإمارات العربية المتحدة ("**الإمارات**") بتاريخ ٥ يونيو ٢٠١٧ ("***التدابير التمييزية***"). مرفق المستند المُبرز ب لهذه الإفادة، وهي جزء من قاعدة بيانات دعاوى لجنة المطالبة بالتعويضات المتعلقة بالإمارات ("***قاعدة بيانات دعاوى لجنة المطالبة بالتعويضات***"). وقد تم تقديم الإفادة، بالإضافة إلى المستندات المبرزة المتعلقة بها، على هيئة الملحق ٢٧٢ من مذكرة قطر.

٣. أقدم هذه الإفادة الثانية بصفتي الرسمية، وذلك لاستكمال قاعدة بيانات دعاوى لجنة المطالبة بالتعويضات بالبيانات المُحدثة التي أصبحت متوفرة منذ تاريخ ٢٥ أبريل ٢٠١٩.

٤. إن الحقائق والأمور الواردة في هذه الإفادة هي في حدود معرفتي الشخصية، وهي صحيحة على حد علمي ومعرفتي.

٥. دعماً لتصريح شهادتي، وكما هو مُشار إليه أدناه، أُرفق المستندات التالية:

أ) تحديث لقاعدة بيانات دعاوى لجنة المطالبة بالتعويضات [**المستند المبرز أ**].

ثانيا: البيانات المحدثة

٦. كما أوضحت في إفادتي السابقة، تلقت لجنة المطالبة بالتعويضات ١,٥٤٨ شكوى متعلقة بالتدابير التمييزية التي فرضتها دولة الإمارات. ومن أصل الشكاوى البالغ عددها ١,٥٤٨، تحققت لجنة المطالبة بالتعويضات من ٩٧٥ شكوى ادعى فيها القطريين حدوث انتهاكات لتطبيق الاتفاقية الدولية للقضاء على جميع أشكال التمييز العنصري، والتي تنعكس على قاعدة بيانات دعاوى لجنة المطالبة بالتعويضات (المستند المُبرز ب، في إفادتي السابقة).

٧. منذ تاريخ ٢٥ أبريل ٢٠١٩، تلقت لجنة المطالبة بالتعويضات معلومات إضافية متعلقة بادعاءات القطريين المتمثلة في قاعدة بيانات دعاوى لجنة المطالبة بالتعويضات، وتلك المعلومات تتعلق بمكان ميلادهم، ومكان ميلاد والديهم، حيث تم التأشير سابقاً على هذه البيانات بأنها "غير معروفة". مرفق قاعدة بيانات مُحدثة لدعاوى لجنة المطالبة بالتعويضات، والتي تتضمن البيانات الإضافية التي تم تحصيلها منذ ٢٥ أبريل ٢٠١٩ على هيئة **المستند المبرز أ** المُرفق مع هذه الإفادة (*"**قاعدة بيانات دعاوى لجنة المطالبة بالتعويضات المحدثة**"*).

٨. وكما هو ظاهر في قاعدة بيانات دعاوى لجنة المطالبة بالتعويضات المحدثة، فمن أصل ٩٧٥ فرداً تقدموا بشكاوى تم التحقق منها من قِبل لجنة المطالبة بالتعويضات، وُلِدَ ما مجموعه ٨٩١ فرداً (٩١%) منهم في قطر. ومن بين هؤلاء الأشخاص البالغ عددهم ٨٩١ فرداً، وُلِدَ ٨١٥ فرداً (٨٤% من الشكاوى التي تم التحقق منها) لأبوين وُلِدوا أيضاً في قطر.

أحمد محمد يوسف عبد الرحمن المانع

٢١ أغسطس ٢٠١٩

الدوحة - قطر

لجنة المطالبة بالتعويضات
Compensation Claims Committee

LIONBRIDGE

STATE OF NEW YORK)
)
) ss
COUNTY OF NEW YORK)

CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Arabic into English of the attached witness declaration by Ahmed Mohammed Al Mana.

Kristen Duffy, Senior Managing Editor
Lionbridge

Sworn to and subscribed before me
this 21st day of August, 2019.

LYNDA GREEN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01GR6205401
Qualified In New York County
My Commission Expires 05-11-2021