STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

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I. Historical Antecedents and Lessons from the Past

The Statute of the International Court of Justice (ICJ) counted on historical antecedents to be kept in mind, in particular in respect of the Statute of its predecessor, the Permanent Court of International Justice (PCIJ). The PCIJ was created under the auspices of the League of Nations pursuant to Article 14 of the Covenant of the League of Nations.[1] The Council of the League of Nations had been entrusted with the project for the establishment of the PCIJ. In early 1920, an Advisory Committee of Jurists was appointed, to prepare and submit a report concerning the establishment of the PCIJ. In June-July 1920, a draft scheme was prepared by the Advisory Committee, and then submitted to the Council of the League of Nations, which, upon its examination, laid it before the first Assembly of the League of Nations. The Third Committee of the first Assembly, after studying the matter, submitted, in December 1920, a revised draft to the League's Assembly, which adopted it unanimously; that revised draft thus became the Statute of the PCIJ.

Although the League of Nations had taken the initiative of the creation of the PCIJ, it was not integrated into the League. The PCIJ operated from 15 February 1922 (when it held its inaugural sitting) until 1940. Many treaties and conventions conferred jurisdiction upon the PCIJ. In that period, the PCIJ settled 29 contentious cases and issued 27 advisory opinions. It was only in 1946 that the new ICJ was established,[2] with the adoption of its Statute at the San Francisco Conference on 26 June 1945. The ICJ Statute relied upon the Statute of its predecessor, the PCIJ; even so, a process of redrafting was undertaken − with the necessary adjustments in the light of the historical experience[3] − first by the United Nations Committee of Jurists, and then by the Fourth Committee of the United Nations Conference on International Organization (UNCIO) in San Francisco in 1945.

An important innovation introduced by the ICJ Statute was its structural interrelationship with the United Nations Charter. The ICJ was incorporated into the United Nations, its Statute forming an integral part of the United Nations Charter. Distinctly, in the case of the PCIJ, the relationship between the Court and the then existing procedures of other (arbitral) organs of dispute-settlement was stated in Article 1 of the PCIJ Statute, in the following terms: the PCIJ would be "in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their

[1] Article 14 provided that: "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly".

[2] As the archives of the PCIJ were preserved during World War II, and as the intention at the time of the creation of the ICJ was for continuity between the PCIJ and the ICJ, the latter could take over the archives of its predecessor.

[3] Besides terminological changes (e.g., to alter the references from the League of Nations to the United Nations).

disputes for settlement". By contrast, the ICJ Statute is annexed to the United Nations Charter itself. It sets forth the structure of the Court, its powers and competences, and the applicable law; the ICJ's interrelationship with the United Nations is enhanced, pursuant to Article 92 of the Charter, which states that:

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

Thus, while Article 92 of the ICJ Statute makes reference to the PCIJ Statute, the intimate relationship between the ICJ and the United Nations is clearly defined under Article 92 of the Charter, characterizing the ICJ as "the principal judicial organ of the United Nations". This tight connection is also evidenced by Article 93 of the Charter, which states that all Member States of the United Nations are *ipso facto* parties to the Statute of the ICJ. Another provision which has a direct bearing on the interrelationship between the ICJ and the United Nations is Article 94 of the Charter, which provides that each Member State of the United Nations "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party". These provisions show that, although the ICJ Statute relied on the PCIJ Statute, it also included innovations, in particular as to the interrelationship between the World Court and the United Nations. With the establishment of the ICJ, much was learned from the experience of the PCIJ, and also from its jurisprudence (*infra*). In April 1946, with the formal dissolution of the PCIJ, the ICJ came into operation.

II. Basis of International Jurisdiction

The ICJ Statute secures (Article 9), in the composition of the Court, the due representation of the main juridical systems of the world. The ICJ is composed of 15 judges, elected by the United Nations General Assembly and Security Council. There cannot be two judges of the nationality of the same State. In case there is not, amongst the members (elected judges) of the ICJ, a judge of the nationality of a State as contending party, this State can designate a judge *ad hoc*, of its choice, for the concrete case, once his or her name is approved by the members of the ICJ.

The ICJ, throughout its history, has defined its role in the judicial settlement of international disputes, as the judicial organ of the legal order of the international community as a whole, and not only of the contending parties appearing before it.[4] In recent years, the ICJ has been called to pronounce upon the most diverse areas of international law, in cases originating from all the regions of the world. They have been submitted to the ICJ either through Applications Instituting Proceedings[5] – on the basis of the optional clause, or else of compromissory clauses – or through Special

[4] G. Abi-Saab, "The International Court as a World Court", in *Fifty Years of the International Court of Justice - Essays in Honour of R. Jennings* (eds. V. Lowe and M. Fitzmaurice), Cambridge, CUP, 1996, p. 7, and cf. pp. 3-16.

[5] Cf., e.g., by date of introduction: ICJ, *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo *versus* Rwanda) (1999); ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *versus* Uganda) (1999); ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *versus* Burundi) (1999).

Agreements/*compromise*.[6] It is for the ICJ itself to decide on questions regarding its jurisdiction: according to Article 36, paragraph 6, in the event of a dispute as to whether the ICJ has jurisdiction in a given case, the matter shall be settled by a decision of the Court.

A way whereby the ICJ may have jurisdiction is through the declarations recognizing as compulsory the jurisdiction of the Court (optional clause), which take the form of a declaration of its acceptance, deposited by the State concerned with the United Nations Secretary-General. These declarations are provided for in Article 36, paragraph 2, of the Statute.[7] At present (beginning of 2014), there are 70 declarations deposited with the United Nations Secretary-General.[8] Out of the 70 declarations, 6 of them were made under the Statute of the PCIJ, which have not lapsed or been withdrawn, and thus remain valid, under Article 36, paragraph 5, in relation to the ICJ.

As the ICJ lacks (automatic) compulsory jurisdiction, its Statute provides for the optional clause (Article 36(2)) of acceptance of the Court's jurisdiction (*supra*), as well as for compromissory clauses (Article 36(1)). As to the latter, Article 36, paragraph 1, provides the basis for the Court's contentious jurisdiction in "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". The last basis of jurisdiction is thus found in clauses of

[6] Cf., e.g., recently, by date of introduction: ICJ, *Frontier Dispute* (Burkina Faso *versus* Niger) (2010); ICJ, *Frontier Dispute* (Benin *versus* Niger) (2002).

[7] Which provides that: "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".

[8] According to the Court's official website (http://www.icj-cij.org/, beginning of 2014), the following States have made such a declaration, by date on which the declaration was deposited: Australia (22 March 2002), Austria (19 May1971), Barbados (1 August 1980), Belgium (17 June 1958), Botswana (16 March 1970), Bulgaria (21 June 1992), Cambodia (19 September 1957), Cameroon (3 March 1994), Canada (10 May 1994), Costa Rica (20 February 1973), Côte d'Ivoire (29 September 2001), Cyprus (3 September 2002), Democratic Republic of the Congo (8 February 1989), Denmark (10 December 1956), Djibouti (2 September 2005), Dominica, Commonwealth of (31 March 2006), Dominican Republic (30 September 1924), Egypt (22 July 1957), Estonia (31 October 1991), Finland (25 June 1958), Gambia (22 June 1966), Georgia (20 June 1995), Germany (30 April 2008), Greece (10 January 1994), Guinea, Republic of (4 December 1998), Guinea-Bissau (7 August 1989), Haiti (4 October 1921), Honduras (6 June 1986), Hungary (22 October 1992), India (18 September 1974), Ireland (15 December 2011), Japan (9 July 2007), Kenya (19 April 1965), Lesotho (6 September 2000), Liberia (20 March 1952), Liechtenstein (29 March 1950), Lithuania (26 September 2012), Luxembourg (15 September 1930), Madagascar (2 July 1992), Malawi (12 December 1966), Malta (2 September 1983), Marshall Islands (23 April 2013), Mauritius (23 September 1968), Mexico (28 October 1947), Netherlands (1 August 1956), New Zealand (23 September 1977), Nicaragua (24 September 1929), Nigeria (30 April 1998), Norway (25 June 1996), Pakistan (13 September 1960), Panama (25 October 1921), Paraguay (25 September 1996), Peru (7 July 2003), Philippines (18 January 1972), Poland (25 March 1996), Portugal (25 February 2005), Senegal (2 December 1985), Slovakia (28 May 2004), Somalia (11 April 1963), Spain (20 October 1990), Sudan (2 January 1958), Suriname (31 August 1987), Swaziland (26 May 1969), Sweden (6 April 1957), Switzerland (28 July 1948), Timor-Leste (21 September 2012), Togo (25 October 1979), Uganda (3 October 1963), United Kingdom of Great Britain and Northern Ireland (5 July 2004), Uruguay (28 January 1921).

treaties and conventions that refer to the ICJ for the adjudication of disputes[9] (compromissory clauses).[10]

Much has been written on the basis of jurisdiction of the ICJ. In my extensive Dissenting Opinion (paras. 1-214) in the ICJ's judgment (of 1 April 2011) in the case of the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (CERD), I deemed it fit to point out the difficulties experienced in the long path towards compulsory jurisdiction.[11] Throughout the last decades, advances could here have been much greater if State practice would not have undermined the original purpose which inspired the creation of the mechanism of the *optional clause* of compulsory jurisdiction (of the PCIJ and the ICJ), that is, the submission of political interests to Law, rather than the acceptance of compulsory jurisdiction in the way one freely wishes (with restrictions). Only in this way would one, as originally envisaged, achieve greater development in the realization of justice at the international level on the basis of compulsory jurisdiction.

In my aforementioned Dissenting Opinion in the case concerning the *Application of the CERD Convention* (2011), I sustained the pressing need of the realization of justice on the basis of the compromissory clause (article 22) of the CERD Convention, discarding any yielding to State voluntarism (cf. *supra*). The foundation of compulsory jurisdiction lies, ultimately, in the confidence in the *rule of law* at the international level,[12] amidst the awareness that we face a *jus necessarium*, and no longer an unsatisfactory *jus voluntarium*. The very nature of a court of justice (beyond traditional arbitration) calls for compulsory jurisdiction.[13] Soon renewed hopes to that effect were expressed in compromissory clauses enshrined into multilateral and bilateral treaties.[14]

These hopes have grown in recent years, with the increasing recourse to compromissory clauses as basis of jurisdiction.[15] This development has been seen as a reassuring one, in the sense of diminishing the probability of procedural incidents, such as

[9] In this sense, another point of connection between the PCIJ and the ICJ is worth highlighting at this stage: pursuant to Article 37 of the ICJ Statute, when a treaty or convention in force refers a dispute to a tribunal instituted by the League of Nations, or to the PCIJ, the matter shall, as between the Parties to the Statute, be referred to the ICJ.

[10] Cases are normally lodged with the ICJ by way of notification to the Registry of an Application Instituting Proceedings, or Special Agreement/*compromis* concluded by the parties to that effect.

[11] A.A. Cançado Trindade, "Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law - Part I", *in* XXXVII *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2010*, Washington D.C., OAS General Secretariat, 2011, pp. 233-259; A.A. Cançado Trindade, "Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law - Part II", *in* XXXVIII *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2011*, Washington D.C., OAS General Secretariat, 2012, pp. 285-366.

[12] Cf., in this sense, C.W. Jenks, *The Prospects of International Adjudication*, London, Stevens, 1964, pp. 101, 117, 757, 762 and 770.

[13] Cf., in this sense, B.C.J. Loder, "The Permanent Court of International Justice and Compulsory Jurisdiction", 2 *British Year Book of International Law* (1921-1922) pp. 11-12. And cf., earlier on, likewise, N. Politis, *La justice internationale*, Paris, Libr. Hachette, 1924, pp. 7-255, esp. pp. 193-194 and 249-250.

[14] E. Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice", 25 *British Year Book of International Law* (1948) p. 153.

[15] Cf. R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 4, 31-32, 83 and 86; R.P. Anand, "Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement", 5 *Max Planck Yearbook of United Nations Law* (2001) pp. 5-7, 11, 15 and 19.

the recourse to exceptions or objections of admissibility of applications instituting proceedings, or of the jurisdiction itself of the ICJ. Around 128 multilateral conventions and 166 bilateral treaties contain clauses providing for the recourse to the ICJ for the settlement of disputes on their interpretation or application – the so-called *compromissory clauses*.

In any case, the ICJ retains at least the power and duty to address *motu proprio* the issue of jurisdiction.[16] The time has come to overcome definitively the regrettable lack of automatism of the international jurisdiction, which, despite all difficulties, has become reality in respect of some international tribunals.[17] In sum, there is a diversity of legal bases to submit a contentious case to the knowledge and decision of the ICJ. There are examples, in recent years, of recourse to each of them, fostering the judicial settlement of international disputes. The procedure before the ICJ comprises two phases – the written phase followed by the oral one – conducted in the two official languages of the ICJ (English and French). Since the lodging of the first case with the ICJ (the *Corfu Channel* case) in May 1947 until now (beginning of 2014), 157 cases have entered the Court's general list. Contentious cases have, in recent years, concerned States from all continents (the Americas, Europe, Africa, Asia and Oceania), highlighting the role of the ICJ as the principal judicial organ of the whole system of the United Nations.

III. Sources of International Law

The ICJ Statute (like previously that of the PCIJ) lists, in Article 38, the "formal" sources of international law.[18] This provision, in referring to the Court's function to decide "disputes [that] are submitted to it", gives an incomplete picture of it, in not addressing likewise the advisory function of the Court (cf. *infra*). Be that as it may, when the Court exercises its advisory function it likewise takes into account the list of "formal sources" found in Article 38 of its Statute (custom, treaties, general principles of law, jurisprudence, doctrine, equity). That list is not exhaustive, but rather illustrative. Such "formal sources" amount to the ways whereby international law manifests itself, not excluding other ways (e.g., unilateral juridical acts of States, resolutions of international organizations). It may be recalled that the list in Article 38 of the Statute dates originally from 1920, when the Advisory Committee of Jurists of the League of Nations prepared it for the PCIJ (*supra*). Ever since, international law has much evolved.

General principles of law, enlisted *inter alia* in Article 38 of the ICJ Statute, encompass those found in all national legal systems (thus ineluctably linked with the very foundations of Law), and likewise the general principles of international law itself. Such principles inform and conform the norms and rules of international law, being – in my own conception – a manifestation of the universal juridical conscience, the ultimate *material* source of all Law. In the *jus gentium* in evolution, basic considerations of humanity play a role of the utmost importance. Reaffirmed time and time again, those principles give

[16] R.C. Lawson, "The Problem of the Compulsory Jurisdiction of the World Court", 46 *American Journal of International Law* (1952) pp. 234 and 238, and cf. pp. 219, 224 and 227.

[17] Cf., for examples, A.A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", *in*: A.A. Cançado Trindade and Dean Spielmann, *A Century of International Justice and Prospects for the Future / Rétrospective d´un siècle de justice internationale et perspectives d´avenir*, Oisterwijk, Wolf Legal Publs., 2013, pp. 1-28, esp. pp. 13-16.

[18] This provision, found earlier in the PCIJ, was reproduced in the ICJ Statute with only minor modifications.

expression to the idea of an *objective justice*, paving the way to the application of the *universal* international law, the new *jus gentium* of our times.[19]

IV. Contentious Cases: Shortcomings of the Strict Inter-State Dimension

From the start, the jurisdiction of the ICJ (and of its predecessor, the PCIJ) has been faced with a limitation *ratione personae*: only States may submit contentious cases to it (Article 34(1) of its Statute). At the time of the drafting and adoption, in 1920, of the PCIJ Statute, a choice was made for a strictly inter-State dimension for its exercise of the international judicial function in contentious matters. Yet, as I have pointed out in my Separate Opinion (paras. 76-81) in the ICJ's Advisory Opinion (of 1 February 2012) on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD*, the fact that neither the Advisory Committee of Jurists in 1920, nor the draftsmen of the ICJ Statute in 1945, found that the time was ripe to grant access to the PCIJ, and later to the ICJ, to subjects of rights other than States (such as individuals), did not mean that a definitive answer had been found to the question at issue. It should not pass unnoticed that the very advent of permanent international jurisdiction at the beginning of the twentieth century, before the creation of the PCIJ, was *not* marked by a purely inter-State outlook of the international *contentieux*.[20]

From 1945 until the present time, the ICJ has been facing the aforementioned limitation, imposed by Article 34, paragraph 1, of its Statute, whereby "only States may be parties in cases before the Court". Looking back in time, the question of access of individuals to international justice,[21] with procedural equality, already drew the attention of legal doctrine ever since the adoption of the PCIJ Statute in 1920, and has continued to do so, throughout more than nine decades. Individuals and groups of individuals began to have access to other international judicial instances, reserving the PCIJ, and later the ICJ, only for disputes between States. Yet, the dogmatic position taken originally in 1920, on the occasion of the preparation and adoption of its Statute, did not hinder the PCIJ to occupy itself promptly of cases pertaining to the treatment of minorities and inhabitants of cities or territories with a juridical statute of their own.

In considerations developed in the examination of such matters, the PCIJ went well beyond the inter-State dimension, taking into account the position of individuals

[19] A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2nd. rev. ed., Leiden/The Hague, Nijhoff, 2013, pp. 1-726.

[20] Cf., as to the systems of minorities (including Upper-Silesia) and of territories under mandates, and the systems of petitions of the Islands Aaland and of the Saar and of Danzig, besides the practice of mixed arbitral tribunals and of mixed claims commissions, of the same epoch: J.-C. Witenberg, "La recevabilité des réclamations devant les juridictions internationales", 41 *Recueil des Cours de l´Académie de Droit International de La Haye* (1932) pp. 5-135; J. Stone, "The Legal Nature of Minorities Petition", 12 *British Year Book of International Law* (1931) pp. 76-94; M. Sibert, "Sur la procédure en matière de pétition dans les pays sous mandat et quelques-unes de ses insuffissances", 40 *Revue générale de droit international public* (1933) pp. 257-272; M. St. Korowicz, *Une expérience en Droit international - La protection des minorités de Haute-Silésie*, Paris, Pédone, 1946, pp. 81-174; C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 109-128; A.A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century", 24 *Netherlands International Law Review* (1977) pp. 373-392; cf. J. Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962, pp. 1-256 (already in the United Nations era).

[21] Cf. A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-236.

themselves (as in, *inter alia*, the Advisory Opinions on *German Settlers in Poland*, 1923; the *Jurisdiction of the Courts of Danzig*, 1928; the *Greco-Bulgarian "Communities"*, 1930; *Access to German Minority Schools in Upper Silesia*, 1931; *Treatment of Polish Nationals in Danzig*, 1932; *Minority Schools in Albania*, 1935).[22] Ever since, the artificiality of that dimension became noticeable and acknowledged, already at an early stage of the case-law of the PCIJ. The option in 1920 (endorsed in 1945) for an inter-State mechanism for judicial settlement of contentious cases, was made, as I have recalled,

> "(...) not by an intrinsic necessity, nor because it was the sole manner to proceed, but rather and only to give expression to the prevailing viewpoint amongst the members of the Advisory Committee of Jurists in charge of drafting the Statute of the PCIJ. Nevertheless, already at that time, some 90 years ago, international law was not reduced to a purely inter-State paradigm, and already knew of concrete experiments of access to international instances, in search of justice, on the part of not only States but also of individuals.
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> The fact that the Advisory Committee of Jurists did not consider that the time was ripe for granting access, to the PCIJ, to subjects of law other than the States (e.g., individuals) did not mean a definitive answer to the question. (...)Already in the *travaux préparatoires* of the Statute of the PCIJ, the minority position marked presence, of those who favoured the access to the old Hague Court not only of States, but also of other subjects of law, including individuals. This was not the position which prevailed, but the ideal already marked presence, in that epoch, almost one century ago".[23]

The dogmatic position of the PCIJ Statute passed on to the ICJ Statute. Once again, the exclusively inter-State character of the *contentieux* before the ICJ has not appeared satisfactory at all. At least in some cases (cf. *infra*), pertaining to the condition of individuals, the presence of these individuals (or of their legal representatives), in order to submit, themselves, their positions, would have enriched the proceedings and facilitated the work of the Court. The artificiality of the exclusively inter-State outlook has been criticised, time and time again, in expert writing, which has recalled that "nowadays a very considerable part of international law" (e.g., law-making treaties) "directly affects individuals", and the effect of Article 34, paragraph 1, of the ICJ Statute has been "to insulate" the Court, by remaining attached to "notions about international law structure of the 1920s".[24]

For example, the strictly inter-State mechanism appeared manifestly inadequate in the handling of the case of the *Application of the Convention of 1902 Governing the Guardianship of Infants* (1958).[25] There has also been sharp criticism of the Court's handling of the *East Timor* case (1995), where the East Timorese people had no *locus*

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[22] Cf. C. Brölmann, "The PCIJ and International Rights of Groups and Individuals", *in Legacies of the Permanent Court of International Justice* (eds. C.J. Tams, M. Fitzmaurice and P. Merkouris), Leiden, Nijhoff, 2013, pp. 123-143.

[23] A.A. Cançado Trindade, *Os Tribunais Internacionais Contemporâneos*, Brasília, FUNAG, 2013, pp. 11-12.

[24] R.Y. Jennings, "The International Court of Justice after Fifty Years", 89 *American Journal of International Law* (1995) p. 504; and cf. also, to the same effect, S. Rosenne, "Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice", *in International Arbitration - Liber Amicorum for M. Domke* (ed. P. Sanders), The Hague, Nijhoff, 1967, pp. 249-250, and cf. pp. 242-243.

[25] S. Rosenne, "Lessons of the Past and Needs of the Future - Presentation", *in*: *Increasing the Effectiveness of the International Court of Justice* (1996 Colloquy - eds. C. Peck and R.S. Lee), The Hague, Nijhoff, 1997, pp. 487-488, and cf. pp. 466-492.

standi to request intervention in the proceedings, not even to present an *amicus curiae*, although the crucial point under consideration was that of sovereignty over their territory. Worse still, the interests of a third State (which had not even accepted the Court's jurisdiction) were taken for granted for the purpose of protection, and promptly safeguarded by the Court, at no cost to itself, by means of the application of the so-called *Monetary Gold* "principle".[26] The aforementioned examples are far from being the only ones; they in fact abound in the history of the ICJ.

In respect of situations concerning individuals or groups of individuals, reference can further be made, for example, to the *Nottebohm* case (1955) pertaining to double nationality; the *Trial of Pakistani Prisoners of War* case (1973), the *Hostages (U.S. Diplomatic and Consular Staff) in Teheran* case (1980); the *Frontier Dispute between Burkina Faso and Mali* case (1986); the *Application of the Convention against Genocide* case (1996 and 2007); and the triad of cases concerning consular assistance, namely, the *Breard* case (*Paraguay versus United States of America*, 1998), the *LaGrand* case (Germany *versus* United States of America, 2001), the *Avena and Others* case (Mexico *versus* United States of America, 2004).

In respect of those cases, one cannot fail to reckon that one of their predominant elements was precisely the concrete situation of the individuals directly affected, and not merely abstract issues of exclusive interest of the litigating States in their relations *inter se*. Moreover, one may further recall that, in the case of *Armed Activities in the Territory of the Congo* (Democratic Republic of the Congo *versus* Uganda, 2005), the ICJ was concerned with grave violations of human rights and of International Humanitarian Law; and in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (1996) the Court was likewise concerned with the victims of armed clashes.

More recently, examples wherein the Court's concerns have had to go beyond the inter-State outlook have further increased in frequency. They include, for example, the case on *Questions Relating to the Obligation to Prosecute or Extradite* (2009-2013) pertaining to the principle of universal jurisdiction under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the case of *A.S. Diallo* (2010) on the detention and expulsion of a foreigner, the case of the *Jurisdictional Immunities of the State* (2010-2012), the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (2011), and the case of the *Temple of Preah Vihear* (provisional measures, 2011).

The same can be said of the two last advisory opinions of the Court, on the *Declaration of Independence of Kosovo* (2010), and on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD* (2012), respectively. The artificiality of the exclusively inter-State outlook has thus been made often manifest, and increasingly so; that outlook rests on a longstanding dogma of the past. Those more recent contentious cases, and requests for advisory opinions, lodged with the Court, have asked it, by reason of their subject-matter, to overcome that outlook.

Fortunately, in the last decades, States themselves seem to have been acknowledging this, in lodging with the ICJ successive cases and matters which clearly transcend the inter-State level. And the Court has been lately responding, at the height of these new challenges and expectations, in taking into account, in its decisions, the situation not only of States, but also of peoples, of individuals or groups of individuals alike

[26] C. Chinkin, "Increasing the Use and Appeal of the Court - Presentation", *in ibid*., pp. 47-48, 53 and 55-56.

(*supra*). Even if the mechanism of dispute-settlement by the ICJ remains strictly or exclusively inter-State, the *substance* of those disputes or issues brought before the Court pertains also to the human person, as the aforementioned contentious cases and advisory opinions, and the Court's reasoning therein, clearly show. The truth is that the strictly inter-State outlook has an ideological content, is a product of its time, a time long past. In these more recent decisions (1999-2014), the ICJ has at times rightly endeavoured to overcome that outlook, so as to face the new challenges of our times, brought before it in the contentious cases and requests for advisory opinions it has been seized of (cf. *infra*).[27]

V. Other Jurisdictional and Procedural Issues in Contentious Cases

1. Intervention

Another issue to be singled out, also in respect of the exercise of jurisdiction by the ICJ in contentious cases, pertains to the *intervention* of States in cases before the Court. Articles 62 and 63 of the Statute provide the framework for such interventions of States in the legal process. While both provisions concern those interventions of States, there are differences between the two. Under Article 62, there is a requirement that the requesting State must consider that it "has an interest of a legal nature which may be affected by the decision in the case". Thus, the State willing to intervene in a contentious case must submit a request for permission to intervene upon which the Court decides. There have been few applications for permission to intervene under Article 62 before the ICJ, and only one before the PCIJ.[28]

Lately, the Court has dealt with almost subsequent applications for permission to intervene in the case concerning *Territorial and Maritime Dispute* (Nicaragua *versus* Colombia, 2011)[29] and in the case concerning *Jurisdictional Immunities of the State* (Germany *versus* Italy: Greece intervening, 2010-2012).[30] In the latter case, for the first time in its history, the ICJ, in its order of 4 July 2011, granted the faculty of intervention to a third intervenor (as non-party, Greece), thus transcending the traditional tendency to a bilateralization of the *contentieux*, proper to the arbitral experience of the past.

As to intervention under Article 63 of the Statute,[31] in contrast with the intervention under Article 62, it happens as of right (and the ICJ should thus have no discretion in deciding whether or not to allow intervention, if the criteria are met), whenever the construction of a Convention (to which the intervening State is also a Party) is at issue. All States that have been notified have "the right to intervene in the proceedings", and, if a State does so, the construction given by the judgment will also be binding upon it. Unlike interventions under Article 62, the intervening party does not need to have an "interest of a legal nature" in the proceedings.

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[27] Cf. A.A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", *op. cit. supra* n. (16), pp. 7-9.

[28] Cf. C. Chinkin, "Article 62", in *The Statute of the International Court of Justice: A Commentary* (eds. A. Zimmermann *et alii*), Oxford, OUP, 2006, pp. 1336-1337.

[29] Cf. ICJ, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application for Permission to Intervene, I.C.J. Reports 2011*, pp. 348 and 420.

[30] ICJ, *Jurisdictional Immunities of the State (Germany* v. *Italy), Application for Permission to Intervene, I.C.J. Reports 2011*, p. 494; and cf. Separate opinion of Judge Cançado Trindade appended to the Court's order of 4 July 2011.

[31] According to Article 63, paragraph 1, whenever "the construction of a Convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith".

Intervention under Article 63 occurs in contentious proceedings through the filing of a "declaration of intervention". There have been very few declarations of intervention under Article 63 of the Statute. Recently, in the case concerning *Whaling in the Antarctic* (Australia *versus* Japan: New Zealand intervening), New Zealand made a declaration of intervention (concerning the construction of article VIII of the 1946 International Convention for the Regulation of Whaling at issue) and thus intervened in the case.[32]

2. Interpretation and Revision

At this juncture, another relevant issue relating to the Court's jurisdiction lies in the possibilities of reopening a case either for interpretation (as in the aforementioned case of the *Temple of Preah Vihear*), or for revision. Interpretation and revision are provided for in Articles 60 and 61 of the ICJ Statute. According to Article 60, in case of a disagreement as to the meaning and scope of a judgment, the Parties may request the Court to construe it. The request for interpretation may be submitted either by application of one or more of the Parties or by a special agreement.[33] Before the Court can entertain a request for interpretation, there must be a dispute ("*une contestation*") as to the meaning and scope of the judgment. The PCIJ, in its landmark judgment on the matter, in the *Chorzów Factory* case (1927), stated that, under that provision, "it 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".[34] The interpretation to be rendered by the Court must be kept within the confines of the judgment which is the object of the requested interpretation.[35]

Another way whereby the Court may be seized of a reopened case is through a request for revision of a judgment, as provided in Article 61 of the Court's Statute. An application for revision of a judgment may be filed only when it is based on the discovery of a fact, taken as decisive, that, when the judgment was delivered, was unknown to the Court and also to the party claiming revision, and such lack of knowledge was not due to negligence. As distinct from requests for interpretation, there is a time-limit for filing the request, that is, the application for revision[36] must be made within six months of discovering the new fact.[37]

It is clear that the notion of revision of judgments may encroach on the concept of *res judicata*, and thus the terms of Article 61 of the Statute make it clear that revision procedures are of an exceptional nature, especially in the light of the principle stated in Article 60 that the judgments of the Court are final and without appeal. The revision procedure has been used in very limited instances throughout the history of the ICJ: there

[32] Cf. ICJ, *Whaling in the Antarctic (Australia* v. *Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013; and cf. Separate opinion of Judge Cançado Trindade appended to the Court´s order of 6 February 2013.
[33] Cf. Rule 98 of the Rules of Court.
[34] PCIJ, *Chorzów Factory case (Interpretation of Judgments Nos. 7 and 8)*, PCIJ, Series A, n. 13, 1927, pp. 10-11.
[35] Cf. ICJ, *Request For Interpretation of the Judgment of 15 June1962 in the case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, Judgment of 11 November 2013.
[36] Cf. Article 99 of the Rules of Court.
[37] On revision procedures at the ICJ, cf., e.g., R. Geiss, "Revision Proceedings before the International Court of Justice", 63 *Zeitschrift fur ausländishes öffentliches Recht und Völkerrecht* (2003), pp. 167-194.

have been only three judgments addressing revision, and all found the respective applications inadmissible.[38]

VI. Provisional Measures of Protection

In situations of gravity and urgency, the ICJ can indicate or order provisional measures of protection, pursuant to Article 41 of its Statute, so as to prevent or avoid irreparable harm. Such provisional measures, thus endowed with a preventive dimension, have a binding character. Along the last decades, in its orders of provisional measures the ICJ has in fact to a large extent based its reasoning either on the need to avoid or prevent an imminent and irreparable harm to the rights of the contending parties (including the rights of the human person), or, more comprehensively, on the need to avoid or prevent the aggravation of the situation which would be bound to affect or harm irreparably the rights of the parties. Yet, in my understanding, the rationale of such orders of the ICJ does not need to limit or exhaust itself in a reasoning of the kind.

In the case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* (Belgium *versus* Senegal, order of 28 May 2009) − where the Court decided not to indicate provisional measures − I warned, in my dissenting opinion (para. 97), that the basic right at issue pertained to the *realization of justice*, and the fact that the binding character of provisional measures of protection is nowadays beyond question, on the basis of the *res interpretata* of the ICJ itself, does not mean that we have reached a culminating point in the evolution of the ICJ case-law on this matter.

In its order of 18 July 2011, in the case (reopened after half a century) of the *Temple of Preah Vihear* (Cambodia *versus* Thailand), the ICJ, in the provisional measures of protection it ordered, determined, for the first time in its history, the creation of a demilitarized zone in the region, which from then onwards put an end to the armed hostilities therein. The determination of urgency and the probability of irreparable damage are exercises to which the ICJ is nowadays used to; yet, although the identification of the legal nature and the material content of the right(s) to be preserved seem not to present great difficulties, the same cannot be said of the consideration of the *legal effects* and *consequences* of the right(s) at issue. In sum, the construction of the whole *legal regime*, proper for provisional measures of protection, still lies ahead of us.

VII. The Expanded Advisory Jurisdiction

It was with the PCIJ that, for the first time, an international tribunal was attributed the advisory function − surrounded as it was by much discussion. Originally conceived to assist the Assembly and the Council of the League of Nations, the PCIJ, making good use of it, ended up assisting not only those organs, but States as well: among the 27 advisory opinions it delivered, 17 of them addressed then existing aspects of disputes between States. It thus contributed to the avoidance of full-blown contentious proceedings, and

[38] Cf. ICJ, *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 192; ICJ, *Application for Revision of the Judgment of 11 July 1996 in the case concerning the* Application of the Convention for the Prevention and Punishment of the Crimes of Genocide (Bosnia Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, p. 7; ICJ, *Application for Revision of the Judgment of 11 September 1992 in the case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras), Judgment, I.C.J. Reports 2003*, p. 392.

exercised a preventive function, to the benefit of judicial settlement itself of international disputes.[39] The advisory function, as exercised by the PCIJ, thus contributed also to the progressive development of international law.

The same can be said of the exercise of the advisory function by the ICJ (pursuant to Article 65 of its Statute and Article 96 of the United Nations Charter). Upon the filing of a request for an advisory opinion, the Court makes up a list of States and international organizations which could furnish information on the question before the Court. The ICJ has discretion to decide whether to give a requested advisory opinion, and it has regularly issued the requested opinions. Ever since the advent of the ICJ, the advisory jurisdiction has kept on expanding. While the PCIJ Statute enabled only the League Council and Assembly to request advisory opinions, the ICJ Statute has enabled the United Nations main organs (General Assembly, Security Council and Economic and Social Council) and specialized agencies (such as ILO, FAO, UNESCO, ICAO, IMO, WMO, WHO, WIPO, UNIDO, ITU, IBRD, IMF, IFC, IFAD) to do so. In effect, the exercise of the advisory function by the ICJ is another aspect that highlights the interconnectedness between the United Nations and the Court itself.

Such interrelationship is demonstrated, at first, by the combined reading of Article 65 of the ICJ Statute and Article 96 of the United Nations Charter. Secondly, United Nations main organs, such as the General Assembly and the Security Council, are entitled to request an advisory opinion from the ICJ on any legal question.[40] Other United Nations organs or specialized agencies may request an advisory opinion, upon authorization by the General Assembly, on legal questions falling within the scope of their operation or activities (Article 96 of the United Nations Charter).

Advisory opinions of the ICJ, on their part, can also contribute, and have indeed done so, to the prevalence of the *rule of law* at national and international levels. Some of them have, likewise, contributed to the progressive development of international law (e.g., the ones on *Reparation for Injuries*, 1949; on *Namibia*, 1971; on *Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999; among others). The ICJ has issued 27 advisory opinions to date (beginning of 2014). Other contemporary international tribunals have been endowed with the advisory jurisdiction, and there are examples of frequent use made of it.[41] Although distinct from the judgments, given their consultative nature, the advisory opinions of the ICJ are endowed with validity, and no State (or other subjects of international law) can in good faith ignore or minimize them.

VIII. The ICJ in the Era of International Tribunals

[39] M.G. Samson and D. Guilfoyle, "The Permanent Court of International Justice and the 'Invention' of International Advisory Jurisdiction", *in Legacies of the Permanent Court of International Justice* (eds. C.J. Tams, M. Fitzmaurice and P. Merkouris), Leiden, Nijhoff, 2013, pp. 41-45, 47, 55-57 and 63.

[40] According to Article 65 of the ICJ Statute, "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

[41] Cf. A.A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", *op. cit. supra* n. (17), p. 13.

The gradual realization − that we witness, and have the privilege to contribute to, nowadays − of the old ideal of justice at the international level[42] has been revitalizing itself, in recent years, with the reassuring creation and operation of the multiple contemporary international tribunals. This is a theme which has definitively assumed a prominent place on the international agenda of this second decade of the twenty-first century. It was necessary to wait for some decades for the current developments in the realization of international justice to take place, not without difficulties,[43] now enriching and enhancing contemporary international law. International legal personality and capacity (not only of States, but also of international organizations and individuals) have indeed been enhanced, and international jurisdiction and responsibility have likewise expanded.

The ICJ, together with other international tribunals, assert and confirm nowadays the aptitude of contemporary international law to resolve the most distinct types of international controversies, at inter-State and intra-State levels. It should not pass unnoticed that the cases that reach the international tribunals constitute a minimal portion of the multiple injustices and abuses perpetrated daily against human beings and peoples all over the world. This is what should be of concern to international legal doctrine, and not false problems of delimitation of competences or inter-institutional competition. The coordination and dialogue among contemporary international tribunals are quite important, as their respective works are complementary and they have the common mission of imparting justice.

Nowadays, the international community fortunately counts on a wide range of international tribunals, adjudicating cases that take place not only at the *inter-State* level, but also at the *intra-State* level. This is reassuring, and was foreseen in the United Nations Charter itself, which provides, in Article 95, that United Nations Member States may entrust the settlement of their differences "to other tribunals by virtue of agreements already in existence or which may be concluded in the future". Such reassuring coexistence of international tribunals nowadays invites us to approach their work from the correct perspective of the *justiciables* themselves,[44] and brings us closer to their *common mission* of securing the realization of international justice, either at the inter-State or at the intra-State level.[45] Access to international justice has reassuringly been enlarged.

From the standpoint of the needs of protection of the *justiciables*, each international tribunal has its importance, in a wider framework encompassing the most distinct situations to be adjudicated, in each respective domain of operation.[46] In sum, the present era of international tribunals has brought about remarkable advances, and the expansion of international jurisdiction has been accompanied by the considerable increase in the number of the *justiciables*, granted access to justice, in distinct domains of international

[42] For a general study, cf., e.g., J. Allain, *A Century of International Adjudication - The Rule of Law and Its Limits*, The Hague, T.M.C. Asser Press, 2000, pp. 1-186.

[43] Cf., *inter alia*, e.g., G. Fouda, "La justice internationale et le consentement des États", *in International Justice - Thesaurus Acroasium*, vol. XXVI (ed. K. Koufa), Thessaloniki, Sakkoulas Publs., 1997, pp. 889-891, 896 and 900.

[44] A.A. Cançado Trindade, *Évolution du Droit international au droit des gens - L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 1-187.

[45] For a general study, cf. A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

[46] Cf., to this effect, A.A. Cançado Trindade, "Contemporary International Tribunals: Their Continuing Jurisprudential Cross-Fertilization, with Special Attention to the International Safeguard of Human Rights", *in The Global Community - Yearbook of International Law and Jurisprudence* (2012) vol. I, p. 188.

law, and in the most diverse situations, including in circumstances of the utmost adversity, and even defenselessness. Yet, there still remains a long way to go.

IX. Concluding Observations

Last but not least, the issue of *compliance* with judgments and decisions of the ICJ and other contemporary international tribunals is a legitimate concern of all of them. The issue encompasses two complementary aspects: measures of domestic law for the execution of international sentences, and mechanisms of monitoring and follow-up, for the supervision of compliance with those judgments and decisions. As to the former, very few States have so far taken concrete initiatives to secure, on a permanent basis, the faithful execution of international judgments concerning them. As to the latter, each international tribunal counts on a mechanism of its own; yet, all of them are susceptible of improvement. The ICJ itself can address this issue during the presentation of its annual reports to the United Nations General Assembly as well as the visit of the President to its Sixth Committee and the Security Council. That compliance ought to be integral, rather than partial or selective. This is a position of principle, in relation to an issue which pertains to the international *ordre public*, and to the *rule of law* (*préeminence du droit*) at international and national levels. There is still much to be done in this respect, to secure the continuing advances in the quest for the realization of international justice.

With the continuing operation of the ICJ together with other international tribunals, two basic distinct conceptions of the exercise of the international judicial function have gradually emerged: one − a strict one − whereby the tribunal has to limit itself to settle the dispute at issue and to handle its resolution of it to the contending parties (a form of transactional justice), addressing only what the parties have put before it; the other, a larger one − the one I sustain − whereby the tribunal has to go beyond that, and say what the Law is (*juris dictio*), thus contributing to the settlement of other like situations as well, and to the progressive development of international law. In the interpretation itself − or even in the search − of the applicable law, there is space for judicial creativity; each international tribunal is free to find the applicable law, independently of the arguments of the contending parties[47] (*juria novit curia*).

It should not pass unnoticed that there has lately been a wide thematic diversity in cases lodged with the ICJ, as never before. Among very recent cases resolved by the ICJ, there are some that have raised questions of the utmost relevance, pertaining to International Humanitarian Law, to the International Law of Human Rights, to International Environmental Law, among other themes.[48] The outlook of the ICJ could hardly be a strict one (proper for transactional justice): in my understanding, in solving such issues, the ICJ is bound to say what the Law is (*juris dictio*).

Furthermore, there are circumstances when the judgments of international tribunals may have repercussions beyond the States parties to a case. Such repercussions tend to

[47] Cf. M. Cappelletti, *Juízes Legisladores?*, Porto Alegre/Brazil, S.A. Fabris Ed., 1993, pp. 73-75 and 128-129; M.O. Hudson, *International Tribunals - Past and Future*, Washington D.C., Carnegie Endowment for International Peace/Brookings Inst., 1944, pp. 104-105.

[48] Cf., *inter alia*, e.g., A.A. Cançado Trindade, "La jurisprudence de la Cour Internationale de Justice sur les droits intangibles / The Case-Law of the International Court of Justice on Non-Derogable Rights", *in Droits intangibles et états d'exception / Non-Derogable Rights and States of Emergency* (eds. D. Prémont, C. Stenersen and I. Oseredczuk), Bruxelles, Bruylant, 1996, pp. 53-71 and 73-89; R. Goy, *La Cour Internationale de Justice et les droits de l´homme*, Bruxelles, Nemesis/Bruylant, 2002, pp. 7-127; among others.

occur when the judgments succeed to give expression to the idea of an *objective* justice. In this way, they contribute to the evolution of international law itself, and to the *rule of law* at the national and international levels in democratic societies. The more international tribunals devote themselves to explaining clearly the foundations of their decisions, the greater their contribution to justice and peace is bound to be.[49] In my conception, in judgments of international tribunals (also at the regional level), the *motifs* and the *dispositif* go together: one cannot separate the decision itself from its foundations, from the reasoning which upholds it. Reason and persuasion permeate the operation of justice, and this goes back to the historical origins of its conception.

The ICJ has an important role in the peaceful settlement of international disputes and the progressive development of international law.[50] A unique feature of the ICJ Statute is the Court's role as the principal judicial organ of the United Nations and its close relationship with the Organization (cf. *supra*). While much has been developed in the jurisprudence of the Court to date, there is still some room for improvement. The ICJ needs to remain attentive to the evolution of international law itself, which is not static, is not the same as when the ICJ was first established. While the Court, in contentious cases, remains open only to States, its judgments and decisions, and advisory opinions as well, have wide implications for other subjects of international law (international organizations, individuals and groups of individuals). In this regard, a continuing expansion of the advisory function of the Court and a broader conception of its jurisdiction in contentious matters can be envisaged, as the ICJ has a prominent role for the development of international law at the service of the international community as a whole.

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