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HAGUE INTERNATIONAL TRIBUNALS INTERNATIONAL COURT OF JUSTICE

The International Court of Justice: Cruising Ahead at 70

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Abstract
The International Court of Justice (ICJ or the Court) continues to hear and determine the contentious cases submitted to it, keeping up what has been referred to as an acceptable 'cruising pace'. After recalling the extent to which the demands on the Court have increased, and the practical means available to it have been greatly extended, the author (following up an earlier article on the subject in the *Netherlands International Law Review*) examines the Court's recent case-law (decisions given since 2010) to show how each decision, besides furthering settlement of the specific dispute, has contributed to the enlargement or development of international law. Attention is concentrated, however, on particular questions: the role of peremptory norms (*jus cogens*); interpretation of treaties; questions of jurisdiction (including the problem of the existence of a justiciable dispute in each case); and certain incidental proceedings contemplated by the Court's Statute and Rules, namely provisional measures and intervention under Articles 62 and 63 of the Statute.

Keywords
ICJ jurisdiction; intervention before the ICJ; judicial decisions; peremptory norms (*jus cogens*); provisional measures

1. INTRODUCTION

At the Cambridge Conference of the European Society of International Law in 2010, the author submitted a paper entitled 'The International Court of Justice 1989–2009: at the Heart of the Dispute Settlement System'.[1] Six years later, as the ICJ celebrates its 70th anniversary, the *Leiden Journal of International Law* has offered me the opportunity to take a look at the more recent work of the Court, and its current standing in the world, in the context of the overall picture of its activity.

On the Court's 60th anniversary, the UN General Assembly adopted a resolution 'solemnly commend[ing] the Court for the important role it has played as the principal judicial organ of the United Nations'. A similar resolution this year would seem equally justified, by (for example) the continued pressing recourse to the Court by

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1 Subsequently published in (2010) 57(3) *Netherlands International Law Review* 347.

states seeking judicial resolution of disputes. The Court itself has marked the 70th anniversary not only with a solemn Sitting, but also by holding a two-day Seminar, to which a number of international lawyers were invited, to discuss its work and prospects.[2]

Seventy years after its establishment, and approaching 100 years since that of its predecessor, the Permanent Court, the ICJ may be said to be flourishing; this was the overall tone of the Anniversary Seminar, though suggestions for improvement were offered, in particular as regards working methods. The figures speak for themselves. In the period 2011–2016, the Court has handed down decisions (in addition to making routine orders for time limits, removal from the list, etc.[3]) in no less than 18 cases,[4] in several of which there have been a number of successive decisions (on preliminary objections, provisional measures, etc.).

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[2] The papers submitted are to be published shortly in the *Journal of International Dispute Settlement.*

[3] These are nowadays rarely made by the President under the relevant provisions of the Statute and Rules, as the full Court is now assembled for far more of the year than used to be the case.

[4] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, [2011] ICJ Rep. 6; Joinder of Proceedings, Order of 17 April 2013, [2013] ICJ Rep. 166; Provisional Measures, Order of 16 July 2013, [2013] ICJ Rep. 230; Provisional Measures, Order of 22 November 2013, [2013] ICJ Rep. 354; Merits, Judgment of 16 December 2015 (not yet reported).

Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70.

Territorial and Maritime Dispute (Nicaragua v. Colombia), Application of Costa Rica for Permission to Intervene, Judgment of 4 May 2011, [2011] ICJ Rep. 348; Application of Honduras for Permission to Intervene, Judgment of 4 May 2011, [2011] ICJ Rep. 420; Merits, Judgment of 19 November 2012, [2012] ICJ Rep. 624.

Jurisdictional Immunities of the State (Germany v. Italy), Application of the Hellenic Republic for Permission to Intervene, Order of 4 July 2011, [2011] ICJ Rep. 494; Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99.

Request for the Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, [2011] ICJ Rep. 537; Merits, Judgment of 11 November 2013, [2013] ICJ Rep. 281.

Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, [2011] ICJ Rep. 644.

Judgment No. 2867 of the Administrative Tribunal of the ILO upon a complaint against IFAD, Advisory Opinion of 1 February 2012, [2012] ICJ Rep. 10.

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment of 19 June 2012, [2012] ICJ Rep. 324.

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422.

Whaling in the Antarctic (Australia v. Japan), Intervention of New Zealand, Order of 6 February 2013, [2013] ICJ Rep. 3; Merits, Judgment of 31 March 2014, [2014] ICJ Rep. 226.

Frontier Dispute (Burkina Faso/Niger), Judgment of 16 April 2013, [2013] ICJ Rep. 44.

Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Joinder of Proceedings, Order of 17 April 2013, [2013] ICJ Rep. 184; Merits, Judgment of 16 December 2015 (not yet reported).

Maritime Dispute (Peru v. Chile), Judgment of 27 January 2014, [2014] ICJ Rep. 3.

Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, [2014] ICJ Rep. 147; Modification of Provisional Measures, Order of 22 April 2015 (not yet reported); Removal from List, Order of 11 June 2015 (not yet reported).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits, Judgment of 3 February 2015 (not yet reported).

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objections, Judgment of 24 September 2015 (not yet reported).

Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016 (not yet reported).

Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment of 17 March 2016 (not yet reported).

Taking a longer view, some increase in the 'output' of the Court might have been expected to follow from the widening of its clientele over the years, in the sense of the increased membership of the UN, with the consequent status of party to the Statute. (However, the potential thus conferred on a state to make use of the Court has not necessarily gone along with a positive attitude of that state to judicial settlement; yet this attitude too has become more widely shared among states.) Such a widening was remarked on in the earlier article already referred to. Any more recent increase in the number of parties to the Statute has been minimal; thus for the flow of cases into and out of the Court's processes to remain steady suggests a satisfactory state of affairs. At the beginning of 2016, there were 11 contentious cases listed as pending before the Court (though two of these had long since effectively come to an end).

At the Court's 70th Anniversary Seminar, mentioned above, one of the speakers had been asked to address the subject of 'Working Methods of the Court': to an extremely valuable paper[5] was appended a tabulation of the number of contentious cases referred to the Court since 2005, the number disposed of, and the length of the proceedings in each. This demonstrated that the Court had cleared the backlog of cases that had previously built up,[6] that 'timescales for processing new cases are generally no longer than those of an arbitral tribunal', and that 'the Court has established a very acceptable "cruising pace", given the complexity of the cases submitted to it and of the issues at stake'.[7]

This is not to say there have been no discordant voices. The late, and much lamented, Professor Cassese suggested a few years ago that reform of the Court is urgently needed if it is to keep its place in the world;[8] and a distinguished US academic, Professor Weisburd, has recently published a book with the provocative title *Failings of the International Court of Justice*.[9] The central message of this latter work is expressed at the outset in four propositions, two of which are the key elements.[10] The first is uncontroversial: that as a result of Article 59 of the Statute, the Court has no *de jure* authority to determine the content of international law. The second recognizes that the Court *could* have established such an authority *de facto* (or perhaps rather as a matter of state acceptance), but it 'has not performed well enough to have earned that type of authority', this being demonstrated by the numerous 'failings' in specific cases pointed out in the body of the book. This assessment is, as the author virtually concedes, a minority view among scholars; it is not necessarily contradicted

5 A. Meron, 'Les methods de travail de la Cour', in *Proceedings of the ICJ 70th Anniversary Seminar* (2016) *Journal of International Dispute Settlement* (forthcoming), para. 4 (translation by ICJ Registry). There has been no request for an advisory opinion of the Court since 2010; any advisory proceedings of the scale of the *Namibia* case or the *Palestine Wall* case could still greatly complicate the smooth processing of contentious cases.

6 Thanks, in a considerable degree, to the direction of Dame Rosalyn Higgins as President, 2006–2009.

7 Since the seminar was held, no less than three new cases have been instituted, which may mean that the cruising pace will have to be stepped up if the Court is to stay ahead.

8 A. Cassese, 'The International Court of Justice: It is High Time to Restyle the Respected Old Lady', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), 239; but see also the response of I. Scobbie, '"All Right, Mr. de Mille, I'm ready for my close-up": Some Critical Reflections on Professor Cassese's "The International Court of Justice: It Is High Time to Restyle the Respected Old Lady"', (2012) 23 EJIL 1071.

9 A.M. Weisburd, *Failings of the International Court of Justice* (2016).

10 Ibid., at 4.

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by the general approval of the Court among states referred to above, but viewed in that context, Professor Weisburd has perhaps an uphill task.

The primary intention of this paper is not however to defend the Court against these or other criticisms, but rather to note, against the background of the Court's history, what seem to the author to be some salient points in the jurisprudence of the last five or six years. Though only examples, they illustrate that the Court continues both to settle specific disputes and to contribute to the growth and clarification of international law. First, however, some background.

2. A GLANCE AT THE PAST

In terms of quantity, the production of decisions by the Court is greater than it was in the past. This is evident simply from a glance at the volumes of the Court's Reports ranged on a shelf: from around the turn of the century, the volumes generally get thicker, and the material becomes so extensive as to require two, or even three, volumes for a single year. But this development is also due to the fact that generally, the Court's decisions at the present day are longer, and arguments more fully stated, than was the case in the earlier years.[11]

If one takes a moment to reflect on the practical or circumstantial differences between the working of the Court in the earlier years and at the present day, it is striking to see how the processes of production of a decision have been facilitated. When the author entered the service of the Court in 1968, little had changed since 1946 (perhaps even since 1922): computer word-processing was, of course, not available, and the staff of the Court was minimal; the judges had no personal assistants or secretaries, and the work of the Registry consisted essentially in administration, interpretation (consecutive and simultaneous), and translation and reproduction of what the judges produced. Judges carried out their own research (with the assistance of the Court's Library); the Drafting Committee wrote the whole decision, though the Registry might assist with the *qualités* – the formal recitals of the procedural history at the beginning of a judgment. Documents were prepared in longhand, or by dictating to a typist from the pool, or to a tape recorder for later transcription.

Today, each judge may be attended by a secretary, a law clerk and a university trainee, and the staff of the Registry has greatly expanded. The details of how a judgment or advisory opinion comes into existence remain confidential, which is as it should be,[12] but there can be little doubt that, while the judges still do the *deciding*, they are able to rely on skilled assistance not only for the research required but also, in some degree and if they wish, for the choice of words to express the decision.

In parallel to this, the computer revolution, and the coming of the internet, have not only made for more speedy working methods, but have also meant that the public operations of the Court can become known to a much wider audience, and

[11] Separate or dissenting opinions of great, sometime immense, length are also probably more frequent at the present time.

[12] For a slight, and (it is hoped) discreet partial lifting of the veil, see H. Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations', (2006) 5 *Chinese Journal of International Law* 15.

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much more quickly, than was formerly the case. The decision can be read on the day that it is delivered, as can the appended opinions.[13] Formerly the pleadings and oral arguments of the parties were eventually published (in the series *ICJ Pleadings, Oral Arguments*) over a period sometimes running into years, and until then could only be inspected at a limited number of major libraries around the world; now the written pleadings are placed on the Court's website when the oral proceedings open, and the oral arguments uploaded on the day they are heard. This means that when the decision in a case is delivered, the reader wishing to consult the pleadings, if it seems that these would clarify anything contained in the decision, can do so at once.

The – comparative – restraint of the decisions of the earlier years is certainly not the result of the practical limitations outlined above; but these may have, at least, discouraged prolixity. Are the many longer decisions of today perhaps partly the result of the comparative facility of their production? And do they *have* to be so long?

In some cases, much more of a decision is taken up with recitals of the arguments of the parties, before the reasoning begins. Sometimes this is historical to the point where the reader is told what the party was contending at each stage, even though it is the final arguments on each side with which the Court needs to engage;[14] and even when the decision eventually turns on a preliminary point, the opportunity is not always taken to omit or compress the parties' arguments on other issues. Is a separate exposé of the parties' arguments needed anyway? There are decisions, of the past and recent, in which those arguments are incorporated into the reasoning to the extent necessary to answer them. All that is essential to the decision, it is suggested, is to explain why the Court *rejects* certain contentions; it makes no difference to the result whether this is based on the counter-arguments of the other party (visible on the Court's website), or on a different approach, so the reader does not necessarily need to be informed what those counter-arguments were. And what is more, they can now be examined, immediately and *in extenso*, on the Court's website. However, decisions are now issued with commendable speed, and it must be recognized that to achieve brevity demands time.[15]

3. Areas surveyed: Different 'fields' of law

The Court's decisions since 2010 have contributed to the development of law on a wide range of substantive legal questions (territorial boundary issues, maritime delimitation, breach of treaty, etc.). To discuss each such contribution here would, however, be to direct the focus away from the Court, and towards the development of that or those fields of law. For simplicity, and to keep this study within bounds, comment will thus not be offered on the contribution made by the Court in recent

[13] It would be a courageous reader who immediately sat down to tackle the decision and *all* the opinions, including some recent examples of enormous length and sometimes of doubtful relevance.

[14] For contrasting and welcome brevity in this regard, see *Maritime Dispute (Peru v. Chile)*, *supra* note 4, at 16, paras. 22–3.

[15] As Pascal famously noted in his *Lettres provençales*, 'Je n'ai fait celle-ci plus longue que parce que je n'ai pas eu le loisir de la faire plus courte': Lettre XVI, 4 décembre 1656.

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years to such specific 'fields' of law, whether comparatively narrow ones, for example, the law of maritime delimitation, or of state immunity, or such wide categories as international humanitarian law, or the law of human rights.

These categories are, of course, convenient intellectual pigeonholes, no more: the Court, being called upon to 'decide in accordance with international law', is free to apply whatever rules are appropriate to the case in hand. This, however, is subject to one important qualification, namely that the jurisdictional instrument under which the Court is entrusted with settling a particular dispute may impose an effective limitation;[16] and it is for that reason that the cases in these 'fields' are frequently limited in scope. In the *Croatia* v. *Serbia* decision, the Court distinguished between 'State responsibility and individual criminal responsibility', and it confined itself to questions of the first category; but it is not entirely clear whether this was because of the existence of the specialized jurisdictions (ICC, ICTY etc.), or a limitation on the Court's function, similar to a jurisdictional exclusion.[17]

The remarks that follow will be addressed to four 'fields' that are generally broader in scope than those just mentioned: the concept of peremptory norms; the interpretation of treaties (rules generally independent of the 'field' to which the treaty applies); the Court's jurisdiction; and some of the Court's incidental proceedings, particularly the role of provisional measures and intervention. The first of these raises, in fact, a question of the permeability of the 'fields' of law just mentioned.

3.1. Peremptory norms (*jus cogens*)

The Court has recently had occasion to revisit the question of the significance to be attached to the status of a norm as 'peremptory', that is to say as one of *jus cogens*. In 2006, in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda*), it had declined to see, as one of attributes of such a norm, the possibility that, when included in a convention, it would have the effect of invalidating a reservation to the compromissory clause in that convention, even if the reservation was otherwise in full compliance with that clause. Rwanda had made a reservation, when acceding to the Genocide Convention, excluding the clause (Article IX) providing for the jurisdiction of the Court over disputes as to its application, and the Court declined to hold that reservation invalid on the grounds of the *jus cogens* nature of the prohibition of genocide, enshrined in the Convention.[18]

The Court's decision was adopted by a strong majority. Five judges, however, appended a joint separate opinion prompted by this part of the judgment, but their

[16] This is illustrated by the Court's ruling in the *Genocide* case brought by Croatia: the Court, seised under the compromissory clause in the Genocide Convention, declined to apply international humanitarian law, or even 'to rule, in general or abstract terms, on the relationship between the [Genocide] Convention and international humanitarian law': *Application of the Genocide Convention (Croatia v. Serbia), supra* note 4, para. 153.

[17] Ibid., paras. 128–9.

[18] Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep. 6, at 32, paras. 67–8, citing previous decisions in the same sense. The opposite view was powerfully argued by A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 499 ff. The present author has explained elsewhere the reasons why he considered that the Court's conclusion was preferable, and the controversy need not be pursued here: H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (2007), Vol. II, 1317.

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doubts were whether it is always correct that 'the fact that a reservation relates to jurisdiction rather than substance necessarily results in its compatibility with the object and purpose of a convention', observing that '[m]uch will depend upon the particular convention concerned and the particular reservation'.[19] There was no acceptance of the approach of the Democratic Republic of the Congo, the view that a norm recognized as peremptory is generally available as a sort of trump card, as over-riding not merely any agreement to the contrary (this being the defining feature of such a norm), but any other rule of law.[20]

The 2012 decision in the case of *Jurisdictional Immunities of the State* concerned a different aspect of the role and operation of peremptory norms.[21] The specific issue was whether the recognized rules of international law concerning state immunity prevented judicial enforcement, through the ICJ, against Germany of judgments of the Italian courts ordering reparation by Germany for acts committed against Italian citizens by the German occupying forces during the Second World War.[22] Italy argued that such immunity was not available because the obligation of Germany was based on responsibility for acts contrary to a peremptory norm of international law.

According to the Court, the key point in the Italian argument was as follows: in Italy's view, '*jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty *or in customary international law*'.[23] This is an attractive proposition but it blurs an important distinction, as the Court's judgment was to make clear. The reason why a peremptory norm, as *jus cogens*, prevails over *jus dispositivum*, that is, any rule or exception based on agreement between states, is because it is the nature of a peremptory norm that it cannot be contracted out of.[24] But it does not follow, because one cannot contract out of a rule of law, that it necessarily over-rides other rules of law;[25] if it does so, it must be on other grounds, such as establishment of such priority through international custom.

The Italian argument in effect adopted the approach championed by Orakhelashvili in the work already cited.[26] It is tempting to suppose that rules of international law identified as those of *jus cogens* are to be treated also as *superior* rules, in the sense that if the application of a legal rule would result in the frustration

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19 Joint separate opinion of Judges Higgins, Kooijmans, El Araby, Owada and Simma, [2006] ICJ Rep. 65, at 70, para. 21.

20 An approach espoused doctrinally by, in particular, Orakheklashvili, *supra* note 18.

21 In its decision in the *Questions relating to the Obligation to Prosecute or Extradite* case in the same year, the Court declared the *jus cogens* status of the prohibition of torture, but did not draw any conclusion from this finding (*supra* note 4, at 457, para. 99).

22 Greek citizens had also been the victims of similar acts, and Greece was authorized to intervene, to a limited extent, in the ICJ proceedings: *Jurisdictional Immunities of the State*, Application of the Hellenic Republic for Permission to Intervene, *supra* note 4, at 494.

23 *Jurisdictional Immunities of the State*, Judgment of 3 February 2012, *supra* note 4, at 140, para. 92 (emphasis added).

24 The concept is familiar in domestic legal systems: freedom of contract reaches its limit when considerations of *ordre public* make it necessary to forbid certain agreements, or more commonly simply to deny them the possibility of enforcement through the courts.

25 The seminal work is recognized to be A. von Verdross, 'Forbidden *Treaties* in International Law' (emphasis added), (1937) 31 AJIL 571; see also 'Règles générales du droit de la paix', (1929) 30 *Recueil des Cours* 304.

26 See *supra* note 18. Reference is in fact made in the Italian Rejoinder (para. 4.12, fn. 67) to an article by the same author: 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong', (2007) 18 EJIL 955, at 967.

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of a peremptory norm, then that rule cannot be applied in such a way as to have that result. This was the basis of the contention as to reservations submitted, and dismissed, in the *Armed Activities* case; the institution of state immunity proves to afford a further example. Certainly the rules that have been recognized as having the status of *jus cogens* are also rules that, on the basis of their attractiveness from an ethical or moral standpoint, should enjoy the widest possible application; but that is not a feature or an outcome of their *jus cogens* status, but a justification. Certainly the reason why a given norm is to be treated as peremptory is because of the interest of the community in seeing the norm observed as widely as possible; but to say, 'This is a peremptory norm, *therefore* it overrides other rules of law', is either a *non sequitur*, or a placing of the cart before the horse.

The Court came at the problem from a slightly different angle. With only one dissentient, it rejected the contention of Italy. It found that:

> This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists... The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[27]

This is, again, an example of 'fields' of international law, but the boundary between 'substantive' and 'procedural' fields is thus much more substantial. The Court could, it is submitted, have conceded that the existing rules on state immunity conflicted with the *jus cogens* norm invoked by Italy, in the sense that those rules protected Germany against the consequences of what, on the basis of that norm, were illegal acts incurring Germany's responsibility; but since that protective effect was not conferred by inter-state agreement but by a general rule of law, the peremptory norm did not over-ride it. But instead of saying that there was a conflict of rules in which the immunity rule prevailed, the Court preferred to say that there was no conflict, because the two norms were in separate 'compartments'.

3.2. The interpretation of treaties

The Vienna Convention on the Law of Treaties continues to be regarded by the Court as the ultimate authority on any matters dealt with in its text. For example, in the *Maritime Dispute* case between Peru and Chile, the Court noted that in a number of cases it had applied Articles 31 and 32 of the Convention to treaties which pre-dated the Convention, and then proceeded to apply them to texts of 1952. This is, in effect, to find that the rules of treaty interpretation expressed in those articles correspond to the rules of customary law on the subject that existed prior to the adoption of

[27] *Jurisdictional Immunities of the State*, Judgment of 3 February 2012, *supra* note 4, at 140, para. 93.

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the Convention. In this, the Court has followed earlier decisions,[28] one of which concerned a treaty of 1858![29]

The theoretical point suggested by these cases is perhaps this: in interpreting a treaty, it is the intention of the parties at the time, and in the light of the circumstances of that time, that has to be sought, and subsequent changes in those circumstances (including changes in the law) must be disregarded. But is the manner, or technique, of interpreting their treaty also something that the parties would, or could, have had in contemplation? If so, then there is, at least in theory, no avoiding the historical research required and the Vienna Convention, as such, is no help. Or are rules of treaty interpretation 'not of an age but for all time', as being the only possible intellectual operation appropriate[30] (or just as 'common sense')?

Another, more justifiable, treatment of the intertemporal aspect of a treaty, in this case the ICJ Statute, was the decision in *Application of the Genocide Convention* between Bosnia and Serbia that the ruling in the *LaGrand* case, that provisional measures indicated under Article 41 of the Statute impose a binding obligation, is equally applicable to measures indicated *before* the *LaGrand* decision had been made.[31] This is logical: in *LaGrand*, the Court had, as it explained, been determining what the intended effect of the Statute was when it was adopted.[32] This does lead to the slightly surprising conclusion that, for example, Iran, by failing to implement the measures ordered in the *Anglo-Iranian Oil Co.* case, was committing a breach of an obligation under international law, though no-one knew it at the time!

Intertemporal questions have also arisen in the interpretation of specific terms of treaties relied on to found jurisdiction; a number of these are considered below in the context of jurisdictional issues.[33]

Generally, if a treaty is to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty',[34] this means *all* the terms, and it is only

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[28] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, [2009] ICJ Rep. 213, at 237, para. 47; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment of 17 December 2002, [2002] ICJ Rep. 625, at 645–6, paras. 37–8; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, [1999] ICJ Rep. 1045, at 1059, para. 18.

[29] The *Costa Rica v. Nicaragua* case (*supra* note 28), in which the Treaty was referred to, with some litotes, as one that 'considerably pre-dates the drafting of the said Convention'.

[30] *Sed quaere*: compare Art. 32 of the Vienna Convention and the rule in UK courts that the parliamentary history of an Act of Parliament may not be put in evidence as a guide to its interpretation. For a recent example of the value of reference to drafting history of a convention, as resolving an ambiguity that there was little or no other means to resolve, see *Application of the Genocide Convention (Croatia v. Serbia)*, *supra* note 4, para. 136.

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43, at 230, para. 453.

[32] The alternative interpretation of the situation, that the meaning of Art. 41 had changed, or 'evolved', was not wholly inconceivable: cf. the ruling on the interpretation of Art. 12 of the UN Charter in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 149–50, para. 27.

[33] See also *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter claims, Order of 6 July 2010, [2010] ICJ Rep. 310, at 317, para. 18, citing *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment of 10 February 2005, [2005] ICJ Rep. 6, at 25, para. 48.

[34] Vienna Convention, Art. 31(1). There may be a preliminary problem in establishing what were the terms, particularly in the case of a 'tacit agreement', something that may be found to exist if there is 'compelling evidence': see *Maritime Dispute*, *supra* note 4, at 37, para. 91, and which may be 'cemented' by, or 'acknowledged in' a subsequent written agreement (ibid., and at 41, para. 102).

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exceptionally that words in a treaty may be ignored as surplus. However, where the Pact of Bogotá excluded matters already 'settled' by arrangements between the parties, or 'governed' by other agreements or treaties, the Court was prepared to find that 'in the specific circumstances of the present case, there is no difference in legal effect' between the two provisions.[35] Subsequently, it was able to find it unnecessary 'to determine whether or not there is a difference of legal effect' between the two phrases,[36] thus implying that there was no absolute presumption that the parties had intended to make a distinction. On the other hand, in the *Racial Discrimination* case, the Court rejected a proffered interpretation of a phrase on the ground that, if it were so interpreted, the phrase 'would have no usefulness'.[37]

3.3. Jurisdiction of the Court

3.3.1. Jurisdictional questions (general)

The function of the Court, as defined in Article 38 of the Statute, is 'to decide ... such disputes as are submitted to it'. In a recent case, the Court has treated this empowerment as implying also a limitation, which the Court treated as a jurisdictional matter. An issue which is not in dispute between the parties, as having been, for example, already agreed between them, may not be included in a decision of the Court, even alongside another issue which the decision *does* resolve and, *semble*, even if the parties agree to ask for its inclusion.[38]

For the most part, however, jurisdictional questions in the cases dealt with in the years under review have been specific, in the sense that the question was whether or not the terms of the jurisdictional instrument relied on were satisfied. As a result of the filing of a number of applications from Latin-American states, many of the decisions have involved the interpretation and application of the Pact of Bogotá, which creates a wide measure of jurisdiction over disputes between states in that region.[39] Other jurisdictional issues have involved the Genocide Convention, and the Convention on the Elimination of All Forms of Racial Discrimination.

A notable category of cases of this kind comprises those where the correct interpretation has intertemporal results: objections *ratione temporis*. An unusual example was the case of the *Application of the Genocide Convention* between Croatia and Serbia, where it was argued that the claim fell outside the jurisdictional clause (Article IX) of that Convention because 'it concerned events which preceded the date on which the FRY [the respondent State] came into existence as a State and thus became capable

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35 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, [2007] ICJ Rep. 832, at 848, para. 39.

36 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 4, at 126, para. 134; *Obligation to Negotiate Access to the Pacific Ocean*, *supra* note 4, at para. 50.

37 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 4, at 126, para. 134.

38 *Frontier Dispute (Burkina Faso/Niger)*, *supra* note 4, at 68–73, paras. 31–59, particularly 70, paras. 48–9. The existence of a dispute may also be a condition of the operation of a jurisdictional clause: see the cases mentioned below.

39 At least one of these cases revealed a major defect in the drafting of that instrument: see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, *supra* note 4, paras. 33–48. The decisions in these cases and others involving treaty-based jurisdiction, have thus also contributed to the law of treaty interpretation.

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of being a party' to the Convention.[40] In this context, the Court made one important distinction between two kinds of treaty obligation:

> a treaty obligation that requires a State to prevent something from happening [in the context, the obligation to prevent genocide] cannot logically apply to events that occurred prior to the date on which that State became bound by that obligation; what has already happened cannot be prevented.[41]

However, '[t]here is no similar logical barrier to a treaty imposing upon a State an obligation to punish acts which took place before that treaty came into force for that State'.[42]

A similar temporal problem, examined in a case between Nicaragua and Colombia,[43] concerned Article XXXI of the Pact of Bogotá. This text provides for jurisdiction on the same lines as Article 36, paragraph 2, of the Statute, i.e., on the basis of individual declarations of acceptance by states, with the same possibilities of limiting the scope of these by reservations. The Court had to resolve the effect in this respect of a denunciation of the Pact. Article XXXI contains a qualification not expressed in Article 36 of the Statute, that the jurisdiction is recognized 'so long as the present Treaty is in force'. On the face of it, this might seem a statement of the obvious, but the question was its interrelation, in temporal terms, with a denunciation of the Pact.[44] This possibility is provided for in Article LVI, on the basis of one year's notice, 'at the end of which period [the Pact] shall cease to be in force with respect to the State denouncing it, but shall continue in force for the remaining signatories', but this is to have 'no effect with respect to pending procedures initiated prior to the transmission' of the denunciation. There is, however, here a hiatus: what of procedures initiated *after* transmission of the denunciation, but before the elapse of the one year's notice?

Into this category fell the application brought by Nicaragua against Colombia. Since this was not a procedure initiated prior to the denunciation, did Article LVI imply *a contrario* that it *was* affected by the denunciation? If so, how could the jurisdictional commitment be considered to continue 'in force' for the remainder of the period of one year's notice? The whole question turned out not to be as simple as it might look, and the parties' arguments were exhaustive; nor was the Court able to resolve the point by one straightforward piece of reasoning: its ultimate decision to reject Colombia's objection was expressed to be based on a number of reasons, and to be reached '[t]aking Article LVI as a whole, and in light of its context and the object and purpose of the Pact'.[45]

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40 See *Application of the Genocide Convention (Croatia v. Serbia)*, *supra* note 4, at para. 77. Some of the events complained of took place as from that date, but the Court had to resolve the issue for the remaining events (the 'great majority' – ibid., para. 91.

41 Ibid., para. 95

42 Ibid., para. 96.

43 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea.*

44 There is a parallel in respect of Art. 36 jurisdiction in relation to the effect of the withdrawal of a declaration of acceptance of jurisdiction: cf. the *Nottebohm* case, Judgment of 6 April 1955, [1955] ICJ Rep. 4 (cited by the Court in its decision in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, *supra* note 4, para. 33).

45 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, *supra* note 4, para. 48.

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3.3.2. Jurisdiction: existence of a dispute

Texts conferring jurisdiction on the Court normally provide for the reference to it of 'any dispute' between the parties, and the question therefore arises from time to time whether there exists a dispute, and if so whether it is of the kind contemplated. A dispute may in fact arise as to whether or not there is a dispute; and this 'dispute-dispute'[46] of course cannot itself be a dispute of the kind contemplated by the text. The definition of the dispute alleged, what it is about, may be vital, both for it to fall into whatever category of disputes is defined by the jurisdictional instrument, and because, even though it is such a dispute, it may then be excluded by some other provision of that instrument.[47]

In the *Racial Discrimination* case, it was argued that, in the context of the mechanisms of the Convention, the word 'dispute' in its text had a special meaning, and the issue before the Court did not fall within that category, but the Court did not uphold this argument.[48] On the other hand, the Court decided, over a strong joint dissent, that 'a dispute does not exist unless the applicant has given notice of its claims to the respondent before the application is filed and the respondent "has opposed" those claims'.[49]

The second preliminary objection of Colombia in the *Alleged Violations* case was also of this kind; the point raised was essentially that a dispute, for the purposes of the Pact of Bogotá, can only exist if the one party has made known to the other that there is a contested issue between them. That being so, the Court's decision (that one of the two alleged disputes did exist, the other did not) turned on considerations of fact. The Court, however, took the opportunity of restating a number of basics: the definition of a dispute (citing the case-law following *Mavrommmatis*); that the point is one 'for objective determination by the Court'; and the critical date for the determination is that of the submission of the application.[50]

A similar issue, but one even more linked to the specific treaty-text (again the Pact of Bogotá), was whether a precondition in that instrument for recourse to the Court referring to 'the opinion of the parties' (on whether or not the dispute could be settled through normal diplomatic channels) signified the opinion of both parties, or merely of one of them.[51] This was not the first time the provision had fallen to be interpreted; as in the previous case,[52] the Court was to 'make its own determination' on the point. It concluded that there was no evidence to show that either of 'the Parties had contemplated, or were in a position, to hold negotiations' on a matter on which they had firmly opposed positions, so that they were effectively in agreement as to

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46 By analogy with *Kompetenz-Kompetenz*.

47 See the decision in *Obligation to Negotiate Access to the Pacific Ocean*, *supra* note 4, paras. 41–50.

48 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 4, at 84, para. 29.

49 The wording is that of the dissenters: Joint Dissenting Opinion of President Owada and Judges Simma, Abraham, Donoghue and Judge *ad hoc* Gaja, [2011] ICJ Rep. 142, at 143.

50 *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, *supra* note 4, paras. 50 and 52.

51 See Pact of Bogotá, Art. II.

52 In which the problem was also raised of discrepancy on the point between the various language-versions of the text: see *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 20 December 1988, [1988] ICJ Rep. 69, at 95, para. 65.

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the futility of diplomatic negotiation. The jurisdictional requirement was therefore met, the Court tacitly[53] holding that it did not need to determine the meaning of 'the opinion of the parties'.

3.4. Incidental proceedings

3.4.1. Provisional measures

A request for the indication of provisional measures, under Article 41 of the Statute, is now a far more frequent feature of contentious cases than it was in the early years of the Court.[54] The first order indicating measures was made in the *Anglo-Iranian Oil Co.* case, in 1951; then followed that in *Interhandel* (1957), and in the two *Fisheries Jurisdiction* cases in 1972. Requests then began to be made more frequently; but there can be little doubt that a turning-point was the decision in *LaGrand* (1999) that an order indicating provisional measures imposes a binding obligation to comply with them on the state addressed – a point on which Article 41 is unclear, and previously scholarly opinion had been divided.[55] Until that date, applicant states may well have felt that there was little point in wasting time and effort on a request for such measures if the state addressed was free to take little or no account of the Court's order.

Sometimes the proceedings on a request for provisional measures, and the order made thereon, suffice to achieve the purpose of the litigation, as occurred in the case of *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia).* After the original order was modified to contemplate return by Australia of the documents seized, and they had been returned, Timor-Leste announced that it had 'successfully achieved the purpose of its Application to the Court, namely the return of Timor-Leste's rightful property, and therefore implicit recognition by Australia that its actions were in violation of Timor-Leste's sovereign rights';[56] it therefore discontinued the proceedings. This was undoubtedly a desirable outcome; but it should be borne in mind that the necessarily provisional view on any jurisdictional issue taken by the Court at the measures stage (and the application of the 'plausible' test – see below) could make it tempting to institute proceedings on a shaky jurisdictional foundation, in the hope of achieving some advantage at least through the indication of measures.[57]

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53 It simply noted that it did not need to 'rehearse' the parties' arguments on the point: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, supra* note 4, para. 95.

54 Of the 12 cases instituted in the period 2010–2016 (counting the three Marshall Islands cases as a single case), four have involved requests for provisional measures.

55 The present author was strongly of the opinion that the interpretation of the Statute affording the legal basis of the *LaGrand* decision was questionable (see H. Thirlway, 'The Law and Procedure of the International Court of Justice 1960–1989: Part Twelve' (2001) 72(1) BYIL 37, at 111–26; and ibid., *The Law and Practice of the International Court of Justice* (2013), Vol. I, 956 ff); but it is clear that a power of the Court to *direct* measures of interim relief fits well into the international dispute-settlement system of today, even though it might not have done so in 1936, let alone in 1922.

56 Removal from List, Order of 11 June 2015, *supra* note 4.

57 This could be one view of Mexico's request for interpretation of the decision in *Avena*, but the end in view – the preservation of a human life – is an excuse, if excuse were needed. See also E.M. Leonhardsen, 'Trials of Ordeal in the International Court of Justice: Why States Seek Provisional Measures when non-Compliance Is to Be Expected', (2014) 5(2) *Journal of International Dispute Settlement* 306.

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Measures normally have to be asked for by a party; Article 75(1) of the Rules does enable the Court 'to examine *proprio motu*' whether measures are needed, but up to now if the Court has ever done so, it has silently decided not to take action. When Nicaragua, in the case of *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica*) invited the Court to undertake such an examination, the Court decided that the circumstances 'were not such as to require the exercise of its power' under this text.[58]

It is now not uncommon for *both* parties to a contentious case to submit requests for the indication of measures. Such a request by a respondent state generally relates to a formal counter-claim by that state; these were formerly an unusual phenomenon, but have also become more frequent.[59] This may reflect an increased complexity in the disputes submitted to the Court, as compared to a straightforward allegation by one state of a breach of international law, and a simple denial by its opponent. However, even where the case is structurally simple in that sense, events may follow whereby it is in the interests of the respondent state to ask for measures, as occurred in the case of *Pulp Mills on the River Uruguay*.[60]

The fact that measures are now to be treated as binding does not, of course, mean that they will be complied with; and the 'death penalty' cases involving the United States showed that non-compliance does not necessarily result from recalcitrance on the part of the state concerned.[61] The Court itself, it may be recalled, has no power to enforce even its final decisions on the merits; still less has it any powers of this nature in relation to a provisional measures order;[62] and the measures, as such, lapse on the completion of the case (though they may to some extent be reflected in the decision on the merits). Mexico, it will be recalled, resorted to a request for interpretation of the *Avena* Judgment, thereby gaining the opportunity of another provisional measures order;[63] but this, like the earlier order, remained something of

58 Request by Nicaragua for the Indication of Provisional Measures, Order of 13 December 2013, [2013] ICJ Rep. 398, at 399, para. 3.

59 See, for example, *Jurisdictional Immunities of the State, supra* note 33; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Counter-claims, Order of 18 April 2013, [2013] ICJ Rep. 200, at 209, para. 24.

60 Argentina, the applicant, asked for measures in the context of its claim against Uruguay (Request for the Indication of Provisional Measures, Order of 13 July 2006, [2006] ICJ Rep. 113); Uruguay subsequently asked for measures (Order of 23 January 2007, [2007] ICJ Rep. 3), inasmuch as groups of Argentinian citizens, in protest against the Uruguayan activities complained of in the case, were blockading an international bridge over the river.

61 The US Government showed willingness to implement the measures, but was unable, in the short term, to do so because the matter was in the hands of one of the constituent states, and constitutionally the federal government could not over-rule the decision taken at that level.

62 An interesting question, but one probably unlikely to have practical importance, is the status of an undertaking by a party of the kind given in the cases of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Provisional Measures, Order of 28 May 2009, [2009] ICJ Rep. 139, at 155, paras. 71–2; and *Questions relating to the Seizure and Detention of Certain Documents and Data*, Provisional Measures, *supra* note 4, at 158–9, paras. 43–7. Is it a unilateral declaration creating legal obligations, even outside the procedural framework, on the lines of those given by France in the *Nuclear Tests* cases?

63 *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 for the Indication of Provisional Measures, Order of 16 July 2008, [2008] ICJ Rep. 311. In the *Temple of Preah Vihear (Interpretation)* case, the Court noted in its judgment that measures had been indicated, but made no further comment, *supra* note 4, at 294, para. 29.

a *coup d'épée dans l'eau*. In the two joined cases between Costa Rica and Nicaragua, the Court found that Nicaragua had 'acted in breach of its obligations' under the 2011 Order indicating measures, but found that the Court's declaration to that effect provided adequate satisfaction.[64]

A difficulty which is becoming more noticeable with the frequency of provisional measures orders is that of the relationship between any tentative findings that the Court has to make in order to decide whether or not measures are required, and its later definitive findings on the main case. Orders on requests for measures contain a standard disclaimer that the decision 'in no way prejudges' its decision on the questions, whether of jurisdiction, admissibility, or merits, that have been touched on. In the *Georgia* v. *Russia* case the Court, however, found it appropriate to emphasize this in its eventual judgment,[65] perhaps fearing that it had given too much the impression of having made up its mind at the earlier stage.

3.4.2. Intervention

3.4.2.1. Intervention under Article 62 of the Statute. Increased participation in ICJ proceedings has also taken the form of more frequent use of the possibilities of intervention under Article 62 of the Statute. That provision (and Article 63 on another form of intervention) had been little used until the Court began, at the end of the 1970s, to be invited to determine bilateral maritime delimitations in areas where third states considered that their claims and interests were also involved. The history of the process of intervention need not be retraced here, but it may be recalled that the stumbling block, when there was first recourse to this procedural option, in the context of maritime delimitation, was the question of jurisdiction. Did an intending intervenor have to show that there existed a jurisdictional basis such that it could have brought independent proceedings? If so, what was the point of intervention? If not, was this not too great an infringement of the consent principle as the basis of jurisdiction?

Since the decision of a Chamber of the Court in the *Land, Island and Maritime Frontier* case, it is recognized that there are two sorts of intervention under Article 62: as a party, for which a jurisdictional link is required, and as a non-party. In either case, Article 62 requires reliance by the would-be intervener on 'an interest of a legal nature which may be affected by the decision'.[66] Recent jurisprudence has, however, brought out a further difficulty (though perhaps only at a verbal level) in reconciling intervention, as having this basis, with the general principle of the relativity of the effect of judicial decisions, expressed in Article 59 of the Statute. If a judgment of the Court cannot affect the rights (or interests) of states not parties to

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64 *Certain Activities Carried Out by Nicaragua in the Border Area*, Judgment of 16 December 2015, *supra* note 4, paras. 129 and 139. The Court refused to award Costa Rica its costs in respect of this aspect of the case: ibid. para. 144; and see the powerful dissent of Judges Tomka, Greenwood, Sebutinde and Dugard, ibid.

65 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, supra* note 4, at 124, para. 129.

66 There is nevertheless some suggestion in two recent decisions that a state seeking to intervene *as a party* must show that not merely a legal interest but a *right* must be potentially affected: see *Territorial and Maritime Dispute*, Application of Costa Rica for Permission to Intervene, *supra* note 4, at 358, para. 26; Application of Honduras for Permission to Intervene, *supra* note 4, at 432, para. 29.

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the proceedings, then logically it should be impossible to show that such an interest 'may be affected' by a future judgment; which would mean that no intervention could ever be justified! The problem is not just hypothetical: in the *Territorial and Maritime Dispute* between Nicaragua and Colombia, Costa Rica, seeking to intervene, was unable to show 'that its interest of a legal nature in the maritime area bordering the area in dispute between Nicaragua and Colombia needs a protection that is not provided by the relative effect of decisions of the Court under Article 59 of the Statute'.[67]

A further fundamental question, to which attention was drawn by Judge Abraham in the *Nicaragua* v. *Colombia* case, is whether intervention is a right:

> in the sense that intervention is not an option whose exercise is subject to permission to be granted or withheld at the discretion of the Court, according to what it considers, on a case-by-case basis, to be in the interest of the sound administration of justice.[68]

Intervention is intended for the benefit (at least primarily) of the intervening state. In some cases, it might well be useful *for the Court*, before deciding a case, to hear the views of a third state which is somehow involved in the matter, but this is not the criterion. It is only in advisory cases that a state may be treated as 'likely to be able to furnish information', and on that basis give its views on the legal issues involved.[69] Yet it was indicated in the context of maritime boundary delimitation, where a full picture of claims in the relevant area is essential, that even when an intervention is rejected, the Court may 'take note of' the information supplied by an unsuccessful intervenor,[70] with the implication that this information might affect its judgment. There is thus some incentive for third states even to attempt to intervene. On the other hand, a successful intervention apparently may not necessarily carry the consequence that the legal interest will not be affected: the Court has also defined the purpose of intervention as being 'in order to ensure that no legal interest may be "affected" *without the intervener being heard*'.[71]

3.4.2.2. Intervention under Article 63 of the Statute. Interventions of this kind are still not common, perhaps because of the fact that a state intervening on this basis to advance its view on the construction of a multilateral convention will, as the text of the Article makes clear, be bound by the Court's decision on the point. New Zealand chose to make such an intervention in the case of *Whaling in the Antarctic*, essentially

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67 Application of Costa Rica for Permission to Intervene, *supra* note 4, at 372, para. 87; the decision was adopted by 9 votes to 7.

68 See *Territorial and Maritime Dispute*, Application of Costa Rica for Permission to Intervene, *supra* note 4, Dissenting opinion Judge Abraham, at 384, para. 4. The judgment in that case lays itself open to this criticism by invoking 'the sound administration of justice', a consideration difficult to pin down, and therefore difficult to keep under control.

69 See Statute, Art. 66(2); 'information' has never been interpreted as limited to *factual* information, but includes information as to the state's view of the applicable law.

70 *Territorial and Maritime Dispute*, Application of Costa Rica for Permission to Intervene, *supra* note 4, at 363, para. 51. Although the Court does not say so, presumably it would also take note of any information supplied by the parties in response to the attempted intervention.

71 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment of 13 September 1990, [1990] ICJ Rep. 92, at 130, para. 90, quoted in *Territorial and Maritime Dispute*, Application of Costa Rica for Permission to Intervene, *supra* note 4, at 360, para. 34 (emphasis added).

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in support of the contentions of the applicant, Australia, on the construction of the International Convention for the Regulation of Whaling.[72]

It has been suggested by a Member of the Court that it is desirable for the Court to be supplied with the views of states not parties to the proceedings on the interpretation of an international convention in issue in the case, or even on 'questions relating to general international law', and that a less formal procedure should be provided.[73] It may be doubted whether this would be justified as within the Statute, even though a 2005 amendment to Article 63 of the Rules made similar provision for international organizations,[74] or whether states parties to a case would welcome such an innovation.

4. Concluding remarks

Summing up, this analysis of many of the decisions given since 2010 gives a clear picture of 'business as usual',[75] with perhaps no striking jurisprudential innovations, but a solid body of revelation and clarification of the law in the domains considered; and the settlement of a number of disputes. The proceedings of the Seminar held to mark the Court's 70th anniversary focused on the way the Court is viewed by its clients, and indicated that the 'cruising pace', mentioned above[76] as being maintained by the Court, points to an acceptance and recognition among states of its value as a means of settling disputes, and of developing the law, as much as to the efficacy of its working methods. The approach at the Seminar also involved comparison with other means of international dispute settlement. The discreetly unspoken question was 'How can the Court attract more business?' This question would have been unrealistic when the *South West Africa* decision, and to a lesser extent that in *Barcelona Traction*, had put off many states from coming to The Hague. It would also have been an unrealistic approach in more recent years, but for a different reason: the Court was struggling to keep up with the business that it already had. By strenuous efforts, it has caught up with the backlog of work that then existed, and now seems able to maintain a satisfactory 'cruising pace'.

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72 There was in fact some suggestion that this course had been chosen, in preference to institution of proceedings jointly by Australia and New Zealand, in order that Australia might have a judge *ad hoc* despite the presence of a regular judge of New Zealand nationality: see Intervention of New Zealand, *supra* note 4, at 9, para. 21, and the Declaration of Judge Owada, ibid., 11, at 12–13, paras. 4–6.

73 See G. Gaja, 'A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice', in U. Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011), 665.

74 The change may be regarded as an implementation of Art. 43(3) of the Statute.

75 This phrase, associated with commercial operations during repairs or renovations to the premises, is perhaps particularly appropriate, as the Court has, for a substantial period, been excluded from a major part of its accommodation in the Peace Palace, following the discovery, in the summer of 2014, of the presence of asbestos in the building.

76 See *supra* note 7 and accompanying text.

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