BOOK REVIEWS

The Law and Practice of the International Court, 1920-1996, by S. Rosenne, Nijhoff, The Hague, 1997, ISBN 90 411 0264 74, Vols. cxiv + 1960 pp., US $617/UK£ 389/Dfl. 995; and

Commentaries on World Court Decisions (1987-1996), by P. Bekker (Ed.) Nijhoff, The Hague, 1998, ISBN 90 411 0558 1, xxi + 301 pp., US $99.50/ UK£ 59.50/Dfl. 175.

Dr Rosenne's *The Law and Practice of the International Court, 1920-1996* is a slip-cased four volume work whose doctrinal authority far exceeds its substantial material weight. It is the culmination of numerous scholarly articles and six monographs, namely *The International Court of Justice: An Essay in Legal and Political Theory* (1957), *The Time Factor in the Jurisdiction of the International Court of Justice* (1960), reprinted in a slightly revised form, with an addendum in S. Rosenne, *An International Law Miscellany* (1993), *The Law and Practice of the International Court* (1965, reprinted 1985), *Procedure in the International Court: a Commentary on the 1978 Rules of the International Court of Justice* (1983), *Intervention in the International Court of Justice* (1993), and *The World Court: What it is and How it Works* (1995).

As he states in his preface (pp. xxvi-xxvii): "in rewriting this work I have made full use of all my previous work on the Court. Over a period of nearly fifty years, in which I have acquired much experience both of the United Nations and of the Court, my views have matured and developed. I make no apologies if positions presented here are not parrot-like repetitions of something I have written earlier." Although for any other scholar, a work such as *The Law and Practice of the International Court, 1920-1996* could credibly be seen as the summation of a lifetime's work, I hope this is not so. Rather, with a view to both Dr Rosenne's continued existence, and thus our continued enlightenment, we should hope that it does not constitute his final word on the Court. Indeed, Dr Rosenne's scholarly achievement is not to be measured solely by his work on the International Court as he has made eminent contributions in other fields of international law, such as the law of treaties (see, e.g., S. Rosenne, *The Meaning of "Authentic Text" in Modern Treaty Law,* which deserves to be recognized as a classic exposition of the question; and the monographs *Breach of Treaty* and *Developments in the Law of Treaties 1945-1986*, which presents a complex, profound and demanding analysis), the law of the sea (in particular, his contribution to the University of Virginia multi-volume *The United Nations Convention on the Law of the Sea 1982: A Commentary*), and codification (see his edited collections *The Progressive Codification of International Law (1925-1928)* and *League of Nations Conference for the Codification of International Law* (1975)).

The publishers designate *The Law and Practice of the International Court, 1920-1996* as the third edition of *The Law and Practice of the International Court*, first published in 1965 and reprinted in 1985. This designation is perhaps misleading for two reasons. Firstly, the work bears a clear genetic relationship to Dr Rosenne's 1957 monograph *The International Court of Justice: An Essay in Legal and Political Theory*. This early work clearly sets out some of the fundamental conceptual features of Dr Rosenne's analysis of the work of the International Court. Secondly, since 1965 far-reaching developments have taken place in the law and practice of the International Court. These have not simply arisen as a result of the 1972 amendment of the Rules of Court, culminating in their revision in 1978, although this reformulation of the Court's procedure has had a profound impact on some matters – for instance, *Law and Practice 1965* examined Chambers procedure in a page of text (pp. 591-592) whereas *Law and Practice 1997* now contains a chapter dedicated to this single issue. Developments have also occurred in the parties' procedural manoeuvres which have necessitated Dr Rosenne to insert chapters on questions such as non-appearance and, especially, intervention to replace the bare handful of pages examining these questions in the 1965 edition. Nor has the Court rested content with simple adhesion to its past practice. Perhaps particularly in its treatment of preliminary objections, the Court has restructured its practice since 1965, a development initially mapped out by Dr Rosenne in *The Reconceptualization of Objections in the International Court of Justice*[1] and expanded in this work. As Dr Rosenne emphasises in the preface (p. xxv): "new forms of testing the jurisdiction of the Court have appeared and introduced serious complications into the practices, techniques and tactics of the judicial settlement of international disputes through the International Court".

A related pertinent development has been the relatively recent emergence of what Dr Rosenne terms pre-judicatory proceedings (*Law and Practice 1997*, p. 905 *et seq.)*, in which the Court determines whether it has been seised of a case, as exemplified by the 1994 *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Jurisdiction and Admissibility)* judgment and the 1995 *Request for Examination of the Situation in Accordance With Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France)* proceedings. All this is without considering the specific effects on the Court's practice and procedure of its jurisprudence as such, contained in proceedings such as the 1966 judgment in the *South West Africa* cases and the *Namibia* advisory opinion, the *Nuclear Tests* cases, and the chain of

1. First published in *Il Processo Internazionale: Studi in Onore di Gaetano Morelli*, 14 Comunicazioni e Studi 735 (1975), reproduced *in* Dr S. Rosenne, An International Law Miscellany 133 (1993). As Dr Rosenne notes (Law and Practice, 1997, at 840, n. 7) this change in practice required him to retitle the chapter dealing with jurisdictional challenges from *Preliminary Objections to Matters of Jurisdiction*. This chapter has also virtually doubled in size, at 437-468 in Law and Practice 1965 but at 837-933 in Law and Practice 1997.

cases dealing with maritime delimitation. In sum, *Law and Practice 1997* is better seen as a new work which not only takes meticulous account of these extensive developments but, as Dr Rosenne notes in the preface (p. xxiv), has also been completely restructured.

The most immediate evidence of this restructuring is that *Law and Practice 1997* comprises four distinct volumes. The first, entitled *The Court and the United Nations* examines the diplomatic, political, and administrative aspects of the Court, covering such matters as the role of the Court in the peaceful settlement of disputes, elections, compliance, and enforcement of judgments, and requests for advisory opinions. The second and third volumes are each devoted to a single broad question: volume two examines jurisdiction and volume three procedure. The fourth volume is more narrowly instrumental as it contains a series of indices and the principal primary instruments, namely the United Nations Charter, the Statute of the Court, and the 1978 Rules of Court. Although volume four contains only the English versions of these instruments, where necessary – and this is particularly true of volume three – both the English and French versions are reproduced and compared in the text of *Law and Practice*. Finally, volume four also contains a brief addendum (*Law and Practice 1997*, pp. 1865-1868), setting out some recent proposals aimed at amending the Statute to allow public international organizations to participate in contentious proceedings.

Law and Practice 1997 is not intended to be an overview of the Court's substantive jurisprudence, but rather a comprehensive analysis of its constitutional and procedural aspects. It comprises a compendious survey of these matters, based firmly on primary sources. In line with the earlier versions of this work – and indeed his other monographs on the International Court – Dr Rosenne is sparing in his references to secondary materials. Nevertheless, his analysis of practice is so comprehensive that it is improbable that *Law and Practice 1997* could ever be bettered as a reference manual. With the exception of *Intervention in the International Court of Justice*, the analysis contained in *Law and Practice 1997* is more elaborate and cuts deeper than that contained in his earlier monographs. This should not be taken as an indication that the reader is short-changed by Dr Rosenne's analysis of intervention in *Law and Practice 1997*. Chapter 26, *Intervention by Third States* is one of the most extensive in the entire work, drawing heavily on the earlier monograph and setting out a thorough exposition of the matter. While, by its nature, this version axiomatically supplants both *Law and Practice 1965/1985* and *The International Court of Justice: An Essay in Legal and Political Theory*, the depth of its analysis far outstrips that contained in *Procedure in the International Court*. Not surprisingly, this is particularly true of volume three, although Dr Rosenne's discussion of the judicial personnel of the Court in volume one has been completely restructured to take account of the express distinction between the members of the Court (titular judges) and the Bench (titular judges plus judges *ad hoc*) introduced by Article 1 of the 1978 Rules of Court. Further, as noted above, Dr Rosenne does not simply reiterate

the substance of his earlier work. His work on the International Court has been cumulative, an exercise in the continuous development of his ideas which leads, at times, to the express acknowledgement that he has changed his opinion on an issue (see, e.g., p. 1229, n. 79).

Having said that, while *Law and Practice 1997* displays a clear line of continuity from both *Law and Practice 1965/1985* and *The International Court of Justice: An Essay in Legal and Political Theory*, it is yet a substantially different work. Dr Rosenne prefaced *The International Court of Justice* by stating (p. vii): "The object of this book is to examine the interplay of political and legal factors having a bearing upon the International Court of Justice and the role it is called upon to play in modern international intercourse. This involves first of all appraisal of the status of the Court as a principal organ and the principal judicial organ of the United Nations, and secondly a re-examination of its whole practice and procedure".

Although it is undoubtedly true that both these elements are retained in *Law and Practice 1997*, it is equally true that the emphasis of this work has moved firmly and emphatically towards the second. This is now principally a detailed and compendious account of the Court's practice and procedure, a scholarly and articulate work of record, rather than an essay in legal and political theory. Indeed, the legal and political theory – contained essentially in the first three chapters of *Law and Practice 1997* – is rooted in the first three chapters of both *The International Court of Justice* and *Law and Practice 1965/1985*. This is structured around a few almost axiomatic propositions, the most important of which appears to be: "once the close interrelation between the political and the legal factors is recognized and the function performed by the existence of the Court (as distinct from the performance of that function by the Court itself) is seen in the ultimate analysis is a political one, much of the Court's practice and procedure, and of the attitudes of States towards the Court, appears in a new perspective" (*Law and Practice 1997*, p. 6, repeating virtually verbatim a passage from *Law and Practice 1965* p. 4, itself mirroring a substantially similar passage in *The International Court of Justice,* p. 4). This stress on the political context expresses itself in basic premises, such as Dr Rosenne's continued reiteration that the Permanent Court is not to be confused with the International. He notes: "as this work has progressed from its initial edition in 1957 through those of 1965 and 1985 to date, the impression has grown stronger that, whatever the present Court's superficial resemblances to and descent from the Permanent Court, it cannot today be regarded as being the same institution under a new name or as meeting the same needs" *(Law and Practice 1997,* p. 8. This impression had its genesis, and initial quickening, in Dr Rosenne's preparation of *The International Court of Justice,* see p. 5, which continued during *Law and Practice 1965*, see p. 5). Dr Rosenne has, however, continually recognised that a functional continuity was deliberately maintained between the two Courts at the San Francisco Conference exemplified, for instance, in the International Court's

employment of precedents established by the Permanent Court and its adoption, with minor amendments, of the 1936 Rules of Court in 1946 (*Law and Practice 1997*, pp. 74-77; mirroring *The International Court of Justice*, pp. 31-33, and *Law and Practice 1965*, pp. 42-44), which remained in force until their revision in the 1970s. Nevertheless, he also argues that it is uncertain whether one can rely on earlier procedural rulings and precedents: "Fundamental differences in the organic structure of the two Courts, and of the respective judicial communities, to a great extent reflected in the major revisions of the Rules of Court (in 1936 and 1978), leave room for doubt how far, in the absence of clear indications by the present Court, different procedural decisions of the Permanent Court or even of itself at some past moment will continue to be followed" (*Law and Practice 1997*, p. 1082; mirroring *The International Court of Justice* at 380, and *Law and Practice 1965*, p. 546).

Indeed, basing himself on a letter from the Registrar in the *ILO Administrative Tribunal* advisory opinion proceedings, he argues that "precedents of a procedural character and based on the previous Statute and Rules cannot safely be followed today" (*Law and Practice 1997,* p. 281, n. 2, repeating verbatim *The International Court of Justice* p. 441, n. 1 and *Law and Practice 1965*, p. 652, n. 1). [2] This is possibly too broad a statement, especially given the attendant circumstances. The Registrar's letter was prompted by a request from the lawyer representing the staff members whose complaint lay at the root of the proceedings, asking guidance on how their views might be presented to the Court. This made an allusion to the direct transmission of the views of the minority in the Danzig Senate in the *1935 Danzig Legislative Decrees* advisory proceedings. The Registrar's reply recalled the procedure adopted in *Danzig Legislative Decrees*, but also adverted to the fact that the operative Statute at that time was the 1920 Statute which made no provision for advisory proceedings, and the applicable Rules of Court were those of 1931 (Letter from the Registrar dated 7 January 1956, *Pleadings* pp. 237-238). Consequently, the resonance of this specific statement must be circumscribed by its context, although Dr Rosenne surely has some point when one considers the procedural mutations which have accompanied the Court's successive treatment of, for instance, intervention.

One of the most interesting procedural mutations discussed by Dr Rosenne is the emergence of pre-judicatory proceedings (see *Law and Practice 1997*, p. 905

2. While noting a verbatim transmission of text between successive versions, it might also be worth noting a variant reading in *Law and Practice 1997* which is possibly a misprint. At 717, while discussing *forum prorogatum*, Dr Rosenne notes that this can arise from the parties' tacit consent as this results from their pleadings. This could result in a transformation of the case such that third States' interests in relation to intervention could be prejudiced. Dr Rosenne suggests that this procedural difficulty "could be overcome by temporarily suspending the proceedings in order to permit the necessary modification to be made to the interested States". It is submitted that the earlier versions, which use the term 'notification' in place of 'modification', is to be preferred (*The International Court of Justice* p. 298 and *Law and Practice 1965,* p. 358-359).

et seq.), which he defines as a "threshold proceeding to determine whether the Court has been seised of a case at all". He locates the source of the Court's authority to entertain pre-judicatory proceedings in Article 48 of the Statute, which provides: "The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence".

Dr Rosenne argues that the first instance of pre-judicatory proceedings was exemplified by the 1994 judgment in the *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* case. In this the Court decided that the parties had not fully implemented the framework agreement under which they had agreed to refer their dispute to the Court, and fixed a time-limit within which the parties were to do so. The second instance was the 1995 *Request for Examination of the 1974 Nuclear Tests* case brought by New Zealand against France, arising from the latter's resumption of nuclear tests in the Pacific, in which the applicant relied on paragraph 63 of the 1974 judgment as a jurisdictional title. Perhaps especially, Dr Rosenne sees the *Request for Examination* proceedings as innovatory: "Although the circumstances leading to that decision are not likely to be repeated, the new provision of Article 38, paragraph 5 of the Rules [...] may require a decision by the Court whether a case has been brought before it or not. The *Request for Examination* case illustrates how the Court can deal with such a situation" (*Law and Practice 1997,* p. 909).

Article 38(2) provides that an application "shall specify as far as possible" the jurisdictional title relied on, and paragraph 5 that if the applicant "proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested" by the putative respondent that no action shall be taken in the proceedings until this consent is forthcoming. Art. 38(5) of the Rules was applied in an initial phase of the dispute which subsequently became the *Gabčíkovo-Nagymoros Project* case following the conclusion of a special agreement conferring jurisdiction on the Court, and in relation to a purported application deposited by Yugoslavia against NATO member States in 1994 (*Law and Practice 1997*, pp. 1222-1223 and 1239).[3]

One might consider whether the *Free Zones* litigation, and in particular the order of 19 August 1929 provides an analogy or prototype for pre-judicatory proceedings. It may be recalled that the parties to this case had asked the Court to give them a reasonable period to settle between themselves a new customs regime for the free zones of Upper Savoy and Gex. Accordingly, the parties had indicated that, after the Court had finished its deliberations but before it formally rendered judgment, they would raise no objection if the Court unofficially communicated to them "any indications which may appear desirable as to the result

3. On the latter, compare the 15 November 1993 Statement of Intention by the Republic of Bosnia and Herzegovina to Institute Legal Proceedings against the United Kingdom before the International Court of Justice, reproduced *in* F.A. Boyle, The Bosnian People Charge Genocide 365 *et seq* (1996).

of the deliberation". The Court rejected this request as, in principle, illegitimate because it breached the terms of the Statute but, to facilitate a "direct and friendly settlement" between the parties as a "strictly exceptional" measure,[4] it indicated its views. The Order's operative clause fixed a time-limit for the conclusion of a negotiated agreement. The possible analogy arises with pre-judicatory proceedings on two counts. Firstly, this was a procedural manoeuvre adopted by the Court to indicate prospectively that it could not be validly seised of an issue in breach of its Statute. Secondly, this ruling was contained in an order. Although the outcome of the *Qatar/Bahrain* pre-judicatory proceedings were embodied in a judgment, the *Request for Examination* proceedings culminated in an order. On the latter, Dr Rosenne comments: "Article 79, paragraph 7, of the Rules requires a decision on a preliminary objection to be in the form of a judgment. By framing this decision in an order the Court, apart from differentiating the case from a preliminary objection, preserved intact the 1974 judgment, including its paragraph 63, should occasion arise in which New Zealand should find it appropriate to have further recourse to it" (*Law and Practice 1997*, p. 909).

Free Zones contains further food for thought. Dr Rosenne repeatedly states that it is controversial whether an order indicating provisional measures is binding (*Law and Practice 1997*, p. 957, n. 42, 1434 and 1451-but compare p. 240). Nevertheless, in considering the 29 August 1929 *Free Zones* order, he notes that although the Permanent Court stated that, unlike judgments, orders had no binding force in terms of Article 59 of the Statute or final effect in terms of Article 60, this statement was "carefully limited" to indicating that orders do not create the same obligations for that parties that arise under judgments. Further: "This does not mean, however, that an order is not binding in a procedural sense, or that an order can be disregarded by a party simply because it does not come within the scope of Article 59 (*Law and Practice 1997*, p. 1622). This identifies the nub of the matter. Although the force of orders, especially interim measures orders, has aroused some controversy, to deny that they are binding would appear to confuse the creation of an obligation by the order and the creation of *res iudicata* by the order. This distinction was expressly recognised in the 1933 Registrar's Report on the Revision of the Rules which stated: "Orders are no doubt binding on the parties from the moment when the latter have received official communication of their contents. (Obviously, however, an order cannot create *res iudicata*)".[5]

Dr Rosenne's apparent unwillingness to take a clear stance on the force of provisional measures orders is, to an extent, characteristic of his treatment of controversial doctrinal matters or possible developments. These are given short shrift, if discussed at all. For instance, he dismisses proposals that the Secretary

4. Free Zones case (France *v.* Switzerland), 1929 PCIJ (Ser. A) No. 22, at 12-13.
5. Free Zones case (France *v.* Switzerland), 1929 PCIJ (Ser. D), addendum 3, at 831.

General should be empowered to request advisory opinions in a single paragraph (*Law and Practice 1997,* pp. 1058-1059) and given his authority on the law of treaties, his discussion of the nature of declarations made under Article 36(2) of the Statute is not candid enough (*Law and Practice 1997,* p. 816 *et seq*). Also one would search long and hard but fruitlessly to find any mention of the possibility of the Court exercising judicial review over decisions of the Security Council despite the contemporary interest this question attracts. Perhaps this feature of *Law and Practice 1997* most clearly illustrates its nature as a learnèd and comprehensive compendium of the Court's practice, rather than a conjectural account of its work. As Dr Rosenne comments at one point, "any attempt at prognosis would be pure speculation" (*Law and Practice 1997*, p. 745).

This is not to say that the work is devoid of evaluation of the Court's practice, although it must also be said that Dr Rosenne is fairly sparing in his criticism – but when he does so, he can be devastating, see, e.g., p. 998, n. 29 on the Court's ruling in the *Nuclear Weapons (WHO)* advisory opinion (para. 28) that the organisation was "not empowered to seek an opinion on the interpretation of its Constitution in relation to matters outside the scope of its functions".

One recurrent point he makes is that the Court's procedure imposes a bilateral and statist framework on the disputes brought before it (see, e.g., p. 557, 608 *et seq*, 1380, and 1654: this is a consideration which has occupied Dr Rosenne in the past, see *Law and Practice 1965* p. 593). This, he claims, is an anachronistic relic suitable for nineteenth century arbitral procedure: "but the unforeseen expansion in the employment of the multilateral treaty on the one hand itself leading to the doctrine of *erga omnes* obligations, and the ever-increasing complexity and multilateralization of international relations in general, must give rise to doubts whether a dispute settlement mechanism based on the single assumption that disputes exist only between two parties is adequate or even appropriate for modern needs" (*Law and Practice 1997,* p. 1654).Coming from such an authoritative and restrained commentator as Dr Rosenne, this opinion must be given serious consideration.

Finally, in discussing the nature of international law, Dr Rosenne adverts to the Buddhist conception of "the 'kingless authority' of the law" (p. 209). *The Law and Practice of the International Court, 1920-1996* clearly demonstrates who is the king of the authorities on the International Court. It serves to place beyond doubt, if indeed any doubt could exist, Judge Bedjaoui's assessment that Dr Rosenne is: "on the Court, the quintessential author, the reference and the standard of value, the jetty to which all studies on the Court are secured" (in S. Rosenne, *The World Court: What it is and How it Works,* p. xi (1995)).

Turning now to Bekker, *Commentaries on World Court Decisions (1987-1996)*, this is a multi-authored work which examines the International Court's judicial activity during this decade. Most, but not all, of these commentaries have been previously published in the *American Journal of International Law.* Reflecting the exigencies of this initial source, the commentaries are, on the

whole, fairly brief although the contributors include some of the respected luminaries of commentators on the International Court – for instance, David Bederman, Dr Bekker himself, Jonathan Charney, Terry Gill, and Keith Highet. The commentaries of individual cases are accompanied by a textual apparatus which includes an introductory essay outlining the Court's role and procedure, essays outlining its activity in each of the years in question, and various annexes. The commentaries follow a common format. A brief account is given of the genesis of the proceedings, followed by a concise summary of the judgment or advisory opinion. Where relevant, the views of judges delivering individual opinions are canvassed, and finally necessarily brief, but pithy, comments and evaluation are offered. Perhaps the most interesting commentary – not previously published in the *American Journal* – is that written by Bekker and Highet on the 1994 and 1995 judgments in the *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* case. This does not focus on the first judgment, that which Dr Rosenne found so interesting and innovative, but rather concentrates on the 1995 judgment in which the Court finally assumed jurisdiction. The critical analysis of this case, apparently written by Highet alone (p. 191, n. 1), constitutes a short but sharp assessment of the Court's handling of an instrument apparently akin to the joint Greco-Turkish communiqué it rejected as a submission to jurisdiction in the *Aegean Sea Continental Shelf* case. Highet is particularly agitated because the Court refused to take into account affidavit testimony of two Bahraini cabinet ministers that, in signing the instrument on which the Court based its jurisdiction, they did not intend to enter into an obligation which would allow Qatar to seise the Court unilaterally. He sees this as potentially damaging to the Court's future prospects as it might impel caution in the negotiation of special agreements. This could tilt the initiation of proceedings towards a reliance on unilateral applications, where it must be expected that States will raise any jurisdictional objections they can.

As one would expect given the original provenance of most of these commentaries, they are well-informed and well-written. Although not without utility as a collection of *aides-mémoires* of the Court's activity during the period 1987-1996, on the whole the depth of critical analysis provided is insufficient to aid scholarly investigation to any great extent. No criticism is intended of the individual authors: it is obvious that they were working to a brief, and have acquitted themselves well within the compass of this endeavour. Given the ubiquity of the *American Journal*, however, one might well wonder why it was thought necessary – apart, perhaps, from considerations of convenience – to republish them as a collection.

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L'utilisation du raisonnable par le juge international. Discours juridique, raison et contradictions, by O. Corten, Bruylant, Bruxelles, 1997, ISBN 2-8027-1021-4, 695 pp.

It can be said that international law, in order to be efficient, must follow the principle of Antoin de St. Exupéry's King, who only gave reasonable orders, so that he would be obeyed: "If I ordered a general to fly from a flower to the other like a butterfly, or to write a tragedy, or to transform himself into a sea bird, and if the general did not execute my orders, who would be in tort, he or me ?" asked the King of the Little Prince. The Little Prince answered the King: "You", and the King then replied: "You are right [...] I can expect to be obeyed because my orders are reasonable".

This parable shows the importance of 'reasonableness' of the rules in any legal system, and it is the merit of Olivier Corten to have chosen to study this concept in public international law.

His study follows a general approach described by the author himself as linked with the sociology of law. In other words the author refuses a purely descriptive approach – which he calls sterile empiricism – as well as a purely conceptual approach – which would amount to abstract rationalism: the objective of the study is to analyse the functions of the use of 'reasonableness' in the complex relationship between law and society. This review cannot make justice to all the subtleties of the rigorous analyses and typologies proposed by Olivier Corten in his pluridisciplinary approach. Only the main ideas will be presented. 'Reasonableness' seems at first glance to incorporate two complementary dimensions, on the one hand 'rationality' and on the other 'common sense' or even better 'common values'. It is this complex notion that the authors will analyse in a thorough and scientific study.

In the first part of his study, Olivier Corten tries to determine *where* this concept of 'reasonableness' is used, and *for what purpose*: after this analytical approach, the second part will be more philosophical and sociological and studies *the content* given by the international judge to 'reasonableness'.

This book starts with a serious inventory of the multiple levels at which reasonableness may be found in the judicial process in international law. Olivier Corten examines successively reasonableness in the interpretation of the rule of law, the establishment of facts, the qualification of facts and "the jurisdictional discourse", looking in each case first to practice and then to theory; but 'reasonableness' is not only to be found in the jurisdictional procedure, it can also be included in the rule of law itself, expressly or implicitly.

Once the fact of the broad and omnipresent use of 'reasonableness' has been established, the author turns to the crucial question of why this notion of 'reasonableness' is used. He shows, in one of the most stimulating parts of his analysis, that the functions of a reference to reasonableness are multifold, but can be analysed under two broad categories, which he calls 'the technical func-

tions' and "the ideological functions".

Among the technical functions, the first and most obvious one is a function of adaptation of the rule to the situation it is deemed to regulate. Certainly, the notion of 'reasonableness' is not very well defined, but precisely this explains its role: "l'indétermination du 'raisonnable', loin de constituer un défaut, représente donc sa qualité première" (p. 150). 'Reasonableness' is, at the same time, a means to give a certain margin of interpretation of the rule, and a means to limit the power of interpretation of the judge, which cannot arrive at an 'unreasonable' result; "la notion apparaît comme indispensable à la prise en compte du mouvement dans le droit, et peut être considérée comme un concept privilégié permettent le déploiement d'une méthode dialectique favorisant le va et vient entre la règle juridique et la situation sociale qu'elle a vocation à régir" (pp. 164-165). In this regard, Olivier Corten quotes Judge Alvarez, in his dissenting opinion in the *South West African* case before the ICJ: "at present, the strict literal sense of the text is sought [...] deductions are made, by pushing logic too far. To this end a whole juridical technique is brought into play, and as a result, solutions are often found which are unreasonable and unacceptable to public opinion [...]. Extreme logic, dialectics and exclusively juridical techniques must also be banished. Reality, the requirements of the life of nations, the common interest, social justice, must never be forgotten" (p. 165).

The second technical function of 'reasonableness' is described as "une fonction latente de renvoi au fondement de l'activité juridictionnelle" (p. 165). Under this quite sophisticated (unreasonable?) title, Olivier Corten develops the interesting idea that the reference to 'reason' which is included in' «reasonableness' is necessary for the judge to make a decision, because there is nothing as an 'objective truth' in the establishment of facts, a single interpretation of the rule, or a unique solution to the case submitted to the judge imposed by the mere logic of reasoning. In other words, following Chaïm Perelman, Olivier Corten assumes that 'the logic of reasonableness' is the only possible basis for any scientific discourse, including the legal discourse: "la position perelmanienne apparaît en harmonie avec les développements contemporains de l'épistémologie, tendant à relativiser les notions de vérité et de certitude tout en préservant une valeur scientifique à tout énoncé appuyé par une argumentation raisonnable" (pp. 206-207). In other words, the second technical function of 'reasonableness' is a function of justification of the jurisdictional process, in the absence of any absolute human certainty.

The third technical function of 'reasonableness' – understood as incorporating reason – is a function of systematisation: 'reasonableness' is used in order to represent the international legal system as a complete, coherent and universal one, as well as what Olivier Corten calls a 'congruent'system – "un système répondant au critère de convenance sur le plan diachronique" (p. 239), which means a system which is coherent through time, while integrating some external values in order to keep this coherence.

The second set of functions of 'reasonableness' are described by Olivier Corten as "ideological functions". In fact, the two ideological functions described are only the two faces of the same coin: the function of legitimation of the solution based on 'reasonableness' – "elle vise à légitimer le droit comme ordre efficace et privilégié de regulation sociale" (p. 277) – only fully plays its part when at the same time it has a function of occultation of all the other possible solutions: "en présentant sa position comme une position 'raisonnable', on prétend à l'objectivité et à la neutralité de manière à masquer la subjectivité des choix de valeurs qui la sous-tendent. Fondamentalement, le prétention à l'universalité charriée par la raison nie les particularités et les rapports de force qui résultent de leur confrontation" (p. 305). This occcultation happens at the moment when the rule is created, as well as when the rule is applied. Of course, the function of legitimation is not restricted to the legitimation of such or such contested decision, it goes much further and plays its role of legitimation of the whole legal system itself: in this sense, I personally should have analysed the third technical function as an ideological function. Of course, Olivier Corten himself has insisted on the close links the two types of function have together: "C'est parce que la raison est un concept qui fonde toute activité scientifique et sa formalisation en système qu'elle est un outil privilégié de légitimation et d'occultation [...]. Les fonctions techniques et idéologiques sont donc, il faut y insister, intimement liées" (p. 333). The second part of the work of Olivier Corten is dedicated to substantial aspects, that is the determination of the content of the notion of 'reasonableness': it will be successively comprehended negatively and positively, through the examination of the decisions of the European Court of Human Rights. In a first attempt to give a precise meaning to 'reasonableness', Olivier Corten tries a negative definition of the notion, in eliminating some notions that seem close to the concept of 'reasonableness', but must be distinguished. Formally, he shows that 'reasonableness' is always determined according to positive international law, based on the will of states, and implies that any act by a state, in order to be accepted as reasonable has to be able to be motivated: "si un Etat dont un acte est qualifié de déraisonnable n'est pas capable de le justifier dans le débat judiciaire, l'impossibilité de fournir une motivation juridique sera le meilleur signe d'un dépassement de son pouvoir discrétionnaire" (p. 382). Not any motivation is sufficient, the motivation must rest on a rational reasoning following a certain logic and based on recognised legal authorities.

But 'reasonableness' implies more than respecting formal criteria, which can result in unacceptable solutions: 'reasonableness' refers also to certain substantial aspects, based on values integrated in the international system. Olivier Corten thus tries to give some flesh to 'reasonableness' in interpreting that notion according to the methods of interpretation contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which according to him can be generalised for any interpretation: thus, the author examines successively the

ordinary meaning of 'reasonableness' in international precedents and observes the frequent association of the word 'reasonable' with others, like 'circumstantial', 'moderate', 'probable', 'balanced', as well as the meaning given by different general or legal dictionaries. This is the occasion for Olivier Corten to bring us into philosophical discussions on the meaning of 'reason': although each philosopher has its own definition, the author thinks that broadly analysed, two types of meaning emerge: in a sense, 'reason' can be understood as a means – this would be called 'la raison discursive' – in another sense 'reason' is considered as a foundation – and this is called by Olivier Corten "la raison-étalon" (p. 449). The first meaning of reason is based on axioms of a logical discourse, like the principle of identity and non-contradiction, the second acceptation of reason – the capital is here used by the author – refers more to truth and justice.

A confrontation between the practical elements of the definition found in international precedents and the philosophical aspects of the definition shows, according to Olivier Corten, that some aspects refer more to logic and some to a norm of reference: "A la réflexion, il nous semble que les caractères de liaison aux circonstances et d'équilibre du 'raisonnable' ressortissent tous deux d'une logique commune plutôt d'ordre pratique, que nous reprendrons sous l'adjectif 'approprié', tandis que les caractères de modération et de probabilité peuvent tous deux s'apparenter à ce qui est conforme à la norme sur un plan davantage théorique" (p. 463). In sum, 'reasonableness' is related to 'measure': Olivier Corten develops here what he calls "la méthode de la mesure", which implies three steps: the establishment of a measure as a standard ('la mesure-étalon'), the act of measurement of reality ('la mesure-action'), the result of the comparison between reality and the set standard ('la mesure-résultat'). In order to find the meaning of 'reasonable', the author looks also into the context in which the word appears: he notes that in international jurisprudence, the word is often used in association with others, the most frequently found associations being 'reasonable and just', 'reasonable and equitable', 'reasonable and good faith', 'reasonable and natural', 'reasonable and necessary'. In each case, the author enters into very subtle analyses of the different possible meanings of the words used in association with 'reasonable', quite stimulating but impossible to restitute in a short review of the study. Let us just mention the conclusion arrived at by Olivier Corten, which conforts the general idea running like a red thread throughout his book: some of the criteria of 'reasonableness' are linked with the idea of rationality, whatever the practical result might be, other criteria are deemed to ensure some justice and equity. So far, the author has approached the concept of 'reasonableness', in trying to distinguish it from other different notions. The last step of his very coherent and exhaustive study will then be to attempt a positive definition of 'reasonableness'. A first step in that direction is the analysis of the decisions of the European Court of Human Rights, a second step the generalisation of this approach.

This book is a very impressive and stimulating sum on the multifold aspects

of 'reasonableness' in public international law, as used by the international judge, and I cannot pretend to have forwarded to the reader even its 'substantifique moëlle'. I hope however that the few imperfect indications given here will induce the readers to go to the original work and plunge in its richness and the far reaching perspectives it gives on the role of international law in an international society full of contradictions: the use of the notion of 'reasonableness' in international law is precisely to solve and/or hide these contradictions.

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