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Judge Vereshchetin: A Russian Scholar at the International Court of Justice

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Abstract

There are three topics within the body of Vereshchetin's academic work which deserve special attention: the law of the sea, space law, and the theory of international law. Vereshchetin's contribution as a judge to the practice and theory of international law can be appreciated through his individual opinions and declarations, in which he dealt with various issues of international law and the international judicial process: self-determination, countermeasures, diplomatic protection, and questions which concern the functioning of the Court (the role and powers of the ICJ, *non liquet*, bases for the revision of decisions, declarations accepting the Court's jurisdiction and reservations to them, and so on).

Key words

biography; case law; International Court of Justice; judges; opinions; Russian doctrine of international law; Vereshchetin

1. A DISTINGUISHED CAREER

Judge Vereshchetin was elected a member of the International Court of Justice (ICJ) as of 26 January 1995. On 1 February 1995, at a public sitting held during the oral proceedings in the case concerning *East Timor (Portugal v. Australia)*, he made his solemn declaration, as newly elected members of the Court are required to do under Article 20 of the Statute in order to be duly installed. He was re-elected for a second term starting on 6 February 1997 and ending on 5 February 2006.

Before joining the International Court of Justice, Vereshchetin enjoyed a distinguished career in international law. He graduated with honours from the international law faculty of the Moscow Institute of International Relations in 1954 and continued with postgraduate studies there. He was taught by Professor Sergei Krylov (the first Soviet judge on the bench of the Court), who encouraged him to focus his studies on the law of the sea. Vereshchetin chose the law of the sea as the topic for his doctoral thesis, benefiting from the wisdom and guidance of his scientific adviser, Professor Vsevolod Durdenevsky.

Having obtained his doctorate, Vereshchetin embarked in 1957 on his professional career, beginning at the presidium of the USSR Academy of Sciences. In 1967 he was appointed first vice-chairman and legal counsel of Intercosmos (Academy of Sciences Council on International Co-operation in the Field of the Exploration and

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Use of Outer Space). From 1981 until 1995 Vereshchetin held the position of Deputy Director and Head of the International Law Department of the Institute of State and Law of the Academy of Sciences in Moscow.

While devoting the greater part of his professional energies to his administrative duties at the Academy and the Institute, Vereshchetin still made time to pursue his academic work, conducting research and teaching extensively at various institutions. Over the years, he has published more than 150 books and articles on international law subjects in Russia and other countries; lectured at universities and institutes in Russia, Greece, Italy, the United States, and the Netherlands; and presented papers at numerous international symposia and conferences. In 1979–90 he was also a USSR delegate to the UN Committee on the Peaceful Uses of Outer Space and its Legal Sub-Committee.

In 1992 Vereshchetin was elected a member of the International Law Commission (ILC) and in 1994 he became its chair, in which position he remained until his election to the International Court of Justice.

2. The scholar

The sheer volume of Vereshchetin's academic oeuvre does not allow for an exhaustive examination in just one article. However, there are three topics within this body of work which deserve special attention. As has been mentioned earlier, Vereshchetin initially focused his intellectual powers on the law of the sea; he then specialized increasingly in space law, a passion which continues to this day; finally, he has written insightfully on the issues of the theory of international law, including the transition from the Soviet doctrine of international law to a new Russian doctrine.

2.1. The law of the sea

In many respects, Vereshchetin's areas of academic focus have reflected topical developments in his contemporary world. His studies on the law of the sea in the mid-to-late 1950s coincided with the preparation of the first Conference on the Law of the Sea, held in Geneva in 1958. Vereshchetin began his impressive publishing record with an article on the fight against piracy on the high seas; his first major publication was entitled 'Freedom of Navigation on the High Seas',[1] and appeared in print in Moscow in 1958. Vereshchetin's breadth of understanding of the law of the sea proved of great relevance when, as a member of the Court, he participated in the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)* and the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain).*

2.2. Space law

With the beginning of the space era Vereshchetin changed his focus of scientific research from the law of the sea to space law. Since the launch of the first Soviet satellite in October 1957, Vereshchetin has been closely involved in the space programme,

1. В.С. Верещетин, *Свобода судоходства в открытом море* (V. S. Vereschetin, *Freedom of Navigation on the High Seas*) (1958).

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contributing in particular to the creation of a legal framework for space exploration. His passion for this subject has never waned, even when he had established himself as a world-renowned specialist on space law. In keeping with his ability to approach a subject as practitioner and academic in tandem, Vereshchetin has elaborated on a number of theoretical and practical aspects of international and national space law, including problems of interrelations between international space law and national law, the role of state sovereignty in space law, custom as a source of international space law, legal issues relating to the military uses of outer space, legal regulations of different types of space activity (remote sensing, satellite telecommunications, manned space flights), the legal framework of international space co-operation, the resolution of space law disputes, and so on. His major monograph in the field of space law is devoted to the legal bases and organizational framework of international space programmes.[2]

Vereshchetin has also taken part in the elaboration of a number of multilateral international space law treaties and various UN documents, forming the basis of this new field of international law. In addition he has participated in framing the constitutional instruments of, and advising on, the legal issues arising from the activities of the Intercosmos multilateral space co-operation programme and the Intersputnik international space communication system and organization. Similarly, he has shared his legal expertise in the context of a number of major international space projects such as the historic Soyuz–Apollo flight of US and Soviet astronauts in July 1975 (the first docking and joint flight of Soviet and US spaceships) and international space flights on the Soviet space station *Mir* (which in English means 'peace' and also 'world').

While a member of the International Court of Justice, Judge Vereshchetin continued to take a lively interest in the development of space law by participating for a number of years, together with several other members of the ICJ, in judging the finals of the Manfred Lachs Space Law Moot Court Competition, and by taking part in the activities of the International Institute of Space Law in Paris[3] and of the International Institute of Air and Space Law of Leiden University. As of the beginning of his term at the Court in 1995 Judge Vereshchetin was a member of the board of directors (until 2003) and of the international advisory board (since 2003) of that latter institution, on which board he still serves.

Judge Vereshchetin sought to fuse his enthusiasm for space law with his role as a judge at the Court, highlighting the relevance of the Court in the face of this whole new area of international law. Consistent with this vision, in 2001 he published an article, 'The International Court of Justice as a Potential Forum for the Resolution of Space Law Disputes'.[4] In it Judge Vereshchetin showed that disputes relating to 'space activities' were of a multifaceted nature. They could involve states as well as

2. В.С. Верещетин, *Международное сотрудничество в космосе (правовые вопросы)* (V. S. Vereshchetin, *International Cooperation in Outer Space (Legal Issues)* (1977).
3. He is an honorary director of the Institute.
4. V. S. Vereshchetin, 'The International Court of Justice as a Potential Forum for the Resolution of Space Law Disputes', in *Air and Space Law in the 21st Century. Liber Amicorum – Karl-Heinz Böckstiegel*, ed. Marietta Benkö and Walter Kröll (2001), 476.

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non-governmental entities; they could cover 'questions specific to space law *stricto sensu*, as well as questions related to environmental law, commercial law, taxation, insurance, intellectual property rights, labour law, torts and even criminal law'; and they could also deal with complicated technological issues. Judge Vereshchetin underscored the potential role of the ICJ as 'a useful mechanism for the resolution of inter-State disputes relating to space activities'. He further noted that the history of the Court's jurisprudence had likewise demonstrated that it could deal efficiently with complex technical problems, as it had, for example, in the *Gabčíkovo-Nagymaros* case.[5] Judge Vereshchetin expressed his regret, however, at 'the very limited number of relevant international treaties and agreements whose dispute resolution clauses contain a reference to the ICJ as a potential forum'.

2.3. The theory of international law

With the beginning of perestroika in the Soviet Union and the end of the Cold War, Vereshchetin set about reappraising the context in which the doctrine of international law had been developed in his native country. In this regard, his academic output has been of particular importance for the science of international law in the Soviet Union and then in the Russian Federation. His works have marked the transformation from the Soviet doctrine of international law which was overburdened with ideological content to a legal doctrine built on real processes taking place in the international community.

In close collaboration with fellow scholars from the Institute of State and Law in Moscow,[6] Vereshchetin has also discussed in more general terms the nature and significance of international law in a changing contemporary world where the notions of interdependence and integrity are key. In particular, he has championed the 'Primacy of International Law in World Politics', seeing international law as a general democratic normative system based on common human values.[7] In arguing that international law must apply equally to all states, 'regardless of national sympathies or antipathies', Vereshchetin, together with his esteemed colleagues, has consistently berated the use of armed force against other nations 'for imposing ideals or values' as a gross violation of international law[8] (it is remarkable that some 15 years on, these words sound even more topical than at the beginning of the 1990s) and has exhorted a more extensive use of the ICJ 'for the settlement of specific conflicts between States, and for advisory opinions on the interpretation of the principles and rules of international law'.[9] While writing on the role of the ICJ a number of years before becoming a member of the Court, the prescience of his words is striking. His strictures on the use of force and his steadfast advocacy of the peaceful settlement of disputes retain all their relevance in the contemporary world.

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5. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Rep. 7.
6. In particular, Rein A. Müllerson and Gennady M. Danilenko.
7. V. S. Vereshchetin and R. A. Müllerson, 'The Primacy of International Law in World Politics', in A. Carty and G. Danilenko (eds.), *Perestroika and International Law – Current Anglo-Soviet Approaches to International Law* (1990), 7.
8. V. S. Vereshchetin and R. A. Müllerson, 'International Law in an Interdependent World', (1990) 28 *Columbia Journal of Transnational Law* 295.
9. Vereshchetin and Müllerson, *supra* note 7, at 12.

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He has consistently argued that encouragement should be given to the development of effective institutional mechanisms and procedures to ensure the observance of rules of international conduct in the interests of the world community. This imperative remains of critical importance for the effectiveness of international law today. Moreover, Vereshchetin's forward-thinking ideas have significance not only for Russian doctrine but also for the doctrine of international law in general.[10]

Vereshchetin's views on constitutional reform in the Soviet Union and, after its dissolution, in the Russian Federation also reflected the new understanding of the role of international law. In particular, the question of the relationship between international and national law was closely considered. In 1990, in an article prepared with his colleagues, he suggested the establishment of the principle of the primacy and direct application of international law norms in the internal legal order as a principle of a new democratic constitution.[11] Moreover, Vereshchetin and his collaborators proposed the inclusion in the body of international law norms having direct application in the territory of the USSR not only treaty rules which require the formal and express consent of a state, but also 'generally recognized principles and norms of international law',[12] that is, customary rules. It was particularly noteworthy as the Soviet doctrine had always in general been reticent regarding the role and significance of customary rules, not least because of the fact that customary rules can become binding on a state in various ways and in certain circumstances without being formally consented to by that state. It is not an exaggeration to say that this change of attitude towards the role of customary norms of international law was an important feature of the new Soviet (later Russian) doctrine of international law. While the significance of philosophical and political approaches to international law should not be underestimated, this new vision of custom evinced a true transformation in terms of real legal concepts, signalling definitive changes in the

10. The above ideas were initially developed in articles published in Russian: В. С. Верещетин, Р. А. Мюллерсон, 'Новое мышление и международное право', (1988) 3 *Советское государство и право* (V. S. Vereshchetin and R. A. Müllerson, 'New Thinking and International Law', (1988) 3 *Soviet State and Law*) 3; В. С. Верещетин, Р. А. Мюллерсон, 'Примат международного права в мировой политике', (1989) 7 *Советское государство и право* (V. S. Vereshchetin and R. A. Müllerson, 'Primacy of International Law in World Politics', (1989) 7 *Soviet State and Law*) 3.

11. В. С. Верещетин, Ґ. М. Даниленко, Р.А. Мюллерсон, 'Конституционная реформа в СССР и международное право', (1990) 5 *Советское государство и право* (V. S. Vereshchetin, G. M. Danilenko, and R. A. Müllerson, 'Constitutional Reform in the USSR and International Law', (1990) 5 *Soviet State and Law*) 13.

12. Ibid., at 16. The generally recognized principles of international law invoked here should not be confused with general principles of law mentioned in Art. 38(1)(c) of the Statute of the Court. The former are understood in the Russian doctrine of international law as the most important norms of international law, which find their expression, for instance, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 1970 or in the Declaration on Principles Guiding Relations between Participating States contained in the Final Act of the Conference on Security and Co-operation in Europe (Helsinki, 1975). It should also be recalled that in its Judgment of 12 October 1984 in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* the Chamber of the Court, referring to the expression 'in accordance with the principles and rules of international law applicable in the matter as between the Parties' in the Special Agreement, stated that 'the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character' ([1984] ICJ Rep. 288, para. 79).

doctrine. The ideas, theoretical concepts, and practical drafting proposals contained in the 1990 article were indeed subsequently reflected in the text of the new Russian Constitution of 1993.[13]

At a later stage, when examining constitutional developments in the Commonwealth of Independent States and in central and eastern Europe, Vereshchetin returned to the issue of the relationship between international and municipal law and the primacy of the former, looking at these developments from a broader, worldwide standpoint enriched by a historical perspective. In the course of his analysis he noted that 'the ever-growing interdependence of states and peoples, accompanied by the constant "intrusion" of international law into many national spheres' had led to the 'de facto affirmation of the primacy of international law' and left no other choice to lawmakers in states seeking to modernize their constitutional systems but to recognize and 'reflect this reality' in their constitutions. In those countries with stable constitutions, the general objective trend leading to the recognition of the primacy of international law manifests itself through the practice of the courts. Vereshchetin thus arrived at the main conclusion that the process whereby international law obtains primacy in domestic legal orders has an objective character and represents a steadfast rule in the modern world.[14]

In the 1990s Vereshchetin put forward a concept of a 'general legal field' which would encompass various legal phenomena influencing each other at both national and international levels.[15] He saw evidence of the existence of such a field in the rise of functional legal systems which were not limited to national or international law, such as space law, the law of telecommunications, environmental law, nuclear law, and, to a large extent, the law of the sea and air law. Each of these functional systems deals with a single area of human activity which has both international and national aspects and thus can only be properly understood and regulated when the relevant rules interact within the 'general legal field'. A further example, European law, which can be qualified neither as international nor as national law, can be taken as an instance of a territorial 'general legal field'. 'The structure and the density of the normative fabric of [the "general legal field"], its "tension", the relative role and the forms of interaction between its component elements and the hierarchy

13. For example, the current text of Art. 15(4) of the Constitution of the Russian Federation in many respects follows one of the drafting proposals set out in 1990. The 1990 suggestion was formulated as follows: 'The generally recognized principles and norms of international law as well as ratified and officially published treaties of the USSR are mandatory for all state organs, public organizations, legal persons and citizens. If a ratified and officially published international treaty of the USSR establishes other rules than those contained in Soviet legislation, the rules of the international treaty shall apply.' (See Vereshchetin et al., *supra* note 11, at 16–17). Art. 15(4) of the Constitution reads, 'The generally recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If an international treaty of the Russian Federation establishes other rules than those enacted by law, the rules of the international treaty shall apply.'

14. See V. S. Vereshchetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National law', (1996) (7) 1 EJIL 29, in particular at 40–1; V. S. Vereshchetin, 'Some Reflections on the Relationship between International Law and National Law in the Light of New Constitutions', in R. Müllerson, M. Fitzmaurice, and M. Andenas (eds.), *Constitutional Reform and International Law in Central and Eastern Europe* (1998), 5, in particular at 13.

15. В. С. Верещетин, ' "Общее правовое поле" современного мира', *Советский журнал международного права*, 1991, No 3–4, с. 3–17 (V. S. Vereshchetin, '"General legal field" of the modern world', (1991) 3–4 *Soviet Journal of International Law* 3).

of the norms differ from region to region and even from one country to another'.[16] The idea of a 'general legal field' has great potential for further development and undoubtedly will find future scholars keen to apply this concept in order to open up further avenues in international law and in the general theory of law.

3. The judge

Vereshchetin's contribution as a judge to the practice and theory of international law can be appreciated through his individual opinions and declarations. It is well known that the Court works as a collegial organ and each of its decisions is a result of a judicial process which involves all members of the Court.[17] The Court's deliberations are secret and each judge's role in this process, beyond the general outcome of the vote, is not made public. However, the contribution of individual judges should not be overlooked. In particular, judges' individual opinions (separate and dissenting) and declarations are of undeniable significance. Sir Gerald Fitzmaurice wrote in an article published in 1950, before he became a member of the International Court of Justice, that opinions of individual judges

> play a valuable part in the functioning of the Court, and to ignore them would be to give but an incomplete portrayal of its work as a whole . . . although dissenting Judges differ from the Court as to the actual conclusion, they may well, in the course of so doing, make general statements or explanations of principle which are in themselves not in any way inconsistent with the views of the Court, but merely differently applied to the facts. Again, a Judge who delivers a separate but not dissenting opinion, agrees with the conclusion of the Court, but for different reasons, or prefers to give his own reasoning. His views clearly form a valuable supplement to those of the Court. Finally, even where the views of an individual Judge are definitely contrary to those of the Court, on matters of principle, it may be desirable to quote them, because it is often the case, particularly with difficult or controversial questions, that a decision can only properly be appreciated in the light of a contrary view.[18]

Before turning to the individual opinions and declarations of Judge Vereshchetin as a means of shedding light on his legal mindset, it is perhaps interesting to quote a few personal words from a speech given by the then president of the Court, Judge Shi, during a visit of the President of the Russian Federation to the International Court of Justice in autumn 2005. In referring to his esteemed colleague, President Shi stated,

> [N]othing gives me greater pleasure than to mention . . . Judge Vereshchetin, . . . who has made such a significant contribution to the collegial decision-making process of the Bench. Judge Vereshchetin's mental agility and natural intellectual curiosity have

16. Ibid., at 14.
17. An excellent description of the Court's internal judicial process can be found in the address by the former President of the Court, Judge Bedjaoui, given on 4 November 1996 to the sixth informal meeting of Legal Advisers to Ministries of Foreign Affairs of States Members of the United Nations (*ICJ Yearbook 1996–1997*, 234) and in the speech to the Sixth Committee of the United Nations General Assembly by the former President of the Court, Judge Shi, in 2005 (http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeechPresident_Shi_Sixth_Committee_20051028.htm).
18. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1 (1986), 1–2.

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always enlivened the Court's judicial debates and his insights into the Russian tradition of international law have been illuminating to his colleagues.[19]

This unique contribution is apparent from the individual opinions and declarations which Judge Vereshchetin appended to the Court's decisions.[20] For the purposes of the present article, and in view of its limited length, only certain of Judge Vereshchetin's individual opinions and declarations or certain parts of them have been selected for examination.

3.1. *East Timor* – questions of self-determination

Judge Vereshchetin's first case on the bench was the case concerning *East Timor (Portugal* v. *Australia)*,[21] in which Portugal had brought a claim against Australia as the 'administering power' with regard to the 'non-self-governing territory' of East Timor.[22] In point of fact, Portugal did so on behalf of the people of East Timor. In his Separate Opinion[23] Judge Vereshchetin agreed with the majority that the Court could not exercise its jurisdiction in the case because in order to decide the claims of Portugal it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that state's consent. At the same time he drew attention to another ground, not dealt with by the Court, which would bar it from adjudicating the claims of Portugal.

19. Address by Judge Shi, President of the International Court of Justice, on the occasion of the visit by the President of the Russian Federation, Mr Vladimir Putin, 2 November 2005 (http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/ispeechPresident_Shi_President_Putin_20051102.htm).
20. Judgment of 30 June 1995 in the case concerning *East Timor (Portugal v. Australia)* (Separate Opinion);
Order on Provisional Measures of 15 March 1996 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Joint Declaration together with Judges Weeramantry and Shi);
Advisory Opinion of 8 July 1996 in the case concerning the *Legality of the Threat or Use of Nuclear Weapons* (Declaration);
Judgment of 11 July 1996 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections (Joint Declaration together with Judge Shi);
Judgment of 25 September 1997 in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Dissenting Opinion);
Judgment of 11 June 1998 on Preliminary Objections in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Separate Opinion);
Judgment of 4 December 1998 in the case concerning *Fisheries Jurisdiction (Spain v. Canada)* (Dissenting Opinion);
Orders on Provisional Measures of 2 June 1999 in the cases concerning *Legality of Use of Force (Yugoslavia v. Belgium) (Yugoslavia v. Canada)* (Dissenting Opinions) *(Yugoslavia v. France) (Yugoslavia v. Germany) (Yugoslavia v. Italy)* (Declarations) *(Yugoslavia v. Netherlands) (Yugoslavia v. Portugal)* (Dissenting Opinions) *(Yugoslavia v. Spain) (Yugoslavia v. United Kingdom)* and *(Yugoslavia v. United States of America)* (Declarations);
Judgment of 16 March 2001 in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Declaration);
Order on Provisional Measures of 17 June 2003 in the case concerning *Certain Criminal proceedings in France (Republic of the Congo v. France)* (joint Separate Opinion with Judge Koroma);
Judgment of 3 February 2003 in the case concerning *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections *(Yugoslavia v. Bosnia and Herzegovina)* (Dissenting Opinion); and
Judgment of 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Separate Opinion).
21. *East Timor (Portugal v. Australia)*, Judgment, [1995] ICJ Rep. 90.
22. East Timor became an independent state (Democratic Republic of Timor-Leste) on 20 May 2002.
23. *Supra* note 21, at 135–8.

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In particular, Judge Vereshchetin argued that, although in accordance with the Statute only states may be parties in cases before the Court, in a situation where the right of a people to self-determination 'lies at the core of the whole case', this people should be given a role to play in the proceedings so that 'the wishes of the people concerned at least be ascertained and taken into account by the Court'. Thus, in the circumstances of the *East Timor* case, the Court should have been presented with reliable evidence on the will of the people of East Timor or, in the absence of direct evidence, the opinion of the appropriate organs of the United Nations could have been provided to the Court. However, the Court did not receive any such information.

Turning to the question of the obligation of an administering power to consult the people of a non-self-governing territory 'when the matter at issue directly concerned that people', Judge Vereshchetin stated that the existence of such an obligation in contemporary international law could not be denied. The exceptions to this rule as set out in the *Western Sahara* Advisory Opinion,[24] referred to by Judge Vereshchetin, were limited and were not applicable in the *East Timor* case.

He concluded that in addition to the absence of Indonesia's consent there was another, no less important, reason for the Court to decline to exercise its jurisdiction, namely 'the lack of any evidence as to the views of the people of East Timor, on whose behalf the Application has been filed'.

His Separate Opinion thus provided lucid guidance on the question of admissibility of applications instituting proceedings before the Court, in the context of the 'indispensable third party' rule,[25] as well as on certain important aspects of the right to self-determination and the role of non-state actors in proceedings before the ICJ.

3.2. *Legality of the Threat or Use of Nuclear Weapons – non liquet* in advisory proceedings

In July 1996 the ICJ gave an Advisory Opinion on the question of the *Legality of the Threat or Use of Nuclear Weapons*,[26] which is considered by many to be one of the most important in its history. Judge Vereshchetin voted with the majority on all the operative paragraphs, including the crucial subparagraph (2)E, which proved controversial and was adopted by seven votes to seven, by the President's casting vote . As is apparent from the appended opinions, the second part of subparagraph (2)E raised certain concerns. This part reads as follows:

> . . . in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear

24. '[I]n certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.' ([1975] ICJ Rep. 33, para. 59).
25. According to this rule, the Court cannot decide a dispute between states if rights and obligations of a third state were to constitute the very subject matter of the judgment to be rendered in the absence of a consent from this third state.
26. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep., at 226.

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> weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[27]

One of the arguments of the judges who voted against subparagraph (2)E of the operative paragraph was that the Court cannot pronounce *non liquet*, i.e. the impossibility of ruling on the merits of a case because of the insufficiency of information on the facts or law. Judge Vereshchetin, explaining his reasons for voting in favour of subparagraph (2)E, elaborated in his declaration[28] on certain important aspects of the issue of *non liquet* in international judicial practice. Noting that the debate on this issue concerned 'predominantly, if not exclusively, the admissibility of *non liquet* in a contentious procedure', he recalled that the doctrinal discussion remained inconclusive. He further wrote that the problem of *non liquet* may, however, be examined within the framework of advisory proceedings, where the Court's function differs substantially from that in its contentious proceedings. While in the latter instance 'the Court is called upon to pronounce a binding, definite decision settling the dispute between the parties', in the former the Court should 'state the law as it finds it at the present stage of its development'. This specificity of the advisory proceedings should also be viewed in conjunction with the well-known postulate that the Court applies rather than creates the law.

Thus, from these two premises, Judge Vereshchetin drew the logical conclusion:

> In advisory procedure, where the Court finds a lacuna in the law or finds the law to be imperfect, it ought merely to state this without trying to fill the lacuna or improve the law by way of judicial legislation. The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive.[29]

This, however, is circumscribed by the condition that the Court's pronouncement of *non liquet*, even if in principle possible, must be justified in the circumstances of a particular case.

Having established the foundation for the pronouncement of *non liquet* by the Court in advisory proceedings, Judge Vereshchetin then considered whether the above approach had been appropriately used, given the realities of the *Legality of the Threat or Use of Nuclear Weapons* case. He indicated first that the Court could plausibly have deduced, 'by inference, implication or analogy, . . . a general rule comprehensively proscribing the threat or use of nuclear weapons' from the existing rules of international humanitarian law. However, mindful of its judicial function, the Court could not ignore the undeniable fact that unlike other weapons of mass destruction (biological and chemical) there was no specific prohibition on the use of nuclear weapons embodied in an international treaty. Moreover, as became apparent from the written and oral statements submitted in the course of the proceedings, states were 'fundamentally' divided on the matter. In this situation, were the Court to 'deduce' a general rule on the absolute prohibition of the use of nuclear weapons, its 'authority and effectiveness' would have been at least questionable.

27. Ibid., at 266.
28. Ibid., at 279–81.
29. Ibid., at 280.

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Judge Vereshchetin thus concluded that in the circumstances of the case the Court had no other choice than to reflect faithfully the state of the international legal system in which states had not yet completed 'the construction of the solid edifice for the total prohibition on the use of nuclear weapons'. It is for the states rather than for the Court 'to bring the construction process to completion'.[30]

Judge Vereshchetin further developed his thoughts with regard to the problem of *non liquet* in a scholarly article published in 1999.[31] He noted that the existence of gaps in international law could not be denied, which fact was admitted, 'in one way or another', even by 'staunch supporters of the doctrine of the 'completeness of international law'. Moreover, gaps sometimes stemmed from the unwillingness or inability of states to legislate in a particular field. There were also situations in which a particular norm had not yet been consolidated. All these factors were conducive to the pronouncement of *non liquet* in certain circumstances, in particular in view of the judicial rather than legislative character of the Court's function. 'The argument carries a special force in advisory proceedings.' If the Court were to be asked a question about the state of the law in a case where there was a gap, it may describe the actual legal situation and even express its attitude towards it, 'but should refrain from filling the gap'. The statutory possibility for the Court to refuse to give a direct 'yes' or 'no' answer to the question is based on Article 65(1) of the Statute, which provides for the discretionary power of the Court to give an advisory opinion. The Court might refuse to give an opinion or might refuse '"to give a complete answer" to the question asked of the Court', because its discretionary power, in Judge Vereshchetin's view, applies also to the 'constituent parts' of the question put to it. By indicating, in an advisory opinion, deficiencies in the state of the law in a particular field the Court provides a better service to the international community than by questionable attempts at judicial lawmaking justified only by the prohibition of the pronouncement of *non liquet*.

3.3. *Gabčíkovo-Nagymaros* – countermeasures

In his dissenting opinion in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*[32] Judge Vereshchetin examined practical issues of the application of the norms relating to countermeasures in the circumstances of a particular case before an international tribunal. Taking as a point of departure materials of the International Law Commission dealing with the question of countermeasures, which, according to him, 'may be viewed as not merely codifying, but also developing customary rules relating to countermeasures', Judge Vereshchetin took a further step forward in terms of both the theory and the practice in relation to countermeasures.

In the *Gabčíkovo-Nagymaros* case the Court, *inter alia*, came to the conclusion that the unilateral diversion of the Danube by Czechoslovakia on its territory in

30. Ibid., at 281.
31. V. S. Vereshchetin, 'Is "Deceptive Clarity" better than "Apparent Indecision" in an Advisory Opinion?', in ed. Emile Yakpo and Tahar Boumedra, *Liber Amicorum – Judge Mohammed Bedjaoui* (1999), 531.
32. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Rep. 219–26.

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response to the suspension and abandonment by Hungary of work on a joint project[33] (i.e. the so-called Variant C) 'was not a lawful countermeasure because it was not proportionate'.[34] In the Court's view the failure to respect the principle of proportionality was reflected in the unilateral assumption by Czechoslovakia of 'control of a shared resource', in the ensuing deprivation of Hungary of 'its right to an equitable and reasonable share of the natural resources of the Danube', and in 'the continuing effects of the diversion of these waters on the ecology of the riparian area'.[35]

Judge Vereshchetin disagreed with the Court's view that Czechoslovakia was not entitled to put into operation Variant C. In this regard he pointed out that having refused to characterize Czechoslovakia's actions as a proportionate countermeasure, the Court should then 'have clearly indicated some other legal option or options whereby Czechoslovakia could have effectively asserted its rights under the [1977 Budapest] Treaty and induced its partner to return to the performance of its obligations'. However, not only did the Court not deal with the issue of possible alternative steps which could have been taken by Czechoslovakia as a response to the wrongful act of Hungary, but, moreover, in Judge Vereshchetin's analysis, it followed from the case file that at the time such alternative means of effective influence on the non-complying party were not available to Czechoslovakia. Generally speaking, an international tribunal should not leave a state's entitlement to respond to a violation of its treaty rights devoid of any meaning. Thus the Court should have considered the relevant conditions and restrictions for the application of the particular countermeasure by Czechoslovakia in the light of this principle and in the concrete circumstances of the case rather than *in abstracto*.

In considering the question as to whether the execution of Variant C could constitute a lawful countermeasure 'in response to Hungary's prior failure to comply with its obligations under international law',[36] the Court first recognized that Hungary's actions (suspension and abandonment of work on the project) were internationally wrongful and that 'Czechoslovakia had requested Hungary to resume the performance of its treaty obligations on many occasions'.[37] Nevertheless, it then found that Czechoslovakia's measure was not proportionate and decided that there was no need to rule upon the condition of reversibility. For Judge Vereshchetin, however, all the basic conditions for the countermeasure to be considered lawful – namely (i) the presence of a prior illicit act; (ii) the necessity of the countermeasure taken; and (iii) the proportionality of that measure in the circumstances of the case – 'were met when Czechoslovakia put Variant C into operation in October 1992'. The issue of the proportionality of Czechoslovakia's acts thus lay at the core of his dissenting opinion.

In order to establish whether Czechoslovakia's actions were proportionate or otherwise he weighed 'the importance of the principle *pacta sunt servanda* breached

33. The construction and operation of the Gabčíkovo-Nagymaros barrage system on the Danube in accordance with the Budapest Treaty of 16 September 1977.
34. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Rep. 56, para. 87.
35. Ibid., at 56, para. 85.
36. Ibid., at 55, para. 82.
37. Ibid., at 55–6, paras. 83–4.

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by Hungary and the concrete effects of this breach on Czechoslovakia against the importance of the rules not complied with by Czechoslovakia and the concrete effects of this non-compliance on Hungary'. Acknowledging that such a process would lead to a certain degree of subjectivity, Judge Vereshchetin suggested a method to reduce this inherent subjectivity in order to arrive at an equitable and judicious result. According to this method all the consequences of the initial breach and of the countermeasure taken should be respectively compartmentalized in order to obtain comparable values which should then be assessed in the relevant context. Thus, in the *Gabčíkovo-Nagymaros* case,

> the Court should have assessed by approximation and compared separately:
>
> (1) the economic and financial effects of the breach as against the economic and financial effects of the countermeasure;
>
> (2) the environmental effects of the breach as against the environmental effects of the countermeasure; and
>
> (3) the effects of the breach on the exercise of the right to use commonly shared water resources as against the effects of the countermeasure on the exercise of this right.
>
> All these assessments and comparisons should have specifically been confined to the span of time defined by the question put to the Court by the Parties, namely November 1991 to October 1992.[38]

Having proceeded to the examination of the case file in accordance with the above method, Judge Vereshchetin found that in all three instances the effects of the breach by Hungary of its treaty obligations and the effects of Czechoslovakia's countermeasure were commensurable. This line of reasoning led him to disagree with the majority on the point of the qualification of Czechoslovakia's actions as a lawful countermeasure, and to vote against the Court's findings (i) that Czechoslovakia was not entitled to put into operation Variant C; and (ii) that Slovakia[39] should compensate Hungary for the damage the latter had sustained on account of the putting into operation of this 'provisional solution' by Czechoslovakia and its maintenance in service by Slovakia.

3.4. *Fisheries Jurisdiction* – subject matter of a dispute and reservations to declarations accepting the Court's jurisdiction

In 1998, in the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*,[40] the Court found that it had no jurisdiction to adjudicate on the dispute brought before it by Spain. Judge Vereshchetin voted against this decision and appended a Dissenting Opinion[41] to the Judgment. In his Opinion he examined certain important issues relating to the Court's jurisdiction, namely the determination by the Court of the

38. Ibid.
39. As the successor state of Czechoslovakia with respect to the 1977 Budapest Treaty, Slovakia accordingly took on the rights and obligations relating to the Gabčíkovo-Nagymaros Project.
40. *Fisheries Jurisdiction, Jurisdiction of the Court*, Judgment, [1998] ICJ Rep. 432.
41. Ibid., at 570–81.

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subject matter of a dispute and the validity and interpretation of declarations accepting the Court's jurisdiction and reservations to them.

On the question of the subject matter of a dispute, Judge Vereshchetin wrote that first it was for the Applicant 'to indicate the subject of the dispute' as stipulated in Article 40(1) of the Statute. Although the Court is not bound by this initial qualification, its discretion cannot go as far as to redefine the subject of the dispute 'in disregard of the terms of the application and of other submissions by the Applicant'. Further, on the question as to whether a dispute should always represent a unity embracing both facts and law taken together, he answered in the negative. With reference to Article 36(2)(b) of the Statute, he stated that nothing prevents the Court from entertaining a legal dispute relating solely to a question of international law. Third, the Court is not barred from adjudicating a dispute which has several aspects even if some of them are allegedly exempted from its jurisdiction. In this situation the Court may find that it has jurisdiction with regard to a 'specific aspect of [the] subject, and has no jurisdiction with regard to others'. On the basis of the above analysis applied to the circumstances of the *Fisheries Jurisdiction* case, Judge Vereshchetin came to the conclusion that the dispute between Spain and Canada fell exactly into the category of such multifaceted disputes. Thus its part relating to the legal entitlements of a coastal state to exercise its jurisdiction in a certain area of the high seas could in principle be severed and entertained by the Court.

Judge Vereshchetin then turned to the question of Canada's reservation to its declaration accepting the Court's jurisdiction. He began by examining the general problems of the Court's jurisdiction and made several noteworthy observations. He drew attention to the fact that, although the consent of the parties is necessary in order to submit a dispute to the Court, this fundamental principle does not have an absolute character in all circumstances. Of course consent should be given; however, once given it cannot easily be withdrawn. A state's freedom in this respect is constrained by 'general rules of international law (*pacta sunt servanda*), specific rules of the treaty in question (the terms of the compromissory clause), [and] the Statute and procedural rules of the Court'. The absence of such absolute freedom is likewise manifested in the Court's power to determine whether it has jurisdiction in a particular case (*compétence de la compétence*).

In the optional clause jurisdiction system a state is free to accept the Court's jurisdiction and to limit its scope as it sees fit. This does not mean, however, that the will of a state 'must always be conclusive for purposes of a decision on the Court's jurisdiction'. Indeed, in assessing declarations and attached reservations the Court needs to have due regard to their compatibility with the 'basic requirements of international law'. In no circumstances should effect be given to reservations which 'are clearly contrary to the Charter of the United Nations, the Statute of the Court or to *erga omnes* obligations under international law'.

Another issue dealt with by Judge Vereshchetin in his dissenting opinion in the *Fisheries Jurisdiction* case relates to the general rules for the interpretation of declarations and reservations thereto. He noted first that it is well established that the Court must accord the natural and ordinary meaning to their wording. But, since the Court decides disputes in accordance with international law, 'the natural

and ordinary' meaning of a term 'is that attributed to it in international law' rather than in other albeit specialized disciplines. Thus in the *Fisheries Jurisdiction* case the key term 'conservation and management measures' should have been interpreted by the Court in the same way as is done in the relevant multilateral agreements, namely having due regard not only to technical requirements, but also to consistency with international law, primarily with the UN Convention on the Law of the Sea (UNCLOS).

Finally, he touched on the next element in the process of interpretation of declarations or reservations, that is, the intention of a state. In accordance with its case law, the Court should give 'due regard' to the intention of a state at the time when the declaration or reservation was made. For Judge Vereshchetin, although this is an important factor, it should not be deemed as being 'controlling and definitive for the outcome of the interpretation by the Court'. A more vital consideration, confirmed by the Court's jurisprudence, is that the intention of a state cannot be understood as directed against compliance with international law, that is, that a state introducing a reservation intended to exempt itself from its obligations under international law.

The above reasoning led Judge Vereshchetin to conclude that the clarification of a number of issues of fact and law relating to Canada's reservation to its declaration accepting the Court's jurisdiction and the qualification of measures taken by Canada could only be done at the merits phase. Thus in the circumstances of the case the Court should have found that the objections of Canada did not have an exclusively preliminary character.

3.5. *Legality of Use of Force* – questions of jurisdiction and the role of the Court

By the Orders of 2 June 1999 in the cases concerning *Legality of Use of Force (Yugoslavia* v. *Belgium) (Yugoslavia* v. *Canada) (Yugoslavia* v. *France) (Yugoslavia* v. *Germany) (Yugoslavia* v. *Italy) (Yugoslavia* v. *Netherlands) (Yugoslavia* v. *Portugal) (Yugoslavia* v. *Spain) (Yugoslavia* v. *United Kingdom)* and *(Yugoslavia* v. *United States of America)*,[42] the Court refused to indicate provisional measures requested by the Federal Republic of Yugoslavia in order to stop air strikes by NATO against its territory following the escalation of the Kosovo crisis, because the Court manifestly had no jurisdiction in the cases against Spain and the United States (those two cases were removed from the Court's list) and had no prima facie jurisdiction in the other eight cases.

Judge Vereshchetin appended identical declarations[43] to the Orders in the cases instituted by Yugoslavia against France, Germany, Italy, Spain, the United Kingdom,

42. *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 124; *Legality of Use of Force (Yugoslavia v. Canada), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 259; *Legality of Use of Force (Yugoslavia v. France), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 363; *Legality of Use of Force (Yugoslavia v. Germany), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 422; *Legality of Use of Force (Yugoslavia v. Italy), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 481; *Legality of Use of Force (Yugoslavia v. Netherlands), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 542; *Legality of Use of Force (Yugoslavia v. Portugal), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 656; *Legality of Use of Force (Yugoslavia v. Spain), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 761; *Legality of Use of Force (Yugoslavia v. United Kingdom), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 826; and *Legality of Use of Force (Yugoslavia v. United States of America), Provisional Measures, Order of 2 June 1999*, [1999] ICJ Rep. 916.

43. Ibid., at 381–2, 440–1, 500–1, 779–80, 847–8, 931–2.

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and the United States, and dissenting opinions[44] in the cases against Belgium, Canada, Netherlands, and Portugal. The text of the declaration in its entirety, as having relevance to all cases, was also included in the dissenting opinions.

In the declarations Judge Vereshchetin raised a paramount question of the Court's role in the modern world. The Court's jurisdiction is consensual. This is how the system of the Statute is organized. However, is it possible for the principal judicial organ of the United Nations, 'whose very *raison d'être* is the peaceful resolution of international disputes', to refuse to deal with a case submitted to it, on the basis of a lack of jurisdiction, in circumstances in which the very foundation of the international community is at stake? Are the Court's hands completely tied in such a situation? Judge Vereshchetin answered in the negative to those questions. Even if the Court, 'due to constraints in its Statute', could not indicate legally binding[45] provisional measures, it 'is inherently empowered, at the very least, immediately to call on the Parties neither to aggravate nor to extend the conflict and to act in accordance with their obligations under the Charter of the United Nations'. This power of the Court, which may even appear to be 'extrajudicial' in nature, flows, according to Judge Vereshchetin, 'from its responsibility for the safeguarding of international law and from major considerations of public order'. He was also convinced that such an action would be consistent with the Statute and Rules of Court and 'could have a sobering effect on the Parties involved in the military conflict'. It is noteworthy that seven years later, in another context, dealing with reservations to Article IX of the Genocide Convention, several judges in a joint separate opinion, although considering the matter of the Court's jurisdiction from another angle, namely whether reservations to Article IX are compatible or otherwise with the object and purpose of the Genocide Convention, came to the very similar conclusion that in contemporary society states should not hide themselves behind the screen of objections to the Court's jurisdiction when allegations of grave violations of international law (in that case the perpetration of genocide) are raised. In particular they stated as follows:

> 25. It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide. It must be regarded as a very grave matter that a State should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide, one of the greatest crimes known.[46]

In addition to the declarations made in all cases, Judge Vereshchetin, in four cases (against Belgium, Canada, the Netherlands, and Portugal), did not concur with the

44. Ibid., at 209–15, 320–6, 604–10, 718–24.
45. The legally binding nature of the Court's provisional measures, which sometimes was put into question, was finally and definitely confirmed by the Court in the *LaGrand* case: 'orders on provisional measures under article 41 [of the Statute] have binding effect' (*LaGrand (Germany v. United States of America)*, Judgment, [2001] ICJ Rep. 506, para. 109; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, [2005] ICJ Rep., para. 263).
46. Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma in the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment, ICJ Rep. 2006.

majority on the question of jurisdiction. In his view, for the purposes of the indication of provisional measures where the Court traditionally applied a lower standard for jurisdiction,[47] the Court had prima facie jurisdiction under Article 36(2) of the Statute of the Court in respect of those states and, as far as Belgium and the Netherlands were concerned, the Court also had prima facie jurisdiction under the Agreements signed between Belgium and Yugoslavia on 25 March 1930 and between the Netherlands and Yugoslavia on 11 March 1931. Thus, according to Judge Vereshchetin, the Court should have indicated provisional measures with regard to Belgium, Canada, the Netherlands, and Portugal.

3.6. *Qatar* v. *Bahrain* – the decision of the former protecting power as a basis of the Court's finding

Judge Vereshchetin voted against two operative paragraphs of the Judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*.[48] However, he chose to append a declaration[49] and not a dissenting opinion because in the first instance he voted against the method selected by the Court to arrive at its decision rather than voting against the substance of that decision; as for the second vote, while Judge Vereshchetin's conclusion differed from that reached by the Court, it would not in the final account have changed substantially the maritime boundary drawn by the Court.

When deciding on the question of the sovereignty over the Hawar Islands the Court relied exclusively on the 1939 decision whereby the British government decided that the Hawar Islands belonged to Bahrain, and stated that

> The conclusion thus reached by the Court on the basis of the British decision of 1939 makes it unnecessary for the Court to rule on the arguments of the Parties based on the existence of an original title, *effectivités*, and the applicability of the principle of *uti possidetis juris* to the present case.[50]

Judge Vereshchetin, on the contrary, argued that the Court could not base its judgment on a decision of a former protecting power without taking into account other relevant factors and questioned the legal validity of such a decision in international law. The historical situation and the status of 'protected states', according to Judge Vereshchetin, 'were to say the very least not conducive to the genuinely free expression of will and the free choice of a third party' by the rulers of Qatar and Bahrain to resolve their territorial dispute. Judge Vereshchetin further examined the 1939 decision in light of criteria set out by the Institut de droit international and its rapporteur, Professor M. Virally, on the subject of the distinction between international texts with or without legal import, in order to determine the international legal

47. The usual formula used by the Court in its orders on provisional measures with regard to questions of jurisdiction reads as follows: 'Whereas on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate such measures, finally satisfy itself that it has jurisdiction on the merits of the case, yet it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded.'
48. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, [2001] ICJ Rep. 40.
49. Ibid., at 217–21.
50. Ibid., at 85, para. 148.

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consequences of the 1939 decision at the point of adoption and at the time of that decision being evaluated by the Court. He concluded that the 1939 decision of the British government was an administrative decision, taken by the protecting power with respect to its protectorates, the international legal effects of which produced in 1939 could not mechanically be presumed by the Court to be the same in 2001 'in an absolutely different legal and political setting'. Judge Vereshchetin did not suggest that the 1939 decision should be put aside, but rather that the Court needed to re-evaluate the substance of the decision, i.e. as to whether it was well founded in law. This process 'might have led the Court either to confirm or reverse the British decision, or else to modify it'. In any event, such an approach would provide, in his view, a more sound basis for the Court's Judgment than 'mere reliance on the administrative decision of the former "protecting Power"'.

Judge Vereshchetin also disagreed with the Court's finding concerning the characterization of Qit'at Jaradah as an 'island' within the meaning of the 1982 Law of the Sea Convention. In his opinion it was a low-tide elevation which could not have its own territorial sea. Its appurtenance depended 'on its location in the territorial sea of one State or the other'. From this fact Judge Vereshchetin drew the conclusion that 'the attribution of Qit'at Jaradah should have been effected after the delimitation of the territorial seas of the Parties and not vice versa'. The Court, however, having decided that Qit'at Jaradah was an island under Bahrain's sovereignty, when drawing the maritime boundary took into account the special circumstances of the case and came to the following conclusion:

> The Court observes that Qit'at Jaradah is a very small island, uninhabited and without any vegetation. This tiny island, which – as the Court has determined . . . – comes under Bahraini sovereignty, is situated about midway between the main island of Bahrain and the Qatar peninsula. Consequently, if its low-water line were to be used for determining a base point in the construction of the equidistance line, and this line taken as the delimitation line, a disproportionate effect would be given to an insignificant maritime feature . . . . In similar situations the Court has sometimes been led to eliminate the disproportionate effect of small islands (see *North Sea Continental Shelf, I.C.J. Reports 1969*, p. 36, para. 57; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 48, para. 64). The Court thus finds that there is a special circumstance in this case warranting the choice of a delimitation line passing immediately to the east of Qit'at Jaradah.[51]

That line of reasoning in point of fact lead the Court to draw the course of the boundary as envisaged by Judge Vereshchetin. Thus there was no need for him to append a dissenting opinion.

3.7. *Revision (Yugoslavia v. Bosnia and Herzegovina)* case – in which circumstances the Court's judgment can be revised

By the Judgment of 3 February 2003 in the case concerning *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina*

51. Ibid., at 104–9, para. 219.

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v. Yugoslavia), Preliminary Objections *(Yugoslavia v. Bosnia and Herzegovina)*,[52] the Court found inadmissible the Application of the Federal Republic of Yugoslavia for revision of the Judgment of 1996 whereby the Court decided that it had jurisdiction in the *Genocide* case. Whereas Yugoslavia argued that its admission to the United Nations in 2000 'revealed' the new fact that it had not been a member of the United Nations and a party to the Genocide Convention in 1996, the Court found that 'no facts within the meaning of Article 61 of the Statute have been discovered since 1996' and concluded that the Application for revision had to be rejected. It is to be recalled that Article 61 of the Statute and Article 99 of the Rules of Court relating to revision of judgments envisage a two-stage procedure,[53] the first part of which deals exclusively with the question of admissibility of the request for revision. In order for a request to be declared admissible 'each of the conditions laid down in Article 61 [must be] satisfied. If any one of them is not met, the application must be dismissed'.[54] The Court's practice in this regard is limited, the Yugoslav Application being only the second request of this kind since 1946.[55]

Judge Vereshchetin disagreed with the Court's findings in the *Revision (Yugoslavia v. Bosnia and Herzegovina)* case and appended a dissenting opinion[56] to the Judgment. He considered the Court's approach with regard to the qualification of a fact under Article 61 of the Statute (the sole basis of the Judgment[57]) to be overly formalistic. In addition to analysing the Court's jurisprudence relating to the case and the factual circumstances of Yugoslavia's status before and after 1 November 2000, when the latter was 'formally admitted to the United Nations as a new member', Judge Vereshchetin provided his view as to the meaning of a 'decisive new fact' for the purposes of Article 61 of the Statute. His position was that the notion of a new fact should not be restricted merely to include phenomena of objective reality. The Court's assumption of a particular situation when rendering the judgment should also be considered a fact. Moreover, the discovery of the wrongfulness of that assumption had to be regarded as a ground for revision of the judgment. To prove the veracity of this statement Judge Vereshchetin referred to the *Schreck* case,

52. *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections *(Yugoslavia v. Bosnia and Herzegovina)*, Judgment, [2003] ICJ Rep. 7.
53. 'Article 61 provides for revision proceedings to open with a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute; Article 99 of the Rules makes express provision for proceedings on the merits if, in its first judgment, the Court has declared the application admissible.' (Ibid., at 11, para. 15.)
54. Ibid., at 12, para. 17.
55. The Judgment in the first revision case was rendered in 1985 (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, [1985] ICJ Rep. 192). A third request for revision was filed by El Salvador in September 2002 and the Judgment was delivered on 18 Dec. 2003 (*Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*, Judgment, [2003] ICJ Rep. 392).
56. *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections *(Yugoslavia v. Bosnia and Herzegovina)*, Judgment, [2003] ICJ Rep. 39–50.
57. 'In the present case, the Court has concluded that no facts within the meaning of Article 61 of the Statute have been discovered since 1996. The Court therefore does not need to address the issue of whether the other requirements of Article 61 of the Statute for the admissibility of the FRY's Application have been satisfied' (ibid., at 32, para. 73).

in which an arbitrator had revised his decision on discovering that it had been based on a wrong assumption of the claimant's nationality. More generally, in his dissenting opinion, Judge Vereshchetin wrote that 'in national jurisprudence one may find many other examples of the revision of decisions based on the discovery of wrong assumptions'. The second finding made by Judge Vereshchetin in respect of the notion of a 'fact' was that the latter comprised likewise certain legal situations, first of all the legal status of various entities. In particular, according to him 'it would be a natural interpretation of the meaning of the term "fact" that it includes a state's status in an organization. Likewise, facts would be statehood, being a party to a treaty, etc.'. In that sense, Judge Vereshchetin points out, the Russian text of Article 61 allows for a broader interpretation as it 'uses the word "circumstances" in place of the word "fact" used in the English text'.

Having considered the Yugoslav request in the light of Article 61 requirements, Judge Vereshchetin reached the conclusion that they had all been met and that accordingly 'the Application of Yugoslavia [was] admissible and the Judgment of the Court of 11 July 1996 should have been laid open for revision'. He emphasized, however, that 'such a procedural decision would not have prejudged the ultimate result of the revision'.

3.8. The *Avena* case – diplomatic protection and 'mixed' claims

In the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*[58] Judge Vereshchetin voted in favour of the operative part of the Judgment, but disagreed with the Court's reasoning as regards the issues of the law of diplomatic protection and the related rule of the exhaustion of local remedies. In particular, the Court stated in paragraph 40 of the Judgment that

> [V]iolations of the rights of the individuals under Article 36 may entail a violation of the rights of the sending State, and . . . violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1(b) [of the Vienna Convention on Consular Relations]. The duty to exhaust local remedies does not apply to such a request.

In his separate opinion[59] Judge Vereshchetin pointed out that this approach deviated from the Court's previous jurisprudence and did not take into account the work of the ILC, which in drawing up the Draft Articles on Diplomatic Protection was guided by this jurisprudence. He argued that the test to be applied in the circumstances of treaty-based 'mixed' claims, where a state alleged both direct injury to itself and indirect injury 'through the wrong done to its nationals', should be the 'preponderance' of claims test. This was the Chamber's position in the case concerning *Elettronica Sicula S.p.A. (ELSI)*,[60] and the position adopted by the ILC. According

58. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, [2004] ICJ Rep. 12.
59. Ibid., at 79–83.
60. *Elettronica Sicula S.p.A.(ELSI) (United States of America v. Italy)*, Judgment, [1989] ICJ Rep. 15.

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to Judge Vereshchetin, the situation in the *Avena* case, in which Mexico brought its claims in its own right and in the exercise of diplomatic protection of its nationals, was similar to the *ELSI* case: both elements of Mexico's claim were based on the same factual circumstances, 'the remedies sought focus on injuries to the nationals concerned'. He further emphasized that 'the claim would not have been brought before the Court, but for Mexico's desire to protect specific nationals'. This was a clear indication that 'the mixed Mexican claim is preponderantly a diplomatic protection claim'.

Thus, for Judge Vereshchetin, contrary to the Court's finding, the interdependence of rights as such did not allow the Court to choose arbitrarily a head of claim based on a direct injury to a state rather than a head of claim based on diplomatic protection. The nature of a claim and the applicability of the exhaustion of local remedies rule cannot be determined following the formal criteria of whether the claim is treaty-based (thus involving a state's rights) or not. In the *Avena* case direct injury to Mexico was consequential on the violation of the rights of its nationals under Article 36(1)(b) of the Vienna Convention on Consular Relations. Moreover, as he wrote, 'in invoking the rights of individuals under the Vienna Convention before this Court, the State, *as a general rule*, is not exempt from the duty to exhaust local remedies, subject to certain exceptions as those specified in article 10[14] of the ILC Draft' (emphasis in the original).

Having stated his view, Judge Vereshchetin further explained why he nevertheless agreed that the exhaustion of local remedies rule did not apply in the case. The reason lay in the very special circumstances of the case. In particular, the *LaGrand* case showed that the wide range of possible local remedies in the United States 'tend to be exhausted only a short time before the execution'. In the *Avena* case, where the Mexican nationals were already on death row, to demand that Mexico should have exhausted all local remedies before coming to the International Court of Justice 'could lead to the absurd result of this Court having to rule at a point in time when its ruling could have no practical effect'.

4. The legacy of Judge Vereshchetin

During his long and varied career, Vereshchetin's wise words have provided clarity and vision in a changing world of international law. His modern-minded approach has been characterized by the avoidance of overly theoretical flights of fancy, always preferring to engage his intellect to meet real situations and offer effective solutions in international law. In this manner, Vereshchetin has coupled an unpretentious and practical approach with a highly imaginative and original mind – an unusual and remarkable combination in any scholar. The range of topics in international law which have come under Vereshchetin's close analytical scrutiny have varied immensely, from the most general issues of theory to specific problems having direct practical significance. In each of these areas he has not only provided solutions to existing and emerging problems but has also identified methodological approaches, thereby facilitating future research processes. In this regard, particular reference should be made to his concept of the 'general legal field', which will undoubtedly prove to be a useful tool for academics and practitioners in years to come.

The wide-ranging spectrum of interests reflects Vereshchetin's dual quest to find, as a practitioner, generic patterns and norms behind everyday occurrences and to build, as a scholar, theoretical concepts on a solid foundation of applied experience. The interrelation between these two approaches to legal thinking, empirical and academic, is characteristic of Vereshchetin's analytical method both as a scholar and as a judge.

The Court has greatly benefited from Judge Vereshchetin's singular judicial style. In addressing difficult questions raised in cases before the Court, he has consistently sought solutions with a sound conceptual and theoretical basis, while never overlooking the need to provide the parties with a practical and workable resolution of their differences. This twofold objective has underpinned each and every opinion and declaration appended by Judge Vereshchetin to the decisions of the Court. Moreover, the significance of Judge Vereshchetin's opinions and declarations has frequently gone beyond the framework of a particular case. In that respect, suffice it to recall the issues of self-determination, countermeasures, diplomatic protection, and questions which concern the functioning of the Court (the role and powers of the ICJ, *non liquet*, bases for the revision of decisions, declarations accepting the Court's jurisdiction and reservations to them, etc.). The legacy of Judge Vereshchetin at the Court cannot be overestimated. An independent thinker who yet thrives on collegial debate and interaction, his infectious enthusiasm, boundless mental energy, and charming disposition have marked Judge Vereshchetin's unique place in the history of the Court.