

HAGUE INTERNATIONAL TRIBUNALS INTERNATIONAL COURT OF JUSTICE

Challenges to the Independence of the International Judiciary: Reflections on the International Court of Justice

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Abstract

The International Court of Justice and other international tribunals have a much more prominent role in settling international disputes than they did 50 years ago. It follows that the measures for the protection of the independence of the institutions and their members are even more important. Those protections include the qualifications judges are to have, the methods of their election and selection, their commitment to their responsibilities, and their methods of work. Also important are the reactions to their decisions by states, particularly the parties, the wider international community and the contribution of the rulings of the institutions to the clarification of the law and its development.

Keywords

assessment of contribution; independence; international judiciary; methods of election and appointment; qualifications of judges

I. INTRODUCTION

To put the current challenges to the independence of the international judiciary into context, it is useful to recall the position of the International Court of Justice (ICJ or the Court) and of international adjudication and arbitration more generally in the 1970s. The Declaration of Principles of International Law concerning Friendly Relations and Cooperation between States, adopted unanimously by the General Assembly on the 25th Anniversary of the United Nations in 1970,¹ made no reference at all to the Court, a ‘scandalous omission’ according to Shabtai Rosenne.² That text emphasized the principles of the sovereign equality of states and of the free choice of means. The situation appeared somewhat better the following year with the

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1 Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, UN Doc. A/Res/25/2625 (1970).

2 S. Rosenne, *The Law and Practice of the International Court, 1920–2005* (2006), Vol. 1, at 120.

delivery of the *Namibia* Opinion,³ which many saw as a reversal of the controversial 1966 *South West Africa* judgments.⁴ However, following a period in which it had no business at all, the Court faced several large challenges with cases being brought against five states which not only flatly rejected the Court's jurisdiction but also refused to appear – Iceland in the *Fisheries* cases brought by the United Kingdom and Germany challenging Iceland's 50-mile fishing zone, France in the *Nuclear Tests* cases brought by Australia and New Zealand, India in the case brought by Pakistan about the repatriation of prisoners of war and civilian internees following the Bangladesh war, Turkey in the *Aegean Sea* case brought by Greece, and Iran in the *Hostages* case brought by the United States.⁵ In the next decade the United States withdrew from participation in the proceedings brought by Nicaragua about military and paramilitary activities in the latter's territory.⁶ That case and the *Nuclear Tests* proceedings led to strong criticism of the Court by senior French and American officials speaking for two states which had long been its principal users and supporters.⁷ Those two states also withdrew their acceptances of the Court's jurisdiction which they had earlier made under Article 36(2) of the Statute of the Court.⁸

The role of international arbitration in that period was also very limited. The UN Reports of International Arbitral Awards contain only five inter-state awards for the 1970's (with an interpretation of one). They included the *Beagle Channel* award given by five ICJ judges which Argentina claimed was null and void, a matter which was not resolved until 1984 following brinkmanship, negotiations, Papal mediation and a Treaty. Another major award given between France and the United Kingdom delimited their maritime spaces in the Channel. The five members of that tribunal included the British and French judges of the ICJ.

In addition to the challenging political and security contexts in which the ICJ cases were to be found, a number were difficult substantively – the rapidly developing law of the sea; the *force de frappe* on the one side and the campaign for nuclear disarmament and for environmental protection on the other; and the strongly held opinion that disputes about the use of armed force were not justiciable. An overall negative perception of the Court appeared in the debates about its role in the General

3 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, [1971] ICJ Rep. 16.

4 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1996] ICJ Rep. 6.

5 *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment of 25 July 1974, [1974] ICJ Rep. 3. *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment [1974] ICJ Rep. 175. *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 253. *Nuclear Tests Case (New Zealand v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 457. *Trial of Pakistani Prisoners of War (Pakistan v. India)* Order of 15 December 1973, [1973] ICJ Rep. 347. *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Jurisdiction, Judgment of 19 December 1978, [1978] ICJ Rep. 3. *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980, [1980] ICJ Rep. 3.

6 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14.

7 See, e.g., K. Keith, '100 Years of International Arbitration and Adjudication', (2014) 15 *Melbourne Journal of International Law* 1, at 13–14.

8 562 UNTS 71, 907 UNTS 129, 1 UNTS 9, 1354 UNTS, 1408 UNTS 270; for related action concerning the 1928 General Act for the Pacific Settlement of Disputes see 961 UNTS 354, 907 UNTS 194, 915 UNTS 324, 943 UNTS 450, 1120 UNTS 850; for India's denial of being a party to the 1928 General Act see, *supra* note 5, Pleadings 139, and *Nuclear Tests* cases, Pleadings Vol. II, 436.

Assembly in the early 1970s,⁹ and from those leading to the establishment of the International Tribunal on the Law of the Sea by the 1982 United Nations Convention on the Law of the Sea (UNCLOS).¹⁰ The limited role of the Court is also evident from the fact that Judge Jimenez de Arechaga, the President from 1976–1979, signed only one Judgment, that in the *Aegean Sea* case, a Judgment in which, moreover, the Court decided it did not have jurisdiction.¹¹ Further, relationships within the Court at that time were plainly difficult, as appears for instance from an essay about the Court by André Gros, the Judge of French nationality who served from 1964–1984.¹²

The situation of the Court and of third-party dispute settlement by adjudication and arbitration more generally is now strikingly different. The Court, over the past 25 years, has been and continues to be busy with cases concerning a wide range of international law issues and involving states from all parts of the world (17 cases pending in August 2016 compared with none in March 1970). Other international courts and tribunals, universal, regional, and *ad hoc*, have growing dockets, as appears from recent volumes of the UN Reports of International Arbitral Awards. They include many territorial disputes, some major such as Eritrea/Ethiopia, Argentina/Chile, and the Sudan case; maritime demarcation cases; fishing disputes; state responsibility for deaths and related matters; pollution issues; and treaty interpretation.¹³

The increase in business makes it all the more important that the authority, legitimacy and effectiveness of international justice be supported by principles, rules and practices protecting the independence of the judiciary.

The principal elements regularly assembled in support of judicial independence concern the qualifications of judges, the methods of their appointment, their tenure and conditions of office, their relationship to one another and to external agencies, and the relationship of the Court with other agencies and with the wider public. That last reference to the Court introduces the matter of institutional autonomy. On the one side, the court or tribunal as an institution has to be free from improper interference or influence and, on the other, its individual judges, while retaining their individual independence, are subject to restrictions arising from the fact that

9 E.g., General Assembly resolutions 2723 (xxv), 2818 (xxvi) and 3232 (xxix). L. Gross, 'Review of the Role of the International Court of Justice', (1972) 66 AJIL 479; for the related amendments of the rules of court, see E.J. De Arechaga, 'The Amendments to the Rules of Procedure of the International Court of Justice', (1973) 67 AJIL 1.

10 See the remarkable comments by a serving judge, S. Oda, 'Dispute Settlement Prospects in the Law of the Sea', (1995) 44 ICLQ 863 (244 Hague Recueil 127).

11 *Aegean Sea Continental Shelf case*, *supra* note 5. By contrast in the latest triennium the President signed eight judgments; there were also six substantive orders.

12 A. Gros, 'La Cour Internationale de Justice 1946–1986: les réflexions d'un juge', in Y. Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 289. See his comments on the elections, particularly of 1952 and 1966, the elections to the Presidency in 1967 and 1970, the politicization of the Court, what he saw as judicial misbehaviour, the reason, again as he saw it, leading to France's withdrawal of its acceptance of jurisdiction and the quality of recent decisions.

13 For another, the World Trade Organization (WTO) dispute settlement system, with the Appellate Body at its head, has, according to WTO officials, handled disputes worth at least US\$ 1 trillion of world trade flows; two thirds of WTO members have participated in the processes, many of them with no earlier experience of international litigation. Since 1995 the Appellate Body has given 125 reports and awards including a number on general issues of international law. See, e.g., Appellate Report United States – Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, AB-1996-1, WT/DS/9, at 17 (the panel of three included two general international lawyers of broad professional experience). Other areas of rapid growth over the last 20 years are investment arbitration and international criminal prosecutions.

they are one of 15, to take the case of the ICJ. The members of that Court have responsibilities as colleagues. They enter the Great Hall of Justice to the cry of '*La Cour*'. They constitute a bench of magistrates, not an academy of jurists, let alone 15 individual scholars each marching to their own drum.

This article aims to examine the independence of the judiciary, with a particular emphasis on the ICJ. It proceeds in four parts: I first consider the necessary qualifications of the Judges. Second, I address the responsibilities of states and others involved in the nomination and election of the Judges, including the special challenge to independence posed by the process of re-election. Third, I examine the corresponding responsibilities of the Court and the Judges. I conclude with a limited assessment of the contributions of the Court, reflections on its value as a court of general jurisdiction, and a reference to the ways its processes may fit with other methods of settling international disputes and managing international matters.

Before turning to the first part, I recall a clear statement of the purpose of judicial independence made by Sir Gerard Brennan, then Chief Justice of the High Court of Australia: the principle of judicial independence is:

not proclaimed in order to benefit the Judges; it is proclaimed in order to guarantee a fair and impartial hearing and an unswerving obedience to the rule of law. That is the way in which our people secure their freedom under the law.¹⁴

He was speaking in a national context, thinking of litigation between individual and individual or between an individual and the state. His statement is to be related back to the entitlement, to use the terms of the 1966 International Covenant on Civil and Political Rights (ICCPR), of all persons in the determination of any criminal charges against them or of their rights and obligations in a suit at law, to a fair and public hearing by a competent, independent and impartial tribunal established by law.¹⁵ In 2015, on its 800th anniversary, the foundational promises of Clauses 39 and 40 of the Magna Carta were recalled even more frequently than usual. Those documents help emphasize the responsibilities of the judge, of all courts. Sir Gerard's statement of purpose, in my view, applies even more to international litigation and to international judges, since in the international context there is a further factor emphasizing the importance of independence and impartiality and their underlying purpose. That factor is that, before international courts and tribunals may exercise jurisdiction over disputes between states, the states must have consented to that jurisdiction. They can give that consent in different ways. As I have noted, they have increasingly done so and they have increasingly made use of those institutions, including the ICJ. Their willingness to give and maintain that consent must in major part be based on their assessment that the judges and others who will decide the disputes will act independently with the necessary impartiality, intellectual competence, qualifications and professional experience, and will decide the disputes submitted to them in accordance with international law, following a fair procedure. A recent indication of that assessment, a positive one, in respect of the ICJ, appears in the

¹⁴ Sir G. Brennan, Chief Justice of the High Court of Australia, speech to the 12th South Pacific Judicial Conference, Sydney, 14 April 1997, at 6.

¹⁵ 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Art. 14.

General Assembly debate on 30 October 2014 following the presentation by the then President of the Court, Judge Peter Tomka, of the Report of the Court for the previous year. Over 30 delegations, including several speaking on behalf of major groupings such as the Non-Aligned Movement, the African Group, and the Community of Caribbean and Latin American States, all commended the Court for its work. States which had failed before the Court were among those speaking positively.¹⁶

2. THE NECESSARY QUALIFICATIONS OF THE JUDGES

The treaties and statutes setting up the courts and tribunals consistently require that candidates be persons of integrity, independence, and impartiality.¹⁷ Those requirements are emphasized and supported by the rules and practices relating to the solemn declarations made by new judges as they take office, their tenure, including immunity from suit, and guarantee of salary, recusal, and removal from office.

The professional requirements for judges of the ICJ are stated as alternatives in Article 2 of its Statute – having the qualifications required in their home countries for appointment to the highest judicial offices, or being jurisconsults of recognized competence in international law. The Statute also requires, in Article 9, that electors bear in mind that in the body as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured. The requirements for other courts and tribunals, such as the International Tribunal on the Law of the Sea (ITLOS),¹⁸ the International Criminal Court (ICC),¹⁹ and the

16 GA Plenary, A/69/PV33, 30 October 2014, at 5, and PV34. Questions may be asked about how strongly that commitment is manifested in practice. Consider the limited number of states which have accepted jurisdiction and the reservations made by those which have. I take just one example. Among those speaking positively was the representative of Japan, see A/69/PV33, at 24, but compare the action taken by that country just a year later excluding many law of the sea matters from its acceptance of the jurisdiction of the ICJ. The justification it gave in terms of preferring the methods available under the UNCLOS is to be related to the position it took in the *Southern Bluefin Tuna case* 23 UNRIAA 1. See also A/70/PV.47, 5 November 2015, at 19.

17 See the emphasis placed on the provisions of Art. 20 of the ICJ Statute by Gros, *supra* note 12, at 291 and Davis S. Robinson, State Department legal adviser at the time of the *Nicaragua* case, (2003) ASIL Proceedings 277. That paper raises serious issues relating as well to the ethics of the parties and their representatives that are demonstrated in the case between Bahrain and Qatar: see the exchange of correspondence relating to 82 documents submitted by Qatar which were forgeries and also the separate opinion of Judge ad hoc Fortier [2001] ICJ Rep. 40, at 451–3. See also the exchange between Paul Reichler, counsel for Nicaragua in the case against the US in the mid-1980s, and Judge Stephen Schwebel, the Judge of US nationality at the time, in recent issues of the *American Journal of International Law*: (2012) 106 AJIL 102, at 316, 582 and 583. Robinson mentions a contact between members of the Nicaraguan team and a serving judge in the lead-up to the case. See also an account in a book published by the Government of Peru relating to its case with Chile (*Peru and Chile in the Hague: An Example for the World* (2014), 82) of a discussion between the Co-Agent and its proposed Judge ad hoc and further, the account by Alain Pellet of exchanges with a ‘civil law’ judge when he was counsel for Australia in the *Nauru* case in *The International Lawyer as Practitioner* (2000), 152.

18 The Statute of ITLOS calls for persons of recognized competence in the law of the sea as well as representation of the principal legal systems of the world and equitable geographic distribution. 1982 United Nations Convention on the Law of the Sea, Annex 6, Statute of the International Tribunal of the Law of the Sea, 1833 UNTS 3, Art. 2.

Although the professional qualification for ITLOS is limited to expertise in the law of the sea, its tasks, inevitably, call on more general skills in international law, and, to take a recent specific matter, issues about the extent of the Tribunal’s rule-making powers and the conferral and exercise of advisory jurisdiction. See Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion, Judgment of 2 April 2015, ITLOS. In terms of that Tribunal’s specialist character it is striking that, in the 20 years since it was established, the ICJ has decided more substantive law of the sea cases than the Tribunal, and ad hoc tribunals have also had a major role.

19 Members of the ICC are to have established competence (a) in criminal law and procedure and the necessary relevant experience as prosecutor, advocate or judge, or (b) in relevant areas of international law such as

World Trade Organization (WTO) Appellate Body,²⁰ tend to reflect their specialized role.

Whatever the constitutive treaty text says, the qualities of the judges and members of a court or tribunal are critical. In Alexander Pope's words:

For forms of government let fools contest;
Whate'er is best administer'd is best²¹

Much has been written about these professional requirements and their changing application in international practice. The Institute of International Law (the Institute) has, for instance, recently adopted a relevant resolution.²² I draw on that material and on my own judging experience, which now extends over 30 years, 18 of them full-time, and a longer period of observing judging, to make the following observations. First, it is worth noting some figures concerning the 29 judges elected to the ICJ over the last 21 years, including the three who joined the Court in February 2015. A majority, including nationals of four of the five Permanent Members of the Security Council, have spent most of their working lives in their foreign services; 13 have had international judging and arbitral experience; about half have had experience as counsel in international cases; six have had national judging experience; many have good records of published scholarship; 13 had been members of the International Law Commission, and three had been judges ad hoc at the ICJ. Particularly in earlier years but also more recently, concern has been expressed about the

international humanitarian law and the law of human rights and relevant professional experience (1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Art. 36). Crucial to the work of the ICC, as to the ad hoc criminal tribunals, are experience and skill in running large scale trials, often in a controversial political context. Early in the life of that Court an experienced trial judge was overruled on a critical procedural matter by colleagues elected on the basis of their established competence in relevant areas of international law. The consequence was an inevitably successful appeal, delays in the completion of the trial and extra cost. See *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of Mr Thomas Lubanga Dyilo and the Prosecutor against rulings of Trial Chamber 1 of 14 July 2009, ICC-01/04-01/06 A 5, A. Ch., 8 December 2009. Some will recall as well the controversies over certain elections, essentially selections, to that Court of persons who appeared not to have even the minimum requirements, lacking real law qualifications. A *Guardian* columnist writing at the time of the launch of a book on the (s)election of international judges by Ruth Mackenzie et al. (*Selecting International Judges: Principle, Process and Politics* (2010)) spoke of a 'toxic system' for electing the world's most senior judges, a system which was 'fundamentally undermining' the legitimacy of international courts. See B.W. Daly, 'Introductory Remarks', (2011) 105 *Proceedings of the Annual General Meeting (American Society of International Law)* 67, at 67; quoting A. Hirsch, 'System for Appointing Judges "Undermining International Courts"', *Guardian*, 8 September 2010, available at www.theguardian.com/law/2010/sep/08/law-international-court-justice-legal. On Mackenzie's book, see also the review by Michael Reisman and Ramannjan Nadadur (2012) 106 *AJIL* 704, the passages from the *Financial Times* quoted there, 704–5, a second article in the issue of 15 September 2011 and a surprising reply from the Director of the International Legal Division of the Japanese Ministry of Foreign Affairs on 23 September 2011.

20 The members of the WTO Appellate Body are to be persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the WTO agreements, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 17(3). The general direction in respect of 'law' in the WTO text is supported by a more specific one that the agreements are to be interpreted in accordance with customary rules of public international law which the Appellate Body from the outset has taken as referring to Arts. 31–3 of the Vienna Convention on the Law of Treaties. See Appellate Report United States, *supra* note 13 and, e.g., I. Van Damme, 'Treaty Interpretation by the WTO Appellate Body', (2000) 21 *EJIL* 605.

21 Alexander Pope, *An Essay on Man* (1733).

22 The Institute of International Law, *The Position of the International Judge* (2011), Vol. 74 *Annuaire* 174. See also the Report of the Study Group of the International Law Association – the Burgh House Principles on the Independence of the International Judges (2004).

predominance of those with extensive Foreign Service experience.²³ On the other hand, that experience is of major value in the working of the Court, particularly when accompanied by real independence and intellectual rigour.

I now turn to three crucial qualifications of the international judge, namely practical experience, competence in international law, and leadership. I also consider the particular geopolitical factors relevant to the ICJ.

2.1 Practical experience

The first qualification relates to the central role of a court: as an independent, impartial body, following fair procedures, it decides disputes of fact and law brought before it by states in accordance with law. In the case of the ICJ, the one substantive addition made to Article 38 of its Statute in 1945 gives further emphasis to that dispute settlement role by declaring that the Court's, 'function is to decide in accordance with international law such disputes as are submitted to it'. That emphasis on assessing the evidence and submissions and deciding disputed issues of fact and law puts skill and experience in litigation at the centre of the Court's and the judges' roles. The increasingly fact-intensive nature of the cases coming before the Court, which are decided by it at first and last instance, with no appeal, gives added force to that point. Judges have to come to grips with very large records and many disputed issues of fact, including technical and scientific ones. In my view, the Court requires a good number of judges with significant litigation experience as counsel or judges or both, and all need to have an extensive knowledge of international law. I need to make it clear that not all the 15 judges have to arrive with that litigation experience; in my observation, a number who have arrived without it quickly acquire a real understanding of such matters, sometimes with the assistance of experience in arbitrations. About half the judges who have served in the last 20 years have had that experience. The Institute in the resolution mentioned above was critical about that practice of sitting judges acting as arbitrators. More importantly from my point of view, it declared that the ability to exercise high jurisdictional functions – high judicial functions – remained the paramount consideration in the process of nomination and election.

2.2 Competence in international law

The Institute also emphasized my second essential qualification: competence in international law. Those involved in nominating, selecting, and electing judges are to ensure that they possess the required competence and that the Court or tribunal is in a position effectively to deal with issues of general international law. That emphasis was not to be found in the 1954 resolution, when the Institute last addressed the matter.²⁴ It is an important corrective to the sense, sometimes expressed in earlier years, that excellence and experience in national judging alone would be sufficient qualification. The huge increase in the scope and complexity of international law is

23 For the early period see, e.g., references in K. Keith, 'International Court of Justice: Reflections on the Electoral Process', (2010) 9 Chinese JIL 49, at 61–4.

24 Study of the Amendments to be made to the Statute of the ICJ, Aix-en-Provence, 1954, Vol. 45 II, 296.

no doubt a major factor in that change of emphasis. This does not, however, apply to the criminal courts and tribunals where, by contrast, trial experience, including that acquired in national courts, is central at the appellate as well as the trial level, and the relevant areas of international law are more confined. Those courts, I suggest, should exercise caution in addressing broader issues of general international law.²⁵

2.3 Leadership

The third personal quality I emphasize is leadership. In several of the national court systems I know, attention is given on a regular basis by those responsible for the appointment of judges to the issue of who is likely to become a good head of bench – not just a very good lawyer and judge, but one with the ability to deal with and lead colleagues and organize the work of the Court; and deal with the parties (states in the case of the ICJ) and their lawyers, with the Registry, with the relevant public agencies (in the case of the ICJ this would include other UN bodies, especially in respect of the budget), with the profession, and with the wider public. In the case of the ICJ, the responsibilities, particularly in chairing drafting committees which prepare draft judgments and opinions, and the lengthy, testing deliberations of all members of the Court leading to its decisions (at least three deliberations in each case), call for the exercise of a wide range of skills. But I am not aware that any real thought is given to that matter, particularly by those states which have major roles in the electoral process. The availability of strong candidates for that position is, I fear, left too much to chance.

2.4 The geopolitical composition of the ICJ

The geopolitical composition of the Court, emphasized by the requirement of representation of the major forms of civilization and the legal systems of the world, has clearly appeared in operation as the number of UN members has increased almost four-fold with new nations, especially from Asia, Africa, the Caribbean and the Pacific, joining the UN. The urging by the Institute in 1954, but not repeated in 2011, that the Article 9 geographic requirement should be subordinated to the personal qualifications set out in Article 2 has had no effect at all.²⁶

Changes in the geopolitical composition of the Court in 1951, when a Western European and Others Group (WEOG) seat went to Asia, 1957 when an Eastern European seat went to WEOG, 1963 when a Latin American seat went to Africa, 1966 when a WEOG seat went to Africa and 1969 when an Asian seat went to Africa and, finally, the adjustment following the election in 1985 of a judge from the People's Republic of China, established the present composition of the Court. The composition then matched that of the Security Council and still does. My comment

25 See for instance the critiques of one aspect of an ICTY decision in S. Linton et al. (eds.), *For the Sake of Present and Future Generations: Essays on International Law, Crime and Justice in Honour of Roger S. Clark* (2015), Ch. 26 and a ruling of the Special Tribunal for Lebanon in B. Saul, 'The Special Tribunal for Lebanon and Terrorism as an International Crime: Reflections on the Judicial Function', in W. Schabas et al. (eds.), *The Ashgate Research Companion to International Criminal Law* (2012), at 79.

26 The Inter-allied Committee in 1944 would have gone further and deleted Art. 9 altogether and reduced the number of judges from 15 to nine. W. Malkin, *Report of the Informal Inter-allied Committee on the Future of the Permanent Court of International Justice: 10 February 1944* (1944), Cmd 6531, 39 AJIL Supp 1.

is that the Court cannot claim to be a World Court and to be attractive to the nations of the world unless it has a composition in terms of nationality much like the present one.

3. THE RESPONSIBILITY OF STATES AND OTHERS IN THE NOMINATION AND ELECTION OF JUDGES

3.1 Nominating groups

States bear ultimate responsibility for electing judges properly qualified for the job. But the first stage of the process requires nomination by national groups. Like the Institute in 2011, I support its strengthening and its wider application, for instance to the ICC and ITLOS. The process is intended to operate independently of governments. The 1944 Inter-allied Committee considered that it was an unsatisfactory method, which should not be continued. In its view only states should nominate, and only one candidate each, who should be a national.²⁷ To the contrary, national groups exercising their independent nominating role should introduce a more professional and a less political assessment. They may also nominate candidates not initially proposed by the national groups of those candidates, as has occurred in at least two major instances. There is certainly evidence of that exercise of independent judgment, but that would be enhanced were the processes of those groups more transparent, and their membership such as to engender confidence in their professional skill and independent status, matters emphasized by the Institute in 2011. Very little is known about the way they operate, with some information being available about the Australian, Canadian, United Kingdom and United States groups.²⁸ A recently retired legal adviser to the State Department has commented that by 'long tradition' the legal adviser has always chaired the group and that when he was in the chair he advised the White House of his intended vote in the group.²⁹ But that has not always been the case. The public record demonstrates the exercise of real independence in 1951, 1960 and 1978, whatever political influence there may have been being rejected.³⁰ There is, sadly, at least one instance of manipulation by a government of the membership of a national group, and other instances of what appears to be improper influence by governments in the work of the groups.³¹

Nominating groups have a responsibility to give real attention to the above three qualifications. I have no doubt that some do, but one fact, among a number, that casts doubt on how effectively they do that is the very small number of candidates put forward in the regular elections, held every three years, of five judges. While the membership of the UN has grown nearly fourfold over the last 70 years, the number of candidates has fallen markedly. In the 1950s, the number of candidates for five

27 Ibid., at 45–6 and 129–30.

28 See, e.g., K. Keith, 'Member of the Permanent Court of Arbitration', in C. Saunders and T.L.H. McCormack (eds.), *Sir Ninian Stephen: A Tribute* (2007), 155, 163–7, nn 28–45 (250–1).

29 J.B. Bellinger III, 'Remarks', (2011) 105 *Proceedings of the Annual General Meeting (American Society of International Law)* 71.

30 Keith, *supra* note 28, at 164.

31 Keith, *supra* note 28, at 163.

vacancies ranged from 33 to 20, in the 1960s from 25 to 15, in the 1970s from 17 to eight, in the 1980s from 14 to nine and in the 1990s from 15 to six. In 2002, there were eight, in 2005 there were seven, in 2008, eight, in 2011, nine, and in 2014, nine. One consequence of the very limited number of nominations is that the general membership of the UN has no real role in the election of many of the judges. Some of the seats, in addition to those held by nationals of the five permanent members of the Security Council (the P5), are in effect allocated by decisions of regional groups or by agreement between major capitals. By contrast, elections of candidates for the seats held by judges from the WEOG, other than the P5, are in general vigorously contested, or at least they have been.

3.2 States

I now come to the electoral phase and to the responsibilities of the electorate, that is, of governments. The process will differ, and differ greatly, from one candidate to another. My campaign was not typical – it lasted for over two years and involved visits to more than 30 capitals as well as to New York three times – but I know it best and I draw two points from it. One is the very heavy commitment a government of a small country like New Zealand undertakes if it is to support a candidate, given that elections to the WEOG seats are usually fought very vigorously. The decision by the government to launch such a campaign is a major one involving, among other things, weighing other possible candidacies and requiring much assistance from its friends, in my case, Canada and Australia.³²

My second point about the campaign relates to a proposition stated by the Institute – ‘elections of judges should not be subjected to prior bargaining which would make the voting in such elections dependent on votes in other elections’.³³ In 1952 and 1954, it had similarly proposed that elections of judges, because of their non-political character, should be held separately from those for other UN organs. I fear such proposals fly in the face of the facts. To provide one illustration, in a major capital in the Middle East, the New Zealand Foreign Ministry official who was accompanying me and I met a senior official in their Foreign Ministry. In a most direct way, he said that in such matters they were concerned with only two issues. Looking at me, he said the first was the quality of the candidate, the individual. I was very well qualified and would be an excellent member of the Court. He wanted to hear no more about that. He then turned to my Foreign Affairs colleague and to his second matter. ‘What is in it for us?’ he asked. The question was about elections, about vote swaps. The New Zealand Foreign Affairs officer was very well prepared with information about all of the elections in which that country might be interested and the commitments New Zealand had already given. That, as I understand it, is the reality. I like to think that my personal and professional qualities were necessary to my being elected (I trust I am not being naïve); but they were certainly not sufficient. I certainly see it as a responsibility of the electors to make that assessment of those qualities, whatever additional matters they may weigh but too often they may not. That was the fear

³² Mackenzie et al., *supra* note 19.

³³ The Institute of International Law, *supra* note 22, at Art. 1(6).

expressed a few years back by a very able lawyer and judge, a national of a small country: the profile of the candidate was not significant; the principal factor was the political profile of the country.³⁴ The consequence was that a higher placed and influential country may nominate a legal weakling and that candidate would be elected. His recent election to the ICJ against a candidate from a much larger country might cause him to question that view!³⁵

3.3 Re-election?

The practice of re-election poses a special challenge to the independence and diversity of the international judiciary. The 106 members of the Court elected since 1946 come from only 50 countries, and the nationals of just 11 of those countries – the P5, Brazil, Germany, Italy, Japan, Nigeria and Poland – have served on the Court for nearly half of the total judge years available.³⁶

Those figures alone provide one reason for supporting the increasingly expressed opinion that there should, in principle, be no re-election. In saying that, I proceed on the basis that the term of nine years is long enough for a judge to make a significant contribution to the work of the Court on a truly independent footing. The Institute in both 1954 and 2011 put its face against re-election. So does the Statute of the ICC, for example. By contrast, the 1944 Inter-allied Informal Committee assumed that re-election would continue. Leading commentators have regularly supported it, and, bizarrely, a current proposal relating to the pensions of future ICJ Judges would encourage it.³⁷ Judges do run for re-election, although the average term on

34 P. Robinson, 'Remarks', (2011) 105 *Proceedings of the Annual General Meeting (American Society of International Law)* 69, at 69.

35 His opponent had nine votes in the Security Council in the first seven rounds of voting (and he only six) while his vote in the General Assembly went from 115 to 130 and his opponent's fell from 77 to 61 (97 was the required majority). The opponent's candidacy was finally withdrawn and he received 15 and 185 votes in the two bodies.

Some evidence is available of 'jobs for the boys'. For instance in 1977 Queen Elizabeth's private secretary in discussion with Sir John Kerr, soon to leave his post as Governor-General of Australia, said that the issue of his departure 'was one he had to decide for [himself]' in the light of his discussions with the Prime Minister, but the private secretary raised with Kerr the possibility of his being appointed to the World Court as his next career move, P. Kelly and T. Branston, *The Dismissal in the Queen's Name* (2015), 8. The seat which was becoming available, held by de Castro of Spain, was taken by Roberto Ago of Italy, a formidable candidate who was easily elected. Note also the refusal of Sir Owen Dixon, the Chief Justice, to participate as the senior member of the Australian national group in the nomination in 1958 of Sir Percy Spender, a former Foreign Minister and then Australian Ambassador in Washington, as a candidate for the ICJ. The senior Indian judiciary appear to have something of a hold on a position, for instance, in elections to casual vacancies including a recent one in which a former legal adviser to the Indian foreign service, member of the International Law Commission (ILC), former judge ad hoc and member of the Institute of International Law was available. Madeleine Albright records that when she, as US Ambassador to the UN, was attempting to persuade Boutros Ghali to abandon his candidacy for re-election as UN Secretary-General one of her proposals was that he would be appointed to the ICJ. *Madam Secretary – A Memoir* (2003), 265.

36 Many commentators refer to a convention or practice or custom that P5 nationals will be elected. It is more than that. It follows from the requirement of the Statute, established in 1920, that candidates have a majority in the Council as well as in the Assembly. The assumption is that the P5 vote for candidates of all P5 nationality and only another three votes (of ten) are needed.

37 Secretary-General, Comprehensive Review of the Pension Schemes for the Members of the International Court of Justice and Judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/66/617 (2011), para. 58 and Advisory Committee, Comprehensive Review of the Pension Schemes for the Members of the International Court of Justice and Judges of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN

the ICJ is only ten years, as against the standard term of nine years. Other reasons for opposing re-election in principle are the perception of bias that may occur, the very appearance of serving international judges on the campaign trail in the UN, in capitals and in embassies, and the disruption that may be caused to the Court's work by the absence of such judges at such times.³⁸ I add the qualification 'in principle' that there should be no re-election in major part because of the third personal quality I mentioned earlier – leadership.

4. THE RESPONSIBILITY OF THE COURT AND THE JUDGES

As indicated at the outset, the principle of judicial independence and the related matters I have discussed have as their aim the provision of support for the good administration of justice and the rule of law, by way of an independent court, following fair procedures, deciding disputes brought before it, in accordance with the law. The Court and its judges bear a heavy responsibility in pursuing that aim. The qualifications of the judges, which I have already addressed, are one essential element. Another is diligent commitment to the task. In terms of Article 23 of the Statute of the Court, its members have a full-time role. The Court remains permanently in session and the members are bound to hold themselves permanently at the disposal of the Court. While that provision enables the Court to determine judicial vacations and leave for judges, those powers have not been expressly exercised in recent decades. The permanent character of the task is matched by the prohibition in Article 16 on judges exercising any political or administrative function or engaging in any other occupation of a professional nature.

Over recent decades the Court's docket has increased markedly. One rough measure is provided by the volumes of the ICJ Reports. Those of the last 30 years are twice in bulk those of the first 37 years, an increase matched by the increase in numbers of judgments: 65 in the last 25 years compared with 52 in the first 45. A second is the list of 17 pending cases in August 2016.

In addition to the number of cases currently considered by the Court, these cases are increasingly factually complex. For example, a recent case between Ecuador and Colombia over aerial herbicide spraying, which absorbs only about ten pages in the ICJ Reports (recording four procedural orders), contains 18 volumes of pleadings. The case was settled by the parties just three weeks before the hearing and then discontinued.³⁹ The 18 volumes include 12,294 pages and about 90 scientific and technical reports. There was extensive evidence relating to the composition of the herbicide, the patterns and places of spraying, the winds at the time of spraying, the toxic effect of the herbicide, and the health status of humans, animals, and plants

Doc. A/66/709 (2012), para. 29. But see to the contrary, President of the International Court of Justice, Letter dated 1 February 2012 from the President of the International Court of Justice addressed to the President of the General Assembly, UN Doc. A/66/726 (2012).

38 See also C.G. Weeramantry, *Towards One World: The Memoirs of Judge C. G. Weeramantry Vol. III: The International Court and Thereafter* (2014) at 282 (but he sought re-election) and his comment on the advantages for P5 nationals in terms of election to the presidency, at 278–9.

39 *Case Concerning Aerial Herbicide Spraying (Ecuador v. Colombia)*, Order Removing the Case from the List, Order of 13 September 2013, [2013] ICJ Rep. 278.

before and after. There were eyewitness accounts and expert reports of various kinds. Some months before the scheduled hearing dates, the Court, based on a detailed examination of much of the evidence, sent the parties a lengthy list of questions which it wished to see addressed at the hearing. It also made arrangements with the parties for some of the witnesses whose statements were in the pleadings to be called for oral questioning. When giving notice of discontinuance and agreeing to it, each party praised the Court for the time, resources, and energy it had devoted to the case and acknowledged that reaching a settlement would have been difficult, if not impossible, but for the involvement of the Court. That preparatory action was taken by the Court, in part, in terms of Article 1 of its 1976 Resolution concerning the internal practice of the Court, which calls for deliberations following the end of the written pleadings with a view to requesting explanations from the parties at the oral stage.⁴⁰ That provision dates back to 1931 and to earlier practice, but in recent years at least has been rarely used. The Court has followed that course in other recent cases.⁴¹ Given the complexity of the cases coming to it, and the first and last instance character of its jurisdiction, the use of that early deliberation in every case appears to me to be a wise, even necessary, course.

Some issues of evidence and procedure arising in the *Aerial Herbicide Spraying* and other cases are new, or relatively so for the Court. In addition to the technical and scientific matters in those cases, the issues include the weight to be given to particular types of evidence or even their admissibility, the handling of disputes about evidence which is said to be confidential, for instance for military or commercial reasons, the appointment of experts, and the processes for questioning certain categories of witnesses. The Court has developed much law and practice in those areas, as valuably described in an address by President Tomka to the Sixth Committee of the General Assembly in October 2014.⁴² In this regard, again the experience of other courts and tribunals, particularly national ones, can play an important role.⁴³

The willingness of the Court to adjust its methods of work to meet increasing demands without sacrificing quality may be seen in it undertaking two or three or even four cases at once, something some judges in the past saw as impossible; in engaging in long term planning, now regularly undertaken in September for the following calendar year; in attempting to schedule hearings about six months after the end of the written phases – something that is not always possible nor indeed always desired by the parties; and in exercising real controls over the length of

40 Resolution Concerning the Internal Judicial Practice of the Court (adopted on 12 April 1976), Art. 1.

41 See, e.g., the orders of 31 May 2016 and 16 June 2016 in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*.

42 P. Tomka, President of the International Court of Justice (speech to the Sixty-Ninth Session of the General Assembly of the United Nations, 30 October 2014), published as P. Tomka and V.-J. Proulx, 'The Evidentiary Practice of the World Court', in J.C. Sainz-Borgo (ed.), *Liber Amicorum Gudmundur Eiriksson* (2016).

43 The practice of the Court of not providing specific references to national law makes it difficult to document this point, but consider the recognition of the principle of *res judicata* by the Court in the *Genocide* case in 2007 and by the 1920 Advisory Committee, the development by the PCIJ in its Rules and practice of the principle of the equality of the parties, the explicit recognition of the elaboration of that principle given by the Human Rights Committee, relating to national law, in the *IFAD* case and the propositions relating to onus of proof, the standard of proof, and the relevance of and weight to be given to evidence, most recently in the 2015 *Genocide* case.

pleadings especially at the oral stage, even if too many counsel in the second round of the hearings ignore the call in the Rules and Practice Directions, a call repeated by the President at the hearings, to direct their arguments to the issues that still divide the parties and not to repeat what they had said in the first round.⁴⁴ It has also made its work more accessible, through its website, which now includes the full written pleadings and annexes; technology in the Court room; the more rapid publication of the reports; and in stylistic changes such as the introduction of tables of contents in judgments and the replacement of the repeated use of ‘whereas’ by regular prose in major orders (although regrettably not yet in all orders). In one order prior to the reform, ‘whereas’ (*considérant* in French) appeared 149 times in a single sentence which was 46 pages long!⁴⁵ Some of those changes and others have been discussed in seminars involving judges, for instance in 1986, 1996, 2006, and 2016.⁴⁶ These efforts to improve the Court’s practices must continue.

In terms of the quality of its judgments and opinions, and its very character as a world court in which the representation of the main forms of civilization and the principal legal systems is to be assured, the Court has maintained its very inclusive processes of deliberation and drafting, essentially in the form established in the 1920s. I do not add to the existing accounts, which have been provided, among others, by the first Registrar of the Permanent Court of International Justice (PCIJ) and by several Presidents and Judges of the present Court.⁴⁷ I would emphasize that that process, more inclusive than that in any other court or tribunal in which I have served, is central to the responsibility of each Judge and the Court as a whole.

A related matter concerns the exercise by Judges of their right to attach separate opinions and declarations to the Judgment or Opinion or, in practice, substantive orders of the Court. Others, notably the first Registrar of the ICJ, have provided careful accounts of the history of the matter from 1920 to 1945, during which proposals to deny that right were regularly rejected.⁴⁸ The reasons for the right – especially in terms of transparency, of the contribution of some proposed separate opinions to the strengthening of the Court’s decision and of the protection of the independence and impartiality of the individual judge – have been well developed over the years. Separate opinions, at their best, may also contribute to the collegiality of the Court and illuminate aspects of the reasoning. Coming from a legal system in which the

44 Art. 60 of the Rules and Practice Direction VI.

45 *Case Concerning the Application of the International Convention on the Elimination of all forms of Racial Discrimination (Georgia v. Russian Federation)* Request for the Indication of Provisional Measures, Order of 15 October 2008, [2008] ICJ Rep. 353.

46 E.g., L.F. Damrosch (ed.) *The International Court of Justice at a Crossroads* (1987); C. Peck and R.S. Lee (eds.) *Increasing the Effectiveness of the International Court of Justice* (1996); (1996) 17 Aust YBIL 1–186; V. Lowe (ed.) *Fifty Years of the International Court of Justice . . .* (1996); International Court of Justice, *A Dialogue at the Court* (2006); G. Gaja and J. Grote Stoutenburg (eds.) *Enhancing the Rule of Law through the International Court of Justice* (2014); J. Crawford et al., ‘The International Court at 70’, (2016) 7 JIDS 225–498.

47 A. Hammarskjöld, ‘Sidelights on the Permanent Court of International Justice’, (1927) 25 Mich 2 Rev 327; see also for that earlier period the valuable comment in 1930 by Charles Evans Hughes who had just left the PCIJ to become Chief Justice of the United States, ‘The World Court as a Going Concern’, (1930) 11 BYIL 180. For a later account see R. Jennings, ‘The Internal Judicial Practices of the International Court of Justice’, (1988) 59 BYIL 31.

48 E. Hambro, ‘Dissenting and Individual Opinions in the International Court of Justice’, (1956) 17 *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht* 229.

right has been long established and indeed is taken for granted, I largely agree with their reasons.⁴⁹

My concern is about the scope of separate opinions and to some extent about their numbers and length. On numbers, the Court has given 310 decisions, a figure that includes substantive orders, to which Judges have appended 1322 opinions and declarations.⁵⁰ Some opinions exceed by a large margin the length of the Court's decision: a matter which absorbed eight pages of the Court's unanimous decision in one case was the subject of a 36 page discussion in a separate opinion which, in terms of the issue actually to be decided, did not depart from the Court's reasoning.⁵¹

I recall, in terms of the scope of such separate opinions, that Article 57 of the Statute permits a judge to write if the decision of the Court 'does not represent in whole or in part the opinion' of that judge.⁵² Thus judges may wish to indicate why they disagree with the decision or the reasoning or to provide additional or alternative reasons supporting the decision. Some judges of recognized eminence have demonstrated that this can be done briefly. I mention two, both of whom served as President, Judge Anzilotti from the PCIJ, often referred to as the 'Great Dissenter', and Judge Basdevant from the ICJ. The former said this in 1930:

Very much to my regret I do not concur in the opinion of the Court and it is my duty to say so. Since, in my view, a dissenting opinion should not be a criticism of that which the Court sees fit to say, but rather an exposition of the view of the writer, I shall confine myself to indicating as briefly as possible what my point of view is and the grounds on which it is based.⁵³

And the latter wrote in 1953:

While concurring in the operative part of the Judgment, I am bound to say that the reasons for which I do so are to a great extent different from those stated by the Court. I therefore think that I should indicate in outline, but without exhaustive consideration of each separate point, the means by which I arrive at agreement with the operative part. I do not propose, in doing this, to embark upon a criticism of the reasoning adopted by the Court, nor to express my views on all the points dealt with in the at times over-complete arguments of the Parties; to do either would be to go beyond the bounds within which an individual opinion ought, in my view, to be kept. I shall not indeed indicate the particular points on which I am in agreement with the reasons given by the Court.⁵⁴

So far as the Judges are concerned, I conclude on this delicate matter with these wise words, expressed jointly and succinctly by two former Presidents of the Court:

49 See, e.g., K. Keith, 'The International Court of Justice: Primus inter pares?', (2008) 5 *International Organizations Law Review* 7, at 16–17.

50 As of 17 March 2016.

51 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development*, Advisory Opinion of 1 February 2012, [2012] ICJ Rep. 10.

52 Statute of the International Court of Justice, Art. 57.

53 *Free City of Danzig and International Labour Organization*, Advisory Opinion of 26 August 1930, PCIJ Rep. Series B No 18, at 18 (Judge Anzilotti, Dissenting Opinion).

54 *The Minquiers and Ecrehos Case (France v. United Kingdom)*, Judgment of 17 November 1953, [1953] ICJ Rep. 47, at 74 (Judge Basdevant, Separate Opinion).

It could be desirable if those disagreeing with the Court would limit themselves to saying why rather than going on to explain at great length how they would themselves have decided the issues. Some opinions have been close to academic discourses rather than judicial pronouncements.⁵⁵

Recall what King Solomon said 3,000 years ago – not everything that you think must you say; not everything you say must you write and, most important of all, not everything you write must you publish. A related and cautious word to the academic community is to recall that the dissenters have failed to persuade their colleagues, nine, ten, or even more . . . of them. What the Court says and actually decides appears to me to be rather too often ignored in commentary.

5. AN ASSESSMENT OF THE WORK OF THE ICJ

The real test of the Court's work, its real accountability to its various audiences, must be in terms of the responses to its judgments and other decisions, especially, but not only, by states. It is mainly by reference to its decisions that the Court is held to account. It is not for a former member of the Court to engage substantively in that accounting. I limit myself to four comments of fact. The first is to recall the increasing numbers of cases being brought before the Court, their widening subject matter, and the greater diversity of the states appearing before it. Compare the present situation with the state of the Court's docket in early February 1970, after the delivery of the *Barcelona Traction* Judgment.⁵⁶ It was completely empty, a matter addressed by President Zafrulla Khan later in the month when the new judges made their solemn declarations⁵⁷ and in the General Assembly, in part in very critical terms, when it reviewed the role of the Court in the following few years.

The second comment is to note that the law stated by the Court has often been incorporated into law-making conventions and texts prepared by the International Law Commission: consider especially the law of the sea, the law of treaties, and the law of state responsibility.⁵⁸

The third point is the response of particular states to decisions binding on them. Careful scholarship has shown a high level of compliance.⁵⁹ But there are recent instances of non-compliance or threatened non-compliance.⁶⁰ Against the non-appearances and withdrawals in the 1970s and 1980s, mentioned earlier, is the steady, if slow, increase in the acceptances of jurisdiction by states in all parts of the

55 A. Zimmerman et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), 16, para. 37.

56 *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3.

57 1969–70 *Yearbook of the Court* 115.

58 See, e.g., on the law of the sea, 1956 Vol. II *Yearbook of the ILC*, at 266–7, 277; on the law of treaties, 1966 Vol. II, *Yearbook of the ILC*, at 201–4, 211–12, 218–28, 241–4, 253–4, 257–60; and on state responsibility, 2001 Vol. II(2) *Yearbook of the ILC*, at 32–41, 47–9, 51, 53, 56–61, 64–8, 71–8, 82–5, 88–91, 93–100, 107, 110–18, 120–37 and 140–3.

59 C. Schulte, *Compliance with Decisions of the International Court of Justice* (2004) and C. Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987', (2004) 98 *AJIL* 434.

60 The executions of Mexican citizens in breach of the order made by the Court in the follow-up to the *Avena* case and the reaction of the Colombian President to the unanimous 2011 ruling on that country's maritime boundary with Nicaragua.

world, and the withdrawal by Eastern European States, beginning in 1989, of their reservations to compromissory clauses in a range of treaties, including human rights treaties.⁶¹ Four of the states which had earlier refused to appear have subsequently participated fully in cases affecting them.⁶²

Fourth, the changing attitude of the UN membership to the Court can be traced through relevant declarations adopted by the General Assembly over the past 45 years. I earlier recalled that the Friendly Relations Declaration of 1970 made no reference at all to the Court. As early as 1982, however, the General Assembly felt able to refer to the Court, in the Manila Declaration on the Peaceful Settlement of International Disputes, in a positive way, concluding that, '[r]ecourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between states'.⁶³

The Summit Declaration adopted on the 50th anniversary in 2005 included within the lengthy paragraph headed the Rule of Law – an expression mentioned only once in 1970 – a substantial endorsement of the Court.⁶⁴

In 2012 the General Assembly also struck a positive note in its Declaration of the high level meeting on the rule of law at the national and international levels:

We recognize the positive contribution of the International Court of Justice, the principal judicial organ of the United Nations, including in adjudicating disputes among States, and the value of its work for the promotion of the rule of law . . .⁶⁵

There is, of course, no systematic hierarchy among courts. Pleas by ICJ judges, including some Presidents, for the Court to have a general appellate role have fallen on deaf ears.⁶⁶ But consider the first proposition stated by the International Law Commission in the text adopted following its valuable, if misnamed, fragmentation

61 See the Status of Treaties section in the United Nations Treaty Collection (online), e.g., Ch. III, 1 and 2; Ch. IV, 1 nn 19, 20, 22, 24–6, Ch. IV, 2 nn 18, 27, 28; Ch. IV, 9, n 16; Ch. V, 2 (post 1989 accessions without reservations); Ch. VI, 16, nn 20, 7, 23, 26; and Ch. XVI, 1, nn 5, 14, 16, 19, 20, 23.

62 France, India, Iran and the United States. Against that are the recent refusals by three states to participate in proceedings before international tribunals: China in the ITLOS proceeding brought by the Philippines, the Russian Federation in the ITLOS proceeding brought by the Netherlands and Croatia in its territorial and maritime proceeding with Slovenia. Pakistan in the NPT case brought by the Marshall Islands at the oral stage in the ICJ, in a letter to the Court explained that it had submitted in its detailed counter memorial that the Court did not have jurisdiction and that the application was inadmissible; its participation in the oral hearing would not add anything (CR 2016/3 at 6). See also the comments by counsel for the United Kingdom in the NPT case brought against it by the Marshall Islands, CR 2016/3 at 32–3 especially para. 59 and CR 2016/7 at 21–2, paras 44–6 (a finding of jurisdiction 'would without doubt raise searching questions about . . . the wisdom of optional clause declarations' – the UK being the only P5 state to have such a declaration). See also note 16 for the actions of a state a national of which has been a member of the Court for all but six of the past 55 years.

63 Manila Declaration on the Peaceful Settlement of International Disputes, UN Doc. A/Res/37/10 (1982), at 2, para. 5.

64 2005 World Summit Outcome, UN Doc. A/Res/60/1 (2005), at 29, para. 134(f).

65 Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Level, UN Doc. A/Res/67/1 (2012), at 5, para. 31.

66 See, e.g., S.M. Schwebel, President of the International Court of Justice 'Address' (Address to the Plenary Session of the General Assembly of the United Nations, 26 October 1999) and G. Guillaume, President of the International Court of Justice, 'Address' (Address to the United Nations General Assembly, 26 October 2000).

project: '[i]nternational law is a legal system ... [it] is not a random collection of [rules and principles].'⁶⁷

In this regard, I mention the contribution which the ICJ and PCIJ have made and the former still continues to make, in addition to those contributions mentioned earlier to codification work, to the elaboration as a court with general jurisdiction, of the law of territorial sovereignty, the law regulating the use of armed force, international humanitarian law, the law of human rights, and jurisdictional, procedural and evidentiary law. Those elaborations, often based on broader principles, are regularly applied and invoked by other international and national courts and tribunals, by states, and by those engaged in the codification and development of the law. Those many agencies of law making and law application are no longer, if they ever were, isolated, contributing no more than a wilderness of single instances. They are part of a larger main, a larger system, and more secure as a result.

6. CONCLUSION

I have been focusing on adjudication. As Articles 2(3) and 33 of the Charter make clear, going to court is just one means of dispute settlement that might be chosen and, if chosen, it may operate along with other methods. First, consider the cases filed by Bolivia against Chile in 2013 and by the Marshall Islands against the nuclear powers in 2014. In each the applicants seek orders requiring the respondent states to negotiate in good faith about certain matters; they are not seeking immediate substantive outcomes. Second, consider the rapid action taken by Peru and Chile, in accordance with the Court's judgment on their maritime boundary, to determine its precise coordinates, and the annual allocations of fish quota made at the second meeting of the South Pacific Regional Fisheries Management Commission, a meeting which began on the day the Court gave that judgment.⁶⁸ And, third, consider the attempts made, before Australia brought the whaling case against Japan, to resolve the matter through negotiation within the International Whaling Commission and the later debates and actions within and outside the Commission. Another example is the *Ecuador v. Colombia* case.⁶⁹ To repeat, adjudication is not the be-all and end-all, as the Court made clear in 1974 in the *Nuclear Tests* cases.⁷⁰

I conclude by recalling the cry of '*La Cour*' and, to borrow from and adapt a little the wise words of an earlier President of the Court, the proposition that the Court is responsible for maintaining, promoting and applying public international law as one artefact of international ordering that is able to claim universal validity.⁷¹

67 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.702 (2006), at 7, para. 14(1). The detailed Report draws on an extensive range of sources including many international court and tribunal decisions, notably those of the ICJ and its predecessor.

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

69 *Aerial Herbicide Spraying* case, *supra* note 39.

70 See *supra* note 5, [1974] ICJ Rep. 271 (para. 58) and 477 (para. 61).

71 Jennings, *supra* note 47, at 46–7. See also his 'Collegiate Responsibility and Authority of the International Court of Justice' in Dinstein (ed.), *supra* note 12, at 343.