THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE: A MYTH?

A STATISTICAL ANALYSIS OF CONTENTIOUS CASES

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I. INTRODUCTION

A. What the Court has done and has failed to do?

IT IS my intention to appeal to scholars of a younger generation to undertake research on the thesis which, on the basis of my experience at the International Court of Justice—and I have been a serving Member for almost a quarter of a century—I shall be presenting in this paper. In my view, one subject missing from contemporary studies on the function and work of the International Court of Justice is a pragmatic examination of the manner in which certain contentious cases presented to the International Court of Justice have disappeared from view and of whether a judgment, once handed down, has actually been complied with by the parties to the dispute.

I clearly remember the days (nearly 50 years ago, shortly after the Second World War) when, as a student at Yale Law School, I studied the American Constitution and, in particular, the section on the role of the Federal Supreme Court. I read with great interest the articles entitled "The United States Supreme Court (19—)" which John P. Frank, Professor of Law at Yale, published every year in the *University of Chicago Law Review* and, in parallel, the articles entitled "What the Supreme Court did not do during 19—" which Fowler Harper, also Professor of Law at Yale, published every year in the *University of Pennsylvania Law Review*. Both series of articles came in for my eager perusal. What is important now is to understand what prevents the International Court of Justice from fulfilling its essential role and, in this connection, I should like to draw the attention of young scholars to the matter presented in this paper.

B. The compulsory jurisdiction of the International Court of Justice: a myth?

The idea that the optional clause should be accepted by all States with the least possible reservation and without any fixed period of validity seems

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to be a fairly popular notion. The United Nations, in its 1974 resolution,[1] appealed to States to accept compulsory jurisdiction with the least possible reservation and to insert the dispute settlement clause in any multilateral treaties they might conclude. In 1992, UN Secretary-General Mr Boutros-Ghali, in his published statement entitled "An Agenda for Peace—Preventive Diplomacy, Peacemaking and Peace-keeping", appealed to all Member States to accept without reservation the general jurisdiction of the Court under Article 36 of the Statute[2] as a step towards strengthening the role of the International Court of Justice. Furthermore, on 20 January 1994, Mr Boutros-Ghali made a similar statement on the occasion of his visit to the International Court of Justice.[3]

This appeal may have been very useful. However, what is important for us is *not* to institutionalise the obligation to submit disputes to the International Court of Justice. It is more important to assess the attitude of each sovereign State in being prepared to entrust the settlement of legal disputes to the International Court of Justice. A basic requirement for the settlement of legal disputes between States by the International Court of Justice is that the States concerned must be willing to request the Court to settle their respective, individual disputes and must have consented to the Court's involvement. The making of a simple declaration of acceptance of Article 36, paragraph 2, of the Court's Statute or the insertion of the dispute settlement clause in multilateral treaties may not, in fact, achieve the essential settlement of the problems in question.

In reflecting on the history of the presentation of contentious cases during the past half century, I should like to examine whether the declaration of acceptance of compulsory jurisdiction itself has any significance at all in practice. I would tend to think that, where a contentious case (one brought by unilateral application) does have any positive sense or meaning, there has in fact been an agreement or consensus between the States concerned to submit the dispute to the International Court of Justice in each particular case. With this in mind, I should like to make some observations on the basis of detailed statistics on all the contentious cases in the Court's history.

II. GENERAL OVERVIEW OF CONTENTIOUS CASES DEALT WITH AT THE COURT (TABLE I)

A. Contentious cases registered in the General List

LET me first look at the total number of contentious cases submitted to the International Court of Justice. Article 40, paragraph 1, of the Statute provides as follows:

1. A/RES/3232 (XXIX)
2. Report of the Secretary-General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992.
3. Communiqué 94/1 of 13 January 1994.

> "Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated."

Article 38 of the Rules of Court provides for the institution of proceedings by means of an application and Article 39 covers the case where proceedings are brought before the Court by the notification of a special agreement. The Registrar shall:

> "keep ... a General List of all cases, entered and numbered in the order in which the documents instituting proceedings or requesting an advisory opinion are received in the Registry".[4]

Table I provides an exhaustive record of "contentious cases", as shown in the Court's General List up to the end of 1999. Since the General List also contains as a class of case "advisory opinions", which are not the subject of this paper, I have not included the folio numbers of such cases in Table I, which explains why the folio numbers are not consecutive. The total number of contentious cases registered in the General List is 98. The case titles given in the table are those specified by the Court as being the standardised official citation. Depending on the case, some titles are followed by the names in parentheses of the States party to the dispute. Sometimes the States are not mentioned; there does not seem to be any hard and fast rule. To avoid confusion I have, where necessary, added the names of the parties in square brackets.

B. Exclusion of certain cases from this examination

*1. Certain cases omitted from this examination (Table I: cases marked *)*

Some explanation, with reference to the folio numbers, needs to be given for those cases that I have specifically excluded from this examination:

(a) In connection with case No.1, *Corfu Channel*, the preliminary objection and the assessment of amount of compensation were registered separately and therefore given separate numbers in the General List (Nos.2 and 1A, respectively). This was due to the continuation of the practice followed by the Permanent Court of International Justice. Any incidental proceedings were subsequently always combined with the main proceedings of the case and not given separate numbers in the General List.

4. Rules of Court, Art. 26, para. 1(b).

(b) Case No.13, *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case*, was classified as being "contentious" under the category "class of case" but given the classification "request for interpretation" under the category "method of submission"; it was distinguished from the classification "application" that was used in other cases. However, after this particular case the expression "request for interpretation" was abolished on the understanding that there would, in future, be only two kinds of submission, namely, "application" and "special agreement". Thus, case No.71, *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*), and case No.101, *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria*, are classified simply as "applications". I shall exclude from examination in this paper the three cases concerning requests for interpretation of judgments previously rendered, namely cases Nos.13, 71 and 101. These requests for interpretation were referred to the Court in connection with the application of Articles 60 and 61 of the Statute and/or Article 98 of the Rules of Court.

(c) The *South West Africa* cases (Nos.46 and 47) were filed individually as separate cases. The *North Sea Continental Shelf* cases (Nos.51 and 52) are two separate cases, which were filed by the notification of two separate Special Agreements. In both these pairs of cases, however, the judgment was handed down jointly. For the purposes of the present examination, I shall count the two *South West Africa* and two *North Sea Continental Shelf* cases as being, in each instance, one case.

(d) The cases concerning *Barcelona Traction, Light and Power Company, Limited* were brought before the Court separately and registered as cases Nos.41 and 50. In the first of these cases (No.41), however, the preliminary objection was dismissed, whereas in the second (No.50) the Belgian claim was itself rejected at the merits stage. I shall therefore treat these two cases as one.

On this basis, I have excluded cases Nos.13, 71 and 101 (the cases referred to in sub-paragraph (b) above) from this account. Since I have combined cases Nos.1, 1A, and 2 (as referred to in sub-paragraph (a) above) as one case and joined cases Nos.41 and 50, Nos.46 and 47, and

Nos.51 and 52 (see sub-paragraphs (c) and (d) above), I have not included in my examination these five cases, Nos.1A and 2, and 47, 50 and 52, in Table I: The eight cases thus not counted in my examination are marked in Table I with an asterisk (*).

The classification of cases and the way in which they have been counted in the attached Table I may seem somewhat subjective. It should nevertheless be borne in mind that, owing to the complexity of a great many cases, it is no simple matter to determine the category in which a particular case should be placed. The table is included simply to afford an overall view of contentious cases so far presented to the International Court of Justice and has been compiled solely for this particular paper. The total number of contentious cases in the General List, which actually amounts to 98, is therefore in this examination counted as 90.

2. *Exclusion from this examination of cases in which* forum prorogatum *arose (Table I: cases marked **)*

In some cases, the applicant State appealed to the other State party to the dispute to subject itself to the Court's jurisdiction, despite the fact that it had given no indication in its application of the basis of the Court's jurisdiction, as provided for in the Rules of Court, Article 38, paragraph 2.[5] This particular formula of *forum prorogatum* is provided for in the Rules of Court under Article 38, paragraph 5, whereby the applicant State proposes to found the Court's jurisdiction upon a consent thereto yet to be given or manifested by the State against which such application is made. The other State is entirely free to decide whether or not to respond to that appeal. There have been eight such cases in all, indicated by a double asterisk (**) in Table I.

In fact in not one of those eight cases, however, did the other State agree to participate in proceedings before the Court on this basis. Such requests, once they have been instituted by an applicant State without that State indicating the basis of the Court's jurisdiction, are registered in the Court's General List but later removed by means of a Court Order. Most cases of this type relate to the institution of proceedings in the early 1950s by the United States concerning the shooting-down of aircraft in Eastern Europe or to the request in the mid-1950s from the United Kingdom concerning the status of the Antarctic. The last of these eight cases arose in 1959 and there has been no other such example since then. These eight cases are excluded from this examination.

Since the 1978 revision of the Rules of Court, an application which does not indicate a legal basis for the Court's jurisdiction is still transmitted to the other party but, unless a positive reply is received from that other

5. See also Art. 35, para. 2 of the 1946 Rules of Court as amended in 1972.

party, the application is not placed on the General List from the outset. In other words, only applications to which a positive response from the other party has been received may be registered in the General List. This is an entirely different situation from that prevailing before 1978. The General List therefore gives no clue regarding this type of application, such cases being reported only in a footnote to be found in the *ICJ Yearbook*. So far, there have been three such cases but, having failed to obtain the consent of the other party to the dispute, they do not appear in the General List. These three cases are only referred to at the end of Table I.

Thus, there has not been a single case in the history of the Court where an application brought with no indication of the basis of jurisdiction achieved a result.

*3. Exclusion of cases withdrawn by the applicant State itself (Table I: cases marked ***)*

Of the cases brought by unilateral application under Article 40, paragraph 1, of the Court's Statute and Article 38, paragraph 1, of the Rules of Court, there have been several in which the applicant State withdrew the case in the early stage of the proceedings because progress had been achieved through diplomatic negotiations or other means. The Court then removed such cases from the General List by means of an Order: either (i) in cases where, even though no explicit objection to the Court's jurisdiction was raised by the respondent State against the application, the applicant State decided to withdraw the application anyway (seven cases); or (ii) in other cases where the applicant State withdrew its application after meeting the preliminary objections raised by the respondent State (four cases).

Included in the former category, are two cases, namely No.86, *Passage through the Great Belt*, and No.99, *Vienna Convention on Consular Relations*, in which the Court, at the request of the applicant State in each case, rendered an Order responding to requests for interim measures. In case No.86 interim measures were not indicated, whereas in case No.99 the Court found that interim measures should be granted.

I have excluded from this examination the 11 cases referred to above and have indicated them in Table I with a triple asterisk (***).

C. A meaningful number of contentious cases registered in the General List

In the General List, 98 items in all are registered as "contentious" under the heading "class of case". However, counting the cases as I have done this paper (as explained above), the number of contentious cases registered during the Court's more than 50 year long history amounts to a total of 90.

I would like to refer specifically to the request for an additional judgment in accordance with Article 5, paragraph 3, of the Special Agreement of 7 April 1993 which Slovakia registered on 3 September 1998 in connection with case No.92, *Gabčíkovo-Nagymaros Project*. This request is not registered in the Court's General List, as the Court (or its Registrar) appears to have taken the view that the Court remains seised of the case despite the fact that this was not indicated in the operative part of the judgment. In my view, case No.92, *Gabčíkovo-Nagymaros Project*, was completed with the rendering of the Court's Judgment on 25 September 1997. The request of 3 September 1998 for an additional judgment should have been registered with a new number and entry in the General List. Otherwise, a case which has once been disposed of may once again become a pending case. However, in this paper, I do not, albeit with some reluctance, count this case as an independent case and shall follow the method used by the Registry and treat case No.92 as a pending case. I have included this request in Table I even though it has not been given a folio number.

Of these 90 cases, excluding eight cases in which *forum prorogatum* arose[6] and 11 cases that were withdrawn,[7] I shall examine the remaining 71 cases below. Twenty-four cases are now pending.[8] The International Court of Justice has so far disposed of 47 cases in all. In the following pages, I shall try to show how each of those 47 cases was presented to the Court and what the outcome of these cases has been. I shall deal with the 24 pending cases towards the end of this examination.

III. CONSENT OF THE PARTIES TO THE DISPUTE TO THE COURT'S JURISDICTION

A. Submission of the dispute by special agreement (Table IIA)

INDIVIDUAL disputes between States may be submitted to the Court by the notification of a special agreement.[9] This, in my view, is the most orthodox method of settling a legal dispute. The parties to the dispute bring the case before the Court on the understanding that they will naturally comply with the judgment, and it goes without saying that disputes subject to a special agreement between States can most properly be settled by the Court. The cases submitted by the institution of special agreements are listed in Table IIA. In the entire history of the International Court of Justice, out of the 47 cases disposed of by the Court, proceedings have been initiated in only 11 cases by the notification of a special agreement between the States in dispute. I must add that I have not included case

6. See Section II.B.2 of this examination.
7. See Section II.B.3.
8. Indicated in Table 1 by means of square brackets enclosing the folio numbers.
9. Statute, Art. 40(1): Rules of Court, Art. 39(1).

No.92, *Gabčíkovo-Nagymaros Project*, because—as stated above in Section II.C—the Court has counted this case as a pending case.

There is the possibility of forming an *ad hoc* chamber as provided for in Article 26, paragraph 2, of the Statute. The chamber functions only at the request of the parties in dispute, in other words with the consent of the parties, and may thus be regarded as an institution by special agreement. However, of the past four chamber cases, one was brought by unilateral application, with the consent of the respondent State being given later. This was case No.76: *Elettronica Sicula S.p.A (ELSI)*. In this examination, I have therefore included in Table IIA only three of the chamber cases, namely cases Nos.67, 69 and 75. If one excludes those three chamber cases, in only eight cases were the disputes presented to the Court (the full Court) by special agreement.

Thus only 11 cases initiated by special agreement, including three chamber cases (all related to boundary delimitation), have been resolved. With the exception of these 11 cases, the remaining 36 cases—out of the total of 47 cases already disposed of—were brought before the Court by means of unilateral application.

B. Consent to the Court's jurisdiction having been given or presumed to have been given, the cases brought unilaterally then proceed to the merits phase (Table IIB)

There have been some cases where the State brought before the Court by the unilateral application of another State raised no objection to the Court's jurisdiction or the admissibility of the case and was prepared to be subjected to the proceedings of the Court's judicial settlement. In those particular cases the parties, after filing of the application by the applicant State, entered into the proceedings on the merits phase with the consent of the respondent States being presumed.[10] Eight cases come under this category. In other words, retrospective consent was given in eight out of the total of 36 cases of unilateral application.

Those eight cases include one chamber case.[11] As stated above in Section III.A, the constitution of a chamber requires, in principle, the advance consent of the parties and may, in fact, be considered to be a submission by agreement. In this particular case, however, a form of unilateral application was utilised. I have therefore listed this chamber case here, under this section.

If one adds the 11 cases presented by special agreement referred to in Section III.A above to those eight cases referred to, it can be seen that in

10. See Table IIB.
11. Case No. 76: *Elettronica Sicula S.p.A (ELSI)*.

19 cases there was agreement or consent between the parties to the dispute concerning settlement by the International Court of Justice. In other words, out of the total of 47 cases already disposed of by the Court, in only 19 cases was there consent—either prior or tacit—to the Court's jurisdiction. In the other 28 cases, the respondent States were regarded as not being ready to settle willingly disputes which had been brought before the Court unilaterally by the applicant States.

IV. THE COURT'S JURISDICTION IN CASES OF UNILATERAL APPLICATION

A. Upholding of the preliminary objection and dismissal of the application—removal from the General List (Table IIIA)

UNILATERAL application may be instituted by one State in a dispute by means of a written application addressed to the Registrar of the Court employing as a basis of jurisdiction[12] either; (a) the compromissory clause of the Statute under which both parties are deemed to have accepted the Court's jurisdiction[13] or; (b) the dispute settlement clause in a multilateral treaty to which both States are parties.[14] In some cases, these two grounds are raised in parallel or supplementary to each other. In Tables IIB, IIIA and IIIB, cases brought under category (a) as referred to above are marked with a plus sign (+) and cases brought under category (b) as referred to above are marked with a hash sign (#).

It is quite common for the respondent State to raise an objection to the jurisdiction or admissibility of the case. This is known as a preliminary objection raised by the respondent State. As the eight cases mentioned in Section III.B, in which the respondent State was deemed to have accepted the Court's jurisdiction can be excluded from the total of 36 cases of unilateral application, preliminary objections concerning jurisdiction or admissibility have therefore been raised in 28 cases.

After examining preliminary objections raised concerning jurisdiction, the Court in its judgments sometimes accepts the respondent's objections and the application initiating the case is thus dismissed. In such a case the Court does not proceed to the merits phase in spite of the applicant State's assertion that the Court has jurisdiction. This type of case is then removed from the General List. Thirteen such cases are listed in Table IIIA, including cases Nos.112 and 114, *Legality of Use of Force* (*Yugoslavia* v. *Spain*), (*Yugoslavia* v. *United States of America*), where the Court dismissed on 2 June 1999 the applications at the interim measures phase on the ground that the Court manifestly lacked jurisdiction.

12. Statute, Art. 40(1).
13. Statute, Art. 36(2).
14. Statute, Art. 36(1).

B. *Cases of unilateral application which proceeded to the merits phase after rejection of preliminary objections to jurisdiction (Table IIIB)*

Following this statistical analysis, I can conclude that of the 36 cases of unilateral application, there are 28 cases in which objections to the Court's jurisdiction have been dealt with. The objection was upheld in 13 cases and the cases were thus dismissed. There have, therefore, been only 15 cases in the history of the Court in which, after the rejection of preliminary objections, the Court proceeded to the merits phase. There are two cases where, after preliminary objections raised by the respondent State were rejected by the Court and the case thus proceeded to the merits stage, the applicant State withdrew the application, which was subsequently removed from the General List, namely case No.74, *Border and Transborder Armed Actions* (*Nicaragua* v. *Honduras*), and case No.80, *Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia*). Thus the Court has handed down a judgment on the merits in 13 cases.

Of these 13 cases, cases Nos.55, *Fisheries Jurisdiction* (*United Kingdom* v. *Iceland*), and 56, *Fisheries Jurisdiction* (*Federal Republic of Germany* v. *Iceland*), and cases Nos.58, *Nuclear Tests* (*Australia* v. *France*) and 59, *Nuclear Tests* (*New Zealand* v. *France*), are respectively accepted as being independent or separate cases, and separate judgments in these cases were handed down. In addition, the 1974 *Fisheries Jurisdiction* cases (Nos.55 and 56) lost their object owing to contemporary developments in the law of the sea, and the 1974 *Nuclear Tests* cases (Nos.58 and 59) lost their object because France had no reason to continue with the testing. It can be said that in the period prior to 1975, a meaningful result—in terms of the effectiveness of judgments—was achieved in only seven cases, namely Nos.1, 15, 18, 32, 41/50, 45 and 54.

In the past quarter of a century or so since 1976 during which I have been a serving Member of the International Court of Justice—a period corresponding to the later years of the Court's half-century history—there have been only two cases brought by unilateral application where a judgment on the merits has been handed down: case No.64, *United States Diplomatic and Consular Staff in Tehran*, and case No.70, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*). But it is more important to note that, in both of these cases where the Court's decision went against the respondent States, the judgments were not complied with as such, although in both cases the Court's judgment did have a long-term effect.

V. PENDING CASES AS AT END-1999 (TABLES I, IIA AND IIIB)

I COME now to the cases which have been registered in the General List but not yet finally been dealt with, namely the 24 pending cases.

A. Cases which will proceed to the merits phase (Table IIA)

Of these 24 pending cases, two were brought by special agreement, namely case No.102, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* and No.92, *Gabčíkovo-Nagymaros Project*, the latter of which the Registry now considers to be a pending case owing to the new request made in September 1998 for an additional judgment. The former, case No.102, was presented to Court in November 1998 but the latter, case No.92, was originally presented in 1993[15]. Apart from these two cases, all the other 22 pending cases have been presented to the Court unilaterally since 1991.

Six cases—from case No.87, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (brought before the Court in 1991), through Nos.88, 89, 90, 91 to No.94, *Land and Maritime Boundary between Cameroon and Nigeria* (brought before the Court in 1994)—are those in which the Court's jurisdiction was objected to by the respondent State but in which the Court dismissed the objections and has reached the merits phase.

Therefore, these six cases and the two cases brought by special agreement—eight cases in total—are all awaiting the Court's final judgment.

B. Cases which are still in the jurisdictional phase

The remaining 16 pending cases, starting with case No.103, *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*) (presented to the Court on 30 December 1998), have all been brought before the Court within the past year. These 16 cases also include the *LaGrand* case, brought in March 1999 by Germany against the United States; the eight cases concerning *Legality of Use of Force* brought in April 1999 by Yugoslavia against eight NATO countries; three cases concerning *Armed activities on the territory of the Congo* brought in June 1999 by the Democratic Republic of the Congo against three of its neighbouring States; a case concerning Application of the Genocide Convention brought in July 1999 by Croatia against Yugoslavia; the case concerning *Aerial Incident* brought in September 1999 by Pakistan against India; and the case concerning Maritime Limitation in the Caribbean Sea brought by Nicaragua against Honduras in December 1999. Apart from case No.119, *Aerial Incident of 10 August 1999*, in which an objection to the Court's jurisdiction has already been raised by India and in which the Court is now in the jurisdictional phase, none of the respondent States in the remaining 15 cases has yet raised objections to the Court's jurisdiction but objections are very likely to be raised.

This is the situation prevailing at the International Court of Justice at the time of writing (end-1999).

15. See Section 11.C above.

VI. OBSERVATIONS ON THIS STATISTICAL ANALYSIS

READERS may find the above figures surprising. I hope that they will be able to draw some conclusions from the facts presented in this examination. I should like to sum up myself with regard to certain points that may require consideration.

A. Forum Prorogatum—*an unrealistic institution (see Section II.2(b))*

Under the old Rules of Court that applied until 1978, there were eight cases brought by unilateral application that were registered in the General List but subsequently removed owing to the respondent States' failure to consent to the proceedings. Under the new Rules of Court in force since 1978, such applications without any indication of the basis of jurisdiction are not entered in the General List from the outset. No cases brought by unilateral application where the basis of jurisdiction is not indicated in the application have come to fruition. This seems to indicate that States are in general not prepared to subject themselves to the Court's jurisdiction when brought before the Court by another State against their wishes.

B. Ad hoc *chamber cases*

Ad hoc chambers are set up, in principle, by agreement between the States party to the dispute. In that sense, chamber cases can be regarded in the same way as cases brought by special agreement. Beginning with the 1981 case between Canada and the United States and ending with the 1987 case between the United States and Italy,[16] which was brought before the Court unilaterally but with the prior understanding that consent would be given by the respondent State, there have been four *ad hoc* chamber cases. All four of these cases occurred in the 1980s and since the *ELSI* case the Court has not received any requests for the *ad hoc* chamber procedure to be applied.

C. Consent of States to the Court's jurisdiction

Only 11 out of the total of 47 registered cases already disposed of were submitted under special agreements.[17] There is no doubt that the submission of a case with the consent of the parties (namely by special agreement) is the ideal in terms of judicial procedures. The Court's judgments in such cases have been duly complied with. In addition, two cases brought by special agreement are currently pending and awaiting

16. See the *ELSI* case.
17. See Table IIA.

the Court's judgment on the merits: case No.92, *Gabčíkovo-Nagymaros Project* and case No.102, *Sovereignty over Pulau Ligitan and Pulau Sipadan*. It may prove useful to examine the situations in which States were willing to submit jointly their disputes to the Court in these 13 cases brought by special agreement and what kinds of disputes were involved.

In addition to the 13 cases brought by special agreement, there are eight cases where, despite the fact that they involved unilateral application, the respondent States raised no objection to the Court's jurisdiction.[18] In fact, since case No.82, *Arbitral Award of 31 July 1989*, presented to the Court in 1989, there have not been any cases where retrospective consent was given by the respondent State.

D. Preliminary Objection by the Respondent State regarding the Court's jurisdiction

Of the 36 cases brought by unilateral application in which the applicant State presumed that the Court would have jurisdiction, either under the optional clause or the compromissory clause of a multilateral convention, preliminary objections were raised in all of them by the respondent States concerned, except in eight cases where the respondent States were prepared, albeit tacitly, to accept the Court's jurisdiction. Thus, in 28 cases brought by unilateral application the Court's jurisdiction was challenged by the respondent State.

In 13 of these 28 cases, the Court upheld the objection and dismissed the original application. The cases of this kind that have occurred during the last quarter of a century are the *Aegean Sea Continental Shelf* case, the *East Timor* case, the *Fisheries Jurisdiction* (*Spain* v. *Canada*) case, the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests* (New Zealand v. France) Case, and the cases entitled *Legality of Use of Force* (*Yugoslavia* v. *Spain*) and *Legality of Use of Force* (*Yugoslavia* v. *United States of America*), the last two cases both being dropped from the General List at the interim measures stage, as it was quite obvious to the Court that it would not have jurisdiction over them.

There have been 15 cases in which the Court proceeded to the merits phase. Two cases were subsequently withdrawn by the applicant States concerned and thus in 13 cases the Court handed down a judgment on the merits after rejecting preliminary objections regarding jurisdiction.[19] Of these 13 cases, there have only been two during the last quarter of a century that achieved a concrete result.[20] In both of these two cases the

18. See Table IIB.

19. See Table IIIB.

20. Case No. 64, United States Diplomatic and Consular Staff in Tehran and Case No. 70, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

"defeated" sides, namely Iran and the United States respectively, have not been seen to have complied directly with the Court's judgments.

If we look at the pending cases, there are six now awaiting the Court's judgment on the merits after the Court's jurisdiction was upheld in all of these cases[21]: case No.87, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*; cases Nos.88 and 89, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*; case No.90, *Oil Platforms*; case No.91, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*; and finally, case No.94, *Land and Maritime Boundary between Cameroon and Nigeria*.

E. The compulsory jurisdiction of the Court—declarations under Article 36, paragraph 1, of the statute

We have seen how difficult it is to proceed with cases where the respondent States, though having accepted the Court's jurisdiction in principle under either the Court's Statute or multilateral treaties, fail to consent to the Court's procedure in a particular case.

The following facts should be noted. Thailand did not renew its declaration upon its expiry on 20 May 1960, after the *Temple of Preah Vihear* case had been brought before the Court in October 1959. France terminated its declaration on 2 January 1974, after the *Nuclear Tests* cases had been brought before the Court in May 1973. The United States, after it had been brought before the Court by Nicaragua in April 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) and the Court had subsequently found that it had jurisdiction in the case in November 1984, withdrew its declaration on 8 October 1985. It should also be noted that less than a third of the States Parties to the Court's Statute have accepted the Court's jurisdiction under Article 36, paragraph 2, of the Statute and that this third does not include four of the States that are permanent members of the Security Council.

In the light of this statistical overview of the Court's jurisprudence, I doubt whether a mere appeal, as mentioned in Section I.B, for wider acceptance of the compulsory jurisdiction of the Court can achieve anything concrete. I am of the view that not a great deal can be expected in terms of meaningful development of the international judiciary from such an appeal or from amendments that may be made to the Court's procedure unless the parties in dispute in each individual case are genuinely willing to obtain a settlement from the Court. I wonder whether it is likely, or even possible, that States will one day be able to bring their disputes to the Court in a spirit of true willingness to settle them.

21. See Table IIIB.

F. The serious situation that faces the Court

It should be noted that as many as 24 cases are now pending before the Court, of which 22 were initiated by unilateral applications. In case No.94, *Land and Maritime Boundary between Cameroon and Nigeria*, and the five cases registered before (namely cases Nos.87, 88, 89, 90, and 91), the Court is at the merits phase after having dismissed the preliminary objections concerning jurisdiction. The remaining 16 cases have been brought unilaterally before the Court during the past year. Eight of those 16 cases concern the *Legality of Use of Force* cases brought by Yugoslavia, and three others relate to the *Armed Activities on the Territory of the Congo* cases, brought by the Democratic Republic of the Congo. Even if these groups of cases are, in each instance, counted as one case, there are still seven cases brought unilaterally during the past year. In these cases the consent of the respondent States is most unlikely to be granted, which means that the Court must first enter the jurisdictional phase.

It is very important to note that, of the 71 contentious cases (and I only include those cases that I consider to be meaningful) registered on the Court's General List over the past 50 years of its history, 47 have to date been disposed of and 24 are at present pending. The Court is faced with eight cases at the merits phase (two cases brought by special agreement and six cases in which the Court's jurisdiction has already been established) and 16 cases at the jurisdictional stage. The Court has never been confronted with such a situation in its entire history. Past practice suggests that, after completion of the written pleadings prepared by the parties, each case, including incidental procedures such as preliminary objections or requests for the indication of interim measures, will take the Court four to five months to reach a judgment or to issue an order. I need not elaborate upon the heavy burden this places upon the Court. The gravity of this situation must be understood.

I personally wonder, in the light of the increasing number of unilateral applications, whether the offhand or casual unilateral referral of cases by some States (which would simply appear to be instigated by ambitious private lawyers in certain developed countries), without the Government of the State concerned first exhausting diplomatic channels, is really consistent with the purpose of the International Court of Justice as the principal judicial organ of the United Nations. I see what may be termed an abuse of the right to institute proceedings before the Court. Past experience appears to indicate that irregular procedures of this nature will not produce any meaningful results in the judiciary.

TABLE I Contentious cases brought before the International Court of Justice

Folio No.		Title	Date of registration	Applicant or parties to special agreements
	1	Corfu Channel, Merits	22.V.47	United Kingdom
*	2	Corfu Channel, Preliminary Objection	9.XII.47	(filed by Albania)
*	1A	Corfu Channel, Assessment of Amount of Compensation	9.IV.49	(Court's Judgment)
	5	Fisheries	28.IX.49	United Kingdom
***	6	Protection of French Nationals and Protected Persons in Egypt	13.X.49	France removed: 29.III.50
	7	Asylum	15.X.49	Colombia/Peru
	11	Rights of Nationals of the United States in Morocco	28.X.50	France
*	13	Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case	20.XI.50	Colombia
	14	Haya de la Torre	13.XII.50	Colombia
	15	Ambatielos	9.IV.51	Greece
	16	Anglo-Iranian Oil Co.	26.V.51	United Kingdom
	17	Minquiers and Ecrehos	6.XII.51	United Kingdom/France
	18	Nottebohm	17.XII.51	Liechtenstein
	19	Monetary Gold Removed from Rome in 1943	19.V.53	Italy
***	20	Electricité de Beyrouth Company	15.VIII.53	France removed: 29.VII.54
**	22	Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungary)	3.III.54	United States removed: 12.VII.54
**	23	Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Union of Soviet Socialist Republics)	3.III.54	United States removed: 12.VII.54

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Folio No.		Title	Date of registration	Applicant or parties to special agreements
**	25	Aerial Incident of 10 March 1953	29.III.55	United States removed: 14.III.56
**	26	Antarctica (United Kingdom v. Argentina)	4.V.55	United Kingdom removed: 16.III.56
**	27	Antarctica (United Kingdom v. Chile)	4.V.55	United Kingdom removed: 16.III.56
**	28	Aerial Incident of 7 October 1952	2.VI.55	United States removed: 14.III.56
	29	Certain Norwegian Loans	6.VII.55	France
	32	Right of Passage over Indian Territory	22.XII.55	Portugal
	33	Application of the Convention of 1902 Governing the Guardianship of Infants	9.VII.57	Netherlands
	34	Interhandel	2.X.57	Switzerland
	35	Aerial Incident of 27 July 1955 (Israel v. Bulgaria)	16.X.57	Israel
***	36	Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)	28.X.57	United States removed: 30.V.60
***	37	Aerial Incident of 27 July 1955 (United Kingdom v. Bulgaria)	22.XI.57	United Kingdom removed: 3.VIII.59
	38	Sovereignty over Certain Frontier Land	27.XI.57	Belgium/Netherlands
	39	Arbitral Award Made by the King of Spain on 23 December 1906	1.VII.58	Honduras
**	40	Aerial Incident of 4 September 1954	22.VIII.58	United States removed: 9.XII.58

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TABLE I *continued*

	Folio No.	Title	Date of registration	Applicant or parties to special agreements
	41	Barcelona Traction, Light and Power Company, Limited	23.IX.58	Belgium
***	42	Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient	13.II.59	France removed: 31.VIII.60
**	44	Aerial Incident of 7 November 1954	7.VII.59	United States removed: 7.X.59
	45	Temple of Preah Vihear	6.X.59	Cambodia
	46	South West Africa [Ethiopia v. South Africa]	4.XI.60	Ethiopia
*	47	South West Africa [Liberia v. South Africa]	4.XI.60	Liberia
	48	Northern Cameroons	30.V.61	Cameroon
*	50	Barcelona Traction, Light and Power Company, Limited	19.VI.62	Belgium
	51	North Sea Continental Shelf [Federal Republic of Germany/ Denmark]	20.II.67	FR Germany/Denmark
*	52	North Sea Continental Shelf [Federal Republic of Germany/ Netherlands]	20.II.67	FR Germany/ Netherlands
	54	Appeal Relating to the Jurisdiction of the ICAO Council	30.VIII.71	India
	55	Fisheries Jurisdiction (United Kingdom v. Iceland)	14.IV.72	United Kingdom
	56	Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)	5.VI.72	FR Germany
	58	Nuclear Tests (Australia v. France)	9.V.73	Australia
	59	Nuclear Tests (New Zealand v. France)	9.V.73	New Zealand
***	60	Trial of Pakistani Prisoners of War	11.V.73	Pakistan removed: 15.XII.73
	62	Aegean Sea Continental Shelf	10.VIII.76	Greece

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	Folio No.	Title	Date of registration	Applicant or parties to special agreements
	63	Continental Shelf (Tunisia/Libyan Arab Jamahiriya)	1.XII.78/ 19.II.79	Tunisia/Libya
	64	United States Diplomatic and Consular Staff in Tehran	29.XI.79	United States
	67	Delimitation of the Maritime Boundary in the Gulf of Maine Area [chamber]	25.XI.81	Canada/United States
	68	Continental Shelf (Libyan Arab Jamahiriya/Malta)	27.VII.82	Libya/Malta
	69	Frontier Dispute [chamber]	20.X.83	Burkina Faso/Mali
	70	Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)	9.IV.84	Nicaragua
*	71	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)	27.VII.84	Tunisia
***	73	Border and Transborder Armed Actions (Nicaragua v. Costa Rica)	28.VII.86	Nicaragua removed: 19.VIII.87
***	74	Border and Transborder Armed Actions (Nicaragua v. Honduras)	28.VII.86	Nicaragua
	75	Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) [chamber]	11.XII.86	El Salvador/Honduras
	76	Elettronica Sicula S.p.A. (ELSI) [chamber]	6.II.87	United States
	78	Maritime Delimitation in the Area between Greenland and Jan Mayen	16.VIII.88	Denmark
***	79	Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)	17.V.89	Iran removed: 22.II.96

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TABLE I *continued*

Folio No.		Title	Date of registration	Applicant or parties to special agreements
	80	Certain Phosphate Lands in Nauru (Nauru v. Australia)	19.V.89	Nauru
	82	Arbitral Award of 31 July 1989	23.VIII.89	Guinea-Bissau
	83	Territorial Dispute (Libyan Arab Jamahiriya/Chad)	31.VIII.90	Libya/Chad
	84	East Timor (Portugal v. Australia)	22.II.91	Portugal
***	85	Maritime Delimitation between Guinea-Bissau and Senegal	12.III.91	Guinea-Bissau removed: 8.XI.95
***	86	Passage through the Great Belt (Finland v. Denmark)	17.V.91	Finland removed: 10.IX.92
	[87]	Maritime Delimitation and Territorial Questions between Qatar and Bahrain	8.VII.91	Qatar
	[88]	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)	3.III.92	Libya
	[89]	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)	3.III.92	Libya
	[90]	Oil Platforms (Islamic Republic of Iran v. United States of America)	2.XI.92	Iran
	[91]	Application of the Convention on the Prevention and Punishment of the Crime of Genocide	20.III.93	Bosnia Herzegovina
	[92]	Gabčíkovo-Nagymaros Project (Hungary/Slovakia)	2.VII.93	Hungary/Slovakia
	[94]	Land and Maritime Boundary between Cameroon and Nigeria	29.III.94	Cameroon
	96	Fisheries Jurisdiction (Spain v. Canada)	28.III.95	Spain

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	Folio No.	Title	Date of registration	Applicant or parties to special agreements
	97	Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests* (New Zealand v. France) Case	21.VIII.95	New Zealand
	98	Case Concerning Kasikili/Sedudu Island	29.V.96	Botswana/Namibia
***	99	Vienna Convention on Consular Relations (Paraguay v. United States of America)	3.IV.98	Paraguay removed: 10.XI.98
	—	Request for an additional Judgment in the case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia)	3.IX.98	Slovakia
*	101	Request for Interpretation of the Judgment of 11 June 1998 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria)	28.X.98	Nigeria
	[102]	Sovereignty over Pulau Ligitan and Pulau Sipadan	2.XI.98	Indonesia/Malaysia
	[103]	Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)	30.XII.98	Guinea
	[104]	LaGrand (Germany v. United States of America)	2.III.99	Germany
	[105]	Legality of Use of Force (Yugoslavia v. Belgium)	29.IV.99	Yugoslavia
	[106]	Legality of Use of Force (Yugoslavia v. Canada)	29.IV.99	Yugoslavia
	[107]	Legality of Use of Force (Yugoslavia v. France)	29.IV.99	Yugoslavia
	[108]	Legality of Use of Force (Yugoslavia v. Germany)	29.IV.99	Yugoslavia
	[109]	Legality of Use of Force (Yugoslavia v. Italy)	29.IV.99	Yugoslavia
	[110]	Legality of Use of Force (Yugoslavia v. Netherlands)	29.IV.99	Yugoslavia

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TABLE I *continued*

Folio No.	Title	Date of registration	Applicant or parties to special agreements
[111]	Legality of Use of Force (Yugoslavia v. Portugal)	29.IV.99	Yugoslavia
112	Legality of Use of Force (Yugoslavia v. Spain)	29.IV.99	Yugoslavia
[113]	Legality of Use of Force (Yugoslavia v. United Kingdom)	29.IV.99	Yugoslavia
114	Legality of Use of Force (Yugoslavia v. United States of America)	29.IV.99	Yugoslavia
[115]	Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Burundi)	23.VI.99	Congo
[116]	Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)	23.VI.99	Congo
[117]	Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Rwanda)	23.VI.99	Congo
[118]	Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)	2.VII.99	Croatia
[119]	Aerial Incident of 10 August 1999 (Pakistan v. India)	21.IX.99	Pakistan
[120]	Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea) (Nicaragua v. Honduras)	8.XII.99	Nicaragua

Legend:

* Cases not included in this examination
** Cases of *forum prorogatum*
*** Cases of withdrawal by the applicant State
[ ] Cases pending as at end-1999
— The request referred to in Section II.C

Note: Cases presented to the Court under Article 38, paragraph 5, of the 1978 Rules of Court
—Application of Hungary against Czechoslovakia concerning Gabčíkovo/Nagymaros on 23 October 1992
—Application of Yugoslav Federal Republic against the member states of NATO on 16 March 1994
—Application of Eritrea against Ethiopia on 15 February 1999.

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TABLE IIA Cases submitted under special agreement

Folio No.	Title	Date of registration	Date of final judgment
7	Asylum	15.X.49	20.XI.50
17	Minquiers and Ecrehos	6.XII.50	17.XI.53
38	Sovereignty over Certain Frontier Land	27.XI.57	20.VI.59
51/52	North Sea Continental Shelf [Federal Republic of Germany/Denmark]/North Sea Continental Shelf [Federal Republic of Germany/Netherlands]	20.II.67	20.II.69
63	Continental Shelf (Tunisia/Libyan Arab Jamahiriya)	1.XII.78	24.II.82
67	Delimitation of the Maritime Boundary in the Gulf of Maine Area [chamber]	25.XI.81	12.X.84
68	Continental Shelf (Libyan Arab Jamahiriya/Malta)	26.VII.82	3.VI.85
69	Frontier Dispute [chamber]	20.X.83	22.XII.86
75	Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) [chamber]	11.XII.86	11.IX.92
83	Territorial Dispute (Libyan Arab Jamahiriya/Chad)	31.VIII.90	3.II.94
98	Case Concerning Kasikili/Sedudu Island	29.V.96	13.XII.99
	Pending cases:		
[92]	Gabčíkovo-Nagymaros Project (Hungary/Slovakia)	2.VII.93	—
[102]	Sovereignty over Pulau Ligitan and Pulau Sipadan	2.XI.98	—

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TABLE IIB Cases of tacit consent

Folio No.	Title	Date of registration	Date of final judgment
5	Fisheries +	28.IX.49	18.XII.51
11	Rights of Nationals of the United States in Morocco +#	28.X.50	27.VIII.52
14	Haya de la Torre #	13.XII.50	13.VI.51
33	Application of the Convention of 1902 Governing the Guardianship of Infants +	9.VII.57	28.XI.58
39	Arbitral Award Made by the King of Spain on 23 December 1906 +#	1.VII.58	18.XI.60
76	Elettronica Sicula S.p.A. (ELSI) [chamber] +	6.II.87	20.VII.89
78	Maritime Delimitation in the Area between Greenland and Jan Mayen +	16.VIII.88	14.VI.93
82	Arbitral Award of 31 July 1989 +	23.VIII.89	12.XII.91

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TABLE IIIA Upholding of preliminary objections and dismissal of application

Folio No.	Title	Date of registration	Date of final judgment
16	Anglo-Iranian Oil Co. +	26.V.51	22.VII.52
19	Monetary Gold Removed from Rome in 1943 +	19.V.53	15.VI.54
29	Certain Norwegian Loans +	6.VII.55	6.VII.57
34	Interhandel +	2.X.57	21.III.59
35	Aerial Incident of 27 July 1955 (Israel v. Bulgaria) #	16.X.57	26.V.59
46/47	South West Africa [Ethiopia v. South Africa]/South West Africa [Liberia v. South Africa] #	4.XI.60	18.VII.66
48	Northern Cameroons #	30.V.61	2.XII.63
62	Aegean Sea Continental Shelf #	10.VIII.76	19.XII.78
84	East Timor (Portugal v. Australia) +	22.II.91	30.VI.95
96	Fisheries Jurisdiction (Spain v. Canada) +	28.III.95	4.XII.98
97	Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case	21.VIII.95	22.IX.95
112	Legality of Use of Force (Yugoslavia v. Spain) +#	29.IV.99	2.VI.99
114	Legality of Use of Force (Yugoslavia v. United States of America) +#	29.IV.99	2.VI.99

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TABLE IIIB Cases in which preliminary objections were dismissed and the Court proceeded to judgment on the merits

Folio No.	Title	Date of registration	Date of dismissal of preliminary objections	Date of final judgment
1	Corfu Channel, Merits	22.V.47	25.III.48	9.IV.49
15	Ambatielos #	9.IV.51	1.VII.52	19.V.53
18	Nottebohm +	17.XII.51	18.XI.53	6.IV.55
32	Right of Passage over Indian Territory +	22.XII.55	26.XII.57	12.IV.60
41/50	Barcelona Traction, Light and Power Company, Limited #	23.IX.58	24.VII.64	5.II.70
45	Temple of Preah Vihear +	6.X.59	26.V.61	15.VI.62
54	Appeal Relating to the Jurisdiction of the ICAO Council #	30.VIII.71	18.VIII.72	18.VIII.72
55	Fisheries Jurisdiction (United Kingdom v. Iceland) #	14.IV.72	2.II.73	25.VII.74
56	Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)#	5.VI.72	2.II.73	25.VII.74
58	Nuclear Tests (Australia v. France) +#	9.V.73	20.XII.74	20.XII.74
59	Nuclear Tests (New Zealand v. France) +#	9.V.73	20.XII.74	20.XII.74
64	United States Diplomatic and Consular Staff in Tehran #	29.XI.79	24.V.80	24.V.80
70	Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) +#	9.IV.84	26.XI.84	27.VI.86
74	Border and Transborder Armed Actions (Nicaragua v. Honduras) +#	28.VII.86	20.XII.88	(withdrawn 27.V.92)

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Folio No.	Title	Date of registration	Date of dismissal of preliminary objections	Date of final judgment
80	Certain Phosphate Lands in Nauru (Nauru v. Australia) +	19.V.89	26.VI.92	(withdrawn 13.IX.93)
	Pending cases awaiting judgment on the merits			
[87]	Maritime Delimitation and Territorial Questions between Qatar and Bahrain	8.VII.91	15.II.95	—
[88]	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)	3.III.92	27.II.98	—
[89]	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)	3.III.92	27.II.98	—
[90]	Oil Platforms (Islamic Republic of Iran v. United States of America)	2.XI.92	12.XII.96	—
[91]	Application of the Convention on the Prevention and Punishment of the Crime of Genocide	20.III.93	11.VII.96	—
[94]	Land and Maritime Boundary between Cameroon and Nigeria	29.III.94	11.VI.98	—

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