Leiden Journal of International Law, 19 (2006), pp. 699–717
 Printed in the United Kingdom doi:10.1017/S0922156506003530

Judge Peter Kooijmans Retires from the International Court of Justice

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Abstract
In February 2006 Judge P. H. Kooijmans retired from the International Court of Justice after having served a full nine-year term. The article focuses on the manner in which Peter Kooijmans has performed his task as a judge by taking a close look at his most significant individual opinions. It focuses on three aspects of his contribution to the work of the Court: settling disputes, applying legal logic, and the development of international law.

Key words
International Court of Justice; Peter H. Kooijmans

1. Introduction

In February 2006 Judge Peter Kooijmans retired from the International Court of Justice (ICJ) after having served a full term of nine years. Having been Professor of Public International Law at Leiden University for many years and therefore having a close link to the *Leiden Journal of International Law*, it seems appropriate in this issue to consider the contribution he has made to the advancement of international law as judge in the World Court.

When in 1996 Professor Kooijmans was elected to the Court expectations of all who knew him were high. He had been a professor of public international law since the beginning of the 1960s, had served in the Dutch government in various roles, finally as Minister for Foreign Affairs in 1993–4, and actively contributed to the advancement of the international protection of international human rights, among others as UN Special Rapporteur on questions relevant to torture for the UN Commission on Human Rights. At an age at which many decide to take early retirement, and for Peter Kooijmans (born 1933) this would have been well deserved if one considers what he had already achieved at that time, he decided to take up this new challenge that would take his full attention for the next nine years. His election to the Court was generally regarded as crowning a lifelong dedication to the promotion of the rule of law in international society, and, knowing his earlier achievements and capabilities, expectations, as has been said, were high. Nine years later, it is safe to say that it will be difficult to find anyone disappointed by the contribution of Judge Kooijmans to the work of the Court.

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It is the purpose of this article to present, as a kind of follow-up to the articles published in 1997 in this Journal,[1] a brief analysis of Judge Kooijmans's role as judge in the International Court of Justice. His separate opinions, declarations, and dissenting opinion, as the most visible aspects of his contribution to the work of the Court, will be taken as the main source for this. Of course, Judge Kooijmans has had an influence on the drafting of the decisions of the Court, but these must be regarded as the collective responsibility of the Court and can therefore not be used in trying to assess an individual judge's contribution.[2] It will not be possible and it is not the intention to analyse every opinion in detail, since this can better be done in the context of the discussion of individual cases or specific questions of law that have arisen in the cases before the Court. Also, this contribution will not provide a chronological summary of the opinions; rather it will attempt to create an impression of the work of Judge Kooijmans that should be accessible also to those readers who have not been in a position to follow the work of the Court closely in the past nine years. This will be done under three different headings: settling disputes, applying legal logic, and the development of international law.[3] It will be evident that by applying such headings the present author colours the presentation, but in general an attempt is made to let Judge Kooijmans speak for himself through his opinions and declarations. First, however, one must present some factual information from which it will become clear that the past nine years have been without precedent in the life of the Court in terms of the quantity, diversity, and sensitivity of the cases put before it.

2. A FULL DOCKET

The Court has had a very full docket in the period when Judge Kooijmans served on it (February 1997–February 2006).[4] It has given 11 judgments on the merits, and judgments on preliminary objections in 16 cases (including the eight decisions in the *Legality of the Use of Force* cases and the two *Lockerbie* cases), and has issued orders on provisional measures in 17 cases (including the ten orders in the *Legality of the Use of Force* cases), dealt with two applications for revision of an earlier judgment, one request for intervention, and one request for interpretation of an earlier judgment. It

1. J. G. Lammers, 'Peter Kooijmans: Minister for Foreign Affairs', (1997) 10 LJIL 121; C. Flinterman, 'Peter Kooijmans and Human Rights', ibid., at 126; M. Brus, 'Peter Kooijmans, Professor of Public International Law', ibid., at 132.
2. As a result some of the cases that have attracted much attention will remain outside the discussion, e.g. *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Order of 9 April 1998 – Request for the indication of provisional measures; *Case Concerning the Vienna Convention on Consular Relations (Germany v. United States of America) (LaGrand Case)*, Order of 3 March 1999, Request for the indication of provisional measures; Judgment of 27 June 2001; *Avena and other Mexican Nationals (Mexico v. United States of America)*, Order of 5 February 2003 – Request for the indication of provisional measures; Judgment of 31 March 2004.
3. As with many attempts to categorize a wide variety of different items or issues, the present categorization should only be regarded as a tool to provide some structure to the analysis and discussion. Many of the cases discussed below are categorized to underline some aspects of the work of Judge Kooijmans and not as an attempt to categorize the cases as such. It would be possible to discuss several cases under more than one of the headings proposed.
4. The figures presented are based on the information as provided on the website of the ICJ (www.icj-cij.org). The only purpose is to present a general indication of the activities of the Court and not a complete factual overview.

rendered two advisory opinions. Numerous orders were issued on procedural aspects, such as the fixing of time limits. The overview shows that the Court delivered a total of some 50 judgments, orders, and advisory opinions. Even if we take account of the fact that the decisions in the *Legality of the Use of Force* cases were to a large extent similar, as well as the decisions in the *Lockerbie* cases, the production of the Court peaked in comparison with earlier periods.

In the nine years previous to Judge Kooijmans's term (1988–97) the Court dealt with five cases on the merits and six cases on preliminary issues, and decided on five requests for provisional measures (including the two *Lockerbie* cases) and on one request to intervene; it delivered four advisory opinions. In all, this was a total of 21 judgments, orders, and advisory opinions. From 1979 to 1988 the Court produced 13 judgments and orders on provisional measures and requests for intervention, revision, and interpretation, and three advisory opinions. In the period 1979–88 the Court had 12 contentious cases on the docket and 22 in 1988–97, while in the period 1997–2006 it was actively dealing with 42 contentious cases. Even if one takes note of the fact that the *Legality of the Use of Force* cases represent ten similar cases, the difference between this and the preceding periods remains great. Being a judge in the World Court is not only a very demanding job as far as the expected quality of the decisions is concerned, but also has become a very demanding job in terms of actual workload. Given the very time-consuming procedures before and of the Court, one wonders how the Court will and can deal with a further increase in its caseload if more states decide to make use of the Court more frequently.

Having to deal with this unprecedented number of cases is in itself a challenging task, but one should also take into account that the judges of the International Court do not have legal clerks or other assistants at their disposal to assist them in research and drafting, but have to do most of the work themselves. Moreover, the International Court follows the tradition of writing individual opinions when a judge disagrees with (parts of) the judgment of the Court or does not agree with the reasoning applied by the Court.[5] This means that on top of the normal work, there is the additional workload of drafting the individual opinions. As expected by many, Judge Kooijmans has been very active in giving his opinions. He has produced 22 separate opinions (of which 14 in the *Legality of the Use of Force* cases), one dissenting opinion, two declarations, two joint separate opinions, and eight joint declarations (in the *Legality of the Use of Force* cases). There are only a few judgments or orders of wider importance to which he did not attach his own opinion.[6] Moreover, besides functioning in the full Court, Judge Kooijmans has sat as judge in the Chamber, consisting of three judges of the Court and two judges ad hoc, that dealt with a dispute between Benin and Niger.[7] Furthermore, outside the International Court he has acted as arbitrator in a dispute between the Netherlands and France on the application of the Convention of 3 December 1976 on the Protection of the Rhine against Pollution by Chlorides and the Additional Protocol of

5. D. W. Bowett et al., *The International Court of Justice: Process, Practice and Procedure* (1997).
6. See, e.g., *supra* note 2.
7. *Case Concerning the Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005.

25 September 1991. The arbitral tribunal was constituted in 2000 and its award delivered in March 2004.[8]

3. Settling disputes

A first and most important task of a judge is to contribute to the settlement of a dispute and not only to provide a decision regarding a particular legal issue. The International Court of Justice is limited in this role by the requirement that the parties before that Court have to consent to its jurisdiction. The terms under which they have consented to its jurisdiction with regard to contentious cases determine the Court's options in contributing to the settlement of a particular dispute. With regard to advisory opinions the Court is restricted to answering the legal questions put before it by the organ or organization that has requested the opinion. Within these limits the Court has to define its position in every case before it. In general it has to limit itself to the legal issues as put before it by the parties to the dispute, but it can do so within fairly wide margins. In its approach and reasoning leading to its decision(s) on the legal issues, the Court has the freedom, if not the task, to take account of the wider aspects of the dispute, for example, the historical and political context, or the implications of its judgment or opinion for the underlying dispute(s) and the relations between the parties. However, how in a given case the right balance can be struck between legal limitations and relevant context is not easy to determine; all judges will have their own ideas and opinions on what can and should be taken into account in a particular case. In this section, five aspects related to the dispute settlement role of the Court as apparent from the work of Judge Kooijmans will be taken into account. First, there is the need to take the wider context into account. However, this should not lead to, second, rendering judgments beyond the submissions of the parties. Third, the relations between the parties to a dispute after the Court has delivered its judgment can be a factor to take into account, and, fourth, the Court should determine clearly in its judgment or opinion what is expected of the parties or individual judges. The fifth point relates to the fact that the Court, although functioning within a political context, must be very aware of the danger of politicization.

As to the first issue, for Judge Kooijmans the wider context of a dispute seems to have been of great importance, in particular in view of the role of the Court in contributing to the settling of the wider dispute through its decision on particular legal issues that are put before it. More often than not the legal issues form only a small part of the underlying dispute. A good example of this can be found in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*.[9] The building of the wall is only one element in the complex Palestine–Israel dispute. Having to consider what the legal consequences arising from the construction of the wall being built by Israel are, as the UN General

8. See www.pca-cpa.org.
9. *Legal Consequences of the Construction of a Wall between Israel and the Occupied Palestinian Territories*, Advisory Opinion of 9 July 2004.

https://doi.org/10.1017/S0922156506003530 Published online by Cambridge University Press

Assembly asked in its request for an advisory opinion, further narrows the questions that the Court can address. The Court concludes that the building of the wall is contrary to international law.[10] In the reasoning that leads to this conclusion it refers to the fact that

> the question of the wall is part of a greater whole, and it would take this circumstance carefully into account in any opinion it might give. At the same time, the question that the General Assembly has chosen to ask of the Court is confined to the legal consequences of the construction of the wall, and the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it.[11]

Judge Kooijmans fully agrees with this observation of the Court, but is not satisfied with the manner in which the Court actually dealt with the wider context. He criticizes the 'two-dimensional' historical résumé from which certain objective historical facts have been omitted, such as the placing under Jordanian sovereignty of the West Bank between 1949 and 1967.[12] Furthermore, with regard to the aspect of the terrorist attacks against Israeli citizens he criticizes the Court for its 'rather oblique references to terrorist acts'.[13] Because an advisory opinion of this kind is 'destined to have effect on a political process', it should reflect in its reasoning 'the legitimate interests and responsibilities of *all* those involved',[14] which it clearly, according to Judge Kooijmans, did not do sufficiently. A related issue in the context of this advisory opinion was whether judicial propriety would require the refusal to give an opinion on such a highly politicized request. Judge Kooijmans has considerable hesitations in this respect. Undue politicization of the Court would possibly, in his view, undermine 'its ability to contribute to global security and to respect for the rule of law'.[15] In the highly political context of this case, refusing to give an opinion would also politicize the Court and therefore he concludes that in this case by 'limiting itself strictly to its judicial function is the Court able to minimize the risk that its credibility in upholding the respect for the rule of law is affected'.[16]

Judge Kooijmans is very aware of the fine line between what is and what is not the proper role of the Court in the context of its wider role in settling disputes. This is also evidenced by his subtle criticism of the Court on how it dealt with the far from 'legally neutral' formulation by the General Assembly of its request for an advisory opinion on the legal consequences of the construction of a wall between Israel and the occupied Palestinian territories. The General Assembly asked, 'What are the legal consequences arising from the construction of the wall being built by Israel . . .'. This question does not expressly ask the Court's opinion of the legality of the building of the wall by Israel, but the Court concludes that in the request to

10. Ibid., at para. 163.
11. Ibid., at para. 54.
12. *Legal Consequences of the Construction of a Wall between Israel and the Occupied Palestinian Territories*, Advisory Opinion of 9 July 2004, Separate Opinion of Judge Kooijmans, paras. 4–13.
13. Ibid., para. 13.
14. Ibid. (emphasis in original).
15. Ibid., para. 20.
16. Ibid.

https://doi.org/10.1017/S0922156506003530 Published online by Cambridge University Press

> state the 'legal consequences' arising from the construction of the wall, the use of these terms necessarily encompasses an assessment of whether that construction is or is not in breach of certain rules and principles of international law.[17]

Judge Kooijmans does not disagree with the conclusion that an assessment of the legality of building the wall is required. However, he is of the opinion that in order to uphold its judicial dignity, the Court should itself have decided to reconsider the content of the request and should not have done so by 'assuming what the Assembly "necessarily" must have assumed', adding with some irony, 'something it evidently did not'.[18]

The need to consider the wider context of a dispute is relevant not only in the case of an advisory opinion on a highly politicized dispute, but also in the context of contentious cases. In his Separate Opinion to the judgment in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* Judge Kooijmans also draws attention to the need to take account of the wider context of the dispute:

> The concept of peaceful dispute settlement is premised on the condition that the parties to a dispute find their particular position and their specific concerns reflected in the settlement suggested to or imposed upon them. That settlement must acknowledge those concerns, even if it fails to satisfy the parties' demands or even censures their conduct.[19]

These observations may be extended beyond the factual and political context. When, for example, states are confronted with the use of armed force by armed groups not representing states, or by terrorists, and states argue that they responded to such force in self-defence, the Court should not shy away from expressing a view on the legal issues that arise in such situations if this is relevant for the assessment of the situation and in the context of the legal issues before the Court.[20] Such legal issues are relevant from the point of view of trying to contribute to settling disputes by taking into account the relevant concerns of the parties involved.

However, there are clear limits to this. A second point to make, therefore, is that the need to take context into account should not lead to a situation in which the Court in fact extends the legal issues beyond what is raised in the submissions by the parties and makes these wider legal questions part of its final decision in the so-called *dispositif* of a judgment. In the view of Judge Kooijmans this undesirable approach may have a negative effect on the confidence of states in the Court. This extension of the submissions was what occurred in the *Oil Platforms* case.[21]

The legal issue in the *Oil Platforms* case was whether the use of force in 1987 and 1988 by the United States against Iranian oil platforms in response to alleged Iranian attacks against US oil tankers during the Iraq–Iran war violated the 1955 Treaty of

17. *Legal Consequences of the Construction of a Wall between Israel and the Occupied Palestinian Territories*, Advisory Opinion of 9 July 2004, para. 39.
18. *Supra* note 12, at para. 26.
19. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, Separate Opinion of Judge Kooijmans, para. 13.
20. See also section 5 *infra*.
21. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion of Judge Kooijmans, para. 35.

Amity, Economic Relations, and Consular Rights between the United States and Iran. In their pleadings the parties devote much attention to the lawfulness of the use of force by the United States, but this 'does not mean that that issue was the dispute before the Court'.[22] The issue before the Court was whether the actions by the United States could be regarded as a violation of the treaty of 1955. This treaty provides that it does not preclude measures that are necessary to protect the essential security interests of a contracting party. The Court concludes in the first paragraph of the *dispositif*

> that the actions of the United States of America against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1(*d*), of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran, as interpreted in the light of international law on the use of force.[23]

The Court comes to this conclusion on the basis of the interpretation and application of the rules relating to the use of force between states. It focuses strongly on the legality of the use of force and, according to Judge Kooijmans, by giving a prominent place in its reasoning to the use of force

> and its interpretation in the light of general international law, combined with the first part of paragraph 1 of the *dispositif* . . . the Judgment reads more like a judgment on the legality of the use of force than as one on the violation *vel non* of a commercial treaty.[24]

By taking this course the Court in fact extended its jurisdiction and came to the unprecedented conclusion that the Respondent (the United States) is held to have acted unlawfully (on the basis of the law on the use of force), while the claim (on the basis of the alleged violation of the 1955 treaty) against it is rejected.[25] Including in its decision the finding on the unlawfulness created a precedent which in Judge Kooijmans's view is 'a highly hazardous one since it raises questions about the scope of a judgment of the Court, e.g., with regard to its *res judicata* character'.[26]

Finding a proper balance between, on the one hand, the need to take into consideration a broad and balanced reflection of the relevant facts and political context – and it cannot be denied that the legality of the use of force is a relevant aspect, given the factual and political context of the dispute between Iran and the United States in the *Oil Platforms* case – and, on the other, a strict adherence to what is required of the Court as a court of law is a typical element in Judge Kooijmans's approach to his role as judge. The Court should always attempt to present its findings in such a

22. Ibid., at para. 32. See also section 4 *infra*.
23. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003 (Merits), para. 125(1).
24. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion of Judge Kooijmans, para. 35.
25. The second sentence of the first paragraph of the *dispositif* (para. 125(1)) reads: '*finds* further that the Court cannot however uphold the submission of the Islamic Republic of Iran that those actions constitute a breach of the obligations of the United States of America under Article X, paragraph 1, of that Treaty, regarding freedom of commerce between the territories of the parties, and that, accordingly, the claim of the Islamic Republic of Iran for reparation also cannot be upheld'.
26. *Supra* note 24, at para. 3.

way that all parties concerned will be convinced that their views and interests are seriously taken into consideration and that the Court as far as possible assists them in settling the dispute.

A third form in which Judge Kooijmans tries to contribute to the settlement of the wider dispute, or in fact to help the concerned states to avoid new disputes from arising after the Court has given its judgment on the specific legal issue(s), can be found in the *Kasikili/Sedudu Island* case between Botswana and Namibia. In this case the Court had to determine the boundary between the two states and the status of the island in the boundary river. Judge Kooijmans, having made some remarks to supplement the reasoning of the Court, continues in his Separate Opinion with a brief overview of the relevant recent development of the rules and principles on equitable and reasonable utilization in the international law of international watercourses and their relevance for the future relations between the two states. He does so in order to 'provide guidance to the Parties for further conduct and place their mutual relations in a wider perspective'.[27]

A fourth point that could be considered under this heading is the fact that a judgment or advisory opinion of the Court should express clearly what is expected of the relevant states. In his Separate Opinion to the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Judge Kooijmans, while in agreement with most findings of the Court in respect of the fact that Israel by constructing the wall has violated several obligations under international law, is critical about the Court's findings with regard to the consequences that are attached to it for third states. He regards the conclusion of the Court that 'All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall'[28] to be a statement without substance, as the relevant resolutions of the UN General Assembly show that there are no states that consider the construction of the wall legal.[29] Furthermore the conclusion of the Court that

> all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention[30]

fails to provide sufficient clarity as to what is expected from the states: 'I fail to see what kind of positive action, resulting from this obligation, may be expected from individual States, apart from diplomatic demarches'.[31]

Fifth, it is clear from the above-mentioned examples that – in so far as is possible in the context of the cases as presented to the Court – Judge Kooijmans is very aware of the role of the Court and of the individual judges in contributing positively to the actual settlement of the dispute at hand. A careful balance is required to avoid

27. *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, Separate Opinion of Judge Kooijmans, para. 23.
28. *Supra* note 17, at para. 168 (3.d).
29. *Supra* note 18, at para. 44.
30. *Supra* note 17.
31. *Supra* note 18, at para. 50.

https://doi.org/10.1017/S0922156506003530 Published online by Cambridge University Press

politicization of the Court. In cases where there is a danger of such politicization, as we have seen above, 'Only by limiting itself strictly to its judicial function is the Court able to minimize the risk that its credibility in upholding the respect for the rule of law is affected'.[32] However, in such situations different possibilities may be open for the Court. In such circumstances, the Court should choose the option that best reflects the judicial function of the Court.

Judge Kooijmans's views on this are clearly expressed in the judgment on jurisdiction in the *Legality of Use of Force* cases between Yugoslavia and a number of NATO states. In this judgment the Court decided unanimously that it has no jurisdiction to entertain the claims made in the application filed by Yugoslavia (from 4 February 2003 Serbia and Montenegro) on 29 April 1999. In this decision, however, the Court rejected its jurisdiction on completely different grounds from those it had used in its decision on the provisional measures. There it decided that it had no jurisdiction *ratione temporis*.[33] In the decision on jurisdiction it takes a completely different approach and decides that it has no jurisdiction *ratione personae*. This conclusion is now based on the fact that the Federal Republic of Yugoslavia was not a member of the United Nations between 1992 and 2000. In 2000 Serbia and Montenegro applied for and were granted new membership of the United Nations. Seven of the judges, including Judge Kooijmans, have attached a Declaration to the judgment in which they 'profoundly disagree with the reasoning upon which the Judgment rests, in particular the ground upon which the Court has found it has no jurisdiction'.[34] They reject the reasoning of the Court for three reasons: (i) lack of consistency and predictability; (ii) neglect of the principle of certitude; and (iii) insufficient taking into account of the consequences for other pending cases. In this unusually strongly worded Joint Declaration they state that they regard this judgment as being contrary to the judicial function of the Court.

Judge Kooijmans supports the Joint Declaration but also adds a Separate Opinion in which he stresses the fact 'that the Court, in the present Judgment, has failed to meet the criteria for a sound judicial policy'.[35] He underlines the points raised in the Joint Declaration and adds that although he had stressed the need to consider the jurisdiction *ratione personae* of the Court in his opinion on the request for provisional measures, in the present case he considers that the Court should not have based its decision to deny jurisdiction in this case on that basis, but should have removed the case *proprio motu* from the list. 'What seemed to me to be a logical ground for determining lack of *prima facie jurisdiction* does not automatically qualify as a proper

32. Ibid., para. 21.
33. *Legality of the Use of Force*, Order of 2 June 1999 (Provisional Measures) in the cases of *Yugoslavia v. Belgium, Canada, Netherlands, Portugal, Spain, and United Kingdom.*
34. *Legality of the Use of Force*, Judgment of 14 December 2004 (Preliminary Objections), in the cases of *Serbia and Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom*, Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, and Elaraby, para. 1.
35. *Legality of the Use of Force*, Judgment of 14 December 2004 (Preliminary Objections), in the cases of *Serbia and Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom*, Separate Opinion of Judge Kooijmans, para. 1.

ground for the *definitive* determination of the issue of jurisdiction'.[36] The applicant, Serbia and Montenegro, had not provided the Court with any plausible information as to the basis of its jurisdiction and it is

> incompatible with the respect due to the Court for a party not to provide it with any substantive argument for the speculation that it might have jurisdiction while explicitly withdrawing the previously adduced jurisdictional grounds. It is not in conformity with judicial propriety and a sound judicial policy to render a fully reasoned Judgment on jurisdiction when the Applicant bases its request to do so on grounds which can only be called inadequate.[37]

Although the Court dealt with the issue of the removal of the cases from the list *in limine litis* before it dealt with the other possible grounds for jurisdiction, according to Judge Kooijmans the Court did not exercise its competence to strike the case from its list in a 'well-considered way'.[38]

4. Applying legal logic

The need to apply legal logic is another recurrent theme in the opinions of Judge Kooijmans. He has consistently stressed the need to follow legal logic in the reasoning of the Court. Even though only on rare occasions has he voted against findings of the Court as stated in the *dispositif*, in many cases he is not (entirely) satisfied with the structure of and legal reasoning in the judgments, orders, or opinions of the Court.

A good example of this is the order of the Court on the *Legality of Use of Force (Request for Provisional Measures)* cases in which the Federal Republic of Yugoslavia invoked the jurisdiction of the Court on the basis of its declaration under Article 36, paragraph 2 of the Statute in which it accepted the jurisdiction of the Court. The Court decided that it did not have prima facie jurisdiction as Yugoslavia had made a limitation *ratione temporis*. However, the question was also raised of whether Yugoslavia, in the light of the decisions of the General Assembly and the Security Council of 1992, could be regarded as a member of the United Nations and party to the Statute. If Yugoslavia could not be regarded as a member of the United Nations, its declaration under Article 36(2) would have to be regarded as invalid since Yugoslavia would then not have fulfilled the necessary preconditions. The Court, however, did not wish to enter into this 'thorny' issue of Yugoslav membership of the United Nations. It decided to reject the request for provisional measures on the ground that the limitation *ratione temporis* provides sufficient ground to conclude that it did not have prima facie jurisdiction on the basis of the Article 36(2) declaration. Judge Kooijmans disagrees with this conclusion on grounds of pure logic: one can only apply a limitation to a declaration if one is of the opinion that there is sufficient ground to consider this declaration valid. In his view, the Court

36. Ibid., para. 11; see also section 4, *infra*.
37. Ibid., para. 24.
38. Ibid., para. 15.

https://doi.org/10.1017/S0922156506003530 Published online by Cambridge University Press

should have addressed this controversial issue and should not have shied away from it.[39]

One of the most discussed cases the Court had to deal with in the relevant period was the *Arrest Warrant* case brought by the Democratic Republic of the Congo (DRC) against Belgium in respect of an international arrest warrant that the Belgian authorities had issued against the then Minister for Foreign Affairs of the DRC for war crimes and crimes against humanity. The two main questions were whether Belgium had the jurisdiction to prosecute the minister on the basis of the principle of universal jurisdiction and, second, whether a minister for foreign affairs is entitled to immunity from such jurisdiction. In the course of the proceedings it became clear that the parties to the dispute were only interested in a finding of the Court on the second question and dropped the question concerning universal jurisdiction from their submissions. The Court therefore had to limit itself in its decision to the question of immunities, but reserved its right to deal with the first question related to universal jurisdiction in its reasoning. It refrained from doing so, however.

Judge Kooijmans, in a joint Separate Opinion with Judges Higgins and Buergenthal, is strongly opposed to the choice made by the Court not to address the issue of universal jurisdiction. The disengagement of the question of immunity from the question of jurisdiction flies in the face of legal logic. Immunity means immunity from jurisdiction. If there is no jurisdiction, the question of immunity does not arise. The Court should have investigated the question of whether Belgium is indeed entitled to exercise universal jurisdiction in the present case, before it could answer the specific question asked by the parties to the dispute. By not dealing with the relevant question of the existence of Belgian jurisdiction, the Court 'has allowed itself to be manoeuvred into answering a hypothetical question'[40] and 'encouraged a regrettable current tendency . . . to conflate the two issues'[41] while they must be regarded as two distinct norms, albeit that immunity can only arise if jurisdiction exists.[42]

In his Separate Opinion to the *Oil Platforms* case, Judge Kooijmans also pronounces on several points of legal logic. In this case the Court was confronted – as already referred to in section 3 above – with a situation of the use of force in the context of a treaty on commerce that provided the sole basis for the Court's jurisdiction. In the opinion of Judge Kooijmans the Court did not sufficiently take into account the limitations that arise from this. It used the opportunity to discuss the lawfulness of the US actions primarily from the point of view of general international law. If the Court had dealt with the case in a logical order it might not even have reached the point at which it was necessary to express its opinion on this issue. Instead of starting its enquiry in this case with the issue of the use of force, Judge Kooijmans is of the opinion that the Court should have approached it in a more logical order

39. *Legality of the Use of Force*, Order of 2 June 1999 (Provisional Measures) in the cases of *Yugoslavia v. Belgium, Canada, Netherlands, Portugal, Spain, and United Kingdom*, Separate Opinion of Judge Kooijmans.
40. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para. 17.
41. Ibid., para. 4.
42. Ibid., para. 5.

https://doi.org/10.1017/S0922156506003530 Published online by Cambridge University Press

by first making an enquiry as to whether the contested actions of the United States constituted a violation of Article X, paragraph 1 of the treaty between the United States and Iran. This Article provides that 'Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation'. If 'the Court would have found (as it actually did) that there was no violation of Article X, paragraph 1, . . . [the] whole issue of Article XX, paragraph 1(*d*), could have been left aside'.[43] However, the Court decided first to explore whether the 'measures' taken by the United States were to be considered as 'necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests' (Art. XX(1)(*d*)). Although Judge Kooijmans does not 'seriously doubt the Court's wisdom in taking up this issue first and considering only at a later stage the main issue of a violation of Article X, paragraph 1', he states that 'with hindsight it can be said that that would have been the more logical and, therefore, the more desirable approach'.[44] To this he adds a somewhat cryptic sentence, 'But pure logic does not always provide the most desirable solution'.[45] This can be interpreted in various ways depending on the criterion used for determining what is desirable. Is it a desirable solution from a political point of view, or is it desirable from a conflict resolution point of view? Is this an indirect criticism of the (political) choice made by the Court, or is it a solution that reflects the proper judicial role of the Court? Given Judge Kooijmans's other expressions on these questions, the first option seems to be the most plausible one, certainly if read in conjunction with his worries about the effect of this approach on states with comparable treaties with a compromissory clause.[46]

By choosing to deal with the issue of the use of force as the first issue, the Court had to deal with the question of whether the attacks on the oil platforms could be regarded as measures 'necessary to protect its essential security interests' under Article XX(1)(*d*) of the treaty. In Judge Kooijmans's opinion the Court here too took an approach that was not correct from the viewpoint of legal logic. The Court started its analysis of the question of the legality of the use of force by the United States on the basis of the rules on self-defence under general international law. It came to the conclusion that

> the actions carried out by United States forces against Iranian oil installations on 19 October 1987 and 18 April 1988 cannot be justified, under Article XX, paragraph 1(*d*), of the 1955 Treaty, as being measures necessary to protect the essential security interests of the United States, *since* those actions constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence, and *thus* did not fall within the category of measures contemplated, upon its correct interpretation, by that provision of the Treaty.[47]

43. *Supra* note 24, at para. 29.
44. Ibid., para. 30.
45. Ibid.
46. Ibid., para. 35.
47. *Supra* note 23, at para. 78 (emphasis added).

https://doi.org/10.1017/S0922156506003530 Published online by Cambridge University Press

According to Judge Kooijmans this is not the correct approach, since in his view the Court lacks jurisdiction in this case 'to determine whether the destruction of the oil platforms can or cannot be justified as acts of legitimate self-defence'.[48] Instead, the Court should first have established that the measures taken by the United States were reasonable in the light of the provision in Article XX(1)(*d*) that a party may take measures 'necessary to protect its essential security interests'. On a positive conclusion that these measures were reasonable and necessary, the Court would then have had to turn to the question of whether or not the use of force in the present case could be considered to be lawful measures under the rules of general international law with regard to the use of force in self-defence. Although in the end the conclusion of the Court could have been the same – the use of force was contrary to general international law – the reasoning employed to arrive at the conclusion would have been more logical and therewith be more acceptable to the parties in the case.

The fact that Judge Kooijmans attaches great value to legal logic has been illustrated above with the relatively extensive discussion of the *Oil Platforms* case. More illustrations can be given, but they would require the discussion of the various cases in detail, which is not the objective of this contribution. His separate opinions in many cases are intended mainly to address particular weaknesses in the legal reasoning of the Court, but do not seem to have much specific value outside the context of the given case. What can be said in general about these opinions is that they are drafted in Judge Kooijmans's well-known eloquent style, in which he explains in a concise manner most complicated legal arguments with great clarity. The opinions certainly add extra depth to the judgments, orders, and opinions of the Court.

This is also true for his only Dissenting Opinion in the case of *Certain Property (Liechtenstein* v. *Germany)*. In that case Judge Kooijmans is of the opinion that the Court should have distinguished preliminary matters – questions concerning jurisdiction and admissibility – and issues of substance much more sharply. The core issue is whether the Court has jurisdiction on the basis of a convention that entered into force between the two states on 18 February 1980. The Convention excludes disputes related to facts or situations prior to the entry into force from the jurisdiction of the Court. The underlying issue is whether Liechtenstein is entitled to compensation in respect of a painting that was confiscated after the Second World War. These facts clearly originate before 1980, but in the opinion of Judge Kooijmans a new situation arose when German court decisions after 1980 'applied the Settlement Convention to neutral assets for the very first time, and that this introduced the new element I referred to earlier – or, to use the words of the Court, that the German courts faced a "new situation"'.[49] Therefore Judge Kooijmans is of the opinion that the Court should have found that it has jurisdiction in that case, even though with regard to the merits of the dispute the most relevant facts originate from before 1980. Instead of denying its jurisdiction, the Court should have accepted jurisdiction or should

48. *Supra* note 24, para. 52.
49. *Certain Property (Liechtenstein v. Germany)*, Judgement of 10 February 2005 (Preliminary Objections), Dissenting Opinion Judge Kooijmans, para. 18.

have determined that the issue is not exclusively of a preliminary character and should therefore be dealt with in the merits phase.

5. The development of international law

The observations made on the *Arrest Warrant* case above were related to Judge Kooijmans's sense of legal logic, but this case also can be regarded as a good example of the third aspect of Judge Kooijmans's approach to his role as a judge. From his opinions it becomes clear that he is very aware of the fact that he is in a position – in so far as this is possible within the limits of a given case – to clarify and further develop international legal norms in the context of the needs of contemporary international society.

Paragraph 5 of the joint Separate Opinion to the *Arrest Warrant* case is one of the instances where this aspect is expressed explicitly:

> One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfils its function of resolving a dispute that has arisen before it.

Since the Court did so insufficiently, the three judges have undertaken the task themselves in their joint Separate Opinion. They provide an extensive analysis of the existence of universal jurisdiction in treaty law and in international customary law that the Court in their view should have included in its reasoning. This very thoughtful and conceptually clear analysis will undoubtedly remain a most authoritative writing on this subject, despite the fact that the conclusion drawn from the analysis is worded very cautiously:

> We may thus agree with the authors of the Oppenheim, 9th Edition, at page 998, that: 'While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect'.[50]

However, in paragraph 65 of the Opinion they are more explicit in their conclusion that for some crimes international law does not preclude the exercise of universal jurisdiction:

> It would seem . . . that the acts alleged do fall within the concept of 'crimes against humanity' and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

50. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para. 52.

Besides addressing the issue of universal jurisdiction, they also have added their comments to the reasoning of the Court with regard to the immunity of a minister for foreign affairs. In this context they show their awareness of the need to find a balance between

> the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members [and] the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference.[51]

They recognize the international evolution with regard to finding such a new balance between impunity and immunity and come to the conclusion that

> In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions. It is, therefore, necessary to analyse carefully the immunities which under customary international law are due to high State officials and, in particular, to Ministers for Foreign Affairs.[52]

Judge Kooijmans's willingness to address relevant legal issues that need clarification or have to be addressed beyond that what is strictly required for the decision on the legal claims of the parties before the Court is clearly present in several of his other opinions. An early example of this is his Separate Opinion in the *Fisheries Jurisdiction (Spain* v. *Canada)* case, where, on the basis of legal logic, he had to concur with the finding of the Court, but he could only do so in dismay at the manner in which Canada had used its options under the optional clause system of Article 36, paragraph 2 of the Statute of the ICJ. In his view, this Article reflects the intention to establish an international legal system in which compulsory dispute settlement by the International Court would be the rule rather than the exception. Using the possibility to limit the scope of the acceptance of the Court's jurisdiction to those issues that suit the accepting state best, or excluding disputes related to activities the excluding state knows will most probably be violating international law, undermines this intention of the optional clause system. Compulsory dispute settlement is, according to Judge Kooijmans, 'more than just another method of settling legal disputes',[53] as it reflects the willingness of states to accept international law as the basis for the evaluation of their conduct. As this (mis)use by Canada (and other states) of the optional clause goes against the heart of what Article 36(2) in fact represents and what the Court should stand for, Judge Kooijmans felt compelled to express his concern about this development. It shows that he is not just a judge in a court of law, but a most prominent representative of those who try to contribute to the realization of an international society based on law.

Similarly, one can point at the joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma on the issue of reservations to human rights treaties, in particular to the Genocide Convention, in the case of the *Armed Activities*

51. Ibid., para. 75.
52. Ibid., para. 79.
53. *Fisheries Jurisdiction (Spain v. Canada)*, Judgment of 4 December 1998 (Jurisdiction of the Court), Separate Opinion of Judge Kooijmans, para. 20.

on the Territory of the Congo (Congo v. *Rwanda)* of 2002. The Congo relied among others on the Genocide Convention for the jurisdiction of the Court. However, Rwanda had made a reservation to the Convention with regard to Article IX that provides for compulsory settlement of disputes arising out of the Convention. The Congo submitted that the reservation was incompatible with the object and purpose of the Convention and therefore invalid. However,

> In the circumstances of the present case the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention.[54]

The judges in their joint Separate Opinion seem to try to prevent the impression that the Court had concluded that 'the fact that a reservation relates to jurisdiction rather than substance *necessarily* results in its compatibility with the object and purpose of a convention'.[55] Such a conclusion would create a rather sharp distinction with the practice as has developed in human rights courts and tribunals and other international bodies that had to deal with the question of reservations to human rights treaties. By providing a broad interpretation of the intention of the Court's statement quoted above, they try to show that

> This development does not create a 'schism' between general international law as represented by the Court's 1951 Advisory Opinion, a 'deviation' therefrom by these various courts and tribunals. Rather, it is to be regarded as developing the law to meet contemporary realities, nothing in the specific findings of the Court in 1951 prohibiting this.[56]

It is clear that the judges would have preferred the Court to take a much more pronounced position on the issue of reservations, in particular on the reservations to the Genocide Convention:

> It must be regarded as a very grave matter that a State should be in a position to shield from international judicial scrutiny any claim that might be made against it concerning genocide. A State so doing shows the world scant confidence that it would never, ever, commit genocide, one of the greatest crimes known.[57]

Apparently, the case of the DRC and Rwanda did not provide the right situation in which to deal with these issues in detail in their Separate Opinion, as was done in the *Arrest Warrant* case, as the judges merely conclude that

> It is thus not self-evident that a reservation to Article IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration.[58]

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54. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006 (Jurisdiction and Admissibility), para. 67.
55. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006 (Jurisdiction and Admissibility), Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, para. 21.
56. Ibid., paras. 22, 23.
57. Ibid., para. 25.
58. Ibid., para. 29.

In a Declaration added to the same case Judge Kooijmans feels compelled to present his view on an issue that for the decision in the case at hand seems rather insignificant, but has a broader relevance since the 'issue transcends the scope of the present case'.[59] In his brief Declaration he is concerned about the restrictive interpretation given by the Court to the requirement that states first have to try to settle a dispute by negotiation as a precondition for initiating arbitration. In the present case this requirement is stated in Article 29, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women. The Court was not satisfied that the DRC had 'sought to commence negotiations in respect of the interpretation or application of the Convention'.[60] Judge Kooijmans shows that although the DRC may not have initiated direct negotiations with Rwanda explicitly related to the violations of the Convention on Discrimination against Women, it had made complaints in various multilateral settings about the human rights violations by Rwanda, including violation of women's rights, but without much effect. These unsuccessful actions by the DRC should, according to Judge Kooijmans, be regarded as sufficiently fulfilling the preconditions for initiating arbitration. In fact, he seems to make two points here: first, that in line with earlier case law of the Court, multilateral forms of diplomacy should be regarded as an accepted form of negotiations; and second, that the Court seems to set a rather high 'threshold for bringing complaints to the Court's attention by States parties about alleged breaches of human rights conventions by other States parties'.[61] This would seem to be contrary to the ideal of promotion of a system of compulsory dispute settlement in which the International Court should play a central role. He seems to express similar concerns here as in the earlier *Fisheries Jurisdiction* case between Spain and Canada.

Finally, one has to refer in this context to Judge Kooijmans's position with regard to the manner in which the Court dealt with the question regarding the legality of self-defence against armed attacks by non-state entities or international terrorists, surely an issue that is highly relevant today. In the *Armed Activities on the Territory of the Congo (Congo v. Uganda)* case the question became relevant as Uganda claimed the right to use force against the territory of the DRC in self-defence against armed bands operating from there. The Court did not deal with the issue. It confined itself to stating that the attacks were not attributable to the DRC and that therefore the Court did not need to take into account any claim based on the right to use force in self-defence:

> the Court finds that the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present. Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.[62]

59. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006 (Jurisdiction and Admissibility), Declaration Judge Kooijmans, para. 1.
60. *Supra* note 54, para. 91.
61. *Supra* note 59, para. 15.
62. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, para. 147.

https://doi.org/10.1017/S0922156506003530 Published online by Cambridge University Press

Judge Kooijmans does not agree with this position:

> The Court only deals with the question whether Uganda was entitled to act in self-defence *against the DRC* and replies in the negative since the activities of the rebel movements could not be attributed to the DRC. By doing so, the Court does not answer the question as to the kind of action a victim State is entitled to take if the armed operation by irregulars, 'because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 103, para. 195) but no involvement of the 'host government' can be proved.[63]

For Judge Kooijmans it would be 'unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require'.[64] In his view the attacked state should be entitled to exercise its right of self-defence if the attacks 'can be said to have amounted to an armed attack in the sense of Article 51'.[65] If that is the case, the next question then becomes whether the state acting in self-defence does so in conformity with the conditions laid down in international law, in particular the requirements of necessity and proportionality. These conditions, Judge Kooijmans adds, were not fulfilled in the case of the Ugandan attacks against the DRC.[66] He strongly feels that 'in the circumstances of the case and in view of its complexity, a further legal analysis of Uganda's position, and the rights ensuing therefrom, would . . . have been appropriate'.[67] Furthermore, 'the Court has forgone a precious opportunity to provide clarification on a number of issues which are of great importance for present-day international society but still are largely obscure from a legal point of view'.[68]

It is a regret similar to that expressed by Judge Kooijmans earlier, with regard to the statements of the Court in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* on the argument used by Israel that it responded in self-defence to terrorist attacks against its population undertaken from Palestinian areas. The Court had stated after citing Article 51 of the UN Charter that 'Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State'.[69] This, however, in Judge Kooijmans's opinion misses the point, since the Security Council in Resolutions 1368 and 1373 had referred to acts of international terrorism without further qualification as a threat to international peace and security.[70] By refraining from discussing this point, the Court has 'regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence'.[71]

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63. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, Separate Opinion of Judge Kooijmans, para. 26.
64. Ibid., para. 30.
65. Ibid., para. 32.
66. Ibid., para. 35.
67. Ibid.
68. Ibid.
69. *Supra* note 17, at para. 139.
70. *Supra* note 18, at para. 35.
71. Ibid.

From this case as well as from the other cases cited above, a clear picture emerges that Judge Kooijmans in his individual opinions is always careful to avoid the impression of taking a particular point of view because he takes the side of one of the parties. His arguments are first of all based on legal arguments and legal logic. The opinions consistently show that he takes the side of international law and tries – within its limits – to contribute to its better operation and further development. As a former minister for foreign affairs he is very aware of the inherent limitations of the currently existing system of international law based as it is on the sovereign equality of states and that it must be applied within the realities of inter-state international society. This may explain his realistic and cautious attitude to many questions that have arisen before the Court in the past nine years. On the other hand, Judge Kooijmans the professor and human rights defender is never far away. Where possible he explains and clarifies the (in his view) correct legal analysis and attempts to contribute to an interpretation and further development of international law in the interest of the international community of mankind.

After a lifetime's dedication to international law we hope that Judge Kooijmans will enjoy his retirement for many years to come. We nevertheless also hope that he will continue to provide his opinion now and then on the many challenging international law issues, even though he is more than entitled to do so at a much more relaxed pace compared with the demanding years in the International Court of Justice.