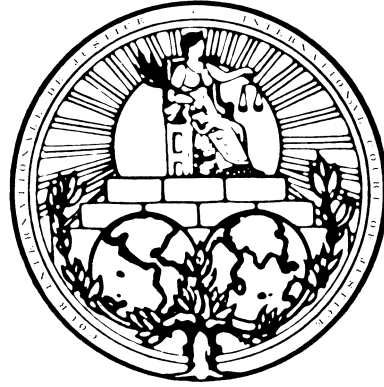




the international  
court  
of justice



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## INTERNATIONAL COURT OF JUSTICE

**After this fifth edition of the Handbook had gone to press, it became apparent that certain items in the text might helpfully be expanded as follows:**

- P. 48, lines 21 to 27, with reference to the Trust Fund: "This Fund is now open to States not only in cases where the Court is seised by special agreement, but, more generally, in all cases where there is not, or no longer, any challenge by them to the jurisdiction of the Court or the admissibility of the application."
- P. 66, after line 37: "There is a further incidental proceeding which requires mention, namely a 'counter-claim', which may be submitted by the respondent State in its Counter-Memorial. This procedure enables the respondent to submit a new claim to the Court in response to the other party's principal claim. The counter-claim must come within the Court's jurisdiction and be directly connected with the subject-matter of the principal claim (Article 80 of the Rules of Court of 1978, as amended on 5 December 2000). Thus the specific characteristic of a counter-claim is that it enlarges the initial scope of the dispute by relying on arguments which go beyond simple rejection of the applicant's claims. For example, a State accused by its opponent of having violated a treaty can argue not only that this is not the case, but that it was in fact the latter which was guilty of such violations (see, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro))."
- P. 83, under "Written and oral proceedings", lines 24 to 29: "With respect to non-governmental international organizations, the Court recently adopted a Practice Direction (No. XII) which provides inter alia that, where an NGO submits a written statement and/or document in advisory proceedings on its own initiative, such statement and/or document is to be treated as a publication readily available, and may be referred to by the States and intergovernmental organizations participating in the proceedings."
- The table on pages 221 to 223 should be corrected to read as follows:
- P. 222, "Period of office" of Judge C. G. Weeramantry, read: "1991-2000".



the international  
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*Cover:* a partial enlargement of a drawing made for the Court by José Maria Sert



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of justice



ICJ THE HAGUE 2004  
FIFTH EDITION

PRINTED IN GREAT BRITAIN



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# foreword

The International Court of Justice, which sits at The Hague in the Netherlands, acts as a world court. It decides in accordance with international law disputes of a legal nature submitted to it by States, whilst in addition certain international organs and agencies are entitled to call upon it for advisory opinions. It was set up in 1945 under the Charter of the United Nations to be the principal judicial organ of the Organization, and its basic instrument, the Statute of the Court, forms an integral part of the Charter.

The present publication is the fifth edition of a handbook which was first published in 1976, with a second edition in 1979, a third in 1986 and a fourth in 1996, on the occasion of the fiftieth anniversary of the Court's inaugural sitting. The handbook was prepared by the Registry under the authority of the President of the Court, i.e., Judge Manfred Lachs for the first edition, Sir Humphrey Waldock for the second, Judge Nagendra Singh for the third, Judge Mohammed Bedjaoui for the fourth and Judge Shi Jiuyong for the fifth.

It is distributed jointly by the Registry and the United Nations Office of Public Information.

The purpose of this booklet, intended for the general public, is to provide, without excessive detail, the basis for a better practical understanding of the facts concerning the history, composition, jurisdiction, procedure and decisions of the Court. In no way does it commit the Court, nor does it provide any interpretation of the Court's decisions, the actual texts of which alone are authoritative. It is not a commentary on the provisions of the United Nations Charter concerning the Court, or of the Statute and Rules of the International Court of Justice, to which the index refers solely for the convenience of the reader. Lastly, it is not intended to replace existing works of scholarship on the Court, the most frequently utilized of which are listed in the short bibliography to be found at the end of this booklet (p. 239).

The International Court of Justice is to be distinguished from its predecessor, the Permanent Court of International Justice (1922-1946). To avoid confusion, in references to cases decided by the two Courts, an asterisk has been placed before the names of cases decided by the Permanent Court of International Justice. The abbreviations ICJ and PCIJ are used respectively to designate the two Courts.

For statistical purposes, cases which, prior to the adoption of the 1978 Rules of Court (see below p. 20), were entered in the General List are included, even though the application recognized that the opposing party declined to accept the jurisdiction of the Court. Since, under the new Rules of Court adopted in 1978 and amended in 2000, such applications are no longer considered as ordinary applications, none of those submitted since 1978 have been entered in the General List and they are therefore disregarded in the statistics, unless the State against which the application has been made has consented to the Court's jurisdiction in the case. This recently happened for the first time when, on 11 April 2003, the French Republic consented to the jurisdiction of the Court to entertain an application filed against it on 9 December 2002 by the Republic of the Congo under Article 38, paragraph 5, of the Rules of Court: the case (*Certain Criminal Proceedings in France (Republic of the Congo v. France)*) was accordingly entered in the List.

The regions into which the States of the globe are divided correspond to the regional groupings in the General Assembly of the United Nations.

All correspondence concerning the Court should be addressed to the Registrar of the International Court of Justice, Peace Palace, 2517 KJ The Hague, Netherlands (telephone (31-70) 302 23 23; fax (31-70) 364 99 28; e-mail: [information@icj-cij.org](mailto:information@icj-cij.org)).

# 1 history

The creation of the Court represented the culmination of a long development of methods for the pacific settlement of international disputes, the origins of which can be said to go back to classical times.

Article 33 of the United Nations Charter lists the following methods for the pacific settlement of disputes between States: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements, to which good offices should also be added. Among these methods, certain involve appealing to third parties. For example, mediation places the parties to a dispute in a position in which they can themselves resolve their dispute thanks to the intervention of a third party. Arbitration goes further, in the sense that the dispute is in fact submitted to the decision or award of an impartial third party, so that a binding settlement can be achieved. The same is true of judicial settlement, except that a court is subject to stricter rules than an arbitral tribunal in procedural matters, for example. Historically speaking, mediation and arbitration preceded judicial settlement. The former was known in ancient India and in the Islamic world, whilst numerous examples of the latter are to be found in ancient Greece, in China, among the Arabian tribes, in the early Islamic world, in maritime customary law in medieval Europe and in Papal practice.

The modern history of international arbitration is, however, generally recognized as dating from the so-called Jay Treaty of 1794 between the United States of America and Great Britain. This Treaty of Amity, Commerce and Navigation provided for the creation of three mixed commissions, composed of American and British nationals in equal numbers, whose task it would be to settle a number of outstanding questions between the two countries which it had not been possible to resolve by negotiation. Whilst it is true that these mixed commissions were not strictly speaking organs of third-party adjudication, they were intended to function to some extent as tribunals. They re-awakened interest in the process of arbitration. Throughout the 19th century, the United States and the United Kingdom had recourse to them, as did other States in Europe and the Americas.

The *Alabama Claims* arbitration in 1872 between the United

Kingdom and the United States marked the start of a second, and still more decisive, phase. Under the Treaty of Washington of 1871, the United States and the United Kingdom agree to submit to arbitration claims by the former for alleged breaches of neutrality by the latter during the American Civil War. The two countries stated certain rules governing the duties of neutral governments that were to be applied by the tribunal, which they agreed should consist of five members, to be appointed respectively by the Heads of State of the United States, the United Kingdom, Brazil, Italy and Switzerland, the last three States not being parties to the case. The award of the arbitral tribunal ordered the United Kingdom to pay compensation, which award was duly complied with. The proceedings served as a demonstration of the effectiveness of arbitration in the settlement of a major dispute and it led during the latter years of the 19th century to developments in various directions, namely —

- a sharp growth in the practice of inserting in treaties clauses providing for recourse to arbitration in the event of a dispute between the parties;
- the conclusion of general treaties of arbitration for the settlement of specified classes of inter-State disputes;
- efforts to construct a general law of arbitration, so that countries wishing to have recourse to this means of settling disputes would not be obliged to agree each time on the procedure to be adopted, the composition of the tribunal, the rules to be followed and the factors to be taken into consideration in making the award;
- proposals for the creation of a permanent international arbitral tribunal in order to obviate the need to set up a special *ad hoc* tribunal to decide each arbitrable dispute.

**The Permanent Court of Arbitration was founded in 1899**

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The Hague Peace Conference of 1899 marked the beginning of a third phase in the modern history of international arbitration. The chief object of the Conference, in which — a remarkable innovation for the time — the smaller States of Europe, some Asian States and Mexico also participated, was to discuss peace and disarmament. It ended by adopting a Convention on the Pacific Settlement of International Disputes, which dealt not only with arbitration but also with other methods of pacific settlement, such as good offices and mediation. With respect to arbitration, the 1899 Convention made provision for the creation of permanent machinery which would enable arbitral tribunals to be set up as desired and would facilitate their work. This institution, known as the Permanent Court of Arbitration, consisted in essence of a panel of jurists designated by each country acceding to the Convention — each such country being entitled to designate up to four — from among whom the

members of each arbitral tribunal might be chosen<sup>1</sup>. The Convention further created a permanent Bureau, located at The Hague, with functions corresponding to those of a court registry or a secretariat, and it laid down a set of rules of procedure to govern the conduct of arbitrations. It will be seen that the name "Permanent Court of Arbitration" is not a wholly accurate description of the machinery set up by the Convention, which represented only a method or device for facilitating the creation of arbitral tribunals as and when necessary. Nevertheless, the system so established was permanent and the Convention as it were "institutionalized" the law and practice of arbitration, placing it on a more definite and more generally accepted footing.

The Permanent Court of Arbitration was established in 1900 and began operating in 1902. A few years later, in 1907, a second Hague Peace Conference, to which the States of Central and Southern America were also invited, revised the Convention and improved the rules governing arbitral proceedings. Some participants would have preferred the Conference not to confine itself to improving the machinery created in 1899. The United States Secretary of State, Elihu Root, had instructed the United States delegation to work towards the creation of a permanent tribunal composed of judges who were judicial officers and nothing else, who had no other occupation, and who would devote their entire time to the trial and decision of international cases by judicial methods. "These judges", wrote Secretary Root, "should be so selected from the different countries that the different systems of law and procedure and the principal languages shall be fairly represented." The United States, the United Kingdom and Germany submitted a joint proposal for a permanent court, but the Conference was unable to reach agreement upon it. It became apparent in the course of the discussions that one of the major difficulties was that of finding an acceptable way of choosing the judges, none of the proposals made having managed to command general support. The Conference confined itself to recommending that States should adopt a draft convention for the creation of a court of arbitral justice as soon as agreement was reached "respecting the selection of the judges and the constitution of the court". Although this court was never in fact to see the light of day, the draft convention that was to have given birth to it enshrined certain fundamental ideas that some years later were to serve as a source of inspiration for the drafting of the Statute of the PCIJ. The court of arbitral justice, "composed of judges representing the various judicial systems of the world, and capable of ensuring continuity in arbitral jurisdiction" was to have had its seat at The Hague and to have had jurisdiction to entertain cases submitted to it pursuant to a general treaty

<sup>1</sup> Countries that have signed the Convention are commonly referred to as "parties participating in the Permanent Court of Arbitration", and the jurists appointed by them as "members of the Permanent Court of Arbitration".

or in terms of a special agreement. Provision was made for summary proceedings before a special delegation of three judges elected annually and the provisions of the convention were to be supplemented by rules to be determined by the Court itself.

Notwithstanding the fate of these proposals, the Permanent Court of Arbitration, which in 1913 took up residence in the Peace Palace that had been built for it thanks to a gift from Andrew Carnegie, has made a positive contribution to the development of international law. Among the classic cases that have been decided through recourse to its machinery, mention may be made of the *Carthage* and *Manouba* cases (1913) concerning the seizure of vessels, and of the *Timor Frontiers* (1914) and *Sovereignty over the Island of Palmas* (1928) cases. Whilst demonstrating that arbitral tribunals set up by recourse to standing machinery could decide disputes between States on a basis of law and justice and command respect for their impartiality, these cases threw into bold relief the shortcomings of the Permanent Court of Arbitration. Tribunals of differing composition could hardly be expected to develop a consistent approach to international law to the same extent as a permanently constituted tribunal. Besides, there was the entirely voluntary character of the machinery. The fact that States were parties to the 1899 and 1907 Conventions did not oblige them to submit their disputes to arbitration nor, even if they were minded so to do, were they duty bound to have recourse to the Permanent Court of Arbitration nor to follow the rules of procedure laid down in the Conventions. The Permanent Court of Arbitration has recently sought to diversify the services that it could offer, alongside those contemplated by the Conventions. The International Bureau of the Permanent Court has *inter alia* acted as Registry in some important international arbitrations, including that between Eritrea and Yemen on questions of territorial sovereignty and maritime delimitation (1998 and 1999), that concerning the delimitation of the boundary between Eritrea and Ethiopia (2002), and that between Ireland and the United Kingdom under the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR). Moreover, in 1993 the Permanent Court of Arbitration adopted new "Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State" and, in 2001, "Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment".

The work of the two Hague Peace Conferences and the ideas they inspired in statesmen and jurists had some influence on the creation of the Central American Court of Justice, which operated from 1908 to 1918, as well as on the various plans and proposals submitted between 1911 and 1919 both by national and international bodies and by governments for the establishment of an international judicial tribunal, which culminated in the creation of the PCIJ within the framework of the new international system set up after the end of the First World War.

**The PCIJ (1922-1946) was created by the League of Nations**

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Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for formulating plans for the establishment of a Permanent Court of International Justice, such a court to be competent not only to hear and determine any dispute of an international character submitted to it by the parties to the dispute, but also to give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

It remained for the League Council to take the necessary action to give effect to Article 14. At its second session early in 1920, the Council appointed an Advisory Committee of Jurists to submit a report on the establishment of the PCIJ. The committee sat in The Hague, under the chairmanship of Baron Descamps (Belgium). In August 1920, a report containing a draft scheme was submitted to the Council, which, after examining it and making certain amendments, laid it before the First Assembly of the League of Nations, which opened at Geneva in November of that year. The Assembly instructed its Third Committee to examine the question of the Court's constitution. In December 1920, after an exhaustive study of the latter by a sub-committee, the Committee submitted a revised draft to the Assembly, which unanimously adopted it. This was the Statute of the PCIJ. The Assembly took the view that a vote alone would not be sufficient to establish the PCIJ and that each State represented in the Assembly would formally have to ratify the Statute. In a resolution of 13 December 1920, it called upon the Council to submit to the Members of the League of Nations a protocol adopting the Statute and decided that the Statute should come into force as soon as the protocol had been ratified by a majority of member States. The protocol was opened for signature on 16 December. By the time of the next meeting of the Assembly, in September 1921, a majority of the Members of the League had signed and ratified the protocol. The Statute thus entered into force. It was to be revised only once, in 1929, the revised version coming into force in 1936.

Among other things, the new Statute resolved the previously insurmountable problem of the election of the members of a permanent international tribunal by providing that the judges were to be elected concurrently but independently by the Council and the Assembly of the League, and that it should be borne in mind that those elected "should represent the main forms of civilization and the principal legal systems of the world". Simple as this solution may now seem, in 1920 it was a considerable achievement to have devised it. The first elections were held on 14 September 1921. Following approaches by the Netherlands Government in the spring of 1919, it was decided that the PCIJ should have its permanent seat in the Peace Palace in The Hague, which it would share with the Permanent Court of Arbitration. It was accordingly in the Peace Palace that on 30 January 1922 the Court's preliminary



session devoted to the elaboration of the Court's Rules opened, and it was there too that its inaugural sitting was held on 15 February 1922, with the Dutch jurist Loder as President.

The PCIJ was thus a working reality. The great advance it represented in the history of international legal proceedings can be appreciated by considering the following :

- Unlike arbitral tribunals, the PCIJ was a permanently constituted body governed by its own Statute and Rules of Procedure, fixed beforehand and binding on parties having recourse to the Court.
- It had a permanent Registry which, *inter alia*, served as a channel of communication with governments and international bodies.
- Its proceedings were largely public and provision was made for the publication in due course of the pleadings, of verbatim records of the sittings and of all documentary evidence submitted to it.
- The permanent tribunal thus established was now able to set about gradually developing a constant practice and maintaining a certain continuity in its decisions, thereby enabling it to make a greater contribution to the development of international law.
- In principle the PCIJ was accessible to all States for the judicial settlement of their international disputes and they were able to declare beforehand that for certain classes of legal disputes they recognized the Court's jurisdiction as compulsory in relation to other States accepting the same obligation. This system of optional acceptance of the jurisdiction of the Court was the most that it was then possible to obtain.
- The PCIJ was empowered to give advisory opinions upon any dispute or question referred to it by the League of Nations Council or Assembly.
- The Court's Statute specifically listed the sources of law it was to apply in deciding contentious cases and giving advisory opinions, without prejudice to the power of the Court to decide a case *ex aequo et bono* if the parties so agreed.
- It was more representative of the international community and of the major legal systems of the world than any other international tribunal had ever been before it.

Although the Permanent Court of International Justice was brought into being through, and by, the League of Nations, it was nevertheless not a part of the League. There was a close association between the two bodies, which found expression *inter alia* in the fact that the League Council and Assembly periodically elected the Members of the Court and that both Council and Assembly were entitled to seek advisory opinions from the Court, but the latter never formed an integral part of the League, just as the Statute never formed part of the Covenant. In particular, a member State of the League of Nations was not by this fact alone automatically a party to the Court's Statute.

Between 1922 and 1940 the PCIJ dealt with 29 contentious cases between States and delivered 27 advisory opinions. At the same time several hundred treaties, conventions and declarations conferred jurisdiction upon it over specified classes of disputes. Any doubts that might thus have existed as to whether a permanent international judicial tribunal could function in a practical and effective manner were thus dispelled. The Court's value to the international community was demonstrated in a number of different ways, in the first place by the development of a true judicial technique. This found expression in the Rules of Court, which the PCIJ originally drew up in 1922 and subsequently revised on three occasions, in 1926, 1931 and 1936. There was also the PCIJ's Resolution concerning the Judicial Practice of the Court, adopted in 1931 and revised in 1936, which laid down the internal procedure to be applied during the Court's deliberations on each case. In addition, whilst helping to resolve some serious international disputes, many of them consequences of the First World War, the decisions of the PCIJ at the same time often clarified previously unclear areas of international law or contributed to its development.

**The ICJ is the principal judicial organ of the United Nations**

The outbreak of war in September 1939 inevitably had serious consequences for the PCIJ, which had already for some years known a period of diminished activity. After its last public sitting on 4 December 1939, the Permanent Court of International Justice did not in fact deal with any judicial business and no further elections of judges were held. In 1940 the Court removed to Geneva, a single judge remaining at The Hague, together with a few Registry officials of Dutch nationality. It was inevitable that even under the stress of the war some thought should be given to the future of the Court, as well as to the creation of a new international political order.

In 1942 the United States Secretary of State and the Foreign Secretary of the United Kingdom declared themselves in favour of the establishment or re-establishment of an international court after the war, and the Inter-American Juridical Committee recommended the extension of the PCIJ's jurisdiction. Early in 1943, the United Kingdom Government took the initiative of inviting a number of experts to London to constitute an informal Inter-Allied Committee to examine the matter. This Committee, under the chairmanship of Sir William Malkin (United Kingdom), held 19 meetings, which were attended by jurists from 11 countries. In its report, which was published on 10 February 1944, it recommended —

- that the Statute of any new international court should be based on that of the Permanent Court of International Justice;

- that advisory jurisdiction should be retained in the case of the new Court;
- that acceptance of the jurisdiction of the new Court should not be compulsory;
- that the Court should have no jurisdiction to deal with essentially political matters.

Meanwhile, on 30 October 1943, following a conference between China, the USSR, the United Kingdom and the United States, a joint declaration was issued recognizing the necessity

“of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security”.

This declaration led to exchanges between the Four Powers at Dumbarton Oaks, resulting in the publication on 9 October 1944 of proposals for the establishment of a general international organization, to include an international court of justice. The next step was the convening of a meeting in Washington, in April 1945, of a committee of jurists representing 44 States. This Committee, under the chairmanship of G. H. Hackworth (United States), was entrusted with the preparation of a draft Statute for the future international court of justice, for submission to the San Francisco Conference, which during the months of April to June 1945 was to draw up the United Nations Charter. The draft Statute prepared by the Committee was based on the Statute of the PCIJ and was thus not a completely fresh text. The Committee nevertheless felt constrained to leave a number of questions open which it felt should be decided by the Conference: should a new court be created? In what form should the court’s mission as the principal judicial organ of the United Nations be stated? Should the court’s jurisdiction be compulsory, and, if so, to what extent? How should the judges be elected?

The final decisions on these points, and on the definitive form of the Statute, were taken at the San Francisco Conference, in which 50 States participated. The Conference decided against compulsory jurisdiction and in favour of the creation of an entirely new court, which would be a principal judicial organ of the United Nations, on the same footing as the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat, and with the Statute annexed to and forming part of the Charter. The chief reasons that led the Conference to decide to create a new Court were the following:

- As the Court was to be the principal judicial organ of the United Nations, it was felt inappropriate for this role to be filled by the Permanent Court of International Justice, which had up till then

been linked to the League of Nations, then on the point of dissolution.

- The creation of a new Court was more consistent with the provision in the Charter that all Member States of the United Nations would *ipso facto* be parties to the Court's Statute.
- Several States that were parties to the Statute of the PCIJ were not represented at the San Francisco Conference, and, conversely, several States represented at the Conference were not parties to the Statute.
- There was a feeling in some quarters that the PCIJ formed part of an older order, in which European States had dominated the political and legal affairs of the international community, and that the creation of a new Court would make it easier for States outside Europe to play a more influential role. This has in fact happened as the membership of the United Nations grew from 51 in 1945 to 191 in 2004.

The San Francisco Conference nevertheless showed some concern that all continuity with the past should not be broken, particularly as the Statute of the PCIJ had itself been drawn up on the basis of past experience, and it was felt better not to change something that had seemed to work well. The Charter therefore plainly stated that the Statute of the ICJ was based upon that of the PCIJ. At the same time, the necessary steps were taken for a transfer of the jurisdiction of the PCIJ so far as was possible to the ICJ. In any event, the decision to create a new Court necessarily involved the dissolution of its predecessor. The PCIJ met for the last time in October 1945 when it was decided to take all appropriate measures to ensure the transfer of its archives and effects to the new ICJ, which, like its predecessor, was to have its seat in the Peace Palace. The judges of the PCIJ all resigned on 31 January 1946, and the election of the first Members of the ICJ took place on 5 February 1946, at the First Session of the United Nations General Assembly and Security Council. In April 1946, the PCIJ was formally dissolved, and the ICJ, meeting for the first time, elected as its President Judge Guerrero, the last President of the PCIJ, appointed the members of its Registry (largely from among former officials of the PCIJ) and held an inaugural public sitting, on the 18th of that month.

#### *Statute and Rules of Court*

The Statute of the ICJ elaborates certain general principles laid down in Chapter XIV of the Charter. Whilst it forms an integral part of the Charter, it is not incorporated into it, but is simply annexed. This has avoided unbalancing the 111 articles of the Charter by the addition of the 70 articles of the Statute, and has facilitated access to the Court

for States that are not members of the United Nations (see below p. 36). The articles of the Statute are divided into five chapters: "Organization of the Court" (Arts. 2-33), "Competence of the Court" (Arts. 34-38), "Procedure" (Arts. 39-64), "Advisory Opinions" (Arts. 65-68) and "Amendment" (Arts. 69-70). The Statute can be amended only in the same way as the Charter, i.e., by a two-thirds majority vote in the General Assembly and ratification by two-thirds of the States, including the permanent members of the Security Council — the only difference being that States parties to the Statute without being members of the United Nations are allowed to participate in the vote in the General Assembly. Should the ICJ consider it desirable for its Statute to be amended, it must submit a proposal to this effect to the General Assembly by means of a written communication addressed to the Secretary-General. However, there has hitherto been no amendment of the Statute of the ICJ.

In pursuance of powers conferred upon it by the Statute, the ICJ has drawn up its own Rules of Court. These Rules are intended to supplement the general rules set forth in the Statute and to make detailed provision for the steps to be taken to comply with them. Since the Rules have been drawn up in pursuance of the Statute, they may not contain any provisions that are repugnant to the Statute or which confer upon the Court powers that go beyond those conferred by the Statute. The Rules of Court thus amplify the provisions of the Statute concerning the Court's procedure and the working of the Court and of the Registry, so that on many points it is necessary to consult both documents. The ICJ is competent to amend its Rules of Court, and can thus incorporate into them provisions embodying its practice as this has developed. On 5 May 1946 it adopted Rules largely based on the latest version of the Rules of Court of the PCIJ, which dated from 1936. In 1967, in the light of the experience it had acquired and of the need to adapt the Rules to the changes that had taken place in the world and in the pace of international events, it embarked upon a thoroughgoing revision of its Rules and set up a standing Committee for the purpose. On 10 May 1972 it adopted certain amendments which came into force on 1 September that year. On 14 April 1978 the Court adopted a thoroughly revised set of Rules which came into force on 1 July 1978. The object of the changes made — at a time when the Court's activity had undeniably fallen off — was to increase the flexibility of proceedings, making them as simple and rapid as possible, and help to reduce the costs to the parties, so far as these matters depended upon the Court. On 5 December 2000 the Court amended two articles of the 1978 Rules: Article 79 on preliminary objections and Article 80 concerning counter-claims. The purpose of the new amendments was to shorten the duration of these incidental proceedings and to clarify the rules in force so as to reflect more faithfully the Court's practice. The Rules in their amended form entered into force on 1 February 2001. However, the Rules as adopted on

14 April 1978 continue to govern all cases submitted to the Court before 1 February 2001, and all phases of such cases.

Moreover, since October 2001 the Court has issued Practice Directions for the use of States appearing before it. Those Directions involve no amendment of the Rules but are supplemental to them. They are the fruit of the Court's constant review of its working methods, as a result of its need to adapt to the considerable growth in its activity over recent years, and have been incorporated in a "Note containing important information for the use of parties to new cases". Reference will be made to certain of these directions later on in this booklet.

From 1946 to 31 July 2004, the Court dealt with 106 contentious cases between States (see below pp. 231-236) and delivered 80 judgments. It also gave 25 advisory opinions (see below pp. 236-237). After an initial period of uncertainty that led to a resolution by the General Assembly in 1947 concerning the need to make greater use of the Court, the Court's work at first assumed a tempo comparable to that of the PCIJ. Then, starting in 1962, all the signs were that the States which had created the ICJ were now reluctant to submit their disputes to it. The number of cases submitted each year, which had averaged two or three during the fifties, fell to none or one in the sixties; from July 1962 to January 1967 no new case was brought, and the situation was the same from February 1967 until August 1971. In the summer of 1970, at a time when the level of the Court's activity was in marked decline, the Secretary-General, in the introduction to his annual report, felt obliged to recall the importance of judicial settlement and 12 States suggested

"that a study should be undertaken . . . of the obstacles to the satisfactory functioning of the International Court of Justice, and ways and means of removing them"

including "additional possibilities for use of the Court that have not yet been adequately explored". The General Assembly placed on its agenda an examination of the Court's role and, after several rounds of discussion and written observations, on 12 November 1974 adopted a fresh resolution concerning the ICJ. From 1972 the number of new cases brought to the Court increased, and between 1972 and 1985 cases averaged from one to three each year. Since 1986, the Court has experienced a significant increase in the number of cases referred to it. Thus in the course of this period it has been asked to deal with 52 contentious cases and six requests for advisory opinions. At 31 July 2004, there were 20 contentious cases pending before the Court. In its resolution 44/23 of 17 November 1989, the General Assembly declared the period 1990-1999 as the United Nations Decade of International Law, and considered that one of the main purposes of the Decade should be:

“To promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice.”

The results of the Decade’s activities, both by States and by certain international and regional organizations, as well as by academic institutions, were considered in detail by the Secretary-General in his final report on the United Nations Decade of International Law (A/54/362). It is clear from that report, which was welcomed by all the States which spoke at the Decade’s closing session (General Assembly Plenary Session of 17 November 1999 (A/54/PV.55)), that the “promotion of means and methods for the peaceful settlement of disputes between States, including resort to, and full respect for, the International Court of Justice” had achieved notable success over the period: it appears that States are indeed having increasing recourse to the Court.

For the texts of the two resolutions adopted by the General Assembly concerning the use of the ICJ and of that relating to the United Nations Decade of International Law, see below, annexes, pp. 215-220.

The Charter of the United Nations and the Statute and Rules of the Court are published in the *I.C.J. Acts and Documents* series; they are also available, along with the Practice Directions, on the Court’s website (<http://www.icj-cij.org>).

## 2 the judges

**The Court is a body composed of elected independent judges**

The Members of the Court are elected by the Member States of the United Nations and other States that are parties to the Statute of the ICJ (see below p. 36). For obvious practical reasons, the number of judges cannot be equal to that of those States. It was fixed at 15 when the revised version of the Statute of the PCIJ that came into force in 1936 was drafted, and has since remained unchanged, despite occasional suggestions that the number be increased. The term of office of the judges is nine years. In order to ensure a certain measure of continuity, one-third of the Court, i.e., five judges, is elected every three years. Judges are eligible for re-election. Should a judge die or resign during his term of office, a special election is held as soon as possible to choose a judge to fill the unexpired part of his term of office.

The ICJ being the principal judicial organ of the United Nations, it is by that Organization that the elections are conducted. Voting takes place both in the General Assembly and in the Security Council. Representatives of States parties to the Statute without being members of the United Nations are admitted to the Assembly for the occasion, whilst in the Security Council, for the purpose of these elections, no right of veto obtains and the required majority is eight. The two bodies concerned vote simultaneously but separately. In order to be elected, a candidate must receive an absolute majority of the votes in both the General Assembly and the Security Council. This often makes it necessary for a vote to be taken a number of times. There is a conciliation procedure to cover cases where one or more vacancies remain after three meetings have been held, but the General Assembly and the Council have up to the present managed to act both independently and harmoniously, and it has not been necessary to make use of this procedure. *A fortiori*, it has not proved necessary to have recourse to election by the Court itself, the last-resort solution for which provision is made. The elections are generally held in New York on the occasion of the annual autumn session of the General Assembly. The judges elected at each triennial election (e.g., 1996, 1999, 2002, etc.) enter upon their term of office on 6 February of the following year, after which the Court proceeds to elect by secret ballot



a President and Vice-President to hold office for three years. As in the case of all other elections by the Court, an absolute majority is necessary and there are no conditions with regard to nationality. After the President and the Vice-President, the order of seniority of Members of the Court is determined by the date on which their term of office began, and, subject thereto, by their age.

The Statute of the ICJ, directed to gaining for the Court the confidence of the greatest possible number of States, indicates concern to ensure that no State or group of States enjoys or appears to enjoy any advantage over the others:

- All States parties to the Statute have the right to propose candidates. These proposals are made not by the government of the State concerned, but by a group consisting of the members of the Permanent Court of Arbitration designated by that State, i.e. by the four jurists who can be called upon to serve as members of an arbitral tribunal under the Hague Conventions of 1899 and 1907 (see above pp. 12-13). In the case of countries not represented on the Permanent Court of Arbitration, nominations are made by a group constituted in the same way. Each group can propose up to four candidates, not more than two of whom may be of its own nationality, whilst the others may be from any country whatsoever, whether a party to the Statute or not and whether or not it has declared that it accepts the compulsory jurisdiction of the ICJ. The names of candidates must be communicated to the Secretary-General of the United Nations within a time-limit laid down by him.
- The Court may not include more than one national of the same State. Should two candidates having the same nationality be elected at the same time, only the elder is considered to have been validly elected.
- At every election of Members of the Court, the General Assembly and the Security Council are required to bear in mind "that in the body as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured". In practice this principle has found expression in the distribution of membership of the ICJ among the principal regions of the globe. Today this distribution is as follows: Africa 3, Latin America and the Caribbean 2, Asia 3, Western Europe and other States 5, Eastern Europe 2, which corresponds to that of membership of the Security Council. Although there is no entitlement to membership on the part of any country, the ICJ has always included judges of the nationality of the permanent members of the Security Council, with the sole exception of China. There was, in fact, no Chinese Member of the Court from 1967 to 1984.

It should be stressed that, once elected, a Member of the Court is a delegate neither of the government of his own country nor of that of any other State. Unlike most other organs of international

organizations, the Court is not composed of representatives of governments. Members of the Court are independent judges whose first task, before taking up their duties, is to make a solemn declaration in open court that they will exercise their powers impartially and conscientiously. The Court has itself emphasized that it

“acts only on the basis of the law, independently of all outside influence or interventions whatsoever, in the exercise of the judicial function entrusted to it alone by the Charter and its Statute”.

In order to guarantee his or her independence, no Member of the Court can be dismissed unless, in the unanimous opinion of the other Members, he or she no longer fulfils the required conditions. This has never in fact happened.

The conditions which Members of the ICJ must satisfy are set forth in the Statute. It stipulates that they are to be elected

“from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law”.

How has this worked out in practice? Of the 94 Members of the Court elected between February 1946 and February 2003, 26 had held judicial office, 8 of them having served as chief justice of the supreme court of their respective countries; 38 had been barristers and 66 professors of law; 60 had occupied senior administrative positions, such as legal adviser to the ministry of foreign affairs (30); and 24 had held cabinet rank, 2 even having been head of State. Almost all had played an important international role, having been, for instance, members of the Permanent Court of Arbitration (37) or of the United Nations International Law Commission (34), participants in major international conferences of plenipotentiaries, etc. Some had already played a part in cases before the PCIJ or the ICJ (31). Their average age at the time of their first election to the Court was 60 (9 were in their seventies, 47 in their sixties, 33 in their fifties and 5 in their forties). The average age of judges during their term of office has stabilized at about 64. The average length of time that judges have served on the Court is 9 years and 10 months, the longest period being that of Judge Oda, at 27 years, and the shortest that of Judge Baxter, at 19 months.

**The Court is a permanent international institution**

Article 22, paragraph 1, of the Statute states that “the seat of the Court shall be established at The Hague”, a city which is also the seat of the Government of the Netherlands. The Court may, if it considers it desirable, hold sittings elsewhere, but this has never been proposed. The Court thus continues to occupy premises in the Peace Palace, constructed between 1907

and 1913, which are placed at its disposal by the Carnegie Foundation of the Netherlands in return for financial contribution by the United Nations. Since 1978 it has also occupied a new wing built, and recently (1997) extended, at the expense of the Netherlands Government. The Court enjoys the facilities of the Peace Palace Library and has as its neighbours the Permanent Court of Arbitration, which was founded in 1899, and the Hague Academy of International Law, founded in 1923.

Although the ICJ is deemed to be permanently in session, only its President is obliged to reside at The Hague. However, the other Members of the Court are required to be permanently at its disposal except during judicial vacations or leave of absence, or when they are prevented from attending by illness or other serious reason. In practice, the majority of Court Members reside at The Hague and all will normally spend the greater part of the year there.

No Member of the Court may engage in any other occupation. He is not allowed to exercise any political or administrative function, nor to act as agent, counsel or advocate in any case. Any doubts with regard to this question are settled by decision of the Court. The most it will permit — and always providing the exigencies of his Court duties so allow — is that a judge may investigate, conciliate or arbitrate cases not liable to be submitted to the ICJ, may be a member of learned bodies and may give lectures or attend meetings of a purely academic nature. In principle, he may not accept any decoration without the Court's consent. Members of the Court are thus subject to particularly strict rules with regard to questions of incompatibility.

On the other hand a Member of the Court, when engaged on the business of the Court, enjoys privileges and immunities comparable with those of the head of a diplomatic mission. At The Hague, the President takes precedence over the doyen of the diplomatic corps, after which there is an alternation of precedence as between judges and ambassadors. They receive an annual salary of 160,000 dollars, with a special supplementary allowance for the President, and, on leaving the Court, they receive an annual pension which, after a nine-year term of office, amounts to 80,000 dollars. These expenses are borne by the United Nations as a special section in its budget, which is adopted by the General Assembly on the proposal of the Court. Less than 2 per cent of United Nations expenses in 1946, the Court now represents less than 1 per cent of the United Nations budget.

The ICJ is an independent body. Its work is directed and its administration supervised by its President, assisted by a Budgetary and Administrative Committee, a Committee on Relations, a Library Committee and a Committee on Computerization, all of them composed of Members of the Court<sup>1</sup>. The Vice-President takes the place of the President if the latter is unable to fulfil his duties or if the office

<sup>1</sup> There is also a standing Rules Committee (see above p. 20).

of President is vacant, and for this purpose he receives a daily allowance. In the absence of the Vice-President, this role devolves upon the senior judge.

### *The Registry*

The Registry is the permanent administrative organ of the ICJ. It is responsible to the Court alone. Since the ICJ is both a court of justice and an international organ, the Registry's tasks are both those of a service helping in the administration of justice — with sovereign States as litigants — and those of the secretariat of an international commission. Its activities are thus on the one hand of a judicial and diplomatic nature, whilst on the other they correspond to those of the legal, administrative and financial departments and of the conference and information services of an international organization. Its officials take an oath of loyalty and discretion on entering upon their duties. In general they enjoy the same privileges and immunities as members of diplomatic missions at The Hague of comparable rank. Their conditions of employment, their emoluments and their pension rights correspond to those of United Nations officials of equivalent category and grade; the costs are borne by the United Nations. In recent years Registry staff numbers have been substantially increased, in order to deal with the unprecedented growth in the Court's work. Its structure has also been modified in line with the recommendations of a Sub-Committee on Rationalization set up by the Court to examine the Registry's working methods and to make proposals for their rationalization and improvement. The Registry now consists of three Departments (Legal Affairs; Linguistic Affairs; Press and Information) and a number of technical divisions. Its staff comprise the following:

- a Registrar, who has the same rank as an Assistant Secretary-General of the United Nations, and a Deputy-Registrar, both of them elected by the Court by secret ballot for seven years. The Registrar, who is required to reside at The Hague, directs the work of the Registry and is responsible for all its departments. He normally serves as the channel for communication between the ICJ and States or organizations, keeps the General List up to date, attends meetings of the Court, ensures that minutes are drawn up, countersigns the Court's decisions and has custody of its seal;
- some 100 officials (either permanent or holding fixed-term contracts) appointed by the Court or the Registrar, consisting of first secretaries (one of whom is responsible for information), secretaries and staff from the following departments or divisions: Department of Legal Matters, Department of Linguistic Matters, Information Department, Personnel Division, Finance Division, Publications Division, Documents Division — Library of the Court, Archives, Indexing and Distribution Division, Shorthand, Type-

writing and Reproduction Division, IT Division, General Assistance Division (comprising telephonists/receptionists, security guards and messengers), as well as administrative assistants ;

- additional temporary staff engaged by the Registrar as and when the Court's work may so require : interpreters, translators, typists, etc.

Over and above the Registry's legal work, a substantial amount of its activity is linguistic. On the grounds that "The permanence of the language must be an outward sign of the permanence of the Court", the 1920 Advisory Committee of Jurists (see above p. 15) had pronounced itself in favour of the Court's employing French alone, but the Council and Assembly of the League of Nations decided that the PCIJ, like the League itself, should have two official languages : French and English. This principle was maintained for the ICJ in 1945, despite the fact that the United Nations itself adopted five official languages. Members of the Court accordingly express themselves in French or English and it is in those languages that parties file their pleadings with the Court or deliver oral arguments before it, the Registry providing sworn interpreters and translators to put the spoken or written word into the Court's other official language (see below pp. 52, 56-60, 68-75 and 84). The parties to a case may agree between themselves to use a single language. This was done, for example, in the \**Lotus*\*, \**Brazilian Loans, Asylum, Frontier Dispute (Burkina Faso/Republic of Mali), Kasikili/Sedudu Island and Frontier Dispute (Benin/Niger)* cases. Parties have the right to employ a language other than French or English, provided they themselves furnish a translation or interpretation into one of the Court's official languages. Registry documents are bilingual and the Registry conducts correspondence in French or English. All Registry officials are required to be proficient in both languages and those whose work calls for a high degree of proficiency, such as the first secretaries and secretaries, must have one of the Court's languages as their first language.

Among the Registry's duties is that of making the outside world aware of the Court's work. Accordingly it maintains relations with universities, international organizations that deal with legal questions, the press and the general public. It discharges this duty in close collaboration with the United Nations Department of Public Information, whose task it is to provide information concerning the activities of organs of the United Nations. The Registry is also responsible for the Court's publications<sup>1</sup>, which carry on under different names the old PCIJ series. These publications comprise :

<sup>1</sup> ICJ publications are sold by the Sales Sections of the United Nations Secretariat at New York and Geneva. They may be consulted in main libraries with a substantial legal section, and may be purchased from specialized bookshops selling United Nations publications. A *Catalogue* of them is issued and regularly updated.

- documents emanating from the Court or the parties (see below pp. 53-54, 72, 86, 87): *Reports of Judgments, Advisory Opinions and Orders* (cited as *I.C.J. Reports*); *Pleadings, Oral Arguments, Documents* (cited as *I.C.J. Pleadings*); and *Acts and Documents concerning the Organization of the Court* (cited as *I.C.J. Acts and Documents*);
- documents prepared under the responsibility of the Registrar: *Yearbooks* and the *Bibliography of the International Court of Justice* (cited as *I.C.J. Yearbook* and *I.C.J. Bibliography*).

**The composition of the Court may vary from one case to another**

When a case is submitted to the ICJ, various problems arise with regard to the Court's composition (see also below pp. 65, 69-70, 72 and 86-87). To begin with, no judge may participate in the decision of any case in which he has previously taken part in any capacity. Similarly, if a Member of the Court considers that for any special reason (e.g., family relationship) he ought not to participate in a case, he must so inform the President. It thus occasionally happens that one or more judges abstain from sitting in a given case. Since there are no deputy-judges in the ICJ, no one else is substituted for them. The President may also take the initiative in indicating to a Member of the Court that in his opinion he should not sit in a particular case. Any doubt or disagreement on this point is settled by decision of the Court. Since 1978 the Rules have provided expressly in Article 34 that parties may inform the President confidentially in writing of facts which they consider to be of possible relevance to the application of the provisions of the Statute in this regard. A judge who, without having taken part in a case or having a special reason for refraining from sitting, simply happens to be a national of one of the parties, retains his right to sit, though should he be the President his functions in the case will be exercised by the Vice-President.

*Judges ad hoc*

Under Article 31, paragraphs 2 and 3, of the Statute, a party not having a judge of its nationality on the bench may choose a person to sit as judge *ad hoc* in that specific case under the conditions laid down in Articles 35 to 37 of the Rules of Court. Before taking up his duties, a judge *ad hoc* is required to make the same solemn declaration as an elected Member of the Court and takes part in any decision concerning the case on terms of complete equality with his colleagues. He receives a fee for every day on which he discharges his duties, that is to say, every day spent by him in The Hague in order to take part in the Court's work, plus each day devoted to consideration of

the case outside The Hague. A party must announce as soon as possible its intention of choosing a judge *ad hoc*. In cases, which occur not all that infrequently, where there are more than two parties to the dispute, it is laid down that parties which are actually acting in the same interest are restricted to a single judge *ad hoc* between them — or, if one of them already has a judge of its nationality on the bench, they are not entitled to choose a judge *ad hoc* at all. There are accordingly various possibilities, the following of which have actually occurred in practice: two regular judges having the nationality of the parties; two judges *ad hoc*; a regular judge of the nationality of one of the parties and a judge *ad hoc*; neither a regular judge having the nationality of one of the parties nor a judge *ad hoc*. Since 1946, 86 individuals have sat as judges *ad hoc*, 13 of whom have been elected Members of the Court at another time, 13 others having been proposed as candidates for election to the Court. Since there is no requirement laid down concerning the nationality of a judge *ad hoc*, he may have the nationality of a country other than the one which chooses him (43 cases out of 85) and even have the same nationality as an elected Member of the Court (which happened twice at the PCIJ and has occurred eight times at the ICJ).

Commentators tend to be sparing in their criticism of the right of elected judges having the nationality of one of the parties to sit, since purely on the basis of the publicly announced results of the Court's voting and the published texts of separate or dissenting opinions, it is evident that they have often voted in a sense contrary to the submissions of their own country (e.g., Judge Anzilotti, Judge Basdevant, Lord Finlay, Sir Arnold McNair and Judges Schwebel and Buergenthal). The institution of the judge *ad hoc*, on the other hand, has not received unanimous support. Whilst the Inter-Allied Committee of 1943-1944 (see above p. 17) argued that

“Countries will not in fact feel full confidence in the decision of the Court in a case in which they are concerned if the Court includes no judge of their own nationality, particularly if it includes a judge of the nationality of the other party”,

certain members of the Sixth Committee of the General Assembly of the United Nations expressed the view, during the discussions between 1970 and 1974 on the role of the Court,

“that the institution, which was a survival of the old arbitral procedures, was justified only by the novel character of the international judicial jurisdiction and would no doubt disappear as such jurisdiction became more firmly established”.

Nevertheless, numerous writers take the view that it is useful for the Court to have participating in its deliberations a person more familiar with the views of one of the parties than the elected judges may



sometimes be. It is furthermore worth pointing out that if the PCIJ and the ICJ had never had judges *ad hoc* and had always excluded Members of the Court having the nationality of one of the parties from sitting, their decisions — having regard to the voting alone — would have been much the same.

It follows from the foregoing that the composition and presidency of the ICJ will vary from one case to another and that the number of judges sitting in a given case will not necessarily be 15. There may be fewer, where one or more elected judges do not sit, or as many as 16 or 17 where there are judges *ad hoc*; in theory there may even be more than 17 judges on the bench if there are several parties to a case who are not in the same interest. The composition of the Court and who presides over it may also sometimes vary from one phase of a case to another: in other words, the composition and the President of the Court need not necessarily be the same with respect to interim measures of protection, preliminary objections and the merits (e.g., *Anglo-Iranian Oil Co.*, *Nottebohm*, *Right of Passage over Indian Territory*, *Interhandel*, *South West Africa*, *Barcelona Traction, Light and Power Company, Limited*, *Fisheries Jurisdiction*, *Military and Paramilitary Activities in and against Nicaragua*, *Arbitral Award of 31 July 1989*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*).

Nevertheless, once the Court has been finally constituted for a given phase of a case, i.e., from the opening of the oral proceedings on that phase until the delivery of judgment with respect thereto, its composition will no longer change. If during this time there is a change in the composition of the Court, those Members whose terms of office have ended continue to sit on the case and the retiring President continues to preside in respect of that phase of the case until the delivery of judgment with respect to it. This has occurred so far, in the time of the PCIJ, only in the *\*Free Zones of Upper Savoy and the District of Gex* case, but in the ICJ on two occasions, in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* and in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*. A judge who resigns or dies after the opening of oral proceedings in a phase of a case is not replaced in respect of that phase. A judge who falls ill during proceedings in principle only resumes his participation if he has not missed any vital aspect of those proceedings. The quorum required for the Court to be validly constituted is nine judges, excluding judges *ad hoc*.

#### Assessors

The Statute and the Rules provide for still other possibilities with regard to the composition and organization of the Court. Some of



these seemed to have fallen into oblivion, and the ICJ has been concerned to revive them in its Rules (see above pp. 19-22), thus making maximum use of the freedom of action which its founders conferred upon it.

In the first place, the ICJ can, in a given case, sit with assessors, whom it elects by secret ballot, and who participate in its deliberations without, however, having the right to vote. At the present time, when disputes of a highly technical nature can come before the Court, this makes it possible for the Court to enjoy the benefit of the specialized knowledge of proven experts in a given field. Although both a party and the Court itself can take the initiative in this respect, no use has ever been made of this possibility in all the years since 1922.

### *Chambers*

Another possibility open to the parties is to ask that a dispute be decided not by the full Court but by a chamber composed of certain judges elected by the Court by secret ballot, whose decisions are regarded as emanating from the Court itself. The Court has three types of chamber:

- the Chamber of Summary Procedure, comprising five judges, including the President and Vice-President, and two substitutes, which the Court is required by Article 29 of the Statute to form annually with a view to the speedy despatch of business;
- any chamber, comprising at least three judges, that the Court may form pursuant to Article 26, paragraph 1, of the Statute to deal with certain categories of cases, such as labour or communications;
- any chamber that the Court may form pursuant to Article 26, paragraph 2, of the Statute to deal with a particular case, after formally consulting the parties regarding the number of its members — and informally regarding their names —, who will then sit on all phases of the case until its final conclusion, even if in the meantime they cease to be Members of the Court.

The provisions of the Rules concerning chambers of the Court are likely to be of interest to States that are required to submit a dispute to the ICJ or have special reasons for doing so but prefer, for reasons of urgency or other reasons, to deal with a smaller body than the full Court. They may accordingly prove particularly useful in respect of certain disputes pertaining to contemporary problems, such as, to give but one example, questions relating to the environment, which seem to be becoming increasingly critical, giving rise to international disputes of growing frequency and intensity. It should be

stressed in this respect that in view of recent developments in the field of environmental law and protection, the Court, in July 1993, decided to establish a Chamber for Environmental Matters. The Chamber is at present composed of seven members, elected for a term of three years.

Despite the advantages that chambers can offer in certain cases, under the terms of the Statute their use remains exceptional (see Article 25, paragraph 1). Their formation requires the consent of the parties. While, to date, no case has been heard by either of the first two types of chamber, by contrast there have been six cases dealt with by *ad hoc* chambers. The first of these was formed in 1982 in the case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* between Canada and the United States, and the second was formed in 1985 in the case concerning the *Frontier Dispute* between Burkina Faso and the Republic of Mali. The third was set up in March 1987 in the case concerning *Elettronica Sicula S.p.A. (ELSI)* between the United States of America and Italy and the fourth was formed in May 1987 in the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras. The year 2002 saw the formation of a fifth chamber to deal with the *Frontier Dispute (Benin/Niger)* case and a sixth to hear the *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*. On every occasion, the Chamber has comprised five members. The Chamber which sat in the *Gulf of Maine* case comprised four Members of the Court (one of them possessing the nationality of one of the parties) and one judge *ad hoc* chosen by the other party. The Chamber formed in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case comprised three Members of the Court and two judges *ad hoc* chosen by the parties. The Chamber formed in the *Elettronica Sicula S.p.A. (ELSI)* case comprised five Members of the Court (two of them possessing the nationality of each of the parties). The Chamber which sat in the case concerning the *Land, Island and Maritime Frontier Dispute* comprised three Members of the Court and two judges *ad hoc* chosen by the parties, and the two Chambers formed in 2002 were similarly composed.

It has been seen that the Court is clearly distinct from arbitral tribunals, which in general are not permanent: not only is it constituted in advance with its own rules, not only has it permanent organs and premises, but, above all, parties before it are not required to pay fees or administrative or linguistic costs, which fall to the charge of the United Nations. If the States that appear before the Court were to ask for all the various possibilities described above — judgment *ex aequo et bono*, the Court to sit away from The Hague, the use of a language other than the Court's two official languages, judges *ad hoc*, assessors and chambers — they would be able to enjoy the benefits of the

flexibility which is normally associated with arbitration without losing the advantages inherent in recourse to the ICJ.

For a list of present and former Members of the ICJ and judges *ad hoc*, see below, annexes, pp. 221-223 and 225-230.

A list of present Members of the Court and brief biographies of them, the composition of the Registry, a list of the chief publications of the two Courts and the budget of the ICJ are published each year in the *I.C.J. Yearbook*.

# 3 the parties

## **Only States may be parties to cases before the Court**

It is the function of the ICJ to decide in accordance with international law disputes of a legal nature that are submitted to it by States. In doing so it is helping to achieve one of the primary aims of the United Nations, which, according to the opening paragraph of Article 1 of the Charter, is to bring about the settlement of disputes by peaceful means and in conformity with the principles of justice and international law.

An international legal dispute is, as the PCIJ put it, "A disagreement on a question of law or fact, a conflict, a clash of legal views or of interests." Such a dispute between opposing parties may eventually lead to contentious proceedings before an international tribunal. It is conceivable that such proceedings could be between a State on the one hand and an international organization, a collectivity or an individual on the other. Within their respective fields of jurisdiction, institutions such as the Court of Justice of the European Communities in Luxembourg or the European Court of Human Rights in Strasbourg would be entitled to hear such disputes. This is not the case, however, with the ICJ, to which no case can be submitted unless both applicant and respondent are States. Despite various proposals and even the existence of a treaty providing for the possibility of proceedings before the Court between an international agency and a State, neither the United Nations nor any of its specialized agencies can be a party in contentious proceedings before the ICJ. As for private interests, these can only form the subject of proceedings in the International Court of Justice if a State, relying on international law, takes up the case of one of its nationals and invokes against another State the wrongs which its national claims to have suffered at the latter's hands, the dispute thus becoming one between States (e.g., *Ambatielos*, *Anglo-Iranian Oil Co.*, *Nottebohm*, *Interhandel*, *Barcelona Traction, Light and Power Company, Limited*, *Elettronica Sicula S.p.A. (ELSI)*, *Vienna Convention on Consular Relations*, *Ahmadou Sadio Diallo*, *LaGrand*, *Avena and Other Mexican Nationals*). Like any other court, the ICJ can only operate within the constitutional limits that have been laid down for it. Hardly a day passes without the Registry receiving written or oral applications from private persons. However heart-rending,

however well founded, such applications may be, the ICJ is unable to entertain them and a standard reply is always sent: "Under Article 34 of the Statute, only States may be parties in cases before the Court."

Today, the Court is open to practically every State in the world:

- States Members of the United Nations, which, by signing the Charter, accepted its obligations and thus at the same time became parties to the Statute of the ICJ, which forms an integral part of the Charter;
- those States (e.g. Nauru and Switzerland prior to their United Nations membership) which have become parties to the Statute of the ICJ without signing the Charter or becoming members of the United Nations; these States must satisfy certain conditions laid down by the General Assembly upon the recommendation of the Security Council: acceptance of the provisions of the Statute, an undertaking to comply with the decisions of the ICJ and an undertaking to make an annual contribution to the expenses of the Court;
- any other State which, whilst neither a member of the United Nations nor a party to the Statute of the ICJ, has deposited with the Registry of the ICJ a declaration that meets the requirements laid down by the Security Council whereby it accepts the jurisdiction of the Court and undertakes to comply in good faith with the Court's decisions in respect of all or a particular class or classes of disputes. Many States have found themselves in this situation before becoming members of the United Nations; having concluded treaties providing for the jurisdiction of the Court, they deposited with the Registry the necessary declaration to be able to appear before the Court. Where they have been parties to a case, they have been required to contribute to the costs thereof.

The jurisdiction of the Court so far as concerns the parties entitled to appear before it — jurisdiction *ratione personae* — covers those States listed above. In other words, in order that a dispute may validly be submitted to the Court it is necessary that the dispute should be between two or more such States.

**A case can only be submitted to the Court with the consent of the States concerned**

Jurisdiction *ratione personae* is not, however, in itself enough. A fundamental principle governing the settlement of international disputes is that the jurisdiction of an international tribunal depends in the last resort on the consent of the States concerned. Accordingly, no sovereign State can be made a party in proceedings before the Court unless it has in some manner or other consented thereto. It must have agreed that the dispute or the class of disputes in question should be dealt with by the Court. It is this agreement that determines the

jurisdiction of the Court so far as the particular dispute is concerned — the Court's jurisdiction *ratione materiae*. It is true that Article 36 of the Charter provides that the Security Council, which may at any stage of a dispute recommend appropriate procedures or methods of adjustment, is to "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice". In the *Corfu Channel* case, however, the ICJ did not consider a recommendation by the Security Council to this effect sufficient to confer jurisdiction on the Court independently of the wishes of the parties to the dispute.

#### *Special agreements*

The way in which States manifest consent to their disputes of a legal nature being decided by the ICJ is defined in Article 36 of the Statute. Paragraph 1 thereof provides:

"The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

The first possibility envisaged here is where the parties bilaterally agree to submit an already existing dispute to the ICJ and thus to recognize its jurisdiction over that particular case. Such an agreement conferring jurisdiction on the Court is known as a "special agreement" or "*compromis*". Once such a special agreement has been lodged with the Court, the latter can entertain the case. Eleven disputes were referred to the PCIJ in this way, while the ICJ has received sixteen (*Asylum, Minquiers and Ecrehos, Sovereignty over Certain Frontier Land, North Sea Continental Shelf* (two cases), *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Delimitation of the Maritime Boundary in the Gulf of Maine Area* (case referred to a chamber), *Continental Shelf (Libyan Arab Jamahiriya/Malta), Frontier Dispute (Burkina Faso/Republic of Mali)* (case referred to a chamber), *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)* (case referred to a chamber), *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Kasikili/Sedudu Island (Botswana/Namibia), Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Frontier Dispute (Benin/Niger)* (case referred to a chamber), *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*) (see table on pages 38-39).

It can also happen that a dispute is brought before the Court while at the time of the institution of the proceedings only one of the disputing States has validly recognized its jurisdiction over the case in question and the other has not, and that this latter State recognizes the Court's jurisdiction subsequently; this is a fairly rare situation

### Cases Instituted by Special Agreement

| Case  | Parties                                 | Date of Special Agreement | Date of notification (filing in the Registry)     |
|---|---|---------------------------|---|
| Asylum  | Colombia/Peru                           | 31 August 1949            | 15 October 1949                                   |
| Minquiers and Ecrehos   | France/United Kingdom                   | 29 December 1950          | 6 December 1951                                   |
| Sovereignty over Certain Frontier Land                          | Belgium/Netherlands                     | 7 March 1957              | 27 November 1957                                  |
| North Sea Continental Shelf                                     | Federal Republic of Germany/Denmark     | 2 February 1967           | 20 February 1967                                  |
| North Sea Continental Shelf                                     | Federal Republic of Germany/Netherlands | 2 February 1967           | 20 February 1967                                  |
| Continental Shelf (Tunisia/Libyan Arab Jamahiriya)              | Tunisia/Libyan Arab Jamahiriya          | 10 June 1977              | 1 December 1978 and 19 February 1979 <sup>1</sup> |
| Delimitation of the Maritime Boundary in the Gulf of Maine Area | Canada/United States of America         | 29 March 1979             | 25 November 1981                                  |
| Continental Shelf (Libyan Arab Jamahiriya/Malta)                | Libyan Arab Jamahiriya/Malta            | 23 May 1976               | 26 July 1982                                      |
| Frontier Dispute  | Burkina Faso/Republic of Mali           | 16 September 1983         | 14 October 1983                                   |

|  |                             |                  |  |
|--|-----------------------------|------------------|--|
| Land, Island and Maritime Frontier Dispute                                   | El Salvador/Honduras        | 24 May 1986      | 11 December 1986                                 |
| Territorial Dispute  | Libyan Arab Jamahiriya/Chad | 31 August 1989   | 31 August 1990 and 3 September 1990 <sup>2</sup> |
| Gabčíkovo-Nagymaros Project  | Hungary/Slovakia            | 7 April 1993     | 2 July 1993                                      |
| Kasikili/Sedudu Island   | Botswana/Namibia            | 15 February 1996 | 29 May 1996                                      |
| Sovereignty over Pulau Ligitan and Pulau Sipadan                             | Indonesia/Malaysia          | 31 May 1997      | 2 November 1998                                  |
| Frontier Dispute   | Benin/Niger                 | 15 June 2001     | 3 May 2002                                       |
| Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge | Malaysia/Singapore          | 6 February 2003  | 24 July 2003                                     |

<sup>1</sup> The first date relates to the notification by Tunisia and the second to the notification by the Libyan Arab Jamahiriya.

<sup>2</sup> The first date relates to the notification by the Libyan Arab Jamahiriya and the second to the filing by Chad of an application instituting proceedings against the Libyan Arab Jamahiriya. The parties subsequently agreed that the proceedings in the case had in effect been instituted by two successive notifications of the Special Agreement.



and is known as *forum prorogatum* (\**Mavrommatis Jerusalem Concessions*, \**Rights of Minorities in Upper Silesia, Corfu Channel*). It has also happened 14 times that a State has instituted proceedings in the ICJ whilst recognizing that the opposing party has not recognized the Court's jurisdiction and inviting it to do so; to date, there has only been one instance where a State against whom an application has been filed has accepted such an invitation (see p. 10).

#### *Treaties and conventions*

The second possibility envisaged in Article 36, paragraph 1, of the Statute is where treaties or conventions in force confer jurisdiction on the Court. It has become a general international practice to include in international agreements — both bilateral and multilateral — provisions, known as jurisdictional clauses, providing that disputes of a given class shall or may be submitted to one or more methods for the pacific settlement of disputes. Numerous clauses of this kind have provided and still provide for recourse to conciliation, mediation or arbitration; others provide for recourse to the Court, either immediately or after the failure of other means of pacific settlement. Accordingly, the States signatory to such agreements may, if a dispute of the kind envisaged in the jurisdictional clause of the treaty arises between them, either institute proceedings against the other party or parties by filing a unilateral application, or conclude a special agreement with such party or parties providing for the issue to be referred to the ICJ. The wording of such jurisdictional clauses varies from one treaty to another. Model jurisdictional clauses have been prepared by, *inter alia*, the Institute of International Law (1956). Jurisdictional clauses are to be found in treaties or conventions

- having as their object the pacific settlement of disputes between two or more States and providing in particular for the submission to judicial decision of specified classes of conflicts between States subject sometimes to certain exceptions;
- having an object other than the pacific settlement of disputes, in which case the jurisdictional clause of the treaty or convention in question will refer solely to disputes concerning the interpretation or application of the treaty or convention or only some of its provisions (e.g., disputes where the issue relates to a peremptory rule of international law — *jus cogens*). Such clauses may be included in the body of the text or in a protocol annexed to the treaty. They may likewise be compulsory or optional and may be open to reservations or not.

Nowadays such jurisdictional clauses confer jurisdiction on the ICJ. Those that were drawn up before the creation of the United Nations conferred it on the PCIJ. In order to prevent these from losing

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**Examples of treaties or conventions conferring  
jurisdiction on the ICJ**

|  |                |                   |
|--|----------------|-------------------|
| American treaty on pacific settlement  | Bogotá         | 30 April 1948     |
| Convention on the prevention and punishment of the crime of genocide   | Paris          | 9 December 1948   |
| Revised act for the pacific settlement of international disputes   | Lake Success   | 28 April 1949     |
| Convention relating to the status of refugees  | Geneva         | 28 July 1951      |
| Treaty of peace with Japan   | San Francisco  | 8 September 1951  |
| Treaty of friendship (India/Philippines)   | Manila         | 11 July 1952      |
| Universal copyright convention   | Geneva         | 6 September 1952  |
| European convention for the peaceful settlement of disputes  | Strasbourg     | 29 April 1957     |
| Single convention on narcotic drugs  | New York       | 30 March 1961     |
| Optional protocol to the Vienna convention on diplomatic relations, concerning the compulsory settlement of disputes   | Vienna         | 18 April 1961     |
| International convention on the elimination of all forms of racial discrimination                                      | New York       | 7 March 1966      |
| Convention on the law of treaties  | Vienna         | 23 May 1969       |
| Convention on the suppression of the unlawful seizure of aircraft  | The Hague      | 16 December 1970  |
| Treaty of commerce (Benelux/USSR)  | Brussels       | 14 July 1971      |
| Convention for the suppression of unlawful acts against the safety of civil aviation                                   | Montreal       | 23 September 1971 |
| International convention against the taking of hostages  | New York       | 17 December 1979  |
| General peace treaty (Honduras/El Salvador)  | Lima           | 30 October 1980   |
| Convention on treaties concluded between States and international organizations or between international organizations | Vienna         | 21 March 1986     |
| United Nations convention against illicit traffic in narcotic drugs and psychotropic substances                        | Vienna         | 20 December 1988  |
| United Nations framework convention on climate change  | New York       | 9 May 1992        |
| Convention on biological diversity   | Rio de Janeiro | 5 June 1992       |
| Protocol to the 1979 convention on long-range transboundary air pollution on further reduction of sulphur emissions    | Oslo           | 14 June 1994      |

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**Examples of treaties or conventions conferring  
jurisdiction on the ICJ (cont.)**

|   |                      |                  |
|---|----------------------|------------------|
| International convention for the suppression of the financing of terrorism  | New York             | 9 December 1999  |
| United Nations convention against transnational organized crime   | New York/<br>Palermo | 15 November 2000 |
| Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations convention against transnational organized crime | New York             | 31 May 2001      |

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their effectiveness, the present Statute provides that the ICJ is to be substituted for the PCIJ. Provided that the agreement to which they relate is still in force and that the States concerned are parties to the Statute of the ICJ, any dispute that arises can be submitted to the ICJ in the same way as it could have been to the PCIJ. The few hundred treaties or conventions that confer jurisdiction on the Court in this way will normally have been registered with the Secretariat of the League or the United Nations and will appear in the collections of treaties published by those two Organizations. In addition, the PCIJ and the ICJ have published lists of and extracts from such treaties and conventions. It is not always easy to determine which of them are still in force. They probably number some 400 or so, some being bilateral, involving about 60 States, and others multilateral, involving a greater number of States.

*Declarations accepting the compulsory  
jurisdiction of the Court*

A third means of consent to the Court's jurisdiction is described in paragraphs 2 and 3 of Article 36 of the Statute :

"2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made uncondi-

tionally or on condition of reciprocity on the part of several or certain States, or for a certain time."

This system, based on what has been known since the days of the PCIJ as the "optional clause", has led to the creation of a group of States who stand as it were in the same position towards the Court as the inhabitants of a country stand towards the courts of that country. Each State belonging to this group has in principle the right to bring any one or more other States belonging to the group before the Court by filing an application instituting proceedings with the Court, and, conversely, it has undertaken to appear before the Court should proceedings be instituted against it by one or more such other States. This is why such declarations are known as "declarations of acceptance of the compulsory jurisdiction of the Court".

These declarations, which take the form of a unilateral act of the State concerned, are deposited with the Secretary-General of the United Nations and are generally signed by the foreign minister of the State concerned or by its representative to the United Nations. They are published in the United Nations *Treaty Series* and in the *I.C.J. Yearbook*. Despite solemn appeals by the General Assembly of the United Nations (see below pp. 215-220), by the Secretary-General of the United Nations (in the introduction to his annual Report on the Work of the Organization, in 1970 and 1974, "Prevention of Armed Conflict", A/55/985-S/2001/54 and Corr.1) and by the Institute of International Law (1959), they are fewer in number than had been hoped. In July 2004 there were only 65, from the following regional groups: Africa 20; Latin America and the Caribbean 13; Asia 5; Europe and other States 27. It must be added that 13 other States that had at one time recognized the compulsory jurisdiction of the ICJ have withdrawn their declarations, 8 of them after they had been made respondents in proceedings before the Court. As with treaties or conventions, the Statute provides that declarations that refer to the PCIJ shall be regarded as applying to the ICJ. Seven of these were still in force in 2004, but 11 countries that had at one time recognized the compulsory jurisdiction of the PCIJ never did so in respect of the ICJ. The table on page 44 shows the relative increase and decrease in declarations over the years.

Matters are further complicated by reservations to the acceptances of compulsory jurisdiction which serve to limit their scope. Such reservations are to be found in most such declarations (51 out of the 65 in force in July 2004). They usually recapitulate some of the wording of paragraphs 2 and 3 of Article 36, including especially points (a), (b), (c) and (d) (17 declarations). The declarations are made for a specific period, generally for five years and normally with a provision for tacit renewal and usually provide for the declarations to be terminated by simple notice, such notice to take effect after a specified time or immediately.

|             | States<br>accepting compulsory<br>jurisdiction | States<br>parties to the<br>Statute |
|-------------|--|-------------------------------------|
| 1925 (PCIJ) | 23   | 36                                  |
| 1930        | 29   | 42                                  |
| 1935        | 42   | 49                                  |
| 1940        | 32   | 50                                  |
| 1945 (ICJ)  | 23   | 51                                  |
| 1950        | 35   | 61                                  |
| 1955        | 32   | 64                                  |
| 1960        | 39   | 85                                  |
| 1965        | 40   | 118                                 |
| 1970        | 46   | 129                                 |
| 1975        | 45   | 147                                 |
| 1980        | 47   | 157                                 |
| 1985        | 46   | 162                                 |
| 1990        | 53   | 162                                 |
| 1995        | 59   | 187                                 |
| 1995        | 59   | 187                                 |
| 2000        | 63   | 189                                 |
| 2003        | 64   | 191                                 |
| 2004        | 65   | 191                                 |

The most frequently employed reservations relate to disputes —

- for which another means of peaceful settlement is provided ;
- arising before a certain date or concerning situations or facts anterior to that date, generally the date on which the State making the declaration first accepted the Court's compulsory jurisdiction ;
- relating to matters falling within the domestic jurisdiction of the declaratory State, as determined by international law or by the State making the declaration itself ;
- arising during or out of hostilities ;
- with certain States: as between members of the Commonwealth or with States with which the State making the declaration does not have diplomatic relations ;
- for the specific purpose of which the other party appears to have made its declaration of acceptance of compulsory jurisdiction ;
- where the other party has accepted the Court's compulsory jurisdiction only a short time before the filing of the application (e.g., less than a year) ;
- concerning certain multilateral treaties<sup>1</sup> ;
- concerning certain aspects of the law of the sea.

<sup>1</sup> See below pp. 66, 76-77.

The two most important of these reservations, that relating to other methods of pacific settlement, which is found in 39 declarations, and that relating to matters of domestic jurisdiction, which is found in 26 declarations, correspond to Article 95 and Article 2 (7) of the United Nations Charter respectively. These provide that nothing in the Charter:

“shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future”;

“shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State”.

With regard to the latter, it is indisputable that every sovereign State has, under international law, what is known as its reserved domain, and it would be inconceivable for the ICJ to decide issues relating thereto. Nevertheless, as the PCIJ made clear in one of its first decisions,

“The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.”

This is no doubt one of the reasons why certain States have excluded from their recognition of the compulsory jurisdiction of the ICJ questions falling essentially within their field of domestic jurisdiction as “determined” by the State concerned or which such State “considers” essentially within its domestic jurisdiction. Such a reservation operates automatically: it is sufficient for a government relying upon such a reservation to declare that a question in relation to which proceedings have been brought against it in the ICJ falls within its domestic jurisdiction for the Court to be deprived of jurisdiction over the case. Ten countries originally employed such a formula in their declarations accepting the compulsory jurisdiction of the Court. The reservation was invoked in the *Certain Norwegian Loans* and *Interhandel* cases. The ICJ upheld the objection based on this reservation in the former case and did not deal with it in the latter case since it upheld an objection based on other grounds. Some Members of the Court expressed the opinion that such a reservation was contrary to the Statute, so that, according to certain judges, the reservation as such was null and void, whereas, according to others, the whole declaration accepting compulsory jurisdiction was null and void (1957, 1959). Following this, the Institute of International Law (1959) and various statesmen and jurists called upon those governments that had included such a reservation in their declaration to withdraw it. Certain States did so. In July 2004, five declarations included a clause of this kind (Liberia, Malawi, Mexico, Philippines, Sudan).

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**States recognizing the compulsory jurisdiction of the Court  
(with or without reservations)**

*July 2004*

|                                     |               |                   |
|-------------------------------------|---------------|-------------------|
| Australia                           | Guinea-Bissau | Panama            |
| Austria                             | Haiti         | Paraguay          |
| Barbados                            | Honduras      | Peru              |
| Belgium                             | Hungary       | Philippines       |
| Botswana                            | India         | Poland            |
| Bulgaria                            | Japan         | Portugal          |
| Cambodia                            | Kenya         | Senegal           |
| Cameroon                            | Lesotho       | Serbia and Monte- |
| Canada                              | Liberia       | negro             |
| Costa Rica                          | Liechtenstein | Slovakia          |
| Côte d'Ivoire                       | Luxembourg    | Somalia           |
| Cyprus                              | Madagascar    | Spain             |
| Democratic Republic of<br>the Congo | Malawi        | Sudan             |
| Denmark                             | Malta         | Suriname          |
| Dominican Republic                  | Mauritius     | Swaziland         |
| Egypt                               | Mexico        | Sweden            |
| Estonia                             | Nauru         | Switzerland       |
| Finland                             | New Zealand   | Togo              |
| Gambia                              | Netherlands   | Uganda            |
| Georgia                             | Nicaragua     | United Kingdom of |
| Greece                              | Nigeria       | Great Britain and |
| Guinea                              | Norway        | Northern Ireland  |
|                                     | Pakistan      | Uruguay           |

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The importance of such reservations is increased by the condition of reciprocity, which expressly or by implication attaches to all declarations of acceptance of the Court's compulsory jurisdiction. This means that where a dispute arises between two or more States that have made a declaration, the reservations made by any of them can be relied upon against it by all the others. In other words, the Court's jurisdiction over the case is restricted to those classes of dispute that have not been excluded by any of them. If, for instance, there are two States, one of which has accepted the compulsory jurisdiction of the Court only in respect of disputes arising after the date of its acceptance of such compulsory jurisdiction, such date being 1 February 1924, and the other State has excluded disputes relating to situations or facts prior to 21 August 1928, the ICJ, irrespective of which State was the applicant, would have jurisdiction only to hear cases arising after this latter date.

**Seventy-four States have been parties to cases before the ICJ**

Since the Court's jurisdiction is founded upon the consent of States, it is their will which in the final analysis determines the extent of that jurisdiction and how often recourse is had to it. Since the creation of the ICJ, 74 States have been parties to contentious proceedings, distributed as follows: Africa 23, Latin America 9, Asia 13, Europe and other States 29. They have submitted a total of 106 cases to the ICJ, about a third by special agreement, a third on the basis of a declaration accepting the compulsory jurisdiction of the Court and a third under a jurisdictional clause in a treaty.

Before considering whether or not sufficient use has been made of the PCIJ and the ICJ, it is worth recalling that the two Courts were not created in order to resolve all international conflicts, but only

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**States that have been parties in cases between 1946 and July 2004**

|                                     |                             |   |
|-------------------------------------|-----------------------------|---|
| Albania                             | Germany                     | Nicaragua                               |
| Australia                           | Greece                      | Niger                                   |
| Bahrain                             | Guatemala                   | Nigeria                                 |
| Belgium                             | Guinea                      | Norway                                  |
| Benin                               | Guinea-Bissau               | Pakistan                                |
| Bosnia and<br>Herzegovina           | Honduras                    | Paraguay <sup>1</sup>                   |
| Botswana                            | Hungary                     | Peru                                    |
| Bulgaria                            | Iceland <sup>2</sup>        | Portugal                                |
| Burkina Faso                        | India                       | Qatar                                   |
| Burundi <sup>1</sup>                | Indonesia                   | Rwanda                                  |
| Cameroon                            | Islamic Republic of<br>Iran | Senegal                                 |
| Cambodia                            | Israel                      | Serbia and Monte-<br>negro <sup>3</sup> |
| Canada                              | Italy                       | Singapore                               |
| Chad                                | Lebanon <sup>1</sup>        | Slovakia                                |
| Colombia                            | Liberia                     | South Africa                            |
| Congo                               | Libyan Arab<br>Jamahiriya   | Spain                                   |
| Costa Rica                          | Liechtenstein               | Sweden                                  |
| Croatia                             | Malaysia                    | Switzerland                             |
| Democratic Republic<br>of the Congo | Mali                        | Thailand                                |
| Denmark                             | Malta                       | Tunisia                                 |
| Egypt <sup>1</sup>                  | Mexico                      | Turkey <sup>2</sup>                     |
| El Salvador                         | Namibia                     | Uganda                                  |
| Ethiopia                            | Nauru                       | United Kingdom                          |
| Finland                             | Netherlands                 | United States of<br>America             |
| France                              | New Zealand                 |   |

<sup>1</sup> Only in cases terminated by discontinuance.

<sup>2</sup> These States did not take part in the proceedings.

<sup>3</sup> Previously known as the Federal Republic of Yugoslavia.



certain disputes of a legal nature. Neither the San Francisco Charter (Arts. 33 and 95) nor the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States excluded other means of resolving international differences. The PCIJ itself pointed out that judicial settlement "is simply an alternative to the direct and friendly settlement of . . . disputes between the parties". It is open to the latter, moreover, to resolve such conflicts without actually having recourse to the Court but basing themselves on the Court's decisions in analogous cases (see below p. 76). What is essential is that the overall purpose — pacific settlement — be achieved. The General Assembly of the United Nations took account of these principles when discussing the role of the ICJ in the years 1970 to 1974 (see above p. 21). Concluding that it was desirable that better use be made of the Court, it recalled in its resolutions 3232 (XXIX), 3283 (XXIX) and 37/10 (Declaration of Manila on the Peaceful Settlement of International Disputes of 1982) what the Institute of International Law had already stated in a resolution of 1959, namely, that recourse to judicial settlement in respect of a dispute ought not to be considered as an unfriendly act. In 1989, the Secretary-General of the United Nations set up a Trust Fund to Assist States in the Settlement of Disputes through the Court. The purpose of the Fund is to provide, in accordance with the terms and conditions specified in the document entitled Terms of Reference, Guidelines and Rules, financial assistance to States for expenses incurred in connection with: (a) a dispute submitted to the Court by way of a special agreement, or (b) the execution of a judgment of the Court resulting from such special agreement.

#### *Agents, counsel and advocates*

States have no permanent representatives accredited to the ICJ. They normally communicate with the Registrar through the medium of their minister for foreign affairs or their ambassador accredited to the Netherlands. Where they are parties to a case they are represented by an agent. A State filing a special agreement or an application must when so doing notify the Court who is to represent it as its agent, whilst the other party must do so on receipt of the agreement or application or, failing this, as soon as possible thereafter. In practice, the agent of a government tends to be its ambassador in The Hague or a senior civil servant, such as the legal adviser to the ministry of foreign affairs. Where the agent is not the ambassador, his signature must be formally certified. An address for service at The Hague must be given. Parties in the same interest may employ different agents or a common agent. An agent plays the same role, and has the same rights and obligations, as a solicitor or *avoué* with respect to a municipal court. But we are dealing here with international relations, and he is

also as it were the head of a special diplomatic mission with powers to commit a sovereign State. He receives at his address for service communications from the Registrar concerning the case and he forwards to the Registrar all correspondence and pleadings duly signed or certified. In public hearings he opens the argument on behalf of the government he represents and he may in fact himself deliver a major part of such argument, though he is not bound to do so. When the time comes, he lodges the submissions. In general, whenever a formal act is to be done by the government he represents, it is done by him.

The agent is sometimes assisted by a co-agent, a deputy-agent, an assistant agent or an additional agent, and he always has counsel or advocates, whose work he co-ordinates, to assist him in the preparation of the pleadings and the delivery of oral argument. The Court must be informed of their names, which may be done at any time in the course of the proceedings. Since there is no special ICJ bar, there are no conditions that have to be fulfilled for counsel or advocates to enjoy the right of arguing before it except only that they must have been appointed by a government to do so. Counsel are not required to possess the nationality of the State on behalf of which they appear and are chosen from among those practitioners, professors of international law and jurists of all countries who appear most qualified to present the view of the country that appoints them. In practice, they form a group of specialists which was once fairly limited, but which is now tending to expand. From 1946 to July 2004 some 200 persons appeared as counsel before the Court, around 20 of them in a number of cases. Their fees normally constitute the chief expense of a State appearing before the ICJ. In order to contribute towards the reduction of such costs, the 1978 Rules (as amended in 2000; see p. 20 above) provide that "the number of counsel and advocates to be heard on behalf of each party shall be settled by the Court". Experience has shown that an agent need not necessarily be assisted by a large team.

Agents, counsel and advocates enjoy the privileges and immunities necessary to the independent exercise of their functions, and for this purpose the ministry of foreign affairs of the country where the Court is sitting is informed of their names. They play a vital part in proceedings before the Court, as they organize the writing of their side's pleadings and co-ordinate preparation of the arguments it submits at hearings.

Examples of a special agreement, jurisdictional clauses and a declaration of acceptance of compulsory jurisdiction may be found on the Court's website (<http://www.icj-cij.org>).

A list of States to which the ICJ is open and a list of the instruments governing its jurisdiction, as well as those declarations of acceptance of the Court's compulsory jurisdiction that are in force, are published each year in the *I.C.J. Yearbook*. The texts of the compromissory clauses of treaties are to be found in the United Nations *Treaty Series*.

# 4 the proceedings

Since the very existence of an international arbitral tribunal results from the will of the parties, it is not surprising that those parties should have a large say in the drawing up of its rules of procedure. The PCIJ, on the other hand, whose composition and jurisdiction were decided before any disputes were submitted to it, felt it proper to present parties with a pre-determined body of rules governing its and their conduct during proceedings. Its founders and its first Members had available to them for this purpose sundry precedents in the practice of arbitral tribunals and of the Permanent Court of Arbitration, but they also to a large extent had to break new ground. They had to devise a procedure capable of satisfying the sense of justice of the greatest possible number of potential litigants and of placing them on a footing of strict equality. It was necessary for the Court to gain their confidence and, reciprocally, to have confidence in them. The Court accordingly sought to combine simplicity and an absence of formalism in the rules laid down with flexibility in the manner of their application. The PCIJ managed to achieve a rough balance between the various requirements it had to meet, and this balance has been preserved by the ICJ, which has acted with extreme prudence in changing the rules laid down by its predecessor.

**Proceedings are instituted by the parties to the case or by one of them**

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A distinction must be drawn according to whether proceedings are instituted through the notification of a special agreement or by means of an application (see above pp. 36-42):

- A special agreement is of a bilateral nature and can be lodged with the Court by either of the States parties to the proceedings or by both of them. A special agreement must indicate the subject of the dispute and the parties thereto. Since there is neither an "applicant" State nor a "respondent" State, in the Court's publications their names are separated by an oblique stroke at the end of the official title of the case, e.g., *Benin/Niger*.
- An application, which is of a unilateral nature, is submitted by an applicant State against a respondent State. It is intended for com-

munication to the latter State and the Rules of Court contain stricter requirements with respect to its content. In addition to the name of the party against which the claim is brought and the subject of the dispute, the applicant State must, as far as possible, indicate briefly on what basis — a treaty or a declaration of acceptance of compulsory jurisdiction — it claims the Court has jurisdiction, and must succinctly state the fact and grounds on which it founds its claim. At the end of the official title of the case the names of the two parties are separated by the abbreviation v. (for the Latin *versus*), e.g., *Nicaragua v. Colombia*.

The special agreement or application is normally signed by the agent (see p. 48 above) and is in general accompanied by a covering letter from the minister for foreign affairs or the ambassador to The Hague. It may be in English or French at the applicant State's choice. A person authorized by the applicant State, in general the ambassador to The Hague or the agent, hands the document to the Registrar or sends it to him by post. The Registrar, after having assured himself that the formal requirements of the Statute and of the Rules have been complied with, transmits it to the other party and to the Members of the Court, has it entered in the Court's General List, and informs the press by means of a brief press release. After having been duly registered, translated and printed, a bilingual version of the agreement or application is then sent to the Secretary-General of the United Nations and to all States to which the Court is open, as well as to any person who asks for it. The institution of proceedings is thus well publicized. The date thereof, which is that of the receipt by the Registrar of the special agreement or application, marks the opening of proceedings before the Court.

It is always some time after a dispute arises between the States concerned that it is submitted to the Court. This pre-Court phase, during which the States concerned discuss and consider the issue lasts on average five to six years, and sometimes over ten years. Nevertheless, many disputes, which must of their very nature be extremely complex, since otherwise they would have been settled between the parties, have not yet been completely clarified when the dispute is brought before the Court, and the issues require lengthy study by the parties themselves throughout the course of the proceedings. It is noteworthy in these circumstances that the average duration of cases argued before the ICJ, from the institution of proceedings to the delivery of final judgment, has been only four years. Some cases have even been decided within a year (*Appeal Relating to the Jurisdiction of the ICAO Council; Aerial Incident of 10 August 1999 (Pakistan v. India)*; *Request for Interpretation of the Judgment of 11 June 1998*). Factors specific to certain cases, such as the number of written pleadings and the time requested by the parties for their preparation, or the frequency of incidental proceedings, mainly

account for their length and for the various remedies adopted by the Court, whether in the course of revision of its Rules (see above p. 20) or otherwise (for example, the issue of Practice Directions). In this regard, reference may be made to an older case, *Barcelona Traction*, which lasted 11 years, and to the more recent ones, that concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (10 years) and the *Oil Platforms* case (11 years).

**The proceedings are first written and then oral**

Combining the two types of procedure that are used to varying degrees in all countries, the Statute of the Court provides that proceedings before the Court shall be in two stages: a written stage and an oral stage. The Court has applied this general principle flexibly, enabling those parties that wish to do so to lay greater emphasis on either the written proceedings, as in the *Fisheries* and *Right of Passage over Indian Territory* cases, or the oral proceedings, as in the *Corfu Channel* and *South West Africa* cases. Whilst each of these phases of the proceedings has sometimes been subject to criticism, there has never been any agreement as to what might be eliminated. In fact, the combination of a written stage followed by an oral stage, as required by the Statute, is highly desirable if the Court is to reach its decision on a fully informed basis. It provides both the parties and the Court with the safeguards required for the sound administration of international justice.

*Written proceedings*

The first or written stage of the proceedings involves the submission to the Court of pleadings containing a detailed statement of the points of fact and of law on which each party relies and an answer to any previous pleading of the other side. The parties are free in their choice of the form they give their pleadings. One of the reasons why cases tend to be very fully pleaded is the need to satisfy the Court as a whole and each of its Members individually, in other words, to satisfy 15 judges coming from different legal backgrounds. Supporting documents must normally be annexed, but if they are too lengthy, extracts only need be attached, and, unless it has already been published, a full text of the document deposited in the Registry, where it is available to Members of the Court and the other party for consultation. The Court may itself call for documents or explanations during the written proceedings (*Rights of Nationals of the United States of America in Morocco*, *Monetary Gold Removed from Rome in 1943*).

The President meets the agents of the parties as soon as possible after their appointment in order to ascertain their views with respect to the number and the order of filing of the pleadings and the time-

limits within which they are to be filed<sup>1</sup>. A decision thereon is then taken by the Court, having regard to the parties' views in so far as this would not cause unjustified delay. The Court embodies its decision in an Order, which is normally made about a month after the institution of proceedings and is published in the *Reports of Judgments, Advisory Opinions and Orders*.

Where proceedings are instituted by means of an application, in principle, two pleadings only are filed: "a Memorial by the applicant; a Counter-Memorial by the respondent". If the parties so request, or if the Court deems it necessary, there may also be a Reply and Rejoinder, which "shall not merely repeat the parties' contentions, but shall be directed to bringing out the issues that still divide them". The time-limits assigned, which "shall be as short as the character of the case permits", are normally the same for each party. They can only be extended on request by a party and provided that the Court "is satisfied that there is adequate justification for the request".

The words between inverted commas in the preceding paragraph are taken from the 1978 Rules (as amended in 2000; see p. 20 above) which take account of the views of numerous commentators. The number of pleadings had previously been fixed at four instead of two (the *Haya de la Torre* case was an exception) and they had become extremely copious (in general a single volume of about 100 pages, though in the *Barcelona Traction* case there were 37 volumes). Even where relatively long time-limits were asked for (in general from three to six months for each pleading, but sometimes as much as a year or more), it appeared difficult not to take account of the wishes expressed by the representatives of sovereign States who were concerned to set forth their case at proper length and with due and proper care. The Court felt itself obliged to agree to requests for extensions that in some cases amounted to as much as a year or 18 months, thereby nearly doubling the originally estimated time for the written proceedings. The latitude thus granted to parties gradually contributed to a considerable increase in the duration of cases, something which the Court noted with regret in an order it made in 1968. The time-limits requested by the parties are still often considerable.

Where a case is brought before the Court or a chamber of the Court by the notification of a special agreement, the parties themselves usually fix in the special agreement the number and order of filing of the pleadings. In recent cases, the parties have agreed upon the submission by each of a Memorial and a Counter-Memorial, and a further pleading if necessary. They have also agreed upon certain time-limits. The Court has taken account of the wishes of the parties on these points (Articles 46 and 92 of the Rules). Hence Replies were filed in the cases concerning the *Continental Shelf (Tunisia/Libyan*

<sup>1</sup> Where the proceedings are initiated by a special agreement it normally states the number and order of filing of the pleadings (see below).

*Arab Jamahiriya*), the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the *Land, Island and Maritime Frontier Dispute*, the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, *Gabčikovo-Nagymaros Project*, *Kasikili/Sedudu Island* and *Sovereignty over Pulau Ligitan and Pulau Sipadan*, but only Memorials and Counter-Memorials were submitted in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*.

Where counter-claims are presented by a party in its Counter-Memorial and the Court makes an Order declaring them admissible, that Order will normally provide for the filing of a Reply and a Rejoinder; in order to ensure strict equality between the parties, a right will be reserved for the party replying to the counter-claims to express itself a second time in writing on those claims in an additional pleading, submission of which will be dealt with in a further Order (for recent practice, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*; additional pleadings were submitted in the latter three cases).

A signed original of each pleading is delivered by the agent to the Registrar, together with 125 copies for the use of the other party, Members of the Court and the Registry. Where they are printed, as is generally the case, pleadings must so far as possible conform to the format and typographical rules recommended by the Court, but, for reasons of economy and speed, since 1972 printing has no longer been compulsory. Furthermore, the parties may now choose either to file all the additional copies of their pleadings in a paper version or to file 75 copies on paper and 50 on CD-ROM. The pleadings and their annexes may be filed in either English or French, at the choice of the party concerned. They may be in a combination of these two languages and may even be wholly or partly in a third language, provided that a certified translation into English or French is attached. The Registry makes an unofficial translation into the other official language of the Court for the convenience of its Members. After the views of the parties have been ascertained, the Court may upon request authorize the communication of the pleadings to the government of any State that is entitled to appear before the Court. It is usual for the pleadings, after consultation of the parties, to be made available to the press and the public as from the opening of the oral proceedings. For this purpose they are deposited in the Press Room and the Carnegie Library in the Peace Palace, at the International Press Centre of The Hague, and in the libraries and information centres of the United Nations (New York, Geneva,



Brussels, etc.); they are also reproduced (without their annexes) on the Court's website.

In each of the pleadings it files, a party indicates its "submissions" (French: *conclusions*) at that stage of the case. These "submissions", a concept borrowed by international arbitral and judicial practice from the legal systems of Civil Law countries and one unknown in this form in Common Law countries, are a concise statement of what precisely the party in question is asking the Court to adjudge and declare on the basis of the facts it has alleged and the legal grounds it has adduced, in respect not only of the original claim but also of any counter-claim. In principle they do not include any recital, however brief, of the aforesaid facts and arguments. They define the scope of the claim and the framework within which the Court will have to reach its decision. As the Court once observed, it is its duty

"not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions".

#### *Oral proceedings*

Once all the pleadings have been filed, the case is ready for hearing, that is to say, for oral argument. In principle there is an interval of a few months before the oral proceedings begin. The date for their opening is decided by the Court, taking into account other calls upon its time. The Court also does its best to meet the convenience of the parties, which always need a fair amount of time.

Unlike arbitral tribunals, the sittings of the International Court of Justice are open to the public unless the parties ask for the proceedings to be *in camera* or the Court so decides of its own motion. Press releases are issued announcing that public sittings are to be held and these generally take place each morning from 10 a.m. to 1 p.m., or in the afternoon from 3 p.m. to 6 p.m., in the Great Hall of Justice on the ground floor of the Peace Palace. Judges wear a black gown and a white jabot, as does the Registrar, who sits with the judges. Agents and counsel for the parties, who are dressed in accordance with the practice of their own countries, face the Court. In proceedings instituted by an application, the applicant State is on the President's left and the respondent State on his right; in proceedings instituted by the notification of a special agreement, the parties are placed in alphabetical order from the left. Arrangements are made to accommodate press and television.

The parties address the Court in the order in which they have filed their pleadings or, in cases submitted under a special agreement, in the order fixed by the Court after consulting the agents of the parties. Normally each party has two turns. The Court may be addressed in



either of its official languages ; it is not required that all argument be in a single language nor that all a party's representatives use the same language. Everything spoken in English is interpreted into French and vice versa. Interpretation was consecutive until 1965 and since then has been simultaneous. Should counsel wish to use a language other than the Court's two official languages (e.g., \*S.S. "Wimbledon" and \*Rights of Minorities in Upper Silesia cases: German; \*Borchgrave and Barcelona Traction cases: Spanish), the party concerned is required to inform the Registrar in advance and to supply a translation into English or French. As frequently happens in the principal organs of the United Nations, those addressing the Court, many of whom are not using their mother tongue, often read from a prepared text, giving the Registry a copy for its convenience before each hearing, though this is in no way compulsory. Oral argument is recorded in the original official language and a transcript is issued by the Registry in the form of a provisional verbatim record of the proceedings, which is distributed a few hours afterwards. Corrections relating to the form of what has been said are then made (under the supervision of the Court) by those who have spoken, and this corrected verbatim record then constitutes the authentic record of the proceedings. The Registry has an unofficial translation made of the provisional verbatim record into the Court's other language, and this is distributed two or three days after the sitting in question.

Hearings generally last for two or three weeks, though in the *Barcelona Traction* case there were 64 sittings, in the *South West Africa* case 102 and in the case concerning the *Land, Island and Maritime Frontier Dispute* there were 50 sittings. The sittings are under the control of the Court and, in particular, of the President. He consults his colleagues and ascertains the views of the parties' agents, whom he will meet, if necessary, before the opening of the hearings. Where required, orders are made concerning the conduct of the proceedings. So far as the actual content of what is said is concerned, the ICJ has up to the present felt it better to refrain so far as possible from giving instructions to the representatives of the sovereign States which are parties before it. Although the Rules authorize the Court as such to put questions on points that seem to it to require explanation, and to call for further information or documents, it has not done this very frequently (e.g., *Corfu Channel*, *Ambatielos*, *United States Diplomatic and Consular Staff in Tehran*, *Military and Paramilitary Activities in and against Nicaragua*). Each judge has the same right individually, but regular use has been made of this right only since 1965. Even then, the judges do not put a question as soon as it comes to mind, but inform the President and their colleagues of their intention to do so ; nor do they ask for an immediate reply. Consequently those addressing the Court have practically no guidance other than the dual need to answer the other side and to leave nothing out that might serve the purpose of their own case. This conception of the oral proceedings

that has developed on the part of the Court and the parties has been subjected to criticism, even by governments, as tending towards a reiteration of what has already been set forth in the pleadings. For this reason, the Rules of 1978, as amended in 2000, provide :

“The oral statements made on behalf of each party shall be as succinct as possible within the limits of what is requisite for the adequate presentation of that party’s contentions at the hearing. Accordingly, they shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, or merely repeat the facts and arguments these contain.”

“The Court may at any time prior to or during the hearing indicate any points or issues to which it would like the parties specially to address themselves, or on which it considers that there has been sufficient argument.”

In its Practice Direction VI, the Court, citing the first paragraph reproduced above, “requires full compliance with these provisions and observation of the requisite degree of brevity”.

So far as the taking of evidence is concerned, the ICJ, which is empowered by the Statute to make all necessary arrangements for this, has tried to avoid a formalistic approach, co-operating with the parties and taking account of the different concepts they may have in this matter. It has consequently shown itself more flexible in the admission of evidence than the courts of certain countries, though reserving its right to reconsider the issue during its deliberations in the case. The Court’s judgments often contain detailed explanations of the way the Court has handled the evidence presented by the parties, having regard to the nature of this evidence and to the circumstances of the case (e.g., *Military and Paramilitary Activities in and against Nicaragua, Merits, Land, Island and Maritime Frontier Dispute, Gabčíkovo-Nagymaros Project*).

■ Matters of fact, which frequently are not in issue as between the parties, are in general proved by documentary evidence, such evidence normally forming part of the pleadings. Once the written proceedings are at an end, new documents can only be submitted in exceptional circumstances and provided this will not delay the proceedings. On this point, the Court has explained in Practice Direction IX that, where a party wishes to submit a new document after the closure of the written proceedings, “it shall explain why it considers it necessary to include the document in the case file and shall indicate the reasons preventing the production of the document at an earlier stage”. The new documents must normally be filed in 125 copies. The Registrar thereupon communicates any such new documents to the other party, asking for its views thereon. If there is no objection, the Court will normally admit the new documents. Should there be an objection to

them, the Court itself will decide the matter and will only accept a document "if it considers the document necessary". No reference may be made by the parties during the oral proceedings to the contents of any document which neither forms part of a readily available publication nor has been submitted to the Court in accordance with the above provisions.

■ In practice there have been relatively few examples in the ICJ or PCIJ of oral evidence by either witnesses or experts (*\*Certain German Interests in Polish Upper Silesia, Temple of Preah Vihear, South West Africa, Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Delimitation of the Maritime Boundary in the Gulf of Maine Area, Continental Shelf (Libyan Arab Jamahiriya/Malta), Military and Paramilitary Activities in and against Nicaragua, Elettronica Sicula S.p.A. (ELSI)*). In hearing witnesses or experts called by either of the parties, the Court has so far in general followed the procedure of Common Law countries, without holding itself necessarily bound by any particular rule: an examination-in-chief by the representatives of the party calling the witnesses, followed by a cross-examination by the representatives of the other party, a re-examination by the former and replies to any question put by the President or Members of the Court. Under the same conditions as apply to oral argument by the representatives of the parties, evidence may be given in a language other than English or French (e.g., *Corfu Channel, Land, Island and Maritime Frontier Dispute*). The Court is itself empowered to call witnesses but has never done so. It can appoint experts to prepare a report for it (*\*Factory at Chorzów, Corfu Channel*), order an investigation *in loco* (*Corfu Channel*) or itself make an inspection *in loco* (*\*Diversion of Water from the Meuse, Gabčíkovo-Nagymaros Project*). In the *\*Free Zones of Upper Savoy and the District of Gex* and *South West Africa* cases, the Court declined requests that it carry out such an inspection. The Chambers constituted by the Court also have this power; for example, an expert was appointed by the Chamber formed in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case, to assist it in examining the technical aspects<sup>1</sup>, although the Chamber formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute* did not consider it necessary to order an investigation or call upon expert assistance.

After the conclusion of oral argument on behalf of each party, counsel reply to or complete their replies to questions put by the Court or by individual judges and each agent reads his country's final submission, handing a signed text thereof to the Registrar. At the end of the last public sitting, the President asks the agents to hold themselves at the disposal of the Court. Sometimes replies to certain questions may subsequently be forwarded in writing to the Court

<sup>1</sup> In this case however the appointment of an expert was provided for in the special agreement.

and further written questions may still be put. Such questions and answers, as well as any written observations on the answers, are duly communicated to the Members of the Court and to each party.

**A case may involve preliminary objections, interim measures of protection, etc.** The procedure described above is the normal procedure that is followed before a full bench of the Court. We must, however, now consider certain matters that, just as in municipal courts, can affect the proceedings.

#### *Preliminary objections*

The most common case is that of preliminary objections raised by the respondent State where proceedings have been instituted by an application. Objections of this kind are raised in order to prevent the Court from delivering judgment on the merits of the case. Such a preliminary objection will be based on an allegation —

- that the Court lacks jurisdiction under the terms of the jurisdictional clause of a treaty, or the declaration of acceptance of the Court's compulsory jurisdiction, upon which the applicant State has founded its entitlement to bring the case before the Court. The respondent State may, for instance, contend that the treaty or declaration of acceptance is null and void or no longer in force; that the dispute antedates the time to which the treaty or declaration applies; or, again, that a reservation attached to the declaration, e.g., a reservation in respect of matters falling within the domestic jurisdiction of the State making the declaration, excludes the dispute in question; or
- that the application is inadmissible on more general grounds. It may be contended that certain essential provisions of the Statute or of the Rules have not been complied with; that the dispute does not exist, no longer has any object, relates to a non-existent right or is not of a legal nature within the meaning of the Statute; that the judgment would be without practical effect or would be incompatible with the role of a court; that the applicant State lacks capacity to act, has no legal interest in the case or has not exhausted the possibility of negotiations or other preliminary procedure; that the applicant is alleging facts which come within the province of a political organ of the United Nations; or, finally, that the private party whom the applicant State is seeking to protect has not its nationality or has not exhausted the local remedies available to him in the respondent country<sup>1</sup>; or

<sup>1</sup> Some of these points may, according to some views, also sometimes form the subject of preliminary objections to jurisdiction. International tribunals have always adopted a pragmatic attitude in this matter.

- that at this preliminary stage there is some other ground for putting an end to the proceedings. It may be argued that the dispute brought before the Court involves other aspects of which it is not seised; that the applicant has not cited before the Court certain parties whose presence is essential; or that certain negotiating procedures have not been exhausted, etc.

The matter is one for the Court itself to decide, as it has jurisdiction to determine its own jurisdiction. According to Article 36, paragraph 6, of the Statute: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." The procedure to be followed is laid down in Article 79 of the Rules. Where a respondent State wishes to raise one or more preliminary objections, it must do so in writing as soon as possible, and not later than three months after the delivery of the Memorial. The written proceedings on the merits are then suspended and written and oral proceedings on the preliminary objection(s), a sort of trial within the trial, begun. They constitute a distinct phase of the case. An Order is made fixing a time-limit within which the applicant State must submit its written observations and submissions, in other words, its answer to the objection(s). In Practice Direction V, the Court states that, with a view to accelerating proceedings, that period shall generally not exceed four months. A series of public sittings is then held similar to those described above, though shorter since, as Practice Direction V makes clear, they are strictly limited to the issues raised by the preliminary objection(s). The Court next deliberates and thereafter delivers a judgment in the usual way (see below pp. 67-75). Only three outcomes are possible :

- the Court will uphold at least one of the preliminary objections and the case will then come to an end, leaving open the possibility that it may be resumed one day if the ground on which the preliminary objection was upheld no longer applies (e.g., where domestic remedies are exhausted to no avail) ; or
- the Court will reject all the preliminary objections and the proceedings on the merits will resume at the point at which they were suspended ; the respondent will then be called upon to deliver its Counter-Memorial within a certain time ; or
- the Court will declare that the objections do not possess an exclusively preliminary character and the proceedings will be resumed in order to enable the Court to decide all the issues laid before it.

Although the above represents the general order of proceedings, certain minor variations are possible :

- The respondent State withdraws its preliminary objection(s) (*Rights of Nationals of the United States of America in Morocco*).
- The respondent State contests the jurisdiction of the Court or the admissibility of the claim in its pleadings or in oral argument but

does not do so by means of a formal preliminary objection; the Court will then deal with this issue at the merits stage if necessary (*\*Rights of Minorities in Upper Silesia, Nottebohm, Appeal Relating to the Jurisdiction of the ICAO Council, Elettronica Sicula S.p.A. (ELSI), East Timor, LaGrand, Arrest Warrant of 11 April 2000*).

- The Court on its own initiative considers a preliminary issue that has not formed the subject of a formal objection (*\*Serbian Loans, \*Prince von Pless Administration, South West Africa, Nuclear Tests, United States Diplomatic and Consular Staff in Tehran*).
- The parties by agreement ask the Court to join the preliminary objections to the merits, which the Court is then bound to do (*Certain Norwegian Loans*). Before the 1972 revision of the Rules, the Court might itself decide that preliminary objections should be joined to the merits (*\*Prince von Pless Administration, \*Pajzs, Csáky, Esterházy, \*Losinger, \*Panevezys-Saldutiskis Railway, Right of Passage over Indian Territory, Barcelona Traction*), but one of the chief amendments of the Rules effected by the ICJ has been to waive this possibility. Since ceasing to have the option of joinder of a preliminary objection to the merits, the Court has stated on one occasion that a reservation relating to multilateral treaties which accompanied a declaration of acceptance of its compulsory jurisdiction did not, in the circumstances of the case, possess an exclusively preliminary character. It subsequently reached its decision on the matter in the merits phase (*Military and Paramilitary Activities in and against Nicaragua, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Land and Maritime Boundary between Cameroon and Nigeria*).
- The applicant State itself raises a preliminary objection within the time-limit laid down for the delivery of its Memorial: such preliminary objection will then be dealt with in exactly the same way as if it had been raised by the respondent State (*Monetary Gold Removed from Rome in 1943*).

Preliminary objections have been more frequent in the ICJ than in the PCIJ and more of them proportionately have been successful. Some critics have even gone so far as to speak in this connection of formalism and timidity, but this is to forget that the ICJ, whose jurisdiction is neither compulsory nor universal, has to be particularly careful not to go beyond the limits laid down for it by governments and that preliminary objections are an essential safeguard available to litigants under all procedural systems. Since 1946, preliminary objections have been formally raised in 40 cases and have been successful in about two-thirds of them. Even where rejected, they have nevertheless delayed the final decision of the case by more than a year. In another 14 cases, even though preliminary objections were not formally raised, the Court had to deal with questions of jurisdiction or admissibility (in seven of

these cases one of the parties failed to appear before the Court). It should be observed in this regard that the new paragraph 2 of Article 79 of the Rules, as introduced in 2000, codified the practice whereby the Court may itself decide, before any preliminary objection, in the strict sense, has been filed by the Respondent, to organize a separate phase dealing with jurisdiction and admissibility if it is apparent from the President's consultation with the parties that the Respondent intends from the outset to dispute the Court's jurisdiction and/or the admissibility of the Application. In such circumstances, the Court will prescribe by Order time-limits for the filing of written pleadings relating to jurisdiction and admissibility, these being in principle restricted to a Memorial and a Counter-Memorial.

#### *Non-appearance*

The Statute also makes provision for cases where the respondent State does not appear before the Court, either because it totally rejects the Court's jurisdiction or for any other reason (Art. 53). Hence failure by one party to appear does not prevent proceedings in a case from taking their course, and this accords both with the Statute and with the principle of the equality of the parties, which requires that neither party should be penalized through the attitude adopted by the other. But in a case of this nature, the Court must satisfy itself that it has jurisdiction, taking all relevant matters into account. If it comes to the conclusion that it has, it must examine whether the claim of the applicant State is well founded in fact and law. Written and oral proceedings thus follow, in which the applicant State participates, and the Court then delivers judgment in the normal way. In some cases the non-appearance has occurred at every stage of the proceedings (*Fisheries Jurisdiction, Nuclear Tests, Aegean Sea Continental Shelf, United States Diplomatic and Consular Staff in Tehran*). In other cases the non-appearance has occurred only during certain phases (*Corfu Channel, Assessment of Amount of Compensation; Anglo-Iranian Oil Co., Interim Protection; Nottebohm, Preliminary Objection; Military and Paramilitary Activities in and against Nicaragua, Merits, Form and Amount of Reparation*). Sometimes the non-appearance has been followed by the applicant State, for one reason or another, discontinuing the proceedings (*\*Denunciation of the Treaty of 2 November 1865 between China and Belgium, \*Polish Agrarian Reform and German Minority, \*Electricity Company of Sofia and Bulgaria, Trial of Pakistani Prisoners of War*). This type of discontinuance may also relate not to the whole of the case but to questions which the Court had deferred for later examination, such as the determination of the amount of compensation (*United States Diplomatic and Consular Staff in Tehran, Military and Paramilitary Activities in and against Nicaragua*).



### *Provisional measures*

If at any time it considers that the rights which form the subject of its application are in immediate danger, the applicant State may request the Court to indicate interim measures of protection or provisional measures. When appropriate, the President may then call upon the parties to refrain from any acts that might jeopardize the effectiveness of any decision the Court may take on the request (e.g., *\*Prince von Pless Administration*, *\*Electricity Company of Sofia and Bulgaria*, *Anglo-Iranian Oil Co., United States Diplomatic and Consular Staff in Tehran*, *Military and Paramilitary Activities in and against Nicaragua*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Vienna Convention on Consular Relations*, *LaGrand*, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*). At all events urgent proceedings are held, taking priority over all others, in order to ascertain the views of the parties. They constitute a separate phase of the case and in general lead to a decision within three to four weeks, though this can also be much more rapid (e.g., *LaGrand*, 24 hours). The decision of the Court is embodied in an Order, which is read by the President at a public sitting.

The Court may decline to indicate provisional measures (*\*Factory at Chorzów*, *\*Legal Status of the South-Eastern Territory of Greenland*, *\*Polish Agrarian Reform and German Minority*, *Interhandel*, *Trial of Pakistani Prisoners of War*, *Aegean Sea Continental Shelf*, *Arbitral Award of 31 July 1989, Passage through the Great Belt*, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (*Libyan Arab Jamahiriya v. United States of America*), *Arrest Warrant of 11 April 2000*, *Certain Criminal Proceedings in France*). Already at this phase of the proceedings the respondent State may contest the Court's jurisdiction or may fail to appear; the Court will normally indicate provisional measures only if it finds that it has prima facie jurisdiction (*Fisheries Jurisdiction*, *Nuclear Tests*, *United States Diplomatic and Consular Staff in Tehran*). Chambers constituted by the Court can also indicate provisional measures, and this was done with particular rapidity in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*. The Court may also indicate provisional measures at the request of the respondent State. It may indicate measures different to those requested or on its own initiative.

In its Judgment of 27 June 2001 in the *LaGrand* case, the Court, for the first time in its history, stated that Orders indicating provisional measures have binding force.



### *Joinder of proceedings*

Should the Court find that parties to separate proceedings are submitting the same arguments and submissions against a common opponent in relation to the same issue, the Court may order a joinder of the proceedings. It follows that those parties will be allowed to appoint only a single judge *ad hoc*, where such an appointment is permissible (see above p. 29), and will submit joint pleadings and oral argument. Only a single judgment will be delivered. The Court may also, without effecting any formal joinder, direct common action in respect of any aspect of the proceedings. The PCIJ joined the proceedings in the \**Certain German Interests in Polish Upper Silesia*, \**Legal Status of the South-Eastern Territory of Greenland* and \**Appeals from Certain Judgments of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* cases. The ICJ joined the proceedings in the *South West Africa* and *North Sea Continental Shelf* cases, but did not do so in the *Aerial Incident of 27 July 1955* cases. Though the proceedings were not joined in the *Fisheries Jurisdiction* and *Nuclear Tests* cases or in the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, the cases proceeded in parallel and similar judgments were delivered on the same day. The same procedure has been followed in the cases concerning the *Legality of the Use of Force*, which are still pending. In the *Fisheries Jurisdiction* cases one of the applicant States had a judge of its nationality on the bench whilst the other had neither a judge of its nationality nor a judge *ad hoc*; in the *Nuclear Tests* cases the two applicant States appointed the same judge *ad hoc*. In one of the *Lockerbie* cases, the Member of the Court of British nationality considered that he should not take part in the case, and the United Kingdom thus appointed a judge *ad hoc* who sat in the phase regarding the jurisdiction of the Court and the admissibility of the application. In the *Legality of the Use of Force* cases, judges *ad hoc* appointed by those Respondents that did not have a judge of their nationality on the Bench sat in the phase of the cases devoted to provisional measures but not in the subsequent phase on preliminary objections.

### *Intervention*

The Statute of the Court (Art. 62) makes it possible for a State to intervene in a dispute between other States so as to provide against the possible effects of a decision in which it has not been involved, when it considers that it has an interest of a legal nature which may be affected by the decision in the dispute between those States. Any third State thus seeking to intervene in the case should normally file its request for permission to do so before the closure of the written

proceedings in the principal case. Fiji sought permission to intervene in the *Nuclear Tests* cases, as did Malta in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Italy in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Nicaragua in the case concerning the *Land, Island and Maritime Frontier Dispute* and Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia with respect to 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*, while the Philippines sought to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* and Equatorial Guinea in that concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*. Only Nicaragua and Equatorial Guinea were successful in their applications.

The Court's Statute stipulates that, where a case involves the interpretation of a multilateral convention to which States other than the applicant and respondent States are parties, the Registrar is required to notify all such States forthwith, and any State so notified may ask to intervene in the proceedings. A declaration of intervention may be made even though the Registrar has not given the notification, but it should normally be filed before the date fixed for the opening of the oral proceedings relating to the principal case. A number of States have presented Declarations of Intervention: Poland in the case concerning the *S.S. "Wimbledon"*, Cuba in the *Haya de la Torre* case and El Salvador in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia with respect to 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*. The intervention was admitted in the first two cases. The interpretation of the multilateral treaty that is given by the Court in its judgment will be binding upon any party that intervenes.

Certain States have indicated in their declaration accepting the compulsory jurisdiction of the Court that such acceptance does not extend to disputes relating to a multilateral treaty, unless all signatories to that treaty are parties to the proceedings.

Examples of a special agreement, an application instituting proceedings, a memorial, preliminary objections, orders and a press release may be found on the Court's website (<http://www.icj-cij.org>).

The official titles of cases decided on by the ICJ and its decisions involving the application of its Statute and Rules are published each year in the *I.C.J. Yearbook*. Pleadings (generally without annexes) and oral arguments are published in the *I.C.J. Pleadings* series and are also found on the Court's website.

# 5 the decision

There are three ways in which a case may be brought to a conclusion.

- A settlement between the parties: at any stage of the proceedings the parties may inform the Court that they have arrived at an agreement, and the Court or its President will then make an Order for the removal of the case from the Court's List (*\*Delimitation of the Territorial Waters between the Island of Castellorizo and the Coasts of Anatolia*, *\*Losinger*, *\*Borchgrave*, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*).
- Discontinuance: an applicant State may at any time inform the Court that it is not going on with the proceedings, or the two parties declare that they have agreed to withdraw the case. The Court then makes an Order for the removal of the case from the Court's List (e.g., *\*Denunciation of the Treaty of 2 November 1865 between China and Belgium*, *\*Prince von Pless Administration*, *\*Appeals from Certain Judgments of the Hungaro/Czechoslovak Mixed Arbitral Tribunal*, *\*Polish Agrarian Reform and German Minority*, *Protection of French Nationals and Protected Persons in Egypt*, *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient*, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Maritime Delimitation between Guinea-Bissau and Senegal*, *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi) (Democratic Republic of the Congo v. Rwanda)*). If the Court is not sitting the President will make the Order (e.g., *Electricité de Beyrouth Company*, *Trial of Pakistani Prisoners of War*, *Border and Transborder Armed Actions (Nicaragua v. Costa Rica)*, *Passage through the Great Belt (Finland v. Denmark)*, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America)*). Occasionally, the discontinuance may relate to only a part of the dispute which was not resolved in a previous phase and remains outstanding. This occurred, for example, in the determination of the amount of compensation in the cases concerning *United States*

*Diplomatic and Consular Staff in Tehran and Military and Paramilitary Activities in and against Nicaragua*. Two cases before the PCIJ ended in an express or tacit withdrawal in consequence of the Second World War (*\*Electricity Company of Sofia and Bulgaria, \*Gerliczy*). Finally, it should be noted that the term “discontinuance of proceedings” (“*désistement d’instance*”) will be used where the Applicant abandons — even if only temporarily — its pursuit of proceedings before the Court, without necessarily giving up its right to reinstitute the proceedings subsequently (e.g., *Barcelona Traction, Light and Power Company, Limited*, where Belgium withdrew its proceedings in 1961 and filed a new application in 1962; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, where proceedings were so withdrawn in 2001, while in 2002 the Democratic Republic of the Congo instituted new proceedings against Rwanda with similar subject-matter), as opposed to “discontinuance of right of action” (“*désistement d’action*”), where the Applicant — unlike in the previous examples — definitively renounces any right to seek to enforce before the Court its claims in respect of the issues which form the subject-matter of the proceedings (examples: *Vienna Convention on Consular Relations (Paraguay v. United States of America)*; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (*Libyan Arab Jamahiriya v. United States of America*)).

■ Judgment: the Court delivers a judgment that terminates the proceedings by upholding a preliminary objection or other interlocutory point or by a decision on the merits. This conclusion of the proceedings through the delivery of judgment, which is the most usual way in which a case is brought to an end, will now be considered in detail.

**The Court’s deliberations are secret**

After the parties have completed the statement of their case, it remains for the Court to proceed to its judgment in the manner best suited to inspire general confidence in the proper administration of international justice. Since the Court is composed of jurists coming from different backgrounds, the Court’s deliberations must be organized in such a way as to afford them all an equal opportunity to participate in the Court’s decision. In order to achieve as large as possible a consensus in so divergent a body, the decision-making process must reflect a joint effort. Accordingly, the system of designating a given judge to act as Rapporteur and to draw up a report on the case for his colleagues, which was in the beginning tried out by the PCIJ, was quickly abandoned. The Court gradually developed a procedure, which it felt useful to codify and make public. To this end it adopted a resolution concerning the internal judicial

practice of the Court, the first version of which was adopted in 1931, the second in 1936 (and continued in force in 1946), the third in 1968 and the fourth, the most recent, in 1976. It should however be noted that the Court has reserved its right to depart from the provisions of the resolution where necessary; this is what it did in certain cases to accelerate its deliberations. The deliberations are secret. This principle, which is generally accepted in judicial systems and applied in all international arbitrations, ensures that the Court's deliberations are unhampered and effective.

In terms of the 1976 resolution, the deliberations normally have five phases and take on average a little over three months:

- Once the public hearings are over, Members of the Court have a short time in which to study the arguments of the parties, following which there is a brief exchange of their preliminary views. The President submits in writing to the Members of the Court a list of these that in his opinion will arise in the case and they may make thereon any suggestions of their own. At their private meetings to deliberate on the case the judges sit as a committee *in camera* in a room of the Peace Palace in the new wing. No one else is allowed to be present except the Registrar and a few officials of the Registry to service the meetings. The minutes of these meetings, which are intended for the internal use of the Court alone, simply state the date, those present, and the subject discussed, without any comment.
- Each judge then has several weeks in which to prepare a written note giving his tentative views on the answers to the questions put by the President and any other judge and on the way in which he considers the case should be decided. The notes, which are in English or French, are translated by the Registry and distributed to all judges composing the Court for the case in question. They enable Members of the Court to gain a first idea of where the majority opinion may lie. The notes are strictly for the use of Members of the Court only.
- After having examined the written notes, Members of the Court resume their deliberations, which may extend over several meetings. At these, the judges express their views orally and usually in inverse order of seniority, i.e., beginning with any judges *ad hoc* there may be and ending with the Vice-President and President. They answer such questions as their colleagues may put to them. The sense of the coming decision and the make-up of the future majority now become more clearly discernible, but no vote is normally yet taken on any specific point. On the conclusion of this deliberation, a drafting committee of three Members of the Court is constituted. Two of its members are elected by secret ballot from among those judges whose personal views most closely reflect the opinion of the apparent majority, whilst the third is the President

ex officio, unless it seems that his views are in the minority, in which case the Vice-President takes his place; should both of them hold minority views, the third member of the drafting committee is also elected.

- The drafting committee then prepares a preliminary draft judgment in English and French, with the assistance of the Registry. The preliminary draft, which like the judges' notes is secret, is circulated to Members of the Court. They then have a short time in which they may make written suggestions for formal or substantive amendments relating to the English or French texts or to any discrepancies between the two languages. The drafting committee considers whether or not to accept these amendments and issues a fresh draft. The Court then gives this a first reading, during which it is discussed at several private meetings. Each paragraph is read aloud in both languages and, after discussion, is either left unchanged, amended or sent back to the drafting committee. Finally, an amended draft judgment is distributed to Members of the Court, which is then given a second reading, shorter than the first reading, at which it is taken page by page and adopted, with or without amendments.
- At the end of the second reading, a final vote is taken on the answers that it is proposed in the final draft judgment the Court should give to the points raised by the parties in their submissions. Members of the Court vote "yes" or "no" orally, in inverse order of seniority. Each decision is taken by an absolute majority of those judges present. No abstentions are allowed on any point voted upon. A judge who has not attended part of the oral proceedings or the deliberations but who has nevertheless not missed anything essential may participate in the vote. If the judge is in a fit condition to vote and wishes to do so but is physically incapacitated from attending the meeting, measures may be taken to enable him to participate, if necessary by correspondence. Should the votes be equally divided, which may happen where there is a judge *ad hoc* or a regular Member of the Court is not sitting, the President or the Member of the Court acting as President has a casting vote (e.g., \*"*Lotus*", *South West Africa*). The results of the vote are recorded in the minutes.

**A judgment is delivered in public**

A judgment is issued as a bilingual document with the English and French versions on opposite pages, the average length being about 50 pages in each language (the minimum so far has been 10 and the maximum 271). In style the Court tries to keep its judgments as simple as the nature of things will allow. In accordance with international legal practice, the Court endeavours to avoid employing words or phrases that are too much connected with any particular legal system. The judgment is divided

into paragraphs, which since 1966 have been numbered. Sub-headings are sometimes used (e.g., *Barcelona Traction, Appeal Relating to the Jurisdiction of the ICAO Council, Land, Island and Maritime Frontier Dispute, Land and Maritime Boundary between Cameroon and Nigeria, Avena and Other Mexican Nationals*). The Court has followed the practice of most Civil Law countries in dividing its judgment into three main parts:

- an introduction, which gives the names of the participating judges and the representatives of the parties, summarizes the proceedings without comment, and gives the parties' submissions;
- the grounds for the Court's decision, where those matters of fact and law that have led the Court to its decision are set forth in detail and the arguments of the parties are given careful and balanced consideration;
- the operative paragraph, which, after the words "For these reasons"<sup>1</sup>, gives the Court's actual decision on the requests made to it by the parties in their submissions and in any special agreement.

After the Court has taken a final vote on the operative provisions, it immediately takes two further decisions: which of the two languages in which the Court has drawn up its judgment, English and French, is to be the authentic version and when judgment is to be delivered.

- The authentic version is printed on the left-hand pages. If the whole of the proceedings, whether by agreement between the parties or otherwise, has been in one only of the Court's two official languages, the version in that language will become the authentic version of the judgment; where this is not the case the Court decides the matter. In any event, both versions issue from the Court itself (exceptions: \**Lotus*\* \**Brazilian Loans*).

- The judgment bears the official date of the day on which it is delivered, which is always some little time after its final approval by the Court in order to enable the Registry to notify the agents of the parties to attend, to invite journalists and the public and to have a provisional issue of the judgment prepared, which was previously printed but is today duplicated. During this brief interval the Court's decision is not communicated to anyone, be it the United Nations Secretariat or the parties. The PCIJ did not accede to the request made to it in a special agreement to communicate its decision unofficially to the parties between the end of its deliberations and the delivery of judgment (\**Free Zones of Upper Savoy and the District of*

<sup>1</sup> By way of exception, the operative provisions of the Judgment delivered in 1970 in the *Barcelona Traction* case begin with the word "Accordingly", and those of the Judgment of 1992 in the case concerning the *Land, Island and Maritime Frontier Dispute* refer, in each of the eight paragraphs of its operative part, to the paragraphs containing the directly relevant grounds.



Gex). The ICJ for its part has found itself obliged to point out that any making, circulation or publication of statements anticipating what its decisions will be is incompatible with the good administration of justice (*Nuclear Tests*).

By contrast with the practice of international arbitral tribunals, the delivery of a judgment by the ICJ is given maximum publicity. It takes place at a public sitting held in the Great Hall of Justice of the Peace Palace. Those judges who participate in voting on the judgment are present unless prevented by serious reasons from attending; a quorum of nine judges must be present. The President reads the judgment, with the exception of the formal summary of the proceedings, in one of the Court's two official languages. Towards the end of his reading, the agents of the parties are each handed a copy of the judgment signed by the President and Registrar and sealed with the Court's seals; these two copies, together with a third copy, also signed and sealed, that is retained in the Court's archives, constitute the official copies of the judgment. On occasion, because of the length of the judgment, the President does not read it in its entirety. In such cases, he indicates which passages have been omitted and gives a brief summary of them. When the President has concluded, the Registrar reads the translation of the operative provisions and the text of the judgment is distributed to journalists and placed on the Court's website. The Registry prepares a brief press release for journalists and a detailed summary of the decision to be used by scholars and practitioners. These documents do not commit the Court. They are sent to numerous recipients and, by the most expeditious means, to the Office of Public Information of the United Nations. The Secretary-General is personally informed of the decision.

Generally within a few months, the judgment is published in printed form in a fascicle of the *Reports of Judgments, Advisory Opinions and Orders*, which is sent by the Registry to, amongst others, the governments of those States that are entitled to appear before the Court, and is put on sale to the public. In order that those who are particularly interested in the case may be fully informed as to the nature and origin of the facts and arguments on which the Court based its decision, the documents in the case are later printed and published in the *Pleadings, Oral Arguments, Documents* series. These volumes contain, in the original language only, the parties' written pleadings and the verbatim records of the public sittings, together with such further documents, annexes and correspondence as are considered essential to illustrate the Court's decision.

#### *Separate and dissenting opinions*

The 1978 Rules as amended in 2000 (see p. 20 above) stipulate that each judgment shall indicate the number and names of the judges



constituting the majority. Judgments under previous Rules give only the number voting for and against each point of the operative provisions of the Court's decision, without stating who has voted which way. It has however always been recognized in the Statute that individual judges are entitled to append their own opinions if they so wish. Some judges have preferred never to do so. This sometimes made it impossible in past judgments to work out which judge voted which way (e.g., *Right of Passage over Indian Territory*, *Barcelona Traction*, *Nuclear Tests*). If the operative provisions are made up of several distinct points, a vote can be taken on each of them separately.

Judges' opinions may take various forms:

- A dissenting opinion states the reason why a judge disagrees, on one or more points, with the Court's decision, i.e., with the operative provisions and the reasoning of the judgment, and has in consequence voted against either the judgment as a whole or what that judge sees as vital aspects of the operative provisions.
- A separate opinion is written by a judge who has voted in favour of the Court's decision, and thus in favour of the operative provisions as a whole or in favour of aspects which he considers to be vital, but who finds himself in disagreement with all or some of the Court's reasoning or has been led to vote in favour of the judgment by a different method of reasoning or for additional reasons; there can thus be separate opinions even in those extremely rare cases where the Court's decision is unanimous (e.g., *Minquiers and Ecrehos*, *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*), *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Land, Island and Maritime Frontier Dispute*, *Aerial Incident of 3 July 1988, LaGrand*).
- A declaration is usually a brief indication of concurrence or dissent.

Since an opinion may be a dissenting opinion in some respects and a separate opinion in others, it is left to its author to decide which title shall be given to it. The matter is of some importance, particularly when the operative part of the judgment consists of several paragraphs on which separate votes have been taken. Two or more Members of the Court may join together to write a joint opinion. Those Members of the Court who wish to file opinions are given an opportunity to do so between the end of the first reading and the beginning of the second, so that the drafting committee can take account of them in drafting its last version of the judgment, which must be submitted to the Court for final adoption. Declarations and opinions are printed after each judgment in their original language, together with a translation by the Registry. On average they number six and represent an additional hundred or so pages in each language

although they have been known to total as many as 13 — the most being in the *South West Africa* cases (454 pages or ten times the length of the judgment itself), *Military and Paramilitary Activities in and against Nicaragua* (around 450 pages or three times the length of the judgment), *Legality of the Threat or Use of Nuclear Weapons* (325 pages or eight times the length of the advisory opinion) and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (343 pages or almost three times the length of the judgment). The declarations and separate or dissenting opinions appended to the Court's decisions are presented according to the seniority of their authors, irrespective of the title given to them. The authors of opinions and declarations sign their opinions in the original copies of the judgment. It is generally considered that they should be confined to points touched upon in the majority view and should be restrained in tone. The desirability of employing at an international level a system which is unknown in the legal procedures of some countries has been disputed and whether this is more likely to strengthen or weaken the authority and cohesion of the Court has been argued, whilst the way in which the system nowadays operates has sometimes attracted criticism. The fact remains that many consider it an essential safeguard of freedom of expression and the good administration of justice<sup>1</sup>. As the Court itself has had occasion to stress,

“an indissoluble relationship exists between such decisions and any separate opinions, whether concurring or dissenting, appended to them by individual judges. The statutory institution of the separate opinion has been found essential as affording an opportunity for judges to explain their votes. In cases as complex as those generally dealt with by the Court, with operative paragraphs sometimes divided into several interlinked issues upon each of which a vote is taken, the bare affirmative or negative vote of a judge may prompt erroneous conjecture which his statutory right of appending

<sup>1</sup> Sometimes judges append declarations or separate or dissenting opinions to Orders of the Court indicating provisional measures, recording a discontinuance of the proceedings, finding that it is for the full Court or for a chamber formed to deal with a case to decide whether to grant an application for permission to intervene, and even providing for procedural matters or relating, for example, to the constitution of a chamber (*Fisheries Jurisdiction*, *Nuclear Tests*, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *Military and Paramilitary Activities in and against Nicaragua*, *Land, Island and Maritime Frontier Dispute*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Fisheries Jurisdiction (Spain v. Canada)*, *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*, *Vienna Convention on Consular Relations, LaGrand*, *Legality of Use of Force, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Arrest Warrant of 11 April 2000, Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*).

an opinion can enable him to forestall or dispel . . . Not only do the appended opinions elaborate or challenge the decision, but the reasoning of the decision itself, reviewed as it finally is with knowledge of the opinions, cannot be fully appreciated in isolation from them." (General Assembly doc. A/41/591/Add.1 of 5 December 1986, Annex II.)

**A judgment is binding on the parties**

So far as the parties to the case are concerned, a judgment of the Court is binding, final and without appeal. This principle applies to all the Court's judgments, whether delivered by a full bench of the Court or by a Chamber, whether delivered by the ICJ when hearing a case brought directly to it or on appeal from another tribunal (*\*Peter Pazmany University, \*Pajzs, Czáky, Esterházy, Appeal Relating to the Jurisdiction of the ICAO Council*), whether the judgment actually states how the dispute is to be resolved or merely states the principles applicable (*North Sea Continental Shelf*) and whether or not it makes any award of costs (these have never actually been awarded) or damages (*\*S.S. "Wimbledon", \*Treaty of Neuilly, Corfu Channel*). The PCIJ always took the view and the ICJ has always taken the view that it would be incompatible with the spirit and the letter of the Statute and with judicial propriety to deliver a judgment the validity of which would be subject to the subsequent approval of the parties or which would have no practical consequences so far as their legal rights and obligations were concerned (*\*Free Zones of Upper Savoy and the District of Gex, Northern Cameroons*).

By signing the Charter, a State Member of the United Nations undertakes to comply with any decision of the International Court of Justice in a case to which it is a party. Other States entitled to appear before the Court undertake the same obligation either by acceding to the Statute or by lodging a declaration to this effect with the Registry (see above p. 36). Since, furthermore, a case can only be submitted to the Court and decided by it if the parties have in one way or another consented to its jurisdiction over the case in question, it is rare for a decision not to be implemented. Generally speaking, those States which accept the jurisdiction of the Court are ready to comply with its decisions. A State — whether a Member of the United Nations or not — which contends that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court may lay the matter before the Security Council, which is empowered to recommend or decide upon the measures to be taken to give effect to the judgment (Article 94 of the Charter).

Since a decision of the Court affects the legal rights and interests solely of the parties to the case and only in that particular case, it

follows that the principle of *stare decisis* (the binding nature of precedents) as it exists in Common Law countries has no place in international law. It is nevertheless reasonable to suppose that where the ICJ has decided a case it would have to have serious reasons for thereafter deciding in a similar case to adopt a different approach, deriving for example from the progress and development of international law. Moreover, the Court often cites, in support of its reasoning, its or its predecessor's pronouncements in previous cases, though it has been careful to refrain from any expressions indicating that it was bound to comply with them. It thus maintains a certain consistency in its decisions. This also enables it to influence the attitude of States towards questions that have already been dealt with by the Court. States may derive guidance from principles laid down by the Court (e.g., the method of delimiting Norwegian territorial waters in the *Fisheries* case). The Court in its turn may then find itself obliged to apply an international custom, to the making of which it has itself contributed. In short, a judgment of the Court does not simply decide a particular dispute but inevitably also contributes to the development of international law. Fully aware of this, the Court takes account of these two objectives in the substance and wording of its judgments.

The ultimate aim of the Court, where there is a conflict, is to open the road to international harmony. The mere fact of bringing a dispute, or at any rate its legal aspect, to the Court already constitutes a step towards pacification. Although the passage of time and the confidentiality that attends the early stages of the proceedings will further conduce towards a calmer atmosphere, and governments are entitled to hope that the Court's decision, whichever way it may go, will enable them to bring their dispute to an honourable conclusion, nevertheless, the mere fact that the case has been submitted to the Court means that the result cannot be clearly foreseen and that good arguments exist on both sides. Naturally each side is convinced of the justice of its case and cherishes the hope that the Court will enable it to achieve that justice. But whilst the ICJ does everything in its power to spare feelings, it is clearly impossible for it to please everybody, still less to favour any party. This is, indeed, inherent in the role of a court.

**A judgment is binding only as between the parties**

A decision of the Court has no binding effect with respect to any dispute other than the one it decides, nor as between States other than the parties to the case (Article 59 of the Statute of the Court). However, it may be that a judgment although not binding upon another State indirectly affects its interests. For instance, the interpretation by the Court of a multilateral

convention cannot be completely ignored by signatory States other than the parties to the proceedings before the Court. In the *Monetary Gold Removed from Rome in 1943* and *East Timor* cases, the Court set a limit to this, by refusing to pronounce upon the merits in two cases in which its decision would in fact have affected the legal interests of another State.

**Interpretation and revision of a judgment**

Where the Court has had jurisdiction to deliver a judgment it will also have jurisdiction to interpret or revise that judgment:

- The Court may, at the request of either party, interpret one of its judgments where there is a divergence of views between the parties as to the meaning and ambit of what the Court has decided with binding force. In some cases, the Court has refused such a request (*\*Treaty of Neuilly, Asylum*). In other cases, it has carried out the request — at least to some extent (*\*Factory at Chorzów, 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)*).
- Should a matter come to light of which the Court was until then unaware and which is of such a nature as to be a decisive factor, either party may request that the judgment be revised. It is further necessary that the requesting party should itself have been unaware of this new fact and that this should not have been through its own negligence, whilst the request for revision must be submitted within six months of the discovery of the new fact and within ten years of the delivery of the judgment (*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)*, *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*). No such application for revision has as yet, however, been found to be admissible.

The resolution concerning the International Judicial Practice of the Court is reproduced in the series *I.C.J. Acts and Documents*.

The *I.C.J. Yearbook* states each year what action has been taken pursuant to decisions of the Court.

# 6 advisory opinions

Since States alone have capacity to appear before the Court, public international organizations cannot as such be parties to any contentious proceedings, nor, indeed, to any case properly so called. It has been proposed from time to time that they be given this power, but nothing so far has come of this. If a question arises concerning the interpretation or implementation of their constitutions or of conventions adopted in pursuance thereof, it is for their member States to bring contentious proceedings in the ICJ; in such a case the organization concerned is informed of the proceedings by the Registrar and receives copies of the pleadings (*Appeal Relating to the Jurisdiction of the ICAO Council, Aerial Incident of 3 July 1988, Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*). All that it can then do is to furnish the Court with relevant information. Public international organizations may also furnish information in other circumstances, either on their own initiative or at the request of the parties or of the Court itself. The constitutions of some (e.g., FAO, Unesco, WHO, ICAO, ITU, WIPO) or agreements between them and the United Nations stipulate that where they are requested to furnish information they are obliged to do so. The Rules of Court provide that time-limits for doing so may be imposed and that the parties to the case may comment on the information furnished. Only ICAO has furnished such written comments in the case concerning the *Aerial Incident of 3 July 1988*.

**Advisory opinions are given to public international organizations**

A special procedure, the advisory procedure, is, however, available to public international organizations and to them alone. Certain organs and agencies, at present 22 in number, have the right to ask the Court for an advisory opinion on a legal question.

■ Through the effect of Article 96 of the Charter of the United Nations, the General Assembly and Security Council have as it were inherited with respect to the ICJ a power which the Covenant of the League of

Nations previously conferred on the Assembly and Council of the League with respect to the PCIJ. In the time of the League, only the Council availed itself of this power, which then extended to "any dispute or question". Since 1947 it has applied to "any legal question" and it is above all the General Assembly of the United Nations that has made use of it, the Security Council having only once requested an advisory opinion.

■ Four other United Nations organs have been authorized by

**Organs and agencies entitled to ask  
the ICJ for an advisory opinion**

**United Nations (UN)**

- \*General Assembly
- \*Security Council
- \*Economic and Social Council
- Trusteeship Council
- Interim Committee of the General Assembly
- \*Committee on Applications for Review of Administrative Tribunal Judgements (until 1995)

**Other agencies**

- International Labour Organization (ILO)
- Food and Agriculture Organization of the United Nations (FAO)
- \*United Nations Educational, Scientific and Cultural Organization (Unesco)
- \*World Health Organization (WHO)
- International Bank for Reconstruction and Development (IBRD)
- International Finance Corporation (IFC)
- International Development Association (IDA)
- International Monetary Fund (IMF)
- International Civil Aviation Organization (ICAO)
- International Telecommunication Union (ITU)
- World Meteorological Organization (WMO)
- \*International Maritime Organization (IMO)<sup>1</sup>
- World Intellectual Property Organization (WIPO)
- International Fund for Agricultural Development (IFAD)
- United Nations Industrial Development Organization (UNIDO)
- International Atomic Energy Agency (IAEA)

Those organs and agencies that have asked for advisory opinions since 1946 are indicated by an asterisk.

<sup>1</sup> Previously known as the Inter-Governmental Maritime Consultative Organization (IMCO).



General Assembly resolutions to request advisory opinions of the Court with respect to “legal questions arising within the scope of their activities”, which represents an innovation as compared with the time of the League of Nations and the PCIJ, and two of those organs have availed themselves of the opportunity to do so.

- Sixteen specialized agencies, or entities assimilated thereto, are authorized by the General Assembly, in pursuance of agreements governing their relationship with the United Nations, to ask the ICJ for advisory opinions “on legal questions arising within the scope of their activities”. Here again, this represents an innovation by comparison with the time of the PCIJ, which, although it gave advisory opinions concerning the ILO, did so at the request of the Council of the League. Up to the present, however, only three agencies have availed themselves of this opportunity to ask the Court for an advisory opinion (Unesco, IMO and WHO).

The precise circumstances in which each agency may avail itself of the Court’s advisory jurisdiction are specified either in its constitutive act, constitution or statute (Constitution of the ILO, 9 October 1946; Constitution of the FAO, 16 October 1945; Constitution of the United Nations Educational, Scientific and Cultural Organization, 16 November 1945; Constitution of the WHO, 22 July 1946; Convention on the Inter-Governmental Maritime Consultative Organization, 6 March 1948, entered into force on 17 March 1958 and modified as from 22 May 1982; Statute of the IAEA, 26 October 1956, etc.), or in such particular instruments as its headquarters agreement or the convention governing its privileges and immunities. Advisory opinions may be requested relating to the interpretation of these texts or of the Charter of the United Nations, and may concern disagreements between —

- two or more organs or agencies *inter se* (e.g., the United Nations Economic and Social Council may submit to the Court “legal questions concerning mutual relations of the United Nations and specialized agencies”) which is a rather theoretical possibility since the entities entitled to seek advisory opinions have in general the same member States ;
- an organ or agency and one or more of its staff members ;
- an organ or agency and one or more of its member States ;
- two or more States Members of the same organ or agency *inter se*.

Although in the final analysis any decision taken by an international entity emanates from the member States, it is always through the intermediary of an organ of the entity, the task of which is to safeguard the collective interest, that a request for an advisory opinion must be made. It has been proposed that States should be given the right to ask for advisory opinions, but this considerable extension of the



Court's jurisdiction has not so far won acceptance<sup>1</sup>; neither have suggestions that the United Nations Secretary-General should be empowered to ask for advisory opinions.

Comparatively little use, however, has been made of the system of advisory opinions. The ICJ has delivered somewhat fewer opinions than its predecessor: 25 from 1948 to July 2004, against 27 from 1922 to 1935. It delivered about the same number of opinions up to and including 1956 (11) as it has done since that time (14). This decrease is to be explained by the fact that many more opinions relating to the consequences of the First World War were requested of the PCIJ (21) than were requested of the ICJ with respect to the consequences of the Second World War (3). Cases relating to decolonization (5) have not been sufficiently numerous to make up for this.

**Procedure in respect of advisory opinions is based on that in contentious proceedings**

The Court's procedure in advisory proceedings, although having distinctive features resulting from the special nature and object of the Court's advisory function, as just described, is based on the provisions in the Statute and Rules relating to contentious proceedings, to the extent that it recognizes them to be applicable.

*Request for advisory opinion*

Advisory proceedings begin with the filing of a written request for an advisory opinion. After suitable discussion, the organ or agency seeking the opinion will have embodied the question or questions to be submitted in a resolution or decision. An annex to the Rules of Procedure of the United Nations General Assembly recommends that advisory opinions be referred to the Sixth (Legal) Committee for advice, or at any rate to a joint committee containing some of its members. Similarly, when faced with the task of drawing up a request for an advisory opinion, the Unesco Executive Council has been assisted by the Secretariat, the IMCO Assembly has turned to its Legal Committee and the World Health Assembly has referred the matter to one of its main committees. Within an average of two weeks (though in the *Constitution of the Maritime Safety Committee of the IMCO* case two months and in the case concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* three months), the request is communicated to the Court under cover of a letter from

<sup>1</sup> It may be noted that the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 21 March 1986 (not yet in force), takes account of this limitation, providing that, in the event of disputes concerning certain articles arising between an international organization and a State party, the State may ask a competent organ or institution to apply to the Court and request an advisory opinion.

the United Nations Secretary-General or from the Director or Secretary-General of the entity requesting the opinion, addressed to the President of the ICJ or, in accordance with the relevant provisions of the Rules of Court, to the Registrar. The latter then immediately informs those States to which the Court is open. In urgent cases the Court will do all it can to speed up the proceedings.

#### *Written and oral proceedings*

In order that it may give its opinion with a full knowledge of the facts, the Court is empowered to hold written and oral proceedings, certain aspects of which recall the proceedings in contentious cases. In theory, the Court may do without such proceedings, but it has never dispensed with them entirely. A few days after the filing of the request, the Court draws up a list of those States and international organizations that will be able to furnish information relevant to the question before the Court<sup>1</sup>. The States so listed are not in the same position as the parties to contentious proceedings, nor will any participation by them in the advisory proceedings render the Court's opinion binding upon them. In general, the States listed are the member States of the organization requesting the opinion, while sometimes the other States to which the Court is open in contentious proceedings are also included. Any State not consulted by the Court may ask to be. It is rare, however, for the ICJ to allow international organizations other than the one that has asked for the opinion to participate in advisory proceedings (e.g., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*). In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court decided to accede to the requests to participate made by intergovernmental international organizations because it considered that they were likely to furnish relevant information. With respect to non-governmental international organizations, the only one ever authorized by the ICJ to furnish information did not in the end do so (*International Status of South West Africa*). The Court has rejected any such request by private parties (*International Status of South West Africa, Legal Consequences for States of the Continued Presence of South Africa in Namibia*).

The written proceedings are shorter but as flexible as in contentious proceedings between States. In case of urgency they may even be omitted entirely. The Court or its President makes an Order laying down a time-limit within which the States and organizations selected may file written statements if they so wish, and the Registrar so

<sup>1</sup> In the special circumstances of the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court decided that Palestine might also file a written statement and participate in the oral proceedings.

informs them. This time-limit, which on average is two months, may be extended at the request of any State or organization concerned (e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia, Legality of the Use by a State of Nuclear Weapons in Armed Conflict*). These statements have varied in both number and length. They must be in English or French (the longest, 456 pages, was in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case). These statements sometimes form the object of written comments. They are addressed to the Registrar, who has them translated for the use of the Court and forwards them to whom they may concern. Formerly they were printed, but nowadays they are duplicated or photocopied. The written statements and comments are regarded as confidential, but are generally made available to the public at the beginning of the oral proceedings.

States are usually invited to present oral statements at public sittings on dates fixed by the Court, but oral proceedings are not always held; for instance, in the *\*Polish Postal Service in Danzig and Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa* cases, none of the States called upon asked to make an oral statement. Where there are oral proceedings, they normally begin two months after the filing of the written statements and in general do not take more than a few sittings, though in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case there were 24 sittings, in the *Western Sahara* case 27 and in the cases concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* and the *Legality of the Threat or Use of Nuclear Weapons*, 13 sittings. States and organizations which take part in the hearings may or may not have submitted written statements. Their representatives before the International Court of Justice are not known as agents. The President normally calls once only on each organization and then on each country, either in alphabetical order or in the order laid down by the Court in response to suggestions by the participating States. The hearings take place in the same way as in contentious proceedings (see above pp. 56-60.)

The entity requesting the advisory opinion has a two-fold role to play in the proceedings, one aspect being compulsory and the other optional:

- The Director or Secretary-General of the requesting entity is required to send the Court at the same time as the request or as soon as possible thereafter all documents likely to throw light upon the question. These may be sent all at once or despatched separately. The documents thus forwarded to the Court are generally quite bulky, consisting as they do not only of documents of the organization itself relating to the origin of the request for an advisory opinion but also of introductory or explanatory notes.

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**States and organizations<sup>1</sup>  
which have submitted written or oral statements in connection with  
advisory proceedings before the ICJ (1946 to July 2004)**

|                |                  |                  |                             |
|----------------|------------------|------------------|-----------------------------|
| Algeria        | El Salvador      | Mauritania       | Switzerland                 |
| Argentina      | Federated States | Mexico           | Syrian Arab                 |
| Australia      | of Micronesia    | Morocco          | Republic                    |
| Azerbaijan     | Finland          | Namibia          | Thailand                    |
| Bangladesh     | France           | Nauru            | Tunisia                     |
| Belarus        | German           | Netherlands      | Turkey                      |
| Belgium        | Democratic       | New Zealand      | Uganda                      |
| Belize         | Republic         | Nicaragua        | Ukraine                     |
| Bolivia        | Germany          | Nigeria          | United Arab                 |
| Bosnia and     | Greece           | Norway           | Emirates                    |
| Herzegovina    | Guatemala        | Palau            | United Kingdom              |
| Brazil         | Guinea           | Pakistan         | United States               |
| Bulgaria       | Honduras         | Panama           | of America                  |
| Burkina Faso   | Hungary          | Papua New Guinea | Venezuela                   |
| Burundi        | India            | Philippines      | Viet Nam                    |
| Cameroon       | Indonesia        | Poland           | Yemen                       |
| Canada         | Iraq             | Portugal         | Yugoslavia                  |
| Chile          | Ireland          | Qatar            | Zaire                       |
| China          | Islamic Republic | Republic of      | Zimbabwe                    |
| Colombia       | of Iran          | Moldova          |                             |
| Costa Rica     | Israel           | Romania          |                             |
| Cuba           | Italy            | Russian          |                             |
| Cyprus         | Japan            | Federation       | UN                          |
| Czechoslovakia | Jordan           | Rwanda           | ILO                         |
| Czech Republic | Kazakhstan       | Samoa            | Unesco                      |
| Denmark        | Kuwait           | San Marino       | OAS                         |
| Democratic     | Lebanon          | Saudi Arabia     | OAU                         |
| People's       | Lesotho          | Senegal          | WHO                         |
| Republic of    | Liberia          | Solomon Islands  | European Union <sup>2</sup> |
| Korea          | Lithuania        | South Africa     | League of Arab              |
| Dominican      | Madagascar       | Spain            | States                      |
| Republic       | Malaysia         | Sri Lanka        | Organization of             |
| Ecuador        | Malta            | Sudan            | the Islamic                 |
| Egypt          | Marshall Islands | Sweden           | Conference                  |

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<sup>1</sup> Also Palestine (see note on p. 83).

<sup>2</sup> Presented by Ireland on behalf of the European Union.

- In addition, the Secretary-General of the United Nations has on occasion submitted written and/or oral statements on the dates laid down for so doing (e.g., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *Applicability of the Obligation to Arbitrate under*

*Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*). Furthermore, the Secretary-General has replied to written questions by Members of the Court (*Western Sahara*). The heads of other entities that asked for advisory opinions were expressly invited to supplement the documents referred to in the previous paragraph with a statement; the Director-General of Unesco did do so, but the Secretary-General of IMCO did not. An oral statement was made on behalf of the Director-General of WHO during the hearings on one of the requests submitted by that organization (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*).

After the end of the case, the written and oral statements of States and international organizations are published in full in their original language in the *Pleadings, Oral Arguments, Documents* series together with — as a rule — the documents lodged by the Director or Secretary-General of the entity that requested the opinion.

#### *Composition of the Court*

By the opening of the oral proceedings at the latest, decisions must be taken with respect to the composition of the Court (see above pp. 29-34):

- In several advisory proceedings, Members of the Court have refrained from sitting.
- In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* case and in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, a State raised objections to the presence on the bench of one or more Members of the Court, but these objections were dismissed by Orders made by the Court before the opening of the oral proceedings.
- The Rules of Court provide that if an “advisory opinion is requested upon a legal question actually pending between two or more States” (Art. 102, para. 3), the latter may be allowed to appoint judges *ad hoc*, the final decision on the matter resting with the Court. Whereas the PCIJ agreed to the appointment of judges *ad hoc* in six advisory cases between 1928 and 1932, only two requests of this kind have been received by the ICJ, namely in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* and *Western Sahara* cases. In the former case, after having heard observations on the question *in camera*, the Court

made an Order declining to accept the appointment of a judge *ad hoc*. In the latter case, in which two States — Mauritania and Morocco — asked to be allowed to appoint judges *ad hoc*, the Court heard observations on this question at public sittings and made an Order accepting one request and rejecting the other. The Court found that there appeared to be a legal dispute between Morocco and Spain relating to the territory of Western Sahara, so that the advisory opinion requested appeared to bear “upon a legal question actually pending between two or more States”, and thus to warrant the appointment of a judge *ad hoc*. On the other hand, there did not appear to be any legal dispute between Mauritania and Spain, so that the appointment of a judge *ad hoc* was not justified. At that time the membership of the Court included a judge of Spanish nationality.

- The 1978 Rules of Court (see pp. 20-21 above) make it plain that it is possible to appoint assessors in advisory proceedings.
- No specific provision is made for recourse to a chamber of the Court in respect of advisory proceedings.

#### *Delivery of the advisory opinion*

Advisory proceedings are concluded by the delivery of the advisory opinions. Advisory opinions are drawn up after the same kind of deliberations as precede judgments, and are divided in the same way into a summary of the proceedings, the Court’s reasoning and the operative provisions. On average they are slightly shorter. Declarations and separate or dissenting opinions may be appended to them. Advisory opinions are delivered in a manner similar to judgments (see above pp. 70-75). A signed and sealed copy of each opinion is kept in the Court’s archives and a second is despatched to the Secretary-General of the United Nations; if the request for an advisory opinion comes from another entity, a third signed and sealed copy is sent to its Director or Secretary-General. The opinion is printed in the two official languages of the Court in the reports of *Judgments, Advisory Opinions and Orders* series and copies are sent *inter alia* to those States to which the Court is open.

In the exercise of its advisory function, the ICJ has to remain faithful to the requirements of its judicial character and cannot depart from the essential rules that guide its activity as a court. It thus always has to begin by considering whether it has jurisdiction to give the requested opinion (seizure by an authorized organ; legal question arising, where appropriate, within the scope of the organ’s activity). In only one case, that of the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, did the Court decide that it lacked jurisdiction to answer the question submitted by the WHO. Once it has established that it has jurisdiction, the Court must consider whether there is any

reason why it should not exercise such jurisdiction. Although the ICJ has stated that "A reply to a request for an opinion should not, in principle, be refused", it may decide not to respond for "compelling reasons". The Court has often felt impelled, either *proprio motu* or at a State's request, to investigate whether certain features of the previous treatment of the subject-matter rendered it undesirable for the Court to pronounce upon it, whether the question really called for a reply, whether the request concerned a contentious matter and a State involved in that matter has not consented to the exercise of the Court's jurisdiction etc. It has generally come to a positive conclusion (e.g., *Conditions of Admission of a State to Membership in the United Nations, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Certain Expenses of the United Nations, Western Sahara, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*). No separate phase is devoted to such issues, but they are usually dealt with at the beginning of the reasoning of each advisory opinion. In the case concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* the ICJ stated at the outset of the public sittings that it had rejected one of several grounds put forward for its declining to deliver an opinion, but ruled on the others in the opinion itself. As for its predecessor, the PCIJ, only once, in the *\*Status of Eastern Carelia* case, did it decline to give an advisory opinion; the question put to it at that time concerned directly a controversy between two States, one of which, not a member of the League, had taken no part in the proceedings — hence to answer the question would have been tantamount to deciding the dispute without the consent of one of the States involved.

It is also conceivable that the requesting body may itself withdraw its request before any advisory opinion is delivered, but here again there has only been one instance, and that in the time of the PCIJ (*\*Expulsion of the Oecumenical Patriarch*).

**The special case of advisory opinions on applications for the review of judgments of the Administrative Tribunals of the United Nations (until 1995) and of the ILO**

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The task of the Administrative Tribunal of the United Nations and the Administrative Tribunal of the ILO is to decide disputes between international organizations and members of their staff with respect to the latter's contracts of employment and conditions of appointment and employment. The Administrative Tribunal of the United Nations has jurisdiction in respect of the United Nations, ICAO and IMO, and the Administrative Tribunal of the ILO in respect of the ILO itself, FAO, Unesco, WHO, ITU, WMO, WIPO, IAEA, etc. The statute of the



Administrative Tribunal of the ILO (like the statute of the Administrative Tribunal of the United Nations until 1995) provides that, in certain cases where the validity of a judgment is contested, an advisory opinion may be requested from the ICJ, and will then be binding.

As regards the Administrative Tribunal of the United Nations, a request to this effect could, under the system in force until December 1995, be framed by the Committee on Applications for Review of Administrative Tribunal Judgements, an organ of the General Assembly, which alone was empowered to apply to the ICJ. As regards the Administrative Tribunal of the ILO, the request for an advisory opinion may emanate either from the Governing Body of the ILO or from the Executive Board of the organization wishing to contest the judgment. The advisory procedure before the Court entails the submission of written statements, as in other cases, but has certain special features which derive from the need to respect the interests of the staff member affected by the judgment, for the sake of justice. Thus, since the staff member concerned has no standing to appear in person before the Court, he is allowed to prepare written observations and submit them to the Court through the chief administrative officer of his organization. The Court has not so far held any oral proceedings in such cases, but has given States and organizations which have filed written statements an opportunity to submit their written comments on each other's statements.

The Court has dealt with applications for advisory opinions under this procedure on four occasions: once on the application of the Executive Board of Unesco (*Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*) and three times by the Committee on Applications for Review of Judgements of the Administrative Tribunal of the United Nations (*Application for Review of Judgement No. 158 of the Administrative Tribunal of the United Nations, Application for Review of Judgement No. 273 of the Administrative Tribunal of the United Nations, Application for Review of Judgement No. 333 of the Administrative Tribunal of the United Nations*).

In the case of the Administrative Tribunal of the United Nations, the General Assembly decided, by resolution adopted on 11 December 1995, to delete Article 11 of the Tribunal's Statute laying down the review procedure, which is thus no longer applicable for judgments of the Tribunal delivered as from 1 January 1996.

**Characteristics of advisory opinions**

It is of the essence of the Court's advisory opinions that they are advisory, i.e., that, unlike the Court's judgments, they have no binding effect. The requesting organ, agency or organization remains free to give effect to the opinion by any means open to it, or not to do so. It is only in a few specific cases



that it is stipulated beforehand that an opinion shall have binding force (e.g., conventions on the privileges and immunities of the United Nations (see *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*), its specialized agencies and the IAEA, and the host agreement between the United Nations and the United States). The Court's advisory function is herein different from its function in contentious cases, and is also to be distinguished from the role played by the supreme court of certain countries as an interpreter of those countries' constitutions. It remains nevertheless that the authority and prestige of the Court attach to its advisory opinions and that where the organ or agency concerned endorses that opinion, that decision is as it were sanctioned by international law.

Chapter 8 contains a brief summary of the advisory cases brought to the Court.

For a list of the advisory opinions rendered by the Court, see below, annexes, pp. 236-237.

The names of the organs and agencies authorized to request advisory opinions, a list of the instruments by virtue of which such requests may be submitted, the official titles of advisory opinions, a summary of such opinions and action taken pursuant to them are published each year in the *I.C.J. Yearbook*. Written and oral statements are published in *I.C.J. Pleadings*; they are also published on the Court's website.

# 7 international law

## **The Court is an organ of international law**

The Court, the principal judicial organ of the United Nations, has described itself as an organ of international law; it is neither a legislative body nor an academic institution.

It dispenses justice within the limits that have been assigned to it. There is today no other judicial organ in the world which has the same capacity for dealing with the problems of the international community as a whole and offers States so wide a range of opportunities for promoting the rule of law.

From a summary of its judicial activity it can be seen how the ICJ has done all that it has deemed possible to fulfil its task of deciding legal disputes between States and assisting the operations of international organizations by giving them its opinions on legal questions. The disputes that have come before it have covered the most varied aspects of public and private law, have concerned all parts of the globe and have necessitated an examination of various legal systems and of wide-ranging State practice, as well as the internal law of international organizations. It will be seen that not every case with which it deals has to be of paramount significance, and that it is not necessarily every aspect of a particular case which has to be submitted for its decision. What matters is that the Court should help in resolving disputes and thereby contribute to the maintenance of peace and to the development of friendly relations among States.

## **The Court applies international law**

Article 38, paragraph 1, of the Statute of the Court declares that the Court's "function is to decide in accordance with international law such disputes as are submitted

to it". In every case, after having determined which rules of international law are applicable to the case before it, it is the Court's duty to give its decision essentially by basing itself on those rules. Article 38, paragraph 1, goes on to provide that the international law to be applied by the Court is to be derived from the following sources:

“(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

- (b) international custom, as evidence of a general practice accepted as law ;
- (c) the general principles of law recognized by civilized nations ;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”.

The above is not an exhaustive statement of the foundations on which the Court can construct its decision. Some are listed, but not all.

For instance, the paragraph does not mention unilateral acts of international law, nor does it make reference to the decisions and resolutions of international organs, which very often contribute to the development of international law. It makes no mention of such principles or considerations as those of equity and justice, to which the Court is always entitled to have recourse, since this is implicit in the functions of a world tribunal. Nor is there any specific reference to the normal processes of judicial reasoning, to which the Court, as a judicial body, can always have recourse.

Whether the Court is deciding a case of a contentious nature, i.e., one concerning a dispute between States, or is engaged in advisory proceedings, i.e., giving an opinion in response to a request from an international organization, it applies the same sources of international law, and its decisions are invested with the same high authority since, in both instances, it is “laying down” the international law, even though the consequences of the decision may be different.

#### *Treaties and conventions*

The expression “international conventions” in Article 38, paragraph 1, is a broad one, and covers not only bilateral and multilateral treaties and conventions formally so called, but also all other international understandings and agreements, even of an informal nature, provided that they establish rules expressly recognized by the States parties to the dispute. The ICJ has emphasized that manifest acceptance or recognition by a State of a convention is necessary before the convention can be applied to that State. It often happens, however, that the language of a treaty or international agreement which is relied on before the International Court of Justice as containing rules especially recognized by the States parties to the dispute is not so plain and precise as to make it clear that such treaty or agreement is applicable to the circumstances of the case in question. As the decisions of the Court show, it will then be for the Court to interpret the instrument and to determine its scope and effect, in order to decide whether it can be applied. In practice, it falls to the Court to interpret a treaty or

agreement in at least three cases out of four. In doing so, it seeks in the first place to determine the usual and natural meaning of the words in their context, without, however, sticking too closely to the particular rules applicable under the procedural law of any legal system, and in that regard frequently refers to Article 31 of the Vienna Convention on the Law of Treaties. In its Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see below p. 195), the Court emphasized that

“an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”.

### *Custom*

The Court’s practice shows that a State which relies on an alleged international custom practised by States must, generally speaking, demonstrate to the Court’s satisfaction that this custom has become so established as to be legally binding on the other party. The attitude of judicial caution with respect to customary rules of international law is consistent with another trend in the Court’s decisions, viz., that the autonomy or sovereignty of a State should be respected unless the Court is duly satisfied that such autonomy or sovereignty is limited by rules that are binding on that State. In the *North Sea Continental Shelf* cases the ICJ stated, with respect to customary international law:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”

Similarly, in the case of the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* it recalled that “the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States”.

It also stated, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, where it found, owing to a reservation accompanying a declaration, that it could not deal with complaints based on certain multilateral treaties, that the reservation in question did not prevent it from applying the principles of customary international law. The fact that these principles

“have been codified or embodied in multilateral conventions does not mean they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions”.

Such principles

“continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated”.

#### *Judicial decisions*

Judicial decisions and the teachings of publicists do not stand on the same footing as the Court's other sources of law. They merely constitute a “subsidiary means for the determination of rules of law”. Their application is made subject to the provisions of Article 59 of the Statute, which stipulates that a decision of the Court has no binding force except between the parties and in respect of that particular case (see above pp. 75-77). It is thus clear that, subject to this reservation, the expression “judicial decisions” covers not only the decisions of municipal or international courts, but also those of the ICJ and the PCIJ. Both make frequent reference, in the reasoning of their decisions, to their own jurisprudence. Moreover, the ICJ often cites its predecessor. Both refer only rarely to awards made by arbitral tribunals (e.g., *Maritime Delimitation in the Area between Greenland and Jan Mayen*, *Gabčíkovo-Nagymaros Project*, *Kasikili/Sedudu Island* and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*).

#### *Ex aequo et bono*

Paragraph 2 of Article 38 of the Statute provides that paragraph 1 of that Article “shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto”. Although this provision has never been applied, it calls for comment. Its effect is that, by consent of the States parties, the Court may proceed to settle a dispute without strict regard for the existing rules of international law, but in the light of the justice and merits of the case. In the absence of the consent of the contesting States, the Court cannot follow this course, but must apply the law, in accordance with the provisions of paragraph 1 of Article 38. The decision of a case *ex aequo et bono* must be distinguished from: (a) the application of the general principles of law; and (b) the application of equitable principles. In both the latter instances (a) and (b), the Court is of necessity bound to keep within the limits of the existing law, whereas in the case of an exercise of its *ex aequo et bono* power with the consent of the parties, the Court may disregard the strict requirements of the law, and may even set them aside. The distinction has frequently been mentioned by the Court itself in its decisions (e.g., *North Sea Continental Shelf*, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Frontier Dispute (Burkina Faso/Republic of Mali)*). Nevertheless, the exercise of the *ex*

*aequo et bono* power with such consent is subject to certain limits. Firstly, the Court remains under a duty to act judicially, and, secondly, the Court would, in the absence of special circumstances, be careful not to infringe the standards of justice or other accepted norms of equity and reasonableness prevailing in the international community.

**The Court contributes to the development of the international law which it applies**

The ICJ, in fulfilling its task of resolving legal disputes among States and assisting international organizations to function effectively and justly in their various fields of activity, emphasizes and affirms the role of international law in international relations. It also contributes to the development of this law.

The confidence placed in the Court by States at any given historical period is undoubtedly bound up with the nature of the international law which it is its task to apply. However, this law is continually evolving, and this evolution has taken on a new dimension in recent decades. Moreover, alongside the development of the rules of international law and their adaptation to present-day circumstances, the actual field of application of this law is continually expanded by States in line with the increasing needs of their mutual relations. The Court has always been aware of the importance of the developing aspect of the international law which it interprets and applies. As early as 1949, the Court recognized that the influence exercised by the Charter of the United Nations represented a "new situation"; in its Advisory Opinion regarding *Reparation for Injuries Suffered in the Service of the United Nations* it commented:

"The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law."

Since then the Court has rendered many decisions which expressly recognize the evolution of international law and the relevance of this factor for the determination of the law which is applicable to the case in question. The cases that have come before the ICJ have covered the most varied aspects of international law. However, the Court's decisions are not confined to recording the evolution of international law and, on many occasions, they have also contributed to that evolutionary process. By interpreting the international law in force and applying it to specific cases, the Court's decisions clarify that law, and thereby frequently pave the way for the progressive development of international law by States, since the Court's decisions are in themselves legal acts and are known both to States and to the international agencies entrusted with the continuing task of codification and progressive development of international law, particularly under the

auspices of the United Nations. Those who carry out this task owe an immense debt to the jurisprudence of the Court. Indeed, the role of the ICJ has taken institutional shape, to some degree, in the statute of the International Law Commission of the United Nations, according to which the Commission prepares its draft articles and submits them to the General Assembly of the United Nations with a commentary which includes a full summary of the precedents and other relevant material, including the "judicial decisions". As will be seen from the drafts of the International Law Commission, the decisions of the International Court of Justice take pride of place in the Commission's presentation of the relevant judicial decisions.

In the area of *decolonization*, for example, the Court has had occasion to stress the primordial role of the principle of self-determination, viewed as an ongoing process (case of the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Western Sahara*). Nor has it hesitated to state that

"to establish . . . and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights"

is a flagrant violation of the purposes and principles of the United Nations Charter (*Legal Consequences for States of the Continued Presence of South Africa in Namibia*).

In a more recent case (*East Timor (Portugal v. Australia)*), the Court has even recognized that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" and that the corresponding principle is "one of the eventual principles of contemporary international law" (see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*).

That pronouncement recalls a passage, now considered a classic, in which the Court accorded general recognition to the obligations which are incumbent upon States towards the international community as a whole ("obligations *erga omnes*"), which it describes as follows:

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination." (*Barcelona Traction, Second Phase*).

The contributions made by the Court's jurisprudence in regard to the *prohibition on the use of force* and to *self-defence* are particularly significant. As early as the end of the Second World War and the adoption of the Charter of the United Nations, the Court affirmed that

a policy of force "such as has, in the past, given rise to most serious abuses . . . cannot, whatever be the present defects in international organization, find a place in international law" (*Corfu Channel*). In its 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court had the opportunity to examine in detail the international rules on the subject, confirming that they were customary in nature and explaining the conditions for the exercise of self-defence. It confirmed those rules ten years later in the context of its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. This subject remains at the heart of the Court's concerns: The Court has, for example, had occasion to examine questions of self-defence in the *Oil Platforms* case, as well as in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. At the time of writing of this publication, other cases on the Court's List also involve questions relating to the legality of the use of force (*Legality of Use of Force*, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*).

Several judgments of the ICJ have also had an impact on the development of the *law of the sea* and on the work of the conferences convened by the United Nations to deal with this subject. Since 1951, when the International Law Commission undertook the codification of this subject, the Court has defined a number of basic criteria governing the delimitation of the territorial sea: the drawing of baselines must not depart to any appreciable degree from the general direction of the coast; maritime expanses lying within these lines must be sufficiently linked to the land domain to be subject to the régime for internal waters; and there may be occasion to take account of the specific economic interests of the region in question, where the significance of these is clearly attested by lengthy usage. The Court has also rejected the view that, in international law, bays having a mouth more than 10 nautical miles wide cannot be treated as internal waters unless they are so-called historic bays (*Fisheries case (United Kingdom v. Norway)*). The ICJ also, at a time when the Third United Nations Conference on the Law of the Sea had hardly started work, made the following statement on the question of the boundaries of the fisheries jurisdiction of States:

"It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all." (*Fisheries Jurisdiction*.)

The Court has also taken an active part in the development of the



principles and rules of international law which apply to maritime expanses under State jurisdiction. It has, for instance, had occasion to analyse some of the new aspects of the law of the sea which were considered by the Third Conference on that subject, and, before the conclusion of the Montego Bay Convention of 10 December 1982, affirmed that the concept of the "exclusive economic zone" was now part of international law (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*). Both the Court and one of its Chambers have also applied new principles in the definition and delimitation of areas of continental shelf between States with adjacent or opposite coasts (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Continental Shelf (Libyan Arab Jamahiriya/Malta)*) and of the continental shelf and exclusive fisheries zones (*Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *Maritime Delimitation in the Area between Greenland and Jan Mayen* (with respect to fishery zones)).

A number of recent cases (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Land and Maritime Boundary between Cameroon and Nigeria*) have seen the Court once again applying the rules of maritime delimitation, thereby helping to clarify them. While the contemporary law of the sea distinguishes between the delimitation of territorial seas, on the one hand, and the delimitation of the continental shelf and fishery zones or exclusive economic zones, on the other, the Court's jurisprudence shows that similar rules apply in all cases. Except where the maritime delimitation has been made by an agreed instrument (in which case the provisions of that instrument should be relied upon), the Court first determines the course of the equidistance line (which requires that appropriate base-lines and base points be identified and that the relevant zone and coasts be taken into consideration), and then considers whether any special circumstances call for an adjustment of that line.

The *law of treaties* is one of the many other fields in which the Court's continuing awareness of developing legal trends has found expression. As early as 1951, after referring to the traditional views concerning the validity of reservations to multilateral treaties, the Court noted the emergence of new trends constituting "manifestation of a new need for flexibility in the operation of multilateral conventions" (case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*). The ICJ has also rejected rigid approaches to the interpretation of treaties. As mentioned above (pp. 93-94), it has emphasized that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation". Indeed, well before the entry into force of the Vienna Convention on the Law of Treaties, the Court unhesitatingly described it as an instrument which, in many respects, represented a codification of customary law. In the *Fisheries Jurisdiction* cases it stated (in the judgment concerning its own jurisdiction):

“This principle [that a change of circumstances will render a treaty ineffective], and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may, in many respects, be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.”

On many occasions the ICJ, like its predecessor the PCIJ, has contributed to the definition of the principles governing *State responsibility*, as regards both the subjective and the objective aspects of an internationally wrongful act, as well as the consequences of such an act. Decisions of the Court concerning the imputability of an act to a State (*United States Diplomatic and Consular Staff in Tehran, Military and Paramilitary Activities in and against Nicaragua*) did not pass unnoticed in the process of codifying the rules relating to State responsibility for internationally wrongful acts. At a time when codification efforts have intensified, the Court has recently been called upon to rule on various issues concerning State responsibility, including the question of: the relationship between the wrongful act and prior conduct of a preparatory character, a state of necessity as a ground for precluding the wrongfulness of an act (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Gabčíkovo-Nagymaros Project*), the conditions governing the taking of countermeasures (*Gabčíkovo-Nagymaros Project*) and reparation for the injury and assurances and guarantees of non-repetition (*Gabčíkovo-Nagymaros Project, LaGrand, Arrest Warrant of 11 April 2000*).

The Court recently reaffirmed that these rules (notably those codified in Articles 60 to 62 of the Vienna Convention), which it applied in the context of the *Gabčíkovo-Nagymaros Project*, are customary in nature. Moreover, in its Judgment in that case the Court provided some elucidation of the relationship between the law of treaties and the law of State responsibility:

“[T]hose two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.”

In the *economic field* also, the ICJ has made its contribution to the progressive development of international law. For example, in the protection of foreign investments, it has defined the state of the applicable law, pointed to its deficiencies, and indicated ways of

remedying these, thus undeniably breaking new ground for the codification of this law, as can be seen from the following excerpts:

“Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests.

It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject.

Thus, in the present state of the law, the protection of shareholders requires that recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed. States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements.” (*Barcelona Traction, Second Phase.*)

In recent years the Court has also twice had occasion to address the issue of *environmental law* and its development. Thus, while noting that existing norms relating to the safeguarding and protection of the environment did not specifically prohibit the use of nuclear weapons, the Court nonetheless emphasized that international law indicates important environmental factors that are relevant to the implementation of the rules of law governing armed conflicts or to an assessment of the lawfulness of self-defence. In this regard, it stated *inter alia* that

“the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.” (*Legality of the Threat or Use of Nuclear Weapons.*)

Barely a year later, citing this passage, the Court reaffirmed “the

great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind”, and made the following observation:

“in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.” (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*.)

Many other decisions of the ICJ, in areas as diverse as *asylum*, the *law of international organizations*, the *right of passage*, *nationality*, *territorial sovereignty*, *diplomatic and consular relations* etc., could also be cited to illustrate its readiness to recognize the evolving nature of the law which it applies, and the significance which it attaches to the development of this law.

See the Explanatory Note on p. 231 for the mode of termination of contentious cases before the ICJ.

The summaries and official modes of citation of decisions of the Court are published each year in the *I.C.J. Yearbook*.



# 8 cases brought before the Court

Between 1946 and 31 July 2004, the Court was called upon to deal with 106 contentious cases in which it delivered 80 Judgments and made 385 Orders. During the same period, it dealt with 24 advisory cases, in which it delivered 25 Advisory Opinions and made 35 Orders. The remainder of this chapter consists of very brief summaries of these cases and of the decisions reached with regard to each one<sup>1</sup>.

## 1. Contentious cases

### 1.1. *Corfu Channel (United Kingdom v. Albania)*

This dispute gave rise to three Judgments by the Court. It arose out of the explosions of mines by which some British warships suffered damage while passing through the Corfu Channel in 1946, in a part of the Albanian waters which had been previously swept. The ships were severely damaged and members of the crew were killed. The United Kingdom seised the Court of the dispute by an Application filed on 22 May 1947 and accused Albania of having laid or allowed a third State to lay the mines after mine-clearing operations had been carried out by the Allied naval authorities. The case had previously been brought before the United Nations and, in consequence of a recommendation by the Security Council, had been referred to the Court. In a first Judgment (25 March 1948), the Court dealt with the question of its jurisdiction and the admissibility of the Application, which Albania had raised. The Court found, *inter alia*, that a communication dated 2 July 1947, addressed to it by the Government of Albania, constituted a voluntary acceptance of its jurisdiction. It called to mind on that occasion that the consent of the parties to the exercise of its jurisdiction was not subject to any particular conditions of form and stated that, at that juncture, it could not hold to be irregular a proceeding not precluded by any provision in those texts. A second

<sup>1</sup> These summaries in no way involve the responsibility of the Court and cannot be quoted against even the texts of the relevant decisions, of which they do not constitute an interpretation.

Judgment (9 April 1949) related to the merits of the dispute. The Court found that Albania was responsible under international law for the explosions that had taken place in Albanian waters and for the damage and loss of life which had ensued. It did not accept the view that Albania had itself laid the mines or the purported connivance of Albania with a mine-laying operation carried out by the Yugoslav Navy at the request of Albania. On the other hand, it held that the mines could not have been laid without the knowledge of the Albanian Government. On that occasion, it indicated in particular that the exclusive control exercised by a State within its frontiers might make it impossible to furnish direct proof of facts incurring its international responsibility. The State which is the victim must, in that case, be allowed a more liberal recourse to inferences of fact and circumstantial evidence; such indirect evidence must be regarded as of especial weight when based on a series of facts, linked together and leading logically to a single conclusion. Albania, for its part, had submitted a counter-claim against the United Kingdom. It accused the latter of having violated Albanian sovereignty by sending warships into Albanian territorial waters and of carrying out minesweeping operations in Albanian waters after the explosions. The Court did not accept the first of these complaints but found that the United Kingdom had exercised the right of innocent passage through international straits. On the other hand, it found that the minesweeping had violated Albanian sovereignty, because it had been carried out against the will of the Albanian Government. In particular, it did not accept the notion of "self-help" asserted by the United Kingdom to justify its intervention. In a third Judgment (15 December 1949), the Court assessed the amount of reparation owed to the United Kingdom and ordered Albania to pay £844,000 (see No. 1.12 below).

### 1.2. Fisheries (*United Kingdom v. Norway*)

The Judgment delivered by the Court in this case ended a long controversy between the United Kingdom and Norway which had aroused considerable interest in other maritime States. In 1935 Norway enacted a decree by which it reserved certain fishing grounds situated off its northern coast for the exclusive use of its own fishermen. The question at issue was whether this decree, which laid down a method for drawing the baselines from which the width of the Norwegian territorial waters had to be calculated, was valid international law. This question was rendered particularly delicate by the intricacies of the Norwegian coastal zone, with its many fjords, bays, islands, islets and reefs. The United Kingdom contended, *inter alia*, that some of the baselines fixed by the decree did not accord with the general direction of the coast and were not drawn in a reasonable manner. In its Judgment of 18 December 1951, the Court found that, contrary to the submissions

of the United Kingdom, neither the method nor the actual baselines stipulated by the 1935 decree were contrary to international law.

*1.3. Protection of French Nationals and Protected Persons in Egypt (France v. Egypt)*

As a consequence of certain measures adopted by the Egyptian Government against the property and persons of various French nationals and protected persons in Egypt, France instituted proceedings in which it invoked the Montreux Convention of 1935, concerning the abrogation of the capitulations in Egypt. However, the case was not proceeded with, as the Egyptian Government desisted from the measures in question. As France decided not to press its suit and as Egypt had no objection, the case was removed from the Court's List (Order of 29 March 1950).

*1.4. Asylum (Colombia/Peru)*

The granting of diplomatic asylum in the Colombian Embassy at Lima, on 3 January 1949, to a Peruvian national, Victor Raúl Haya de la Torre, a political leader accused of having instigated a military rebellion, was the subject of a dispute between Peru and Colombia which the parties agreed to submit to the Court. The Pan-American Havana Convention on Asylum (1928) laid down that, subject to certain conditions, asylum could be granted in a foreign embassy to a political refugee who was a national of the territorial State. The question in dispute was whether Colombia, as the State granting the asylum, was entitled unilaterally to "qualify" the offence committed by the refugee in a manner binding on the territorial State — that is, to decide whether it was a political offence or a common crime. Furthermore, the Court was asked to decide whether the territorial State was bound to afford the necessary guarantees to enable the refugee to leave the country in safety. In its Judgment of 20 November 1950, the Court answered both these questions in the negative, but at the same time it specified that Peru had not proved that Mr. Haya de la Torre was a common criminal. Lastly, it found in favour of a counter-claim submitted by Peru that Mr. Haya de la Torre had been granted asylum in violation of the Havana Convention.

*1.5. Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*

On the very day on which the Court delivered the Judgment on the *Asylum* case (see No. 1.4 above), Colombia filed a request for interpretation, seeking a reply to the question of whether the Judgment implied an obligation to surrender the refugee to the Peruvian authorities. In a Judgment delivered on 27 November 1950, the Court declared the request inadmissible.



*1.6. Haya de la Torre (Colombia v. Peru)*

This case, a sequel to the earlier proceedings (see Nos. 1.4-5 above), was instituted by Colombia by means of a fresh application. Immediately after the Judgment of 20 November 1950, Peru had called upon Colombia to surrender Mr. Haya de la Torre. Colombia refused to do so, maintaining that neither the applicable legal provisions nor the Court's Judgment placed it under an obligation to surrender the refugee to the Peruvian authorities. The Court confirmed this view in its Judgment of 13 June 1951. It declared that the question was a new one, and that although the Havana Convention expressly prescribed the surrender of common criminals to the local authorities, no obligation of the kind existed in regard to political offenders. While confirming that diplomatic asylum had been irregularly granted and that on this ground Peru was entitled to demand its termination, the Court declared that Colombia was not bound to surrender the refugee; these two conclusions, it stated, were not contradictory because there were other ways in which the asylum could be terminated besides the surrender of the refugee.

*1.7. Rights of Nationals of the United States of America in Morocco (France v. United States of America)*

By a decree of 30 December 1948, the French authorities in the Moroccan Protectorate imposed a system of licence control in respect of imports not involving an official allocation of currency, and limited these imports to a number of products indispensable to the Moroccan economy. The United States maintained that this measure affected its rights under treaties with Morocco and contended that, in accordance with these treaties and with the General Act of Algeciras of 1906, no Moroccan law or regulation could be applied to its nationals in Morocco without its previous consent. In its Judgment of 27 August 1952, the Court held that the import controls were contrary to the Treaty between the United States and Morocco of 1836 and the General Act of Algeciras since they involved discrimination in favour of France against the United States. The Court then considered the extent of the consular jurisdiction of the United States in Morocco and held that the United States was entitled to exercise such jurisdiction in the French Zone in all disputes, civil or criminal, between United States citizens or persons protected by the United States. It was also entitled to exercise such jurisdiction to the extent required by the relevant provisions of the General Act of Algeciras. The Court rejected the contention of the United States that its consular jurisdiction included cases in which only the defendant was a citizen or protégé of the United States. It also rejected the claim by the United States that the application to United States citizens of laws and regulations in the French Zone of Morocco required the prior assent of the

United States Government. Such assent was required only in so far as the intervention of the consular courts of the United States was necessary for the effective enforcement of such laws or regulations with respect to United States citizens. The Court rejected a counterclaim by the United States that its nationals in Morocco were entitled to immunity from taxation. It also dealt with the question of the valuation of imports by the Moroccan customs authorities.

#### *1.8. Ambatielos (Greece v. United Kingdom)*

In 1919, Nicolas Ambatielos, a Greek shipowner, entered into a contract for the purchase of ships with the Government of the United Kingdom. He claimed he had suffered damage through the failure of that Government to carry out the terms of the contract and as a result of certain judgments given against him by the English courts in circumstances said to involve the violation of international law. The Greek Government took up the case of its national and claimed that the United Kingdom was under a duty to submit the dispute to arbitration in accordance with Treaties between the United Kingdom and Greece of 1886 and 1926. The United Kingdom objected to the Court's jurisdiction. In a Judgment of 1 July 1952, the Court held that it had jurisdiction to decide whether the United Kingdom was under a duty to submit the dispute to arbitration but, on the other hand, that it had no jurisdiction to deal with the merits of the Ambatielos claim. In a further Judgment of 19 May 1953, the Court decided that the dispute was one which the United Kingdom was under a duty to submit to arbitration in accordance with the Treaties of 1886 and 1926.

#### *1.9. Anglo-Iranian Oil Co. (United Kingdom v. Iran)*

In 1933 an agreement was concluded between the Government of Iran and the Anglo-Iranian Oil Company. In 1951, laws were passed in Iran for the nationalization of the oil industry. These laws resulted in a dispute between Iran and the company. The United Kingdom took up the company's case and instituted proceedings before the Court. Iran disputed the Court's jurisdiction. In its Judgment of 22 July 1952, the Court decided that it had no jurisdiction to deal with the dispute. Its jurisdiction depended on the declarations by Iran and the United Kingdom accepting the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Court's Statute. The Court held that the declaration by Iran, which was ratified in 1932, covered only disputes based on treaties concluded by Iran after that date, whereas the claim of the United Kingdom was directly or indirectly based on treaties concluded prior to 1932. The Court also rejected the view that the agreement of 1933 was both a concessionary contract between Iran and the company and an international treaty between Iran and the United Kingdom, since the United Kingdom was not a party to

the contract. The position was not altered by the fact that the concessionary contract was negotiated through the good offices of the Council of the League of Nations. By an Order of 5 July 1951, the Court had indicated interim measures of protection, that is, provisional measures for protecting the rights alleged by either party, in proceedings already instituted, until a final judgment was given. In its Judgment, the Court declared that the Order had ceased to be operative.

*1.10. Minquiers and Ecrehos (France/United Kingdom)*

The Minquiers and Ecrehos are two groups of islets situated between the British island of Jersey and the coast of France. Under a special agreement between France and the United Kingdom, the Court was asked to determine which of the parties had produced the more convincing proof of title to these groups of islets. After the conquest of England by William, Duke of Normandy, in 1066, the islands formed part of the Union between England and Normandy which lasted until 1204, when Philip Augustus of France conquered Normandy but failed to occupy the islands. The United Kingdom submitted that the islands then remained united with England and that this situation was placed on a legal basis by subsequent treaties between the two countries. France contended that the Minquiers and Ecrehos were held by France after 1204, and referred to the same medieval treaties as those relied on by the United Kingdom. In its Judgment of 17 November 1953, the Court considered that none of those Treaties stated specifically which islands were held by the King of England or by the King of France. Moreover, what was of decisive importance was not indirect presumptions based on matters in the Middle Ages, but direct evidence of possession and the actual exercise of sovereignty. After considering this evidence, the Court arrived at the conclusion that the sovereignty over the Minquiers and Ecrehos belonged to the United Kingdom.

*1.11. Nottebohm (Liechtenstein v. Guatemala)*

In this case, Liechtenstein claimed restitution and compensation from the Government of Guatemala on the ground that the latter had acted towards Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law. Guatemala objected to the Court's jurisdiction but the Court overruled this objection in a Judgment of 18 November 1953. In a second Judgment, of 6 April 1955, the Court held that Liechtenstein's claim was inadmissible on grounds relating to Mr. Nottebohm's nationality. It was the bond of nationality between a State and an individual which alone conferred upon the State the right to put forward an international claim on his behalf. Mr. Nottebohm, who was then a German national, had settled

in Guatemala in 1905 and continued to reside there. In October 1939 — after the beginning of the Second World War — while on a visit to Europe, he obtained Liechtenstein nationality and returned to Guatemala in 1940, where he resumed his former business activities until his removal as a result of war measures in 1943. On the international plane, the grant of nationality was entitled to recognition by other States only if it represented a genuine connection between the individual and the State granting its nationality. Mr. Nottebohm's nationality, however, was not based on any genuine prior link with Liechtenstein and the sole object of his naturalization was to enable him to acquire the status of a neutral national in time of war. For these reasons, Liechtenstein was not entitled to take up his case and put forward an international claim on his behalf against Guatemala.

*1.12. Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*

A certain quantity of monetary gold was removed by the Germans from Rome in 1943. It was later recovered in Germany and found to belong to Albania. The 1946 agreement on reparation from Germany provided that monetary gold found in Germany should be pooled for distribution among the countries entitled to receive a share of it. The United Kingdom claimed that the gold should be delivered to it in partial satisfaction of the Court's Judgment of 1949 in the *Corfu Channel* case (see No. 1.1 above). Italy claimed that the gold should be delivered to it in partial satisfaction for the damage which it alleged it had suffered as a result of an Albanian law of 13 January 1945. In the Washington statement of 25 April 1951, the Governments of France, the United Kingdom and the United States, to whom the implementation of the reparations agreement had been entrusted, decided that the gold should be delivered to the United Kingdom unless, within a certain time-limit, Italy or Albania applied to the Court requesting it to adjudicate on their respective rights. Albania took no action, but Italy made an application to the Court. Later, however, Italy raised the preliminary question as to whether the Court had jurisdiction to adjudicate upon the validity of its claim against Albania. In its Judgment of 15 June 1954, the Court found that, without the consent of Albania, it could not deal with a dispute between that country and Italy and that it was therefore unable to decide the questions submitted.

*1.13. Electricité de Beyrouth Company (France v. Lebanon)*

This case arose out of certain measures taken by the Lebanese Government which a French company regarded as contrary to undertakings that that Government had given in 1948 as part of an

agreement with France. The French Government referred the dispute to the Court, but the Lebanese Government and the company entered into an agreement for the settlement of the dispute and the case was removed from the List by an Order of 29 July 1954.

- 1.14-15. *Treatment in Hungary of Aircraft and Crew of the United States of America (United States of America v. Hungary; United States of America v. USSR)*
- 1.16. *Aerial Incident of 10 March 1953 (United States of America v. Czechoslovakia)*
- 1.17. *Aerial Incident of 7 October 1952 (United States of America v. USSR)*
- 1.18. *Aerial Incident of 4 September 1954 (United States of America v. USSR)*
- 1.19. *Aerial Incident of 7 November 1954 (United States of America v. USSR)*

In these six cases the United States did not claim that the States against which the applications were made had given any consent to jurisdiction, but relied on Article 36, paragraph 1, of the Court's Statute, which provides that the jurisdiction of the Court comprises all cases which the parties refer to it. The United States stated that it submitted to the Court's jurisdiction for the purpose of the above-mentioned cases and indicated that it was open to the other Governments concerned to do likewise. These Governments having stated in each case that they were unable to submit to the Court's jurisdiction in the matter, the Court found that it did not have jurisdiction to deal with the cases, and removed them respectively from its List by Orders dated 12 July 1954 (Nos. 1.14-15), 14 March 1956 (Nos. 1.16 and 1.17), 9 December 1958 (No. 1.18) and 7 October 1959 (No. 1.19).

- 1.20-21. *Antarctica (United Kingdom v. Argentina; United Kingdom v. Chile)*

On 4 May 1955, the United Kingdom instituted proceedings before the Court against Argentina and Chile concerning disputes as to the sovereignty over certain lands and islands in the Antarctic. In its Applications to the Court, the United Kingdom stated that it submitted to the Court's jurisdiction for the purposes of the case, and although, as far as it was aware, Argentina and Chile had not yet accepted the Court's jurisdiction, they were legally qualified to do so. Moreover, the United Kingdom relied on Article 36, paragraph 1, of the Court's Statute. In a letter of 15 July 1955, Chile informed the Court that in its view the Application was unfounded and that it was not open to the Court to exercise jurisdiction. In a note of 1 August 1955, Argentina informed the Court of its refusal to accept the Court's jurisdiction to deal with the case. In these circumstances, the Court

found that neither Chile nor Argentina had accepted its jurisdiction to deal with the cases, and, on 16 March 1956, Orders were made removing them from its List.

*1.22. Certain Norwegian Loans (France v. Norway)*

Certain Norwegian loans had been floated in France between 1885 and 1909. The bonds securing them stated the amount of the obligation in gold, or in currency convertible into gold, as well as in various national currencies. From the time when Norway suspended the convertibility of its currency into gold — on several occasions after 1914 — the loans had been serviced in Norwegian kroner. The French Government, espousing the cause of the French bondholders, filed an Application requesting the Court to declare that the debt should be discharged by payment of the gold value of the coupons of the bonds on the date of payment and of the gold value of the redeemed bonds on the date of repayment. The Norwegian Government raised a number of preliminary objections to the jurisdiction of the Court and, in the Judgment it delivered on 6 July 1957, the Court found that it was without jurisdiction to adjudicate on the dispute. Indeed, the Court held that, since its jurisdiction depended upon the two unilateral declarations made by the parties, jurisdiction was conferred upon the Court only to the extent to which those declarations coincided in conferring it. The Norwegian Government, which had considered the dispute to fall entirely within its national jurisdiction, was therefore entitled, by virtue of the condition of reciprocity, to invoke in its own favour, and under the same conditions, the reservation contained in the French declaration which excluded from the jurisdiction of the Court differences relating to matters which were “essentially within the national jurisdiction as understood by the Government of the French Republic”.

*1.23. Right of Passage over Indian Territory (Portugal v. India)*

The Portuguese possessions in India included the two enclaves of Dadra and Nagar-Aveli which, in mid-1954, had passed under an autonomous local administration. Portugal claimed that it had a right of passage to those enclaves and between one enclave and the other to the extent necessary for the exercise of its sovereignty and subject to the regulation and control of India; it also claimed that, in July 1954, contrary to the practice previously followed, India had prevented it from exercising that right and that that situation should be redressed. A first Judgment, delivered on 26 November 1957, related to the jurisdiction of the Court, which had been challenged by India. The Court rejected four of the preliminary objections raised by India and joined the other two to the merits. In a second Judgment, delivered on 12 April 1960, after rejecting the two remaining preliminary objec-

tions the Court gave its decision on the claims of Portugal, which India maintained were unfounded. The Court found that Portugal had in 1954 the right of passage claimed by it but that such right did not extend to armed forces, armed police, arms and ammunition, and that India had not acted contrary to the obligations imposed on it by the existence of that right.

*1.24. Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*

The Swedish authorities had placed an infant of Netherlands nationality residing in Sweden under the régime of protective upbringing instituted by Swedish law for the protection of children and young persons. The father of the child, jointly with the deputy-guardian appointed by a Netherlands court, appealed against the action of the Swedish authorities. The measure of protective upbringing was, however, maintained. The Netherlands claimed that the decisions which instituted and maintained the protective upbringing were not in conformity with Sweden's obligations under the Hague Convention of 1902 governing the guardianship of infants, the provisions of which were based on the principle that the national law of the infant was applicable. In its Judgment of 28 November 1958, the Court held that the 1902 Convention did not include within its scope the matter of the protection of children as understood by the Swedish law on the protection of children and young persons and that the Convention could not have given rise to obligations in a field outside the matter with which it was concerned. Accordingly, the Court did not, in this case, find any failure to observe the Convention on the part of Sweden.

*1.25. Interhandel (Switzerland v. United States of America)*

In 1942 the Government of the United States vested almost all the shares of the General Aniline and Film Corporation (GAF), a company incorporated in the United States, on the ground that those shares, which were owned by Interhandel, a company registered in Basle, belonged in reality to I.G. Farbenindustrie of Frankfurt, or that GAF was in one way or another controlled by the German company. On 1 October 1957, Switzerland applied to the Court for a declaration that the United States was under an obligation to restore the vested assets to Interhandel or, alternatively, that the dispute on the matter between Switzerland and the United States was one fit for submission for judicial settlement, arbitration or conciliation. Two days later Switzerland filed a request for the indication of provisional measures to the effect that the Court should call upon the United States not to part with the assets in question so long as proceedings were pending before the Court. On 24 October 1957, the Court made an Order noting that, in the light of the information furnished, there appeared



to be no need for provisional measures. The United States raised preliminary objections to the Court's jurisdiction, and in a Judgment delivered on 21 March 1959 the Court found the Swiss application inadmissible, because Interhandel had not exhausted the remedies available to it in the United States courts.

*1.26. Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*

This case arose out of the destruction by Bulgarian anti-aircraft defence forces of an aircraft belonging to an Israeli airline. Israel instituted proceedings before the Court by means of an Application in October 1957. Bulgaria having challenged the Court's jurisdiction to deal with the claim, Israel contended that, since Bulgaria had in 1921 accepted the compulsory jurisdiction of the Permanent Court of International Justice for an unlimited period, that acceptance became applicable, when Bulgaria was admitted to the United Nations in 1955, to the jurisdiction of the International Court of Justice by virtue of Article 36, paragraph 5, of the present Court's Statute, which provides that declarations made under the Statute of the PCIJ and which are still in force shall be deemed, as between the parties to the present Court's Statute, to be acceptances applicable to the International Court of Justice for the period which they still have to run and in accordance with their terms. In its Judgment on the preliminary objections, delivered on 26 May 1959, the Court found that it was without jurisdiction on the ground that Article 36, paragraph 5, was intended to preserve only declarations in force as between States signatories of the United Nations Charter, and not subsequently to revive undertakings which had lapsed on the dissolution of the PCIJ.

*1.27. Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)*

This case arose out of the incident which was the subject of the proceedings mentioned above (see No. 1.26 above). The aircraft destroyed by Bulgarian anti-aircraft defence forces was carrying several United States nationals, who all lost their lives. Their Government asked the Court to find Bulgaria liable for the losses thereby caused and to award damages. Bulgaria filed preliminary objections to the Court's jurisdiction, but, before hearings were due to open, the United States informed the Court of its decision, after further consideration, not to proceed with its application. Accordingly, the case was removed from the List by an Order of 30 May 1960.

*1.28. Aerial Incident of 27 July 1955 (United Kingdom v. Bulgaria)*

This case arose out of the same incident as that mentioned above (see Nos. 1.26 and 1.27 above). The aircraft destroyed by



Bulgarian anti-aircraft defence forces was carrying several nationals of the United Kingdom and Colonies, who all lost their lives. The United Kingdom asked the Court to find Bulgaria liable for the losses thereby caused and to award damages. After filing a Memorial, however, the United Kingdom informed the Court that it wished to discontinue the proceedings in view of the decision of 26 May 1959 whereby the Court found that it lacked jurisdiction in the case brought by Israel. Accordingly, the case was removed from the List by an Order of 3 August 1959.

*1.29. Sovereignty over Certain Frontier Land (Belgium/Netherlands)*

The Court was asked to settle a dispute as to sovereignty over two plots of land situated in an area where the Belgo-Dutch frontier presented certain unusual features, as there had long been a number of enclaves formed by the Belgian commune of Baerle-Duc and the Netherlands commune of Baarle-Nassau. A Communal Minute drawn up between 1836 and 1841 attributed the plots to Baarle-Nassau, whereas a Descriptive Minute and map annexed to the Boundary Convention of 1843 attributed them to Baerle-Duc. The Netherlands maintained that the Boundary Convention recognized the existence of the status quo as determined by the Communal Minute, that the provision by which the two plots were attributed to Belgium was vitiated by an error, and that Netherlands sovereignty over the disputed plots had been established by the exercise of various acts of sovereignty since 1843. After considering the evidence produced, the Court, in a Judgment delivered on 20 June 1959, found that sovereignty over the two disputed plots belonged to Belgium.

*1.30. Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*

On 7 October 1894, Honduras and Nicaragua signed a Convention for the demarcation of the limits between the two countries, one of the articles of which provided that, in certain circumstances, any points of the boundary line which were left unsettled should be submitted to the decision of the Government of Spain. In October 1904, the King of Spain was asked to determine that part of the frontier line on which the Mixed Boundary Commission appointed by the two countries had been unable to reach agreement. The King gave his arbitral award on 23 December 1906. Nicaragua contested the validity of the award and, in accordance with a resolution of the Organization of American States, the two countries agreed in July 1957 on the procedure to be followed for submitting the dispute on this matter to the Court. In the Application by which the case was brought before the Court on 1 July 1958, Honduras claimed that failure by Nicaragua to give effect to the arbitral award constituted a

breach of an international obligation and asked the Court to declare that Nicaragua was under an obligation to give effect to the award. After considering the evidence produced, the Court found that Nicaragua had in fact freely accepted the designation of the King of Spain as arbitrator, had fully participated in the arbitral proceedings, and had thereafter accepted the award. Consequently the Court found in its Judgment delivered on 18 November 1960 that the award was binding and that Nicaragua was under an obligation to give effect to it.

*1.31. Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*

On 23 September 1958, Belgium instituted proceedings against Spain in connection with the adjudication in bankruptcy in Spain, in 1948, of the above-named company, formed in Toronto in 1911. The Application stated that the company's share-capital belonged largely to Belgian nationals and claimed that the acts of organs of the Spanish State whereby the company had been declared bankrupt and liquidated were contrary to international law and that Spain, as responsible for the resultant damage, was under an obligation either to restore or to pay compensation for the liquidated assets. In May 1960, Spain filed preliminary objections to the jurisdiction of the Court, but before the time-limit fixed for its observations and submissions thereon Belgium informed the Court that it did not intend to go on with the proceedings. Accordingly, the case was removed from the List by an Order of 10 April 1961.

*1.32. Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*

Belgium had ceased pursuing the aforementioned case (see No. 1.31 above) on account of efforts to negotiate a friendly settlement. The negotiations broke down, however, and Belgium filed a new Application on 19 June 1962. The following March, Spain filed four preliminary objections to the Court's jurisdiction, and on 24 July 1964 the Court delivered a Judgment dismissing the first two but joining the others to the merits. After the filing, within the time-limits requested by the parties, of the pleadings on the merits and on the objections joined thereto, hearings were held from 15 April to 22 July 1969. Belgium sought compensation for the damage claimed to have been caused to its nationals, shareholders in the Barcelona Traction, Light and Power Company, Ltd., as the result of acts contrary to international law said to have been committed by organs of the Spanish State. Spain, on the other hand, submitted that the Belgian claim should be declared inadmissible or unfounded. In a Judgment delivered on 5 February 1970, the Court found that Belgium had no legal standing to exercise diplomatic protection of shareholders in a

Canadian company in respect of measures taken against that company in Spain. It also pointed out that the adoption of the theory of diplomatic protection of shareholders *as such* would open the door to competing claims on the part of different States, which could create an atmosphere of insecurity in international economic relations. Accordingly, and in so far as the company's national State (Canada) was able to act, the Court was not of the opinion that *jus standi* was conferred on the Belgian Government by considerations of equity. The Court accordingly rejected Belgium's claim.

*1.33. Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient (France v. Lebanon)*

This case arose out of certain measures adopted by the Lebanese Government with regard to two French companies. France instituted proceedings against Lebanon because it considered these measures contrary to certain undertakings embodied in a Franco-Lebanese agreement of 1948. Lebanon raised preliminary objections to the Court's jurisdiction, but before hearings could be held the parties informed the Court that satisfactory arrangements had been concluded. Accordingly, the case was removed from the List by an Order of 31 August 1960.

*1.34. Temple of Preah Vihear (Cambodia v. Thailand)*

Cambodia complained that Thailand occupied a piece of its territory surrounding the ruins of the Temple of Preah Vihear, a place of pilgrimage and worship for Cambodians, and asked the Court to declare that territorial sovereignty over the Temple belonged to it and that Thailand was under an obligation to withdraw the armed detachment stationed there since 1954. Thailand filed preliminary objections to the Court's jurisdiction, which were rejected in a Judgment given on 26 May 1961. In its Judgment on the merits, rendered on 15 June 1962, the Court noted that a Franco-Siamese Treaty of 1904 provided that, in the area under consideration, the frontier was to follow the watershed line, and that a map based on the work of a Mixed Delimitation Commission showed the Temple on the Cambodian side of the boundary. Thailand asserted various arguments aimed at showing that the map had no binding character. One of its contentions was that the map had never been accepted by Thailand or, alternatively, that if Thailand had accepted it, it had done so only because of a mistaken belief that the frontier indicated corresponded to the watershed line. The Court found that Thailand had indeed accepted the map and that, even if there were any doubt in that connection, it could not now deny that it had done so. The Court concluded that the Temple was situated on Cambodian territory. It also held that Thailand was under an obligation to withdraw any military or police force

stationed there and to restore any objects removed from the ruins since 1954.

*1.35-36. South West Africa (Ethiopia v. South Africa; Liberia v. South Africa).*

On 4 November 1960, Ethiopia and Liberia, as former States Members of the League of Nations, instituted separate proceedings against South Africa in a case concerning the continued existence of the League of Nations mandate for South West Africa (see below, Advisory Cases, Nos. 2.5-8) and the duties and performance of South Africa as mandatory Power. The Court was requested to make declarations to the effect that South West Africa remained a Territory under a mandate, that South Africa had been in breach of its obligations under that mandate, and that the mandate and hence the mandatory authority were subject to the supervision of the United Nations. On 20 May 1961, the Court made an Order finding Ethiopia and Liberia to be in the same interest and joining the proceedings each had instituted. South Africa filed four preliminary objections to the Court's jurisdiction. In a Judgment of 21 December 1962, the Court rejected these and upheld its jurisdiction. After pleadings on the merits had been filed within the time-limits fixed at the request of the parties, the Court held public sittings from 15 March to 29 November 1965 in order to hear oral arguments and testimony, and judgment in the second phase was given on 18 July 1966. By the casting vote of the President — the votes having been equally divided (7-7) — the Court found that Ethiopia and Liberia could not be considered to have established any legal right or interest appertaining to them in the subject-matter of their claims, and accordingly decided to reject those claims.

*1.37. Northern Cameroons (Cameroon v. United Kingdom)*

The Republic of Cameroon claimed that the United Kingdom had violated the Trusteeship Agreement for the Territory of the Cameroons under British administration (divided into the Northern and the Southern Cameroons) by creating such conditions that the Trusteeship had led to the attachment of the Northern Cameroons to Nigeria instead of to the Republic of Cameroon, the territory of which had previously been administered by France and to which the Southern Cameroons had been attached. The United Kingdom raised preliminary objections to the Court's jurisdiction. The Court found that to adjudicate on the merits would be devoid of purpose since, as the Republic of Cameroon had recognized, its judgment thereon could not affect the decision of the General Assembly providing for the attachment of the Northern Cameroons to Nigeria in accordance with

the results of a plebiscite supervised by the United Nations. Accordingly, by a Judgment of 2 December 1963, the Court found that it could not adjudicate upon the merits of the claim.

*1.38-39. North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*

These cases concerned the delimitation of the continental shelf of the North Sea as between Denmark and the Federal Republic of Germany, and as between the Netherlands and the Federal Republic, and were submitted to the Court by special agreement. The parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis. By an Order of 26 April 1968 the Court, having found Denmark and the Netherlands to be in the same interest, joined the proceedings in the two cases. In its Judgment, delivered on 20 February 1969, the Court found that the boundary lines in question were to be drawn by agreement between the parties and in accordance with equitable principles in such a way as to leave to each party those areas of the continental shelf which constituted the natural prolongation of its land territory under the sea, and it indicated certain factors to be taken into consideration for that purpose. The Court rejected the contention that the delimitations in question had to be carried out in accordance with the principle of equidistance as defined in the 1958 Geneva Convention on the Continental Shelf. The Court took account of the fact that the Federal Republic had not ratified that Convention, and held that the equidistance principle was not inherent in the basic concept of continental shelf rights, and that this principle was not a rule of customary international law.

*1.40. Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*

In February 1971, following an incident involving the diversion to Pakistan of an Indian aircraft, India suspended overflights of its territory by Pakistan civil aircraft. Pakistan took the view that this action was in breach of the 1944 Convention on International Civil Aviation and the International Air Services Transit Agreement and complained to the Council of the International Civil Aviation Organization. India raised preliminary objections to the jurisdiction of the Council, but these were rejected and India appealed to the Court. During the written and oral proceedings, Pakistan contended, *inter alia*, that the Court was not competent to hear the appeal. In its Judgment of 18 August 1972, the Court found that it was competent to hear the appeal of India. It further decided that the ICAO Council was competent to deal with both the Application and the Complaint

of which it had been seized by Pakistan, and accordingly dismissed the appeal laid before it by the Government of India.

*1.41-42. Fisheries Jurisdiction (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*

On 14 April and 5 June 1972, respectively, the United Kingdom and the Federal Republic of Germany instituted proceedings against Iceland concerning a dispute over the proposed extension by Iceland, as from 1 September 1972, of the limits of its exclusive fisheries jurisdiction from a distance of 12 to a distance of 50 nautical miles. Iceland declared that the Court lacked jurisdiction, and declined to be represented in the proceedings or file pleadings. At the request of the United Kingdom and the Federal Republic, the Court in 1972 indicated, and in 1973 confirmed, provisional measures to the effect that Iceland should refrain from implementing, with respect to their vessels, the new Regulations for the extension of the fishery zone, and that the annual catch of those vessels in the disputed area should be limited to certain maxima. In Judgments delivered on 2 February 1973, the Court found that it possessed jurisdiction; and in Judgments on the merits of 25 July 1974, it found that the Icelandic Regulations constituting a unilateral extension of exclusive fishing rights to a limit of 50 nautical miles were not opposable to either the United Kingdom or the Federal Republic, that Iceland was not entitled unilaterally to exclude their fishing vessels from the disputed area, and that the parties were under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences.

*1.43-44. Nuclear Tests (Australia v. France; New Zealand v. France)*

On 9 May 1973, Australia and New Zealand each instituted proceedings against France concerning tests of nuclear weapons which France proposed to carry out in the atmosphere in the South Pacific region. France stated that it considered the Court manifestly to lack jurisdiction and refrained from appearing at the public hearings or filing any pleadings. By two Orders of 22 June 1973, the Court, at the request of Australia and New Zealand, indicated provisional measures to the effect, *inter alia*, that pending judgment France should avoid nuclear tests causing radioactive fall-out on Australian or New Zealand territory. By two Judgments delivered on 20 December 1974, the Court found that the Applications of Australia and New Zealand no longer had any object and that it was therefore not called upon to give any decision thereon. In so doing the Court based itself on the conclusion that the objective of Australia and New Zealand had been achieved inasmuch as France, in various public statements, had announced its intention of carrying out no further atmospheric nuclear tests on the completion of the 1974 series.

#### *1.45. Trial of Pakistani Prisoners of War (Pakistan v. India)*

In May 1973, Pakistan instituted proceedings against India concerning 195 Pakistani prisoners of war whom, according to Pakistan, India proposed to hand over to Bangladesh, which was said to intend trying them for acts of genocide and crimes against humanity. India stated that there was no legal basis for the Court's jurisdiction in the matter and that Pakistan's application was without legal effect. Pakistan having also filed a request for the indication of provisional measures, the Court held public sittings to hear observations on this subject; India was not represented at the hearings. In July 1973, Pakistan asked the Court to postpone further consideration of its request in order to facilitate the negotiations which were due to begin. Before any written pleadings had been filed, Pakistan informed the Court that negotiations had taken place, and requested the Court to record discontinuance of the proceedings. Accordingly, the case was removed from the List by an Order of 15 December 1973.

#### *1.46. Aegean Sea Continental Shelf (Greece v. Turkey)*

On 10 August 1976, Greece instituted proceedings against Turkey in a dispute over the Aegean Sea continental shelf. It asked the Court in particular to declare that the Greek islands in the area were entitled to their lawful portion of continental shelf and to delimit the respective parts of that shelf appertaining to Greece and Turkey. At the same time, it requested provisional measures indicating that, pending the Court's judgment, neither State should, without the other's consent, engage in exploration or research with respect to the shelf in question. On 11 September 1976, the Court found that the indication of such measures was not required and, as Turkey had denied that the Court was competent, ordered that the proceedings should first concern the question of jurisdiction. In a Judgment delivered on 19 December 1978, the Court found that jurisdiction to deal with the case was not conferred upon it by either of the two instruments relied upon by Greece: the application of the General Act for Pacific Settlement of International Disputes (Geneva, 1928) — whether or not it was in force — was excluded by the effect of a reservation made by Greece upon accession, while the Greco-Turkish press communiqué of 31 May 1975 did not contain an agreement binding upon either State to accept the unilateral referral of the dispute to the Court.

#### *1.47. Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*

By a Special Agreement notified to the Court in 1978, it was asked to determine what principles and rules of international law were applicable to the delimitation as between Tunisia and the Libyan Arab Jamahiriya of the respective areas of continental shelf appertaining to each. After considering arguments as well as evidence based on



geology, physiography and bathymetry on the basis of which each party sought to claim particular areas of the sea-bed as the natural prolongation of its land territory, the Court concluded, in a Judgment of 24 February 1982, that the two countries abutted on a common continental shelf and that physical criteria were therefore of no assistance for the purpose of delimitation. Hence it had to be guided by "equitable principles" (as to which it emphasized that this term cannot be interpreted in the abstract, but only as referring to the principles and rules which may be appropriate in order to achieve an equitable result) and by certain factors such as the necessity of ensuring a reasonable degree of proportionality between the areas allotted and the lengths of the coastlines concerned. The Court found that the application of the equidistance method could not, in the particular circumstances of the case, lead to an equitable result. With respect to the course to be taken by the delimitation line, it distinguished two sectors: near the shore, it considered, having taken note of some evidence of historical agreement as to the maritime boundary, that the delimitation (beginning at the boundary point of Ras Adjir) should run in a north-easterly direction at an angle of approximately 26°; further seawards, it considered that the line of delimitation should veer eastwards at a bearing of 52° to take into account the change of direction of the Tunisian coast and the existence of the Kerkennah Islands, to which a "half-effect" was attributed (see map on p. 121).

During the course of the proceedings, Malta requested permission to intervene, claiming an interest of a legal nature under Article 62 of the Court's Statute. In view of the very character of the intervention for which permission was sought, the Court considered that the interest of a legal nature which Malta had invoked could not be affected by the decision in the case and that the request was not one to which, under Article 62, the Court might accede. It therefore rejected it.

*1.48. United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*

The case was brought before the Court by Application by the United States following the occupation of its Embassy in Tehran by Iranian militants on 4 November 1979, and the capture and holding as hostages of its diplomatic and consular staff. On a request by the United States for the indication of provisional measures, the Court held that there was no more fundamental prerequisite for relations between States than the inviolability of diplomatic envoys and embassies, and it indicated provisional measures for ensuring the immediate restoration to the United States of the Embassy premises and the release of the hostages. In its decision on the merits of the case, at a time when the situation complained of still persisted, the Court, in its Judgment of 24 May 1980, found that Iran had violated and was still violating obligations owed by it to the United States under conventions



in force between the two countries and rules of general international law, that the violation of these obligations engaged its responsibility, and that the Iranian Government was bound to secure the immediate release of the hostages, to restore the Embassy premises, and to make reparation for the injury caused to the United States Government. The Court reaffirmed the cardinal importance of the principles of international law governing diplomatic and consular relations. It pointed out that while, during the events of 4 November 1979, the conduct of militants could not be directly attributed to the Iranian State — for lack of sufficient information — that State had however done nothing to prevent the attack, stop it before it reached its completion or oblige the militants to withdraw from the premises and release the hostages. The Court noted that, after 4 November 1979, certain organs of the Iranian State had endorsed the acts complained of and decided to perpetuate them, so that those acts were transformed into acts of the Iranian State. The Court gave judgment, notwithstanding the absence of the Iranian Government and after rejecting the reasons put forward by Iran in two communications addressed to the Court in support of its assertion that the Court could not and should not entertain the case. The Court was not called upon to deliver a further judgment on the reparation for the injury caused to the United States Government since, by Order of 12 May 1981, the case was removed from the List following discontinuance.

*1.49. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*

On 25 November 1981, Canada and the United States notified to the Court a Special Agreement whereby they referred to a Chamber of the Court the question of the delimitation of the maritime boundary dividing the continental shelf and fisheries zones of the two Parties in the Gulf of Maine area. This Chamber was constituted by an Order of 20 January 1982, and it was the first time that a case had been heard by an *ad hoc* Chamber of the Court.

The Chamber delivered its Judgment on 12 October 1984. Having established its jurisdiction and defined the area to be delimited, it reviewed the origin and development of the dispute and laid down the principles and rules of international law governing the issue. It indicated that the delimitation was to be effected by the application of equitable criteria and by the use of practical methods aimed at ensuring an equitable result, taking account of the geographical configuration of the coast and the other relevant circumstances. It rejected the delimitation lines proposed by the Parties, and defined the criteria and methods which it considered to be applicable to the single delimitation line which it was asked to draw. It applied criteria of a primarily geographical nature, and used geometrical methods appropriate both for the delimitation of the sea-bed and for that of the superjacent

waters. As for the plotting of the delimitation line, the Chamber distinguished between three segments, the first two lying within the Gulf of Maine and the third outside it. In the case of the first segment, it considered that there was no special circumstance precluding the division into equal parts of the overlapping of the maritime projections of the two States' coasts. The delimitation line runs from the starting-point agreed between the Parties, and is the bisector of the angle formed by the perpendicular to the coastal line running from Cape Elizabeth to the existing boundary terminus and the perpendicular to the coastal line running from that boundary terminus to Cape Sable. For the second segment, the Chamber considered that, in view of the quasi-parallelism between the coasts of Nova Scotia and Massachusetts, a median line should be drawn approximately parallel to the two opposite coasts, and should then be corrected to take account of (a) the difference in length between the coasts of the two States abutting on the delimitation area and (b) the presence of Seal Island off the coast of Nova Scotia. The delimitation line corresponds to the corrected median line from its intersection with the above-mentioned bisector to the point where it reaches the closing line of the Gulf. The third segment is situated in the open ocean, and consists of a perpendicular to the closing line of the Gulf from the point at which the corrected median line intersects with that line. The terminus of this final segment lies within the triangle defined by the Parties and coincides with the last point of overlapping of the respective 200-mile zones claimed by the two States (see map opposite). The co-ordinates of the line drawn by the Chamber are given in the operative part of the Judgment.

*1.50. Continental Shelf (Libyan Arab Jamahiriya/Malta)*

This case, which was submitted to the Court in 1982 by Special Agreement between Libya and Malta, related to the delimitation of the areas of continental shelf appertaining to each of these two States. In support of its argument, Libya relied on the principle of natural prolongation and the concept of proportionality. Malta maintained that States' rights over areas of continental shelf were now governed by the concept of distance from the coast, which was held to confer primacy on the equidistance method of defining boundaries between areas of continental shelf, particularly when these appertained to States lying directly opposite each other, as in the case of Malta and Libya. The Court found that, in view of developments in the law relating to the rights of States over areas of continental shelf, there was no reason to assign a role to geographical or geophysical factors when the distance between the two States was less than 400 miles (as in the instant case). It also considered that the equidistance method did not have to be used and was not the only appropriate delimitation technique. The Court defined a number of equitable principles and

applied them in its Judgment of 3 June 1985, in the light of the relevant circumstances. It took account of the main features of the coasts, the difference in their lengths and the distance between them. It took care to avoid any excessive disproportion between the continental shelf appertaining to a State and the length of its coastline, and adopted the solution of a median line transposed northwards over a certain distance. In the course of the proceedings, Italy applied for permission to intervene, claiming that it had an interest of a legal nature under Article 62 of the Statute. The Court found that the intervention requested by Italy fell, by virtue of its object, into a category which — on Italy's own showing — was one which could not be accepted, and the application was accordingly refused.

#### 1.51. Frontier Dispute (Burkina Faso/Republic of Mali)

On 14 October 1983 Burkina Faso (then known as Upper Volta) and Mali notified to the Court a Special Agreement referring to a Chamber of the Court the question of the delimitation of part of the land frontier between the two States. This Chamber was constituted by an Order of 3 April 1985. Following grave incidents between the armed forces of the two countries at the very end of 1985, both Parties submitted parallel requests to the Chamber for the indication of interim measures of protection. The Chamber indicated such measures by an Order of 10 January 1986.

In its Judgment delivered on 22 December 1986, the Chamber began by ascertaining the source of the rights claimed by the Parties. It noted that, in that case, the principles that ought to be applied were the principle of the intangibility of frontiers inherited from colonization and the principle of *uti possidetis juris*, which accords pre-eminence to legal title over effective possession as a basis of sovereignty, and whose primary aim is to secure respect for the territorial boundaries which existed at the time when independence was achieved. The Chamber specified that, when those boundaries were no more than delimitations between different administrative divisions or colonies all subject to the same sovereign, the application of the principle of *uti possidetis juris* resulted in their being transformed into international frontiers, as in the instant case.

It also indicated that it would have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law and which is based on law. The Parties also relied upon various types of evidence to give support to their arguments, including French legislative and regulative texts or administrative documents, maps and "colonial *effectivités*" or, in other words, the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period. Having considered those various kinds of evidence, the Chamber defined the course of the boundary between the Parties in the disputed area. The Chamber

likewise took the opportunity to point out, with respect to the tripoint Niger-Mali-Burkina Faso, that its jurisdiction was not restricted simply because the end point of the frontier lay on the frontier of a third State not a party to the proceedings. It further pointed out that the rights of Niger were in any event safeguarded by the operation of Article 59 of the Statute of the Court.

*1.52. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*

On 9 April 1984 Nicaragua filed an Application instituting proceedings against the United States of America, together with a request for the indication of provisional measures concerning a dispute relating to responsibility for military and paramilitary activities in and against Nicaragua. On 10 May 1984 the Court made an Order indicating provisional measures. One of these measures required the United States immediately to cease and refrain from any action restricting access to Nicaraguan ports, and in particular the laying of mines. The Court also indicated that the right to sovereignty and to political independence possessed by Nicaragua, like any other State, should be fully respected and should not be jeopardized by activities contrary to the principle prohibiting the threat or use of force and to the principle of non-intervention in matters within the domestic jurisdiction of a State. The Court also decided in the aforementioned Order that the proceedings would first be addressed to the questions of the jurisdiction of the Court and of the admissibility of the Nicaraguan Application. Just before the closure of the written proceedings in this phase, El Salvador filed a declaration of intervention in the case under Article 63 of the Statute, requesting permission to claim that the Court lacked jurisdiction to entertain Nicaragua's Application. In its Order dated 4 October 1984, the Court decided that El Salvador's declaration of intervention was inadmissible inasmuch as it related to the jurisdictional phase of the proceedings.

After hearing argument from both Parties in the course of public hearings held from 8 to 18 October 1984, on 26 November 1984 the Court delivered a Judgment stating that it possessed jurisdiction to deal with the case and that Nicaragua's application was admissible. In particular, it held that the Nicaraguan declaration of 1929 was valid and that Nicaragua was therefore entitled to invoke the United States declaration of 1946 as a basis of the Court's jurisdiction (Article 36, paragraphs 2 and 5, of the Statute). The subsequent proceedings took place in the absence of the United States, which announced on 18 January 1985 that it "intends not to participate in any further proceedings in connection with this case". From 12 to 20 September 1985, the Court heard oral argument by Nicaragua and the testimony of the five witnesses it had called. On 27 June 1986, the Court delivered its Judgment on the merits. The findings include a rejection

of the justification of collective self-defence advanced by the United States concerning the military or paramilitary activities in or against Nicaragua, and a statement that the United States had violated the obligations imposed by customary international law not to intervene in the affairs of another State, not to use force against another State, not to infringe the sovereignty of another State, and not to interrupt peaceful maritime commerce. The Court also found that the United States had violated certain obligations arising from a bilateral Treaty of Friendship, Commerce and Navigation of 1956, and that it had committed acts such to deprive that treaty of its object and purpose.

It decided that the United States was under a duty immediately to cease and to refrain from all acts constituting breaches of its legal obligations, and that it must make reparation for all injury caused to Nicaragua by the breaches of obligations under customary international law and the 1956 Treaty, the amount of that reparation to be fixed in subsequent proceedings if the Parties were unable to reach agreement. The Court subsequently fixed, by an Order, time-limits for the filing of written pleadings by the Parties on the matter of the form and amount of reparation, and the Memorial of Nicaragua was filed on 29 March 1988, while the United States maintained its refusal to take part in the case. In September 1991, Nicaragua informed the Court, *inter alia*, that it did not wish to continue the proceedings. The United States told the Court that it welcomed the discontinuance and, by an Order of the President dated 26 September 1991, the case was removed from the Court's List.

*1.53. 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)*

This application was submitted to the Court by Tunisia, which took the view that the 1982 Judgment (cf. No. 1.47 above) gave rise to certain problems of implementation. Although the Court had already had to deal with several requests for interpretation, this was the first time an application for revision had come before it. The Statute of the Court states that a judgment may only be revised if there has been a discovery of some fact of such a nature as to be a decisive factor. Libya opposed Tunisia's twofold application, denying that there had been any problems of implementation of the kind invoked by Tunisia, and arguing that Tunisia's request for interpretation was merely an application for revision, in another guise.

In its Judgment of 10 December 1985, rendered unanimously, the Court rejected the application for revision as inadmissible. It found admissible the request for interpretation of the Judgment of 24 February 1982 so far as it related to the *first sector* of the delimitation laid down by that Judgment, stated the interpretation which

should be made in that respect, and found that the submission of Tunisia relating to that sector could not be upheld; it found moreover that the request made by Tunisia for the correction of an error was without object, and that there was no call for it to give a decision thereon. The Court also found admissible the request for interpretation of the Judgment of 24 February 1982 so far as it related to the most westerly point of the Gulf of Gabes in the *second sector* of the delimitation laid down by that Judgment, stated the interpretation which should be made in that respect, and found that it could not uphold the submission made by Tunisia relating to that sector. In conclusion, the Court found that no cause had arisen for it to order an expert survey for the purpose of ascertaining the precise co-ordinates of the most westerly point of the Gulf of Gabes.

*1.54-55. Border and Transborder Armed Actions (Nicaragua v. Costa Rica) (Nicaragua v. Honduras)*

On the same day, 28 July 1986, Nicaragua instituted proceedings against Costa Rica and Honduras, respectively, alleging various violations of international law for which the two States bore legal responsibility, particularly on account of certain military activities directed against the Nicaraguan authorities by the *contras* operating from their territory.

In the former case, Nicaragua proceeded to file its Memorial on the merits on 10 August 1987. Subsequently, by a communication dated 12 August 1987, Nicaragua, referring to an agreement signed on 7 August 1987 at Guatemala City by the Presidents of the five States of Central America (the "Esquipulas II" Agreement), declared that it was discontinuing the judicial proceedings instituted against Costa Rica. Costa Rica did not object to the discontinuance, and the case was removed from the General List by an Order of the President dated 19 August 1987.

In the latter case, Honduras informed the Court that in its view the Court had no jurisdiction to deal with the case and, after a meeting with the President, the Parties agreed that the questions of jurisdiction and admissibility would be dealt with at a preliminary stage of the proceedings. Once the Parties had filed their written pleadings and taken part in hearings devoted to those questions, the Court delivered its Judgment in the case on 20 December 1988. Nicaragua had relied, as the basis of the jurisdiction of the Court, both on Article XXXI of the Inter-American Treaty for the Peaceful Settlement of Disputes (known as the "Pact of Bogotá") of 1948 and on the declarations of acceptance of the compulsory jurisdiction of the Court made by the Parties under Article 36, paragraph 2, of the Statute. The Court found that the Pact of Bogotá conferred jurisdiction upon it. It dismissed the two arguments asserted successively by Honduras in that regard, namely that Article XXXI of the Pact had to be supplemented by a

declaration of acceptance of compulsory jurisdiction or that it could be so supplemented but need not be. The Court found that the first argument was incompatible with the actual terms of Article XXXI. With regard to the second argument, the Court had to consider the divergent interpretations of Article XXXI that were proposed by the Parties, and set aside the interpretation of Honduras according to which, *inter alia*, effect should be given to the reservations to Honduras's acceptance of the jurisdiction of the Court that had been introduced into its declaration of 1986. On that point, the Court found that the commitment in Article XXXI of the Pact was independent of the declarations of acceptance of its jurisdiction.

The Court moreover rejected the four objections raised by Honduras to the admissibility of the Application, of which two had a general character and two were derived from the Pact of Bogotá.

Subsequently, and after the proceedings on the merits had been initiated and Nicaragua had filed its Memorial, and after the Court, at the request of the Parties, had postponed the date for the fixing of the time-limit for the presentation of the Counter-Memorial of Honduras, the Agent of Nicaragua, in May 1992, informed the Court that the Parties had reached an out-of-Court agreement and did not wish to go on with the proceedings. On 27 May 1992, the Court made an Order recording the discontinuance of the proceedings and directing the removal of the case from the General List.

*1.56. Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*

On 11 December 1986, El Salvador and Honduras notified to the Court a Special Agreement whereby the Parties requested the Court to form a chamber — consisting of three Members of the Court and two judges *ad hoc* — in order to (1) delimit the frontier line in the six sectors not delimited by the 1980 General Treaty of Peace concluded between the two States in 1980 and (2) determine the legal situation of the islands in the Gulf of Fonseca and the maritime spaces within and outside it. That Chamber was constituted by an Order of 8 May 1987. The time-limits for the written proceedings were fixed, but extended several times at the request of the Parties.

In November 1989, Nicaragua addressed to the Court an application under Article 62 of the Statute for permission to intervene in the case, stating that, while it had no desire to intervene in the dispute concerning the land boundary, it wished to protect its rights in the Gulf of Fonseca (of which the three States are riparians), as well as "in order to inform the Court of the nature of the legal rights of Nicaragua which are in issue in the dispute". Nicaragua further maintained that its request for permission to intervene was a matter exclusively within the procedural mandate of the full Court. The Court, by an Order adopted on 28 February 1990, found that it was for the Chamber



formed to deal with the case to decide whether the application for permission to intervene should be granted. Having heard the Parties and Nicaragua at a series of public sittings, the Chamber delivered its Judgment on 13 September 1990. It found that Nicaragua had shown that it had an interest of a legal nature which might be affected by part of the Judgment of the Chamber on the merits, with regard to the legal régime of the waters of the Gulf of Fonseca.

The Chamber on the other hand decided that Nicaragua had not shown such an interest which might be affected by any decision it might be required to make concerning the delimitation of those waters, or any decision as to the legal situation of the maritime spaces outside the Gulf or any decision as to the legal situation of the islands in the Gulf. Within the framework thus defined, the Chamber decided that Nicaragua was entitled to intervene in the case. A written statement of Nicaragua and written observations on that statement by El Salvador and Honduras were subsequently filed with the Court. The oral arguments of the Parties and the oral observations of Nicaragua were heard at 50 public sittings, held between April and June 1991. The Chamber delivered its Judgment on 11 September 1992.

The Chamber began by noting the agreement of both Parties that the fundamental principle for determining the land area is the *uti possidetis juris*, i.e., the principle, generally accepted in Spanish America, that international boundaries follow former colonial administrative boundaries. The Chamber was, moreover, authorized to take into account, where pertinent, a provision of the 1980 Peace Treaty that a basis for delimitation is to be found in documents issued by the Spanish Crown or any other Spanish authority during the colonial period, and indicating the jurisdictions or limits of territories, as well as other evidence and arguments of a legal, historical, human or any other kind. Noting that the Parties had invoked the exercise of government powers in the disputed areas and of other forms of *effectivité*, the Chamber considered that it might have regard to evidence of action of this kind affording indications of the *uti possidetis juris* boundary. The Chamber then considered successively, from west to east, each of the six disputed sectors of the *land boundary*, to which some 152 pages were specifically devoted.

With regard to the *legal situation of the islands in the Gulf*, the Chamber considered that although it had jurisdiction to determine the legal situation of all the islands, a judicial determination was required only for those in dispute, which it found to be El Tigre, Meanguera and Meanguerita. It rejected Honduras's claim that there was no real dispute as to El Tigre. Noting that in legal theory each island appertained to one of the Gulf States by succession from Spain, which precluded acquisition by occupation, the Chamber observed that effective possession by one of the States could constitute a post-colonial *effectivité* shedding light on the legal situation. Since Honduras had occupied El Tigre since 1849, the Chamber concluded that the conduct of the



Parties accorded with the assumption that El Tigre appertained to it. The Chamber found Meanguerita, which is very small, uninhabited and contiguous to Meanguera, to be a "dependency" of Meanguera. It noted that El Salvador had claimed Meanguera in 1854 and that from the late 19th century the presence there of El Salvador had intensified, as substantial documentary evidence of the administration of Meanguera by El Salvador showed. A protest in 1991 by Honduras to El Salvador over Meanguera was considered too late to affect the presumption of acquiescence by Honduras. The Chamber thus found that Meanguera and Meanguerita appertained to El Salvador.

With respect to the *maritime spaces within the Gulf*, El Salvador claimed that they were subject to a condominium of three coastal States and that delimitation would hence be inappropriate; Honduras argued that within the Gulf there was a community of interests necessitating a judicial delimitation. Applying the normal rules of treaty interpretation to the Special Agreement and the Peace Treaty, the Chamber found that it had no jurisdiction to effect a delimitation, whether inside or outside the Gulf. As for the legal situation of the waters of the Gulf, the Chamber noted that, given its characteristics, the Gulf was generally acknowledged to be an historic bay. The Chamber examined the history of the Gulf to discover its "régime", taking into account the 1917 Judgement of the Central American Court of Justice in a case between El Salvador and Nicaragua concerning the Gulf. In its Judgement, the Central American Court had found *inter alia* that the Gulf was an historic bay possessing the characteristics of a closed sea. Noting that the coastal States continued to claim the Gulf as an historic bay with the character of a closed sea, a position in which other nations acquiesced, the Chamber observed that its views on the régime of the historic waters of the Gulf coincided with those expressed in the 1917 Judgement. It found that the Gulf waters, other than the three-mile maritime belt, were historic waters and subject to the joint sovereignty of the three coastal States. It noted that there had been no attempt to divide the waters according to the principle of *uti possidetis juris*. A joint succession of the three States to the maritime area thus seemed to be the logical outcome of the *uti possidetis* principle. The Chamber accordingly found that Honduras had legal rights in the waters up to the bay closing line, which it considered also to be a baseline.

Regarding the *waters outside the Gulf*, the Chamber observed that entirely new concepts of law, unthought-of when the Central American Court gave its Judgement in 1917, were involved, in particular those regarding the continental shelf and the exclusive economic zone, and found that, excluding a strip at either extremity corresponding to the maritime belts of El Salvador and Nicaragua, the three joint sovereigns were entitled, outside the closing line, to a territorial sea, continental shelf and exclusive economic zone, but must proceed to a division by mutual agreement.

Lastly, as regards the effect of the Judgment on the intervening State, the Chamber found that it was not *res judicata* for Nicaragua.

*1.57. Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*

On 6 February 1987, the United States instituted proceedings against Italy in respect of a dispute arising out of the requisition by the Government of Italy of the plant and related assets of Raytheon-Elsi S.p.A., an Italian company producing electronic components and previously known as Elettronica Sicula S.p.A. (ELSI), which was stated to have been 100 per cent owned by two United States corporations. The Court, by an Order dated 2 March 1987, formed a Chamber of five judges to deal with the case, as requested by the Parties. Italy, in its Counter-Memorial, raised an objection to the admissibility of the Application on the grounds of a failure to exhaust local remedies, and the Parties agreed that that objection should "be heard and determined within the framework of the merits". On 20 July 1989, the Chamber delivered a Judgment in which it rejected the objection raised by Italy and said that it had not committed any of the breaches alleged by the United States of the bilateral Treaty of Friendship, Commerce and Navigation of 1948, or of the Agreement Supplementing that Treaty. The United States principally reproached the Respondent (a) with having effected an unlawful requisition of the ELSI plant, thus depriving the shareholders of their direct right to proceed to the liquidation of the company's assets under normal conditions; (b) with having been incapable of preventing the occupation of the plant by the employees; (c) with having failed to reach any decision as to the legality of the requisition during a period of sixteen months; and (d) with having intervened in the bankruptcy proceedings, with the result that it purchased ELSI at a price well below its true market value. After a detailed consideration of the facts alleged and the relevant conventional provisions, the Chamber found that the Respondent had not breached the 1948 Treaty and the Agreement supplementing that Treaty in the manner claimed by the Applicant, and rejected the claim for reparation made by the United States.

*1.58. Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*

On 16 August 1988, the Government of Denmark filed in the Registry an Application instituting proceedings against Norway, by which it seized the Court of a dispute concerning the delimitation of Denmark's and Norway's fishing zones and continental shelf areas in the waters between the east coast of Greenland and the Norwegian island of Jan Mayen, where both Parties laid claim to an area of some 72,000 square kilometres. On 14 June 1993, the Court delivered its Judgment. Denmark had asked the Court to draw a single line of

delimitation of those areas at a distance of 200 nautical miles measured from Greenland's baseline, or, if the Court did not find it possible to draw such a line, in accordance with international law. Norway, for its part, had asked the Court to find that the median line constituted the two lines of separation for the purpose of the delimitation of the two relevant areas, on the understanding that those lines would then coincide, but that the delimitations would remain conceptually distinct. A principal contention of Norway was that a delimitation had already been established between Jan Mayen and Greenland, by the effect of treaties in force between the Parties — a bilateral Agreement of 1965 and the 1958 Geneva Convention on the Continental Shelf — as both instruments provide for the drawing of a median line.

The Court noted, in the first place, that the 1965 Agreement covered areas different from the continental shelf between the two countries, and that that Agreement does not place on record any intention of the Parties to undertake to apply the median line for any of the subsequent delimitations of that continental shelf. The Court then found that the force of Norway's argument relating to the 1958 Convention depended in the circumstances of the case upon the existence of "special circumstances" as envisaged by the Convention. It subsequently rejected the argument of Norway according to which the Parties, by their "conjoint conduct" had long recognized the applicability of a median line delimitation in their mutual relations. The Court examined separately the two strands of the applicable law: the effect of Article 6 of the 1958 Convention, applicable to the delimitation of the continental shelf boundary, and then the effect of the customary law which governed the fishery zone. After examining the case-law in this field and the provisions of the 1982 United Nations Convention on the Law of the Sea, the Court noted that the statement (in those provisions) of an "equitable solution" as the aim of any delimitation process reflected the requirements of customary law as regards the delimitation both of the continental shelf and of exclusive economic zones. It appeared to the Court that, both for the continental shelf and for the fishery zones in the instant case, it was proper to begin the process of delimitation by a median line provisionally drawn, and it then observed that it was called upon to examine every particular factor in the case which might suggest an adjustment or shifting of the median line provisionally drawn. The 1958 Convention required the investigation of any "special circumstances"; the customary law based upon equitable principles for its part required the investigation of the "relevant circumstances".

The Court found that, although it was a matter of categories which were different in origin and in name, there was inevitably a tendency towards assimilation between the two types of circumstances. The Court then turned to the question whether the circumstances of the instant case required adjustment or shifting of the median line. To that end it considered a number of factors. With regard to the disparity

or disproportion between the lengths of the “relevant coasts”, according to Denmark, the Court concluded that the striking difference in lengths of the relevant coasts constituted a special circumstance within the meaning of Article 6, paragraph 1, of the 1958 Convention. Similarly, as regards the fishery zones, the Court was of the opinion that the application of the median line led to manifestly inequitable results. The Court concluded therefrom that the median line should be adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan Mayen.

The Court then considered certain circumstances that might also affect the position of the boundary line, i.e. access to resources, essentially fishery resources (capelin), particularly with regard to the presence of ice; population and economy; questions of security; conduct of the Parties. Among those factors, the Court only retained the one relating to access to resources, considering that the median line was too far to the west for Denmark to be assured of equitable access to the capelin stock. It concluded that, for that reason also, the median line had to be adjusted or shifted eastwards. Lastly, the Court proceeded to define the single line of delimitation as being the line M-N-O-A marked on the sketch-map reproduced above on page 135.

*1.59. Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*

By an Application dated 17 May 1989, the Islamic Republic of Iran instituted proceedings before the Court against the United States of America, further to the destruction in the air by the *USS Vincennes*, a guided-missile cruiser of the United States armed forces operating in the Persian Gulf, of an Iran Air Airbus A-300B, causing the deaths of its 290 passengers and crew. According to the Government of the Islamic Republic of Iran, the United States, by its destruction of that aircraft occasioning fatal casualties, by refusing to compensate Iran for the damage caused and by its continuous interference in aviation in the Persian Gulf, had violated certain provisions of the Chicago Convention on International Civil Aviation (1944) and of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971). The Islamic Republic of Iran likewise asserted that the Council of the International Civil Aviation Organization (ICAO) had erred in a decision of 17 March 1989 concerning the incident. Within the time-limit fixed for the filing of its Counter-Memorial, the United States of America raised preliminary objections to the jurisdiction of the Court.

Subsequently, by a letter dated 8 August 1994, the Agents of the two Parties jointly informed the Court that their Governments had “entered into negotiations that [might] lead to a full and final settlement of [the] case” and requested the Court “[to postpone] *sine die* the

opening of the oral proceedings” on the preliminary objections, for which it had fixed the date of 12 September 1994. By a letter dated 22 February 1996 and filed in the Registry on the same day, the Agents of the two Parties jointly notified the Court that their Governments had agreed to discontinue the case because they had entered into “an agreement in full and final settlement”. Accordingly, the President of the Court, also on 22 February 1996, made an Order recording the discontinuance of the proceedings and directing the removal of the case from the Court’s List.

*1.60. Certain Phosphate Lands in Nauru (Nauru v. Australia)*

On 19 May 1989 the Republic of Nauru filed in the Registry of the Court an Application instituting proceedings against the Commonwealth of Australia in respect of a dispute concerning the rehabilitation of certain phosphate lands mined under Australian administration before Nauruan independence. In its Application, Nauru claimed that Australia had breached the trusteeship obligations it had accepted under Article 76 of the Charter of the United Nations and under the Trusteeship Agreement for Nauru of 1 November 1947. Nauru further claimed that Australia had breached certain obligations towards Nauru under general international law, more particularly with regard to the implementation of the principle of self-determination and of permanent sovereignty over natural wealth and resources. Australia was said to have incurred an international legal responsibility and to be bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered. Within the time-limit fixed for the filing of its Counter-Memorial, Australia raised certain preliminary objections relating to the admissibility of the Application and the jurisdiction of the Court.

On 26 June 1992, the Court delivered its Judgment on those questions. With regard to the matter of its jurisdiction, the Court noted that Nauru based that jurisdiction on the declarations whereby Australia and Nauru had accepted the jurisdiction of the Court under Article 36, paragraph 2, of the Statute. The declaration of Australia specified that it did “not apply to any dispute in regard to which the Parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement”. Referring to the Trusteeship Agreement of 1947 and relying upon the reservation contained in its declaration to assert that the Court lacked jurisdiction to deal with Nauru’s Application, Australia argued that any dispute which arose in the course of the trusteeship between “the Administering Authority and the indigenous inhabitants” should be regarded as having been settled by the very fact of the termination of the trusteeship (provided that that termination was unconditional) as well as by the effect of the Agreement relating to the Nauru Island Phosphate Industry of 1967, concluded between the Nauru Local Government Council, on

the one hand, and Australia, New Zealand and the United Kingdom, on the other, whereby Nauru was said to have waived its claims to rehabilitation of the phosphate lands. As Australia and Nauru did not, after 31 January 1968, when Nauru acceded to independence, conclude any agreement whereby the two States undertook to settle their dispute relating to rehabilitation, the Court rejected that first preliminary objection of Australia. It likewise rejected the second, third, fourth and fifth objections raised by Australia.

The Court then considered the objection by Australia based on the fact that New Zealand and the United Kingdom were not parties to the proceedings. It noted that the three Governments mentioned in the Trusteeship Agreement constituted, in the very terms of that Agreement, "the Administering Authority" for Nauru; but this Authority did not have an international legal personality distinct from those of the States thus designated; and that, of those States, Australia played a very special role, established, in particular, by the Trusteeship Agreement. The Court did not consider, to begin with, that any reason had been shown why a claim brought against only one of the three States should be declared inadmissible *in limine litis*, merely because that claim raised questions regarding the administration of the territory, which was shared with the two other States. It further considered, *inter alia*, that it was in no way precluded from adjudicating upon the claims submitted to it, provided the legal interests of the third State which might possibly be affected did not form the actual subject-matter of the decision requested. Where the Court was so entitled to act, the interests of the third State which was not a party to the case were protected by Article 59 of the Statute. The Court found that, in the instant case, the interests of New Zealand and the United Kingdom did not constitute the actual subject-matter of the Judgment to be rendered on the merits of Nauru's Application and that, consequently, it could not refuse to exercise its jurisdiction and that the objection argued on that point should be dismissed.

Lastly, the Court upheld the preliminary objection addressed by Australia to the claim by Nauru concerning the overseas assets of the British Phosphate Commissioners, according to which it was inadmissible on the ground that it was a completely new claim which appeared for the first time in the Memorial, and that the object of the dispute originally submitted to the Court would have been transformed if it had dealt with that request. A Counter-Memorial of Australia on the merits was subsequently filed and the Court fixed the dates for the filing of a Reply by the Applicant and a Rejoinder by the Respondent. However, before those two pleadings were filed, the two Parties, by a joint notification deposited on 9 September 1993, informed the Court that they had, in consequence of having reached a settlement, agreed to discontinue the proceedings. Accordingly, the case was removed from the General List by an Order of the Court of 13 September 1993.

*1.61. Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*

On 23 August 1989, Guinea-Bissau instituted proceedings against Senegal, on the basis of the declarations made by both States under Article 36, paragraph 2, of the Statute. Guinea-Bissau explained that, notwithstanding the negotiations pursued from 1977 onwards, the two States had been unable to reach a settlement of a dispute concerning the maritime delimitation to be effected between them. Consequently they had jointly consented, by an Arbitration Agreement dated 12 March 1985, to submit that dispute to an Arbitration Tribunal composed of three members. Guinea-Bissau indicated that, according to the terms of Article 2 of that Agreement, the Tribunal had been asked to rule on the following twofold question:

“1. Does the Agreement concluded by an exchange of letters [between France and Portugal] on 26 April 1960, and which relates to the maritime boundary, have the force of law in the relations between the Republic of Guinea-Bissau and the Republic of Senegal?

2. In the event of a negative answer to the first question, what is the course of the line delimiting the maritime territories appertaining to the Republic of Guinea-Bissau and the Republic of Senegal respectively?”

Guinea-Bissau added that it had been specified, in Article 9 of the Agreement, that the Tribunal would inform the two Governments of its decision regarding the questions set forth in Article 2, and that that decision should include the drawing of the frontier line on a map. According to the Application, the Tribunal communicated to the Parties on 31 July 1989 a “text that was supposed to serve as an award” but did not in fact amount to one. Guinea-Bissau asserted that the decision was inexistent as the majority of two arbitrators (against one) that had voted in favour of the text was no more than apparent given that one of the two arbitrators — in fact the President of the Tribunal — was said to have “expressed a view in contradiction with the one apparently adopted by the vote”, in a declaration appended thereto. Subsidiarily, Guinea-Bissau maintained that the Award was null and void, as the Tribunal had failed, in various ways (see explanation below) to accomplish the task assigned to it by the Agreement. By an Order dated 12 February 1990, the Court dismissed a request for the indication of provisional measures presented by Guinea-Bissau.

It delivered its Judgment on 12 November 1991. The Court first considered its jurisdiction, and, in particular, found that Guinea-Bissau’s declaration contained no reservation, but that the declaration of Senegal, which replaced a previous declaration of 3 May 1985, provided among other things that it was applicable only to “all legal disputes arising after the present declaration . . .”. As the Parties



agreed that only the dispute relating to the Award rendered by the Tribunal (which arose after the Senegalese declaration) was the subject of the proceedings before the Court and that it should not be seen as an appeal from the Award, or as an application for revision of it, the Court accordingly regarded its jurisdiction as established. It then rejected, *inter alia*, Senegal's contention that Guinea-Bissau's Application, or the arguments used in support of it, amounted to an abuse of process. With regard to Guinea-Bissau's contention that the Award was inexistent, the Court considered that the view expressed by the President of the Tribunal in his declaration constituted only an indication of what he considered would have been a better course. His position therefore could not be regarded as standing in contradiction with the position adopted by the Award. The Court accordingly dismissed the contention of Guinea-Bissau that the Award was inexistent for lack of a real majority.

The Court then examined the question of the nullity of the Award, as Guinea-Bissau had observed that the Tribunal had not replied to the second question put in Article 2 of the Arbitration Agreement and had not appended to the Award the map provided for in Article 9 of that Agreement. According to Guinea-Bissau, those two omissions constituted an *excès de pouvoir*. It was further asserted that no reasons had been given by the Tribunal for its decision. With regard to the absence of a reply to the second question, the Court recognized that the structure of the Award was, in that respect, open to criticism, but concluded that the Award was not flawed by any failure to decide. The Court then observed that the Tribunal's statement of reasoning, while succinct, was clear and precise, and concluded that the second contention of Guinea-Bissau must also be dismissed. With regard to the validity of the reasoning adopted by the Tribunal on the issue of whether it was required to answer the second question, the Court recalled that an international tribunal normally had the right to decide as to its own jurisdiction and the power to interpret for that purpose the instruments which governed that jurisdiction. It observed that Guinea-Bissau was in fact criticizing the interpretation in the Award of the provisions of the Arbitration Agreement which determine the Tribunal's jurisdiction, and proposing another interpretation.

Further to a detailed consideration of Article 2 of the Arbitration Agreement, it concluded that the Tribunal had not acted in manifest breach of its competence to determine its own jurisdiction by deciding that it was not required to answer the second question except in the event of a negative answer to the first. Then, with respect to the argument of Guinea-Bissau that the answer given by the Tribunal to the first question was a partially negative answer and that this sufficed to satisfy the prescribed condition for entering into the second question, the Court found that the answer given achieved a partial delimitation, and that the Tribunal had thus been able to



find, without manifest breach of its competence, that its answer to the first question was not a negative one. The Court concluded that, in this respect also, the contention of Guinea-Bissau that the entire Award was a nullity must be rejected. It considered moreover that the absence of a map could not in this case constitute such an irregularity as would render the Award invalid.

#### 1.62. *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*

On 31 August 1990, the Libyan Arab Jamahiriya filed in the Registry a notification of an Agreement that it had concluded with Chad in Algiers on 31 August 1989, in which it was agreed, *inter alia*, that in the absence of a political settlement of their territorial dispute, they undertook to submit that dispute to the Court. On 3 September 1990, Chad filed an Application instituting proceedings against the Libyan Arab Jamahiriya that was based upon the aforementioned Agreement and, subsidiarily, on the Franco-Libyan Treaty of Friendship and Good Neighbourliness of 10 August 1995. The Parties subsequently agreed that the proceedings had in fact been instituted by two successive notifications of the Special Agreement constituted by the Algiers Agreement. The written proceedings occasioned the filing, by each of the Parties, of a Memorial, a Counter-Memorial and a Reply, accompanied by voluminous annexes, and the oral proceedings were held in June and July 1993.

The Court delivered its Judgment on 3 February 1994. It began by observing that Libya considered that there was no existing boundary, and had asked the Court to determine one, while Chad considered that there was an existing boundary, and had asked the Court to declare what that boundary was. The Court then referred to the lines claimed by Chad and by Libya, as illustrated in Sketch Map No. 1 reproduced in the Judgment (see below p. 142); Libya's claim was on the basis of a coalescence of rights and titles of the indigenous inhabitants, the Senoussi Order, the Ottoman Empire, Italy and Libya itself; while that of Chad was on the basis of a Treaty of Friendship and Good Neighbourliness concluded by France and Libya on 10 August 1995, or, alternatively, on French *effectivités*, either in relation to, or independently of, the provisions of earlier treaties.

The Court noted that it had been recognized by both Parties that the 1955 Treaty between France and Libya was the logical starting-point for consideration of the issues before the Court. Neither Party questioned the validity of the 1955 Treaty, nor did Libya question Chad's right to invoke against Libya any such provisions thereof as related to the frontiers of Chad. One of the matters specifically addressed was the question of frontiers, dealt with in Article 3 and Annex I. The Court pointed out that if the 1955 Treaty did result in a boundary, this furnished the answer to the issues raised by the Parties. Article 3 of the Treaty provided that France and Libya recognized that the

frontiers between, *inter alia*, the territories of French Equatorial Africa and the territory of Libya were those that resulted from a number of international instruments in force on the date of the constitution of the United Kingdom of Libya and reproduced in Annex I to the Treaty. In the view of the Court, the terms of the Treaty signified that the Parties thereby recognized complete frontiers between their respective territories as resulting from the combined effect of all the instruments listed in Annex I. By entering into the Treaty, the Parties recognized the frontiers to which the text of the Treaty referred; the task of the Court was thus to determine the exact content of the undertaking entered into. The Court specified in that regard that there was nothing to prevent the Parties from deciding by mutual agreement to consider a certain line as a frontier, whatever the previous status of that line. If it was already a territorial boundary, it was confirmed purely and simply.

It was clear to the Court that — contrary to what was contended by the Libyan Arab Jamahiriya — the Parties had agreed to consider the instruments listed as being in force for the purpose of Article 3, since otherwise they would not have included them in the Annex. Having concluded that the Contracting Parties wished, by the 1955 Treaty, to define their common frontier, the Court considered what that frontier was. Accordingly it proceeded to a detailed study of the instruments relevant to the case, i.e., (a) to the east of the line of 16° longitude, the *Anglo-French Declaration of 1899* — which defined a line limiting the French zone (or sphere of influence) to the north-east in the direction of Egypt and the Nile Valley, already under British control — and the *Convention of 8 September 1919 signed at Paris between Great Britain and France*, which resolved the question of the location of the boundary of the French zone under the 1899 Declaration; (b) to the west of the line of 16° longitude, the *Franco-Italian Agreement (Exchange of Letters) of 1 November 1902*, which referred to the map annexed to the Declaration of 21 March 1899. The Court pointed out that that map could only be the map in the *Livre jaune* published by the French authorities in 1899 and which showed a dotted line indicating the frontier of Tripolitania.

The Court then described the line resulting from those relevant international instruments (see above, map on p. 143). Considering the attitudes adopted subsequently by the Parties with regard to their frontiers, it reached the conclusion that the existence of a determined frontier had been accepted and acted upon by the Parties. Lastly, referring to the provision of the 1955 Treaty according to which it was concluded for a period of 20 years and could be terminated unilaterally, the Court indicated that that Treaty had to be taken to have determined a permanent frontier, and observed that, when a boundary has been the subject of agreement, its continued existence is not dependent upon the continuing life of the Treaty under which that boundary was agreed.

### 1.63. *East Timor (Portugal v. Australia)*

On 22 February 1991, Portugal instituted proceedings against Australia concerning "certain activities of Australia with respect to East Timor", in relation to the conclusion, on 11 December 1989, of a treaty between Australia and Indonesia which created a Zone of Co-operation in a maritime area between "the Indonesian Province of East Timor and Northern Australia". According to the Application Australia had,

"by its conduct, failed to observe . . . the obligation to respect the duties and powers of [Portugal as] the Administering Power [of East Timor] . . . and . . . the right of the people of East Timor to self-determination".

In consequence, according to the Application, Australia had incurred international responsibility vis-à-vis the people of both East Timor and Portugal. As the basis for the jurisdiction of the Court, the Application referred to the declarations by which the two States had accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute. In its Counter-Memorial, Australia raised questions concerning the jurisdiction of the Court and the admissibility of the Application.

The Court delivered its Judgment on 30 June 1995. It began by considering Australia's objection that there was in reality no dispute between itself and Portugal. Australia contended that the case as presented by Portugal was artificially limited to the question of the lawfulness of Australia's conduct, and that the true respondent was Indonesia, not Australia, observing that Portugal and itself had accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, but that Indonesia had not. The Court found in that respect that there was a legal dispute between the two States. The Court then considered Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia. Australia contended that the Court would not be able to act if, in order to do so, it were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. In support of its argument, Australia referred to the Court's Judgment in the case concerning the *Monetary Gold Removed from Rome in 1943* (see No. 1.12 above).

After having carefully considered the arguments advanced by Portugal which sought to separate Australia's behaviour from that of Indonesia, the Court concluded that Australia's behaviour could not be assessed without first entering into the question why it was that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the

Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of the continental shelf. The Court took the view that it could not make such a determination in the absence of the consent of Indonesia.

The Court then rejected Portugal's additional argument that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them. In the Court's view, Portugal's assertion that the right of peoples to self-determination had an *erga omnes* character, was irreproachable, and the principle of self-determination of peoples had been recognized by the Charter of the United Nations and in the jurisprudence of the Court, and was one of the essential principles of contemporary international law. However the Court considered that the *erga omnes* character of a norm and the rule of consent to jurisdiction were two different things, and that it could not in any event rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of another State which was not a party to the case.

The Court then considered another argument of Portugal which rested on the premise that the United Nations resolutions, and in particular those of the Security Council, could be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over East Timor and, where the latter is concerned, to deal only with Portugal. Portugal maintained that those resolutions would constitute "givens" on the content of which the Court would not have to decide *de novo*. The Court took note, in particular, of the fact that for the two Parties, the Territory of East Timor remained a non-self-governing territory and its people had the right to self-determination, but considered that the resolutions could not be regarded as "givens" constituting a sufficient basis for determining the dispute between the Parties. It followed on the whole of those findings that the Court would necessarily first have to rule upon the lawfulness of Indonesia's conduct. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent, which would run directly counter to the principle according to which "the Court can only exercise jurisdiction over a State with its consent". The Court accordingly found that it was not required to consider Australia's other objections and that it could not rule on Portugal's claims on the merits.

*1.64. Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)*

On 12 March 1991, while proceedings were still in progress in the case brought by Guinea-Bissau against Senegal in relation to the

*Arbitral Award of 31 July 1989* (see No. 1.61 above), Guinea-Bissau filed a further Application instituting proceedings against Senegal, in which the Court was asked to adjudge and declare:

“What should be, on the basis of the international law of the sea and of all the relevant elements of the case, including the future decision of the Court in the case concerning the Arbitral ‘award’ of 31 July 1989, the line (to be drawn on a map) delimiting all the maritime territories appertaining respectively to Guinea-Bissau and Senegal.”

For its part, Senegal indicated that it had every reservation as to the admissibility of that fresh claim, and possibly as to the Court’s jurisdiction. At a meeting held by the President of the Court with the representatives of the Parties on 5 April 1991, the latter agreed that no measure should be taken in the case until the Court had delivered its decision in the other case pending between the two States. The Court delivered its Judgment in that case on 12 November 1991 indicating, *inter alia*, that it considered it “highly desirable that the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989 be resolved as soon as possible, as both Parties desire”. The Parties then initiated negotiations. As they were able to conclude an “*accord de gestion et de coopération*”, they subsequently, at a meeting with the President of the Court on 1 November 1995, notified him of their decision to discontinue the proceedings. By a letter dated 2 November 1995, the Agent of Guinea-Bissau confirmed that his Government, by virtue of the agreement reached by the two Parties on the disputed zone, had decided to discontinue the proceedings. By a letter dated 6 November 1995, the Agent of Senegal confirmed that his Government agreed to that discontinuance. On 8 November 1995, the Court made an Order recording the discontinuance of the proceedings and directing the removal of the case from the Court’s List.

*1.65. Passage through the Great Belt (Finland v. Denmark)*

On 17 May 1991 Finland instituted proceedings against Denmark in respect of a dispute concerning passage through the Great Belt (Storebælt), and the project by the Government of Denmark to construct a fixed traffic connection for both road and rail traffic across the West and East Channels of the Great Belt. The effect of this project, and in particular of the planned high-level suspension bridge over the East Channel, would be permanently to close the Baltic for deep-draught vessels of over 65 m height, thus preventing the passage of such drill ships and oil rigs manufactured in Finland as require more than that clearance. Finland requested the Court to adjudge and declare (a) that there was a right of free passage through the Great Belt which applied to all ships entering and leaving Finnish ports and shipyards; (b) that this right extended to drill ships, oil rigs and

reasonably foreseeable ships; (c) that the construction of a fixed bridge over the Great Belt as currently planned by Denmark would be incompatible with the aforementioned right of passage; (d) that Denmark and Finland ought to start negotiations, in good faith, on how the right of free passage should be guaranteed. On 23 May 1991, Finland requested the Court to indicate certain provisional measures aimed, principally, at stopping all construction works in connection with the planned bridge project over the East Channel which it was alleged would prevent the passage of ships, in particular drill ships and oil rigs, entering and leaving Finnish ports and shipyards.

By an Order dated 29 July 1991, the Court dismissed that request for the indication of provisional measures by Finland, while at the same time indicating that, pending its decision on the merits, any negotiation between the Parties with a view to achieving a direct and friendly settlement was to be welcomed, and going on to say that it would be appropriate for the Court, with the co-operation of the Parties, to ensure that the decision on the merits was reached with all possible expedition. By a letter dated 3 September 1992, the Agent of Finland, referring to the relevant passage of the Order, stated that a settlement of the dispute had been attained and accordingly notified the Court of the discontinuance of the case. Denmark let it be known that it had no objection to that discontinuance. Consequently, the President of the Court, on 10 September 1992, made an Order recording the discontinuance of the proceedings and directing the removal of the case from the Court's List.

*1.66. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*

On 8 July 1991, Qatar filed in the Registry of the Court an Application instituting proceedings against Bahrain in respect of certain disputes between the two States relating to sovereignty over the Hawar Islands, sovereign rights over the shoals of Dibal and Qit'at Jaradah and the delimitation of their maritime areas. Qatar founded the jurisdiction of the Court upon certain agreements between the Parties stated to have been concluded in December 1987 and December 1990, the subject and scope of the commitment to accept that jurisdiction being determined by a formula proposed by Bahrain to Qatar in October 1988 and accepted by the latter State in December 1990 (the "Bahraini formula"). As Bahrain contested the basis of jurisdiction invoked by Qatar, the Parties agreed that the written proceedings should first be addressed to the questions of jurisdiction and admissibility. After a Memorial of the Applicant and Counter-Memorial of the Respondent had been filed, the Court directed that a Reply and a Rejoinder be filed by each of them, respectively.

On 1 July 1994 the Court delivered a first Judgment on the above-mentioned questions. It took the view that both the exchanges of letters of December 1987 between the King of Saudi Arabia and the Amir of Qatar, and between the King of Saudi Arabia and the Amir of Bahrain, and the document entitled "Minutes" and signed at Doha in December 1990 constituted international agreements creating rights and obligations for the Parties; and that by the terms of those agreements they had undertaken to submit to the Court the whole of the dispute between them. In the latter regard, the Court pointed out that the Application of Qatar did not cover some of the constitutive elements that the Bahraini formula was supposed to cover. It accordingly decided to give the Parties the opportunity to submit to it "the whole of the dispute" as circumscribed by the Minutes of 1990 and that formula, while fixing 30 November 1994 as the time-limit within which the Parties were, jointly or separately, to take action to that end. On the prescribed date, Qatar filed a document entitled "Act", which referred to the absence of an agreement between the Parties to act jointly and declared that it was submitting "the whole of the dispute" to the Court. On the same day, Bahrain filed a document entitled "Report" in which it indicated, *inter alia*, that the submission to the Court of "the whole of the dispute" must be "consensual in character, that is, a matter of agreement between the Parties". By observations submitted to the Court at a later time, Bahrain indicated that the unilateral "Act" of Qatar did not "create that jurisdiction [of the Court] or effect a valid submission in the absence of Bahrain's consent". By a second Judgment on the questions of jurisdiction and admissibility, delivered on 15 February 1995, the Court found that it had jurisdiction to adjudicate upon the dispute submitted to it between Qatar and Bahrain, and that the Application of Qatar, as formulated on 30 November 1994, was admissible. The Court, having proceeded to an examination of the two paragraphs constituting the Doha Agreement, found that, in that Agreement, the Parties had reasserted their consent to its jurisdiction and had defined the object of the dispute in accordance with the Bahraini formula; it further found that the Doha Agreement permitted the unilateral seisin and that it was now seised of the whole of the dispute. By two Orders, the Court subsequently fixed and then extended the time-limit within which each of the Parties could file a Memorial on the merits.

Following the objections raised by Bahrain as to the authenticity of certain documents annexed to the Memorial and Counter-Memorial of Qatar, the Court, by an Order of 30 March 1998, fixed a time-limit for the filing, by the latter, of a report concerning the authenticity of each of the disputed documents. By the same Order, the Court directed the submission of a Reply on the merits of the dispute by each of the Parties. Qatar having decided to disregard the challenged documents for the purposes of the case, the Court, by an Order of 17 February 1999, decided that the Replies would not rely on those



documents. It also granted an extension of the time-limit for the filing of the said Replies.

In its Judgment of 16 March 2001, the Court, after setting out the procedural background in the case, recounted the complex history of the dispute. It noted that Bahrain and Qatar had concluded exclusive protection agreements with Great Britain in 1892 and 1916 respectively, and that that status of protected States had ended in 1971. The Court further cited the disputes which arose between Bahrain and Qatar on the occasion, *inter alia*, on the granting of concessions to oil companies, as well as the efforts made to settle those disputes.

The Court first considered the Parties' claims to Zubarah. It stated that, in the period after 1868, the authority of the Sheikh of Qatar over Zubarah was gradually consolidated, that it was acknowledged in the Anglo-Ottoman Convention of 29 July 1913 and definitively established in 1937. It further stated that there was no evidence that members of the Naim tribe had exercised sovereign authority on behalf of the Sheikh of Bahrain within Zubarah. Accordingly, it concluded that Qatar had sovereignty over Zubarah.

Turning to the Hawar Islands, the Court stated that the decision by which the British Government had found in 1939 that those islands belonged to Bahrain did not constitute an arbitral award, but that did not mean that it was devoid of legal effect. It noted that Bahrain and Qatar consented to Great Britain settling their dispute at the time and found that the 1939 decision must be regarded as a decision that was binding from the outset on both States and continued to be so after 1971. Rejecting Qatar's arguments that the decision was null and void, the Court concluded that Bahrain had sovereignty over the Hawar Islands.

The Court observed that the British decision of 1939 did not mention Janan Island, which it considered as forming a single island with Hadd Janan. It pointed out, however, that in letters sent in 1947 to the Rulers of Qatar and Bahrain, the British Government had made it clear that "Janan Island is not regarded as being included in the islands of the Hawar group". The Court considered that the British Government, in so doing, had provided an authoritative interpretation of its 1939 decision, an interpretation which revealed that it regarded Janan as belonging to Qatar. Accordingly, Qatar had sovereignty over Janan Island, including Hadd Janan.

The Court then turned to the question of the maritime delimitation. It recalled that international customary law was the applicable law in the case and that the Parties had requested it to draw a single maritime boundary. In the southern part, the Court had to draw a boundary delimiting the territorial seas of the Parties, areas over which they enjoyed territorial sovereignty (including sea-bed, superjacent waters and superjacent aerial space). In the northern part, the Court had to make a delimitation between areas in which the Parties had only



sovereign rights and functional jurisdiction (continental shelf, exclusive economic zone).

With respect to the territorial seas, the Court considered that it had to draw provisionally an equidistance line (a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured) and then to consider whether that line must be adjusted in the light of any special circumstances. As the Parties had not specified the baselines to be used, the Court recalled that under the applicable rules of law, the normal baseline for measuring the breadth of the territorial sea was the low-water line along the coast. It observed that Bahrain did not include a claim to the status of archipelagic State in its formal submissions and that the Court was therefore not requested to take a position on that issue. In order to determine what constituted the Parties' relevant coasts, the Court first had to establish which islands came under their sovereignty. Bahrain had claimed to have sovereignty over the islands of Jazirat Mashtan and Umm Jalid, a claim which had not been contested by Qatar. As to Qit'at Jaradah, the nature of which was disputed, the Court held that it should be considered as an island because it was above water at high tide; the Court added that the activities which had been carried out by Bahrain were sufficient to support its claim of sovereignty over the island. With regard to low-tide elevations, the Court, after noting that international treaty law was silent on the question whether those elevations should be regarded as "territory", found that low-tide elevations situated in the overlapping area of the territorial seas of both States could not be taken into consideration for the purposes of drawing the equidistance line. That was true of Fasht ad Dibal, which both Parties regarded as a low-tide elevation. The Court then considered whether there were any special circumstances which made it necessary to adjust the equidistance line in order to obtain an equitable result. It found that there were such circumstances which justified choosing a delimitation line passing on the one hand between Fasht al Azm and Qit'at ash Shajarah and, on the other, between Qit'at Jaradah and Fasht ad Dibal.

In the northern part, the Court, citing its case-law, followed the same approach, provisionally drawing an equidistance line and examining whether there were circumstances requiring an adjustment of that line. The Court rejected Bahrain's argument that the existence of certain pearling banks situated to the north of Qatar, and which were predominantly exploited in the past by Bahraini fishermen, constituted a circumstance justifying a shifting of the line. It also rejected Qatar's argument that there was a significant disparity between the coastal lengths of the Parties calling for an appropriate correction. The Court further stated that considerations of equity required that the maritime formation of Fasht al Jarim should have no effect in determining the boundary line.

*1.67-68. Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Libyan Arab Jamahiriya v. United States of America)*

On 3 March 1992 the Libyan Arab Jamahiriya filed in the Registry of the Court two separate Applications instituting proceedings against the Government of the United States of America and the Government of the United Kingdom, in respect of a dispute over the interpretation and application of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed in Montreal on 23 September 1971, a dispute arising from acts resulting in the aerial incident that occurred over Lockerbie, Scotland, on 21 December 1988. In its Applications, Libya referred to the charging and indictment of two Libyan nationals by a Grand Jury of the United States of America and by the Lord Advocate of Scotland, respectively, with having caused a bomb to be placed aboard Pan Am flight 103. The bomb subsequently exploded, causing the aeroplane to crash, all persons aboard being killed. Libya pointed out that the acts alleged constituted an offence within the meaning of Article 1 of the Montreal Convention, which it claimed to be the only appropriate Convention in force between the Parties, and asserted that it had fully complied with its own obligations under that instrument, Article 5 of which required a State to establish its own jurisdiction over alleged offenders present in its territory in the event of their non-extradition; and that there was no extradition treaty between Libya and the respective other Parties, so that Libya was obliged under Article 7 of the Convention to submit the case to its competent authorities for the purpose of prosecution. Libya contended that the United States of America and the United Kingdom were in breach of the Montreal Convention through rejection of its efforts to resolve the matter within the framework of international law, including the Convention itself, in that they were placing pressure upon Libya to surrender the two Libyan nationals for trial. On 3 March 1992, Libya made two separate requests to the Court to indicate forthwith certain provisional measures, namely: (a) to enjoin the United States and the United Kingdom respectively from taking any action against Libya calculated to coerce or compel it to surrender the accused individuals to any jurisdiction outside Libya; and (b) to ensure that no steps were taken that would prejudice in any way the rights of Libya with respect to the legal proceedings that were the subject of Libya's Applications.

On 14 April 1992, the Court read two Orders on those requests for the indication of provisional measures, in which it found that the circumstances of the cases were not such as to require the exercise of its powers to indicate such measures. Within the time-limit fixed for the filing of its Counter-Memorial, each of the respondent States filed preliminary objections: the United States of America filed certain

preliminary objections requesting the Court to adjudge and declare that it lacked jurisdiction and could not entertain the case; the United Kingdom filed certain preliminary objections to the jurisdiction of the Court and to the admissibility of the Libyan claims. In accordance with the provisions of Article 79 of the Rules of Court, the proceedings on the merits were suspended in those two cases. By Orders dated 22 September 1995, the Court then fixed 22 December 1995 as the time-limit within which the Libyan Arab Jamahiriya might present, in each case, a written statement of its observations and submissions on the preliminary objections raised, which it did within the prescribed time-limit.

On 27 February 1998, the Court delivered two Judgments on the preliminary objections raised by the United Kingdom and the United States of America. The Court first began by dismissing the Respondents' respective objections to jurisdiction on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention. It declared that it had jurisdiction on the basis of Article 14, paragraph 1, of that Convention to hear the disputes between Libya and the respondent States concerning the interpretation or application of the provisions of the Convention. The Court then went on to dismiss the objection to admissibility based on Security Council resolutions 748 (1992) and 883 (1993). Lastly, it found that the objection raised by each of the respondent States on the ground that those resolutions would have rendered the claims of Libya without object did not, in the circumstances of the case, have an exclusively preliminary character.

In June 1999, the Court authorized Libya to submit a Reply, and the United Kingdom and the United States to file Rejoinders. Those pleadings were filed by the Parties within the time-limits laid down by the Court and its President.

By two letters of 9 September 2003, the Governments of Libya and the United Kingdom on the one hand, and of Libya and the United States on the other, jointly notified the Court that they had "agreed to discontinue with prejudice the proceedings". Following those notifications, the President of the Court, on 10 September 2003, made an Order in each case placing on record the discontinuance of the proceedings with prejudice, by agreement of the Parties, and directing the removal of the case from the Court's List.

*1.69. Oil Platforms (Islamic Republic of Iran v. United States of America)*

On 2 November 1992, the Islamic Republic of Iran filed in the Registry of the Court an Application instituting proceedings against the United States of America with respect to the destruction of Iranian oil platforms. The Islamic Republic founded the jurisdiction of the Court upon a provision of the Treaty of Amity, Economic Relations

and Consular Rights between Iran and the United States, signed at Tehran on 15 August 1955. In its Application, Iran alleged that the destruction caused by several warships of the United States Navy, in October 1987 and April 1988, to three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, constituted a fundamental breach of various provisions of the Treaty of Amity and of international law. Time-limits for the filing of written pleadings were then fixed and subsequently extended by two Orders of the President of the Court. On 16 December 1993, within the extended time-limit for filing the Counter-Memorial, the United States of America filed a preliminary objection to the Court's jurisdiction. In accordance with the terms of Article 79, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended; by an Order of 18 January 1994, the Court fixed 1 July 1994 as the time-limit within which Iran could present a written statement of its observations and submissions on the objection, which was filed within the prescribed time-limit.

In its Judgment of 12 December 1996, the Court rejected the preliminary objection raised by the United States of America and found that it had jurisdiction, on the basis of Article XXI, paragraph 2, of the Treaty of 1955, to entertain the claims made by Iran under Article X, paragraph 1, of that Treaty, which protects freedom of commerce and navigation between the territories of the Parties.

When filing its Counter-Memorial, the United States of America submitted a counter-claim requesting the Court to adjudge and declare that, through its actions in the Persian Gulf in 1987 and 1988, Iran had also breached its obligations under Article X of the Treaty of 1955. Iran having disputed the admissibility of that counter-claim under Article 80, paragraph 1, of the Rules, the Court ruled on the matter in an Order of 10 March 1998. It found that the counter-claim was admissible as such and formed part of the current proceedings, and directed Iran to submit a Reply and the United States to submit a Rejoinder. Those pleadings were filed within the extended time-limits thus fixed. In its Order of 1998, the Court also stated that it was necessary, in order to ensure strict equality between the Parties, to reserve the right of Iran to present its views in writing a second time on the counter-claim, in an additional pleading, the filing of which might be the subject of a subsequent Order. Such an Order was made by the Vice-President on 28 August 2001, and Iran subsequently filed its additional pleading within the time-limits fixed. Public sittings on the claim of Iran and the counter-claim of the United States of America were held from 17 February to 7 March 2003.

The Court gave judgment on 6 November 2003. Iran had contended that, in attacking on two occasions and destroying three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, the United States had violated freedom of commerce between the territories of the Parties as guaran-

ted by the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. It sought reparation for the injury thus caused. The United States had argued in its counter-claim that it was Iran which had violated the 1955 Treaty by attacking vessels in the Gulf and otherwise engaging in military actions that were dangerous and detrimental to commerce and navigation between the United States and Iran. The United States likewise sought reparation.

The Court first considered whether the actions by American naval forces against the Iranian oil complexes were justified under the 1955 Treaty as measures necessary to protect the essential security interests of the United States (Art. XX, para. 1 (*d*), of the Treaty). Interpreting the Treaty in light of the relevant rules of international law, it concluded that the United States was only entitled to have recourse to force under the provision in question if it was acting in self-defence. The United States could exercise such a right of self-defence only if it had been the victim of an armed attack by Iran and the United States actions must have been necessary and proportional to the armed attack against it. After carrying out a detailed examination of the evidence provided by the Parties, the Court found that the United States had not succeeded in showing that these various conditions were satisfied, and concluded that the United States was therefore not entitled to rely on the provisions of Article XX, paragraph 1 (*d*), of the 1955 Treaty.

The Court then examined the issue of whether the United States, in destroying the platforms, had impeded their normal operation, thus preventing Iran from enjoying freedom of commerce "between the territories of the two High Contracting Parties" as guaranteed by the 1955 Treaty (Art. X, para. 1). It concluded that, as regards the first attack, the platforms attacked were under repair and not operational, and that at that time there was thus no trade in crude oil from those platforms between Iran and the United States. Accordingly, the attack on those platforms could not be considered as having affected freedom of commerce between the territories of the two States. The Court reached the same conclusion in respect of the later attack on two other complexes, since all trade in crude oil between Iran and the United States had been suspended as a result of an embargo imposed by an Executive Order adopted by the American authorities. The Court thus found that the United States did not breach its obligations to Iran under Article X, paragraph 1, of the 1955 Treaty and rejected Iran's claim for reparation.

In regard to the United States counter-claim, the Court, after rejecting the objections to jurisdiction and admissibility raised by Iran, considered whether the incidents attributed by the United States to Iran infringed freedom of commerce or navigation between the territories of the Parties as guaranteed by Article X, paragraph 1, of the 1955 Treaty. The Court found that none of the ships alleged by the

United States to have been damaged by Iranian attacks was engaged in commerce or navigation between the territories of the two States. Nor did the Court accept the generic claim by the United States that the actions of Iran had made the Persian Gulf unsafe for shipping, concluding that, according to the evidence before it, there was not, at the relevant time, any actual impediment to commerce or navigation between the territories of Iran and the United States. The Court accordingly rejected the United States counter-claim for reparation.

*1.70. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro<sup>1</sup>)*

On 20 March 1993, the Republic of Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia in respect of a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948, as well as various matters which Bosnia and Herzegovina claimed were connected therewith. The Application invoked Article IX of the Genocide Convention as the basis of the jurisdiction of the Court. Subsequently, Bosnia and Herzegovina also invoked certain additional bases of jurisdiction.

On 20 March 1993, immediately after the filing of its Application, Bosnia and Herzegovina submitted a request for the indication of provisional measures under Article 41 of the Statute and, on 1 April 1993, Yugoslavia submitted written observations on Bosnia and Herzegovina's request for provisional measures, in which it, in turn, recommended the Court to order the application of provisional measures to Bosnia and Herzegovina. By an Order dated 8 April 1993, the Court, after hearing the Parties, indicated certain provisional measures with a view to the protection of rights under the Genocide Convention. On 27 July 1993, Bosnia and Herzegovina submitted a new request for the indication of provisional measures and, on 10 August 1993, Yugoslavia also submitted a request for the indication of provisional measures. By an Order dated 13 September 1993, the Court, after hearing the Parties, reaffirmed the measures indicated in its Order of 8 April 1993 and declared that those measures should be immediately and effectively implemented. Then, within the extended time-limit of 30 June 1995 for the filing of its Counter-Memorial, Yugoslavia, referring to Article 79, paragraph 1, of the Rules of Court, raised preliminary objections concerning both the admissibility of the Application and the jurisdiction of the Court to entertain the case.

<sup>1</sup> The title of the case was amended following the change in the name of Yugoslavia on 4 February 2003. In the following summary, the name "Yugoslavia" has been retained with respect to all proceedings before this date.

In its Judgment of 11 July 1996, the Court rejected the preliminary objections raised by Yugoslavia and found that it had jurisdiction to deal with the dispute on the basis of Article IX of the Genocide Convention, dismissing the additional bases of jurisdiction invoked by Bosnia and Herzegovina. Among other things, it found that the Convention bound the two Parties and that there was a legal dispute between them falling within the provisions of Article IX.

By an Order dated 23 July 1996, the President of the Court fixed 23 July 1997 as the time-limit for the filing by Yugoslavia of its Counter-Memorial on the merits. The Counter-Memorial was filed within the prescribed time-limits and contained counter-claims, by which Yugoslavia requested the Court, among other things, to adjudge and declare that Bosnia and Herzegovina was responsible for acts of genocide committed against the Serbs in Bosnia and Herzegovina and for other violations of the Genocide Convention. The admissibility of the counter-claims under Article 80, paragraph 1, of the Rules of Court having been called into question by Bosnia and Herzegovina, the Court ruled on the matter, declaring, in its Order of 17 December 1997, that the counter-claims were admissible as such and formed part of the proceedings in the case. The Reply of Bosnia and Herzegovina and the Rejoinder of Yugoslavia were subsequently filed within the time-limits laid down by the Court and its President. During 1999 and 2000, various exchanges of letters took place concerning new procedural difficulties which had emerged in the case. In April 2001, Yugoslavia informed the Court that it wished to withdraw its counter-claims. As Bosnia and Herzegovina had raised no objection, the President of the Court, by an Order of 10 September 2001, placed on record the withdrawal by Yugoslavia of the counter-claims it had submitted in its Memorial. On 4 May 2001, Yugoslavia submitted to the Court a document entitled "Initiative to the Court to reconsider *ex officio* jurisdiction over Yugoslavia"; on 1 July 2001, it also filed an Application for revision of the Judgment of 11 July 1996 (see No. 1.96 below).

#### *1.71. Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*

On 2 July 1993 the Governments of the Republic of Hungary and of the Slovak Republic notified jointly to the Registry of the Court a Special Agreement, signed at Brussels on 7 April 1993, for the submission to the Court of certain issues arising out of differences which had existed between the Republic of Hungary and the Czech and Slovak Federal Republic regarding the implementation and the termination of the Budapest Treaty of 16 September 1977 on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System and on the construction and operation of the "provisional solution". The Special Agreement records that the Slovak Republic is in this respect the sole successor State of the Czech and Slovak Federal



Republic. In Article 2 of the Special Agreement, the Court was asked to say: (a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros project and on that part of the Gabčíkovo project for which the Treaty attributed responsibility to the Republic of Hungary; (b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the "provisional solution" and to put into operation from October 1992 this system (the damming up of the Danube at river kilometre 1,851.7 on Czechoslovak territory and the resulting consequences for the water and navigation course); and (c) what were the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary. The Court was also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the above-mentioned questions. Each of the Parties filed a Memorial, a Counter-Memorial and a Reply accompanied by a large number of annexes.

In June 1995, the Agent of Slovakia requested the Court to visit the site of the Gabčíkovo-Nagymaros hydroelectric dam project on the Danube for the purpose of obtaining evidence. A Special Agreement was signed in November 1995 between the two Parties. The visit to the site, the first such visit by the Court in its 50-year history, took place on 4 April 1997 between the first and second rounds of oral pleadings.

In its Judgment of 25 September 1997, the Court asserted that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros project and on the part of the Gabčíkovo project for which it was responsible, and that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described by the terms of the Special Agreement. The Court also stated that Czechoslovakia was not entitled to put into operation, from October 1992, the barrage system in question and that Slovakia, as successor to Czechoslovakia, had become Party to the Treaty on 16 September 1977 as from 1 January 1993. The Court also decided that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation and must take all necessary measures to ensure the achievement of the objectives of the said Treaty, in accordance with such modalities as they might agree upon. Further, Hungary was to compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible, whereas, again according to the Judgment of the Court, Slovakia was to compensate Hungary for the damage it had sustained on account of the putting into operation of the dam by Czechoslovakia and its maintenance in service by Slovakia.

On 3 September 1998, Slovakia filed in the Registry of the Court a request for an additional Judgment in the case. Slovakia considered



such a Judgment necessary because of the unwillingness of Hungary to implement the Judgment delivered by the Court on 25 September 1997. In its request, Slovakia stated that the Parties had conducted a series of negotiations of the modalities for executing the 1997 Judgment and had initialled a draft Framework Agreement, which had been approved by the Slovak Government. However, according to the latter, Hungary had decided to postpone its approval and had even disavowed it when the new Hungarian Government had come into office. Slovakia requested the Court to determine the modalities for executing the Judgment, and, as the basis for its request, invoked the Special Agreement signed at Brussels on 7 April 1993 by itself and Hungary. After the filing by Hungary of a statement of its position on Slovakia's request, the Parties resumed negotiations and informed the Court on a regular basis of the progress in them.

*1.72. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*

On 29 March 1994, Cameroon filed in the Registry of the Court an Application instituting proceedings against Nigeria with respect to the question of sovereignty over the Bakassi Peninsula, and requesting the Court to determine the course of the maritime frontier between the two States in so far as that frontier had not been established in 1975. As a basis for the jurisdiction of the Court, Cameroon referred to the declarations made by the two States under Article 36, paragraph 2, of the Statute of the Court, by which they accepted that jurisdiction as compulsory. In its Application, Cameroon referred to "an aggression by the Federal Republic of Nigeria, whose troops are occupying several Cameroonian localities on the Bakassi Peninsula", and asked the Court, *inter alia*, to adjudge and declare that sovereignty over the Peninsula of Bakassi was Cameroonian, by virtue of international law, and that Nigeria had violated and was violating the fundamental principle of respect for frontiers inherited from colonization (*uti possidetis juris*), as well as other rules of conventional and customary international law, and that Nigeria's international responsibility is involved. Cameroon also requested the Court to proceed to prolong the course of its maritime boundary with Nigeria up to the limit of the maritime zone which international law placed under their respective jurisdictions.

On 6 June 1994, Cameroon filed in the Registry an Additional Application "for the purpose of extending the subject of the dispute" to a further dispute described as relating essentially "to the question of sovereignty over part of the territory of Cameroon in the area of Lake Chad", while also requesting the Court to specify definitively the frontier between Cameroon and Nigeria from Lake Chad to the sea. That Application was treated as an amendment to the initial Application. After Nigeria had raised certain preliminary objections,

Cameroon presented, on 1 May 1996, a written statement of its observations and submissions relating thereto, in accordance with an Order of the President dated 10 January 1996. Moreover on 12 February 1996, Cameroon, referring to the "grave incidents which [had] taken place between the . . . forces [of the Parties] in the Bakassi Peninsula since . . . 3 February 1996", asked the Court to indicate provisional measures. By an Order dated 15 March 1996, the Court indicated a number of provisional measures aimed principally at putting an end to the hostilities.

The Court held hearings from 2 to 11 March 1998 on the preliminary objections raised by Nigeria. In its Judgment of 11 June 1998, the Court found that it had jurisdiction to adjudicate upon the merits of the dispute and that Cameroon's requests were admissible. The Court rejected seven of the preliminary objections raised by Nigeria and declared that, as the eighth did not have an exclusively preliminary character, it should be settled during the proceedings on the merits.

Nigeria filed its Counter-Memorial, including counter-claims, within the time-limit extended by the Court. On 30 June 1999, the Court adopted an Order declaring Nigeria's counter-claims admissible and fixing 4 April 2000 as the time-limit for the filing of the Reply of Cameroon and 4 January 2001 as the time-limit for the filing of the Rejoinder of Nigeria. In its Order, the Court also reserved the right of Cameroon to present its views in writing a second time on the Nigerian counter-claims in an additional pleading which might be the subject of a subsequent Order. The Reply and the Rejoinder were duly filed within the time-limits so fixed. In January 2001, Cameroon informed the Court that it wished to present its views in writing a second time on Nigeria's counter-claims. As Nigeria had no objection to that request, the Court authorized the presentation by Cameroon of an additional pleading relating exclusively to the counter-claims submitted by Nigeria. That pleading was duly filed within the time-limit fixed by the Court.

On 30 June 1999, the Republic of Equatorial Guinea filed an Application for permission to intervene in the case. Each of the two Parties having filed its written observations on that Application and Equatorial Guinea having informed the Court of its views with respect to them, the Court, by Order of 21 October 1999, authorized Equatorial Guinea to intervene in the case pursuant to Article 62 of the Statute, to the extent, in the manner and for the purposes set out in its Application. Equatorial Guinea filed a written statement and each of the Parties filed written observations on the latter within the time-limits fixed by the Court. Public hearings on the merits were held from 18 February to 21 March 2002.

In its Judgment of 10 October 2002, the Court determined as follows the course of the boundary, from north to south, between Cameroon and Nigeria :

- In the Lake Chad area, the Court decided that the boundary was delimited by the Thomson-Marchand Declaration of 1929-1930, as incorporated in the Henderson-Fleuriau Exchange of Notes of 1931 (between Great Britain and France); it found that the boundary started in the Lake from the Cameroon-Nigeria-Chad tripoint (whose co-ordinates it defined) and followed a straight line to the mouth of the River Ebeji as it was in 1931 (whose co-ordinates it also defined) and thence ran in a straight line to the point where the river today divided into two branches.
- Between Lake Chad and the Bakassi Peninsula, the Court confirmed that the boundary was delimited by the following instruments:
  - (i) from the point where the River Ebeji bifurcated as far as Tamnyar Peak, by the Thomson-Marchand Declaration of 1929-1930 (paras. 2-60), as incorporated in the Henderson-Fleuriau Exchange of Notes of 1931;
  - (ii) from Tamnyar Peak to pillar 64 referred to in Article XII of the Anglo-German Agreement of 12 April 1913, by the British Order in Council of 2 August 1946;
  - (iii) from pillar 64 to the Bakassi Peninsula, by the Anglo-German Agreements of 11 March and 12 April 1913.

The Court examined point by point seventeen sectors of the land boundary and specified for each one how the above-mentioned instruments were to be interpreted.

- In Bakassi, the Court decided that the boundary was delimited by the Anglo-German Agreement of 11 March 1913 (Arts. XVIII-XX) and that sovereignty over the Bakassi Peninsula lay with Cameroon. It decided that in that area the boundary followed the *thalweg* of the River Akpakorum (Akwayafe), dividing the Mangrove islands near Ilang in the way shown on map TSGS 2240, as far as a straight line joining Bakassi Point and King Point.
- As regards the maritime boundary, the Court, having established that it had jurisdiction to address that aspect of the case — which Nigeria had disputed —, fixed the course of the boundary between the two States' maritime areas.

In its Judgment the Court requested Nigeria, expeditiously and without condition, to withdraw its administration and military or police forces from the area of Lake Chad falling within Cameroonian sovereignty and from the Bakassi Peninsula. It also requested Cameroon expeditiously and without condition to withdraw any administration or military or police forces which might be present along the land boundary from Lake Chad to the Bakassi Peninsula on territories which, pursuant to the Judgment, fell within the sovereignty of Nigeria. The latter had the same obligation in regard to territories in that area which fell within the sovereignty of Cameroon. The Court took note of Cameroon's undertaking, given at the hearings, to

“continue to afford protection to Nigerians living in the [Bakassi] peninsula and in the Lake Chad area”. Finally, the Court rejected Cameroon’s submissions regarding the State responsibility of Nigeria, as well as Nigeria’s counter-claims.

### 1.73. Fisheries Jurisdiction (*Spain v. Canada*)

On 28 March 1995, Spain filed in the Registry of the Court an Application instituting proceedings against Canada with respect to a dispute relating to the Canadian Coastal Fisheries Protection Act, as amended on 12 May 1994, to the implementing regulations of that Act, and to certain measures taken on the basis of that legislation, more particularly the boarding on the high seas, on 9 March 1995, of a fishing boat, the *Estai*, sailing under the Spanish flag. Spain indicated, *inter alia*, that by the amended Act an attempt was made to impose on all persons on board foreign ships a broad prohibition on fishing in the Regulatory Area of the North-West Atlantic Fisheries Organization (NAFO), that is, on the high seas, outside Canada’s exclusive economic zone, while expressly permitting the use of force against foreign fishing boats in the zones that that Act terms the “high seas”. Spain added that the implementing regulation of 3 March 1995 “expressly permit[s] such conduct as regards Spanish and Portuguese ships on the high seas”. The Application of Spain alleged the violation of various principles and norms of international law and stated that there was a dispute between Spain and Canada which, going beyond the framework of fishing, seriously affected the very principle of the freedom of the high seas and, moreover, implied a very serious infringement of the sovereign rights of Spain. As a basis of the Court’s jurisdiction, the Application referred to the declarations of Spain and of Canada made in accordance with Article 36, paragraph 2, of the Statute of the Court. As Canada contested the jurisdiction of the Court, on the basis of its aforementioned declaration, it was decided that the written pleadings should focus initially upon that question of jurisdiction. A Memorial of the Applicant and a Counter-Memorial of the Respondent were filed in that respect. By an Order dated 8 May 1996, the Court decided not to authorize the presentation of a Reply of the Applicant and a Rejoinder of the Respondent.

In its Judgment of 4 December 1998, the Court found that the dispute between the Parties was a dispute that had “ar[isen]” out of “conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area” and “the enforcement of such measures”, and that, consequently, it was within the plain terms of one of the reservations in the Canadian declaration. The Court found that it therefore had no jurisdiction to adjudicate in the case.

1.74. *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*<sup>1</sup>

On 21 August 1995, the New Zealand Government filed in the Registry a document entitled "Request for an Examination of the Situation" in which reference was made to a

"proposed action announced by France which will, if carried out, affect the basis of the Judgment rendered by the Court on 20 December 1974 in the *Nuclear Tests (New Zealand v. France)* case",

namely "a decision announced by France in a media statement of 13 June 1995" by the President of the French Republic, according to which "France would conduct a final series of 8 nuclear weapons tests in the South Pacific starting in September 1995". In that Request, the Court was reminded that, at the end of its 1974 Judgment, it had found that it was not called upon to give a decision on the claim submitted by New Zealand in 1973, that claim no longer having any object, by virtue of the declarations by which France had undertaken not to carry out further atmospheric nuclear tests (see Nos. 1.43-44 above). That Judgment contained a paragraph 63 worded as follows

"Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; . . ."

New Zealand asserted that this paragraph gave it the "right", in such circumstances, to request "the resumption of the case begun by application on 9 May 1973", and observed that the operative part of the Judgment concerned could not be construed as showing any intention on the part of the Court definitively to close the case. On the same day, the New Zealand Government also filed in the Registry a "Further Request for the Indication of Provisional Measures" in which reference was made, *inter alia*, to the Order for the indication of provisional measures made by the Court on 22 June 1973, which was principally aimed at ensuring that France would refrain from conducting any further nuclear tests at Mururoa and Fangataufa Atolls.

After holding public hearings on 11 and 12 September 1995, the Court made its Order on 22 September 1995.

The Court found that when inserting into paragraph 63 the sentence "the Applicant could request an examination of the situation *in*

<sup>1</sup> The Court's decision in this case formed the object of an Order, in which it is indicated that the request was entered in the General List for the sole purpose of enabling it to determine whether the conditions laid down in the said paragraph 63 had been fulfilled.

*accordance with the provisions of the Statute*”, the Court had not excluded a special procedure for access to it (unlike those mentioned in the Court’s Statute, such as the filing of a new application, or a request for interpretation or revision, which would have been open to the Applicant in any event); however, it found that that special procedure would only be available to the Applicant if circumstances were to arise which affected the basis of the 1974 Judgment. And that, it found, was not the case, as the decision announced by France in 1995 had related to a series of underground tests, whereas the basis of the Judgment of 1974 was France’s undertaking not to conduct any further atmospheric nuclear tests. Consequently, New Zealand’s request for provisional measures and the applications for permission to intervene submitted by Australia, Samoa, Solomon Islands, the Marshall Islands and the Federated States of Micronesia as well as the Declarations of Intervention made by the last four States, all of which were proceedings incidental to New Zealand’s main request, likewise had to be dismissed.

#### *1.75. Kasikili/Sedudu Island (Botswana/Namibia)*

On 29 May 1996, the Government of Botswana and the Government of Namibia notified jointly to the Registrar of the Court a Special Agreement which was signed between them on 15 February 1996 and entered into force on 15 May 1996, for the submission to the Court of the dispute existing between them concerning the boundary between Kasikili/Sedudu Island and the legal status of that island. The Special Agreement referred to a Treaty between Great Britain and Germany concerning the respective spheres of influence of the two countries, signed on 1 July 1890, and to the appointment on 24 May 1992 of a Joint Team of Technical Experts to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island on the basis of that Treaty and of the applicable principles of international law. Unable to reach a conclusion on the question submitted to it, the Joint Team of Technical Experts recommended recourse to a peaceful settlement of the dispute on the basis of the applicable rules and principles of international law. At the Summit Meeting held in Harare, Zimbabwe, on 15 February 1995, the Presidents of the two States agreed to submit the dispute to the Court.

Taking account of the relevant provisions of the Special Agreement, the Court, by an Order dated 24 June 1996, fixed time-limits for the filing, by each of the Parties, of a Memorial and a Counter-Memorial. Those pleadings were duly filed within the time-limits fixed.

The Court, in view of the agreement between the Parties, also authorized the filing of a Reply by each Party. The Replies were duly filed within the time-limits so prescribed.

In its Judgment of 13 December 1999, the Court began by stating that the Island in question, which in Namibia is known as “Kasikili”,

and in Botswana as "Sedudu", is approximately 3.5 km<sup>2</sup> in area, that it is located in the Chobe River, which divides around it to the north and south, and that it is subject to flooding of several months' duration, beginning around March. It briefly outlined the historical context of the dispute, then examined the text of the 1890 Treaty which, in respect of the region concerned, located the dividing line between the spheres of influence of Great Britain and Germany in the "main channel" of the River Chobe. In the Court's opinion, the real dispute between the Parties concerned the location of that main channel, Botswana contending that it was the channel running north of Kasikili/Sedudu Island and Namibia the channel running south of the Island. Since the Treaty did not define the notion of "main channel", the Court itself proceeded to determine which was the main channel of the Chobe River around the Island. In order to do so, it took into consideration, *inter alia*, the depth and the width of the Channel, the flow (i.e., the volume of water carried), the bed profile configuration and the navigability of the channel. After considering the figures submitted by the Parties, as well as surveys carried out on the ground at different periods, the Court concluded that "the northern channel of the River Chobe around Kasikili/Sedudu Island must be regarded as its main channel". Having invoked the object and purpose of the 1890 Treaty and its *travaux préparatoires*, the Court examined at length the subsequent practice of the parties to the Treaty. The Court found that that practice did not result in any agreement between them regarding the interpretation of the Treaty or the application of its provisions. The Court further stated that it could not draw conclusions from the cartographic material "in view of the absence of any map officially reflecting the intentions of the parties to the 1890 Treaty" and in the light of "the uncertainty and inconsistency" of the maps submitted by the Parties to the dispute. It finally considered Namibia's alternative argument that it and its predecessors had prescriptive titles to Kasikili/Sedudu Island by virtue of the exercise of sovereign jurisdiction over it since the beginning of the century, with the full knowledge and acceptance of the authorities of Botswana and its predecessors. The Court found that while the Masubia of the Caprivi Strip (territory belonging to Namibia) did indeed use the Island for many years, they did so intermittently, according to the seasons and for exclusively agricultural purposes, without it being established that they occupied the Island *à titre de souverain*, i.e., that they were exercising functions of State authority there on behalf of the Caprivi authorities. The Court therefore rejected that argument. After concluding that the boundary between Botswana and Namibia around Kasikili/Sedudu Island followed the line of deepest soundings in the northern channel of the Chobe and that the Island formed part of the territory of Botswana, the Court recalled that, under the terms of an agreement concluded in May 1992 (the "Kasane Communiqué"), the Parties had undertaken to one another that there should be unimpeded navigation for craft of their nationals and flags in the channels around the Island.



1.76. *Vienna Convention on Consular Relations (Paraguay v. United States of America)*

On 3 April 1998, the Republic of Paraguay filed in the Registry an Application instituting proceedings against the United States of America in a dispute concerning alleged violations of the Vienna Convention on Consular Relations of 24 April 1963. Paraguay based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute and on Article I of the Optional Protocol which accompanies the Vienna Convention on Consular Relations, and which gives the Court jurisdiction as regards the settlement of disputes arising out of the interpretation or application of that Convention. In its Application, Paraguay indicated that, in 1992, the authorities of Virginia had arrested a Paraguayan national, charged and convicted him of culpable homicide and sentenced him to death without informing him of his rights as required by Article 36, paragraph 1 (b), of the Convention. Those rights included the right to request that the relevant consular office of the State of which he was a national be advised of his arrest and detention and the right to communicate with that office. It was further alleged by the Applicant that the authorities of the Commonwealth of Virginia had not advised the Paraguayan consular officers, who were therefore only able to render assistance to him from 1996, when the Paraguayan Government learned of the case by its own means. Paraguay asked the Court to adjudge and declare that the United States of America had violated its international legal obligations towards Paraguay and that the latter was entitled to "restitution in kind".

The same day, 3 April 1998, Paraguay also submitted a request for the indication of provisional measures to ensure that the national concerned was not executed pending a decision by the Court. At a public hearing on 9 April 1998, the Court made an Order on the request for the indication of provisional measures submitted by Paraguay. The Court unanimously found that the United States of America should take all measures at its disposal to ensure that the Paraguayan national concerned was not executed pending the decision by the Court. By an Order the same day, the Vice-President, acting as President, having regard to the Court's Order for the indication of provisional measures and the agreement of the Parties, fixed the time-limits for the filing of the Memorial and the Counter-Memorial. Paraguay filed its Memorial on 9 October 1998.

By letter of 2 November 1998, Paraguay indicated that it wished to discontinue the proceedings with prejudice. The United States of America concurred in the discontinuance on 3 November. On 10 November 1998, the Court therefore made an Order placing on record the discontinuance and directing the case to be removed from the List.



1.77. *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), Preliminary Objections (Nigeria v. Cameroon)*

On 28 October 1998, the Republic of Nigeria filed in the Registry of the Court an Application instituting proceedings against the Republic of Cameroon, whereby it requested the Court to interpret the Judgment on the preliminary objections delivered on 11 June 1998 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (see Section 1.72 above). In its request for an interpretation, Nigeria submitted that one aspect of the case concerning the *Land and Maritime Boundary* still before the Court was the alleged responsibility of Nigeria for certain incidents said by Cameroon to have occurred at various places in Bakassi and Lake Chad and also along the length of the frontier between those two regions. Nigeria held that, as Cameroon had not provided full information on those incidents, the Court had not been able to specify which incidents were to be considered further as part of the merits of the case. Nigeria considered that the meaning and scope of the Judgment required interpretation. The Court had been asked to interpret the Judgment as suggested by the Applicant.

After the filing of written observations by Cameroon on Nigeria's request for an interpretation, the Court did not deem it necessary to invite the Parties to furnish further written or oral explanations. At a public hearing on 25 March 1999, the Court delivered a Judgment declaring inadmissible the request for an interpretation submitted by Nigeria.

1.78. *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*

On 2 November 1998, the Republic of Indonesia and Malaysia jointly notified the Court of a Special Agreement between the two States, signed at Kuala Lumpur on 31 May 1997 and having entered into force on 14 May 1998. In accordance with that Special Agreement they requested the Court to determine, on the basis of the treaties, agreements and any other evidence furnished by them, to which of the two States sovereignty over Pulau Ligitan and Pulau Sipadan belonged.

Shortly after the filing by the Parties of the Memorials, Counter-Memorials and Replies, the Philippines, on 13 March 2001, requested permission to intervene in the case. In its Application, the Philippines indicated that the object of its request was to

“preserve and safeguard the historical and legal rights [of its Government] arising from its claim to dominion and sovereignty

over the territory of North Borneo, to the extent that those rights [were] affected, or [might] be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan”.

The Philippines specified that it was not seeking to become a party in the case. Further, the Philippines specified that “[its] Constitution . . . as well as its legislation ha[d] laid claim to dominion and sovereignty over North Borneo”. The Application for permission to intervene drew objections from Indonesia and Malaysia. Among other things, Indonesia stated that the Application should be rejected on the ground that it had not been filed in time and that the Philippines had not shown that it had an interest of a legal nature at issue in the case. Meanwhile, Malaysia added that the object of the Application was inadequate. The Court therefore decided to hold public sittings to hear the Philippines, Indonesia and Malaysia, before ruling on whether to grant the Application for permission to intervene. Following those sittings, the Court, on 23 October 2001, delivered a Judgment by which it rejected the Application by the Philippines for permission to intervene.

After the holding of public sittings from 3 to 12 June 2002, the Court delivered its Judgment on the merits on 17 December 2002. In that Judgment, it began by recalling the complex historical background of the dispute between the Parties. It then examined the titles invoked by them. Indonesia asserted that its claim to sovereignty over the islands was based primarily on a conventional title, the 1891 Convention between Great Britain and the Netherlands.

After examining the 1891 Convention, the Court found that, when read in the context and in the light of its object and purpose, that instrument could not be interpreted as establishing an allocation line determining sovereignty over the islands out to sea, to the east of the island of Sebatik, and that as a result the Convention did not constitute a title on which Indonesia could found its claim to Ligitan and Sipadan. The Court stated that that conclusion was confirmed both by the *travaux préparatoires* and by the subsequent conduct of the parties to the Convention. The Court further held that the cartographic material submitted by the Parties in the case did not contradict that conclusion.

Having rejected that argument by Indonesia, the Court turned to consideration of the other titles on which Indonesia and Malaysia claimed to found their sovereignty over the islands of Ligitan and Sipadan. The Court sought to determine whether Indonesia or Malaysia obtained a title to the islands by succession. In that connection, it did not accept Indonesia’s contention that it retained title to the islands as successor to the Netherlands, which allegedly acquired itself through contracts concluded with the Sultan of Bulungan, the original title-holder. Nor did the Court accept Malaysia’s contention

that it acquired sovereignty over the islands of Ligitan and Sipadan following a series of alleged transfers of the title originally held by the former sovereign, the Sultan of Sulu, that title having allegedly passed in turn to Spain, to the United States, to Great Britain on behalf of the State of North Borneo, to the United Kingdom and finally to Malaysia.

Having found that neither of the Parties had a treaty-based title to Ligitan and Sipadan, the Court next considered the question whether Indonesia or Malaysia could hold title to the disputed islands by virtue of the *effectivités* cited by them. In that regard, the Court determined whether the Parties' claims to sovereignty were based on activities evidencing an actual continual exercise of authority over the islands, i.e., the intention and will to act as sovereign.

In that connection, Indonesia cited a continuous presence of the Dutch and Indonesian navies in the vicinity of Ligitan and Sipadan. It added that the waters around the islands had traditionally been used by Indonesian fishermen. In respect of the first of those arguments, it was the opinion of the Court that from the facts relied upon in the case "it [could] not be deduced . . . that the naval authorities concerned considered Ligitan and Sipadan and the surrounding waters to be under the sovereignty of the Netherlands or Indonesia". As for the second argument, the Court considered that "activities by private persons [could] not be seen as *effectivités* if they [did] not take place on the basis of official regulations or under governmental authority".

Having rejected Indonesia's arguments based on its *effectivités*, the Court turned to the consideration of the *effectivités* relied on by Malaysia. As evidence of its effective administration of the islands, Malaysia cited *inter alia* the measures taken by the North Borneo authorities to regulate and control the collecting of turtle eggs on Ligitan and Sipadan, an activity of some economic significance in the area at the time. It relied on the Turtle Preservation Ordinance of 1917 and maintained that the Ordinance "was applied until the 1950s at least" in the area of the two disputed islands. It further invoked the fact that the authorities of the colony of North Borneo had constructed a lighthouse on Sipadan in 1962 and another on Ligitan in 1963, that those lighthouses existed to this day and that they had been maintained by Malaysian authorities since its independence. The Court noted that

"the activities relied upon by Malaysia . . . [we]re modest in number but . . . they [we]re diverse in character and include[d] legislative, administrative and quasi-judicial acts. They cover[ed] a considerable period of time and show[ed] a pattern revealing an intention to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands".

The Court further stated that “at the time when these activities were carried out, neither Indonesia nor its predecessor, the Netherlands, [had] ever expressed its disagreement or protest”.

The Court concluded, on the basis of the above-mentioned *effectivités*, that sovereignty over Pulau Ligitan and Pulau Sipadan belonged to Malaysia.

*1.79. Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*

On 28 December 1998, the Republic of Guinea instituted proceedings against the Democratic Republic of the Congo (DRC) by submitting an “Application with a view to diplomatic protection”, in which it requested the Court to “condemn the Democratic Republic of the Congo for the grave breaches of international law” allegedly “perpetrated upon the person of a Guinean national”, Mr. Ahmadou Sadio Diallo.

According to Guinea, Mr. Ahmadou Sadio Diallo, a businessman who had been a resident of the DRC for 32 years and been “unlawfully imprisoned by the authorities of that State” for two and a half months, “divested of his important investments, companies, bank accounts, movable and immovable properties, then deported” on 2 February 1996 for demanding payment of sums owed to him by the DRC and by oil companies operating in that country under contracts with companies owned by him (Africom-Zaire and Africontainers-Zaire). In its Application, as a basis of the Court’s jurisdiction, Guinea relied on the declarations by which it and the Congo had accepted the compulsory jurisdiction of the Court in 1989 and 1998 respectively.

The Memorial of Guinea was filed within the time-limit as extended by the President in his Order of 8 September 2000. On 3 October 2002, within the time-limit fixed for the filing of the Counter-Memorial, the DRC raised preliminary objections to the admissibility of the Application. Pursuant to Article 79, paragraph 3, of the Rules of Court, adopted in April 1978, the proceedings on the merits were then suspended. On 7 July 2003, within the time-limit fixed by the Court, Guinea filed its observations on the preliminary objections raised by the DRC.

*1.80. LaGrand (Germany v. United States of America)*

On 2 March 1999, the Federal Republic of Germany filed in the Registry of the Court an Application instituting proceedings against the United States of America in a dispute concerning alleged violations of the Vienna Convention on Consular Relations of 24 April 1963. Germany stated that, in 1982, the authorities of the State of Arizona had detained two German nationals, Karl and Walter LaGrand, who

were tried and sentenced to death without having been informed of their rights, as is required under Article 36, paragraph 1 (b), of the Vienna Convention. Germany also alleged that the failure to provide the required notification precluded Germany from protecting its nationals' interest provided for by Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the United States courts. Germany asserted that although the two nationals, finally with the assistance of German consular officers, did claim violations of the Vienna Convention before the federal courts, the latter, applying the municipal law doctrine of "procedural default", decided that, because the individuals in question had not asserted their rights in the previous legal proceedings at State level, they could not assert them in the federal proceedings. In its Application, Germany based the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol of the Vienna Convention on Consular Relations.

Germany accompanied its Application by an urgent request for the indication of provisional measures, requesting the Court to indicate that the United States should take "all measures at its disposal to ensure that [one of its nationals, whose date of execution had been fixed at 3 March 1999] [was] not executed pending final judgment in the case . . .". On 3 March 1999, the Court delivered an Order for the indication of provisional measures calling upon the United States of America, among other things, to "take all measures at its disposal to ensure that [the German national] [was] not executed pending the final decision in [the] proceedings". However, the two German nationals were executed by the United States.

Public hearings in the case were held from 13 to 17 November 2000. In its Judgment of 27 June 2001, the Court began by outlining the history of the dispute and then examined certain objections of the United States of America to the Court's jurisdiction and to the admissibility of Germany's submissions. It found that it had jurisdiction to deal with all Germany's submissions and that they were admissible.

Ruling on the merits of the case, the Court observed that the United States did not deny that, in relation to Germany, it had violated Article 36, paragraph 1 (b), of the Vienna Convention, which required the competent authorities of the United States to inform the LaGrands of their right to have the Consulate of Germany notified of their arrest. It added that, in the case concerned, that breach had led to the violation of paragraph 1 (a) and paragraph 1 (c) of that Article, which dealt respectively with mutual rights of communication and access of consular officers and their nationals, and the right of consular officers to visit their nationals in prison and to arrange for their legal representation. The Court further stated that the United States had not only breached its obligations to Germany as a State party to the Convention, but also that there had been a violation of the individual

rights of the LaGrands under Article 36, paragraph 1, which rights could be relied on before the Court by their national State.

The Court then turned to Germany's submission that the United States, by applying rules of its domestic law, in particular the doctrine of "procedural default", had violated Article 36, paragraph 2, of the Convention. That provision required the United States to "enable full effect to be given to the purposes for which the rights accorded [under Article 36] [were] intended". The Court stated that, in itself, the procedural default rule did not violate Article 36. The problem arose, according to the Court, when the rule in question did not allow the detained individual to challenge a conviction and sentence by invoking the failure of the competent national authorities to comply with their obligations under Article 36, paragraph 1. The Court concluded that, in the present case, the procedural default rule had the effect of preventing Germany from assisting the LaGrands in a timely fashion as provided for by the Convention. Under those circumstances, the Court held that in the present case the rule referred to violated Article 36, paragraph 2.

With regard to the alleged violation by the United States of the Court's Order of 3 March 1999 indicating provisional measures, the Court pointed out that it was the first time it had been called upon to determine the legal effects of such orders made under Article 41 of its Statute — the interpretation of which had been the subject of extensive controversy in the literature. After interpreting Article 41, the Court found that such orders did have binding effect. In the present case, the Court concluded that its Order of 3 March 1999 "was not a mere exhortation" but "created a legal obligation for the United States". The Court then went on to consider the measures taken by the United States to implement the Order concerned and concluded that it had not complied with it.

With respect to Germany's request seeking an assurance that the United States would not repeat its unlawful acts, the Court took note of the fact that the latter had repeatedly stated in all phases of those proceedings that it was implementing a vast and detailed programme in order to ensure compliance, by its competent authorities, with Article 36 of the Convention and concluded that such a commitment must be regarded as meeting the request made by Germany. Nevertheless, the Court added that if the United States, notwithstanding that commitment, were to fail again in its obligation of consular notification to the detriment of German nationals, an apology would not suffice in cases where the individuals concerned had been subjected to prolonged detention or convicted and sentenced to severe penalties. In the case of such a conviction and sentence, it would be incumbent upon the United States, by whatever means it chose, to allow the review and reconsideration of the conviction and sentence taking account of the violation of the rights set forth in the Convention.

1.81-90. *Legality of Use of Force (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Canada) (Serbia and Montenegro v. France) (Serbia and Montenegro v. Germany) (Serbia and Montenegro v. Italy) (Serbia and Montenegro v. Netherlands) (Serbia and Montenegro v. Portugal) (Yugoslavia v. Spain) (Serbia and Montenegro v. United Kingdom) (Yugoslavia v. United States of America)*<sup>1</sup>

On 29 April 1999, the Federal Republic of Yugoslavia filed in the Registry of the Court Applications instituting proceedings against Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom and United States of America for alleged violations of their obligation not to use force against another State. In its Applications against Belgium, Canada, Netherlands, Portugal, Spain and United Kingdom, Yugoslavia referred, as a basis for the jurisdiction of the Court, to Article 36, paragraph 2, of the Statute of the Court and to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1949. Yugoslavia also relied upon Article IX of that Convention in its Applications against France, Germany, Italy and United States, but also relied on Article 38, paragraph 5, of the Rules of Court.

On 29 April 1999, Yugoslavia also submitted, in each case, an Application for the indication of provisional measures to ensure that the respondent State concerned "cease immediately its acts of use of force and . . . refrain from any act of threat or use of force" against Yugoslavia. After hearings on the provisional measures from 10 to 12 May 1999, the Court delivered its decision in each of the cases on 2 June 1999. In two of them (*Yugoslavia v. Spain* and *Yugoslavia v. United States of America*), the Court, rejecting the request for the indication of provisional measures, concluded that it manifestly lacked jurisdiction and consequently ordered that the cases be removed from the List. In the eight other cases, the Court declared that it lacked prima facie jurisdiction (one of the prerequisites for the indication of provisional measures) and that it therefore could not indicate such measures.

In each of the eight cases which remained on the List, Yugoslavia filed a Memorial in January 2000. In July 2000, the Respondents filed preliminary objections to jurisdiction and admissibility within the time-limit laid down for the filing of their Counter-Memorials. Consequently, pursuant to Article 79, paragraph 3, of the Rules of Court adopted on 14 April 1978, the proceedings on the merits in each of the cases were suspended. By Orders of 8 September 2000, the Vice-President

<sup>1</sup> The titles of the eight cases remaining on the Court's List were modified following the change in the name of Yugoslavia on 4 February 2003. In the following summary, the name "Yugoslavia" has been retained with respect to all proceedings before this date.



fixed 5 April 2001 as the time-limit for the submission by Yugoslavia, in each case, of a written statement containing its observations on the preliminary objections.

In January 2001 and February 2002, Yugoslavia, referring to “dramatic” and “ongoing” changes in the country, which would have put those cases “in a quite different perspective”, as well as to the decision to be taken by the Court in another case involving Yugoslavia, requested the Court “for a stay of proceedings or for an extension by 12 months of the time-limit for the submission of observations on the preliminary objections raised by . . . [the respondent State]” in each case. In 2001 and 2002, the respondent States indicated that they were not opposed to a stay of proceedings or to an extension of the time-limit for the filing of the observations and submissions of Yugoslavia on their preliminary objections. Consequently, the Court twice extended by one year the time-limits originally fixed for the submission by Yugoslavia of the written statements containing its observations and submissions on the preliminary objections raised by the eight respondent States. On 20 December 2002, Yugoslavia filed that written statement in each of the eight cases.

By subsequent letters addressed to the Court in January and February 2003, the eight respondent States expressed their views concerning the written statement of Serbia and Montenegro. In reply, by a letter of 28 February 2003, Serbia and Montenegro informed the Court that its written observations filed on 20 December 2002 were not to be interpreted as a notice of discontinuance of the proceedings; it indicated that their object was simply to request the Court to decide on its own jurisdiction on the basis of the new elements to which the Court’s attention had been drawn.

Serbia and Montenegro availed itself of the right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc*, during the phase of the cases devoted to the request for the indication of provisional measures. At that time, some of the respondent States also chose judges *ad hoc*. In the subsequent phase of the proceedings, Belgium, Canada and Italy requested the extension of the appointments of their judges *ad hoc* and Portugal indicated its intention to appoint a judge *ad hoc*. Serbia and Montenegro objected on the ground that the respondent States were in the same interest. Following a meeting held by the President with the representatives of the Parties on 12 December 2003, the Registrar informed the Parties that the Court had decided, pursuant to Article 31, paragraph 5, of its Statute, taking into account the presence on the Bench of judges of British, Dutch and French nationality, that the judges *ad hoc* chosen by the respondent States should not sit during the then current phase of the procedure in these cases; and that that decision did not in any way prejudice the question whether, if the Court should reject the preliminary objections of the respondents, judges *ad hoc* chosen by them might sit in subsequent stages of the said cases.

At the meeting of 12 December 2003, the question was also raised of joinder of the proceedings. By the Registrar's letters of 23 December 2003, the Parties were informed that the Court had decided that the proceedings should not be joined.

Although there were thus eight separate proceedings, instituted by eight separate applications, the position of the Applicant in each case was the same, and its responses to the eight sets of preliminary objections proceeded on substantially the same basis. Consequently, the Court organized the conduct of the oral proceedings in this phase of the case in such a manner as to avoid unnecessary duplication of arguments. Oral proceedings were held from 19 to 23 April 2004, and the Court then proceeded to its deliberation on the cases.

*1.91. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi) (Democratic Republic of the Congo v. Rwanda) (Democratic Republic of the Congo v. Uganda)*

On 23 June 1999, the Democratic Republic of the Congo (DRC) filed in the Registry of the Court Applications instituting proceedings against Burundi, Uganda and Rwanda "for acts of armed aggression committed . . . in flagrant breach of the United Nations Charter and of the Charter of the Organization of African Unity". In addition to the cessation of the alleged acts, Congo sought reparation for acts of intentional destruction and looting and the restitution of national property and resources appropriated for the benefit of the respective respondent State.

In its Applications instituting proceedings against Burundi and Rwanda, the DRC referred, as bases of the jurisdiction of the Court, to Article 36, paragraph 1, of the Statute, the New York Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation, and lastly, Article 38, paragraph 5, of the Rules of Court. However, the Government of the DRC informed the Court on 15 January 2001 that it intended to discontinue the proceedings instituted against Burundi and Rwanda, stating that it reserved the right to invoke subsequently new grounds of jurisdiction of the Court. The two cases were therefore removed from the List on 30 January 2001.

In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the DRC founded the jurisdiction of the Court on the declarations of acceptance of the compulsory jurisdiction of the Court made by the two States. On 19 June 2000, the DRC filed a request for the indication of provisional measures to put a stop to all military activity and violations of human rights and of the sovereignty of the DRC by Uganda. On 1 July 2000, the Court ordered each of the two Parties to prevent and refrain from

any armed action which might prejudice the rights of the other Party or aggravate the dispute, to take all measures necessary to comply with all of their obligations under international law and also to ensure full respect for fundamental human rights and for the applicable provisions of humanitarian law.

Uganda subsequently filed a Counter-Memorial containing three counter-claims. By an Order of 29 November 2001, the Court found that two of the counter-claims were admissible as such and formed part of the proceedings. It also directed the submission of a Reply by the Congo and a Rejoinder by Uganda relating to the claims of both Parties in the proceedings. Those pleadings were filed within the time-limits laid down by the Court.

In January 2003, the DRC, referring to the Order of 29 November 2001 providing for that eventuality, informed the Court that it wished to present its views in writing a second time on the Ugandan counter-claims, in an additional pleading. By an Order of 29 January 2003, the Court authorized the submission by the DRC of an additional pleading relating solely to the counter-claims submitted by Uganda, which was duly filed on 28 February 2003.

The opening of the oral proceedings was fixed for 10 November 2003. In a letter dated 5 November 2003, the DRC raised the question whether the case might be adjourned to a later date, in April 2004, in order to enable the diplomatic negotiations engaged by the Parties to be conducted in an atmosphere of calm. By a letter of 6 November 2003, Uganda indicated that it supported the proposal and adopted the request of the Congo.

By a letter dated 6 November 2003, the Registrar informed the Parties that the Court, acting under Article 54, paragraph 1, of the Rules of Court, and taking account of the representations made to it by the Parties, had decided that the opening of the oral proceedings would be postponed but had also decided that it was impossible to fix a date in April 2004 for the adjourned hearings. As the Court's judicial calendar for the period from November 2003 until well into 2004 had been adopted some time previously, providing for the hearing of, and deliberation on, a number of other cases, the new date for the opening of the oral proceedings in the present case would be fixed in due course.

*1.92. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*<sup>1</sup>

On 2 July 1999, Croatia filed an application against the Federal Republic of Yugoslavia "for violations of the Convention on the

<sup>1</sup> The title of the case was amended following the change in the name of Yugoslavia on 4 February 2003. In the following summary, the name "Yugoslavia" has been retained with respect to all proceedings prior to this date.

Prevention and Punishment of the Crime of Genocide". As a basis for the jurisdiction of the Court, Croatia invoked Article IX of that Convention to which, according to it, both Croatia and Yugoslavia were parties.

The Memorial of Croatia was filed on 1 March 2001, within the time-limit fixed by the Court for that purpose. On 11 September 2002, Yugoslavia filed preliminary objections to the jurisdiction of the Court and to the admissibility of the claims made by Croatia and, pursuant to Article 79, paragraph 3, of the Rules of Court adopted on 14 April 1978, the proceedings on the merits were suspended. On 29 April 2003, within the time-limit fixed by the Court, Croatia presented a written statement containing its observations and submissions on the preliminary objections.

### *1.93. Aerial Incident of 10 August 1999 (Pakistan v. India)*

On 21 September 1999, the Islamic Republic of Pakistan filed an Application instituting proceedings against the Republic of India in respect of a dispute concerning the destruction, on 10 August 1999, of a Pakistani aircraft. By letter of 2 November 1999, the Agent of India notified the Court that his Government wished to submit preliminary objections to the jurisdiction of the Court, which were set out in an appended note. On 19 November 1999, the Court decided that the written pleadings would first address the question of the jurisdiction of the Court and fixed time-limits for the filing of the Memorial of Pakistan and the Counter-Memorial of India, which were duly filed within the time-limits so prescribed. Public hearings on the question of the jurisdiction of the Court were held from 3 to 6 April 2000.

In its Judgment of 21 June 2000, the Court noted that, to establish the jurisdiction of the Court, Pakistan had relied on Article 17 of the General Act for Pacific Settlement of International Disputes, signed at Geneva on 26 September 1928, on the declarations of acceptance of the compulsory jurisdiction of the Court made by the Parties and on Article 36, paragraph 1, of the Statute. It considered those bases of jurisdiction in turn.

The Court pointed out first that, on 21 May 1931, British India had acceded to the General Act of 1928. It observed that India and Pakistan had held lengthy discussions on the question whether the General Act had survived the dissolution of the League of Nations and whether, if so, the two States had become parties to that Act on their accession to independence. Referring to a communication addressed to the United Nations Secretary-General of 18 September 1974, in which the Indian Government indicated that, since India's accession to independence in 1947, they had "never regarded themselves as bound by the General Act of 1928 . . . whether by succession or otherwise", the Court concluded that India could not be regarded as party to the said

Act on the date the Application was filed by Pakistan and that the Convention did not constitute a basis of jurisdiction.

The Court then considered the declaration of acceptance of the compulsory jurisdiction of the Court made by the two States. It noted that India's declaration contained a reservation under which "disputes with the government of any State which is or has been a member of the Commonwealth of Nations" was barred from its jurisdiction. The Court recalled that its jurisdiction only existed within the limits within which it had been accepted and that the right of States to attach reservations to their declarations was a recognized practice. Consequently, Pakistan's arguments to the effect that India's reservation was "extra-statutory" or was obsolete could not be upheld. Pakistan being a member of the Commonwealth, the Court concluded that it did not have jurisdiction to deal with the Application on the basis of the declarations made by the two States.

Considering, thirdly, the final basis of jurisdiction relied on by Pakistan, namely Article 36, paragraph 1, of the Statute, according to which "the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations", the Court indicated that neither the United Nations Charter nor Article 1 of the Simla Accord of 2 July 1972 between the Parties conferred jurisdiction upon it to deal with the dispute between them.

Lastly, the Court explained that there was "a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law" and that "the Court's lack of jurisdiction [did] not relieve States of their obligation to settle their disputes by peaceful means".

#### *1.94. Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*

On 8 December 1999, the Republic of Nicaragua filed an Application instituting proceedings against the Republic of Honduras in respect of a dispute concerning the delimitation of the maritime zones appertaining to each of those States in the Caribbean Sea.

By an Order of 21 March 2000, the Court fixed 21 March 2001 and 21 March 2002, respectively, as the time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Honduras. Those pleadings were filed within the time-limits so fixed.

By an Order of 13 June 2002, the Court authorized the submission of a Reply by Nicaragua and a Rejoinder by Honduras. In the same Order, the Court also fixed the following time-limits for the filing of those pleadings: 13 January 2003 for the Reply of Nicaragua and 13 August 2003 for the Rejoinder of Honduras. Those pleadings were also filed within the prescribed time-limits.

*1.95. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*

On 17 October 2000, the Democratic Republic of the Congo (DRC) filed an Application instituting proceedings against Belgium concerning a dispute over an international arrest warrant issued on 11 April 2000 by a Belgian examining judge against the acting Congolese Minister for Foreign Affairs, Mr. Abdoulaye Yerodia Ndombasi, seeking his detention and subsequent extradition to Belgium for alleged crimes constituting "grave violations of international humanitarian law". The arrest warrant was transmitted to all States, including the DRC, which received it on 12 July 2000.

The DRC also filed a request for the indication of a provisional measure seeking "an order for the immediate discharge of the disputed arrest warrant". Belgium, for its part, called for that request to be rejected and for the case to be removed from the List. On 8 December 2000, at a public hearing, the Court delivered an Order which, rejecting Belgium's request for the case to be removed from the List, stated that "the circumstances, as they [then] presented themselves to the Court, [were] not such as to require the exercise of its power, under Article 41 of the Statute, to indicate provisional measures".

The Memorial of the DRC was filed within the prescribed time-limits. The Court having rejected a request by Belgium seeking to derogate from the procedure in the case, Belgium filed, within the prescribed time-limits, a Counter-Memorial addressing both issues of jurisdiction and admissibility and the merits.

In its submissions presented at the public hearings, the DRC requested the Court to adjudge and declare that Belgium had violated the rule of customary international law concerning the inviolability and immunity from criminal process of incumbent foreign ministers and that it should be required to recall and cancel that arrest warrant and provide reparation for the moral injury to the DRC. Belgium raised objections relating to jurisdiction, mootness and admissibility.

In its Judgment of 14 February 2002, the Court rejected the objections raised by Belgium and declared that it had jurisdiction to entertain the application of the DRC. With respect to the merits, the Court observed that, in the case, it was only questions of immunity from criminal jurisdiction and the inviolability of an incumbent Minister for Foreign Affairs that it had to consider, on the basis, moreover, of customary international law.

The Court then observed that, in customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States. The Court held that the functions exercised by a Minister for Foreign Affairs were such that, throughout the duration of his or her office, a Minister for

Foreign Affairs when abroad enjoyed full immunity from criminal jurisdiction and inviolability. Inasmuch as the purpose of that immunity and inviolability was to prevent another State from hindering the Minister in the performance of his or her duties, no distinction could be drawn between acts performed by the latter in an "official" capacity and those claimed to have been performed in a "private capacity" or, for that matter, between acts performed before assuming office as Minister for Foreign Affairs and acts committed during the period of office.

The Court then observed that, contrary to Belgium's arguments, it had been unable to deduce from its examination of State practice that there existed under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs when they were suspected of having committed war crimes or crimes against humanity.

The Court further observed that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities. The immunities under customary international law, including those of Ministers for Foreign Affairs, remained opposable before the courts of a foreign State, even where those courts exercised an extended criminal jurisdiction on the basis of various international conventions on the prevention and punishment of certain serious crimes.

However, the Court emphasized that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs did not mean that they enjoyed *impunity* in respect of any crimes they might have committed, irrespective of their gravity. While jurisdictional immunity was procedural in nature, criminal responsibility was a question of substantive law. Jurisdictional immunity might well bar prosecution for a certain period or for certain offences; it could not exonerate the person to whom it applied from all criminal responsibility. The Court then spelled out the circumstances in which the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs did not represent a bar to criminal prosecution.

After examining the terms of the arrest warrant of 11 April 2000, the Court noted that the *issuance*, as such, of the disputed arrest warrant represented an act by the Belgian judicial authorities intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs, on charges of war crimes and crimes against humanity. It found that, given the nature and purpose of the warrant, its mere issuance constituted a violation of an obligation of Belgium towards the DRC, in that it failed to respect the immunity which Mr. Yerodia enjoyed as incumbent Minister for Foreign Affairs. The Court also declared that the international circulation of the disputed arrest warrant from June 2000 by the Belgian authorities constituted a violation of an obligation of Belgium towards the DRC, in that it had



failed to respect the immunity of the incumbent Minister for Foreign Affairs.

Finally, the Court considered that its findings constituted a form of satisfaction which would make good the moral injury complained of by the DRC. However, the Court also held that, in order to re-establish "the situation which would, in all probability have existed if [the illegal act] had not been committed", Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it had been circulated.

*1.96. Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*

On 24 April 2001, Yugoslavia<sup>1</sup> filed an Application for a revision of the Judgment delivered by the Court on 11 July 1996 on the preliminary objections raised in the case instituted against it by Bosnia and Herzegovina. By that Judgment of 11 July 1996, the Court had declared that it had jurisdiction on the basis of Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and had dismissed the additional bases of jurisdiction relied on by Bosnia and Herzegovina, finding that the Application filed by the latter was admissible. Yugoslavia contended that a revision of the Judgment was necessary, since it had now become clear that, before 1 November 2000 (the date on which it was admitted as a new Member of the United Nations), it did not continue the international legal and political personality of the Socialist Federal Republic of Yugoslavia, was not a Member of the United Nations, was not a State party to the Statute of the Court and was not a State party to the Genocide Convention. Yugoslavia therefore requested the Court to adjudge and declare that there was a new fact of such a character as to call for revision of the 1996 Judgment under Article 61 of the Statute.

After the filing, by Bosnia and Herzegovina, of its written observations on the admissibility of the Application, public hearings were held from 4 to 7 November 2002. In its Judgment on the admissibility of the Application, delivered on 3 February 2003, the Court noted in particular that, under Article 61 of the Statute, an application for revision of a judgment may be made only when it is "based upon the discovery" of a "new" fact which, "when the judgment was given", was unknown. Such a fact must have been in existence prior to the judgment and have been discovered subsequently. On the other hand,

<sup>1</sup> In fact, the Federal Republic of Yugoslavia, which is referred to as "FRY" in the Judgment of 3 February 2003.

the Court continued, a fact which occurred several years after a judgment had been given was not a "new" fact within the meaning of Article 61, irrespective of the legal consequences that such a fact might have.

Hence, the Court considered that the admission of Yugoslavia to the United Nations on 1 November 2000, well after the 1996 Judgment, could not be regarded as a new fact capable of founding a request for revision of that Judgment.

In the final version of its argument, Yugoslavia claimed that its admission to the United Nations and a letter of 8 December 2000 from the Organization's Legal Counsel simply "revealed" two facts which had existed in 1996 but had been unknown at the time, namely, that it was not then a party to the Statute of the Court and that it was not bound by the Genocide Convention. On that point, the Court considered that, in so arguing, Yugoslavia was not relying on facts that existed in 1996 but "in reality, base[d] its Application for revision on the legal consequences which it [sought] to draw from facts subsequent to the Judgment which it [was] asking to have revised". Those consequences, even supposing them to be established, could not be regarded as facts within the meaning of Article 61 and the Court therefore rejected that argument of Yugoslavia.

The Court indicated that at the time when the Judgment of 1996 was given, the situation obtaining was that created by General Assembly resolution 47/1. That resolution, adopted on 22 September 1992, stated *inter alia*:

"The General Assembly . . . considers that the Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore decides that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly."

In its Judgment of 2003, the Court observed that

"the difficulties which arose regarding the FRY's status between the adoption of that resolution and its admission to the United Nations on 1 November 2000 resulted from the fact that, although the FRY's claim to continue the international legal personality of the Former Yugoslavia was not 'generally accepted' . . ., the precise consequences of this situation were determined on a case-by-case basis (for example, non-participation in the work of the General Assembly and ECOSOC and in the meetings of States parties to the International Covenant on Civil and Political Rights, etc.)".

The Court specified that resolution 47/1 did not affect Yugoslavia's right to appear before the Court or to be a party to a dispute before the Court under the conditions laid down by the Statute, nor did it

affect the position of Yugoslavia in relation to the Genocide Convention. The Court further stated that resolution 55/12 of 1 November 2000 (by which the General Assembly decided to admit Yugoslavia to membership of the United Nations) could not have changed retroactively the *sui generis* position which that State found itself in vis-à-vis the United Nations over the period 1992 to 2000, or its position in relation to the Statute of the Court and the Genocide Convention.

From the foregoing, the Court concluded that it had not been established that Yugoslavia's Application was based upon the discovery of "some fact" which was "when the judgment was given, unknown to the Court and also to the party claiming revision" and accordingly found that one of the conditions for the admissibility of an application for revision laid down by Article 61, paragraph 1, of the Statute had not been satisfied.

#### 1.97. *Certain Property (Liechtenstein v. Germany)*

By an Application filed in the Registry on 1 June 2001, Liechtenstein instituted proceedings against Germany relating to a dispute concerning

"decisions of Germany, in and after 1998, to treat certain property of Liechtenstein nationals as German assets having been 'seized for the purposes of reparation or restitution, or as a result of the state of war' — i.e., as a consequence of World War II —, without ensuring any compensation for the loss of that property to its owners, and to the detriment of Liechtenstein itself".

Liechtenstein requested the Court "to adjudge and declare that Germany [had] incurred international legal responsibility and [was] bound to make appropriate reparation to Liechtenstein for the damage and prejudice suffered". It further requested "that the nature and amount of such reparation should, in the absence of agreement between the parties, be assessed and determined by the Court, if necessary in a separate phase of the proceedings". As a basis for the Court's jurisdiction, Liechtenstein relied on Article I of the European Convention for the Peaceful Settlement of Disputes, signed at Strasbourg on 29 April 1957.

Liechtenstein filed its Memorial on 28 March 2002, within the time-limit laid down by the Court. On 27 June 2002, Germany filed preliminary objections to jurisdiction and admissibility and the proceedings on the merits of the dispute were consequently suspended pursuant to Article 79, paragraph 5, of the Rules of Court of 1978, as amended in 2000. On 15 November 2002, Liechtenstein filed its written observations on the preliminary objections of Germany within the time-limit laid down by the President of the Court. Public hearings on the preliminary objections of Germany were held from 14 to 18 June 2004.

1.98. *Territorial and Maritime Dispute (Nicaragua v. Colombia)*

On 6 December 2001, the Republic of Nicaragua filed an Application introducing proceedings against the Republic of Colombia with regard to "a group of related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation".

On 28 April 2003, Nicaragua filed its Memorial, within the time-limit laid down by the Court. On 21 July 2003, Colombia filed preliminary objections to jurisdiction and the proceedings on the merits were therefore suspended pursuant to Article 79, paragraph 5, of the Rules of Court of 1978, as amended in 2000.

1.99. *Frontier Dispute (Benin/Niger)*

On 3 May 2002, Benin and Niger, by joint notification of a Special Agreement signed on 15 June 2001 at Cotonou and which entered into force on 11 April 2002, seised the Court of a dispute concerning "the definitive delimitation of the whole boundary between them".

Under the terms of Article 1 of the Special Agreement, the Parties agreed to submit their frontier dispute to a chamber of the Court formed pursuant to Article 26, paragraph 2, of the Statute and each to choose a judge *ad hoc*. By an Order of 27 November 2002, the Court unanimously decided to accede to the request of the two Parties for a special chamber of five judges to be formed to deal with the case. It formed a Chamber composed as follows: President Guillaume; Judges Ranjeva, Kooijmans; Judges *ad hoc* Bedjaoui (chosen by Niger) and Bennouna (chosen by Benin). In that Order, the Court also fixed 27 August 2003 as the time-limit for the filing of a Memorial by each Party; those pleadings were filed within the time-limit so prescribed. By an Order of 9 July 2004 the President of the Chamber authorized the filing of a Reply by each of the Parties, and fixed 17 December 2004 as the time-limit therefor.

1.100. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*

On 28 May 2002, the Democratic Republic of the Congo (DRC) filed in the Registry of the Court an Application introducing proceedings against Rwanda for "massive, serious and flagrant violations of human rights and international humanitarian law" resulting

"from acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of the Congo in flagrant breach of the sovereignty and territorial integrity [of the DRC], as guaranteed by the United Nations Charter and the Charter of the Organization of African Unity".

The DRC stated in its Application that the Court's jurisdiction to deal with the dispute between it and Rwanda "deriv[ed] from compromissory clauses" in many international legal instruments, such as the 1979 Convention on the Elimination on All Forms of Discrimination against Women, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Constitution of the World Health Organization (WHO), the Constitution of Unesco, the 1984 New York Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. The DRC added that the jurisdiction of the Court also derived from the supremacy of peremptory norms (*jus cogens*), as reflected in certain international treaties and conventions, in the area of human rights.

On 28 May 2002, the date of the filing of the Application, the DRC also submitted a request for the indication of provisional measures. Public hearings were held on 13 and 14 June 2002 on that request. By an Order of 10 July 2002, the Court rejected that request, holding that it did not, in that case, have the prima facie jurisdiction necessary to indicate the provisional measures requested by the DRC. Further, "in the absence of a manifest lack of jurisdiction", it also rejected Rwanda's request for the case to be removed from the List. The Court also found that its findings in no way prejudged the question of its jurisdiction to deal with the merits of the case or any questions relating to the admissibility of the Application or relating to the merits themselves.

On 18 September 2002, the Court delivered an Order directing that the written pleadings should first be addressed to the questions of the jurisdiction of the Court and the admissibility of the Application, and fixed 20 January 2003 and 20 May 2003, respectively, as the time-limits for the filing of the Memorial of Rwanda and Counter-Memorial of the DRC. Those pleadings were filed within the prescribed time-limits.

*1.101. Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*

On 10 September 2002, El Salvador filed a request for revision of the Judgment delivered on 11 September 1992 by a Chamber of the Court in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*. El Salvador indicated that "the sole purpose of the Application [was] to seek revision of the course of the boundary decided by the Court for the

sixth disputed sector of the land boundary between El Salvador and Honduras". It was the first time that an application had been made seeking a revision of a judgment rendered by one of the Court's Chambers.

By an Order of 27 November 2002, the Court unanimously decided to accede to the request of the two Parties for it to form a special chamber of five judges to deal with the case. It formed a Chamber composed as follows: President Guillaume; Judges Rezek and Buergenthal; Judges *ad hoc* Torres Bernárdez (chosen by Honduras) and Paolillo (chosen by El Salvador). In its Order, the Court also fixed 1 April 2003 as the time-limit for the filing of written observations by Honduras on the admissibility of the request for revision. That pleading having been filed within the time-limit so prescribed, the Chamber held public hearings on the admissibility of the Application from 8 to 12 September 2003.

The Chamber rendered its Judgment on 18 December 2003. In the earlier proceedings which had resulted in the 1992 Judgment, Honduras had contended that in the sixth sector the boundary followed the present course of the river Goascorán. El Salvador, however, had claimed that the boundary was defined by a previous course of the river, which it had abandoned as a result of an "avulsion" — an abrupt change in the river bed. The Chamber began by recalling that at this stage of the proceedings it must determine whether the Application for revision was admissible in that it satisfied the requirements laid down by Article 61 of the Court's Statute; that is to say, the application must, *inter alia*, be based on the "discovery" of a fact "of such a nature as to be a decisive factor" which, "when the judgment was given", was "unknown to the Court and also to the party claiming revision".

In support of its Application, El Salvador *inter alia* claimed to possess scientific, technical and historical evidence showing the existence of a previous bed of the Goascorán and of its avulsion in the mid-eighteenth century. El Salvador contended that this evidence constituted "new facts" within the meaning of Article 61, and that these were "decisive", since in the 1992 Judgment, in the absence of proof of any avulsion, the boundary had been declared to follow the course of the Goascorán as it was in 1821 and not the course prior to avulsion. After examining the reasoning followed by the Chamber in 1992, the present Chamber found that the boundary had been determined by application of the principle *uti possidetis juris*, whereby the boundaries of States resulting from decolonization in Spanish America are to follow the colonial administrative boundaries. However, the 1992 Judgment had indicated that the situation resulting from *uti possidetis* was susceptible of modification as a result of the conduct of the Parties after independence in 1821. The Chamber found that the 1992 Chamber had rejected El Salvador's claims precisely because of that State's conduct subsequent to 1821. The Chamber

accordingly held that it did not matter whether or not there had been an avulsion of the Goascorán, since, even if avulsion were now proved, findings to that effect would provide no basis for calling into question the decision taken by the Chamber in 1992 on different grounds. The facts asserted by El Salvador were accordingly not “decisive factors” in respect of the Judgment which it sought to have revised.

In regard to the second new fact relied on by El Salvador, namely the discovery of further copies of the “Carta Esférica” (a maritime chart of the Gulf of Fonseca prepared in or about 1796 by officers of the brigantine *El Activo*) and of the report of that vessel’s expedition, which differed from those produced by Honduras in the original proceedings, El Salvador contended that the fact that these documents existed in a number of versions and contained discrepancies and anachronisms compromised the evidentiary value that the Chamber had attached to them in 1992. The Chamber accordingly considered whether the 1992 Chamber might have reached different conclusions if it had had before it the new versions of these documents produced by El Salvador. It concluded that this was not the case. The new versions in fact confirmed the conclusions reached by the Chamber in 1992 and were thus not “decisive factors”.

Having found that none of the new facts alleged by El Salvador were “decisive factors” in relation to the Judgment of 11 September 1992, the Chamber held that it was unnecessary for it to ascertain whether the other conditions laid down by Article 61 of the Statute were satisfied.

*1.102. Avena and Other Mexican Nationals (Mexico v. United States of America)*

On 9 January 2003, Mexico brought a case against the United States of America in a dispute concerning alleged violations of Articles 5 and 36 of the Vienna Convention on Consular Relations of 24 April 1963 with respect to 54 Mexican nationals who had been sentenced to death in certain states of the United States. At the same time as its Application, Mexico also submitted a request for the indication of provisional measures, among other things so that the United States would take all measures necessary to ensure that no Mexican national was executed and no action was taken that might prejudice the rights of Mexico or its nationals with regard to any decision the Court might render on the merits of the case. After public hearings on the provisional measures held on 21 January 2003, the Court, on 5 February 2003, made an Order, by which it decided that the

“United States of America sh[ould] take all measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera [three Mexican nationals] [we]re not executed pending final judgment in these proceedings”,



that the "United States of America sh[ould] inform the Court of all measures taken in implementation of [that] Order", and that the Court would remain seized of the matters which formed the subject of that Order until the Court had rendered its final judgment. The same day, it issued another Order fixing 6 June 2003 as the time-limit for the filing of the Memorial by Mexico and 6 October 2003 as the time-limit for the filing of the Counter-Memorial by the United States of America. The President of the Court subsequently extended those dates respectively to 20 June 2003 and 3 November 2003. Those pleadings were filed within the time-limits thus extended.

Following public hearings held from 15 to 19 December 2004, the Court rendered its Judgment on 31 March 2004. Mexico had amended its claims during the written phase of the proceedings and again at the oral proceedings, so that the Court ultimately ruled on the cases of 52 (rather than 54) Mexican nationals.

The Court first considered four objections by the United States to its jurisdiction and five objections to admissibility. Mexico had argued that all of these objections were inadmissible because they had been submitted outside the time-limit prescribed by the Rules of Court, but the Court did not accept this. The Court then dismissed the United States objections, whilst reserving certain of them for consideration at the merits stage.

Ruling on the merits of the case, the Court began by considering whether the 52 individuals concerned were solely of Mexican nationality. Finding that the United States had failed to show that certain of them were also United States nationals, the Court held that the United States was under an obligation to provide consular information pursuant to Article 36, paragraph 1 (b), of the Vienna Convention in respect of all 52 Mexican nationals. Regarding the meaning to be given to the phrase "without delay" in Article 36 (1) (b), the Court further held that there is an obligation to provide consular information as soon as it is realized that the arrested person is a foreign national, or that there are grounds for thinking that he is probably a foreign national. The Court found that, in all of the cases except one, the United States had violated its obligation to provide the required consular information. Taking note of the interrelated nature of the three subparagraphs (a), (b) and (c) of paragraph 1 of Article 36 of the Vienna Convention, the Court then went on to find that the United States had, in 49 cases, also violated the obligation to enable Mexican consular officers to communicate with, have access to and visit their nationals and, in 34 cases, to arrange for their legal representation.

In relation to Mexico's arguments concerning paragraph 2 of Article 36 and the right of its nationals to effective review and reconsideration of convictions and sentences impaired by a violation of Article 36 (1), the Court found that, in view of its failure to revise the procedural default rule since the Court's decision in the *LaGrand* case (see 1.80), the United States had in three cases violated paragraph 2

of Article 36, although the possibility of judicial re-examination was still open in the 49 other cases.

In regard to the legal consequences of the proven violations of Article 36 and to Mexico's requests for *restitutio in integrum*, through the partial or total annulment of convictions and sentences, the Court pointed out that what international law required was reparation in an adequate form, which in this case meant review and reconsideration by United States courts of the Mexican nationals' convictions and sentences. The Court considered that the choice of means for review and reconsideration should be left to the United States, but that it was to be carried out by taking account of the violation of rights under the Vienna Convention. After recalling that the process of review and reconsideration should occur in the context of judicial proceedings, the Court stated that the executive clemency process was not sufficient in itself to serve that purpose, although appropriate clemency procedures could supplement judicial review and reconsideration. Contrary to Mexico's claims, the Court found no evidence of a regular and continuing pattern of breaches of Article 36 by the United States. The Court moreover recognized the efforts of the United States to encourage compliance with the Vienna Convention, and took the view that that commitment provided a sufficient guarantee and assurance of non-repetition as requested by Mexico.

The Court further observed that, while the present case concerned only Mexican nationals, that should not be taken to imply that its conclusions did not apply to other foreign nationals finding themselves in similar situations in the United States. Finally, the Court recalled that the United States had violated paragraphs 1 and 2 of Article 36 in the case of the three Mexican nationals concerned by the Order of 5 February 2003 indicating provisional measures, and that no review and reconsideration of conviction and sentence had been carried out in those cases. The Court considered that it was therefore for the United States to find an appropriate remedy having the nature of review and reconsideration according to the criteria indicated in the Judgment.

*1.103. Certain Criminal Proceedings in France (Republic of the Congo v. France)*

On 9 December 2002, the Republic of the Congo filed an Application instituting proceedings against France seeking the annulment of the investigation and prosecution measures taken by the French judicial authorities further to a complaint concerning crimes against humanity and torture allegedly committed in the Congo against individuals of Congolese nationality filed by various human rights associations against the President of the Republic of the Congo, Mr. Denis Sassou Nguesso, the Congolese Minister of the Interior, General Pierre Oba, and other individuals including General Norbert

Dabira, Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard. The Congo contends that by

“attributing to itself universal jurisdiction in criminal matters and by arrogating to itself the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed by him in connection with the exercise of his powers for the maintenance of public order in his country”,

France had violated “the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations . . . exercise its authority on the territory of another State”. The Congo further submitted that, in issuing a warrant instructing police officers to examine the President of the Republic of the Congo as witness in the case, France had violated “the criminal immunity of a foreign Head of State — an international customary rule recognized by the jurisprudence of the Court”.

In its Application, the Congo indicated that it sought to found the jurisdiction of the Court, pursuant to Article 38, paragraph 5, of the Rules of Court, “on the consent of the French Republic, which [would] certainly be given”. In accordance with that provision, the Congo’s Application was transmitted to the French Government and no action was taken in the proceedings. By a letter dated 8 April 2003, France indicated that it “consent[ed] to the jurisdiction of the Court to entertain the Application pursuant to Article 38, paragraph 5”, and the case was thus entered in the Court’s List. It was the first time, since the adoption of Article 38, paragraph 5, of the Rules of Court in 1978, that a State thus accepted the invitation of another State to recognize the jurisdiction of the Court to entertain a case against it.

The Application of the Congo was accompanied by a request for the indication of a provisional measure seeking “an order for the immediate suspension of the proceedings being conducted by the investigating judge of the Meaux *Tribunal de grande instance*”, and hearings on that request were held on 28 and 29 April 2003. In its Order of 17 June 2003, the Court noted that its power to indicate provisional measures had as its object to preserve the respective rights of the parties pending a final decision in the case, that it presupposed that irreparable prejudice should not be caused to the rights in dispute, and that such measures were justified solely if there was urgency. Having considered the various allegations made by the Congo, it concluded that no evidence had been placed before the Court of any irreparable prejudice to the rights in dispute and that, consequently, circumstances were not such as to require the exercise of its power to indicate provisional measures. By an Order of 11 July 2003, the President of the Court fixed 11 December 2003 and 11 May 2004 respectively as the time-limits for the filing of the Memorial of the Republic of the Congo and the Counter-Memorial of

France. After these pleadings had been filed, the Court, by an Order of 17 June 2004, authorized the filing of a Reply by the Republic of the Congo and a Rejoinder by France, and fixed the time-limits for these at 10 December 2004 and 10 June 2005 respectively.

*1.104. Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*

On 24 July 2003, Malaysia and Singapore jointly seised the Court of a dispute between them by notification of a Special Agreement signed on 6 February 2003 at Putrajaya and which entered into force on 9 May 2003. Under that Special Agreement, the Parties requested the Court to “determine whether sovereignty over: (a) Pedra Branca/Pulau Batu Puteh; (b) Middle Rocks; and (c) South Ledge belong[ed] to Malaysia or the Republic of Singapore”. They agreed in advance “to accept the Judgment of the Court . . . as final and binding upon them”. By an Order of 1 September 2003, pursuant to Article 4 of the Special Agreement, the President of the Court fixed 25 March 2004 as the time-limit for the filing of a Memorial by each of the Parties and 25 January 2005 as the time-limit for the filing of a Counter-Memorial by each of the Parties. The Memorials were filed within the time-limit fixed.

## **2. Advisory cases**

*2.1. Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*

From the creation of the United Nations some 12 States had unsuccessfully applied for admission. Their applications were rejected by the Security Council in consequence of a veto imposed by one or other of the States which are permanent members of the Council. A proposal was then made for the admission of all the candidates at the same time. The General Assembly referred the question to the Court. In the interpretation it gave of Article 4 of the Charter of the United Nations, in its Advisory Opinion of 28 May 1948, the Court declared that the conditions laid down for the admission of States were exhaustive and that if these conditions were fulfilled by a State which was a candidate, the Security Council ought to make the recommendation which would enable the General Assembly to decide upon the admission.

*2.2. Competence of the General Assembly for the Admission of a State to the United Nations*

The above Advisory Opinion (No. 2.1) given by the Court did not lead to a settlement of the problem in the Security Council. A Member

of the United Nations then proposed that the word “recommendation” in Article 4 of the Charter should be construed as not necessarily signifying a favourable recommendation. In other words, a State might be admitted by the General Assembly even in the absence of a recommendation — this being interpreted as an unfavourable recommendation — thus making it possible, it was suggested, to escape the effects of the veto. In the Advisory Opinion which it delivered on 3 March 1950, the Court pointed out that the Charter laid down two conditions for the admission of new Members: a recommendation by the Security Council and a decision by the General Assembly. If the latter body had power to decide without a recommendation by the Council, the Council would be deprived of an important function assigned to it by the Charter. The absence of a recommendation by the Council, as the result of a veto, could not be interpreted as an unfavourable recommendation, since the Council itself had interpreted its own decision as meaning that no recommendation had been made.

### *2.3. Reparation for Injuries Suffered in the Service of the United Nations*

As a consequence of the assassination in September 1948, in Jerusalem, of Count Folke Bernadotte, the United Nations Mediator in Palestine, and other members of the United Nations Mission to Palestine, the General Assembly asked the Court whether the United Nations had the capacity to bring an international claim against the State responsible with a view to obtaining reparation for damage caused to the Organization and to the victim. If this question were answered in the affirmative, it was further asked in what manner the action taken by the United Nations could be reconciled with such rights as might be possessed by the State of which the victim was a national. In its Advisory Opinion of 11 April 1949, the Court held that the Organization was intended to exercise functions and rights which could only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane. It followed that the Organization had the capacity to bring a claim and to give it the character of an international action for reparation for the damage that had been caused to it. The Court further declared that the Organization can claim reparation not only in respect of damage caused to itself, but also in respect of damage suffered by the victim or persons entitled through him. Although, according to the traditional rule, diplomatic protection had to be exercised by the national State, the Organization should be regarded in international law as possessing the powers which, even if they are not expressly stated in the Charter, are conferred upon the Organization as being essential to the discharge of its functions. The Organization may require to entrust its agents with important missions in disturbed parts of the world. In such cases, it is necessary that the

agents should receive suitable support and protection. The Court therefore found that the Organization has the capacity to claim appropriate reparation, including also reparation for damage suffered by the victim or by persons entitled through him. The risk of possible competition between the Organization and the victim's national State could be eliminated either by means of a general convention or by a particular agreement in any individual case.

#### *2.4. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*

This case concerned the procedure to be adopted in regard to the settlement of disputes between the States signatories of the Peace Treaties of 1947 (Bulgaria, Hungary, Romania, on the one hand, and the Allied States, on the other). In the first Advisory Opinion (30 March 1950), the Court stated that the countries, which had signed a Treaty providing an arbitral procedure for the settlement of disputes relating to the interpretation or application of the Treaty, were under an obligation to appoint their representatives to the arbitration commissions prescribed by the Treaty. Notwithstanding this Advisory Opinion, the three States, which had declined to appoint their representatives on the arbitration commissions, failed to modify their attitude. A time-limit was given to them within which to comply with the obligation laid down in the Treaties as they had been interpreted by the Court. After the expiry of the time-limit, the Court was requested to say whether the Secretary-General, who, by the terms of the Treaties, was authorized to appoint the third member of the arbitration commission in the absence of agreement between the parties in respect of this appointment, could proceed to make this appointment, even if one of the parties had failed to appoint its representative. In a further Advisory Opinion of 18 July 1950, the Court replied that this method could not be adopted since it would result in creating a commission of two members, whereas the Treaty provided for a commission of three members, reaching its decision by a majority.

#### *2.5. International Status of South West Africa*

This Advisory Opinion, given on 11 July 1950, at the request of the General Assembly, was concerned with the determination of the legal status of the Territory, the administration of which had been placed by the League of Nations after the First World War under the mandate of the Union of South Africa. The League had disappeared, and with it the machinery for the supervision of the mandates. Moreover, the Charter of the United Nations did not provide that the former mandated Territories should automatically come under trusteeship. The Court held that the dissolution of the League of Nations and

its supervisory machinery had not entailed the lapse of the mandate, and that the mandatory Power was still under an obligation to give an account of its administration to the United Nations, which was legally qualified to discharge the supervisory functions formerly exercised by the League of Nations. The degree of supervision to be exercised by the General Assembly should not, however, exceed that which applied under the mandates system and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations. On the other hand, the mandatory Power was not under an obligation to place the Territory under trusteeship, although it might have certain political and moral duties in this connection. Finally, it had no competence to modify the international status of South West Africa unilaterally.

*2.6. Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*

Following the preceding Advisory Opinion (see No. 2.5) the General Assembly, on 11 October 1954, adopted a special Rule F on voting procedure to be followed by the Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South West Africa. According to this Rule, such decisions were to be regarded as important questions within the meaning of Article 18, paragraph 2, of the United Nations Charter and would therefore require a two-thirds majority of Members of the United Nations present and voting. In its Advisory Opinion of 7 June 1955, the Court considered that Rule F was a correct application of its earlier Advisory Opinion. It related only to procedure, and procedural matters were not material to the degree of supervision exercised by the General Assembly. Moreover, the Assembly was entitled to apply its own voting procedure and Rule F was in accord with the requirement that the supervision exercised by the Assembly should conform as far as possible to the procedure followed by the Council of the League of Nations.

*2.7. Admissibility of Hearings of Petitioners by the Committee on South West Africa*

In this Advisory Opinion of 1 June 1956, the Court considered that it would be in accordance with its Advisory Opinion of 1950 on the international status of South West Africa (see No. 2.5 above) for the Committee on South West Africa, established by the General Assembly, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa if such a course was necessary for the maintenance of effective international supervision of the mandated Territory. The General Assembly was legally qualified to carry out an



effective and adequate supervision of the administration of the mandated Territory. Under the League of Nations, the Council would have been competent to authorize such hearings. Although the degree of supervision to be exercised by the Assembly should not exceed that which applied under the mandates system, the granting of hearings would not involve such an excess in the degree of supervision. Under the circumstances then existing, the hearing of petitioners by the Committee on South West Africa might be in the interest of the proper working of the mandates system.

*2.8. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*

On 27 October 1966, the General Assembly decided that the mandate for South West Africa (see Nos. 2.5-7 above and Contentious Cases, Nos. 1.35-36) was terminated and that South Africa had no other right to administer the Territory. In 1969 the Security Council called upon South Africa to withdraw its administration from the Territory, and on 30 January 1970 it declared that the continued presence there of the South African authorities was illegal and that all acts taken by the South African Government on behalf of or concerning Namibia after the termination of the mandate were illegal and invalid; it further called upon all States to refrain from any dealings with the South African Government that were incompatible with that declaration. On 29 July 1970, the Security Council decided to request of the Court an advisory opinion on the legal consequences for States of the continued presence of South Africa in Namibia. In its Advisory Opinion of 21 June 1971, the Court found that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw its administration immediately. It found that States Members of the United Nations were under an obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts implying recognition of the legality of, or lending support or assistance to, such presence and administration. Finally, it stated that it was incumbent upon States which were not Members of the United Nations to give assistance in the action which had been taken by the United Nations with regard to Namibia.

*2.9. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*

In November 1950, the General Assembly asked the Court a series of questions as to the position of a State which attached reserva-

tions to its signature of the multilateral Convention on genocide if other States, signatories of the same Convention, objected to these reservations. The Court considered, in its Advisory Opinion of 28 May 1951, that, even if a convention contained no article on the subject of reservations, it did not follow that they were prohibited. The character of the convention, its purposes and its provisions must be taken into account. It was the compatibility of the reservation with the purpose of the convention which must furnish the criterion of the attitude of the State making the reservation, and of the State which objected thereto. The Court did not consider that it was possible to give an absolute answer to the abstract question put to it. As regards the effects of the reservation in relations between States, the Court considered that a State could not be bound by a reservation to which it had not consented. Every State was therefore free to decide for itself whether the State which formulated the reservation was or was not a party to the convention. The situation presented real disadvantages, but they could only be remedied by the insertion in the convention of an article on the use of reservations. A third question referred to the effects of an objection by a State which was not yet a party to the convention, either because it had not signed it or because it had signed but not ratified it. The Court was of the opinion that, as regards the first case, it would be inconceivable that a State which had not signed the convention should be able to exclude another State from it. In the second case, the situation was different: the objection was valid, but it would not produce an immediate legal effect; it would merely express and proclaim the attitude which a signatory State would assume when it had become a party to the convention. In all the foregoing, the Court adjudicated only on the specific case referred to it, namely, the genocide Convention.

#### *2.10. Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*

The United Nations Administrative Tribunal was established by the General Assembly to hear applications alleging non-observance of contracts of employment of staff members of the United Nations Secretariat or of the terms of appointment of such staff members. In its Advisory Opinion of 13 July 1954, the Court considered that the Assembly was not entitled on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal in favour of a staff member of the United Nations whose contract of service had been terminated without his assent. The Tribunal was an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions and not merely an advisory or subordinate organ. Its judgments were therefore binding on the United Nations Organization and thus also on the General Assembly.

*2.11. Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco*

The Statute of the Administrative Tribunal of the International Labour Organization (ILO) (the jurisdiction of which had been accepted by the United Nations Educational, Scientific and Cultural Organization (Unesco) for the purpose of settling certain disputes which might arise between the organization and its staff members) provides that the Tribunal's judgments shall be final and without appeal, subject to the right of the organization to challenge them. It further provides that in the event of such a challenge, the question of the validity of the decision shall be referred to the Court for an advisory opinion, which will be binding. When four Unesco staff members holding fixed-term appointments complained of the Director-General's refusal to renew their contracts on expiry, the Tribunal gave judgment in their favour. Unesco challenged these judgments, contending that the staff members concerned had no legal right to such renewal and that the Tribunal was competent only to hear complaints alleging non-observance of terms of appointment or staff regulations. In its Advisory Opinion of 23 October 1956, the Court said that an administrative memorandum which had announced that all holders of fixed-term contracts would, subject to certain conditions, be offered renewals might reasonably be regarded as binding on the organization and that it was sufficient to establish the jurisdiction of the Tribunal, that the complaints should appear to have a substantial and not merely artificial connection with the terms and provisions invoked. It was therefore the Court's opinion that the Administrative Tribunal had been competent to hear the complaints in question.

*2.12. Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*

The Inter-Governmental Maritime Consultative Organization (IMCO) (now the International Maritime Organization (IMO)) comprises, among other organs, an Assembly and a Maritime Safety Committee. Under the terms of Article 28 (a) of the Convention for the establishment of the organization, this Committee consists of 14 members elected by the Assembly from the members of the organization having an important interest in maritime safety, "of which not less than eight shall be the largest ship-owning nations". When, on 15 January 1959, the IMCO Assembly, for the first time, proceeded to elect the members of the Committee, it elected neither Liberia nor Panama, although those two States were among the eight members of the organization which possessed the largest registered tonnage. Subsequently, the Assembly decided to ask the Court whether the Maritime Safety Committee was constituted in accordance with the Convention for the establishment of the organization. In its Advisory

Opinion of 8 June 1960, the Court replied to this question in the negative.

### *2.13. Certain Expenses of the United Nations*

Article 17, paragraph 2, of the Charter of the United Nations provides that "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." On 20 December 1961, the General Assembly adopted a resolution requesting an advisory opinion on whether the expenditures authorized by it relating to United Nations operations in the Congo and to the operations of the United Nations Emergency Force in the Middle East constituted "expenses of the Organization" within the meaning of this Article of the Charter. The Court, in its Advisory Opinion of 20 July 1962, replied in the affirmative that these expenditures were expenses of the United Nations. The Court pointed out that under Article 17, paragraph 2, of the Charter, the "expenses of the Organization" are the amounts paid out to defray the costs of carrying out the purposes of the Organization. After examining the resolutions authorizing the expenditures in question, the Court concluded that they were so incurred. The Court also analysed the principal arguments which had been advanced against the conclusion that these expenditures should be considered as "expenses of the Organization" and found these arguments to be unfounded.

### *2.14. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*

On 28 April 1972, the United Nations Administrative Tribunal gave, in Judgement No. 158, its ruling on a complaint by a former United Nations staff member concerning the non-renewal of his fixed-term contract. The staff member resorted to the machinery set up by the General Assembly in 1955, and applied for the review of this ruling to the Committee on Applications for Review of Administrative Tribunal Judgements, which decided that there was a substantial basis for the application and requested the Court to give an advisory opinion on two questions arising from the applicant's contentions. In its Advisory Opinion of 12 July 1973, the Court decided to comply with the Committee's request considering that the review procedure was not incompatible with the general principles of litigation. It expressed the opinion that, contrary to those contentions, the Tribunal had not failed to exercise the jurisdiction vested in it and had not committed a fundamental error in procedure having occasioned a failure of justice.

### *2.15. Western Sahara*

On 13 December 1974, the General Assembly requested an advisory opinion on the following questions:

“I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?”

If the answer to the first question is in the negative,

“II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?”

In its Advisory Opinion, delivered on 16 October 1975, the Court replied to Question I in the negative. In reply to Question II, it expressed the opinion that the materials and information presented to it showed the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally showed the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court’s conclusion was that the materials and information presented to it did not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court did not find any legal ties of such a nature as might affect the application of the General Assembly’s 1960 resolution 1514 (XV) — containing the Declaration on the Granting of Independence to Colonial Countries and Peoples — in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory.

#### *2.16. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*

Having considered a possible transfer from Alexandria of the World Health Organization’s Regional Office for the Eastern Mediterranean Region, the World Health Assembly in May 1980 submitted a request to the Court for an advisory opinion on the following questions:

“1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?

2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the two-year period between notice and termination of the Agreement?”

The Court expressed the opinion that, in the event of a transfer of the seat of the Regional Office to another country, the WHO and Egypt

were under mutual obligation to consult together in good faith as to the conditions and modalities of the transfer, and to negotiate the various arrangements needed to effect the transfer with a minimum of prejudice to the work of the organization and to the interests of Egypt. The party wishing to effect the transfer had a duty, despite the specific period of notice indicated in the 1951 Agreement, to give a reasonable period of notice to the other party, and during this period the legal responsibilities of the WHO and of Egypt would be to fulfil in good faith their mutual obligations as set out above.

*2.17. Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*

A former staff member of the United Nations Secretariat had challenged the Secretary-General's refusal to pay him a repatriation grant unless he produced evidence of having relocated upon retirement. By a Judgement of 15 May 1981, the United Nations Administrative Tribunal had found that the staff member was entitled to receive the grant and, therefore, to compensation for the injury sustained through its non-payment. The injury had been assessed at the amount of the repatriation grant of which payment was refused. The United States Government addressed an application for review of this Judgement to the Committee on Applications for Review of Administrative Tribunal Judgements, and the Committee requested an advisory opinion of the Court on the correctness of the decision in question. In its Advisory Opinion of 20 July 1982, the Court, after pointing out that a number of procedural and substantive irregularities had been committed, decided nevertheless to comply with the Committee's request, whose wording it interpreted as really seeking a determination as to whether the Administrative Tribunal had erred on a question of law relating to the provisions of the United Nations Charter, or had exceeded its jurisdiction or competence. As to the first point, the Court said that its proper role was not to retry the case already dealt with by the Tribunal, and that it need not involve itself in the question of the proper interpretation of United Nations Staff Regulations and Rules further than was strictly necessary in order to judge whether the interpretation adopted by the Tribunal had been in contradiction with the provisions of the Charter. Having noted that the Tribunal had only applied what it had found to be the relevant Staff Regulations and Staff Rules made under the authority of the General Assembly, the Court found that the Tribunal had not erred on a question of law relating to the provisions of the Charter. As to the second point, the Court considered that the Tribunal's jurisdiction included the scope of Staff Regulations and Rules and that it had not exceeded its jurisdiction or competence.

*2.18. Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*

This case concerns a refusal by the Secretary-General of the United Nations to renew the appointment of a staff member of the Secretariat beyond the date of expiry of his fixed-term contract, the reasons given being that the staff member had been seconded from a national administration, that his secondment had come to an end and that his contract with the United Nations was limited to the duration of the secondment. In a Judgement delivered on 8 June 1984, the Administrative Tribunal rejected the staff member's appeal against the Secretary-General's refusal. The staff member in question applied for a review of the Judgement to the Committee on Applications for Review of Administrative Tribunal Judgements, which requested the Court to give an advisory opinion on the merits of that decision. In its Advisory Opinion, rendered on 27 May 1987, the Court found that the Administrative Tribunal did not fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the applicant after the expiry of his fixed-term contract, and that it did not err on any question of law relating to the provisions of the Charter of the United Nations. In that regard, the Court found that the Tribunal had established that there had been "reasonable consideration" of the applicant's case, and by implication that the Secretary-General had not been under a misapprehension as to the effect of secondment, and that the provision of Article 101, paragraph 3, of the Charter must have been present in the mind of the Tribunal when it considered the question. In the view of the Court, those findings could not be disturbed on the ground of error on a question of law relating to the provisions of the Charter.

*2.19. Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*

On 2 March 1988, the General Assembly of the United Nations adopted a resolution whereby it requested the Court to give an advisory opinion on the question of whether the United States of America, as a party to the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, was under an obligation to enter into arbitration in accordance with Section 21 of the Agreement. That resolution had been adopted in the wake of the signature and imminent entry into force of a law of the United States, entitled Foreign Relations Authorization Act, Title X of which established certain prohibitions regarding the Palestine Liberation Organization, *inter alia*, a prohibition

"to establish or maintain an office, headquarters, premises or other facilities or establishments within the jurisdiction of the United



States at the behest or direction of, or with funds provided by the Palestine Liberation Organization”.

The PLO, in accordance with the Headquarters Agreement, had a Permanent Mission to the United Nations. The Secretary-General of the United Nations invoked the dispute settlement procedure set out in Section 21 of the Agreement and proposed that the negotiations phase of the procedure commence on 20 January 1988. The United States, for its part, informed the United Nations that it was not in a position and was not willing to enter formally into that dispute settlement procedure, in that it was still evaluating the situation and as the Secretary-General had sought assurances that the on-going arrangements for the Permanent Observer Mission of the Palestine Liberation Organization would not be curtailed or otherwise affected. On 11 February 1988, the United Nations informed the Department of State that it had chosen its arbitrator and pressed the United States to do the same. The Court, having regard to the fact that the decision to request an advisory opinion had been made “taking into account the time constraint”, accelerated its procedure. Written statements were filed, within the time-limits fixed, by the United Nations, the United States of America, the German Democratic Republic and the Syrian Arab Republic, and on 11 and 12 April 1988 the Court held hearings at which the United Nations Legal Counsel took part. The Court rendered its Advisory Opinion on 26 April 1988. It began by engaging in a detailed review of the events that took place before and after the filing of the request for an advisory opinion, in order to determine whether there was, between the United Nations and the United States, a dispute of the type contemplated by Section 21 of the United Nations Headquarters Agreement. In so doing, the Court pointed out that its sole task was to determine whether the United States was obliged to enter into arbitration under that Agreement, not to decide whether the measures adopted by the United States in regard to the PLO Observer Mission did or did not run counter to that Agreement. The Court pointed out, *inter alia*, that the United States had stated that “it had not yet concluded that a dispute existed” between it and the United Nations “because the legislation in question had not been implemented”. Then, subsequently, referring to “the current dispute over the status of the PLO Observer Mission” it had expressed the view that arbitration would be premature. After initiating litigation in its domestic courts, the United States, in its written statement, had informed the Court of its belief that arbitration would not be “appropriate or timely”. After saying that it could not allow considerations as to what might be “appropriate” to prevail over the obligations deriving from Section 21, the Court found that the opposing attitudes of the United Nations and the United States showed the existence of a dispute, whatever the date on which it might be deemed to have arisen. It further qualified that dispute as a dispute concerning the

application of the Headquarters Agreement, and then found that, taking into account the United States attitude, the Secretary-General had in the circumstances exhausted such possibilities of negotiation as were open to him, nor had any "other agreed mode of settlement" within the meaning of Section 21 of the Agreement been contemplated by the United Nations and the United States. The Court accordingly concluded that the United States was bound to respect the obligation to enter into arbitration, under Section 21. In so doing, it recalled the fundamental principle of international law that international law prevailed over domestic law, a principle long endorsed by a body of judicial decisions.

*2.20. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*

On 24 May 1989, the Economic and Social Council of the United Nations (ECOSOC) adopted a resolution whereby it requested the Court to give, on a priority basis, an advisory opinion on the question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Mr. Dumitru Mazilu, Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights. Mr. Mazilu, a Romanian national, had been entrusted, by a resolution of the Sub-Commission, with the task of drawing up a report on "Human Rights and Youth" in connection with which the Secretary-General was asked to provide him with all the assistance he might need. Mr. Mazilu was absent from the 1987 session of the Sub-Commission, during which he was to have filed his report, and Romania let it be known that he had been taken into hospital. Mr. Mazilu's mandate finally expired on 31 December 1987, but without his being relieved of the task of Rapporteur that had been assigned to him. Mr. Mazilu was able to get various messages through to the United Nations, in which he complained that Romanian authorities were refusing him a travel permit. Moreover, those authorities, further to contacts initiated by the Under-Secretary-General for Human Rights at the request of the Sub-Commission, had let it be known that any intervention of the United Nations Secretariat would be considered as interference in Romania's internal affairs. Those authorities subsequently informed the United Nations of their position with regard to the applicability to Mr. Mazilu of the Convention on the Privileges and Immunities of the United Nations, asserting, *inter alia*, that the Convention did not equate Rapporteurs, whose activities were only occasional, with experts on missions for the United Nations; that they could not, even if granted some of that status, enjoy anything more than functional immunities and privileges; that those privileges and immunities began to apply only at the moment when the expert left on a journey connected with the performance of his mission; and that

in the country of which he was a national an expert enjoyed privileges and immunities only in respect of actual activities relating to his mission. The Court rendered its Advisory Opinion on 15 December 1989, and began by rejecting Romania's contention that the Court lacked jurisdiction to entertain the request. Moreover, the Court did not find any compelling reasons that might have led it to consider it inappropriate to render an opinion. It then engaged in a detailed analysis of Article VI, Section 22, of the Convention, which relates to "Experts on missions for the United Nations". It reached the conclusion, *inter alia*, that Section 22 of the Convention was applicable to persons (other than United Nations officials) to whom a mission had been entrusted by the Organization and who were therefore entitled to enjoy the privileges and immunities provided for in that Section with a view to the independent exercise of their functions; that during the whole period of such missions, experts enjoyed these functional privileges and immunities whether or not they travelled; and that those privileges and immunities might be invoked against the State of nationality or of residence unless a reservation to Section 22 of the Convention had been validly made by that State. Turning to the specific case of Mr. Mazilu, the Court expressed the view that he continued to have the status of Special Rapporteur, that as a consequence he should be regarded as an expert on mission within the meaning of Section 22 of the Convention and that that Section was accordingly applicable in his case.

#### *2.21. Legality of the Use by a State of Nuclear Weapons in Armed Conflict*

By a letter dated 27 August 1993, filed in the Registry on 3 September 1993, the Director-General of the World Health Organization (WHO) officially communicated to the Registrar a decision taken by the World Health Assembly to submit to the Court the following question, set forth in resolution WHA46/40 adopted on 14 May 1993

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"

The Court decided that WHO and the member States of that organization entitled to appear before the Court were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute. Written statements were filed by 35 States, and subsequently written observations on those written statements were presented by 9 States. In the course of the oral proceedings, which took place in October and November 1995, the WHO and 20 States presented oral statements. On 8 July 1996, the Court found

that it was not able to give the advisory opinion requested by the World Health Assembly.

It considered that three conditions had to be satisfied in order to found the jurisdiction of the Court when a request for advisory opinion was submitted to it by a specialized agency: the agency requesting the opinion had to be duly authorized, under the Charter, to request opinions of the Court; the opinion requested had to be on a legal question; and that question had to be one arising within the scope of the activities of the requesting agency. The first two conditions had been met. With regard to the third, however, the Court found that although according to its Constitution the WHO is authorized to deal with the health effects of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in, the question put to the Court in the present case related *not to the effects* of the use of nuclear weapons on health, but to the *legality* of the use of such weapons *in view of their health and environmental effects*.

The Court further pointed out that international organizations did not, like States, possess a general competence, but were governed by the "principle of speciality", that is to say, they were invested by the States which created them with powers, the limits of which were a function of the common interests whose promotion those States entrusted to them. Besides, the WHO was an international organization of a particular kind — a "specialized agency" forming part of a system based on the Charter of the United Nations, which was designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The Court therefore concluded that the responsibilities of the WHO were necessarily restricted to the sphere of "public health" and could not encroach on the responsibilities of other parts of the United Nations system. There was no doubt that questions concerning the use of force, the regulation of armaments and disarmament were within the competence of the United Nations and lay outside that of the specialized agencies. The Court accordingly found that the request for an advisory opinion submitted by the WHO did not relate to a question arising "within the scope of [the] activities" of that organization.

## *2.22. Legality of the Threat or Use of Nuclear Weapons*

By a letter dated 19 December 1994, filed in the Registry on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registry a decision taken by the General Assembly, by its resolution 49/75 K adopted on 15 December 1994, to submit to the Court, for advisory opinion, the following question:

“Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The resolution asked the Court to render its advisory opinion “urgently”. Written statements were filed by 28 States, and subsequently written observations on those statements were presented by 2 States. In the course of the oral proceedings, which took place in October and November 1995, 22 States presented oral statements.

On 8 July 1996, the Court rendered its Advisory Opinion. Having concluded that it had jurisdiction to render an opinion on the question put to it and that there was no compelling reason to exercise its discretion not to render an opinion, the Court found that the most directly relevant applicable law was that relating to the use of force, as enshrined in the United Nations Charter, and the law applicable in armed conflict, together with any specific treaties on nuclear weapons that the Court might find relevant.

The Court then considered the question of the legality or illegality of the use of nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force. It observed, *inter alia*, that those provisions applied to any use of force, regardless of the weapons employed. In addition it stated that the principle of proportionality might not in itself exclude the use of nuclear weapons in self-defence in all circumstances. However at the same time, a use of force that was proportionate under the law of self-defence had, in order to be lawful, to meet the requirements of the law applicable in armed conflict, including, in particular, the principles and rules of humanitarian law. It pointed out that the notions of a “threat” and “use” of force within the meaning of Article 2, paragraph 4, of the Charter stood together in the sense that if the use of force itself in a given case was illegal — for whatever reason — the threat to use such force would likewise be illegal.

The Court then turned to the law applicable in situations of armed conflict. From a consideration of customary and conventional law, it concluded that the use of nuclear weapons could not be seen as specifically prohibited on the basis of that law, nor did it find any specific prohibition of the use of nuclear weapons in the treaties that expressly prohibited the use of certain weapons of mass destruction. The Court then turned to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flowed from that source of law. Noting that the members of the international community were profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constituted the expression of an *opinio juris*, it did not consider itself able to find that there was such an *opinio juris*. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such was hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the doctrine of deterrence on the other.

The Court then dealt with the question whether recourse to nuclear weapons ought to be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality. It laid emphasis on two cardinal principles: (a) the first being aimed at the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets while (b) according to the second of those principles, unnecessary suffering should not be caused to combatants. It follows that States do not have unlimited freedom of choice in the weapons they use. The Court also referred to the Martens Clause, according to which civilians and combatants remained under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience. The Court indicated that, although the applicability to nuclear weapons of the principles and rules of humanitarian law and of the principle of neutrality was not disputed, the conclusions to be drawn from it were, on the other hand, controversial. It pointed out that, in view of the unique characteristics of nuclear weapons, the use of such weapons seemed scarcely reconcilable with respect for the requirements of the law applicable in armed conflict. Nevertheless, in view of the current state of international law viewed as a whole, as examined by the Court, and of the elements of fact at its disposal, the Court was led to observe that it could not reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

In a broader context, the Court added, lastly, that there was an obligation to pursue in good faith and to conclude negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

### *2.23. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*

By a letter dated 7 August 1998, the Secretary-General of the United Nations officially communicated to the Registry Decision 1998/297 of 5 August 1998, by which the Economic and Social Council requested the Court for an advisory opinion on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations to a Special Rapporteur of the Commission on Human Rights, and on the legal obligations of Malaysia in that case. The Special Rapporteur, Mr. Cumaraswamy, was facing several lawsuits filed in Malaysian courts by plaintiffs who asserted that he had used defamatory language in an interview published in a specialist journal and who were seeking damages for a total amount of US\$112 million. However, according to the United

Nations Secretary-General, Mr. Kumaraswamy had been speaking in his official capacity as Special Rapporteur and was thus immune from legal process by virtue of the above-mentioned Convention.

Written statements having been filed by the Secretary-General and by various States, public sittings were held on 7, 8 and 10 December 1998, during which the Court heard oral statements by the representative of the United Nations and three States, including Malaysia. In its Advisory Opinion of 29 April 1999, having concluded that it had jurisdiction to render such an Opinion, the Court noted that a Special Rapporteur entrusted with a mission for the United Nations must be regarded as an expert on mission within the meaning of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations. It observed that Malaysia had acknowledged that Mr. Kumaraswamy was an expert on mission and that such experts enjoyed the privileges and immunities provided for under the Convention in their relations with States parties, including those of which they were nationals. The Court then considered whether the immunity applied to Mr. Kumaraswamy in the specific circumstances of the case. It emphasized that it was the Secretary-General, as the chief administrative officer of the Organization, who had the primary responsibility and authority to assess whether its agents had acted within the scope of their functions and, where he so concluded, to protect those agents by asserting their immunity. The Court observed that, in the case concerned, the Secretary-General had been reinforced in his view that Mr. Kumaraswamy had spoken in his official capacity by the fact that the contentious article several times explicitly referred to his capacity as Special Rapporteur, and that in 1997 the Commission on Human Rights had extended his mandate, thereby acknowledging that he had not acted outside his functions by giving the interview. Considering the legal obligations of Malaysia, the Court indicated that, when national courts were seised of a case in which the immunity of a United Nations agent was in issue, they must immediately be notified of any finding by the Secretary-General concerning that immunity and that they must give it the greatest weight. Questions of immunity were preliminary issues which must be expeditiously decided by national courts *in limine litis*. As the conduct of an organ of a State, including its courts, must be regarded as an act of that State, the Court concluded that the Government of Malaysia had not acted in accordance with its obligations under international law in the case concerned.

#### *2.24. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

By resolution ES-10/14, adopted on 8 December 2003 at its Tenth Emergency Special Session, the General Assembly decided to request the Court for an advisory opinion on the following question:



“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?”

The resolution requested the Court to render its opinion “urgently”. The Court decided that all States entitled to appear before it, as well as Palestine, the United Nations and subsequently, at their request, the League of Arab States and the Organization of the Islamic Conference, were likely to be able to furnish information on the question in accordance with Article 66, paragraphs 2 and 3, of the Statute. Written statements were submitted by 45 States and four international organizations, including the European Union. At the oral proceedings, which were held from 23 to 25 February 2004, 13 States and two international organizations made oral submissions. The Court rendered its Advisory Opinion on 9 July 2004.

The Court began by finding that the General Assembly, which had requested the advisory opinion, was authorized to do so under Article 96, paragraph 1, of the Charter. It further found that the question asked of it fell within the competence of the General Assembly pursuant to Articles 10, paragraph 2, and 11 of the Charter. Moreover, in requesting an opinion of the Court, the General Assembly had not exceeded its competence, as qualified by Article 12, paragraph 1, of the Charter, which provides that while the Security Council is exercising its functions in respect of any dispute or situation the Assembly must not make any recommendation with regard thereto unless the Security Council so requests. The Court further observed that the General Assembly had adopted resolution ES-10/14 during its Tenth Emergency Special Session, convened pursuant to resolution 377 A (V), whereby, in the event that the Security Council has failed to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly may consider the matter immediately with a view to making recommendations to Member States. Rejecting a number of procedural objections, the Court found that the conditions laid down by that resolution had been met when the Tenth Emergency Special Session was convened, and in particular when the General Assembly decided to request the opinion, as the Security Council had at that time been unable to adopt a resolution concerning the construction of the wall as a result of the negative vote of a permanent member. Lastly, the Court rejected the argument that an opinion could not be given in the present case on the ground that the question posed was not a legal one, or that it was of an abstract or political nature.

Having established its jurisdiction, the Court then considered the

propriety of giving the requested opinion. It recalled that lack of consent by a State to its contentious jurisdiction had no bearing on its advisory jurisdiction, and that the giving of an opinion in the present case would not have the effect of circumventing the principle of consent to judicial settlement, since the subject-matter of the request was located in a much broader frame of reference than that of the bilateral dispute between Israel and Palestine, and was of direct concern to the United Nations. Nor did the Court accept the contention that it should decline to give the advisory opinion requested because its opinion could impede a political, negotiated settlement to the Israeli-Palestinian conflict. It further found that it had before it sufficient information and evidence to enable it to give its opinion, and emphasized that it was for the General Assembly to assess the opinion's usefulness. The Court accordingly concluded that there was no compelling reason precluding it from giving the requested opinion.

Turning to the question of the legality under international law of the construction of the wall by Israel in the Occupied Palestinian Territory, the Court first determined the rules and principles of international law relevant to the question posed by the General Assembly. After recalling the customary principles laid down in Article 2, paragraph 4, of the United Nations Charter and in General Assembly resolution 2625 (XXV), which prohibit the threat or use of force and emphasize the illegality of any territorial acquisition by such means, the Court further cited the principle of self-determination of peoples, as enshrined in the Charter and reaffirmed by resolution 625 (XXV). In relation to international humanitarian law, the Court then referred to the provisions of the Hague Regulations of 1907, which it found to have become part of customary law, as well as to the Fourth Geneva Convention of 1949, holding that these were applicable in those Palestinian territories which, before the armed conflict of 1967, lay to the east of the 1949 Armistice demarcation line (or "Green Line") and were occupied by Israel during that conflict. The Court further established that certain human rights instruments (International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, United Nations Convention on the Rights of the Child) were applicable in the Occupied Palestinian Territory.

The Court then sought to ascertain whether the construction of the wall had violated the above-mentioned rules and principles. Noting that the route of the wall encompassed some 80 per cent of the settlers living in the Occupied Palestinian Territory, the Court, citing statements by the Security Council in that regard in relation to the Fourth Geneva Convention, recalled that those settlements had been established in breach of international law. After considering certain fears expressed to it that the route of the wall would prejudice the future frontier between Israel and Palestine, the Court observed that the construction of the wall and its associated régime created a "fait accompli" on the ground that could well become permanent, and

hence tantamount to a *de facto* annexation. Noting further that the route chosen for the wall gave expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements and entailed further alterations to the demographic composition of the Occupied Palestinian Territory, the Court concluded that the construction of the wall, along with measures taken previously, severely impeded the exercise by the Palestinian people of its right to self-determination and was thus a breach of Israel's obligation to respect that right.

The Court then went on to consider the impact of the construction of the wall on the daily life of the inhabitants of the Occupied Palestinian Territory, finding that the construction of the wall and its associated régime were contrary to the relevant provisions of the Hague Regulations of 1907 and of the Fourth Geneva Convention and that they impeded the liberty of movement of the inhabitants of the territory as guaranteed by the International Covenant on Civil and Political Rights, as well as their exercise of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the Convention on the Rights of the Child. The Court further found that, coupled with the establishment of settlements, the construction of the wall and its associated régime were tending to alter the demographic composition of the Occupied Palestinian Territory, thereby contravening the Fourth Geneva Convention and the relevant Security Council resolutions.

The Court then considered the qualifying clauses or provisions for derogation contained in certain humanitarian law and human rights instruments, which might be invoked *inter alia* where military exigencies or the needs of national security or public order so required. The Court found that such clauses were not applicable in the present case, stating that it was not convinced that the specific course Israel had chosen for the wall was necessary to attain its security objectives, and that accordingly the construction of the wall constituted a breach by Israel of certain of its obligations under humanitarian and human rights law. Lastly, the Court concluded that Israel could not rely on a right of self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall, and that such construction and its associated régime were accordingly contrary to international law.

The Court went on to consider the consequences of these violations, recalling Israel's obligation to respect the right of the Palestinian people to self-determination and its obligations under humanitarian and human rights law. The Court stated that Israel must put an immediate end to the violation of its international obligations by ceasing the works of construction of the wall and dismantling those parts of that structure situated within Occupied Palestinian Territory and repealing or rendering ineffective all legislative and regulatory

acts adopted with a view to construction of the wall and establishment of its associated régime. The Court further made it clear that Israel must make reparation for all damage suffered by all natural or legal persons affected by the wall's construction.

As regards the legal consequences for other States, the Court held that all States were under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction. It further stated that it was for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination be brought to an end. In addition, the Court pointed out that all States parties to the Fourth Geneva Convention were under an obligation, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention. Finally, in regard to the United Nations, and especially the General Assembly and the Security Council, the Court indicated that they should consider what further action was required to bring to an end the illegal situation in question, taking due account of the present Advisory Opinion.

The Court concluded by observing that the construction of the wall must be placed in a more general context, noting the obligation on Israel and Palestine to comply with international humanitarian law, as well as the need for implementation in good faith of all relevant Security Council resolutions, and drawing the attention of the General Assembly to the need for efforts to be encouraged with a view to achieving a negotiated solution to the outstanding problems on the basis of international law and the establishment of a Palestinian State.

The texts of decisions in both contentious and advisory cases are reproduced in the series entitled *Reports of Judgments, Advisory Opinions and Orders*.

# annexes

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<sup>1</sup> Previous editions have included examples of the Court's drafting practice. Readers may now consult such texts on the Court's website: <http://www.icj-cij.org>.

**resolution 171 (II)  
of the united nations  
general assembly**

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14 november 1947

**Need for Greater Use  
by the United Nations and its Organs  
of the International Court of Justice**

A

The General Assembly,

Considering that it is a responsibility of the United Nations to encourage the progressive development of international law ;

Considering that it is of paramount importance that the interpretation of the Charter of the United Nations and the constitutions of the specialized agencies should be based on recognized principles of international law ;

Considering that the International Court of Justice is the principal judicial organ of the United Nations ;

Considering that it is also of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation,

Recommends that organs of the United Nations and the specialized agencies should, from time to time, review the difficult and important points of law within the jurisdiction of the International Court of Justice which have arisen in the course of their activities and involve questions of principle which it is desirable to have settled, including points of law relating to the interpretation of the Charter of the United Nations or the constitutions of the specialized agencies, and, if duly authorized according to Article 96, paragraph 2, of the Charter, should refer them to the International Court of Justice for an advisory opinion.

.....

C

The General Assembly,

Considering that, in virtue of Article 1 of the Charter, international disputes should be settled in conformity with the principles of justice and international law ;

Considering that the International Court of Justice could settle or assist in settling many disputes in conformity with these principles if, by the full application of the provisions of the Charter and of the Statute of the Court, more frequent use were made of its services,

1. Draws the attention of the States which have not yet accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraphs 2 and 5, of the Statute, to the desirability of the greatest possible number of States accepting this jurisdiction with as few reservations as possible;

2. Draws the attention of States Members to the advantage of inserting in conventions and treaties arbitration clauses providing, without prejudice to Article 95 of the Charter, for the submission of disputes which may arise from the interpretation or application of such conventions or treaties, preferably and as far as possible to the International Court of Justice;

3. Recommends as a general rule that States should submit their legal disputes to the International Court of Justice.



**resolution 3232 (XXIX)  
of the united nations  
general assembly**

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12 november 1974

**Review of the Role of the International Court  
of Justice**

The General Assembly,

Recalling that the International Court of Justice is the principal judicial organ of the United Nations,

Bearing in mind that, in conformity with Article 10 of the Charter of the United Nations, the role of the International Court of Justice remains an appropriate matter for the attention of the General Assembly,

Recalling further that in accordance with Article 2, paragraph 3, of the Charter, all Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,

Taking note of the views expressed by Member States during the debates in the Sixth Committee on the question of the review of the role of the International Court of Justice at the twenty-fifth, twenty-sixth, twenty-seventh and twenty-ninth sessions of the General Assembly,

Taking note also of the comments transmitted by Member States and by Switzerland in answer to a questionnaire of the Secretary-General in accordance with General Assembly resolutions 2723 (XXV) of 15 December 1970 and 2818 (XXVI) of 15 December 1971, and of the text of the letter dated 18 June 1971 addressed to the Secretary-General by the President of the International Court of Justice,

Considering that the International Court of Justice has recently amended the Rules of Court, with a view to facilitating recourse to it for the judicial settlement of disputes, *inter alia* by simplifying the procedure, reducing the likelihood of undue delays and costs and allowing for greater influence of parties on the composition of *ad hoc* chambers,

Recalling the increasing development and codification of international law in conventions open for universal participation and the consequent need for their uniform interpretation and application,

Recognizing that the development of international law may be reflected, *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice,

Recalling further the opportunities afforded by the power of the International Court of Justice, under Article 38, paragraph 2, of its Statute, to decide a case *ex aequo et bono* if the parties agree thereto,

1. Recognizes the desirability that States study the possibility of accepting, with as few reservations as possible, the compulsory jurisdiction of the International Court of Justice in accordance with Article 36 of its Statute ;
2. Draws the attention of States to the advantage of inserting in treaties, in cases considered possible and appropriate, clauses providing for the submission to the International Court of Justice of disputes which may arise from the interpretation or application of such treaties ;
3. Calls upon States to keep under review the possibility of identifying cases in which use can be made of the International Court of Justice ;
4. Draws the attention of States to the possibility of making use of chambers as provided in Articles 26 and 29 of the Statute of the International Court of Justice and in the Rules of Court, including those which would deal with particular categories of cases ;
5. Recommends that United Nations organs and the specialized agencies should, from time to time, review legal questions within the competence of the International Court of Justice that have arisen or will arise during their activities and should study the advisability of referring them to the Court for an advisory opinion, provided that they are duly authorized to do so ;
6. Reaffirms that recourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered as an unfriendly act between States.

**resolution 44/23  
of the united nations  
general assembly**

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17 november 1989

United Nations Decade of International Law

The General Assembly,

Recognizing that one of the purposes of the United Nations is to maintain international peace and security, and to that end to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace,

Recalling the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and the Manila Declaration on the Peaceful Settlement of International Disputes,

Recognizing the role of the United Nations in promoting greater acceptance of and respect for the principles of international law and in encouraging the progressive development of international law and its codification,

Convinced of the need to strengthen the rule of law in international relations,

Stressing the need to promote the teaching, study, dissemination and wider appreciation of international law,

Noting that, in the remaining decade of the twentieth century, important anniversaries will be celebrated that are related to the adoption of international legal documents, such as the centenary of the first International Peace Conference, held at The Hague in 1899, which adopted the Convention for the Pacific Settlement of International Disputes and created the Permanent Court of Arbitration, the fiftieth anniversary of the signing of the Charter of the United Nations and the twenty-fifth anniversary of the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

1. Declares the period 1990-1999 as the United Nations Decade of International Law;

2. Considers that the main purposes of the Decade should be, *inter alia*:

- (a) to promote acceptance of and respect for the principles of international law;
- (b) to promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice;

(c) to encourage the progressive development of international law and its codification;

(d) to encourage the teaching, study, dissemination and wider appreciation of international law;

3. Requests the Secretary-General to seek the views of Member States and appropriate international bodies, as well as of non-governmental organizations working in the field, on the programme for the Decade and on appropriate action to be taken during the Decade, including the possibility of holding a third international peace conference or other suitable international conference at the end of the Decade, and to submit a report thereon to the Assembly at its forty-fifth session;

4. Decides to consider this question at its forty-fifth session in a working group of the Sixth Committee with a view to preparing generally acceptable recommendations for the Decade;

5. Also decides to include in the provisional agenda of its forty-fifth session the item entitled "United Nations Decade of International Law".

## members and former members of the ICJ

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|                            | Country        | Period of office |
|----------------------------|----------------|------------------|
| R. Ago                     | Italy          | 1979-1995        |
| A. Aguilar Mawdsley        | Venezuela      | 1991-1995        |
| B. A. Ajibola              | Nigeria        | 1991-1994        |
| R. J. Alfaro               | Panama         | 1959-1964        |
| A. S. Al-Khasawneh         | Jordan         | 2000-            |
| A. Alvarez                 | Chile          | 1946-1955        |
| F. Ammoun                  | Lebanon        | 1965-1976        |
| E. C. Armand-Ugon          | Uruguay        | 1952-1961        |
| P. Azevedo                 | Brazil         | 1946-1951        |
| A. H. Badawi               | Egypt          | 1946-1965        |
| *J. Basdevant              | France         | 1946-1964        |
| R. R. Baxter               | United States  | 1979-1980        |
| *M. Bedjaoui               | Algeria        | 1982-2001        |
| C. Bengzon                 | Philippines    | 1967-1976        |
| T. Buergenthal             | United States  | 2000-            |
| *J. L. Bustamante y Rivero | Peru           | 1961-1970        |
| L. F. Carneiro             | Brazil         | 1951-1955        |
| F. de Castro               | Spain          | 1970-1979        |
| R. Córdova                 | Mexico         | 1955-1964        |
| C. De Visscher             | Belgium        | 1946-1952        |
| H. C. Dillard              | United States  | 1970-1979        |
| A. El-Erian                | Egypt          | 1979-1981        |
| A. El-Khani                | Syria          | 1981-1985        |
| *T. O. Elias               | Nigeria        | 1976-1991        |
| J. Evensen                 | Norway         | 1985-1994        |
| I. Fabela                  | Mexico         | 1946-1952        |
| L. Ferrari Bravo           | Italy          | 1995-1997        |
| Sir Gerald Fitzmaurice     | United Kingdom | 1960-1973        |
| C.-A. Fleischhauer         | Germany        | 1994-2003        |
| I. Forster                 | Senegal        | 1964-1982        |
| S. A. Golunsky             | USSR           | 1952-1953        |
| A. Gros                    | France         | 1964-1984        |
| *J. G. Guerrero            | El Salvador    | 1946-1958        |
| *G. Guillaume              | France         | 1987-            |
| N. Elaraby                 | Egypt          | 2001-            |
| G. H. Hackworth            | United States  | 1946-1961        |
| G. Herczegh                | Hungary        | 1993-2003        |
| R. Higgins                 | United Kingdom | 1995-            |

|                           | Country                     | Period of office |
|---------------------------|-----------------------------|------------------|
| Hsu Mo                    | China                       | 1946-1956        |
| L. Ignacio-Pinto          | Benin                       | 1970-1979        |
| *Sir Robert Jennings      | United Kingdom              | 1982-1995        |
| P. C. Jessup              | United States               | 1961-1970        |
| *E. Jiménez de Aréchaga   | Uruguay                     | 1970-1979        |
| *H. Klaestad              | Norway                      | 1946-1961        |
| P. H. Kooijmans           | Netherlands                 | 1997-            |
| F. I. Kojevnikov          | USSR                        | 1953-1961        |
| V. M. Koretsky            | USSR                        | 1961-1970        |
| A. G. Koroma              | Sierra Leone                | 1994-            |
| S. B. Krylov              | USSR                        | 1946-1952        |
| *M. Lachs                 | Poland                      | 1967-1993        |
| G. Ladreit de Lacharrière | France                      | 1982-1987        |
| Sir Hersch Lauterpacht    | United Kingdom              | 1955-1960        |
| *Sir Arnold McNair        | United Kingdom              | 1946-1955        |
| K. Mbaye                  | Senegal                     | 1982-1991        |
| G. Morelli                | Italy                       | 1961-1970        |
| L. M. Moreno Quintana     | Argentina                   | 1955-1964        |
| P. D. Morozov             | USSR                        | 1970-1985        |
| H. Mosler                 | Federal Republic of Germany | 1976-1985        |
| *Nagendra Singh           | India                       | 1973-1988        |
| Ni Zhengyu                | China                       | 1985-1994        |
| S. Oda                    | Japan                       | 1976-2003        |
| C. D. Onyeama             | Nigeria                     | 1967-1976        |
| H. Owada                  | Japan                       | 2003-            |
| L. Padilla Nervo          | Mexico                      | 1964-1973        |
| G. Parra-Aranguren        | Venezuela                   | 1996-            |
| R. S. Pathak              | India                       | 1989-1991        |
| S. Petrán                 | Sweden                      | 1967-1976        |
| R. Ranjeva                | Madagascar                  | 1991-            |
| Sir Benegal Rau           | India                       | 1952-1953        |
| J. E. Read                | Canada                      | 1946-1958        |
| F. Rezek                  | Brazil                      | 1997-            |
| *J. M. Ruda               | Argentina                   | 1973-1991        |
| *S. M. Schwebel           | United States               | 1981-2000        |
| J. Sette-Camara           | Brazil                      | 1979-1988        |
| M. Shahabuddeen           | Guyana                      | 1988-1997        |
| *Shi Jiuyong              | China                       | 1994-            |
| B. Simma                  | Germany                     | 2003-            |
| *Sir Percy C. Spender     | Australia                   | 1958-1967        |
| J. Spiropoulos            | Greece                      | 1958-1967        |
| K. Tanaka                 | Japan                       | 1961-1970        |
| N. K. Tarassov            | Russian Federation          | 1985-1994        |
| S. Tarazi                 | Syria                       | 1976-1980        |
| P. Tomka                  | Slovakia                    | 2003-            |
| V. S. Vereshchetin        | Russian Federation          | 1994-            |
| *Sir Humphrey Waldock     | United Kingdom              | 1973-1981        |
| C. G. Weeramantry         | Sri Lanka                   | 1991-            |

|                                | Country    | Period of office           |
|--------------------------------|------------|----------------------------|
| V. K. Wellington Koo           | China      | 1957-1967                  |
| *B. Winiarski                  | Poland     | 1946-1967                  |
| *Sir Muhammad Zafrulla<br>Khan | Pakistan   | 1954-1961<br>and 1964-1973 |
| M. Zoričić                     | Yugoslavia | 1946-1958                  |

The names of judges who have been Presidents of the Court are preceded by an asterisk.





## **judges *ad hoc* who have sat with the ICJ**

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Since the institution of the Court, judges *ad hoc* have been chosen in the following cases (unless otherwise indicated, they held the nationality of the appointing party):

*Corfu Channel (United Kingdom v. Albania)*. Albania chose Mr. I. Daxner (Czechoslovakia), who sat upon the Bench when the preliminary objection was heard, and Mr. B. Ečer (Czechoslovakia), who sat when the case was heard on the merits and also for the assessment of the amount of compensation.

*Asylum (Colombia/Peru), Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru) and Haya de la Torre (Colombia v. Peru)*. Mr. J. J. Caicedo Castilla was chosen by Colombia and Mr. L. Alayza y Paz Soldán by Peru.

*Ambatielos (Greece v. United Kingdom)*. Mr. J. Spiropoulos was chosen by Greece.

*Anglo-Iranian Oil Co. (United Kingdom v. Iran)*. Mr. K. Sandjabi was chosen by Iran.

*Nottebohm (Liechtenstein v. Guatemala)*. Mr. C. García Bauer<sup>1</sup> was chosen by Guatemala and Mr. P. Guggenheim (Switzerland) by Liechtenstein.

*Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*. Mr. G. Morelli was chosen by Italy.

*Right of Passage over Indian Territory (Portugal v. India)*. Mr. M. Fernandes was chosen by Portugal and the Hon. M. A. C. Chagla by India.

*Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*. Mr. J. Offerhaus was chosen by the Netherlands and Mr. F. J. C. Sterzel by Sweden.

*Interhandel (Switzerland v. United States of America)*. Mr. P. Carry was chosen by Switzerland.

*Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*. Mr. Justice Goitein was chosen by Israel and Mr. J. Žourek (Czechoslovakia) by Bulgaria.

*Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)*<sup>2</sup> Mr. J. Žourek (Czechoslovakia) was chosen by Bulgaria.

<sup>1</sup> The Government of Guatemala first chose Mr. J. C. Herrera as judge *ad hoc*, then Mr. J. Matos, before choosing Mr. García Bauer.

<sup>2</sup> Case removed from the List before the Court had occasion to sit.

*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*. Mr. R. Ago (Italy) was chosen by Honduras and Mr. F. Urrutia Holguín (Colombia) by Nicaragua.

*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*<sup>1</sup>. Mr. W. J. Ganshof van der Meersch was chosen by Belgium and Mr. F. de Castro by Spain.

*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*. Sir Louis Mbanefo (Nigeria)<sup>2</sup> was chosen by Ethiopia and Liberia and the Hon. J. T. van Wyk by South Africa.

*Northern Cameroons (Cameroon v. United Kingdom)*. Mr. P. Beb a Don was chosen by Cameroon.

*Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*. Belgium chose Mr. W. J. Ganshof van der Meersch, who sat upon the Bench when the preliminary objections were heard, and Mr. W. Riphagen (Netherlands), who sat in the second phase. Spain chose Mr. E. C. Armand-Ugon (Uruguay).

*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*. Mr. H. Mosler was chosen by the Federal Republic of Germany and Mr. M. Sørensen (Denmark) by Denmark and the Netherlands.

*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*. Mr. Nagendra Singh was chosen by India.

*Nuclear Tests (Australia v. France)*. Sir Garfield Barwick was chosen by Australia.

*Nuclear Tests (New Zealand v. France)*. Sir Garfield Barwick (Australia) was chosen by New Zealand.

*Trial of Pakistani Prisoners of War (Pakistan v. India)*. Pakistan chose Sir Muhammad Zafrulla Khan, who sat in the proceedings on the request for interim measures until 2 July 1973, and Mr. Muhammad Yaqub Ali Khan<sup>3</sup>.

*Western Sahara*. Mr. A. Boni (Ivory Coast) was chosen by Morocco.

*Aegean Sea Continental Shelf (Greece v. Turkey)*. Mr. M. Stassinopoulos was chosen by Greece.

*Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*. Mr. E. Jiménez de Aréchaga (Uruguay) was chosen by the Libyan Arab Jamahiriya and Mr. J. Evensen (Norway) by Tunisia.

*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (case referred to a Chamber). Mr. M. Cohen was chosen by Canada.

<sup>1</sup> Case removed from the List before the Court had occasion to sit.

<sup>2</sup> The Governments of Ethiopia and Liberia had first chosen as judge *ad hoc* the Hon. J. Chesson, subsequently Sir Muhammad Zafrulla Khan and then Sir Adetokunboh A. Ademola, before choosing Sir Louis Mbanefo.

<sup>3</sup> This case was removed from the List before the Court had occasion to hear argument on the question of its jurisdiction.

*Continental Shelf (Libyan Arab Jamahiriya/Malta)*. Mr. E. Jiménez de Aréchaga (Uruguay) was chosen by the Libyan Arab Jamahiriya. Mr. J. Castañeda (Mexico) was chosen by Malta and sat in the proceedings culminating in the Judgment on Italy's application for permission to intervene. Mr. N. Valticos (Greece) was chosen by Malta to sit when the case was heard on the merits.

*Frontier Dispute (Burkina Faso/Republic of Mali)* (case referred to a Chamber). Mr. F. Luchaire (France) was chosen by Burkina Faso and Mr. G. Abi-Saab (Egypt) by the Republic of Mali.

*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Mr. C.-A. Colliard (France) was chosen by Nicaragua.

*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)*. Mrs. S. Bastid (France) was chosen by Tunisia and Mr. E. Jiménez de Aréchaga (Uruguay) by the Libyan Arab Jamahiriya.

*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (case referred to a Chamber). Mr. N. Valticos (Greece) was chosen by El Salvador and Mr. M. Virally (France) was chosen by Honduras. Following the death of Mr. Virally, Mr. S. Torres Bernárdez (Spain) was chosen by Honduras.

*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*. Mr. P. H. Fischer was chosen by Denmark.

*Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*. Mr. M. Aghahosseini was chosen by the Islamic Republic of Iran<sup>1</sup>.

*Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*. Mr. H. Thierry (France) was chosen by Guinea-Bissau. Following the expiry of Judge Mbaye's term of office on 5 February 1991 Senegal no longer had a judge of its nationality on the Bench. It therefore chose Mr. K. Mbaye to sit as judge *ad hoc*.

*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*. Mr. J. Sette-Camara (Brazil) was chosen by the Libyan Arab Jamahiriya and Mr. G. Abi-Saab (Egypt) by Chad.

*East Timor (Portugal v. Australia)*. Mr. A. de Arruda Ferrer-Correia was chosen by Portugal. Following his resignation, on 14 July 1994, Mr. K. J. Skubiszewski (Poland) was chosen by Portugal. Sir Ninian Stephen was chosen by Australia.

*Passage through the Great Belt (Finland v. Denmark)*. Mr. B. Broms was chosen by Finland and Mr. P. H. Fischer by Denmark.

*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*. Mr. J. M. Ruda (Argentina) was chosen by

<sup>3</sup> This case was removed from the List before the Court had occasion to hear argument on the question of its jurisdiction.

Qatar. Following the death of Mr. Ruda, Mr. S. Torres Bernárdez (Spain) was chosen by Qatar. Mr. N. Valticos (Greece) was chosen by Bahrain. Mr. Valticos resigned as from the end of the jurisdiction and admissibility phase of the case. Consequently, Bahrain chose Mr. M. Shahabuddeen (Guyana). Following the resignation of Mr. Shahabuddeen, Bahrain chose Mr. Y. L. Fortier (Canada) to sit as judge *ad hoc*.

*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*. Mr. A. S. El-Kosheri (Egypt) was chosen by the Libyan Arab Jamahiriya. As Judge Higgins considered that she should not sit in the case, the Bench no longer included a judge from the United Kingdom, which therefore chose Sir Robert Jennings to sit as judge *ad hoc*. The latter sat in that capacity for the jurisdiction and admissibility phase of the case.

*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)*. Mr. A. S. El-Kosheri (Egypt) was chosen by the Libyan Arab Jamahiriya.

*Oil Platforms (Islamic Republic of Iran v. United States of America)*. Mr. F. Rigaux (Belgium) was chosen by the Islamic Republic of Iran.

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. Mr. E. Lauterpacht (United Kingdom) was chosen by Bosnia and Herzegovina. Following the resignation of Judge Lauterpacht, Judge A. Mahiou (Algeria) was chosen by Bosnia and Herzegovina. Mr. M. Kreća was chosen by Serbia and Montenegro.

*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. Mr. K. J. Skubiszewski (Poland) was chosen by Slovakia. On 6 February 2003, a Member of the Court of Slovak nationality (Judge P. Tomka) took up his duties, and Judge K. J. Skubiszewski was therefore no longer able to sit in the case. As Judge Tomka himself considered that he should not sit in the case, Mr. Skubiszewski was again chosen by Slovakia to sit as judge *ad hoc*.

*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*. Mr. K. Mbaye (Senegal) was chosen by Cameroon and Prince B. A. Ajibola by Nigeria.

*Fisheries Jurisdiction (Spain v. Canada)*. Mr. S. Torres Bernárdez was chosen by Spain and the Honourable Mr. Lalonde was chosen by Canada.

*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*. New Zealand chose Sir Geoffrey Palmer to sit as judge *ad hoc*.

*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), Preliminary Objections (Nigeria v.*

Cameroon). Prince B. A. Ajibola was chosen by Nigeria and Mr. K. Mbaye (Senegal) was chosen by Cameroon.

*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*. Mr. M. Shahabuddeen (Guyana) was chosen by Indonesia. Following the resignation of Mr. M. Shahabuddeen, Mr. Thomas Franck (United States of America) was chosen by Indonesia. Mr. C. G. Weeramantry (Sri Lanka) was chosen by Malaysia.

*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. Mr. M. Bedjaoui (Algeria) was chosen by Guinea. Following the resignation of Mr. M. Bedjaoui, Mr. A. Mahiou (Algeria) was chosen by Guinea. Mr. A. Mampuya Kamunika was chosen by the Democratic Republic of the Congo.

*Legality of Use of Force (Serbia and Montenegro v. Belgium) (Serbia and Montenegro v. Canada) (Serbia and Montenegro v. France) (Serbia and Montenegro v. Germany) (Serbia and Montenegro v. Italy) (Serbia and Montenegro v. Netherlands) (Serbia and Montenegro v. Portugal) (Yugoslavia v. Spain) (Serbia and Montenegro v. United Kingdom) (Yugoslavia v. United States of America)*. In all ten cases Yugoslavia (which became Serbia and Montenegro) chose Mr. M. Kreća. Mr. P. Duinslaeger was chosen by Belgium. Mr. M. Lalonde was chosen by Canada. Mr. M. Gaja was chosen by Italy. Mr. S. Torres Bernárdez was chosen by Spain. These judges sat in the proceedings on Yugoslavia's requests for the indication of provisional measures.

*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi) (Democratic Republic of the Congo v. Uganda) (Democratic Republic of the Congo v. Rwanda)*. In all three cases Mr. J. Verhoeven (Belgium) was chosen by the Democratic Republic of the Congo. Mr. J. J. A. Salmon (Belgium) was chosen by Burundi. Mr. J. L. Kateka (Tanzania) was chosen by Uganda. Mr. C. J. R. Dugard (South Africa) was chosen by Rwanda.

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)*. Mr. B. Vukas was chosen by Croatia and Mr. M. Kreća was chosen by Yugoslavia (which became Serbia and Montenegro).

*Aerial Incident of 10 August 1999 (Pakistan v. India)*. Mr. S. S. U. Pirzada was chosen by Pakistan and Mr. B. P. J. Reddy was chosen by India.

*Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*. Mr. G. Gaja (Italy) was chosen by Nicaragua and Mr. J. González Campos (Spain) was chosen by Honduras.

*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Mr. S. Bula-Bula was chosen by the Democratic Republic of the Congo and Mrs. C. Van den Wyngaert was chosen by Belgium.

*Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and*

*Herzegovina*). Mr. V. Dimitrijević was chosen by Yugoslavia and Mr. A. Mahiou (Algeria) was chosen by Bosnia and Herzegovina.

*Certain Property (Liechtenstein v. Germany)*. Mr. I. Brownlie (United Kingdom) was chosen by Liechtenstein. Following Mr. Brownlie's resignation, Sir Franklin Berman (United Kingdom) was chosen by Liechtenstein. Mr. B. Simma, of German nationality, became a Member of the Court on 6 February 2003, but considered that he should not sit in the case; Mr. C.-A. Fleischhauer was chosen by Germany to sit as judge *ad hoc*.

*Territorial and Maritime Dispute (Nicaragua v. Colombia)*. Mr. M. Bedjaoui (Algeria) was chosen by Nicaragua. Mr. Y. L. Fortier (Canada) was chosen by Colombia.

*Frontier Dispute (Benin/Niger)*. Mr. M. Bennouna (Morocco) was chosen by Benin. Mr. M. Bedjaoui (Algeria) was chosen by Niger.

*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*. Mr. J.-P. Mavungu Mvumbi-di-Ngoma was chosen by the Democratic Republic of the Congo and Mr. C. J. R. Dugard (South Africa) was chosen by Rwanda.

*Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras)*. Mr. F. Paolillo (Uruguay) was chosen by El Salvador and Mr. S. Torres Bernárdez (Spain) was chosen by Honduras.

*Certain Criminal Proceedings in France (Republic of the Congo v. France)*. Mr. J.-Y. de Cara (France) was chosen by the Republic of the Congo.

*Avena and Other Mexican Nationals (Mexico v. United States of America)*. Mr. B. Sepúlveda was chosen by Mexico.

## contentious and advisory cases before the ICJ

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### Explanatory Note

The figures preceding the titles of contentious cases in the following list are explained as follows:

- <sup>1</sup> Case concluded by a judgment on the merits.
- <sup>2</sup> Case concluded by a judgment on an objection or a preliminary point.
- <sup>3</sup> Case concluded by an order finding that the Court does not have jurisdiction.
- <sup>4</sup> Case concluded by discontinuance before a judgment on the merits.
- <sup>5</sup> Current case.

| Title   | Dates     |
|---|-----------|
| Contentious   |           |
| <sup>1</sup> <i>Corfu Channel (United Kingdom v. Albania)</i>   | 1947-1949 |
| <sup>1</sup> <i>Fisheries (United Kingdom v. Norway)</i>  | 1949-1951 |
| <sup>4</sup> <i>Protection of French Nationals and Protected Persons in Egypt (France v. Egypt)</i>                             | 1949-1950 |
| <sup>1</sup> <i>Asylum (Colombia/Peru)</i>  | 1949-1950 |
| <sup>1</sup> <i>Rights of Nationals of the United States of America in Morocco (France v. United States of America)</i>         | 1950-1952 |
| <sup>1</sup> <i>Request for Interpretation of the Judgment of 20 November 1950 in the Asylum case (Colombia v. Peru)</i>        | 1950      |
| <sup>1</sup> <i>Haya de la Torre (Colombia v. Peru)</i>   | 1950-1951 |
| <sup>1</sup> <i>Ambatielos (Greece v. United Kingdom)</i>   | 1951-1953 |
| <sup>2</sup> <i>Anglo-Iranian Oil Co (United Kingdom v. Iran)</i>   | 1951-1952 |
| <sup>1</sup> <i>Minquiers and Ecrehos (France/United Kingdom)</i>   | 1951-1953 |
| <sup>2</sup> <i>Nottebohm (Liechtenstein v. Guatemala)</i>  | 1951-1955 |
| <sup>2</sup> <i>Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)</i>      | 1953-1954 |
| <sup>4</sup> <i>Electricité de Beyrouth Company (France v. Lebanon)</i>   | 1953-1954 |
| <sup>3</sup> <i>Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungary)</i> | 1954      |



| Title  | Dates     |
|--|-----------|
| <sup>3</sup> <i>Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. USSR)</i>   | 1954      |
| <sup>3</sup> <i>Aerial Incident of 10 March 1953 (United States of America v. Czechoslovakia)</i>                              | 1955-1956 |
| <sup>3</sup> <i>Antarctica (United Kingdom v. Argentina)</i>   | 1955-1956 |
| <sup>3</sup> <i>Antarctica (United Kingdom v. Chile)</i>   | 1955-1956 |
| <sup>3</sup> <i>Aerial Incident of 7 October 1952 (United States of America v. USSR)</i>                                       | 1955-1956 |
| <sup>2</sup> <i>Certain Norwegian Loans (France v. Norway)</i>   | 1955-1957 |
| <sup>1</sup> <i>Right of Passage over Indian Territory (Portugal v. India)</i>   | 1955-1960 |
| <sup>1</sup> <i>Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)</i>        | 1957-1958 |
| <sup>2</sup> <i>Interhandel (Switzerland v. United States of America)</i>  | 1957-1959 |
| <sup>2</sup> <i>Aerial Incident of 27 July 1955 (Israel v. Bulgaria)</i>   | 1957-1959 |
| <sup>4</sup> <i>Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)</i>                                     | 1957-1960 |
| <sup>4</sup> <i>Aerial Incident of 27 July 1955 (United Kingdom v. Bulgaria)</i>   | 1957-1959 |
| <sup>1</sup> <i>Sovereignty over Certain Frontier Land (Belgium/Netherlands)</i>   | 1957-1959 |
| <sup>1</sup> <i>Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)</i>                       | 1958-1960 |
| <sup>3</sup> <i>Aerial Incident of 4 September 1954 (United States of America v. USSR)</i>                                     | 1958      |
| <sup>4</sup> <i>Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)</i>                                    | 1958-1961 |
| <sup>4</sup> <i>Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient (France v. Lebanon)</i>     | 1959-1960 |
| <sup>3</sup> <i>Aerial Incident of 7 November 1954 (United States of America v. USSR)</i>                                      | 1959      |
| <sup>1</sup> <i>Temple of Preah Vihear (Cambodia v. Thailand)</i>  | 1959-1962 |
| <sup>2</sup> <i>South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)</i>                                      | 1960-1966 |
| <sup>2</sup> <i>Northern Cameroons (Cameroon v. United Kingdom)</i>  | 1961-1963 |
| <sup>2</sup> <i>Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)</i>            | 1962-1970 |
| <sup>1</sup> <i>North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)</i> | 1967-1969 |
| <sup>1</sup> <i>Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)</i>                                | 1971-1972 |
| <sup>1</sup> <i>Fisheries Jurisdiction (United Kingdom v. Iceland)</i>   | 1972-1974 |

| Title   | Dates     |
|---|-----------|
| <sup>1</sup> <i>Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)</i>   | 1972-1974 |
| <sup>2</sup> <i>Nuclear Tests (Australia v. France)</i>   | 1973-1974 |
| <sup>2</sup> <i>Nuclear Tests (New Zealand v. France)</i>   | 1973-1974 |
| <sup>4</sup> <i>Trial of Pakistani Prisoners of War (Pakistan v. India)</i>   | 1973      |
| <sup>2</sup> <i>Aegean Sea Continental Shelf (Greece v. Turkey)</i>   | 1976-1978 |
| <sup>1</sup> <i>Continental Shelf (Tunisia/Libyan Arab Jamahiriya)</i>  | 1978-1982 |
| <sup>1</sup> <i>United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)</i>  | 1979-1981 |
| <sup>1</sup> <i>Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)</i> [case referred to a Chamber]  | 1981-1984 |
| <sup>1</sup> <i>Continental Shelf (Libyan Arab Jamahiriya/Malta)</i>  | 1982-1985 |
| <sup>1</sup> <i>Frontier Dispute (Burkina Faso/Republic of Mali)</i> [case referred to a Chamber]   | 1983-1986 |
| <sup>1</sup> <i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)</i>   | 1984-1991 |
| <sup>1</sup> <i>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)</i> | 1984-1985 |
| <sup>4</sup> <i>Border and Transborder Armed Actions (Nicaragua v. Costa Rica)</i>  | 1986-1987 |
| <sup>4</sup> <i>Border and Transborder Armed Actions (Nicaragua v. Honduras)</i>  | 1986-1992 |
| <sup>1</sup> <i>Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)</i> [case referred to a Chamber]*  | 1986-1992 |
| <sup>1</sup> <i>Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)</i> [case referred to a Chamber]   | 1987-1989 |
| <sup>1</sup> <i>Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)</i>   | 1988-1993 |
| <sup>4</sup> <i>Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)</i>   | 1989-1996 |
| <sup>4</sup> <i>Certain Phosphate Lands in Nauru (Nauru v. Australia)</i>   | 1989-1993 |
| <sup>1</sup> <i>Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)</i>   | 1989-1991 |
| <sup>1</sup> <i>Territorial Dispute (Libyan Arab Jamahiriya/Chad)</i>   | 1990-1994 |
| <sup>2</sup> <i>East Timor (Portugal v. Australia)</i>  | 1991-1995 |

\* The intervention of Nicaragua was admitted on 13 September 1990 (see *I.C.J. Yearbook 1990-1991*, pp. 160-174).

| Title   | Dates     |
|---|-----------|
| <sup>4</sup> <i>Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal)</i>  | 1991-1995 |
| <sup>4</sup> <i>Passage through the Great Belt (Finland v. Denmark)</i>   | 1991-1992 |
| <sup>1</sup> <i>Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)</i>  | 1991-2001 |
| <sup>4</sup> <i>Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)</i>  | 1992-2003 |
| <sup>4</sup> <i>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)</i>                                    | 1992-2003 |
| <sup>1</sup> <i>Oil Platforms (Islamic Republic of Iran v. United States of America)</i>  | 1992-2003 |
| <sup>5</sup> <i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)</i>   | 1993-     |
| <sup>5</sup> <i>Gabčíkovo-Nagymaros Project (Hungary/Slovakia)</i>  | 1993-     |
| <sup>1</sup> <i>Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*</i>   | 1994-2002 |
| <sup>2</sup> <i>Fisheries Jurisdiction (Spain v. Canada)</i>  | 1995-1998 |
| <sup>2</sup> <i>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</i>   | 1995      |
| <sup>1</sup> <i>Kasikili/Sedudu Island (Botswana/Namibia)</i>   | 1996-1999 |
| <sup>4</sup> <i>Vienna Convention on Consular Relations (Paraguay v. United States of America)</i>  | 1998      |
| <sup>2</sup> <i>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), Preliminary Objections (Nigeria v. Cameroon)</i> | 1998-1999 |
| <sup>1</sup> <i>Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)</i>   | 1998-2002 |
| <sup>5</sup> <i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i>   | 1998-     |
| <sup>1</sup> <i>LaGrand (Germany v. United States of America)</i>   | 1999-2001 |
| <sup>5</sup> <i>Legality of Use of Force (Serbia and Montenegro v. Belgium)</i>   | 1999-     |
| <sup>5</sup> <i>Legality of Use of Force (Serbia and Montenegro v. Canada)</i>  | 1999-     |
| <sup>5</sup> <i>Legality of Use of Force (Serbia and Montenegro v. France)</i>  | 1999-     |

<sup>1</sup> The intervention of Equatorial Guinea was admitted on 21 October 1999 (see *I.C.J. Yearbook 1999-2000*, p. 218).

| Title   | Dates     |
|---|-----------|
| <sup>5</sup> <i>Legality of Use of Force (Serbia and Montenegro v. Germany)</i>   | 1999-     |
| <sup>5</sup> <i>Legality of Use of Force (Serbia and Montenegro v. Italy)</i>   | 1999-     |
| <sup>5</sup> <i>Legality of Use of Force (Serbia and Montenegro v. Netherlands)</i>   | 1999-     |
| <sup>5</sup> <i>Legality of Use of Force (Serbia and Montenegro v. Portugal)</i>  | 1999-     |
| <sup>3</sup> <i>Legality of Use of Force (Yugoslavia v. Spain)</i>  | 1999      |
| <sup>5</sup> <i>Legality of Use of Force (Serbia and Montenegro v. United Kingdom)</i>  | 1999-     |
| <sup>3</sup> <i>Legality of Use of Force (Yugoslavia v. United States of America)</i>   | 1999      |
| <sup>4</sup> <i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)</i>  | 1999-2001 |
| <sup>5</sup> <i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)</i>   | 1999-     |
| <sup>4</sup> <i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)</i>   | 1999-2001 |
| <sup>5</sup> <i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia and Montenegro)</i>  | 1999-     |
| <sup>2</sup> <i>Aerial Incident of 10 August 1999 (Pakistan v. India)</i>   | 1999-2000 |
| <sup>5</sup> <i>Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)</i>   | 1999-     |
| <sup>1</sup> <i>Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)</i>   | 2000-2002 |
| <sup>1</sup> <i>Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)</i> | 2001-2003 |
| <sup>5</sup> <i>Certain Property (Liechtenstein v. Germany)</i>   | 2001-     |
| <sup>5</sup> <i>Territorial and Maritime Dispute (Nicaragua v. Colombia)</i>  | 2001-     |
| <sup>5</sup> <i>Frontier Dispute (Benin/Niger) [case referred to a Chamber]</i>   | 2002-     |
| <sup>5</sup> <i>Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)</i>   | 2002-     |
| <sup>2</sup> <i>Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (El Salvador v. Honduras) [case referred to a Chamber]</i>                                      | 2002-2003 |
| <sup>1</sup> <i>Avena and Other Mexican Nationals (Mexico v. United States of America)</i>  | 2003-2004 |

| Title  | Dates     |
|--|-----------|
| <sup>5</sup> <i>Certain Criminal Proceedings in France (Republic of the Congo v. France)</i>   | 2003-     |
| <sup>5</sup> <i>Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)</i>  | 2003-     |
| Advisory   |           |
| <i>Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)</i>   | 1947-1948 |
| <i>Reparation for Injuries Suffered in the Service of the United Nations</i>   | 1948-1949 |
| <i>Interpretation of Peace Treaties with Bulgaria, Hungary and Romania</i>   | 1949-1950 |
| <i>Competence of the General Assembly for the Admission of a State to the United Nations</i>   | 1949-1950 |
| <i>International Status of South West Africa</i>   | 1949-1950 |
| <i>Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide</i>  | 1950-1951 |
| <i>Effect of Awards of Compensation Made by the United Nations Administrative Tribunal</i>   | 1953-1954 |
| <i>Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa</i>   | 1954-1955 |
| <i>Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco</i>   | 1955-1956 |
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