ECRITS SUR LA COMMUNAUTE INTERNATIONALE:
ENJEUX JURIDIQUES, POLITIQUES ET DIMPLOMATIQUES

ON THE INTERNATIONAL COMMUNITY:
LEGAL, POLITICAL, DIPLOMATIC ISSUES

Liber Amicorum

Stelios Perrakis

Edited by

Jean-Paul Jacqué
Florence Benoît-Rohmer
Panagiotis Grigoriou
Maria Daniella Marouda

I. SIDERIS
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THE INTERNATIONAL COURT OF JUSTICE AT AGE 70[1]

Alain Pellet

'*La Cour!*' Who, attending for the first time hearings before the International Court of Justice, has not been impressed by these two words boomed by the usher announcing the entry of the Judges? And the entire assembly to stand, as for the celebration of the Holy Mass. This is the immutable ritual followed at the opening of each hearing before the Court, that seems frozen in time since the creation of the PCIJ in 1920 - the first permanent international court, the Permanent Court of Arbitration (PCA) having only the adjective. A sign that the World Court remains 'the' international court *par excellence*, that withstands the attrition of time.[2] 'Or would this ceremonial (as well as other archaisms) only be a mean '*pour réparer des ans l'irréparable outrage*'?[3]

The answer is not self-evident, even for a familiar figure in this courtroom. One may be annoyed by the formalism of the proceedings, regret its cumbersomeness and its slowness, while admitting that these defects – some of them at least – have their positive reverse: they may be necessary for a methodical justice, whose solemnity increases the authority. And indeed, the prestige of 'the' Court, as devoid of authority over the other international courts and tribunals as it may be, remains intact.

1. THE STATE OF AFFAIRS

It is common ground that '[o]nly states may be parties in cases before the Court'[4] and that the Court is only open to the States parties to the Statute and, under conditions

1. This contribution to the *Liber Amicorum* in honour of my good friend Professor Stelios Perrakis is, in large parts, an updated translation of my contribution "'*La Cour*' supputations indécises sur l'avenir de la CIJ" in the *Festschrift* in honour of my other good friend, Professor Habib Slim (*Ombres et lumières du Droit international*, Paris, Pedone, 2016, pp. 377-400). With thanks to Benjalin Samson, PhD candidate, University Paris Ouest Nanterre La Défense.
2. See L. Condorelli, 'La Cour internationale de Justice: 50 ans et (pour l'heure), pas une ride' (1995) 6(3) *ESIL* 388-400.
3. J. Racine, *Athalie,* acte II, scène V ('Le songe d'Athalie') ('In order to repair the ravages of years irreparable') <http://www.gutenberg.org/files/21967-h/21967-h.htm#link2H_4_0011>
4. Article 34, para. 1, of the Statute.

laid down by the Security Council, to other States;[5] but given that, to-day, all entities being indisputably States are members of the United Nations (and, therefore, Parties to the Statute), this issue is mostly theoretical. Besides the State of Palestine, remain only outside the Court debated State entities – the main ones being, Western Sahara, the Holy Seat, and Chinese Taipeh.

As regards international organisations, the General Assembly or the Security Council,[6] and under rather strict conditions, other organs of the United Nations and specialized agencies, may request the International Court of Justice to give an advisory opinion on legal questions, in accordance with Article 96 of the UN Charter and with Articles 65 to 68 of the Court's Statute. Moreover, according to paragraphs 2 and 3 of Article 34 of the Statute, 'public international organizations' (a formula which clearly excludes NGOs) may give information relevant to cases before the Court, in particular when 'the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question'. There are means for other actors to intervene in proceedings before the ICJ, but they do not impact on the number of cases brought before the Court, which can only result from actions by States or international organizations.

Giving these statutory limitations, can we anticipate any growth of the number of cases before the Court? Or on the contrary, should we fear a return to the situation prevailing in the 1960s. At the time – and not only in relation with the unfortunate 1966 Judgment of the Court on the *South West Africa* cases: between 1960 and 1975: only 12 new cases were added on the List (some plural applications concerning in fact a single case)[7] and no new case was brought in 1963, 1964, 1965, 1966 (in other words: *before* the second phase of *South West Africa*), nor in 1968, 1969, 1970, 1974 and 1975 – and this occurred again in 1980 and 1985.

Then started better times. In 2003, the List included 25 cases. However, even though the Judges and the Registry kept complaining on an excessive workload – I'll come back on this too later – , this was largely illusory: 10 cases concerned the same situation (NATO bombing of Serbia in relation with Kosovo) and several bore upon dormant cases – the most striking one being *Gabčíkovo-Nagymaros*, since the amount of reparation had not been fixed in the 1997 Judgment[8] in which the Court found mutual responsibilities of the Parties; it is still not fixed and the case is still on the docket in 2016, 19 years after the decision on responsibility.

Anyway the situation in the early 2000's appears to have been entirely exceptional: by the time-being we are sent back to the pre-existing picture. No case has

5. Article 35.
6. Contrary to the Council of the League of Nations, the Security Council never filed such request.
7. See the *South West Africa* (*Ethiopia* v. *South Africa* and *Liberia* v. *South Africa*) cases, the cases concerning the *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark* and *Federal Republic of Germany/Netherlands*), the *Fisheries Jurisdiction* (*United Kingdom of Great Britain and Northern Ireland* v. *Iceland* and *Federal Republic of Germany* v. *Iceland*) cases and the *Nuclear Tests* (*Australia* v. *France* and *New Zealand* v. *France)* cases.
8. ICJ, Judgement, 25.09.1997, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Reports 1997*, p. 81, paras. 151-154.

been introduced in 2012, four have been in 2013, five in 2014[9] and none in 2015. As of today (April 2016), thirteen cases are pending – among which still the *Gabčíkovo-Nagymaros Project* which is clearly a vestige of the past and should be removed from the Court's docket[10] and three, identical, in substance are *sub judice*.[11] The number is neither ridiculous nor impressive.

On may consider the glass half full: giving the rather nonchalant rhythm of work of the Court, it is busy for the next three or four years. But, one may also consider it half empty: clearly the World Court remains 'an alternative to the direct and friendly settlement of such disputes between the Parties'[12] and States would opt for negotiations as much as they can. The use of the Court remains quite exceptional – all the more so that the ICJ faces 'competition' from other judicial bodies, notably in matters concerning sea delimitation which was until recently one of the main fields for which it was called to exercise jurisdiction.[13]

Similar remarks can be made regarding the optional declarations made under Article 36, paragraph 2, of the Statute: their number increases very slowly[14], but, among the permanent members of the Security Council, only the UK has made one and it includes a great many reservations which largely empty it of substance – and this is the case for many other Article 36(2) declarations. States' defiance *vis-à-vis* the compulsory jurisdiction of the Court is also reflected by the decreasing number of treaties including a compromissory clause providing for the jurisdiction of the Court.[15]

It is comonplace to lament this situation,[16] which has led the General Assembly to

9. There are only three if one regroups the applications filed by the Marshall Islands. On 24.04.2014, the Republic of the Marshall Islands filed applications against nine States (China, the U.S., the Russian Federation, France, India, Israel, Pakistan, the Democratic People's Republic of Korea and the U.K.), but acknowledged that six of them did not consent to the jurisdiction of the Court.
10. Concerning the *Armed Activities on the Territory of the Congo*, nearly ten years after the Judgment on the responsibility, Uganda introduced a new Application requesting the Court to decide the question of the reparation due to the DRC in the case. The proceedings are on-going in 2016.
11. See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), (Marshall Islands* v. *Pakistan)* and *(Marshall Islands* v. *United Kingdom)*.
12. PCIJ, Order, 19.08.1929, *Free Zones of Upper Savoy and the District of Gex*, Series A, No. 22, p. 13.
13. 16 entirely or partially maritime delimitation cases since 1967 (the date when the North Sea Continental Shelf cases were initiated) on a total of 97 contentious cases.
14. According to Professor Akande, in 1994, 58 States out of the 186 States parties to the Statute had accepted the compulsory jurisdiction under Art. 36 (2). In 2005, 66 States had made optional clause declarations out of the 191 parties to the Statute. Today, 72 States have made optional clause declarations out of 193 parties to the Statute. ('Selection of the International Court of Justice as a forum for contentious and advisory proceedings (including jurisdiction)', speech given at the seminar in honour of the 70th anniversary of the International Court of Justice, The Hague, 18.04.2016).
15. Professor Akande notes 'that that there has been an appreciable decline in the number of treaties which include compromissory clauses providing for recourse to the Court as a method of dispute settlement. Apparently, no treaty with such a clause has been concluded since 200617. This is a worrisome trend, especially when combined with the fact that in practically every year between 1945 and 2006, there was at least one treaty concluded between states including a compromissory clause that referred to the Court.' (*ibid.*).
16. See e.g. Statement by H.E. Judge Peter Tomka, President of the International Court of Justice, at the High-Level Meeting on the Rule of Law, 24.09.2012 pp. 2-3 <http://www.icj-cij.org/presscom/files/0/17100.pdf>.

call States to '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'[17] – without much effect. States – and particularly so those which assume (or think they assume) World wide responsibilities – are reluctant to relinquish their freedom of choice of the means of to settle disputes. Then, the question may be asked: given this States' reluctance, instead of preaching in the desert, would it be not more appropriate for the General Assembly or the Security Council to recommend[18] the seizing of the Court in given cases amenable to judicial resolution?

How can we explain the situation prevailing today? My view is that the Court itself bears little responsibility: despite the vociferations of certain States – like Colombia after the Judgment of 19 November 2012 in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* – all its recent Judgments are balanced and perfectly legally defensible. Furthermore, it is true that the proceedings are slow, but these last years – and particularly under the presidencies of Judges Higgins then Tomka – the Court rather caught up with its usual excessive delays to deal with a case. And if the Court's low productivity (the Court renders rarely more than three decisions per year)[19] has been often criticized, it is the price to pay to thorough, thoughtful and respected decisions – all the more so if we take into account the fact that – save the constitution of a Chamber – the formation is generally composed of 15 to 17 members. This renders the deliberation all the more difficult that the discussion is held in two languages – French and English.

Moreover, it is clear that States continue to see the Court as a useful mean of dispute settlement, but they don't systematically have recourse to it – expect Nicaragua which appears to have included the I.C.J. in the first place of its legal external policy.[20] Generally, the recourse to the I.C.J. remains exceptional and reserved for highly sensi-

17. UNGA, Res. 3232 (XXIX), 12.11.1974, 'Review of the role of the International Court of Justice'. See also: UNGA, Res. 37/10, 15.11.1982, 'Manilla Declaration on the Peaceful Settlement of International Disputes', II(5)(b)(ii).
18. There can be no doubt that the Council may recommend to submit 'legal disputes' to the ICJ (see Art. 36 of the Charter). I also suggest that, in case of threat to the peace, the Security Council could decide, with binding effect for the States involved that they must bring their case before the Court.
19. In 2004, the Court rendered ten judgments but eight concerned the *Legality of Use of Force* in Yugoslavia <http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=2004>; in 2007 <http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=2007> and 2011 <http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=2011>, it rendered four judgments and in 2012, four judgments and one advisory opinion <http://www.icj-cij.org/docket/index.php?p1=3&p2=5&p3=-1&y=2012>.
20. Since 1984 and its Request against the United States in the *Military and Paramilitary Activities in and against Nicaragua* case, Nicaragua has filed seven Applications (*Border and Transborder Armed Actions (Nicaragua* v. *Costa Rica)*, *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)* and *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*); it has intervened in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras and was brought before the Court three times by Costa Rica (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)*).

tive political cases. However, even for these cases, the Court faces competition from other international courts and tribunals.

2. THE COMPETITION WITH OTHER INTERNATIONAL COURTS AND TRIBUNALS

If one enlarges the scope of the inquiry in order to grasp international justice as a whole, one notes that, alongside the International Court of Justice, 'principal judicial organ of the United Nations', and numerous specialized courts and tribunals,[21] coexist six major permanent mechanisms for the settlement of disputes:

- the PCA is a list of potential arbitrators and an efficient source of 'arbitral services': model rules, registrar, material facilities (rooms, translation and transcription); 117 States are Parties to its Statute (the 1899 Hague Convention, revised in 1907);
- the very complex disputes settlement system established in the third United Convention on the Law of the Sea (UNCLOS), to which 167 States are Parties;
- the WTO disputes settlement procedures, compulsory for the 162 Members of the Organization;
- the ICSID System for the settlement of investment disputes, which gathers 152 States Parties;[22]
- regional courts of human rights; and
- although States are not directly parties to the proceedings, international criminal courts and tribunals and first and foremost, the International Criminal Court, which have been ratified by 124 States.

Does the activity of these courts and tribunals compete with the ICJ or does it show the Court's deficiencies, which could explain the preference of States for these other *fora* to settle their disputes? The only true 'competition' comes essentially from *ad hoc* arbitral tribunals administered by the P.C.A., which are called upon to decide interstate disputes, and, more incidentally, the other disputes settlement means referred to in the UNCLOS.[23] The three other courts or tribunals listed above (ICSID, criminal and human rights jurisdictions) do not primarily settle interstate disputes,

21. See e.g. the list given by J. Crawford and N. Schrijver' "The Institution of Permanent Adjudicatory Bodies and Recourse to 'ad hoc' Tribunals" in Y. Daudet (eds.), *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la Paix / Topicality of the 1907 Hague Conference, the Second Peace Conference,* Nijhoff, 2008, pp. 153-175, in particular, pp. 167-168. See also <http://www.worldlii.org/catalog/2561.html.>

22. Three States have denounced the Washington Convention: Bolivia, on 2.05.2007 (with effect on 3.11.2007), Ecuador, on 6.07.2009 (with effect on 7.01.2010) and Venezuela, on 24.01.2012 (with effect on 25.11.2012).

23. Which include Tribunals constituted under Annex VII of the UNCLOS, which usually use the PCA as the registry of the Tribunal. Up to now, 16 Annex VII Arbitrations have been instituted, 12 have been or are administered by the PCA, 3 have finally been submitted to the ITLOS by agreement of the Parties (*Saint Vincent and the Grenadines v. Guinea (The M/V Saiga*); *Bangladesh v. Myanmar (Bay of Bengal Maritime Boundary)* and *Panama/Guinea-Bissau (The M/V 'Virginia G' Case)* and one has been administered by ICSID (*New Zealand v Japan, Australia v Japan (Southern Blue Fin Tuna Case)*).

even though they may indirectly contribute to it. As regards the panels and the Appellate Body of the WTO, they are compulsory jurisdictions specialized in the settlement of commercial disputes which have rarely been referred to the World Court.[24]

In the last years, the interstate disputes which have not been referred to the ICJ whereas they could have been, are:

- the *Arbitration Between the Republic of Croatia and the Republic of Slovenia* on land and maritime delimitation;[25]
- the *Indus Waters Kishenganga Arbitration (Pakistan* v. *India)* case;[26]
- the *Railway Land Arbitration (Malaysia/Singapore)* case;[27] and
- the *Arbitration under the Timor Sea Treaty* between Timor-Leste and Australia;[28]
- the *Chagos Marine Protected Area Arbitration* between Mauritius and the United Kingdom;[29]
- the case between the Philippines and China concerning the maritime jurisdiction of the Parties in the South China Sea;[30]
- the *Arctic Sunrise* case opposing the Netherlands to Russia, also submitted to an Annex VII arbitral tribunal;[31]
- the *Duzgit Integrity Arbitration (Malta* v. *São Tomé and Príncipe)* case;[32] and
- the case concerning *the 'Enrica Lexie' Incident* between Italy and India.[33]

All submitted to *ad hoc* arbitral tribunal administered by the PCA;

- the *Bay of Bengal Maritime Boundary Arbitration* between Bangladesh and India also administered by the PCA[34] while the 'twin case' between Bangladesh and Myanmar was submitted to the ITLOS, and satisfactorily settled by the Tribunal's Judgment of 14.03.2012;[35] and finally
- the maritime delimitation case between Ghana and Ivory Coast which was submitted to a Chamber of the ITLOS.[36]

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24. See however the *Oscar Chinn* case before the PCIJ (Judgment, 12.12.1934, Series A/B, No. 63) and, to a certain extent, the *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*) case (Judgment, 27.06.1986, *Reports 1986*, p. 14).
25. Agreement of 4.11.2009.
26. Notification of 17.05.2010; the Tribunal rendered a Partial Award on 18.02.2013 <https://pcacases.com/web/sendAttach/1681> and a Final Award on 20.12.2013 <https://pcacases.com/web/sendAttach/48>.
27. Submission Agreement of 9.01.2012.
28. Notification of 23.04.2013.
29. Notification of 20.12.2010. The Award was rendered on 18.03.2015 <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>.
30. Notification of 22.01.2013. The Tribunal rendered its Award on Jurisdiction and Admissibility on 29.10.2015 <https://pcacases.com/web/sendAttach/1506>.
31. Notification of 4.10.2013.
32. Notification of 22.10.2013
33. Notification of 26.06.2015.
34. Notification of 8.10.2009. The Award was rendered on 7.07.2014 <https://pcacases.com/web/sendAttach/383>.
35. Notification of 13.12.2009. Bangladesh and Myanmar consented, respectively on 4 November and 12 December 2009 to the jurisdiction of the ITLOS, which rendered its Judgment on 14.03.2012 <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf>.
36. Notification du 24.09.2014.

Law of the sea disputes have probably a special situation because the Parties must follow the tortuous directives of Part XV of the UNCLOS which failing agreement to refer a dispute to the ICJ, provides for compulsory arbitration under Annex VII of the Convention.[37] But, the fact remains that, in these cases, the Parties decided not to refer their dispute to the World Court and, in the *Bangladesh/Myanmar* case, the Parties gave *ex post* preference to the ITLOS.

It is worth pausing on this last case. Two aspects make it emblematic. It is the first maritime delimitation case brought before the Hamburg Tribunal and the first judicial delimitation of the continental shelf beyond 200 nautical miles. Two other aspects are relevant to our investigation:

- the ITLOS conducted these proceedings expeditiously: seized on 13 December 2009, it rendered its Judgment on 14 March 2012 – twice as fast as the Annex VII arbitral tribunal seized at the same date of the Bangladesh/India case and which rendered its Award only on 7 July 2014; in this respect, it is noteworthy that the I.C.J. settled its first maritime delimitation case in less than two years from the day it was referred to it[38];
- if it is not exempt of criticism,[39] the ITLOS Judgment is reasonable and 'responsible': the ITLOS followed the case law of the ICJ which stabilized the law of maritime delimitation.

Provisional conclusion: in maritime delimitation and – more generally – in law of the sea matters, the ICJ is facing the stimulating competition of the ITLOS – whose jurisdiction is 'natural' in these matters – and that of Annex VII tribunals, with the risk of fragmentation that this competition bears.[40]

This does not really solve the mystery: nothing can really justify this preference for arbitration in the recent years; these arbitral tribunals are not quicker than the ICJ; choosing the Judges in each case is a Herculean task and the Parties do not derive any benefit from it: the choice of each Party collides with the other Party's choice and, if they disagree, they take the risk of leaving the final decision in the hands of the appointing authority, which could satisfy neither Party but could displease both;[41] in fact, the great number of judges when the full ICJ (15 to 17) or the full ITLOS (21 to 23) is siting guarantees impartiality and independence from the Parties as well as the objectivity of the decision.[42] Moreover, in addition to the greater predictability of the

37. Article 287(3) of the UNCLOS.
38. The *North Sea Continental Shelf* cases (Special Agreement of 20.02.1967 and Judgment of 20.02.1969). However, in the *Nicaragua* v. *Colombia* case, it took the Court some eleven years to deliver its Judgment (Application of 6.12.2001 and Judgment of 19.11.2012). But, with more than fifteen and half years, the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* holds the record (Application of 2.07.1999 and Judgment of 3.02.2015).
39. The author was Counsel and Advocate to the Republic of Myanmar.
40. It must however be noted that, with the exception of a few arbitral awards, the arbitral case law in maritime delimitation is consistent and follows the ICJ jurisprudence.
41. However, one must note that these authorities, whether it is the President of the ICJ or of the ITLOS or the Secretary-General of the PCA have a great experience of the 'small world' of international law and try to consult with the Parties as much as they reasonably can.
42. In my opinion, the reasons militating for permanent jurisdictions (in plenary formation) should also

decision due to the stability of their jurisprudence, two other reasons increase the attractiveness of permanent courts and tribunals compared to arbitral tribunals:

- they have rules of procedure which have been thoroughly tested in practice and adapted to needs overtime;[43]
- only the fees and expenses of the pleading team are borne by the Parties; the remuneration of the judges, the costs of the Registrar are paid by the Parties to both Statutes[44] and the facilities are put at the disposal of the Parties.[45]

In the absence of a global explanation, one may try to find some kind of explanation by examining each case individually:

- concerning the cases brought before an Annex VII arbitral tribunal, the easiest explanation is that the constitution of such tribunal is the result of the application of the mechanism established in Part XV of the UNCLOS; this reasons is not entirely convincing because the Parties have the possibility to agree to refer their dispute to the ICJ or to the ITLOS, as Bangladesh and Myanmar did; this explanation is really convincing only when the defendant defaults in participating in the proceedings, like China in the case introduced by the Philippines or Russia in the *Arctic Sunrise* case; as for the *Chagos Arbitration*, the preference for arbitration is certainly a consequence of the fact that Commonwealth countries exclude the jurisdiction of the Court to settle their disputes *inter se*;[46]
- the same consideration probably explains that, in the *Kishenganga* case, Article IX of the Indus Water Treaty provides for arbitration, which is consistent with the firm refusal by India to submit its disputes with Pakistan to the ICJ;[47]
- Similarly, in the *Timor Sea* case, Australia's Article 36(2) Declaration excludes

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discourage the Parties to refer their cases to chambers of the Court (Articles 27-29 of the ICJ Statute and 15-18 and 90-93 of its Rules) or of the ITLOS (Articles 15 of the ITLOS Statute and 28-31 and 107-109 of its Rules).

43. However, in the recent years, the PCA adapted its Rules in order to '[r]eflect the public international law elements that may arise in disputes involving a State, State controlled entity, and/or intergovernmental organization' and '[e]mphasize flexibility and party autonomy' (Introduction to the 2012 Arbitration Rules). In addition to its Arbitration Rules, the PCA adopted 8 optional sets of rules adapted to various types of disputes, whether because of the Parties to the dispute (ex: Optional Rules for Arbitration between International Organizations and Private Parties) or because of the subject-matter of the dispute (ex: Optional Rules for Arbitration of Disputes Relating to Outer Space Activities). Having acted as registrar in more than 50 interstate disputes, the PCA has gained a great experience in this field.
44. The budget of the ICJ, which amounts to 52 344 800 American dollars for the biennium 2014-2015, is adopted by the General Assembly of the United Nations; that of the ITLOS (21 239 120 euros for the biennium 2013-2014) is adopted by the States Parties to the UNCLOS.
45. For a recent a detailed analysis of the costs of international justice, see A. Miron 'Le coût de la justice internationale. Enquête sur les aspects financiers du contentieux interétatique' (2014) *A.F.D.I.* 1-39.
46. Article 36(2) optional Declaration of Mauritius of 23.09.1968 excludes 'disputes with the Government of any other country which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree' and that of the U.K., in its 31.12.2014 version, 'any dispute with the government of any other country which is or has been a Member of the Commonwealth.'
47. See the *Trial of Pakistani Prisoners of War (Pakistan v. India)* case (Order, Removal from the list, 15.12.1973, *Reports 1973*, p. 347) and the *Aerial Incident of 10.08.1999 (Pakistan* v. *India)* case (Judgment, 21.06.2000, *Reports 2000*, p. 12); see also the numerous reservations to India's Article 36(2) Declaration) and in particular those excluding '(1) disputes in regard to which the parties to the dis-

the jurisdiction of the Court over 'any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation';[48]

- In the *Croatia*/*Slovenia* case, the choice for an Arbitral Tribunal is easily explained: for various reasons, one of the Parties (Slovenia) conditioned its acceptation of a binding settlement to an injection of a measure of equity[49] and, in spite of the possible recourse to *ex aequo et bono* under Article 38, paragraph 2, of the Court's Statute, the ICJ is not well equipped to deal with such a request; moreover the case is tightly linked with the candidacy of Croatia to the EU and a 'European'[50] arbitral seems more logical.

To put it clearly: the (relative) disinterest for the Court is not based on any rational reasons, with the understanding however that the ITLOS is a credible alternative for matters covered by its jurisdiction, including maritime delimitation.

3. INCREASE THE COURT'S ATTRACTIVENESS BY OPENING ITS *FORUM* TO NEW ACTORS?

Taking into account the incapacity of the Court to deal simultaneously with a great number of cases, is it possible to envisage new options likely to strengthen its attractiveness?

Several suggestions have been made. None of them totally convinces me.

One of these propositions is to open the Court's forum to new actors, such as private actors or international organizations.[51] It is appealing only at first sight.

Indeed, one of the strengths of the ICJ is that it is open and reserved to States (with

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pute have agreed or shall agree to have recourse to some other method or methods of settlement; (2) disputes with the government of any State which is or has been a Member of the Commonwealth of Nations; (…) (4) disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective actions taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been or may in future be involved; (…) 10) disputes with India concerning or relating to: (a) the status of its territory or the modification or delimitation of its frontiers or any other matter concerning boundaries (…)'

48. Declaration of 21.03.2002.
49. See Article 4 of the 4.11.2009 Agreement: 'The Arbitral Tribunal shall apply (a) the rules and principles of international law for the determinations referred to in Article 3 (1) (a); (b) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances for the determinations referred to in Article 3 (1) (b) and (c)' (Article 3 (1): '(b) Slovenia 's junction ta the High Sea; (c) the regime for the use of the relevant maritime areas').
50. That is composed of European citizens.
51. See e.g. S. Rosenne, 'Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice' in P. Sanders (ed.), *International Arbitration - Liber Amicorum for M Domke,* Nijhoff, 1967, p. 250 ; R. Higgins, 'Conceptual Thinking about the Individual in International Law' in R. Falk, F. Ktayochwil and S.H. Mendlovitz (eds.), *International Law: A Contemporary Perspec-*

the exception of advisory opinions requested by certain organs of organizations of the United Nations system – a separate issue to which I will come back). And, whatever the 'post-modern' doctrine claims, the sovereign State remains a very special – and sovereign – entity and it is still premature to write its obituary.[52]

As the Court explained in several occasions, it is 'the organ' of public international law[53] conceived in the strict and traditional definition of the expression, that is inter-state law. Indeed, it does not mean that to-day's international law is limited to that purely inter-state law but:

- *first*, in my view, sovereignty still plays a central role, even in new branches of international law where it seems absent *prima facie* (even a legal system which was formed "without the State" like *lex mercatoria* is marked by sovereignty since the private actors which are at the origin of this legal order take sovereignty into account in order to bypass it); and,
- *second*, it appears normal and justified that not only these new legal orders (such as *lex mercatoria* or *sportiva* or the proper law of international organizations) but also new branches of international law *stricto sensu* use different *fora* and means of peaceful settlement, if only because international law has become hardly "distrainable" in all its complexity and technicalities. Most of the ICJ Judges are "general international lawyers", but it is not bad that cases which involve technical rules, be referred to specialized courts or tribunals – and this is certainly true of cases in which private persons may intervene as parties, such as international criminal law, human rights law or international investment law. The same holds true for specialized fields, such as WTO law; and it is even more true for regional laws, whether it is that of the EU, that of Mercosur or that of the numerous African organizations.

Private actors have their own international *fora* of disputes settlement; it is therefore not necessary to open the Court's *forum* to them, with the understanding that it could be envisaged to provide for some kind of intervention as *amicus curiae* before the Court. This is not excluded by the Statute[54] and would be in line with a general

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tive, Boulder, CO, Westview Press, 1985, pp. 481-482; M.W. Janis, 'Individuals and the International Court', in Muller *et al.* (eds.), *The International Court of Justice: its future rote after fifty years,* Nijhoff, 1997, pp. 205-216 and F. Orrego Vicuna, *International Dispute Settlement in an Evolving Global Society,* CUP, 2004, p. 60.

52. Cf L. Henkin, 'The Reports of the Death of Article 2(4) Are Greatly Exaggerated, (1971) *A.J.I.L* .544-548.

53. PCIJ, Judgment 25.05.1926, *Certain German Interests in Polish Upper Silesia (Merits)*, Series A, No. 7, p. 19 or I.C.J., Judgment, 9.04.1949, *Corfu Channel case*, *Reports 1949*, p. 35.

54. Moreover, Practical Direction XII (adopted in 2004) provides that:
'1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.
2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.
3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental

trend in international tribunals – whether you think of the WTO settlement of disputes settlement[55] or of the recent case law of ICSID.[56] This has been proposed from time to time;[57] however, two reasons at least militate for some caution: it must be open in such a way (i) not to burden the Court and, especially, the Registry with a flood of requests emanating from non-really interested persons and (ii) not to rub out the essential character of the ICJ as a 'sovereignty disputes' court.

Now, what about international organisations? Two sub-questions are at stake:

(1) should international organisations be authorized to be claimants or defendants in contentious cases?
(2) should the possibility for advisory opinions be widened?

I would probably answer positively to both questions – but with caution, qualifications and *caveats*:

(1) the most difficult sub-question is the first one; *a priori* this would be logical at a time when international organisations – at least some of them – act more and more like States in some fields; it would therefore seem normal that, when their responsibility or the limits of their competences are at stake, this can be brought before an international law court exactly as when two States are in dispute; on the other hand, as shown (or, unfortunately, not completely shown…[58]) by the recent ILC Articles on the responsibility of international organisations, the consequences of such responsibility are so complex, its articulation with the responsibility of member States, so uncertain, that such an opening of the Court contentious forum should, I think, be restricted to cases when only the active or passive responsibility *of the organisation* is at stake

organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.'

55. See e.g. WTO, Appellate Body, Report, 6.11.1998, *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AB/R and Report, 7.06.2000, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating from the United Kingdom*, WT/DS138/AB/R.
56. See e.g. *Methanex Corp. v. United States*, Decision of the Tribunal on Peittions from Third Party to Intervene as *Amicus Curiae*, 15.06.2001; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5.02.2007 and for a case granting the *amicus curiae* status to the European Union, *AES Summit Generation Ltd. And AES-Tisza Eromu Kft. V. Republic of Hungary*, ICSID Case No. 07/22.
57. See e.g.: G. Gaja, 'A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice' in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, O.U.P., 2011, pp. 669-671.
58. V. A. Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 *International Organizations Law Review* 63-77 ; E. Paasivirta, 'Responsibility of a Member State of an International Organization: Where Will it End' (2010) 7 *International Organizations Law Review* 49-61 ; J. D'Apremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) SHARES Research Paper 12 *ACIL* accessed in <http://www.sharesproject.nl/publication); A. Pellet, "International Organizations Are Definitely not States>. 'Cursory Remarks on the ILC Articles on the Responsibility of International Organizations' in M. Ragazzi (ed.), *Responsibility of International Organizations. Essays in Memory of Sir Jan Brownlie,* Martinus Nijhoff Publishers, Leiden 2013, pp. 49-54.

(to the exclusion of the possible joint or joint and several responsibility of the member States); in any case, this extension seems unattainable since it would suppose an amendment to the Charter, which, for the time being seems out of reach. Suffice to recall in this respect the difficulties with the accession of the EU to the ECHR: discussed since the late 1970s, the accession became a legal obligation only under the Treaty of Lisbon, which entered into force on 1 December 2009. The accession project has been signed on 5 April 2013 and its ratification is subject to an advisory opinion of the E.C.J.

(2) This would not be the case in all hypotheses if one envisages an extension of the possibility for international organisations to request advisory opinions. Again two 'sub-possibilities' can be envisaged

First, such a right could be extended to other international organisations or institutions within the UN system – this is simply a question of political will since, according to Article 96, paragraph 2, of the UN Charter '… organs of the United Nations [other than the General Assembly and the Security Council] and specialized agencies, […] may at any time […] authorized by the General Assembly [to] request advisory opinions of the Court on legal questions arising within the scope of their activities'. Now the only real issue is: should such a right be granted to the Secretary General.[59] This is proposed from time to time – I am not really convinced: either the requests would concern relatively minor technical points and there is no real need to bypass the Legal Adviser and to undermine his or her authority; or the requests would bear upon 'war and peace' issues and this would threaten the delicate balance between the organs concerned with the maintenance of international peace and security.

Second, the other possibility would be to open the *jus standi* to request advisory opinions to organisations others than specialized agencies, including other international courts and tribunals.[60] This looks rather attractive – especially if other courts and tribunals could seize the World Court of questions of principle concerning the interpretation and scope of general rules of international law. Such a possibility would help to limit the inconveniences of the 'fragmentation' of international law and be in the interest of all the stakeholders of such a system. However,

- in such a case, the opinions, while 'advisory' should be … binding upon the organisation or tribunal having requested it, in order to avoid undermining the authority of the Court (and this is quite possible as shown by the former mecha-

59. See e.g. S. Schwebel, 'Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice' (1984) 78(4) *A.J.J.L.* 869-878; M. S.M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations,* Kluwer Law International, 2003, p. 60 or R. Kolb, *La Cour internationale de Justice,* Pedone, Paris 2013, pp. 1085-1086.

60. See e.g. the Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly, 26.10.2000 <http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1>, see also the Address by H. E. Judge Stephen M. Schwebel, President of the International Court of Justice, to the General Assembly of the United Nations, 26.10.1999 <http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1>. See also S. Yee, 'Reform Proposals Regarding the International *Court* of Justice' in R. Wude (ed.), *Report of the International Law Association Study Group on United Nations Reform,* décembre 2011, paras. 15-16.

nism of 'review' of the UNAT judgments and the one, still existing, in respect to the ILOAT judgments);[61]
- but, even if this would probably be a useful reform, it too supposes a revision of the UN Charter, which I do not foresee as realistic.

It flows from these considerations that it seems either undesirable or completely unrealistic to envisage to strengthen the Court's attractiveness by opening its *forum* to other actors.

4. INCREASE THE ATTRACTIVENESS AND THE "PRODUCTIVITY" OF THE COURT

The I.C.J. is often criticized for the burdensome and formalism of its procedure, sources of an undue slowness, and for its conservatism.[62] One may wonder if the authors of these criticisms measure the advantages and reasons of this attachment to tradition.

Moreover, it is not self-evident that, even globally, these criticisms are founded. With respect to the length of the proceedings, it is not more marked than before most international – and national – courts and tribunals; furthermore, most of the time, the Parties are responsible for the length of the proceedings (excessive demands for a long written phase, accumulation of useless documents) – but it is true that the Court could be more prescriptive in the conduct of the proceedings; finally, the I.C.J. has proved, especially in the recent years, that it is able to decide a case within a reasonable time[63]

61. See e.g. W. Choi, 'Judicial Review of International Administrative Tribunal Judgments' in T. Burgenthal (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn,* N. P. Engel, 1984, pp. 347-370 ; R. Ostrihansky, 'Advisory Opinions of the International Court of Justice as Reviews of International Administrative Tribunals' (1988) 17 *Polish Yearbook of International Law* 101-121; J. Gomula, 'The International Court of Justice and Administrative Tribunals of International Organizations' (1991-1992) 13 *Michigan Journal of International Law* 83-121 ; C.F. amerasinghe, 'Cases of the International Court of Justice Relating to Employment in International Organizations' in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings,* 1996, pp. 193-209 ; K.H. Kaikobad, *The international Court of Justice and Judicial Review,* Kluwer Law International, 2000, xxvii-353 p.; S. Rosenne, *The Law and Practice of the International Court 1920-2005,* Nijhoff, 2006, Vol. II, pp. 949-1020 and J. Gomula, 'The Review of Decisions of International Administrative Tribunals by the International Court of Justice' in E. Ülufemi, *The Development and Effectiveness of International Administrative Law,* Nijhoff, 2012, pp. 249-373. V. aussi l'article 66 de la Convention de Vienne de 1986 sur le droit des traités conclus par les organisations internationales.
62. D. Bowett *et al.*, *The International Court of Justice - Process, Practice and Procedure,* BIICL, London 1997, xi-190 p., C. Peck and R.S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice - Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court,* Nijhoff/UNITAR, 1997, xvi-542 p.
63. Since 2000, eighteen proceedings have led to a judgment on the merits. On these eighteen proceedings, three lasted less than two years (*Arrest Warrant of 11.04.2000 (Democratic Republic of the Congo* v. *Belgium)*, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* and *Request for Interpretation of the Judgment of 15.06.1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*), four lasted about 3 years, six lasted about 4 years, three lasted about 5 years, one lasted about 6 years and one about 11 years (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*).

(and, in the recent *Whaling* case between Australia and Japan, it acted with excessive haste).[64]

This being said, 'micro-reforms' likely to increase the "productivity" and, hence, the image of the World Court are possible.

There is not much to change as regards the seizing of the Court. The institution of proceedings by an Application or the notification of a Special Agreement does not cause any problem – and the Court's case-law has specified in great details (and enough flexibility) the form and content of those documents.[65] But two related remarks can be made:

- *first*, it is certainly good that the popularity of Chambers within the Court among States has declined;[66] it is mongrel mixture between the arbitral and judicial process (which, in itself is not a problem), which combine both inconveniences without decisive advantage: the choice of the Judges is a conundrum; there is no real gain of time;[67] and you lose the advantage of having a large panel, whose global impartiality and neutrality is assured by the diversity of its composition;
- *second*, I fully agree with 'Practice Direction' n° I, according to which "the practice of simultaneous deposit of pleadings in cases brought by special agreement" is to be discouraged: the simultaneity of written pleadings prevents the Parties from seriously responding to each other. Unfortunately, this call is not respected in practice because the Parties don't wish to appear as Applicant or Defendant. This is a wrong reason: the Special Agreement may specify the order of written pleadings without prejudice of the respective position of the Parties and, in any event, the simultaneity is not possible during the oral phase.

This being said, the adoption Practice Directions is a detestable practice. It has been introduced thirteen years ago in order to complete the Rules of Court – which can however simply be amended if need be by the Court itself.[68] The legal effect of

64. See below, note 82.
65. See e.g. ICJ, Judgment, 19.12.1978, *Aegean Sea Continental Shelf, Reports 1978*, p. 39, para. 96; Judgment, 2.11.1963, *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections*, *Reports 1963*, pp. 27-28; Judgment, 1.07.1994, *Maritime Delimitation und Territorial Questions between Qatar and Bahrain, Jurisdiction und Admissibility*, *Reports 1994*, pp. 118-122, paras. 21-30; Judgment, 11.07.1996, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, *Reports 1996*, pp. 613-614, par. 26 or Judgment, 18.11.2008, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections*, *Reports 2008*, pp. 438-440, par. 82.
66. See the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* case, the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case (see also the *Application for Revision of the Judgment of 11.09.1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras)*), *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)* case or the *Frontier Dispute (Benin/Niger)* case. Fortunately, the *Burkina Faso/Niger* case was submitted to the full Court.
67. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* = 3 years; *Frontier Dispute (Burkina Faso/Republic of Mali)* = 3 years; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* = 6 years; *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)* = 2 years and *Frontier Dispute (Benin/Niger)* = 3 years.
68. See Article 30 of the Statute of the Court.

theese 'Directions' is totally uncertain: nobody knows whether they are binding or not. And, if they are not all questionable,[69] some are completely superfluous since they simply reaffirm existing rules of procedure;[70] and many are abusively detailed and hardly applicable.[71] This is certainly a very negative drift coming from the growing "Anglo-Saxonisation" of the Court… Not all and every stage of the proceeding has to be locked into rigid rules – there must some room for adaptation in the concrete circumstances of the case and for free and reasonable appreciation by the Court on a case-by-case basis.

With respect to incidental proceedings, only two remarks are in order in the limited context of this contribution:

- the Court is somewhat too lax in respect to requests for interim measures, which it tends to welcome rather too lightly – all the more so that following the most debatable *LaGrand* principle according to which interim measures are binding upon the Parties,[72] tends to encourage the Claimant State to ask for such measures and radically complicates the issues of reparation when responsibility is at stake – even very artificially as exemplified by *Cameroon* v. *Nigeria*;[73]
- on the contrary, I am concerned with the new trend apparently inspiring the Court in the matter of intervention: after a long period of very restrictive approach in respect to the admissibility of interventions, the Court seemed to have adopted a balanced approach with its Judgment of 13 September 1990, on Nicaragua's

69. Some are even useful – in particular Practice Direction VII which provides that 'when choosing a judge *ad hoc* pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court" – but there is no reason to exclude persons which "have acted in that capacity in the three years preceding the date of the nomination.'
70. See e.g. Article 31 of the Rules and Practice Direction X on the meetings of the Parties with the President or Article 56 and Practice Direction IX on the submission of new documents after the closure of the written proceedings.
71. The best example is Practical Direction IX *quater* which reads as follows: '1. Having regard to Article 56 of the Rules of Court, any party wishing to present audio-visual or photographic material at the hearings which was not previously included in the case file of the written proceedings shall submit a request to that effect sufficiently in advance of the date on which that party wishes to present that material to permit the Court to take its decision after having obtained the views of the other party.
2. The party in question shall explain in its request why it wishes to present the audio-visual or photographic material at the hearings.
3. A party's request to present audio-visual or photographic material must be accompanied by information as to the source of the material, the circumstances and date of its making and the extent to which it is available to the public. The party in question must also specify, wherever relevant, the geographic co-ordinates at which that material was taken.
4. The audio-visual or photographic material which the party in question is seeking to present shall be filed in the Registry in five copies. The Registrar shall communicate a copy to the other party and inform the Court accordingly.
5. It shall be for the Court to decide on the request, after considering any views expressed by the other party and taking account of any question relating to the sound administration of justice which might be raised by that request.' It is rather absurd and abusively punctillous.
72. ICJ, Judgment, 27.06.2001, *LaGrand (Germany* v. *United States of America)*, *Reports 2001*, pp. 502-503, para. 102.
73. ICJ, Judgment, 10.10.2002, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, *Reports 2002,* pp. 450-453, paras. 309-324, an in particular, pp. 453-453, paras. 320-322.

intervention in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras,[74] confirmed among others in its 1999 Order in *Cameroon* v. *Nigeria*;[75] unfortunately its Judgments of 4 May 2011 (*NICOL*) concerning the interventions of Honduras[76] and, more shockingly, Costa Rica,[77] in *Nicaragua* v. *Colombia* show a worrying step backward in this respect.

That said, no reform of the applicable rules to these two incidental proceedings seems necessary. Simple shifts jurisprudential would suffice – and we may think particularly the return to a more open intervention would likely increase the interest of States for the World Court (even when they are not party to the system of the optional clause).

Once the proceedings have started, what improvements would be likely to increase the efficiency and attractiveness of the Court?

Concerning the written pleadings, my main complaint is the tendency of States, encouraged by their Counsel – and, in the first place, Anglo-American law-firms, to write too much or, more precisely, to pile up annexes with very little discernment: with the new technologies (Internet which gives access to an excess of information and, very basically, the facilities in reprography), they have a tendency to annex to their written pleadings an impressive number of documents which, quite often, have only a vague link with the argument and are included 'just in case' and not because they are really useful for the case. Unfortunately, besides self-restrain by the Parties, the Court is not very well equipped to face this leeway – although it could take support on Article 48 of its Statute[78] to be more active in the conduct of the proceedings.

Now, these drifts are unfortunate not only because they use tons of paper and are anti-ecological, but also because they slow down the proceedings. Not only conscientious Judges will – probably hopelessly in some cases – try to read or at least go through all those documents – which is extremely time-consuming for a disappointing result -, but also because all this should, theoretically be translated since according to Article 39, paragraph 1, of the Statute '[t]he official languages of the Court shall be French and English'.

The bilingualism introduced by this provision is of course explained by its historical context. The period from 1920 to 1945, which was crucial for the adoption of the

74. ICJ, Judgment, 13.09.1990, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, *Reports 1990*, p. 92.
75. ICJ, Judgment, 21.10.1999, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, *Application to Intervene, Reports 1999,* p. 1029.
76. ICJ, Judgment, 4.03.2011, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application for Permission to Intervene*, *Reports 2011*, p. 420.
77. ICJ, Judgment, 4.03.2011, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application for Permission to Intervene*, *Reports 2011*, p. 348.
78. 'The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.' The Court could also use Article 62(1) of its Rules: 'The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, or may itself seek other information for this purpose' – this provision is applicable to the oral proceedings but nothing bars the Court from applying it to the written proceedings or to amend its Rules accordingly.

Statute, marks the occasion in which English supplanted French as the International *lingua franca*. However, this provision has significant consequences, both practical as well as more fundamental.

At the practical level, the result is a very heavy workload for the Court Registry. As long as the written procedure remained, with certain exceptions, within reasonable dimensions, the obligation to translate all procedural submissions into the other official language was acceptable. This requirement became excessive with the increase of the length of the Parties' submissions and above all their annexes. While I cannot be entirely sure – I am after all obviously an external observer – it appears to me that the Registry has wisely refused to translate the entirety of these annexes, which despite the opinions expressed by certain lawyers, the parties insist on accumulating. However, if this is the case, it is regrettable that the Judges are not required to understand, or at least have a passive understanding of the other official language. French is reputed to be a difficult language but it is a working language of the Court, and even French can be learned…

Given the subsequent burden of bilingualism for the International Court of Justice, it must be asked – should the policy of bilingualism be reviewed? Not being an activist of the French language, I have often pondered about that myself.[79] After all, the deliberations of the European Court of Justice are conducted exclusively in French and this has enormous advantages. Judges are able to exchange their ideas directly without having to communicate through an interpreter. Furthermore, this tradition has not been questioned despite the successive spread and multiplication of languages used in the Community. Why therefore do we not implement a single procedural language, to the benefit of *the* international language, which today is English?

The main reason which in my opinion detracts from the simplifying and practical appeal of such a solution is that bilingualism is not just a source of frustration and constraint, but also one of enrichment. One should not cover up the fact that the disappearance of the French language would result little by little, perhaps slowly, but surely without doubt, in the increased rejection of counsel from Latin countries in favour of Anglo-Saxon counsel, which is already today largely predominant in the 'invisible bar'. Furthermore, this absence will, indirectly but surely too, affect the jurisprudence of the International Court of Justice and thus the evolution of international law itself. Of course one can plead in English before a French or French-speaking Brazilian or Moroccan Judge, but language is not in itself a neutral agent. I believe that the opportunity to address the International Court of Justice in both a language that constitutes a natural vehicle for common law and on the other hand one that is more linked to the particulars of Latin law is a source of complementary and mutual enrichment.

Language is merely the tip of the iceberg. Beyond this is the legal approach to international relations; the very concept of international law is at stake. This results from the essential encounter of two legal traditions: Romano-Germanic law, of Latin origin, which without doubt is practiced in the majority of the world's countries and whose influence was certainly predominant when the foundations of modern inter-

79. See for example, A. Pellet, 'Remarks on Proceedings before the International Court of Justice' (2006) *LPICT* 170-173.

national law were suggested and thought of in the 17th and 18th centuries, and on the other hand, common law, with its very different methods of reasoning. Moreover, pursuant to Article 9 of the Statute of the ICJ or Article 2 of the Statute of the ITLOS, the Judges of the Court or of the Tribunal are chosen in order to assure 'in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world.' This diversity provides great richness even though the educational background of the Judges is in fact rather uniform.

For their parts, oral pleadings are often the object of squabbling in discussions between Judges and Counsel. The first impute to the second a desire to stretch the length of the hearings to the maximum. The second suspect the first of wanting to shorten the hearings below the reasonable minimum. I, for my part, have a rather nuanced opinion. I agree with the Judges that hearings are often too long and lead to useless repetitions. But I also know from experience, that, whether wrong or right, the States favour relatively long hearings which are the occasion to show to the public opinions that all which could be done for defending the case has been done. The Judges are 'obliged to hear,' and, we hope, to listen, and the public hearings can constitute an acknowledgement that all possible arguments were raised (the hearings are nowadays usually integrally broadcasted by national TV programmes). This said, I would think that limiting oral pleadings to shorter period than was usual in the past[80] is understandable, but on two conditions:

- the first is that of course everything is relative: in certain cases a few hours of hearings are sufficient; in others this would not allow that justice not only be done but furthermore seem to be done;.
- the second would be that the Court renounce imposing on counsel the exhausting rhythm which is often decided; without increasing the number of hearings it is indispensable to carefully handle the different rounds of pleadings, the preparation phases which are often reduced to the most simple expression do not give to counsel enough time to seriously study opposing arguments and obligates them to either dash through insufficiently reasoned responses or to read their texts preprepared before the oral pleadings to which they are supposed to respond. Here again however, I can again note a certain improvement in recent years. I am now able to get some sleep in The Hague, (I mean to sleep in a bed not in a hearing room, even if sometimes I do succumb to a discreet somnolence which is not reserved only to some Judges).

Last – and general – procedural point. The proceedings before the ICJ are often criticized for their slowness and their formalism. And, indeed, they are rather slow and extremely formalistic.

As to the length of the proceedings, I have already evoked the issue several times.[81]

80. In the *South-West Africa cases*, 21 days in 1962 and more than 6 months in 1965-1966; in the *Barcelona Traction* case, 3 months.

81. See e.g.: 'Remarques sur l'(in)efficacité de la Cour internationale de Justice et d'autres juridictions internationales' in Liber Amicorum *Jean-Pierre COT - Le procès international*, Bruylant, Bruxelles 2009, pp. 208-209 and 'Remarks on Proceedings before the International Court of Justice' in A. del Vecchio ed., *New International Tribunals and New International Proceedings*, Giuffrè, Milano

Just three brief remarks then: *first*, they are not that longer than before most other international (and indeed domestic) courts and tribunals; *second*, more often than not States are more responsible for the excessive length of the proceedings than the Court itself (excessive requests for long preparation of the written pleadings; requests for extension or for unnecessary third round; accumulation of excessive documents) – although the Court could be more directive in its guidance of the procedure; and *third*, the ICJ has shown, in recent times in particular, that it could be reasonably expedient (and, in one recent case – the *Whaling* case between Australia and Japan – excessively so from my point of view)[82].

Now, last, formalism. Yes, proceedings before the Court are extremely formal and this is particularly visible in respect to the hearings. Even if considerably shortened by comparison with the past, they remain rather long (and, to be honest, usually quite boring) and by contrast with other courts (in particular the EU Court and the ECHR in Strasbourg) as well as investment arbitrations, they are exceptionnally formal in that the Judges listen silently to the advocates' presentations (or they discretely sleep) but very rarely ask questions – even though they have done it a little bit less parsimonously these very last times;[83] but questions remain rare; are usually only asked at the end of the first or the second round of pleadings; and are previously discussed between the Judge who whishes to ask it and the whole Court; moreover, they never call for an immediate answer by Counsel and, quite usually, a comfortable period of time (between one week and one month) is allocated to the Parties to answer.

I must say that all well considered, I would rather keep things as they are in this respect: the Parties before the Court are sovereign States; the cases submitted to the

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2006, pp. 116-117, and in *The Law and Practice of International Courts and Tribunals*, 2006, pp. 180-181.

82. In this case, in a very debatable manner, the Court rejected Japan's request for a second round of written pleadings concerning its preliminary objection (see, Judgment, 31.03.2014, para. 6), even though Japan had raised this exception only in its Counter-Memorial, as it had the right to do (see I.C.J., Judgment 30.11.2010, *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Reports 2010*, p. 658, par. 44).

83. In the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* case, several judges asked questions to the Parties in the course of the March 2012 hearings (Judgment, 20.07.2012, *Reports 2012*, p. 428, para. 11). Questions were also asked by the Bench in the *Frontier Dispute (Burkina Faso/Niger)* case during the October 2012 hearings (Judgment, 16.04.2013, *Reports 2013*, p. 53, par. 8). In the case concerning the *Request for Interpretation of the Judgment of 15.06.1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, a judge asked a question to the Parties in the course of the hearings held in April 2013 (Judgment, 11.11.2013, *Reports 2013*, p. 287, para 10). In the *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)* case, several judges asked questions to the Parties as well as to the experts during the July 2013 hearings (Judgment, 31.03.2014, *Reports 2014,* p. 237, paras. 21-22). In provisional measures proceedings in the *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* case, Judge Greenwood asked a question to Nicaragua and President Tomka requested the answer before the end of the session (CR 2013/27, 17.10.2013, morning, pp. 16-17); the Agent of Nicaragua answered a few minutes later (*ibid.,* p. 33). In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* case, questions were asked during the March 2014 hearings. Even more recently, in the cases relating to *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India; Marshall Islands* v. *Pakistan and Marshall Islands* v. *United Kingdom)*, the Bench asked questions to the Parties during the March 2016 hearings.

ICJ usually are extremely sensitive political issues; and in these circumstances, spontaneity is not an option and it is much preferable in particular that Counsel can discuss their answers to the Judges' questions with their Team and their Agent, who, more often than not has to refer to his or her capital.

CONCLUSION: THE I.C.J. AND THE MULTIPLICATION OF INTERNATIONAL COURTS AND TRIBUNALS

The so-called 'fragmentation' of international law is at the origin of blossoming of jurisdictions and other means of settlement of disputes; far from globally being an inconvenience, it is a sign of the vitality of the international court phenomenon. Without a doubt, to quote President Bedjaoui, this multiplication of judicial bodies constitutes '*la bonne fortune du droit des gens*'[84] – the good fortune of *jus gentium*;

This does not mean that this situation has no disadvantage. The risks of contradiction in the case law of those various courts and tribunals are real;[85] the *forum shopping* stemming from this 'proliferation' may shock austere lawyers – at least those for whom domestic law is the only parangon of the 'real law'. However, the proliferation of international courts and tribunals has not eliminated situations where no particular mechanism for the settlement of disputes exists or has jurisdiction; this is particularly so in respect to the activities and actions of international organisations which, quite often, cannot be submitted to any such mechanism (I have particularly in mind the peace-keeping operations which, regrettably, are in large part 'unjusticiable').

This is one of congenital defects of international law. But we must accept it as it is and note that, in the fields where international courts are called to decide, the moral dominance ICJ is striking. Proof of this is the tribute paid by all other judicial or arbitral proceedings to the Court's case law when it comes to general public international law.[86]

Introducing his presentation as the Agent for Greece on the occasion of the intervention of his country in the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* Professor Perriakis expressed his admiration for the 'the Court and the work it has been doing for the last 66 years'.[87] This appreciation is well deserved.

84. 'Conclusions générales - La multiplication des tribunaux internationaux ou la bonne fortune du droit des gens' in *SFDI*, Colloque de Lille, pp. 529-545.
85. See, with respect of attribution and 'control', the irreconcilable positions adopted by the ICTY (Appeal Chamber, Judgment, 15.07.1999, *Prosecutor v. Tadic*, IT-94-1, pars. 116-145) and by the I.C.J. (Judgment, 26.02.2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, *Reports 2007,* pp. 206-214, paras. 396-412) – in international investment law, contradictory positions exist with regard to the definition of investment, MFN and umbrella clauses (for a presentation of these contradictions, see A. Pellet, 'The Caselaw of the ICJ in Investment Arbitration' (2013) 28(2) *ICSID Review* 224-225, notes 3-5).
86. This is also true for 'peripheral' system such as ICSID arbitration, see *ibid.*, pp. 223-240.
87. CR 2011/19, 14.09.2011, translation, p. 2 (French original: '*il est opportun d'emblée d'exprimer ma profonde considération pour la Cour et son œuvre depuis soixante-six années ainsi que mon dévouement à la justice internationale et le droit international*' – CR 2011/19, 14.09.2011, p. 10).

There is no need for solemn and large-scale reform in order for the Court to keep its implicit status of *primus inter pares* – not to say of *prima donna*, whose position, even questionable,[88] is respected and, in general, followed. And better preserving the respect which the Court has won rather than weakening it by addressing sometimes unfair and often vain criticisms or by proposing reckless reforms, which cannot suceed given that an amendment of the Court's Statute is unlikely in a forseeable future. In any event, despite ups and downs, 'the Court' will long remain 'La *Cour*'.

88. See the very debatable 'Nicaragua test' which has become *the* reference with regard to the attribution of internationally wrongful acts committed under influence. See M. Spinedi, 'On the Non Attribution of the Bosnian Serbs' Conduct to Serbia' (2007) 5(4) *JICJ* 829-838; J. Griebel and M. Plucken, 'New Developments Regarding the Rules of Attribution?: the International Court of Justice's Decision in Bosnia v. Serbia". *L.JJ.L.,* Vol. 21, 2008, No. 3, pp. 601-622; O. de Frouville, "Attribution of Conduct to the State: Private Individuals", in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility,* OUP, 2010, pp. 257-280; A. Pellet, "Remarques sur la jurisprudence récente de la CIJ dans le domaine de la responsabilité internationale", in *Perspectives of International Law in the 21 si Century - Perspectives du droit international au 21e siècle, Liber Amicorum Professor Christian Dominicé in Honour of his 80th Birthday,* Martinus Nijhoff, 2012, pp. 332-336 and P. Jacob, "Les définitions des notions d''organe' et d''agent' retenues par la CDI sont-elles opérationnelles?", *R.B.D.I.,* Vol. 47, 2013, No. 1, pp. 17-44.