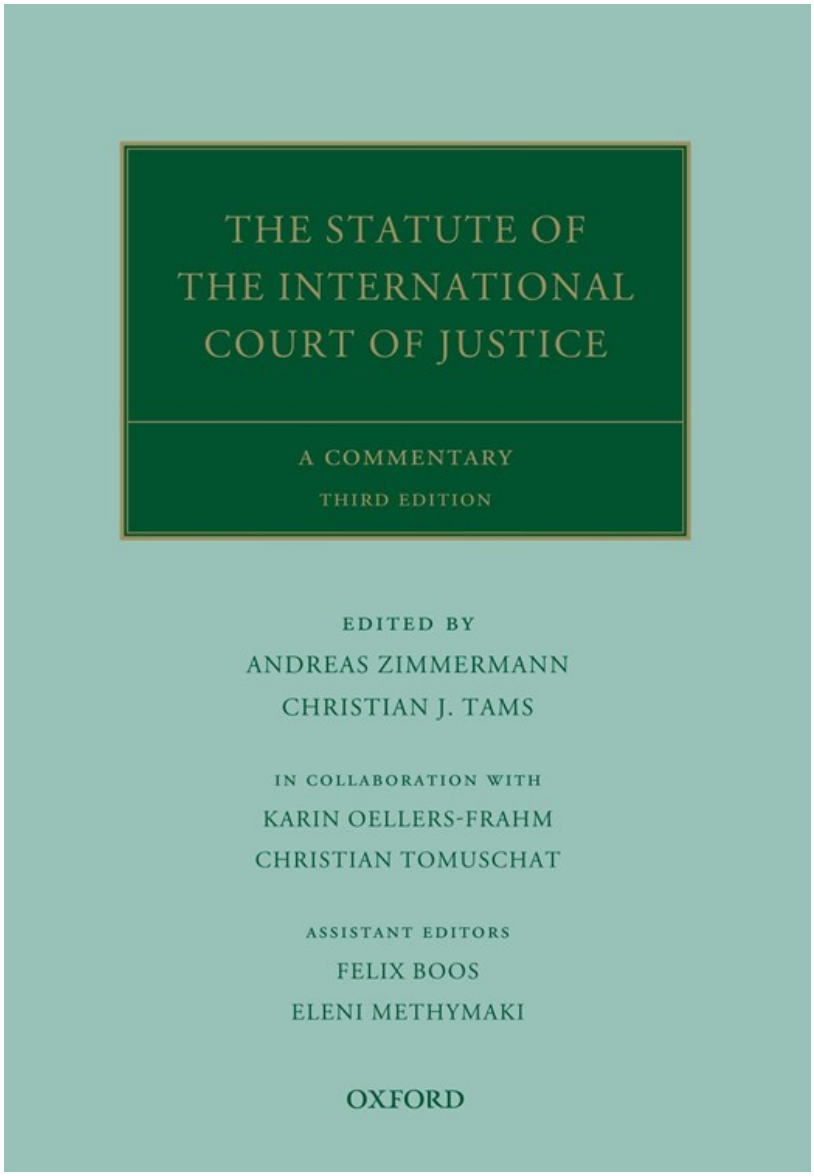

The Statute of the International Court of Justice: A Commentary (3rd Edition)

Andreas Zimmermann (ed.) et al.

https://doi.org/10.1093/law/9780198814894.001.0001

Published: 2019 **Online ISBN:** 9780191852589 **Print ISBN:** 9780198814894

CHAPTER

Article 36

Christian Tomuschat

https://doi.org/10.1093/law/9780198814894.003.0048 Pages 712–798

Published: March 2019

Abstract

This section is about Article 36 of the Statute of the International Court of Justice

Keywords: Jurisdiction, Genocide, UN Charter, Treaties, interpretation, Settlement of disputes, Sources, foundations and principles of international law

Subject: Arbitration, Public International Law, Private International Law and Conflict of Laws, International Criminal Law, International Humanitarian Law, Law of Treaties, Settlement of Disputes, Sources, Foundations and Principles of International Law, Law of the Sea

Series: Oxford Commentaries on International Law

Collection: Oxford Scholarly Authorities on International Law

1. 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.	**1. La compétence de la Cour s'étend à toutes les affaires que les parties lui soumettront, ainsi qu'à tous les cas spécialement prévus dans la Charte des Nations Unies ou dans les traités et conventions en vigueur.**
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:	**2. Les Etats parties au présent Statut pourront, à n'importe quel moment, déclarer reconnaître comme obligatoire de plein droit et sans convention spéciale, à l'égard de tout autre Etat acceptant la même obligation, la juridiction de la Cour sur tous les différends d'ordre juridique ayant pour objet:**
a. the interpretation of a treaty;	**a. l'interprétation d'un traité;**
b. any question of international law;	**b. tout point de droit international;**
c. the existence of any fact which, if established, would constitute a breach of an international obligation;	**c. la réalité de tout fait qui, s'il était établi, constituerait la violation d'un engagement international;**
d. the nature or extent of the reparation to be made for the breach of an international obligation.	**d. la nature ou l'étendue de la réparation due pour la rupture d'un engagement international.**
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.	**3. Les déclarations ci-dessus visées pourront être faites purement et simplement ou sous condition de réciprocité de la part de plusieurs ou de certains Etats, ou pour un délai déterminé.**
4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.	**4. Ces déclarations seront remises au Secrétaire général des Nations Unies qui en transmettra copie aux parties au présent Statut ainsi qu'au Greffier de la Cour.**
5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.	**5. Les déclarations faites en application de l'Article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes.**
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.	**6. En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide.**

MN

Select Bibliography

Abraham, R., 'Presentation of the International Court of Justice over the Last Ten Years', *JIDS* 7 (2016), pp. 297–307
Google Scholar WorldCat

Akande, D., 'Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)', *JIDS* 7 (2016), pp. 320–44
Google Scholar WorldCat

Alexandrov, S.A., *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice* (1995)
Google Scholar Google Preview WorldCat COPAC

——, 'Accepting the Compulsory Jurisdiction of the International Court of Justice with Reservations: An Overview of Practice with a Focus on Recent Trends and Cases', *Leiden JIL* 14 (2001), pp. 89–124
WorldCat

——, 'The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?', *Chinese JIL* 5 (2006), pp. 29–38
WorldCat

Arangio-Ruiz, G., 'The Plea of Domestic Jurisdiction before the International Court of Justice: Substance or Procedure?', in *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Lowe, V./Fitzmaurice, M., eds., 1996), pp. 440–64
Google Scholar Google Preview WorldCat COPAC

Briggs, H.W., 'Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice', *Rec. des Cours* 93 (1958–I), pp. 223–367
Google Scholar WorldCat

Brown Weiss, E., 'Reciprocity and the Optional Clause', in Damrosch, *ICJ at a Crossroads*, pp. 82–105
WorldCat

Charney, J., 'Compromissory Clauses and the Jurisdiction of the International Court of Justice', *AJIL* 81 (1987), pp. 855–87
Google Scholar WorldCat

Crawford, J., 'The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court', *BYIL* 50 (1979), pp. 63–86
Google Scholar WorldCat

D'Amato, A., 'Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court', *AJIL* 79 (1985), pp. 385–405
Google Scholar WorldCat

Damrosch, L.F., 'Multilateral Disputes', in Damrosch, *ICJ at a Crossroads*, pp. 376–400
WorldCat

Dominicé, C., 'La compétence *prima facie* de la Cour internationale de Justice aux fins d'indication de mesures conservatoires', in *Liber Amicorum Judge Shigeru Oda* (Ando, N., *et al*., eds., 2002), pp. 383–95
Google Scholar Google Preview WorldCat COPAC

Gaja, G./Grote Stoutenburg, J. (eds.), *Enhancing the Role of Law through the International Court of Justice* (2012)
Google Scholar Google Preview WorldCat COPAC

Hernández, G.I., *The International Court of Justice and the Judicial Function* (2014)
Google Scholar Google Preview WorldCat COPAC

Gordon, E., 'Legal Disputes under Article 36(2) of the Statute', in Damrosch, *ICJ at a Crossroads*, pp. 183–222

WorldCat

Gowland-Debbas, V., 'The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case', *AJIL* 88 (1994), pp. 643–77

Gray, C., 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua', *EJIL* 14 (2003), pp. 867–905
Google Scholar WorldCat

Hambro, E., 'The Jurisdiction of the International Court of Justice', *Rec. des Cours* 76 (1950–I), pp. 121–215
Google Scholar WorldCat

Koroma, A.G., '*Asserting Jurisdiction* by the International Court of Justice', in *Asserting Jurisdiction* (Capps, P., *et al*., eds., 2003), pp. 189–98
Google Scholar Google Preview WorldCat COPAC

Lamm, V., 'Reciprocity and the Compulsory Jurisdiction of the International Court of Justice', *Acta Jur. Hung.* 44 (2003), pp. 45–66
Google Scholar WorldCat

——, 'Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice', *Acta Jur. Hung.* 45 (2004), pp. 25–48
WorldCat

Merrills, J.G., 'The Optional Clause Today', *BYIL* 50 (1979), pp. 87–116
Google Scholar WorldCat

——, 'The Optional Clause Revisited', *BYIL* 64 (1993), pp. 197–244
WorldCat

——, 'The Optional Clause at Eighty', in *Liber Amicorum Judge Shigeru Oda* (Ando, N., *et al*., eds., 2002), pp. 435–50
Google Scholar Google Preview WorldCat COPAC

Morrison, F.L., 'Treaties as a Source of Jurisdiction, Especially in U.S. Practice', in Damrosch, *ICJ at a Crossroads*, pp. 58–81
WorldCat

Oda, S., 'The Compulsory Jurisdiction of the International Court of Justice: A Myth?', *ICLQ* 49 (2000), pp. 251–77
Google Scholar WorldCat

Orrego Vicuña, F., 'The Legal Nature of the Optional Clause and the Right of a State to Withdraw a Declaration Accepting the Compulsory Jurisdiction of the International Court of Justice', in *Liber amicorum Judge Shigeru Oda* (Ando, N., *et al*., eds., 2002), pp. 463–79
Google Scholar Google Preview WorldCat COPAC

Owada, H., Introductory Remarks at the Seminar on the Contentious Jurisdiction of the International Court of Justice, Speech to the Legal Advisers of United Nations Member States, 26 October 2010, <http://www.icj-cij.org/files/press-releases/5/16225.pdf>
WorldCat

Quintana, J.J., 'The Nicaragua Case and the Denunciation of Declarations of Acceptance of the Compulsory Jurisdiction of the International Court of Justice', *Leiden JIL* 11 (1998), pp. 97–121
Google Scholar WorldCat

Scott, G.L./Carr, C.L., 'The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause', *AJIL* 81 (1987), pp. 57–76
Google Scholar WorldCat

Shany, Y., *Questions of Jurisdiction and Admissibility Before International Courts* (2016)
Google Scholar Google Preview WorldCat COPAC

Simma, B., 'How Has Article 36 (2) of the ICJ Statute Fared?', in *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference* (Giegerich, T., ed., 2009), pp. 455–9
Google Scholar Google Preview WorldCat COPAC

Szafarz, R., *The Compulsory Jurisdiction of the International Court of Justice* (1993)
Google Scholar Google Preview WorldCat COPAC

Thirlway, H., 'The International Court of Justice 1989–2009: at the Heart of the Dispute Settlement System?', *NILR* 57 (2010), pp. 347–95
Google Scholar WorldCat

Tomka, P., 'The Special Agreement', in *Liber Amicorum Judge Shigeru Oda* (Ando, N., *et al*., eds., 2002), pp. 553–65
Google Scholar Google Preview WorldCat COPAC

Torres Bernárdez, S., 'Reciprocity in the System of Compulsory Jurisdiction and in other Modalities of Contentious Jurisdiction Exercised by the International Court of Justice', in *Essays in Honour of Judge Taslim Olawale Elias* (Bello, E.G./Ajibola, B.A., eds., 1992), pp. 291–329
Google Scholar Google Preview WorldCat COPAC

Verhoeven, J., 'Jus Cogens and Reservations or "Counter-Reservations" to the Jurisdiction of the International Court of Justice', in *International Law: Theory and Practice. Essays in Honour of Eric Suy* (Wellens, K., ed., 1998), pp. 195–208
Google Scholar Google Preview WorldCat COPAC

Waldock, C.H.M., 'The Plea of Domestic Jurisdiction Before International Legal Tribunals', *BYIL* 31 (1954), pp. 96–142
Google Scholar WorldCat

——, 'Decline of the Optional Clause', *BYIL* 32 (1955–1956), pp. 244–87
WorldCat

Wittich, S., 'The Judicial Functions of the International Court of Justice', in *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Buffard, I., *et al*., eds., 2008), pp. 981–1000
Google Scholar Google Preview WorldCat COPAC

A. Historical Development

The key issue concerning the adjudication of international disputes between States is under what conditions States may be subject to the jurisdiction of any potentially competent judicial body. At the height of the era of unfettered State sovereignty, from the middle of the nineteenth century to the outbreak of the First World War, there could be no doubt at all that any adjudication of inter-State disputes required the consent of the litigant parties. A formal reflection of this doctrine can be found in the 1907 Hague Convention for the Pacific Settlement of International Disputes (Article 38): 1

> In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognised by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. ↳
>
> Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.[1]

p. 717

This cautious approach could, on the one hand, be hailed as progress in legal thinking, since arbitration was acknowledged as the method best suited to resolve disputes having a legal background. On the other hand, however, it still confirmed the supremacy of sovereign political decisions in this field.

I. The PCIJ

2 After the First World War, it was generally realized that any peaceful modality of settling international disputes was indeed better than war. Judicial settlement was viewed more favourably than a few years earlier at the two Hague Peace Conferences of 1899 and 1907.[2] Thus, the Members of the newly established League of Nations formally declared their readiness to resort to judicial settlement of their differences. Article 12, para. 1 of the Covenant of the League provided:

> The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement ...

This statement was confirmed and corroborated by the propositions enunciated in Article 13, para. 1 and para. 2 of the Covenant:

> The Members of the League agree that, whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration or judicial settlement, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.
>
> Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

Notwithstanding these expressions of preference to be given to adjudication, it was still fairly open whether Articles 12 and 13 of the Covenant of the League contained any binding and enforceable obligations or whether the pertinent words constituted no more than a recommendation, to be executed in any single instance by the parties concerned through the conclusion of a *compromis* (or special agreement), which would in turn specify the precise modalities of submission of a given dispute to judicial determination. Decisive arguments militated in favour of the latter since in any event the States concerned had to make a choice between arbitration and judicial settlement.

3 The Committee of Jurists, entrusted by the Council of the League of Nations with drawing up a first draft for the establishment of a Permanent Court of International Justice,[3] recommended providing the Court with 'compulsory jurisdiction'. States were to be free to adhere to the instrument governing the future judicial
p. 718 body, but acceptance of ↳ that instrument was to be conceived as acceptance of the determination of any emerging dispute by judicial decision. Article 33 of the Committee's Draft Scheme was framed as follows:

> Lorsqu'un différend surgit entre Etats, qu'il n'a pu être réglé par la voie diplomatique et que l'on n'est pas convenu de choisir une autre juridiction, la Partie qui se prétend lésée peut en saisir la Cour. La Cour, après avoir décidé s'il est satisfait aux prescriptions précédentes, statue sous les conditions et limitations déterminées par l'article suivant.

This suggestion was rejected by the Council of the League of Nations. Likewise in the ensuing deliberations of the Assembly the proposals of the Committee of Jurists did not meet with approval.[4] The opinion prevailed that acceptance of the jurisdiction of the PCIJ should be encouraged but that States should have some discretion in restricting their submission to judicial settlement.[5] The end product of the discussion

process in the different bodies of the League of Nations was Article 36 of the Statute of the PCIJ, a provision largely similar to the current text of Article 36 of the Statute:

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.
>
> The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of 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.

> The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.
>
> In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Technically, it was not the Statute itself that constituted the focal point of signature and ratification but a Protocol of Signature with the Statute as an annex.[6] Curiously enough, declarations under Article 36, para. 2 of the Statute were not to be made directly under this provision but by accepting an 'Optional Clause' that was appended to the Protocol of Signature. This Optional Clause ran as follows: 4

> The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the ↳ jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions.[7]

p. 719

II. The Drafting of the Statute of the ICJ

When after the Second World War the establishment of a new world organization was envisioned, consideration had also to be given to complementing the organizational structure by a judicial body. The choice was between continuing the PCIJ and creating a new court. Very soon, the decision was made to opt for a fresh start, but on the basis of the experiences gathered from the operation of the PCIJ.[8] Once again, the pivotal issue was whether the jurisdiction of the new court should be compulsory or whether some optional elements should be included in the scheme. A Committee of Jurists, entrusted with carrying out preparatory work before the convening of the San Francisco Conference (the 'Washington' Committee of Jurists, named after its venue), proposed in its Draft of an International Court of Justice[9] two versions of a new Article 36, which was to be again the provision governing jurisdiction. While the first version followed more or less the model of the PCIJ Statute, the second version opted bluntly for the general submission of States to the jurisdiction of the planned court. It provided (para. 2): 5

> The Members of The United Nations and States parties to the present Statute recognise as among themselves the jurisdiction of the Court as compulsory *ipso facto* and without special agreement in any legal dispute concerning [then followed the well-known list].[10]

There was no additional para. 3 acknowledging the right of States to modify this commitment by reservations. However, in the commentary thereto—which acknowledged that this formula might be 'too simple'—it was recognized that some further elaboration might be necessary, permitting, for instance, some reservations *ratione temporis* or reservations excluding the occurrences of the recent war.[11]

At the San Francisco Conference, consideration of Article 36 was entrusted to Committee IV/1, which again established a Subcommittee for that purpose (IV/l/D). This latter body had to decide which draft it should take as the basis of its work. It had the choice between the two proposals submitted by the Washington Committee of Jurists and a draft submitted by New Zealand, which was also founded on a strict concept of compulsory jurisdiction (para. 2): 6

> Save as hereinafter excepted the court shall in particular have jurisdiction to hear and determine, and the parties to this Statute agree to submit to it, any legal dispute concerning ...[12]

New Zealand was not totally against excluding some classes of disputes from this clause, but in principle it favoured a comprehensive approach with almost no flexibility for States. The Subcommittee decided, however, to follow the traditional path (version 1 of the Washington Committee of Jurists draft),[13] although in reality most of the delegates ↳ favoured compulsory jurisdiction. From a realistic perspective it was feared that too rigid a scheme would become an obstacle to obtaining agreement on the text of both the Statute and the Charter.[14] In fact, it had clearly emerged in the discussions held in the plenary Committee that, in particular, the United States and the Soviet Union were staunch opponents of compulsory jurisdiction as suggested by the second version of the Washington proposals and the New Zealand proposal.[15] Eventually, the draft submitted by the Subcommittee[16] was approved by a broad majority of thirty-one to fourteen, following the logic of *realpolitik*. In sum, only two substantial changes had been made to Article 36 of the PCIJ Statute. The phrase 'or any of the classes' in Article 36, para. 2 was deleted, and a new para. 5 dealing with declarations made with regard to the PCIJ was added.

p. 720

B. Main Features of the Jurisdictional Scheme under Article 36

I. Jurisdiction

The concept of jurisdiction as employed in Article 36, para. 1 denotes the authority of the ICJ to make binding determinations by adjudicating disputes between States.[17] Although this provision does not place the Court to a hierarchically superior position compared to other adjudicatory bodies in international law, the Court 'remains the pre-eminent standing tribunal for the adjudication' of such disputes.[18] As provided for under Article 34, the ICJ is not vested with authority to decide on disputes with or among other subjects of international law, which may appear as an anachronism at a time when in particular the European Union is increasingly admitted as a party to multilateral conventions. In the practice of the ICJ, no difficulties have arisen as to the meaning of the term jurisdiction. Generally, the ICJ has taken great care in interpreting the substantive scope of jurisdiction conferred upon it by the parties. In recent years, the interpretation of the scope *ratione materiae* of jurisdictional clauses has increasingly given rise to difficulties. However, the authority of the decisions handed down by the Court has rarely been challenged, since it directly derives from Article 94, para. 1 UN Charter.[19] 7

p. 721

II. Disputes

The jurisdiction of the ICJ in inter-State relationships is of an adversarial nature; it extends only to disputes.[20] This specification, which appears not only in Article 36, para. 2 but also Articles 38, para. 1 and 40, para. 1, applies to the whole of Article 36, as well as to cases brought before the Court under a conventional instrument, either by way of a *compromis* or in accordance with a compromissory clause in a bilateral or multilateral treaty. Non-contentious proceedings, *i.e.*, proceedings aimed at obtaining from the ICJ an advisory opinion, may only be instituted pursuant to Article 96 UN Charter. Individual States are not entitled to request an advisory opinion. It is obvious that to open advisory proceedings to States too would burden the ICJ with an unmanageable workload, in particular at a time when the membership of the United Nations has risen to 193 States. 8

In one of its first judgments in 1924, *The Mavrommatis Palestine Concessions*, the PCIJ elaborated a definition of the term 'dispute' which has been maintained by its successor without any significant modification as to its terms: 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.'[21] Indeed, in recent decisions rendered by the ICJ in the *Certain Property* case,[22] in *Armed Activities (New Application: 2002)* (DRC v. Rwanda),[23] as well as more recently in the *Marshall Islands* cases,[24] the *Mavrommatis* judgment was again referenced. It is evidently considered as a determinative precedent the validity of which remains unaffected by the passage of more than eight decades,[25] although technically it does not seem to be entirely correct: a conflict of interests, which might be based on political grounds, would not satisfy the requirements which the Court itself has upheld in its later decisions.[26] Implicitly, at least, the Court has consistently proceeded from the assumption that an applicant must advance a legal claim. Except for this limitation, however, the concept of dispute has always been interpreted in a truly broad sense. In only one instance (comprising three cases) has the Court determined that no dispute existed between the parties because the applicant, *i.e.*, the Marshall Islands, had not sufficiently specified that by requesting nuclear disarmament it was in fact pursuing a genuine legal claim against the respondents: India, Pakistan, and the United Kingdom. The grounds relied upon by the Court were less than convincing, which led to a split vote of eight against eight among the judges, the vote of the President becoming determinative for rejecting the claims as not coming within the jurisdiction of the Court.[27] Notwithstanding this broad conception of the term, the jurisprudence of the ICJ has particularized the general proposition by adding some elements which give it somewhat clearer contours. Thus, in the *South West Africa* cases, the ICJ stated that it must be shown that 'the claim of one party is positively opposed by the other',[28] a formula which reappears in the *Northern Cameroons* case embodied in the requirement that the existence of a dispute presupposes 'opposing views' as to the interpretation and application of a legal rule.[29] In this case, the Court also made a general statement about the relevance of the concept of dispute within the Statute's system of adjudication: 9

p. 722

> The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.[30]

It has also been emphasized that the presence of a dispute is a matter for objective determination:[31] it is 'not sufficient for one party to assert that there is a dispute'.[32] None of these additional components has brought about any significant substantive change to the original *Mavrommatis* formula: they have clarified the requirement of 'dispute', but have not granted it with a new meaning.

However, as already hinted earlier, in the *Marshall Islands* cases the ICJ has introduced a new criterion that had never been applied before. According to the Court, the respondent party must have become aware prior to the application for judicial settlement of the fact that its position was actually opposed by the applicant.[33] It may well be that this new element will soon be surpassed since it does not seem to serve any useful purpose. It also seems to be incompatible with the proposition that the existence of a dispute is a matter for

objective determination by the ICJ.[34] In any event, it is clear that the intention to seise the Court does not
p. 723 have to be brought to the opponent's knowledge by a formal ↳ notification, nor is it a general requirement that prior negotiations must have taken place before a dispute in the legal sense emerges.[35]

Controversies have arisen concerning the question as to whether a dispute must exist at the time of the filing of the application or whether the requirement of a dispute can be understood in a more flexible way as being susceptible of crystallizing at a later stage during the course of the proceedings. In the *Marshall Islands* cases the ICJ determined that indeed the institution of proceedings is the relevant date;[36] on the contrary, in its preceding jurisprudence it had shown greater flexibility, holding that through the subsequent procedural acts of a party the issue in question may attain the character of an inter-State dispute.[37] Specifically on this matter the judges in the *Marshall Islands* cases were deeply divided.

Additionally, it is of no significance, according to the Court, whether the claims brought forward by the 10
applicant party are asserted 'rightly or wrongly'.[38] No matter how self-evident this statement seems to be, inasmuch as at the stage of ruling on jurisdiction and admissibility the ICJ cannot pronounce on the merits of a case, it raises some problems if a State makes claims which are devoid of any substantiation. Thus, in the *Certain Property* case, Liechtenstein claimed compensation for the loss of assets that had been confiscated by Czechoslovakia at the end of the Second World War in 1945 and which had never been interfered with by Germany. It is doubtful whether in such circumstances, where a claim is predicated on an artificial legal construction unsupported by any facts, the refusal of the respondent to accede to the demands of the claimant is capable of engendering a true legal dispute.[39] Following the logic resorted to by the ICJ in the *Certain Property* case, a dispute could be 'invented' at any time against any State. Yet, the dispute requirement serves to protect States from having to answer frivolous claims brought against them. It should not be overlooked that conducting proceedings before the ICJ entails considerable expenditures.[40]

III. Difference of Opinion

In some compromissory clauses, the term 'difference of opinion' may be used. In its judgment in the *Certain* 11
p. 724 *German Interests* case, the PCIJ had to construe that expression, ↳ which defined its jurisdiction under a German–Polish convention of 1922. It found that 'a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views'.[41] Thus, the threshold is lower than that required for the existence of a dispute.[42] It suffices that one of the parties disagrees with a position taken by the other, there being no need for that disagreement to have been translated into an open conflict with the opponent.

IV. Legal Disputes

The jurisdiction of the ICJ is confined to legal disputes as opposed to political ones, although according to 12
the text of Article 36 a difference seems to exist between para. 1 and para. 2: only the latter refers explicitly to 'legal disputes'. Such differentiation would, however, run counter to the philosophy of Article 36. In the high time of the sovereign State, before the outbreak of the First World War, great efforts were spent on distinguishing between the two classes of disputes.[43] A formula largely in use excluded from arbitration disputes affecting 'national honour, vital interests or independence'.[44] Still, in the 1920s and 1930s, the classification scheme gave rise to heated discussions. During that epoch, the debate was stimulated by the regime of the 1928 General Act for the Pacific Settlement of International Disputes. Under Article 28 of the Act,[45] non-legal disputes, *i.e.*, political disputes, were to be referred to an arbitration tribunal.

It is clear that the ICJ would be unable to adjudicate a case if the applicant did not invoke any legal rules in 13
support of its submissions. This, however, is a remote eventuality that has never occurred. Rightly, therefore, legal doctrine has ceased focusing on the issue. In fact, the legal position has undergone dramatic

changes since the coming into force of the Statute of the PCIJ. The network of rules of international law has become so tight in the contemporary world, in particular through the inclusion of human rights in the body of international law, that there exists hardly any matter to date that would be totally removed from the realm of international law.[46] Only once has the Court had the opportunity to state what it understands by a legal dispute, namely a dispute 'capable of being settled by the application of principles and rules of international law'.[47] In the *Aegean Sea Continental Shelf* case, the Court concluded that it was manifest that 'legal rights' lay at the root of the dispute that divided the two litigant parties, Greece and Turkey.[48]

p. 725

V. Political Disputes

It is a different question altogether whether a dispute may become unsuitable for adjudication on account of the political context in which it is embedded. By their very essence, disputes between States are permeated by political considerations. Consequently, it would be fatal for the ICJ to deny its jurisdiction solely on the ground that inevitably its decision will contribute to shaping the political circumstances from which it arose. When in the Tehran hostage crisis, the request of the United States to indicate provisional measures was countered by Iran with the argument that the hostage issue formed 'only "a marginal and secondary aspect of an overall problem" involving the activities of the United States in Iran over a period of more than 25 years',[49] the Court emphasized that: 14

> no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.[50]

This statement was confirmed in the judgment on the merits:

> never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them.[51]

This was the basis on which the ICJ also rejected challenges against its jurisdiction in the *Nicaragua* case[52] and the case between Nicaragua and Honduras, where it also specified that any possible 'political motivation' of an application is irrelevant for the discharge of its judicial function.[53] This would seem to be the final word of the ICJ on the issue. The Court would emasculate itself if it refrained from agreeing to clarify the legal position in disputes of great importance for the peace and security of the world. Concerning advisory proceedings, the Court has also firmly insisted that the political character of a question submitted to it does not affect its jurisdiction.[54] Rightly, the ICJ views itself as part and parcel of the machinery established by the UN Charter with the foremost task of promoting the purposes and principles of the Charter over their entire breadth. Neither any act-of-State doctrine nor any political-question doctrine[55] hampers the discharge of its functions.

During its time of existence, the PCIJ was rather reluctant to accept as coming within its jurisdictional mandate tasks of a substantially non-legal character which went beyond saying whether the conduct of one (or both) of the parties was lawful. Thus, in the *Free Zones* case, ↳ the Court denied that it could settle all the questions involved in the execution of Article 435, para. 2 of the Treaty of Versailles, a provision suggesting a new legal framework for the specific customs regime in the free zones in the vicinity of the city of Geneva inherited from the Vienna Peace Conference of 1815. It held that its adjudicatory competence was confined to legal issues and that it could not deal with questions that had to be decided on the basis of economic considerations.[56] A few years later, in the *Socobel* case,[57] it came to the conclusion that it could not compel the parties before it (Belgium and Greece) to enter into an arrangement which would be adjusted to the budgetary and monetary capacity of Greece.[58] Today, the Court would probably have fewer hesitations in making pronouncements on such issues that lie at the borderline between law and fact, given the much less 15

p. 726

hermetic separation between international and domestic law. In its time, the PCIJ also seems to have overlooked that in any event it was entitled, with the consent of the parties concerned, to render decisions *ex aequo et bono*. For such decisions, it is imperative not to limit the elements to be taken into account to legal grounds, but to assess the wider context that comprises both factual data and political considerations.

VI. The ICJ and the Security Council

The UN Charter does not contain any rules on the relationship between proceedings before the ICJ and parallel proceedings before the Security Council.[59] Only the relationship between the two main political organs, the General Assembly and the Security Council, has been regulated in Article 11, para. 2 and Article 12 UN Charter. According to these provisions, the Security Council enjoys precedence in matters of international peace and security. In the absence of any similar rule, the ICJ has denied any subordination to the Security Council.[60] In the *Nicaragua* case, it stressed that according to Article 24 UN Charter the Security Council is vested with primary, but not exclusive responsibility for the maintenance of international peace and security, adding: 16

> The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.[61]

This proposition has been confirmed in all later cases, where alongside the Court the Security Council had also been seised of the same situation.[62] In particular, the adoption by the Council of resolutions on the same matter cannot deprive the Court of its ↳ jurisdiction once a dispute has been submitted to it.[63] From a political viewpoint, the underlying philosophy of cooperation between the ICJ and the Security Council should be unconditionally welcomed.[64]

p. 727

Once the Security Council has made decisions under Chapter VII of the UN Charter, the obligations deriving therefrom prevail over any obligations which the parties concerned may bear under other international agreements (Article 103 UN Charter).[65] The legal effects produced by such Security Council decisions will hence also have to be taken into account by the ICJ.[66] The ICJ may not issue orders that contradict binding resolutions of the Security Council. However, in the *Lockerbie* cases, where the Court indeed showed such respect for the Security Council, the handling of the matter gave rise to serious doubts concerning whether SC Res. 748 (1992) had been adopted with a view to frustrating the pending proceedings before the Court.[67] 17

VII. Disputes Unsuitable for Judicial Settlement

Only in a single instance has the ICJ refused to entertain a dispute as being unsuitable for judicial settlement, namely in the *Northern Cameroons* case.[68] The Republic of Cameroon was of the view that the United Kingdom, as the Trusteeship Authority for the Northern Cameroons, had not complied with its obligations resulting from the Trusteeship Agreement of 1946 to separate the administration of that specific territorial unit from the administration of Nigeria. Because of that, the results of a plebiscite held on 11 and 12 February 1961, in which the population of Northern Cameroons had opted to become independent by joining Nigeria, had been vitiated. Cameroon sought a declaratory judgment from the Court, being aware of the fact that the General Assembly had approved the plebiscite and that just two days after the filing of the application (30 May 1961) Northern Cameroons had joined Nigeria (1 June 1961). Given these circumstances, the Court obviously felt that the developments as they had in fact taken place could not be reversed and that any adjudication would be ‘devoid of purpose’.[69] It held: 18

> There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an

> applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[70]

p. 728 This judgment sits uncomfortably between a doctrine insisting on the propriety of the judicial function and an alternative explanation that views the case simply as having lost its object. In the *Frontier Dispute* between Burkina Faso and Niger the same *ratio decidendi* was resorted to in a case where the Court had been requested to 'place on record' the parties' agreement on the delimitation of the frontier between the two countries. For the Court, whose function it is to adjudicate disputes, such a task resembling that of a notary public lies beyond its jurisdiction.[71] In the *Marshall Islands* case the United Kingdom forcefully argued that the controversy about the obligation to enter into negotiations concerning nuclear disarmament was unfit for adjudication. Rejecting the Marshall Islands application because of the absence of an actual dispute, the ICJ did not address that particular objection. Yet, the UK's position was shared by the Chinese judge,[72] while two other judges emphasized that the objection would have deserved careful examination.[73]

VIII. Consent

Article 36 is consistently founded on the principle of consent. Thirlway calls it 'a truism that international judicial jurisdiction is based on and derives from the consent of States'.[74] At the present juncture, according to the prevailing view in legal doctrine,[75] no State can be compelled to accept the jurisdiction of the ICJ. Article 33, para. 1 UN Charter explicitly sets forth that the parties to any dispute have the right to resort to methods of settlement 'of their own choice'. Although the UN Charter characterizes the ICJ as the 'principal judicial organ of the United Nations' (Article 92), admission as a member to the World Organization—and thereby as a party to the Statute—does not amount to automatic submission to the jurisdiction of the Court. For its part, consent may be expressed in various forms. Article 36, para. 1 deals with instances where the agreement of the parties concerned is expressed in conventional form, either in a *compromis* (special agreement) or in a compromissory clause in a pre-existing international agreement, while Article 36, para. 2 governs unilateral declarations which States are free to make under the optional clause. The Court has invariably upheld the principle of consent in its jurisprudence.[76] The absolute freedom of States either to accept or to reject judicial settlement of their disputes may at first glance appear to be anachronistic in the world of today where so many supranational regimes have come into existence, the most prominent among them being the sophisticated regime of the European Union with the broad compulsory jurisdiction of the European Court of Justice. However, it is still true that at world level, the chances of voluntary compliance are slim. If States were forced to submit their disputes to the jurisdiction of the Court, the record of actual 19
p. 729 compliance with judgments ↳ rendered would be abysmal. It is therefore unavoidable that developments should take place cautiously, step by step.

If during ongoing proceedings a State disintegrates, the consent given will not be automatically inherited by the successor States. In the *Bosnian Genocide* case, the Court held that the case could be pursued against the Republic of Serbia, which continued the personality of the former State of Serbia and Montenegro. By contrast, Montenegro, which was generally recognized as a new State, could not be deemed to remain involved as a second respondent to the proceedings since it had not specifically given its consent to the jurisdiction of the Court.[77] 20

IX. Indispensable Third Party

1. The Principle

Since the adjudication of the *Monetary Gold* dispute,[78] it is acknowledged that in certain instances the Court is unable to entertain the merits of a case if a third party, whose presence is indispensable for a thorough examination of the case at hand, has not given its consent to the proceedings and is not present before the Court. In that dispute between Italy, on the one hand, and France, the United Kingdom, and the United States on the other, the Court was requested to determine, *inter alia*, whether certain quantities of gold, rightfully owned by Albania, were to be given back to Albania or should instead be delivered to Italy as compensation for damage allegedly caused to Italy by an Albanian law. Although it was the applicant, Italy raised a preliminary objection on account of the absence of Albania from the proceedings. Responding to this objection, the Court held: 21

> In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania ... Where ... the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.[79]

It is not easy to determine when these conditions are fulfilled. In the *Nicaragua* case the Court rejected a rather unsubstantiated reference of the United States to the rights and ↳ interests of some other Central American States (Costa Rica, El Salvador, Honduras) as being irrelevant for the adjudication of the submissions before it.[80] In the *Nauru* case, the key issue was whether the responsibility of Australia for the unlawful exploitation of Nauru's natural resources, as alleged by Nauru, could be determined independently of the responsibility of the United Kingdom and New Zealand. All three governments had acted jointly as Administering Authority, first under a League of Nations Mandate and later under a Trusteeship granted by the United Nations. Australia contended that the Court could not pass judgment upon its responsibility without adjudicating upon the responsibility of the other two States. The Court pointed out that normally third States are protected by the provision of Article 59, according to which a judgment is binding only between the parties and in respect of the particular case decided. In that case, the determination of the responsibility of New Zealand and the United Kingdom was not a prerequisite for the determination of the responsibility of Australia, although any finding might well have had implications for the legal situation of those two States.[81] In the *Armed Activities* case (DRC v. Uganda) the Court followed this precedent by arguing that certain interests of Rwanda, which had also been involved in hostilities with Uganda on the territory of the Congo, did not constitute 'the very subject-matter' of the decision to be rendered.[82] By contrast, in *East Timor*, where the subject-matter was constituted by an agreement between Australia and Indonesia about the delimitation of the continental shelf in the Timor Gap, the Court refused to exercise its jurisdiction. It stressed that by necessity it would have had to determine whether the occupation of East Timor by Indonesia was wrongful under international law: p. 730

> 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 its continental shelf.[83]

In the *Certain Property* case, the Court refrained from ruling on a preliminary objection raised by Germany according to which any decision on the compensation claims made by Liechtenstein regarding Liechtenstein assets confiscated by Czechoslovakia in 1945 would presuppose a determination of the lawfulness of the

Czechoslovak measures.[84] In one of the *Marshall Islands* cases the issue was raised whether an injunction against the United Kingdom to engage actively in negotiations for nuclear disarmament could produce any real effects since a positive outcome could only be reached by agreement between all the parties to the Non-Proliferation Agreement.[85] The ICJ avoided this delicate issue by rejecting the application on the ground of absence of a dispute.

The *Monetary Gold* rule does not apply to instances where an incidental assessment of the conduct of UN 22
p. 731 institutions (for instance, conduct of the personnel of a peacekeeping ↳ mission) may have to be conducted. The United Nations is not a sovereign entity. Institutionally, since the Court is one of its own organs, it must be deemed to be debarred from arguing that no judicial determination on its rights and obligations may be carried out in its absence. Under no circumstances can the United Nations assume the role of a party in a contentious proceeding (Article 34, para. 1). Furthermore, given that the United Nations is today almost invariably involved in some way or another in any grave international crisis situation, resort to the doctrine of the indispensable third party could result in serious damage to the judicial function of the Court. If the Secretary-General is of the view that in a contentious proceeding the rights and interests of the United Nations might be adversely affected, he or she is free to provide the relevant information under Article 34, para. 2.

2. Boundary Disputes

Boundary disputes constitute a special class of disputes where the rights or interests of a third party may be 23
adversely affected. On a number of occasions, it has been argued by the respondent in such a dispute that a boundary could not be determined in the absence of a neighbouring State that might also have legitimate claims to the territory or maritime area concerned. In such circumstances, the Court has to consider whether an absent third party is sufficiently protected by the provision of Article 59 according to which a decision 'has no binding force except between the parties', and by the opportunities provided to it under Article 62 to intervene in a proceeding taking place between two other States.[86] Additionally, it must under its own responsibility see to it that it does not encroach upon the basic principle that for any judicial pronouncement the consent of the State concerned is necessary.

a) Maritime Boundaries

On the one hand, regarding delimitation of the territorial sea, the exclusive economic zone or the 24
continental shelf, the Court has shown great reluctance in making determinations in areas claimed or that may potentially be claimed by a third State. In the *Continental Shelf* case between Libya and Malta, it abstained from pronouncing on the delimitation between the two litigant parties in those sectors where Italy had maintained that it was the holder of the rights concerned.[87] One of the reasons lying behind this caution was the perception that Italy's claims were not 'obviously unreasonable'.[88] In the *Land and Maritime Boundary* case,[89] the Court held that the rights of both Equatorial Guinea and Sao Tomé and Principe had to be taken into account,[90] notwithstanding the fact that Equatorial Guinea had chosen not to intervene in the proceedings between Cameroon and Nigeria. Essentially, in concretizing this approach, it proceeded from the equidistance principle as laid down in UNCLOS.[91] Therefore, it pronounced on the lateral delimitation of the exclusive economic zones between Cameroon and Nigeria only up to a certain point which was clearly
p. 732 out of the reach of any legitimate claim of the two potentially affected neighbouring ↳ countries.[92] The same approach was followed in denying Costa Rica the right to intervene in the proceedings between Nicaragua and Colombia over the delimitation of the two countries' maritime zones in the Caribbean Sea. In that case, the Court observed that the interests of Costa Rica were sufficiently protected by Article 59 of the Statute which defines and restricts *res judicata* to the parties involved in the case at hand.[93]

b) Land Boundaries

As far as land boundary disputes are concerned, the Court has never felt prevented from adjudicating the issues brought before it. In the *Frontier Dispute* case between Burkina Faso and Mali, where Mali argued that the frontier line could not be determined to its full length, *i.e.*, as far as the point of intersection with the boundary of Niger, the Court rightly held that no claims had been made by Niger to the disputed area and that in any event Niger was protected by Article 59 of the Statute.[94] Likewise, in the *Territorial Dispute* between Libya and Chad[95] it was clear beyond any doubt that, because of its geographical location, the boundary line the Court was requested to determine could not affect any third State; nonetheless, in order to allay any possible concerns, the Court emphasized again that the interests of Niger would be safeguarded by the limited *ratione personae* effect of its judgment.[96] Finally, in the *Land and Maritime Boundary* dispute between Cameroon and Nigeria,[97] the preliminary objection raised against Cameroon's application was of a totally theoretical nature, the frontier line between Cameroon and Chad up to the tripoint in Lake Chad never having been contested by Chad.[98] In other words, the Court has never had to deal with a case where two States would have attempted to obtain by adjudication sectors of a territory which according to plausible evidence belonged to a third State. One may assume that in such an instance the Court would indeed rely on the *Monetary Gold* principle. Therefore, it should not be concluded that there is any determinative distinctive feature between land and maritime boundary disputes, as in none of the land boundary cases hitherto adjudicated by the Court could any real or possible interference with the rights of a third State be perceived. By contrast, in the maritime cases as set out previously it was obvious that by going beyond certain geographical points the Court might have indeed encroached upon the rights of other States. 25

X. *Jus cogens*

The jurisprudence of the Court has clarified that allegations of a breach of *jus cogens* or *erga omnes* rules[99] do not provide a special title of jurisdiction, independently of the ↳ provisions of Article 36. In the *East Timor* case, Portugal attempted to overcome the *Monetary Gold* obstacle by contending—in consonance with the Court—that the right of self-determination of peoples, which was at issue in the proceedings, should be balanced against Indonesia's sovereignty, *i.e.*, the object safeguarded by the *Monetary Gold* rule, and should be given precedence. The Court flatly rejected this submission: 26 p. 733

> Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[100]

With slightly different words, this *dictum* was repeated in the provisional measures phase of the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case, where the Democratic Republic of the Congo invoked a number of rules which do indeed form the core of a world order based on peace and respect of human rights: 'whereas it does not follow from the mere fact that rights and obligations *erga omnes* are at issue in a dispute that the Court has jurisdiction to adjudicate upon that dispute'.[101] The determination on jurisdiction and admissibility followed the same lines, this time, however, by adding explicitly that invocation of *jus cogens* norms did not change the legal position.[102] Significantly enough, when ruling on Bosnia-Herzegovina's application against Serbia with respect to allegations of genocide,[103] the Court focused exclusively on the jurisdictional clause in Article IX of the Genocide Convention and refrained from even considering that jurisdiction could automatically flow from the breach of a *jus cogens* rule.[104] On the other hand, in the genocide case brought by Croatia against Serbia the ICJ confirmed explicitly that neither the invocation of an *erga omnes* obligation nor of a *jus cogens* rule could affect its jurisdiction.[105] Unfortunately, the Court is absolutely right in this finding. If any infringement of *jus cogens* or *erga omnes* rules provided access to the Court, any armed conflict could be submitted to adjudication inasmuch as the principle of non-

use of force is deemed to belong to that class of legal norms. This would overstretch the capacities of the Court. To date, the 'constitutionalisation' of public international law has not reached a point where it is generally acknowledged that at least the most basic principles upon which the legal order is found would be automatically enforceable by judicial means.[106]

p. 734 Hence it is also perfectly permissible to enter a reservation to a compromissory clause or to restrict the scope of a unilateral declaration of acceptance of the jurisdiction of the Court with regard to activities which openly contradict, or in any event are susceptible of contradicting, *jus cogens* or *erga omnes* rules.[107] Excluding a judicial remedy does not, in principle, affect the substantive rule as such. The special authority of *jus cogens* norms does not also encompass secondary rules relating to procedure.[108] It is precisely with regard to such eventualities that States wish to be free to choose the best-suited method of peaceful settlement. The legitimacy of this concern cannot be denied. Indeed, it would be difficult to argue that, with regard to instances of armed conflict, settlement by judicial pronouncement is the most appropriate course. Generally, judges are unable to deal successfully with entire periods of history, given the procedural meticulousness they are required to apply in identifying and appraising the relevant facts. It is significant in this regard that the relevant instruments of international humanitarian law do not contain any compromissory clauses. 27

XI. Reciprocity

The term 'reciprocity' appears solely in Article 36, para. 3, but it permeates the provision on the jurisdiction of the Court in its entirety.[109] Whenever a compromissory clause is contained in an international agreement ('treaties and conventions in force') in accordance with Article 36, para. 1, it applies obviously to all the parties concerned in a like manner, provided that the parties have not opted for a different formula. Thus, compromissory clauses ensure equality with regard to access to the Court (principle of 'mutuality'). Alternatively, if States make a unilateral declaration pursuant to Article 36, para. 2, that declaration extends its effects to 'any other state accepting the same obligation'. In other words, such declarations may only be invoked by States that on their part have accepted the jurisdiction of the Court ('consensual bond'). If it were otherwise, if any State could *ad hoc* institute proceedings against States subject to the jurisdiction of the Court, the so-called sitting duck phenomenon would be produced: those States having made a declaration under Article 36, para. 2 would remain unprotected. They would not reap any benefit from their willingness to support the rule of law in international relations. Reciprocity is a device suitable to entice them to make use of the optional clause. By submitting to the jurisdiction of the Court, they not only become possible targets of applications directed against them but also they acquire at the same time the right to sue all of those States which have also chosen to entrust their legal disputes to judicial settlement by the Court.[110] 28

Reciprocity governs not only the relationship *ratione personae* between the different States concerned p. 735 ('mutuality'), but determines also the scope *ratione materiae* of the ↳ jurisdiction of the Court. This is self-evident in that under Article 36, para. 1 States subscribe to the same compromissory clause. As far as unilateral declarations according to Article 36, para. 2 are concerned, there is of course no guarantee that they all cover the same ground, given that Article 36, para. 3 explicitly permits reservations. To submit to the jurisdiction of the Court, to keep aloof from it, or to embark on a middle course by modifying the declaration through reservations belongs to the sovereign rights of every State. However, in order to maintain a condition of equality among all of the parties having accepted the optional clause, it is necessary also to apply the principle of reciprocity as regards subject-matter. The jurisdiction of the Court exists only to the extent that the commitments of the two sides coincide.[111] This means that the lowest common denominator is the determining parameter. On the other hand, the exact wording of the relevant declarations does not matter; they only need to match one another regarding their substantive scope. Reciprocity furthermore entails an entitlement for each of the litigant parties to invoke not only its own 29

reservations but also the reservations entered by its opponent. Thus, in the *Norwegian Loans* case,[112] Norway relied on the French declaration of acceptance of the jurisdiction of the Court which, following the US declaration with the famous *Connally* Reservation, read as follows: 'The declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic.'[113] On that ground, the Court had to dismiss the French application.

Another famous example is provided by the time clause Yugoslavia inserted in its declaration of acceptance of the jurisdiction of the Court of 26 April 1999. By excluding all disputes that had arisen before that date, it forwent the right to bring to the cognizance of the Court the air attacks by NATO States on its territory in the Kosovo conflict, since those bombings had started on 24 March 1999 and were considered by the Court to constitute a unity that could not be dissected into different conflicts on a daily basis.[114] In the *Whaling in the Antarctic* case, Japan denied the jurisdiction of the ICJ on the basis of the reservation Australia had appended to its declaration under Article 36, para. 2, eventually without success as Australia's reservation was related to delimitation issues and whaling was considered a matter of a different nature.[115] In other words, reciprocity pervades Article 36 as a whole, although with some limitations.[116] It is not relevant only for para. 3. Indeed, reciprocity ensures fairness relating to the conditions of access and subjection to the Court. It may thus be viewed as a particularization of Article 2, para. 1 UN Charter, reflecting also the requirement of good faith which is enshrined in Article 2, para. 2 UN Charter.

p. 736

XII. Issues to be Raised *ex officio* or *proprio motu* by the Court

Jurisdiction belongs to the issues which the Court must examine *ex officio* or *proprio motu*. It cannot entertain the merits of a case brought before it without having determined that it is entitled to do so.[117] 30
Certainly, a respondent State is free implicitly to accept the jurisdiction of the Court, even if the relevant application has not been able to identify any title of jurisdiction, by answering the application and the supporting memorial without raising any preliminary objections (*forum prorogatum*, Article 38, para. 5 of the Rules). Moreover, if a State deliberately refrains from asserting a jurisdictional defence, as did the United States in the *Nicaragua* case, where it deliberately abstained from invoking the *Connally* reservation in order not to suffer a severe defeat (as it is hardly a plausible argument that the violation of Nicaraguan territory would come under the domestic jurisdiction of the United States),[118] there is no ground for the Court to step in as 'guardian' of the respondent. However, as soon as the respondent party objects to its jurisdiction, the Court must ascertain whether it is in fact entitled to rule on the substance of the requests before it.[119] Thus, for instance, in the *Tehran Hostages* case, the Court examined on its own initiative whether the fact that the United States had referred its dispute with Iran to the Security Council affected in any manner its right to discharge its judicial functions[120]—which it found not to be the case.[121] In the *Legality of Use of Force* cases, the Court originally made the time clause in the Yugoslav declaration of acceptance the pivotal issue, concluding that it lacked jurisdiction to indicate provisional measures,[122] although at least one of the respondents (Belgium)[123] had not invoked that clause as an obstacle barring Yugoslavia's request.[124] Furthermore, in the same case the Court has clarified that in a given proceeding the parties are not entitled retroactively to make determinations on the right of the applicant to seise the Court in accordance with the rules governing its jurisdiction. The question whether a State has access to the Court as a party to the Statute or under the conditions specified in Article 35, para. 2 of the Statute lies outside the matters the parties can dispose of:

> The question is whether *as a matter of law* Serbia and Montenegro was entitled to seise the Court as a party to the Statute at the time when it instituted proceedings in these cases. Since that question is independent of the views or wishes of the Parties, even if they were now to have arrived at a shared view on the point, the Court would not have to accept that view as necessarily the correct one. The function of the Court to enquire into the matter and reach its own conclusion is thus

p. 737

> mandatory ↳ upon the Court irrespective of the consent of the parties and is in no way incompatible with the principle that the jurisdiction of the Court depends on consent.[125]

In the *Bosnian Genocide* case between Bosnia and Herzegovina and Yugoslavia (Serbia and Montenegro), the Court unfortunately did not live up to its own standards. It did not examine *ex officio* whether a claim could validly be brought against Yugoslavia (Serbia and Montenegro), confining itself to scrutinizing the preliminary objections raised by the Yugoslav government.[126] None of the two litigant parties was at that time interested in drawing the attention of the Court to the issues arising under Article 35 of the Statute. Bosnia and Herzegovina did not wish to imperil its own application, and the 'new' non-socialist Yugoslavia (Federal Republic of Yugoslavia, FRY) firmly maintained its assertion that the demise of the socialist State (Socialist Federal Republic of Yugoslavia, SFRY) through dissolution had not affected its identity. In the *Legality of Use of Force* cases, the Court eventually had to acknowledge that continuity of UN membership (beyond 27 April 1992, the day of the establishment of the 'new' Yugoslavia) could not be upheld.[127] When eventually the Court had to rule on the merits of the charges of genocide brought by Bosnia-Herzegovina against Serbia[128] and, in the analogous case of Croatia against Serbia to assess its jurisdiction,[129] it went into a lengthy discussion of the meandering of its jurisprudence without being able to afford a plausible explanation. By that time, in any event, Serbia had invoked the inapplicability of the compromissory clause of Article IX of the Genocide Convention.

On the other hand, it is not the task of the Court to search for titles of jurisdiction which the applicant itself has not invoked.[130] It may be quite difficult, in a given case, to know on what basis the Court might be competent to adjudicate on the merits of a dispute. In that regard, the Court must be able to rely on the submissions brought before it. It falls to the parties to prepare their case thoroughly as required by the circumstances. Essentially, the existence of jurisdiction is a legal question, but one that may be related to specific factual circumstances so that, exceptionally, the rules on the distribution of burden of proof might come into operation.[131] 31

It follows from the specific character of jurisdiction as a prerequisite for lawful proceedings on the merits that the Court must make sure that it is competent to hear the case if the respondent chooses not to make an appearance. In such situations, governed by Article 53, the Court inquires *ex officio* whether a legitimate title of jurisdiction exists.[132] 32

p. 738

XIII. Incidental Jurisdiction

Some classes of disputes are ancillary to a principal dispute and do not require any specific acceptance of the Court's jurisdiction. In all cases brought to its cognizance, the Court is vested with the power not only to adjudicate the merits constituting the subject-matter proper of an application but also to make determinations on requests for the indication of provisional measures (Article 41),[133] for interpretation of a judgment (Article 60),[134] and for revision of a judgment (Article 61).[135] Some of these procedures are listed in Part III, Section D (Articles 73–89) of the Rules. Additionally, Article 48 of the Statute confers on the Court all the requisite powers for the good conduct of the case.[136] 33

C. Detailed Analysis of Article 36

I. Article 36, paras. 1 and 2—Common Characteristics

Article 36 is designed to facilitate access to the ICJ in the best possible way. While in para. 1 provision is made for referrals by mutual agreement, para. 2 allows for unilateral declarations as an offer that can be accepted by any other State willing also to submit to the Court's jurisdiction under the same terms.[137] While originally high hopes were placed in the optional clause system, it has emerged that in practice the application of Article 36, para. 1 is more effective. When a case is brought before the Court by virtue of a special agreement, normally no preliminary objections are raised. On the other hand, more and more cases are brought to the Court on the basis of compromissory clauses in multilateral treaties, more than 50 per cent of the agenda in the last decade.[138] 34

1. Interpretation of Compromissory Clauses and Optional Clause Declarations

States that wish to have their disputes settled by the ICJ must express their consent either in accordance with Article 36, para. 1, *i.e.*, by entering into a conventional agreement, or pursuant to Article 36, para. 2, by submitting to the jurisdiction of the Court by virtue of a unilateral declaration. Obviously, an application can be based on several different heads of jurisdiction. On the other hand, the Court is required to assess every claim according to its specific characteristics.[139] On the interpretation and application of Article 36, para. 1 no formalism is to be exercised. States can express their consent to the jurisdiction of the Court also in two separate and successive acts, provided that their desire to accept judicial settlement of the case at hand is clear and unequivocal.[140] The Court has even ↳ taken the view that its jurisdiction may be established by acquiescence.[141] In this regard, the PCIJ had already paved the way in its jurisprudence by suggesting that its jurisdiction may be inferred from acts 'conclusively establishing it'.[142] Whatever method they choose, and leaving aside those instances where a party articulates its agreement only implicitly, the relevant instrument will invariably be in need of interpretation. The Court will have to determine, in particular, whether the dispute referred to it comes within the scope *ratione materiae* of the instrument. The question then arises whether the acceptance of jurisdiction should be interpreted broadly or restrictively. Although the Court has always emphasized that declarations under Article 36, para. 2 are unilateral acts and thus differ from conventional arrangements under Article 36, para. 1,[143] with the consequence that it is the will of the declarant State that enjoys primacy as means to be relied upon,[144] it has refrained from elaborating, on that basis, a doctrine of restrictive interpretation. In fact, in a number of cases it has explicitly rejected suggestions that it should resort to this method.[145] Nor has it applied this doctrine to compromissory clauses. Its predecessor, the PCIJ, had already rejected the thesis that in case of doubt jurisdiction should be declined.[146] In the *Corfu Channel* case,[147] the ICJ cited with approval the *dictum* of the PCIJ in the *Free Zones* case according to which 'the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects'.[148] In fact, since the classical opinion that international treaties should be interpreted restrictively[149] has not survived the coming into force of the VCLT, where no trace of it can be found, there is no reason to resort to that doctrine with respect to jurisdictional clauses.[150] To agree to judicial settlement is not a unilateral sacrifice, but a well-calculated step which carries with it not only negative aspects, but also many advantages, precisely on account of the pervading principle of reciprocity. Therefore, the general rules on interpretation should be applied as they are laid down in the VCLT, reflecting the established position under customary law. The Court has consistently embraced this position.[151] 35

p. 739

p. 740

2. Application of Domestic Law

The ICJ has had to take cognizance of legal issues that are governed by domestic law on many occasions. The nationality of an individual on whose behalf the home State claims reparation, the legal existence of a corporate body, the conduct of judicial proceedings before national criminal courts, these are all primarily placed under the authority of municipal law, and yet they may be determinative for a proceeding where the conduct of the State concerned will be tested against the yardstick of rules of international law. It stands to reason that the instruments conferring jurisdiction on the Court do not specifically mention such issues as being included in their scope. Nevertheless, such incidental issues of a preliminary character are generally deemed to be included in the purview of the relevant conventional clauses or optional declarations. The PCIJ did not hesitate to affirm its jurisdiction in such instances,[152] and the ICJ has followed that line.[153] Otherwise, the Court would not be able properly to discharge its function in full knowledge of all the relevant facts of a case before it. In any event, however, the essence of the dispute must still be governed by rules of international law. It is not the function of the Court to see to it that domestic law be correctly applied. In the instances discussed here, domestic law just furnishes elements of information to the Court. 36

3. Application of General Rules of International Responsibility

An even more important question relates to the authority of the Court to adjudge upon requests by an applicant seeking to obtain a judicial determination on reparation for internationally wrongful acts. Generally, compromissory clauses or optional declarations specify the subject-matter on which the Court is permitted or invited to pronounce, but they do not touch upon the relevant remedies. If the Court were confined to delivering declaratory decisions that would not touch upon the appropriate remedies to make good the harm suffered by the victim State, its real impact in the process of conflict resolution would be greatly diminished. In one of its first judgments, the PCIJ dismissed such a restrictive reading of a general compromissory clause.[154] In the *LaGrand* case, the United States argued that in any event the Court was prevented from pronouncing on the German request for assurances and guarantees of non-repetition, contending that these remedies were conceptually different from reparation. This argument was not accepted by the Court, however: 'Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation.'[155] Proceeding from this basis, the Court made a finding which enjoined the United States to grant reparation in a carefully specified manner: 37

p. 741

> *Finds* that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 (b), of the [Consular] Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violations of the rights set forth in the Convention.[156]

In the later *Avena* case, the Court first confirmed its earlier holding.[157] Concluding its consideration of the case, it again specified in particularized terms what the United States had to do in order to comply with the judgment rendered against it:

> *Finds* that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals referred to ... above, by taking account both of the violation of the rights set forth in Article 36 of the Convention and of paragraphs 138 to 141 of this Judgment.[158]

In the *Jurisdictional Immunities of the State* case, the ICJ ordered Italy to ensure that

> by enacting appropriate legislation, or by resorting to other methods of its choosing ... the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect.[159]

Against the backdrop of these judgments, it is now firmly established that the Court is empowered to make precise determinations on reparation owed to a State victim of a breach of international law. Support for this proposition can also be found in Article 36, para. 2 (d). By listing 'the nature or extent of the reparation to be made for the breach of an international obligation' as one of the possible items of a legal dispute, the Statute underlines the close connection which exists between the level of primary rules of conduct and the level of secondary rules which deal with the legal consequences of a breach of a primary rule. This conclusion stands in perfect harmony with the authority of the Court to apply the relevant rules of general international law, no matter how specifically the subject-matter of a dispute has been delineated (see MN 58).[160]

4. Multiplicity of Titles of Jurisdiction

In introducing an action an applicant may rely either on one particular or several different jurisdictional clauses, in a conventional instrument, and on declarations under the Optional Clause of Article 36, para. 2.[161] The different titles of jurisdiction are generally meant to have a cumulative effect.[162] It is then the task of the Court to ascertain the scope of its jurisdiction with regard to each one of the claims that have been brought before it for adjudication. In principle, such clauses are independent of one another, not subject to the *lex* p. 742 *posterior* principle if no intention to that effect has been ↳ stipulated.[163] A restriction contained in one of them cannot *ipso facto* be applied to the others.[164] 38

II. Article 36, para. 1

The first paragraph of Article 36 deals with situations where a dispute is referred to the ICJ on the basis of a conventional instrument.[165] There are deep-seated differences, however, between the various situations contemplated in this provision.[166] First of all, the parties to an actual dispute can jointly come to the conclusion that it would be the wisest solution to seek judicial settlement of their dispute by the Court. In such case, they will conclude a special agreement (*compromis*) which determines in detail the questions which the Court is requested to adjudicate. On the other hand, States may be prepared to insert in a bilateral or multilateral treaty a compromissory clause providing for the jurisdiction of the Court if they feel that in the specific field regulated by the treaty concerned judicial settlement would in general constitute the most appropriate mode of dispute settlement. Before accepting such a clause, the risks inherent in submitting to the authority of the ICJ are generally considered with great care. This notwithstanding, compromissory clauses apply to disputes as they may arise in the future, the precise contours of which can never be predicted with absolute certainty. In fact, sometimes the actual use made of a compromissory clause can place a party before rather unexpected circumstances. Thus, NATO countries were taken by complete surprise when Yugoslavia, in reaction to NATO's airstrikes during the Kosovo crisis, invoked Article IX of the Genocide Convention as the alleged basis of the jurisdiction of the Court, albeit with no success.[167] Similarly, the Russian Federation did not expect that the circumstances surrounding the armed hostilities in, and at the borders of, Georgia might be brought to the cognizance of the Court under Article 22 CERD. In this case the application failed not on account of the limited extent of the scope of that clause, but on procedural grounds.[168] In any event, however, in the Kosovo case the States having subscribed to the compromissory clause of the Genocide Convention had to defend themselves before the Court in a proceeding which lasted more than five years. 39

Because of the risks inherent in compromissory clauses a tendency has emerged in recent years to omit from new multilateral treaties such clauses providing for the jurisdiction of the ICJ.[169] It must be noted,

however, that the ICJ has consistently endeavoured to resist transforming such clauses into a 'trap', because of which States would have to endure the exercise of international adjudication against their will.[170]

p. 743

1. *Special Agreement* (Compromis)

a) Different Modalities of Seising the Court

The Statute (Article 40, para. 1) proceeds from the assumption that a *compromis* will be jointly notified to the Court by the parties. However, for the purposes of the present classification it matters little whether after the conclusion of a special agreement the parties take that procedural course or whether on that basis one of the parties unilaterally institutes proceedings.[171] The determinative feature is the *ad hoc* nature of the *compromis* pursuant to which and in view of a dispute that has already arisen the parties opt for judicial settlement. The Rules of Court also provide for configurations which do not conform to the usual method. Article 39, para. 1 of the Rules states that 'the notification may be effected by the parties jointly or by any one or more of them'. In any event, nothing changes if such instances are classified as cases brought to the Court under 'treaties and conventions in force'. 40

b) *Forum prorogatum*

Finally, to the first category of cases referred by the parties to the Court also pertain those situations where one of the parties files an application with the Court before having established the requisite bases of jurisdiction *ratione personae* and where the respondent, after the seisin of the Court, declares its consent to the proceeding (*forum prorogatum*). This has happened only three times in the history of the ICJ. In the *Corfu Channel* case[172] between the United Kingdom and Albania, the former heeded the recommendation of the Security Council of 9 April 1947 to the effect that both governments should 'immediately' take their dispute to the Court,[173] by unilaterally filing an application on 22 May 1947. The Albanian government objected to this course of action, arguing that both sides should have instituted proceedings jointly on the basis of a special agreement. However, in the same letter of protest it declared that it was nonetheless prepared 'to appear before the Court'.[174] This phrase was rightly interpreted by the Court as expressing Albania's consent to the jurisdiction of the Court. In the *Certain Criminal Proceedings in France* case (Republic of the Congo v. France),[175] it was a developing country that filed an application without any pre-existing jurisdictional clause. For whatever reasons, France did not regard this application as an unjustified attempt to force it into the position of respondent, but agreed to the exercise of jurisdiction by the Court.[176] Djibouti took this case as a model and also filed an application against France without having beforehand secured the requisite jurisdictional basis. Again, France accepted the jurisdiction of the ↳ Court, probably in order to show that it had perfectly complied with the rule of law.[177] *Forum prorogatum* may also be established if an applicant's submissions go beyond the scope of the relevant title of jurisdiction and if nonetheless the respondent does not object to that extension *ratione materiae*. In sum, no requirements as to formalities need to be observed. What matters is the actual agreement of the parties to have recourse to the Court.[178] However, if the State against which the application is directed refrains from giving its consent, the case may not be entered in the General List of cases (Article 38, para. 5 of the Rules). At that stage, no provisional measures may be ordered either.[179] 41

p. 744

c) Advantages and Shortcomings of Special Agreement

42 The legal literature unanimously agrees on the advantages inherent in seising the Court by way of *compromis* (or special agreement).[180] Indeed, as already hinted at, under such circumstances no unpleasant surprises can arise. The parties are able to gauge beforehand the risk which they might incur by submitting their dispute to judicial settlement. Recourse to the Court may also permit them to disentangle acrimonious internal controversies. It is well known that boundary disputes are particularly susceptible of unleashing waves of nationalistic sentiment. Any government that makes concessions to its opponent in such a dispute could be in danger of being toppled even though it may have valid grounds to distance itself from its own position. In such a situation, referral to the Court as an objective and impartial body may be more acceptable to the domestic public. All these factors also have the advantage that in such instances, as a rule, no preliminary objections are raised,[181] given that both parties are genuinely interested in obtaining a determination on the controversial issues by the Court. Finally, one can generally expect that a judgment based on a *compromis* will be faithfully complied with by the parties, including the losing State.

43 In the *Liber Amicorum Judge Shigeru Oda*, Peter Tomka gave an almost complete list of the cases submitted to the Court on the basis of a special agreement, excluding, however, those cases where, in departure from Article 40, para. 1, proceedings were instituted not by notification of that agreement, but unilaterally by one of the parties.[182] It emerges from the list that, notwithstanding their importance, the disputes concerned had a limited scope and most of them were of a territorial character. None of the great political conflicts which the Court had to rule upon—the *Anglo-Iranian Oil Co.* case,[183] the *Nuclear Tests* cases,[184] the *Tehran*
p. 745 *Hostages* case,[185] the dispute between the United States ↳ and Nicaragua,[186] the *Legality of Use of Force* cases,[187] the *Bosnian* and *Croatian Genocide* cases[188]—found their way to the Court through a *compromis*. The conclusion therefore seems to be inescapable that the *compromis*, in spite of its obvious advantages, has rightly been recognized as only one of the possible titles upon which the jurisdiction of the Court may be based. The role of the Court as an element of the world system of governance set up by the UN Charter would be considerably diminished if it did not have other sources providing it with jurisdiction.[189]

d) Necessity of Binding Commitment

44 Both parties have to manifest their will unequivocally to have a specific dispute adjudicated by the Court. Any relevant declaration must constitute an 'unequivocal indication' of the will to accept the Court's jurisdiction in a 'voluntary and indisputable manner'.[190] In this regard, three cases presented particularly difficult problems of construction. In the *Aegean Sea Continental Shelf* dispute between Greece and Turkey, Greece relied, *inter alia,* on a communiqué issued to the press immediately after a meeting of the two Prime Ministers in Brussels on 31 May 1975. The relevant passage read:

> In the course of their meeting the two Prime Ministers had an opportunity to give consideration to the problems which led to the existing situation as regards relations between their countries.
>
> They decided [*ont décidé*] that those problems should be resolved [*doivent être résolus*] peacefully by means of negotiations and as regards the continental shelf of the Aegean Sea by the International Court at The Hague. They defined the general lines on the basis of which the forthcoming meetings of the representatives of the two Governments would take place.[191]

Rightly, after careful analysis of this text, the Court held that the communiqué was not intended to, and did not, constitute an 'immediate commitment' by the two countries to accept unconditionally the unilateral submission of the dispute on the delimitation of the continental shelf in the Aegean Sea to the Court.[192] In fact, there should be a general presumption against hastily drafted press communiqués as sources of truly binding international obligations, notwithstanding the rejection of such a presumption by the Court.[193] Likewise, in the *Bosnian Genocide* case, the Court refused to acknowledge a common letter signed by the

Presidents of Bosnia and Herzegovina and the Federal Republic of Yugoslavia (Serbia and Montenegro),
p. 746 where it was suggested that all the ↳ issues arising in the context of the disintegration of the Socialist Federal Republic of Yugoslavia should be referred to the ICJ, as the expression of 'an immediate commitment by the two Presidents, binding on Yugoslavia, to accept unconditionally the unilateral submission to the Court of a wide range of legal disputes'.[194] Given the political background of that letter, this was certainly the correct interpretation.

On the other hand, in the dispute between Qatar and Bahrain the heart of the matter was a text called 45
'Minutes' (25 December 1990) which the Foreign Ministers of Bahrain and Qatar—and Saudi Arabia—had signed after protracted negotiations. The text explicitly said that 'The following was agreed', and one of those propositions agreed upon was recourse to the ICJ should the good offices of the King of Saudi Arabia not succeed in bringing about a settlement of the territorial (and maritime) dispute between the two countries by a specific date: 'After the end of this period, the parties may submit the matter to the International Court of Justice'.[195] While Bahrain maintained that this was 'a simple record of negotiations', not to be classified as an international agreement, the Court held that in view of the solemnity surrounding the signature of the text, the 'Minutes' constituted in fact a binding international agreement, capable of justifying recourse to the ICJ:

> the Minutes are not a simple record of a meeting, similar to those drawn up within the framework of the Tripartite Committee; they do not merely give an account of discussions and summarize points of agreement and disagreement. They enumerate the commitments to which the Parties have consented. They thus create rights and obligations in international law for the Parties. They constitute an international agreement.[196]

It is only natural that the usual methods of treaty interpretation are resorted to in such instances. The fact that an agreement providing for the submission of an international dispute to the ICJ is at issue does not entail any specificities.

In accordance with Article 102 UN Charter, any special agreement must be notified to the UN Secretary- 46
General for registration. Otherwise, it could not be invoked before any organ of the United Nations, including, pursuant to the text of Article 102, the Court. The practice of the Court in that respect, however, lacks consistency. In the *Aegean Sea Continental Shelf* case, the Court discussed at length whether a press release could qualify as a treaty conferring jurisdiction upon it without raising the issue of registration.[197] In the *Maritime Delimitation and Territorial Questions* case, by contrast, it insisted on the necessity of compliance with Article 102 UN Charter.[198] Consequently, discordant voices can be identified in legal literature.[199] Whatever may be the right answer, the Court has generally shown a considerable measure of generosity with regard to formalities. There is no cut-off date. Consequently, registration should provide a foundation for the jurisdiction of the Court even after the applicant has instituted proceedings.

p. 747 ## 2. Charter of the United Nations

The most curious instance dealt with in Article 36, para. 1 are cases 'provided for in the Charter of the United 47
Nations'. The origin of this phrase can be traced back to a proposal made by the United States during the meeting of the Washington Committee of Jurists.[200] It was included in both drafts submitted by that Committee. No further discussions took place at the San Francisco Conference.[201] In fact, during the deliberations held by the Committee of Jurists, nobody could foresee whether the future UN Charter would provide for instances of compulsory jurisdiction by the Court, for which only a blueprint had been devised. The drafters of the Charter did not follow that course. They abstained from conferring any kind of compulsory jurisdiction on the Court which they created. In fact, the Court has confirmed that the Charter contains no specific provision to that effect.[202]

Nonetheless, in the light of the development of the Charter in the six decades since its entry into force, reasonable use could be made of this seemingly 'idle' title of jurisdiction. According to Article 36, para. 3 UN Charter, the Security Council has the power to recommend to the parties to any dispute to refer that dispute to the ICJ.[203] This provision, however, is without prejudice to the powers of the Security Council under Chapter VII of the Charter. There seems to be no serious reason militating against decisions of the Security Council that would enjoin States confronting one another about issues affecting international peace and security, to bring their disputes before the Court.[204] Such an injunction would become the point of departure for a mode of settlement infinitely more appropriate than a decision of the Security Council making binding determinations.[205] Before the Security Council, nations which are not members of the Council are not always guaranteed a fair hearing. Before the Court, they could plead their case on the strength of any available legal arguments, enjoying all safeguards which the Statute provides to the parties. Thus, from the viewpoint of proportionality as a modern principle of international law, referral of disputes to the ICJ by the Security Council has many advantages. The Council should be encouraged to avail itself of this window of opportunity. Evidently, no State can be compelled to defend its case competently or even vigorously, ↳ as required by the circumstances. However, invariably one of the litigant parties will have most to win from a defence of its claims in accordance with the rule of law. That State, at least, will institute proceedings. If, then, its opponent as respondent does not make an appearance, the general principles about non-appearance (Article 53) will apply. Once the Court has rendered its judgment, its findings will become binding in accordance with Article 94, para. 1 UN Charter. It will then again be incumbent upon the Security Council to take the necessary measures under Article 94, para. 2 UN Charter for the enforcement of the Court's judgment.

48

p. 748

3. Treaties and Conventions in Force

It is neither possible nor convenient to provide, in this commentary, a complete list of all the compromissory clauses enshrined in treaties and conventions in force. The Court provides such a list on its website, albeit with a disclaimer to the effect that '[t]he fact that a treaty is or is not included in this section is without prejudice to its possible application by the Court in a particular case'. Compromissory clauses can be contained in bilateral[206] or multilateral agreements. It is striking that the list fails to mention the 1928 General Act for the Pacific Settlement of International Disputes, a legal instrument which has been often invoked by applicants seeking to find legal support for the jurisdiction of the Court,[207] but never actually applied by the Court in that sense.[208] It thus remains open whether the 1928 General Act has survived the demise of the PCIJ in accordance with Article 37 of the Statute. The Court has deliberately avoided taking a stance on this issue. The phrase 'in force' does not refer back to any historical point in time but is open for interpretation, encompassing any legal instrument in force at the decisive time of institution of proceedings.

49

a) General Treaties and Conventions Providing for Dispute Settlement by the ICJ

Among the many multilateral treaties containing compromissory clauses, those providing for the general referral of disputes to the Court are of the greatest importance. Such instruments exist at the regional level. In Europe, the 1957 European Convention for the Peaceful Settlement of Disputes[209] sets forth in its Article 1 that '[t]he High Contracting Parties shall submit to the judgment of the International Court of Justice all international legal disputes which may arise between them'. This formulation clearly amounts to comprehensive compulsory jurisdiction, something which at world level could hardly ever be attained and which may only be explained by the high degree of confidence that exists among the members of the Council of Europe. Clearly, however, many States have misgivings about the breadth of the jurisdiction thus conferred on the ICJ. Although the Convention was signed almost fifty years ago, to date it has received no more than fourteen ratifications—clearly a rather meagre record.[210] In the Americas, Article XXXI of the Pact of Bogotá[211] provides: 50 p. 749

> In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning [follows the list of Article 36, para. 2 of the Statute].

In the *Border and Transborder Armed Actions* case between Nicaragua and Honduras, the Court discussed the meaning of this formula. It can either be interpreted as a treaty provision conferring jurisdiction upon the Court in accordance with Article 36, para. 1 or as a collective declaration of acceptance of compulsory jurisdiction under Article 36, para. 2. Taking the view that in any event it constitutes acceptance of jurisdiction, the Court chose not to pursue the matter further.[212] In fact, a precise classification seems to be only of academic interest. However, as in the case of its European counterpart, the Pact has weak foundations. It counts only fourteen States parties.[213] On the positive side, one may note that some of the dominant nations in Latin America, namely Brazil, Chile, and Mexico, have ratified it. Among the great absentees is the United States. Ample use has been made of Article XXXI of the Pact of Bogotá.[214] El Salvador (1973) and Colombia (2012) have denounced it specifically because of its comprehensive compromissory clause. Currently (December 2018), three cases are pending before the Court where the applicants rely on that clause.[215]

b) Specialized Multilateral Treaties and Conventions with Compromissory Clauses

aa) Optional Protocols to the Diplomatic and Consular Conventions

Among specialized multilateral treaties, which provide for jurisdiction of the ICJ to settle disputes between States parties, three have come to prominence in recent years. First of all, the compromissory clauses in the two Optional Protocols concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations[216] and the Vienna Convention on Consular Relations[217] enabled the United States to institute proceedings against Iran[218] in the Tehran hostages crisis.[219] More recently, the United States was the respondent in disputes brought against it on account of allegations that its domestic authorities had not lived up to their duty to inform the consular posts of foreign States about the arrest and trial of their nationals in US territory, and also those persons themselves about their right to consular assistance. In the first of these cases (*Breard*), Paraguay did not pursue its claims to the end, but informed the Court that, despite the fact that it had filed a Memorial on the merits of the case, it did not wish to go on with the proceedings and requested that the case be removed from the Court's List.[220] Germany, on the other hand, in the *LaGrand* case did not abandon its efforts after the LaGrand brothers had both been executed, and eventually obtained a finding of the Court to the effect that the United States had breached its obligations under the Vienna Convention on Consular Relations.[221] Likewise, Mexico was successful with its application in the *Avena* case. In its judgment of 31 March 2004, the Court found that the United States had infringed its commitments under that same Convention.[222] To escape from the jurisdiction of the Court with regard to cases of arrests of foreign nationals, the United States denounced the Optional Protocol thereafter in March 2005, notwithstanding the absence of a denunciation clause in that instrument.[223] In the recent *Jadhav Case* India, the applicant, invoked the jurisdiction of the Court under the Optional Protocol since its declaration under Article 36, para. 2, is framed in such a restrictive manner that Pakistan, the respondent, could have easily availed itself of those restrictions by invocation of the principle of reciprocity.[224] Finally, on 28 September 2018 Palestine filed an application instituting proceedings before the Court against the United States with respect to the relocation of the US Embassy from Tel Aviv to Jerusalem under the Optional Protocol to the Vienna Convention on Diplomatic Relations, to which both Palestine and the US are parties.[225] Although concerns have already been raised with respect to the potential for success of Palestine's application,[226] the United States on 3 October 2018 announced its withdrawal from the Optional Protocol.[227]

51

p. 750

p. 751

bb) 1971 Montreal Convention

In the *Lockerbie* cases, the controversy centred on the question as to whether the application filed by Libya against the United Kingdom and the United States could be founded on Article 14, para. 1[228] of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[229] Both respondents contended that the dispute did not exist specifically between them as individual States and Libya, but related to a general threat to international peace and security resulting from Libya's involvement in acts of terrorism. This argument was dismissed by the Court. It held that, as shown by the submissions of the respondents, both sides differed as to the legal regime applicable to the Lockerbie incident. Consequently, it found its jurisdiction established.[230]

52

cc) Genocide Convention

Finally, specific mention should be made of the Convention on the Prevention and Suppression of the Crime of Genocide.[231] Article IX of this Convention provides:

53

> Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or

> for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Originally, it was felt that after the horrors of the Nazi regime in Europe genocide was just a very remote theoretical construct. However, it turned into a horrific reality in the second half of the twentieth century and became the object of several cases before the Court. First, Bosnia and Herzegovina instituted proceedings against 'Yugoslavia'.[232] 'Yugoslavia' objected to the jurisdiction of the Court by arguing that Article IX covered only:

> the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.[233]

Rightly, this objection was rejected by the Court since it finds no support in the text of the clause.[234] In the course of these proceedings, 'Yugoslavia' as the respondent also requested the Court to indicate provisional
p. 752 measures, a request to which the Court ↳ responded positively to a limited extent.[235] Finally, in 1999 Croatia brought an application against 'Yugoslavia', alleging that Yugoslav armed forces had committed acts of genocide in the territory of Croatia. After sixteen years, the Court finally handed down its final judgment in that case[236] following the dismissal of preliminary objections raised by the respondent.[237]

It is all too obvious that the ICJ, which essentially is not a trial court, experienced great difficulties in being 54
compelled to inquire into the merits of all the allegations of genocide that were made by the different parties involved. The Court simply lacks the infrastructure which would be essential for a comprehensive process of fact-finding on the ground. In fact, the Court relied to a large extent on the findings of the ICTY on matters of fact.[238]

Article IX of the Genocide Convention was also one of the main jurisdictional bases for the proceedings 55
which 'Yugoslavia' brought against ten NATO countries a few weeks after the Kosovo war had started.[239] It alleged that the armed activities against its territory, in particular the use of ammunition containing depleted uranium, met the criteria of genocide as defined by the Convention. The Court, however, did not accept this line of reasoning. It emphasized that the intent to destroy a group constitutes the essential characteristic of genocide; the threat or use of force alone could not constitute an act of genocide.[240] In the judgment on the preliminary objections raised by the ten States,[241] the Court did not deal with the issue since it denied its jurisdiction inasmuch as 'Yugoslavia' having been transformed into Serbia and Montenegro, lacked a right of access to the Court (Article 35).[242]

c) Gaps in the Network of Compromissory Clauses

Recent case law has confirmed that the compromissory clauses found in multilateral conventions provide 56
scant meaningful judicial protection against violations of the principle of non-use of force and of international humanitarian law. In May 2002, the Democratic Republic of the Congo, allegedly victim of incursions by Rwandan troops into its territory, attempted to institute proceedings against Rwanda, invoking a whole series of international agreements, but without avail because all of those instruments lacked a clause providing for the jurisdiction of the ICJ.[243] One can hardly expect that this state of affairs will change in the near future. Generally, as far as occurrences involving threats to international peace and
p. 753 security are concerned, the Security Council would seem to be the ↳ most appropriate organ to be seized with these situations on behalf of the international community.

d) Determination of Scope of Compromissory Clauses

57 The compromissory clauses contained in bilateral or multilateral treaties must always be construed in connection with the substantive provisions of the treaty concerned (jurisdiction *ratione materiae*). Whenever appropriate, the Court painstakingly examines whether and to what extent the complaints brought by the applicant are susceptible of coming within the purview of those provisions. In this regard, the *Oil Platforms* case, where the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran was at issue, constitutes an outstanding example. In its judgment on the preliminary objections raised by the United States, the Court, taking as its starting point Article XXI, para. 2 of that Treaty, went through the relevant provisions one by one, rejecting Article I as a pure objective which did not set forth truly binding international obligations, specifying that Article IV, para. 1 as an economic guarantee of fair treatment did not come into play in respect of military acts of force, and finally concluding that Article X, para. 1, which dealt with freedom of commerce and navigation, could have been affected by the United States' attacks against the two oil platforms.[244] In this case, a major role was also played by Article XX, para. 1 (d) of the Treaty, according to which the Treaty did not preclude the application of measures 'necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests'. The United States contended that this provision set forth a substantive limitation of the jurisdiction of the Court, while according to Iran, which relied on the judgment of the Court in the *Nicaragua* case,[245] this was a simple defence on the merits. Clearly, the United States was interested in not having its attacks on the platforms discussed at all by the Court, while the construction preferred by Iran would have led the Court first to consider those activities before examining whether they could be justified on that exceptional head. After a lengthy discussion, the Court opted for the construction suggested by Iran.[246]

58 In a similar fashion, the Court devoted meticulous attention to the scope *ratione materiae* of the compromissory clause in some other prominent cases. In the *Bosnian Genocide* case, the key issue was whether the Genocide Convention is confined to the criminal responsibility of individuals or whether issues of general international responsibility of States are also encompassed.[247] In the case concerning *Mutual Assistance in Criminal Matters* between Djibouti and France, a case of *forum prorogatum*, the Court had to determine which occurrences were covered by France's acceptance of having the application filed by Djibouti adjudicated by the Court,[248] and in the *Pulp Mills* case, the meaning of pollution had to be assessed: the Court excluded noise and visual pollution as well as 'bad odours', restricting the scope of the relevant
p. 754 jurisdictional clause to pollution ↳ of, and harm to, the Uruguay River proper, its waters, and the organisms living therein.[249] In the dispute between Georgia and the Russian Federation, the Court had to ascertain whether the Russian attacks carried out on Georgian territory came within the scope of Article 22 CERD, which covers instances of racial discrimination only.[250]

59 A particularly delicate treaty condition is the requirement that judicial proceedings may be initiated only after negotiations have proved to be of no avail. The Court had to deal with this issue both in the case between Georgia and the Russian Federation, where Article 22 CERD, and in the case between Belgium and Senegal, where Article 30 CAT had to be construed. The proposition stated in the former case that negotiations are more demanding than an exchange of claims and directly opposed counter-claims, requiring a genuine attempt by one disputing party to engage in discussions with the other disputing party, with a view to resolving the dispute, was also maintained in the latter case.[251] Obviously, negotiations cannot be extended *ad infinitum*. It must be accepted that they may be interrupted if they are deadlocked or have become futile.

60 It should be emphasized that the confinement of a given compromissory clause to the legal rules enunciated in a specific treaty does not exclude the applicability to the dispute of the rules of general international law.[252] This does not derive solely from the provision of Article 31, para. 3 (c) VCLT,[253] but follows from the conceptual unity of international law. Without any exception, particular treaty regimes are based on the

foundations of general international law. The Court expressed this seemingly trivial but crucial proposition in the *Bosnian Genocide* case, where the rules on treaty interpretation and on responsibility of States for internationally wrongful acts were classified as 'general international law',[254] as well as in the *Pulp Mills* case, where the duty to carry out an environmental impact assessment was derived from general international law.[255] However, where the claims of a breach of international law brought against the respondent party are based on a conventional compromissory clause, they remain confined to the provisions of the treaty concerned and cannot be extended to a parallel customary rule.[256]

e) Challenges to the Validity of Treaties and Conventions

61 It hardly needs to be stressed that a treaty clause providing for the jurisdiction of the Court does not lose its applicability as soon as one of the parties concerned challenges the validity of the treaty. The *raison d'être* of compromissory clauses is to provide judicial relief in case a dispute arises. It would be too easy to dispose of judicial settlement regimes carefully designed, if it sufficed to invoke any grounds allegedly vitiating the
p. 755 treaty as a ↳ whole. In the *ICAO Council* case, the Court took a decisive stance against such attempts to overthrow compromissory clauses:

> If a mere allegation, as yet unestablished, that a treaty was no longer operative could be used to defeat its jurisdictional clauses, all such clauses would become potentially a dead letter, even in cases like the present, where one of the very questions at issue on the merits, and as yet undecided, is whether or not the treaty is operative—*i.e.*, whether it has been validly terminated or suspended. The result would be that means of defeating jurisdictional clauses would never be wanting.[257]

In the *Tehran Hostages* case, the Court reiterated that it was precisely when difficulties arose because of the alleged violation of a treaty that compromissory clauses assumed their greatest importance: such difficulties could not have the effect of precluding the parties concerned from invoking those clauses inasmuch as they provided for the pacific settlement of the dispute.[258] This judicial *dictum* applies irrespective of the grounds which a party relies on to call into question the validity of a compromissory clause. In the *Fisheries Jurisdiction* cases, Iceland contended that by way of change of circumstances the clause contained in Exchanges of Notes which had taken place with the Federal Republic of Germany and the United Kingdom in 1961 had become obsolete. The Court dismissed this argument outright.[259] Assessing Nicaragua's claim that a border treaty concluded in 1928 with Colombia, which defined the jurisdictional clause contained in Article VI of the Pact of Bogotá, was invalid, the Court stressed that for more than fifty years no such challenge had been advanced by Nicaragua. Thus, Nicaragua could not successfully invoke that defence today.[260]

f) Appropriate Wording of Compromissory Clauses

62 The text of compromissory clauses can be framed in different terms. The wording of some clauses leaves no room for any doubts as to whether it grants direct access to the ICJ. Thus, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provides that disputes shall be submitted to the Court 'at the request of any of the parties to the dispute'. Article I of the two Optional Protocols to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations specifies, too, that 'any party' may seise the Court. Other clauses are drafted in a less felicitous way. In the *Tehran Hostages* case, the Court was confronted, in addition to the two Optional Protocols just mentioned, with Article XXI, para. 2 of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. This provision reads:

> Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International

> Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.[261]

p. 756 The formula employed here could be interpreted to mean that the Parties undertake to establish, between them, a special agreement for the submission of the dispute to the Court. The process would then go through two stages. First, the special agreement would have to be concluded, and thereafter the ICJ could be seised, either by notification of that agreement or by unilateral application. The Court dismissed such restrictive understanding of Article XXI, para. 2 of the 1955 Treaty:

> While that Article does not provide in express terms that either party may bring a case to the Court by unilateral application, it is evident … that this is what the parties intended. Provisions drawn in similar terms are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court, in the absence of agreement to employ some other pacific means of settlement.[262]

The inference drawn by the Court, which was confirmed with regard to a similar clause contained in the Treaty of Friendship, Commerce and Navigation concluded by the United States with Nicaragua,[263] is to be welcomed. Indeed, if it has not been possible to resolve a controversy by diplomatic means, it would be futile to trust the ability of the parties concerned to hammer out a special agreement that would open the gates to the ICJ. Endorsing the restrictive interpretation would thus amount to depriving the relevant clauses of any real meaning inasmuch as the party opposed to adjudication would simply attempt to frustrate the obligation incumbent upon it by dragging out the negotiations on the special agreement *ad infinitum*.

In other instances, the jurisdictional clauses have been clearly framed as *pacta de contrahendo* only. Thus, 63
Article XI, para. 2 of the Antarctic Treaty specifies that any dispute not resolved by negotiation or other methods of peaceful settlement 'shall, with the consent, in each case, of all parties to the dispute, be referred to the International Court of Justice'. Such clauses constitute no more than a reminder of the obligation with which in any event States must comply under Article 33 UN Charter.

g) Compromissory Clauses Referring to Substance of Dispute

Compromissory clauses may sometimes be particularly difficult to handle because they establish a close 64
connection with the merits of the dispute. Thus, Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide provides for the jurisdiction of the Court with regard to disputes relating to the interpretation, application or fulfilment of that Convention, *i.e.*, to acts of genocide. Yet, at the initial stage of a proceeding no certainty exists as to whether in fact genocide may have been perpetrated. It is the objective of such a proceeding to investigate the allegations and then, on the basis of the available evidence, draw the requisite conclusions. Therefore, at that moment the Court is confronted with no more than contentions by the party that wishes to base its application on Article IX. It is also clear that not every unsubstantiated allegation can be deemed to provide a basis for the Court to exercise its jurisdiction. Logically, some middle way must be devised.

To date, the jurisprudence of the Court has not been able to provide a precise definition of the criteria which 65
it applies in such instances. The 'sufficiency of subject-matter connection' is a matter of degree, where
p. 757 different formulae have been thrust into the ↳ debate. In the first relevant case it had to deal with in 1923 in the form of an advisory opinion, the PCIJ held that it should content itself with drawing a 'provisional conclusion'.[264] One year later, however, in the *Mavrommatis* case, it proceeded to an exhaustive examination of the legal aspects of jurisdiction (without investigating the factual side), not afraid of intruding into the merits.[265] It continued this latter line of reasoning in the *Certain German Interests* case,[266] where it argued from the opposite position that an objection raised by the respondent could not deprive it of its jurisdiction.

The relevant case law of the ICJ began in the *Ambatielos* case with a reference to the necessity of a ‘sufficiently plausible character’ of the invocation of a ground of jurisdiction.[267] In *Interhandel*, by confining itself to a ‘provisional conclusion’, the Court took its inspiration from the advisory opinion in *Nationality Decrees Issued in Tunis and Morocco.*[268] By contrast, in the *ICAO Council* case, without formulating a general proposition regarding the proper method to be followed, it considered a number of legal points which were also relevant for the merits in order to establish whether it had jurisdiction in accordance with Article 84 of the Chicago International Civil Aviation Convention of 1944.[269] A more benevolent approach for the applicant was followed in the *Nicaragua* case, where the Court defined the relevant test as the establishment of a ‘reasonable connection’ between the compromissory clause concerned and the claims submitted to it.[270] Obviously conscious of the fact that this threshold was fairly low, in the *Oil Platforms* case the Court adopted another formula, which may be considered a return to the *Mavrommatis* test: 66

> the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.[271]

It follows from the further considerations developed in this judgment that the examination carried out by the Court is a purely legal one. The Court sought to establish that, assuming the allegations advanced by the applicant correspond to reality, they would constitute a breach coming within the purview of the compromissory clause. It noted that the destruction of the oil platforms was ‘capable’ of having an adverse effect upon the export trade in Iranian oil and consequently upon the freedom of commerce guaranteed by the 1955 Treaty between the United States and Iran.[272] In two separate opinions to this judgment, it is explained that a ‘reasonable connection’, as suggested by the 1984 decision in the *Nicaragua* case, is not enough. Judge Ranjeva favoured a ‘probability’ test, which he seems to equate with ‘plausibility’,[273] while Judge Higgins rejected plausibility, arguing, in agreement with the majority opinion, that the legal analysis
p. 758 must definitively establish whether, on the basis of the applicant’s claims, a violation would have to be ↳ found.[274] It was against the backdrop of this legal reasoning that, in the *Legality of Use of Force* cases, the Court stated that it could not confine itself to noting that Yugoslavia maintained the applicability of Article IX of the Genocide Convention; rather, it had to ascertain whether the breaches alleged were ‘capable of falling’ within the scope of that provision. Since genocide required specific intent to destroy an ethnic or other group, the Court concluded that ‘the threat or use of force against a State cannot in itself constitute an act of genocide’.[275] On that basis, it dismissed Yugoslavia’s request to indicate provisional measures but did not refuse it the opportunity to argue its case again under the conditions of the normal procedure.

The *Legality of Use of Force* cases provide at the same time an example of a configuration where there was not 67
the slightest chance that the jurisdictional clause invoked by Yugoslavia would have been capable of serving as the basis of the Court’s jurisdiction. Vis-à-vis the United States, Yugoslavia invoked Article IX of the Genocide Convention although the United States had made a reservation concerning that provision, specifying that before any dispute could be submitted to the Court, its ‘specific consent’ was necessary. Given this reservation, the validity of which could not be challenged, the Court not only declined to indicate provisional measures, but also ordered the removal of the case from its List.[276] In sum, it may be concluded that concerning the legal aspects of a compromissory clause, the Court will proceed to an exhaustive examination. As far as the factual aspects are concerned, the Court will generally abstain from ascertaining the accuracy of the facts invoked. On the other hand, it will not blindly follow allegations which are clearly at variance with reality.

h) Reservations to Compromissory Clauses

In its early advisory opinion on *Reservations to the Genocide Convention*[277] the Court had to struggle with the permissibility of reservations to the relevant jurisdictional clause, Article IX of that Convention. It came to the conclusion that in departure from the earlier regime of reservations, according to which the consent of all State parties to the treaty was required, States were free to make reservations to a treaty provision, provided that the reservation concerned did not run counter to the 'object and purpose' of the treaty concerned.[278] This formula is now reflected in Article 19 (c) VCLT.[279] It did not, however, provide a specific answer to the question as to whether States should be granted the right to evade the jurisdictional review of their contractual commitments. Still in the *Legality of Use of Force* cases, the Court did not devote any specific attention to the question as to whether reservations to the jurisdictional clause in an instrument embodying *jus cogens* rules might be considered invalid.[280] ↳ Only recently did the Court state explicitly that judicial enforcement mechanisms did not pertain to the substantive core of a treaty and that accordingly reservations to such provisions were not incompatible with its object and purpose.[281] This view was harshly criticized in a joint separate opinion in the *Armed Activities* case (DRC v. Rwanda).[282] It stands to reason, in particular, that in respect of certain treaties of a mainly procedural character, reservations to the relevant jurisdictional clauses might exceptionally be susceptible of infringing their object and purpose.[283] Thus, in a parallel configuration reservations to the competence of the Human Rights Committee to examine State reports would obliterate the core element of the monitoring system of the International Covenant on Civil and Political Rights and would without any doubt run against its basic philosophy.

68

p. 759

According to the procedural rules laid down in the VCLT, the appraisal of reservations shall be entrusted to the other States parties. In the field of human rights, both the Human Rights Committee[284] and the ECtHR,[285] as well as the IACtHR,[286] have successfully asserted their competence to assess the lawfulness of any reservations.[287] In *Armed Activities (New Application: 2002)*, the Court, at least implicitly, manifested its intention to exercise that kind of review too.[288] However, compromissory clauses as a procedural complement to the substantive clauses of a treaty will only rarely pertain to the object and purpose of the treaty as such.

69

III. Article 36, para. 2

1. The Optional Clause and Its Importance Today

Article 36, para. 2 is traditionally called the 'Optional clause', a more felicitous expression than the equivalent term 'compulsory jurisdiction', which seemingly calls into question the basic concept of freedom of choice in respect of methods of dispute settlement. States are free, and they are even invited, to subscribe to that clause by making the unilateral declaration provided for therein. Article 36, para. 2 reflects the basic philosophy of the system of judicial settlement established by the UN Charter. The States members of the United Nations did not opt for comprehensive jurisdiction of the Court in respect of all classes of legal disputes, but preferred to leave it to each individual State to decide whether and to what extent it wishes to submit to that jurisdiction. Nonetheless, judicial settlement remains the preferred method for all legal disputes (Article 36, para. 3 UN Charter).

70

p. 760

At the PCIJ's inception, it was hoped that through individual declarations under Article 36, para. 2 a tight network would be established among all of the States of the world so that, on a voluntary basis, any legal dispute would be susceptible of being brought to judicial settlement. This hope did not materialize during the epoch of the League of Nations, and it has not come true under the aegis of the United Nations either, notwithstanding appeals by the General Assembly to States to make the requisite declarations.[289] Of the permanent members of the Security Council, only the United Kingdom still recognizes the compulsory jurisdiction of the ICJ under Article 36, para. 2. France withdrew its acceptance after the Court indicated

71

provisional measures in the *Nuclear Tests* cases,[290] and the United States followed suit after the Court had declared admissible the application brought against it by Nicaragua.[291] Russia (formerly the Soviet Union) and China have never submitted to the compulsory jurisdiction of the ICJ under Article 36, para. 2; however, Russia has accepted a number of compromissory clauses in multilateral treaties by withdrawing the reservations which the Soviet Union had made with regard to those clauses.[292]

Currently (December 2018), the total number of States having made the declaration under Article 36, para. 2 stands at 73, which is slightly more than one-third of the members of the United Nations. It is an encouraging sign that quite a number of former socialist States, which in the past resolutely refused to accept the jurisdiction of the Court, have reversed their attitude (Bulgaria, 1992; Hungary, 1992; Georgia, 1995; Poland, 1996; Slovakia, 2004; Romania, 2015). As already pointed out, of the permanent members of the Security Council only the United Kingdom remains subject to the Court's jurisdiction. Since the first and second editions of this Commentary, Japan (July 2007) and Germany (April 2008) have joined that group of States. While former Yugoslavia had submitted to the jurisdiction of the Court in 1999, none of its successor States has followed suit. On the whole, only a few of the seventy-three States have submitted purely and simply to the jurisdiction by following the wording of Article 36, para. 2.[293] In most instances, the declarations have been modified by reservations. However, nowhere has ↳ the quantity and density of reservations reached the same level as in the case of India, which has succeeded in shaping an instrument that will certainly prevent any attempt ever to bring an application against it, thus converting the act of acceptance into a barely veiled act of non-acceptance. Because it would have to suffer by way of reciprocity from the restrictions built into its own declaration under Article 36, para. 2, in the *Jadhav Case*, where the unlawful arrest, trial, conviction, and sentencing of one of the members of a consular mission in Pakistan was at issue, India relied exclusively on the Optional Protocol to the Vienna Convention on Consular Relations as the basis to establish the Court's jurisdiction.[294]

72

p. 761

2. Declarations under the Optional Clause as Unilateral Acts

Declarations of acceptance of the jurisdiction of the Court under Article 36, para. 2 are by essence unilateral acts, issued under the authority of State sovereignty.[295] In the *Nicaragua* case, the Court summarized the legal position as follows: 'Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements that States are absolutely free to make or not to make.'[296] This holds true notwithstanding the aim pursued by Article 36, para. 2, which seeks to promote a system of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction; at the same time, this system is a 'standing offer' to other States which have not yet made a declaration.[297] To the extent that the declarations coincide, a consensual bond is formed between the States concerned which fulfils the general requirement for the exercise of jurisdiction by the Court. The Court has characterized the network thus engendered as a 'series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction, in which the conditions, reservations, and time-limit clauses are taken into consideration'.[298] Thus, through uncoordinated unilateral declarations a system emerges which resembles to some extent a multilateral treaty, but does not provide the same expectations of stability and reliability since it is not placed under the proposition *pacta sunt servanda* or *declaratio est servanda*.

73

3. Interpretation

It has already been pointed out that the Court has not developed any specific doctrine of restrictive interpretation regarding declarations under Article 36, para. 2.[299] The Court proceeds, however, from the assumption that the will of the declarant State must be duly taken into account. Any intention, in order to become determinative, must be reflected in the text of the declaration itself.[300] The Court will take the text together with the ↳ reservations attached to it 'as it stands'.[301] The relevant words are to be interpreted in a 'natural and reasonable way'.[302] Thus, if there is any departure from the general rules of treaty interpretation in international law, the distance can only be slight. 74

p. 762

4. Withdrawal

The most delicate question in this connection is whether and under what conditions a State is entitled to withdraw its acceptance of the jurisdiction of the Court. Following the doctrine of *actus contrarius*, one might conclude that, just as States are free at any time to submit to the jurisdiction of the Court, they should also be free to repeal their engagement at their free will without any restriction in point of time. However, such a line of reasoning would overlook the fact that the growth of a network of consensual bonds constitutes a confidence-building process. Through its acceptance of the jurisdiction of the Court, every State creates legitimate expectations. The conditions to join the network are not therefore identical to those to withdraw from it.[303] 75

In the first place, the text of the declaration itself is determinative. If a State specifies explicitly that it reserves the right to withdraw its declaration at any time with immediate effect, no legitimate expectations can come into existence. Thus, Slovakia, one of the latest States to make a declaration under Article 36, para. 2, formulated its denunciation clause as follows: 76

> The Slovak Republic reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the date of receipt of such notification, to amend or withdraw this declaration.[304]

Germany recognized the jurisdiction of the Court:

> until such time as notice may be given to the Secretary-General of the United Nations withdrawing the declaration and with effect as from the moment of such notification.

Such a stipulation, which has by now become a recurrent proviso, must be heeded by the Court. It cannot disregard it simply because it makes the regime of the optional clause highly unstable. To be sure, clauses of that type are regrettable in that they enable States to terminate their acceptance of the Court's jurisdiction as soon as they sense that an undesirable application might be forthcoming. However, this seems to be the price to be paid in order to induce adherence by States to the optional clause, and it corresponds to the logic of a jurisdictional system which is still largely based on unfettered sovereignty. For the Court, it would be extremely difficult to ignore the expression of the will of a State that wishes to be able to regain its freedom of choice as regards dispute settlement at any point. A reasonable time limit can only be required if a State has failed to specify under what conditions it may terminate its submission to the Court's jurisdiction. It remains the case, however, that once proceedings have been instituted by the filing of an application the respondent is bound to assume the role the Statute assigns to it.[305]

p. 763

In the *Nicaragua* case, the United States attempted to withdraw its declaration, which it had made in 1946, after being informed that Nicaragua would file an application against it. In fact, it succeeded in depositing the withdrawal of the declaration with the Secretary-General of the United Nations on 6 April 1984, three days before Nicaragua's application reached the Court on 9 April 1984. However, this manoeuvre did not 77

attain its objective. The text of the US declaration specified that it would 'remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration'.[306] The Court held that the United States was bound by this act of self-commitment:

> Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.[307]

This holding would seem to be absolutely unobjectionable. Otherwise, the text of a declaration which the declarant State has formulated itself would be devoid of any real meaning. In other words, the conditions of a notice of termination as specified in the relevant declaration are binding and cannot be departed from.

Second, the question arose whether, by virtue of the principle of reciprocity, the United States could rely on the termination modalities of the Nicaraguan declaration. This declaration was silent on how it could possibly be denounced. The Court denied a right for the United States to invoke in its favour the particular modalities for the exercise of Nicaragua's right of denunciation.[308] Continuing its reasoning on a hypothetical basis, it stated: 78

> the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirement of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.[309]

Intense debate has followed this pronouncement.[310] In any event, however, the users of the Court cannot but take note of the position the Court has embraced.[311] This position should be well understood. It concerns solely declarations which either contain no rules on their termination or declarations by which a State has simply manifested its will to terminate the applicability of its declaration by a unilateral decision, without specifying the relevant modalities. In the legal literature, it has been suggested that a period of between three months and one year would in any event constitute sufficient notice.[312] As a consequence, quite a number of States revised their declarations under ↳ Article 36, para. 2, making it unambiguously clear that, if need be, they wished to be able to shed their obligations under the optional clause with immediate effect.[313]

p. 764

5. Irrelevance of Later Events

Once a proceeding has been instituted, any later developments do not affect the jurisdiction of the Court, with the exception of instances where a case is deprived of its object. Even if the temporal validity of a declaration lapses two days after an application has been filed, the respondent cannot raise any objection. Given that, as just mentioned, many States reserve the right to terminate their declaration with immediate effect, proceedings could be easily frustrated if such termination puts an end to the authority of the Court to entertain a case. In this regard, the Court has been absolutely consistent over many decades.[314] 79

6. Direct and Immediate Effect of Deposit of Declaration

The words '*ipso facto*' denote the direct effect that a declaration under the optional clause will produce. No additional step is required. Indeed, it is the specificity of the optional clause that it offers an alternative to Article 36, para. 1 which provides for the jurisdiction of the Court through the conclusion of agreements, either a special agreement (*compromis*) or a bilateral or multilateral treaty complemented by a compromissory clause. Going through the seventy-three declarations which are currently in operation, one very clearly perceives that the governments concerned are well aware of the legal significance of the commitment entered into by a declaration under the optional clause. 80

The words '*ipso facto*' also mean that the legal effect which a declaration is intended to produce takes place immediately vis-à-vis all the other States which have likewise subscribed to the optional clause. In several cases, at a time when electronic communication did not yet exist or was less well developed than today, applicants surprised the respondents by filing an application a short while after accepting the jurisdiction of the Court. However, both in *Right of Passage*,[315] where Portugal brought an application against India only three days after having deposited its declaration, and in *Land and Maritime Boundary*,[316] where the time distance between the two (Cameroonian) acts amounted to twenty-six days, the Court rejected all the arguments advanced by the respondent against such procedural conduct. Distinguishing between the denunciation of a declaration and the filing of a new one, it emphasized that a State which has submitted to the jurisdiction of the Court enjoys no legitimate interest in not being confronted with an application since accepting the optional clause amounts to making a standing offer to all other States in the same position to settle their dispute by judicial means. It was also right in pointing ↳ out that to allow the requirement for a reasonable time to elapse would be 'to introduce an element of uncertainty into the operation of the optional clause system'. Finally, also in the *Legality of Use of Force* cases, where Yugoslavia filed its application on 29 April 1999 after having deposited its declaration on 26 April 1999, an accurate reflection of the dispute between Portugal and India in the *Right of Passage* case, the Court implicitly confirmed its earlier decisions.[317] Taking into consideration the means of electronic communication as they exist today, the complaints raised by India in its case against Portugal have lost even more in persuasiveness. Thus, one can easily dispose of fears previously articulated about the 'sitting duck' or the 'hit-and-run' phenomenon. 81 p. 765

7. Mutuality *ratione personae* and Reciprocity

It has already been pointed out that the phrase 'in relation to any other state accepting the same obligation' reflects the principle of reciprocity, which pervades the entire Article 36.[318] Mutuality *ratione personae* was originally intended to permit States to accede to the jurisdiction of the PCIJ on the condition that some of the leading nations also subscribed to the optional clause.[319] In the early days of international adjudication by a permanent court, it was necessary, as felt by the proponents of the clause, to make sure that those who first embraced the clause were not treated as 'guinea pigs'.[320] At the present time, it has lost this specific meaning in practice, although a couple of States from the former British Commonwealth, today the Commonwealth of Nations, still exclude disputes with other Commonwealth countries from the jurisdiction of the Court, apparently assuming that among brotherly nations there exist better methods for the settlement of disputes.[321] This clause was tested in the *Aerial Incident* case and found by the Court to be unobjectionable.[322] 82

8. List of Specific Subject-Matters

The list of subject-matters which Article 36, para. 2 enunciates, which was taken from Article 13, para. 2 of 83
the Covenant of the League of Nations,[323] has never played any role in practice.[324] This is certainly due to the extremely wide scope of the four items on the list and the overlap which exists between them. The item 'any
p. 766 question of international ↳ law' encompasses just about anything that can legitimately be submitted to the Court as a legal dispute. The 'interpretation of a treaty' must be classified as a sub-item of b. There is hence no point in trying to elucidate the exact meaning of the various subject-matters.[325] Any legal dispute that is susceptible of being decided on the basis of international law falls *ratione materiae* within the scope of Article 36, para. 2.[326]

IV. Exceptional Title of Jurisdiction outside Article 36, paras. 1 and 2?

In the *Nuclear Tests* cases the Court, after stating that the dispute had lost its object following the official 84
French declarations that France would henceforth refrain from any atmospheric nuclear tests, added that, if the basis of its judgment 'were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute'.[327] When in 1995 New Zealand, availing itself of this formulation, filed in the Registry a 'Request for an Examination of the Situation',[328] the meaning of the ominous sentence had to be clarified. While New Zealand contended that obviously the Court had not closed the proceedings by its judgment of 20 December 1974 and that accordingly it was entitled to resume the 1973 proceedings even after twenty-one years, France was of the view that the case was definitively closed. The Court found that in its earlier judgment it could not have intended to just refer to the proceedings which are in any event open to a State (filing of a new application, request for interpretation or request for revision), but that it had opened up a new special procedure (textually: 'did not exclude a special procedure').[329] Apparently, when putting an end to the *Nuclear Tests* cases, the Court had not been sure that its interpretation of the statements made by a number of high-ranking French officials was correct; if France had continued its atmospheric testing of nuclear devices, the case would not have become moot. Yet, whatever motivations may have prompted the Court to include the controversial sentence in its judgment, in the commentator's view its position would appear to be wrong, as was rightly pointed out by Judge Shahabuddeen in his separate opinion.[330] The Court has no power to ensure the execution of its judgments or to act in any other manner as a monitoring mechanism of follow-up. In each case, the requirements of jurisdiction as specified by Article 36, paras. 1 and 2 must be met. The Court cannot extend its judicial authority by inserting monitoring clauses in judgments which bring a case to its close.[331] Thus, the request by New Zealand simply had to be interpreted as a new application subject to the ordinary conditions of jurisdiction and admissibility.

p. 767

V. Article 36, para. 3

1. Sovereign Freedom to Make Reservations

Article 36, para. 3 makes clear that States are allowed to modify their declarations of acceptance of the jurisdiction of the Court under the optional clause by reservations. Relying solely on the text of Article 36, para. 3, a reader could be led into the erroneous belief that only the reservations explicitly mentioned there are permissible. The two World Courts have never taken such a restrictive view. From the early days of the PCIJ, States engaged in a practice of carefully defined reservations suiting their individual needs, as perceived by them.[332] At the San Francisco Conference, as the *travaux préparatoires* reveal, the right to make reservations was deemed to be firmly established, not requiring any explicit recognition.[333] Since the ICJ views the acceptance of its jurisdiction as a sovereign act, it had logically to come to the conclusion that States are entitled to make any reservations in accordance with their political discretion. In the *Nicaragua* case it held: 85

> In making the declaration a State is ... free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations. In particular, it may limit its effect to disputes arising after a certain date; or it may specify how long the declaration itself shall remain in force, or what notice (if any) will be required to terminate it.[334]

Similar formulations can be found in the judgment in the *Fisheries Jurisdiction* case between Spain and Canada,[335] where Spain had suggested that reservations running against general rules of international law are unlawful and hence must be discarded. The Court dismissed this argument, drawing attention to the fact that a State may enter a reservation precisely because it feels vulnerable regarding the lawfulness of its position or policy.[336] In such instances, although remaining bound by the applicable substantive rules, a State may prefer methods of peaceful settlement other than adjudication. This is perfectly in accordance with the principle of free choice of means.[337] Since States are free to submit to the jurisdiction of the ICJ *vel non*, they cannot be prevented from restricting their acceptance, even in instances where the subject-matter concerned is governed by rules of *jus cogens*.[338] In sum, the freedom of States to confine the scope of their declarations under Article 36, para. 2 by reservations may perhaps have certain outer limitations, but such limitations are no more than a theoretical construct, lacking any relevance in practice. A wise formula has been devised by the Inter-American Court of Human Rights. When ruling on a far-reaching reservation entered by Trinidad and Tobago, it held:

> The declaration formulated by the State of Trinidad and Tobago would allow it to decide in each specific case the extent of its own acceptance of the Court's compulsory jurisdiction to the detriment of this Tribunal's compulsory functions. In addition, it would give the State the
p. 768 discretional ↳ power to decide which matters the Court could hear, thus depriving the exercise of the Court's compulsory jurisdiction of all efficacy.[339]

It is clear that such a reservation would totally obliterate the substance of the relevant declaration concerning the Court's jurisdiction and would thus have to be assessed as being contrary to the object and purpose of the Statute.

2. Classes of Reservations

a) Reciprocity

The condition of reciprocity is routinely copied in many declarations. Strictly speaking, this is a superfluous specification. The whole system of the optional clause is founded upon reciprocity. Reciprocity operates therefore whether or not a State has mentioned it as a condition of its acceptance of the jurisdiction of the Court. 86

According to the Court's holding in the *Nicaragua* case, reciprocity applies only to the scope and substance of the commitments entered into under a declaration of acceptance of the Court's jurisdiction, but not to the 'formal conditions of their creation, duration, or extinction'.[340] Such conditions are not recognized as susceptible of reciprocity. One may have serious doubts as to whether this distinction is entirely appropriate inasmuch as the time element constitutes an essential element of the balance of mutual obligations.[341] In any event, reciprocity is measured at the moment when proceedings are instituted. The fact that an applicant has reserved the right to denounce its own declaration with immediate effect cannot be invoked by the respondent after the seisin of the Court. The Court has also denied, contrary to a doctrine developed half a century ago by Waldock,[342] the right for a State to base itself on the rule of reciprocity in the time before a case has been brought before it. Thus, in the *Nicaragua* case, it considered that the letter of 6 April 1984, by which the United States entered a new reservation regarding disputes with Central American countries three days before Nicaragua's application reached the Court, produced no legal effect: it held that the United States was bound by its own declaration which provided for a six-month notice of termination, notwithstanding the fact that Nicaragua's declaration contained no such restriction.[343] In sum, once the Court has been validly seised on the basis of consent expressed by the two parties in whatever form, any further conditions attached to that manifestation of consent become irrelevant and cannot be relied upon any longer under the guise of reciprocity. 87

b) Time Clauses

Time clauses, which are explicitly referred to by Article 36, para. 3, may be divided into three classes. First of all, a State has a choice to make a declaration for a fixed term or for an indefinite period of time. Second, it must be clarified as from which point in time, and ↳ for which occurrences, the declaration becomes operational. Finally, a State may specify how it should be able to denounce or withdraw its declaration. 88 p. 769

aa) Fixed Term or Indefinite Period of Time

Declarations made for a fixed-term period are presently fairly rare. There was a certain habit in earlier decades to limit the validity of a declaration to a few years, adding that after the expiry of that period it will remain in force until notice of its withdrawal has been given,[344] or to specify that the period of validity will be tacitly renewed for the same number of years unless notice of denunciation is given.[345] Such provisos serve no useful purpose if the declarant State reserves the right to withdraw its declaration at any time. Among the formerly listed declarations there was only one which was given for a limited period of time and has not been renewed since, namely the declaration by Nauru.[346] Apparently, Nauru had made the declaration in order to be able to file its application against Australia.[347] After that was done, Nauru, the smallest of the Member States of the United Nations, does not seem to have seen any advantage in being subject to the compulsory jurisdiction of the Court. 89

bb) Denunciation

The importance of denunciation clauses has already been stressed.[348] It should be reiterated that withdrawal will not have an immediate effect if a State has confined itself to stating in general terms that it reserves the right to give notice of termination.[349] In such instances, the jurisprudence developed by the Court in the *Nicaragua* case applies: a notice of termination will deploy its effects only after the lapse of a 'reasonable' period of time.[350] 90

cc) Protection against Retroactive Application

The most important of all the time clauses is designed to identify the disputes covered by a declaration. Many declarations do not contain such a clause, and one State, Suriname, even explicitly states that its declaration encompasses disputes arising out of events both prior and subsequent to their acceptance of the jurisdiction of the Court. However, a considerable number of States wish on legitimate grounds to exclude any retroactive effect of their declarations. This can be done in two ways. A simple formulation specifies that the declaration covers only disputes arising after the declaration has been made.[351] This limitation has almost no relevance any longer in the case of declarations made many decades ago under the regime of the PCIJ (Luxembourg, 1930). Additionally, the protective effect of that clause for the declarant State is rather modest. As in particular the ↳ case *Certain Property* between Liechtenstein and Germany[352] has shown, it is extremely easy to base new claims on facts dating back to a remote past so that all of a sudden a new dispute can emerge. 91 p. 770

Therefore, if a State wishes to be able to trust that certain events in its past are not susceptible of being brought before the Court, it should employ the 'Belgian formula', which confines the jurisdiction of the Court to disputes arising after the date of the declaration and concerning situations or facts subsequent to that date. 92

This formula has attained its highest degree of sophistication in the Indian declaration of 18 September 1974, which excludes:

> disputes prior to the date of this declaration, including any dispute the foundations, reasons, facts, causes, origins, definitions, allegations or bases of which existed prior to this date, even if they are submitted or brought to the knowledge of the Court hereafter.

Obviously, India was intent on recouping by this extensive description its defeat against Portugal in the *Right of Passage* case.[353] Because of the complexity of the issue, the President of the Court has indeed called upon governments to specify with great care the time limits that should demarcate their acceptance of the Court's jurisdiction.[354]

Given that any judicial proceeding has a factual background which is by necessity rooted in events of the past, it is of great importance to understand and apply the two criteria correctly—emergence of dispute and relatedness to facts prior or subsequent to the making of the declaration concerned—to the occurrences constituting the subject-matter of a dispute. The first question is when a dispute arises. Here, the jurisprudence has given a straightforward answer. The critical date is the time when a request was made and that request was rejected[355] or the time when an alleged actual violation of the rights claimed by one of the parties occurred, which in the *Right of Passage* case was the placing of obstacles by India impeding the exercise of the right of passage by Portugal.[356] In the *Legality of Use of Force*, the dispute arose when NATO, on 24 March 1999, commenced its air attacks on Yugoslav territory, *i.e.*, prior to 25 April 1999, the date on which Yugoslavia's declaration became operational; consequently, the Court, complying with the principle of reciprocity, could not recognize that declaration as a basis for its jurisdiction. Rightly, it rejected the Yugoslav contention that each air attack after 25 April 1999 gave rise to a new dispute.[357] 93

It is more difficult to determine which facts are to be classified as prior or subsequent to the deposit of a declaration of acceptance of the jurisdiction of the Court. In a wider sense, everything is related to everything else, and the causal chain linking events of the present to the past never ends. Hence, some evaluation has to take place; the requisite classification is not a question of pure logic. In two cases, where the Court's jurisdiction was founded upon declarations employing the double formula, the PCIJ had to specify the meaning of 'situations or facts subsequent' to a declaration under Article 36, para. 2 ↳ of its Statute. Consistently, it held in both judgments, *Phosphates in Morocco*[358] and *Electricity Company of Sofia and Bulgaria*,[359] that what mattered were the facts which constituted the source, the 'real cause' of the dispute. Thus, factors only remotely related to the dispute are discarded, and continuing effects of a measure taken before the critical date are not to be taken into account. Neither does it matter what are the foundations of the rights a party asserts, since the key criterion is the dispute itself. This latter particularization of the time clause came to prominence in the *Right of Passage* case, where the ICJ followed the path demarcated by its predecessor. Obviously, the controversial Portuguese right of passage over Indian territory must have had its roots far back in history, but it was the measures taken by India to prevent Portugal from exercising that right which gave rise to the dispute in 1954 and which were indeed subsequent to India's declaration of acceptance of 1930.[360] In the *Legality of Use of Force*, both the dispute and the relevant facts—the bombing of Yugoslav territory—traced their origin to a date prior to Yugoslavia's declaration.[361]

94

p. 771

It stands to reason that time clauses give rise to identical issues both in the case of compromissory clauses and of declarations under Article 36, para. 2. Invariably, the 'real cause' of the dispute must be identified. In the case between Liechtenstein and Germany concerning *Certain Property*, a case brought under Article 36, para. 1, the dispute, according to the findings of the Court, arose after the entry into force of the European Convention for the Pacific Settlement of Disputes as between the litigant parties, but it had its real source in the confiscation measures taken by Czechoslovakia in 1945.[362] It came to a similar conclusion in an Order of 6 July 2010 in *Jurisdictional Immunities of the State*,[363] which dismissed a counter-claim brought by Italy against Germany for the violations of international humanitarian law committed during the Second World War by German authorities. Here, however, the Court took the view that those violations could not be regarded as the 'real cause' of the dispute underlying the counter-claim. It was the legal regime established in the aftermath of the Second World War for the reparation of war damages, an ensemble of facts and situations centering on the Italian Peace Treaty of 1947, which had come into existence prior to the entry into force of the European Convention for both parties, that constituted that 'real cause'.[364] It is not easy to understand the rationale of that decision.

95

Another time clause became attractive after the 'surprise attack' of Portugal against India in the *Right of Passage* case. The fact that India's argument to the effect that the proceedings had not been instituted in an orderly fashion in accordance with the Statute was not accepted by the Court[365] led many governments to modify their declarations under Article 36, para. 2.[366] The model became the clause introduced by the United Kingdom, which in its current version of 22 February 2017 excludes:

96

p. 772

> any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

Same or a similar clauses can now be found in no fewer than twenty-four declarations.[367] Nigeria, which did not include such a clause in its declaration still in 1994, could therefore be sued by Cameroon which, after having deposited its declaration on 3 March 1994, filed an application against its neighbour on 29 March 1994. Eventually, Nigeria modified its declaration in line with the UK clause in April 1998. In the *Legality of*

Use of Force cases, the new wording effectively prevented Spain and the United Kingdom from being sued by Yugoslavia on account of their declarations under Article 36, para. 2.[368]

c) Domestic Jurisdiction

One of the traditional reservations specifies that matters within domestic jurisdiction remain excluded from the jurisdiction of the Court.[369] Currently, almost half of the declarant States have thought it useful to opt for this regime. Yet, no real advantage can be expected from a clause to this effect even where reference is made to disputes 'essentially' under domestic jurisdiction (a formulation derived from Article 2, para. 7 UN Charter)[370] and not to matters 'exclusively' under national jurisdiction (derived from Article 15, para. 8 of the Covenant of the League of Nations). It need not be stressed that the Court can adjudicate cases solely on the basis of international law as determined by Article 38. Whenever recourse may be had to a rule of international law for the settlement of a dispute, that dispute ceases to be one under domestic law. In its advisory opinion on the *Nationality Decrees in Tunis and Morocco*, the PCIJ stated that this is an 'essentially relative question' which depends upon the development of international relations.[371] In fact, the irrelevance of the argument of domestic jurisdiction has been amply confirmed in the jurisprudence of the ICJ. In the advisory opinion concerning the *Interpretation of Peace Treaties* the relevant objection remained unsuccessful,[372] and in the *Right of Passage*,[373] the *Interhandel*,[374] the *Aegean Sea Continental Shelf*,[375] and the *Tehran Hostages* cases,[376] where the different respondents attempted to portray the respective dispute as falling under ↳ their exclusive national authority, they invariably failed to convince the Court. At a time when the concept of national sovereignty, unfettered by any rule of international law, has shrunk to a *quantité négligeable*, domestic jurisdiction has lost any real significance as a defence against becoming the victim of illegitimate claims asserted by other States.

97

p. 773

d) *Connally* Reservation

98 Through its declaration of 1946, the United States hoped to reach absolute immunity against any unwelcome applications by defining the concept of domestic jurisdiction as depending on its own evaluation. The so-called *Connally* Reservation, named after Texan Senator Connally, specifies that the jurisdiction of the Court does not extend to matters under domestic jurisdiction 'as determined by the United States of America'. Currently, this or a similar formulation can still be found in a number of declarations, although very few.[377] Indeed, practice has shown that this reservation is not very helpful for a State appending it to its declaration. In the very first case where it had to be applied by the Court,[378] the *Norwegian Loans* case between France and Norway, the Court was seemingly debarred from ruling on the merits because Norway could invoke the relevant reservation in France's recognition of the Court's jurisdiction. The Court did not question the lawfulness of the reservation as such, which was challenged by Judge Lauterpacht in a forceful separate opinion,[379] because in any event the application would have had to be dismissed if the French declaration, on account of an unlawful reservation, had been found to be invalid. The outcome of this proceeding made it abundantly clear that, by virtue of the principle of reciprocity, the reservation works both ways, for and against the applicant and the respondent.[380] Neither has it been beneficial for the United States itself. In the *Interhandel* case, the Court simply stated that the alleged confiscation of the assets of nationals of a neutral country was a matter governed by international law and had to be decided 'in the light of the principles and rules of international law governing the relations between belligerents and neutrals in time of war'.[381] In the *Nicaragua* case, the United States did not even refer to the *Connally* amendment,[382] obviously worried about contending openly that activities such as the mining of the ports of a Central American country were a matter under the domestic jurisdiction of the United States. Given the treatment of the issue in the *Interhandel* case, it can be said with certainty that the *Connally* reservation can be helpful for the declarant State only in borderline situations where legitimate doubts may be entertained as to the precise classification of the subject-matter of a dispute. On the contrary, one may even conclude that it is a respondent 'non-*Connally* State' which derives the greatest benefits from the reservation.

p. 774

e) *Vandenberg* Reservation

99 It was also the United States which introduced one of the most complex reservations, the so-called multilateral treaty reservation or *Vandenberg* reservation, thereby excluding the jurisdiction of the ICJ unless, in the case of a multilateral treaty, 'all parties to the treaty affected by the decision are also parties to the case before the Court'. Currently, five other States have opted for similar language in their declarations.[383] In the *Nicaragua* case, the reservation prevented the Court from applying, in particular, the UN Charter. Instead, the Court resorted to the rules of customary law that run parallel to the conventional rules: the principle of non-use of force, the principle of non-intervention, and the right to self-defence. Thus, the reservation had no practical effect. According to the view taken by the Court, the reservation had 'some obscure aspects'.[384] Indeed, first of all it was not even clear whether the word 'affected' related to 'parties' or to 'treaty'; second, it was most nebulous what 'affected' could mean; and third, it is common knowledge that proceedings which involve entire groups of States never take place in practice. Thus, the *Vandenberg* reservation may generally serve as a definite brake on any consideration of the merits of a case by the Court. It is significant that India, in addition to all the other reservations it has made, has also chosen the *Vandenberg* reservation in its most abrasive form[385] to protect itself—thereby making it also impossible for it ever to bring an application against a foreign State.[386] No State may be advised to formulate such a far-reaching reservation if it is seriously committed to accepting dispute settlement by the Court.

f) Other Reservations

In practice, many other types of reservations are used by States. They will only be briefly noted here. The most 'popular' clause is the clause according to which other mechanisms of dispute settlement as agreed between the parties concerned prevail over the general jurisdiction of the Court. Special arrangements will obtain such precedence in any event, irrespective of any reference to them in a declaration under Article 36, para. 2, depending on the interpretation to be given to such clauses. In *Maritime Delimitation in the Indian Ocean* (Somalia v. Kenya) the Court observed that such reservations do not preclude its jurisdiction by conferring precedence on the system of dispute settlement under Section 2 of Part XV of UNCLOS since Article 282 UNCLOS evinces a clear intention of ensuring access to the procedure under the Statute founded on optional clause declarations, a reliable and effective international remedy.[387] A number of States exclude any territorial disputes from the scope of their acceptance,[388] and a similar reservation can fairly often be found concerning maritime disputes, including those concerned with the territorial ↳ sea.[389] Other States take care not to submit to the jurisdiction of the Court disputes potentially relating to any activities of their armed forces.[390] Environmental protection is another field which some States wish to reserve to their own discretion.[391] Finally, one may also mention those instances where the jurisdiction of the Court is excluded in instances where no diplomatic relations exist between the litigant parties.[392]

100

3. Difference between the Regime of Reservations under the Optional Clause and the Regime of Reservations to Multilateral Treaties under the VCLT

In concluding the comments on reservations, it should be emphasized again that the Court has never declared any reservation unlawful and therefore invalid. Indeed, the regime of reservations to declarations accepting the jurisdiction of the Court is essentially different from the regime governing reservations to multilateral treaties according to Articles 19–22 VCLT. In the case of a multilateral treaty, a State wishing to derogate from the text agreed upon by the parties is faced with a legal instrument that has already been negotiated and finely tuned to take into account the interests of all States involved. Unilateral departures from the negotiated text disturb this carefully established equilibrium. In the case of Article 36, there is no expectation pre-dating the final act of acceptance which produces a legally binding effect. States are entirely free to stay aloof from the jurisdiction of the Court, they may bind themselves over the whole breadth of their conduct or they may choose any intermediate formula. Solely with regard to withdrawal of a declaration under Article 36, para. 2 has the Court relied to some extent on an analogy with a rule set forth in the VCLT, namely Article 56, para. 2,[393] since withdrawal or termination does indeed affect legitimate expectations. Things would be different from the moment that there existed any obligation to accept, in principle, judicial settlement, which is not the case in view of the principle of free choice of means as laid down in Article 33, para. 1 UN Charter. On the other hand, the acceptance of the jurisdiction of the Court is a legal device governed by Article 36. In that regard, by definition, it must be placed under some restrictions. Yet, realistically speaking, the outer limits are hardly recognizable. As already pointed out, even the 'automatic reservation' (*Connally* reservation) introduced by the United States has not led to invalidating the jurisdictional bond which it was intended at the same time to engender and to reduce to insignificance.[394]

101

4. Disadvantages of Far-Reaching Declarations for Declarant State

Finally, it should again be recalled that any reservation which restricts the scope of a declaration under Article 36, para. 2 cannot only be invoked by a declarant State target of an application but also by the respondent in a proceeding brought by a declarant State.[395] Consequently, a State which makes far-reaching reservations not only protects itself against any undesired involvement in a judicial proceeding but also at the same time seriously ↳ weakens its own opportunities to bring a case against another State in a dispute which, it feels, should be adjudicated by the Court. Reciprocity thus has a most healthful influence, as borne out by the progressive disappearance of the *Connally* clause and the *Vandenberg* clause, rightly found by governments to be most damaging to their own interests. 102 p. 776

VI. Article 36, para. 4

1. Duties of States

Article 36, para. 4 regulates the modalities for the deposit of declarations under Article 36, paras. 2 and 3 and the way in which such declarations shall be processed. It is incumbent upon States wishing to submit to the jurisdiction of the Court to deposit the corresponding declaration with the Secretary-General of the United Nations, not with the Court itself. What applies to a declaration applies also to its modification by amendment or to its withdrawal. No provision on that issue was included in the Statute of the PCIJ or in the Protocol of Signature of the Optional Clause. Therefore, the most varied procedures were resorted to by governments.[396] In order to bring about legal certainty and clarity, it was felt at the San Francisco Conference that it would be convenient to draft a specific rule.[397] 103

It is the deposit of the declaration itself which produces the intended legal effect: as from that date, a State has the right to bring an application against another State; conversely, it is from that same date that it can be made the target of an application. It has already been pointed out that the Court has resisted any arguments claiming that some adequate span of time must elapse between the deposit of a declaration and the institution of proceedings by the declarant State.[398] Nor does the Court view the legal effect of declarations as dependent on their being brought to the notice of the other States subject to Article 36, para. 2. The two rules which Article 36, para. 4 enunciates are considered by it to be independent from one another.[399] Consequently, if States are afraid that they might be ‘attacked’ by surprise applications, they should insert into their own declarations the type of reservation which the United Kingdom has introduced into international practice (at least twelve months must elapse between the two dates). 104

2. Duties of the Secretary-General

It is the task of the Secretary-General to transmit copies of declarations under Article 36, para. 2 to the (other) parties to the Statute and to the Registrar of the Court. It is obvious that the deposit of such declarations cannot remain confidential since it affects, in particular, all the States which for their part are subject to the jurisdiction of the Court under the same provision. In earlier decades, transmission of the relevant information, which was effected by ordinary diplomatic channels, could take a fairly lengthy time. Thus, in the *Right of Passage* case, Portugal deposited its declaration on 19 December 1955, of which India received a copy unofficially from the Court through its Embassy at The Hague on 30 December 1955. 105
p. 777 However, it was no earlier than one month later, on 19 January 1956, that the Secretary-General of the ↳ United Nations transmitted a copy to the Indian government in compliance with Article 36, para. 4.[400] Apparently, the services of the UN Secretariat did not always live up to what may legitimately be expected of them. According to the submissions of Nigeria in the *Land and Maritime Boundary* case, the Secretary-General transmitted copies of the Cameroonian declaration of 3 March 1994 no less than eleven-and-a half months later to it although Cameroon had already filed its application on 29 March 1994. In New York, the deposit of any declaration is immediately announced in the Official Journal of the United Nations.[401] This is certainly not enough. To date, no practice seems to exist as yet according to which the Court would issue a press release as soon as it has been officially informed of the deposit of a new or modified declaration under Article 36, para. 2. Such a practice might be helpful in view of the fact that all those declarations are eventually reproduced on the Court's website.

VII. Article 36, para. 5

Article 36, para. 5 is a transitional provision which has sought to ensure that declarations made under the PCIJ Statute would remain in force, obviating the need for States to declare explicitly that they were likewise prepared to accept the jurisdiction of the new Court established under the auspices of the United Nations. As such, Article 36, para. 5 is the most telling sign that there exists a high degree of continuity between the PCIJ and the ICJ.[402] In 2018, only a few of the declarations made in the 1920s and 1930s remained in force by virtue of Article 36, para. 5.[403] Many legal departments have thought it wise to amend declarations which had been made without taking any precautions in order to establish defences against applications for cases not deemed to be amenable to judicial settlement. 106

1. The *Aerial Incident* case between Israel and Bulgaria

In the *Aerial Incident* case between Israel and Bulgaria,[404] Israel relied on Article 36, para. 5 vis-à-vis Bulgaria, which had accepted the jurisdiction of the PCIJ in 1921. However, the Court refused to entertain the case, holding—on persuasive grounds, by relying in particular on the *travaux préparatoires*—that Article 36, para. 5 was meant to apply solely to original members of the United Nations and signatories of the Statute that were present at the San Francisco Conference.[405] Bulgaria became a member of the United Nations no earlier than 1955. Consequently, the Court had to deny its jurisdiction.[406] 107

2. The *Temple of Preah Vihear* case between Cambodia and Thailand

In the *Temple of Preah Vihear* case,[407] Thailand sought to evade the jurisdiction of the Court by alleging that the declaration which it had made in 1950 renewing its 1940 declaration regarding the jurisdiction of the PCIJ had missed its aim and hence could not be deemed to have conferred jurisdiction on the Court. Thailand argued that in the light of the *Aerial Incident* case it was now clear that its own declaration had lapsed in April 1946 when the PCIJ had ceased to exist, since it did not belong to the original members of the United Nations. Consequently, in 1950 it could not 'renew' its declaration of acceptance of the jurisdiction of the Court. Rightly, the Court found this line of reasoning too sophisticated to be convincing. In fact, Thailand had made its declaration '[i]n accordance with the provisions of Article 36, paragraph 4, of the Statute of the International Court of Justice'.[408] On the basis of general rules of interpretation, the declaration had to be understood as being directed to the ICJ, its somewhat infelicitous wording being irrelevant in consideration of the clear intention manifested in it.[409] 108

p. 778

3. The *Nicaragua* case

The discussion on Article 36, para. 5 reached its climax when Nicaragua based its claim against the United States in the *Nicaragua* case on a declaration of 24 September 1929 which had been made in connection with the Protocol of Signature of the Statute of the PCIJ, both approved by the competent governmental institutions domestically in 1935, but apparently never sent to Geneva to the seat of the League of Nations. Notwithstanding this obvious lacuna in the constitutive legal process designed to produce the intended legal result, the Court was of the view that Nicaragua could invoke its declaration of acceptance, given the fact that for more than a decade Nicaragua had been listed in the official reports of the Court as a State having made the declaration under Article 36, para. 2 of the Statute of the PCIJ: 109

> Nicaragua was placed in an exceptional position, since the international organs empowered to handle such declarations declared that the formality in question had been accomplished by Nicaragua. The Court finds that this exceptional situation cannot be without effect on the requirements obtaining as regards the formalities that are indispensable for the consent of a State to its compulsory jurisdiction to have been validly given. It considers therefore that, having regard to the origin and generality of the statements to the effect that Nicaragua was bound by its 1929 Declaration, it is right to conclude that the constant acquiescence of the State in those affirmations constitutes a valid mode of manifestation of its intent to recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute, and that accordingly Nicaragua is, vis-à-vis the United States, a State accepting 'the same obligation' under that Article.[410]

Notwithstanding the passage of time, one may still entertain doubts as to the correctness of this argument. To be sure, Nicaragua could not have called into question the jurisdiction of the Court if an application had been brought against it. Under the rule of acquiescence, it could not have objected to a legal assertion which it never cared to reject. The question is, however, whether a State can derive rights from its own negligence and ambiguity. On that point, the opposite conclusion could also have been reached.[411]

For many years now, the former controversies have been reduced to issues of legal history. None of the four remaining declarations pre-dating the establishment of the United Nations is in any way in doubt. Article 36, para. 5 has discharged its function and will no longer give rise to legal difficulties in future disputes. 110

p. 779

VIII. Article 36, para. 6

1. *The Principle of* Kompetenz-Kompetenz

It is a rule generally encountered in the statutes of international courts and tribunals that the judicial body concerned decides on its own jurisdiction should any doubt arise. It enjoys *Kompetenz-Kompetenz*. Were it otherwise, the authority of the eventual judicial findings would be gravely compromised. Only if a judicial body is empowered to make binding determinations on all the issues which arise during a proceeding brought before it, is it able to issue an unchallengeable judicial ruling. In the *Nottebohm* case, the Court traced the tradition of the principle *Kompetenz-Kompetenz* back to the *Alabama* case.[412] There has indeed been a number of statutory rules since then to that effect. The 1907 Hague Convention for the Pacific Settlement of International Disputes (Article 73) acknowledges such a power, which has also found expression in the statutes of all of the important international courts of our time (*e.g.*, IACtHR, Rules of Procedure, Article 27;[413] ECtHR, ECHR, Article 32, para. 2;[414] ITLOS, UNCLOS, Article 288, para. 4[415]). The *Kompetenz-Kompetenz* principle is vested in the Court even in cases where one of the parties argues that its seisin is marred by grave defects.[416] 111

2. The Applicable Regime under the Rules of Court

There may be instances where no basis of jurisdiction can reasonably be asserted. On the one hand, a State may openly acknowledge that it has filed its application outside any consensual arrangement with the respondent State. Under such circumstances, the case will not be entered in the General List (Article 26, para. 1 (b) Rules of Court) unless and until the State concerned 'consents to the Court's jurisdiction for the purposes of the case' (Article 38, para. 5 Rules of Court). Failing such grant of consent, the potential respondent may request that the case either not be included in the General List or that it should be removed therefrom if the registration has already taken place.[417] 112

Details of the procedure to be followed under regular circumstances where a respondent challenges the jurisdiction of the Court and objects to the admissibility of the application are governed, in particular, by Article 79 of the Rules of Court.[418] This provision sets forth: 113

1. Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested ↳ before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time limit fixed for the delivery of that party's first pleading. p. 780

2. Notwithstanding paragraph 1, following the submission of the application and after the President has met and consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined separately.

3. Where the Court so decides, the parties shall submit any pleadings as to jurisdiction and admissibility within the time limits fixed by the Court and in the order determined by it, notwithstanding Article 45, paragraph 1.

4. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached.

5. Upon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time limit within

which the other party may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

6. Unless otherwise decided by the Court, the further proceedings shall be oral.

7. The statements of facts and law in the pleadings referred to in paragraphs 4 and 5 of this Article, and the statements and evidence presented at the hearings contemplated by paragraph 6, shall be confined to those matters that are relevant to the objection.

8. In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue.

9. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time limits for the further proceedings.

10. Any agreement between the parties that an objection submitted under paragraph 1 of this Article be heard and determined within the framework of the merits shall be given effect by the Court.

Paragraph 1 of Article 79 of the Rules was adopted by the Court on 5 December 2000 and entered into force on 1 February 2001. Under the 1978 Rules, a party objecting to the jurisdiction of the Court could do so within the time limits set for the delivery of the counter-memorial. In quite a number of cases, this time frame was used to its full extent even for fairly futile preliminary objections. In that way, a party desirous to drag out the case could win precious time. The reform of 2000/2001 constitutes a welcome attempt to prevent such abuses. Now, the time for the raising of preliminary objections is fairly limited (maximum: three months). Since preliminary objections are essentially based on legal grounds and do not require any lengthy factual investigations, the period of three months does not appear to be excessively short. It helps to keep within reasonable limits the duration of proceedings before the Court. Under the new regime, if a preliminary objection is raised only in the memorial of the respondent party after the expiry of the ↳ three-month period, the special legal effects provided for by Article 79 of the Rules will not be triggered. 114

p. 781

The main legal effect of the raising of preliminary objections in accordance with Article 79 of the Rules is the suspension of the proceedings on the merits. An incidental proceeding will follow, focused exclusively on the relevant issues of jurisdiction and admissibility. The applicant will be provided with the opportunity to respond to the arguments put forward by the respondent. No second round of written pleadings is provided for, but the Court will hold oral hearings. Many disputes never get beyond this preliminary stage. At the end of this stage the Court shall either dismiss the objections raised by the respondent and thereafter proceed to the examination of the merits, uphold the objections and consequently dismiss the application *in toto* or partially, or declare that the objection does not possess an 'exclusively preliminary character' (Article 79 Rules, para. 9).[419] The Court is thus prevented from joining an objection to jurisdiction and admissibility to the merits of the case at its own discretion as it was permitted under the previous versions of the Rules. 115

a) Concept of 'Application'

There can be no doubt that the term 'application' in Article 79, para. 1 of the Rules has to be understood in a broad sense as referring to the claim of the applicant as detailed not only in the application but also the ensuing memorial and possibly also during the oral hearings.[420] Although at such later stages of the case the scope of the application may be particularized and clarified, and to some extent also broadened, such 'development' of an application may not be used to introduce 'new' claims. A dispute cannot be transformed into another one different in character.[421] It will always be difficult to trace the precise boundary between substantiation and explanation of a pending claim, on the one hand, and addition of new items, on the other. 116

b) Scope *ratione personae* of Right to Raise Preliminary Objections

It should be noted that Article 79, para. 1 of the Rules grants the right to raise preliminary objections not only to the respondent but also to parties other than the respondent. This second clause of Article 79, para. 1 of the Rules refers in particular to those instances where proceedings are instituted by notification of the special agreement in accordance with Article 40, para. 1 where there is technically no applicant and no respondent. But an applicant can also have valid grounds—in exceptional situations like the *Monetary Gold* case[422]—to question the jurisdiction of the Court or the admissibility of its own application.[423] As a rule, however, preliminary objections are raised by the respondent where the jurisdiction of the Court is founded on a compromissory clause or an optional clause declaration under Article 36, para. 2. 117

p. 782

c) Meaning of Ninety-Day Time Limit

If a respondent does not raise preliminary objections during the ninety-day period prescribed in Article 79 of the Rules, it does not forfeit its right to advance at any later stage of the proceedings preliminary objections that it may not have thought of during the initial stage of a proceeding. However, if the special procedure under Rule 79 is not resorted to, the effects set forth in para. 5—suspension of the proceedings on the merits—do not take place. The preliminary objections raised will then be dealt with in the framework of the consideration of the merits.[424] In other words, a respondent remains free to set forth its preliminary objections in its counter-memorial. This alternative strategy has the advantage of saving time. No separate incidental proceedings, which necessarily entail a delay of many months as a minimum, will then take place. Once a respondent has filed its counter-memorial without raising preliminary objections, it will in any event be deemed to have acquiesced to the jurisdiction of the Court.[425] 118

d) Raising Preliminary Objections ahead of Receipt of Memorial?

A discussion has taken place on the question whether a respondent is entitled to raise preliminary objections even before the applicant has submitted its memorial or whether it may immediately take that procedural step after having taken note of the application, which normally is fairly succinct. The Court, following its general line of distancing itself from unnecessary formalism, has seen no obstacle to the respondent voicing its defence at the earliest possible stage of a proceeding: 119

> Whereas, in accordance with article 79, paragraph 1, of the Rules of Court, while a respondent which wishes to submit a preliminary objection is entitled before doing so to be informed as to the nature of the claim by the submission of a Memorial by the Applicant, it may nevertheless file its objection earlier.[426]

It is submitted that this is the correct solution.[427] A respondent cannot be prohibited from putting forward its counter-arguments of any kind at the point in time it judges to be the most appropriate. There can be no custodianship by the Court in this regard. On the other hand, the Court, on its part, can obviously not be

bound to rule on the preliminary objections raised before it has been fully informed about the relevant facts through the submission of the applicant's memorial.

e) Invocation of New Grounds of Jurisdiction by Applicant

On the other hand, an applicant is also entitled to adduce new grounds of jurisdiction even after having filed its application and the supplementary memorial.[428] It stands to reason that, when such new legal foundations susceptible of supporting the application are introduced after the respondent has filed its counter-memorial, the special procedure under Article 79, para. 1 of the Rules will not—or not again—be available to the respondent. Although Article 79 of the Rules is designed to protect the interests of the respondent, which should not be forced into the merits of a dispute if there exists no genuine basis of jurisdiction, the liberal jurisprudence of the Court has not given rise to any real difficulties in practice. 120

p. 783

f) Jurisdiction and Admissibility

While Article 36 confines itself to addressing the issue of jurisdiction, Article 79 of the Rules explicitly deals at the same time with jurisdiction and admissibility. Article 62 of the 1936 Rules of the PCIJ[429] referred simply to the concept of 'preliminary objection', without specifying what kind of legal points could be raised by means of such an objection. However, by that time it was recognized that the provision encompassed any obstacles which might prevent the PCIJ from considering the merits of a case pending before it.[430] Jurisdiction is geared to the basic requirement of consent by the litigant parties, whereas admissibility touches upon other requirements which may result either from the application of general rules of international law (*e.g.*, exhaustion of local remedies for the exercise of diplomatic protection) or from specific agreements between the parties concerned (*e.g.*, referral of a particular class of disputes to arbitration).[431] Additionally, Article 79, para. 1 of the Rules mentions—without any real need for such precaution[432]—a third category of objections 'the decision upon which is requested before any further proceedings on the merits'. This last phrase captures quite well the essential characteristics of preliminary requirements.[433] For the Court, jurisdiction and admissibility must both be present for a case to be susceptible of adjudication on its merits. Generally, it can be said that jurisdiction must positively be shown to exist, while admissibility, if jurisdiction is established, will generally be lacking only on account of exceptional circumstances. While, as pointed out previously, the Court feels obligated to examine its jurisdiction *ex officio* or *proprio motu*, it has never maintained that it is under a similar obligation to raise issues of admissibility on its own initiative. The only exception to this rule developed in practice are issues of judicial propriety as they have emerged in the *Northern Cameroons* case,[434] where both parties were desirous of the Court delivering a judgment.[435] 121

aa) Distinction between the Two Classes of Preliminary Objections

Although in theory it may be easy to draw a distinction between jurisdiction and admissibility, in practice it 122
p. 784 may prove extremely difficult to identify a precise boundary.[436] ↳ Thus, an agreement between the parties to refer disputes arising in a specific field solely to arbitration or to use another exclusive method of dispute settlement will have to be classified as an objection to admissibility, while the same rule, if inserted in a declaration under the optional clause, would become relevant as a defence against jurisdiction. In the *Northern Cameroons* case the Court, apparently overwhelmed by the inventiveness of the respondent in suggesting that the case was either without any basis of jurisdiction or lacked admissibility, abstained from determining whether all of the arguments raised were objections to jurisdiction or to admissibility or based on other grounds. It noted that during the course of the oral hearing 'little distinction if any' was made by the parties themselves between jurisdiction and admissibility.[437] In the *Land and Maritime Boundary* case, where Nigeria had raised no fewer than eight preliminary objections, the Court acknowledged that the first and the fourth objections related to jurisdiction,[438] but then renounced classifying the other six as falling within the first or the second basket. In the *Croatian Genocide* case, the Court attempted to introduce a clear conceptual distinction between objections to jurisdiction and objections to admissibility: jurisdiction centres on consent, whereas admissibility relates to a more disparate range of other grounds due to which, notwithstanding the existence of jurisdiction, the Court should not hear the case.[439] These episodes show how wisely the Court acted as legislator in addressing preliminary objections *in toto* in one provision, namely Article 79 of the Rules. The Court has made clear that it does not have to follow a schematic course in examining preliminary objections. It is free to rely on those that provide the most direct and conclusive answer to whether its jurisdiction is established and whether it should exercise it in any given case.[440] While objections related to jurisdiction have some logical priority, the Court may even, on grounds of procedural economy, reject an application for lack of admissibility before having considered all the issues relating to jurisdiction.[441]

bb) Jurisdiction

The jurisdiction of the Court is delineated by Articles 34, 35, and 36. Concerning Article 34, no real difficulty 123
has ever arisen, although almost continually private individuals or non-governmental organizations have sent 'applications' to the Court, either out of ignorance or as a means to manifest their opposition to the political regime in a given country. In such instances, the Registrar provides an answer, informing the author of the communication that his/her concerns cannot be addressed by the Court.[442] In contrast, the requirements of Article 35 played a determinative role in the *Legality of Use of Force* cases. After Yugoslavia had been excluded from any participation in the work of the United Nations,[443] it was doubtful whether it could still be counted as a member of the World Organization. While originally the Court saw no obstacle in
p. 785 recognizing that ↳ applications could be brought against the 'new' non-socialist Yugoslavia,[444] it eventually determined in the *Legality of Use of Force* cases that this new Yugoslavia, comprising only Serbia and Montenegro, was not identical to the former socialist Yugoslavia and that at the time it instituted proceedings against the NATO States participating in the Kosovo war (April 1999) it was not a member of the United Nations and hence not a party to the Statute, lacking the right to resort to the Court.[445]

The logical consequence of the findings in the *Legality of Use of Force* cases would have been to conclude that 124
the applications brought by Bosnia and Herzegovina against Serbia in 1993 and by Croatia against Serbia in 1999 lacked a basic requirement of jurisdiction *ratione personae*, namely Serbia's quality as party to the Court's Statute. However, the Court did not come to that conclusion. In the *Bosnian Genocide* case, it felt bound by its 1999 judgment in which it had rejected the preliminary objections raised by the respondent against the application.[446] Thus, a clear inconsistency emerged: Serbia was denied the right to defend its rights that had allegedly been infringed by the NATO members during the airstrikes campaign in Kosovo, but no legal obstacle was deemed to exist for it to be sued before the Court. In the *Croatian Genocide* case, on

the other hand, the Court departed from the proposition that the conditions of jurisdiction must be fulfilled at the time of the filing of the application, given the short time that had passed between that date and the full regularization of the legal position of Serbia and Montenegro.[447]

g) In particular: Admissibility

aa) Diplomatic Protection: Nationality Rule and Exhaustion of Local Remedies

Among the inadmissibility grounds, one finds in the first place those connected to the exercise of diplomatic protection by the home State in favour of a person who has suffered injury at the hands of the respondent State. According to traditional rules, a State can only endorse the cause of its own nationals.[448] Additionally, in the *Nottebohm* case the Court held that for the purposes of diplomatic protection, nationality presupposes a genuine link between the person concerned and the State to which he or she is related through the bond of nationality, adding thus the criterion of effectiveness.[449] In cases of dual nationality, no claim can be brought against the second home State of the victim,[450] except where one of the two nationalities is the absolutely dominant one.[451] In sum, the ↳ question whether a State has standing to defend the rights of private persons or companies is to be considered within the scope of the concept of admissibility. 125

p. 786

Likewise, in accordance with the rules governing diplomatic protection, State action to defend the cause of one of its nationals requires that the person concerned has beforehand exhausted any available domestic remedies of the respondent State. This rule, which has been repeatedly confirmed by the Court,[452] only applies to cases where the applicant State relies exclusively on a violation of the rights of its national. If it additionally invokes a direct violation of its own sovereign rights, it is under no obligation to wait until domestic proceedings have been completed by the injured person.[453] Nor is exhaustion of local remedies a compulsory requirement of diplomatic protection if the respondent State has failed to inform the injured individual about the available remedies as required under international law.[454] The current commentary is not the place for dealing in detail with the doctrine of diplomatic protection.[455] It suffices to recall that the Court has indeed felt bound by the traditional rules which are applicable also before any formalized inter-State dispute settlement mechanism, with the exception of the organs of the United Nations. 126

bb) Substantiation of Subject-Matter of Application

In particularization of Article 40, para. 1 of the Statute, Article 38, para. 2 of the Rules sets forth the requirements with which any application must comply: 127

> The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based.

Failure to live up to these requirements may be a ground of inadmissibility. Although lack of sufficient substantiation of the application has often been advanced as an argument from the respondent, the Court has invariably shown a high degree of generosity in accepting applications which, even after having been supplemented by the subsequent memorial, were still significantly marred by a lack of clarity, being thus susceptible of compromising the defence of the respondent concerned.[456] In that respect, although an application filed by a State with its many human resources will never be totally baseless, it is advisable to not show too much leniency. In inter-State relations, a considerable degree of professionalism may be expected. In the case of *Certain Property*, lack of substantiation had been strongly criticized by Germany, although eventually the argument proved irrelevant as the Court dismissed the application on grounds *ratione temporis*.[457]

p. 787 **cc) Agreement on Other Method of Pacific Settlement**

Considerable importance attaches also in practice to the objection that, notwithstanding the general consent of the parties to the jurisdiction of the Court, some other method of dispute settlement enjoys priority in view of the specific case at hand.[458] Among the clauses providing for other dispute settlement mechanisms are Articles 55 of the ECHR[459] and 344 of the TFEU.[460] To date, no conflicts between the jurisdiction of the ICJ and the Court of Justice of the European Union have arisen.[461] As far as diplomatic negotiations are concerned, on the other hand, the Court and its predecessor have discarded as unfounded objections that under general international law access to its judicial resources is conditioned upon the prior exhaustion of such negotiations.[462] Even in cases when the relevant compromissory clause makes recourse to diplomatic means a precondition for the institution of judicial proceedings, the Court refrains from any excessive demands. It contents itself with noting that indeed the parties had been unable to find common ground before the application was filed.[463] This approach had already been taken by the PCIJ in *The Mavrommatis Palestine Concessions* case: 128

> Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*.[464]

A clear departure from this perception of the requirement of prior negotiations occurred in the judgment of the Court in the *Georgia v. Russia* case. In that case, the demands placed on the applicant party were extremely high,[465] an approach certainly not unrelated to the highly political character of the dispute.

p. 788 The usual flexibility is, by contrast, applied to other methods of settlement. In the view of the Court, no formal conclusion of a proceeding which was initiated before the seisin of the Court is necessary for the latter to exercise its jurisdiction: 'It is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed.'[466] In view of this finding, it was not necessary for the Court to formally decide whether the *Contadora* process initiated by some OAS Member States with a view to restoring peace in Central America should have been classified as a 'special procedure' or a 'pacific procedure' under Articles II and IV of the Pact of Bogotá, *i.e.*, as a procedure which would have enjoyed precedence over any procedure before organs of the international community at universal level.[467] In the *Nauru* case, the Court rejected the relevant objection raised by Australia, simply noting that no agreement providing for dispute settlement had been concluded between Australia and Nauru.[468] In that respect, an alternative dispute settlement mechanism must first of all exist in legal terms and must also be effective as a matter of fact. Litispendence of the same dispute before another international tribunal constitutes a sub-category of the same configuration, which is however rarely encountered in practice.[469] International procedures differ so widely that most times it can hardly be contended that the claims pursued by the parties are identical.[470] *Res judicata* may also be raised as an objection to admissibility but will rarely become relevant if the subject-matter of the two proceedings is clearly distinct.[471] 129

dd) Delay

Other preliminary objections that have been regularly raised against the admissibility of a case relate to delays in bringing a claim, to abuse of process, to the power of representation of the State organ that has ordered the filing of the application, or to waiver of the right to have recourse to judicial settlement. None of these arguments has been successful in practice. In the *Ambatielos* case, the Court almost summarily dismissed the argument advanced by the United Kingdom that in introducing in April 1951 an application regarding events that referred back to a commercial contract concluded by a Greek citizen with British authorities in 1919, Greece, the applicant, was acting improperly.[472] In *Nauru*, the Court embraced *in abstracto* the proposition that delay by a claimant State could make the application inadmissible, given that such delay could prejudice the respondent with regard to both the establishment of the facts and the determination of the ↳ applicable law, but in the case at hand, it found that no such delay existed.[473] 130

p. 789

Similarly in the *Armed Activities* case (DRC v. Uganda), it gave short shrift to Uganda's defence that the Democratic Republic of the Congo had waited too long before raising certain occurrences dating way back into the past.[474] While in both these cases the applicants had delayed excessively before coming to the Court, in *LaGrand* a further complication arose as Germany had instituted proceedings less than two days before the date scheduled for the execution of Karl LaGrand. Yet, even in this case the Court rejected the objection that the filing of the application was too late.[475] Likewise in *Avena* any risk of prejudice against the United States as the respondent State was denied by the Court.[476]

ee) Abuse of Process, Infringement of Good Faith, Obstacle of Clean Hands

Abuse of process is a defence which can be raised easily when the respondent has no better argument at its disposal. In the case of the *Arbitral Award*,[477] in *Nauru*,[478] as well as in the *Land and Maritime Boundary*, where the objection was termed an infringement of the principle of good faith,[479] the Court recognized that abuse of process or infringement of good faith was relevant in assessing the admissibility of an application, but made no great case of it. Indeed, when the requirements of jurisdiction in accordance with Article 36 are met, the States concerned do have the right to bring a dispute before the Court, and judicial settlement will generally be considered the most appropriate methods of peaceful dispute settlement. Therefore, the objection can be successful only under extreme circumstances which have never been considered present in any of the cases decided by either the PCIJ or the ICJ. The clean hands doctrine, on the other hand, is best situated within the realm of the substantive rules of diplomatic protection. It has never been recognized as an inadmissibility ground.[480] 131

ff) Power of Representation

In borderline cases, the Court may have to examine whether the State organ that authorized the relevant procedural acts is entitled to represent the State in its international relations. Here, by analogy, the VCLT rules provide an appropriate yardstick.[481] When in February 2017 the former representatives of Bosnia and Herzegovina sent a document to the Court requesting revision of the judgment of 26 February 2007 in the *Bosnian Genocide* case, the President of the Court responded by issuing a press release noting that the authors of the document had not been duly authorized by the government of their country to perform that procedural act.[482] 132

gg) Waiver

In theory, a State as a sovereign entity is free to waive its right to seise the Court. However, solid evidence 133
p. 790 must be adduced to show that such was the intent in a specific case. In the ↳ *Nauru* case, the Court was not convinced that the Nauruan authorities had waived their substantive rights together with the attendant procedural rights as Australia argued,[483] and in the *Legality of Use of Force* cases it likewise abstained from interpreting the submissions put forward by Serbia and Montenegro as a renunciation of its procedural rights, despite the fact that at least implicitly the respondent, by affirming that at the relevant time in April 1999 it was not a party to the Genocide Convention, had refuted the basis of jurisdiction originally invoked by it.[484]

hh) Lack of *locus standi*

Locus standi, defined as the 'right of appearance in a court of justice',[485] is a secondary concept which does 134
not indicate the real cause of the procedural status of a party before the Court. It was at the centre of the *South West Africa* cases where the Court, in its first judgment,[486] treated it as a preliminary matter,[487] whereas in the second judgment[488] it took the view that it belonged to the merits of the dispute, stating that the applicants:

> did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust'.[489]

Under normal conditions, the question whether an alleged right exists pertains to the merits of the case. If, by contrast, a State invokes rights which are derived from a multilateral treaty, a treaty concluded among other parties or rights established under general international law, two different interpretations are possible. On the one hand, the treaty may provide for a purely procedural position, confined to the State asserting the rights of a third party,[490] or it may set forth true substantive rights for a third party in the sense contemplated by Article 36 VCLT. In the case between Belgium and Senegal concerning the prosecution of the former Chadian dictator, Hissène Habré, the ICJ found that CAT (Article 5) conferred upon all States parties the right to demand that the obligations under the Convention be fulfilled. It recognized thus the right of Belgium to bring an application for that purpose. In the *Marshall Islands* cases the ICJ did not reach the stage of ruling on issues of admissibility, as it denied that it had jurisdiction to entertain the applications brought by the Marshall Islands against India, Pakistan, and the United Kingdom. In the *Barcelona Traction* case, standing was eventually denied to Belgium since, according to the Court, there is no right of a State to endorse the claim of the shareholders of a company which has the nationality
p. 791 of a third country.[491] In this ↳ case, lack of standing resulted from the application of the general rules on diplomatic protection.

The ILC ASR[492] have considerably broadened the scope of *jus standi* in light of the adoption of Article 48. It is 135
precisely the *Barcelona Traction* case with its distinction between 'ordinary' obligations under international law and 'obligations *erga omnes*',[493] which may be seen as the juridical source of Article 48 ASR. To date, this new procedural device has not played a significant role in international law.[494] The most pertinent case is the dispute between Belgium and Senegal about the extradition of the Chadian dictator, Hissène Habré, to Belgium.[495] In that case, Belgium did not claim that it was the direct victim of an injurious act committed by Senegal, but rather that it acted on the basis of universal jurisdiction as provided under CAT, with a view to enforcing international law vis-à-vis a political leader who allegedly had committed serious breaches of international humanitarian and human rights law. The ICJ accepted that claim, holding that any State party to the Convention has a legal interest entitling it to bring a judicial action against any other State party for violation of its obligations flowing therefrom.[496] This case has thereby set a precedent that may be invoked

many times in the future whenever a State is intent on acting as defender and prosecutor of the common values enshrined in the CAT or other treaties for the protection of human rights.

3. No Forfeiture of the Right to Seise the Court

136 Rightly, the Court has rejected on principle the argument that a State which has not on its part abided by the obligations that it has sought to enforce against another State has forfeited its right to seise the Court,[497] as it is most essential to have the Court monitor intricate situations where wrongful acts and countermeasures are so tightly interwoven that it is difficult to disentangle the web of claims and counter-claims. As already pointed out,[498] occurrences at the level of substantive law do not, in general, affect the procedural regime set forth by Article 36. Thus, if States wish to be able to escape judicial proceedings on highly politicized and delicate matters, they have to frame their declarations under paras. 2 and 3 accordingly.

p. 792

4. Critical Date

137 The 'critical date' for determining the admissibility of an application is the date on which the application is filed.[499] Consequently, in principle later events have no impact on the power of the Court to entertain the merits of a case. However, under specific circumstances it may appear exceedingly formalistic to dismiss an application on procedural grounds, in particular if shortly after the filing of the application the defects were cured or where immediately afterwards the applicant could again institute proceedings against the respondent that would be held admissible.[500] On the other hand, it may occur that in the course of the proceedings a case is deprived of its object. In that case, the Court does not continue with the examination of the matter. According to its own words, in such instances it is 'not called upon to give a decision'.[501] In the *Nuclear Tests* cases, affirming that the dispute had become moot, it was relieved from the duty to acknowledge that, although it had indicated provisional measures under Article 41, it in fact lacked jurisdiction. In all the other cases where the issue has been discussed, the Court has declined to uphold the objection.[502]

5. Decision on Preliminary Objections

138 Article 79, para. 9 of the Rules determines how preliminary objections should be dealt with after having been considered. In any event, the Court is required to hand down its decision in the form of a judgment. The legal position is straightforward either when it finds a preliminary objection unfounded, in which case it will be rejected, or well-founded, in which case it will be upheld. If a party—the potential respondent—does not appear before the Court, in which case jurisdiction and admissibility will be examined *ex officio* without any objection having been raised, the Court is bound to find, in case the requisite requirements are met, that it has jurisdiction.[503] In many instances, however, arguments pertaining to jurisdiction and admissibility are interwoven with the merits of the dispute. The Rules which were applicable until 1972 conferred upon the
p. 793 Court a great measure of discretion in that respect. In case of doubt, the Court was authorized to ↳ join a preliminary objection to the merits.[504] Thus, an issue which had been extensively discussed in a first round at the preliminary stage of the proceedings could come up for discussion a second time.[505] This discretion was curtailed by the reform of the Rules in 1972.[506] Now consideration of a preliminary objection can be reserved for the merits stage only if the objection does not have an 'exclusively preliminary character' (Article 79, para. 9). In other words, if such exclusively preliminary character exists, the Court must deal with the objection immediately, until it has come to a clear conclusion, without being able to postpone a final determination until the very end of the proceedings. On the other hand, if an objection lacks an exclusively preliminary character, it will indeed have to be considered along with the merits.

139 In the application of the new version of the Rules, the Court has in a number of proceedings declared that a given objection does not possess an exclusively preliminary character. The first relevant case was the

dispute between Nicaragua and the United States. Here, the multilateral treaty reservation (*Vandenberg* clause) was considered to be so closely related to the substance of the dispute that it could not be exhaustively dealt with at a preliminary stage.[507] This finding, however, did not appear in the *dispositif* of the relevant judgment but was solely expressed in its legal grounds. This was reversed in the *Lockerbie* cases, where the Court had to determine whether the claims brought forward by Libya had lost their object as a result of the two resolutions adopted by the Security Council on the incident.[508] In this case, a finding was made also in the *dispositif* that the objection raised by the United Kingdom and the United States did not have an exclusively preliminary character—and would thus have to be addressed at the merits stage.[509] A few months later, the Court ruled in the dispute between Cameroon and Nigeria[510] that the eighth preliminary objection by Nigeria to the effect that any pronouncement on the maritime boundary between the two countries affected the rights and interests of third countries was so intimately bound to the merits that it could not be adjudicated upon at the preliminary stage of the proceedings. This finding was reflected both in the legal considerations as well as in the *dispositif* of the judgment.[511] Essentially, a declaration that an objection does not have an exclusively preliminary character is nothing more than its joining to the merits as under the old system of the Rules. The sole difference lies ↳ in the changed requirements for ordering the postponement of its consideration to the merits stage.

p. 794

The Court is free to choose the grounds on which to dismiss a case either for lack of jurisdiction or as being inadmissible. It does not have to follow a specific order nor is there any rule making it compulsory to adjudge first issues of jurisdiction before proceeding admissibility.[512] The Court generally bases its decision on the ground which in its view is 'more direct and conclusive'. In pure legal logic, it would seem inescapable that the Court would have to rule first by order of priority on objections to jurisdiction.[513] However, such a strict procedural regime would be all the more infelicitous since the boundary between the two classes of preliminary objections is to some extent dependent on subjective appreciation.[514] The Court therefore chooses the ground which is best suited to dispose of the case ('direct and conclusive'). Thus, in *Certain Property* it examined only two of the preliminary objections raised by Germany.[515] It has departed, however, from this general proposition with regard to the right of a party to have access to the Court in accordance with Article 35. In the view of the Court, this objection assumes precedence over all others.[516] In any event, the Court has emphasized that in principle a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings.[517]

140

6. Applications Lacking any Jurisdictional Basis

There may be cases where the applicant acknowledges that the respondent it has identified has not accepted the jurisdiction of the Court or where lack of jurisdiction is so obvious that it might amount to a violation of the rights of the defence to register such applications as ordinary cases in the General List held by the Court (Article 26, para. 1 (b) of the Rules). Regarding the former group of instances, Article 38, para. 5 of the Rules provides:

141

> When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.

In fact, if the respondent does not consent to the jurisdiction of the Court when the application is brought to its knowledge, the case cannot proceed. In such cases, it is not even necessary to make a formal determination to that effect. Under the 1946 Rules, where even such 'phoney' cases were registered, the Court made a formal order to remove ↳ the case from its List.[518] In recent years, France was twice targeted by applications in which it was openly stated that the respondent had not (yet) accepted the jurisdiction of

p. 795

the Court but that the requisite acceptance was expected. In both instances, *Certain Criminal Proceedings in France* (Republic of the Congo v. France)[519] and *Mutual Assistance in Criminal Matters* (Djibouti v. France),[520] the respondent did indeed inform the Court that the French government accepted the jurisdiction of the Court for the purposes of those disputes, apparently in an attempt to show that the withdrawal of its declaration under Article 36, para. 2 in 1974 after its negative experience in the *Nuclear Tests* cases[521] did not amount to a definite rejection of the Court.

142 A middle-ground situation emerged when New Zealand in 1995 submitted a *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 Case*.[522] While New Zealand relied on the relevant paragraph in the earlier judgment, France was of the opinion that this judgment could not provide a basis of jurisdiction and that, as a logical result, the case could not be registered in the General List. In order to sort out the contradictory submissions of the two parties, the Court considered it necessary to hold oral hearings. Eventually, France consented to this procedure while maintaining that its objections did not amount to truly 'preliminary objections'—since the case did not exist in legal terms so that any consideration was 'anterior' to a genuine examination of jurisdiction and admissibility.[523]

143 The question is what treatment should be given to cases where the indications furnished by the applicant as to the alleged basis of jurisdiction are so tenuous that *prima facie* jurisdiction seems to be non-existent. Notwithstanding the similarities with the group of cases just referred to, it would appear to be obvious that different rules apply to 'weak' or 'flimsy' cases registered in the General List, as long as the applicant provides some indications as to the bases of jurisdiction allegedly supporting the application. In the *Legality of Use of Force* cases, the Court decided to remove Yugoslavia's applications against Spain and the United States from the General List even at the stage of provisional measures, without an oral hearing. In the case of Spain, the Court relied on the fact that on account of the time clause limiting Spain's declaration under Article 36, para. 2, as well as due to Spain's reservation to Article IX of the Genocide Convention, its jurisdiction was 'manifestly' lacking. In the case of the United States, the matter hinged on its reservation to the compromissory clause of the Genocide Convention (Article IX). As a result of this manifest lack of jurisdiction, the Court found that:

p. 796

> within a system of consensual jurisdiction, to maintain on the General List a case upon which it appears certain that the Court will not be able to adjudicate on the merits would most assuredly not contribute to the sound administration of justice.[524]

In the *dispositif* of the two judgments, an order was included to remove the cases from the General List.[525] In the *Fisheries Jurisdiction* case between Spain and Canada, the respondent had first sought to obtain a pre-preliminary rejection by the Court of the Spanish application, given the newly introduced reservation to its declaration of acceptance of the Court's jurisdiction. Its original response to the application was a letter of just a single page in which it flatly pointed out that the Court 'manifestly' lacked jurisdiction. However, in a meeting between the President of the Court and the representatives of the parties it was agreed to follow the normal course of procedure.[526] In a recent case, where the respondent also attempted to obtain the removal of cases brought against it from the List, the Court showed a greater degree of caution. In the case of *Armed Activities on the Territory of the Congo (New Application: 2002)* (DRC v. Rwanda), where the Democratic Republic of the Congo sought interim relief against Rwanda, the Court came to the conclusion, after having carefully reviewed all of the possible bases of jurisdiction invoked by the applicant, that *prima facie* it lacked jurisdiction to indicate provisional measures. Nonetheless, it did not draw the conclusion from this finding that the case should be removed from the General List, which meant that the Democratic Republic of the Congo was given the opportunity to substantiate its case in a special hearing on jurisdiction, notwithstanding the almost hopeless situation of the applicant.[527] In the *Legality of Use of Force* cases, regarding the respondents other than Spain and the United States, a choice might have been open to the

Court to remove the cases from its List, given the ambiguous attitude of Serbia and Montenegro on jurisdiction. Some governments had firmly requested that the case be dealt with in the most informal manner.[528] But the Court went the more prudent way in delivering a formal judgment, emphasizing that Serbia and Montenegro had neither foregone nor renounced its claims and had explicitly requested a determination by the Court on the issue of jurisdiction.[529] Hence, removal from the General List is an option available only in instances where either the existence of a jurisdictional link cannot even be alleged or where a time clause is so crystal-clear that the case at hand cannot possibly be covered by the relevant declaration of acceptance. The Court has now clarified that only in cases of 'manifest' lack of jurisdiction a case may be removed from the List.[530]

IX. Jurisdiction in Instances of Provisional Measures under Article 41

In proceedings instituted with a request for the indication of provisional measures, the Court is unable to undertake an exhaustive examination of the issue of jurisdiction. By necessity, such requests are made in circumstances where there is urgent need for a judicial order. Therefore, the Court must satisfy itself with some provisional assessment. After some hesitation,[531] it has developed a standard formula which can now be found in all relevant decisions. In the *Legality of Use of Force* cases, for instance, that formula was framed as follows: 144

> Whereas on a request for provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established.[532]

D. Evaluation

In a comparative assessment, the consensual regime as it is reflected in Article 36 of the Statute may appear to belong to the remnants of a past when the sovereign State was the centrepiece of the world order, out of step with the current tendencies towards a new system of universal governance under the auspices of peace and human rights. Some international tribunals have indeed been vested with compulsory jurisdiction over the whole breadth of their field of competence. At world level, reference can be made in the first place to the International Tribunal for the Law of the Sea and the Dispute Settlement Body of the WTO within the framework of the Understanding on Rules and Procedures Governing the Settlement of Disputes. The latter is very close to a genuine judicial system, inasmuch as the reports of the panels at first instance and the standing Appellate Body at second instance can only be reversed by a unanimous ('consensus') decision of all the members of the Dispute Settlement Body—which will never be the case. Within regional frameworks, the European Court of Human Rights and the Court of Justice of the European Union stand out in that their jurisdiction is firmly connected to the treaties they are called upon to monitor: every State which ratifies the European Convention on Human Rights or which becomes a member of the European Union is automatically subject to the jurisdiction of the respective competent tribunals. However, compulsory jurisdiction has been conferred only with regard to specific subject-matters, never without any limitations *ratione materiae*. It is significant, in this regard, that the Member States of the European Union have refrained from entrusting the p. 798 Court of Justice of the European Union with judicial powers when it comes to common foreign ↳ and security policy. Evidently, neither is the time ripe for a comprehensive system of judicial settlement nor would it necessarily be the best solution to assign all disputes to an international judge. Our age has become aware of the strengths and weaknesses of the different methods of dispute settlement. In a globalized world, the international community is dependent on loyal cooperation between different bodies with different qualifications to ensure international peace and security. While international judges have an important role to play, they cannot claim a monopoly for themselves. 145

CHRISTIAN TOMUSCHAT

Notes

1 Hague Convention No. 1 for the Pacific Settlement of International Disputes, 18 October 1907, UKTS 6 (1907), 1 Bevans 577, 205 CTS 233, Art. 38.

2 *Cf.* Eyffinger, *The 1899 Peace Conference: 'The Parliament of Man, the Federation of the World'* (1999), pp. 353 *et seq*.; Baker, 'Hague Peace Conferences (1899 and 1907)', *EPIL IV*, pp. 689–98, 696.

3 *Cf.* Hudson, *PCIJ*, pp. 114–5.

4 *Cf.* for more details Spiermann, Historical Introduction, MN 11–17.

5 *Cf.* Fachiri, *The Permanent Court of International Justice* (2nd edn., 1932), pp. 2–9; von Stauffenberg, pp. 247–55; Waldock, *BYIL* (1955–1956), p. 244.

6 *Cf. Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 399, para. 15. *Cf.* Spiermann, Historical Introduction, MN 22.

7 Reproduced in Hudson, *PCIJ*, p. 681.

8 *Cf.* Chesterman/Gowlland-Debbas on Art. 1 MN 6–9, 26–34; Chesterman/Oellers-Frahm on Art. 92 UN Charter MN 12–16.

9 UNCIO XIV, p. 821.

10 *Ibid*., p. 842.

11 *Ibid*., p. 841.

12 UNCIO XIII, p. 561.

13 *Ibid*., p. 558: vote of eight against three.

14 *Ibid*., p. 559.

15 *Ibid*., p. 226.

16 *Ibid*., p. 560.

17 *Cf. Third Restatement of the Law: The Foreign Relations Law of the United States*, vol. 1 (American Law Institute, ed., 1987), p. 230. Generally, the words 'jurisdiction' and 'competence' have the same meaning, but see for nuances: Shaw, *Rosenne's Law and Practice*, vol. II, p. 544.

18 Akande, *JIDS* (2016), p. 323; see also Shaw, *Rosenne's Law and Practice*, vol. II, p. 538.

19 The most famous departure from this lesson of experience is the refusal of the United States to accept the Court's judgment in the *Nicaragua* case, Merits, ICJ Reports (1986), pp. 14 *et seq*. In the Security Council, the United States vetoed a draft resolution calling for full compliance with that judgment: see UN Doc. S/PV.2704 (1986). Factual disregard of a judgment is another matter. Thus, it took many years before Nigeria complied with the judgment of the Court of 10 October 2002 in the *Land and Maritime Boundary* case, Merits, ICJ Reports (2002), pp. 303 *et seq*., with regard to the Bakassi peninsula, see message of Secretary-General Ban Ki-Moon of 14 August 2008, UN Doc. SG/SM/11745-AFR 1737. In the case of *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99 *et seq.*, the implementation of the orders issued by the ICJ was blocked by the Italian Constitutional Court that held the operation of the rule of immunity as enunciated by the ICJ in its judgment to be incompatible with the right to a remedy guaranteed under the Italian Constitution, see Judgment No. 238, 22 October 2014, *ILM* 54 (2015), pp. 474–506.

20 Art. 34 provides that the ICJ's authority is confined to inter-State disputes; *cf.* generally Dupuy/Hoss on Art. 34 MN 1–5.

21 *The Mavrommatis Palestine Concessions*, Jurisdiction, PCIJ, Series A, No. 2, pp. 6, 11.

22 *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 18, para. 24.

23 *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Judgment, ICJ Reports (2006), pp. 6, 40, para. 90.

24 *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 269, para. 34; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 566, para. 34; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833, 849, para. 37.

25 *Cf. Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 27; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 13, para. 31; *Obligation to Arbitrate*, Advisory Opinion, ICJ Reports (1988), pp. 12, 27, para. 35; *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 99–100, para. 22; *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 614–5, para. 29; *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 17, para. 22 and pp. 115, 122–3, para. 21; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 314–5, para. 87; *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 13, para. 27; *Avena*, Provisional Measures, ICJ Reports (2003), pp. 77, 88, para. 46; *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 84–5, para. 30; *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 442, para. 46; *Caribbean Sea*, Preliminary Objections, ICJ Reports (2016), pp. 3, 26–7, para. 50; *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 115, para. 22.

26 For a critical assessment *cf.* Gordon, in Damrosch, *ICJ at a Crossroads*, pp. 200–1; Kolb, *ICJ*, p. 327.

27 *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255 *et seq.; Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552 *et seq.; Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833 *et seq*.

28 *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319, 328.

29 *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 27; *cf.* also *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 614–5, para. 29; *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 442, para. 46; *Caribbean Sea*, Preliminary Objections, ICJ Reports (2016), pp. 3, 26–7, para. 50; *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 115, para. 22.

30 *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 33–4.

31 *Interpretation of Peace Treaties*, First Phase, Advisory Opinion, ICJ Reports (1950), pp. 65, 74.

32 *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 270–1, para. 55 and pp. 457, 476, para. 58.

33 *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 271, para. 38; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 568, para. 38; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833, 850–1, para. 41.

34 *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 84–5, para. 30; *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 442, para. 46; *Caribbean Sea*, Preliminary Objections, ICJ Reports (2016), pp. 3, 26–7, para. 50; *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 270–1, para. 36; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 567, para. 36; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833, 849–50, para. 39.

35 *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 297, para. 39, 321–2, para. 109. The obligation to undertake prior negotiations may be provided for in a compromissory clause, such as Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 7 March 1966, 660 UNTS 1, as in *Georgia v. Russia*, Judgment, ICJ Reports (2011), pp. 70, 80–1, para. 20, or in Article 30 of the Convention Against Torture

and Other Cruel, Inhuman or Degrading Treatment of Punishment, 10 December 1984, 1465 UNTS 85, ('CAT'), as in *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 448, para. 62.

36 *Marshall Islands v. India*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 255, 271–2, para. 42; *Marshall Islands v. Pakistan*, Jurisdiction and Admissibility, ICJ Reports (2016), pp. 552, 568, para. 39; *Marshall Islands v. UK*, Preliminary Objections, ICJ Report (2016), pp. 833, 851, para. 42.

37 See *The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 34; *Certain German Interests*, Judgment, PCIJ, Series A, No. 6, pp. 4, 14; *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 613–4, para. 26; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 315–6, para. 91 and p. 317, para. 93; *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 18–9, para. 25; *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 442, para. 87.

38 *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 99–100, para. 22.

39 *Cf.* the declaration by Judge *ad hoc* Fleischhauer in the *Certain Property* case, Preliminary Objections, ICJ Reports (2005), pp. 69 *et seq*.

40 An alleged dispute must be a real one, *cf*. Quintana, *ICJ Litigation*, p. 58.

41 *Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 14.

42 *Cf. Marshall Islands v. UK*, Preliminary Objections, Sep. Op. Owada, ICJ Reports (2016), pp. 877, 879, para. 6.

43 *Cf.* Gordon, in Damrosch, *ICJ at a Crossroads*, pp. 183, 207 *et seq*.

44 *Ibid*., p. 209.

45 General Act for the Pacific Settlement of International Disputes, 26 September 1928, 93 LNTS 343, Art. 28: 'If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply the rules in regard to the substance of the dispute enumerated in Article 38 of the Statute of the Permanent Court of International Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.'

46 *Cf.* also Art. 1 of the resolution entitled 'Classification des Conflits Justiciables' adopted by the *Institut de droit international* at its Grenoble session in 1922, *Annu. de l'Inst. de Droit Internat.* 29 (1922), p. 258 (also reprinted in *Tableau général des résolutions* (Institut de droit international, ed., 1957), p. 7): 'Tous les conflits, quels qu'en soient l'origine et le caractère, sont en règle générale, et sous les réserves indiquées ci-après, susceptibles d'un règlement judiciaire ou d'une solution arbitrale.'

47 *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 91, para. 52; later confirmed in *Application of the Interim Accord of 13 September 1995*, Judgment, ICJ Reports (2011), pp. 644, 664, para. 58.

48 *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 13, para. 31.

49 *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 15, para. 22.

50 *Ibid*., p. 15, para. 24.

51 *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 20, para. 37.

52 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 434–5, para. 95, 439–40, para. 105; Merits, ICJ Reports (1986), pp. 14, 26–7, para. 33.

53 *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 91–2, paras. 52–4.

54 *Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996), pp. 226, 233–4, para. 13; *Wall*, Advisory Opinion, ICJ Reports (2004), pp. 136, 155–6, para. 41. *Cf.* d'Argent on Art. 65 MN 21–26; see also Higgins *et al*., *Oppenheim's International Law: United Nations* (2017), pp. 1167–8.

55 Both of these doctrines exist in the law of the United States, *cf.* US Supreme Court, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416–39 (1964) for the act-of-state doctrine and US Supreme Court, *Baker v. Carr*, 369 U.S. 186, 208–37 (1962) for the political question issue. For similar limitations on justiciability under English law, *cf*. House of Lords, *Buttes v. Hammer*, [1981] 3 *All ER* 616 (per Lord Wilberforce); Court of Appeal, *R (Abbasi and Juma) v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, [2002] EWCA Civ 1598 (*per* Lord Phillips of Worth Matravers MR).

56 *Free Zones*, Order of 6 December 1930, PCIJ, Series A, No. 24, pp. 4, 15; Judgment, PCIJ, Series A/B, No. 46, pp. 96, 160–3.

57 *Socobel*, Judgment, PCIJ, Series A/B, No. 78, pp. 160 *et seq*.

58 *Ibid*., p. 177.

59 On the relationship between the two institutions *cf*. the Security Council Research Report, 'The Rule of Law: Can the Security Council make better use of the International Court of Justice?', 20 December 2016, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_5_rule_of_law_2016.pdf>. See also Higgins *et al*., *supra*, fn. 54, pp. 57–61.

60 *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 21–2, para. 40; implicitly the same idea can be found in the *Aegean Sea Continental Shelf* case, Provisional Measures, ICJ Reports (1976), pp. 3, 12–3, paras. 36–41.

61 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 434–5, para. 95.

62 *Bosnian Genocide* case, Provisional Measures, ICJ Reports (1993), pp. 3, 18–9, para. 33; *Armed Activities* (DRC v. Uganda), Provisional Measures, ICJ Reports (2000), pp. 111, 126–7, para. 36.

63 *Lockerbie* (Libya v. UK; Libya v. US), Preliminary Objections, ICJ Reports (1998), pp. 9, 23–4, para. 38 and pp. 115, 129, para. 37.

64 *Cf*. also Gowland-Debbas/Forteau on Art. 7 UN Charter MN 27–46.

65 *Cf*. Oellers-Frahm/Zimmermann on Art. 41 MN 119.

66 Although not listed in Art. 38 of the Statute, the secondary law of international organization pertains to the body of international law the ICJ is mandated to apply. *Cf.* Pellet/Mueller on Art. 38 MN 99 *et seq*.

67 *Cf. Lockerbie* (Libya v. UK; Libya v. US), Provisional Measures, ICJ Reports (1992), pp. 3, 15, para. 39 and pp. 114, 126, para. 42; for critical comments see Skubiszewski, 'The International Court of Justice and the Security Council', in *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Lowe/Fitzmaurice, eds., 1996), pp. 606–29, 615–9.

68 *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15 *et seq*. The *Haya de la Torre* case between Colombia and Peru, Judgment, ICJ Reports (1951), pp. 71, 81, where the Court refused to provide 'positive assistance' to the prosecution of a political refugee, does not seem to fall into this category although the reasons given were far from clear.

69 *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 38.

70 *Ibid*., p. 29.

71 *Frontier Dispute* (Burkina Faso/Niger), Judgment, ICJ Reports (2013), pp. 44, 69–70, paras. 45–6.

72 *Marshall Islands v. UK*, Preliminary Objections, Decl. Xue, ICJ Reports (2016), pp. 1029, 1033, para. 16.

73 *Marshall Islands v. UK*, Preliminary Objections, Sep. Op. Bhandari, ICJ Reports (2016), pp. 1057, 1062, paras. 23–4; *Marshall Islands v. UK*, Preliminary Objections, Diss. Op. Yusuf, ICJ Reports (2016), pp. 861, 863–4, paras. 10–3.

74 Thirlway, *ICJ Law and Procedure*, p. 690.

75 But *cf. infra*, MN 47 regarding the power of the Security Council to enjoin States to seek judicial settlement of a dispute.

76 *Cf. The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 16; *Minority Schools (Silesia)*, Judgment, PCIJ, Series A, No. 15, pp. 4, 22; *Interpretation of Peace Treaties*, First Phase, Advisory Opinion, ICJ Reports (1950), pp. 65, 71; *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93, 103; *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 32; *Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Preliminary Objections, ICJ Reports (1959), pp. 127, 142; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 431, para. 88; *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 32, para. 44; *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 260, para. 53; *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 101, para. 26; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 324, para. 116; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 132, para. 20; *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 241, para. 57; *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 32, para. 65; *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 200–1, para. 48.

77 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 76, paras. 76–7.

78 *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19 *et seq. Cf.* also Thienel, 'Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle', *GYIL* 57 (2014), pp. 321–52; Zimmermann, 'Die Zuständigkeit des Internationalen Gerichtshofes zur Entscheidung über Ansprüche gegen am Verfahren nicht beteiligte Staaten: Anmerkungen aus Anlaß der Entscheidung des IGH im Streitfall zwischen Portugal und Australien betreffend Ost-Timor', *ZaöRV* 55 (1995), pp. 1051–76.

79 *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 32–3. *Cf.* also the comments on that judgment in the *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ Reports (1990), pp. 92, 114–5, para. 54.

80 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 431, para. 88.

81 *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 261–2, para. 55.

82 *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 238, para. 204.

83 *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 102, para. 28.

84 *Certain Property*, Preliminary Objections, Diss. Op. Owada, ICJ Reports (2005), pp. 47, 65–6, paras. 52–6. In the case concerning the *Application of the Interim Accord of 13 September 1995* it was clear that Greece's responsibility could be determined without assessing the lawfulness of the conduct of the other NATO States involved, Judgment, ICJ Reports (2011), pp. 644, 664, para. 57.

85 *Marshall Islands v. UK*, Preliminary Objections, Sep. Op. Tomka, ICJ Reports (2016), pp. 885, 896–9, paras. 33–41.

86 In the *Land, Island and Maritime Frontier Dispute*, Application by Nicaragua for Permission to Intervene, Judgment, ICJ

Reports (1990), pp. 92, 122, para. 73, the Court held that the threshold conditions for intervention are lower than the *Monetary Gold* criteria. *Cf*. Miron/Chinkin on Art. 62 MN 32.

87 *Continental Shelf* (Libya/Malta), Judgment, ICJ Reports (1985), pp. 13, 24–8, paras. 20–3.

88 *Ibid*., p. 28, para. 23.

89 *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303 *et seq*.

90 *Ibid*., p. 426, para. 254.

91 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3, Arts. 74 and 83.

92 *Land and Maritime Boundary*, Judgment, ICJ Reports (2002), pp. 303, 448, para. 307.

93 *Territorial and Maritime Dispute*, Application by Costa Rica for Permission to Intervene, Judgment, ICJ Reports (2011), pp. 348, 372–3, paras. 87–90; *cf*. also *Maritime Delimitation in the Black Sea*, Judgment, ICJ Reports (2009), pp. 61, 100, para. 112. *Cf.* generally on the issue Pellet, 'Land and Maritime Tripoints in International Jurisprudence', in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Hestermeyer *et al.*, eds., 2012), vol. I, pp. 245–63, 255.

94 *Frontier Dispute* (Burkina Faso/Republic of Mali), Judgment, ICJ Reports (1986), pp. 554, 576–80, paras. 44–50.

95 *Territorial Dispute*, Judgment, ICJ Reports (1994), pp. 6 *et seq*.

96 *Ibid*., p. 33–4, para. 63.

97 *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275 *et seq*.

98 *Ibid*., p. 311–2, para. 79.

99 It is well known that for many years the Court shied away from resorting in its case law to the notion of *jus cogens*, due, in particular, to French resistance to that notion. Instead, the notion of 'intransgressible principles of international customary law' made its way into the jurisprudence: *Nuclear Weapons*, Advisory Opinion, ICJ Reports (1996), pp. 226, 257, para. 79. Since the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case, Judgment, ICJ Reports (2006), pp. 6, 31–2, para. 64, this reluctance has been overcome. The Court dealt at length with arguments concerning *jus cogens* in *Jurisdictional Immunities of the State*, Judgment, ICJ Reports 2012, pp. 99, 140–2, paras. 92–7. For a detailed review of the Court's jurisprudence *cf.* Sep. Op. Dugard in the *Armed Activities (New Application: 2002)* (DRC v. Rwanda) case, Judgment, ICJ Reports (2006), pp. 86–91.

100 *East Timor*, Judgment, ICJ Reports (1995), pp. 90, 102, para. 29.

101 *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 245, para. 71; reiterated in the judgment on the jurisdiction of the Court and the admissibility of the application, *ibid*., Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 31–2, para. 64 and p. 35, para. 78. *Cf.* Zimmermann on Art. 35 MN 85, fn. 166.

102 *Cf. supra*, fn. 99.

103 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43 *et seq*.

104 Only in one short sentence did it mention the irrelevance of peremptory norms or obligations *erga omnes* for the purposes of jurisdiction, *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 104, para. 147.

105 *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 47–8, para. 88.

106 *Cf.* in particular *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 140–2, paras. 92–7.

107 *Cf. Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 455–6, para. 54; *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 32–3, paras. 67–8. *Cf*. also *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 768–72, paras. 21–33; *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, pp. 916, 923–4, paras. 21–5.

108 Confirmed in *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 140, para. 93.

109 *Cf*. Torres Bernárdez, in Bello/Ajibola (1992), *passim*.

110 According to the words of D'Amato, *AJIL* (1985), p. 386, a declaration under Art. 36, para. 2 'is as much an offensive weapon against the international legal delicts of other states as it is a defensive weapon; it is a sword as well as a shield'.

111 *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93, 103; *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 23; *cf*. also *Phosphates in Morocco*, Preliminary Objections, PCIJ, Series A/B, No. 74, pp. 10, 23; *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction, ICJ Reports (1998), pp. 432, 452–3, para. 44; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 135, para. 30; *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 770–1, para. 25; *Legality of Use of Force* (Serbia and Montenegro v. UK), Provisional Measures, ICJ Reports (1999), pp. 826, 835–6, para. 25.

112 *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9 *et seq*.

113 *Ibid*., p. 21.

114 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 134–5, paras. 28–30.

115 *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226 *et seq*.

116 *Cf. infra*, MN 79 concerning clauses governing the applicability *ratione temporis* of declarations under Art. 36, para. 2.

117 *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 52, para. 13; *Jurisdictional Immunities of the State*, Judgment, ICJ

Reports (2012), pp. 99, 117–8, para. 40.

118 *Cf. Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 421–2, para. 67.

119 *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 52, para. 13; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 295, para. 36; *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 91–2, para. 118 and p. 94, para. 122; *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 117–8, para. 40.

120 *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 20–4, paras. 39–44.

121 *Cf. supra*, MN 16.

122 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 132–5, paras. 20–30.

123 As far as Portugal is concerned, the Order contains no explicit indications, *cf. Legality of Use of Force* (Serbia and Montenegro v. Portugal), Provisional Measures, ICJ Reports (1999), pp. 656, 666, para. 25.

124 *Cf.* Obata, 'The Relevance of Jurisdiction to Deal with the Merits to the Power to Indicate Interim Measures: A Critique of the Recent Practice of the International Court of Justice', in *Liber Amicorum Judge Shigeru Oda* (Ando *et al.*, eds., 2002), pp. 451–62, 461.

125 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 295, para. 36 (emphasis in original).

126 *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 609 *et seq*. In *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 311, para. 82, the Court explicitly acknowledged that 'it saw no reason' to examine the status of Yugoslavia under Art. 35.

127 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 314–5, para. 91.

128 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43 *et seq*.

129 *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412 *et seq*. The tortuous lines of reasoning of the Court appear explicitly in the title of the criticism by Blum, 'Consistently Inconsistent: The International Court of Justice and the Former Yugoslavia (Croatia/Serbia)', *AJIL* 103 (2009), pp. 264–71; for a more friendly commentary see Rosenne, 'Capacity to Litigate in the International Court of Justice: Reflections on Yugoslavia in the Court', *BYIL* 80 (2009), pp. 217–43.

130 *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 38, para. 93.

131 *Cf. Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 75–6, para. 16.

132 *Cf.* von Mangoldt/Zimmermann on Art. 53 MN 54–57.

133 *Cf.* Oellers-Frahm/Zimmermann on Art. 41 MN 28–29.

134 *Cf.* Zimmermann/Thienel on Art. 60 MN 50–51.

135 *Cf.* Zimmermann/Geiss on Art. 61 MN 29–32.

136 *Cf.* Torres Bernárdez/Mbengue on Art. 48, *passim*.

137 By May 2018, 73 States had made declarations under Art. 36, para. 2 recognising the jurisdiction of the Court as compulsory. For the texts of these declarations see <http://www.icj-cij.org/en/declarations>.

138 Owada, Introductory Remarks at the Seminar in the Contentious Jurisdiction of the International Court of Justice, p. 2. For a pessimistic view on the suitability of the system of compulsory jurisdiction under Art. 36, para. 2, *cf.* Oda, *ICLQ* (2000), pp. 252 *et seq*.; *contra* Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', *EJIL* 18 (2007), pp. 815–52.

139 *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 860, paras. 83–5.

140 *Corfu Channel*, Preliminary Objection, ICJ Reports (1948), pp. 15, 27; *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Judgment, ICJ Reports (2006), pp. 6, 18–9, para. 21; *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 204, para. 62.

141 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 85, para. 102.

142 *Minority Schools (Silesia)*, Judgment, PCIJ, Series A, No. 15, pp. 4, 24.

143 *Cf. infra*, MN 71.

144 *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93, 104: 'having due regard to the intention of the Government of Iran'; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 29, para. 69: 'regard must be paid to the intention of the Greek Government'; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 454, para. 48: 'the Court has not hesitated to place a certain emphasis on the intention of the depositing State'; *cf.* also *Aerial Incident of 10 August 1999* (Pakistan v. India), Judgment, ICJ Reports (2000), pp. 12, 30–1, paras. 42–4. In his dissenting opinion. In the *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 582, 639 *et seq.*, Judge *ad hoc* Torres Bernárdez resolutely attacked the way in which the Court construed Canada's new reservation to its declaration under Art. 36, para. 2 as not being in line with the general rules of interpretation in international law. Yet the ICJ has maintained its view that 'a

certain emphasis may be placed on the intention' of the State author of the relevant declaration; see also *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 244, para. 36.

145 *Preah Vihear*, Preliminary Objections, ICJ Reports (1961), pp. 17, 32: 'the Court must apply its normal canons of interpretation'; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 28–32, paras. 69–76; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 452–3, para. 44.

146 *Factory at Chorzów (Indemnity)*, Jurisdiction, PCIJ, Series A, No. 9, pp. 4, 32.

147 *Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 24.

148 *Free Zones*, Order of 19 August 1929, PCIJ, Series A, No. 22, pp. 5, 13.

149 On that issue *cf., e.g.*, Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *Rec. des Cours* 281 (1999), pp. 9–438, 170–2.

150 This is also the result of the careful analysis conducted by Charney, *AJIL* (1987), p. 883.

151 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1995), pp. 6, 18, para. 33; *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 109–10, para. 160. *Cf.* also Sep. Op. of Judge Higgins in the *Oil Platforms* case, Preliminary Objections, ICJ Reports (1996), pp. 847, 857, para. 35.

152 *The Mavrommatis Jerusalem Concessions*, Judgment, PCIJ, Series A, No. 5, pp. 6, 29; *Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 18.

153 *Cf.* for instance the *Nottebohm* case, Second Phase, ICJ Reports (1955), pp. 4, 13–4, and the *Barcelona Traction* case, Second Phase, Judgment, ICJ Reports (1970), pp. 3, 33–4, para. 38; *Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 605–7; *Diallo*, Merits, ICJ Reports (2010), pp. 639, 674–9, paras. 103–13.

154 *Factory at Chorzów (Indemnity)*, Jurisdiction, PCIJ, Series A, No. 9, pp. 4, 22.

155 *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 485, para. 48; *cf.* also earlier statement in *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, ICJ Reports (1974), pp. 175, 203, para. 72.

156 *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 516, para. 128 (7).

157 *Avena*, Judgment, ICJ Reports (2004), pp. 12, 33, para. 34.

158 *Ibid*., p. 72, para. 153 (9); *cf.* also p. 73, para. 153 (11).

159 *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99, 155, para. 139 (4).

160 *Cf*. also Kawano, 'Decisions of the International Court of Justice on Disputes Concerning Internal Law', in Gaja/Grote (2012), pp. 119–37.

161 *Electricity Company of Sofia and Bulgaria*, Preliminary Objection, PCIJ, Series A/B, No. 77, pp. 64, 76.

162 *Cf.* also Kolb (2014), pp. 202–3; Shaw, *Rosenne's Law and Practice*, vol. II, pp. 945–52; Thirlway, *ICJ Law and Procedure*, pp. 762–6.

163 *Corfu Channel*, Merits, ICJ Reports (1949), pp. 4, 24.

164 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 426, para. 77; *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 90, para. 48; *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 872, para. 132.

165 *Cf.* generally Morrison, in Damrosch, *ICJ at a Crossroads*, pp. 58 *et seq*.

166 Rightly emphasized by Morrison, *ibid*., p. 59.

167 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279 *et seq*. The key issue, namely the substantive scope of Art. IX of the Genocide Convention, was not resolved by that judgment.

168 *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 140, para. 184.

169 At UN level, from 2006 to 2016 only one multilateral treaty was adopted with a compromissory clause, see Abraham, *JIDS* (2016), p. 299; Akande, *JIDS* (2016), p. 324.

170 *Cf.* observations by Abraham, *JIDS* (2016), p. 300: the interpretation should be 'neither too extensive nor too restrictive'.

171 *Cf*. the cases concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*, Judgment, ICJ Reports (1960), pp. 192, 194, and *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112 *et seq.; Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1995), pp. 6, 18–20, paras. 35–6. Essentially, the *Monetary Gold* case also belongs to this category, Judgment, ICJ Reports (1954), pp. 19, 21–2.

172 *Corfu Channel*, Preliminary Objection, ICJ Reports (1948), pp. 15 *et seq*.

173 SC Res. 22 (1947). *Cf*. also Giegerich on Art. 36 UN Charter MN 62–74.

174 *Corfu Channel*, Preliminary Objection, ICJ Reports (1948), pp. 15, 19.

175 By Order of the Court of 16 November 2010, ICJ Reports (2010), p. 635, the case was removed from the List after the Democratic Republic of the Congo had withdrawn its application by a letter of 5 November 2010.

176 Letter of the French Minister for Foreign Affairs of 8 April 2003 accepting the jurisdiction of the Court, *cf.* Order of 11 July 2003, ICJ Reports (2003), p. 143.

177 *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 181, para. 4.

178 See above MN 19.

179 For further details *cf.* Quintana, *ICJ Litigation*, pp. 122–4.

180 Already perceived by von Stauffenberg, p. 256. From the more recent literature, *cf*. Oda, *ICLQ* (2000), p. 262; Tomka, in Ando *et al.* (2002), pp. 553 *et seq.; cf.* also Steinberger, 'The International Court of Justice', in MPI, *Judicial Settlement*, pp. 193–283, 252. Detailed analysis of special agreements also by Quintana, *ICJ Litigation*, pp. 80–95.

181 From the more recent past see *Frontier Dispute* (Benin/Niger), Judgment, ICJ Reports (2005), pp. 90, 94–5, para. 1; *Pedra Branca*, Judgment, ICJ Reports (2008), pp. 12, 17, para. 1; *Frontier Dispute* (Burkina Faso/Niger), Judgment, ICJ Reports (2013), pp. 44 *et seq*. An exception to this rule of thumb was the *Monetary Gold* case, Judgment, ICJ Reports (1954), pp. 19 *et seq*.

182 Tomka, in Ando *et al.* (2002), pp. 553–65.

183 *Anglo-Iranian Oil Co.*, Judgment, ICJ Reports (1952), pp. 93 *et seq*.

184 *Nuclear Tests* (Australia v. France; New Zealand v. France), Orders of 22 June 1973, ICJ Reports (1973), pp. 99 *et seq*. and pp. 135 *et seq*.; Judgment, ICJ Reports (1974), pp. 253 *et seq*. and pp. 457 *et seq*.

185 *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7 *et seq.*; Judgment, ICJ Reports (1980), pp. 3 *et seq*.

186 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392 *et seq.*; Merits, ICJ Reports (1986), pp. 14 *et seq*.

187 *Legality of Use of Force* cases (Serbia and Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom, United States of America), Provisional Measures, ICJ Reports (1999), pp. 124 *et seq.*, 259 *et seq.*, 363 *et seq.*, 422 *et seq.*, 481 *et seq.*, 542 *et seq.*, 656 *et seq.*, 761 *et seq.*, 826 *et seq.*, 916 *et seq.; Legality of Use of Force* cases (Serbia and Montenegro v. Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, United Kingdom), Preliminary Objections, ICJ Reports (2004), pp. 279 *et seq.*, 429 *et seq.*, 575 *et seq.*, 720 *et seq.*, 865 *et seq.*, 1011 *et seq.*, 1160 *et seq.*, 1307 *et seq.*

188 *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595 *et seq*.; *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412 *et seq*.

189 The appraisal by Scott/Carr, *AJIL* (1987), p. 74, that 'compulsory jurisdiction of the Court under Article 36 (2) hinders the evolving efficacy of the Court' can therefore not be shared. Nor should one speak of 'abuse' of the ICJ in cases involving use of force, as suggested by Gray, *EJIL* (2003), pp. 867–905. For a well-balanced view *cf.* Schachter, 'Disputes Involving the Use of Force', in Damrosch, *ICJ at a Crossroads*, pp. 223–41.

190 *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 18–9, para. 21.

191 *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 39–40, para. 97.

192 *Ibid*., p. 44, para. 107.

193 *Ibid*., p. 39, para. 96.

194 *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 618–19, para. 37; *cf.* also *ibid*., Provisional Measures, ICJ Reports (1993), pp. 3, 18, para. 31.

195 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112, 118–19, para. 19.

196 *Ibid*., p. 121, para. 25.

197 *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 38–44, paras. 94–108.

198 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, ICJ Reports (1994), pp. 112, 122, para. 29.

199 For a strict view *cf.* Tomka, in Ando *et al.* (2002), pp. 564–5, for a liberal assessment Morrison, in Damrosch, *ICJ at a Crossroads*, pp. 58, 70. *Cf.* also Martens, in Simma, *UN Charter*, Art. 102 MN 56.

200 UNCIO XIV, p. 325.

201 *Cf.* also Shaw, *Rosenne's Law and Practice*, vol. II, p. 664.

202 *Aerial Incident of 10 August 1999* (Pakistan v. India), Judgment, ICJ Reports (2000), pp. 12, 32, para. 48.

203 The Security Council has done so in just two cases, first in the British–Albanian dispute over the incidents in the Corfu Channel, SC Res. 22 (1947), and later in the Greek–Turkish dispute over the Aegean Sea, SC Res. 395 (1976), para. 4. It stands to reason that a pure recommendation cannot provide a basis for the jurisdiction of the Court; *cf.* in this regard *Corfu Channel*, Preliminary Objections, Sep. Op. Basdevant, Alvarez, Winiarski, Zoričič, De Visscher, Badawi Pasha, and Krylov, ICJ Reports (1948), pp. 31 *et seq.* and, for a summary of their reasoning, Chesterman/Oellers-Frahm on Art. 92 UN Charter MN 38. *Cf.* also Giegerich on Art. 36 UN Charter MN 52–61.

204 Ruffert, 'Special Jurisdiction of the ICJ in the Case of Infringements of Fundamental Rules of the International Legal Order?', in *The Fundamental Rules of the International Legal Order: Jus cogens and Obligations Erga Omnes* (Tomuschat/Thouvenin, eds., 2006), pp. 295–310, 307. Against such deviation from the consent rule *cf.* Krari-Lahya, 'Cooperation and Competition between the International Court of Justice and the Security Council', in Gaja/Grote (2012), pp. 47–61, 52; Quintana, *ICJ Litigation*, p. 47; Spijkers, 'What's Wrong with the Relationship between the International

Court of Justice and the Security Council?', in *What's Wrong with International Law* (Ryngaert *et al.*, eds, 2015), pp. 347–64, 349. Zimmermann, 'Organic Links between the International Court of Justice and the other Principal Organs of the United Nations', in *Liber Amicorum Torsten Stein* (Calliess, ed., 2015), pp. 393–400, reserves his position.

205 In this regard, the settlement of the war between Iraq and Kuwait by SC Res. 687 (1991) went way too far.

206 A prominent example of a bilateral agreement is provided by the *Application of the Interim Accord of 13 September 1995* between the Former Yugoslav Republic of Macedonia and Greece, see Judgment, ICJ Reports (2011), pp. 644 *et seq*.

207 *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 25 (the Act had been mentioned by France, but, according to the Court, it was not actually invoked); *Preah Vihear*, Preliminary Objections, ICJ Reports (1961), pp. 17, 21; *Nuclear Tests* (Australia v. France; New Zealand v. France), Orders of 22 June 1973, ICJ Reports (1973), pp. 99, 102–3, paras. 16, 19, and pp. 135, 139, para. 20; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 38, paras. 91–3; *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 23–5, paras. 26–8. For further analysis *cf.* Simma/Richemond-Barak on Art. 37, especially MN 15 and 20.

208 For a discussion of the legal position *cf.* Tomuschat, 'The 1928 General Act for the Pacific Settlement of Disputes Revisited', in *Liber Amicorum Judge Shigeru Oda* (Ando *et al.*, eds., 2002), pp. 977–94; Shaw, *Rosenne's Law and Practice*, vol. II, pp. 673–4.

209 29 April 1957, 320 UNTS 243, ETS No. 23.

210 It provided the foundation of the jurisdiction of the Court only twice, in the *Certain Property* case between Liechtenstein and Germany, Preliminary Objections, ICJ Reports (2005), pp. 6 *et seq*., and in *Jurisdictional Immunities of the State*, Judgment, ICJ Reports (2012), pp. 99 *et seq*.

211 American Treaty on Pacific Settlement (Pact of Bogotá), 30 April 1948, 30 UNTS 55.

212 *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 84, paras. 32–4.

213 <http://www.oas.org>.

214 Latest merits judgments: *Territorial and Maritime Dispute*, Judgment, ICJ Reports (2012), pp. 624 *et seq.; Maritime Dispute*, Judgment, ICJ Reports (2014), pp. 3 *et seq.; Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*, Judgment, ICJ Reports (2015), pp. 665 *et seq.; Certain Activities carried out by Nicaragua in the Border Area*, Compensation, Judgment of 2 February 2018; *Caribbean Sea Delimitation* and *Islas Portillos*, Judgment of 2 February 2018; *Obligation to Negotiate Access to the Pacific Ocean*, Merits, Judgment of 1 October 2018.

215 *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* between Nicaragua and Colombia; *Caribbean Sea* between Nicaragua and Colombia; *Silala Waters* between Chile and Bolivia.

216 18 April 1961, 500 UNTS 223, Art. I.

217 24 April 1963, 596 UNTS 469, Art. I.

218 The text of both Optional Protocols is identical (Art. I): 'Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol.'

219 *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 24, para. 45.

220 *Cf. Breard*, Order of 10 November 1998, ICJ Reports (1998), pp. 426 *et seq. Cf.* also Wegen, Discontinuance and Withdrawal, MN 2.

221 *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 482–3, para. 42.

222 *Avena*, Judgment, ICJ Reports (2004), pp. 12, 71–2, para. 153(4)–(8).

223 Letter of Secretary of State Condoleezza Rice of 7 March 2005, *AJIL* 99 (2005), p. 490. Commented on approvingly by Reisman/Arsanjani, 'No Exit? A Preliminary Examination of the Legal Consequences of United States' Notification of Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations', in *Promoting Justice, Human Rights and Conflict Resolution through International Law. Liber Amicorum Lucius Caflisch* (Kohen, ed., 2007), pp. 897–926. Assessment from the viewpoint of international relations by Helfer, 'Exiting Treaties', *Va. L. Rev.* 91 (2005), pp. 1579–648, 1628–9.

224 *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 237–8, para. 22.

225 *Relocation of the United States Embassy to Jerusalem*, Application Instituting Proceedings, 28 September 2018; ICJ Press Release No. 2018/47 of 28 September 2018. Palestine, on 4 July 2018, deposited a declaration to the Court recognizing its jurisdiction as compulsory 'for the settlement of all disputes that may arise or that have already arisen covered by Article I of the Optional Protocol to the Vienna Convention on Diplomatic Relations', see <https://www.icj-cij.org/en/states-not-parties>.

226 See for a short commentary Milanovic, 'Palestine Sues the United States in the ICJ re Jerusalem Embassy', EJIL:*Talk!*, 30 September 2018, available at <https://www.ejiltalk.org/palestine-sues-the-united-states-in-the-icj-re-jerusalem-

embassy/>; cf. Miron, 'Palestine's Application the ICJ, neither Groundless, nor Hopeless. A Reply to Marko Milanovic', EJIL: *Talk!*, 8 October 2018, available at https://www.ejiltalk.org/palestines-application-the-icj-neither-groundless-nor-hopeless-a-reply-to-marko-milanovic/>.

227 See <https://www.reuters.com/article/us-usa-diplomacy-treaty-idUSKCN1MD2CP>.

228 'Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months of the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.'

229 23 September 1971, 974 UNTS 177.

230 *Lockerbie* (Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 115, 123, para. 24.

231 9 December 1948, 78 UNTS 277.

232 *Cf.* the judgment on the preliminary objections raised by 'Yugoslavia', *Bosnian Genocide* case, Preliminary Objections, ICJ Reports (1996), pp. 595 *et seq*.

233 *Ibid*., p. 616, para. 32.

234 *Ibid*., p. 616–7, paras. 32, 33. This line of reasoning was pursued in the decision on the merits, Judgment, ICJ Reports (2007), pp. 43, 118–9, para. 179.

235 *Ibid*., Provisional Measures, ICJ Reports (1993), pp. 3, 24–5, para. 52 B.

236 *Croatian Genocide* case, Judgment, ICJ Reports (2015), pp. 3 *et seq*.

237 *Croatian Genocide* case, Preliminary Objections, ICJ Reports (2008), pp. 412 *et seq*.

238 *Bosnian Genocide* case, Judgment, ICJ Reports (2007), pp. 43, 134, para. 223; for a comment see Higgins *et al., supra*, fn. 54, pp. 1205–6.

239 *Cf. supra*, fn. 187.

240 *Cf. e.g., Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 138, para. 40.

241 *Legality of Use of Force* case (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279 *et seq*.

242 *Cf.* Zimmermann on Art. 35 MN 46, 80–85 and Oellers-Frahm/Zimmermann on Art. 93 UN Charter MN 11–13.

243 No fewer than eleven jurisdictional clauses were invoked by the Democratic Republic of the Congo, but none of them covered the dispute, *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Judgment, ICJ Reports (2006), pp. 6 *et seq*. Beforehand, a request by the applicant to the Court to order provisional measures had failed on the same grounds, Provisional Measures, ICJ Reports (2002), pp. 219 *et seq*.

244 *Oil Platforms*, Preliminary Objections, ICJ Reports (1996), pp. 803, 810 *et seq*.

245 *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 117, para. 225.

246 *Oil Platforms*, Preliminary Objections, ICJ Reports (1996), pp. 803, 811, para. 20; *cf.* also the judgment on the Merits, ICJ Reports (2003), pp. 161, 178–84, paras 31–45.

247 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 106–7, para. 152, 114, paras. 167–8, and 118–9, para. 179.

248 *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 206 *et seq.*, paras. 65 *et seq.*

249 *Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 41–2, para. 52.

250 *Georgia v. Russia*, Judgment, ICJ Reports (2011), pp. 70, 120, para. 113.

251 *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422, 445–6, para. 57. Recently reconfirmed in the *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 120–1, para. 43.

252 See Tomuschat, 'What is General International Law?', in *Guerra y Paz: 1945–2009. Obra homenaje al Dr. Santiago Torres Bernárdez* (2010), pp. 329–48. Critical assessment by the ILC's Special Rapporteur Wood, First report on formation and evidence of customary international law, UN Doc. A/CN.4/663 (2013), para. 42.

253 *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 182, para. 41.

254 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 105, para. 149; confirmed in the *Croatian Genocide* case, Judgment, ICJ Reports (2015), pp. 3, 56–7, para. 115.

255 *Pulp Mills*, Judgment, ICJ Reports (2010), pp. 14, 82–4, paras. 204–5.

256 *Cf. Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 96, para. 179; *Croatian Genocide*, Judgment, ICJ Reports (2015), pp. 3, 47–8, paras. 88–9.

257 *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 53–4, para. 16 (b).

258 *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 27–8, paras. 53–4.

259 *Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Jurisdiction, ICJ Reports (1973), pp. 3, 19–21, paras. 40–3 and pp. 49, 64–5, paras. 40–3 respectively. By contrast, for a forceful pleading in favour of taking into account a

fundamental change of circumstances *cf.* Diss. Op. Judge Schwebel in the *Nicaragua* case, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 558, 621–2, para. 100.

260 *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 859, paras. 79–80.

261 *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 27, para. 51.

262 *Ibid*., p. 27, para. 52; *cf.* also *Oil Platforms*, Preliminary Objections, ICJ Reports (1996), pp. 803, 809, para. 15.

263 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 427–8, para. 81.

264 *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, PCIJ, Series B, No. 4, pp. 7, 26.

265 *The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 16 *et seq.*, 23.

266 *Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 15.

267 *Ambatielos*, Judgment, ICJ Reports (1953), pp. 10, 18.

268 *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 24.

269 *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 61–9, paras. 27–43.

270 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 427–8, para. 81.

271 *Oil Platforms*, Preliminary Objection, ICJ Reports (1996), pp. 803, 809–10, para. 16.

272 *Ibid*., p. 820, para. 51.

273 *Ibid*., Sep. Op. Ranjeva, ICJ Reports (1996), pp. 842, 844.

274 *Ibid*., Sep. Op. Higgins, ICJ Reports (1996), pp. 847, 856, para. 32.

275 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 137–8, paras. 38–40.

276 *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, ICJ Reports (1999), pp. 916, 923–6, paras. 21–34. *Cf*. generally *infra*, MN 141–143.

277 *Reservations to the Genocide Convention*, Advisory Opinion, ICJ Reports (1951), pp. 15 *et seq*.

278 *Ibid*., pp. 24–5.

279 Article 19 of the VCLT, 23 May 1969, 1155 UNTS 331, reads: 'A State may when signing, ratifying, accepting approving or acceding to a treaty, formulate reservations unless: … (*c*) in cases not failing under subparagraphs (*a*) and (*b*), the reservation is incompatible with the object and purpose of the treaty.'

280 *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 772, para. 32; *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, ICJ Reports (1999), pp. 916, 924, paras. 24–5.

281 *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 245–6, para. 72; Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 32, para. 67.

282 *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, Sep. Op. Higgins, Kooijmans, Elaraby, Owada, Simma, ICJ Reports (2006), pp. 65 *et seq*. Hernández (2014), p. 48, calls the stance of the Court 'formalistic'.

283 See, in particular, Owada, Introductory Remarks at the Seminar on the Contentious Jurisdiction of the International Court of Justice, p. 5.

284 General Comment No. 24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 18.

285 *Cf*., in particular, *Belilos v. Switzerland*, Appl. No. 10328/83, ECtHR, Series A, vol. 132, para. 50.

286 *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion, OC-3/83, 24 September 1983, Series A No. 3, para. 45; *Hilaire v. Trinidad and Tobago*, Preliminary Objections, Judgment, 1 September 2001, Series C No. 80, paras. 78 *et seq*.

287 *Cf*. critical comments by the ILC Special Rapporteur Alain Pellet, Second Report on reservations to treaties, UN Doc. A/CN.4/477 (1996), paras. 234–40; For the outcome of the work of the ILC *cf*. Guide to Practice on Reservations to Treaties, *ILC Yearbook* (2011), vol. II (2), paras. 3.2.1–3.2.5 on the competence of treaty monitoring bodies to assess the permissibility of reservations.

288 *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6, 32, para. 67.

289 *Cf.* GA Res. 57/26 (2002), operative para. 9: '*Reminds* States that have not yet done so that they may at any time make a declaration under Article 36, paragraph 2, of the Statute of the International Court of Justice with regard to its compulsory jurisdiction in relation to any other State accepting the same obligation, and encourages them to consider doing so.' In his report 'In Larger Freedom: towards development, security and human rights for all' (UN Doc. A/59/2005 (2005), para. 139), Secretary-General Kofi Annan also invited States to 'consider recognizing the compulsory jurisdiction of the Court'. More recently the appeal to recognize the jurisdiction of the Court was reiterated in the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, GA Res. 67/1 (2012), para. 31.

290 Letter of 10 January 1974, reproduced in *AFDI* 20 (1974), pp. 1052–4.

291 Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, 7 October 1985, reproduced in *ILM* 24 (1985), pp. 1742–5.

292 Letter of 28 February 1989 from Soviet Minister for Foreign Affairs Eduard A. Shevardnadze to UN Secretary-General Javier Pérez de Guéllar, reproduced in *AJIL* 83 (1989), p. 457. In particular, the Soviet Union withdrew its original reservations concerning Article Art. IX Genocide Convention, Art. 22 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 31 March 1950, 96 UNTS 271, Art. IX of the Convention on the Political Rights of Women, 21 March 1953, 193 UNTS 135, Art. 22 CERD, Art. 29, para. 1 of the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 UNTS 1, and Art. 30, para. 1 CAT. It is on the basis of Art. 22 CERD that Georgia was able to institute proceedings against Russia, *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70 *et seq*.

293 From the new declarations made after 1945: Cameroon, Costa Rica, Democratic Republic of the Congo, Denmark, Commonwealth of Dominica, Georgia, Guinea-Bissau, Timor-Leste, Togo, and Uganda.

294 *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 237–8, para. 22.

295 *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 29; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 418, para. 60; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 453, para. 46.

296 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 418, para. 59.

297 *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 291, para. 25; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 453, para. 46.

298 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 418, para. 60. *Cf.* also *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 291, para. 25; *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 453, para. 46.

299 *Cf. supra*, MN 35.

300 *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 31, para. 44.

301 *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 27.

302 *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 454, para. 49; *Whaling in the Antarctic*, Judgment, ICJ Reports (2014), pp. 226, 244, para. 36.

303 *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 295, para. 34.

304 Similar declarations were made in 2015 by Bulgaria and Romania.

305 *Cf. infra*, MN 79.

306 *Cf. Nicaragua*, Jurisdiction and Admissibility, Judgment, ICJ Reports (1984), pp. 392, 398, para. 13.

307 *Ibid*., p. 419, para. 61.

308 *Cf. infra*, MN 87.

309 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 419–20, para. 63.

310 For a comprehensive study of the issue *cf.* Brown Weiss, in Damrosch, *ICJ at a Crossroads*, pp. 82 *et seq.*; critical comments by Orrego Vicuña, in Ando *et al.* (2002), pp. 463, 478; approval by Briggs, 'Nicaragua v. United States: Jurisdiction and Admissibility', *AJIL* 79 (1985), pp. 373–8, 376–8: Franck, 'Icy Day at the ICJ', *AJIL* 79 (1985), pp. 379–84, 383.

311 Confirmation of the jurisprudence in *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 295, para. 33.

312 Quintana, *Leiden JIL* (1998), p. 118.

313 Australia, 22 March 2002; Cyprus, 3 September 2002; Guinea, 11 November 1998; Nigeria, 30 April 1998; Peru, 7 July 2003; Slovakia, 11 May 2004; United Kingdom, 5 July 2004; Germany, 30 April 2008; later: Greece, 14 January 2015; Italy, 25 November 2014; Japan, 6 October 2015; Marshall Islands, 24 April 2013; Netherlands, 21 February 2017; Pakistan, 29 March 2017; Romania, 23 June 2015; United Kingdom, 22 February 2017.

314 *Nottebohm*, Preliminary Objection, ICJ Reports (1953), pp. 111, 123; *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 142; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 416, para. 54; *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 28–29, para. 36; Merrills, in Ando *et al.* (2002), p. 438.

315 *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 145–8.

316 *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 290–6, paras. 21–35.

317 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 133–4, paras. 24–5.

318 *Cf. supra*, MN 28–29.

319 *Cf.* Waldock, *BYIL* (1955–1956), p. 255.

320 Brazil explicitly availed itself of the clause under the regime of the PCIJ by stating that its declaration of acceptance of the Court's jurisdiction would become applicable only if and as soon as 'it has likewise been recognised as such by two at least of the Powers permanently represented on the Council of the League of Nations', *cf.* Hudson, *PCIJ*, p. 684.

321 Barbados, Canada, Gambia, India, Kenya, Malta, Mauritius, United Kingdom.

322 *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 29–30, paras. 35–40.

323 *Cf. supra*, MN 2. It was already observed in 1934 by von Stauffenberg, 'Die Zuständigkeit des Ständigen Internationalen Gerichtshofs für die sogenannten politischen Streitigkeiten', *Deutsche Juristen-Zeitung* 39 (1934), pp. 1325–30, 1325, that the description of the relevant subject matters was certainly not felicitous.

324 *Cf.* Torres Bernárdez, in Bello/Ajibola (1992), p. 299. In the *Norwegian Loans* case, Judgment, ICJ Reports (1957), pp. 9, 21, the Norwegian government argued that the subject-matter of the dispute 'did not fall within any of the categories of disputes enumerated in Article 36, paragraph 2, of the Statute', but the Court did not take up that argument. Likewise, the dispute concerning the *Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Judgment, ICJ Reports (1959), pp. 127, 133, where Bulgaria maintained that none of the categories of Art. 36, para. 2 was applicable, was decided on other grounds.

325 For a careful analysis against the backdrop of the jurisprudence of the PCIJ *cf.* Hudson, *PCIJ*, pp. 460 *et seq*.

326 *Cf.* also Shaw, *Rosenne's Law and Practice*, vol. II, p. 741; Vukas, 'Some Provisions of the Statute of the International Court of Justice which Deserve Amendments', in *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Yee/Morin, eds, 2009), pp. 277–84, 279. This was already the opinion of Hudson, *PCIJ*, p. 459.

327 *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 272, para. 60 and pp. 457, 477, para. 63.

328 *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*, Order of 22 September 1995, ICJ Reports (1995), pp. 288 *et seq*.

329 *Ibid*., p. 303, paras. 52–3.

330 *Ibid*., Sep. Op. Shahabuddeen, ICJ Reports (1995), pp. 312, 315.

331 Conclusion also reached by Thirlway, 'Law and Procedure, Part Thirteen', *BYIL* 74 (2003), p. 23. But *cf.* Zimmermann/Geiss on Art. 61 MN 19–22.

332 For references *cf. Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 29, paras. 36–7.

333 UNCIO XIII, p. 559.

334 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 418, para. 59.

335 *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 452–3, para. 44.

336 *Ibid*., p. 455–6, para. 54.

337 *Cf.* also *Aerial Incident of 10 August 1999* (Pakistan v. India), Judgment, ICJ Reports (2000), pp. 12, 29–30, paras. 34–9.

338 *Cf. Armed Activities (New Application: 2002)* (DRC v. Rwanda), Judgment, ICJ Reports (2006), pp. 6, 33, para. 69.

339 *Supra*, fn. 286, MN 69.

340 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 419, para. 62; for an extensive comment *cf.* Brown Weiss, in Damrosch, *ICJ at a Crossroads*, pp. 82 *et seq*.; Kolb (2014), pp. 193–4.

341 *Cf. Nicaragua*, Jurisdiction and Admissibility, Sep. Op. Mosler, ICJ Reports (1984), pp. 461, 466. There seems to exist a certain degree of contradiction between paras. 60 and 62 of the judgment as far as the formulation is concerned.

342 Waldock, *BYIL* (1955–56), pp. 278–9.

343 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 419–20, paras. 62–3, a holding criticized as unfair by Quintana, *ICJ Litigation*, p. 108. However, a declaration made without specifying the way in which it may be terminated cannot be withdrawn with immediate effect, considerations of good faith standing in the way of such surprise moves, *cf. supra*, MN 75–78.

344 Currently, such a clause can be found in the declarations of Austria, Belgium, Bulgaria, Cambodia, Cameroon, Liberia, Mexico, New Zealand, Suriname.

345 Examples are Costa Rica, Denmark, Finland, Luxemburg, Norway, Sweden.

346 Period of five years as from 29 January 1993; an earlier declaration, also covering five years, had been made with effect as from 29 January 1988. Regarding Djibouti, the website of the ICJ indicates that its jurisdiction was recognized for five years as from 18 July 2005.

347 Application of 19 May 1989, *cf. Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 242, para. 1.

348 *Cf. supra*, MN 75–78.

349 The Belgian declaration may serve as an example in this respect.

350 *Cf. supra*, MN 77.

351 Declarations by Barbados, Egypt, Paraguay, Philippines, Senegal. The Netherlands has introduced a formula according to which disputes dating back more than 100 years are excluded—presumably in order to not be held accountable for its colonial past.

352 *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6 *et seq*.

353 *Right of Passage over Indian Territory*, Merits, ICJ Reports (1960), pp. 6, 33–6.

354 Owada, Introductory Remarks at the Seminar on the Contentious Jurisdiction of the International Court of Justice, p. 8.

355 *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 21.

356 *Right of Passage over Indian Territory*, Merits, ICJ Reports (1960), p. 6, 35.
357 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 134–5, paras. 28–9.
358 *Phosphates in Morocco*, Judgment, PCIJ, Series A/B, No. 74, pp. 10, 23–4.
359 *The Electricity Company of Sofia and Bulgaria*, Preliminary Objections, PCIJ, Series A/B, No. 77, pp. 64, 82.
360 *Right of Passage over Indian Territory*, Merits, ICJ Reports (1960), pp. 6, 35.
361 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 124, 134–5, paras. 28–9.
362 *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 26–7, para. 52.
363 *Jurisdictional Immunities of the State*, Order of 6 July 2010, ICJ Reports (2010), pp. 310 *et seq*.
364 *Ibid*., p. 320, para. 27.
365 *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 145–8.
366 On the other hand, in the Case concerning the *Arbitral Award of 31 July 1989*, where Guinea-Bissau, after having deposited its declaration on 7 August 1989, filed its application on 23 August 1989, the issue of an allegedly abusive jurisdictional attack was not raised by the respondent, Senegal, *cf. Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 61 *et seq.*, paras. 22 *et seq*.
367 Australia, Bulgaria, Cyprus, Germany, Greece, Hungary, India, Italy, Japan, Lithuania, Malta, Marshall Islands, Mauritius, New Zealand, Nigeria, Pakistan, Philippines, Poland, Portugal, Romania, Slovakia, Somalia, Spain, United Kingdom.
368 *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 770–1, para. 25; *Legality of Use of Force* (Serbia and Montenegro v. United Kingdom), Provisional Measures, ICJ Reports (1999), pp. 826, 835–6, para. 25.
369 For a detailed study *cf.* Arangio-Ruiz, in Lowe/Fitzmaurice (1996), pp. 440 *et seq*. According to him, the plea of domestic jurisdiction is essentially a plea to the merits (p. 448). *Cf.* also generally as to the concept of domestic jurisdiction see Nolte, in Simma, *UN Charter*, Art. 2, para. 7, *passim*.
370 Botswana, India, Liberia, Niger, Swaziland.
371 *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, PCIJ, Series B, No. 4, pp. 7, 24.
372 *Interpretation of Peace Treaties*, First Phase, Advisory Opinion, ICJ Reports (1950), pp. 65, 70.
373 *Right of Passage over Indian Territory*, Merits, ICJ Reports (1960), pp. 6, 32–3.
374 *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 23–5.
375 *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 21–7, paras. 48–62.
376 *Tehran Hostages*, Provisional Measures, ICJ Reports (1979), pp. 7, 15–6, para. 25. This was a case under Art. 36, para. 1.
377 Malawi, Mexico, Philippines, Sudan.
378 In *U.S. Nationals in Morocco*, the United States had originally filed preliminary objections, which it withdrew after having reached an understanding with the French government on the scope of the application, *cf. U.S. Nationals in Morocco*, Judgment, ICJ Reports (1952), pp. 176, 179.
379 *Norwegian Loans*, Judgment, Sep. Op. Lauterpacht, ICJ Reports (1957), pp. 34, 42 *et seq.*, especially p. 49: 'an undertaking in which the applicant party reserves for itself the exclusive right to determine the extent or the very existence of its obligation is not a legal undertaking'. As the *Nicaragua* case has shown, Lauterpacht was wrong in his assumption.
380 D'Amato, *AJIL* (1985), p. 392, speaks of the 'Connally Trap'.
381 *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 25.
382 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 421–2, para. 67.
383 India, Djibouti, Malta, Pakistan, Philippines.
384 *Nicaragua*, Jurisdiction and Admissibility, Judgment, ICJ Reports (1984), pp. 392, 424, para. 72.
385 India's reservation excludes disputes concerning the interpretation or application of a multilateral treaty 'unless all the parties to the treaty are also parties to the case before the Court'.
386 As pointed out earlier (MN 51), in the *Jadhav Case* India relied in its application against Pakistan on the Optional Protocol to the Convention on Consular Relations, see *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231 *et seq*.
387 Preliminary Objections, ICJ Reports (2017), pp. 3, 49–50, paras. 129–33; see also case comment by Bonafé, *AJIL* 111 (2017), pp. 725–31; for a comment see Serdy, 'Article 282: Obligations under general, regional and bilateral agreements', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 1825–9.
388 *E.g.*, Djibouti, India, Nigeria, Philippines, Poland, Portugal, Surinam.
389 *E.g.*, Australia, Barbados, Bulgaria, Canada, Djibouti, Greece, Japan, Honduras, India, Malta, New Zealand, Nigeria, Norway, Pakistan, Philippines.
390 *E.g.*, Djibouti, Germany, Greece, Honduras, Hungary, India, Kenya, Lithuania, Malawi, Malta, Mauritius, Nigeria, Pakistan, Romania, Sudan.
391 *E.g.*, Poland, Romania, Slovakia.

392 *E.g.*, India, Nigeria.
393 *Cf. supra*, MN 79.
394 *Cf. supra*, MN 99.
395 *Cf. supra*, MN 29.
396 *Cf.* Hudson, *PCIJ*, p. 453.
397 *Cf.* UNCIO XIII, p. 284.
398 *Cf. supra*, MN 81.
399 *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146; *Preah Vihear*, Preliminary Objections, ICJ Reports (1961), pp. 17, 31; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 412, para. 45; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 292, para. 27.
400 *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 146.
401 *Cf.* Shaw, *Rosenne's Law and Practice*, vol. II, p. 754.
402 *Cf.* Chesterman/Gowlland-Debbas on Art. 1 MN 26 *et seq*.
403 With the exception of the declaration of Luxembourg, they are all declarations of Latin American States: the Dominican Republic, Haiti, Panama, Uruguay.
404 *Aerial Incident of 27 July 1955*, Judgment, ICJ Reports (1959), pp. 127 *et seq*.
405 But *cf. ibid*., Joint Diss. Op. by Judges Hersch Lauterpacht, Wellington Koo, and Percy Spender, pp. 156–94. Regarding compromissory clauses in conventional instruments, governed by Art. 37, the Court itself has chosen—on hardly convincing grounds—a different interpretation: *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 31; *cf.* Thirlway, 'Law and Procedure, Part Nine', p. 82. *Cf.* also Simma/Richemond-Barak on Art. 37 MN 5–6.
406 *Aerial Incident of 27 July 1955*, Preliminary Objections, ICJ Reports (1959), pp. 127, 136 *et seq*.
407 *Preah Vihear*, Preliminary Objections, ICJ Reports (1961), pp. 17 *et seq*.
408 *Ibid*., p. 24.
409 *Ibid*., p. 34. On 28 April 2011, Cambodia filed an application requesting interpretation of the judgment in the *Preah Vihear* case, requesting at the same time the urgent indication of provisional measures, *cf. Preah Vihear (Request for Interpretation)*, Judgment, ICJ Reports (2013), pp. 281 *et seq*., where the Court confined itself to reminding Thailand of its obligation to respect the determinations made in the earlier judgment by withdrawing its troops from the territory adjudicated as belonging to Cambodia.
410 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 412–3, para. 47.
411 *Cf. Nicaragua*, Jurisdiction and Admissibility, Sep. Op. Mosler, ICJ Reports (1984), pp. 461, 465.
412 *Nottebohm*, Preliminary Objections, ICJ Reports (1953), pp. 111, 119.
413 IACtHR Rules of Procedure of 2009, available at <https://www.cidh.oas.org/Basicos/English/Basic20.Rules%20of%20Procedure%20of%20the%20Court.htm#_ftn1>.
414 European Convention on Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5.
415 10 December 1982, 1833 UNTS 3. For a comment see Treves, 'Article 288: Jurisdiction', in *United Nations Convention on the Law of the Sea: A Commentary* (Proelss, ed., 2017), pp. 1857–63, 1862–3.
416 *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 441–2, paras. 85–6.
417 For more details *cf. infra*, MN 141–143.
418 Art. 79 of the Rules can be traced back to Art. 62 of the 1936 Rules of the PCIJ, Series D, third addendum to No. 2, pp. 2, 28, 49. *Cf.* generally Mačák on Art. 43 MN 176–208.
419 For two examples of the classification of an objection as not possessing an exclusively preliminary character see the *Lockerbie* case (Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 115, 133–4, para. 49 and the *Croatian Genocide* case, Preliminary Objections, ICJ Report (2008), pp. 412, 456–60, paras. 120–9.
420 *Cf.*, in this regard, *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 262, para. 58.
421 *Socobel*, Judgment, PCIJ, Series A/B, No. 78, pp. 160, 173; *Preah Vihear*, Merits, ICJ Reports (1962), pp. 6, 36; *Fisheries Jurisdiction* (Federal Republic of Germany v. Iceland), Merits, ICJ Reports (1974), pp. 175, 203, para. 72; *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 266, para. 67; *Fisheries Jurisdiction* (Spain v. Canada), Jurisdiction, ICJ Reports (1998), pp. 432, 453, para. 46; *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 213–4, para. 117.
422 *Monetary Gold*, Judgment, ICJ Reports (1954), pp. 19, 30–3.
423 Similar case: *Borchgrave* case, Preliminary Objections, PCIJ, Series A/B, No. 72, pp. 158 *et seq*.
424 *Avena*, Judgment, ICJ Reports (2004), pp. 12, 28–9, para. 24.
425 *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 52, para. 13.
426 *Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. USA), Order of 13 December 1989, ICJ Reports (1989), pp. 132, 134. For the earlier practice *cf.* Guyomar, *Commentaire*, p. 508.
427 *Cf.* also the lengthy discussion of the issue in the Separate Opinions of Judges Schwebel and Shahabuddeen, *Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. USA), Order of 13 December 1989, ICJ Reports (1989), pp. 136 *et seq.* and

pp. 145 *et seq.* respectively.

428 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 426–7, para. 80; *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 325, 338–9, para. 28.

429 PCIJ, Series D, third addendum to No. 2, pp. 2, 28, 49.

430 *Panevezys–Saldutiskis Railway*, Judgment, PCIJ, Series A/B, No. 76, pp. 4, 16.

431 On the essence of requirements of admissibility, see *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 456–7, para. 120; *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 177, para. 29; *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 123, para. 48.

432 The Court is of the view that this third category covers instances in which external events have rendered a case without object, *cf. Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 26–7, para. 47 and pp. 115, 131–2, para. 46. In the legal literature, reference is likewise made to the *U.S. Nationals in Morocco* case, Judgment, ICJ Reports (1952), pp. 176 *et seq.*, where the United States as the respondent sought certain clarification about the parties on whose behalf the proceedings had been instituted, *cf.* Guyomar, *Commentaire*, p. 513; de Aréchaga, 'The Amendments to the Rules of Procedure of the International Court of Justice', *AJIL* 67 (1973), pp. 1–22, 18.

433 It is not always clear whether a given argument pertains to admissibility or to the merits, *cf.* the judgment in the *South West Africa* cases, Second Phase, ICJ Reports (1966), pp. 6, 42–3, paras. 74–6.

434 *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 36–8.

435 *Cf.* Thirlway, 'Law and Procedure, Part Eleven', *BYIL* 71 (2000), p. 157.

436 *Cf.* also *ibid*., pp. 73–83; Shaw, *Rosenne's Law and Practice*, vol. II, p. 873.

437 *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 27.

438 *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 290, para. 21 and pp. 311–2, para. 79.

439 *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 456–7, para. 120.

440 *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 25; *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 23–4, para. 26; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298–9, para. 46.

441 Shaw, *Rosenne's Law and Practice*, vol. II, p. 897, recognizes that the logical hierarchy suggested by him is not a binding rule of procedural law under the Statute.

442 *Cf.* Dupuy/Hoss on Art. 34 MN 4.

443 SC Res. 777 (1992); GA Res. 47/1 (1992).

444 *Bosnian Genocide*, Preliminary Objections, ICJ Reports (1996), pp. 595, 609 *et seq*, paras. 16 *et seq*.

445 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 314–5, para. 91. *Cf.* also Zimmermann on Art. 35 MN 46 and Oellers-Frahm/Zimmermann on Art. 93 UN Charter MN 4–5.

446 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 89–102, paras. 114–40.

447 *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 437–44, paras. 77–92.

448 *Panevezys–Saldutiskis Railway*, Judgment, PCIJ, Series A/B, No. 76, pp. 4, 16; *Nottebohm*, Second Phase, ICJ Reports (1955), pp. 4, 21, 24; *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 44; *Barcelona Traction*, Judgment, ICJ Reports (1970), pp. 3, 32–3, para. 35; *Avena*, Judgment, ICJ Reports (2004), pp. 12, 36–7, para. 42; *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 276, para. 333; *Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 599, para. 39; ILC, Draft Articles on Diplomatic Protection, Report of the ILC on its 58th session, UN Doc. A/61/10 (2006), p. 16, Draft Art. 1.

449 *Nottebohm*, Second phase, ICJ Reports (1955), pp. 4, 23.

450 In the *Avena* case, Judgment, ICJ Reports (2004), pp. 12, 36–7, para. 42, the Court treated the issue of nationality as falling within the merits, as Mexico had also invoked a violation of its own rights under the Vienna Convention on Consular Relations.

451 ILC Draft Articles on Diplomatic Protection, *supra*, fn. 448, Draft Art. 7.

452 *Interhandel*, Judgment, ICJ Reports (1959), pp. 6, 27; *Barcelona Traction*, Preliminary Objections, ICJ Reports (1964), pp. 6, 46; *ELSI*, Judgment, ICJ Reports (1989), pp. 15, 44, para. 55; *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 276, para. 333; *Diallo*, Preliminary Objections, ICJ Reports (2007), pp. 582, 599, para. 40.

453 *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 17–8, para. 40; *Avena*, Judgment, ICJ Reports (2004), pp. 12, 35–6, para. 40.

454 *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 488, para. 60.

455 Reference is made to the ILC Draft Articles on Diplomatic Protection, *supra*, fn. 448.

456 *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 92, paras. 55–7; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 318–9, paras. 98–102;

Fisheries Jurisdiction (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 447–8, para. 29; *Land and Maritime Boundary (Request for Interpretation)*, Judgment, ICJ Reports (1999), pp. 31, 38, para. 15.

457 *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 22 *et seq*.

458 For a comment on the relationship of the ICJ with other international courts and tribunals see Gaja, Relationship of the ICJ with other International Courts and Tribunals, *passim*; also, Higgins *et al., supra*, fn. 54, pp. 1203–6.

459 Art. 55 reads: 'The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purposes of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.'

460 Treaty on the Functioning of the European Union, Consolidated texts, OJ 2016 C 202, pp. 47, 194, Art. 344 reads: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

461 *Cf.*, however, the *Mox Plant* dispute, *European Commission v. Ireland*, Case C-459/03 (2006), (2006) ECR I-04635.

462 *Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 14; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 302–3, para. 56; *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 210–1, para. 107. Nor does the Court accept the argument that ongoing diplomatic negotiations are an obstacle to having recourse to judicial settlement, *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 12, para. 29; *Application of the Interim Accord of 13 September 1995*, Judgment, ICJ Reports 2011, pp. 644, 664, para. 57.

463 *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319, 344–6; *Tehran Hostages*, Judgment, ICJ Reports (1980), pp. 3, 27, para. 51; *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 428–9, para. 83; *Oil Platforms*, Merits, ICJ Reports (2003), pp. 161, 210–1, para. 107.

464 *The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, pp. 6, 14 (emphasis added).

465 The formula used ('a genuine attempt by one of the disputing parties to engage in discussion with the other disputing party, with a view to resolving the issue', see *Georgia v. Russia*, Preliminary Objections, ICJ Reports (2011), pp. 70, 132, para. 157) does not fully reflect the actual inferences drawn from its application.

466 *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 100, para. 80.

467 *Ibid*., p. 105, para. 93.

468 *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 246–7, para. 11.

469 *Cf. Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 20, where the objection was held to be unfounded. For the issue, see generally, McLachlan, *Lis Pendens in International Litigation* (2009).

470 But *cf.*, in particular, Art. 5, para. 2 (a) of the Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement'), which applies to proceedings before the European Court of Human Rights.

471 *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, Preliminary Objections, ICJ Reports (2016), pp. 100, 123, para. 49 and 132, paras. 85–8.

472 *Ambatielos*, Merits, ICJ Reports (1953), pp. 10, 23.

473 *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 253, para. 32, 255, para. 36.

474 *Armed Activities* (DRC v. Uganda), Judgment, ICJ Reports (2005), pp. 168, 267, para. 295.

475 *LaGrand*, Judgment, ICJ Reports (2001), pp. 466, 487, para. 57.

476 *Avena*, Judgment, ICJ Reports (2004), pp. 12, 37–8, para. 44.

477 *Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 63, para. 27.

478 *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 255, para. 38.

479 *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 296–7, paras. 38–9.

480 *Cf.* Kolb, General Principles of Procedural Law, MN 57.

481 *Bosnian Genocide*, Provisional Measures, ICJ Reports (1993), pp. 3, 11, para. 13; Preliminary Objections, ICJ Reports (1996), pp. 595, 621–2, para. 44.

482 ICJ Press Release No. 2017/12 of 9 March 2017.

483 *Nauru*, Preliminary Objections, ICJ Reports (1992), pp. 240, 247–50, paras. 12–21.

484 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, para. 43. *Cf.* also Wegen, Discontinuance and Withdrawal, MN 29.

485 *Black's Law Dictionary* (6th edn., 1990), p. 941.

486 *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319 *et seq*.

487 *Ibid*., pp. 335–42.

488 *South West Africa* cases, Second Phase, ICJ Reports (1966), p. 6 *et seq*.

489 *Ibid*., pp. 18, para. 4, and 28–9, para. 33.

490 In the case of Art. 33 ECHR a substantive and a procedural position seem to go hand in hand.

491 *Barcelona Traction*, Second Phase, ICJ Reports (1970), pp. 3, 32 *et seq.*, paras. 32 *et seq.*

492 Taken note of by GA Res. 56/83 (2001).

493 *Barcelona Traction*, Second Phase, ICJ Reports (1970), pp. 3, 32, para. 33.

494 *Cf.* Crawford, 'Responsibility for Breaches of Communitarian Norms: an Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts', in *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Fastenrath *et al.*, eds., 2011), pp. 224 *et seq.*

495 *Questions relating to the Obligation to Prosecute or Extradite*, Judgment, ICJ Reports (2012), pp. 422 *et seq.*

496 *Ibid*., pp. 449–50, paras. 66–70.

497 *Avena*, Judgment, ICJ Reports (2004), pp. 12, 38, para. 47. In *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, paras. 42–3, the respondent's arguments that the applicant had forfeited its right to seise the Court were dismissed outright by the judges.

498 *Cf. supra*, MN 10.

499 *South West Africa* cases, Preliminary Objections, ICJ Reports (1962), pp. 319, 344; *Border and Transborder Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 95, para. 66; *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 26, para. 44 and pp. 115, 130–1, para. 43; *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275, 318–9, para. 99; *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 17–8, para. 40; *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 148–9, para. 46.

500 *Croatian Genocide*, Preliminary Objections, ICJ Reports (2008), pp. 412, 438 *et seq.*, paras. 81 *et seq*.

501 *Nuclear Tests* (Australia v. France; New Zealand v. France), Judgment, ICJ Reports (1974), pp. 253, 272–4, para. 62 and pp. 457, 478, para. 65.

502 *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 26–9, paras. 46–51 and pp. 115, 131–4, paras. 45–50; *Arrest Warrant of 11 April 2000*, Judgment, ICJ Reports (2002), pp. 3, 14–5, para. 32; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, para. 43.

503 This happened in the *Fisheries Jurisdiction* cases between the United Kingdom and Germany, on the one hand, and Iceland, on the other, *cf. Fisheries Jurisdiction* (UK v. Iceland; Federal Republic of Germany v. Iceland), Jurisdiction, ICJ Reports (1973), pp. 3, 22, para. 46 and pp. 49, 66, para. 46. For the risks inherent in such a finding *cf.* Thirlway, *Non-Appearance before the International Court of Justice* (1985), pp. 172–3. *Cf.* also von Mangoldt/Zimmermann on Art. 53 MN 54–57.

504 1946 Rules of Court, Art. 62, para. 5: 'After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings.'

505 Prominent examples are the *Right of Passage over Indian Territory*, Preliminary Objections, ICJ Reports (1957), pp. 125, 149 *et seq.*, where the fifth and the sixth preliminary objection (domestic jurisdiction and time limit) were joined to the merits to be considered again in the final judgment, ICJ Reports (1960), pp. 6, 32–6, and the *Barcelona Traction* case, with two stages: Preliminary Objections, ICJ Reports (1964), pp. 6, 41 *et seq.* and Second Phase, Judgment, ICJ Reports (1970), pp. 3, 32 *et seq.*, where the right of diplomatic protection in favour of shareholders in a juristic person incorporated in another State was at issue.

506 *Cf.* de Aréchaga, *supra*, fn. 429, pp. 1–11 *et seq.*, as well as the comments by the Court itself in *Nicaragua*, Merits, ICJ Reports (1986), pp. 14, 29–31.

507 *Nicaragua*, Jurisdiction and Admissibility, ICJ Reports (1984), pp. 392, 425–6, para. 76, and p. 442, para. 113 (1) (a); Merits, ICJ Reports (1986), pp. 14, 31–8, paras. 42–56.

508 SC Res. 748 (1992) and 883 (1993).

509 *Lockerbie* (Libya v. UK; Libya v. USA), Preliminary Objections, ICJ Reports (1998), pp. 9, 28–9, para. 50, p. 31, para. 53 (3) and pp. 115, 133–4, para. 49, p. 136, para. 53 (3).

510 *Land and Maritime Boundary*, Preliminary Objections, ICJ Reports (1998), pp. 275 *et seq.*

511 *Ibid*., pp. 322–5, paras. 112–7, and 326, para. 118 (2).

512 *Norwegian Loans*, Judgment, ICJ Reports (1957), pp. 9, 25; *cf. Aerial Incident of 27 July 1955* (Israel v. Bulgaria), Preliminary Objections, ICJ Reports (1959), pp. 127, 146; *Aegean Sea Continental Shelf*, Judgment, ICJ Reports (1978), pp. 3, 16–7, paras. 39–40; *Aerial Incident of 10 August 1999* (Pakistan v. India), Jurisdiction, ICJ Reports (2000), pp. 12, 23–4, para. 26; *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298–9, para. 46.

513 This was the position taken by Hersch Lauterpacht and Gerald Fitzmaurice, *cf.* Fitzmaurice, 'Hersch Lauterpacht—The Scholar as Judge: Part II', *BYIL* 38 (1962), pp. 1–83, 56–7.

514 *Cf*. also Sep. Op. Bhandari in the *Marshall Islands v. UK* case, Preliminary Objections, ICJ Reports (2016), pp. 1057, 1059, para. 10.

515 *Certain Property*, Preliminary Objections, ICJ Reports (2005), pp. 6, 27, para. 53.

516 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 298, para. 45; *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 85, paras. 102–3.

517 *Territorial and Maritime Dispute*, Preliminary Objections, ICJ Reports (2007), pp. 832, 852, para. 51.

518 *Treatment in Hungary of Aircraft and Crew of the United States of America* (USA v. Hungary; USA v. USSR), Orders of 12 July 1954, ICJ Reports (1954), pp. 99, 101 and pp. 103, 105; *Antarctica* (UK v. Argentina; UK v. Chile), Orders of 16 March 1956, ICJ Reports (1956), pp. 12 *et seq.* and pp. 15 *et seq.; Aerial Incident of 4 September 1954* (USA v. USSR), Order of 9 December 1958, ICJ Reports (1958), pp. 158, 161; *Aerial Incident of 7 November 1954* (USA v. USSR), Order of 7 October 1959, ICJ Reports (1959), pp. 276, 278.

519 *Certain Criminal Proceedings in France*, Provisional Measures, ICJ Reports (2003), pp. 102, 103, para. 6.

520 *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, ICJ Reports (2008), pp. 177, 181, para. 4.

521 *Nuclear Tests* (Australia v. France; New Zealand v. France), Orders of 22 June 1973, ICJ Reports (1973), pp. 99 *et seq*. and 135 *et seq*.

522 For details of that proceeding *cf. supra*, MN 85.

523 *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*, Order of 22 September 1995, ICJ Reports (1995), pp. 288, 295, paras. 23–4 and pp. 300–1, paras. 40–1.

524 *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 773, para. 35; *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, ICJ Reports (1999), pp. 916, 925, para. 29. This was a novelty, *cf.* Dominicé, in Ando *et al.* (2002), pp. 383, 385.

525 *Legality of Use of Force* (Yugoslavia v. Spain), Provisional Measures, ICJ Reports (1999), pp. 761, 774, para. 40 (2); *Legality of Use of Force* (Yugoslavia v. USA), Provisional Measures, ICJ Reports (1999), pp. 916, 926, para. 34 (2).

526 *Fisheries Jurisdiction* (Spain v. Canada), Judgment, ICJ Reports (1998), pp. 432, 435, paras. 3–4.

527 *Armed Activities (New Application: 2002)* (DRC v. Rwanda), Provisional Measures, ICJ Reports (2002), pp. 219, 249, para. 91. The final judgment came, not surprisingly, to the conclusion that none of the alleged bases of jurisdiction was applicable, *ibid*., Jurisdiction and Admissibility, ICJ Reports (2006), pp. 6 *et seq*.

528 *Cf.*, in particular, *Legality of Use of Force* (Serbia and Montenegro v. France), Preliminary Objections, ICJ Reports (2004), pp. 575, 586, para. 23. *Cf.* also the *Nuclear Tests* (Australia v. France; New Zealand v. France), Orders of 22 June 1973, ICJ Reports (1973), pp. 99, 105, para. 32 and pp. 135, 141–2, para. 33.

529 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, ICJ Reports (2004), pp. 279, 297, para. 43. *Cf.* also Wegen, Discontinuance and Withdrawal, MN 29.

530 *Immunities and Criminal Proceedings*, Provisional Measures, ICJ Reports (2016), pp. 1148, 1165, para. 70.

531 *Cf.* Sep. Op. Higgins in the *Legality of Use of Force* case (Serbia and Montenegro v. Belgium), Provisional Measures, ICJ Reports (1999), pp. 161–70.

532 *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Provisional Measures, pp. 124, 132, para. 21; *Pulp Mills*, Provisional Measures, Order of 23 January 2007, ICJ Reports (2007), pp. 3, 10, para. 24; *Certain Criminal Proceedings in France*, Provisional Measures, ICJ Reports (2003), pp. 102, 106, para. 20; *Questions relating to the Obligation to Prosecute or Extradite*, Provisional Measures, ICJ Reports (2009), pp. 139, 147, para. 40; *Certain Activities Carried out by Nicaragua in the Border Area*, Provisional Measures, ICJ Reports (2011), pp. 6, 17–8, para. 49; *Certain Documents and Data*, Provisional Measures, ICJ Reports (2014), pp. 147, 151, para. 18; *Immunities and Criminal Proceedings*, Provisional Measures, ICJ Reports (2016), pp. 1148, 1155, para 31; *ICSFT and CERD* case, Provisional Measures, ICJ Reports (2017), pp. 104, 114, para. 17; *Jadhav Case*, Provisional Measures, ICJ Reports (2017), pp. 231, 236, para. 15.